

(1955) 09 BOM CK 0102
In the Bombay High Court
Case No : A.F.O.D. No. 446 of 1950

Ratanlal Acharatlalshet

APPELLANT

Vs

Nanabhai Miyabhai

RESPONDENT

Date of Decision : 05-09-1955

Acts Referred:

Contract Act, 1872 — Section 73, 74
Evidence Act, 1872 — Section 101, 102, 103, 104, 3
Transfer of Property Act, 1882 — Section 55, 55(1)

Citation : AIR 1956 Bom 175

Hon'ble Judges : Dixit, J;Chainani, J

Bench : Division Bench

Advocate : R.M. Shah, for the Appellant; Y.B. Rege and B.G. Thakor, for the Respondent

Judgement

Dixit, J.—This appeal arises from a suit to recover the amount of earnest money paid under an agreement of sale. The facts leading up to the suit are shortly these.

2. The property in suit is Final Plot No. 516/1 with a storied bungalow therein. This property was at one time, described as Plot No. 1 of City Survey No. 125 A. It was part of a bigger property owned by a Mahomedan family and there was on 17-3-1933, a partition between the members of the family and the partition is evidenced by a document.

Under the partition property now known as Final Plot No. 516/1 fell to the share of one Atekabai & property now known as Final Plot No. 516/2 fell to the share of one Alihussein. On 26-7-1937 Atekabai executed a deed of gift of her property in favour of the defendant Nanabhai and the deed is Ex. 65 in the case. On 14-6-1944 Alihussein executed in favour of one Narandas a deed of sale in respect of Final Plot No. 516/2.

3. On 9-12-1947 the defendant executed in favour of the plaintiff an agreement to sell to the plaintiff Final Plot No. 516/1. The agreement is Ex. 35 in the case.

According to the agreement a pacca sale deed was to be executed within four months from the date of the agreement, after removing whatever claims and burdens which might exist on the property and after making clear title to the property and also after getting a rent note executed in favour of the plaintiff by Nandlal Banchhodlal who was in possession of a part of the property as a tenant.

The agreement provides that if the vendor did not pass a Pakka sale deed within the time specified in favour of the plaintiff, the plaintiff would be entitled to get a conveyance passed in his favour. The agreement further provides that if the plaintiff did not obtain the pakka sale deed from the vendor, the earnest money paid by him to the defendant would stand forfeited and that the plaintiff would not be entitled to the return of the earnest money.

4. After the agreement of sale, there was correspondence between the parties and in the end, the plaintiff filed this suit on 5-10-1948, seeking to recover a sum of Rs. 15,770-14-0 consisting of Rs. 15,000/- as earnest money, Rs. 740 as interest at 6 per cent, per annum from 9-12-1947 to 24-8-1948 and Rs. 30-14-0 as expenses of the notice.

5. The plaintiff by his plaint, alleged that the defendant had committed a breach of the agreement inasmuch as the defendant had kept from the plaintiff a material defect relating to the property which was in the nature of a right of way of one Narandas Sadhram. The plaintiff farther alleged that the defendant had failed to clear the title, even though time was extended in order to enable the defendant to do so, and inasmuch as there was a breach of the agreement on 18-6-1948, the plaintiff filed the present suit against the defendant.

6. The defendant filed a written statement Ex. 12. He contends that the plaintiff had entered into the agreement after reading all the title deeds pertaining to the suit property, that nobody had any right of way or easement over the suit property, that the rights, if any, had been extinguished by a Town Planning Scheme, that the plaintiff had been informed of all these facts and that the claim put forward by Narandas in suit No. 3227 of 1947 was false when, as a matter of fact, the right of way, if any, had been extinguished on or about 13-2-1945.

It was further contended that it was not the defendant who had committed the breach of the agreement but the breach was committed by the plaintiff, inasmuch as he failed to get a sale deed executed by the defendant within the time specified. It was also contended that there was no material defect in the title, even though Narandas had put up a false claim over the suit property. In the end, the defendant contended that the plaintiff was not entitled to any relief and that his suit should accordingly be dismissed.

