

(1970) 02 GUJ CK 0005
In the Gujarat High Court
Case No : Second Appeal No. 676 of 1962

Shankarrao Ramrao Mairal and Another	APPELLANT
Vs	
Sumati Bhikaji Khiste	RESPONDENT

Date of Decision : 24-02-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, 100
Specific Relief Act, 1877 — Section 12

Citation : AIR 1971 Guj 178 : (1971) 12 GLR 570

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : N.V. Karlekar, for the Appellant; C.K. Patel, for the Respondent

Judgement

1. This appeal is directed against the appellate judgment and decree in Regular Civil Appeal No. 41 of 1961 decided by Mr. D. A. Desai, District Judge, Baroda.
2. The facts of the case briefly stated are as under.
3. The defendant No. 1 owned a piece of land in the Wadi locality of the city of Baroda. He farmed out plots in that piece of land and started selling them as building sites. There were several rows of plots known as A, B, C and so on. Row C contained 10 plots which were numbered as C10. On 26th August 1958 the plaintiff entered into an agreement of sale with the defendant No. 1 for purchasing plot C-5. The defendant No. 1 agreed to sell it to her for a sum of Rs. 326.25 p. The agreement of sale is evidenced by receipt of payment Ex. 43 under which on 27th August 1958 the plaintiff paid to the defendant No. 1 a sum of Rs. 51/- as earnest money. On 3rd March 1959 the balance of Rs. 275.25 p. was paid by the plaintiff to the defendant No. 1. It is the plaintiff's case that thereafter the defendant No. 1 did not execute the sale-deed in spite of the plaintiff's attempts to get it executed by him. The plaintiff, therefore, filed Regular Civil Suit No. 1252 of 1959 in the Court of the Civil Judge (Senior Division) at Baroda for obtaining decree for specific performance of the said agreement.

4. The defendant No. 1 filed his written statement. He contended that though he had farmed out the plots and numbered them it was only a provisional lay-out because it was subject to the approval of the Municipality of Baroda. According to him, since the Municipality of Baroda did not accord immediate approval to his lay-out of the plots he could not execute a sale-deed in favour of the plaintiff. All that he did was to register the intending purchasers of the plots. He further contended that plot C-5 had not been in existence at the time of the final lay-out because it had merged into a road. Therefore, according to him, no specific performance can be ordered against him.

5. The trial Court raised the issues and recorded evidence. It held the agreement of sale to have been proved. But it further held that plot C-5 as it existed at the date of the suit was materially different from the original plot C-5 and that, therefore, the identity of the original plot C-5 had been lost. In that view of the matter the learned trial Judge dismissed the suit.

6. The plaintiff filed in the Court of the District Judge at Baroda Regular Civil Appeal No. 41 of 1961 challenging the decree passed by the learned trial Judge.

7. The learned District Judge, on consideration of evidence, arrived at the finding that though original plot C-5 had undergone alterations they were not substantial or material alterations and that, therefore, the plaintiff was entitled to obtain decree for specific performance against the defendant No. 1. In that view of the matter the learned District Judge allowed the appeal, set aside the decree of the trial Court and passed decree for specific performance against the defendants.

8. I may state here that the defendant No. 2 has purchased the new plot C-5 from the defendant No. 1. His defence was that he is a bona fide purchaser for value without notice. On appreciation of evidence his plea has been negated by the Courts below.

9. It is against this appellate decree of the learned District Judge that the defendants have filed the present Second Appeal.

10. Mr. Karlekar who appears for the original defendants has raised three contentions before me: (1) Identity of the original plot C-5 has been lost and, therefore specific performance cannot be ordered. (2) Application Ex. 58 was made to the trial Court for framing an issue whether the power of attorney holder had the authority to transfer the property and the trial court was in error in rejecting that application. (3) There is an error in holding that the defendant No. 2 is not a bonafide purchaser for value without notice.

11. So far as the third contention is concerned, the decision of both the Courts below thereon has been based upon appreciation of oral evidence in the case. Therefore, whether the defendant No. 2 is a bona fide purchaser for value without notice or not is a question of fact and I cannot interfere with it in second Appeal.

