
(2013) 09 BOM CK 0122
In the Bombay High Court
Case No : Second Appeal No. 296 of 1989

Parshram Tanaji Aher and Others

APPELLANT

Vs

Dattu Kadu Aher and Pundalik Amruta Jadhav

RESPONDENT

Date of Decision : 24-09-2013

Acts Referred:

Citation : (2014) 2 ABR 120 : (2014) 1 ALLMR 251 : (2014) 2 MhLj 250

Hon'ble Judges : R.G. Ketkar, J

Bench : Single Bench

Advocate : S.M. Gorwadkar, for the Appellant; Sandeep Shinde, for the Respondent

Final Decision : Allowed

Judgement

R.G. Ketkar, J.—Heard Mr. S.M. Gorwadkar, learned counsel for the Appellants and Mr. S.K. Shinde, learned counsel for the Respondents, at length. By this Appeal u/s 100 of the Code of Civil Procedure, 1908, (for short C.P.C.), the original Defendants No. 1-A to 1-H have challenged the judgment and decree dated 5-10-1985 passed by the Learned Civil Judge Junior Division, Chandwad in Regular Civil Suit No. 96 of 1975 as also the Judgment and Decree dated 12-9-1988 passed by the Learned III Additional District Judge, Nashik in Civil Appeal No. 46 of 1986. By these orders, the courts below decreed the suit instituted by Respondent No. 1-Plaintiff for specific performance of contract dated 30-12-1968. The parties shall, herein after be referred as per their status in the trial court. The facts and circumstances, giving rise to the filing of the present Second Appeal briefly stated, are as under:

2. Respondent No. 1 (original Plaintiff) instituted the suit initially for redemption of mortgage. The controversy in this Appeal is in respect of land which previously was bearing CTS No. 96/5 measuring 32 Gunthas assessed at Rs. 1.69 ps. and subsequently merged in the lands of Appellants (Defendants No. 1A to 1H) and formed block No. 294 which together measures at 1 Acre and 37 gunthas (for short "suit land"). It was the case of the Plaintiff that on 21-8-1968 (exhibit 46)

he had mortgaged the suit land to defendant No. 2 i.e. Pundalik. The document was however styled as a sale deed and consideration of Rs. 2000/- was shown. It is the case of the Plaintiff that he had received Rs. 1500/-. The said document was executed by way of security for repayment of the loan. The Plaintiff needed Rs. 1000/- more, so he demanded Rs. 1000/- from Defendant No. 2. Defendant No. 2 did not have that much amount and on the contrary he demanded Rs. 1500/- paid to the Plaintiff under Exhibit 46. The Plaintiff approached Defendant No. 1, since deceased who paid Rs. 2500/- and document dated 30-12-1968 Exhibit 45 was executed. Though this document was styled as sale deed, the said document was executed by way of security only. Under that document possession was delivered to Defendant No. 1. At that time Defendant No. 1 agreed to execute a separate document about re-conveyance of the suit land to the Plaintiff. Accordingly Defendant No. 1 executed a receipt on 30-12-1968 (exhibit 40). The Plaintiff issued notice on 14-11-1975 to Defendant No. 1 for redemption of mortgage. It was alleged that defendant No. 1 had executed a receipt on 30-12-1968 and agreed to sell the suit land to the Plaintiff upon paying Rs. 2500/-. Defendant No. 1 gave reply on 2-12-1975. On 8-12-1975 the Plaintiff instituted the suit for redemption of mortgage. It was alleged by him that the sale deed dated 30-12-1968 was in fact a mortgage with conditional sale. It was further alleged that the document even though styled as a sale deed, in reality, it was agreed between the parties that the Defendant No. 1 would take agricultural produce in lieu of interest and after return of Rs. 2500/-, would convey the suit land to the Plaintiff.

3. The Plaintiff filed application on 17-8-1982 for amendment of the plaint. By that amendment the plaintiff sought specific performance of the contract dated 30-12-1968. By judgment and order dated 20-9-1982 the Trial Court rejected that application. Aggrieved by that decision, the plaintiff instituted Civil Revision Application No. 714 of 1982 in this court. By judgment and order dated 2-2-1984 this court allowed the civil revision application thereby permitting the plaintiff to amend the plaint.