7. The learned trial Judge dismissed the plaintiff's suit, holding that the defendant could not be said to have committed the breach of the agreement of sale Ex. 35 and that accordingly the plaintiff was not entitled to claim the amount of the earnest money from the defendant. From the decree made in the suit the plaintiff has come up in appeal.

8. Upon this appeal, the only question for decision is whether the defendant has committed the breach of the agreement because if the defendant has committed the breach of the agreement, the plaintiff is clearly entitled to have the amount of the earnest money returned to him. Mr. R.M. Shah who appears for the plaintiff-appellant contends that there was a material defect in regard to the suit property, which defect the defendant knew and of which the plaintiff was not aware, and it was the duty of the defendant to disclose to the plaintiff this material defect and inasmuch as the defendant did not do so, it was the defendant who had committed the breach of the agreement and not the plaintiff.

In order to understand this contention, it will be necessary first to briefly trace the history of the property. The bigger property was described in the city survey record as composed of 125A and 125B which correspond to plot Nos. 1/A and 1/B. Atekabai, daughter of Gulamhussein, was the owner of the former property and Alihussein, the vendor of Narandas, was the owner of the other, and plots Nos. 1/A and 1/B came to be subsequently reconstituted in a Town Planning Scheme and were described in that scheme as Final Plots Nos. 516/1, and 516/2.

The defect in title is concerning a right of way and the right of way given to Alihussein is to be found in the deed of partition, para. 8 of which runs as follows:

"In the land gone to the party of the other part (i.e. Gulamhussein), for passing the men, motors, cars and other vehicles a space has been kept which begins from the gate of the land gone to the party of the first part (i. e. Atekabai) and which extends up to the boundary of the party of the other part (viz., Alihussein) admeasuring 134 feet from East to West and 12 feet wide from North to South. The ownership of that land is of the party of the one part (Atikabai). But in the said land the party of the other part (Alihussein) is given a right of way as stated above.

The said land which has been kept open upto the boundary of the land of the party of the other part (Alihussein) for using as a passage for all sorts of vehicles and the party of the one part (Atikabai) undertakes to maintain the said passage in good condition for passing the men and vehicles of all kinds".

Now it is to be remembered that this right of way is not specifically mentioned in the agreement of sale. In the deed of gift executed by Atekabai in favour of the defendant reference is made to the deed of partition and the agreement of sale, in turn, made reference to the deed of gift. There is no doubt upon a perusal of the deed of partition that there was a right of way created in favour of Alihussein in respect of the property of the ownership of Atekabai.

9. It appears, however, that there was in or about 1945 a Town Planning Scheme which is referred to in the proceedings as the Ellis Bridge Town Planning Scheme. The agreement refers to scheme No. 5 and the plaint also refers to scheme No. 5. But a document which is a book of the Town Planning Scheme refers to the scheme as No. 3. Mr. R.M. Shah has made a point that while the agreement of sale referred to scheme No. 5, Ex. 30, which is the book of the Town Planning

Scheme, referred to the scheme as Scheme No. 3.

But this is of no importance because the properties owned by Atekabai and Alihussein are referred to in Ex. 30 at page 79 and it is not in dispute that plot No. 1/A corresponds to Final Plot No. 516/1 and plot No. 1/B corresponds to Final Plot No. 516/2. As to what the effect of the Town Planning Scheme is, I will refer to that question a little later.

10. It will now be convenient to refer to the correspondence which took place between the parties soon after the agreement of sale. The agreement, as I have already pointed out, provided that a deed of sale was to be executed within four months and it appears that on 1-1-1948 a public notice was given by the plaintiff concerning this property.

It is not possible to ascertain what the public notice was because a copy of the public notice has not been placed upon the record. On 5-1-1948 the defendant put in an affidavit in order to satisfy the requisitions made by the plaintiff. That affidavit states as follows:

"We have to give you as per the said agreement regarding our title thereto viz., that we are entitled to sell and that no third party has got any right of any kind over this property."

