
(1999) 04 BOM CK 0047
In the Bombay High Court
Case No : First Appeal No. 934 of 1981

Ramjibhai Vishram Patel and Another	APPELLANT
Vs	
Arjun Karsan Patel and Another	RESPONDENT

Date of Decision : 01-04-1999

Acts Referred:

Citation : (2000) 1 CivCC 528

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : R.S. Apte with Mr. B.G. Prabhu, for the Appellant; R.D. Souza instructed by M/s Manilal Kher and Ambalal and Co. for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—This first appeal is directed against judgment and decree passed by the 2nd Joint Civil Judge, Senior Division, Pune, on 28.8.1981 whereby the trial Court decreed the Plaintiff's suit for specific performance of the agreement of sale dated 7.9.1967 and passed a consequential order including delivery of vacant possession of portion of plot admeasuring 1000 sq. ft. to the Plaintiff.

2. Arjun Karsan Patel, Respondent No. 1 herein is the original Plaintiff in the suit filed before the Civil Judge, Senior Division, Pune. The suit was filed against Madhav Gangadhar Bapat, Respondent No. 2 herein (original Defendant No. 1), Ramjibhai Vishram Patel, Appellant No. 1 herein (original Defendant No. 2), and M/s Geet Udhyog, Appellant No. 2 herein (original Defendant No. 3). The original Plaintiff prayed for decree for specific performance of agreement of sale dated 7.9.1967 executed by original Defendant No. 1 in respect of 3300 sq. ft. of the land from the plot No. 121 details of which were given in paragraph 1 of the plaint. The original Plaintiff prayed that out of 3300 sq. ft. of land agreed to be sold by original Defendant No. 1 to original Plaintiff, the land admeasuring 2300 sq. ft. is in actual use and occupation of the original Plaintiff and in addition to that land to be included in sale deed, the land admeasuring 1000 sq. ft. should

also be included. The original Defendant No. 1 as per the agreement dated 7.9.1967 agreed to sell 3 300 sq. ft. of the land from plot No. 121 details of which have been given in paragraph 1 of the plaint and is also given in paragraph 1 of the agreement of sale for a consideration of Rs. 10.000/-. A sum of Rs. 5500/- which was due from the original Defendant and payable to original Plaintiff was adjusted as earnest money and the remaining about of Rs. 4500/- was payable in presence of the Sub-Registrar at the time of execution of the sale deed which was to be executed by the original Defendants within six years i.e. before 31.8.1973. The agreement for sale further provided that original Plaintiff who was already in use and occupation of portion of land admeasuring 2300 sq. ft. for storing his goods upon execution of sale deed would retain the said possession as portion of the land sold to him. The remaining 1000 sq. ft. adjacent to the portion of 2300 sq. ft. which was in occupation of Sanghavi Jethmal Kasturchand as tenant was to be given to the original Plaintiff on execution of sale deed since the said tenant Sanghavi Jetlimal Kasturchand had right to retain possession upto 1973 only. It was further provided in the agreement that the original Defendant shall execute sale deed in favour of the original Plaintiff within the period prescribed and get the sale deed registered and if he fails to do it, he might get the sale deed executed through Courts and if original Plaintiff refused the sale deed executed, the agreement shall stand cancelled. The period of the said agreement of sale which was to expire at the end of August 1973 was extended from time to time by original Defendant No. 1 on 18.8.1973, 5.11.1973, 16.4.1974 and thereafter upto 15.1.1975. The original Plaintiff averred in the plaint that he has paid the remaining amount of Rs. 4500/- to the original Defendant No. 1 when he got the period of agreement of sale extended. The original Plaintiff further averred in the plaint that he had complied with all the terms which were required to be complied with by him. It is further averred in the plaint that the original Defendant No. 1 colluded with Defendant No. 2 and despite the agreement of sale executed by Defendant No. 1 in favour of the Plaintiff, had sold the property to original Defendant No. 2. The original Defendant No. 2 thus had not acquired any right and title. The original Plaintiff further averred in the plaint that the portion which was in possession of original Defendant No. 1 excluding the portion in possession of original Plaintiff has been handed over to original Defendant No. 3 for defeating the rights of original Plaintiff.

