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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.636 OF 2014

WITH
CIVIL APPLICATION NO.1511 OF 2014
IN
SECOND APPEAL NO.636 OF 2014

Krishnarao Hampanna Lokray,)
(Since deceased through legal)
Representatives :))

1A) Smt.Indira Krishnarao Lokray)
Age 80 years, occ : Agriculturist,)

1B) Shri Pramod Krishnarao Lokray)
Adult,)

1C) Shri Dilip Krishnarao Lokray)
Adult,)

All residing at 1170/3,)
Shivajinagar, Pune – 411 005)

1D) Dr.Mrs.Sulabha S. Hunde)
Adult, Residing at D-3/4, Manav)
Apartments, Mithagar Road,)
Mulund (East) Bombay – 81.)

1E) Mrs.N. Snehalata, Adult)
R/0. Plot No.1-15, Saraswati)
Colony, Uphal, Hyderabad – 500 039)

1F) Mrs.Veena Bagare, Adult)
3-4-634, Narayangoda)
Hyderabad – 500 026)

1G) Mrs.Prema Yepuri, Adult)

R/o, 24/4, Phoenix Hill DR)
Lovisville – KY, 40207 -U.S..A.) ...Appellants
Ori.Defendants

….Versus....

M/s.Patvekar Hotels Private Limited)
A company registered under the)
Companies Act, having its Registered)
Office at CTS No.1170/3, Revenue)
Colony, Jangli Maharaj, Road,)
Pune – 411 005.) ...Respondent /
...Ori.Plaintiff

Mr.A.Y. Sakhare, Senior Counsel with Mr.Pankaj Sawant, Senior Counsel i/b Ms.Nikita Trivedi for the Appellants.

Mr.Prashant Karande for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 4TH FEBRUARY, 2016.

ORAL JUDGMENT :-

1. By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (legal heirs of the original defendant) have impugned the order and judgment dated 14th March, 2014 delivered by the learned District Judge-16, Pune dismissing Civil Appeal No.970 of 2012 filed by the appellants herein and upholding the order and judgment delivered by the learned trial Judge passing a decree for specific performance in favour of the respondent (original plaintiff. Some of the relevant facts for the purpose of deciding this second appeal are as under :

2. It is the case of the appellants that their father Krishynarao Hampanna Lokray had acquired one of the property on tenancy from one Rajopadhye. The said tenancy was in the name of the father of the appellants (original defendant). On 14th October, 1982, there was a tripartite agreement entered into between the original defendant, the said Rajopadhye and the developer. Under the said tripartite agreement, the developer agreed to allot two flats to the original defendant and the additional area on payment of additional consideration of Rs.1,31,000/-. The said original defendant surrendered the said tenancy to the landlord and acquired two flats.

3. On 5th January, 1985, the original defendant addressed a letter to the developer informing him that certain amounts were paid by the sons of the original defendant and thus the sale deed in respect of those flats shall be executed in favour of his sons.

4. On 28th November, 1985, the original defendant entered into an agreement for sale in respect of the suit property with the respondent (original plaintiff). On 5th June, 1986, the original defendant agreed to sell the the flats to the respondent herein.

5. It was the case of the respondent (original plaintiff) that since the original defendant did not comply with his part of obligation under the said agreement, the original plaintiff filed a suit for specific performance in the Court of the learned Joint Civil Judge, Senior

Judge, Pune against the original defendant *inter-alia* praying for specific performance. The said suit was resisted by the original defendant by filing the written statement. It was one of the plea raised in the written statement that the tenancy rights acquired by the original defendant in respect of one of the suit properties was for the benefit of the joint family. It was urged that the original defendant alone was not the owner. Some part of the consideration was paid by the sons of the original defendant. It was pleaded that the suit is required to be dismissed for mis-joinder of necessary party. When the agreement was entered into with the original plaintiff, the original defendant was staying away from the family at other place.

6. The original plaintiff examined four witnesses i.e. an advocate, a tax consultant, Mr.Balu B. Kamble and himself.

7. When the said tax consultant was examined by the original plaintiff to prove that there was no undue influence on the original defendant for execution of the agreement for sale in favour of the original plaintiff, the original defendant raised an objection about the examination of the said tax consultant by the original plaintiff as a witness on the ground that the advice given to the original defendant by the said tax consultant could not have been disclosed in evidence and the same would be in breach of the professional ethics. The

learned trial Judge agreed to decide the said objection later on.

