

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

FMA 185 of 2020

CAN 1 of 2019

CAN 3 of 2023

DURGA MONDAL

VS.

PRITIKANA SAHA ROY

For the Appellant : Mr. Haradhan Banerjee, Adv.
Mr. Amitava Pain, Adv.
Mr. Parthapratim Mukhopadhyay , Adv.

For the Respondent nos. 1 & 2 : Mr. Aniruddha Chatterjee, Adv.
Mr. K. S. Tarafdar, Adv.

For the Respondent nos. 3 to 5 : Mr. Sounak Bhattacharyya, Adv.
Mr. Abhirup Halder, Adv.

Hearing concluded on : 21st September, 2023

Judgement on : 8th December, 2023

Siddhartha Roy Chowdhury, J:

1. Challenge in this appeal is to the judgement and decree passed by learned Additional District Judge, 1st Court, Howrah in Title Appeal No. 33 of 2017. By the impugned judgement learned First Appellate Court was pleased to set aside the judgement passed by learned Trial Court in Title Suit No. 56 of 2013 and invoking the provision of Order 41 Rule 23A of the Code of Civil Procedure was further pleased to remand the suit formulating the following issues :

Whether the defendants no. 1 and 2 accrued any right on the basis of the agreement for sale and whether the

defendants no. 1 and 2 violated the terms and conditions of the aforesaid agreement dated 8th July, 2009.

2. For the sake of convenience, the parties to this proceeding would be referred to as they have been arrayed in the suit.
3. Briefly stated, the plaintiff being the owner of the suit property described in schedule 'A' of the plaint, decided to develop the same by constructing a four storied building and to transfer the flats to the intending purchasers. The defendant no. 1 expressed her willingness to purchase one of such flat measuring about 1600 square feet on the 2nd floor of the said four storied building at a consideration of Rs. 16,00,000/- and the defendant no. 1 and 2 being wife and husband paid a sum of Rs. 8,80,000/- as part of consideration money on different dates but ultimately they failed to act in terms of the agreement. They did not pay the rest of the consideration money as per schedule and made an attempt to take forceful possession in respect of 'B' schedule property. The defendants even made an attempt to get the construction dismantled by making false complaint with Zila Parisad, Howrah alleging unlawful or illegal construction allegedly undertaken by the plaintiffs.
4. Under such circumstances, the plaintiff filed the suit seeking declaration of his title in respect of suit property and for permanent injunction restraining the defendants and their men and agents from causing any disturbance in the possession and enjoyment of the plaintiff in respect of suit property.

5. It is contended that the defendant no. 1 was never willing to perform her part of contract and did not discharge his obligation in terms of the agreement. Subsequently, the plaintiff transferred 'B' schedule property which is a flat to Narendra Narayan Pramanik and Sabita Pramanik and part of the said flat was transferred to Victor Mondal and Bikram Mondal, two sons of the plaintiff who again transferred the property to defendant no. 5.
6. It is further contended that the defendants took out a proceeding before the District Consumer Forum for redressal and also filed a suit for specific performance of contract.
7. The defendants no. 1 and 2 contested the suit by filing the written statement denying all material allegations made therein. It is the specific case of the defendant that they were always ready and willing to perform their part of contract but the plaintiff was not willing to discharge her obligation. The flat was kept unfinished. The plaintiff since failed to adhere to the time schedule the defendants had to file the suit for specific performance of contract. The defendants prayed for dismissal of the suit.
8. From the attending facts of the case it transpires that the subsequent purchasers have been impleaded as defendants no. 3, 4 and 5 and they contested the suit by filing written statement and counter claim seeking declaration of title in respect of the property which they have acquired by purchase with value.
9. The defendants no. 1 and 2 also filed written statement to that counter claim, maintaining their stand already taken.

10. Learned Trial Court after considering the evidence on record adduced by the parties both oral and documentary was pleased to allow the prayer of the plaintiff and suit was decreed but in part.
11. The defendants no. 1 and 2 have been restrained by way of permanent injunction from interfering with the 'B' schedule property.
12. Learned Appellate Court, however, reversed the finding of learned Trial Court and disposed of the appeal with an order of remand directing the learned Trial Court to decide two issues in the backdrop of direction given by the District Consumer Forum. Hence the appeal.
13. Assailing the impugned judgement, Mr. Haradhan Banarjee, learned Counsel for the plaintiff submits that from the attending facts of the case it is admitted that an agreement was entered into by and between the plaintiff and defendants no. 1 and 2 in respect of a flat described as 'B' schedule property. The defendants no. 1 and 2 agreed to acquire the property acknowledging the status of the plaintiff as owner of the said property.
14. The defendants no. 1 and 2 could not purchase the property and 'B' schedule property was ultimately sold to defendants no. 3, 4 and 5. Defendant no. 2 who happens to be the husband of defendant no. 1 while adducing evidence admitted that an agreement was executed by and between the parties to purchase the property described in schedule 'B' and the defendants did not pay the entire consideration money. Rather they made an attempt to stall the project. As D.W. 1 the defendant no. 2 stated that he had no intention to take forceful possession of the suit property.

