

(2009) 03 BOM CK 0047

In the Bombay High Court

Case No : Appeal No. 547 of 2004 in L.C. Suit No. 37 of 1980

Shrikant Vasudeo Bhole since deceased through LRs. Smt.
Mangala Shrikant Bhole and Others

APPELLANT

Vs

Satish Shankar Gupte and Others

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : (2009) 4 BomCR 729

Hon'ble Judges : D.K. Deshmukh, J;A.A. Sayed, J

Bench : Division Bench

Advocate : P.S. Dani, instructed by Suresh Gole and Co, for the Appellant; M. Bhandare, for Respondent Nos. 2(a) to 2(d) and Owen Menezes and Maya Sarkar, instructed by Madhukar Munim and Co., for the Respondent

Judgement

D.K. Deshmukh, J.—By this appeal, the appellants who are original plaintiffs challenge the judgment and decree dated 2nd July 2004 passed by the learned Single Judge of this Court in L.C. suit No. 37 of 1980. The plaintiffs had filed the suit seeking a decree of specific performance of the agreement of sale of a flat dated 27th February 1977. The agreement was entered into between plaintiffs and defendant No. 1. Admittedly, defendant No. 1 is the owner of the land bearing No. 33, admeasuring 492 sq. yards, bearing C.S. No. 6/509, situated at Mahim, Mumbai. The defendant No. 1 was constructing a multistoried building on the land. He entered into an agreement dated 27th February 1977 with the original plaintiff to sell flat No. 7 to him. The total agreed consideration was Rs. 55,000/- and the plaintiff paid full amount of consideration to the defendant No. 1. According to the plaintiff, the defendant No. 1 could not develop the property himself. Therefore, he entered into an agreement with the defendant No. 2 dated 2nd July 1979 for completing the construction. The defendant No. 2 however was obliged to deliver possession of the flat to the persons with whom the defendant No. 1 had agreed to give possession of respective flats unless the issue is settled with the flat purchasers. According to the plaintiff, the defendant No. 2 was

obliged to deliver possession of flat No. 7 which was renumbered as flat No. 14. According to the plaintiff, though the defendant No. 1 was willing to deliver possession to the plaintiff, he could not do so because of operation of injunction order passed in the suit filed by the defendant No. 2. The plaintiff was therefore seeking a decree for delivery of possession against the defendant No. 2. He was also claiming a decree against defendant No. 3 to whom the plot was sold by the defendant No. 2. The defendant No. 1 filed his written statement and admitted the claim of the plaintiff. According to the defendant No. 1, a decree in terms of prayer Clause (a) can be passed. By prayer Clause (a), a decree of specific performance was claimed only against defendant No. 1. The suit was opposed by defendant Nos. 2 and 3. On the basis of rival claims, following issues were framed:

- 1) Does plaintiff prove that agreement (Ex.A) dated 27th February 1977 was registered under receipt (Ex.B) dated 29th March 1977?
- 2) Does he prove that the agreement relates to suit premises i.e. Flat No. 14 on 3rd Floor, Building No. 33, Mahim, Mumbai 400016?
- 3) Does he prove that this flat was initially numbered as Flat No. 7 and changed to Flat No. 14?
- 4) Does defendant No. 2 prove that he entered into development agreement bonafide without notice of agreement dated 27.2.1977?
- 5) Does defendant No. 3 prove that he is bonafide purchaser for value without notice of agreement between plaintiff and defendant No. 1?
- 6) Is plaintiff entitled to specific performance of the agreement?
- 7) Whether in the alternative, plaintiff is entitled to claim damages and does he prove quantum of Rs. 1,50,000/-?
- 7A) Do the defendant Nos. 2 and 3 prove that the suit has been filed collusively by the original plaintiff and the defendant No. 1?
- 8) What decree or order?

