

(2022) 08 GUJ CK 0100
In the Gujarat High Court
Case No : R/Second Appeal No. 42 Of 1990

Dhansukhlal Rambhai Patel & 1 Other(S)	APPELLANT
Vs	
Dhansukhlal Nagindas Kapadia	RESPONDENT

Date of Decision : 26-08-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100
Specific Relief Act, 1963 — Section 20

Citation : (2022) 08 GUJ CK 0100

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : Pravin P Panchal, Archit P Jani, Varsha Brahmbhatt

Final Decision : Dismissed

Judgement

Dr A. P. Thaker, J

1. The original defendant have filed this Second Appeal under Section 100 of the Code of Civil Procedure being aggrieved and dissatisfied by the judgment and decree dated 12.01.1990 passed by the learned Assistant Judge, Valsad at Navsari in Regular Civil Appeal No.86 of 1985. The appellant is original defendant and respondent is plaintiff before the Trial Court. For the brevity and convenience, the parties are referred to in this judgment, as per the character assigned to them, before the Trial Court i.e. defendant and plaintiff.

2. The defendant has contended that the appellate Court has erred in holding that the plaintiff has proved execution of agreement to sell dated 23.08.1979 at exhibit 29. It is also contended that the Trial Court has rightly dismissed the suit of the plaintiff which ought not to have been interfered with by the First Appellate Court. It is also contended that the Appellate Court has erred in law in passing the decree of specific performance of the contract. It is also contended that the Appellate Court has erred in holding that in a suit for specific performance only those defense could be taken which are available under the

provisions of the Specific Relief Act, 1963. It is also contended that the First Appellate Court has failed to appreciate facts of disability of the defendant and the defense raised by the defendant that he has never entered into any agreement to sell and that the plaintiff has taken advantage of defendants blindness and has used his signature for creating a document in his own favour. According to the defendants, the First Appellate Court ought to have accepted the defense of the defendant and ought not to have passed the impugned judgment and decree against the defendant. It is also contended that merely because the suit against the defendant no.2 remained *exparte* was not a proper ground for passing the impugned judgment and decree by the First Appellate Court. According to him, the First Appellate Court has also erred in observing that the plaintiff has parted with Rs.2,601/-. It is also contended that the entire sale transaction is disputed by the defendant in his written statement which is not properly appreciated by the First Appellate Court. He has also contended that when the plaintiff has prayed for an alternative relief of damages then the Appellate Court ought to have given option to the defendant and ought to have not passed the decree for specific performance of the contract.

3. The present Second Appeal has been heard on the following questions of law:-

(i) In the facts and circumstances of the case, whether the learned First Appellate Court has committed error of facts and law in reversing the decree passed by the Trial Court rejecting the suit of the plaintiff and has committed error of law in passing the decree for specific performance of the contract, upon agreement at exhibit 29?

4. Heard learned advocate Mr.Pravin Panchal for the appellant defendant and Ms.Varsha Brahmbhatt for the respondent- original plaintiff. Both the learned advocates for the respective parties have submitted their written submissions and same are taken into consideration.

5. The facts emerges from the records are as under:-The defendants are owner of the suit property. As per the contentions of the plaintiff, the defendants have agreed to sale this property to the plaintiff for a consideration of Rs.15,001/- by agreement to sell dated 23.08.1979 and at the time of execution of agreement to sell, the plaintiff paid earnest money of Rs.301/- to the defendant no.1 and it was agreed upon to pay Rs.1,200/- within two days to one Mr.Rameshbhai Valabhai Parekh a friend of defendant no.1. It was agreed upon to bring a previous document pertaining to the suit property from the said Rameshbhai. Thereafter the plaintiff has to pay Rs.13,500/- to the defendants within a period of one month and get executed the sale deed in his favour. According to the plaintiff, pursuant to this agreement, he paid Rs.1,000/- to Rameshbhai as he persuaded Rameshbhai to accept Rs.1000/-instead of Rs.1200/- and Rs.200/- was paid to defendant no.1 and thereby the plaintiff obtained previous deed of suit property from Rameshbhai. According to the plaintiff, he has paid Rs.1501/- to the defendant no.1 and on the request of defendant no.1, he paid Rs.1,000/- more on 29.08.1979. That amount was deposited by the defendant in his bank

account in the Bank of Baroda, Chikhli Branch and thus until 28.09.1979, the plaintiff has paid in all Rs.2601/- to the defendant no.1.

