

PETITIONER:
INDUBEN ASHOKRAO NALVADE(DEAD) BY L.RS.

Vs.

RESPONDENT:
DHIRAJLAL SHIVLAL SURATI & ANR.

DATE OF JUDGMENT 14/08/1995

BENCH:
MAJMUDAR S.B. (J)
BENCH:
MAJMUDAR S.B. (J)
BHARUCHA S.P. (J)
FAIZAN UDDIN (J)

CITATION:
1995 AIR 2486 1995 SCC Supl. (3) 541
JT 1995 (6) 299 1995 SCALE (4) 824

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.B. Majmudar, J.
Leave granted.

By consent of learned advocates of parties the Civil Appeal is heard finally and is being disposed of by this judgment. This appeal arises out of the judgment of High Court of Gujarat dismissing first Appeal No. 803 of 1982 and confirming the judgment and decree dated 2nd May 1981 passed by the learned civil Judge, Senior Division, Bharuch in Special Civil Suit No.22 of 1977. The appellants before us are the heirs of original plaintiff while the respondents are the original defendants. We will refer to the appellants and respondents as plaintiff and defendants respectively for the sake of convenience in the latter part of this judgment.

A few relevant facts for highlighting the grievance of the plaintiff are required to be noted at the outset. The original plaintiff Induben Nalvade who died during the pendency of proceedings before the High Court and who is represented by her heirs, the present appellants, had filed Special Civil Suit No. 22 of 1977 in the Court of learned Civil Judge, Senior Division, Bharuch for specific performance of an agreement dated 16th July 1974 executed by defendants in her favour for sale of the suit property situated at Darjiwad locality of Ankleshwar town of Bharuch District. Her case is that the defendants are brothers. They are owners of the suit house bearing City Survey No. 3112, Municipal No. 443 situated in the aforesaid locality of Ankleshwar town. That on 12th March 1974 the defendants had agreed to sell the entire ground floor of the suit house including the Chowk and one attached room to the plaintiff for Rs.12,000/-. She further alleged that she paid Rs. 4,000/- to the defendants by way of earnest money. According to her the defendants had agreed to execute a registered Sale Deed in her favour on or before 16th August 1974 and

that she had to pay the remaining amount of Rs.8,000/- at the time of execution of the registered Sale Deed. It was here case that she was occupying a part of the property as a tenant while the other portion of the house was in possession of another tenant. That the defendants had mortgaged the suit house with one Nanalal Chhaganlal of Nainpur Village, Tehsil Mahemdabad of Kera District and they wanted to redeem the suit house. It is her further case that on 16th July 1974 the defendants came to her and suggested that they were prepared to sell the entire suit house for Rs.16,000/- That she agreed to the above terms and on the same day, that is, 16th July 1974 she paid Rs.12,000/- in cash to the defendants. She further alleged that thereafter the defendants had to execute the registered Sale Deed after redeeming the mortgage. That on the 16th of July 1974 the defendants accordingly executed another agreement to sell the suit house in favour of the plaintiff. According to her she being a Maharashtrian lady was not knowing Gujarati language and she could not properly read or write the said language. That the defendants took undue advantage of this situation and in the agreement dated 16th July 1974 did not mention about the receipt of Rs.16,000/- by way of total consideration, nor did they mention that they had agreed to sell the entire suit house to the plaintiff but they wrongly mentioned in the agreement to sell that only half portion of the Wada and the room on the ground floor of the property was agreed to be sold to her. According to the plaintiff the defendants redeemed the suit house but they did not show their willingness to execute registered Sale Deed in her favour. That the plaintiff came to know that defendants had cheated her and so she filed a criminal complaint against the defendants. She also gave a notice dated 2nd March 1977 and called upon them to execute a registered Sale Deed in her favour of the entire suit property. As the defendants did not comply with the same she filed the suit for specific performance of the agreement to sell the entire suit house to her. She also prayed for award for damages as the defendants committed breach of contract. She alternatively prayed for a decree for Rs. 16,000/- against the defendants.