3. The original Defendant No. 1 filed his written statement contesting the claim of the original Plaintiff. The original Defendant No. 1 set up the defence that the agreement dated 7.9.1967 was not an agreement of sale, but was an agreement of security for money taken on loan by him and therefore, the suit for specific performance was wholly misconceived. The original Defendants Nos. 2 and 3 filed separate written statements and besides setting up the defence that the alleged agreement of sale dated 7.9.1967 was bogus, set up defence that they were bona fide purchasers of the entire plot No. 121 for valuable consideration without notice and therefore, the suit was liable to be dismissed against them.

4. The trial Court framed as many as 14 issues and after recording evidence and hearing the parties recorded that the original Defendant No. 1 failed to prove that the suit agreement of sale dated 7.8.1967 was executed by him as a security for money which he was owing to the Plaintiff and the original Defendant No. 1 also failed to prove that he has not received the amount shown to have been paid to him in the said agreement of sale. The trial Court also concluded that the original Plaintiff has been able to prove that the original Defendant No. 2 was knowing about the agreement of sale dated 7.9.1967 and therefore, he was not bona fide purchaser for valuable consideration without notice. The trial Court also held that Defendant No. 3 also was knowing about the suit agreement. The trial Court also negated various technical pleas set forth by the Defendants and by its judgment and decree dated 28.8.1981 decreed the Plaintiff's suit for specific performance of agreement of sale dated 7.8.1967 and further directed original Defendant No. 1 to execute sale deed of the said plot in favour of the Plaintiff as per terms and conditions of the agreement of sale within the period of one month from the date of decree. It was also directed by the trial Court that Defendant No. 2 being the subsequent transferee be joined in conveyance with Defendant No. 1 within the prescribed period and that the original Plaintiff is entitled to get the sale deed executed through Court in execution proceedings by appointing a Commissioner in that behalf. The trial Court also ordered the Defendants nos. 1 to 3 to deliver vacant possession of portion of land admeasuring 1000 sq. ft. to the Plaintiff.

5. The original Defendant No. 1-Vendor has not challenged the judgment and decree passed by the trial Court. The present appeal is at the instance of the original Defendant No. 2 i.e. the subsequent transferee and the original Defendant No. 3 who was in possession of the part of plot No. 121. Mr. Apte the learned Counsel for the Appellants contended that the suit agreement was not an agreement for sale, but was an agreement of security for the money which the original Defendant No. 1 was owing to the Plaintiff. He further urged that the Appellants are bona fide purchasers for value without notice and therefore, the Court below erred in decreeing the Plaintiff's, suit for specific performance of the contract.

6. The agreement for sale dated 7.9.1967 has been exhibited at Exh.74. The contents thereof clearly reveal that the original Defendant No. 1 agreed to sell a piece of land admeasuring 3300 sq. ft. from plot No. 121 to the original Plaintiff for a consideration of Rs. 10,000/-. An amount of Rs. 5500/- which the original Defendant No. 1 owed to the original Plaintiff was treated as earnest money and the remaining amount of Rs. 4500/- was payable at the time of registration of sale deed. The sale deed was to be registered within six years i.e. before 31.8.1973. The said agreement was for the first time extended on 18.8.1973 by the original Defendant No. 1 till 15.11.1973. Thereafter it was extended from time to time upto 15.1.1975. The fact that the time stated in the agreement was extended from time to time clearly indicates that the agreement in question was an agreement of sale and not an agreement of security for money as was sought