On behalf of the plaintiff, son of the plaintiff by name Suhas was examined as a witness. On behalf of the defendant No. 2, Bento Lobo was examined as a witness who was son of the defendant No. 2. No oral evidence was led by the defendant No. 3. The suit was decided by the learned Single Judge by his judgment dated 2nd July 2004. The learned Single Judge held that the plaintiff has proved that he entered into an agreement dated 27th February 1977 with the defendant No. 1 and that agreement was lodged for registration on 29th March 1977. The second issue was also answered in favour of the plaintiff. The learned Single Judge held that the agreement dated 27th February 1977 relates to flat No. 14 on third floor of the suit building. The learned Single Judge however held that the plaintiff is not entitled to a decree of specific performance because the learned Single Judge held that the defendant Nos. 2 and 3 are

bonafide purchasers for value without notice. The learned Single Judge also held that there was collusion between plaintiff and defendant No. 1.

2. The learned Counsel appearing for plaintiff submits that the defendant No. 1 had admitted the claim of the plaintiff. It is an admitted position that the defendant No. 1 was the owner of the land and continues to be the owner of the land. The status of the defendant No. 2 was only as a developer and the learned Single Judge has himself recorded a finding that he was merely an agent of the defendant No. 1. The learned Counsel submits that if the status of the defendant No. 2 was that of an agent, then in view of the admission of the claim made by the principal viz. defendant No. 1, it was not necessary for the learned Single Judge to hold any further enquiry and therefore, the learned Single Judge should have proceeded to make decree against defendant No. 1 and the agent of the defendant No. 1 viz. defendant No. 2 would be bound by that decree. The learned Counsel further submits that even assuming that the defendant No. 2 is a transferee and not an agent, then also there is no evidence led on behalf of the defendant No. 2 or defendant No. 3 that they were bonafide purchasers for value without notice. The learned Counsel submits that the learned Single Judge has recorded a finding that defendant No. 2 was a bonafide purchaser without notice, only on finding that the defendant No. 1 did not disclose the agreement dated 27th February 1977 to the defendant No. 2. The learned Counsel submits that even accepting the finding that the defendant No. 1 while entering into agreement with defendant No. 2 concealed the fact that he has entered into an agreement with the plaintiff, then also in order to establish that the defendant No. 2 was a bonafide purchaser without notice, it was for the defendant No. 2 to prove what steps were taken by him to investigate the title of the defendant No. 1 to effect transfer in his favour. The learned Counsel submits that the learned Single Judge himself has found that the agreement between the defendant No. 1 and defendant No. 2 is dated 2nd July 1977 whereas the agreement between the plaintiff and defendant No. 1 was admittedly lodged for registration on 29th March 1977. Had the defendant No. 2 tried to investigate the title of the defendant No. 1, then he would have come to know that there is an agreement entered into between the plaintiff and defendant No. 1.

3. The learned Counsel appearing for defendant No. 2 submitted that the learned Single Judge has observed that there is suspicion whether the suit agreement related to the suit land. According to the learned Counsel, really speaking the suit agreement did not relate to the suit land because there are several factors indicating that the suit agreement does not relate to the suit property. The learned Counsel further submitted that there was a clear case of collusion between plaintiff and defendant No. 1. The learned Counsel took us through the record to contend that there was a clear case of collusion between plaintiff and the defendant No. 1. The learned Counsel submitted that the learned Single Judge was justified in declining to make a decree of specific performance against defendant No. 2. On being pointed out that the learned Single Judge himself has recorded a finding that the defendant No. 2 is merely an agent of the defendant

No. 1 and that the defendant No. 2 has not taken any steps to challenge that finding, the learned Counsel stated that he should be given time to take steps to challenge that finding. The learned Counsel appearing for defendant No. 3 submitted that in the plaint, there is no pleading that the plaintiff was always ready and willing to perform his part of the contract and therefore the learned Single Judge was justified in declining to pass a decree of specific performance in favour of the plaintiff. In support of his submission, he relied on judgments of Supreme Court in the cases of Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, , Abdul Khader Rowther Vs. P.K. Sara Bai and Others, , Umabai and Another Vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Another, and the judgment of this Court in the case of Bhikaram Nathuji Vanjari and Anr. v. Saraswatibai Motilal Zarkariya reported in (1996) 2 Mh.L.J. 756.

