

(2000) 07 BOM CK 0102

In the Bombay High Court

Case No : Second Appeal No's. 573 of 1993 and 280 of 1994

Smt. Anusaya and Others

APPELLANT

Vs

Smt. Raghunath Shankar Rahate and Others

RESPONDENT

Date of Decision : 21-07-2000

Acts Referred:

Contract Act, 1872 — Section 25, 62
Specific Relief Act, 1963 — Section 20
Transfer of Property Act, 1882 — Section 5, 54

Citation : (2000) 102 BOMLR 32

Hon'ble Judges : H.L. Gokhale, J

Bench : Single Bench

Judgement

H.L. Gokhale, J.—The Appellants in Second Appeal No. 573 of 1993 are the two Defendants in Regular Civil Suit No. 30 of 1979 which the Respondent No. 1 had filed against them as well as the Respondent No. 2. That suit was concerning a house property of the size of 53ft.x 13.25ft. situated at House Nos. 333-A and 334-A at Patan, District Satara. The Respondent No. 1 in this Appeal had filed the said suit for reconveyance concerning the said house property and possession thereof. The Respondent No. 2 to this Appeal is the original Defendant No. 3 who was occupying a part of the premises and by now he has given a writing that he has no concern or interest in the premises. As of now the contest remains only between the Appellants and the Respondent No. 1.

2. The said suit was dismissed by the Trial Court by its judgment and decree dated 23rd February, 1989. Being aggrieved by the said judgment and decree, the Respondent No. 1 herein preferred Regular Civil Appeal No. 180 of 1989 to the District Court at Satara. That Appeal came to be allowed by the judgment and decree of Second Additional District Judge, Satara dated 19th July, 1993, wherein the learned Judge ordered the Appellant No. 1 herein to execute a registered sale deed in favour of Respondent No. 1 in respect of the suit house. The Appellant No. 1 was permitted to receive the amount deposited by the Respondent No. 1 in that Court. Some consequential directions were also given.

The judgment however did not specifically include a direction to hand over possession of the suit property. Second Appeal No. 573 of 1993 is filed against the appellate judgment and decree. The other connected Second Appeal No. 280 of 1994 is filed by the Respondent No. 1 in this Appeal i.e. the original Plaintiff being aggrieved by the absence of the specific direction that the possession of the suit property be given to the original Plaintiff. Second Appeal No. 573 of 1993 has been admitted in view of the substantial questions of law raised in grounds (a) to (e) thereof and in the order admitting the appeal there is also a reference to the question of Plaintiff being ready and willing to perform his part of the contract which is ground (h). Second Appeal No. 280 of 1994 is admitted thereafter, it being a cross appeal.

3. Mr. R.A. Thorat with Ms. Mujumdar have appeared for the Appellants in Second Appeal No. 573 of 1993 whereas Mr. P.B. Shah with Ms. Mane have appeared for the Respondent No. 1 in this Appeal. The Respondent No. 2 has been served and has not cared to engage anybody nor is he present. In the other Second Appeal No. 280 of 1994, Mr. Shah has appeared for the Appellant and Mr. Thorat for Respondent Nos. 1 and 2 and Respondent No. 3 though served has remained absent. In the order hereinbelow, the Appellants in Second Appeal No. 573 of 1993 (who are Respondent Nos. 1 and 2 in Second Appeal No. 280 of 1994) are referred to as Appellants whereas the Respondent No. 1 in Second Appeal No. 573 of 1993 (who is Appellant in Second Appeal No. 280 of 1994) is referred to as Respondent No. 1.

