HIGH COURT OF GUJARAT *(D.B.)*

NAJMUDIN I BHARMAL AND OTHERS
V/S
CHAROTAR GRAMODDHAR SAHAKARI MANDALI LTD AND OTHERS

Date of Decision: 20 October 1978

Citation: 1978 LawSuit(Guj) 155

Hon'ble Judges: J N Bhatt, R M Doshit

Case Type: First Appeal

Case No: 1292 of 1983

Subject: Civil, Contract, Property

Acts Referred:
CODE OF CIVIL PROCEDURE, 1908 SEC 96
TRANSFER OF PROPERTY ACT, 1882 SEC 3
CONTRACT ACT, 1872 SEC 56

Final Decision: Appeal dismissed

Important Para: 20

Advocates: A H Mehta, Devang S Nanavati,K S Nanavati, Kaushal Thaker, S I Nanavati

Reference Cases:
Cases Referred in (+): **4**

Judgement Text:-

J N Bhatt, J

[1] Should the appellants be granted or not the decree for specific performance of an agreement to sell, dated 8.12.1977 (Exh. 71), in respect of a land bearing Survey No. 354/2, situated in Gondal, Rajkot District which is an agricultural land, admeasuring about 7 acres, is the central theme of the present appeal.

[2] The appellants are the original plaintiffs who initiated legal battle, by filing Special Civil Suit No. 76 of 1978, in the Court of Civil Judge (S.D.), Gondal, for specific performance of the aforesaid agreement to sell (Exh. 71), and in the alternative claimed a decree for Rs. 1,00,000/-, by way of compensation or damages, for breach of the agreement, including refund of Rs. 15,000/-, paid by them as earnest money against the respondents, who are the original defendant Nos. 1 to 5.

[3] Defendant Nos. 1 to 4 filed their written statement, at Exh. 16, inter alia, contending that, they are impleaded, unnecessarily, only on the ground that they are office-bearers of the original defendant No. 1-Society. Defendant No. 5-Firm filed its written statement, at Exh. 19, raising various contentions. It also adopted the written statement, Exh. 18 of the defendant Nos. 1 to 4. In short, all the defendants raised a common contention that, the plaintiffs are not entitled to a decree for specific performance.

[4] The trial Court raised the issues at Exh. 45, in the light of the pleadings of the parties and the facts and circumstances emerging from the record and on appreciation, and assessment of the evidence, the trial Court refused the decree for specific performance. However, the trial Court granted decree against the original defendant No. 1-Society, for an amount of Rs. 25,000/- with interest at the rate of 6% per annum from the date of the suit till payment. The judgment was recorded on 27th April 1983.

[5] Being dissatisfied by the impugned judgment and decree, the original plaintiffs have, now, come up, before this Court, by way of this First Appeal, under Section 96 of the Code of Civil Procedure, 1908 (the Code). The respondent No. 1, original defendant No. 1-Society has also filed cross- objections against the passing of the decree for an amount of Rs. 25,000/-. Thus, the entire impugned decree is under challenge, by both the parties.

[6] The trial Court has, while passing the impugned judgment and decree, held, that :

(i) The defendants have committed breach of the contract.

(ii) The plaintiffs were ready and willing to perform their part of the contract.

(iii) The plaintiffs failed to prove that the defendant No. 1- Society illegally, sold away the suit property along with possession to the defendant No. 5-Firm.

(iv) The plaintiffs have failed to show that sale transaction in favour of the original defendant No. 5 is not binding to them.

(v) The suit is not barred for mis-joinder of the parties.

(vi) The plaintiff No. 1 out of three plaintiffs was the only agriculturist.

(vii) The plaintiff No. 1 has not committed any breach of the agreement as contended by the defendants.

(viii) The plaintiffs are entitled to recover an amount of Rs. 10,000/- by way of damages and return of Rs. 15,000/-, the amount, paid as earnest money by them.

(ix) The defendant No. 5-Firm is a bona fide purchaser with value without notice.

(x) The suit agreement was for the purchase of non-agricultural land.

(xi) The permission for conversion into non-agricultural land out of agricultural suit land was refused by the competent authority which has resulted into frustration of the agreement.

(xii) The plaintiffs are not entitled to a decree for specific performance of the

suit agreement.

(xiii) The suit is not barred by the provisions of Prevention of Fragmentation and Consolidation of Holdings Act.