4. Now if in the light of these rival submissions the record of the case is perused, following are the admitted positions:

A) The defendant No. 1 was and continues to be the owner of the property.

B) There was an agreement dated 27th February 1977 entered into between the plaintiff and defendant No. 1.

C) The defendant No. 1 admits that the plaintiff has paid full amount of consideration that was agreed in the agreement dated 27th February 1977.

D) The learned Single Judge himself has recorded a finding that the agreement dated 27th February 1977 was lodged for registration in the office of the Registrar on 29th March 1977.

E) The learned Single Judge has recorded a finding that the suit agreement relates to the suit flat and that finding has not been challenged by defendant No. 2.

F) The defendant No. 1 in his written statement has admitted the claim of the plaintiff and has stated that the decree in terms of prayer Clause (a) may be passed in favour of the plaintiff.

Prayer Clause (a) of the plaint reads as under:

(a) that the defendant No. 1 be ordered and decreed to perform specifically the said agreement of sale dated 27th of February 1977 and consequently be ordered and decreed to put the plaintiffs in possession of suit flat viz. Flat No. 7 now renumbered as Flat No. 14 on the 3rd Floor of the building constructed on the plot bearing No. 33 Town Planning and Bombay City at Bombay 400 016 (Mahim Area) Inland and Sub-registration District of Bombay;

Now, the defendant No. 1 is owner of the property, he is agreeable to a decree on admission being passed against him, therefore we have to see what is the status of defendant No. 2 in relation to the property. In that regard, in our opinion, the learned Counsel appearing for plaintiff rightly relied on the finding recorded by the learned Single Judge. In paragraph 24, the learned Single Judge

has observed thus:

24. As discussed above, the suit agreement between the plaintiff and defendant No. 1 has been proved. It is undisputed that defendant No. 1 is the owner and defendant No. 2 is only developer of the property. Therefore, defendant No. 2 is the agent of defendant No. 1.

This finding has gone unchallenged. We also declined to adjourn the matter to enable the defendant No. 2 to challenge the finding because the request was made when the arguments of the plaintiff were over and we were hearing the defendants. In our opinion, once it is held that the defendant No. 2 is merely an agent of the defendant No. 1 and defendant No. 1 admits the claim of the plaintiff, no further enquiry is necessary and decree for specific performance passed against defendant No. 1 will be fully binding on the defendant No. 2 and also the defendant No. 3 who claims through defendant No. 2.

5. So far as the submission made on behalf of the defendant No. 2 that the learned Single Judge has observed that it is suspicious whether the suit agreement relates to the suit land is concerned, in our opinion, the answer by the learned Single Judge to second issue puts the matter beyond any doubt. The second issue is - "Does he prove that the agreement relates to suit premises i.e. Flat No. 14 on 3rd Floor, Building No. 33, Mahim, Mumbai 400016?" and the answer is in the affirmative. Once the learned Single Judge records a clear finding that the agreement dated 27th February 1977 relates to the suit property, there is no question of there being any suspicion that the agreement relates to any other land. What is further pertinent to note here is that even assuming that the defendant No. 2 was a transferee and not an agent, the material available on record shows that he had clear knowledge of the transaction. The witness of the plaintiff has clearly stated in his examination-in-chief that:

I produced the certified copy of the plaint filed by the defendant No. 2. The defendant No. 2 Shri Lobo used to be in the office of the defendant No. 1 whenever payment was made in the said office.

In cross-examination, the witness repeated thus:

After signing of the agreement, 2 to 4 months thereafter, when we had gone for making payment to the defendant No. 1, we met the defendant No. 2 Shri Dominic. At the time of signing of agreement, my father, my younger brother and myself were present and the Clerk of the defendant No. 1 was present.

