

(2000) 09 CAL CK 0029
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction S.A.T. No. 005 of 1999, S.A.T. No. 007 of 2000

T. Poppan and Another

APPELLANT

Vs

Karia Gounder and Others
 Karia Gounder and Others
Vs T. Poppan and Another

RESPONDENT

Date of Decision : 18-09-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 106, 114
Specific Relief Act, 1963 — Section 14, 16, 19, 20

Citation : AIR 2001 Cal 42 : (2001) 1 CALLT 389

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. S. Abdus Sattar and Mr. Haradhan Banerjee, for the Appellant;

Judgement

K.J. Sengupta, J.—This appeal and the Cross-Objection are taken up for hearing for convenience sake inasmuch as the question of law involved in both the matters are identical.

2. The plaintiffs-appellants filed a suit against the defendant No. 1 for decree for specific performance for sale of an immovable property being a single-storied house standing on Survey No. 250, measuring an area of 500 sq. mt. situated at Dollygunj in Port Blair Tahsil, South Andaman, Andaman District (hereinafter referred to as the "said property"). After filing of the suit, it was discovered that the said property was sold to defendant No. 3. So, plaint, was amended and thereby the aforesaid claim was changed by the plaintiff asking relief for specific performance of the contract against the defendant No. 3 and for declaration that the aforesaid sale being null and void and for perpetual injunction for obtaining possession of the said property. The defendant No. 2 was impleaded as party, since at the time of filing of the suit, it was apprehended by the plaintiffs that the said property might be sold to him defeating their claim. The defendants No. 1 and 2 have jointly filed written statement. The defendant No. 3 has filed separate

written statement.

3. The short case of the plaintiffs is that by and under an oral agreement in or about second week of November, 1992, the first defendant being in need of money for sending his son to mainland for medical treatment, approached the plaintiffs for a sum of Rs. 30,000/-. At that time the defendant No. 1 agreed to sell and the plaintiffs agreed to purchase the said property at a sum of Rs. 70,000/-. So, a sum of Rs. 30,000/- was paid as and by way of advance and/or part payment for such sale and purchase of the said property. The aforesaid payment was made and oral agreement was entered into by and between the plaintiffs and the defendant No. 1 in presence of various persons. After return from the mainland the first defendant, however, in breach of the said oral agreement did not sell the said property. As such, the aforesaid suit was filed. The plaintiffs at all material times had and still have been ready and willing to pay the balance amount of consideration to purchase the said property. The plaintiffs through their learned lawyer, demanded by a letter dated 19th December, 1993 for specific performance of such oral agreement,

4. Both the defendants No. 1 and 2 have denied the factum of existence of any concluded agreement and in fact the first defendant has denied having received any such payment of Rs. 30,000/-. Further plea taken by both the defendants No. 1 and 2 is that even if there has been any oral agreement, the same is not enforceable in view of the subsequent sale and registration of the said property in favour of the defendant No. 3. The defendant No. 3 pleaded in his written statement that he is bona fide purchaser for value without notice of agreement and he also contends that it was not within his knowledge despite his best efforts, of existence of any oral agreement. Rather the defendant No. 1 at the time of sale represented that there was no such agreement.

5. The learned trial Judge has framed several issues. The plaintiffs apart from examining themselves, also examined two other witnesses, namely, P.Ws. 3 and 4. After analysing evidence, the learned trial Judge held that there was no agreement for sale and the plaintiffs could not prove the same. So, the suit was dismissed.

6. On appeal, the first appellate Court after analysing evidence came to finding that there was an oral agreement and the plaintiffs paid a sum of Rs. 30,000/- to the defendant No. 1. However, the learned appellate Court below held that the agreement could not be directed to be performed in view of the subsequent sale of the said property to the defendant No. 3 and further the agreement has become non-existent because of its determinate in nature by reason of non stipulation of time as to its performance. Therefore, the learned appellate Court below granted a decree for return of the advance sum of Rs. 30,000/- together with interest thereon at the rate of 12% per annum from the date of receipt by the defendant No. 1 till the date of actual payment. So, the judgment and decree of the learned trial Court was set aside to the extent as above. The appellants have preferred this appeal against the judgment and decree for not granting

specific performance for sale of the said property. The respondent No. 1 has preferred the cross-objection against the judgment of the appellate Court for granting the decree of return of the advance amount as aforesaid.

7. The learned counsel appearing for the appellants-plaintiffs, submits that the decree and order of the learned Appellate Court below refusing to grant relief for specific performance is absolutely on the wrong proposition of law. He argues that the appellate Court having found that there was a valid agreement for sale, a decree for specific performance should have been passed holding that the subsequent transfer in favour of the defendant No. 3 is wholly illegal, and he is also bound by such agreement u/s 19(b) of the Specific Relief Act. The learned appellate Court below has absolutely ignored that the defendant No. 3 has not proved the case of bona fide purchase for value without notice. The learned Court below has illegally shifted the burden upon the plaintiffs appellants. He argues that it is for the defendant No. 3 to prove his case that he purchased the property without any notice bona fide for value. Mere averment in the written statement would not suffice and the same has to be proved by cogent evidence. There is no such proof that the decree for grant of specific performance declaring subsequent sale being invalid, is a matter of course. In support of his submissions, he relies upon the following decisions.

