(1974) 08 GUJ CK 0014

In the Gujarat High Court

Case No : First Appeal No. 793 of 1969

Keshavlal Laxmandas Patel APPELLANT

Vs

Narsinhbhai Kalidas Patel and Another RESPONDENT

Date of Decision : 17-08-1974

Acts Referred:
Specific Relief Act, 1963 — Section 34, 38

Citation : AIR 1976 Guj 154 : (1975) GLR 520

Hon'ble Judges : T.U. Mehta, J;J.B. Mehta, J

Bench : Division Bench

Advocate : M.H. Chhatrapati, for the Appellant; Kiran V. Desai, for the Respondent

Judgement

T.U. Mehta, J.—This Appeal arises out of the suit filed by the appellant-plaintiff for obtaining a decree for declaration that the agreement to sell the suit lands entered into between him and the respondent No. 1 on 9-1-1965 is still subsisting. The plaintiff has also claimed a permanent injunction restraining the defendants from transferring the suit lands to any other person. The said suit was filed in the court of the Civil Judge, S. D., Baroda, which was registered as Special Civil Suit No. 30/68. The learned trial Judge having dismissed the suit, the plaintiff has filed this First Appeal.

2. Short facts of the case are that the suit is with reference to agricultural land bearing S. No. 3/1 situated in the sim land of village Nagarwada near Baroda. On 9th January, 1965 the ''suit land was standing in the name of the defendant No. 1 in the revenue record. On that day the plaintiff and the defendant No, 1 entered into an agreement by, virtue of which the defendant No. 1agreed to sell the suit land to the plaintiff at the rate of Re. 0.75 per sq. ft. and also gave (received ?) the earnest money of Rs. 150/-. At that time the suit land was cultivated by one Dahyabhai Ranchhodbhai as a tenant. The agreement to sell, therefore, stipulated that the document of sale should be executed and the remaining amount of consideration should be paid up by the plaintiff after vacant

possession of the suit land was obtained by the defendant No. 1 from the tenant Dahyabhai Ranchhodbhai. This agreement is found at Ex. 23 in the record of the case.

3. Several months thereafter i.e. on 2nal December, 1965 the defendant No. 1 got the land mutated to the name of the defendant No. 2, who is related to him as his mother. The mutation entry which is found at Ex. 39. shows that the land was eventually mutated to the name of the defendant No. 2 as it was alleged that the land was partitioned and had gone to the share of the defendant No. 2 as early as 17-5-1949. In proof of the said partition some document also produced before the for the purpose of mutation. The case of the plaintiff is that he knew nothing about this mutation.

4. The plaintiff has alleged that thereafter tenancy case No. 58/67 was filed on 5-1-67 against the tenant Dahyabhai Ranchhodbhai, who is said to have agreed to surrender his tenancy rights voluntarily. The record of the case possesses at Ex. 30 the order of the Tenancy Mamlatdar dt. 30th June, 1967. The Tenancy Mamlatdar made a further order in the said case giving over the possession of the suit land to the defendant No. 2. This is evident from Ex. 31. The mutation entries found at Ex. 27furtherreveal that possession from the tenant was ordered to be taken over on 14-8-67. Thereafter by his order dt. 22nd February. 19-68 the Collector, Baroda, took, u/s 76-A of the Bombay Tenancy and Agricultural Lands Act, 1948, further proceedings in suo motu revision with a view to satisfy himself as to the regularity and the propriety of the above said orders passed by the Tenancy Mamlatdar. These proceedings before the Collector were pending when this suit was filed on 30th March, 1969.

5. The plaintiff''s case is that since the defendants are trying to sell away the suit land at higher price in breach of the terms of the Banakhat, it has been necessary to file this suit for declaration that the Banakhat is still subsisting.

6. The suit has been resisted by the defendants on various grounds. The learned Judge framed several issues and kept some of these issues as preliminary issues. He gave finding on these preliminary issues in favour of the plaintiff but on issues which were on the merits of the case, he came to the conclusion that the suit land never belonged to defendant No. 1 and, therefore, the defendant No. 1 had no right, title or interest to execute this disputed Banakhat. In view of these findings on merits, the learned judge dismissed the suit.

7 & 8.

9. We thus find that the plaintiff is successful so far as the merits of the case are concerned. The question which, however, arises to be considered is whether the plaintiff can get any relief either of declaration or of injunction under any of the provisions of the Specific Relief Act. So far as the relief of declaration is concerned, the same is contemplated by Section 34 of the Specific Relief Act, which is in the following terms:

"34. Discretion of court as to declaration of status or right - Any person entitled to any legal character, or to any right 4 to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration. where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation:- A trustee of property is a "person interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be trustee."

Thus, this section postulates that only that person can avail of the remedy of obtaining a decree for declaration who is entitled to "any legal character" or who has any right as to any property." In case of an agreement to sell, parties to the agreement are not entitled to a "legal character" nor can it be said that a person, who has agreed to purchase has got "any right to any property" for the simple reason that a mere agreement to sell, does not create any interest or any right in the property agreed to be purchased. Under these circumstances, it is not a case in which the plaintiff can obtain any declaratory decree u/s 34 of the Act.

