
(1999) 10 BOM CK 0040

In the Bombay High Court

Case No : Appeal No. 857 of 1994 in Short Cause Suit No. 603 of 1977

Sakina Mohammedally Mulla and another

APPELLANT

Vs

Sulphur Refinery Pvt. Ltd.

RESPONDENT

Date of Decision : 07-10-1999

Acts Referred:

Evidence Act, 1872 — Section 10, 101
Specific Relief Act, 1963 — Section 15, 20

Citation : (2000) 1 BomCR 449

Hon'ble Judges : D.K. Deshmukh, J;B.P. Saraf, J

Bench : Division Bench

Advocate : A.N. Maniar, for the Appellant; J.F. Pochkhanwala Sr. C. and R. Shah, for the Respondent

Judgement

Per D.K. Deshmukh, J.—By this appeal, the appellants challenge the judgment and decree passed by the learned Single Judge of this Court in Short Cause Suit No. 603 of 1977. That suit was filed by the present respondents claiming a decree of specific performance of the agreement. The plaintiffs in the plaint claimed that the defendants are the heirs of late Lalmiya Mulla Amiruddin and Mahomedally Mulla Amiruddin and that the plaintiffs, which is the company incorporated under the Companies Act, had entered into indenture of lease dated 17-1-1962 with the abovenamed Lalmiya Mulla Amiruddin and Mahomedally Mulla Amiruddin, whereby the lease of the land described in the schedule of the agreement of lease dated 17-1-1962 was granted for a term of 99 years at a monthly rent of Rs. 1400/- on the terms and conditions mentioned therein.

2. The suit of the plaintiffs was based on Clause (4) of the agreement dated 17-1-1962. Clause (4) of the agreement dated 17-1-1962 reads as under :---

"4. It is agreed between the parties that the lessee shall have an option to purchase the said premises with the structure of the lessors within a period of fifteen years from the date hereof for the price of Rs. 2,80,000/ -. All out of pocket expenses of the said sale such as stamps, registration, searches etc. shall

be borne and paid by the lessor and lessee equally. Each party will pay its respective Solicitors' costs".

It is clear from Clause (4) that by that clause the lessor agreed to sell the land to the plaintiffs for a consideration of Rs. 2,80,000/-. However, that option to purchase was to be exercised by the plaintiffs within 15 years from the date of the lease deed. It was the case of the plaintiffs that within the aforesaid period, the plaintiffs exercised their option and filed a suit for specific performance of the contract. The present appellants, who were defendants in the suit contested the suit by filing a written statement. On the basis of the pleadings of the parties, the trial Court framed following issues :---

1(a) Whether by the Indenture of Lease dated 17th January 1962 (copy whereof is Exhibit "B" to the plaint), Lalmiya Mulla Amiruddin and Mohammedally Mulla Amiruddin granted lease of the suit lands in favour of the plaintiffs within an option to the plaintiffs to purchase the suit property with the structure thereon within a period of 15 years from the date of the lease for the price of 2,80,000/-?

1(b) If so, whether the plaintiffs exercised the said option to purchase the property by their Advocate's letter dated 4th February, 1976 as contemplated under Clause 4 of the said Indenture of Lease? If so, whether the exercise of such option by the plaintiffs was lawful and the same is binding on the defendants?

2. Whether the plaintiffs were ready and willing to pay a sum of Rs. 2,80,000/- to the defendants?

3. Whether the plaintiffs are entitled to obtain specific performance of the said option clause contained in the said indenture of Lease and whether the defendants are bound to convey to the plaintiffs the suit land at or for the price of Rs. 2,80,000/-?

4. Whether the defendants prove that Clause 4 of the said Indenture of lease was never intended to be acted upon as alleged para 5 of the written statement?

In so far as, the oral evidence is concerned, the plaintiffs examined two witnesses in support of their case. The defendants, however, did not choose to enter into the witness-box. They also did not examine any witness. The learned Single Judge, on the basis of the evidence on record, decreed the suit in favour of the plaintiffs and granted decree for specific performance of the contract in terms of prayers Clause (a) & (b) of the plaint. It is this decree passed by the learned Single Judge, which is challenged in the appeal.

3. The learned Counsel for the appellants raised only one contention before us. He submitted that the plaintiffs had admitted that they have entered into agreement to sell the property to third parties after it is sold to them by the defendants. Relying on the judgment of the Gujarat High Court in the case of Dave Ramshankar Jivatram Vs. Bai Kailasgauri, , the learned Counsel submitted that the plaintiffs/company is not going to use the property after its sold to it for

the same purpose for which it is being used by the plaintiffs as lessee and as the plaintiffs want to sell the property, specific performance should not have been granted by the learned Single Judge, of the agreement of sale.