8. Gulla Kharagjit Carpenter Vs. Nar Singh Nandkishore Rawat, , Simanchal Mahapatro and Another Vs. Budhiram Padhi and Another, , AIR 1955 Mysore 3, AIR 1946 97 (Privy Council) , AIR 1955 NOC 345, Vol. XI ALJ. 137 equivalent to 18 IC 533, 68 CWN 611, 100 Law Weekly 489, AIR 1983 Punjab 470, AIR 1947 Sind 6 and Veeramalai Vanniar (Died) and Others Vs. Thadikara Vanniar and Others, .

9. Mr. Bandopadhyay, appearing for the respondents No. 1 and 2, submits that finding of the learned appellate Court below is wholly wrong and without having any acceptable evidence. The plaintiff No. 1 has not proved the case of oral agreement. Even both the plaintiffs have contradicted themselves in their evidence as to the date of entering into the agreement. According to him, such contradiction is vital and the learned appellate Court below illegally overlooked such contradiction. Moreover, the learned appellate Court below ought not to have upset the finding of the learned trial Judge as to non-existence of the oral agreement. It is not open for the learned appellate Court below without giving any reason, to interfere with the finding of the learned trial Judge, who had the benefit of watching the demeanour of the particular witness. Since it is a case of oral agreement, the demeanour of the witnesses is very material.

10. The learned lawyer appearing for the respondent No. 3, submits that his client has purchased the said property without any notice and bonafide for value. He argues that it is the plaintiffs-appellant who is to discharge initial onus proving that the defendant No. 3 had notice and/or knowledge of the prior agreement. Since it is a case of alleged oral agreement, one cannot have its notice or knowledge.

11. Having heard respective learned lawyers in this case, two points are required to be considered before I dispose of this appeal, (1) whether the finding of the learned appellate Court below as to the existence of oral agreement is lawful and further justified in the facts and circumstances of this case, or not, (2) if the finding is justified, then whether the learned appellate Court below has rightly and lawfully refused to grant relief for specific performance.

12. In a second appeal, it is established law that fact finding is never gone into, but in this case, the fact finding of the existence of oral agreement and also payment of earnest money arrived at by the learned appellate Court below is required to be considered in second appellate jurisdiction as the learned trial Judge came to a finding that there was no proof of such agreement. Therefore, in substance, the second appellate Court is to act as first appellate Court, so far as it relates to the finding of the first appellate Court as to the existence of oral agreement and payment of earnest money.

13. I have examined the finding of the learned appellate Court below. While doing so, I had to go through the evidence of the four witnesses cited by the plaintiffs appellants. I do not find any infirmity and illegality of the conclusion arrived at by the learned appellate Court below. Both the plaintiffs have proved in spite of, cross-examination, existence of oral agreement and payment of earnest money and/or part payment. Their oral evidence had been supported and/or corroborated by PW3 and PW4, who are independent witnesses and are known to both the parties. Of course the plaintiff No. 1 has spoken about different date of oral agreement, but such a contradiction and/or omission is not fatal, since all the witnesses have unanimously stated that there was an oral agreement and payment of earnest money. So, I am not inclined to upset the finding of the learned appellate Court below. I, accordingly, affirm such finding.

14. When the existence of oral agreement and payment of earnest money in terms thereof have been proved, now question remains whether the learned appellate Court below was justified in refusing to grant a decree for specific performance in view of the subsequent sale in favour of the third party.

15. Admittedly, there was a sale in favour of the defendant No. 3. The learned appellate Court below has refused to grant decree for specific performance on the plea that since there was a subsequent sale and the plaintiffs have failed to prove that the defendant No. 3 had notice and knowledge of such prior agreement, so oral agreement for sale has now become anfractuous and unsustainable u/s 14 of the Specific Relief Act. The aforesaid reasoning of the learned appellate Court below in refusing to grant decree for specific performance is wholly erroneous on the point of law. Under section. 19(b) of the Specific Relief Act. 1963 agreement for sale squarely binds subsequent purchaser, provided of course if such purchaser does not purchase the property in question in good faith and without any notice of the original contract.

16. Section 19(b) of the Specific Relief Act. 1963 is quoted as follows :--

"19. Relief against parties and persons claiming under thereby subsequent title-- Except as otherwise provided by this chapter, specific performance of a contract may be enforced against-

(a)

(b) any other person claiming under him by a title arising subsequently to the contract except transferee for value who has paid his money in good faith and without notice of the original contract."

