

(2004) 04 BOM CK 0133
In the Bombay High Court
Case No : Second Appeal No. 655 of 1990

Ramesh Nanasaheb Sandhbor	Vs	APPELLANT
Shri Matsyendra Ramkrishna Wafgaonkar		RESPONDENT

Date of Decision : 21-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2004) 04 BOM CK 0133

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Anjali N. Helekar, for B.P. Apte, for the Appellant; Anita A. Agarwal, for the Respondent

Judgement

D.Y. Chandrachud, J.—This appeal is directed against a judgment and order dated 20th March, 1990 of the Additional District Judge, Pune. The suit for specific performance was decreed by the Trial Court. The decree for specific performance was not challenged in appeal by the vendor but by a subsequent purchaser in whose favour a sale deed was executed by the vendor. Both the Courts came to the conclusion that the subsequent purchaser, the First Respondent herein is not a bonafide purchaser. However, the judgment and order of the Trial Court decreeing the suit for specific performance has been reversed by the Appellate Court on the ground that the Appellant has failed to establish that he was ready and willing to perform his part of the contract.

2. In these circumstances, the substantial questions of law that arise in the present proceedings are thus :

- 1) Whether the discretion not to grant specific performance of the agreement can be exercised at the instance of Respondent No. 1 who was held not to be a bonafide purchaser for value and particularly when the decree for specific performance was not challenged by the vendors?
- 2) Whether the Additional District Judge, Pune has erroneously come to the

conclusion that the Appellant was not ready and willing to perform his part of the contract, particularly in the light of the payments which were found to have been made and upon the Government having waived the amount of the outstanding loan of Rs. 5,715/- on 21st May, 1983?

3. On 28th May, 1970 an agreement to sell was entered into between the Appellant and one Babu Genu Waghmare in respect of lands bearing Survey No. 25 admeasuring 7 Acres 5 Gunthas situated at Mauje Chandoli near Khed. The Appellant was a minor on the date of the agreement and the agreement was entered into on his behalf by his mother. The agreement recites that the total consideration that had been fixed was in the amount of Rs. 10,900/- of which an amount of Rs. 1,000/- was paid as earnest money before the execution thereof. The vendor had taken a Government loan of Rs. 5,000/- as and by way of lift loan and had also incurred a Tagai loan of Rs.900/-. The responsibility to repay the loan was that of the Appellant as purchaser, together with interest. The Appellant agreed to pay an amount of Rs. 4,000/- to the vendor at the time of the execution of the sale deed. Parties stipulated that the sale deed would be executed within a period of three years. The agreement to sell also recorded that possession of the land had been handed over by the vendor to the Appellant and that the Appellant would be entitled to the use and enjoyment of the land. The aforesaid agreement to sell was marked in evidence as Exh. 36. A further agreement was entered into between the parties on 8th December, 1990. It transpired that as a result of the outstanding lift loan, the land had been resumed by the Government. Consequently, the subsequent agreement Exh. 37 recorded that after the land was regranted by the State and upon the permission of the Government the sale deed would be executed in favour of the Appellant. The agreement also recited that the Appellant had as agreed paid the installments an account of the lift loan from time to time and the vendor assumed the absolute responsibility for obtaining permission for the completion of the sale transaction. From the evidence which has emerged on the record, it is not disputed now that the Appellant had from time to time paid an amount of Rs. 2,694.81 partly on account of the repayment of the loan installments and partly on account of land revenue. 19 receipts in all were produced in evidence and were marked as Exh. 40 to Exh. 58. On 25th May, 1971 an order was passed by the Assistant Collector of Junnar (Exh. 60) recording that as the Tagai loan under the lift irrigation scheme had not been repaid, the land was sought to be sold in auction on 12th June, 1968. Since no bid was forthcoming, the land was purchased at a nominal bid of Re. 1 by the State and the auction sale was confirmed. The land was thereafter entered in the record of rights as Government waste. The order at Exh. 60 then records that the Tahsildar, Khed had reported that the loanee whose lands were put to auction sale for the realization of an amount of Rs. 709/-, being the outstanding installments, had paid the due installments as well as the amount of rent for 1969-70, and 1970-71. Accordingly, the Assistant Collector directed that the land should be restored to the original occupant on the original tenure. The Appellant produced

the receipt for the payment of Rs. 175 (Exh. 59) that was effected for the regrant of the lands. On 21st May, 1983, the outstandings on account of the loan which were then in the amount of Rs. 5,715.50 came to be waived by the Government.