The affidavit then sets forth the history in respect of the property of the family and states that it was the joint property of Sheth Adamji and Sheth Gulamhussein in equal shares. The affidavit then refers to a partition of 6-10-1922 and also refers to the deed of 17-3-1933 and then the affidavit goes on to say that the property which was to be sold to the plaintiff under the document and which is bearing Ellis Bridge Final plot No. 516/1 had gone to the share of Atekabai. The affidavit then refers to the gift deed executed in favour of the defendant in 1937 and concludes:

"In the said (suit) property nobody else has got any right of way or any other right of easement. Nobody has got a charge over the said property on account of debt or maintenance nor has anybody any share therein. We are the only heirs thereof and we have got every right to sell the property and we give you a solemn assurance thereof."

11. After this affidavit the plaintiff wrote a letter to the defendant on 27-2-1948. It commences by pointing out that the defendant was to pass a registered sale deed in favour of the plaintiff after removing all sorts of rights of any person over the property and after clearing the right or title of the vendor. The letter also points out that the defendant had given a guarantee to the plaintiff that there was no right of way or easement of anybody in the said property.

The letter then mentions that the plaintiff had received a notice dated 13-1-1948 from Narandas Sadhuram through his Advocate Mr. Vamanrao Ratanlal Dholakia and also a copy of a plaint sent to the plaintiff along with the notice. In order to understand this notice and the suit, a few facts will have to be stated. Alihussein

had sold the property to Narandas on 14-6-1944. It appears that Narandas filed a suit against the defendant and Alihussein on 23-12-1947.

This will be seen from a copy of the plaint which has been filed in the case and is at Ex. 63. The plaintiff on receipt of a copy of the notice and a copy of the plaint pointed out to the defendant in his letter of 27-2-1948 that it was evident from the notice and the plaint that Narandas claimed a right of way from Final Plot No. 516/1 and he intended that the said way should be kept open for ever.

By the letter the plaintiff called upon the defendant that the defendant should clear all sorts of rights of any third party in respect of the said land and that if the defendant failed to clear the rights of Narandas in respect of the said land within the time given by the plaintiff, the plaintiff stated that it would be presumed that the defendant's rights in respect of the said land were not clear and that the defendant was not able to give a marketable title and accordingly, it would be considered that the defendant intended to commit a breach of the agreement. The defendant sent a reply to the notice of the plaintiff, but curiously enough, the reply does not bear any date.

It appears that it was received by the plaintiff on 9-3-1948, which suggests that the reply was given before 9-3-1948, i.e., between 27-2-1948 and 9-3-1948. By the reply, the defendant stated that Narandas or any other person had not got any sort of easement right in the property mentioned in the agreement of sale. The reply states that the defendant had shown all his title deeds to the plaintiff, that the title was clear and that the plaintiff was satisfied regarding the same, adding that this position was made clear in the affidavit of 5-1-1948. Paragraph 3 of the reply states as follows:

"Before my client sworn the said affidavit, your client had made proper enquiries regarding the passage mentioned in the said notice of pleader Mr. Vamanrao Ratanlal Dholakia. And my client had shown you from the Ellis Bridge Town Planning Scheme that the alleged easement right is Illusory and false and it was also shown that the same has been extinguished from the date the Ellis Bridge Town Planning Scheme came into operation."

The reply stated that after that the plaintiff was satisfied regarding the title of the defendant and that the defendant made the affidavit and only the work of executing the document remained. In para 4 of the reply the defendant pointed out that Narandas had filed an application in the Court of the City Mamlatdar of Ahmedabad in order to have his alleged right of way entered in respect of Final Plot No. 516/1 in the record of rights. But the reply points out that the application had been dismissed. The reply further states that the defendant was given an extract of the record of rights on 28-2-1948 without this right being shown in the record of rights. The reply points out that if the plaintiff wanted to have a look at the extract, the extract would be made available to the plaintiff.

In para 8 of the reply the defendant stated that he gave the plaintiff a guarantee that the said Narandas had no easement or any other right over Final plot No.