[7] It could very well be seen from the aforesaid findings that the trial Court denied the relief to pass a decree for specific performance of the suit agreement, on the ground of frustration of the contract and that the defendant No. 5-Firm is a bona fide purchaser of the suit property with value, without notice. However, the trial Court awarded an amount of Rs. 25,000/- with interest at the rate of 6% per annum to the plaintiffs against defendant No. 1-Society. The break-up of the said amount decreed is of Rs. 15,000/- paid to the defendants as an earnest money and an amount of Rs. 10,000/- by way of nominal damages and compensation.

[8] Learned Advocate Mr. Mehta, while appearing for the appellants-original plaintiffs has, vehemently, raised the following contentions :

(i) That the trial Court has, seriously, erred in refusing to decree for specific performance of the suit agreement.

(ii) That the defendant No. 5 is not entitled to the suit property as said Firm was not a bona fide purchaser with value, without notice.

(iii) That the trial Court should not have relied on the evidence to hold that there was frustration of the contract and that, whether there was a frustration of the contract or not, was not to be determined by the parties.

(iv) That in view of the rise in prices, the defendant No. 1- Society has, illegally, transferred the suit property to the defendant No. 5, Kothari Oil Products, a partnership firm, and that the specific performance of the decree ought to have been granted, by exercising discretion in favour of the plaintiffs, in the light of the facts and circumstances, on record.

(v) That the suit transaction was in respect of agricultural land and the

plaintiff being an agriculturist, no permission was required of the competent authority.

[9] The aforesaid contentions are, seriously, traversed and controverted, by learned Advocate Mr. D.S. Nanavati, appearing for respondent No. 5-original defendant No. 5. He has, also, raised additional following contentions:

(i) That in view of the provisions of the Saurashtra Gharkhed, Tenancy Settlement and Agricultural Lands Ordinance, 1949 (Ordinance No. XLI of 1949), the suit transaction arising out of the suit agreement was not legal and valid and, therefore, the plaintiffs were not entitled to a decree for specific performance thereof.

(ii) That in view of the refusal of the permission for conversion of the land into non-agricultural one, by the competent authority, the suit agreement became frustrated and, therefore, no specific performance could be granted.

(iii) That the Court cannot pass a conditional decree for specific performance, in view of the fact that, not only the contract is prohibited and invalid, but, by virtue of the amendment in Section 54(1)(c) of the aforesaid Saurashtra Gharkhed, Tenancy Settlement and Agricultural Lands Ordinance, 1949, the agreement was also prohibited.

(iv) That the defendant No. 5, a partnership firm, has, lawfully, purchased the suit property and the defendant No. 5 is a bona fide purchaser, without notice for a value and, therefore, the firm is a protected person against whom decree cannot be passed.

Learned Advocate Mr. Thaker, appearing for respondent Nos. 1 to 4, original defendant Nos. 1 to 4, has also criticised the passing of the decree of an amount of Rs. 25,000/- against the defendant No. 1; and has also contended that, the suit agreement cannot be, specifically, enforced, as it became frustrated.

[10] Since the aforesaid contentions are inter-linked and inter-connected, they are being dealt with, simultaneously, so as to avoid repetition of narration of the factual aspects and evidence.

[11] The suit agreement, Exh. 71, dated 8.12.1977 was between the original plaintiff No. 1, Mr. Najmudin Isufali Bharmal and original defendant No. 1-Society, in respect of the land bearing Survey No. 354/2, situated at the outskirts of Gondal City, in Rajkot District. It is an agricultural land, admeasuring about 7 acres. The finding of the trial Court that, the suit agreement was in respect of the non-agricultural land after its conversion, is criticised. The suit agreement is held to be for the purchase of N.A. land after the conversion, in the light of the evidence on record.

[12] We have, carefully, and, dispassionately, examined the suit agreement and the relevant testimonial collections and we have no hesitation in finding that, the suit agreement was in respect of a non-agricultural property after the conversion of the same from agricultural one. We are satisfied that, the view taken by the trial Court is justified in the light of the facts and circumstances emerging from the evidence, on record. The plaintiffs have changed their version, at different stages. They have also, later on, shown their readiness and willingness to purchase even the suit property, without its conversion. We would deal with the legality of this contention, hereinafter, but we may point out presently, that the specific performance of a contract could be granted only in respect of an agreement or a contract without variation or alteration.