4. The original vendor, Babu Genu Waghmare expired on 27th July, 1976. On 26th August, 1977 his wife Yamunabai purported to enter into an agreement to sell, Exh. 68 with one Snail a Burhade at and for a consideration of Rs. 5,000/- recording that possession was being handed over. Barely three days thereafter on 29th August, 1977 Yamunabai entered into a second transaction with the First Respondent, Exh.66, by which the same land was sought to be sold to the First Respondent at and for a consideration of Rs. 5,000/-. The agreement with the First Respondent also recorded that possession had been handed over to the First Respondent.

5. The Appellant instituted a suit for specific performance in the Court of the Civil Judge, Junior Division, Khed on 25th April, 1978. The Trial Court framed 11 issues which together with the relevant findings thereon are as follows :

"1. Does plaintiff prove that Babu Genu Waghmare agreed to sell the suit land to plaintiff and accordingly executed a document of sale to that effect on 28.5.1970? Yes.

2. Does plaintiff prove that he received the possession of the suit land on the date of agreement of sale? Yes.

3. Does plaintiff further prove that at the time of agreement of sale, plaintiff agreed to pay Rs. 4 ,000/ at the time of sale deed and also agreed to pay all the debts charged on the suit land? Yes.

4. Does plaintiff prove that the parties to the document dtd.28.5.1970 were competent to contract? Yes.

5. Does plaintiff prove that he was and is ready to perform his part of contract? Yes.

6. Whether the suit is within limitation? Yes.

7. Does Defendant No. 3 prove that he is bonafide purchaser for value without notice? No.

8. Is the suit bad for non joinder of necessary party? No.

9. Does plaintiff further prove that he has paid all the debts on the suit land? Yes.

10. Whether plaintiff is entitled for a decree for specific performance? Yes.

11. What decree and orders? As per order."

6. The judgment and order of the Trial Court was not challenged on the part of the vendors. Yamunabai, the original First Defendant died during the pendency of

the suit and Indumati, who was her married daughter was already on the record as the Second Defendant. It appears that Yamunabai also had a son from her first marriage who was also brought on the record of the proceedings in the appeal. Indumati filed a purshis before the Trial Court admitting the suit claim. An appeal was filed before the Additional District Judge by the First Respondent with whom Yamunabai had entered into a sale transaction on 29th August, 1977. The Appellate Court held that the original Plaintiff -Appellant herein had duly proved that Babu Genu Waghmare had agreed to sell the suit land to him at and for a consideration of Rs. 10,900/- and had accordingly executed an agreement of sale dated 28th May, 1970. The Court held that the parties to the agreement to sell were competent to contract; that the suit claim was not barred by limitation and the suit was not bad for non joinder of necessary parties. The Appellate Court also affirmed the finding of the Trial Court that the First Respondent herein was not a bonafide purchaser for value without notice. However, the decree for specific performance has been reversed on the sole ground that the Appellant was not ready and willing to perform his part of the contract.

7. Counsel appearing on behalf of the Appellant has urged that the Appellate Court has clearly been in an error in reversing the judgment and order of the Trial Court decreeing the suit for specific performance. Counsel urged that upon the death of the widow of the original vendor Babu Genu Waghmare, his daughter Indumati (Defendant No. 2) admitted the claim of the Appellant in the suit. The decree was challenged by the First Respondent, the sale transaction in whose favour has been held by both the Courts not to be bonafide. The Appellate Court affirmed the finding that the First Respondent was not a bonafide purchaser for value without notice. Hence, it was urged that the Appellate Court ought not to have reversed the judgment of the Trial Court in an appeal filed by the First Respondent who is not a bonafide purchaser for value without notice, particularly when there was no challenge to the finding of the Trial Court by the original vendor. Moreover, it was urged that on the basis of the admitted facts as they stand, it is abundantly clear that the finding that the Appellant was not ready and willing to perform his part of the contract is perverse. The Appellant has pleaded his readiness and willingness; the Appellant had adduced sufficient evidence to show that payments were made from time to time for repayment of the loan and that on 21st May, 1983 the remaining balance of the loan was waived by the Government. That being the position, it was submitted that the entire finding on the absence of readiness and willingness is contrary to the weight of the evidence, is manifestly erroneous, and has led to a serious miscarriage of justice.

