
(1955) 09 BOM CK 0047
In the Bombay High Court
Case No : A.F.O.D. No. 640 of 1951

Ambalal Kesherbhai

APPELLANT

Vs

Ranchhodbhai Jerbhai and Another

RESPONDENT

Date of Decision : 26-09-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 24, Order 21 Rule 32
Specific Relief Act, 1877 — Section 12
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1956 Bom 120

Hon'ble Judges : Bavdekar, J

Bench : Single Bench

Advocate : A.S. Pradhan and G.B. Kulkarni, for the Appellant; H. Kamat, for the Respondent

Judgement

1. Respondent No. 1 had filed suit from which the present appeal arises or specific performance of an agreement for sale of property entered into between him and the owner of the property, respondent No. 2 who was defendant No. 1 in the trial Court. The agreement is dated 13-12-1946.

The appellant is the subsequent transferee of the property from respondent No. 1, and it was his case that prior to the agreement between respondent No. 1 and respondent No. 2, respondent No. 2 had entered into an agreement With him orally on 27-11-1946 to convey the same property to him and that the subsequent sale deed executed by respondent No. 2 was in pursuance of the prior oral agreement. He also claimed in the alternative that he did not know of oral agreement. He also claimed in the alter, native that he did not know of the agreement between the respondents and was a bona fide transferee for value without notice of the agreement in favour of respondent No. 1.

2. The learned trial Judge has held that there was no oral agreement between respondent No. 2 and the appellant, and in the second! instance that the appellant knew full well of the agreement between the respondents when he took

a sale deed of the properties conveyed to him.

He has consequently called upon the appellant to execute a sale deed of the property covered by the agreement of 13-12-1946 in favour of respondent No. 1 on payment to the appellant of the consideration of the agreement, namely, Rs. 5940. He has also ordered both respondent No. 2 and the appellant to hand over possession of the properties agreed to be conveyed to respondent No. 1.

3. Defendant No. 2 has come in appeal and the first point which falls for determination is as to whether the appellant has proved the oral agreement of 27-11-1946. Now, the agreement being oral, there could be of course no document in regard to it. But the appellant relied upon two letters Exs. 34 and 89, in support of his case that there was such an oral agreement, and the oral evidence of himself and one Ishwarbhai, who was the attesting witness to the sale deed.

Now, Ex. 34 is a postcard written by defendant No. 1's husband to the appellant. It does not specifically mention anything about any oral agreement to convey the property later on agreed to be conveyed to respondent No. 1 on 13-12-1946; but defendant No. 1's husband says that he would write to the appellant and then he should be present. He said that he could not come (apparently at some earlier time) because of some Government work, but immediately he finds that he could come, he would intimate the appellant and come.

It may at the most show that the appellant was anxious to purchase the property from defendant 1 as respondent No. 1 was. If an oral agreement had as a matter of fact been entered into, there was no particular reason for defendant No. 1's husband not to say that he would come for the purpose of executing the document together with his wife defendant No. 1. In any case, it is obvious that in the absence of any specific reference in the letter to the agreement, which was supposed to have taken place before, it is not possible to say that Ex. 34 supports the case of an oral agreement on 27-11-1946.

The second letter is a letter dated 30-12-1946 written by the plaintiff's witness Jhaverbhai Lallubhai to the appellant. When the witness was asked about this letter, he said that he had written the letter to the appellant because the appellant had told him that he was willing to purchase part of a house belonging to one Soma and had asked him to approach Soma in the matter. There is nothing in the letter of 30-12-1946 written by the witness which is against this reply given by him.

All that the letter says is that the man was about to accomplish or bring about something. It could hardly be the sale in furtherance of the oral agreement upon which the defendant relied, because prior to this date the witness had already written the agreement between the two respondents by which respondent No. 2 had agreed to convey the property to respondent No. 1. Mr. pradhan contends that it may be that Jhaverbhai was running with both the purchasers; but there is nothing to show that that was so.

4. The oral evidence apart from defendant No. 2's is the evidence of only one Ishwarbhai, who is also an attesting witness to the sale deed taken by the appellant. The oral agreement is supposed to have been entered into not between defendant No. 1 herself and the appellant but between her husband and the appellant, his case being that it was agreed between the parties, namely, defendant No. 1 herself and the appellant before 27-11-1946, that she was to sell the property to the latter.

The oral agreement between defendant 1's-husband and the appellant is supposed to have been made on Mavgashirsh Sud, 2nd in accordance with the sale deed, taut when the appellant gave a public notice on 9-1-1947 the date of the oral agreement was mentioned as Margashirsha Sud 4th. In the second instance, at the time when the oral agreement was alleged to have taken place Rs. 451 are alleged to have been given in cash to defendant No. 1.

Neither defendant No. 1 nor her husband were examined in support of the story of the appellant. It is true that the appellant appears to have made a number of attempts to secure the presence of defendant No. 1 before the Court; but that does not alter the fact that defendant No. 1 seems to have been unwilling to come forward to support the story of the appellant. The property was admittedly burdened with debts before-27-11-1946.

Whether we take into consideration the agreement for sale executed by defendant No. 1 in favour of the plaintiff or the sale deed executed by defendant No. 1 in favour of the appellant, there can be little doubt that the property was just sufficient to pay off defendant No. 1's debts. In these circumstances it is not at all likely that defendant No. 2 would hand over a sum of Rs. 451 to defendant No. 1 without taking any writing from her. No such writing was taken, in any case none has been produced.

The oral evidence adduced on behalf of defendant No. 2 was not sufficient to counteract these defects in the story of defendant No. 2 with regard to the oral agreement for purchase of 27-11-1946. The learned trial Judge was obviously right therefore in holding that this agreement was not proved.

