

(2016) 08 BOM CK 0157

In the Bombay High Court

Case No : Second Appeal No. 29 of 2016

Siddhivinayak Audyogik Vasahat Maryadit

APPELLANT

Vs

Murlidhar Vedu Jadhav

RESPONDENT

Date of Decision : 30-08-2016

Acts Referred:

Specific Relief Act, 1963 — Section 20

Citation : (2017) 2 ALLMR 13 : (2017) 3 MhLJ 326

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Mr. R.A. Thorat, Senior Advocate a/w Ms. Aditi Naikare a/w Mr. M.M. Mahajan i/by Mr. Anilkumar Patil, Advocates, for the Appellants; Mr. Simil Purohit a/w Mr. Manish Doshi i/by M/s. Vimadalal & Co, for the Respondent No. 7 in Second Appeal No. 29 of 2016;

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this second appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant (original plaintiff) has impugned the order and judgment dated 1st August 2015 passed by the learned District Judge-2, Niphad, Nashik dismissing the Regular Civil Appeal No.82 of 2012 filed by the appellant. The appellant had impugned the judgment and decree dated 15th September 2009 passed by the Civil Judge, Senior Division, Niphad, Nashik in Special Civil Suit No.54 of 2002 filed by the appellant inter alia praying for specific performance of the agreements dated 15th August 1990 and 15th November 1999 in respect of the suit property i.e. land bearing Gat No.2509 situated at village Ozar, Tal.Naiphad, Dist.Nashik (Hereinafter referred to as the Suit Property). The parties are described in later part of the judgment as they were described in the proceedings before the trial Court.

2. Both the parties have agreed that the facts in both the matters are identical. I am summarizing the facts in Second Appeal No.29 of 2016.

3. It was the case of the plaintiff that the plaintiff was the owner and in

possession of the land bearing Gat Nos.2610, 2612 and 2614 which were adjoining to the suit property. The suit property is owned by the defendant No. 1 along with other co-owners. It was the case of the plaintiff that the defendant no.1 agreed to sell the suit property to the plaintiff on 15th August 1990 for consideration of Rs.5,04,000/- and entered into a writing with the plaintiff by accepting earnest amount of Rs.5,000/-. According to the plaintiff, the defendant no.1 had executed an agreement in favour of the Chief Promoter of Siddhi Vinayak Industrial Estate. It was the case of the plaintiff that the names of the deceased mother of the defendant no.1 and his absconding brother by name Waman were entered in 7/12 extract. The defendant no.1 agreed to get their names removed from the record of the rights and to execute a registered sale deed in favour of the plaintiff. It was the case of the plaintiff that since the suit land was "Inam" land, as per the provisions of Restoration of Lands to Tribal Act, a permission was required from the Government before selling such Inam land. The defendant no.1 was admittedly a tribal.

4. It was the case of the plaintiff that as per the terms and conditions of the said agreement dated 15th August 1990, the defendant no.1 failed to obtain necessary permission from the Government though he had received huge amount from the plaintiff under the sale deed dated 15th August 1990 and the plaintiff and the defendant no.1 entered into a new agreement on 15th November 1999 by reproducing earlier terms and conditions recorded in the agreement dated 15th August 1990. According to the plaintiff, the plaintiff had already paid a sum of Rs.1,89,150/- to the defendant no.1 from 15th August 1990 till 15th November 1999.

5. It was the case of the plaintiff that since the defendant no.1 did not obtain any permission from the Government and did not execute the sale deed in favour of the plaintiff, the plaintiff filed a suit (Special Civil Suit No.52 of 2002) in the Court of Civil Judge, Senior Division inter alia praying for specific performance of the agreements dated 15th August 1990 and 15th November 1999 or in the alternative for damages and for refund of the amount paid by the plaintiff to the defendant no.1. During the pendency of the suit, the defendant no.1 entered into an agreement for sale along with other co-owners in favour of the defendant nos.2 to 6 and put them in possession of the suit property after obtaining necessary permission from the competent authority and by executing the sale deed. The defendant no.1 resisted the said suit by filing his written statement and denied the execution of the alleged agreement for sale dated 15th August 1999 in favour of the plaintiff. The defendant no.1 also denied the receipt of any amount from the plaintiff under the said agreement. It was the case of the defendant no.1 that the defendant no.1 belonged to tribal caste. According to the defendant no.1, the description of the property mentioned in the plaint was not sufficient to identify the suit property. It was the case of the defendant no.1 that he was not the absolute owner of the suit land and other co-owners were not authorised to execute any alleged agreement in favour of the plaintiff. It was the case of the defendant no.1 that the suit property was owned by more than 30

persons of tribal family and could not be sold without prior sanction of the Government.