4. Original Defendant No. 1 Tanaji filed Written Statement on 24-8-1976 and additional written statement on 31-8-1984. It was inter alia contended that the transaction dated 21-8-1968 (Exhibit 46) between the Plaintiff and Defendant No. 2 was an out and out sale and not a transaction of mortgage as alleged by the Plaintiff. Defendant No. 1 further contended that one Babulal had obtained his blank signatures and taking undue advantage of signatures on blank papers, the plaintiff has alleged that Defendant no. 1 had executed receipt dated 31-12-1968 (exhibit 40) allegedly agreeing to reconvey the suit land.

5. The learned Trial Court framed the necessary issues. The parties led oral as well as documentary evidence before the Trial Court. By Judgment and decree dated 5-10-1985 the Learned Trial Judge decreed the suit for specific performance of contract dated 30-12-1968 (Exhibit 40). The Trial Judge held that the Plaintiff had failed to prove that the suit property was mortgaged with

defendant no. 2. He further held that the suit instituted by the Plaintiff was within limitation and was not barred by provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. He further held that the Plaintiff had proved receipt dated 30-12-1968 (exhibit 40 executed by Defendant no. 1. During the pendency of the suit, defendant No. 1-Tanaji died and Defendant Nos. 1A to 1H being his heirs and legal representative were brought on record. Aggrieved by the decision of the Trial Court, Defendant Nos. 1A to 1H preferred appeal no. 46 of 1986. By Judgment and decree dated 12-9-1988, the Learned District Judge dismissed the appeal and confirmed the decree of the Trial Court. It is against these decisions Defendant Nos. 1A to 1H have instituted the present second appeal. The second appeal was admitted on 1-8-1989 as involved substantial questions of law mentioned in ground nos.(a) to (e). The ground nos. (a) to (e) read as under:

(a) Whether the alleged agreement dated 30th December 1968 between the defendant and the plaintiff is void as without consideration in view of the findings of the lower appellate court that the title in the suit land had already passed in favour of the defendant under sale deed dated 21st August 1968 (Exhibit 46).

(b) Whether the alleged agreement dated 30th December, 1968 in respect of CTS No. 96/5 admeasuring 32 gunthas was liable to be specifically performed when on the date of the suit it had merged with other lands and has become part of the Gat No. 294 admeasuring 1 Acre and 37 gunthas and has lost its original identity.

(c) Whether in view of the findings of the lower appellate court that exhibit 46 dated 21st August 1968 and Exhibit 45 dated 30th December 1968 are simplicitors sale deeds and not mortgage transactions as contended by the plaintiff. The suit filed by the plaintiff was maintainable in the present form.

(d) Whether the plaintiff was ready and willing to perform his part of contract in view of the specific findings of the courts below that he had not deposited Rs. 2,500/- in the court till the date of the judgment by the trial court on 5th October 1985 though he had stated so in his plaint and the said statement was found to be false.

(e) Whether the suit filed by the plaintiff was barred by limitation when the plea and relief of specific performance was sought by an amendment to the plaint beyond the period of limitation and whether the amendment related back to the date of the suit.

6. In support of this appeal, Mr. Gorwadkar submitted that the courts below committed serious error in decreeing the suit instituted by the Plaintiff for specific performance of contract dated 30-12-1968 (Exhibit 40). In the first place, he submitted that the plaintiff had misused the signatures of defendant no. 1 that were taken on blank papers and further he alleged that defendant no. 1 had executed receipt on 30-12-1968 (exhibit 40) thereby purportedly agreed to reconvey the suit land. Secondly, he submitted that in any case the courts

below committed serious error in holding that suit for specific performance of contract was within limitation. He submitted that initially the plaintiff had instituted suit only for redemption of the mortgage. The suit was instituted on 8-12-1975 at that time, the plaintiff did not pray for specific performance of contract. He further filed application for amendment of plaint which was rejected by the trial court on 20-9-1982. By judgment and order dated 2-2-1994 in civil revision application no. 714 of 1982, this court allowed the civil revision application thereby permitting the plaintiff to amend the plaint. He submitted that basically when the plaintiff filed application for amendment of plaint on 17-8-1982, the relief of specific performance itself was barred by limitation. He submitted that though this court permitted the plaintiff to amend the plaint on 2-2-1994, the amendment so allowed does not relate back to the date of institution of the suit namely 8-12-1975. In support of this submission, he relied upon the following decisions:

- (i) Tarlok Singh Vs. Vijay Kumar Sabharwal,
- (ii) Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another,
- (iii) South Konkan Distilleries and Another Vs. Prabhakar Gajanan Naik and Others,
- (iv) Sampath Kumar Vs. Ayyakannu and Another,
- (v) Ragu Thilak D. John Vs. S. Rayappan and Others,
- (vi) Southern Ancillaries Private Limited Vs. Southern Alloy Foundaries Private Limited,
- (vii) Sri. Gobinda Ghosh and Others Vs. Biswanath Ghosh and Others,

7. In any case, Mr. Gorwadkar submitted that the courts below committed serious error in decreeing the suit instituted by the Plaintiff for specific performance of contract dated 30-12-1968 (Exhibit 40), when the plaintiff was not all along ready and willing to perform his part of contract. He submitted that plaintiff had neither pleaded nor proved his readiness and willingness to perform his part of contract as required u/s 16(c) of the Specific Relief Act, 1963 and as per form Nos. 47 and 48 of the 1st Schedule of CPC. Though the plaintiff had issued notice on 14-11-1975 (exhibit 86), he did not offer to pay the amount as per the alleged agreement dated 30-12-1968 (exhibit 40). He did not deposit any amount at the time of instituting the suit on 8-12-1975 nor during the pendency of the suit. The plaintiff also did not comply the specific direction issued while passing the decree by the trial court for depositing the balance consideration on or before 2-12-1985. Thus the plaintiff has not established his continuous readiness and willingness as required u/s 16(c) of the Specific Relief Act, 1963. In support of this submission, he relied upon the following decisions:

- (i) Abdul Khader Rowther Vs. P.K. Sara Bai and Others,

(ii) N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, ,

(iii) Raj Kishore (Dead) By L.Rs. Vs. Prem Singh and Others,

8. On the other hand, Mr. Shinde supported the impugned orders. He submitted that the courts below have concurrently held that the suit instituted by the plaintiff was within limitation and that the plaintiff was all along ready and willing to perform his part of contract. He submitted that since the Plaintiff has deposited the amount as per the directions of the trial court, it cannot be said that he was not ready and willing to perform his part of the contract. He further submitted that the courts below have rightly held that the suit for specific performance was not barred by limitation. In any case when this court allowed the civil revision application on 2-2-1984, this court did not keep the issue of limitation open. This court also did not direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it, shall be deemed to have been brought before the court on the date of which the application seeking amendment was filed. In other words, he submitted that the issue of limitation was not left open for being agitated by the parties. Once this court had allowed the amendment though on 2-2-1984, it relates back to the date of the institution of the suit namely 8-12-1975. He further submitted that the trial court decreed the suit. The Appellate Court confirmed the decree. The discretion exercised by the Appellate Court cannot be termed as arbitrary or capricious. He, therefore, submitted that since the appeal does not raise any question of law much less any substantial question of law, the same is liable to be dismissed.

9. I have considered the rival submissions made by the parties. I have also perused the material on record. From the material on record, the following facts are emerged.

(i) The Plaintiff had executed sale deed in favour defendant no. 2 on 21-8-1968 (exhibit 46). Though the plaintiff alleged that it was a transaction of mortgage, the courts below have concurrently held that it was an out and out sale

(ii) Defendant no. 1 purchased the suit land from defendant no. 2 on 30-12-1968 (exhibit 45). It is the case of the plaintiff that on the same day i.e. 30-12-1968 defendant no. 1 executed receipt (exhibit 40) where under he agreed to reconvey the suit land to the plaintiff. Defendant no. 1 contended that his signatures on blank papers were misused. The courts below concurrently found that defendant no. 1 had executed receipt on 30-12-1968 in favour of the plaintiff.

(iii) on 14-11-1975, the plaintiff issued notice to defendant no. 1 for redemption of mortgage. It was alleged that defendant no. 1 had executed a receipt on 30-12-1968 where under he agreed to reconvey the suit land to the plaintiff when he returns Rs. 2500/-. Defendant no. 1 gave reply on 2-12-1975 and refused to convey the land to the plaintiff.

(iv) on 8-12-1975, the plaintiff instituted suit for redemption of mortgage. At that time, the plaintiff did not pray for specific performance of contract dated 30-12-1968.

(v) on 17-8-1982 the plaintiff filed application for amendment of the plaint thereby praying for specific performance of contract dated 30-12-1968. The trial court rejected that application on 20-9-1982.

