

(2009) 07 BOM CK 0113
In the Bombay High Court
Case No : Second Appeal No. 378 of 1990

Tukaam Laxman Karale

APPELLANT

Vs

Baba Govind Sase and Maruti Vithoba Ware

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Gujarat Co-operative Societies Act, 1961 — Section 49(1)
Maharashtra Co-operative Societies Act, 1960 — Section 101, 41(d), 48, 65
Specific Relief Act, 1963 — Section 20
Transfer of Property Act, 1882 — Section 41

Citation : (2009) 07 BOM CK 0113

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : R.N. Dhorde, for the Appellant; Pawan Pawar holding for S.P. Brahme, for the Respondent

Judgement

P.R. Borkar, J.—This second appeal is preferred by original Defendant No. 2 being aggrieved by the judgment and decree passed by learned Civil Judge, Junior Division, Newasa in Regular Civil Suit No. 376 of 1978 decided on 28.2.1984, thereby declaring that the sale deed executed by Respondent No. 2 Original Defendant No. 1 in favour of appellant original defendant No. 2 dated 27.11.1978 is void and illegal and that Respondent No. 1 original Plaintiff Baba s/o Govind case is entitled to specific performance of contract and therefore, Respondent No. 2 original Defendant No. 1 is directed to execute the sale deed in favor of Respondent No. 1 plaintiff on accepting amount of Rs. 19,000/= from the appellant original defendant No. 2 and the appellant is directed to hand over possession of property to Respondent No. 1 plaintiff. The judgment and decree of the trial court is confirmed by learned 4th Additional District Judge, Ahmednagar, in Regular Civil Appeal No. 91 of 1984 decided on 28.2.1984.

2. Some of the facts giving rise to this appeal need to be stated at the outset. Gat No. 39 of village Handi Nimgaon, Taluka Newasa, District Ahmednagar, is the

suit property. As per appellant Tukaram, on 15.10.1978, Respondent No. 2 Maruti had agreed to sell the suit property to him for Rs. 12,000/= and Rs. 50/= were paid as earnest money. Appellant Tukaram was put in possession of the suit property. Whereas as per present Respondent No. 1 Plaintiff Baba, it was an ante dated document of agreement of sale and the agreement of sale between appellant Tukaram and Respondent No. 2 Maruti was subsequent to the agreement of sale with him. It is further case of Respondent No. 1 Plaintiff Baba that Respondent No. 2 Maruti, who was original owner, had agreed to sell the suit property to him for Rs. 20,000/= and executed an agreement of sale on that day. He paid Rs. 1,000/= to Respondent No. 2 Maruti as earnest money. On 27.11.1978, Respondent No. 2 Maruti executed a registered sale deed in favour of appellant Tukaram for Rs. 12,000/= and the document is at Exh 94. On 5.12.1978, Regular Civil Suit No. 378 of 1978 was filed by present Respondent No. 1 Plaintiff in the Civil court at Newasa for specific performance of contract and for declaration that the sale deed dated 27.11.1978 executed by Respondent No. 2 Maruti in favour of appellant Tukaram is illegal and void; and for injunction in the alternative for possession.

3. Present appellant resisted the suit and denied that the agreement of sale dated 15.10.1978 produced at Exh.93 was ante dated as claimed by Respondent No. 1 plaintiff. He further alleged and proved that on 17.10.1978 the appellant along with Respondent No. 2 made an application to Bhan Shivara Vivid Karyakari Sahakari Society for granting permission for sale of the suit land and the said Cooperative Society had granted such permission on the same day, by letter Exh. 96. Since the agreement of sale with appellant was prior in point of time to the agreement of sale with Respondent No. 1 original plaintiff, the suit deserves to be dismissed.

4. On 8.8.1979, Respondent No. 2 original defendant No. 1 and original owner of the property, filed written statement and denied execution of any document in favour of Respondent No. 1 original plaintiff and thus denied agreement of sale with the plaintiff. Respondent No. 2, however, admitted execution of sale deed in favour of the appellant.

