

(2004) 03 BOM CK 0011

In the Bombay High Court

Case No : Second Appeal No. 123 of 1990

Sudhakarrrao Shankarrao Sarnaik

APPELLANT

Vs

Bhanudas N. Deshmukh and Another

RESPONDENT

Date of Decision : 16-03-2004

Acts Referred:

Limitation Act, 1963 — Article 54
Specific Relief Act, 1963 — Section 20, 22

Citation : AIR 2004 Bom 350

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : P.A. Deshmukh, for the Appellant; S.C. Mehadia, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—The short question that arises for determination, in this second appeal is whether the appellant-plaintiff is entitled for the refund of earnest money with interest from the date of the suit till realisation.

2. Relevant facts are as under :--The respondent-defendant No. 1 is the owner of agricultural land bearing survey No. 56/7 admeasuring 2.00 acres situated at village Mohaja. He entered into the agreement of sale on 29-9-1979 in favour of the plaintiff and agreed to sale his land for the consideration of Rs. 4,500/-. The Isar Chitthi was also executed though the possession was not delivered. It was agreed that the balance consideration of Rs. 500/- would be paid at the time of execution and registration of the sale deed on or before 30-9-1980. Thereafter, the plaintiff requested the defendant No. 1 to receive the balance about of Rs. 500/- and to execute the sale deed, but in vain. However, the defendant No. 1 sold the same land to the defendant No. 2 by virtue of the sale deed dated 7-1-1983 and also delivered the possession to him. Thus, the plaintiff had filed suit for specific performance of the contract and in the alternative for refund of the earnest money.

3. The defendant No. 1 combated the claim of the plaintiff and contended that he had executed the agreement of sale in favour of the plaintiff by way of security for the amount of loan borrowed by him. He contended that he had repaid the amount of Rs. 4,200/- inclusive of interest, on 27-1-1983 in presence of two witnesses. He contended that the plaintiff's father was carrying on the business of money lending and therefore, he was not entitled to the relief of the specific performance of contract. The learned Civil Judge, Junior Division on considering the evidence adduced before him refused to grant specific performance of the contract but decreed the suit for refund of earnest money of Rs. 4,000/-. Being aggrieved by this judgment, the defendant No. 1 carried appeal to the District Court. The learned District Judge allowed the appeal, set aside the decree passed by the trial Court and consequently dismissed the judgment dated 15-12-1989. This is how the plaintiff by invoking the jurisdiction of this Court u/s 100 of the Code of Civil Procedure, filed this appeal restricting his claim to refund the amount of earnest money only.

4. Mr. Deshmukh, the learned counsel for the plaintiff contended that the claim of the plaintiff in this appeal is restricted to refund of earnest money only. He contended that the plaintiff himself is not dealing in money lending business and the property and business of his father is entirely separate and therefore, the learned Additional District Judge could not have declared the father of the plaintiff as money lender in the suit when he was not a party. He contended that the plaintiff had paid the amount of Rs. 4,000/- as consideration and the execution of the agreement of sale is not denied. He contended that the defendant No. 1 admitted that he had signed on the blank stamp paper and therefore, the execution of the agreement of sale can be very well presumed especially when the defendant No. 1 would not sign the blank stamp paper. He further contended that the plaintiff is certainly entitled to refund of the earnest money. He pointed out that the Additional District Judge has committed error of law and facts and therefore, the judgment refusing to grant refund of earnest money cannot be sustained in law.

5. The learned counsel for the defendant No. 1 contended that the agreement of sale is said to have been executed on 29-9-1979 but the possession was not delivered. The plaintiff is said to have paid substantial amount i.e. 90%. He contended that the amount of loan was paid to the father of the plaintiff who did not issue any receipt for the said amount and he also did not return the document of agreement of sale on the pretext that the agreement of sale was kept in a locker. He contended that the appellate Court has considered the evidence adduced by the defendant's witnesses and recorded a finding that the plaintiff's father was doing money lending business and as such he was not entitled to receive the refund of earnest money much less the loan amount of Rs. 1,400/- because the document was executed for the security of that loan. He contended that there was interpolation of date 30-9-1980 in the agreement of sale and therefore the suit filed by the plaintiff was barred by the period of limitation. He contended that the appellate Court was perfectly justified in

dismissing the suit of the plaintiff. He contended that no substantial question of law is involved in this appeal and the same is liable to be dismissed.

6. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. It is not in dispute that the defendant No. 1 owns agricultural land bearing Survey No. 56/7 admeasuring 2.00 acres which is said to have been agreed to be sold for the consideration of Rs. 4,500/- in favour of the plaintiff on 29-9-1979. It is also not in dispute that thereafter the defendant No. 1 sold the said land to defendant No. 2 by registered sale deed on 27-1-1983. Perusal of the agreement of sale dated 29-9-1979 would reveal that it has been scribed on stamp paper of Rs. 5/- and that bears the signature of defendant No. 1. The covenant of the agreement of sale would reveal that the defendant No. 1 had executed the agreement of sale on receiving the amount of Rs. 4,000/- and the total consideration was Rs. 4,500/-. It further reveals that the balance consideration of Rs. 500/- was to be paid on or before 30-9-1980 and the defendant No. 1 had agreed to execute the sale deed on receiving the balance consideration. It is also not in dispute that the possession of this land was not delivered by the defendant No. 1 to the plaintiff at any time.

