

Vimal Builders Vs. Nand Kumar Anant Vaity and Others

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Court : Mumbai

Decided On : Jun-10-2013

Judge : The Honourable Mrs. Justice Roshan Dalvi

Appeal No. : Notice of Motion No. 1716 of 2010 In Notice of Motion No. 3679 of 2007 In Suit No. 2715 of 2007

Appellant : Vimal Builders

Respondent : Nand Kumar Anant Vaity and Others

Judgement :

1. This Notice of Motion is taken out by Defendant No.41 for 3 reliefs:

For setting aside an order passed in the earlier Notice of Motion No.3679 of 2001, for deciding the preliminary issue under Section 9A and for rejection of the plaint under Order 7 Rule 11(d) of the CPC.

2. The relief claimed under Order 7 Rule 11(d) is upon the bar created by the law of limitation. It must first be seen whether from the plaint itself the suit is seen to be barred by the law of limitation. If that is seen, the other two prayers would not come up for consideration; Neither would the issue be required to be framed nor would any order in any notice of motion being required to be granted or set aside.

3. The plaint is in respect of two properties:

The first property described in **Exhibit-A1** to the plaint and the second property described in **Exhibit-A2** to the plaint. The main suit property is the first property. The second property is a small adjacent land-locked property. The arguments are advanced essentially with regard to the first property. The plaintiff claims the two suit properties as against defendant No. 41 Society who has pressed this notice of motion.

4. What transpired in respect of the first property would, therefore, be material to see to consider the bar of limitation as reflected from the plaint itself to decide whether the plaint merits total rejection of the plaintiffs' claim or not.

5. The initial agreement for sale for the first property dated 29th April, 1979 is between the initial owners of the properties, defendant Nos. 1 to 39 and the promoters of defendant No.41 society. Under the agreement earnest amount of Rs.30,000/- was paid to the owners. Under the said agreement the purchase price agreed by the parties was at the rate of Rs.35/- per sq. yard of land of 8754 sq. yds. A power of attorney was also executed by the original owners in favour of defendant No.41 society represented by its members.

6. A memorandum of agreement was entered into between the said owners, defendant Nos. 1 to 39 and the promoters of defendant No.41 society on 24th October, 1981 (**Exhibit-D**) when the society was yet not registered. Under that memorandum of agreement the purchase price of Rs.2,06,390/- which would be calculated for the property to be purchased at the rate of Rs.35/- for 8754 sq. yds. of land was agreed to be increased to Rs.3,26,390/- upon taking joint measurement of the property by the parties to the agreement. The entire purchase price was deposited by the purchasers, defendant No.41 society, with the attorneys M/s. Solomon and Company. The purchasers were handed over actual vacant possession of the property. That aspect was recited in clauses 9 and 10 of the agreement. A receipt for the purchase price, a letter confirming delivery of possession, a power of attorney and a deed of indemnity were executed by the vendors which was recited in clause 13 of the agreement.

7. A power of attorney executed on 24th October, 1981, as recited in the earlier agreement dated 29th April, 1979, granted an irrevocable power of 20 years from

the date of execution to the then unregistered defendant No.41 society to convey the property as per the initial agreement dated 29th April, 1979 and execute deeds, declarations and conveyance etc.

8. The society was registered in 1987.

9. Solomon and Company; the Solicitors of defendant Nos. 1 to 39, the vendors, by their letter dated 18th November, 1993 to the society admitted that they had received Rs.3,69,650.50 which was the total purchase price.

10. The 3 constituted attorneys of defendant Nos.1 to 39 executed a conveyance in favour of defendant No.41 society on 18th August, 1989 and lodged it for registration. It remained pending for want of the Income Tax Clearance Certificate of the vendors, defendant Nos. 1 to 39 under Section 230A of the Income Tax Act, 1961 until 29th November, 1994 when it came to be registered.

11. It is the case of the plaintiffs that defendant Nos.1 to 39 cancelled the deed of conveyance by a declaration-cum-deed of cancellation executed on 18th December, 1995. The declaration-cum-deed of cancellation **Exhibit-O** to the plaint recites about the initial agreement dated 29th April, 1979 substituted by the agreement dated 24th October, 1981 for increased purchase price and the registered conveyance dated 18th August, 1989 registered under Serial No.8899 of 1989. It states that because the rate agreed in the conveyance registered on 18th August, 1989 which was the same rate of Rs.35/- in 1979 was not proper and the valuation was at the very low rate and because some of the persons who executed the power of attorney on 18th August, 1989 were dead, the power of attorney was not legal and some of the vendors who executed the power of attorney were stated to be minors, but were majors and had not executed the power of attorney and hence the conveyance was cancelled as it was not binding upon the vendors.

