

(2013) 08 BOM CK 0088
In the Bombay High Court
Case No : First Appeal No. 22 of 2013

Sebastiana Escolastica Beatriz Nunes Mendonca Alias Beartiz Mendonca APPELLANT

Vs

M/s. Ravalnath Builders RESPONDENT

Date of Decision : 01-08-2013

Acts Referred:

Citation : (2013) 5 ABR 703 : (2013) 6 ALLMR 783 : (2014) 1 BomCR 196 : (2014) 4 MhLj 476

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : M.B. Da Costa and Ms. K. Betquekar, for the Appellant; A. Kantak, for the Respondent

Judgement

R.C. Chavan, J.—This appeal questions judgment of the learned Additional Senior Civil Judge, Panaji dismissing the appellant's/plaintiff's Special Civil Suit No. 20/2005 for declaration and specific performance of agreement dated 18/09/1995 and payment of about Rs. 35 lacs. The plaintiff had also sought various injunctive reliefs. The appellant is now a 95 years old lady, who exclusively owned property bearing Survey No. 2/1 and 292/1. In respect of these properties, she entered into the agreement with the respondent/defendant, a builder, on 18/09/1995 for development of the property. The defendant was to pay a sum of Rs. 35,35,000/- towards consideration in addition to providing a 100 square meters three bedroom flat with a garage on plot No. 2/1. Since the defendant paid some amounts to the plaintiff but did not pay the balance of amount from time to time and also did not place the plaintiff in possession of the flat, the plaintiff sent a notice to the defendant on 9/09/2003 pointing out that till then only a sum of Rs. 7 lacs had been paid to the plaintiff. This notice was replied on 13/10/2003 whereby the defendant claimed to have paid a sum of Rs. 10 lacs. In the reply, details of cheques issued were given and two of those cheques were issued in the name of plaintiff's son Mario. It was also stated that the possession of the flat and garage was delivered on 31/01/2002 itself. The

defendant had also claimed to have renovated the plaintiff's house at a substantial cost of Rs. 25,66,355/-. After receiving this reply, the plaintiff filed the said suit.

2. In the written statement filed on behalf of the defendant, the defendant took same pleas which had been taken in the notice namely that possession of the flat as well as garage had been already delivered on 31/01/2002 and that the balance of consideration was adjusted towards renovation of the plaintiff's old house. In the written statement, it was claimed that a sum of Rs. 30,22,990.87/- had been spent on the renovation of the plaintiff's old house. It was also stated that there was a subsequent agreement dated 20/03/1996 whereby the earlier agreement dated 18/09/1995 was modified. Under the new agreement the plaintiff was to get a 150 square meters flat in place of a 100 square meters flat. The agreement also recorded that the plaintiff had authorised the defendant to appropriate balance of consideration towards repairs and renovation and reconstruction of plaintiff's residential house. The defendant, therefore, prayed for dismissal of the suit.

3. On these pleadings, the learned trial Judge framed the necessary issues. After considering the evidence tendered before her, the learned Judge held that the plaintiff did not prove that the defendant had failed to fulfill the defendant's part of agreement of sale dated 18/09/1995 or that the defendant was liable to pay balance of consideration of Rs. 28,35,000/- with interest or that the defendant had failed to deliver possession of the flat and garage as agreed, or that the sale deeds were null and void. The learned Judge also held that the defendant had proved payment and adjustment of total consideration and compliance of his part of the agreement. Aggrieved thereby, the plaintiff has preferred this appeal.

4. I have heard the learned Senior Counsel appearing for the plaintiff and the learned Counsel for the respondent/defendant. With the help of both, I have gone through the evidence on record. The only point for my determination is whether the learned trial Judge was in error in holding that plaintiff did not prove that defendant had not performed his part of the contract. The learned Senior Counsel for the appellant submitted that the learned trial Judge seems to have been considerably influenced by the fact that the plaintiff had not stepped into the witness box and, therefore, relying on a judgment of the Supreme Court in the case of Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, , the learned Judge held against the plaintiff and in favour of the defendant. The learned Senior Counsel for the appellant submitted that the plaintiff is quite old. She is hard of hearing and, therefore, inspite of several attempts she could not at all be examined. Therefore, he submitted that it could not have been held by the learned trial Judge that the plaintiff had kept herself from entering the witness box or that holder of her power of attorney was not competent to depose.

