IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

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FIRST APPEAL NO. 5 OF 2004

Mr.Kanhayyalal Madhavlal Khandelwal .. Appellant
Vs.
1) Mrs.Roshan Eruch Mehta
2) Mr.Kersi Eruch Mehta
3) Mr.Firoosh Eruch Mehta
4) M/s.Pushpam Promotoers & Builders Pvt. Ltd.
5) Oriental Bank of Commerce (A Nationalized Bank) .. Respondents

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Mr.Madhav Jamdar, Advocate for the Appellant.
None for the Respondents.

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CORAM : A.S. OKA &
C.V. BHADANG, JJ.

DATED : APRIL 21, 2015.

ORAL JUDGMENT (Per C.V. BHADANG, J.):

This Appeal is by the original Plaintiff taking exception to the Judgment and Decree dated 16th November, 2002 passed by the learned Civil Judge, Senior Division, Pune in Special Suit No.455 of 2001. By the impugned Judgment and Decree, the suit filed by the appellant for specific performance of agreement for sale of the suit property has been dismissed, while granting a decree of refund of a sum of Rs.4,25,000/- along with interest. The respondents herein are the original defendants before the trial

Court.

2 The brief facts necessary for the disposal of the Appeal may be stated thus:

That a piece of land along with structures standing thereon bearing CTS No.135/B Sangamwadi Scheme No.10, Tadiwalla Road, Pune is the subject matter of dispute (hereinafter referred to as “the suit property”). The suit property was originally owned by one Cawas Nadirsha Daji and Pallonji Ardeshir Talathi of Bombay being the executor of will of late Shri Kaikhushru Hormasji Vakil. On 28th July, 1975 the original owner sold and conveyed the suit property to the first respondent Mrs.Roshani Eruch Mehta. Roshani Education Society, registered under the Societies Registration Act, 1860 and a public Trust under the Bombay Public Trust Act, 1960 (hereinafter referred to as “the society”) had signed the said sale deed as a consenting party. The said society was running a school in the suit property.

3 According to the appellant, the first respondent illegally and unauthorizedly included the names of the second and third respondents in the city survey record pertaining to the suit property without any deed of conveyance. Thus, the second and third respondents who are also claiming to be the owners, were arrayed as defendants in the suit.

4 On 23rd November, 1996, the first respondent issued a public notice expressing his intention to sale the suit property inviting offers from the prospective purchasers. In pursuance thereof the appellant offered to purchase the suit property which led to the appellant and the first respondent executing a Memorandum of Understanding (MOU) on 29th April, 1997 under which the suit property was agreed to be sold by the first respondent for a consideration of Rs.1,50,00,000/-. It may be mentioned that in terms of the recitals of the MOU, the agreement of sale was to be prepared for Rs.1,10,00,000/- and an amount of Rs.40,00,000/- was to be paid to the first respondent, “as and when required”. The initial token amount was to be paid by the end of August 1997. The balance amount was to be given with interest @ 6% per annum, on handing over vacant possession. It is not in dispute that a total amount of Rs.4,25,000/- was paid by the appellant to the first respondent, comprised in three installments and the first respondent had received the same. There were certain formalities and compliances required to be made before the execution of the sale deed, inasmuch as the society was running a school in the suit property which was required to be closed down after obtaining permission from the Education Department of the Government of Maharashtra. This included making alternate arrangement for accommodating the students and also settling the

dues of the teaching and non-teaching staff. It was also necessary to obtain a clearance certificate from the Income Tax Authorities and a no-objection certificate from the competent authority under the Urban Land (Ceiling and Holding) Regulations Act, 1976. According to the appellant, the first respondent had undertaken to complete these formalities and furnish all the title deeds and necessary documents before execution of a deed of conveyance. It appears that the parties exchanged certain communications/ notices attributing failure to abide by the terms of the MOU to each other. According to the appellant, the first respondent failed to take necessary steps for obtaining permission of the closure of the school and completion of other formalities. It was also contended that the suit property was subject matter of reservation under the Town Planning Scheme. It was contended that the appellant made an attempt and helped the first respondent for obtaining the necessary permission for closure of the school, as also for dereservation of the property and had incurred expenditure on the same.