5. The trial court held that after or at about same time when the sale deed was executed by Respondent No. 2 in favour of appellant on 27.11.1978, receipt Exh.93, which was agreement of sale purported to have been executed by Respondent No. 2 in favour of appellant, was executed and it is ante dated document. It is also observed that the appellant was aware of the agreement of sale dated 23.11.1978 between Respondent No. 2 and Respondent No. 1 and as such, appellant was not bonafide purchaser for value without notice and in the circumstances, the trial court decreed the suit.

6. The first appellate court agreed with above said conclusion of the trial court and further considered Section 48 of the Maharashtra Cooperative Societies Act, 1960 ("MCS Act" for brevity) and held that the sale in favour of the appellant was with permission of the cooperative society but since all dues of the society were

not paid prior to the sale, the sale is unlawful u/s 48(d) the MCS Act. We find discussion regarding the same in paragraphs 28 to 30 of the appellate court's judgment.

7. This second appeal was admitted on 27.11.1990 on substantial questions of law mentioned in ground Nos. 2 and 3 of the appeal memo which read thus;

II. Whether the courts below have erroneously held that the transaction dated 27.11.1978 namely sale deed executed in favour of the appellant by the respondent No. 2 was in contravention of the provisions of Section 48 of the Maharashtra Cooperative Societies Act in absence of any pleadings and proof to that effect?

III. Whether Section 48 of the Maharashtra Co-operative Societies Act is applicable qua the transferee when there is no dispute regarding the said debt between the vendor and the said society regarding the said loan for which the charge has been created?

On 10.7.2009, after hearing the parties to some extent, it was felt that some more substantial questions of law need to be framed in order to decide the appeal completely and accordingly, following additional three substantial questions of law were framed and the parties are heard on the same.

1. Whether the finding by the trial court and the first appellate court that defendant No. 2 was not bonafide purchaser for value without notice, is rightly recorded ?

2. Whether the discretion u/s 20 of the Specific Reliefs Act, in granting specific performance of contract, was properly exercised as per settled principles of law ?

3. Whether conclusion that the agreement of sale in favour of appellant was prior in point of time to the agreement of sale in favour of Respondent No. 1 is correct, though the letter Exh. 96 and evidence of respondent No. 1 and DW4 Gopinath Pehere are not considered by trial court and first appellate court?

Substantial questions of law involved as per ground Nos. 2 and 3 of the appeal memo.

8. Learned Counsel for Respondent No. 1 submitted that there was no pleading regarding violation of Section 48 of the MCS Act. On the other hand, it is submitted by the learned Advocate for the appellant that there was evidence on record to show that permission was obtained before sale and ignoring the said evidence, learned first appellate court came to a wrong conclusion. Learned Counsel for Respondent No. 1 also stated that there was no pleading or issue regarding Section 48 of the MCS Act and as such, there could not be substantial question of law regarding the same. Learned Counsel relied upon the case of Anathula Sudhakar v. Buchi Reddy 2008 AIR SCW 2692. In paragraph 23 of the judgment, the Hon"ble Apex Court has observed that when the pleas were not made in the plaint, the question of denying or traversing them did not arise and

stating that he would pay outstanding loan amount to the society and thereafter society would give permission. Accordingly, on 17.10.1978, he gave an application to the society and on the same day he received permission from it to purchase the land. In order to prove this document, the appellant has examined one Gopinath Pehere (DW4) at Exhibit 77. Gopinath deposed that from 1978 to 1983 he was Secretary of Bhanshivra society and that Respondent No. 2 original defendant 1 was defaulter and owed loan. Respondent No. 2 and appellant gave an application to the society for permission for sale and thereafter society gave said permission. Witness has proved the said permission. Absolutely, there is no reason to disbelieve this witness. In fact, evidence of this witness was not discussed by the trial court and the first appellate court. The said permission is at Exh.96 and it is signed by both, Secretary and the Chairman of Bhanshivra Vividh Karyakari Vikas Cooperative Society. It is stated in this letter (Exh.96) dated 17.10.1978 that appellant Tukaram had agreed to purchase the land from Respondent No. 2. The appellant had agreed to repay the entire loan of the society and had executed Hami Patra (guarantee letter) and on condition of repayment of entire loan of the society, permission was granted to Respondent No. 2 to sell the property to appellant. Loan was to be repaid within fifteen days, else action u/s 101 of the MCS Act for recovery of amount would be taken. It is also deposed by DW4 Gopinath Pehere that the loan amount was actual paid by appellant and it also stated that the dated 17.10.1978 mentioned on the permission letter is correct. However, in the cross examination, Gopinath admitted that no outward number was mentioned on the said letter and he stated that it was his mistake but that by itself is not sufficient to discard his evidence. This evidence was totally ignored by the first appellate court and in these circumstances, it must be said that both the courts have erroneously held that the sale transaction dated 27.11.1978 was in contravention of Section 41(d) of the MCS Act.

