

(2007) 12 KAR CK 0054

In the Karnataka High Court

Case No : Regular First Appeal No. 265 of 1995

Sri Chandrashekar and Others

APPELLANT

Vs

The Tuheed Co-operative Housing Society (Regd.) and Others

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Specific Relief Act, 1963 — Section 10, 20, 20 (2), 23

Citation : (2008) ILR (Kar) 4003

Hon'ble Judges : V. Gopala Gowda, J; Ashok B. Hinchigeri, J

Bench : Division Bench

Advocate : Shekar Shetty, for the Appellant; G. Balakrishna Shastry, for R1(a) and (b), for the Respondent

Final Decision : Allowed

Judgement

Ashok B. Hinchigeri, J.—This Regular First Appeal is directed against the judgment and decree, dated 6th January, 1995 passed by the Court of Principal Civil Judge, Hubli in OS No. 55 of 1993.

2. The brief facts of the case are that the first respondent is a Co-operative Society registered under the Karnataka Co-operative Societies Act, 1959. It entered into an agreement of sale with the appellants on 7th March, 1986 in respect of the lands measuring 22 acres out of 27 acres 5 guntas (18 acres 18 guntas at R.S. No. 7, 4 acres 37 guntas at R.S. No. 5A/3B/1, and 3 acres 30 guntas in R.S. No. 5A/3B/2 of Bammapura Village, Hubli Taluk). These lands, constituting the subject matter of the same, are hereinafter called as "suit property". The sale consideration agreed upon was Rs. 35,000/- (Rupees thirty five thousand only) per acre.

3. The said agreement stipulated that the first respondent Society should obtain necessary clearance and approvals from the State Government at its cost. It was further stipulated that the sale deed would be executed and registered within one year from the date of the agreement, failing which the agreement was to be

renewed for a further period of six months but only on the payment of one half of the consideration amount. The balance amount was to be paid before the Sub-Registrar at the time of registration of the sale deed. The appellants were readily signing all the documents/applications for getting the permission from the Government for the purchase of the suit property. On obtaining the no-objection, conversion order, exemption under the provisions of the Urban Land (Ceiling & Regulation) Act, 1976 etc. (now repealed) the first respondent Society approached the appellants for the execution of the sale deed in respect of the suit property. The appellants demanded more money. The first respondent Society had to give the amounts aggregating to Rs. 7,00,000/- (Rupees seven lakh only) to the appellants.

4. On 29th May, 1992 the first respondent Society had to give a sum of Rs. 50,000/- (Rupees fifty thousand only) as demanded by the appellants for putting the first respondent Society in possession of the suit property. On taking the possession, the first respondent Society was doing the developmental work on the suit property. When the appellants refused to execute the sale deed and on the other hand started interfering in the possession of the suit property of the first respondent Society, it was constrained to file the suit against the appellants. The appellants filed the written statement denying the plaint averments as false. It is the defence of the appellants that the sale agreement, dated 7th March, 1986 was only tentative; it was superseded by another agreement dated 21st May, 1988. They agreed to sell the suit property but only at Rs. 3,25,000/- (Rupees three lakh twenty five thousand only) per acre. They dubbed the letter, dated 20th November, 1988 addressed to the Housing and Urban Development Secretary, as a forged and concocted document. The appellants further contended in the written statement that the nominal agreement, dated 7th March, 1986 was entered into for the limited purpose of securing the exemption/permission under the Urban Land Ceiling Act, 1976. They prayed for the dismissal of the suit contending that the first respondent Society is not entitled for the reliefs as prayed in the suit.

5. Based on the rival pleadings, the trial Court formulated the following issues for its consideration and determination:

1. Whether the plaintiff proves that defts. have agreed to sell the suit property at the rate of 35,000/- per acres and received an advance of Rs. 50,000/- by executing an agreement of sale dated 7.3.1986?
2. Whether the plffs. have established that they are all the while and always ready and willing to perform their part of the agreement?
3. Whether the plaintiffs prove that they have paid Rs. 50,000/- through cheque to the defts. on 29.5.1992 and took possession of the suit property to an extent of 22 acres?
4. Whether the defts. prove that an agreement dated 7.3.86 was superseded by another agreement dated 25.1.1988 and that plffs. have agreed to purchase the

suit property at the rate of Rs. 3,25,000/-per acre?

