
(1989) 06 BOM CK 0032
In the Bombay High Court
Case No : First Appeal No. 444 of 1975

Mahibub Ghudubhai Siledar	Vs	APPELLANT
Hanmantrao Nilappa Patil and Others		RESPONDENT

Date of Decision : 26-06-1989

Acts Referred:

Specific Relief Act, 1963 — Section 12(3), 12(4)

Citation : (1989) 2 BomCR 581

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : R.M. Agrawal, for the Appellant; P.M. Mengane and J.R. Lalit, for the Respondent

Final Decision : Dismissed

Judgement

Sharad Manohar, J.—This appeal is filed by original defendant No. 1 against the decree passed by the trial Court in the suit filed by present respondent No. 1 for specific performance of the Agreement for Sale of the suit property dated 20-5-1970 (Exh. 68) signed by original defendants No. 1 and 3 (Appellant and respondent No. 2 respectively in this Court) which agreement was reiterated by a registered document/agreement (Exh. 69) on 1-6-1970 (but which was signed only by original defendant No. 2). By the agreement dated 20-5-1970, both defendants Nos 1 and 2 agreed to sell the entire suit land to the plaintiff (respondent No. 1 before me) for a total sum of Rs. 15,000/-. The defendants are Muslims and there is no dispute before me at this stage that defendant No. 2 had 40 paise share in the property, whereas original defendant No. 1 had only 23.1/3 share in the same. Both of them had, between themselves, thus, 63 1/3 share in the suit property which was agreed to be sold by the two defendants to the plaintiff. The case of the plaintiff, however, has been that both of them represented to the plaintiff that they had the authority to sell even the share of the other shares, defendants Nos. 3 to 5, in the property. At least at this stage there is no dispute that at the time of the agreement dated 20-5-1970 (Exh 68)

a sum of Rs 100/- was paid by the plaintiff as earnest money. A registered Sathekhat was executed on 1-6-1970 (Exh 69) in favour of the plaintiff and at that time the plaintiff paid a further amount of Rs. 3000/- towards the performance of his part of the contract. The plaintiff's suit for specific performance of the said agreement of sale. The suit was opposed mainly by defendant No. 1. The trial Court has negatived the contention of defendant No. 1 and has decreed the plaintiff's suit, but only to the extent of Rs. 63.1/3 percent, meaning thereby that out of the total property the plaintiff is held entitled to a Sale Deed in respect of a portion equivalent to 63.1/3 percent of the property. The consideration payable by the plaintiff has therefore been reduced by the learned Judge proportionately and a decree for specific performance for that much portion of the suit property upon payment of balance of proportionate consideration has been passed by the learned Judge.

The present appeal is filed by original defendant No. 1, who was the main contestant in the trial Court.

Facts Undisputed and indisputable

2(A). The suit property is Survey No. 52/1-A, situated at Village Tirth, Taluka South Solapur, District Solapur. It admeasures 13 Acres 28 Gunthas and is assessed at Rs. 6.12. Admittedly it belonged originally to one Kutubsaheb.

The following genealogy will help the understanding of the shares of the various defendants in the said property :---

Kutubsaheb | ----- | | |
 Daughter Son Son Biyambi Hazratsaheb Ghudubhai d/5 d/2 (died in 1969) | |
 Her Husband (Share = 40 | Aminsahab paise) Wife : Malanbi d/3 (Share :20
 paise) (Share 5 paise) | ----- | | Daughter Son
 Rasulama Mahibub d/4 d/1 (Share : 11-2-3 paise) (Share : 12 1/3 paise)

Kutubsaheb had two sons : Hazratsaheb and Ghudubhai and daughter Biyamma, (Ghudubhai died in 1969, quite some time before the date of Agreement in question, leaving behind his widow Malanbi, who is defendant No. 3. in the suit and son Mahibub (defendant No. 1) and Rasulma (defendant No. 4).