10. Shri Dhorde, learned Counsel for the appellant, cited case of Narayan Kisan Gade Vs. Machchindranath Kundlik Tarade and Another, . In paragraph 35 of the judgment, the Court referred to observations of the Hon''ble Apex Court in Corpus Juris Secundum Vo. 16, pages 236237 and held:

...If, therefore, these observations are read in juxtaposition with the present facts, it would be seen that when the society has not taken steps to declare the alienation void; when the society did not think that the alienation was prejudicial although based on public policy, the plaintiff could not be the person who could question the sale deed. In this case, what is to be noticed is that during pendency of the suit or even much earlier than that or after institution of the suit, the society has removed its charge on the property. The plaintiff is, therefore, rather incompetent to make a grievance which could legitimately be made by the society against the defendants Nos. 1 and 2. The same has not been done and, therefore, I feel that this is a case which can not be entertained both on the ground of the charge not coming within the scope of Section 65 as the parties being equally guilty and further the plaintiff having no proper locus to

agitate the question at this stage.

11. Another case cited on the same point is Sindav Hari Ranchhod Vs. Jadev Lalji Jaymal and others, . This is a case under Gujarat Cooperative Societies Act, 1961. It is observed by the Hon"ble Apex Court that the cooperative society can waive its right u/s 49(1)(d) of Gujarat Cooperative Societies Act. It is observed that for deciding whether the society could waive its right or not, the society should be a party to the proceedings. Considering the facts on record and evidence led in the present case, in my opinion, the appellant must succeed on both substantial questions of law framed initially and which are ground Nos. 2 and 3 in the appeal memo.

12. Point Nos. 1 to 3 as framed on 10.7.2009. After going through the judgments of the trial court and the first appellate court, it appears that both the courts were highly prejudiced against the appellant and did not consider the evidence in proper perspective while holding that the agreement between the appellant and Respondent No. 2 dated 15.10.1978 produced at Exh.93 was antedated document and that it was prepared after or at the time of sale deed which was executed on 27.11.1978. It may be noted that the agreement of sale between Respondent Nos. 1 and 2 was executed on 23.11.1978 and even prior to that on 17.10.1978, as discussed earlier, the appellant and Respondent No. 2 had applied to the cooperative society seeking permission for sale and on 17.10.1978 itself such permission was granted and letter (Exh.96) was issued. Neither the trial court nor the first appellate court discussed evidence either of DW1 Tukaram the appellant or DW4 Gopinath Pehere. Therefore, without considering material evidence on record, inference was drawn by both the courts that the agreement dated 15.10.1978 was ante dated.