8. On the other hand, counsel appearing on behalf of the First Respondent supported the judgment of the Appellate Court.

9. While considering the submissions which have been urged on behalf of the Appellant, it would be necessary to record at the outset that both the Trial Court

as well as the Appellate Court have concurred in holding that an agreement to sell was duly entered into in favour of the Appellant by the original owner of the lands in question on 28th May, 1970; that possession was in fact handed over to the Appellant and that parties were competent to enter into the contract. In so far as the First Respondent is concerned, there is a concurrent finding that he is not a bonafide purchaser for value without notice. The Appellate Court has found that the agreement that was entered into with the Appellant, (Exh. 36), showed that possession was handed over to the Appellant. Thereafter right from 1971-72 until 1981-82 there were entries in the revenue records recording the name of the Appellant as being in possession. In the written statement the First Respondent had admitted that the Appellant was in possession of the land and that the land had been handed over to the Appellant in order to pay the dues of the Government and the Tagai loan out of the income of the land. The First Respondent in the course of his evidence has admitted that on the date of the sale deed, he did not receive actual possession of the land. Despite this, in the sale deed which was entered into with the First Respondent by Yamunabai, it was mentioned that possession of the land was handed over to the First Respondent. The First Respondent stated that though he had purchased the land for Rs. 13,000/-, the sale deed mentioned a figure of only Rs. 5,000/- and that the sale deed had deliberately been executed for a lesser amount. On the basis of the evidence, both the Courts have held that the First Respondent was not a bonafide purchaser for value without notice. That finding has not been challenged in the course of submissions before this Court. That being the position, and particularly since the original vendors have chosen not to challenge the decree for specific performance or even to appear before this Court in support of the judgment of the Appellate Court, I am of the view that the contention which has been urged on behalf of the Appellant must be accepted. The First Respondent is not a bonafide purchaser for value without notice. The sale transaction with the First Respondent is almost seven years after the execution of the agreement with the Appellant.

10. Be that as it may, and for the sake of completeness, I have considered it fit to decide the issue on merits and to determine whether the Appellate Court was justified in reversing the finding in regard to the readiness and willingness of the Appellant. The Appellant, it must be noted, is found to have specifically pleaded in paragraph 4 of the plaint that he was ready and willing to perform his part of the contract, to pay the balance of Rs. 4,000/- and to get the sale deed executed. In the course of the cross examination of the First Respondent, receipts in respect of the payments made by the Appellant were drawn to the attention of the First Respondent who admitted that the amounts as stated therein were duly paid. The Appellate Court noted that 19 receipts, marked as Exh. 40 to 58 showing a total payment of Rs. 2,694.81 have been produced on behalf of the Appellant. The Appellant also produced the receipt for the payment of Rs. 175/- for obtaining a regrant of the land from the State Government. On 21st May, 1983, the outstanding in the General Account on account of the Tagai

loan was waived by the Government. If at all, the benefit of this waiver of the outstanding on account of the loan would enure to the benefit of the original vendor. His widow who was the First Defendant expired and their daughter, the Second Defendant, specifically admitted the claim of the Appellant - Plaintiff. In these circumstances, on the basis of the admitted position that the outstandings on account of the loan have been waived by the Government on 21st May, 1983, the Appellate Court was clearly in error in coming to the conclusion that the readiness and willingness of the Appellant was not proved or established. Upon the waiver of the outstanding loan, it cannot be said that the Appellant was not ready and willing to discharge his part of the contract and at the highest the benefit of the waiver which was obtained from the Government must enure to the vendor. Least of all, is it open to the First Respondent who has been held not to be a bonafide purchaser for value without notice to set up the plea of an absence of readiness and willingness on the part of the Appellant. In the circumstances, conscious as I am of the limitations on the exercise of the jurisdiction of this Court in a second appeal u/s 100 of the Code of Civil Procedure, 1908, I am of the view that the Appellant is entitled to succeed. the First Appellate Court has manifestly erred in taking a view ignoring the clear effect of the finding in regard to the absence of bonafides on the part of the First Respondent. The finding is in the teeth of the evidence on record which shows that the Appellant had at all material times acted in pursuance of the agreement by making diverse payments as noted above. The interference of the Court is hence warranted to correct what otherwise would be a manifest failure of justice.

11. In the circumstances, this Appeal is allowed. The judgment of the 8th Additional District Judge, Pune dated 20th March, 1990 is quashed and set aside and the judgment of the learned Civil Judge, Junior Division, Khed dated 7th January, 1987 shall stand restored.

The Second Appeal shall stand disposed of in the aforesaid terms.

There shall be no order as to costs.

Certified copy expedited.