(1992) 09 BOM CK 0002

In the Bombay High Court

Case No : First Appeal No. 967 of 1984

Seema Marutrao Devakar and Others APPELLANT

Vs

Shalan Purushottam Joshi and Others RESPONDENT

Date of Decision : 17-09-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2
Specific Relief Act, 1963 — Section 10, 14

Citation : (1993) 1 BomCR 369

Hon'ble Judges : S.M. Daud, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Dilip B. Bhonsale, for the Appellant; C.R. Dalvi, for the Respondent

Final Decision : Allowed

Judgement

S.M. Daud, J.—This is plaintiffs'' appeal taking exception to the refusal of the trial Court to grant unto them a decree for specific performance vide agreement dated 13-12-1979 marked Exhibit 27.

2. Appellants 1 and 2 are the wife and younger brother of Marutrao Devkar. Respondents-defendants 1 to 4 (Joshis) are the widow and children respectively of Purushottam Joshi. Respondents 5 to 7 are the tenants on the upper storeys of a three-storeyed house bearing City Survey No. 471/B, Narayan Peth, Pune. The said house originally belonged to Purushottam Joshi and came by inheritance after his death to the Joshis. The rent paid by defendants 5 to 7 is a meagre sum, not exceeding Rs. 200/- per month. Plaintiff No. 3 (Wadekar) is a real-estate broker doing business in the name and style of Wadekar Enterprises at Deccan Gymkhana, Pune. In the year 1979, defendant No. 4 Sheela was a spinster though of marriageable age. On 13-12-1979, Joshis executed Exhibit 27 in favour of plaintiff Nos. 1 and 2 (Devkars). This document recited an agreement to sell the suit house to the Devkars for a total consideration of Rs. 1,02,500/-, the receipt of Rs. 10,500/- as earnest money, the readiness and willingness of the executants of the document to execute a proper sale deed on

receipt of the balance consideration, the time for that purpose being six months and lastly the executants, not having entered into any previous commitment with other vis-a-vis the house, etc., etc. On 13th June 1980, an endorsement was made at the foot of Exhibit 27 regarding an extension of the time by 15 months i.e. on or before 13th September 1981. On 12-5-1981, the Devkars through their advocate addressed a notice to the Joshis which notice is at Exhibit. A reference was made in this notice to the events ending with the extension of the time within which the contract was to be performed and further averring that despite repeated requests by the Devkars, the Joshis had not done the needful viz., obtaining permission of the Competent Authority under the Urban land (Ceiling & Regulation) Act and that this lapse was coming in the way of the performance of the agreement. Those written to were requested to obtain the requisite permission and intimate the same to the Devkars who had ceased to believe any longer in the shallow promises of the Joshis. The notice ended with a call upon the Joshis to obtain the requisite permission and complete the transaction in favour of the Devkars or a person to be nominated by them. Incidentally, Exhibit 27 itself provides that the Joshis were under an obligation to sell the house to the Devkars or any nominee to be designated by them. Exhibit 30 was replied by advocate P.A. Joshi on behalf of the Joshis. The reply found fault with some minor details in the notice which was given at the instance of the Devkars. It was made clear in the reply that advocate Joshi''s clients would do what was necessary to obtain the permission from the Competent Authority but, that this required the co-operation of the Devkars, without which co-operation, it would be possible neither to obtain the required sanction nor pass a sale deed. The reference to the shallow promises was repudiated as a falsehood not acceptable to the Joshis. The last date for the performance of the agreement was 13-9-1981. It came and went, and on 16-9-1981, the Devkars together with Wadekar filed the suit wherefrom this appeal arises.

3. The plaintiffs i.e. Devkars and Wadekar set out a summary of Exhibit 27, the extension of the period within which the sale deed was to be passed, their readiness to perform their obligations under the agreement and the avoidance of the Joshis to have the agreement performed. Wadekar was not a party to the transaction under Exhibit 27 and his joinder as a plaintiff was explained in the plaint in these words :

"Plaintiffs 1 to 2 have agreed with plaintiff No. 3 to purchase the suit property in common and as such the plaintiff No. 3 is joined in the suit and the defendants 1 to 4 are bound to execute the sale deed in favour of the plaintiffs."

