
(2005) 06 MP CK 0028
In the Madhya Pradesh High Court
Case No : First Appeal No. 91 of 1989

Gyaneshwar

APPELLANT

Vs

Smt. Moongabai @ Muneshwaribai and Another

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 52
Specific Relief Act, 1963 — Section 16, 19, 20
Transfer of Property Act, 1882 — Section 3

Citation : (2006) 1 MPHT 287 : (2006) 1 MPLJ 221

Hon'ble Judges : Abhay Naik, J

Bench : Single Bench

Advocate : P.R. Bhawe and Satyendra Patel, for the Appellant; Pranay Verma, for the Respondent

Judgement

Abhay Naik, J.

The present appeal arises out of dismissal of suit for specific performance by the Court of First Additional District Judge to the Court of District Judge, Balaghat, vide judgment and decree dated 26-4-1989, passed in Civil Suit No. 24-A/88.

The plaintiff on 22-6-1985 instituted a suit for specific performance in respect of an immovable property in the nature of house and plot situated in the district of Balaghat. The property belonged to Kunwarlal, which was inherited by the defendants Moongabai and Parwatibai, both being his widows. Both widows entered into an agreement for sale of suit property to the appellant/ plaintiff, for a consideration of Rs. 65,000/-. Out of this amount, Rs. 10,000/- were received by defendants No. 1 and 2 and the balance amount was liable to be paid at the time of execution of the registered sale deed. It is further stated in the plaint that the plaintiff had been residing in the suit property during the life time of Kunwarlal. Possession of suit property with the plaintiff was acknowledged by the defendants No. 1 and 2, in the capacity of protective purchaser. Since, one of the rooms, comprised in the suit property was occupied by one Harish Kumar

Nagpure, the same continued in the occupation of the said Harish Kumar Nagpure with the consent of the plaintiff and defendants No. 1 and 2. The plaintiff in the month of September, 1984 asked the defendant No. 1 to receive the balance amount and execute the registered sale deed in his favour, in respect of the suit property. Since they were close relatives, the plaintiff trusted the defendant No. 1 that she would execute the registered sale deed in future. However, it is contended that the plaintiff was ready and willing to pay the balance amount of consideration and get the sale deed executed in his favour. On 9-5-1985, the plaintiff came to know that the defendant No. 1 was going to sell the suit property in favour of one Jaiswal. The plaintiff submitted an application before the Sub-Registrar, Balaghat with a prayer that the defendant No. 1 may not be permitted to alienate the property in favour of a third person, on account of earlier sale agreement in favour of the plaintiff. However, the plaintiff later on came to know that defendant No. 1 has sold the suit property to the younger brother of Chhedilal Jaiswal, vide registered sale deeds dated 9-5-1985 and 10-5-1985. The plaintiff contended that Ghanshyam Jaiswal, who was impleaded as defendant No. 3, was aware of the earlier agreement dated 28-6-1984 and was not a bonafide purchaser. Accordingly, the plaintiff has prayed for decree for specific performance against defendant No. 1. The plaintiff has further prayed for declaration that the sale deeds executed by defendant No. 1 are not binding on him. In the alternative, plaintiff has prayed for refund of consideration amount paid as advance, with interest.

Defendants No. 1 and 3 submitted their separate written statements and denied the claim of the plaintiff. The defendant No. 1 has stated that Kunwarlal was maternal uncle of the plaintiff and had no issue from both the aforesaid wives. She denied the factum of alleged agreement of sale for consideration of Rs. 65,000/- and has further denied the receipt of Rs. 10,000/- as part of consideration. She further contended that the plaintiff was liable to pay the balance amount of consideration of Rs. 55,000/- by first week of October, 1984 and was liable to get the sale deed executed positively by this time, because the time was essence of the contract. She stated that the plaintiff was not possessed of the balance money and was not ready and willing to purchase the suit property. So, the alleged sale agreement stood cancelled automatically on account of failure on the part of the plaintiff to comply with the sale agreement. The suit property has been validly sold to defendant No. 3 by registered sale deeds. She further stated that the plaintiff was trying to grab the suit property because the defendants No. 1 and 2 had no issue. Earlier, he had claimed suit property on the ground of gift and had also claimed the ownership over it.

Defendant/respondent No. 3 also raised the same pleas as raised by defendant No. 1 and prayed for dismissal of the suit.

The learned Trial Judge after recording the evidence ultimately dismissed the suit for specific performance and granted a decree for refund of Rs. 10,000/-, without interest. Aggrieved by the same the plaintiff/appellant has preferred the present

appeal. During the pendency of the suit, respondent No. 2, Parwatibai died and her name was deleted from the proceedings in the Trial Court.

Shri P.R. Bhave, learned Counsel for the appellant made mainly the following submissions :-

- (i) that the time was not essence of the contract.
- (ii) Readiness and willingness on the part of the plaintiff/appellant was well established and the learned Trial Judge has committed a grave error in holding otherwise.
- (iii) Defendant/respondent No. 3 is not bonafide purchaser and he having purchased the suit property after the sale agreement in favour of the plaintiff is bound by the agreement.
- (iv) Accordingly, it is contended by Shri P.R. Bhave, learned Counsel for the appellant, that the suit for specific performance ought to have been decreed and this appeal deserves to be allowed.