12. So far as the second contention raised by Mr. Karlekar is concerned his

submission is that the plaintiff has sued the holder of power of attorney and not the principal. Vishnu Narayan Malthankar is the holder of power-of-attorney. In the plaint the defendant No. 1 has been described as follows.

"Shri Shankarrao Ramrao Mairal by his constituted attorney Shri Vishanu Narayan Malthankar, residing at Baroda. Dandia Bazar".

In my opinion, the manner in which the defendant No. 1 has been described in the plaint clearly shows that the plaintiff has been suing the principal Shankarrao Ramrao Mairal and not the holder of power of attorney Vishnu Narayan Malthankar. It was not necessary for the plaintiff to write the name of the holder of power of attorney while stating the name of the principal Shankarrao Ramrao Mairal as the defendant No. 1. But in any case by doing so the plaintiff has not sued the holder of power of attorney. The suit which she has filed is, so far as the defendant No. 1 is concerned, against Shankarrao Ramrao Mairal, the principal. Therefore, the second contention which Mr. Karlekar has raised fails.

13. So far as the first contention of Mr. Karlekar is concerned. I shall first state certain facts which both the Courts below have found. Plot C-5 as it was at the date of the suit was not the same as it was at the date of the agreement of sale. Plot C-5 was reconstituted by the defendant No. 1 after he entered into the present agreement of sale with the plaintiff. The reconstituted plot C-5 is different from the original plot C-5 in certain respects. Firstly, the boundaries have undergone alterations. The northern boundary of the original plot C-5 has been shifted 4 feet to the south. Therefore, a stretch of land 4 feet in width in the north which earlier formed a part of the original plot C-5 has now been excluded from the reconstituted plot C-5. The southern boundary of the original plot C-5 has been shifted 4 feet further to the south. Therefore, a stretch of land 4 feet in width to the south has been added to it with the result that this new piece of land is an addition so far as the reconstituted plot C-5 is concerned. With the refixing of the northern and the southern boundaries as stated above the western and the eastern boundaries have necessarily undergone alterations. Both of them have been extended in the south to the extent of 4 feet each and have been cut down in the north to that extent. The learned District Judge has been in error in observing that the reconstitution of the original plot C-5 has not produced any impact whatsoever upon its western and eastern boundaries. However, the total extent of the area of the reconstituted plot C-5 has remained the same as the original plot C-5 had. However, even though the extent of the area of the reconstituted plot C-5 has remained the same all its boundaries have undergone alterations and its physical situation has also been altered with the exclusion of a 4 feet wide piece of land in the north and inclusion of a new 4 feet wide piece of land in the south.

14. All these alterations were rendered necessary for the defendant No. 1 to make because at the time of according the sanction to his lay out of the plots the Municipality of Baroda imposed a condition that there must be a road intervening between plots C-5 and C-6 and extending on both the sides. The fulfilment of this

requirement of laying out a road between the original plot C-5 and the original plot C-6 necessitated the reconstitution of plots and in the process of reconstitution row C which had 10 plots originally came to have only 9 plots. This process of reconstitution has been described by the learned District Judge in his judgment quite clearly. It is, therefore, not necessary for me to repeat all those facts here.

15. Laying out of a road between the original plot C-5 and the original plot C-6 which were earlier adjacent to and conterminous with each other has also altered the situation of the original plot C-5. The reconstituted plot C-5 now opens cut and abuts on the road. So far as the alterations are concerned, the learned District Judge has not found anything more than what the learned trial Judge has found. Taking into account all these alterations it cannot be said that what the defendant No. 1 agreed to sell and the plaintiff agreed to purchase was such a reconstituted and physically altered plot. Merely because a plot bears the same number C-5 it cannot be said to be the same property agreed to be sold. A mere number determines nothing. The identity of the property, if not in all respects at least in material respects, must be the same. It must answer in all material particulars, the description of the property agreed to be sold. A mere number cannot answer the description of the property agreed to be sold. Merely because some area of land which was a part of original plot C-5 is also a part of reconstituted plot C-5 now it cannot be said that the reconstituted plot C-5 answers the description of the original plot C-5. Supposing A and B enter into an agreement of sale in respect of a plot of land which bears No. 10. The plots are subsequently re-numbered. Plot No. 25 comes to be renumbered as plot No. 10 and plot No. 10 comes to be renumbered as plot No. 19. If a suit for specific performance of the agreement of sale of plot No. 10 is filed, in respect of which plot shall the Court pass a decree for specific performance - Plot No. 25 which is renumbered a plot No. 10 or plot No. 19 which is the original plot No. 10? Specific performance can only be ordered in my opinion, in respect of new plot No. 19 (old plot No. 10). Therefore, merely because a plot bears the same number as it bore at the time when the parties entered into the agreement of sale it does not ipso facto follow that a decree for specific performance of the agreement of sale in respect of that plot must be passed. On reading the entire judgment of the learned District Judge I find that he has been guided by two factors. The first of them is that there is a plot which bears No. C-5. He, therefore, arrives at the conclusion that a decree for specific performance can be passed. The second factor which I find in his judgment is that what the learned trial Judge regards as material alterations are regarded by him as insignificant and inconsequential alterations. I may add that on appreciating the evidence on record and on considering the facts and circumstances of the case the learned District Judge has found no new facts which the learned trial Judge did not find. If he had found some new facts they would have probably justified the tilting of the balance. The learned District Judge has not disturbed any finding of fact arrived at by the learned trial Judge. In such a case, there would have been