5. it was contended next that assuming that the oral agreement was not proved, there was nothing to show that the appellant knew about the agreement for sale. The learned trial Judge relied in support of his view that the appellant knew of it first upon the evidence of one Bhagwanbhai; secondly, upon the mention in the appellant's own sale deed of the oral agreement, and thirdly upon the fact that the village was a small village and ordinarily people would know about such an agreement at any rate after some time had elapsed.

The agreement is dated 13-12-1946, and the sale deed which has been taken by the appellant is dated 3-2-1947. Here again I think that the learned trial Judge is right for the reason that there was no reason for the appellant to have the oral agreement mentioned in the sale deed, unless he had come to know of the agreement executed by defendant 1 in favour of plaintiff on 13-12-1946.

6. it is contended, however, that even so there was no mutuality about the agreement between defendant No. 1 and the plaintiff for the reason that the agreement is executed by defendant No. 1 alone. It is not executed by the purchaser. In the second instance, the agreement provides that if defendant 1 did not execute the sale deed as she had promised to do, she would pay damages and the moneys which had been deposited as earnest would have to be returned by her.

Mr. Pradhan contends that the document does not provide what was to happen in case in stead of defendant No. 1 refusing to complete the plain t iff refused to do so. Now, it is inherent in every contract of purchase and sale that both the parties are entitled to insist upon the completion of the contract. It is not necessary that the document should mention what the effect would be in case either party refused to complete.

Parties sometime do mention what is to happen, and in any particular instance one may draw an inference that there was no mutuality of the contract from the failure of the parties to provide what was to happen in one case that is, when one party refuses to perform that contract and for not providing what was to happen if the other side failed to do so when taken in conjunction with other circumstances.

But here the document purports to have been executed by defendant 1 in favour of plaintiff. Consequently plaintiff took down in writing what was to happen in case defendant 1 failed to perform her part of the contract. That does not mean that the parties intended that defendant I was not entitled to insist upon the completion of the contract of purchase. There is nothing in the document which would show that parties did not intend, as they would intend in every contract of purchase and sale, that if the purchaser refused to complete the contract the defendant could sue him for specific performance as well as for damages.

7. The next point which is made is that it appears that in this case a sum of Rs. 500/-was given to defendant 1 at the time she entered into the agreement of 13-12-1943. The agreement provided that she would have to return the amount because apparently the debts of defendant 1 amounted to Rs. 5940 and that was the only price which was agreed to between the parties. Rs. 500/- were to be given to defendant 1 out of which RS. 200/- were paid to her. In cash, and Rs. 300/- were kept with one Jhaverbhai.

So this amount was an earnest money or deposit made for securing the performance by the purchaser of his part of the contract. But I fail to understand why merely because this deposit was to be returned by the vendor at the time of the completion of the sale transaction the Court should say that it would not decree specific performance of the contract.

It cannot be said that the agreement was without consideration, because the consideration for the agreement for sale was the payment of a sum of Rs. 5940 by the plaintiff to defendant No. 1. It was not to be paid directly to her. It was to

be paid actually as a matter of fact to her creditors. Nothing was to go to her, for the reason that parties agreed that the property was just sufficient for paying off all the debts due from defendant No. 1; but one could not say that the transaction was a transaction without consideration merely because defendant No. 1 was not to get any money in that transaction; nor is it a case in which, for example, the mortgagee takes a document for sale from the mortgagor without payment of any fresh consideration.

Defendant No. 1 had not only to pay the debts" secured upon the property agreed to be conveyed out also there were debts due from her personally. The plaintiff had undertaken to pay out of the purchase money the debts due to the mortgagee as well as the debts due to the persons to whom defendant No. 1 owed only unsecured debts. I fail to understand that in such a case that defendant No. 1 was not to get any cash at the time of the sale is a consideration which would induce the Court to refuse to direct specific performance of the contract.

8. Finally it said that in this case the parties appear to have provided that in case defendant 1 failed to perform her part of the contract then she would be liable in damages. It is conceded that this alone would not entitle defendant 1 or any successor of hers to say that they would not perform the contract. It is urged however that if parties provided that the plaintiff would be entitled to damages it would be quite-sufficient to rebut the presumption that damages were an inadequate remedy in cases of contracts for sale of immovable property arising under the proviso to Section 12 of the Specific Relief Act.

I find however that this question as to whether damages were an inadequate remedy was never raised at any time in the trial Court, with the result that the plaintiff had never had an opportunity to show why the damages would not be an adequate remedy, and the question ought not to be allowed to be taken up for the first time in appeal. But it is obvious that even if this question is allowed to be raised, the fact that the parties contemplated that the plaintiff would be entitled to damages is one of the considerations in deciding whether the damages are an" adequate remedy.

The presumption in the case of contracts for immovable property always is that damages are not an adequate remedy, and that presumption is not rebutted merely by the fact that the parties had provided for recovery of damages by the plaintiff. It has got to be remembered that a party to the contract may sometimes be entitled to damages is one of the considerations in addition to the remedy of specific performance.

9. The decretal order does undoubtedly direct defendant No. 2 to execute a sale deed in favour of the plaintiff. But that is as it should be because owing to the conveyance executed by defendant No. 1 in favour of defendant No. 2 the title is now in defendant No. 2, and in a suit for specific performance where the vendor has conveyed the property to another who has purchased the property with

notice of the earlier agreement for sale. It is open to the Court to direct the purchaser to execute a conveyance in favour of the purchaser; see -- "Potter v. Sanders" (1346) 67 ER 1057 (A). The order in that case was for all accessory parties to convey.

10. The appeal will therefore be dismissed with costs.

11. Appeal dismissed.