(2016) 08 BOM CK 0068

In the Bombay High Court

Case No : First Appeal No. 795 of 2016, Civil Application No. 2212 of 2014 and Civil Application No. 2364 Of 2015

Sham Pundlalik Dhumatkar APPELLANT

Vs

Smt. Pushpa Mohanlal Talreja RESPONDENT

Date of Decision : 09-08-2016

Acts Referred:

Registration Act, 1908 — Section 49

Specific Relief Act, 1963 — Section 20

Citation : (2017) 170 AIC 287 : (2016) 5 AIRBomR 552 : (2017) 1 ALLMR 65 : (2017) 3 BCR 248 : (2017) 1 CivCC 547 : (2017) 1 CivilLJ 837 : (2016) 6 MhLJ 736

Hon'ble Judges : R.M. Savant, J.

Bench : Single Bench

Advocate : Mr. Krishna Kore, Advocate, for the Appellants; Mr. Sanjay Jain i/by Mr. Ramesh Jain, Advocates, for the Respondent Nos. 1 and 2; Mr. Rakesh Singh i/by M.V. Kini & Co, Advocate, for the Respondent No. 3

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Admit. Having regard to the challenge involved heard forthwith.

2. The above First Appeal takes exception to the Judgement and order dated 06.05.2014 passed by the Learned Judge of the City Civil Court, Greater Mumbai, by which order, the suit in question being SC Suit No. 7748 of 1998 (High Court Suit No. 940 of 1998) came to be decreed. Consequently, the Defendant nos. 1 and 2 are directed to specifically perform the Agreement i.e. the Memorandum of Understanding dated 18.09.1997 within two months subject to the Plaintiffs depositing the balance consideration of Rs. 1,50,000/- within a period of four weeks from the date of the Judgement with the Court Receiver. It is further provided that if the Defendant nos. 1 and 2 failed to carry out the directions as contained in clause (1) then the Court Receiver shall execute the sale deed in favour of the Plaintiffs and hand over possession of the suit premises to the

Plaintiff and do such acts as may be necessary.

3. The Appellants herein are the original Defendant nos. 1 and 2 and the Respondent nos. 1 and 2 are the original Plaintiffs and the Respondent No. 3 is the original Defendant. It appears that the original Plaintiff No. 1 Smt. Pushpa Mohanlal Talreja expired during the pendency of the proceedings and her heirs who are shown as Respondent nos. 1a to 1d were brought on record in the Trial Court.

4. The facts giving rise to the filing of the above First Appeal in brief can be stated thus :

It is the case of the Plaintiffs that the Defendant Nos. 1 and 2 who were the owners of the suit premises being office block No. 501, situated on the 5th floor of the building known as A.N. House on 31st Road, off Linking Road, Bandra (W), Mumbai-50 had agreed to sell, transfer the same under the Memorandum of Understanding (For short the "MOU") dated 18.09.1997 for a consideration of Rs. 11,00,000/-. The terms of payment and the other details have been mentioned in the said MOU. The Plaintiffs paid an amount of Rs. 1,00,000/- as the earnest amount. It is the case of the Plaintiffs that though the balance payment was to be made to the Defendants on compliance of the terms and conditions, the Plaintiffs paid an amount of Rs. 8,50,000/- on account of the financial difficulty faced by the Defendants. It is the case of the Plaintiff that they were always ready and willing to complete the transaction. However, the Defendants avoided to complete the transaction despite having received Rs. 9,50,000/- out of the total consideration of Rs. 11,00,000/-. In view of the reluctance of the Defendant Nos. 1 and 2 to complete the transaction though the Plaintiffs were ready and willing for the same, it is the case of the Plaintiffs that the same aroused a suspicion about the intent of the Defendants and therefore the Plaintiffs filed the instant suit for specific performance.

5. In the said suit, the Plaintiffs filed a Notice of Motion for interim reliefs whilst the suit was pending in this Court. By an order passed by a Learned Single Judge of this Court, the Defendants were restrained from dealing with the property in question. However, since the Defendants acted in violation of the said interim order, the defence of the Defendants was struck of by order dated 15.12.2008 and the Court Receiver was directed to take possession of the property. The said order of striking of the defence was not taken exception to by the Defendants and therefore the said order became final and binding. Since the defence of the Defendants was struck of, the Trial Court proceeded to frame the following issues :

"1. Whether the agreement dated 18th September, 1997 is valid and Binding ?