5.1. According to the plaintiff, he has to pay Rs.12,400/- within a period to 23.09.1979 as the defendant no.1 has asked for extension of more time. Thereafter, in spite of several attempts to pay the rest of the amount by him, the defendant no.1 avoided the completion of the contract. Therefore, on 07.10.1979, the plaintiff gave a notice to the defendants for specific performance of the contract which was not complied with by the defendants. Hence, the plaintiff filed a Civil Suit No.35 of 1983 before the Civil Court, Chikhli for specific performance of the contract along with the ancillary prayers which includes execution of sale deed and for actual possession of the property. In the alternatively plaintiff has also sought for relief for damages of Rs.15,001/- with interest and the cost of the suit.

6. The defendants were served with the summons. The defendant no.1 only remained present and filed his written statement at exhibit 18 before the Trial Court. The suit against the defendant no.2 came to be ordered to be proceeded ex parte. The main contentions of the defendant no.1 in his written statement are as follows:-

6.1. That the plaintiff has got up the document of so called agreement to sell the suit property. The defendant has denied of execution of such agreement. According to the defendant no.1, he has a friendship with the plaintiff and he has denied of having received earnest money and other money from the plaintiff. He has stated that in fact Rameshbhai was a friend of him and he was demanding Rs.1,000/- from him and therefore at his instance the plaintiff paid Rs.1,000/- to Rameshbhai. According to defendant no.1, Rameshbhai met him and he represented that he had given previous sale deed to one of his friend and therefore the defendant no.1 waited for about 20 to 25 days. It is further contended by the defendant no.1 that Rameshbhai told him that plaintiff had come to take the document and therefore, he has given it to him. According to the defendant, when the defendant no.1 met the plaintiff, the plaintiff told him that such a document is important one and he will have to pass a receipt and therefore defendant no.1 passed a written receipt dated 20.09.1979. It is further the defense of the defendant that on account of his ill health and weak eye sight, he has to left the Bank service and has to start business. According to him, due to his weak eye sight, the plaintiff has purportedly got executed the said agreement to sell. He has submitted that the suit is false one and is time barred and the defendant has no liability to execute the sale deed in favour of the plaintiff. He has prayed to dismiss the suit with cost.

7. It appears from the record that following issues have been framed at exhibit 20 by the Trial Court:-

(i) Whether the plaintiff proves that defendant has entered into the suit contract as averred?

- (ii) Whether the plaintiff is entitled to get specific performance as averred? If yes, whether the plaintiff is entitled for damages as averred?
- (iii) Whether the defendant proves that the suit is barred by law of limitation?
- (iv) Whether the defendant proves the averments made by him in his written statement?
- (v) What relief plaintiff is entitled to get?
- (vi) What order and decree?

8. It appears from the record that after considering the oral and documentary evidence and hearing learned advocates for the parties, the learned Trial Court has decided all the issues in negative and has ultimately dismissed the suit of the plaintiff.

9. Being aggrieved by the said judgment and decree of the Trial Court, the original plaintiff preferred the First Appeal being Regular Civil Appeal No.86 of 1985 before the District Court Navsari which came to be heard by learned Assistant Judge, Valsad at Navsari.

10. The First Appellate Court has framed following points for the determination of the First Appeal in para 10 of its judgment:-

- (i) Whether the appellant proves that the respondent nos.1 and 2 executed an agreement to sell dated 23.08.1979 and subsequently failed to perform their part of the contract?
- (ii) Whether the appellant proves that the learned Trial Judge committed an error in dismissing the plaintiff's suit?
- (iii) What final order?

11. The First Appellate Court, after hearing learned advocates appearing for the respective parties and perusing the material placed on record has decided the point nos.1 and 2 in affirmative and has ultimately allowed the appeal and passed the decree for specific performance of the contract, directing the defendants to execute the sale deed and to hand over the actual physical and vacant possession of the suit premises of the plaintiff within three months from the date of the order. It has also granted liberty to the appellant -plaintiff to deposit the remaining amount of Rs.12,400/- with the lower Court and to get the Court Commissioner appointed for execution of the sale deed in his favour.

12. Learned advocate Mr.Panchal for the appellant has vehemently submitted same facts which are narrated in the memo of appeal. While assigning the impugned judgment of the First Appellate Court, learned advocate Mr.Panchal has vehemently submitted that the defendant has taken a defense that he was blind and was not in a position to see and the plaintiff has taken undue advantage of this situation by obtaining his signatures on various documents. According to him, this defense clearly comes within the meaning of coercion

fraud or misrepresentation under the Contract Act. He has submitted that the observations of the First Appellate Court that defendant has not taken defense of coercion or fraud or misrepresentation is clearly not sustainable in the eyes of law. He has submitted that the defense regarding the weakness in the eye sight of the defendant and of taking disadvantage of this fact by the plaintiff clearly falls within the definition of misrepresentation or fraud under the Contract Act.

