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Court : Mumbai

Decided On : Sep-18-1996

Reported in : 1997(1)BomCR664

Judge : B.P. Saraf and ;M.S. Rane, JJ.

Acts : [Transfer of Property Act, 1882](#) - Sections 7; Specific Performance Act, 1963 - Sections 4 and 10; [Contract Act, 1872](#) - Sections 182 and 188

Appeal No. : Appeal No. 909 of 1995 in Notice of Motion No. 2284 of 1989 in Suit No. 2421 of 1993

Appellant : Devkubai N. Mankar and ors.

Respondent : Rajesh Builders and ors.

Advocate for Def. : Navin Parekh and ;H.V. Chande, Advs.

Advocate for Pet/Ap. : I.M. Chagla, ;Zia Mody and ;P.K. Samdani, Advs., i/b., Prakash & Co.

Disposition : Appeal allowed

Judgement :

B.P. Saraf, J.

1. This is an appeal of the successors of original defendant No. 2 from the order of the learned Single Judge dated 3rd November, 1995 made in Notice of Motion No. 2284 of 1989 in Suit No. 2421 of 1983 refusing to set aside the interim order of injunction passed on 19-6-1984 in Notice of Motion No. 1953 of 1983 against their predecessor (original defendant No. 2 since deceased).

2. The relevant facts of the case, briefly stated, are as follows. The appellants (hereinafter, for the sake of convenience, referred to as 'the heirs of Warli') are the heirs and legal representatives of one Madhya Govind Warli who was defendant No. 2 in the suit filed by M/s. Rajesh Builders, respondent No.1 herein. On or about 5th July, 1973, Mr. Warli, the predecessor of the appellants, had executed a power of attorney in favour of one Mahendra Damodar Patil, original defendant No. 1 (since deceased and represented by his legal representatives who are respondents in this appeal), in respect of certain immovable properties bearing Survey No. 327, Hissa No. 3 and Survey No. 328, Hissa No. 11 (hereinafter referred to as 'Warli property'). Identical power of attorney was also executed by one Mr. Mhase, original defendant No. 3 in respect of certain property belonging to him. Another appeal, being Appeal No. 958 of 1995, which is clubbed with this appeal for hearing, pertains to the property belonging to Mr. Mhase and the alleged agreement of sale executed by Mr. patil in respect of the said property.

3. The suit in question was filed by respondent No. 1 against the predecessor of the appellants for specific performance of an agreement of sale dated 10th June 1983 executed by the power of attorney holder Mr. Patil for sale of the Warli property. The case of respondent No. 1 in the suit was that by the agreement dated 10th June, 1983 executed by Mr. Patil in his individual capacity for his own property, as a constituted attorney for the predecessor of the appellants in respect of Warli property, and on behalf of Mr. Mhase property were agreed to be transferred or conveyed to the respondent No. 1 for development. The agreement is a composite one for development of the personal property of Mr. Patil as well as Warli property and Mhase property. In this appeal, we are concerned only with Warli property and so henceforth we would refer only to that property. The case of the appellants is that the said transaction is collusive. According to the appellants, Mr. Warli never received any consideration. Admittedly, he was all throughout in

the possession of the said property. It appears that in course of time, some differences arose between respondent No. 1, the developer, and Mr. Patil, the power of attorney holder, as a result of which respondent No. 1 filed a suit for specific performance of the agreement of sale dated 10th June, 1983. The said suit was numbered as Suit No. 2421 of 1983. In that suit, respondent No. 1, original plaintiff, also took out a Notice of Motion No. 1953 of 1983 and prayed for appointment of a receiver and injunction. Prayer (b) of the Notice of Motion which is relevant for the purposes of the present controversy is set out below:

'that pending the hearing and final disposal of the above suit, the defendants, their servants and/or agents be restrained by an order and injunction of this Hon'ble Court from in any way selling, transferring, letting out, alienating, mortgaging or otherwise in any manner dealing with or disposing off the suit lands described in Ex. 'A' to the Plaint or any part thereof in any manner whatsoever.'