13. Learned Counsel for Respondent No. 1 has taken me through the reasons given by the trial court and the first appellate court. In paragraph 12 of its judgment, the trial court has observed that Ananda Bhangе, who was the witness examined by appellant at Exhibit 78, has identified signature of Respondent No. 2 Maruti on the receipt dated 15.10.1978 at Exh.93. Ananda Bhangе deposed that possession was delivered to appellant on that day. Ananda Bhangе admitted that he was related to the appellant, so also to Rabaji Bhangе, who was witness on receipt at Exh.93 which is in the form of agreement of sale. However, witness Ananda did not identify the signature of Respondent No. 2 on receipt dated 23.11.1978. It may be noted that this Anada is not an handwriting expert. He deposed that Respondent No. 2 signed on receipt Exh.93 because it was executed in his presence. Merely because he had not identified signature of Respondent No. 2 on the agreement of sale in favour of Respondent No. 1, there is no reason to disbelieve him. Similarly, it is said that Mohan Walture has signed as attesting witness on agreement of sale in favour of Respondent No. 1 and also on the sale deed in favour of appellant, but he is not examined. I wonder how that can be a reason to hold that the receipt dated 15.10.1978 was ante dated. It is also stated that the appellant and Anada Bhangе submitted their affidavits

at the time of filing suit and during depositions, they stated that the affidavits were not correct. It is true that certain details in the affidavit were not admitted. However, that is not sufficient to hold that the witnesses were liars. Learned trial judge held that though the land was situated at Newasa, the sale deed was registered at Ahmednagar and three reasons were given, namely, (i) money was available at Ahmednagar, (ii) the Sub Registrar at Ahmednagar was known to the parties and (iii) the amount was available at a hotel at Ahmednagar and it was to be gathered from the hotel.

14. Both the Courts below ignored that credibility of testimony, oral or circumstantial, depends on a judicial examination of the totality, not isolated scrutiny. Truth suffers from some infirmity when projected through human processes. There is always difference in capacity of each individual in observation, understanding, memorising and then recalling events after years when depositions are recorded in court. So, there are bound to be some inconsistencies or variations in evidence of witnesses of same incident. One should consider if inconsistencies or discrepancies go to the root of the matter. It is for the judge to separate truth from falsehood as far as possible. That is art of judging. It may not be always easy. So, human conduct, probabilities of the case should also be taken into consideration. As observed in the case of State of U.P. Vs. M.K. Anthony, even an honest witness may differ in some details unrelated to the main incident because of power of observation, retention and reproduction differ with individuals. As often stated maxim `falsus in uno falsus in omnibus' does not apply to India. As observed in Bhagwan Tana Patil Vs. The State of Maharashtra, , the said maxim is not to be blindly invoked in apprising the evidence in courts when witnesses seldom tell whole truth, but often resort to exaggeration, embellishments and "padding up" to support story however true in the main. The said principle though stated in context of criminal cases is equally true in civil matters.

15. After considering the judgments of both the courts, in my opinion, they have not properly appreciated the facts and evidence on record. Both the courts totally ignored the evidence regarding permission obtained from the cooperative society on 17.10.1978 which was a document prior to the agreement of sale between Respondent Nos. 1 and 2 executed on 23.11.1978. Without discussing the said evidence, without assigning any reasons for disbelieving evidence of DW4 Gopinath and without commenting on letter Exh.96, which is a permission for sale, conclusion was drawn that the agreement of sale dated 15./10.1978 must be ante dated. The very letter of the cooperative society dated 17.10.1978 Exh.96 clearly shows that the agreement between the appellant and Respondent No. 2 was prior to that date and this aspect was totally ignored by both the courts.

16. Moreover, no thought was given to obvious probabilities. If the agreement of sale between Respondent No. 1 and 2 was prior in point of time to the agreement of sale between appellant and Respondent No. 2 in that case,

Respondent No. 2 would not have entered into any agreement with appellant and he would have supported the case of Respondent No. 1 plaintiff. It may be noted that the agreement of sale with Respondent No. 1 Plaintiff was for Rs. 20,000/=. It is said that Rs. 1,000/= were paid as earnest money and balance due was Rs. 19,000/=; whereas, the agreement of sale between the appellant and Respondent No. 2 shows that the appellant was to pay only Rs. 12,000/= and out of that, only Rs. 50/= were paid to Respondent No. 2. So, no person would have entered agreement of sale for Rs. 12,000/= after having already entered into an agreement of sale for Rs. 20,000/= and Rs. 19,000/= were yet to be paid. More particularly when the agreement was entered on 23.11.1978, he was not likely to sell his property after four days i.e. on 27.11.1978 for only Rs. 12,000/=. Secondly, it is mentioned in document at Exh.93 that out of Rs. 12,000/= only Rs. 50/= were paid as earnest money. This shows that it is a genuine document, otherwise if this document was prepared at the time of sale deed on 27.11.1978 or thereafter, substantial amount out of Rs. 12,000/= could have been mentioned as payment of earnest money as admittedly, amount of Rs. 12,000/= was paid by appellant to Respondent No. 2 on or before 27.11.1978.