8. By an order and judgment dated 15th June, 1992, the learned Joint Civil Judge, Senior Judge, Pune passed a decree for specific performance of the suit agreement in favour of the original plaintiff and against the original defendant and directed the original defendant to hand over and deliver vacant and peaceful possession of the suit premises to the plaintiff and to execute the sale deed in favour of the plaintiff by accepting the balance consideration in pursuance to the terms and conditions of the decree.

9. Being aggrieved by the said order and decree passed by the learned trial Judge, the legal heirs of the original defendant, who expired during the pendency of the suit, filed Civil Appeal No.970 of 2012 in the Court of District Judge-16, Pune. The learned District Judge also formulated nine points for determination and upheld the order and decree passed by the learned trial Judge on all issues.

10. Mr.Sakhare, learned senior counsel appearing for the appellants invited my attention to the various documents forming part of the appeal paper book and also compilation of documents and the pleadings which were forming part of the record before the lower appellate Court. It is submitted by learned senior counsel for the appellants that the suit was bad for non-joinder of necessary party. He submits that the tenancy was acquired by the original defendant

for the benefit of the joint family. He submits that two of the sons of the original defendant had paid consideration amount for acquisition of the flats in question. He submits that since the interest was created in favour of the sons, the sons of the original defendant were necessary parties to the suit and the suit was required to be dismissed as bad for non-joinder of the necessary parties. He submits that the learned trial Judge thus could not have passed a decree for specific performance only against the original defendant. In support of this submission, learned senior counsel invited my attention to the tripartite agreement entered into between the original defendant, Rajopadhye and the developer and also a copy of the letter dated 5th January, 1985 addressed by the original defendant to the developer to execute the sale deed in favour of his sons.

11. The next submission of learned senior counsel for the appellants is that the original plaintiff could not have examined the tax consultant of the original defendant who had given him an advice on the issue of capital gain tax. He submits that though the objection was raised by the appellant at the time of examination of the said tax consultant by the original plaintiff before the learned trial Judge, the learned trial Judge though agreed to decide the said issue later, has dealt with the evidence of the said tax consultant in the impugned order and decree and did not decide the objection raised by the

original defendant. My attention is invited to the oral evidence of the said tax consultant and it is submitted that the advice given by the said tax consultant could not have been disclosed by him being in breach of the professional ethics and that part of evidence ought to have been discarded by the learned trial Judge.

12. He submits that the learned trial Judge thus could not have rendered a finding against the original defendant that there was no undue influence against the original defendant in execution of the agreement for sale in favour of the original plaintiff. It is submitted that the learned trial Judge as well as the lower appellate Court did not consider two documents i.e. tripartite agreement entered into between the original defendant, said Rajopadhye and the developer and a letter addressed by the original defendant to the developer to execute the sale deed in favour of the sons of the original defendant. He submits that since in the order and decree passed by the learned trial Judge, he has overlooked the material and crucial documents, the lower appellate Court ought to have set aside the order and decree passed by the learned trial Judge.

13. It is lastly submitted that due to strain relation of the original defendant with his family members, the original defendant was staying separately and not in the suit premises. He submits that since inception the present appellants who were legal heirs of the

original defendant were staying in the suit premises. He submits that the learned trial Judge ought to have considered hardship caused to the present appellants who were staying in the suit premises and not the original defendant. He submits that the appellants herein have no other shelter. It is submitted that the learned trial Judge also ought to have considered the price escalation in respect of the suit premises while exercising the discretion for granting specific performance in favour of the original plaintiff and against the original defendant.

14. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***K. Narendra vs. Riviera Apartments (P) Ltd. (1995) 5 SCC 77*** and in particular paragraphs 29 and 30 thereof. It is submitted that under section 20 of the Specific Relief Act, even if the Court comes to the conclusion that the plaintiff had proved the execution of the agreement and had complied with his part of obligation, the Court is not bound to grant such relief merely because it is lawful to do so. In support of this submission, learned senior counsel appearing for the appellants also placed reliance on the judgment of the Supreme Court in case of ***Nirmala Anand vs. Advent Corporation (P) Ltd. & Ors. (2002) 5 SCC 481*** and more particularly paragraphs 18 to 21 thereof.

15. Mr.Karande, learned counsel appearing for the respondent

(original plaintiff) on the other hand invited my attention to various findings of fact recorded by by two Courts below and would submit that both the Courts below have considered the documentary as well as oral evidence and the findings recorded are concurrent findings and the same being not perverse, this Court cannot interfere with such findings under section 100 of the Code of Civil Procedure.