2. Whether the plaintiffs have at all material times been and continue to be ready and willing to perform the agreement ?"

The Trial Court on the basis of the material on record answered both the issues against the Defendants.

6. In so far as the Plaintiffs are concerned, they have led the evidence of the Plaintiff No. 2 and produced the following documents :

[1] The Memorandum of Understanding dated 18th September, 1997.

[2] Five receipts for the payment made under and pursuant to the Memorandum of Understanding dated 18th September, 1997.

[3] The Plaintiffs'' letter dated 11th December, 1997 addressed to the Secretary of the Society.

[4] The Plaintiffs'' then advocates letter dated 14th January, 1998 with postal records in connection therewith."

7. The said documents were marked as Exhibits. Initially, it seems that the Defendants did not appear after the suit was transferred to the City Civil Court on the enhancement of the pecuniary jurisdiction of the City Civil Court. However on notice being issued to the Defendant Nos. 1 and 2 the said Defendants appeared through advocate who tendered written submissions on 22.07.2014. It was contended in the written submissions that specific performance of the MOU is sought, which is not a contract enforceable by law, since the document is executed only on a stamp paper of Rs. 20/- when the transaction is for Rs. 11,00,000/-. It was further contended that though the defence of the Defendants has been struck of, the Plaintiffs are required to prove their case independently. It was further contended that the MOU is a contingent contract as the title deeds are in possession of the Defendant No. 3. The filing of the suit was also questioned on the ground that the society was not a party to the suit and lastly it was contended that the Defendant Nos. 1 and 2 cannot pass a better title than they possess.

8. In the context of the said submissions, it is required to be noted that the document on which the suit is based i.e. the MOU dated 18.09.1997 was marked as Exh. P1 whilst the suit was pending in this Court.

9. The Trial Court as indicated above has by the impugned judgement and order dated 06.05.2014 decreed the suit. The gist of the reasoning of the Trial Court was that the MOU was an agreement for the sale of suit property and therefore considering the nature of the agreement, it was not necessary to be stamped or registered as the same could also be oral. The Trial Court also recorded a finding that from the covenants it could not be said that the contract evidenced by the agreement is a contingent contract. The Trial Court held that in so far as the Defendant No. 3 i.e. City Bank N.A. is concerned, its right could be decided independently in the suit filed by it. However, in so far as the instant suit is concerned, the rights which the Defendant Nos. 1 and 2 have in the suit property could be well conveyed to the Plaintiffs. The Trial Court also recorded a finding that the Plaintiffs have proved that they had paid an amount of Rs. 8,50,000/-. The Trial Court accordingly concluded that the rights of the third parties i.e. the

Bank would not be affected by the decreeing of the suit if their dues are not cleared by the Defendant Nos. 1 and 2. As indicated above, it is the said Judgement and order dated 06.05.2014 which is taken exception to by way of the above First Appeal.

10. The submissions on behalf of the Appellants by the Learned Counsel Mr. Krishna Kore :

(A) That the Judgement and order passed by the Trial Court is contrary to the order dated 04.05.1999 passed by a Learned Single Judge of this Court whereby the Notice of Motion filed by the Plaintiffs was made absolute in terms of prayer clause (a) without the power of sale.

(B) That since the suit property was mortgaged the instant suit filed for specific performance was not maintainable. Reliance is placed on the Judgement of the Apex Court reported in 2016 (1) SCC 290 in the matter of Market Committee, Hodal, through its Secretary v. Sukhdevi and others.

(C) That though the defence of the Defendant Nos. 1 and 2 was struck of, the Plaintiffs were required to prove their case which they have not done so and therefore are not entitled to the discretionary relief of specific performance.

(D) That the Trial Court had erred in decreeing the suit based on the MOU which was not registered. Reliance is placed on the Judgement of the Apex Court reported in 2008 (8) SCC 564 in the matter of K.B. Saha and Sons Private Limited v. Development Consultant Ltd.