Though in the Notice of Motion Mr. Warli was made a party along with power of attorney holder Mr. Patil, admittedly, the notice was served only on Mr. Patil, both for himself in his individual capacity as well as on behalf of Mr. Warli as his attorney. As a result, Mr. Warli had no notice of the Notice of Motion in question. The Notice of Motion came up for hearing before the learned single Judge and interim order came to be passed in terms of prayer clause (b) which is set out above, excluding the words 'Otherwise in any manner dealing with' appearing in the said clause. When Mr. Warli came to know of this order, he took out a Notice of Motion, which was numbered as Notice of Motion No. 2284 of 1989, for setting aside the above interim order injuncting Mr. Warli, the owner of the property, from selling, transferring, etc. of the property in question.

4. The contention of the appellants before the learned single Judge in the Notice of Motion was that Mr. Patil, in whose favour he had given power of attorney, had no power to enter into any agreement of sale of the property. He was only authorised by the power of attorney to manage the property and to do all other acts incidental for that purpose. The only other power conferred on him, in addition to the power of management, was the power under clause 17 of the power of attorney to negotiate for the sale of the property. In that clause, it was made clear that the

power of attorney holder Mr. Patil was authorised 'to negotiate for the sale of the property'. The case of the appellant before the learned single Judge was that no power or authority had been given to Mr. Patil to sell the property or to enter into any agreement for the sale of the same and the power to negotiate cannot be construed as meaning power to sell. The further case of the appellants was that the so-called agreement of sale executed by Mr. Patil cannot confer any title on the respondent No. 1 to claim specific performance of the said agreement. It was also contended by the appellants that the action of Mr. Patil was mala fide which is evident from the fact that even in the suit and also the Notice of Motion, notices on behalf of the appellants were also accepted by him, with a view to keeping the appellants in dark about the proceedings in the Court and the orders likely to be passed therein. It was in such circumstances that the Notice of Motion was taken out by the appellants before the learned single Judge for setting aside the interim order passed by him behind the back of the appellants.

5. The learned single Judge dismissed the above Notice of Motion by relying upon clause 17 of the power of attorney it was not possible for him to hold that there was no power conferred on Mr. Patil to enter into an agreement of sale of Warli property. Aggrieved by the above order of the learned single Judge, the appellants are in appeal before us.

6. We have heard Mr. Chagla, learned Counsel for the appellants. At the very outset, Mr. Chagla drew our attention to the power of attorney executed by Mr. Warli, predecessor of the appellants, in favour of Mr. Patil, in particular, to clause 17 thereof and submitted that the said clause did not authorise Mr. Patil to enter into an agreement for sale of Warli property. According to Mr. Chagla, the learned single Judge erred in law in holding that clause 17 of the power of attorney authorised Mr. Patil to do so. We have carefully perused the power of attorney executed by Mr. Warli in favour of Mr. Patil. In the preamble of the power of attorney, it is stated that because it was not possible for Mr. Warli, without greater inconvenience, to attend to the Court cases and to take care of, supervise and manage the same and attend the offices, courts, etc. in connection with his property mention therein and to attend, take care of and take part in the enquiries, proceedings, etc. in connection therewith and to appear in person in the courts

including Special Land Acquisition Officer, Tahsildars and other authorities under B.T. & A.L. Act, 1948, Mr. Patil was appointed as his attorney to appear for and act and represent him and to execute or to do all or any of the acts and things mentioned in the power of attorney. The acts and things mentioned in various clauses of the power of attorney are : to manage the said property (clause 1), to collect and recover rents and profits of the properties (clause 2), to give valid and proper receipts in respect of payments made by any person or persons (clause 3), to appoint or engage the services of a lawyer, attorney, solicitor, etc., for the purpose of enquiry, suit or proceedings and for the purpose of the management of aforesaid properties and to give and sign his name or on any warrant of attorneys, or vakalatnama, etc., to prosecute and defend on the premises; (clause 4); to sign petitions, etc. in respect of the properties and/or in any proceedings in connection with the management and superintendence of the said properties (clause 5). Power was also conferred on Mr. Patil to compromise, compound and negotiate and settle any dispute and refer the same to the arbitration (clause 6). He was also authorised to accept the service of any notice, summons or writs issued by any Court, officers, etc. (clause 7). He was also empowered to make complaints or to file them in Court, civil criminal or revenue, etc. (clause 8). Power was also conferred on him to rent out or hire the property in question and to execute and deliver leases, licences, etc., if necessary. By clause 11, power was conferred to enter into and take possession of lands, tenements, premises, etc. to which Mr. Warli might become entitled to and to collect and receive the rents and profits thereof and to manage the same with liberty in course of such management to let out or demise the same or part thereof by granting leases and pattas to and accepting kabulayats or leases from year to year or any terms of years and for that purpose to make , assign and deliver and, if necessary, register all agreements, leases, pattas and all other lawful and proper deeds and documents and to receive from such tenants or persons liable to pay the same all rents and moneys due or payable for or in respect of such properties. All other clauses also pertain to one or more powers pertaining to the management of the property. By clause 17, on which reliance is placed by the respondent No. 1, specific power was conferred to negotiate for sale of the lands to the prospective purchasers or customers for the best available price. It is also mentioned in the said clause that on any sale of land