16. Insofar as the submission of learned senior counsel for the appellants that the sons of the original defendant were necessary parties and the suit was therefore bad for by non-joinder of necessary parties is concerned, learned counsel for the respondent invited my attention to the terms and conditions of the tripartite agreement and also the findings rendered by the learned trial Judge. He submits that a bare perusal of the provisions in the tripartite agreement as well as the letter addressed by the original defendant himself to the developer would clearly indicate that the payment for acquisition of the suit property was not made by the sons of the original defendant but it was at the most a simplicitor loan transaction between the original defendant and his sons which was to be repaid by the original defendant to his sons with interest. He submits that it was proved before the learned trial Judge that out of part of the sale consideration payable to the defendant by the plaintiff, the defendant had agreed to repay the said loan paid to him by his two sons with interest. He

submits that there is thus no substance in the submission made by learned senior counsel for the appellant on the issue of suit being barred by non-joinder of necessary parties.

17. Insofar as the issue of undue influence raised by the appellants is concerned, learned counsel for the respondent submits that the tax consultant examined by the plaintiff was an independent consultant and as a consultant had given advice before execution of the tripartite agreement for sale in favour of the original plaintiff and there was thus no question of any undue influence. He submits that both the Courts below have rendered the findings of fact after considering the oral evidence on this issue and thus no interference is warranted with those findings of fact. He submits that the said tax consultant had not disclosed the contents of the advise given by him to the original defendant.

18. Insofar as the issue raised by the appellants that the Courts below ought not to have exercised its discretion under section 20 of the Specific Relief Act in favour of the original plaintiff and against the original defendant is concerned, learned counsel placed reliance on the judgments of the Supreme Court. He submits that the learned trial Judge has considered even this issue at length and has dealt with the judgments relied upon by both the parties before him and has rightly exercised his discretion in favour of the plaintiff and

against the defendant. He submits that the Delhi High Court has also held in the judgment in case of ***Ajit Prasad Jain vs. N.K. Widhani & Ors.*** reported in ***AIR 1990, Delhi, 42***, that the grant of decree specific performance is a rule whereas refusal is an exception. He submits that the plaintiff had already complied with its part of obligation under the agreement for sale, whereas the defendant had committed breaches. He submits that the learned trial Judge rendered a finding of fact in respect of breaches committed by the original plaintiff. In this situation the learned trial Judge has rightly exercised discretion in favour of the plaintiff and against the defendant.

19. In re-joinder Mr.Sakhare, learned senior counsel for the appellants submits that though the learned trial Judge has considered the issue of hardship, the lower appellate Court did not consider this issue. He submits that the learned trial Judge did not consider the two material and crucial piece of evidence while dismissing the appeal filed by the appellants.

20. I have heard both the parties at great length. I have also perused the pleadings, documentary as well as oral evidence to which my attention has been invited by the learned counsel for the parties.

21. Insofar as the first issue raised by the appellants that the sons of the original defendant were necessary or proper parties to the

suit and the suit was bar for non-joinder of necessary parties or proper parties is concerned, it is not in dispute that when the original defendant had acquired the tenancy in respect of one of the suit property, the appellant no.1 was 14 years old. At the time of acquiring the tenancy rights the sons of the original defendant were minor and there was no question of the sons contributing any amount in respect of acquisition of the tenancy. Insofar as the other two flats purchased by the original defendant is concerned, it is not in dispute that the said two flats were also acquired by the original defendant in his own name after surrendering the tenancy in respect of the said property. Even if there was any finance provided by the sons to the original defendant, a perusal of the record clearly indicates the same was simplicitor a loan transaction between the original defendant and his sons which was repayable by the original defendant to his sons with interest. The documents which Mr.Sakhare, learned senior counsel for the appellants placed reliance before this Court would also indicate the same position. In my view, there was thus no prejudice caused to the appellants.

22. It is not in dispute that though the sons of the original defendant were fully aware of the filing of the suit they being in possession of the suit premises did not apply for their impleadment as parties defendants to the suit. On one hand it is the case of the

appellants that the relation between the original defendant and his sons were strained and on the other hand it was pleaded before the learned trial Judge that the amount was contributed by the sons and they were necessary parties to the suit. If there was any hardship,the sons of the original defendant could have applied for their impleadment to place their alleged interest in the suit. In my view the defence of the original defendant that his sons were necessary parties to the suit was thoroughly frivolous and has been rightly rejected by the learned trial Judge as well as by the lower appellate Court.