6. The defendant nos.2 to 6 also resisted the suit by filing a separate written statement and pointed out that the defendant no.1 along with other co-owners had executed a registered sale deed in respect of suit property in their favour on 4th December 2004. It was the case of the defendant nos.2 to 6 that the defendant no.1 and the other co-owners had executed an agreement on 20th November 2000 in their favour for sale of the suit land. It was alleged that all the co-owners of the suit property had agreed to sell the land to Shri Ghumare for Rs.75,00,000/- which was prevailing market rate of the suit property. It was the case of the defendant nos.2 to 6 that they were bona fide purchasers of the suit land and had purchased the suit property after making due enquiry in respect of title of the land i.e. by issuing public notice in daily newspaper.

7. It was the case of the plaintiff that the defendant nos.2 to 6 executed a sale deed in favour of the defendant no.7 in respect of the suit property on 16th June 2009. The defendant no.7 was not impleaded as a party-defendant in the civil suit but was impleaded in the appeal filed by the plaintiff. The learned trial Judge framed 10 issues for determination. The plaintiff examined eight witnesses before the learned trial Judge. The defendant no.1 examined the witnesses. The defendant nos.2 to 6 also examined the witnesses.

8. The learned trial Judge by a judgment and order dated 15th September 2009 dismissed the claim for specific performance of the agreements. The learned trial Judge however decreed the alternate relief claimed by the plaintiff i.e. by way of refund of earnest amount of Rs.1,94,150/- paid by the plaintiff with interest @6% p.a. from the date of filing of the suit till its full realisation.

9. Being aggrieved by the said judgment and decree dated 15th September 2009, the plaintiff filed an appeal (Regular Civil Appeal No. 82 of 2012) before the learned District Judge-2. By an order and judgment dated 1st August 2015 passed by the learned District Judge-2, the said appeal came to be dismissed. Being aggrieved by the said order and judgment dated 1st August 2015, the plaintiff filed this second appeal under Section 100 of the Code of Civil Procedure, 1908.

10. Mr. Thorat, learned senior counsel for the plaintiff invited my attention to the copy of the plaint, notes of evidence, separate compilation filed before this Court, Agreements, findings rendered by the learned trial Judge and also the appellate Court. It is submitted by the learned senior counsel that since the copy of the agreement dated 15th August 1990 entered into between the plaintiff and the defendant no.1 was missing, the parties had entered into an agreement dated 15th November 1999 on the same terms and conditions except few modifications. He submits that since the suit property was an Inam land, the said property could be sold only after sanctioning from the Government. The plaintiff had taken such responsibility under the agreement dated 15th November 1999

and had agreed to bear such expenses for obtaining such land. He submits that the plaintiff claims to be in possession of the suit property under the agreement dated 15th November 1999. There were no major changes in the agreement dated 15th November 1999. He submits that the said agreement dated 15th November 1999 was proved by the plaintiff before the learned trial Judge.

11. It is submitted by the learned senior counsel that the finding of the learned trial Judge on issue no.2 was inconsistent with the issue no.1. He submits that on one hand, the learned trial Judge has rendered a finding that the plaintiff had proved that on 15th August 1990, the defendant no.1 had accepted a sum Rs.5,000/- as an earnest money and thereafter accepted some amounts towards the said transaction and on the other hand, has held that the plaintiff had failed to prove that the defendant no.1 had executed an agreement to sell in its favour on 15th August 1990 for an amount of Rs.5,04,000/-.

12. It is submitted by the learned senior counsel that though the plaintiff had produced original agreement dated 15th November 1999, the learned trial Judge has erroneously rendered a finding that the plaintiff had failed to prove execution of the sale agreement dated 15th November 1999. He submits that the though plaintiff was all throughout ready and willing to perform its part of the obligation under the agreement, the learned trial Judge however erroneously held that the plaintiff had failed to prove that it was ready and willing to perform its part of the obligation under the agreement.

13. It is submitted by the learned senior counsel that the learned trial Judge had granted alternate relief of refund of the amount paid by the plaintiff to the defendant no.1, which presupposes that the amount was paid by the plaintiff to the defendant no.1 under the agreement for sale which existed and was proved by the plaintiff before the learned trial Judge.