7. It is true that the father of the plaintiff was not a party to the suit, but according to the defendant No. 1 he had borrowed the loan amount of Rs. 1,400 and signed on the blank stamp paper. He contended that he had repaid the amount of Rs. 4,200/- which was inclusive of interest to the father of the plaintiff on 27-1-1983 in presence of two witnesses namely Gulabrao (D.W. 2) and Keshav (D.W. 3). The oral evidence of these witnesses would not carry any evidentiary value especially when the defendant No. 1 did not take any receipt of repayment of the loan amount with interest from the plaintiff or his father. The defendant No. 1 in all probability would not have failed to take back the document of agreement of sale which was executed if at all he had only signed on the blank stamp paper.

8. The trial Court has framed the issues and issue No. 7 is "Whether the plaintiff is entitled to specific performance of the contract as prayed for?" This issue has been answered in the negative and the observations of the trial Court are that the relief of specific performance is a discretionary relief and the plaintiff has failed to show readiness and willingness to perform his part of contract and naturally, he is entitled to relief of specific performance of contract. He is not entitled for this relief especially when Defendant No. 2 is in possession of the suit land and when the land is adjoining to his land. From the record it appears that the plaintiff has paid the sum of Rs. 4,000/- as earnest money to the defendant No. 1. Therefore, he is entitled to that amount. The record shows that there is oral evidence on behalf of the defendant that he has refunded the amount of Rs. 4,200/- to Shankarrao, the father of the plaintiff. However, the said Shankarrao is not appointed as Mukhtayar of the plaintiff to receive the said amount. Shankarrao did not come forward to admit that he has taken this amount. There is no documentary evidence to show this repayment. Thus, it appears that the

plaintiff is entitled to refund of consideration instead of relief of specific performance of the contract. Considering the evidence on record, the trial Court on the basis of these observations, decreed the suit for refund of amount of Rs. 4,000/-.

9. The appellate Court did not take into consideration that the defendant No. 1 though claims to have signed on a blank stamp paper and though claims to have repaid the amount to the father of the plaintiff, did not obtain any receipt for the same nor he had insisted that the agreement of sale or the blank stamp paper should be returned to him and in such circumstances, the trial Court was perfectly justified in coming to the conclusion that the plaintiff is entitled to the decree for refund of money of Rs. 4,000/- and therefore, it is not possible to accept the contention of the learned counsel for the defendant No. 1 that since substantial amount of consideration was already paid and the possession was not delivered and therefore the transaction was in the nature of money lending and since the borrowed amount of loan has been repaid, no decree for refund of money can be passed.

10. The next contention of the learned counsel for the defendant No. 1 is that the suit is barred by period of limitation and in this context he pointed out that there was inter pollution in the date mentioned in the agreement of sale, i.e. 30-9-1980. The inter pollution appears to be in the date "30". What is pertinent to note is that the parties agreed that the sale deed would be executed on or before 30-9-1980 and according to the learned counsel for the defendant No. 1, this date was 20-9-1980 and the suit is filed on 26-9-1983, which is barred by period of limitation. It is not possible to accept this contention because it is settled law that in case of the immovable properties, the time may or may not be essence of the contract depending upon the facts and circumstances in each case. Since the agreement of sale was executed on 29-9-1979, the claim of specific performance of the contract was perfectly within the period of limitation. It is another thing that the plaintiff is not entitled to the relief of specific performance, as is observed by both the Courts-below, but that does not mean that the suit claiming alternatively for refund of money is barred by period of limitation. Therefore, this contention is also devoid of any merit.

11. This Court may usefully refer the decision of the Hon^{ble} Supreme Court in the case of Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others, wherein it is held in Para 16 that; "The further aspect that requires to be noticed is as to the nature and character of earnest money deposit and in that contest the distinguishing features, which help delineate the differences, if any. The matter is not, at any rate, res integra. In (Kunwar) Chiranjit Singh v. Har Swarup, AIR 1926 PC 1, it was held that the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reasons of the fault or failure of the purchaser. This statement of law had the approval of this Court in Maula Bux Vs. Union of India (UOI), . Further, it is not the description by words used in the agreement only

that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well. That have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as "a deposit or earnest money" may ultimately turn out to, be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

12. In the present case substantial amount of consideration was paid on the date of agreement of sale and the contention of defendants that they repaid it with interest has been rightly negated by the trial Court and thus in equity also the plaintiff is entitled to refund of the consideration of Rs. 4,000/- with interest.

13. On close scrutiny, it would reveal that the appellate Court has committed an error in refusing to grant decree for refund of earnest money and the impugned judgment cannot be sustained in law and deserves to be set aside and that of the trial Court deserves to be restored. In the result, the impugned judgment passed by the appellate Court is set aside and that of the trial Court is restored and the appeal is allowed with costs, throughout.