12.1. He has also submitted that the First Appellate Court has failed to consider the provisions of Specific Relief Act. He has further submitted that the observations of the First Appellate Court regarding none appearance of the defendant no.2-who happens to be wife of the defendant no.1 is also not tenable in the eyes of law. Learned advocate has submitted that the defendant no.2 is the house wife and she has not moved out of the house at all in absence of husband-defendant no.1 and therefore she has never known the facts that any suit is filed against her and she has simply signed the papers as and when required by her husband. According to learned advocate Mr.Panchal, considering these facts any adverse information ought not to have been drawn against defendant no.2 and the Appellate Court has committed serious error of facts and law in passing the impugned decree only on the ground that defendant no.2-wife has remained absent in the proceedings.

12.2. Learned advocate Mr.Panchal has also submitted that the medical certificate regarding the blindness of the defendant no.1 has not been properly appreciated by the First Appellate Court. He has submitted that as per the certificate there is a weakness in the eye sight of defendant no.1. Regarding the document at exhibit 29, Mr.Panchal has submitted that this document is not genuine one and signature of the defendants have been taken under misrepresentation and there is a fraud committed. Mr.Panchal has read entire pleadings of the parties as well as evidence on record and has vehemently submitted that the First Appellate Court has clearly misdirected itself and has misread the evidence and has wrongly set aside the judgment and decree of the Trial Court dismissing the suit. He has also submitted that when the plaintiff has prayed for an alternative remedy of damages, then, instead of passing decree of specific performance, alternative remedy of damages ought to have been granted. Mr.Panchal has submitted that considering the facts and circumstances of the case and the facts that the judgment and decree of the Trial Court was proper one, the judgment and decree of the First Appellate Court need to be set aside and judgment and decree of the Trial Court be restored and thereby to dismiss the suit of the plaintiff with cost.

13. Per contra learned advocate Ms.Varsha Brahmabhatt for the respondent has submitted that the First Appellate Court has properly appreciated the facts and circumstances of the case and has not committed any error of facts and law in passing the decree of specific performance. She has submitted that as the Trial Court has committed error of facts and law in dismissing the suit, the First Appellate Court has properly re-appreciated the facts and evidence on record and

has properly passed the impugned judgment and decree in favour of the plaintiff for specific performance of the contract. She has also referred to the pleadings of the parties as well as the documentary evidence and has submitted that in reality there is no substantial question of law involved in his appeal and the appeal deserves to be dismissed. She has also submitted that along with the Second Appeal, the appellant-defendant has produced certain documents first time in this Second Appeal which were never produced before the Courts below and it was never exhibited in evidence and therefore those documents which are placed in paper book from page 77 to 86 in this Second Appeal, may not be taken into consideration by this Court. Regarding other documents, she has also submitted that the defendant-appellant has produced all these documents in the paper book for the first time in this Second Appeal without any separate application or any order of this Court. By referring to the oral and documentary evidence, she has submitted that the execution of agreement to sell at exhibit 29 and letter at exhibit 42 are duly proved by the evidence of the plaintiff's witnesses. She has submitted that the defense regarding the weak eye sight cannot be accepted which is not rightly accepted by the First Appellate Court. She has submitted that the defendant was a bank employee and therefore he has sufficient knowledge regarding the contents of the document and being a bank employee he would not have signed if really there was no any transaction between the parties regarding the sale of a property. She has supported the impugned judgment and decree of the First Appellate Court and has prayed to dismiss the present appeal with cost.

14. Having considered the submissions made on behalf of both the sides coupled with the Records and Proceedings of the Trial Court and the impugned judgments of the both the Courts below, it reveals that the plaintiff has filed suit for specific performance of the contract against the defendants. The main defense of the defendants is regarding execution of such document under misrepresentation or fraud committed by the plaintiff taking undue advantage of the weak eye sight of the respondent no.1. The Trial Court has dismissed the suit of the plaintiff. On re-appreciation of the entire evidence, the First Appellate Court has set aside the impugned judgment of the Trial Court and has passed the decree of specific performance of contract.

