

CASE NO.:
Appeal (civil) 5628 of 1999

PETITIONER:
Devalsab (Dead) By LRs.

RESPONDENT:
Ibrahimsab F.Karajagi & Anr.

DATE OF JUDGMENT: 04/03/2005

BENCH:
ASHOK BHAN & A.K. MATHUR

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against an order passed by learned Single Judge of the High Court of Karnataka at Bangalore in Regular Second Appeal No.68 of 1994 whereby learned Single Judge by his order dated October 17,1997 has allowed the second appeal of the defendant No.1 and set aside the order passed by the trial court and the first appellate court and dismissed the suit filed by the plaintiff for specific performance but decreed the suit of the plaintiff for the alternative relief for refund of the purchase money of Rs.15,000/- with future interest and the court costs from Defendant No.1. Aggrieved against this order the Special Leave Petition was filed by the plaintiff.

Brief facts for disposal of this appeal are that the Defendant No.1 was the owner of the suit property which is a house bearing HDMC No.715 comprised in CTS No.1529/16-C situated at Hubli. Defendant No.1 agreed to sell the suit property to the plaintiff on March 13, 1981 for a sum of Rs.15,500/- and received an advance of Rs.2,000/- and executed an agreement for sale agreeing to execute the sale deed within two months after obtaining necessary permission. The plaintiff assisted the Defendant No.1 in obtaining necessary permission from the competent authority. But Defendant No.1 after getting necessary permission for sale failed to execute the sale deed accepting the balance consideration money of Rs.13,500/- from the plaintiff. Defendant No.1 took the plaintiff to the Sub-Registrar's Office on February 23, 1982 and persuaded him to purchase the stamp paper but Defendant No.1 escaped from the Office of the Sub-Registrar when the sale deed was about to be registered. The plaintiff was ready and willing to perform his part of the contract according to the terms and conditions of the agreement of sale on March 13, 1981. In spite of requests by the plaintiff, Defendant No.1 did not execute the registered sale deed receiving the balance amount. Hence, the suit was filed for specific performance of the agreement by the plaintiff and in the alternative the plaintiff also prayed if the court were to come to the conclusion that specific performance cannot be granted then a decree for refund of the earnest money including the cost of registration and damages to the plaintiff should be awarded. The plaint was subsequently amended on account of the new facts coming to the light that Defendant No.1 has executed another agreement for sale in favour of Defendant No.2 on March 8,1982. The plaintiff got a news item published in Vishwavani daily on March 24, 1982 about the earlier transactions between himself and Defendant No.1 with respect to the suit property. But defendant Nos. 1 & 2 with an intention to defeat and defraud the plaintiff filed another collusive suit being

O.S.No.101 of 1983 before the Munsif, Hubli and obtained a compromise decree. By virtue of the said compromise decree Defendant No.2 obtained the sale deed from Defendant No.1 in respect of the suit property. Therefore, the plaintiff amended the plaint and impleaded Defendant No.2 and prayed that the collusive decree obtained by Defendant Nos.1 & 2 is illegal, void and not binding on the plaintiff. It was further prayed that Defendant No.2 was also bound to execute the sale deed along with Defendant No.1 and hand over possession of the suit property.

A written statement was filed by Defendant No.1. He denied the allegation in the plaint but subsequently Defendant No.1 did not contest the suit. Defendant No.2 i.e. the subsequent purchaser was impleaded as a party by amendment of the plaint carried on November 21, 1986 and assisted the suit by filing the written statement. He denied the allegation about the agreement of sale executed in favour of the plaintiff. It was also pointed out that he was a tenant in the suit premises under Defendant No.1 since long time. It was contended that Defendant No.1 agreed to sell the suit property and entered into an agreement for sale on March 8, 1982. It was further contended that Defendant No.2 was not aware of the previous transaction between the Plaintiff and Defendant No.1. Since Defendant No.1 avoided to execute the sale deed, therefore, he filed the suit i.e. O.S.No.101 of 1983 for specific performance which was decreed by compromise and Defendant No.1 subsequently executed the sale deed in his favour. It was pointed out that Defendant No.1 did not reveal previous transaction between himself and the plaintiff to him. It was further pointed out that he was a bona fide purchaser for the value of the suit property. It was contended by Defendant No.2 that the sale between the plaintiff and Defendant No.1 was not binding on him.

On the pleadings of the parties, eleven issues were framed by the trial court. Both the parties led necessary evidence. Learned Munsif after hearing the parties and considering the relevant evidence came to the conclusion that Issue Nos.1 to 4 regarding agreement of sale executed in favour of the plaintiff and also the ready and willingness of the plaintiff in affirmative. He also answered Issue No.5 in negative. It was held that the sale agreement was not taken for security of the loan and the parties never intended to act upon it. Issue No.6 was also answered in negative and the contention of Defendant No.2 that the agreement of sale between the plaintiff and Defendant No.1 as a sham document. With regard to Issue No.7, that Defendant No.2 is a bona fide purchaser, it was answered in negative and it was held that the sale deed executed in favour of Defendant No.2 was illegal. Therefore, the learned Munsif decreed the suit of the plaintiff for specific performance of the contract. Aggrieved against the said judgment and decree passed by the trial court, Defendant No.2 i.e. the second purchaser filed an appeal before the first appellate court though Defendant No.1 did not prefer any appeal against the said order of the trial court. The decree passed against Defendant No.1 was not challenged by him but since the decree affected the rights of Defendant No.2, he filed an appeal contending that he was a bona fide purchaser of the suit property for consideration and he had no knowledge about the plaintiff's interest in it, agreement of sale executed in favour of the plaintiff by Defendant No.1 was not binding on him. But the first appellate court did not agree and dismissed the appeal filed by Defendant No.2 and affirmed the judgment and decree passed by the trial court. Aggrieved against the said order Defendant No.2 preferred a second appeal being R.S.A.No.68 of 1994 before the High Court.