12. It may be mentioned that no cancellation of the document can take place unilaterally by a party. The party desiring of cancelling the document must do so with consent of other party or by an action at law in a Court of law. Hence defendant Nos. 1 to 39 requiring to cancel the conveyance executed on their

behalf by the 3 constituted attorneys in favour of defendant No.41 society on 18th August, 1989 must do so within a period of 3 years from 18th August, 1989. If the conveyance though lodged for registration was not registered until 29th November, 1994, it may at best be challenged within 3 years from that date. The plaintiffs have relied upon the act of defendant Nos. 1 to 39, through whom the plaintiffs claim, as has been stated thereafter in the plaint and as shall be set out herein. It may be mentioned that the plaintiffs had knowledge of the unilateral cancellation unknown to law. The plaintiffs have sued essentially for the declaration that defendant Nos. 1 to 39 are the owners in respect of the first property described in **Exhibit-A1** to the plaint. This declaration is sought upon the first premise with defendant Nos. 1 to 39 unilaterally cancelled the registered conveyance dated 18th August, 1989. For the relief of declaration of ownership, which is seminally based upon the act of the owners defendant Nos. 1 to 39 executing the unilateral deed of cancellation, defendant Nos. 1 to 39 or any other party who may claim thereafter through them would have to sue for getting the registered conveyance dated 18th August, 1989 set aside and to declare it having been validly cancelled.

13. That having not been done, defendant Nos. 1 to 39 proceeded to enter into another agreement with defendant No.40 on 4th October, 2002, **Exhibit-B** to the plaint. Defendant No.40 was not the purchaser without notice of the claim of the earlier purchaser, defendant No.41 society. The agreement dated 4th October, 2002 set out itself that it was subject to the claim of defendant No.41 society. Hence defendant No.40 was a purchaser with notice of claim of the defendant No.41 society. The notice was not only that defendant No.41 society was the earlier purchaser but also that there was a pending litigation between the owners of the land who entered into the said agreement with defendant No.40 and the factum of the registered conveyance. The purported vendors were, therefore, not vendors in law. Clause 5 of the said agreement made it clear that the owners were the absolute owners subject to the claim of defendant No.41 society. Their claim was, therefore, subject to the conveyance. The conveyance was not cancelled by the order of the Court, but unilaterally done. The conveyance, therefore, remained in law. Defendant Nos. 1 to 39 had notice of the conveyance and gave notice to defendant No.40.

14. It is the plaintiffs case in para 9 of the plaint that thereafter there were negotiations between the plaintiffs and defendant No.40 for development of the first property in the suit and a power of attorney dated 8th July, 2003 came to be executed by defendant No.40 and an agreement came to be executed on 27th November, 2003 by defendant No.40 in favour of the plaintiffs of which specific performance is claimed in the suit.

15. The agreement of the plaintiff dated 27th November, 2003 also shows the claim of defendant No.41 society having disputes with the owners stated to be defendant Nos. 1 to 39 and is subject to the settlement of the disputes of the society by defendant No.40 as set out in recital (ix) of the agreement.

16. Both the aforesaid power of attorney and the agreement dated 8th July, 2003 and 27th November, 2003 are pursuant to and flow from the agreement dated 4th October, 2002. The agreement dated 4th October, 2002 in turn is pursuant to and flows from the deed of cancellation dated 18th December, 1995 and the deed of cancellation is a wholly illegal unilateral document. The deed of cancellation has been entered into by the original owners who were then not the owners and who were to be declared owners if the registered conveyance dated 18th August, 1989 had to be cancelled. That having not been done, despite the fact that they were not the owners, they entered into the agreement dated 4th October, 2002 with defendant No.40. Defendant No.40 negotiated with the plaintiffs and executed the power of attorney on 27th November, 2003 entered into the agreement with the plaintiffs on 8th July, 2003.

17. Defendant Nos. 1 to 39, defendant No.40 as also the plaintiffs have not got the registered deed of conveyance dated 18th August, 1989 cancelled.

