
(2014) 01 BOM CK 0190
In the Bombay High Court
Case No : Suit No. 2170 of 2010

Jayesh Gopaldas Sampat and Others

APPELLANT

Vs

Paresh Satyendra Vohra and Others

RESPONDENT

Date of Decision : 27-01-2014

Acts Referred:

Citation : (2014) 5 ALLMR 205 : (2015) 5 BomCR 445 : (2014) 6 MhLj 259

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Naushad Engineer, Mr. Nilesh Modi, Mr. Siddharth Shenoy, Mr. Siddharth Chandrashekar instructed by Rustomji K. Giniwala, for the Appellant;

Judgement

G.S. Patel, J.—The suit is listed for ex parte decree. The defendants were served on 21st September 2011. No written statement has been filed. None appears for the defendants. Heard Mr. Naushad Engineer, learned Advocate for the plaintiffs. Perused the plaint. The Plaintiffs have tendered an affidavit of documents and a compilation, as also an affidavit in lieu of examination in chief of one Jayesh Gopaldas Sampat, the 1st plaintiff. Mr. Sampat is personally present in Court. He confirms the correctness of the statements made in the affidavit in lieu of examination in chief. The documents produced by him along with his affidavit of documents, and attested to in his affidavit in lieu of examination in chief are taken on record and marked Exhibit "P1" collectively. Plaintiffs shall file a compilation of photocopies of these documents within one week from today. This compilation shall be verified by the office and the original documents shall then be returned to the advocate for the Plaintiffs.

2. This is a suit for specific performance. The 2nd plaintiff is the 1st plaintiff's mother, and the 3rd plaintiff is his wife. The plaintiffs seek a specific performance of a flat purchase agreement dated 24th September 2006.

3. Defendant Nos. 1 to 4 are the owners of a immovable property at Borivali. There stood a building called Padmalaya of ground and three floors on this plot.

The plaintiffs resided in flat No. 4 on the ground floor of this building along with the 1st plaintiff's brother, one Sameer Sampat ("Sameer"), and their family members. The 1st plaintiff's father was the original tenant of that flat. He died intestate and was survived by the 1st plaintiff's mother, Sameer, the 1st plaintiff ("Jayesh") and their married sisters.

4. Defendant Nos. 1 to 4, the original owners, entered into a development agreement with the 5th defendant, a firm of developers, of which defendants Nos. 6 and 7 are the partners, for the demolition of "Padmalaya" and the construction of a new building in its stead. Defendant Nos. 1 to 4, the landlords, approached Jayesh and Sameer and their family offered them permanent alternate accommodation in the new building. An initial round of negotiations failed. There followed certain eviction proceedings in the Small Causes Court, and a fresh round of negotiations. During these further negotiations, Jayesh, his mother and his married sister agreed that the tenancy could be transmitted to Sameer's name. Declarations were executed to that effect.

5. Thereafter, an agreement dated 27th February 2005 was executed between defendant Nos. 1 to 4 and Sameer, under which Sameer was to get a flat of about 742 square feet on the second floor of the proposed building. The eviction proceedings were also compromised. It seems that two brothers desired that they live as neighbours in proximity to each other. Jayesh therefore decided to purchase a flat in the same building. Sameer entered into a supplementary agreement with the defendants, by which, instead of a flat on the second floor, he was now to be provided a flat on the fourth floor, viz., Flat No. 402, in the same building along with an additional car parking space and additional carpet area. Jayesh, for his part, agreed to purchase a flat on the fifth floor, i.e., flat No. 502, directly above the flat to be purchased by Sameer.

6. It was in these circumstances that an agreement for purchase of flat No. 502 was executed between the plaintiffs and defendant No. 5 on 24th September 2006. The agreement is registered. The flat purchase agreement requires the 5th defendant to sell to the plaintiffs flat No. 502 with a carpet area of about 1160 square feet and car parking space No. 11, for a total consideration of Rs. 29,35,000/-. The consideration was payable in two installments. The first, Rs. 13,35,500/- was to be paid on execution of the agreement. Its receipt is admitted in the agreement itself. The second instalment of Rs. 15,99,500/- was to be paid by Jayesh against his being given possession.

7. Jayesh says that he was at all times ready and willing to perform his obligations under this agreement. He did, in fact, perform his obligations by making payment of Rs. 13,35,500/-. The time for payment of the second instalment has not yet been reached, as the defendants have not completed construction of the building or handed him possession. He is ready and willing to make payment of the second instalment even now if possession is handed over to him. In paragraph 21 of his affidavit in lieu of examination in chief, the 1st plaintiff has reaffirmed and reiterated his continuing readiness and willingness to

perform his obligations under the flat purchase agreement.

