

(2009) 08 BOM CK 0114

In the Bombay High Court

Case No : Second Appeal No's. 196 and 197 of 1997

Sau. Subhadrabai Bhanudas Gadhave and Bhanudas Arjun
Gadhave

APPELLANT

Vs

Dagduba Salve, Kesharbai Namdeo Kakde and Mandabai
Namdeo Kakde

RESPONDENT

Date of Decision : 29-08-2009

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : (2010) 5 BomCR 397

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.L. Deshpande, for the Appellant; U.S. Dahat, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—These two appeals can be decided by a common judgment since they have been preferred against the common judgment delivered by the District Judge.

2. Two suits namely; Civil Suit No. 532 of 1992 filed by the respondents herein and Civil Suit No. 1 of 1993 filed by the appellants herein were heard and decided together. These appeals have been preferred by the defendants in Civil Suit No. 532 of 1992 and the plaintiffs in Civil Suit No. 1/1993. The parties shall hereinafter be referred to as the plaintiffs and the defendants, who were plaintiffs and the defendants in Civil Suit No. 1 of 1993.

3. The facts are as follows The respondents instituted Civil suit No. 532 of 1992 for possession and declaration. Respondents are the owner of gat No. 286, admeasuring 2 hectares 62 ares. It is alleged that deceased Ranu had taken a loan from the present appellants in the year 1990 when Ranu's wife died. It is alleged that they were in need of money for meeting the funeral expenses. The appellant No. 2 Bhanudas i.e. original defendant No. 2 in the suit is a money

lender. He agreed to lend money on the condition that an agreement of sale be executed in his favour and he be put in possession of the suit property. The respondents contended in their suit that they executed such a document and defendants had in fact agreed to redeliver the possession and tear off agreement of sale upon repayment. The respondents tried to repay the amount but there was no response from appellant Bhanudas. Hence, they instituted a suit for declaration and possession. The said suit was resisted by the appellants. They contended that Ranu had in fact agreed to sell suit property to him and he had paid consideration of Rs. 9000/to Ranu and agreed to pay balance of the consideration of Rs. 4000/at the time of execution of the sale deed. It is their contention that Ranu had delivered possession to them but was avoiding to execute the sale deed.

4. Bhanudas later instituted a Civil Suit No. 1 of 1993 claiming specific performance of contract of the agreement of sale and claimed that he had paid entire consideration and defendants were avoiding execution of sale deed.

5. The defendants therein i.e. the present respondents resisted that suit on the ground that they had not agreed to sell the field and had obtained loan of Rs. 1200/only.

6. The learned judge of the trial court while deciding the suit by a common judgment held that there was no agreement of sale between the parties. It was a loan transaction and plaintiff Ranu was entitled to delivery of possession. He dismissed the suit for specific performance of contract filed by the present appellants. Feeling aggrieved thereby, the present respondents preferred two appeals before the District judge; one against dismissal of their suit for specific performance and second against the decree passed against them to deliver the possession to Ranu in Civil suit No. 532 of 1992. Both the appeals were heard by the learned District Judge together. The learned District Judge found that there was an agreement of sale between the parties and possession was delivered under an agreement of sale. However, the learned District Judge found that Bhanudas and Subhadrabai were not willing and ready to take the sale deed and perform their part of contract. Holding so, he dismissed both the appeals. Feeling aggrieved thereby, these appeals have been preferred by Bhanudas and his wife Subhadrabai ? the plaintiffs in Civil Suit No. 1 of 1993.

7. Both appeals were admitted on the following substantial questions of law.

B. Whether the learned judge of the first appellate court was correct in dismissing the appeal filed by the appellants/plaintiffs in view of the admitted fact that the appellants had paid the entire consideration to respondents and it was for the respondents to execute the sale deed in which they had failed and in view of this the learned judge of the first appellate court ought to have decreed the suit filed by the appellants/plaintiffs?

C. Whether the learned judge of the lower appellate court erred in holding that the appellant No. 2 did not prove that he was ready and willing to perform his

party of the contract especially in light of the fact that the appellant No. 2 had deposited and/or paid the entire consideration agreed under the Agreement of sale to respondents and there was nothing left to be done on the part of the present appellants/plaintiffs?

8. I have heard the learned Counsel for the parties.

9. The appellate court disagreeing with the trial court held that the transaction in suit was not one of loan but was a genuine transaction of agreement of sale. He, however, found that the plaintiff/appellant was not entitled to decree for specific performance of contract as plaintiff was not ready and willing to perform his part of the contract.

10. Necessarily, therefore, the answer to the questions depends upon the discretion to be used and readiness and willingness to perform the part of the contract by the plaintiffs in Civil Suit No. 1 of 1993 i.e. the appellants. Section 16(c) of the Specific Relief Act reads as follows

16(a)....

16(b)....

16(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation ? For the purposes of Clause (c),

(i) Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The plaintiff has to aver and prove either of the two things. One; that he has performed his part of the contract or two; that he has always been ready and willing to perform his part of the contract if he has not performed part of it.