A decree for specific performance was solicited. It has been averred in the plaint that the plaintiffs were ever ready and willing to perform their obligations under the agreement. Blame was attributed to the Joshis for the agreement''s not having been performed Prayer (a) of the plaint recites :

"The defendants 1 to 4 may be ordered to execute the sale deed of the suit property ----- in favour of the plaintiffs for the amount of Rs. 1,02,500/- by receiving the rest of the amount of Rs. 92,000/- from the plaintiffs and the plaintiffs are ready and willing to deposit the said amount in the Court as will be directed by the Honourable Court."

The Joshis in their written statement took the stand that Exhibit 27 was a cloak to conceal a money-lending transaction. They were in need of money for the performance of the marriage of Sheela. Much before 1979 Sheela had attained the marriageable age. Respondent No. 1 as the eldest from amongst the respondents 1 to 4 (the Joshis), did not have sufficient funds to get Sheela married to Gajanan Viswanath Ghaisas. The sum required by respondent No. 1 was in the vicinity of Rs. 15,000/- to Rs. 20,000/-. Wadekar was an acquaintance of respondent No. 1 and when approached by respondent No. 1, gave an assurance that he would make the necessary arrangements to enable her to get a loan. Wadekar introduced the Devkars to respondent No. 1 and the Devakars agreed to advance the money to the Joshis at an exorbitant rate of interest. The Devkars did not have a money-lending licence and they persuaded the Joshis to pass a nominal agreement to sell the suit house unto them. The price to be shown in the agreement was also nominal. The resultant agreement which is at Exhibit 27 was not to be acted upon. The Devkars gave a loan of Rs. 5,500/- by cheque and Rs. 3,610/- in cash, deducting in advance from the sum to be loaned, an amount of Rs. 1,890/- representing interest for a period of 12 months. The agreement was that at the end of the 12 months'' period, the Joshis would repay a sum of Rs. 19,500/- to Devkars. Sheela''s marriage took place on 21-2-1981. From the very beginning the parties to Exhibit 27 were clear in their minds that the document was nominal and not to be acted upon. The Joshis had inherited the suit house and had got a deep-seated sentimental attachment to it. The house was a large one and the price mentioned in Exhibit 27 was far less than what the house would fetch in the open market. In fact, on 13-12-1979 itself the price of the house was more than Rs. 3,00,000/-. All the terms in Exhibit 27 tilted in favour of the vendees. A document so one-sided could not be enforced in law. The Joshis would be rendered homeless if a decree for specific performance was passed. The relief of specific performance is a discretionary one and could not lead to one-sided disaster. The Joshis were ready and willing to return the amount borrowed with such interest as the Court deemed fit and proper.

4. Pleadings summarised above gave rise to the requisite issues. The four witnesses examined at the trial were plaintiff No. 1 Seema Devkar, plaintiff No. 3 Wadekar, defendant No. 1 Shalan Joshi and Charudatt Narhar Sirpotdar---the last named person being an attestant to Exhibit 27. In the course of the trial before the learned Civil Judge, certain documents had been filed by the plaintiffs. One of them was the original of Exhibit 41. A photo-copy of the agreement was obtained by the Joshis and the said photo-copy is at Exhibit 41. It purports to bear the signatures of the Devkars and Wadekar. Briefly stated, Exhibit 41 recites that the Devkars had on 7th February 1981 found themselves hard-pressed for finance and that, that had compelled them to take in Wadekar as a co-beneficiary to

Exhibit 27. The in-coming Wadekar was said to have paid them a sum of Rs. 9,000/- through a cheque drawn upon the Bank of Baroda. Wadekar was to pay half the price for the acquisition of the house, the other half to be borne by the Devkars. At a later stage, the original of Exhibit 41 was withdrawn and the original''s existence became the subject matter of a heated controversy, and this, while defendant No. 1 Shalan Joshi was in the witness-box. Shalan Joshi claimed that she could identify the signatures of Devkars and Wadekar on Exhibit 41. The suggestion made by the cross-examine Counsel was that she could not do so and that Exhibit 41 itself was a spurious document. What is important is the fact that no attempt was made to get back the Devkars or Wadekar into the witness-box for a clarification on the subject to substantiate the insinuated spuriousness of Exhibit 41.