(vi) Aggrieved by this decision, the plaintiff instituted civil revision application no. 714 of 1982 in this Court which was allowed on 2-2-1984.

10. The question that requires to be considered is whether the relief of specific performance of contract was barred by limitation or not. Mr. Gorwadkar submitted that on the date of filing application on 17-8-1982, the claim for specific performance of contract dated 30-12-1968 was obviously time barred, as in reply dated 2-12-1975 defendant no. 1 had refused to convey the suit land to the plaintiff. The time will start running from date of refusal on the part of defendant no. 1 to perform his part of contract. The relief for specific performance ought to have been made within 3 years from the date of refusal by defendant no. 1 i.e. to say on or before 1-12-1978.

11. As against this Mr. Shinde submitted that while allowing civil revision application on 2-2-1984, this court did not keep the issue of limitation open. He submitted that this Court while permitting the amendment did not direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which application seeking the amendment was filed. I find merit in the submission of Mr. Shinde in the case of Sampath Kumar, (supra) the Apex Court observed in paragraph 10 as under:

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed.

12. In the light of the above judgment, amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent, while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed.

13. In case of Ragu Thilak D. John Vs. S. Rayappan and Others, , the Apex Court observed that whether the amendment was barred by time or not was a disputed

question of fact and therefore that prayer for amendment could not be rejected and in such circumstance the issue of limitation can be made an issue in the suit itself. In other words, the court while allowing the application for amendment can permit the parties to agitate issue of limitation by keeping that issue open as observed in the case of Ragu Thilak (supra) or as observed in Sampath Kumar's case (supra) in case while permitting the amendment, the court directs that the amendment permitted by it shall not relate back to the date of the suit and shall be deemed to have been brought before the court on the date on which the application seeking amendment was filed, in such circumstance only the question of limitation can be agitated.

14. Perusal of the order dated 2-2-1984 passed by this Court in CRA No. 714 of 1982 shows that this court neither kept the issue of limitation open nor directed that the amendment so allowed shall not relate back to the date of institution of the suit but shall be deemed to have been brought before the Court on the date of which application seeking the amendment was filed. In view thereof it is not possible to accept the submissions of Mr. Gorwadkar that the amendment allowed by this court will not relate back to the date of the suit. The reliance placed on the Judgments (i) Tarlok Singh (supra), (ii) Vishwambhar (supra), (iii) South Konkan Distilleries (supra), (iv) Sampath Kumar (supra), (v) Ragu Thilak D. John (supra), (vi) Southern Ancillaries Pvt. Ltd. (supra), (vii) Sri Gobinda Ghosh (supra), does not advance the case of Defendant Nos. 1A to 1H.

15. The next question that is required to be considered is whether the courts below were justified in holding that the plaintiff was all along ready and willing to perform his part of contract. Mr. Gorwadkar relied upon the decision of Abdul Khader Rowther (Supra) and in particular paragraphs 10, 11 and 12 thereof. In that case the Apex court held that even by putting a liberal construction on the various statement contained in the plaint, it is difficult to hold that there has been even a faint attempt to make it to conform to the requirements prescribed in Forms 47 and 48 of the First schedule in the CPC, that the plaintiff had applied to the defendants specifically to perform the agreement and that he had been and is still ready and willing to specifically perform his part of the agreement. In such circumstance equitable relief of specific performance cannot be granted. He also relied upon decision of the apex court in the case of N.P. Thirugananam (supra). In that case, the apex Court held that evidence did not show that the plaintiff was ever ready to perform his part of contract. 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 other attending circumstances. He also relied upon the decision of Raj Kishore (Supra) and in particular paragraph 27. In this case the apex court held that it is mandatory for the plaintiff to assert that he/she was always ready and willing to perform the essential terms of the contract sought to be enforced against the defendant. In the absence of such an averment, relief of specific performance cannot be granted.

15. In the light of this, if the record of the present case is perused, it would be evident that the Plaintiff did not aver specifically that he was and is ready and willing to perform his part of contract namely payment of consideration of Rs. 2500/-. In fact perusal of the averments made in paragraph 3 of the plaint, shows that it was asserted that an amount of Rs. 2500/- is being deposited in the Court. The appellate court in paragraph 10 of the impugned order observed that Rs. 2500/- were not deposited in the court though there is a recital about such deposit being made in the Court. The Plaintiff in fact did not deposit the amount in the Court. Perusal of the operative part of the trial court order and in particular clauses (1) and (3) thereof clearly shows that the plaintiff did not deposit the amount even during the pendency of the suit and in fact the plaintiff was directed to deposit the amount in the trial court on or before 2-12-1985. In paragraph 11, the appellate court observed that since the plaintiff has already deposited the amount as per the directions of the trial court, he is entitled to specific performance of contract.