10. So far as the relief as to injunction is concerned, we would be guided by the provisions contained in Section 38, which is in the following terms:

"38 Perpetual injunction when granted:-

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff''s rights to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:-

(a) Where the defendant is trustee of the property for the plaintiff;

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) Where the invasion is such that the compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings. "

It is undoubtedly true that by entering into an agreement to sell the disputed property, the defendant No. 1 has incurred an obligation and from the facts of the case it can be said that he has committed a breach of the obligation which flows from the agreement to sell. Breach of such an obligation can be remedied by giving a perpetual injunction to the person committing the breach. Sub-see. (2) of Sec.38 says that wh3n any such obligation arises from contract, the court shall be guided by rules and provisions contained in Chapter II of the Specific Relief Act. If a reference is made to Chapter II, it will be found that it refers to the cases in which specific performance of contracts is enforceable. These provisions further show that so far as the Immovable properties are concerned, specific performance would generally be a rule. Under the circumstances, if we are to be guided by the rules and provisions contained in Chapter II of the Specific Relief Act, it would follow that so far as the Immovable properties are concerned, the real remedy available, to the party who has agreed to purchase a particular Immovable property is to obtain specific performance thereof. The question is why the court should not prevent the breach of an obligation to sell any Immovable property. We find that a person, who has agreed to sell his Immovable property is more or less in the position of a trustee for the person to whom he has agreed to sell the property. This particular point has been considered at length by a division Bench of this Court in F. A. 181/64 decided on July 14, 1971 (Guj) wherein my learned brother speaking for the Bench has made the following observations which are very pertinent to the facts of the present case:

"The learned Advocate General vehemently argued that the position of such a purchaser who had agreed to this type of covenant was not that of a trustee or a person who had any obligation to maintain the machinery in working order so that it can be returned in the same state, The purchaser became the complete owner until the property was reconveyed by the legally execuced reconveyance. Therefore, in such a context, looking to the absolute ownership of the defendants the "new machinery" must take in whatever was spent by the defendants on the machinery by way of renewal, whether by way of repairs, putting in spare parts or by way of replacement of worn out parts or by way of addition. This contention of the learned Advocate General is wholly misconceived. In Plews v. Samuel 1904 (1) Ch. D. 464, Kekewich J. in terms considered the position of such a vendor in possession qua the person who had taken agreement for purchasing the property in question and the completion and purchase was delayed without any fault on the part of the purchaser so that the vendor who was in possession was in a sense a trustee and he was not entitled to treat the asset as his own so long as he had an obligation which can be specifically performed by reason of the contract which he had entered into with the purchaser. If he wilfully damaged or injured the property he was liable to the purchaser; more than that, he was liable if he did not take reasonable care. If, however, the contract was not specifically performed notwithstanding the fact that during the subsistance of the contract, the vendor was a trustee for the purchaser, the relation was altogether discharged and nothing could be said against the vendor as to neglect or even mis-feasance. If, however, a judgment for specific performance was obtained, his liability remained as a trustee. Therefore, he was a trustee in a modified sense, not while he continued to remain in possession on his own right but from the time fixed for completion of sale when the purchaser was entitled to get specific performance. If, therefore, the vendor was a trustee in this modified sense, although not a full trustee, he held a fiduciary position and he owed a duty to the purchaser. There is clearly a case of conflict between interest and duty and where there is such a conflict in the case of a person occupying the position of a trustee, the settled legal position is that the duty must prevail and so the Court would insist on the duty being performed, Therefore, Kekewich J. held that the duty prevailing, the vendors must be held to have received the rents for the purchaser to whom they belonged and while they were in possession, after the duty fixed for completion of the sale for no fault of the purchaser and they could not set up their own interest."

After observing as above, my learned brother has referred to the Privy Council decision in Central Trust and Safe Deposit Company v. Snider 1916 A. C. 26 at p. 272 and ultimately to the decision given by the Supreme Court in Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others, , wherein their Lordships of the Supreme Court have pointed out that a contract to sell an Immovable property creates an obligation which is recognised by Section 3 of the Specific Relief Act, 1877 and Section 91 of the Indian Trusts Act, 1382. The Supreme Court has further observed, after pointing out to these provisions of law, that the principle embodied in See, 91 of the Indian Trusts Act lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. It was contended before the division Bench, to distinguish the above said observations of the Supreme Court, that these observations are true so far as the transferee is concerned. But this contention was repelled by my learned brother observing as under:

"This contention of the learned Advocate General proceeded on a complete misconception because their Lordships have in terms laid down that even though a contract of sale does not create an interest'' in the property, such a covenant runs with the land in the sense that every transferee, without value or with notice would be bound by such a covenant. The obligation is one which is enforceable within the meaning of See. 3 of the Specific Relief Act, by creating a duty enforceable by law on the vendor. Section 91 of the Trust Act also creates a trust which can be enforced against any person with notice of this covenant by making the covenant run with the land. The fact that a transferee with notice even could be asked to join in the conveyance and specific performance can be ordered against him as well shows that it is binding and enforceable not only against the covenantee but even subsequent transferee with notice. Both the covenante as well as a transferee without value or with notice must hold the property in trust to the extent that It is necessary to give specific performance of the contract. That is why, illustration (g) of Section 3 of Specific Relief Act, in terms provides that the transferee is a trustee only within the meaning of the Act by emphasising the fact that the trusteeship is not in the full sense but in the modified sense in so far as it is necessary to enforce the contractual obligation which runs with the land." It is thus evident that even a person who has agreed to sell an Immovable property stands in a sort of fiduciary relationship with the person who has agreed to purchase and, therefore, the former cannot commit any breach of his obligation and if he does so, he can be prevented from doing so by a suitable injunction u/s 38 of the Specific Relief Act.

11. We therefore find that though the plaintiff in this case is not entitled to any decree for declaration he is found entitled to a decree for permanent injunction restraining the defendants from selling or transferring the land to any other person in breach of the agreement to sell which is found at Ex. 28. The plaintiff''s suit succeeds and a decree for permanent injunction in terms stated above is ordered to be granted, in his favour. This appeal, therefore succeeds. It is further ordered that the plaintiff shall be entitled to the cost in this suit throughout, from the defendants.

12. Appeal allowed.