15. The learned Trial Court, according to Mr. Banerjee was absolutely justified in passing the judgement and decree by allowing the suit in part for the simple reason that during pendency of the suit admittedly the plaintiff sold and transferred part of the properties to different purchasers.
16. Learned First Appellate Court, according to Mr. Banerjee, has failed to appreciate that mere agreement does not confer any right upon the party to the agreement unless as part performance of contract, possession of the property is delivered to the intending purchasers.
17. It is further submitted by Mr. Banerjee that the suit for specific performance of contract is pending. The order of District Consumer Forum cannot be said to have any impact on the decision of the Civil Court more so when this particular suit is for declaration and injunction. It is adverted by Mr. Banerjee that when sufficient evidence was available with the record, learned First Appellate Court had no reason to send back the suit on remand. It was an abuse of process of law.
18. Refuting such contention of Mr. Banerjee, Mr. Aniruddha Chatterjee learned Counsel submits that when District Consumer Forum has directed the plaintiff to execute the deed upon payment of rest of the consideration money in favour of the defendants no. 1 and 2 there is every reason to hold that the defendants have incurred substantial interest in the suit property. This development is required to be taken into consideration by the learned Trial Court. Therefore,

learned First Appellate Court was absolutely justified in passing the impugned order.

19. Mr. Sounak Bhattacharyya, learned Counsel representing the defendants no. 1, 2 and 3 submits that they purchased the flat, described in 'B' schedule property from the plaintiff. They are bonafide purchaser for value. Their counter-claim has been rightly accepted by learned Trial Court, which was not challenged in appeal.
20. From the attending facts of the case it appears that plaintiff being owner of the property admittedly decided to construct a multi-storied building consisting of various flats and defendants no. 1 and 2 entered into agreement to purchase 'B' schedule property. Ultimately the defendants no. 1 and 2 did not pay the entire consideration money and the flat was sold and transferred to defendants no. 3, 4 and 5. The plaintiff since sold and transferred flats constructed over 'A' schedule property to some other person, learned Trial Court declared title of the plaintiff in respect of portion of 'A' schedule property, which was not transferred to any other person and restrained the defendants no. 1 and 2 by way of permanent injunction.
21. The defendants no. 3, 4 and 5 who are the subsequent transferee obtained a decree in the form of counter claim declaring their right title interest in respect of properties described in schedule 'C' and 'D' which was originally schedule 'B' property. The agreement was in force and till 13th November, 2023 and subsequent thereto such transfer was made.

22. Be that as it may, the defendants no. 1 and 2 though challenged the judgement in the suit but did not prefer any appeal against the counter claim. The defendant no. 2 as D.W. 1 in his oral testimony stated that they have neither taken or have been given possession of 'B' schedule property though they entered into an agreement to purchase the said property.

23. Section 53A of the Transfer of Property Act envisages :-

*“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable 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 2***, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor 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.”*

24. Therefore, there is every reason to presume that the defendants no. 1 and 2 were never given possession pursuant to the agreement and thus they cannot be said to have acquired any right or interest in the 'B' schedule property which has been sold to defendants no. 3 to 5.
25. Therefore, learned First Appellate Court had no reason to send the suit back on remand. Learned First Appellate Court passed the order in breach of Order 41 Rule 23A of the Code of Civil Procedure. It is settled principle of law that when the evidence on record is sufficient to decide the lis the learned Appellate Court may determine the case finally.
26. This is a suit for declaration and permanent injunction and not for specific performance of contract. When the defendant is not challenging the title of the plaintiff and not claiming to have acquired any interest in the suit property and it has been established that the 'B' schedule property has already been transferred to defendants no. 3, 4 and 5, the impugned judgement passed by learned First Appellate Court cannot stand to reason.
27. Section 100 of the Consumer Protection Act, 2019 envisages that the provision of this act is in addition to and not in derogation of the provision of any other act in force. Order of learned District Consumer Forum, if any, cannot be said to have any bearing with this lis.
28. The impugned judgement, in my humble opinion, should not be allowed to remain in force and should be set aside, which I accordingly do.

29. Consequently, the appeal is allowed. The judgement and order of remand passed by learned First Appellate Court are set aside. The judgement passed by learned Trial Court stands restored.
30. With the disposal of this appeal connected applications, if any, stand disposed of.
31. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.
32. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)