The defendants contested the proceedings. According to them they had executed one agreement on 16th February, 1974 in favour of the plaintiff. That there was a tenant occupying the first floor of the suit house and so it was difficult to get it vacated from the tenant. Consequently on 12th March 1974 they executed second agreement to sell in favour of the plaintiff. And by this agreement they agreed to sell the ground floor of the suit house to the plaintiff for Rs.12,000/-. According to them the amount of Rs. 4,000/- which was paid on 16th February, 1974 by way of earnest money was adjusted in the agreement dated 12th March 1974. The defendants denied that the plaintiff was not understanding Gujarati language and that they had taken undue advantage of the situation. According to the defendants as there was no latrine in the Wada they required a portion of the Wada for construction of the bathroom and latrine. So it was agreed between the parties that the land admeasuring 15'x7' and 7 1/2' x 7' should be given to them and hence on 16th July 1974 a fresh agreement to sell to that effect was executed and that consideration for the agreement to sell was fixed at Rs. 12,000/-. It was further contended that the amount of Rs 4,000/- which was paid earlier was to be adjusted towards this new agreement and it was agreed between the parties that the plaintiff should pay the remaining amount of Rs. 8,000/- to them. That in view of this agreement dated 16th July 1974 the earlier two

agreements stood rescinded and that they had already informed the plaintiff in their reply to the notice that they were willing to perform their part of the agreement dated 16th July 1974.

In the light of the aforesaid pleadings of the parties the learned Trial Judge framed five issues as under :

- "(1) Whether the plaintiff proves that on 16.7.74 the defendants agreed to sell the suit property to her for Rs. 16,000/- as alleged?
- (2) Whether the plaintiff proves that the defendants took undue advantage of her not knowing Gujarati language at the time of execution of agreement dated 16.7.74 as alleged?
- (3) Whether the plaintiff proves that she had paid in all Rs. 16,000/- to the defendants as alleged?
- (4) Whether the plaintiff is entitled to any relief as prayed for?
- (5) What order and decree?

After recording evidence led by the parties on these issues the learned Trial Judge held on Issue No.1 that the plaintiff had not proved that on 16th July, 1974 the defendants had agreed to sell the entire suit house to her for Rs. 16,000/-. However, it was proved that on 16th July, 1974 the defendants agreed to sell ground floor of the suit house together with half portion of the wada and one of the rooms which is described in the agreement to sell Ex. 75 to the plaintiff for Rs. 12,000/-. Issue No. 2 was found in the negative. As far as Issue No. 3 was concerned it was held that the plaintiff had paid Rs.16,000/- to the defendants. On Issue No. 4 it was held that the plaintiff was entitled to relief of specific performance of contract in respect of the agreement to sell dated 16th July, 1974. She was not entitled to relief of recovery of damages and recovery of amount of Rs. 4, 000/- or Rs. 16, 000/- or any amount from the defendants. Accordingly the suit for specific performance was decreed and the defendants were directed to execute a registered Sale Deed in terms of the agreement Ext. 75 dated 16th July 1974 in favour of the plaintiff within three months from the date of the order and if the defendants failed to execute the registered Sale Deed within three months of the order then the plaintiff was at liberty to move the Court for execution of the registered Sale Deed in her favour. The rest of the suit was dismissed.

The original plaintiff being aggrieved by the decision of the Trial Court inasmuch as it did not grant specific performance of the agreement to sell dated 16th July 1974 for the entire suit house in view of the finding of the learned Trial Judge on Issue No.1 preferred first appeal before the High Court being First Appeal No. 803 of 1982. So far the defendants were concerned they did not challenge the decree for specific performance of the agreement, nor did they challenge any of the findings recorded by the learned Trial Judge on Issue Nos. 3 and 4. Pending the said appeal the original plaintiff expired and the present appellants were brought on record as her heirs and legal representatives. Said First Appeal came to be dismissed by the learned Single Judge of the High Court. Under these circumstances the heirs of the original plaintiff filed Special Leave Petition (Civil) No.3367 of 1993 before this Court. Notice was issued to the respondents in Special Leave petition and as noted earlier special leave is granted and the appeal is being disposed of by this judgment. As the

appellants were appearing as parties in person and were not in a financial position to engage any advocate, we had requested Shri Mudgal, learned counsel to give legal aid to them and to assign a Marathi knowing senior lawyer to assist the appellants and that is how Shri Salve, learned Senior Counsel, and Shri Khanwilkar appeared for the appellants.

We may state at the outset that the learned Single Judge who decided the first appeal had not considered all the relevant aspects of the case and had observed that the Trial Court had reached findings of fact on appreciation of evidence and even after hearing the heirs of deceased Induben for sometimes the learned Judge did not find any exception that can be taken to the reasoning and the findings of the learned Trial Judge. With respect, the said approach of the First Appellate Court was, to say the least, a very casual and cursory one. As a Court of First Appeal it was expected of the court to come to the grip of the problem and to re-appreciate the evidence led in the case. As that has not been done we would have been required to remand this matter for a fresh decision in the first appeal. However, as we had to consider the circumstances established on the record for the purposes of this appeal and as they are of a clinching nature in favour of the plaintiff and as the litigation is a very old one we decided not to remand the case and to dispose it of finally. The learned advocates of the parties addressed us on the merits of their respective cases and took us through the relevant evidence on record.