to be alleged by the original Defendant No. 1. Moreover original Defendant No. 1 even did not dare to enter the witness box and therefore, the defence set forth by him in the written statement that the said agreement was not an agreement of sale but an agreement of security was not at all proved. As a matter of fact the agreement does not at all show that it is in the nature of money lending transaction. In this background the trial Court cannot be said to have erred in holding that the agreement dated 7.9.1967 was an agreement of sale and not an agreement for security as contended by the original Defendant No. 1. The transaction dated 7.9.1967 was between the original Defendant No. 1 and the original Plaintiff and original Defendant No. 2 cannot therefore be said to have personal knowledge about the said transaction. The original Defendant No. 1 having failed to prove that the agreement of sale dated 7.9.1967 was executed by him for security for money, the present Appellants cannot successfully challenge the correctness of the findings recorded by the trial Court on issue No. 1. The first contention of the learned Counsel for the Appellants has no merit and is rejected.

7. The contention of Mr. Apte that the original Defendant No. 2 was a bona fide purchaser for valuable consideration without notice also has no merit and is liable to be rejected. It would be seen that the original Defendant No. 2 has purchased the entire plot No. 121 from the original Defendant No. 1 vide sale deed dated 9.1.1975 (Exh.71). In paragraph 3 of the said sale deed reference about the agreement of sale dated 4.4.1967 is made. Paragraph 3 of the said sale deed reads thus:-

(3). After the document dated 11.12.1963 said above, out of this plot, on western side land measuring 60 feet in length on southern and northern and 55 feet broad east west and its area is 3300 square feet which includes the land in use and occupation of Shri Sanghavi, and I have executed a nominal agreement of sale in favour of Arjun Karsan Patel as the security and for repayment of the amount of Rs. 5500/- due to be paid to him by me as on 4.7.1967 showing the said amount as earnest money, the said land of 3300 square feet was agreed to be sold for a sum of Rs. 10,000 (Rupees Ten thousand). However, according to the said agreement of sale the transaction of actual sale deed was not intended to be executed but term is that I have to repay only a sum of Rs. 5500/-. (Rupees five thousand five hundred) with interest thereon at the rate of 6% per annum.

8. Paragraph 3 of the sale deed executed by original Defendant No. 1 in favour of original Defendant No. 2 clearly reveals that original Defendant No. 2 was notified about the agreement of sale made by original Defendant No. 1 in favour of the original Plaintiff, though according to Defendant No. 1 it was only a nominal agreement of sale and the actual sale deed was never intended to be executed, but the minimum expected of a buyer of ordinary prudence was to get in touch, with the original Plaintiff and find out about the real nature of transaction. The original Defendant No. 2 has entered the witness Box and

admitted that he had not contacted the original Plaintiff to find out whether by the agreement dated 7.9.1967 entered into by the original Defendant No. 1 in favour of the original Plaintiff was actually intended to be acted upon or the said agreement was only a nominal one and by that original Defendant No. 1 was only required to repay a sum of Rs. 5500/-. Mr. Apte the learned Counsel for the Appellant fairly conceded that there is no evidence to that effect that at any time the original Defendant No. 2 enquired from the original Plaintiff about the true nature of the transaction. This clearly reveals that purchase of entire plot No. 121 by Defendant No. 2 from original Defendant No. 1 despite the agreement of sale executed by original Defendant No. 1 in favour of the Plaintiff for a piece of land of 3300 sq. ft. was not bona fide and in good faith. It is expected of a purchaser of an immovable property to make reasonable enquiries about the title of the vendors and whether the property suffered from any encumbrances or not. A reasonable and prudent purchaser in good faith would never purchase the property without making full enquiries, particularly in the case like the present one, when the purchaser has been informed that there was an agreement of sale between the vendor and the original Plaintiff though according to the Vendor the said agreement was only nominal, In that event the least expected of the original Defendant No. 2 was to find out the real nature of transaction with the Plaintiff by original Defendant No. 1 before purchasing the property. The trial Court has considered this aspect and appreciated the evidence in right perspective to which I fully agreed and therefore, the second contention raised by Mr. Apte also has no merit.

9. No other point was urged.

10. The first appeal accordingly has no merit and is dismissed. No order as to costs.