8. Under the flat purchase agreement, possession was to be given to the plaintiffs on or before 31st December 2006. This was not done. In the meantime, Jayesh and his family, including Jayesh's brother, Sameer, vacated the tenanted premises occupied by them, so that reconstruction/development could commence. As the progress of the work was very slow, the plaintiffs, through their advocates, addressed a letter to the defendants on 12th June 2007. The defendants' advocates responded on 20th June 2007 requesting the plaintiffs to bear with them. A further reply followed on 24th July 2007. At internal page 4 of this letter, the defendants assured the plaintiffs that the development work had been resumed and would be completed at the earliest within a period of no more than 12 months. As no work seemed to be progressing at site, the plaintiffs' advocates sent a further letter/notice to the defendants on 12th October 2007. To this, there is no response till date. The plaintiffs therefore filed this suit on 12th July 2010, within time.

9. In his affidavit evidence, Jayesh has adduced evidence and material in support of his claim for damages. As regards the quantification of damages, he has candidly admitted that there is an arithmetical error in computing the damages mentioned in prayer clause (b). The correct figure of Rs. 1,87,05,000/- is set out in paragraph 23 as the loss sought to be avoided.

10. It seems that the work on project is currently at a standstill. There is no doubt that the defendants are bound by the terms of the agreement and must fulfill their obligations under it. They must complete construction of the building and deliver possession of flat No. 502 and car parking space No. 11 to the plaintiffs. The plaintiffs are, therefore, entitled to a decree for specific performance in terms of prayer (a).

11. Prayer (b) is the usual prayer for damages in the alternative, i.e., if a decree for specific performance is not granted. Having regard to the peculiar facts of the present case, in my view, it is necessary and in order to meet the ends of justice that a conditional decree be made. The defendants are entirely without justification in not completing the project in time, although the plaintiffs vacated the tenanted premises and paid the first instalment under the agreement in question. The plaintiffs are now being forced to live elsewhere, even though they specifically entered into the flat purchase agreement so that they could live near the 1st plaintiff's brother, Sameer. Therefore, in addition to enjoining the defendants to specifically perform the agreement dated 24th September 2006, a conditional decree must follow against the defendants should they fail to do so.

12. Perhaps it is unusual that in a suit such as this, an order should be made for specific performance and, in default, for damages. This is not a matter of the Court being unable to compel specific performance. It is, rather, a question of a defendant or judgment debtor refusing or failing to perform his obligation not just under a contract, but under a decree of a court of competent jurisdiction.

That would leave a hapless plaintiff to seek what might perhaps be an ineffective further remedy. It simply cannot be where the rules of Code of Civil Procedure, 1908 drive a plaintiff in such a situation to yet another long drawn out round of litigation in the executing court or elsewhere. A defendant who does not even take the trouble to enter a defence, and against whom a exparte decree is passed, must know that these decrees are not to be taken lightly. Certainly, they cannot be ignored. Nor should a successful plaintiff be asked to leave the Court with nothing more than a paper decree in his hands. A conditional decree is, in my view, a permissible exercise of discretion only to ensure that the defendant against whom the decree is passed fulfills his contractual obligations to the plaintiffs. In *Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others*, the Supreme Court held that a decree for specific performance can always be made conditional. Usually, such a decree requires some specified conditions to be fulfilled before the decree for specific performance is made effective. There is, to my mind, no reason why, if the defendants are enjoined to specifically perform an agreement and fail to do so, the plaintiffs should not then be entitled to a decree in compensation or damages.

13. The permanent injunction sought in terms of prayer clause (c) is much too wide as it relates to the entire property. Mr. Engineer fairly states that the injunction sought must be restricted to the flat and car parking space in question.

14. Hence, there will be a decree in favour of the plaintiffs and against the defendants in terms of prayer clause (a). The defendants shall specifically perform the flat purchase agreement dated 24th September 2006 (copy at Exhibit "B" to the Plaint) within twelve months from the date of this decree, i.e., by 27th January 2015.

15. In the event of the defendants failing to specifically perform the agreement dated 24th September 2006 in terms of the preceding clause (a) by 27th January 2015, there will be a decree jointly and severally the defendants in the amount of Rs. 1,87,05,000/- as damages and compensation with further interest thereon at the rate of 12% per annum from the date of filing of the suit till realization.

16. There will also be a decree against the defendants and in favour of the plaintiffs in terms of prayer clause (c) restricted to Flat No. 502 and car parking space no. 11.

17. There shall also be a decree against the defendants for costs, quantified at Rs. 1.5 lakhs. Drawn up decree is expedited. Sealing of decree is dispensed with.