Shri Salve, appearing for the appellants, submitted that both the courts below had patently erred in not decreeing the suit of the plaintiff in its entirety. He submitted that when finding on Issue No.3 that the plaintiff had paid Rs. 16,000/- to the defendants had remained well established on record and when the defendants had not challenged the said finding before the High Court in appellants' appeal it was obvious that as compared to the earlier agreement to sell dated 12th March 1974 the latter agreement to sell dated 16th July 1974 which contemplated payment of additional amount of Rs. 4,000/- by the plaintiff to the defendants could not have covered lesser extent of the property sought to be conveyed under the latter agreement Ex. 75. That the original plaintiff was not a signatory to the agreement Ex.75 and, therefore, her case that she was not knowing Gujarati language and the defendants had inserted self-serving averments in the latter agreement Ex.75, was required to be accepted. That when the suit house was agreed to be sold by the defendants to the plaintiff pursuant to the suit agreement Ex. 75 it would be improbable to believe that only ground floor portion was to be sold to the plaintiff excluding the upper floor portion which was a Malia or a loft. That such a floorwise division of the proprietary rights in a residential house could not be countenanced and normally the first floor loft portion would go with the ground floor portion of the suit house and it was the entire suit house which would be the subject matter of agreement to sell. That separate ownership of different floors of a residential house in a taluka place like Ankleshwar, could not be contemplated. That even on a proper construction of the entire document, Ex.75, it became obvious that the entire suit house was sought to be sold by defendants to the plaintiff and the defendants could not have retained only the first floor loft portion in their ownership. Learned counsel for the respondents however on the other hand submitted that the decree as passed by the learned Trial Judge and as confirmed by the High Court does not suffer from any error of law or fact. That the plaintiff

was staying in Ankleshwar since last number of years and it could not be believed that she was not knowing Gujarati language. That both the courts have given a concurring finding of fact that what was sought to be conveyed by the defendants to the plaintiff pursuant to the agreement to sell, was not the entire suit house. That only ground floor of the suit house together with Wada and the room as described in the agreement to sell, Ex.75, was to be sold for Rs. 12,000/-.

Having given our anxious consideration to the rival contentions we have reached the conclusion that the appellant-heirs of original plaintiff are entitled to the decree for specific performance for the entire suit house and not to a limited decree for specific performance confined only to a part of the suit house being its ground floor portion. The reasons are obvious. The earlier agreement dated 12th March 1974 which the defendants executed in favour of the original plaintiff was for the sale of the ground floor portion of the property mentioned in the said document, for Rs. 12,000/-. The said agreement clearly recites that the defendants were agreeing to sell the ground floor portion of the suit house to the plaintiff for Rs. 12,000/-. The property sought to be conveyed under that document for total consideration of Rs. 12,000/- was described to comprise of the entire ground floor portion along with the ceiling over that portion and also the Chowk portion of the Wada and the room adjoining it. The said agreement further recited that towards the consideration of Rs. 12,000/- Rs. 4,000/- were received by the executants on the same day and on receipt of the balance the sale deed was to be executed by 16th August 1974. Both the defendants had signed that agreement. It is in light of the aforesaid document of 12th March 1974 that we have to consider what was agreed to be sold pursuant to the latter agreement dated 16th July 1974. The said agreement recites that on the date of the agreement, that is, 16th July 1974, Rs.12,000/- were paid by the plaintiff to the defendants. And in lieu of the said payment defendants were agreeing to sell their house, that is, the suit house to the plaintiff. It was also recited in the said document that the said house was mortgaged by way of conditional sale for Rs. 9,999/- to one Nanalal of Nainpur Village of Mahemdabad Taluk. That house was to be released from said Nanalal on payment of said amount. Consequently out of the said consideration of Rs. 12,000/-, Rs. 9,999/- were to be paid to Nanalal Chhaganlal and for that purpose that amount was received in cash from the plaintiff. After getting the said house released it was to be conveyed to the plaintiff by regular Sale Deed and the plaintiff would be entitled to get the Sale Deed executed from the defendants and their heirs and assigns. Then follows the description of the property sought to be conveyed. But while describing the property sought to be conveyed in the last line of the agreement, Ex. 75, it is mentioned that the ground floor portion, Wada portion including the ceiling of the Malia portion were agreed to be sold to the plaintiff by the said document. Below the signature of the defendants on the said document, Ex. 75, is found a written receipt executed by defendant no.2 for having been paid Rs. 12,000/- in cash by the plaintiff. The relevant recitals in the agreement, Ex. 75, clearly show that for a total consideration of Rs. 16,000/- (Rs. 12,000/- being paid along with the document, Ex. 75, and Rs.4,000/- already paid earlier) the defendants had agreed to sell the entire suit house to the plaintiff and not only the ground floor thereof. It is obvious that when only ground floor