The High Court framed two substantial questions of law which

are reproduced as under :

" 1. Whether the two courts below have proceeded to grant decree for specific performance without bearing in mind that it is a discretionary relief and have granted the relief only because it is lawful to do so ?

2. Whether in view of undisputed tenancy of the appellant, the two courts below were right in directing him in the present proceeding to put the plaintiff in actual physical possession of the property in question ?

The High Court after hearing the parties found that the view taken by both the Courts below is correct but it was held that Defendant No.2 was not aware of the transactions between the plaintiff and Defendant No.1, he cannot be held to be bona fide purchaser for value as the matter was pending before the trial court and it was lis pendence. It was also held that the compromise decree obtained by Defendant Nos.1 & 2 was a collusive one as on the same day the suit was filed & the compromise decree was obtained. But the learned Single Judge of the High Court held that both the courts below have not committed any error but they did not advert to Section 20 of the Specific Relief Act. Section 20 of the Specific Relief Act lays down that the grant of relief of specific performance is discretionary and the Courts should keep in view the hardship which is likely to cause to the other party while exercising this discretionary power. Learned Single Judge of the High Court after taking into consideration the hardship which is likely to cause to Defendant No.2 that he is in possession of the suit property prior to the agreement of sale by Defendant No.1 in favour of the plaintiff and if he is evicted from the suit premises he would lose money as well as long possession, therefore, considering the hardship to Defendant No. 2 declined to confirm the decree granted by both the courts below but directed that the plaintiff is entitled to the alternative relief as claimed by him i.e. refund of money with costs. Hence the present appeal by the plaintiff.

In fact, so far as the questions of fact are concerned, all the three Courts are unanimous that the plaintiff entered into an agreement for purchase of the suit premises first in point of time, that the plaintiff had already issued advertisement in the press which was published in the daily newspaper that the suit property has been purchased by him. The Courts below have also held against Defendant No.2 that it cannot be said that Defendant No.2 was not aware of the transactions between the plaintiff and Defendant No.1. It has also been held that Defendant No.2 cannot be treated as a bona fide purchaser for value. But learned Single Judge of the High Court has invoked Section 20 of the Specific Relief Act, 1963 and held that it will be more harsh to Defendant No.2 as he has already paid the consideration and he is residing in the very premises for a very long time and the suit premises are in his possession, therefore, it would be more harsh to him than to the plaintiff-appellant herein. Therefore, instead of granting decree for specific performance of the agreement to sell against Defendant No.1, learned Single Judge of the High Court modified the decree and denied relief of specific performance of the agreement being discretionary remedy and directed the Defendant No.1 for refund of the purchase money for a sum of Rs.15,500/- with future interest and costs and dismissed the suit of the plaintiff for possession of the suit schedule property.

Learned counsel for the plaintiff-appellant submitted that in fact exercise of discretionary relief in favour of Defendant No.2 is not correct as this kind of discretion if exercised in favour of Defendant No.2 then it is likely to lay down a bad precedent. This will give premium to unethical transaction and a bona fide purchaser will

be left high and dry. Learned counsel for the defendants submitted that it is true that Section 20 of the Specific Relief Act is a discretionary remedy that is not always necessary to grant a decree for specific relief if it appears to be inequitable and causes hardship to the other side. But looking to the facts of the present case we are of opinion that it will be unfair and inequitable not to grant a decree for specific relief in favour of the plaintiff-appellant herein because he is a bona fide purchaser and he has done everything which is possible, that he has purchased the stamp paper and was ready and willing to perform his part of the contract, that he went along with Defendant No.1 to the Sub-Registrar's Office for registration but somehow Defendant No.1 sneaked away from that place as he had already entered into another agreement to sell the present premises, so much so that a sham suit was got filed by Defendant No.2 against Defendant No.1 and on the same day a compromise decree was obtained. These facts go to show that there is not much equity left in favour of Defendant No.2 as it appears that the suit by Defendant No.2 was a pre-arranged affair with connivance with Defendant No.1. Otherwise the suit would not have been filed on the same day and a compromise decree would not have been obtained the very same day. This shows that there was a pre-conceived agreement between Defendant Nos.1 & 2 in order to cheat the plaintiff-appellant herein. Therefore, we are of opinion that the discretionary power exercised by learned Single Judge of the High Court was not correct. In fact, it appears that Defendant No.2 has purchased the litigation and therefore, there is no equity in his favour.

Hence, in the result of our above discussion, we allow this appeal and set aside the impugned order of the learned Single Judge of the High Court of Karnataka passed in R.S.A. No.68 of 1994, affirm the decree of the trial court as well as the first appellate court and grant a decree for specific performance of the agreement to sell against Defendant No.1. However, so far as the question of granting possession of the suit premises is concerned, that order we are not passing for the reason that Defendant No.2 is in possession of the premises for a long time and the plaintiff-appellant herein has to execute a formal agreement of purchase with Defendant No.1. However, it would be open for the plaintiff to take appropriate proceedings for eviction of Defendant No.2 and take possession of the suit premises in accordance with law. It will be open to Defendant No. 2 to file a suit against Defendant No. 1 to recover his money in accordance with law. There shall be no order as to costs.