18. The registered conveyance in favour of defendant No.41 society dated 18th August 1989 has remained at that. That prayer has not even been sought in this suit. Whilst the registered deed of conveyance dated 18th August, 1989 in favour of defendant No.41 society is in existence, it having only been sought to be cancelled unilaterally by the deed of cancellation dated 18th December 1995 and not by an order of the Court, the plaintiffs have claimed reliefs for declaration of the agreement dated 27th November, 2003 as binding and for specific

performance thereof and for reliefs incidental thereto including the injunction not only against defendant No.40 who is the party to that agreement, but also defendant No.41 society as having no right, title and interest in the suit property.

19. For the claim that defendant Nos. 1 to 39 are the owners as per prayer (a) in the suit and for the declaration that defendant No.41 society has no right, title and interest in the suit property as per prayer (b) in the suit, the plaintiffs have sought to show that the registered conveyance deed dated 18th August, 1989 has been cancelled by the deed of cancellation dated 18th December, 1995 unilaterally executed by defendant Nos. 1 to 39 who are sought to be declared the owners pursuant only to the deed of cancellation. Hence the plaintiffs' claim in the plaint for claiming the two main reliefs of declaration in prayers (a) and (b) of the suit is only referable to the deed of cancellation dated 18th December, 1995 executed by defendant Nos. 1 to 39 **Exhibit-O** to the plaint. For obtaining those reliefs upon such deed of cancellation, defendant Nos. 1 to 39 or the plaintiffs or even defendant No.40 had to sue within 3 years of the registered deed of conveyance dated 18th August, 1989 which made defendant No.41 society the owners of the suit land or at least within 3 years from the date of the knowledge of the execution of the said deed of conveyance, it having been entered into by the 3 constituted attorneys of defendant Nos. 1 to 39. The deed of cancellation itself shows the knowledge of the execution of the deed of conveyance. At least, therefore, the suit to challenge such a conveyance or to set it aside or to claim rights as against such a conveyance as is done in this suit, should have been filed at the latest within 3 years of such knowledge. If the conveyance remains at that and is not set aside or cancelled by the Court, the main reliefs under prayers (a) and (b) of the suit cannot be granted. In fact, the further agreements executed by defendant Nos. 1 to 39 as the owners (who had ceased to be owners on the date of execution of those agreements) could not have been executed at all.

20. Hence the right to sue first accrued to defendant Nos. 1 to 39, or to defendant No.40 or to the plaintiffs who claim through defendant Nos. 1 to 39 when the conveyance was executed or at least when defendant Nos. 1 to 39 acquired knowledge of its execution. This is under Article 58 in Part III of the Schedule to the Limitation Act, 1963 which runs thus:

PART III SUITS RELATING TO DECLARATIONS

Article 58 To obtain any other declaration.

Three years When the right to sue first accrues.

21. However it is claimed by the plaintiffs that the plaintiffs have not sued upon the execution of the conveyance in favour of defendant No.41 society or its cancellation. They have sued upon their rights under the agreement dated 27th November, 2003 having been threatened. It is argued that in paragraph 24 of the plaint the plaintiffs have set out what they call their cause of action. The plaintiffs claim that defendant Nos. 1 to 40 attempted to dispossess them and are attempting to negate the agreement. The plaintiffs have also claimed in the said para that the right of defendant No.41 society was in dispute in a dispute filed under the Maharashtra Co-operative Societies Act, 1960 which came to be dismissed by the Co-operative Court and from which an appeal came to be lodged on 8th May, 2007. That dispute was also for declaration of title of the plaintiffs against defendant No.41 society. In this suit also the plaintiffs have claimed that defendant No.41 society has no right, title and interest in prayer (b) of the plaint. That declaration of title claimed against defendant No.41 society in the Co-operative Court as also claimed by the plaintiffs in this suit is, as per the averments in the plaint itself, under the registered deed of conveyance dated 18th August, 1989. The relief of injunction prayed for against defendant No.41 society is, therefore, only the consequential relief to the declaration sought. The cause of action set out in para 24 of the plaint would merit only a suit for injunction. Such injunction can be claimed upon the plaintiffs themselves being owners of the suit property. Upon such averments a suit for the declaration sought in prayers (a) and (b) would not be merited. Such declarations have necessarily to be sought upon the knowledge of the conveyance and not upon the plaintiffs right being threatened.

