
(2011) 03 BOM CK 0185
In the Bombay High Court
Case No : Writ Petition No. 77 of 2011

Mr. Nanu Gaonkar alias Nanu Diukar	APPELLANT
Vs	
M/s. Modest Builder and Others	RESPONDENT

Date of Decision : 09-03-2011

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2011) 03 BOM CK 0185

Hon'ble Judges : A. P. Lavande, J

Bench : Single Bench

Advocate : S.S. Kakodkar, for the Appellant; A.N.S. Nadkarni with Mr. H.D. Naik, for the Respondent

Final Decision : Dismissed

Judgement

A. P. Lavande, J.—By this petition under Article 227 of the Constitution of India, the petitioner takes exception to the judgment and order dated 27/12/2010 passed by the District Judge II, North Goa, Panaji in Miscellaneous Civil Appeal No.201/2010 dismissing the appeal preferred against the order dated 19/10/2010 passed by the Civil Judge, Jr. Division, Panaji in Special Civil Suit No. 102/2008/A whereby the application for temporary injunction filed by the plaintiff/petitioner has been dismissed. The petitioner is the plaintiff and the respondents are the defendants in the above suit filed seeking reliefs of specific performance of agreement, declaration and permanent injunction.

2. The plaintiff filed a suit for specific performance of an agreement dated 19/10/1994 alleging that the defendants nos.4 and 5 had agreed to sell plot no.37 forming part of the property bearing survey no.235/1 at Odxel Taleigao which was tenanted to his father Mr. Jose Dias. According to the plaintiff, defendants nos.4 and 5 had delayed execution of sale deed on the ground that a civil dispute is pending amongst the co-owners. Thereafter, notice dated 27/3/2007 was issued by the plaintiff and ultimately the suit dated 1/11/2008 was filed seeking specific performance of the agreement and setting aside sale

deed dated 8/2/2006 by which an area of 28,816 was sold to defendants nos. 2 and 3.

3. The suit was contested by the defendants. The defendants nos. 4 and 5, inter alia, took the stand that the suit was barred by limitation.

4. The Trial Court by order dated 19/10/2010 dismissed the suit mainly on the ground that the plaintiff had approached the Court with unclean hands and the agreement upon which reliance was placed by the plaintiff was tampered with and changed to plot no. 37 from plot no. 38. The Trial Court further held that the notice dated 28/4/2008 issued by the plaintiff referred to plot no.38 and not plot no.37.

5. The lower Appellate Court held that only when prima facie case is made out, balance of convenience and irreparable loss that would be caused to the plaintiff, becomes relevant. The lower appellate Court also concurred with the finding of the Trial Court that the plaintiff having carried out the alteration in the agreement was not entitled to injunction sought for.

6. Mr. Kakodkar, learned counsel appearing for the petitioner in support of the petition made the following submissions:

(1) Both the Courts below have not considered three factors, namely, prima facie cases balance of convenience and irreparable loss and injury while passing the impugned orders.

(2) Both the Courts below have failed to appreciate that the plaintiff has made out prima facie case and the factors of balance of convenience and irreparable loss and injunction are clearly in favour of the plaintiff.

(3) The materials placed by the plaintiff as well as the defendants prima facie establish that there was a agreement of sale dated 19/10/1994 in respect of plot no.37 and that the plaintiff was put in possession of the said plot.

(4) The issue as to whether the suit was within limitation is a mixed question of law and facts and therefore the suit instituted in the year 2008 for specific performance of the agreement dated 19/10/1994 is maintainable.

