

(1994) 11 KAR CK 0029

In the Karnataka High Court

Case No : Regular First Appeal No. 688 of 1987

Ramachandraiah

APPELLANT

Vs

Nagappa Naidu

RESPONDENT

Date of Decision : 30-11-1994

Acts Referred:

Specific Relief Act, 1963 — Section 18 A

Citation : (1995) ILR (Kar) 570

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : S.G. Bhat, for the Appellant;

Judgement

Saldanha, J.—Heard learned Counsel for the appellant Respondent unrepresented and absent.

1(a). This Appeal has been preferred by the original defendant against a judgment of the City Civil Court at Bangalore in O.S. No. 3206/81. The present appellant who was the original defendant is an allottee in respect of the disputed premises which consists of a house property. That the house was allotted to him by the Housing Board in October 1965 is undisputed. The Lease cum Sale Agreement indicated that House No. 540(B), Hosalli, Bangalore was allotted to the appellant under the Low/Middle Income Group Housing Scheme is established. It is also necessary for me to take note of the fact that under Clause (3) of the Agreement, there is a total bar of alienation of the title and interest in the property to third parties save and except to certain specified institutions for purposes of obtaining a loan with the prior approval of the Housing Board. It appears that on 30.5.1980 the defendant entered into an Agreement with the plaintiff who was in occupation of the premises agreeing to sell the house in question to him for a price of Rs. 70,000/-. It is a unusual Agreement to Sell and as far as the consideration is concerned, it is very clearly laid down that the price shall not be varied regardless of market fluctuations. The plaintiff contended that the Agreement itself records a payment of Rs. 25,000/- having been made by

him leaving a balance of Rs. 45,000/- outstanding. It is contended by the plaintiff that he had called upon the defendant to complete the transaction, that he was ready and willing to pay the balance consideration and that the defendant had refused to execute the sale deed. On this background, the plaintiff prayed for a decree of specific performance against the defendant.

2. The learned trial Judge framed the necessary issues, recorded the evidence and after the hearing the parties accepted the validity of the Agreement and decreed the suit. The defendant was directed to execute the sale deed on receipt of the balance amount of Rs. 45,000/- within a period of six months. It is this decree that has been appealed against. It is necessary for me to record at this stage that the plaintiff who is the respondent to this Appeal was earlier represented and after the illness and demise of his learned Advocate the Court issued notice to the respondent to remain present before this Court or to arrange for due representation. He has not done either of the two and consequently, I was required to scrutinise the record for purposes of ascertaining whatever may be stated on his behalf.

3. At the commencement of the hearing, Mr. Bhat, the appellant's learned Advocate requested the Court to pass orders on I.A. III whereby it was his desire that the evidence in relation to the original order of allocation of the house to the appellant should be permitted to be led and he also desired that prior to this, amendment be carried out in the written statement. Mr. Bhat pointed out, that he is conscious of the stage at which he is making the application, that he is aware of the fact that normally, it would be impossible to permit an amendment to a written statement, or additional evidence at this point of time, long after the suit has been decreed and the Appeal has come up for final hearing; but that this is one of the unusual cases whereby a total failure of Justice would result if this procedure were not to be permitted. For this purpose, I heard learned Counsel at some length and perused the record of this case.

4. It is a well settled principle of law that an amendment has got to be made in good time and certainly not at a stage when a suit has already been decreed and lastly not at the stage when the appeal has come up for final hearing. A singular exception would perhaps have to, be made in that very restricted class of cases such as the present one because Mr. Bhat points out to me that the error committed before the trial Court is so very basic and fundamental that it would affect the very validity of the decree; in other words, that it virtually goes to the root of the matter. Learned Counsel demonstrates to me that the defendant is not trying to introduce evidence that has subsequently been received nor is the application as a result of an after-thought but that it is a clear and definite mistake that has occurred in the conduct of the proceedings which if not rectified, would lead to a total failure of Justice. After hearing learned Counsel, I am constrained to agree with him that this case does qualify to come within the microscopically small number of proceedings where such an exception will have to be made in the overall consideration of achieving the ends of Justice. However,

the question will arise as to whether on the state of the present record a remand only for this purpose is absolutely necessary.

5. The appellant's learned Counsel has pointed out to me that the Agreement of allotment is on record and that effectively it would mean an amplification of the evidence in respect of this Agreement for which, the aforesaid procedure might have been necessary. Normally, this Court would have had no option except to remand the matter for this purpose. Having regard to the time factor, and the additional aspect that all Courts are already heavily over-burdened and that it would virtually amount to a total waste of Judicial time to remand the proceedings merely for the sake of the aforesaid mechanical exercise, I have taken the view that while I.A. No. III is justified, that the same purpose can be achieved by taking cognizance of the Agreement which is already on record. I have taken Judicial note of the fact that the limited question relates to the introduction of a document executed by a public authority and that this Agreement cannot be disputed even if one has to go through the procedural formality of examination-in-chief and cross-examination. It is only a clause of this Agreement that is really material and nothing else. Under these circumstances, in view of the fact that a Court should as far as possible avoid a remand if that can be done, I am desisting from remanding the matter and hearing the Appeal on merits.