22. By way of an amendment to the plaint the plaintiffs have claimed that in September, 2012 they came to learn that a deed of settlement dated 25th October, 2007 was executed. The deed of settlement **Exhibit-X1** to the plaint is executed between 4 members of defendant No.41 society and the constituted attorney of

partners of defendant No.40 representing 12 members of defendant No.41 society. Defendant No.41 society has 16 members. The plaintiffs claim that 12 out of those members have settled with defendant No.40. Defendant No.40 has entered into the aforesaid power of attorney on 8th July 2003 and agreement dated 27th November, 2003 with the plaintiffs. Hence the plaintiffs, who claims through defendant No.40, claim rights in the deed of settlement dated 25th October, 2007. It is, therefore, seen that 4 members of the society who have not settled with defendant No.40 have entered into the deed of settlement with the other 12 members represented by defendant No.40. The plaintiffs claim that the knowledge of the deed of settlement would itself show that the plaintiffs claim in the suit is not barred by the law of limitation but that their rights under the agreement dated 27th November, 2003 would be fortified by the deed of settlement dated 25th October, 2007.

23. Under the deed of settlement the 16 members of defendant No.41 society registered on 23rd November, 1987 set out the disputes between them and agreed to demarcate their respective plots of land amongst themselves. This deed of settlement at best only settles the disputes, if any, between 4 members of defendant No.41 society on the one hand and 12 members of defendant No.41 society on the other represented by the partners of defendant No.40. The deed of settlement itself has no bearing upon the claim in the suit.

24. The plaintiffs have contended that the deed of settlement dated 25th October, 2007 was executed pursuant to 12 individual agreements entered into by the 12 out of 16 members of defendant No.41 society in favour of defendant No.40 along with separate irrevocable powers of attorney in favour of the partners of defendant No.40 to take steps under the 12 agreements. The plaintiffs claim crytalisation of their rights to the extent of the plots of 12 members who have settled with defendant No.40. The individual agreements of 12 out of 16 members of defendant No.41 society cannot bind the registered society. These events subsequent to the filing of the suit, also do not save the bar of limitation. They only show part of the plaintiffs claim having been settled.

25. Consequently the plaintiffs' seminal claim in the suit is that the defendant Nos. 1 to 39 continued to be the owners of the suit property as averred in para 2 of the plaint itself and that consequently defendant No.41 society has no right, title and interest in the suit properties. The plaintiffs have sought a declaration that defendant Nos. 1 to 39 are the owners of the suit property being the first property described in **Exhibit-A1** to the plaint. This declaration the plaintiffs must claim only upon cancellation of the conveyance in favour of the society dated 18th August, 1989. That conveyance has remained. That conveyance was made known to defendant No.40. Defendant No.40, who is the predecessor-in-title of the plaintiffs, was the purchaser with notice of the claim of defendant No.41 society. The plaintiffs are the successors-in-title in title of defendant No.40, they having negotiated with defendant No.40 and entered into the power of attorney dated 8th July, 2003 and the agreement dated 27th November, 2003 with defendant No.40. That conveyance was also made known to the plaintiffs. It may be mentioned that what cannot be claimed by the direct vendors in a document cannot be claimed by parties claiming to be their successors-in-title. What is the bar of limitation upon the vendors is the bar of limitation upon their successors-in-title also.

26. The relief of the plaintiffs in prayer (b) of the plaint that defendant No.41 society has no right, title and interest in the first property described in **Exhibit-A1** to the plaint, is, therefore, referable to nothing other than their conveyance and would accrue to the plaintiffs as the ultimate successor of defendant Nos. 1 to 39 only upon the cancellation of the conveyance. The relief of the declaration that defendant Nos. 1 to 39 are owners and the defendant No.41 has no right, title and interest must, therefore, be claimed either by defendant Nos.1 to 39 or by defendant No.40 or by the plaintiffs within 3 years of the deed of conveyance or its knowledge.

27. The fact that several transactions have transpired thereafter do not save the bar of limitation for those declaratory reliefs. Without the declaratory reliefs in prayers (a) and (b) no other consequential relief can be granted. The relief of specific performance of the later agreement between defendant No.40 and the plaintiffs dated 27th November, 2003 is also a relief consequential to the two declaratory reliefs.

28. The plaintiffs claim specific performance of the agreement dated 27th November, 2003 also upon they being the successors-in-title of defendant No.40 who claims through defendant Nos. 1 to 39.

29. From a reading of the plaint the suit in respect of the two main reliefs is wholly barred by the law of limitation. The consequential reliefs flow as a corollary and can never be granted without the grant of prayers (a) and (b) or if prayers (a) and (b) are withdrawn or deleted.