4. The facts leading to the controversy in these two Appeals are as under:-

The parties in this litigation are related to each other and it appears that the Respondent No. 1 was in urgent need of some funds in the year 1964. He therefore entered into an agreement of sale of the above referred house property with the Appellant No. 1 on 1st April, 1964. Appellant No. 2 is the husband of Appellant No. 1 and was employed in police force. The agreement provided that the house property was being sold for an amount of Rs. 3,000/-. An amount of Rs. 1500/- was paid at that time itself and the remaining amount was to be paid later on by the time conveyance was effected, though possession was handed over forthwith. On the same day, another agreement for reconveyance was signed between the parties and it provided that within a period of 5 years after the expiry of 10 years from the date of the sale deed, the Appellant No. 1 herein was to reconvey the property to the Respondent No. 1 on accepting the amount of Rs. 3,000/-, Later on the balance payment was made and a regular sale deed w/s entered into between the parties on 27th August, 1964 in pursuance to the earlier referred agreement of sale made on 1st April, 1964. It is the case of the Respondent No. 1 that on 22nd August, 1974 he gave a notice to the Appellant No. 1 to reconvey the property. In her reply dated 5th September, 1974, the Appellant No. 1 disputed the fact of reconveyance agreement itself. Another notice was subsequently given by the Respondent No. 1 on 25th March, 1976, which was replied on 27th March, 1976. In view of this refusal by the Appellant

No. 1, the Respondent No. 1 was constrained to file the above referred suit which he filed on 9th March, 1979 seeking a reconveyance of the property in terms of the above referred agreement for reconveyance. As stated above, the Trial Court dismissed the suit whereas the same was decreed in Appeal though specific direction for handing over possession remained to be passed.

5. Mr. Thorat, learned Counsel appearing for the Appellants, raised a number of points making a grievance with respect to the appellate judgment and decree. Firstly he submitted that there was no specific prayer in the suit that the deed of conveyance be cancelled. His submission was that in the absence of such a specific prayer, the prayer for reconveyance would not lie. He then submitted that on the date on which the agreement for reconveyance was entered into, the Appellant No. 1 did not have the right to reconvey the property since her right in the property was not complete at that point of time. His submission was that she had only entered into an agreement to purchase the property and the sale deed was yet to be signed as on that date. He relied upon the definition of "transfer of property" in Section 5 of the Transfer of Property Act to emphasise that it implies an act by which a living person conveys property in present or in future. He referred and relied upon the last part of the definition of "sale" in Section 54 of the Transfer of Property Act which provides that a contract for sale of the immovable property is a contract that a sale of such property shall take place on terms settled between the parties and that it does not by itself create any interest in or charge on such property. His submission was that on 1st April, 1964 the Respondent No. 1 had only entered into an agreement of purchase. The conveyance in consequence thereto had not been effected and therefore she did not have the authority to reconvey on that date. In support of his submission, he relied upon a judgment of the Madras High Court in the case of Rajendrakumar Bhandari Vs. Poosammal and Others, . This ground has been taken in grounds (c) and (d) of the Appeal Memo. In this connection, Mr. Thorat also submitted that no amount was paid at the time of entering the reconveyance agreement and therefore the reconveyance agreement was void in the absence of consideration u/s 25 of the Contract Act. He disputed the execution of the reconveyance agreement itself and also contended that the signature of the Appellant No. 1 was taken thereon by practicing deception.

6. Mr. Thorat then submitted that assuming that the reconveyance agreement was valid and enforceable, the Respondent No. 1 had not shown readiness and willingness to complete his part of the transaction. He pointed out that it was only in the year 1982 that the Respondent No. 1 deposited the agreed amount of Rs. 3,000/- for reconveyance. This is a ground in Clause (h) of the Appeal Memo. Then, by referring to Article 54 of the Limitation Act, Mr. Thorat submitted that the suit was filed beyond the period of limitation. This point is raised -in grounds (a) and (b) of the Appeal Memo. Article 54 provides the period of three years for a suit for specific performance from (i) the date fixed for the performance or (ii) if no such date is fixed, when the Plaintiff has notice that performance is refused. Mr. Thorat pointed out that in this case, the Appellant No. 1 had refused to

reconvey the property by her reply dated 5th September, 1974 and the period of three years should be counted therefrom, whereas the suit is filed in 9th March, 1979. The next submission of Mr. Thorat was that the document of sale signed on 27th August, 1964 was silent about the agreement of reconveyance which had been entered into earlier on 1st April, 1964. He therefore submitted that assuming that there was any such agreement of reconveyance entered into, the same had been given up when the sale deed was signed. This is ground (e) of the Appeal Memo.