5 It appears that on 27th January, 1999, the first respondent executed an agreement for sale of the suit property in favour of the fourth respondent and subsequently a deed of conveyance was executed on 10th September, 1999 in favour of the fourth respondent for a consideration of Rs.1,60,00,000/-. On 8th

May, 2000, the first respondent intimated the appellant that the suit property has been sold to the fourth respondent. In such circumstances, the appellant filed Special Civil Suit No.455 of 2001 before the Civil Judge Senior Division, Pune for specific performance of the MOU for execution of a sale deed in respect of the suit property and for a further relief of a declaration that the deed of conveyance dated 10th September, 1999 in favour of the 4th respondent being illegal, null and void. In the alternative, the appellant claimed damages of Rs.5,00,00,000/-.

6 The first respondent resisted the suit by filing written statement (Exh.43) which has been adopted by the second and third respondents. It was contended that by a letter dated 2nd May, 1998 the appellant was called upon to complete the said transaction within eight days. However, the appellant failed to comply. As such, the MOU was terminated in May 1998. The suit having been filed on 6th June, 2001 was barred by limitation. The first respondent also raised other contentions about the MOU being contrary to the provisions of the Income Tax Act and Indian Contract Act. It was also contended that it was against public policy and not enforceable. It was contended that the appellant was never ready and willing to perform his part of the contract. It was denied that the defendant had agreed to demarcate the property and to furnish a certificate to that effect. It was

contended that already a permission from the Education Department to close down the school was obtained and the Municipal Corporation had also taken a decision not to acquire the suit property. It was contended that the appellant had not helped the first respondent in completing any of these formalities. It was, thus, contended that the appellant was not entitled to the specific performance of the contract of sale or for the alternate relief of damages, as claimed.

7 The fourth respondent contested the suit. It was contended that the suit property had undergone substantial and material changes before the institution of the suit and as such the description of the suit property was denied, being incorrect. It was not disputed that the fourth respondent has entered into a contract with the first respondent on 27th January, 1999 for a consideration of Rs.1,60,00,000/- and an earnest amount of Rs.10,00,000/- was paid. It was contended that a registered sale deed was executed in favour of the fourth respondent on 10th September, 1999 and thereafter the fourth respondent submitted a plan for construction of ground plus two floors in the property for which commencement certificate was granted on 4th April, 2000. Accordingly, the 4th respondent started effecting new construction after pulling down the existing structure and the construction was completed by the end of September 2000. The fourth respondent raised material

defence about he being a bonafide purchaser for value without notice. It was contended that the fourth respondent has been recorded as owner in the record of rights.

8 The fifth respondent contended that the suit property was mortgaged in its favour against a loan of Rs.2,46,00,000/- granted to the fourth respondent.

9 The learned trial Court framed as many as eleven issues. The parties produced oral and documentary evidence. The appellant examined himself and produced certain documents. On behalf of the first to third respondents, the first respondent was examined. The fourth respondent examined himself in support of his defence. The fifth respondent/Bank examined one Hariharan Nagrajan and R.K. Sharma.

10 The learned trial Court answered all the issues against the Appellant except the issue no.5 about limitation and the issue no.6 about refund of earnest amount. The learned trial Court also found that the fourth respondent was a bonafide purchaser for value without notice. In such circumstances, it was found that the only relief to which the appellant was entitled to, was refund of the earnest amount with interest at the rate of 12% per annum. In the face of such a finding, the suit came to be partly decreed to the

extent of refund of consideration along with interest. Feeling aggrieved, the appellant is before this Court.

11 We have heard Mr.Jamdar, the learned counsel for the appellant. There was no appearance on behalf of the respondents. With the assistance of the learned counsel, we have perused the record and the impugned judgment.

12 It is submitted on behalf of the appellant that the learned trial Court was in error in holding that the suit was barred by limitation. It is submitted by the learned counsel for the appellant that the negative finding recorded against the issue no.5 is contrary to the observations in paragraph 21 of the judgment. It is submitted that the learned Trial Judge has found that the suit was within limitation as such the issue no.5 ought to have been answered in the affirmative.