(B) Although at some stage both Mahibub (defendant No. 1) and Hazratsaheb (defendant No. 2) appeared to be claiming 50 paise share each in the suit property, thus, denying to the other defendants their rightful claim in the suit property, at least at this stage in this appeal, there is no dispute about the shares had by each of the heirs of Kutubsaheb. There is no dispute that Hazratsaheb and Ghudubhai being the sons, had 40 paise share each in the suit property, whereas Biyamma being the daughter had 20 paise share in the same. Since Ghudubhai died before the date of the suit, his share devolved upon his widow and two children, whose names are mentioned above. His widow Malanbi got 5% share in the suit property and the remaining 35 paise share was divided between son Mahibub (defendant No. 1) and Rasulma (defendant No. 4) in the

proportion of 2:2:1. It follows that Mahibub (defendant No. 1) got $23\frac{1}{3}$ paise share and daughter Rasulma (defendant No. 4) got $11\frac{2}{3}$ share.

This is what is held by the trial Court and the correctness of this finding is not called in question before me.

(C) Since both Rasulma (defendant No. 4) and Biyamma (defendant No. 5) are married and are living away from the paternal home and since Malanbi has only 50% share in the entire property, it stands to reason that defendants Nos. 1 and 2, the male members of the family, were in de facto possession of the suit land. It is the contention of defendant No. 1 that in fact he alone was in possession of the suit land. He may or may not be right in saying so. The fact remains that he had only $23\frac{1}{3}\%$ share in the suit land whereas Hazratsaheb (defendants No. 2) had 40% share in the same.

On 20-5-1970 these defendants executed an Agreement (Exh. 68) in favour of the plaintiff for the sale of the suit land for a total sum of Rs. 15,000/-. A sum of Rs. 100/- was paid by the plaintiff as earnest money towards the said transaction. By the Agreement it appears, defendants Nos. 1 & 2 took upon themselves the responsibility of the signatures of remaining defendants Nos 3 to 5 of the sale deed which was to be executed in favour of the plaintiff upon the payment of balance of consideration by him, ultimately. This document (Exh. 68) was not a registered document. It was in the contemplation of the parties that a registered document was to be executed. They could have registered the very document (Exh. 68). But on 1-6-1970 another document came to be executed incorporating the same terms, mentioning therein the earlier document, Exh. 68. At the time of this 2nd Agreement, which was a registered document (Exh. 68) a further sum of Rs. 3000/- was paid by the plaintiff to one of the intending vendees viz. defendant No. 2. Out of the amount of Rs. 100/- paid on the earlier occasion as earnest money, a sum of Rs 50/- each was taken by each of the two defendants. So far as this document, Exh. 69, is concerned, a sum of Rs. 3000/- has been paid by the plaintiff in addition to the earlier amount. Out of this, a sum of Rs. 1500/- was received by the defendant No. 2. Defendant No. 1 was not present for signing the agreement. The balance of Rs. 1500/- was deposited by the plaintiff with one of his close relatives Malikarjunappa Shivappa Birajdar. A thevchitte was executed for this purpose with Mallikarjunappa, who was regarded as a person of mutual confidence.

It is the plaintiff's contention that upon the payment of this further sum of Rs. 3000/- defendant No. 2 put the plaintiff in possession of the suit land. But I may state in this stage itself that this contention has been stoutly denied by defendant No. 1 and it does appear that if the plaintiff was led to believe that possession was given to him, it must have been only a paper possession, because it does appear that the plaintiff never got into actual possession of any portion of the suit land. This evidently is the reason why decree passed by the learned Judge in plaintiff's favour provides for equitable partition of the suit land and for recovery of separate possession of the suit land by the plaintiff.

(D) Obviously, defendant No. 1 decided to go back upon the contract. After getting the registered document (Exh. 69), though executed by defendant No. 2 alone, the plaintiff gave a Public Notice in the daily newspaper "Sanchar" on 4-6-1970 making the above mentioned Agreement dated 20-5-1970 and 01-06-1970 known to the public and inviting objections from the parties concerned to the intended sale transaction. This Notice appeared in the said newspaper on 4-6-1970. Reply to this Public Notice was given by Mahibub (defendant No. 1.) and his mother Malambi (defendant No. 3) by another public notice dated 7-6-1970. In the Notice they took up the plea that the 2nd Agreement dt. 1-6-1970 was not signed by anyone, excepting defendant No. 2 and that defendant No. 2 alone was not entitled to enter into agreement to sell the land. They set out their share in the land. They further stated that they were not parties to the Agreement of Sale and that they were not bound by the said Agreement. They also denied the fact that the plaintiff was not in possession of the suit land.