7. Mr. Thorat lastly submitted that if this Court is of the opinion that the Respondent No. 1 had established an agreement of reconveyance which was enforceable, at the most appropriate relief would be that damages should be awarded and not the decree as sought by him. For this purpose, he relied upon the conduct of the Respondent No. 1. He pointed out that whereas the first notice was given on 22nd August, 1974, the suit was filed 4 ½ years thereafter in March, 1979. The Respondent No. 1 had initially contended that an amount of Rs. 1000/- was paid in the presence of panchas towards the reconveyance amount. This submission was disbelieved by the Trial Court and in Appeal it was not pressed. In any case, in the year 1982 during the course of the trial when the Respondent No. 1 was required to deposit the balance of the consideration, he ought to have deposited Rs. 2000/- which would have been the balance as per his case, but he deposited the amount of Rs. 3,000/-. He also drew my attention to the deposition of Respondent No. 1 in cross-examination that he has two additional houses and three apartments which he had rented out in the meanwhile. The submission of Mr. Thorat therefore was that at the highest appropriate damages could be awarded but not reconveyance of the property as claimed by the Respondent No. 1, since in his view the decree would result into more hardships to the Appellants, which is an aspect to be examined u/s 20(b) of the Specific Relief Act.

8. Mr. Shah, learned Counsel appearing for the Respondent No. 1, laid much emphasis on the over all aspect of the litigation. He emphasised the fact that even as per the evidence given by the Appellant No. 1, at the time when the agreement of sale and the agreement of reconveyance were entered into in the year 1964, the suit property was worth Rs. 15,000/- and the agreement was entered to sell it only for Rs. 3,000/-. This was essentially because of the then financial difficulties of the Respondent No. 1 and the near relationship of the parties involved. He also emphasised the fact that initially the Appellant No. 1 took a stand that her signature on the document of reconveyance was taken by deception and therefore contending that the agreement be held as not binding on her. As against that, in her cross-examination she admitted her signature thereon and the fact that the agreement for reconveyance had been read over to her. The husband of the Appellant No. 1 has been in the police department and in case the Respondent No. 1 had played any such deception or fraud, surely he would have lodged some complaint with the police authorities or taken appropriate action. Hence the submission of Mr. Shah is that as far as the

execution of the agreement for reconveyance is colicerned, there cannot be any dispute that it was so executed with full -understanding by the parties concerned. With respect to the submission of Mr. Thorat that the Respondent No. 1 is having two additional houses and three apartments, Mr. Shah pointed out that it has come on record that the Appellants had also constructed another house of 16 khans (rooms) and given them on rent. Hence as far as that part is concerned, the Appellants were in much better financial position or had better housing facilities than the Respondent No. 1. In his submission, undoubtedly the Respondent No. 1 was in financial difficulties in the year 1964 and therefore for a paltry sum of Rs. 3,000/- he had to enter into the agreement of sale when the house was worth at least Rs. 1 5,000/- even as per the evidence of the Appellant No. 1. As far as the execution of the document of reconveyance is concerned, he also drew my attention to the fact that two witnesses had been examined by the Respondent No. 1 to prove the execution of the document.

9. With respect to absence of specific mention of the agreement of reconveyance in the sale deed [ground (e) in the appeal], Mr. Shah submitted that at no point of time the Appellant No. 1 took a stand that due to this silence or absence of the provision in the sale deed, the reconveyance had been given up. In fact in the first reply given by the Appellant No. 1 on 5th September, 1974, she has stated that some kind of agreement for reconveyance was in fact executed in the year 1964. The only dispute raised by her was that the money was to be paid in 5 years. Mr. Shah therefore submitted that having admitted the execution of the agreement of reconveyance, the burden of proving that the reconveyance agreement had been given up was on the Appellant No. 1 and she has failed to discharge that. Again, by referring to paragraph 7 of the written statement, Mr. Shah pointed out that there also she has repeated that the house was to be taken back in 5 years. She only disputed the condition of 10 years and not the document as such, nor is it pleaded in the written statement that the reconveyance agreement had been given up due to absence of a specific mention in the sale deed. Mr. Shah submitted that if the Respondent No. 1 had given up that right of reconveyance at the time when the sale deed was entered into, the Appellant No. 1 would have specifically got it mentioned in writing in the sale deed.