13 So far as the merits of the matter are concerned, it is submitted that the execution of the agreement and the fact that there was a school running in the suit property is not in dispute. It is submitted that, it was necessary for the first respondent to obtain orders from the competent authority for closure of the school and also to get the suit property dereserved from the Municipal Corporation. It is submitted that the first respondent

did not take any steps for compliance of these formalities. It is submitted that the appellant helped the first respondent and also spent amount for obtaining the orders regarding the closure of the school, settling of the claim and for getting the property de-reserved. The learned counsel would submit that there is also no dispute that the first respondent has received a total amount of Rs.4,25,000/- from the appellant, which has been acknowledged below the MOU. It is, thus, submitted that the appellant was all along ready and willing to perform his part of the contract and inspite of the first respondent being called upon to execute the deed of conveyance, the same was not done.

14 It is submitted that the first respondent during subsistence of the valid agreement for sale, transferred the property vide deed of conveyance dated 10th September, 1999 to the fourth respondent. It is submitted that there is enough material on record to show that the fourth respondent was aware of the existence of the agreement/MOU between the appellant and the first respondent and as such, the fourth respondent cannot be said to be a bonafide purchase for value without notice. The learned counsel has taken exception to the finding recorded by the learned trial Court, against an issue no.9. It is submitted that the suit property is sold to the fourth respondent for a consideration of Rs.1,60,00,000/- when the actual valuation of the property was

more than Rs.2,00,00,000/-. He, therefore submitted that the said transaction would be hit by Section 269 of the Income Tax Act and would not be binding. He, therefore, submitted that the suit for specific performance of the contract ought to have been decreed. The learned counsel would submit that in the alternative a decree for compensation of Rs.5,00,00,000/- with interest may be passed.

15 We have considered the rival circumstances and the submissions made. At the outset, it needs to be mentioned that although the learned trial Court has answered issue no.5 in the negative, the reasoning articulated in para 20 of the Judgment would show that the learned trial Court has held that the notice Exhibit-73 dated 20th August, 1998 stipulated that the MOU would be cancelled within eight days. Thus, the suit having been instituted on 6th June, 2001 (i.e. within three years from the date of the issuance of the notice Exh.73) was well within limitation. The learned trial Court also mentioned in para 21 that issue no.5 is answered in the affirmative. Thus, we find that the negative finding recorded against the issue no.5 is in all probability out of sheer inadvertence/mistake inasmuch as the learned trial Court finds and in our opinion rightly so, that the suit was within limitation. Thus, this aspect may not detain us any longer.

16 This takes us to the merits of the controversy. The

execution of the MOU (Exh.66) is not in dispute. The recitals in the MOU (Exh.66) would show that the suit property was agreed to be sold to the appellant for a consideration of Rs.1,50,00,000/- and the agreement of sale was to be prepared for Rs.1,10,00,000/-. The MOU further recites that the appellant had agreed to pay an amount of Rs.40,00,000/- to the first respondent “as and when required”. The initial amount as a token was to be paid by August 1997. The balance amount was agreed to be paid with 6% interest on handing over the possession. Significantly enough, the agreement is silent as to the amount, which was to be paid as a token and what was the balance amount which was to be paid on completion of the transaction i.e. on delivery of vacant possession. Be that as it may, it is undisputed that the appellant has paid a total amount of Rs.4,25,000/- to the first respondent, comprised in three installments which has been acknowledged below the MOU (Exh.66). It is further undisputed that there was a school being run in the suit property and for the completion of the transaction as agreed the closure of the school on obtaining of permission from the competent authority was necessary. It is further a matter of record that the appellant had issued in all five communications/notices on 21st October, 1997 (Exh.69), 8th May, 1996 (Exh.71), 12th September, 1998 (Exh.74), 2nd June, 1999 (Exh.75), 27th April, 2000 (Exh.77) and the first respondent has issued in all four communications being dated 2nd May, 1998

(Exh.70), 9th June, 1998 (Exh.72), 20th August, 1998 (Exh.73) and 8th May, 2000 (Exh.78). In notice (Exh.69) the appellant claims that the first respondent had allegedly made a representation that an additional FSI of 5000 square feet would be available for construction. It further recites that the appellant had taken various steps and had spent “more than Rs.2,50,000/-” besides the amount paid to the first respondent towards the purchase price. In reply Exhibit-70, the first respondent claimed that from January 1998 it was the appellant who was deliberately avoiding to get the sale deed executed on some or the other pretext, which was causing heavy financial loss on account of loss of interest. The appellant was called upon to get the sale deed executed within eight days. In communication Exh.71 the appellant again claimed that he has spent “huge amounts” on behalf of the first respondent for clearing the clog on the title on the property which was denied by the first respondent vide communication Exh.72. The first respondent claimed that it was the appellant who was avoiding to getting the sale deed executed and had committed breach of the MOU. In the communication Exh.73 the first respondent claimed that the transaction was to be completed by August 1997. The appellant was called upon to pay the balance amount of Rs.1,45,75,000/- within eight days failing which it was intimated that the MOU will stand automatically terminated and the earnest amount of Rs.4,25,000/- will stand forfeited. In the communication