In addition to the above Public Notice, an Advocate's Notice dated 16-6-1970 was given by defendants Nos. 1 & 3 to the plaintiff. By the Notice the execution of the Agreement dated 20-5-1970 was denied by defendant No. 1.

(E) Defendants Nos 1 & 3 did not stop there. They filed Suit No. 395 of 1970 against the plaintiff and defendant No. 2 but not for any declaration. The suit was for injunction, pure and simple, restraining the plaintiff and defendant No. 2 from interfering with their possession of the suit land. We do not know what transpired later on in the suit. But whatever order that was passed in that suit has not been put in issue by any of the parties in the present Appeal.

(F) On 18-5-1971 the plaintiff gave a registered Notice to defendants Nos. 1 & 2 to remain present in the office of the sub-Registrar for receiving the balance of the amount viz. Rs. 11,900/- from him and to execute the sale deed in question in favour of the plaintiff. It is the plaintiff's contention that defendant No. 1 did not remain present in the Office of the sub-Registrar for execution of the sale deed and for receiving the balance amount.

It was in the context of these facts that the instant suit was filed by the plaintiff against all the defendants for specific performance of the contract of sale dated 20-5-1970 affirmed by the subsequent registered document dated 1-6-1971.

Brief summary of the plaint

3. All the above mentioned facts are stated in the plaint. It appears to be the further contention of the plaintiff in the plaint is that defendants No. 1 & 2 had the authority of the remaining defendants Nos. 3 to 5 to enter into the Agreement of Sale of the suit land and to transfer their right, title and interest in the suit land in favour of the plaintiff. In the alternative, the plaintiff has contended that defendants Nos. 1 & 2 represented to the plaintiff that they had the authority to enter into the transaction on behalf of the remaining defendants and to execute the sale deed on behalf of the said defendants as well. Prayer

therefore was made in the plaint that the defendants should be directed to execute the sale deed in respect of the entire suit land upon receiving from the plaintiff the balance of the said price, viz. Rs. 11,900/-.

It is unnecessary to refer to the other consequential prayers made in the plaint.

Summary of Written Statement

4. (A) The main contesting defendant is defendant No. 1 who has filed his written statement, Exhibit 42. Defendants Nos. 3 & 4 (his mother and sister respectively) have filed purshis (Exh. 43) adopting the written statement of defendant No. 1. Defendant No. 2 has executed the Written Statement virtually admitting the pleas and plaint of the plaintiff, Hence it is unnecessary to set out the statement made by him in his Written Statement. Defendant No. 5 filed no Written Statement and took no part in the proceedings and hence, was proceeded against ex parte.

(B) The substance of the pleas raised by defendant No. 1 was as follows :-

(i) He claimed 50% of share in the suit property for himself and for defendant No. 2 respectively. This clearly meant that he was trying to devour even the 20% share of his sister, Biyamma, but he did not rest there. He claimed also the share of defendant No. 2 in the suit property with the contention that defendant No. 2 had relinquished his share in the suit property in his (defendant No. 1's) favour. The story narrated by him was that there was another land, Survey No. 51/2. belonging to these 2 defendants Nos. 1 & 2 which was sold by them to one Mehboob Mohammad in the year 1970 for Rs. 9,000/- for discharging the Government dues on that land as well as on the suit land. According to the defendant, the entire amount of Rs. 9,000/- was appropriated by defendant No. 2 alone and into the bargain, defendant No. 2 did not pay any of the Government dues. The plea set up by defendant No. 2 therefore was that for this reason defendant No. 2 had relinquished his one-half share in the suit land in favour of defendant No. 1.

(ii) Nextly, he contended that he was in exclusive possession of the suit land. It was his further contention that he have executed any isarpawati (Exh. 68) in the plaintiff's favour and denied that defendant No. 2 had any authority to enter into any transaction of sale on behalf of defendant No. 1. According to him, the present suit for specific performance was filed by plaintiff as a counterblast to his own suit. No. 395 of 1970 filled by him against the plaintiff for injunction as mentioned above.