5. This argument is indeed persuasive. But, because of the performance of the holder of power of attorney of the plaintiff i.e. Mr. Savio Nunes, in the witness

box no fault can be found with the conclusions drawn by the learned Judge. Savio admitted to his lack of knowledge about almost everything in respect of which he sought to depose on behalf of the plaintiff. His evidence is therefore utterly useless in coming to any conclusion about the transaction that took place between the parties. No other witness was examined on behalf of the plaintiff. Therefore, in the face of this type of evidence tendered, it would be difficult to hold that the trial Judge was not right in holding against the plaintiff.

6. Even so, the learned Senior Counsel for the appellant submitted that in civil matters it is not only oral evidence which is decisive. He pointed out that there was enough evidence on record to show that the defendant was coming up with false and fabricated case. He pointed out that the agreement dated 18/09/1995 ran into 11 pages and the signatures of the plaintiff and others were to be found on the 11th page. DW 1/Rajesh Harmalkar had admitted in his cross-examination recorded on 15/07/2010 that two prints of the agreement had been taken out from the computer. The learned Senior Counsel submitted that a bare look at the agreement dated 20/03/1996 which runs into two pages would show that page 11 of the earlier agreement, copy whereof has been prepared, was used for being stapled as page No. 2 of the agreement dated 20/03/1996. This is indeed clear to naked eye and one can make out that the page No. 11 at the top of the page has been obliterated by applying whitener and no plausible explanation has been furnished by the defendant. Even so, the fact remains that the plaintiff did not cause this agreement to be referred for expert examination in order to establish that a false and fabricated document was sought to be placed before the Court.

7. The learned Senior Counsel for the appellant pointed out that this agreement was possibly fabricated subsequently, as could be seen from the fact that there is no reference to this agreement in the notice dated 13/10/2003, which was sent by the respondent's Advocate in reply to the plaintiff's notice dated 9/09/2003. The learned counsel rightly submitted that had there been such an agreement on 20/03/1996, it would have definitely been referred to by the Advocate in the reply dated 13/10/2003. He submitted that the defendant had come up with the case in the written statement that a sum of Rs. 30,22,990.87/- had been spent on the renovation of old house of the plaintiff. But curiously, there is no reference to this sum in the notice dated 13/10/2003. Therefore, according to him, the learned trial Judge should not have relied on the subsequent agreement dated 20/03/1996.

8. Though the agreement dated 20/03/1996 may have been prepared by stapling signed copy of page No. 11 of the earlier agreement to the new agreement, this in itself cannot result in rejection of the defendant's case, about his having spent huge sum on the renovation of the plaintiff's old house because there are several bills about renovation, which bear the initials of the plaintiff as well as her son, as having accepted the amounts in the bills. One such bill is at Exhibit 112 which shows that the sum of Rs. 5,74,521.20/- was spent. It bears the

initials B.M. and signature of Mario Mendonca, plaintiff's son, about an inch below the word "accepted". In between there is also amount mentioned in words in parenthesis. The learned Senior Counsel for the appellant wondered as to why such interpolation should have occurred. After going through the originals, of the bills, as rightly accepted by the learned Counsel for the respondent, it appears that there is no interpolation and the amount in words has been written by a civil engineer, possibly in the year 2003, when he checked the bills, because there was a doubt expressed by Mario's son. In fact, if this is taken to be an interpolation, it itself would point to the genuineness of the initials "B.M." on the document, because, had the defendant wanted to fabricate the document, he could have as well arranged to have the initials placed below the amount in words. No attempt was made by the plaintiff to have these documents sent to handwriting expert to check whether the plaintiff had in fact signed those documents or not. Now, if the plaintiff did sign those bills, it would be apparent that she accepted that some amount was to be spent by the respondent on the renovation of her house. Therefore, the contentions of the appellant in this behalf cannot be accepted. In spite of suspicious nature of the document dated 20/03/1996, these subsequent bills lend credence to the story of agreement being reached between the parties about payment of the cost of repairs being adjusted against the balance of consideration by the defendant.