5. The learned Civil Judge held that Exhibit 27 was what it ostensibly purported to be, viz., an agreement to sell and purchase the suit house on the terms and conditions set out therein. Next, he held that the Devkars had failed to establish that they were ready and willing to perform their obligations under Exhibit 27. His inference on the basis of certain answers given by Wadekar in the witness-box, coupled with the evidence relating to Exhibit 41, was, that the Devkars were never sincere nor in a position to purchase the suit property. Wadekar had given answers indicating his reservations about the sale deed to be passed by the Joshis in his name. Therefore, the learned Civil Judge passed a decree for refund of the earnest money together with interest at the rate of 18% per annum to be reckoned from 13th December 1979 till the payment was made. Costs in proportion to this relief were allowed to the plaintiffs and the claim for specific performance was dismissed. The Joshis were left to bear their own costs.

6. After the judgment of the learned Civil Judge, the Joshis are said to have remitted the money part of the decree passed against them through a cheque to the Devkars and possibly to Wadekar. The plaintiffs declined to accept the cheque and instead preferred the instant appeal. They contend that the trial Court was in error in refusing unto them the relief of specific performance. They had established their being ever ready and willing to perform their obligations under Exhibit 27. It was the Joshis who had failed and, therefore, they should not have been given the benefit of being absolved of the liability to perform the agreement. The Joshis raise the same defences as they did at the trial.

7. The points arising for determination are :

(1) Did the defendants---Joshis establish that Exhibit 27 was a nominal document drawn up with a view to ensure the repayment of a loan borrowed by them from the plaintiffs?

(2) Did the plaintiffs prove their readiness and willingness to perform their obligations under Exhibit 27?

(3) Whether there existed any reasons for refusing the relief of specific performance unto the plaintiffs?

(4) What order ?

8. Our findings, for reasons given below, are :

(1) No.

(2) Yes.

(3) No.

(4) Appeal allowed as per order.

9. Reasons :

The learned Civil Judge does not seem to have realised the incongruity of the conflicting findings recorded by him. On the one hand, he negatived the defence of the Joshis about Exhibit 27 being a cloak to cover up a loan transaction and yet inconsistently enough he held that the Devkars and Wadekar were not sincere in performing their obligations under Exhibit 27. Be that as it may, we have first to see whether the trial Court''s finding on the ostensible language of Exhibit 27 representing the real nature of the transaction, is correct or otherwise. Mr. Dalvi for the Joshis contended that the very terms of Exhibit 27 indicate that it cloaked a money-lending transaction. The only evidence in support of this plea of the Joshis is the bare word of defendant No. 1 and attestant Charudatt Sirpotdar. Neither witness can inspire confidence. Defendant No. 1 has chosen to deny the contents in a register written by her in her own hand-writing maintained by Wadekar. Wadekar''s testimony is to the effect that defendant No. 1 had commissioned him to find out a small flat or flat-let for her within the price range of Rs. 70,000/- to which accommodation she intended to move, after the disposal of the suit house. Defendant No. 1 admits that Wadekar had been approached by her even before the execution of Exhibit 27. She says that the visit of Wadekar was in the company of her sister who wanted to purchase a small accomodation for herself. She admits that Wadekar put forth a register in which came to be recorded the purpose of the visit made. If the commission given to Wadekar was by defendant No. 1''s sister, that lady would not have signed the name of defendant No. 1 to the contents showing the engagement of Wadekar to be for finding out a residential accomodation for defendant No. 1. Assuming that such a thing could be done, nothing stopped the Joshis from examining defendant No. 1''s sister. When questioned on the subject, defendant No. 1 came out with a flat denial of any intention to get her sister into the witness-box. But apart from this, the best refutation to the stand taken by the Joshis in their written statement is the answer given to Exhibit 30 i.e. the notice given on behalf of the Devkars. In the reply, which is at Exhibit 31, it was not alleged that Exhibit 27 cloaked a money-lending transaction and that the Devkars were being dishonest in claiming specific performance. Defendant No. 1 says that the contents of Exhibit 31 were drafted by advocate P.A. Joshi wrongly, though she cannot explain why advocate P.A. Joshi should have departed from instructions given to him by her. She claims to have pointed out the error to