516/1 as stated by the plaintiff. In para 9 of the reply the defendant stated that he was willing to pass a registered sale deed of the property according to the terms of the agreement after receipt of the balance of the amount.

There was further correspondence between the parties which it is not necessary to mention in any detail, and the plaintiff, believing that the defendant had committed a breach of the agreement, filed this suit.

12. The question for consideration is whether the defendant committed the breach of the agreement. This question must turn upon the proper interpretation of Section 55, T.P. Act, which, so far as material provides:

"In the absence of a contract to the contrary, the buyer and the seller of Immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover."

It is apparent that the seller is required by the section to disclose to the buyer a material defect in the property or in the seller's title thereto. In the present case the material defect was in connection with a right of way which the owner of Final Plot No. 516/2 had over Final Plot No. 516/1 and Mr. R.M. Shah contends that it was this material defect of which the defendant was aware and of which the plaintiff was not aware.

Now a seller has a dual duty to perform. He is required to disclose to the buyer a material defect of which he is aware at the time when the Parties enter into an agreement of sale. Apart from this duty, a seller is also required to answer requisitions made by the buyer and it is not enough for a seller to say that his duty is over or discharged by answering requisitions without pointing out to the buyer a material defect of which he is aware and of which the buyer is not aware.

This question is, of course, the subject of a controversy between the plaintiff and the defendant. In the plaint filed by the plaintiff the plaintiff stated in para 10 thereof that it was false to say, as the defendant alleged, that he had informed the plaintiff regarding Narandas right of way and that if it was so, that fact would have been mentioned in the affidavit which the defendant gave.

In para 11 of the plaint, the plaintiff stated that though the defendant was quite aware of the material defect which would render the property totally useless, the defendant made the plaintiff to enter into the sale agreement without in any way disclosing it to the plaintiff. It is clear, therefore, that the plaintiff's assertion was that the "defendant did not disclose to the plaintiff the material defect regarding the right of way when the agreement of sale took place.

The defendant filed a written statement and the defendant rejoined by stating that the defendant had, at the very beginning, informed the plaintiff that since after the Ellis Bridge Town Planning Scheme had come into force, Narandas had no right of passage over the suit plot and that if some one came forward with a false claim over the suit property, it could not be said that thereby a material defect had arisen with respect to the title of the property concerned.

It was also pointed out that the defendant had not suppressed anything from the plaintiff's knowledge and that the plaintiff's reason in that regard was false. It was pointed out that there was no defect in the property. Now in this case the plaintiff is alleging a breach of the agreement on the part of the defendant and claiming to recover the amount of the earnest money.

It is, therefore, for the plaintiff to show that the defendant has committed the breach and to succeed in that contention, the plaintiff must show that the defendant had not disclosed to him, at the time when the agreement took place, a material defect in the property of which the defendant was aware and of which the plaintiff was not aware.

The burden of proof being, therefore, upon the plaintiff. It was for the plaintiff to show that the defendant had not disclosed to him this material defect at the time when the agreement took place. Section 102, Evidence Act, provides:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

13. In the present case, for reasons best known to himself the plaintiff did not give oral evidence in support of this claim. There is a purshis Ex. 61 filed by the plaintiff which states that the plaintiff did not propose to lead oral evidence in the case. The purshis was also signed by the defendant's Advocate, which means that the defendant also did not want to lead oral evidence in the case.

But, the burden of proof being upon the plaintiff, it would not be open to him to suggest that his statements in the plaint should therefore be accepted as evidence in the case. The parties are in dispute as regards a material fact and a mere averment in the plaint cannot furnish evidence in the case.

In the absence of evidence, therefore, given on behalf of the plaintiff, we must hold that the plaintiff has not proved the allegations made by him in paras 10 and 11 of the plaint. The statements made in the plaintiff's letter of 27-2-1948 and in the defendant's undated letter received by the plaintiff before 9-3-1948 are nothing but assertions and counter-assertions, but that surely cannot constitute substantive evidence in the case.