14. It is submitted by the learned senior counsel that the finding of the learned trial Judge as well as the appellate Court on the issue of limitation is also totally erroneous and perverse. He submits that the second agreement was entered into on 15th November 1999 whereas the suit for specific performance was filed by the plaintiff in the year 2002 i.e. prior to the date of expiry of three years from the date of the said agreement.

15. It is submitted by the learned senior counsel that the defendant nos.2 to 6 and the defendant no.7 were not bona fide purchasers without notice and could not claim right, title and interest in the suit property in view of those transactions having taken place during the pendency of the proceedings filed by the plaintiff.

16. It is lastly submitted by the learned senior counsel that even if it was held that the defendant no.1 was only one of the co-owner of the suit property along with other co-owners, in view of the fact that the defendant no.1 had admittedly executed the agreement for sale in respect of the entire property in favour of the plaintiff, the learned trial Judge ought to have passed a decree for specific performance at least in respect of the share of the defendant no.1 on the suit

property.

17. Mr. Purohit, learned counsel for the respondent no.7 invited my attention to the findings recorded by the learned trial Judge and also by the appellate Court. He submits that admittedly, the suit land was an Inam land and thus could not have sold without prior permission from the Government. He submits that the defendant no.1 admittedly was not the sole owner in respect of the suit property but the same was owned by several co-owners. The defendant no.1 along with other co-owners after obtaining permission from the Government sold the said suit property to the defendant nos.2 to 6. The defendant nos.2 to 6 in turn has sold the suit property to the defendant no.7 for consideration. The sale deed entered into in favour of the defendant no.7 by the defendant nos.2 to 6 was duly registered.

18. It is submitted by the learned counsel for the defendant no.7 that admittedly the plaintiff had failed to produce the alleged original agreement dated 15th November 1999 before the learned trial Judge. He submits that the plaintiff had admittedly applied for specific performance of the alleged agreements dated 15th August 1990 and 15th November 1999 before the learned trial Judge which was not permissible. He submits that the learned trial Judge had rightly rendered a finding that there was vast variance in the pleadings and evidence led by the plaintiff. He submits that since the plaintiff had propounded both the documents, the onus was on the plaintiff to prove the existence and contents of those two alleged agreements.

19. It is submitted by the learned counsel for the defendant no.1 that even if the first agreement was executed between the plaintiff and the defendant no.1 in the year 1990, the plaintiff had not been able to demonstrate before the learned trial Judge that during the period between 1990 and 1999, any steps were taken by the plaintiff under the said alleged agreement. Not a single letter has been produced by the plaintiff on record showing any steps having been taken during the period between 1990 and 1999 by the plaintiff. He submits that even if the said agreement dated 15th November 1999 was treated as proved, even under the said agreement, the responsibility was on the plaintiff to take an appropriate permission from the Government for transfer of the land and that also at its own cost which the plaintiff failed admittedly. He submits that even during the period between 1999 and 2002, the plaintiff did not take any steps under the said alleged agreement of 1999 except issuing a notice in the year 2001. He submits that the plaintiff has to prove its readiness and willingness to comply with its part of the obligation under the alleged agreement prior to the date of filing of the suit, during the pendency of the suit and till decree is passed.

20. It is submitted by the learned counsel for the defendant no.7 that though the defendant no.7 had issued a public notice before purchasing suit property from the defendant nos.2 to 6 in the newspaper having wide circulation inviting objections, the plaintiff did not raise any objection. He submits that the defendant no.7 was thus bona fide purchaser without notice.

21. In so far as the submission of the learned senior counsel for the plaintiff that the learned trial Judge ought to have passed a decree at least in respect of the share of the defendant no.1 is concerned, it is submitted by the learned counsel that admittedly the plaintiff did not apply for decree for part of the property and did not comply with the conditions prescribed under Section 12 of the Specific Reliefs Act, 1963.

