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Court : Mumbai Nagpur

Decided On : Mar-06-2014

Judge : A.P. Bhangale

Appeal No. : Second Appeal No. 216 of 2002

Appellant : Deorao and Others

Respondent : Ganpat, (Since Deceased), Through His Legal Representatives and Others

Judgement :

1. This Second appeal filed by the original Plaintiff arises from the Judgement and order dated 28-02-2002 passed by the Adhoc Additional District Judge Nagpur in Regular Civil Appeal no.254 of 1993 which was allowed by setting aside the decree for possession and damages awarded by judgement and order dated 01-02-1993 in R.C. Suit no.827 of 1986 passed by the 4th Jt. C.J. J. D. Nagpur in which counterclaim was rejected .The first appellate court negatived the claim of the plaintiff that the defendant made encroachment over the suit plot in January 1982 and held that the defendants possession was protected under Section 53-A of the Transfer of Property Act 1882 .

2. The suit was instituted on 02-05-1986. The dispute relate to the land Khasra no. 6/1, a plot no 3 admeasuring 1650 Sq. Feet (30 feet X 50 feet approx.) situated at Manewada , Balaji Nagar at Nagpur which as alleged was agreed to be sold for the sum of Rs.3000/- out of which the sum of Rs.500/- earnest money was paid (vide Ex 47) and the balance amount was payable at the time of the execution and registration of the Sale deed. It was agreed to be executed within six months. The plaintiff had delivered possession on 05-09-1974 itself. The Defendant failed to pay the amount and to approach the plaintiff for the execution of the Sale deed. The defendant had avoided to pay the balance of consideration on the pretext that the Sale of land is prohibited under the Urban Lands Ceiling Act. According to the plaintiff the Agreement to sell was executed before the ULC Act came to be enforced. There was no any order from the competent authority that the land in possession of the defendant was surplus. Even assuming so it was it was never vested in the Government. The appellant (Ori. Defendant) was called upon by the Plaintiff to execute the Sale Deed. (vide Ex 52). The Defendant asked the plaintiff by notice dated 2510 1982 to vacate the possession of the suit property. (Ex 53). On 07-01-1985 the Notice was issued from the plaintiff that the Defendant avoided to execute the Sale deed. In the suit it may be noted that three years after the suit for recovery of possession was filed the counter-claim was filed, which was rejected.

3. The Trial Court held that the Plaintiff had agreed to sell the suit property to the Defendant and the Defendant committed the breach of Contract, while time was made the essence of the Contract. The entire land was declared as surplus land under the ULC Act. The possession of the Defendant was not protected under the Section 53-A of the Transfer of Property Act as it does not confer any right upon the party who is not willing to perform his part of the Contract. Thus the prospective Vendee who took possession of the suit property cannot resist the claim for possession, particularly when the defendant had not shown readiness and willingness to perform his part of the contract nor he had filed any suit to insist upon the specific performance of the Contract. The suit was thus decreed for possession and damages with direction as to the inquiry in to mesne profits.

4. Original defendant preferred appeal being RCA No.254 of 1993 challenging the judgment and decree passed by the trial Court. The 1st appellate court vide judgment and order dated 28th February 2002 held that encroachment on the part of defendant on Plot No.3 in January 1982 was not proved by plaintiff and that defendant's possession can be protected by virtue of Section 53-A of the Transfer of Property act. 1st appellate thus allowed the appeal.

5. The second appeal was admitted upon the following substantial questions of law -

œ1. Whether the First Appellate Court erred in not considering the aspect that the defendant/present respondent did not exercise his right of getting the sale-deed executed within a reasonable time ?

2. Whether the First Appellate Court erred in not considering the aspect of continuous readiness and willingness on the part of the defendant/present respondent to perform his part of the contract ??

My answer to both the above questions is in the affirmative for the following reasons:-

6. The contention is bald without any evidence as to possession taken from the original plaintiff or municipal sanction for construction. Learned counsel for the appellant argued that the judgement by the first appellate court suffered from perversity as it did not consider the the evidence as to whether the time was made the essence of the Contract as also readiness and willingness to execute the sale deed as agreed . According to learned Advocate for the appellant the dishonesty of the defendant not to execute the Sale Deed was overlooked by the first appellate Court. Learned Advocate Shri Pal referred to the ruling in Mrs Saradamani Kandappan v. Mrs S. Rajalakshmi and ors reported in AIR 2011 SC 3234. Honble Supreme Court In paragraphs 24, 25 and 26 observed thus:-

œ24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few

years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or nonperformance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the

misery is the delay in disposal of cases relating to specific performance, as suits and appeals there-from routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs. One lakh and received Rs. Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs. Ninety Thousand, when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable.?