Advocate Joshi as soon as she was made aware of the contents of Exhibit 31. And even so, we are asked to believe that the incorrectly recorded reply at Exhibit 31, was sent to the advocate who had addressed the notice on behalf of Devkars. Advocate P.A. Joshi was not examined and defendant No. 1 made it clear that she had no intention to get him into the witness-box. Mr. Dalvi says that there are intrinsic circumstances pointing to Exhibit 27''s cloaking a transaction of loan. Firstly, there was no recital in the agreement about delivery of possession by the vendors to the vendees. But delivery of such possession is an implied term in any agreement to sell. We agree that in the mofussil documents are written with great precision and an agreement to sell would normally make an express mention of the vendors'' liability to place the vendees in possession. But it does not appear that Exhibit 27 was scribed by a professional in the business of bond-writing. Next, Mr. Dalvi refers to the admission of Seema Devkar about her husband being in the business of advancing money on pledges. But there is no irrefutable presumption that pawn-brokers cannot enter into genuine transactions to purchase property or that every document in relation to real estate to which they are parties, whether personally or through nominees, is a device to cloak money-lending transactions. Mr. Dalvi invites us to appraise the assertion of Seema Devkar that she and her family were in dire need of a house of their own and yet entering into a transaction with Wadekar to enable the latter to share part of gains made by them under Exhibit 27. Now, it is not that people are always flush with funds. Times and situations change. People once having ready money may find themselves in a difficult position because of a change in circumstances. Mr. Dalvi points to the clause in Exhibit 27 entitling the vendees to nominate a person in whose favour the vendors were to pass a sale deeds upon being so required by the vendees. This would not mean that the Devkars did not genuinely desire to purchase the property. Learned Counsel next refers to the absence of evidence to indicate that Devkars or Wadekar had made any real investigation into the transaction Exhibit 27 or even thereafter. Seema Devkar has testified that one advocate Marne had been directed to look into the title of the vendors. It is true that advocate Marne has not been examined and the result of his investigation has not been brought on record. But there was hardly anything much to investigate. The City Survey records showed the Joshis to be the owners of the property and recitals in Exhibit 27 itself were in the nature of an iron-clad guarantee that there was no infirmity in the title of the Joshis. Mr. Dalvi says that plaintiffs did not even issue a public notice proclaiming their desire to purchase the suit house and inviting objections as is normally done. We agree that in the mofussil, or, for that matter even in Bombay, such notices are a common precaution. But let it be clear that this is not a statutory requirement and that nothing much turns upon the response or absence of a response to such a public notice. As was to be expected, the Joshis have punched upon Exhibit 41 to indicate that there was no real desire on the part of Devkars to purchase the suit house. If we are going to look into Exhibit 41, justice demands that it should be looked into in its entirely. Exhibit 41 shows that on 7-2-1981 Devkars found themselves in a somewhat difficult position, which compelled them to go into a partnership with Wadekar. By no stretch of imagination, can Exhibit 41 be looked upon as an indication of Exhibit 27 cloaking a loan transaction. If Exhibit 41 were an innocent transaction so if regarded Wadekar and plaintiff''s advocate in the lower Court would not have put up such a vehement resistance against its admission. We agree that an unnecessary fuss was created in the matter of Exhibit 41. It was a photo-copy of a document which was filed at one stage by the plaintiffs and which was deemed to be inconvenient at a later stage, when it was removed from the record. By this time the Joshis had realised the significance of the original of Exhibit 41 and had got a photo-copy made thereof. Whatever the difficulty in believing defendant No. 1''s claim to have identified the signatures of the plaintiffs upon the photo-copy of the agreement dated 7-2-1981, what cannot be forgotten is the omission of Seema Devkar and Wadekar to go into the witness-box and give a straight denial of the signatures said to be theirs vis-a-vis Exhibit 41. But Exhibit 41 proves no more than what it purports to viz. an agreement between the Devkars on the one had and Wadekar on the other, to share the benefits of the transaction recorded in Exhibit 27. It was argued that if Exhibit 27 were genuine, there would have been some reference therein to the need to obtain the required sanction under the Urban Land Ceiling Act. No such recital appears in Exhibit 27. But even advocate Joshi''s reply at Exhibit 31 concedes that parties had agreed to move together for obtaining sanction under the Urban Land Ceiling Act. As a matter of fact, no such sanction was required. As against these minor tilts in favour of the Joshis, there are several circumstances confirming the genuineness of the recitals appearing in Exhibit 27. Firstly, sufficient time was given for the performance of the agreement, and, not satisfied with that, there was a further extension of nearly about 21/2 times the period initially agreed upon. Next, was the admission in Exhibit 31 about the genuineness of the agreement, Exhibit 27. Third, is an admitted fact brought out in Seema Devkar''s testimony that she and her brother-in-law, the 2nd plaintiffs, were to pay the expenses connected with the execution and registration of the sale deed. Fourthly, defendant No. 1 had instructed Wadekar to be on the look out for a small house for her. The suit house was agreed to be sold for a little over Rs. 1,00,000/-. Money was required to get Sheela married and the balance was to go into the acquisition of the smaller accommodation which was to be acquired with the aid of Wadekar. After the marriage of Sheela, the only persons left in the family were defendant Nos. 1 and 2. The suit house was not much of an investment, in that, the rent paid by defendant Nos. 5 to 7 was a meagre sum of less than Rs. 200/- per month. The Joshis are educated persons and they rightly thought that it would be prudent to get rid of a virtually extinct investment and get the cash value in hand. Defendant No. 1''s unsubstantiated word and the disinclination to examine defendant No. 1''s sister as also advocate Joshi strengthen the plaintiffs'' claim. For all these reasons, we confirm the finding of the trial Court that Exhibit 27 is a correct reflection of the consensus between the parties.