Issues

5. On these pleadings, issues were framed by the learned Judge, which are to be found in para 7 of his Judgment.

There is no dispute about the correctness of the said issue, except that a legal point is raised by Mr. Agarwal regarding the effect of the provisions of section 12

of the Specific Relief Act with particular reference to sub-section 12 of the Specific Relief Act with particular reference to sub-section (3)(b)(i) of the same. I will presently deal with that part of the agreement. Here it may be stated that the issues related mainly to the authority of defendants Nos. 1 & 2 to bind defendants Nos. 3 to 5 so as to enable the plaintiff to take a Sale Deed in respect of their share in the land as well and to the question whether the Agreement of Sale were binding on defendant No. 1 or not or whether it was binding on defendant No. 2 alone.

Re : Evidence

6. Coming to the evidence led by the parties, I may state at this stage itself that the entire evidence led by both parties has been examined and appreciated by the learned Judge not only exhaustively and carefully but also quite correctly. I am in full agreement with the appreciation of the evidence by the learned Judge and since by this judgment I am confirming all the findings of facts recorded by the learned Judge, I do not propose to examine the entire evidence exhaustively and de novo. I will only briefly refer to the salient features of the evidence of the plaintiff and the defendants.

Plaintiff's evidence

(A) The plaintiff has led the evidence of himself as P.W. 1 of Mallikarjunappa Shivappa Birajdar (P. W. 2) and Bhairu Kulkarni (P. W 3), who is the scribe of isarpawati (Exh. 68). All the three witnesses have deposed to the case made out by the plaintiff in his plaint and their evidence remained undoubted in the cross examination. The learned Judge has examined the entire evidence and has found no difficulty in fully accepting the evidence.

Defendant's Evidence

(B) The defendant examined himself as D. W. 1 for himself and for defendants Nos. 3 and 4. No other evidence is led by him. The learned Judge has found that the evidence of defendant No. 1 practically makes no sense. His main plea was that he has 50% share in the property, which was meaningless on the face of it. His further plea was that he had not signed the isarpawati (Exh. 68). His evidence leaves no room for doubt that his said denial is a tissue of lie. His plea that he has signed some blank papers has been examined by the learned Judge thread bare and I am in full agreement with the learned Judge that the plea does not deserve serious consideration, even for a trice. A somewhat hesitant plea sought to be made by Mr. Agrawal for defendant No. 1 appearing before me that the registered sathekhat (Exh. 69) was not signed by defendant No. 1. This is a legal question and I will consider the effect of the same a little later while examining the argument advanced by Mr. Agrawal in this Court. What needs to be stated here is that the fact that defendant No. 1 had signed the first Agreement (Exh. 68) and had received a part of the earnest money in pursuance of the said agreement stands fully proved. As will be presently pointed out, a registered sathekhat (Exh. 69) makes no modification or novation of the

Agreement (Exh. 68). The only difference between two documents is that the latter one. Exh. 69, is a registered document and, as will be pointed out, the registration does not bring about any difference in the terms or effect of the Agreement inter parties.

Further, the plea of defendant No. 1 that defendant No. 2 had relinquished his share in the suit land in his (defendant No. 1's) favour has been rejected by the learned Judge outright and, for very cogent reasons. No independent evidence whatsoever has been led by the said defendant in support of that plea, either oral or documentary. He comes to the Court, stands in the witness-box and makes a statement airily as it were that defendant No. 2 had relinquished his share in his (defendant No. 1's) favour and there the matter ends. The learned Judge has rightly refused to ascribe any value to such evidence.

At the same time, however, the learned Judge has rightly held also that defendants Nos. 1 & 2 had no authority to enter into the Agreement for sale of the suit land so far as the interests of defendants Nos. 3 to 5 were concerned. The plea filed by the plaintiff gives an impression that he was trying to apply the principles of Hindu Law to the property which was owned by the Muslims. Plea was that defendants Nos. 1 & 2 were acting as Kartas on behalf the remaining defendants. This plea is on the face of it untenable. The learned Judge rightly held that the agreement entered into by defendants Nos. 1 & 2 would be of no legal consequences so far as the shares of defendants Nos. 3 to 5 were concerned.