5. Whether the plaintiff is entitled to a decree as prayed for?

Additional Issue:

1. Whether the plaintiff is entitled to possession of the suit property in the event if it is held that they are not in possession of it?

6. The suit went for trial. On behalf of the first respondent Society, three witnesses were examined as PWs. 1 to 3 marked 47 documents in Exhibit "P" series. On behalf of the appellants, the first appellant was examined as DW1 and three other witnesses were examined and marked 12 documents in Exhibit "D" series. On considering the pleadings, oral and documentary evidence placed on its record, the trial Court has answered Issues No. 1 to 3 and 5 in the affirmative and Issue No. 4 in the negative. On Additional Issue, the trial Court has said "does not arise", in view of its answering Issue No. 3 in the affirmative. Consequentially it has decreed the suit directing execution of the sale deed by the appellants in respect of the suit property pursuant to the sale agreement at Ex.P6 by receiving the balance sale consideration of Rs. 70,000/- (Rupees seventy thousand only).

7. Aggrieved by the aforesaid judgment and decree, the defendants 1 to 5 have instituted this appeal. Sri Shekar Shetty, the learned Counsel for the appellants, urged the following legal contentions questioning the correctness of the findings and reasons recorded on the contentious issues in the impugned Judgment in favour of the first respondent Society.

a) The very identity of the lands proposed for sale is in dispute. The description of the three survey numbers namely, RS Nos. 7, 5A/3B/1 and 5A/3B/2 aggregates to 27 acres 5 guntas. Out of this total extent of 27 acres 5 guntas, only 22 acres were agreed to be sold. The boundaries shown in the plaint are for the entire extent of 27 acres 5 guntas and not for 22 acres only. Property must be identifiable in order to avail the relief under the Specific Relief Act, 1963. To buttress his submissions, Sri Shekar Shetty has relied on the following reported judgments:

i) Nahar Singh Vs. Harnak Singh and Others,

ii) Shafiqur Rehman Khan and Anr. v. Smt. Mohammad Jahan Begum and Ors., (1982) 2 SCC 456

b) The first respondent has sought specific performance of the Government order at Ex.P9. What can be enforced is the specific performance of the agreement between the parties and not the Government order. Therefore it is urged by the learned Counsel for the appellants that the first respondent is not entitled to the relief of specific performance in respect of suit properties, as prayed in the suit.

c) The trial Court has committed a serious error both on facts and in law by granting specific performance Decree in respect of the suit property on the basis

of the agreement at Ex.P6, which relief was not sought for by the first respondent Society. In this regard, he has relied upon a judgment of the Hon''ble Supreme Court in the case of *Maliyakkal Abdul Azeez Vs. Assistant Collector, Kerala and Another*, .

d) He brought to our notice the provisions contained in Section 20 of the Specific Relief Act, 1963 and contends that the respondents are not entitled for the relief of specific performance in respect of the suit property. It reads as follows:

20. Discretion as to decreeing specific performance - (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation I.- mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation II.- The question whether the performance of a contract would involve hardship on the defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

e) Once the contract between the parties is concluded, no relief based on the variation is grantable by the civil court. When the agreement at Ex.P6 is only in respect of 22 acres, the Government order at Ex. P9 is in respect of varied extent - 27 acres, 3 5 guntas. In this regard, he has relied upon the following reported judgments:

i) K. Narendra Vs. Riviera Apartments (P) Ltd., .

ii) Arjundas Parashuram v. Keshavamurthy C.V. and Ors. 1981 (1) Kar L.J. 226.

iii) Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan, .