22. It is submitted by the learned counsel for the defendant no.7 that the learned trial Judge has considered all the issues and all criteria required to be fulfilled before passing a decree for specific performance including the existence of the agreement, readiness and willingness on the part of the plaintiff and the discretionary powers of the Court for granting specific relief under the provisions of the Specific Reliefs Act, 1963. He submits that the findings recorded by the two Courts are not perverse and cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

23. Mr. Thorat, learned senior counsel for the plaintiff in rejoinder submits that the plaintiff had relied upon two agreements before the learned trial Judge. The learned trial Judge relied upon the second agreement. He submits that there was no bar from granting specific performance in respect of the two documents. He submits that the plaintiff has not taken any benefit of the clause recording possession of the Plaintiff under the said agreement dated 15th November 1999. It is submitted that during the period between 1990 and 1992, the defendant no.1 had removed the names of other co-sharers and more particularly on 19th January 2001. He submits that the plaintiff had already paid 1/3 amount of the agreement as consideration agreed to be paid to the defendant no.1. The finding rendered by both the Courts are perverse and a decree for specific performance of the agreement ought to have been granted by the learned trial Judge.

24. There is no dispute that the plaintiff did not produce the alleged original agreement dated 15th August 1990 before the learned trial Judge alleging that the same was missing and was not available with it. The plaintiff did not produce any document on record before the learned trial Judge showing any steps alleged to have been taken by the plaintiff between 15th August 1990 and 15th November 1999. I am not inclined to accept the submission of the learned senior counsel for the plaintiff that the agreement dated 15th November 1999 was similar to the earlier agreement dated 15th August 1990. Even according to the agreement dated 15th November 1999, the responsibility was of the plaintiff to take steps to apply for permission from authority before sale of the Suit Property. In the said agreement dated 15th November 1999, it is also alleged for the first time that the plaintiff was in possession of the suit property which was even according to the plaintiff was not recorded in the alleged agreement dated 15th August 1990. In my view, the learned trial Judge has rightly recorded a finding that there were inconsistencies and contradictions in the pleadings and the documents produced by the plaintiff about the amounts paid by the plaintiff and about the other terms and conditions alleged to have been agreed upon.

25. It is not in dispute that the suit property did not absolutely belong to the defendant no.1 but he had ? share in the total land which came into 6 H 72 R. There was no proper identification of the suit land between the parties in the agreement dated 15th November 1999. The learned trial Judge has rightly rendered a finding that there was no evidence on record produced by the plaintiff that the alleged original agreement dated 15th August 1990 was lost and was not traceable and did not apply for permission for leading secondary evidence. Admittedly, the plaintiff did not lead any secondary evidence.

26. The learned trial Judge took cognizance of the facts which were proved by the defendants that they were bonofide purchasers without notice. In spite of notices issued by the defendant nos.2 to 6 before purchase of the suit property, no objection was raised by the plaintiff. Admittedly, there was no partition of the property between the co-sharers of the land in question. After considering the entire evidence in a great detail by the learned trial Judge, it is held that in the facts and circumstances of the case, the learned trial Judge could not have granted discretionary relief of specific performance in favour of the plaintiff. The learned trial Judge accordingly directed the defendant no.1 to pay an amount of Rs.1,94,150/- with interest @6% p.a. from the date of filing of the suit till its full realization and rejected the prayer for specific performance of the agreement.

27. The appellate Court has also framed three points for determination and has rendered a finding that the plaintiff had failed to prove that it was ready and willing to perform its part of the agreement and that the plaintiff was entitled to the relief of declaration that the sale deed executed in favour of the defendant nos.2 to 6 by the defendant no.1 was illegal, null and void and was not binding upon it. The appellate Court has also rendered detailed reasons while rendering various findings of fact in favour of the defendants.

28. A perusal of the record clearly indicates that the plaintiff neither produced the alleged oral agreement dated 15th August 1990 nor sought any permission to lead secondary evidence to prove the said alleged agreement. The plaintiff also could not have proved the alleged steps taken between 1990 and 1999. There were vast variances between the pleadings filed by the plaintiff and contents of the agreement dated 15th November 1999. The plaintiff did not take any steps even according to the clauses mentioned in the agreement dated 15th November 1999.

29. The learned trial Judge, in my view, has rightly considered the entire evidence including documentary evidence and has held that the plaintiff had failed to prove the alleged agreement dated 15th November 1990. Both the Courts below have also taken into consideration the subsequent events i.e. agreement already entered into by the plaintiff in favour of the defendant nos.2 to 6 in respect of the suit property who were bona fide purchasers. The defendant nos.2 to 6 in turn had executed a sale deed in favour of the defendant no.7. Since the plaintiff could not prove its readiness and willingness and existence of the alleged agreement dated 15th August 1990, the learned trial

Judge was justified in refusing to exercise discretion to grant discretionary relief in view of Section 20 of the Specific Reliefs Act, 1963.