Conclusions arrived at by the learned Judge

7. Taking this view of the matter, the learned Judge has held that the plaintiff is entitled to the specific performance of the Agreement (Exh. 68) but only to the extent of the share of defendants Nos. 1 & 2 in the suit property. In view of this conclusion, he has also held that the plaintiff is also entitled to reduction in the sale price payable by him under the Agreement (Exh. 68), read with the registered sathekhath (Exh. 69). He has therefore passed a decree in favour of the plaintiff for specific performance of the contract and has directed defendants Nos. 1 & 2 to execute in his favour a sale deed in respect of their 63-1/3% share free of all encumbrances. For getting this sale deed he directed the plaintiff to pay to the said two defendants : Rs. 4450/- (to defendant No. 2) and Rs. 3450/- to defendant No. 1). The Court has also directed equitable partition of the suit land for the purpose of giving effect to the plaintiff's right of possession of his share of 63-1/3 paise in the suit land. There are other usual directions given but no reference to them needs to be given here.

The position resulting from this Appeal.

8. Only defendant No. 1 has filed this Appeal against the said decree. None of the other defendants are made as co-appellants, although defendant No. 1 has given evidence on behalf of himself and defendants Nos. 3 & 4 in the trial Court. They are impleaded as party respondents. So far as defendant No. 5 was

concerned, she was originally impleaded as respondent No. 5 but Appeal against her is ordered to be dismissed for non prosecution by this Court's order dated 31-08-1976. No argument was, however advanced before me on behalf of the plaintiff (respondent No. 1 before me) about the maintainability of the Appeal in the absence of respondent No. 5.

The two arguments advanced by Mr. Agarwal on behalf of Appellant.

9. Mr. Agarwal, the learned Advocate for the appellant, was frank enough not to question the finding of facts recorded by the learned Judge. However, he raised two points in support of the Appeal :---

(i) that the registered Agreement (Exh. 69) was not signed by defendant No. 1 which meant that there was no oral Agreement of Sale so far as defendant No. 1 was concerned; and

(ii) the plaintiff was not entitled to get specific performance of a part of the contract unless he had offered to pay the entire balance of consideration viz. Rs. 11,900/-. The plea was that the plaintiff had demanded, in the first instance, specific performance of the entire contract and for sale deed in respect of the entire suit land and, in the alternative, for sale deed in respect of the share of defendants Nos. 1 & 2 in the suit land upon payment of the proportionate price by the plaintiff. According to the learned Advocate this did not constitute compliance with the requirement of Section 12 of the Specific Relief Act and this, according to the learned Advocate, necessitated dismissal of the suit in toto.

The 1st argument dealt with.

10. The 1st argument of Mr. Agarwal need not detain us very long. I see no justification for the contention that the failure of defendant No. 1 to sign the registered sathekhat (Exh. 69) had the effect of undoing or nullifying the earlier document Exh. 68, which was undisputedly signed by him and for which he had received even a part of the consideration. Registration of the Agreement of Sale does not bring about a change in the terms and conditions of the same. Even a casual perusal at Exh. 68 & 69 is enough to show that the terms of the Agreements, Exh. 68 & 69 are the same. The intendment to have the Agreement of sale registered is to safeguard the interest of the parties to the Agreement and to make it binding upon the world at large. Registration of the said Agreement is effected only with a view to prevent the owners from entering into a similar agreement with other unwary person and to prevent him from defrauding the intending purchasers. There is nothing either in Exh. 68 or 69, which showed that the Agreement. Exh. 68 was not final. My attention was not invited to any clause in the said Agreement, Exh. 68, or, for the matter of that, even in Exh. 69 which showed the lack of finality of the intention of the parties manifested by both the documents. No authority was cited in support of the proposition that if a subsequent registered document is contemplated, the original unregistered Agreement of State ceases to have any legal effect or binding effect.

The 2nd argument of Mr. Agrawal based upon Sec. 12(3) of the Specific Relief Act.