6. Mr. Bhat has advanced only one submission on a point of law which to my mind is sufficient as far as the present appellant is concerned. He demonstrates to me that even though there is some dispute with regard to the circumstances under which the amount of Rs. 25,000/- is alleged to have been paid by his client since it is the defendant's case that it consisted of two amounts of Rs. 15,000/- and Rs. 10,000/- which were loans/in connection with some forthcoming marriages, Mr. Bhat states that since there is a recital in the Agreement to that effect that he would prefer not to dispute this aspect. Obviously, learned Counsel is right in the submission because the documentary evidence would normally outweigh oral evidence as far as this aspect of the matter goes. What is essentially submitted by the learned Counsel is that even if the receipt of the payment is accepted and even if the execution of the Agreement is not disputed, that no decree could have been passed against the defendant in law since the premises in question happen to be allotted under a Housing Board Scheme to the defendant. Mr. Bhat points out to me on the basis of the Allotment Agreement and in particular with reference to Clause (3) thereof, that there is a bar of alienation as far as third parties are concerned and that this will have to be taken note of by the Court even if this was not specifically brought to the notice of the trial Court and was therefore overlooked. Having regard to this clause, which prescribes that save and except instances where loans can be raised from certain authorities like the LIC., Banks etc. with the permission of the Housing Board, that the right, title and interest in the premises cannot be alienated during the currency of the tenancy. There is a good reason for prescribing such a bar which is obviously because these premises are allotted to persons who are expected to

be genuine residents and the authorities desire to prohibit any form of trading in respect thereof. In the light of this bar, the defendant cannot be said to have had either a marketable title or a perfect title in law for purposes of transferring the same. This impediment makes a fundamental difference to the entire transaction in so far as if the defendant despite this bar were to enter into an Agreement of Sale, then the Agreement itself would be void.

7. In this regard, Mr. Bhat has drawn my attention to two Decisions in support of his submission that it is a well settled proposition of law that where a party to a sale agrees to transfer a property in respect of which he does not have a valid or a marketable title, that no decree for specific performance is competent in such a situation. In the first instance, Mr. Bhat has relied on the Decision reported in the case of O. Ramalingam and Others Vs. The Director, Daily Thanthi, Madras and Another, wherein the Court has very clearly laid down that where the vendor had no marketable title, that it was not permissible for a Court to direct specific performance. Learned Counsel has also placed reliance on a Decision of the Bombay High Court reported in the case of Bhiku Keru Gade Vs. Dashrath and Others, In this case, the Court was concerned with a situation wherein the vendor had an imperfect title even though he claimed that he has acquired interest in the property and the question arose as to whether he could be compelled to transfer that limited interest to the vendee. The Court after considering the scope of Section 18-A of the Specific Relief Act held that in the absence of the vendor having a perfect title, that it was not permissible to enforce an order for specific performance in respect of such a title. It is obvious, that the interest that can be conveyed is necessarily a 100% interest which the vendor possesses and where the title is imperfect or where as in the present case there is bar to the alienation and therefore, the title cannot be conveyed, it is not competent for a Court to order specific performance. The only alternative is to compensate the aggrieved party by way of damages as a decree for specific performance would virtually be legally still-born and no Court can pass a decree that is virtually infructuous. We are therefore left with the position that on the record before the Court, undisputedly the appellant was not competent to sell the house in question and therefore, that he could not have been ordered to do so through a decree for specific performance.

8. Mr. Bhat has drawn my attention to Clause (a) of the agreement of sale. The trial Court has unfortunately overlooked this clause which provides an alternate avenue in the event of one of the parties committing default. Where the contracting parties themselves prescribe that in the event of a breach by either party that the only remedy would be by way of compensation for the loss incurred, the aggrieved party in such circumstances is legally estopped from claiming anything other than such compensation or damages. It is not a matter of chance but it is a matter of the intention of the parties as embodied in that contract which binds them and which is required to be enforced. This basic aspect of the case both on facts and in law has been overlooked by the trial Judge and Mr. Bhat is therefore right in pointing out that at the very highest that

the learned Judge could have ordered to the defendant to repay a sum of Rs. 25,000/- with interest. There is no evidence brought on record by the plaintiff to indicate that he has suffered any special loss or damages and in the absence of such a record, this is the highest that the trial Court could have done and I am also in full agreement with the submission advanced by the learned Counsel as far as this aspect of the matter is concerned.

9. In the light of the aforesaid position, the Appeal succeeds. The decree passed by the trial Court is liable to be modified to the extent that the decree for specific performance passed against the appellant is set aside. The appellant, original defendant is however, directed to refund to the respondent/original plaintiff an amount of Rs. 25,000/- along with interest at the rate of 12% per annum, simple interest calculated from the date of the Agreement to Sell i.e. with effect from 30th May 1980 upto the date of repayment. Having regard to the status of the defendant, Mr. Bhat submits that he should be granted three months time to make the aforesaid payment. The said payment shall accordingly be made within a period of three months.

10. The Appeal accordingly succeeds. The decree passed by the trial Court to stand modified as indicated above. On the facts of the present case, there shall be no order as to costs.