30. In my view, there is no merit in the submission of the learned senior counsel that the findings recorded by the learned trial Judge are inconsistent or contradictory. A perusal of the order passed by both the Courts indicates that though the onus was on the plaintiff to prove that the alleged agreement existed and that the plaintiff was all throughout ready and willing to perform its part of the obligation under the alleged agreement dated 15th November 1999 or the alleged agreement dated 15th August 1990, the plaintiff failed to prove the readiness and willingness. The learned trial Judge and the appellant Court considered all the ingredients which are required for passing a decree of specific performance under the provisions of the Specific Reliefs Act, 1963. The plaintiff had failed to satisfy the mandatory condition for grant of specific performance in all respect.

31. It is not in dispute that the suit land was an Inam land and thus could not have been sold without prior permission from the Government. Admittedly no such permission was obtained by the plaintiff from the Government when the agreement dated 15th August 1990 alleged to have been executed or the agreement dated 15th November 1999 was executed. The defendant no.1 along with other co-owners had subsequently obtained the permission from the Government before selling the suit property to the defendant Nos.2 to 6. Though the defendant no.7 had issued a public notice before purchasing suit property from the defendant Nos.2 to 6 in the newspaper having wide circulation inviting objections, the plaintiff did not raise any objection.

32. In so far as the submission of the learned senior counsel for the plaintiff that even if the defendant no.1 was not exclusive owner of the entire suit property, the trial Court could have granted relief of specific performance at least in respect of the share of the defendant no.1 in the suit property is concerned, admittedly, the plaintiff did not apply for decree in respect of the share of the defendant no.1 by complying with the requisite conditions provided under Section 12 of the Specific Reliefs Act, 1963. No decree for part of the property thus could be granted by the trial Court. Mr.Thorat, learned senior counsel for the plaintiff agreed before this Court that no such relief was sought by the plaintiff against the defendant no.1 nor any submission in that regard was made before any of the Courts below. In my view, there is thus no merit in this submission of the learned senior counsel for the plaintiff.

33. In my view, the plaintiff who sought specific performance had to prove that it was ready and willing to perform its part of the obligation under the agreement for purchase of the immovable property which readiness and willingness shall be continuous from the date of execution of the agreement till the date of decree. Unless and until the plaintiff proves continuous readiness and willingness on its part which is a condition precedent for grant of specific performance, no decree for specific performance can be granted by the Court.

34. In my view, the findings of facts recorded by the learned trial Judge and also the appellate Court are recorded after considering oral and documentary evidence led by both the parties which are not perverse and thus such findings of facts cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

35. In so far as the Second Appeal No.311 of 2016 is concerned, Mr.Thorat, learned senior counsel for the plaintiff submits that the facts of this appeal are identical to the facts in Second Appeal No.29 of 2016. He however submits that only additional submission which the plaintiff seeks to make for consideration of this Court in that appeal is that though this Court had granted permission to the plaintiff to lead secondary evidence before the trial Court and though an attested photocopy of the alleged agreement dated 25th August 1990 was produced by the plaintiff, the learned trial Judge disbelieved the said photocopy.

36. A perusal of the order passed by the learned trial Judge clearly indicates that the plaintiff failed to prove the alleged agreement dated 25th August 1990. The witness examined by the plaintiff had admitted in the cross-examination that there was no documentary evidence to show that the original agreement for sale was in possession of late Vinayak Kadam and that no notice was issued to the family members of deceased Promoter of the society i.e. Mr. Vinayak Kadam to produce the original agreement for sale dated 25th August 1990. The learned trial Judge, in my view, has rightly rejected this submission of the plaintiff.

37. In my view, thus there is no merit in the additional submission made by the learned senior counsel for the plaintiff in so far as the Second Appeal No.311 of 2016 is concerned. For the reasons already recorded by this Court while dealing with the facts and submissions made in Second Appeal No.29 of 2016, in my view, the Second Appeal No.311 of 2016 is also devoid of merit. No substantial question of law has arisen in any of the aforesaid appeals. Both the appeals are totally devoid of merits. The findings recorded by two Courts below are concurrent findings of facts which are not perverse and thus cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

38. I therefore pass the following order :-

(a) Second Appeal Nos.29 of 2016 and 311 of 2016 are dismissed.

(b) There shall be no order as to costs.