iv) Narain Singh Vs. Dalip Singh,

f) It is urged that the trial Court has not given any weightage to the contention urged on behalf of the appellants that the agreement at Ex.P6 is for the limited purpose of obtaining permission under Urban Land Ceiling Act, 1976.

g) The Government order at Ex.P9, on the basis of which the suit is allowed is a nullity in the eyes of law. Admittedly when the land was an agricultural land, the question of Government granting permission in respect of vacant land in excess of the limit under the Urban Land Ceiling Act, 1976, does not arise at all.

h) The transaction in question is hit by Section 23 of the Indian Contract Act, 1872. u/s 79-B of the Karnataka Land Reforms Act, 1961 a Co-operative society is not eligible to possess the agricultural land. As the agreement in question is of the year 1986, the first respondent Society cannot fall back on the amendment made to Section 109 of the Karnataka Land Reforms Act, 1961 providing for exemption from the provisions of Section 79-B of the said Act, because the said amendment has come into force subsequent to the said agreement. In support of his submissions, he relied on the following reported judgments:

i) Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co., .

ii) Pujari Narasappa and Anr. v. Shaik Hazrat and Ors. AIR 1960 Mys 59(DB) HN-(C).

iii) Ashwinkumar Manilal Shah Vs. Chhotabhai Jethabhai Patel, HN-(E).

i) If the first respondent Society were only to produce the book of resolutions, things would have become clearer as to whether the agreement at Ex.D8 is authentic or not. As the best piece of evidence was withheld from the Court, adverse inference u/s 114 of the Evidence Act, 1872 should have been drawn. To drive home this point, Sri Shetty, the learned Counsel for the appellants brought to our notice the two judgments of the Apex Court reported in:

i) S. Gopal Reddy Vs. State of Andhra Pradesh, .

ii) Vidhyadhar Vs. Manikrao and Another, .

j) Sri Shekar Shetty, learned Counsel for the appellants submitted that the sale

agreement at Ex.P.6 could not have been relied upon by the trial Court and granted the relief in favour of the first respondent Society at all for the following reasons:

- i) No amount whatsoever was paid to the appellants under Ex.P6,
 - ii) Even when several payments were made after Ex.P6, no entry thereof came to be made in Ex.P.6,
 - iii) No extension of time to perform the contract by the appellants was endorsed in Ex.P.6,
 - iv) Ex.P.6 stipulates that if the sale deed is not executed within one year, the respondents should make an extra payment of half of the sale price and enter into an agreement by taking six months" time. As admittedly, neither half of the sale price was paid nor any further agreement is entered into by the first respondent Society with the appellants, therefore Ex.P6 is not enforceable in law against the appellants.
 - k) The sale agreement at Ex.P6 is superceded by the sale agreement at Ex.D8.
 - l) The trial Court has not considered the sequence of events in their proper perspective at the time of recording its findings on the contentious issues in the impugned judgement. The issuance of the notice by the appellants to the first respondent Society, not replying to the same by it, have not received any weightage at the hands of the trial Court. Although the mother and the sister of the appellants have got a right in the property in question, they are not made parties to the agreement. Therefore the same is not binding on them and is not enforceable.
 - m) The trial Court has failed to decide what was the property value in question at the time of exercising its discretionary power as required u/s 20(2) of the Specific Relief Act. When the Government Notification at Ex.D12 issued by the Special Deputy Commissioner, Dharwad, showed the price of the lands in Bammapur village at Rs. 15,000/- per gunta for commercial purpose and Rs. 10,000/- per gunta for residential purpose, the Court below has directed the sale of the property in question at Rs. 35,000/- per acre, which is opposed to the provisions of Section 20(2) of the Specific Relief Act and the law laid down by the Apex Court and various High Courts on this important aspect of the case.
8. Per contra, Sri G. Balakrishna Shastry, the learned Counsel for the respondent No. 1 has submitted that the first respondent Society has paid a total consideration of Rs. 7,00,000/- to the appellants; it was a bonafide sale agreement holder and that it has performed its part of the obligations under the agreement at Ex.P6. Sri Shastry submitted that the revised agreement Ex.D8 is a concocted document. The document at Ex.D8 is typed by one Sri C.R. Balagannavar, a typist. The said typist was not examined. The appellants ought to have examined the typist, when both the document writer and stamp vendor have not supported the appellants" case. The learned Counsel for the first