10. We now turn to the difficult question of the plaintiffs being ready and willing to perform their obligations under Exhibit 27. Seema Devkar has testified that she and her brother-in-law, plaintiff No. 2, were always ready and willing to perform their obligations under Exhibit 27. No exception was taken to this assertion of Seema Devkar. The notice at Exhibit 30 asserts the readiness of the Devkars to perform their obligations under Exhibit 27. There is nothing to show that after the Joshis sent their reply at Exhibit 31 showing their readiness to perform their obligations under the agreement, they did anything to honour the said commitment. Exhibit 41 has been used as a red herring to confuse the issue. It does not show that the Devkars, on the day on which the notice at Exhibit 30 was given, did not have the requisite funds to go in for the purchase of the suit house and it was not necessary for the Devkars to establish that personally they always had the financial capacity to pay the balance of the price payable under Exhibit 27. That document gave them a right to nominate a purchaser and it is no one''s case that they could not have found anyone ready and willing in the city of Pune to purchase the three storeyed structure for a little over Rs. 1,00,000/- in the year 1981. Having regard to the stand taken by the Joshis in their written statement, an inference has to be drawn that they had been avoiding to perform their obligations under Exhibit 27 and it was this which compelled the plaintiffs to rush to the Court within 3 days of the deadline stipulated in Exhibit 27.

11. The other contention put forth by Mr. Dalvi to dissuade us from granting specific performance is the alleged sentimental attachment of his clients to the suit house. It is contended that the Joshis have inherited the property from their predecessor purushottam and their sentiments about not parting with the suit house, should be respected. Mr. Dalvi says that the trial Court has, in exercise of its discretion, refused specific performance and we should not interfere with the verdict however strong our views about the correctness thereof. A verdict where discretion plays a fairly prominent part with regard to the resolution of issues, is not to be lightly trifled with by a Court of appeal. Indeed, this limitation applies to every verdict which comes up before a Court of appeal. The obvious explanation is that the adjudicatory function should not degenerate into a game of dice. But the discretionary verdict to be inviolate should not be capricious, arbitrary or whimsical. Here the trial Court has been led astray by Exhibit 41 which was of no significance in relation to the issue of the readiness and willingness of the Devkars to perform their obligations under Exhibit 27. The trial Court has also overlooked the important consequences flowing from Exhibits 30 and 31 as also the filing of the suit within 3 days of the expiry of the deadline fixed by the parties for the performance of the agreement.