On the other hand Shri Pranay Verma, learned Counsel for the respondent No. 2, supported the impugned judgment.

I have considered the lengthy arguments made by the respective Counsels and have perused the record of the Trial Court.

Shri Bhave, learned Counsel strenuously argued that the defendant/respondent No. 2 is not a bonafide purchaser, in as much as he did not make requisite enquiry before purchase of the suit property. Secondly, the plaintiff was already in possession and the respondent No. 2 ought to have made an enquiry into the character of the possession of the plaintiff. Thirdly, the purchase by respondent No. 2 having been admittedly made after execution of the sale agreement in favour of the plaintiff, he is bound by the sale agreement and the suit ought to have been decreed in favour of the plaintiff. Shri Bhave relied upon various authorities on the point, which are being dealt with here under:-

- (i) The plaintiff has been in possession of the suit property, as admitted by defendant/respondent No. 2. He has stated in Paragraph 9 of his statement that he did not make any enquiry with the plaintiff about the character of his possession. He has further admitted in the same paragraph that he did not make enquiry with the vendor whether there was any earlier agreement or not. He has also admitted in Paragraph 4 that he was assured by the defendant/respondent No. 1 that the possession of Gyaneshwar, the plaintiff will be delivered to him after 3-4 days. Thus, defendant/respondent No. 2 was well aware of plaintiff's possession over the suit property (except the portion which was earlier occupied by Harish Nagpure and was later on delivered to the defendant No. 2). The Apex Court in *Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others*, has held in Paragraph 18 that if the purchaser has relied upon the assertion of the vendor or on his own knowledge and abstained from making enquiry into the real nature of

the possession of the tenant, he can not escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act.

(ii) The Hon'ble Supreme Court in *R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others*, has held that Section 19(b) of Specific Relief Act, 1963 protects bonafide purchaser in good faith for value without notice of the original contract. This protection is in the nature of an exception to the general rule. Hence, the onus of proof of good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty. The Apex Court has further held that it is essential that the subsequent purchaser makes an enquiry as to the title or interest of the person in actual possession as on the date when the sale transaction was made in his favour. In the instant case respondent No. 2 is not found to have acted in good faith, so as to claim the protection of Section 19(b) of Special Relief Act.

(iii) The Madras High Court in *Veeramalai Vanniar (Died) and Others Vs. Thadikara Vanniar and Others*, has held that a subsequent transferee can retain the benefit of his transfer by purchase which prima facie, he has no right to get, only after satisfying the two conditions concurrently viz., (1) he must have paid the full value for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. The High Court has further held that the burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale. It is also the duty of the subsequent purchaser to enquire from the persons in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into.

Shri Bhawe also relied upon three authorities of this Court viz., *Sajan Singh v. Fanindra Pal Singh and Ors.* [1994(1) VIBHA 77], *Balram v. Bapu Singh* (1982 MPWN 294) and *Sadaram and Anr. v. Gangadhar* [1977(1) MPWN 291] and contended that burden of proof and good faith and lack of notice of prior agreement is on the subsequent purchaser. This position being already well settled, no further discussion is required on this point.

In the light of the aforesaid legal position, I will consider the other evidence on record in this respect. The plaintiff has specifically pleaded in the plaint that he came to know that the suit property is being sold to Chhedilal, the brother of defendant/purchaser. This has also been substantiated in evidence on oath. It is the case of the plaintiff that he issued notice to defendant/respondent No. 1 and verbally apprised Chhedilal of the agreement of sale in his favour. The plaintiff has stated that in connivance of Chhedilal the suit property was purchased in the name of respondent No. 2 in whose presence the information about the sale agreement was provided by the plaintiff. It is important to note that Chhedilal, in spite of being the brother of defendant/respondent No. 2 has not been examined, this leads to an adverse inference against respondent No. 2.

On the basis of aforesaid discussion, I hold that defendant/respondent No. 2 was aware of the prior agreement in favour of the plaintiff and he can not be termed as a bonafide purchaser.