9. The learned Senior Counsel for the appellant further submitted that if the entire balance of consideration was thus adjusted towards the costs of renovation in 1996, there would have been no occasion for the defendant to pay any further amount to the plaintiff or her son by cheques, as has been shown to have been done in the notice dated 13/10/2003. The defendant was cross-examined on this and in his cross-examination on 17/08/2010 could not explain as to why he was required to pay these amounts subsequent to the agreement dated 20/03/1996. The learned Senior Counsel therefore submitted that this payment would rule out that there was any agreement on 20/03/1996. As already pointed out, may be the agreement is not free from suspicion, all the same, the fact remains that the plaintiff had either authorised or at least agreed to the expenditure incurred on the renovation of her house by signing the bills which have been produced and proved by the defendant. Therefore, it would not be open to the plaintiff to contend that she is yet to receive the balance of consideration from the defendant.

10. The learned Senior Counsel for the appellant submitted that while the property which had been given for development to the defendant was exclusively owned by the plaintiff, the house which was renovated belonged to the plaintiff and her son. Therefore, according to him, even if some amount was spent on renovation of the house by the defendant, the plaintiff's share would come to half of the amount spent and therefore the other half was precisely due and payable to the plaintiff. This argument too could have been accepted had some stranger been the owner of the property along with the plaintiff. It was plaintiff's own son who was the co-owner of the property and the plaintiff and her son has

together signed the bills. Therefore, the defendant, as a stranger to the family, would have no business to know as to what were the type of relations between the plaintiff and her son. DW 1, holder of power of attorney of plaintiff however clarifies that the plaintiff's relations with her son till he died in December, 2002 were good. Therefore, if the relations of the plaintiff with her son were good and if the plaintiff along with her son signed the bills about renovation, the plaintiff cannot now claim that she had not authorized those repairs or renovation or that she is not ready to foot the entire bill or that her son should equally contribute towards the renovation. If she has any grievance in this behalf, she could have raised it with her son. It appears from the evidence that the plaintiff left the family house the day after her son died. Therefore, as far as the balance of consideration is concerned, it has been duly utilised for renovation of the family house and if plaintiff has any differences with her daughter-in-law they have to be sorted out by the family. Therefore, the defendant developer could not be held responsible.

11. The learned Senior Counsel for the appellant submitted that even according to the fictitious agreement dated 20/03/1996, the plaintiff was to be placed in possession of 150 square meters flat and that there is nothing to show that the plaintiff was in fact placed in possession of such a flat. Therefore, at least to that extent, there is a breach of the agreement between the parties. The learned counsel for the respondent pointed out that the defendant had in specific words stated in the written statement that the plaintiff had been placed in possession of the flat on 31/01/2002 itself, before the development agreement sale deed was executed in favour of the defendant-developer. He submitted that this claim in the written statement has been duly proved by the evidence of the defendant who categorically stated that the possession was delivered to the plaintiff. Against this, is the evidence of plaintiff's attorney, who stated that he was not personally aware as to what happened on 31/01/2002. He also stated that he did not know whether the possession of flat No. B/F4 was with the daughter-in-law and grandson of the plaintiff. It was necessary for the attorney of the plaintiff to ascertain facts and then come to the Court and specifically state that the possession of the flat was not with the plaintiff's family members or was still with the defendant. This could have helped the plaintiff in proving that the possession of flat was not I delivered to the plaintiff. If the plaintiff and her son were living together in the family house and if the relations were not strained on 31/01/2002, it is not improbable that the possession could have been taken by the plaintiff's son and upon the demise of plaintiff's son it remained with the plaintiff's daughter-in-law. Since the learned Counsel for the respondent states that the respondent is decidedly not in possession of the property and that the possession has been given to the plaintiff, as also, that the property is recorded in the village panchayat in the name of the plaintiff, it would be for the plaintiff to retrieve possession from the occupant of the flat by proper procedure. Principally, because the plaintiff failed to enter the witness box and instead sent her attorney, who had absolutely no knowledge about the dispute, the word of the

defendant on oath has to be believed inspite of the deficiencies which have been referred to in the foregoing discussion. In view of this, no fault can be found with the findings recorded by the learned trial Judge. The appeal is consequently dismissed.