7. In support of his submissions Mr. Kakdokar relied upon the following judgments:

i) Shrimant Shamrao Suryawanshi & Anr Vs. Pralhad Bhairoba Suryawanshi & anr. 2002 (2) ALL MR 267.

ii) Sakharam Laxman Mathane since deceased by his heirs and LRs. Rangubai Sakharam Mathane and Others Vs. Laxman Bahiru Dige deceased by his heirs and LRs. Sonabai Laxman Dige and Others, .

iii) S. Brahmanand and Others Vs. K.R. Muthugopal (D) and Others, .

iv) Panchanan Dhara and Others Vs. Monmatha Nath Maity (Dead) thr. L.Rs. and

Another, .

v) R.K. Parvatharaj Gupta Vs. K.C. Jayadeva Reddy, .

vi) Gunwantbhai Mulchand Shah and ors. Vs. Anton Elis Farel and ors., (2006) 3 SCC 635.

vii) Sadashiv Chander Bhamgare Vs. Eknath Pandharinath Nangude, .

8. Per contra, Mr. Nadkarni, learned Senior Counsel appearing for the respondents submitted that:

i) The suit filed by the plaintiff seeking specific performance of an agreement is barred by limitation.

ii) The agreement does not disclose that the plaintiff was put in possession of plot no.37 nor there is any cogent evidence on record in support of the said fact.

iii) The plaintiff himself having made the alteration in the agreement without the consent of the defendants nos.4 and 5 is not entitled to seek specific performance of the agreement dated 19/10/1994.

iv) Notice dated 28/4/2008 addressed by Advocate P. Kamat on behalf of the plaintiff to M/s. Essar Builders/Respondent no.4 mentions plot no.38 and therefore the plaintiff is not entitled to any relief in respect of plot no.37.

v) Both the Courts have correctly appreciated the materials on record and have refused to grant injunction sought for by the plaintiff.

9. I have carefully considered the rival submissions, perused the record and the judgments relied upon by both the parties.

10. Having considered the submissions made by the learned counsel for the parties and having perused the record I am of the considered opinion that no case has been made out for interference with the impugned orders in exercise of the supervisory jurisdiction under article 227 of the Constitution of India. It is well settled that jurisdiction under Article 227 is very limited and is to ensure that the subordinate Courts and Tribunals act within the limits of its authority (see Mohd. Yunus Vs. Mohd. Mustaqim and Others,).

11. Perusal of the record and more particularly the plaint filed by the plaintiff discloses that nowhere in the plaint the plaintiff has averred facts which entitle the plaintiff to file the suit for specific performance of the agreement dated 19/10/1994 in the year 2008. In terms of Article 54 of the Schedule of the Limitation Act, 1963 the suit for specific performance of a contract has to be filed within three years from the date fixed for performance of the agreement, or if no such date is fixed, when the plaintiff has notice that performance is refused. The plaintiff has not given any details as to justify filing of the suit in the year 2008 for specific performance of agreement dated 19/10/1994. Therefore, in my considered opinion, the suit for specific performance is, prima facie barred by limitation. In so far as claim put by the plaintiff that he was put in possession of

the suit plot is concerned, the agreement itself does not state so and there is absolutely no other evidence except self serving statement of the plaintiff that he was put in possession of the said plot. Therefore, prima facie, it is difficult to accept that the plaintiff was put in possession of the suit plot. Moreover, it is admitted position that the agreement dated 19/10/1994 is tampered with and in the operative clause plot no.38 has been substituted in place of plot no.37. Perusal of the said agreement discloses that the correction has been countersigned only by the plaintiff and not by the defendants nos.4 and 5.

12. This being the position, I do not find any fault with the findings given by the both the Courts below that the plaintiff has not come to the Court with clean hands and therefore he is not entitled to equitable relief of injunction. In my opinion, the petitioner has not made out prima facie case for grant of interim relief.

13. In so far as the argument of Mr. Kakodkar that both the courts below have not dealt in detail with three principles granting injunction is concerned, I am of the considered opinion that the said argument does not advance the case of the plaintiff. It is well settled that unless the plaintiff makes out a prima facie case the question of considering factors namely balance of convenience, irreparable loss and injury does not arise.

14. I do not deem it necessary to make reference to all the authorities relied upon by Mr. Kakodkar since I have taken into account the principles laid down in the said judgments. In the result I do not find any merit in this petition. Hence, the petition is dismissed.