

(2001) 02 BOM CK 0013
In the Bombay High Court
Case No : Suit No. 1246 of 1989

Taraben Ambalal Shah and Another

APPELLANT

Vs

Naginbhai Pragji Desai

RESPONDENT

Date of Decision : 28-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3
Contract Act, 1872 — Section 10
Evidence Act, 1872 — Section 115, 61
Specific Relief Act, 1963 — Section 20, 5

Citation : (2001) 2 ALLMR 544 : (2001) 3 BomCR 371

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : P.K. Vyas, for the Appellant; Santosh Shetty, instructed by M.P. Vashi, for the Respondent

Judgement

A.B. Palkar, J.—This is a suit for specific performance of contract of sale of Immovable property being flat No. 2 on the 4th floor of Parimal Co-operative Housing Society Ltd., 22, Tilak Mandir Road, Vile Parle (East), Mumbai 400 057. The defendant agreed to sell the suit flat to the plaintiffs for consideration of Rs. 9,11,000/- and executed an agreement of sale on 1-9-1988. The transactions was to be completed before 31-12-1988. The plaintiff paid a sum of Rs. 1,50,000/- on 1-9-1988 and a further sum of Rs. 50,000/- on 3-11-1988 to the defendant. The balance sum of Rs. 7,11,000/- was agreed to be paid on or before 31-12-1988 at the time of completion of the contract by delivery of possession. However, after having received Rs. 2 lakhs the defendant expressed some difficulty to vacate the suit flat by 31-12-1988 and sought extension of time upto 31-1-1989. Defendant agreed in writing to that effect. Thereafter again defendant required some time and it was extended upto 15-3-1989 on the request of the defendant and defendant's endorsement to that effect was taken on the agreement.

2. In spite of all this, defendant failed to comply with the terms of the agreement

and did not execute sale deed and hand over possession as expected of him and did not perform his part of the contract. Plaintiffs therefore sent a notice through their Advocate on 11-3-1989 calling upon defendant to perform his part of the contract by executing sale deed and delivery of possession. In spite of the notice defendant failed to perform his part of the contract and hence the suit. In the alternative plaintiff has claimed relief by way of refund of Rs. 2 lakhs with interest at 24% per annum thereon.

3. Contesting the suit, defendant filed his written statement contending inter alia therein that the flat belongs to the society and not to the defendant and he could not have agreed to sell the same. The society is a necessary party. Defendant entered into negotiations for sale of the flat with plaintiff and the terms and conditions were reduced to writing. The sale was subject to these terms and conditions. One of the condition was that the society should agree for transfer of the flat. Plaintiff agreed even to pay 50% of the transfer charges. Defendant had certain difficulties to vacate the flat. However, he was not given copy of the agreement of sale and he does not know as to what terms are incorporated therein.

4. Plaintiffs and defendant were staying in the same building and their relations were cordial. Defendant could not vacate the flat on 31-12-1988. Plaintiff took law in their hands and physically assaulted defendant and his wife. Complaints were lodged to the police and matter was pending investigation. In the meantime defendant received a notice of the suit and the said notice was replied. Defendant sent a complaint to the Commissioner of Police stating the incident that had taken place when he and his wife were assaulted.

5. On these pleadings issues were settled and the issues with their findings recorded against them are as below and reasons for the findings are stated in the paragraphs that follows:---

REASONS

6. Issue No. 1:---The Co-operative society is not a necessary party to the suit inasmuch as there is an agreement of sale between the plaintiffs and defendant. Defendant has agreed to transfer the suit flat to plaintiffs and hand over possession. The society is not necessary party to transfer by a member in favour of a third party. No provisions of law is brought to my notice to accept the defendant's contention that the society was a necessary party and the suit for specific performance without joining the society is not tenable. Issue No. 1 is answered accordingly.

7. Issue No. 2:---Defendant has miserably failed to bring on record any fact or circumstance to indicate that this Court has no jurisdiction. Even in the written argument this point has not been pressed, obviously because there is nothing in favour of the defendant on which this contention can be supported. Issue No. 2 is accordingly answered in the negative.

8. Issue No. 3:---This issue has been framed in view of the fact that in the written statement it is categorically admitted not only that there was an agreement of sale in favour of the plaintiffs, but the fact that defendant twice sought extension of time to perform his part of the contract and deliver possession of the suit flat as he had certain difficulties. However, when the trial commenced, defendant realised the difficulty in his way and therefore, taking a somersault, an attempt was made to introduce a plea that he never entered into any agreement of sale and it was only a loan transaction. Defendant therefore proposed to amend his written statement on the date of recording of evidence. That application was rejected. As there is no pleading the evidence to that effect and the argument advanced can not be considered. The agreement of sale is signed not only by the defendant but also by his wife. On the reverse of it, defendant has given in his own hand writing an undertaking to vacate the suit flat by a particular date. Hand writing is admitted. Defendant and his wife are working as teachers and if there was no agreement of sale, the defendant would not have given undertaking in his own hand writing. It is obvious that defendant has tried to introduce such a pleading at the last stage, in order to protract the trial. Defendant having specifically admitted existence of agreement of sale, the issue has been framed specifically as to whether the agreement is subsisting. Nothing is brought on record to show that the agreement is not subsisting. This issue is therefore answered accordingly.