Exh.74, the appellant for the first time claimed that the Pune Municipal Corporation has proposed an acquisition of the suit property. The appellant claimed therein that he carried out negotiations with various authorities and succeeded in getting the proposal dropped and has spent more than Rs.15,00,000/- over the same. The appellant further claimed that the first respondent requested him to bear Rs.5,00,000/- and charge Rs.10,00,000/- on her account. It was claimed that the first respondent has received a further sum of Rs.75,000/- and a total amount of Rs.15,00,000/- has been paid. This was denied by the communication dated 8th May, 2000 (Exh.78).

17 It would be now necessary to make a reference to the case made out in the plaint and the evidence led. It would be significant to note that in the plaint the Appellant has nowhere pleaded that he has paid the amount of Rs.40,00,000/- which according to the MOU was to be paid to the first respondent "as and when required". The appellant in the cross-examination states that the property was agreed to be purchased for the amount of Rs.1,50,00,000/-, however, on paper, the consideration was to be shown as Rs.1,10,00,000/- and a sum of Rs.40,00,000/- was agreed to be paid to the first respondent without mentioning it on record and without claiming any receipts. He further states that he had not made any inquiry about the owners of the suit property, before

signing the MOU. He had not issued any public notice before execution of the MOU or thereafter. For the first time in the cross-examination the appellant claimed that prior to preparing of the MOU he had paid an amount of Rs.10,00,000/- to the first respondent for which no receipt was obtained. If that be so, significantly enough the MOU is silent on this aspect. He thereafter states that there was no agreement of sale executed after the MOU. He claimed that in all he has paid Rs.40,00,000/- to the first respondent out of which Rs.30,00,000/- were paid up to the year 1999. He does not remember the exact date of payment of these amounts. He clarifies during the evidence that "huge amount" as mentioned in the notice Exh.69 was Rs.22,50,000/-. He, then claimed that he has neither shown the amount of Rs.40,00,000/- in his account nor in his Income Tax Return. It would be further significant to note that the appellant claimed in his evidence that he has not paid amount (remaining amount of consideration) after receipt of the notice Exh.70. He, claimed that he had no amount in his account on or after the notice Exh.70 dated 2nd May, 1998. Significantly enough he claimed that he had a cash of more than Rs.1,10,00,000/-.

On a careful consideration of the pleadings of the appellant and the evidence led, we are clearly of the view that they are discrepant on material aspects. We do not find that the case put forth by the appellant can be accepted.

18 It is trite that relief of specific performance is discretionary in nature and can be granted on well established principles. Section 20 (1) and 20(2)(a) of the Specific Relief Act 1963 (hereinafter referred to as "the Act of 1963", for short) which is relevant for the purpose reads as under:

> ***20. Discretion as to decreeing specific performance.—***
>
> *(1) 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; but 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.*
>
> *(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—*
>
> *(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*

The Honourable Apex Court in the case of ***Laxman Tatyaba Kankate & Anr. Vs. Smt. TaramatiHarishchandra Dhtrak***[1] has *interalia* held that the Court is invested with wide discretion under Section 20 of the Act of 1963, either to grant a decree for specific performance or to decline the same. However, such discretion is not arbitrary but judicial in nature to be exercised in the facts and circumstances of each case. In ***Sardar Singh Vs. Krishna Devi [Smt.] & Anr.***[2] the Hon'ble Supreme Court has held that the circumstances specified in Section 20 of the Act of 1963 are only illustrative and not exhaustive. The Court would take into consideration the circumstances of each case, including conduct of the parties.