7. Shri Pal also invited my attention to the ruling in N.P Thirugnanam Vs. Dr R. Jagan Mohan Rao reported in (1995) 5 SCC 115. In paragraph 6 the Apex Court refers to the settled legal position thus :-

œ6. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform

his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.?

Thus the mutual readiness and willingness of the parties to the agreement to Sell and their conduct before as well as subsequent to the suit need to be borne mind while concluding the controversy between the parties.

8. Shri Pal finally made reference to the ruling in Smt Hardei Vs. Sh. Amin Chand and others reported in 2012 (2) Civil L.J. 81 in which it is observed thus “

œ12. As already indicated hereinabove, there can be no quarrel with this proposition of law. However, an important aspect of the matter is that Section 53A itself provides that not only should the transferee have been put in possession of the property in pursuance to the contract but the transferee must also show that he has performed or is willing to perform his part of the contract. True it may be, that the transferee despite having lost his remedy to file a suit for specific performance can raise such a defence but while contesting the suit by the real title holder he must plead and prove that he has either performed his part of the contract or has always been ready and willing and is still ready and willing to perform his part of the contract. In case he does not prove or plead these facts then he cannot be given protection under Section 53-A. A person who approaches the Court seeking a relief in equity claiming that he was put in possession on payment of amount must also, in fairness, prove that whatever remaining amount had to be paid in terms of the contract had either been paid by him or he is still ready and willing to pay the same.

13. The argument raised on behalf of the appellant that the owner could have filed a suit for specific performance or for recovery of balance amount, in my view, cannot be accepted because when the right of a true owner is challenged by the proposed vendee, the said proposed vendee must establish that he has done all that was required to be done on his part under the contract. While taking this view I am supported by the observations of the Apex Court in Mohan Lal (deceased)

through his LRs Kachru and others vs. Mira Abdul Gaffar and another, AIR 1996 SC 910, wherein the Apex Court held as follows:

Equally, when transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted there under.

14. In the present case, neither in the pleadings nor in the evidence the defendant averred or proved that he had either performed his part of the contract or was ready and willing to perform his part of the contract.

15. Sh.Verma has also raised a plea that the plaintiff in the plaint had not made a mention about the agreement to sell. It would be pertinent to mention that the plaint was not filed by Sh. Pala Ram the original owner who entered into the agreement to sell but by his legal heirs who may or may not have been aware about the agreement entered into by their father. Even otherwise, non mentioning of this fact would not disentitle the plaintiff to claim possession. The burden was on the defendant who sought protection of Section 53-A of the Act to plead and prove the essential ingredients of the said section.?

9. Learned Advocate for the Respondent on the other hand submitted that the finding recorded regarding the possession handed over in part performance cannot be ignored. He submitted that the first appellate court rightly allowed the appeal. On behalf of the respondent it is submitted that vide Ex 92 on 14-09-1989 Khasra No.6/1 vested in the Government.

10. Let us discuss the legal position in this regard. A contract is an agreement between two or more persons upon a sufficient consideration to perform a certain obligation. If the person, upon whom such contractual obligation rests, fails to

discharge it, the other person contracting becomes entitled to a right either to insist on the actual performance of the contract or to obtain compensation for the nonperformance of the contract. The right of the party to claim actual performance of the contract is called Specific Performance. It has been held that the award of Specific Performance is discretionary and is not obligatory on the part of the court to pass a decree of Specific Performance. While exercising its discretion, the validity of the contract in question is ascertained by the court. The decree of specific performance of contract is an equitable remedy which comes forth in the absence of inadequacy of any legal remedy i.e. when the award of damages by the law is inadequate. In case, the loss or damage (caused by the breach of contract) can be sufficiently compensated in terms of money, the court may not grant specific performance of contract. Readiness and willingness cannot be treated as a straitjacket formula and the issue has to be decided keeping in view the facts and circumstances relevant to the intention and conduct of the party concerned. In N.P. Thirugnanams case (supra) the Court found that the appellant was dabbling in real estate transaction without means to purchase the property and observed:

œSection 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of

the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. Intention must be expressed in unequivocal language.?

10. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while nonperformance involving no such hardship on the plaintiff is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.

11. First appellate court (1st Ad hoc Additional District Judge, Nagpur) held that possession of the Defendant is required to be protected under Section 53-A of the Transfer of Property Act. It relates to principle of Part performance of the contract. It stated thus:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed

there-for by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof. The principle is a shield to retain possession. It is not to sue the transferor for declaration of the Title. The question is raised as to whether plaintiff had tested the readiness and willingness of the defendant to perform his part of the contract.