in question taking place pursuant to such negotiation, the attorney shall be entitled to a commission of 4% on the amount of the value or price of lands or consideration for sale mentioned in the deed of conveyance on the final conveyance being made and registered but not otherwise whatever may be the cause of non-compliance. It is this clause which has been relied upon by the respondents in support of their case that the Mr. Patil, who had executed the deed in question had authority to do so and on the basis of which the learned single Judge has also come to the prima facie conclusion that the attorney Mr. Patil had power to enter into an agreement for the sale of the properties. The determination of the controversy in this case, therefore, depends upon the true and correct interpretation of clause 17 of the power of attorney, which reads as follows:---

' For removal of doubt, it is expressly stated that my said Attorney shall also have the power right and authority under this presents, to negotiate for the sale of the lands, to the prospective purchasers or customers for the best available price and the event of the sale of lands in question taking place, my said Attorney shall be entitled to a commission of 4% on the amount of the value or price of lands or consideration for sale mentioned in the Deed of Conveyance on the final conveyance being made and registered nut not otherwise whatever may be the cause of non-compliance. IT IS FURTHER EXPRESSLY STATED THAT I HEREBY GIVE SHRI DAMODAR DHARAM PATIL, by these presents power of attorney special or General, if any, given by me to and or in favour of any person or persons other than my own self or my aforesaid Attorney, are hereby revoked and cancelled and shall deemed to have been so revoked and cancelled.'

From a reading of the above Clause, it is clear that the power conferred thereby on the attorney is the power 'to negotiate' for the sale of the land with the prospective purchasers or customers for the best available price. Whether power to 'negotiate' can be construed as meaning power to enter into agreement for sale or to complete the sale is the question for determination before us. The answer to this question will depend upon the true meaning and import of the expression 'to negotiate'.

7. The word 'negotiate' is a technical word and as used with reference to commercial paper, it is almost a word of art. It may be used in two senses, as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. In law and law books, it is sometimes used in both senses. The word 'negotiate' used in connection with business transactions ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. It is that what passes between the parties or their agents in course of or incident to the making of a contract and is also conversation in arranging terms of a contract. It also means 'to discuss or arrange a sale or a bargain; to arrange the preliminaries of a business transaction'. According to Black's Law Dictionary (Sixth Edition), negotiation is a process of submission and consideration of offers until acceptable offer is made and accepted. It means the deliberations, discussion or conference upon the terms of a proposed agreement or the act of settling or arranging the terms and conditions of a bargain, or sale, or other business transaction. Negotiation is thus a communication process used to put deals together. The job of the negotiator in case of negotiation for sale is to obtain all the terms and the conditions, including the price, and to place the same before the owner. With that his job as a negotiator 'to negotiate' comes to an end. It is not within his domain to strike a bargain and perform the deal. It is for the owner to accept or not to accept the deal arrived at by the agent or attorney by negotiation.