Although I have held that the defendant/respondent No. 2 is not a bonafide purchaser but the same will not be the end of the matter. The plaintiff has to establish his entitlement to seek specific performance of agreement in his favour, then alone the question of bonafides of defendant/respondent No. 2 would come up for consideration. Simply because the respondent No. 2 is not held to be a bonafide purchaser for full value, the plaintiff will not be absolved from the requirement of establishing his claim for specific performance. The bonafides of respondent No. 2 will be relevant only if the plaintiff is found to be entitled to a decree for specific performance in accordance with the provisions of the Specific Relief Act, 1963. Now, I will scan the evidence from this angle. The learned Counsel for the appellant submitted that the time was not an essence of the contract and the finding of the learned Trial Judge in this regard is incorrect. He has relied upon the decision of the Apex Court reported in the case of K.S. Vidyanadam and Others Vs. Vairavan, and of Delhi High Court in Nanak Builders and Investors Pvt. Ltd. v. Vinod Kumar Alag (AIR 1991 Del 315). It may be seen that there is no hard and fast rule that the language of the agreement will decide the essentiality of the stipulation regarding time. This is almost a settled proposition that to decide whether the time was essence of the contract, intention of the parties has to be found out from the material record. The Apex Court in the case (supra) has clearly stated that the time limit may not be the essence of the contract but it must have some meaning. To begin with it, I will first consider the sale agreement contained in Ex. P-1, which is dated 28th June, 1984. It is mentioned in this agreement that the total consideration was settled at Rs. 65,000/- and Rs. 10,000/- were received by the prospective vendor, as advance. The balance consideration, amounting to Rs. 55,000/- was payable in the first week of October, 1984. Ex. P-1, contains a default clause also that in case of failure to make the payment within the stipulated period the advance amount shall lapse and the sale agreement shall stand cancelled. The defendant/respondent No. 1 is a widow with no other source of income. It is not the case of the defendant/respondent No. 1 that the condition about limitation was inserted merely as a formality. However, defendant/respondent No. 1 has also not stated in her statement that there was any urgency to receive the money within a fixed time period. On the contrary, in Paragraph 4 of the statement defendant/respondent No. 1 has stated categorically that there was no reason to fix the limitation for execution of sale deed. She has merely stated that the period upto the month of October was mentioned in Ex. P-1, since it was so expressed by the plaintiff. In view of this categorical statement of defendant/respondent No. 1, I find that the time period mentioned in the sale agreement Ex. P-1, was not the essence of the contract.

The next crucial point for deciding the entitlement of plaintiff to seek a decree for specific performance is to determine whether the plaintiff has been ready and

willing to perform his part under the agreement. Admittedly, the plaintiff out of the consideration amount of Rs. 65,000/- had paid only Rs. 10,000/-. The balance of consideration amounting to Rs. 55,000/- was not paid by the plaintiff within the stipulated period. It was also not deposited in the Court during the pendency of the suit or even during the pendency of the present appeal. The plaintiff has nowhere stated even in his chief examination that he had ever offered the balance consideration to the defendant/respondent No. 1. Even along with notice Ex. P-2, issued by the plaintiff to the defendant/respondent No. 1, the amount of balance consideration was not offered/ tendered to the defendant/respondent No. 1. The witnesses of the plaintiff are also silent on this point. No such suggestion seems to have been made to the defendant/respondent No. 1. The readiness and willingness for the purpose of seeking a decree for specific performance implies monetary potential to pay the consideration and mental preparedness to perform the part under the contract. The plaintiff/appellant having failed to discharge this burden is not entitled to a decree for specific performance in view of the Apex Court decision reported as N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, . The Hon"ble Supreme Court of India has held in the case (supra):-

5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrary as adumbrated u/s 20 of the Specific Relief Act, 1963(for short "the Act"). u/s 20, the Court is not bound to grant the relief justice because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with the attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to the available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.

Accordingly, I hold that the plaintiff/appellant having failed to establish the

mandatory requirement of readiness and willingness contemplated u/s 16(c) of the Specific Relief Act has been rightly non-suited by the learned Trial Judge.

There is one more reason to deny the decree for specific performance. Section 20 of the Specific Relief Act, empowers the Court to deny the relief of specific performance in exercise of its discretion, when the Court finds that the conduct of the plaintiff has made him dis-entitled for the relief of specific performance. Reference may be made to the decision of the Apex Court in the case of Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, and of Kerala High Court in Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma, . In the instant case it may be seen that the defendant/respondent No. 1 is an issueless widow. The plaintiff is son of sister of her husband. The plaintiff has been in possession of the suit house and was well aware of the fact that with the passage of time no other person may claim the suit property from him and he may not be even required to pay the balance amount of consideration. Moreover, less than 20% of the consideration was paid at the time of the execution of the sale agreement and the balance consideration was neither paid nor tendered/offered. It was also not deposited during the pendency of lis. Apart from this, the title of the plaintiff over the suit property was asserted by his parents independent of the sale agreement, as revealed in Ex. D-3 and D-4. In view of the same, the learned Trial Judge has not committed any error in refusing the relief of specific performance.

Lastly, the learned Trial Judge has granted a decree for refund of Rs. 10,000/- which was received by defendant/respondent No. 1, as part of consideration. The learned Trial Judge has for no reason denied the interest on this amount. It may be seen that the defendant/respondent No. 1 has already sold out the suit property to the respondent No. 2 and has retained the amount of Rs. 10,000/- for a period of over 20 years. There is no justification to deny the interest to the plaintiff on this amount. So, the plaintiff is found to be entitled to interest on Rs. 10,000/-, @ 6% per annum from the date of institution of the suit until realisation. To this extent, the judgment and decree are liable to be modified.

In the result, the appeal stands rejected except to the extent of entitlement of the plaintiff to receive interest on the sum of Rs. 10,000/- from the date of institution of the suit until realisation. Rest of the judgment and decree of the learned Trial Judge are affirmed. Decree shall be modified to the aforesaid extent, accordingly.

No order as to costs.