12. The Supreme Court also considered Section 53-A of the Transfer of Property Act in the case of *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi* (AIR 2002 SC 960). It was held that a person obtaining possession of the property in part performance of an agreement of sale can defend his possession in a suit for recovery of possession filed by the transferor or by subsequent transferee of the property claiming under him. In the course of the said decision, the Apex Court also referred to the conditions to be satisfied before a transferee can seek to defend his possession under Section 53-A of the Act. The said conditions are:

- (1) there must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf,
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof,
- (5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract.

13. If the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation. He can even file a suit seeking injunction against the Transferor to protect his possession as held in full bench of the Bombay High Court in *Sadashiv Chander Bhamgare Vs Eknath Pandharinath Nangude* reported in (AIR 2004 Bom. 378). even if the suit for specific performance of the contract is found to be barred by limitation, it is open to the plaintiff to defend/protect his possession under Section 53-A of the Transfer of Property Act. It has been contended that for applicability of Section 53-A of the Transfer of Property Act what is required is that there should be a written contract in respect of immovable property for consideration. Transferee in part of performance of the contract is put in possession or is continued in terms of the contract. Transferee has performed his part of obligation or he is willing to perform his part of performance of the contract. It has been held that if such conditions are satisfied, neither the transferrer nor anybody claiming under him can object to the possession in view of language of Section 53-A of the Transfer of Property Act.

14. The transferee in possession as against the transferor can avail of the benefit of Section 53-A of the T.P. Act on the ground of equity in his favour as a shield to retain his possession if he can prove the above ingredients.

15. In cases of the Second appeal interference in the judgment and order would be justifiable as held in *Hero Vinoth (Minor) Vs. Seshammal* reported in (2006) 5 SCC 545, Honble Supreme Court has observed as under :

œThe general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to

cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

16. The facts revealed from the evidence on record show that the agreement to sell was dated 05-09-1974. Sale deed was to be executed before the year 1975. The defendant had refused to purchase on the pretext of restriction under the Urban Ceiling Act. Case of the plaintiff in the trial court was that the Defendant in the year 1983/84 took possession of the suit and constructed on the plot of land taking advantage of the fact that the plaintiff was ill and admitted in the hospital. The defendant deposed that on 05-09-1974 the agreement to sell (Ex 47) was in respect of the plot no.3; 30 x 55 feet at khasra no.6/1 for earnest money paid in the sum of Rs.500/- and the Sale deed was to be executed within six months by payment of the balance sum subject to sanction by NIT. The defendant though claimed having constructed an house, there was no any correspondence between the parties during the period between 1974 to 1982. The facts in the present case indicated that the Defendant could not establish that he had taken possession of the suit plot in part-performance of the contract and he was continuously and bona-fide ready and willing to perform his part of the Contract and could not get the Sale deed executed within stipulated time as per the agreement. The defendant herein did not choose to institute the suit for specific performance of the Contract as alleged. Such defendant cannot be allowed to take advantage of his defaults as well as his wrong conduct. Hence Defendant is liable to deliver back the possession to the plaintiff who is real owner of the suit property as held by the trial Court. The Possession of the defendant if acquired and withheld unlawfully in breach of the contract the defendant is not entitled for the equitable relief of specific performance. The structure raised by the defendant if any on the suit land is liable to be removed by the defendant at his own costs and was bound to vacate the possession of the suit plot and deliver it to the plaintiff. The defence under Section 53-A could have been available to the defendant by proving that the prospective vendee acted in furtherance of the contract and was ready and willing to perform his part of the contract. The defendant as prospective vendee was bound to prove the essential requirements of the part performance of contract observed on his part. Breach of the agreement and His failure to prove his

continuous readiness and willingness was made the ground by the trial Court to decree the suit by the transferor for possession and damages.

17. Benefit of Section 53-A of the T.P. Act for the defendant was dependent upon the pleading and proof on the part of the Defendant-respondent that he was always or continuously ready and willing to perform his part of the contract . No such case was made out by the Defendant. The first appellate Judge did not appreciate the legal position as discussed above in the light of the facts, before he set aside the well-reasoned and sound conclusions by the trial Court to decree the suit in the facts and circumstances of the case. Impugned judgment suffers from perversity and justify interference by this Court. Hence appeal need to be allowed.

18. In the result the second appeal succeeds. Hence order.

ORDER

The impugned Judgment and order by the first appellate court is set aside and the decree as passed by the trial Court is restored with costs. Second Appeal is allowed accordingly.

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