8. We are supported in our above conclusion by the following observations of Bowen, L.J. in a century old decision of the Chancery Division in England in *In re Macgowan. Macgowan v. Murray* (1891)1 Ch. 105 :

'Negotiation is that which passes between parties or their agents in the course of or incident to the making of the contract; and if the negotiation is brought to such a close as leaves the principal at liberty to say, 'I accept the offer'-- then the agent has done all that a negotiating agent can do

In the above case, the controversy before the Court was about the scope of the power of a solicitor to arrange or negotiate sale or purchase under the orders of

the Court. In that context, Lindley, L.J. also said (at page 114) :

'Now it appears to me there is a little confusion of thought there as to what 'negotiation' means. What is a solicitor who has the conduct of the sale in Court to do What is his business as a negotiator? I cannot understand that it is anything more than this, to obtain all the terms and all the conditions, including the cost price, which are to be laid before the Court. It is his business to negotiate that; it is not his business as negotiator to see to their performance. That is quite another matter. But when he draws up the proposals, and finally settles the proposals, which are laid before the Court for its approval, it appears to me to finish that part of the business which can properly be called 'negotiation'.

The above decision, to our mind, clearly brings out the scope and ambit of 'the authority to negotiate for sale.'

9. We may now turn to the facts of the instant case. Here, the attorney Mr. Patil was authorised to negotiate for the sale of the properties of Mr. Warli. This authority was conferred on him with a view to removing doubt, because the power of attorney was basically for the management of the properties, and in the absence of such an authority, it would not have been permissible for Mr. Patil to negotiate for the sale of the properties. Otherwise also, nobody would have liked to negotiate the sale or purchase of a property belonging to somebody else with a person who has no authority, express or implied, to do so. Obviously, it was only with a view to enabling the attorney Mr. Patil to find out the best available price and terms and conditions for the sale of the properties in question that it was made clear in clause 17 of the power of attorney that in addition to the authority to manage the properties and to take all steps necessary or incidental thereto, he had also the authority to negotiate with the intending purchasers for the sale of the same. Such an authority cannot be construed as meaning authority to dispose of the properties or to enter into an agreement for the sale of the same. We are, therefore, of the clear opinion that Mr. Patil had no authority to enter into an agreement for the sale of the properties of Mr. Warli on the basis of which he could confer on the respondent No. 1 a right to claim specific performance of such agreement and to compel the owner to execute deed of sale of the property in

their favour.

10. It is pertinent to note that in the instant case it is not the case of respondent No. 1 that they had seen the power of attorney and on a reading of Clause 17 thereof, they got an impression that Mr. Patil was authorised to enter into an agreement for the sale of the property of Mr. Warli. On the other hand, the admitted position is that they had never seen the power of attorney, nor had they made any effort to know whether Mr. Patil, with whom they were entering into the agreement of sale, had any authority to sell the property belonging to Mr. Warli. Reliance on Clause 17 of the power of attorney was sought to be placed by the respondent No. 1 only when the said power of attorney was filed in the Court by the appellants in support of their case that Mr. Patil had no authority to enter into an agreement for the sale of the properties. There can be no dispute about the fact that a person competent to transfer can only transfer interest in the property. Section 7 of the Transfer of Property Act clearly provides that every person competent to contract and entitled to transferable property or 'authorised to dispose of transferable property. In the instant case, Mr. Patil had no authority to transfer the property of Mr. Warli nor to enter into an agreement for sale thereof. The agreement for sale entered into by the respondent No. 1 with Mr. Patil, therefore, cannot confer any right on them to claim the execution of the sale of the property of Mr. Warli on the basis of such an agreement of sale.

11. In view of the above, we are of the clear opinion that the learned single judge was not justified in refusing to set aside the interim order passed by him restraining the appellants from disposing of, transferring or alienating the property in question.

12. In the result, this appeal is allowed. The impugned order of the learned single Judge is set aside. The interim order passed by the learned single Judge in Notice of Motion No. 1953 of 1983 stands vacated insofar as the property of Mr. Warli is concerned. In the facts and circumstances of the case, we make no order as to costs.

Learned counsel for the respondent No. 1 prays that order dated 20th September, 1989 passed in Appeal No. 1015 of 1989 which is operating till today, should be

allowed to continue for a period of 3 months from today. Learned counsel for the appellants states that no such order is required as the appellants would not transfer, alienate or dispose of the property in question or create any further third party right therein for a period of 8 weeks from today. The above statement is taken on record. In view of the above, it is not necessary to pass any order on the prayer of the appellants for stay of this order.

Issuance of certified copy of this order is expedited.

Appeal allowed order set aside.

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