12. In England, the relief for specific performance is an offspring of the equitable jurisdiction. Our laws do not recognise the dichotomy between common law and equity. But the brooding presence of equity in the true sense of that word, in the legislation governing specific relief, is clear. The Specific Relief Act, whether of 1877 or 1963, emphasises the importance to be attached to the principles of

common decency in the grant or refusal of specific reliefs. We have held that the Devkars were and are ready and willing to perform their part of the bargain. The contract remained unperformed due to the delaying and unethical stand adopted by the Joshis. Though the Devkars are entitled to specific performance, it cannot be on the literal terms spelt out in Exhibit 27. The value of money has been drastically eroded by a ravaging inflation corroding currencies all over the world, not excluding this country. It may be argued that the Devkars are not to be blamed for this phenomenon. We agree, but cannot be impervious to the need to balance the equities. The Joshis have earned rent all these years and were not forced to hunt for alternate accommodation consequent upon the refusal of the main relief. In this way also they have benefited in pecuniary terms. The plaintiffs could have applied for the making of a deposit of the balance of the price as soon as the suit was filed. That would have fortified their claim of being sincere about their desire to purchase the house. Had the deposit been made alongside the institution of the suit, that money would have become a productive asset; in the sense that it would have been placed in a fixed deposit with a nationalised bank. The interest accruing would have been far more than the legitimate benefit that Joshis have derived by sticking on to the suit house. To balance the equities, the Devkars should be made liable to pay the balance of the price together with interest at the rate of 12% per annum from 13-10-1969 up to the date the same is deposited in Court.

13. Last, is the issue of hardship raised by the learned Counsel for the Joshis. I do not see how the issue of hardship can be raised at all. We have the mere say-so of defendant No. 1 that even in 1981 the suit house was worth much more than that agreed to be paid by the Devkars. The fact that the Joshis could not or did not get another party interested in the acquisition of the property, is itself proof that there is no substance in the plea raised by the Joshis. It is stated that if the Joshis are compelled to part with the suit house, they will be without a roof over their heads. If true, this will be a situation of their own creation. Had honesty been of greater concern to the Joshis, they would not have found themselves in the position in which they will be finding themselves, once the day of reckoning comes. Mr. Dalvi asks us not to forget the steep rise in prices of real estate. We will not; but must make it clear that if undue weight is given to this aspect, no decree for specific performance can ever be passed, because suits for specific performance are not known to be disposed of early. Neither can it be said that first appeals are decided early in this Court. Litigants cannot be denied the relief to which they are entitled because of law''s delays. However, the factor of a rise in the price should be adequately compensated. The measure we devise is to direct plaintiffs 1 and 2 to deposit the balance of the price along with interest at the rate of 12% per annum from 13-12-1979 till realisation.

14. Hence the order :

(a) Appeal allowed. Plaintiffs 1 and 2 do deposit within 3 months from today or in period extended for good cause established upon application, the balance of the consideration agreed to be paid under Exhibit 27 together with interest at the rate of 12% per annum from 13-12-1979 up to the date of the payment. On such deposit being made, respondents 1 to 4 do execute a sale deed in accordance with the terms of Exhibit 27 and place the plaintiffs Devkars in khas possession of the ground floor of the suit house and symbolical possession of the upper storeys of the suit house.

(b) On the failure of respondents 1 to 4 to execute the sale deed and place the plaintiffs in possession, the plaintiffs Devkars will be at liberty to move the Court to get the sale deed executed and obtain possession.

(c) In the event of plaintiffs Devkars not making the deposit of the requisite sum within the stipulated or the extended time, the claim for specific performance shall stand dismissed with parties being left to bear their own costs.

(d) Having regard to the complex questions that have arisen, we leave parties to bear their own costs in both the courts.

(e) The interim injunction obtained in favour of the appellants shall continue to operate until it stands vacated.