portion was agreed to be sold to the plaintiff by the defendants pursuant to the earlier agreement dated 12th March 1974 for Rs. 12,000/-, Rs.4,000/- were already received by the defendants. Consequently when the subsequent agreement, Ex.75, was executed on 16th July 1974 and they received additional amount of Rs. 12,000/- as clearly recited in the document, the total consideration which passed from the plaintiff to the defendants was to the tune of Rs.16,000/-. Thus as compared to the consideration of Rs.12,000/- mentioned in the earlier document dated 12th March 1974 the plaintiff paid an additional amount of Rs.4,000/- by the latter agreement dated 16th July 1974. When additional consideration of Rs.4,000/- passed from the plaintiff to the defendants it is obvious that as compared to the agreement to sell only the ground floor portion of the suit house as per the earlier agreement dated 12th March 1974 the defendants must have agreed to convey at least some additional portion of the suit house by the latter agreement dated 16th July 1974, as it cannot be countenanced that the plaintiff would agree to get a lesser portion or the same portion of the suit property by paying Rs.4,000/- more, as compared to what she agreed to purchase in March 1974 for Rs.12,000/- especially when it is no one's case that between February and July 1974 price of the suit house had risen or that the defendants were demanding more price for the same portion of the suit property covered by agreement of February 1974. It has to be kept in view that the defendants have not challenged decree for specific performance as per Ex.75. Not only that they even did not challenge the finding of the learned Trial Judge on Issue No.4 that they had already received Rs.4,000/- from the plaintiff at the time of execution of earlier agreement to sell dated 12th March 1974. Consequently it has to be held that in all Rs.16,000/- were paid by the plaintiff in favour of the defendants. Then there was no earthly reason for her to agree to purchase only a part of the suit house pursuant to the agreement Ex.75 by paying Rs.4,000/- more. That lays credence to her case that as she was not knowing Gujarati the defendants appear to have taken undue advantage of her ignorance and had purported to convey only ground floor portion of the suit house pursuant to the agreement, Ex.75 even after getting Rs.4,000/- more from the plaintiff. It has also to be kept in view that pursuant to the agreement Ex. 75 the defendants had in terms agreed to convey the house to the plaintiff, namely, the suit house which was earlier mortgaged to Nanalal. It is not the case of the defendants that entire suit house was not mortgaged to Nanalal but only ground floor portion was mortgaged and the upper floor, namely, the Malia portion was not subject matter of mortgage. Once that position becomes clear it is obvious that the entire house which was mortgaged to Nanalal was to be got released by the defendants and to be conveyed to the plaintiff. Any inaccuracy in the latter part of the recitals about the description of the suit property cannot whittle down the effect of these clear recitals in the document. Ex.75. about the property agreed to be sold thereby. Even otherwise it is impossible to contemplate that the entire ground floor of the suit house would be agreed to be sold to the plaintiff but the left portion on the first floor would not be sold to the plaintiff and its ownership would be retained by the defendants. Such type of truncated conveyance of a residential property in a taluka place like Ankleshwar and floorwise splitting up of ownership cannot be contemplated.

For all these reasons therefore, it must be held that

the defendants had agreed to sell the entire suit house including the first floor portion thereof to the plaintiff as per agreement Ex.75. The finding on Issue No.1 as arrived at by the Trial Court is set aside. It is held that Ex.75 is for sale of entire suit house for Rs.16,000/-. The appellant-heirs of original plaintiff would, therefore, be entitled to the decree of specific performance for the entire suit house including the first floor portion. The appeal is accordingly allowed. The judgment and decree of the Trial Court and as confirmed by the High Court are modified by directing the defendants to execute registered Sale Deed in terms of the agreement, Ext. 75, dated 16th July 1974 in favour of the heirs of original plaintiff for the entire suit house including the first floor thereof. The rest of the directions contained in the judgment and decree of the Trial Court would stand confirmed.

Before parting with this case, we must place on record our appreciation for the trouble taken by learned senior counsel as well as learned Advocate on Record for assisting the appellants in this case at our request.

In the result the appeal is allowed with costs throughout.