16. In the light of the aforesaid discussions, I am more than satisfied that the plaintiff was not all along ready and willing to perform his part of contract. As noted earlier, all that was asserted in the plaint was that amount of Rs. 2500/- is being deposited in the court. Factually the plaintiff did not deposit the amount in the trial court. Apart from that even during the pendency of the suit, the plaintiff did not deposit the amount of Rs. 2500/- in the trial court. Perusal of clauses (1) and (3) of the operative part of the trial court clearly shows that the plaintiff did not deposit any amount in the trial court and was therefore, directed to deposit the amount on or before 2-12-1985. The Apex court in the case of Raj Kishore (supra) has held that it is mandatory for the plaintiff in a suit for specific performance to plead and prove that he was always ready and willing to perform his part of contract. In the facts and circumstances of the present case, I am more than satisfied that the Plaintiff has failed to plead and prove his continuous readiness and willingness to perform his part of contract.

17. Mr. Shinde, submitted that the trial court decreed the suit. Against that order, Defendants No. 1A to 1H preferred Appeal. The Appellate Court dismissed the appeal. He submitted that it cannot be said that discretion exercised by the Appellate Court u/s 20 of the Specific Relief Act, 1963, was either arbitrary or capricious. The Appellate Court has exercised sound discretion while confirming the trial court's decree. He therefore submitted that no case is made out for exercising discretion u/s 20 of the said Act. In any case, he submitted that the courts below have concurrently decreed the suit and even otherwise no case is made out u/s 100 of CPC.

18. In case of N.P. Thirugnanam (supra), the Apex Court observed in paragraph 5 as under:

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 arbitrarily as adumbrated under S.

20 of the Specific Relief Act 1963 (for short, "the Act"). Under S. 20, the court is not bound to grant the relief just because there was 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 alongwith other attending circumstances.

19. Perusal of paragraph 5 extracted herein above shows that the remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion is required to be exercised according to settled principles of law and not arbitrarily. u/s 20, the court is not bound to grant the relief just because there was 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.

20. I have already held that the plaintiff was not all along ready and willing to perform his part of contract. In view of the Judgment of the Apex Court in the case of N.P. Thirugnanam (supra), the Appellate Court committed serious error in exercising discretion u/s 20 of the Act. In the case of Abdul Khader Rowther (Supra) the Apex Court has held that a suit for specific performance has to conform to the requirements prescribed in form Nos. 47 and 48 of the 1st Schedule of CPC. The Plaintiff must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. I am, therefore, satisfied that the courts below could not have decreed the suit for specific performance of contract.

21. Coming to the submissions of Mr. Shinde based upon Section 100 of CPC, I do not find any merit in the submission of Mr. Shinde. In the case of Union of India (UOI) Vs. Ibrahim Uddin and Another, , the Apex Court considered various Judgments. In paragraphs 68 and 70 it was observed as under:

68. In Jai Singh Vs. Shakuntala, this Court held that it is permissible to interfere even on question of fact but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible-it is a rarity rather than a regularity and thus in fine it can be safely

concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection

70. There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal, the Court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the Court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal.

22. In my opinion, the present case squarely falls in the criteria laid down by the Apex Court. Though the Plaintiff was not all along ready and willing to perform his part of the contract, still the courts below decreed the suit. It is held by the Apex Court that the requirement of pleading and proof of readiness and willingness to perform his part of the contract is mandatory requirement.

In the light of this discussions, I am satisfied that the courts below committed serious error in decreeing the suit instituted by the plaintiff for specific performance of the contract.

In the result Appeal succeeds and the same is allowed. The impugned Judgment and decree dated 5-10-1985 passed by the trial court in Regular Civil Suit No. 96 of 1975 as also the impugned Judgment and decree dated 12-9-1988 passed by the Learned District Judge, Nasik in Civil Appeal No. 46 of 1986 are quashed and set aside. The suit instituted by the plaintiff for specific performance of contract stands dismissed with no order as to costs.