30. The argument on behalf of the plaintiff that the cause of action accrued to the plaintiffs only when the rights were threatened is wholly misconceived. Their rights are apprehended to be interfered with by defendant No.41 society. Defendant No.41 society would interfere with the plaintiffs' rights only based upon their claim under the registered conveyance dated 18th August, 1989. Hence if the plaintiffs do not claim cancellation of the conveyance, but only claim an injunction against defendant No.41 society they may be entitled to sue for injunction alone. The plaintiffs cannot be granted such a relief as they are not admitted owners of the suit property. Hence the plaintiffs have sued for declaration also under prayer (b) in the plaint. That declaratory relief is barred by the law of limitation since it cannot be granted unless the conveyance is cancelled.

31. Hence upon a reading of the plaint, the suit is barred by the law of limitation against defendant No.41 society, the interference of the plaintiffs' rights being in August, 2007 notwithstanding and the deed of settlement executed between the members of the defendant No.41 society notwithstanding.

32. Since it is clear from a reading of the plaint and nothing else that the plaintiffs cannot claim the declaratory reliefs as having been barred by the law of limitation for the first property described in **Exhibit-A1** to the plaint, the plaint must be rejected for that property.

33. In fact in the application for ad-interim relief in the suit made before Dr. Justice Chandrachud also no relief came to be granted against defendant No.41 society when that society was not brought on record of the suit. At that time the Liquidator appointed in respect of the society was on record. It has been observed in that

order also that the agreement of defendant Nos. 1 to 39 in favour of defendant No.40 dated 4th October, 2002 and the agreement dated 27th November, 2003 between defendant No.40 and the plaintiff expressly recognised the right of the defendant No.41 society and the plaintiff at the highest would claim to have stepped into the shoes of defendant No.40. It was, therefore, observed that the plaintiffs had notice of the pre-existing rights of defendant No.41 society under the registered deed of conveyance and the society not being a party, though the Liquidator was appointed in favour of the society, the plaintiff cannot proceed to obtain any reliefs. Hence in ad-interim relief against defendant No.41 society came to be refused. The notice of motion taken out by the plaintiff came to be rejected by this Court. Appeals therefrom have been dismissed.

34. Defendant No.41 has applied for setting aside an order dated 9th June, 2008 passed in Notice of Motion No.3679 of 2007 in this suit. That order is not against defendant No.41 society. That order is only against defendant No.40 upon a statement made by defendant No.40. Defendant No.40 has not defended the suit. The injunction granted in terms of the statement made by defendant No.40 does not prejudice defendant No.41 society. The relief in prayer (a), therefore, need not be granted.

35. In view of the rejection of the plaint in respect of the first property shown in **Exhibit-A1** to the plaint the preliminary issue relating to the bar of limitation as the jurisdictional issue, need not be framed under Section 9A. It is only upon seeing the plaint that the suit is seen to be barred by the law of limitation for first property. No evidence is required in that behalf and consequently prayer (b) need not be granted also.

36. The plaint stands rejected under Order 7 Rule 11(d) of the CPC in respect of the first property in the suit being property under Survey No.34, hissa Nos. 1 and 3, and City Survey Nos. 339, 339/1, 340, 340/1and2, 341, 343, 343/1, 344, 345, 346 and 346/1 to 7 situate at Deonar, Taluka Kurla, District Mumbai which has been conveyed by defendant Nos. 1 to 39 in favour of defendant No.41 society under the registered conveyance dated 18th August, 1989.

37. A small piece of land being the property shown as the second property in the suit described in **Exhibit-A2** of the plaint has been claimed by the plaintiffs under a deed of sub-lease dated 31st January, 2003 entered into between defendant No.40, 40A to 40D and one Hindustan Candle Manufacturing Company. That is property on survey No.34, hissa No. 13 situate at Deonar, Taluka Kurla, District Mumbai. Defendant Nos. 1 to 39 claimed the said property by adverse possession. The plaintiffs claim to be put in possession under the aforesaid agreement dated 27th November, 2003 itself. Since that property has not been seen to be conveyed to defendant No.41 society, but has been claimed directly from defendant Nos. 1 to 39 and later defendant No.40, the plaintiffs claim in respect of that property is not seen to be barred by the law of limitation.

38. It is contended by defendant No.41 society that it is a small land-locked portion of the land adjacent to the land conveyed to defendant No.41 society and has no access except through the land of defendant No.41 society. Be that as it may, the plaintiffs' suit in respect of such land-locked property cannot be dismissed as being barred by the law of limitation. Only that claim would, therefore, survive.

39. Notice of Motion is disposed of accordingly.

40. Defendant No.41 is the main contesting defendant. The defendant No.41 Society shall file its written statement with regard to the second suit property described in **Exhibit-A2** of the plaint within 30 days.

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