Thus, there is a clear statement made by the witness examined on behalf of the plaintiff that the defendant No. 2 was present when payment was made by plaintiff to defendant No. 1. This piece of evidence has been totally deleted from consideration by the learned Single Judge. The defendant No. 1 is the only witness who was party to the agreement between plaintiff and defendant No. 1 and also between defendant No. 1 and defendant No. 2, who has been examined

in this case. He states in paragraph 8 of his affidavit in examination-in-chief thus:

8. Between February 1977 and 2nd July 1977 there were three to four meetings between myself, original plaintiff, defendant No. 2 and Shri Hariya, the defendant No. 3 herein who was interested in purchasing the said Flat No. 7 for settlement. On all the said occasions, the settlement did not come through and the same failed.

Perusal of the cross-examination shows that there is no cross-examination of this witness on this aspect of the matter. The learned Counsel appearing for defendant No. 2 was not able to point out that the defendant No. 1 had been cross-examined on this aspect of the matter. Thus, the defendant No. 1 has made a clear statement that the defendant No. 2 was clearly aware of the agreement between the plaintiff and defendant No. 1. In our opinion, the finding recorded by the learned Single Judge about the defendant No. 2 being a bonafide purchaser without notice is liable to be set aside because it is recorded by ignoring material piece of evidence on record. In our opinion, mere finding recorded by the learned Single Judge about the failure of the defendant No. 1 to disclose to the defendant No. 2 that there was an agreement between the plaintiff and defendant No. 1 would not make defendant No. 2 a bonafide purchaser without notice. It was for the defendant No. 2 to show that he had taken all care of a prudent man before entering into the agreement to see that there were no encumbrances. That care has not been taken. When the witness on behalf of the defendant No. 2 was specifically asked whether the defendant No. 2 had taken inspection of the Collector's record, the witness stated that he is unaware about it. Even a notice in the newspapers calling objections, which is usually issued, was not issued before the defendant No. 2 entered into an agreement with the defendant No. 1. So far as the finding recorded by the learned Single Judge about collusion between plaintiff and defendant No. 1 is concerned, perusal of the judgment of the learned Single Judge shows that the learned Single Judge has merely on the basis of his suspicion recorded a finding of collusion. In our opinion, once the learned Single Judge recorded a finding that the agreement was actually entered into between the plaintiff and defendant No. 1 and that it was also lodged for registration and that while entering into the agreement with the defendant No. 2, the defendant No. 1 did not disclose that agreement, a finding of collusion between plaintiff and defendant No. 1 cannot be recorded. The finding that the defendant No. 1 did not disclose the suit agreement to the defendant No. 2 is also recorded without considering the above quoted statement made by the defendant No. 1 in his deposition that the defendant No. 2 participated in the discussion with the plaintiff. In our opinion, no finding of collusion between plaintiff and defendant No. 1 can be recorded in the face of the evidence on record.

6. So far as the submission made on behalf of defendant No. 3 is concerned, it is clear from the provisions of Section 16 of the Specific Relief Act that the plaintiff who files a suit for decree of specific performance, has to plead and prove that

he was always ready and willing to perform his unperformed part of the contract. If there is any part of the contract which is to be performed by the plaintiff and that part remains unperformed, then the plaintiff has to plead that he was always ready and willing to perform his unperformed part of the contract. But, if the plaintiff comes to the Court with the case that he has performed entirely his part of the contract, then it is not possible for the plaintiff to say that he was ready and willing to perform his part of the contract. In the present case, the plaintiff has come to the Court with a clear case that he had performed entirely his part of the contract and therefore, there was no necessity for the plaintiff to perform his part of the contract. In the result therefore, appeal succeeds and is allowed. The judgment and decree impugned in the appeal is set aside. The suit of the plaintiff is decreed in terms of prayer Clauses (a) because of admission by defendant No. 1 and also in terms of prayer Clause (d). No order as to costs. Enquiry into mesne profits be held.

At the request of the defendant No. 3, the execution of the decree that is passed by this order is stayed for a period of eight weeks from today. The learned Counsel appearing for defendant No. 3 states that during the above period of eight weeks, no third party interest will be created in the flat and possession of the flat will also not be delivered to anybody except the plaintiff.

Parties to act on the copy of this order duly authenticated by the Associate/Private Secretary of the Court.

Certified copy is expedited.