[13] The trial Court has, carefully, examined and, rightly, reached the conclusion that the suit contract was only for the purchase of non- agricultural landed property, after its conversion. Ordinarily, the tenor of writing also would not be in the same fashion, as it is in the suit agreement, at Exh. 71, had it been for the purchase of an agricultural land.

[14] We may highlight some aspects so as to substantiate the said finding from a plain perusal of the suit agreement, Exh. 71 :

(i) That it is in the suit agreement itself that the plaintiff agreed to purchase the suit land at Rs. 7/- per sq.mtr. which, ordinarily, is not the standard rate for the purchase of agricultural land for which there is no dispute. By and large, in the case of purchase of agricultural land, the rate or measurement would be in Acre, Gunthas, Bigha or Hectare.

(ii) Again, the suit agreement shows that, the suit land was to be purchased

in the name of 3 to 4 persons, by different sale deeds which would also not be a common phenomenon in case of purchase of agricultural property. It may also be mentioned here that, a person who is interested to purchase an agricultural land, would first think of having a well for water, therein; whereas, here the position is other way round. It is, specifically, mentioned in the suit agreement that, the purchase of the suit land except a well, what it would show? Obviously, it would show an imprint of a dabbler rather than an agriculturist.

[15] After having examined the aforesaid terms and conditions of the suit agreement coupled with the evidence of the plaintiffs' witness Najmudin Isufali, at Exh. 102, and subsequent correspondence exchanged between the parties and the conduct, it leaves no any manner of doubt that, the suit agreement was only for the purchase of non-agricultural land, after its conversion.

[16] An application for conversion of agricultural land was also made by the defendant No. 1-Society, on 28th December 1977, at Exh. 91, stating, therein, that the same was required for the purpose of expansion of the factory premises. Letter, Exh. 92, dated 28.2.1978 is by the Regional Manager of Gujarat Industrial Development Corporation, Rajkot, to the Assistant Collector, Gondal, in respect of the suit land, wherein, it was requested that the suit property should not be permitted to be converted into non-agricultural purpose, since the same was required by the Corporation for the purpose of industrial expansion and growth. The suit land is situated near the Estate of the said Corporation, in Gondal as stated in the said letter. Exh. 94 is also a letter addressed to the Assistant Collector, Gondal, by the Works Manager of the defendant No. 1-Society, wherein, it is clarified that the purpose of asking the conversion of the suit land should be, as, for sale of the property and not for expansion of the premises. Thus, the correspondence would go to show that the defendant No. 1-Society did ask for the conversion of the suit land into non-agricultural land, pursuant to the suit agreement. It is also not disputed that the competent authority refused to oblige defendant No. 1-Society and thereby rejected the application seeking permission for conversion into non-agricultural land.

[17] This is clearly evidenced and manifested by the order of the competent authority produced, at Exh. 93, dated 21-3-1978. It is, therefore, clear from the record that, permission for conversion into non-agricultural land was sought on account of the suit

agreement which, unfortunately, for the parties, came to be rejected. Therefore, the trial Court has, rightly, taken into consideration this documentary evidence before concluding that, the suit agreement was for non-agricultural land and the permission sought by the defendant No. 1-Society was declined, with the result that the trial Court had to observe that specific performance could not be granted, as there was frustration of the contract. Section 56 of the Contract Act makes a provision for frustration of the contract.

> This finding of the trial Court is, vehemently, criticised. Hence, it would be expedient to deal with this aspect, in little greater details.

[18] Section 56 of the Contract Act, 1872, provides that, an agreement to do an act impossible in itself is void. Section 56 reads as under:

> " Agreement to do impossible act: An agreement to do an act impossible in itself is void.
>
> Contract to do act afterwards becoming impossible or unlawful :
>
> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> xxx xxx xxx
>
> xxx xxx "xxx"
>
> It could very well be seen from the aforesaid provisions of Section 56 of the Indian Contract Act, 1872, that the contract to do an act, after it is made, when it becomes impossible by reason of any event, which the promisor could not prevent or it becomes unlawful, it is a void agreement. The trial Court, after considering the provisions of Section 56 in the light of the fact scenario emerging from the evidence, has found that, on account of the fact that the competent authority refused to grant permission for conversion of

the suit property into non-agricultural land, frustrated the contract.