11. The 2nd Argument of Mr. Agrawal was based upon his own interpretation of section 12 of the Specific Relief Act. The argument is that if the plaintiff wants to have specific performance of the agreement evidenced by these two documents, Exh. 68 & 69, to the extent of the shares of defendants Nos. 1 & 2 in the suit land only he has to pay the entire sale price agreed upon as per the Agreements. Exhs. 68 & 69, that is to say the entire balance of Rs. 15,000/- and not pro rata. The argument is based upon the provisions of section 12(3)(ii). For understanding the argument which can be understood only by examination of the entire section 12, said section 12 is appended to this Judgment as Appendix 1.

"Appendix - 1

Mr. Agrawal relied upon sub-section (3)(ii) of said section 12 of the Specific Relief Act.

The very commencement of sub-section (3) is "where party to a contract is unable to perform the whole of his part of it and the part which must be left unperformed is a considerable part of the whole (admitting of monetary compensation or not admitting of monetary compensation), the other party is entitled to specific performance of the agreement, where the monetary benefit if possible has paid the consideration of the whole of the contract without abatement and relinquishes all claims to the performance of the remaining part."

Paraphrasing into simple language the arguments of Mr. Agrawal, what is meant is that if the plaintiff was not entitled to get specific performance of the entire area of suit land and wanted specific performance in respect of 63-1/3 per cent of the suit land, he has to pay the entire amount of Rs. 15,000/- and shall not be entitled to abatement pro rata and, further, he had to relinquish his claim in respect of the remaining land. Since both the things have not been done by the plaintiff, the specific performance could not be granted to him, argues the Counsel.

The above argument dealt with, Sec. 12(3) & (4) analysed and examined.

12. Prima facie, the argument appears to be somewhat attractive. But the failure of the same surfaces if one subjects said sub-section (3) to close scrutiny.

What sub section (3) refers to is the case of a person who is unable to perform the whole of his part of the contract. In the instant case, defendant No. 1 as also the other defendant have to execute the sale deed in respect of 23 1/3 per cent and 40 per cent respectively which is the entirety of their share in the suit land. Each of them is able to perform the whole of his part of the contract. Defendant No. 1 can execute the Sale Deed in respect of his 23 1/3 share in the land and defendant No. 2 can execute the sale deed in respect of his 40 per cent share in the land. So far as their own parts are concerned, they can perform them fully and wholly. Sub-section (3) therefore, does not come into operation at all and

consequently causes (i) and (ii) of the same also do not come into play.

In fact the provision that holds the field is sub-section (4), which specifically has empowered the Court to grant specific performance of the part of the contract which stands on a separate and independent footing from another part of the contract. In the present case, the Court cannot and ought not direct specific performance of the Agreement to Sale so far as the separate share of defendants No. 3 to 5 (totally aggregating to $36 \frac{2}{3}$) were concerned. But it is futile arguing that their share does not stand on a separate and independent footing from the other part. Each of the defendant is having a separate, independent and distinct share in the suit land. The plaintiff cannot purchase the share of defendants Nos. 3, 4, & 5. But it is perfectly open to defendants Nos. 1 & 2 to sell their share and for the plaintiff to purchase the share of defendants Nos. 1 and 2 in the suit land. The section does not make the right of such plaintiff for specific performance in respect of a portion of the land conditional upon his payment of the entire consideration. Provisions of sub-section (3) do not apply to such a case at all. The argument that the decree for specific performance was bad because the entire sale price was not paid by the plaintiff is, therefore, unacceptable.

The offer made by the Advocate for respondent No. 1 referred to.

13. However, I may mention that even on the assumption that the plaintiff is bound to pay the entire sale price even for the purchase of $63 \frac{1}{3}$ of the land, Mr. Mengane, the learned Advocate for respondent No. 1, had made a statement before the Court that he has no objection even to the payment of the entire amount if the law so requires.

I have not called upon him to make the payment, because, in my opinion, the plaintiff must succeed by payment of the pro rata consideration, as is ordered by the Court below.

14. For all the reasons mentioned above, the Appeal fails and the same is hereby dismissed with costs.