17. The learned appellate Court below was in error in shifting the burden upon the plaintiffs to prove that the defendant No. 3 has had no knowledge of the agreement. In my view, it is established principle of law that whether a person pays money in good faith and without notice of the original contract, or not is to be proved by the person who has pleaded. In this connection, reference may be made to the following decisions.

18. In a decision rendered by the Privy Council reported in 1946 privy Council page 97 it has been held amongst others relying on an earlier decision reported in 61 Indian Appeals 115, that the burden of proving good faith and lack of notice lay upon the defendants.

19. In a decision of Punjab and Haryana High Court reported in AIR 1983 Punjab 470 rendered by the Division Bench it has been held amongst others that the onus is on the defendant transferee to prove that he had no notice of the prior agreement to sell in favour of the plaintiff. This onus can only be discharged by evidence led in the case.

20. In a Division Bench judgment of Orissa High Court reported in Simanchal Mahapatro and Another Vs. Budhiram Padhi and Another, it has been held amongst others that a subsequent purchaser in order to successfully resist a suit for specific performance of a prior contract of sale must establish that--(a) he is a bona fide purchaser for value, (b) he had no notice of the prior contract and (c) before he had notice of the prior contract of sale, he paid the consideration money to the owner.

21. It appears that the defendant No. 3 has pleaded aforesaid excuse and/or exception. Unfortunately, the defendant No. 3 has not called any witness nor has examined himself as witness to prove the aforesaid averment. It also appears from the cross-examination of the plaintiffs' witnesses done by the dependents, that the aforesaid case of bona fide purchase for value without notice was not even suggested. So, the defendant No. 3's case is squarely hit by the decision reported in A.E.G. Carapiet Vs. A.Y. Derderian, . In this celebrated decision of Division Bench of this Court in its paragraph 10 law on this aspect has been laid down as follows :--

"10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not

be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross examination is being made comes to give and lead evidence by producing witness. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then it must be taken to accept the plaintiffs' account in its entirety,

Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."

22. It is the law that the value of oral agreement is as good as a written agreement. It is not necessary in this kind of agreement that same should be reduced into writing specific performance of agreement can be directed to be performed. The law was always there but sometimes it has to be "declared and accepted by the judicial pronouncement. It was held in an ancient decision of the Privy Council reported in AIR 1946 Privy Council 97 at page 99 that an oral contract is valid and enforceable.

23. The plea of ignorance of existence of oral agreement by the defendant No. 3 is thus not accepted by me. Moreover, whether the defendant No. 3 is a bonafide purchaser for value and without any notice of the aforesaid agreement is within the domain of special knowledge of the defendant No. 3, under the provision of section 106 of the Evidence Act such fact has to be proved, and the proof cannot be substituted by mere averment in the written statement. The defendant No. 3 as I have already observed has not called any witness, so u/s 114 of the Evidence Act it has to be adversely inferred as to the stand taken by the defendant No. 3.

24. The learned appellate Court below unfortunately has not addressed to the aforesaid question of fact and law while deciding the issue, on the contrary, he has delved himself into some other questions which are not at all raised by any of the parties in their pleadings or on the arguments. Whether the agreement was terminable in nature or not and whether the agreement has become unenforceable because of the passage of time, are not at all canvassed by any of the parties. The learned Court below ought not to have made such endeavour unnecessarily on this point. Oral agreement was entered into in November 1992 and the suit has been filed in 1994. It is settled law that where there is no fixed period for performance of a contract then the reasonable time should be inferred and in such a situation the suit has to be brought within the period of three years

from the date of execution of the agreement. So it cannot be said that the agreement has become lapsed and the learned appellate Court below has decided wrongly on this point unnecessarily.

25. So, I hold that the findings of the learned appellate Court below was lawful and justified while answering to the point No. 1. I further hold that learned appellate Court below has not rightly and lawfully refused to grant relief for specific performance while answering to the point No. 2.

26. Therefore, I allow the appeal and dismiss the cross objection and I direct the defendant Nos. 1 and 3 to execute and register conveyance in favour of the plaintiffs/appellants jointly in respect of the said property upon the plaintiffs/appellants depositing the balance sum of Rs. 40,000/- in Court. In the event such deposit is made within four weeks from the date of receipt of the certified copy of the judgment and decree then the aforesaid decree would be operative. In the event no deposit is made within the time as above then the appeal will stand dismiss so also the cross-objection. In default of such execution and registration of conveyance, the Serestadar of the learned appellate Court below will execute and register such conveyance on behalf of the defendant Nos. 1 and 3. The aforesaid deposit shall be made with the Serestadar who shall keep the same and hand over the said amount to the defendant No. 3 after execution and registration of the said conveyance.

There will be no order as to costs.

27. Appeal allowed