The correspondence merely shows the reaction of the parties to the dispute between them and so far as the record shows, it is amply clear from the extract of the record of rights which was given to the defendant and to which reference has been made by the defendant in reply to the plaintiff's notice that the extract does not mention any such existence of right.

That extract is Ex. 45 in the case. It refers to plot No. 516 H.No. 1 and there is a column which is under the title "other rights" and in reference to plot No. 516 H.No. 1, of which Nanabhai i.e. the defendant, is the occupier, no other right has been mentioned. The result is that in the Government record is not to be found at any rate in 1943 the alleged right of way which existed in favour of the vendor of Narandas under a deed of partition of the year 1933.

There is one significant fact and that is that in the affidavit made by the defendant on 5-1-1948 a statement is made that in the said suit property nobody else had got any right of way or any other right of easement. Now this statement is upon a sworn affidavit and it is a clear statement that no one else has any right of easement.

We think, therefore, that the plaintiff has not made out that at the time when the agreement took place the defendant did not disclose to him the material defect which was in the shape of a right of way which was in favour of the vendor of Narandas and subsequently in favour of Narandas.

14. But Mr. R.M. Shah argues that the plaintiff had, on account of the suit filed by Narandas, sufficient reason for not complying with the terms of the agreement. That suit was filed on 23-12-1947 i.e. shortly after the agreement which was entered into on 9-12-1947. Mr. B.M. Shah says that on account of the notice which the plaintiff got from Mr. Vamanrao Dholakia and from a copy of the plaint received by him the plaintiff came to know that in respect of Final plot No. 516/1 Narandas was asserting a right which was a right of way.

He argues that that was a sufficient reason for not complying with the terms of the agreement. Now, it is not every apprehension which would entitle a party not to act according to the terms of the agreement. The apprehension must be a reasonable apprehension. The title which a party agrees to convey must be a title free from reasonable doubt.

A party in whose favour an agreement of sale has been executed is entitled to have a marketable title made out for him. Section 55. T.P. Act, was amended in the year 1929 and the words "or in the seller's title thereto" were added by the amending Act. Section 55 speaks of a material defect in the property or a material defect in the seller's title thereto.

There may be a material defect in the property, if there is a right of way as in this case. I There may be a material defect in the seller's title, as for example where the property is subject to a prior encumbrance and Marten J. in - Bai Dosibai Vs. Bai Dhanbai, has taken the view that a restrictive covenant may be a material defect in the title of a party.

A defect in property is a different thing from a defect in title and I am not quite sure that an easement would be a material defect in title as I opposed to a material defect in property. But I will assume in favour of Mr. R.M. Shah that a material defect in property would amount to a material defect in title.

In the present instance the title was originally vested in the members of the Mahomedan family. Under the deed of partition the title was vested in Atekabai and by virtue of the deed of gift the title was vested in Nanabhai, the defendant. The title was, therefore, in Atekabai. The title was also in Nanabhai the defendant and the only right which Alihussein and Narandas had was the right of way, i.e., a right of easement.

A right of easement would restrict the enjoyment of the property, i.e., while Atekabai had title to the property, as also the defendant, the right of Atekabai and of defendant to enjoy the property was restricted by the imposition of a right of way. But I am prepared to say, as was said by Marten J., that a material defect in property would amount to a material defect in title.

The question then arises whether there was in fact a material defect in the title of the defendant. In this connection reference has to be made to the book of the Ellis Bridge Town Planning Scheme Ex. 30. That document shows that the Town planning Scheme was sanctioned to take effect on 15-3-1945. This scheme was published in the Bombay Government Gazette. Final Plots Nos. 516/1 and 516/2 are shown at serial Nos. 12 and 13 at page 79 of the book. There is at page 137 of Ex. 30 para 2, a note and that note runs as follows:

"All rights of passage hitherto existing over any land included in the scheme are hereby extinguished excepting (1) those in respect of Final plots Nos. 124 to 130. 194 to 200 and 207 to 231 situated to the west of the river and Final plots Nos. 1, 16, 32, 113 and 119 of Dariapur Kazipur section wherein the existing agricultural access shall be retained as a permanent access and (2) a few others as indicated in column 16 of Form A."