4. The learned Counsel appearing for the original plaintiffs on the other hand submitted that when the option was exercised by the plaintiffs, as also when the suit was filed, they had no intention to transfer the property. According to the learned Counsel, the appellants are not right in submitting that the plaintiffs wanted to purchase the property for selling it for construction of a building. The learned Counsel further submits that even if it is assumed that the plaintiffs want to sell the property after they purchase it from the defendants, specific performance cannot be denied, in view of the fact that the defendants have not entered the witness box to establish that any hardship would be caused to the defendant in case specific performance of the contract is granted in favour of the plaintiffs. The learned Counsel relying on the judgment of this Court in the case of Abdul Kayum Ahmad and Others Vs. Damodhar Paikaji Kinhekar and Another, , submits that once discretion is exercised by the learned trial Court, the Appellate Court is not justified in interfering with the discretion exercised by the trial Court especially when it cannot be said that the discretion exercised by the trial Court either arbitrarily or capriciously.

5. Now if in the light of these rival submissions the record of the case is perused, it becomes clear that by the agreement dated 17-1-1962 a clear option has been given to the plaintiffs to purchase the property for a consideration of Rs. 2,80,000/- within 15 years of the date of the agreement. There is no dispute before us that this option was validly exercised by the plaintiffs. The only question that needs to be considered in view of the submissions made by the learned Counsel for the appellants is whether the learned Single Judge was justified in exercising his discretion in granting specific performance in favour of the plaintiffs. The only fault that was found by the learned Counsel for the appellants with the exercise of the discretion of the learned Single Judge in favour of the plaintiffs is that, according to the learned Counsel, as the plaintiffs wanted to sell the property and did not want to use it for the same purpose for which it was leased, specific performance ought not to have been granted. It is to be seen that perusal of the provisions of section 10 of the Specific Relief Act shows that a presumption is raised, which of course is rebuttable, that the breach of a contract to transfer of Immovable property cannot be adequately relieved by compensation in money. It is, therefore, obvious that the moment the plaintiffs show that there is a valid contract to transfer the Immovable property and that contract has been breached a presumption arises in favour of the plaintiffs that the breach can not be adequately relieved by compensation in money. The burden, therefore, shifts on the defendants to rebut this presumption. For that purpose, it would be necessary for the defendants, firstly, to enter the witness box and to lead evidence to establish that in that particular case, the breach of contract to transfer Immovable property can be adequately relieved by compensation in money. In the present case, the defendants have

not entered the witness box and have not led any evidence to rebut the presumption. In so far as the judgment of the Gujarat High Court in Dave Ramshankar's case relied on by the learned Counsel for the appellants is concerned, the facts of that case have been considered in detailed by the learned Single Judge in his judgment impugned in this appeal and has held that the observations have been made in the peculiar facts of that case. Perusal of the judgment of the Gujarat High Court in the above referred case further shows that in that case the plaintiff was seeking specific performance of the agreement for reconveyance only for the purpose of selling the property for earning profits. It is further to be seen here that in that case, the defendant had led evidence to show that hardship would be caused to the defendant if the agreement of sale is specifically enforced. Perusal of provisions of section 20 of the Specific Relief Act shows that the Court can refuse to exercise its discretion in favour of granting decree of specific performance, if it comes to the conclusion that the plaintiff would get unfair advantage over the defendant by granting specific performance. But for that purpose also the defendant would have to establish this fact. In the present case, the defendants have not led any evidence whatsoever and therefore, in our opinion, the learned Single Judge rightly exercised the discretion and granted specific performance of the contract. It is further to be seen here that to grant specific performance of contract is in the discretion of the Court and once that discretion is exercised by the learned Single Judge of this Court, a Division Bench of this Court in exercise of jurisdiction under the Letters Patent would not be entitled to interfere with that discretion, unless it is shown that the exercise of discretion is either arbitrary or capricious.

6. We find that in the facts and circumstances of this case, the learned Single Judge was perfectly justified in exercising his discretion in favour of the plaintiffs and granting specific performance of contract. We further find that due to failure of the defendants to lead any evidence to discharge the onus of proof that lay upon them, the learned Single Judge had no option but to exercise the discretion in favour of the plaintiffs.

7. In the result, therefore, the appeal fails and is dismissed with costs.

8. Appeal dismissed.