9. Issue Nos. 4, 5, & 6:---It was contended on behalf of the defendant that the agreement Exh. A is not admissible in evidence. In fact this objection was overruled while recording the evidence. However, defendant has relied on a judgment of the Supreme Court reported in Veena Hasmukh Jain and Another Vs. State of Maharashtra and Others, . I have perused the judgment. This is clearly an agreement of sale in which possession was agreed to be given and therefore, it is not a conveyance. Reliance placed by the defendant on the said judgment of the Supreme Court is misplaced. Moreover even assuming for the sake of argument that the agreement is inadmissible in evidence. In view of the fact that the execution of the agreement is admitted by the defendant, plaintiffs are entitled to claim specific performance if there is no legal impediment. Plaintiff was and is ready and willing to perform his part of the contract. The readiness and willingness of the plaintiff is clear from the record. Defendant himself was claiming extension of time which the plaintiffs granted. Plaintiffs gave notice and expressed his desire to perform his part of the contract, but defendant failed to perform his part and committed breach. Plaintiff has expressed his readiness and willingness to perform his part of the contract consistently throughout and even today he is ready and willing to perform his part of the contract.

10. It was then contended on behalf of the defendants that the plaintiff has suppressed material facts. In respect of an incident dated 5-3-1989 in respect of which the plaintiff has filed criminal case in the Court of the Metropolitan Magistrate. So far defendant has not filed any complaint in Court. He claims that he had filed a complaint with the police but even a copy of the same is not

produced. It is therefore difficult to hold as to how the conduct of the plaintiff in filing a criminal complaint for the incident of 5-3-1989 disentitles him from claiming specific performance. Defendant has come out with an imaginary story that on 5-3-1989 he was called by the plaintiff to sign the agreement and because of his refusal to sign the written agreement, he was assaulted. To say the least, this is obviously a false plea of the defendant intended to protract the litigation. Plaintiff was already having the agreement in writing and he had no reason to make any such attempt for getting the written agreement signed by defendant.

11. Lastly it was contended that in view of the provisions of section 20 of the Specific Relief Act discretion should not be exercised in favour of the plaintiff in decreeing for specific performance. In fact it was for the defendant to bring on record facts and circumstances which would disentitle the plaintiff from claiming discretionary relief of specific performance. On the contrary the facts on record clearly show that it was defendant who had sought extension of time twice, and after getting the same, when the plaintiff claimed performance of contract, he refused. In the witness box the defendant has stated that the prices have increased and therefore he expects more money and thus the cat was out of the bag. The property involved is a flat in Vile Parle, Bombay, and prices have increased as the agreement in question was entered into long back. Prices of the Immovable property in urban area especially in Bombay are increasing every day. However, if for that reason the parties are allowed to go back on their words and commit breach of contract solemnly entered into then it would amount to putting a premium on their dishonest conduct. There is nothing on record to show that the plaintiff is not entitled to the discretionary relief. It is the plaintiff who was required to go to the Criminal Court and file complaint. Defendant had obviously no reason to complain. Criminal case against the defendant is pending. Therefore, this is a case in which the plaintiff should be granted discretionary relief of specific performance. Discretion has to be exercised judicially. Plaintiff has proved the agreement. Plaintiff has also proved that it was defendant who has committed breach of the agreement. Defendant has no excuse and does not want to abide by the contract only because prices have gone up. There is therefore no obvious reason why plaintiff should be denied relief of specific performance of contract. Therefore, issue Nos. 4, 5 and 6 are answered accordingly.

11. Issue No. 7:---The plaintiff is entitled to the specific performance of the contract. However, I find that passing a decree in terms of the prayer clause would not be adequate. Hence the suit has to be decreed with appropriate order. Hence the following order:

12. Suit is decreed. Plaintiff shall deposit the amount of balance consideration amounting to Rs. 7,11,000/- with the Prothonotary & Senior Master of this Court within two weeks from the date of this order and on deposit of the said amount, the defendant do specifically perform the contract by executing sale deed in

favour of the plaintiffs and do hand over peaceful and vacant possession of the suit flat to the plaintiffs. In case defendant fails to execute the sale deed, the same shall be executed for and on behalf of the defendant by an officer appointed by this Court for that purpose and vacant and peaceful possession of the suit flat shall be delivered through Court to the plaintiff. On the sale deed being executed and registered and possession being delivered, the plaintiff is at liberty to take appropriate steps to apply for change in electric meter, revenue record and property extract of the Municipal Corporation which ever is necessary. On the sale deed being completed, the defendant shall inform the society to transfer the flat in the name of the plaintiff and on failure of the defendant to inform, the plaintiff is at liberty to approach the society to record the flat and shares in appropriate name as per the sale deed. On execution and registration of sale deed the balance of consideration deposited with the Prothonotary shall be paid to the defendant forthwith.

13. Defendant shall pay cost of the suit to the plaintiff and shall bear his own costs.

14. Certified copy and decree expedited.

15. Parties to act on ordinary copy of the order duly authenticated by the Associate of the Court.