15. Now, on perusal of the judgment of both the Courts below, it appears that the Trial Court as well as the Appellate Court has believed the execution of agreement to sell at exhibit 29. Thus, the factum of execution of agreement to sell between both the parties are believed by both the Courts below. Thus, there is a finding of the facts, on which both the Courts below have concurrently accepted the case of the plaintiff that there was an execution of agreement to sell between the parties. On perusal of the pleadings as well as the oral evidence which consists of the evidence of the plaintiff, evidence of petition writer Mr. Ranchoddas Pujari at exhibit-55, evidence of defendant no.1 at exhibit- 63, agreement to sale at exhibit-29, receipt at exhibit 40, agreement for extension of time for execution of agreement and handing over the possession at exhibit-42, writing by defendant no.1 addressed to Mr. Rameshchandra Vallabhdas Soni of

Navsari regarding payment of Rs.1,000/- as full and final payment and getting back his own document of the property from him at exhibit-43, it clearly reveals that the document was written by the petition writer and the defendant has put a signature which was witnessed by the witness. It is pertinent to note that considering the evidence of the defendant himself, he has accepted that the witness Mr.Natvarlal Parsottamdas is known to him and the defendant himself accepted the signing of the document at exhibit 29. The defense raised by the defendant is to the effect that due to his weak eye sight he was not able to read the same and on the basis of trust on the plaintiff regarding payment of Rs.1,000/- he has put his signature. Thus, it is for the defendant to substantiate his defense regarding fraud or misrepresentation exercised by the plaintiff over himself regarding the said execution of the document at exhibit 29. On reading of the entire evidence of the defendant coupled with the documentary evidence produced by him and the oral evidence of his bank colleague for his version that due to his weak eye sight, he has resigned from the bank service, does not substantiate his defense as to his inability to read and of having got his signature purportedly by misrepresentation or fraud by the plaintiff on the agreement to sell at exhibit 29. It reveals from the oral evidence of the defendant himself that after resigning from the bank in the year 1964, he has carried out the small business of milk and tea and he has also engaged one servant. Not only that it also reveals from the entire oral evidence that even at the time of deposition in the Court, he himself, without any help of anybody, has attended the Court. It also reveals that his written statement was filed way back in the year 1981, whereas the document was executed in the year 1979. Thus, the defense of the defendant regarding his blindness at the time of execution of the agreement to sell at exhibit 29 cannot be believed.

16. Further, it also reveals from the evidence on record that the defendant himself has issued receipt at exhibit 40 regarding the receipt of Rs.1000/- wherein averment has been made that the amount pertains to the sale transaction. Not only that, but it also reveals from exhibit 42 that defendant no.1 has sought time for one month more for execution of sale deed in pursuance to the agreement to sell at exhibit 29. During the course of the evidence, the defendant has admitted his signature over all these documents. The subscriber of exhibit 29 and 42 i.e. petition writer has clearly deposed in his evidence regarding the preparation of both these documents by himself and it being signed by the defendant no.1 in his presence and in presence of other witness. Thus, the execution of exhibit 29 by the defendant is duly proved and the defense raised by the defendant no.1 even on the touch down of principles of preponderance of probability is not acceptable.

17. Now, considering the impugned judgment of the First Appellate Court, it clearly transpires that the First Appellate Court has properly appreciated the entire evidence on record. It also reveals that when the Trial Court has accepted the version of the plaintiff regarding execution of the agreement to sell by the defendants at exhibit 29, then, as a consequence, thereof, the decree of specific

performance needs to be passed, in view of the amended section 20 of the Specific Relief Act. Of course prior to the amendment of Section 20, the grant of relief of specific performance was discretionary one.

18. At this juncture, it is worthwhile to refer to the decision of Hon'ble Apex Court in the case of K. Narendra V. Riviera Apartments (P) Ltd. reported in (1999) 5 SCC 77, wherein the Hon'ble Apex Court has laid down the proposition in para 29 thereof regarding section 20 of the Specific Relief Act to the following effect:-

".....29. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant....."

19. Now, in the present case, the appellant has neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. The only plea raised by the defendant-appellant is regarding execution of the agreement to sell by fraud or misrepresentation and/ or taking undue advantage of the weak eye sight of the defendant no.1. Thus, even under the amended section 20 of the Specific Relief Act, the discretionary relief of granting specific performance of the contract needs to be passed against the defendant no.1. Moreover, it is also well settled law that mere delay by itself, without more, cannot be the sole factum to deny specific performance.

20. Now, considering the impugned judgment of the First Appellate Court, it is crystal clear that the First Appellate Court has not committed any error of facts and law in passing the impugned decree of specific performance of a contract against the defendant-appellant.

21. In the aforesaid facts and circumstances of the case, therefore, I have decided the questions raised in this appeal as referred to herein above in negative.

22. In view of the above discussions, the present appeal is liable to be dismissed. Hence, I pass the following final order in the interest of justice.

ORDER

The present Second Appeal stands dismissed.

The judgment and decree passed by the First Appellate Court dated 12.01.1990 in the First Appeal No.86 of 1985 are hereby confirmed.

Considering the facts and circumstances of the case, the parties are directed to bear their respective cost of this Second Appeal.

Decree to be drawn in this Second Appeal.

Along with the copy of this judgment and decree, Records and Proceedings to be sent back to the learned Trial Court.