10. With respect to this controversy arising out of the absence of a specific mention, Mr. Shah referred me to a judgment of the Apex Court in the case of Sri Babu Ram Alias Durga Prasad Vs. Sri Indra Pal Singh (Dead) by Lrs., wherein the facts were almost similar and merely because of absence of a specific reference to the reconveyance agreement in the subsequent sale deed, the Apex Court did not hold the agreement for reconveyance to be non-enforceable. In the facts of that case, the Court noted that there also the agreement of sale and agreement of reconveyance had been almost simultaneously entered into and having got the sale deed executed, the Defendant was held not entitled to approbate and reprobate and to contend that the other part regarding reconveyance was given a go-bye. The Court observed that normally when such agreement for sale and

agreement for reconveyance was entered into, it is customary to mention the agreement of reconveyance in the sale deed. The problem comes only when it is not so specifically mentioned and the Court held that merely because it is not so mentioned, it cannot mean that the agreement of reconveyance was no longer enforceable. The relevant observations of the Apex Court in paragraph 19 of the judgment is as follows:-

...It is true that it is customary to include a recital regarding the agreement of reconveyance in the sale deed itself. But where, as here, there was an agreement preceding the sale deed and that agreement contained such a clause, and a sale deed was executed consequent thereto, the absence of a reference to the agreement of reconveyance in the sale deed would not, in our opinion, lead to the inference that the said right was given up by the plaintiff. Unless there is a detailed plea and also evidence that before execution of the sale deed there was novation and parties expressly agreed to give a go-bye to the agreement of reconveyance, no inference could be drawn that the agreement of reconveyance contained in the agreement of sale dated 19.11.63 which preceded the sale deed was given a go-bye.

Mr. Shah therefore submitted that there was no substance in the contention that the agreement of reconveyance was not an enforceable one or that it was given up merely because of absence of any reference thereto in the sale deed.

11. With reference to the submission of Mr. Thorat that the Appellant No. 1 did not have the present right to enter into the agreement of reconveyance [grounds (c) and (d) of Appeal], Mr. Shah drew my attention to a judgment of the Apex Court in the case of *Habiba Khatoon Vs. Ubaidul Huq and Others*, wherein even the assignee of the purchaser was held to be having the right of reconveyance. In the present case, the agreement of sale and agreement of reconveyance were entered into on the same day and they operate as the consideration for each other. Therefore the submission was that it cannot be said that there was any absence of consideration when the agreement of reconveyance was entered into or that no consideration was received on that date. In our case, it was a case of a set of promise and counter-promise, each forming consideration for each other between the parties who were directly concerned in the transaction. Mr. Shah submitted that reference to Sections 5 and 54 of the Transfer of Property Act by Mr. Thorat was misconceived inasmuch as when Section 5 defines the concept of transfer, it specifically provides that transfer can be in present or in future.

12. With respect to the question of limitation [grounds (a) and (b) of Appeal], Mr. Shah submitted that as per the agreement of reconveyance, the right of reconveyance was available during a period of 5 years after the expiry of 10 years from the sale deed. This period of 10 years expired on 27th August, 1974 since the sale deed is of 27th August, 1964. The earliest notice issued by the Respondent No. 1 on 22nd August, 1974 was premature in time. It is only the notice which was given after the time started running, namely the one dated 25th March, 1976 which would be the relevant notice and the suit has been filed

within three years therefrom i.e. on 9th March, 1979.

13. With respect to the submission concerning readiness and willingness [ground (h) of the Appeal] Mr. Shah submitted that in the very first notice issued on 22nd August, 1974 the Respondent No. 1 had stated that the money was kept ready and was available. That was again stated in the second notice of 25th March, 1976. It was reiterated in the suit and the amount was deposited in the year 1982. In his submission, readiness and willingness had to be seen in this context. Mr. Shah therefore submitted that the Appellate Court was right in coming to the conclusion that the agreement of reconveyance was enforceable one and that in view of the fact that the Respondent No. 1 was ready and willing to execute the necessary deed of reconveyance, the suit was rightly decreed. He however found fault with the Court not giving specific direction for handing over possession of the suit house for which the other connected appeal has been filed by the Respondent No. 1.

14. With respect to the last submission of Mr. Thorat that assuming that the agreement of reconveyance was established, at the most damages be awarded by way of relief. Mr. Shah drew my attention to the fact that the Appellants had good number of houses in the very town. His submission was that it cannot be said that the Appellant No. 1 will suffer more hardship if the decree as passed by the Appellate Court was directed to be maintained and executed.