(E) That the Trial Court had failed to appreciate that assuming the MOU was a contract capable of being enforced, it was a contingent contract and therefore the suit as filed in the year 1998 was premature as the title deeds were in possession of the Defendant No. 3.

11. Submissions on behalf of the Respondent Nos. 1 and 2 by the Learned Counsel Mr. Sanjay Jain :

I) That the Respondent Nos. 1 and 2 herein i.e. the original Plaintiffs have proved their case by adducing oral evidence as also producing documents in support of their assertions in the suit.

II) That the MOU having been exhibited in this Court whilst the suit was pending in this Court, the Appellants are estopped from questioning the maintainability of the suit on the ground of the said MOU being not properly stamped. Reliance is placed on the Judgement of the Apex Court reported in AIR 2007 SCC 637 in the matter of Shyamal Kumar Roy v. Sushil Kumar Agarwal.

III) That having regard to the proviso to Section 49 of the Registration Act in a suit for specific performance an unstamped document can be received as evidence and a suit can be based on it.

IV) That in the impugned Judgement and order care has been taken by the Trial

Court to see to it that the rights of the third parties are not affected and therefore it cannot be said that the impugned judgement and order has been passed by the Trial Court thereby affecting the rights of the third parties.

V) That the Respondent Nos. 1 and 2 having paid 90% of the consideration were entitled to specific performance of the said MOU dated 18.09.1997 and the Appellants having accepted the said substantial consideration cannot now call in question the decree of specific performance.

Consideration

12. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The issue which arises in the above First Appeal is whether the decree of specific performance granted by the Trial Court is required to be interfered with. As indicated above, the suit in question has been filed for specific performance of the MOU dated 18.09.1997 which was in respect of the sale of the office premises being block No. 501, situated on 5th floor of the building known as A.N. House on 31st road, off Linking Road, Bandra (W), Mumbai 50. The consideration mentioned in the said MOU Rs. 11,00,000/- out of which a amount of Rs. 1,00,000/- was paid as earnest money and the balance amount was to be paid in terms of the schedule mentioned in the said MOU. However, it seems that on account of the financial stringency that the Defendant Nos. 1 and 2 were facing they had requested the Plaintiffs for payment of the amount. The Plaintiffs have accordingly paid an amount of Rs. 8,50,000/- for which the Defendant Nos. 1 and 2 issued receipts. It is on account of the reluctance of the Defendant Nos. 1 and 2 to complete the transaction that the Plaintiffs were required to file the suit in question. As indicated above, by the impugned Judgement and order dated 06.05.2014 the suit has been decreed and the Plaintiffs have been granted specific performance of the said MOU dated 18.09.1997. Now coming to the contentions raised on behalf of the Appellants i.e. original Defendants. One of the contentions raised was that the contract comprising the said MOU was a contingent contract and since the contingency had not occurred the filing of the suit by the Plaintiffs was premature. The Trial Court has rejected the said contention by holding that from the covenants of the agreement it does not appear that the same was to take effect on the happening of certain events. This Court has also with the assistance of the Learned Counsel for the parties has gone through the said MOU and the Learned Counsel for the Appellants has not able to point out any covenant from which it can be said that the contract in question was a contingent contract. The said contention was probably sought to be urged on the basis that since a mortgage was created in favour of the Defendant No. 3 unless the mortgage was redeemed, the suit could not have been filed by the Plaintiffs. In my view, the said submission is misconceived as the Trial Court in the impugned Judgement and order has adequately protected the rights of the third parties in so far as their claim against the Defendant Nos. 1 and 2 is concerned. Moreover, the Learned Counsel appearing for the Defendant No. 3 stated that the suit filed by the Defendant No.

3 has been withdrawn. In my view, therefore the reliance placed by the Learned Counsel appearing on behalf of the Appellants on the Judgement of the Apex Court in Market Committee, Hodal, through its Secretary''s case (supra) is misplaced, as the said suit concerned a suit for possession filed in respect of a land acquired for a public purpose under the Land Acquisition Act.