23. Insofar as the submission of learned senior counsel for the appellants that there was undue influence on the original defendant at the time of execution of the agreement for sale is concerned, with the assistance of the learned counsel for the original plaintiff, I have perused the findings of the learned trial Judge as well as of the lower appellate Court. The original defendant had admitted in his evidence that he was given an advise by the tax consultant to enter into an agreement for sale with the original plaintiff. There was sufficient time between the said consultation and in execution of the agreement for sale with the original plaintiff. The original defendant was a graduate in English and was carrying on business till he had attained the age of 50 years. The original defendant never made any complaint of any

undue influence against the plaintiff at any stage did not even apply for cancellation of the agreement for sale by filing any appropriate proceedings. In my view, there is thus no substance in this submission of the learned senior counsel for the appellants.

24. Insofar as the submission of learned senior counsel for the appellant that the learned trial Judge could not have considered the oral evidence of the tax consultant on the ground that the advise given by the tax consultant to the original defendant could not have been disclosed it being in breach of the professional ethics is concerned, my attention is invited to the oral evidence of the said tax consultant by the learned senior counsel for the appellants which clearly indicates that the said consultant had not disclosed the contents of the advise given by him to the original defendant. The said tax consultant was examined by the original plaintiff only to prove that the defendant had consulted the tax consultant and to prove that there was no question of any undue influence upon the original defendant at the time of execution of the agreement for sale. The learned trial Judge as well as the lower appellate Cort have dealt with this issue at great length in the impugned orders and have rightly rendered the finding of fact in favour of the plaintiff and against the defendant. In my view, there is thus no substance in the submission made by learned senior counsel appearing for the appellants.

25. Insofar as the submission of the learned senior counsel for the appellants that the learned trial Judge though had decided to consider the objection about the examination of the said tax consultant at later stage and did not consider in the said impugned order and decree is concerned, I have perused the contents of the oral evidence led by the said tax consultant. In my view, the said evidence was led only for the purpose of proving the issue whether there was any undue influence or not. The objection raised by the defendant before the learned trial Judge itself was of no substance and thus the judgment of the trial Judge, in my view, is not vitiated due to this objection.

26. Insofar as the last submission of learned senior counsel for the appellants that under section 20 of the Specific Relief Act, 1963, the learned trial Judge could not have exercised the discretion in favour of the plaintiff and against the defendant on the ground of hardship or on the ground that the appellants herein had no other accommodation or on the ground that the price of the property had escalated is concerned, in my view, there is no merit in this submission of learned senior counsel for the appellants. The plaintiff had proved beyond reasonable doubt before the learned trial Judge that he was always ready and willing to comply with its part of obligation. The original defendant had committed breaches on his

part under the said agreement for sale. The learned trial Judge has rendered a finding that the defendant had committed breach of his obligation under the agreement for sale and thus has rightly exercised the discretion in favour of the original plaintiff. Since the original plaintiff had proved breaches on the part of the original defendant, the original defendant having been found a defaulter of his obligation under the terms and conditions of the agreement for sale by the learned trial Judge, in my view the learned trial Judge could not have exercised his discretion under section 20 of the Specific Relief Act, 1963 in favour of the original defendant.

27. Insofar as the judgment of the Supreme Court in the case of ***K. Narendra vs. Riviera Apartments (P) Ltd.*** and ***Nirmala Anand vs. Advent Corporation (P) Ltd. & Ors.*** (supra) relied upon by Mr.Sakhare, learned senior counsel appearing for the appellants is concerned, there is no dispute about the proposition of law laid down by the Supreme Court. Under section 20 of the Specific Relief Act, 1963, the Court has to exercise the discretion while considering an application for grant of specific performance or not. The discretion has to be exercised in the facts and circumstances of each case. The Delhi High Court in case of ***AIR 1990, Delhi, 42*** (supra) has held that grant of decree of specific performance is a rule whereas refusal is exception. In my view the principles laid down by the Delhi High Court

in the said judgments would squarely apply to the facts of this case. I am in respectful agreement with the views expressed in the said judgment. The appellants did not make out any case for escalation of price nor had raised any such plea before the Courts below. A party who has committed breaches of the agreement could not seek any discretionary reliefs from the Court.

28. In my view, the findings recorded by the two Courts below are concurrent findings and are not perverse and thus cannot be interfered with by this Court under section 100 of the Code of Civil Procedure. In my view, there is no substantial question of law having arisen in this appeal. The appeal is devoid of merits and is accordingly dismissed.

29. In view of the dismissal the appeal from order, the civil application does not survive and is accordingly dismissed. No order as to costs.

30. At this stage, Mr.Sakhare, learned senior counsel appearing for the appellants seeks stay of the order passed by the learned trial Judge and this Court to consider this judgment, I am inclined to grant such request for a period of six weeks from today. Operation of the order of trial Court and of this Court is stayed for a period of six weeks.

(R.D. DHANUKA, J.)