respondent has sought to justify the findings and reasons recorded on the contentious issues, as the same are based on proper appreciation of the legal evidence on record and the same are in accordance with law. Further it is contended that the appellants have not shown to this Court that the findings are either erroneous or error in law. Therefore the impugned Judgment and Decree cannot be interfered with by this Court in exercise of its appellate jurisdiction and power.

9. Sri Balakrishna Shastry also submits that the first respondent Society has already invested the following amounts into the suit property:

(a) Total sale consideration paid Rs. 7,00,000.00 (b) Conversion fee Rs. 2,72,200.00 (c) Plan sanctioning fee Rs. 2,91,547.00 (d) Contractor's bill Rs. 4,39,018.00 (e) Cost of the materials Rs. 5,00,000.00 -----
Total Rs. 22,02,765.00 -----

10. On hearing the learned advocates, the following points fall for our consideration and determination in this appeal:

- 1) Whether the findings and reasons recorded on the contentious issues are vitiated on account of either erroneous reasoning or error in law?
- 2) Whether the grant of relief of specific performance is in accordance with the provisions of the Specific Relief Act?
- 3) What Decree?

11. We answer the aforesaid points in favour of the appellants for the following reasons.

The trial Court has not examined the provisions of the statute before granting the relief to the respondent No. 1. Section 10 of the Specific Relief Act, 1963 reads as follows:

10. Cases in which specific performance of contract enforceable - Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

- (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
- (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

12. We are of the considered view that in this case, the first respondent Society can be compensated in terms of money for the non-performance of the agreement at Ex.P6. We have no hesitation in providing for the reimbursement of the admitted sale consideration of Rs. 7,00,000/- and conversion fee of Rs. 2,72,200/- and plan sanctioning fee of Rs. 2,91,547/-. Ex.P13 evidences the payment of conversion fine of Rs. 2,72,250/-. Similarly Ex.P41 shows that a sum of Rs. 2,91,547/- was towards the plan sanction. However we are disallowing the

claim of Rs. 4,39,018/- towards the running bill No. 1 by the Engineer of the first respondent society. Neither the agreement between the first respondent Society and the Contractor/Engineer was produced before the trial Court nor the particulars of the payment like Cheque No., Demand Draft No. are produced. Similarly, we are not in a position to concede to the claim of the first respondent Society that the materials dumped on the suit property were of the value of Rs. 5,00,000/- because no documents, to support this claim, are produced before the trial Court. The first respondent Society has totally paid a sale consideration of Rs. 7,00,000/- and incurred an expenditure of Rs. 5,63,747/- on obtaining certain clearances from the Government. Whether those clearances were really necessary and under what authority of law they were issued, is not a relevant consideration for the purpose of ordering reimbursement.

13. In the case of *Ramji Patel v. Rao Kishore Singh* AIR 1929 PC 190, the Privy Council came to the conclusion that once the Court forms the opinion that the breach of contract could be compensated in terms of money, then the specific performance should not be directed.

14. The delay in approaching the Court, coupled with the substantial raise in the prices of the properties, makes it inequitable to give the relief of specific performance. This is the considered view expressed by the Hon'ble Supreme Court in the case of *K.S. Vidyanadam and Others Vs. Vairavan*, and in the case of *Tejram Vs. Patirambhau*, .

15. In the instant case, the respondent No. 1 approaches the Court after seven long years of the agreement at Ex.P6. That the price shown in Ex.P6 is unrealistically low is also evident from the Government Notification at Ex.D 12. Ex.D12 shows that the price per acre ranges between Rs. 4 to 6 lakh depending upon whether it was for commercial or residential purposes. The trial Court is dismissive of this vital aspect of the matter. It has merely held that the inadequacy of a price is not a ground to refuse the relief of specific performance, which finding is contrary to the legal position as laid down by the Apex Court in the cases referred to supra and Clauses (a) and (b) of Sub-section (2) of Section 20 of Specific Relief Act.