17. So the probabilities of the case are such that Respondent No. 2 would not have executed the sale deed for Rs. 12,000/= if he had an offer of Rs. 20,000/= on 23.11.1978, unless he was aware that he had already entered into agreement for Rs. 12,000/= prior to 23.11.1978. Not only that, permission of the cooperative society was also obtained on 17.10.1978 for sale in favour of the appellant. Therefore, looked from natural course of human conduct and probabilities of the case, in my opinion, appreciation of evidence by the trial court and the first appellate court is perverse. They have ignored substantial evidence led by the appellant and his witness Gopinath regarding application to the cooperative society for permission to sell the land and grant of such permission vide Exh.96.

18. Learned Counsel for Respondent No. 1 cited case of Govindaraju Vs. Mariamman, . In this case, it is laid down that the scope of exercise of jurisdiction by High Court in second appeal u/s 100 of the CPC is limited to substantial questions of law framed at the time of admission of appeal or additional questions framed at later date after recording reasons for the same. It is observed that, the High Court committed error in reappreciating the evidence and coming to a conclusion other than one recorded by Court of facts. So, it is argued that there could not be reappreciation of evidence by this Court in second appeal.

19. Learned Counsel for Respondent also relied upon the case of State Bank of India v. S.N. Goyal reported in 2008 AIR SCW 4355. In paragraph 9.3 of the judgment, errors generally committed by High Court in dealing with second appeal are enumerated and Clause (g) is to the effect that while deciding second appeal, there is reappreciation of evidence and interference with findings of fact, ignoring the questions of law.

20. However, now it is well settled that if the trial court and the first appellate court have ignored some piece of evidence available on record and which is admissible in evidence, then the same can be considered in second appeal. Even in case, where there is a perverse finding, the High Court can interfere in the second appeal. For this proposition, learned Counsel for the appellant has relied upon some authorities. In the case of Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs., . It has been observed by the Hon"ble Apex Court that though there was concurrent finding of fact, the High Court was justified in reappreciating evidence as the findings on possession were recorded by the trial court and the first appellate court by ignoring the document evidencing compromise, containing recitals of surrender of possession and other material evidence. In paragraph 3 of the judgment, the Apex Court has observed that the finding on question of possession recorded by two courts below, was vitiated and interference in second appeal was justified.

21. Second case on the same point is State of Punjab v. Mohinder Singh 2005 AIR SCW 1476, for supporting the proposition that in second appeal, non consideration of material document can be a substantial question of law. In the reported case, the first appellate court acted on irrelevant material and left out of consideration the relevant material. Question of law was said to have been involved and, therefore, dismissal of second appeal by observing that there was no substantial question of law, was held improper. In the present case, first appellate court and the trial court both have ignored evidence of appellant Tukaram and his witness DW4 Gopinath regarding letter of permission at Exh.96 issued by cooperative society for sale on guarantee to repay entire loan amount of the society within fifteen days by the appellant. So, material which was relevant was ignored and wrong conclusion was arrived at.

22. Learned Counsel for Respondent cited case of this Court i.e. Bhau Bhiku Pawar Vs. Bapu Manu Dhane since deceased by his heirs Kamal Bapu Dhane and Others, and drew my attention particularly to paragraph 19 in which some Supreme Court cases were referred in support of proposition that if there is concurrent finding of fact based on non consideration of relevant evidence, then the High Court is not precluded from recording proper finding and reappreciating the evidence.