This shows that in some cases whatever rights were existing before the Town Planning Scheme were maintained under that scheme and it is significant that in respect of Final Plots Nos. 516/1 and 516/2 no such rights were reserved and, therefore, maintained. These facts invite the application of Section 41. Bombay Town Planning Act, 1915. Section 41 by Clause (b) provides:

"On the day on which the final scheme comes into force:

(a) x s x x

(b) All rights in original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by the arbitrator."

It is true that prior to the coming into force of the scheme there may be certain rights, but the effect of Section 41 is to say clearly that those rights come to an end as soon as the plots are reconstituted, unless those rights have been reserved. Mr. R. M. Shah argues that looking to Sections 20, 21 and 30, it would not be proper to say that the right of way had come to an end. But, in our opinion Mr. R.M. Shah is not right.

It is for the arbitrator to give the consideration to the rights of the parties. It is for him to say whether the rights will continue or whether the rights will cease to exist and when once a scheme has been finally sanctioned by Government and new plots are reconstituted, the parties will be governed by the reconstituted plots.

If that is the correct view of the provisions of the Bombay Town Planning Act, 1915, it is obvious that although a right of way once existed in favour of Narandas and his predecessor-in-title, that right was no longer in existence when Final plot No. 516/1 was reconstituted. The defendant, in his reply, has categorically stated that the so-called right was illusory and that the same had been extinguished from the date when the Ellis Bridge Town Planning Scheme came into operation.

It is clear, therefore, that at the date when the agreement of sale took place i.e. on 9-12-1947, this defect did not exist and if that is so, the plaintiff was not justified in not acting in accordance with the terms of the agreement. Mr. R.M. Shah has no doubt pointed out that a suit had been filed by Narandas asserting this right of way, but in considering this question, one must ask oneself the question whether it can be said of the plaintiff that he had a reasonable apprehension about the so-called right of Narandas.

On the one hand, there was a suit filed by him against the defendant and Alihussein asserting that right and on the other, there was the consequence arising u/s 41, Bombay Town Planning Act, 1915. If by operation of law the right had been extinguished, it is futile to say that the plaintiff had a reasonable apprehension that there was a material defect in the title of the defendant.

It would have been possible to accept the contention of Mr. R.M. Shah provided there stood alone the suit filed by Narandas, without anything more. But in this case there was on the one hand, the suit filed by Narandas and on the other, there was the operation of Section 41. Again it is significant to note that the Town Planning Scheme came into force in March 1945 i.e. some 2 1/2 years before the agreement of sale took place.

There was, therefore, on 9-12-1947 no material defect, so far as the right of way is concerned. At any rate, the plaintiff had no reason to suppose that he had a reasonable apprehension that there was such a material defect. In view of this conclusion, we must hold that the view taken by the Court below is right,

15. The learned Judge has said that this material defect could have been discovered by the plaintiff, had the plaintiff Inspected the property. We do not concur in that reasoning of his. It is not a question of inspecting the property, but it is a question of the duty which is imposed upon the seller to disclose to the buyer a material defect of which the seller is aware and of which the buyer is not aware.

16. For the reasons given above we think the decree passed by the lower Court

is correct The result is that the appeal fails and it will be dismissed.

17. Mr. Thakor for the respondent presses for costs, Although we have held against the plaintiff on the contention which he has raised in appeal, it cannot be said that the suit of the plaintiff was altogether unjustified.

The facts are that Narandas had filed a suit against the defendant and Alihussein, claiming a right of way and a copy of the plaint had been sent to the plaintiff and a notice was also given in that connection. We think, therefore, that this is a case in which we may well direct the parties to bear their own costs of the appeal. The appeal fails, but there will be no order as to costs of the appeal.

18. In Civil Application No. 1647 of 1954 there will be no order upon the application and no order as to costs.

19. Appeal dismissed.