19 We are of the considered view that the conduct of the parties both in relation to the contract in question as also relating to any attending circumstance, would be relevant in deciding whether a party would be entitled to a relief of specific performance. At the cost of repetition it needs to be stated that specific performance is an equitable and discretionary relief and the conduct of the parties in general would assume significance. The learned trial Court has placed reliance on the decision of the

1 AIR 2010 SCC 3025

2 [1994]4 SCC 18

Hon'ble Apex Court in the case of ***Sm. Surasaibalini Debi Vs. Phanindra Mohan Majumdar***[3], in order to hold that the MOU (Exh.66) in this case is illegal being hit by Section 23 of the Contract Act and Section 269 UC of the Income Tax Act. We find that the consideration agreed was Rs.1,50,00,000/-, and the agreement of sale was to be executed only for Rs.1,10,00,000/- and Rs.40,00,000/- were not to be accounted for. We also find that the evidence of the appellant on the point of spending of any amount for getting the clog on the title cleared is not satisfactory and acceptable. We find that the conduct of the appellant by which he has admitted that the amount of Rs.40,00,000/- was neither reflected in the account books nor shown in the Income Tax Return is of such a nature which would dis-entitle him from getting the relief of specific performance. Moreover, in his cross examination, the appellant was bold enough to state that out of total agreed consideration payable, a substantial part was to be paid by way of unaccounted cash amount. Thus, the Trial Court rightly held that Section 23 of the Contract Act will be attracted.

Section 16 of the Act of 1963 enumerates personal bars to relief as to the specific performance. It would be necessary to make a reference to Section 16(c) of the Act of 1963. It provides that a party who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of

3 AIR 1965 SC 1364

the contract, (which are to be performed by him) is not entitled to the said relief. Thus, readiness and willingness on the part of the plaintiff is a condition precedent for obtaining the relief of specific performance. Readiness and willingness contemplates both, namely willingness to complete the contract as also readiness/ability i.e. financial or otherwise, to complete the same. In the present case, as has been admitted by the appellant he was not having the requisite amount in his bank account. However, the appellant claims that he was having a cash of Rs.1,10,00,000/-, which cannot be accepted. Thus, we are not inclined to accept that the appellant had the financial ability to complete the transaction. In such circumstances, we find that no exception can be taken to the finding recorded by the learned trial Court about the appellant being not ready and willing to perform his part of the contract. We also find that the conduct of the appellant, would otherwise dis-entitle him from getting the relief of specific performance.

20 We are also not inclined to accept the submission on behalf of the Appellant that the 4th respondent cannot be held to be a bonafide purchaser for value without notice. Admittedly, the MOU Exh.66 is not a registered document, so as to amount to a notice to a third party.

The suit is filed on 6th June, 2001 i.e. after the conveyance was executed in favour of the fourth respondent on

10th September, 1999. The first respondent has stated in her evidence that, as the agreement with the appellant was cancelled, the fourth respondent was not informed about the same. Thus, we do not find that any exception can be taken to the finding recorded by the learned trial Court against issue no.9.

22 This takes us to the submission based on Section 269 of the Income Tax Act about the deed of conveyance between the first and the fourth respondents being invalid. Admittedly, the suit property has been sold in favour of the fourth respondent for a consideration of Rs.1,60,00,000/- while its valuation is shown to be more than Rs.2,60,92,000/- (Exh.128). The question is whether this would have any bearing on the entitlement of the appellant to a decree for specific performance. In our considered view once the appellant is otherwise found to be not entitled to a decree of specific performance, assuming for a moment that the transaction between the first and the fourth respondents was invalid, the same would be inconsequential. Secondly, it is between the revenue and the assessee and it is for the appropriate Government to act under Section 269 UD of the Income Tax Act, if at all necessary. The Sale transaction by itself cannot be bad in law. We are of the considered view that the submission as made cannot be accepted.

23 As far as the claim for compensation is concerned the

appellant not has made out any case as to how the amount of Rs.5,00,00,000/- is arrived at. There are absolutely no pleadings in this regard. We thus find that the appellant has not made out any case for grant of compensation much less Rs.5,00,00,000/-, as claimed.

24 In view of the discussion as above, the impugned judgment and decree passed by the learned trial Court needs no interference.

25 In the result the Appeal fails and is hereby dismissed. There will be no order as to costs.

(C.V. BHADANG, J.) **(A.S. OKA, J.)**