11. The necessity to go into the second contingency would arise only if the first contingency is not fulfilled. In the instant case, pleadings in civil suit No. 1 of 1993 if seen, they make it clear that the price was settled at Rs. 15000/and Rs.9000/were paid on the date of agreement i.e. 1/3/1990. It is the case of the plaintiff further that although the balance of consideration was agreed to be paid on 1/3/1991, he paid Rs. 2000/to defendant No. 1 Dagaduba s/o Ranu at the say of Ranu, and Dagaduba signed the agreement in token of having received Rs. 2000/. Next, it is the case of the plaintiff that on 1/3/1991 deceased Ranu and defendant No. 1 Dagaduba came to his house and told that they were going out due to some urgency and would be back on 4/3/1991 and would execute the saledeed. It is also pleaded that on 4/3/1991 Ranu came at 1.00 p.m. and said

that it was now too late and he would execute the sale deed next day. The plaintiff avers that on same day i.e. on 4/3/1991 deceased Ranu demanded another Rs. 4000/and that sum was also paid and acknowledgment obtained on Isarpavati. Obviously, the plaintiff avers that he has paid entire consideration and nothing remains to be paid and therefore, he is not supposed to perform any further thing in pursuance to the contract. The learned Counsel for the appellant submits that once it is pleaded and proved that all consideration was paid and nothing remains to be done, there was no need to plead and prove the readiness and willingness. He submits that readiness becomes evident when it is alleged and proved that all that is required to be done was already done. There may not be in such circumstances a need to plead further readiness and willingness. But in the instant case, the readiness and willingness has to be determined on the basis of attending circumstances, particularly when defendant disputes having received the entire consideration. If it is possible to draw the conclusion that the plaintiff has not actually paid the entire consideration as alleged necessarily it will have to be said that there is no readiness and willingness. This is so because the plaintiff does not say that if for any reason the court comes to conclusion that all amount is not paid the plaintiff is ready to pay any further amount that the court may direct.

12. This takes me to consider the evidence with regard to the payment made under the agreement of sale. It is the case of the plaintiff that he had paid Rs. 9000/on the date of agreement and then Rs. 2000/on 13/12/1990 and further Rs. 4000/on 11 4/3/1991. The defendant pleads that his father Ranu had taken Rs.1200/only. Even during the course of his evidence PW.1 Dagaduba states that he had received Rs. 1200/. PW 1 Dagaduba, however, admits his signature on agreement (Exh.45) at two places. The agreement recites of payment of Rs. 9000/on 1/3/1990 and then there is another endorsement of receipt of Rs.2000/ on 13/12/1990. Since PW 1 Dagaduba admits his signature, it must be held that he admits receipt of Rs. 9000/and Rs.2000/. However, as far as the second endorsement dated 4/3/1991 is concerned, that does not bear signature of Dagaduba or his father Ranu or even thumb impression of Ranu. A very strange explanation is tried to be offered by D.W.1 and 2 that thumb impression of Ranu was not obtained as stamp pad was not available. If stamp pad was not available, the plaintiff could have obtained signature of Dagaduba on 4/3/1991 just as his signature was obtained on 13/12/1990. DW 1 admits presence of Dagaduba on 4/3/1991. DW 1 says that the endorsement is written in ink pen. If ink pen was available, there was no difficulty in applying ink to the thumb. The explanation as offered is not pleaded and therefore, that evidence in fact needs to be rejected. There is neither signature of defendant No. 1 on second endorsement dated 4/3/1991 nor there is thumb impression of Ranu. Therefore, only conclusion that can be drawn is that such an endorsement is totally false and fabricated one and no amount seems to have been paid to Ranu or Dagaduba on that date.

13. Further, plaintiff does not appear to be acting fairly. Even though the transaction in suit is merely an agreement of sale, he got his wife's name

mutated in the revenue record in connivance with the Patwari treating the agreement as sale deed. Making a false endorsement of payment of Rs. 4000 on the agreement of sale and getting the name mutated surreptitiously, clearly go to show that the plaintiff has not acted fairly. The relief of Specific Performance is an equitable and discretionary relief. In view of the above conduct, it seems to me that the learned District Judge has rightly used his discretion in not decreeing the specific performance. The plaintiff wants to have a decree without paying the entire consideration and does not show readiness.

14. Mr. Deshpande, learned Counsel for the appellants, contends that when more than two third amount is paid by plaintiff, it should be assumed that he was ready and willing to perform his part of the contract. He submits that there is evidence available of payment of Rs. 11000/, hence, readiness and willingness should be assumed. He relied on a decision of the Supreme Court in *Motilal Jain Vs. Smt. Ramdasi Devi and Others*, . The Supreme Court observes as follows:

10. In the instant case a perusal of paras 6 to 11 of the plaint does clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. It was stated that he demanded the defendant to receive the balance of consideration of Rs. 8000/ and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place the plaintiff filed the suit against him. In support of his case, he adduced the evidence of PW 1 and PW 2. The plaintiff had parted with two thirds of the consideration at the time of execution of Ext.2. There is no reason why he would not pay the balance of one third consideration of Rs. 8000/ to have the property conveyed in his favour.

15. In the reported case, the plaintiff had offered to pay the balance of the amount and court found that there was no reason why plaintiff would not pay the balance. In the case at hand, the plaintiff tries to make out the case of payment of all consideration but fails and does not plead and prove that he is ready to pay Rs. 4000/ further. In the circumstances, the decision has no bearing on the case at hand.

16. The learned judge of the first appellate court rightly found that the plaintiff was not ready and willing, and rightly did not use the discretion in his favour for his unfair acts. The substantial questions of law, as are framed, are answered accordingly. There is no substance in the appeals. They are dismissed with costs. Heard learned Counsel for the appellants. The appeals have been dismissed and the decree passed by the courts below is confirmed. He submits that the appellants have been in possession of the property for quite long time and intend to prefer Special Leave before the Supreme Court. In view of this, the execution of the decree is stayed for a period of two months.