13. It was also the submission of the Learned Counsel appearing on behalf of the Appellants that though the defence of the Defendants was struck of as a consequence of the order dated 15.12.2008 passed in Notice of Motion No. 3631 of 2006 in the above suit whilst it was pending in this Court nevertheless the Plaintiffs were still required to prove their case. There can be no dispute about the said proposition. It is required to be seen whether the Plaintiffs have discharged the burden cast upon them in the instant case. As indicated above, the Plaintiff No. 1 has examined himself and produced the documents on which the Plaintiffs have relied upon in assertion of their case. Having regard to the material which has come on record on behalf of the Plaintiffs, it would have to be said that the Plaintiffs have proved their case as the said case of the Plaintiffs has not been dented by the Defendant Nos. 1 and 2.

14. The next submission of the Learned Counsel appearing on behalf of the Appellants was that the suit in question for specific performance is based on a document which is unregistered and executed on a Rs. 20/- stamp paper and therefore was not maintainable having regard to Section 49 of the Registration Act. In so far as the said contention is concerned, it is required to be noted that the proviso to Section 49 itself carves out an exception in respect of a suit for specific performance. The said proviso reads thus :

"49. Effect of non-registration of documents required to be registered. No document required by section 17 [or by any provision of the Transfer of Property Act, 1882,] to be registered shall -

(a) ?......

(b)...........

(c)................

[Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.]"

In the light of the proviso, there is no substance in the said contention. It was also the submission of the Learned Counsel appearing for the Appellants that an unregistered document could not have been exhibited. In my view, the said submission also cannot be countenanced in view of the fact that whilst the suit was pending in this Court, the documents were marked by order dated 28.07.2009 passed by a Learned Single of this Court (Dr. D.Y. Chandrachud, J, as

His Lordship then was) and having regard to Section 36 of the Bombay Stamp Act, the Court was prohibited from reopening the matter as regards the exhibition of the document. Reference could be made to the Judgement of the Apex Court in Shyamal Kumal Roy''s case (supra) wherein the Apex Court has held that if an insufficiently stamped document is admitted in evidence then Section 36 gets attracted and the Court is prohibited from reopening the matter (Section 36 of the Indian Stamp Act is pari materia with Section 35 of the Maharashtra Stamp Act). The Plaintiffs would undoubtedly be required to pay the stamp duty at the time of the execution of the document of Conveyance in their favour. In my view, the Judgement of the Apex Court in K.B. Saha & Sons case (supra) would not aid the Appellants, as the facts in the said case can be distinguished from the facts of the present case. The suit in question in K.B. Saha & Sons case (supra) was not a suit filed for specific performance but a suit filed for eviction of a lessee and a clause in an unregistered lease deed was sought to be relied upon for a collateral purpose. The Apex Court held that the purpose for which the clause was sought to be relied upon was not a collateral purpose and therefore the unregistered lease deed could not be relied upon.

15. A submission was also sought to be raised on behalf of the Appellants that the Trial Court has erred in not appreciating the fact that the rights of the Defendant No. 3 Bank would get affected. As indicated herein above, the Trial Court in the impugned Judgement and order has taken sufficient care to see to it that the rights of the third parties are not affected by observing that the third parties would not be affected if their dues are not cleared by the Defendant Nos. 1 and 2. Moreover the Defendant No. 3 it seems has withdrawn the suit filed by it against the Defendant Nos. 1 and 2. The submission of the Learned Counsel for the Appellants that the instant decree is contrary to the order dated 04.05.1999 passed in the suit is only stated to be rejected as it is well settled that all interim orders are subject to the final orders that are passed in the suit. In my view, there is no merit in the above First Appeal, the decree passed by the Trial Court granting specific performance to the Respondent Nos. 1 and 2 herein i.e. the Plaintiffs therefore does not merit any interference in the Appellate jurisdiction of this Court. The First Appeal is accordingly dismissed.

16. After pronouncement of Judgement At this stage, the Learned Counsel for the Appellants seeks stay of the instant judgement. Rather than staying the judgement, it would be appropriate that the decree is stayed for a period of four weeks.