15. Having heard the submissions of both the counsel, it is clear that the parties had entered into an agreement for reconveyance of the concerned house property. The submission on behalf of the Appellants that there was any deceit or that the terms of the agreement were not understood by the Appellant No. 1 cannot be accepted. As pointed out by Mr. Shah, the evidence in that behalf is very clear. Then with respect to the plea that reconveyance was given up [ground (e)], it is seen that when the initial agreement for sale was entered into in the year 1964, the value of the house property was around Rs. 15,000/- whereas it was agreed to be sold for Rs. 3,000/-. The agreement for reconveyance was also entered on the same day. The sale deed is executed some 4 months later in August, 1964. At that time also, at the time of finalisation of the sale deed the amount to be paid is retained at Rs. 3,000/-. It is nobody's case that the Appellant No. 1 paid any more amount to the Respondent No. 1 in the meanwhile or that there was any further consideration from the Appellants to the Respondent No. 1 so that the Respondent No. 1 would give up the agreement for reconveyance which was entered on 1st April, 1964. In fact, it could be said that a house worth Rs. 15,000/- was agreed to be sold for Rs. 3,000/- (i.e. for a price lesser by Rs. 12,000/-) mainly for three reasons: (a) the urgent requirement of the Respondent No. 1 for Rs. 3,000/-, (b) the near relationship of the parties, and (c) the fact that the house was to be reconveyed on the same terms. As held by the Apex Court in the case of Babu. Ram v. Indra Pal Singh (*supra*), in a case like this there has to be a novation within the terms of Section 62 of the Contract Act. It is only in that case that the agreement for reconveyance can be said to

have been superseded. As held by the Apex Court in that judgment, unless there is a detailed plea and also evidence that before the execution of the sale deed there was novation and parties expressly agreed to give up the agreement for reconveyance, no inference can be drawn that it has been superseded. That being the position, the absence of the specific mentioning with respect to reconveyance agreement in the said sale deed cannot by itself be read against the Respondent No. 1.

16. Similarly with respect to the plea of Mr. Thorat that the Appellant No. 1 did not have a present right at the time when the agreement for reconveyance was entered into [grounds (c). and (d)], as held by the Apex Court in the case of *Habiba Khatoon v. Ubaidul Haq* (supra), when an assignee of a purchaser was held to be having the right of reconveyance, a party which was purchasing the property at the particular point of time could certainly enter into an agreement at the same time that as and when it becomes the full owner thereof it will reconvey the property on the terms being agreed between them at that point of time. The agreement of sale and the agreement of reconveyance form a set of counter agreements and the agreement of reconveyance cannot be said to be void by contending that there was no consideration. A house property worth Rs. 15,000/- was being sold for Rs. 3,000/- on the particular date, thus it was being sold for a price which was less by Rs. 12,000/- or so. That itself formed a part of consideration for the agreement for reconveyance which was to be subsequently to be completed by returning the amount of Rs. 3,000/- within the period stipulated.

17. With respect to the aspect of readiness and willingness, which is necessary, when one seeks specific performance [ground (h)], it has been held by the Apex Court in *R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others*, that readiness and willingness cannot be treated as a strait-jacket formula. It has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. In the case of *Sukhbir Singh and others Vs. Brij Pal Singh and others*, the respondent's presence in Sub-Registrar's office for the execution of the document was considered as sufficient to establish his willingness. The Apex Court observed "It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree." And again as observed by the Apex Court in *Syed Dastagir Vs. T.R. Gopalakrishnasetty*, it is the pith and substance of the plea that is to be seen in interpreting a pleading and wherever there be two possible interpretations, then the one which defeats justice should be rejected and the one which subserves to justice should be accepted. In the present case, as has been noted above, in the very first notice the Respondent No. 1 had stated that the money was kept ready. That was repeated in the subsequent correspondent also. It is true that the stand taken by the Respondent No. 1 that he had paid an amount of Rs. 1000/- in the presence of panchas, is disbelieved by the Trial Court and is not pressed in Appeal. But that by itself cannot be said

to mean that the Respondent No. 1 was not willing to complete his part of the transaction. In any case, he has deposited the requisite amount in the year 1982. That being the position and as held by the Apex Court, one has to accept an interpretation which will subserve justice rather than one which will defeat it. In the facts of the present case, one has to hold that the Respondent No. 1 was ready and willing to complete his part of the transaction.