23. In the present case, since the appellant has entered into agreement of sale with Respondent No. 2 prior to agreement of sale between Respondent No. 1 and 2 on 23.11.1978, it cannot be said that the appellant is not bonafide purchaser for value without notice. It is not the case of appellant that his agreement with Respondent No. 2 was even prior to 23.11.1978. The notice given by Respondent No. 1 to the appellant was subsequent to sale deed dated 27.11.1978. It has come on record that the said notice was issued on 30.11.1978. So, such notice cannot be said to be sufficient notice. Notice ought to have been given prior to 27.11.1978. Looked from these angles, in my opinion, the trial court and the first appellate court committed error of law in ignoring the relevant evidence on

record and came to a wrong conclusion that the agreement of sale between Respondent Nos. 1 and 2 was prior in point of time to the agreement of sale between appellant and Respondent No. 2 and also came to further wrong conclusion that the appellant is not bonafide purchaser for value without notice.

24. So far as Section 20 of the Specific Reliefs Act is concerned, learned Counsel for Respondent No. 1 submitted that original plaintiff Respondent No. 1 is fighting litigation for 30 years, but that is also true in case of the appellant. It is also said that an amount of Rs. 1,000/= would be deposited as directed by the court immediately after the decree. But, that by itself is not enough to set aside the sale deed in favour of the appellant and pass decree for specific performance in the light of the facts found by this Court.

25. Learned Counsel for Respondent also relied upon the case *Gobind Ram v. Gian Chand* 2000 AIR SCW 3468. In that case, facts were totally different. The appellant in that case was trying to wriggle out of contract in view of escalation of prices of real estate properties. The Respondent had paid earnest money. The Appellant offered to pay money, but the Respondent did not cancel the contract. The Respondent had deposited entire balance amount in court and was not taking any unfair advantage.

26. Learned Counsel for the appellant cited case of *V. Muhusami (D) by Lrs. v. Angammal and Ors.* 2002 (3) MLR 16, wherein it is held that when the plaintiff is subsequent purchaser and where defendant is bonafide purchaser for value without notice of agreement of sale in favour of plaintiff, grant of refund of earnest money is proper remedy to avoid hardship. Learned Counsel for the appellant also relied upon the case of *Thiruvengada Pillai Vs. Navaneethammal and Another*, , and more particularly paragraph 17, wherein it is held that it is for plaintiff to prove that his agreement of sale was prior in point of time to the agreement of sale in favour of the defendant.

27. In the present case, Respondent No. 1 plaintiff has entered into agreement of sale with Respondent No. 2 subsequently and offered to pay the price more than the amount offered by the appellant by his earlier agreement of sale. The appellant in this case has proved that his sale was prior in point of time and even before Respondent No. 1 had entered into agreement of sale with Respondent No. 2. Even permission of the cooperative society for sale was obtained on 17.10.1978 which was more than one month prior to the agreement of sale between Respondent Nos. 1 and 2. It is quite possible that during this period of one month because of the permission obtained from the cooperative society, Respondent No. 1 might have tempted Respondent No. 2 to enter into agreement of sale for higher amount of Rs. 20,000/= on 23.11.1978. But, Respondent No. 2 for some reasons relented and executed sale deed on 27.11.1978 as per agreement of sale dated 15.10.1978 with the appellant. If value of the property was Rs. 12,000/= as on 15.10.1978, there is no reason to believe how it could rise to Rs. 20,000/= within a month on 23.11.1978. There is no explanation why Respondent No. 1 had offered to pay Rs. 20,000/= for a land which was worth

Rs. 12,000/= and here it is worth noting that Respondent No. 2 had no complaint about adequacy of the price paid by appellant to him.

28. In my opinion, considering the facts and circumstances of the case present appeal deserves to be and is accordingly allowed. The decree passed by the trial court, as confirmed by the District Court, is hereby set aside. Respondent No. 2 is directed to pay earnest money of Rs. 1,000/= with interest at rate of 12 per cent per annum from 23.11.1978 till actual payment, to Respondent No. 1. In the facts and circumstances, parties are directed to bear their own costs.