some justification for tilting the balance. What I find is that what one regards as material is regarded by another as inconsequential. It is merely a difference in approach. It is merely a difference in the manner of looking at the question. So far as the reconstituted plot C-5 is concerned. I cannot cling merely to the number and confirm the decree passed by the learned District Judge. The alterations, referred to by me in the foregoing paragraphs, are, in my opinion, substantial and material alterations and, therefore, it cannot be said that the original plot C-5 in respect of which the present agreement of sale was entered into between the parties has been in existence.

16. Section 12 of the Specific Relief Act, 1877 (it applies to the present case) confers upon a Court of law discretion in the matter of passing decree for specific performance. It is well-settled that this discretion has to be exercised judicially and according to well-recognised principles. It cannot be exercised arbitrarily. In this case the learned trial Judge refused to pass the decree. No new facts and circumstances have been pointed out by the learned District Judge which could have persuaded him to take a different view and to interfere with the refusal of the learned trial Judge to exercise his discretion to pass the decree. The decree which the learned trial Judge passed in this case was reasonable and in order. Merely because one is able to look at the question from a slightly different angle at the appellate stage one cannot always interfere with the decree of the trial Court in matters of specific performance. In this view of the matter the decree passed by the learned District Judge is liable to be set aside.

17. Mr. Patel appearing for the plaintiff has contended that instead of restoring the decree passed by the learned trial Judge. I should remand the suit to the trial Court for the following purpose. He submits that both the Courts below have assumed that the defendant No. 1 was under compulsion from the Baroda Municipality to lay out the road intervening between the original plot C-5 and the original plot C-6 and to reconstitute the plots consequently. He further submits that there is no evidence on record to support that assumption of both the Courts below. Whether the defendant No. 1 laid out the road intervening between the original plot C-5 and the original plot C-6 and reconstituted the plots voluntarily or under compulsion is a material question. If he did it without any compulsion from the Baroda Municipality then it is open to the plaintiff to obtain the decree for specific performance in respect of that particular piece of land which was original plot C-5 irrespective of the reconstitution of plots and irrespective of the lay-out of the said road. I find some force in this contention raised by Mr. Patel.

18. In the result, I allow the appeal, set aside the decrees passed by both the Courts below and remand the suit to the trial Court for raising the following issue.

Whether the defendant No.1 was under compulsion from any local authority to reconstitute the plots and to lay out the road intervening between the original plot C-5 and the original plot C-6 or whether he did those things voluntarily and on his own.

19. So far as the question which was agitated before the two Courts below is concerned it has been concluded by this judgment. If on the issue raised by me the learned trial Judge arrives at the finding that the defendant No. 1 was under compulsion from the local authority to do so the claim for specific performance will have to be dismissed. If he arrives at the contrary finding then he shall decide the suit according to law and in light of the observations made in this judgment. It shall be open to the plaintiff to make such claim for compensation before the trial Court as she is entitled to make in law. If the plaintiff applies for amendment of the plaint so as to enable her to make such a claim, the trial Court shall consider it on merits and according to law. In the special circumstances of this case, there shall be no order as to costs of this appeal.

20. Appeal allowed.