18. Even on limitation [ground (a)], the submission of Mr. Shah is correct. The Respondent No. 1 could have sought the specific performance as per the agreement only after the expiry of 10 years after the sale deed i.e. after 27th August, 1974. The notice given prior thereto and reply to it cannot be used to defeat his claim. The notice subsequent to this date is given on 25th March, 1976 and the reply has come on 27th March, 1976. The suit filed on 9th March, 1979 will therefore be within limitation. In the circumstances, in my view, the agreement for reconveyance was entered into between the parties, it was enforceable in law and the Respondent No. 1 was at all material times ready and willing to act in accordance therewith. The Respondent No. 1 was therefore entitled to specific performance as sought by him in his suit. Mr. Thorat had contended that a prayer to set aside the sale deed was necessary before reconveyance was sought. In my view, it was not necessary and it was clearly implied when the execution of reconveyance was sought.

19. Then I come to the last submission as to whether in the facts of the present case instead of specific performance, damages be awarded to the Respondent No. 1. Mr. Thorat, learned Counsel appearing for the Appellants, submitted that the premises concerned are in possession of the Appellants since the year 1964. Mr. Thorat had shown willingness to appropriately compensate the Respondent No. 1. Every effort therefore was made by this Court also to see to it that the settlement takes place. Both the parties are relatives and therefore this effort was undertaken. Unfortunately the intervention of the Court has also failed. Hence the Court has to see as to what will be the hardship to either of the parties in the event either the decree is granted or it is denied. Section 20(2)(b) of the Specific Relief Act requires the Court to examine as to what would be the hardship on the Defendant which he did not foresee and as to what would be the hardship on the Plaintiff due to non-performance of the contract. In the present case, as it has been recorded earlier, the Plaintiff-Respondent No. 1 is having two additional houses and three apartments in the same town and he has rented them as is seen in his deposition in the cross-examination. As against that, the Defendant-Appellant herein has constructed another 16 khans (rooms) in the same town and has given them on rent. In this set of circumstances, it is difficult for this Court to come to a conclusion one way or the other that there will be more hardship to the Appellants or to the Respondent No. 1. That being the position, in view of the fact that the agreement has been proved, and is held to be valid, lawful and enforceable, in my view, the proper course will be to grant and uphold the decree passed by the District Court in favour of the Respondent No. 1 which directs the Appellant No. 1 to collect the amount of Rs. 3,000/ -

deposited in Court and to execute the necessary sale deed, failing which the Respondent No. 1 is permitted to obtain the sale deed through Court.

20. In view of the discussion above, Second Appeal No. 573 of 1993 will have to be dismissed and is hereby dismissed with costs.

21. The cross appeal, viz. Second Appeal No. 280 of 1994, seeks a direction that the impugned decree be modified and it may be added that the Defendants be directed to hand over the possession of the suit premises. There is also a prayer in this appeal for an order in respect of mesne profits at the rate of Rs. 300/- per month from 1974, This prayer was rejected by the Trial Court while deciding issue No. 5, but in the Appellate order there is no direction in this behalf. There is no specific mention of this direction in the Appellate Court decree and hence by way of abundant caution this Second Appeal No. 280 of 1994 has been filed. With a view not to leave any doubt, it would be desirable that the prayer made in this Appeal is granted. Accordingly this Second Appeal is allowed with cost and the decree of the Appellate Court is modified to state that the Defendants are directed to hand over possession of the suit property to the original Plaintiff immediately on executing the sale deed. There will also be a direction to hold enquiry as to the mesne profits from the date of institution of the suit till possession is delivered.

22. Mr. Thorat applies for the stay of this judgment in both these Appeals for a period of 8 weeks. The judgment and decree passed by me in both these Appeals will stand stayed for a period of 8 weeks from today. It is made clear that in the meanwhile the Appellants will not create any third party rights nor will induct anybody in the suit property nor shall damage it in any manner whatsoever.

Drawing of certified copy is expedited.

A copy of this order authenticated by the Personal Secretary of this Court be made available to the parties.