16. We also find considerable force in the submissions of the learned Counsel Sri Shekar Shetty that no relief of specific performance could have been granted in favour of the first respondent Society based on the Government order, as his submissions are supported by the decisions of the Apex Court referred supra. The specific performance relief could have been granted in favour of the first respondent only in respect of the agreement between the parties.

17. We also hold that no relief of specific performance could have been granted by the trial Court in favour of the first respondent in respect of a property whose description is insufficient and whose very identity is disputable. In the instant case, the boundaries given are for a larger extent of 27 acres 5 guntas and not 22 acres, which were alleged to have agreed to be sold by the appellants on the

basis of Ex.P6.

18. To balance the equities between the first respondent Society and the appellants, we deem it fit and proper to award interest on the aforesaid sum of Rs. 12,63,747/- at 9 per cent per annum [(i) Rs. 7,00,000/-, paid by way of advance sale consideration, from 7th March, 1986 (the date of signing the agreement); (ii) Rs. 2,72,250/-, paid towards conversion, from 22nd October, 1992, the date of payment as is evident from Ex.P13; and (iii) Rs. 2,91,547/-, paid for getting the plans sanctioned, from 5th August, 1993, the date on which the said amount was paid, as is evident from Ex.P41].

19. To sum up, we are allowing this appeal for the following reasons:

a) The relief of specific performance can be only of an agreement and not of the Government order.

b) The property agreed to be sold is not clear, certain and hence not identifiable.

c) There is a delay of seven years on the part of the first respondent Society in approaching the Civil Court seeking the relief of specific performance.

d) That the parties agreed on the sale consideration of Rs. 35,000/- is not believable, as the same is grossly inadequate in view of the Government Notification for the lands in the same village (Bammapur) fixing the guidance value at Rs. 4,00,000/- to Rs. 6,00,000/-per acre.

e) The sale agreement is for a different extent and the specific performance sought is for a different extent based on the Government order and therefore the grant of Decree is vitiated in law.

f) The first respondent Society failed to produce the book of resolutions, which would have thrown light on the authenticity or otherwise of the agreement at Ex.D8. Therefore adverse inference shall be drawn against the first respondent Society by applying the decisions of the Apex Court relied upon by the appellants side.

g) The conduct of the parties to act outside the sale agreement (Exhibit P6) is evident from the acts of giving and receiving the instalments of sale consideration for which there is no endorsement in the sale deed. If the trial Court were only to consider this vital aspect of the matter, it would have recorded the finding on the contentious issue against the first respondent.

h) The mother and sister of the appellants are not being made parties to the sale agreement, although they are also the joint owners of the suit property alongwith the appellants No. 1 to 5. Therefore the document at Ex.P6 can not be acted upon.

i) The first respondent Society can be compensated in terms of money as provided u/s 20(2) read with Sections 10 and 23 of the Specific Relief Act.

j) u/s 79-B of Karnataka Land Reforms Act, 1961, a Co-operative Society is not

eligible to possess agricultural land. Therefore the very transaction in question is forbidden u/s 23 of the Indian Contract Act, 1872.

20. We allow this appeal, set aside the judgment and decree passed by the trial Court and by directing the appellants to pay a sum of Rs. 12,63,747/- (Rs.7,00,000/- towards the refund of advance sale consideration, Rs. 5,63,747/- towards the reimbursement of the expenditure incurred by the first respondent Society towards obtaining the clearances) with interest at 9% per annum. It is clarified that the interest payable is from 7th March 1986, 22nd October, 1992 and 5th August, 1983 on Rs. 7,00,000/-, Rs. 2,72,250/- and Rs. 2,91,547/- respectively, as set out in paragraph 19 hereinabove.

21. No order as to costs.