[19] The following conditions are essential before Section 56 of the Contract Act becomes applicable :

(1) A valid and subsisting contract to meet the purpose.

(2) There must be some part of the contract yet to be completed after it is entered into becomes impossible to be performed.

The doctrine of frustration comes into play when a contract becomes impossible after it is made on account of circumstances beyond the control of the parties, or change in circumstances makes performance of the contract impossible. As such, an impossibility and frustration are often used with inter- changeable expression, the changed circumstance makes the performance of the contract impossible.

[20] The rule in Section 56, exhaustively, deals with frustration of the contract. Once the Court finds that the contract has become impossible to be performed, there cannot be a decree for specific performance of such act or action to be impossible or the performance of which is beyond the control of the party. There is a definite policy, philosophy and purpose behind the doctrine of frustration. The trial Court, in the circumstances emerging from the evidence, has, rightly, observed that, on account of the denial or refusal of the permission for conversion of suit land into non-agricultural land, would result into frustration of contract and, therefore, there cannot be a decree for specific performance, thereof.

[21] Again, the trial Court reached the conclusion that the original defendant No. 5-partnership firm is a bona fide purchaser with value, without notice of subsisting contract: Since the contract has become frustrated on account of the aforesaid contingency on refusal of permission by the competent authority for the conversion of the suit land into non-agricultural land, which was the basis of bargain; the defendant No. 1-Society had entered into sale transaction with the defendant No. 5-Firm. It is borne out from the evidence that, the parties had taken the refusal of permission by the competent authority as a frustration of the contract. Therefore, the defendant No. 5

could not be said to be a party having knowledge of the valid subsisting contract between the original plaintiffs on one hand, and the defendant Nos. 1 to 4, on the other hand. Knowledge of frustrated contract cannot be interpreted and imputed of knowledge of subsisting contract.

[22] It is contended on behalf of the appellants that, the frustration of the contract could not be decided, inter se, by the parties. Yes, this submission may, prima-facie, appear subtle, but not sustainable. What is required to be known by the parties is, whether there was subsisting contract. When a party knows the fact that the earlier contract has come to an end on account of the doctrine of frustration could not be characterised a purchaser with notice of subsisting contract. There is no dispute about the fact that, the defendant No. 5 is purchaser who purchased from original owner, defendant No. 1-Society, for value. Therefore, the finding of the trial Court that, the defendant No. 5 is a bona fide purchaser without notice, with value, could not be countenanced.

[23] Section 3 of the T.P. Act, 1882, provides, interpretation clause, in which when a person is said to have notice is provided. A person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an inquiry or search which he ought to have made or gross negligence, he would have known it.

[24] Express notice or actual notice whereby a person acquires actual knowledge of fact. The equitable doctrine of notice which controls unconscionable transaction is recognised in various provisions in T.P. Act.

[25] The doctrine of constructive notice or legal presumption of knowledge arises from :

1. Wilful abstention from inquiring.

2. Gross Negligence.

3. Registration (Exp. I).

4. Actual Possession (Exp. II)

5. Notice to an agent.

Since in the present case, the defendant No. 5-Firm had notice of frustrated and not subsisting contract and therefore, his right cannot be said to be jeopardised. We are incomplete agreement with the ultimate conclusion of the trial Court in this behalf. Therefore, other points do not assume any significance as they are not attracted.

[26] Learned Advocate Mr. Mehta, while appearing for the appellants has contended that, for the specific performance, decree could be granted on condition. In other words, he has contended that a conditional decree can be passed, subject to obtaining the permission of the competent authority. In support of his contention, he has placed reliance on a Full Bench decision of this Court, rendered in "Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai, Ahmedabad and Ors., 1984 AIR(Guj) 145. According to the submission of Mr. Mehta, the Court could pass a conditional decree for specific performance, subject to permission being obtained as such a decree is legal and valid in view of the aforesaid Full Bench decision. In the said Full Bench judgment, in the case of Shah Jitendra Nanalal , this Court passed a conditional decree for specific performance, subject to exemption being granted under the provisions of Section 20 of the Urban Land (Ceiling and Regulation) Act (33 of 1976) and observed that:

"The passing of a conditional decree for specific performance of the obligation of the holder to transfer vacant land in excess of ceiling limit held by him subject to exemption being obtained under Section 20 is permissible."

So long as the provision declaring the transfer of a vacant land in excess of ceiling limit under Section 5(3) as void is subject to the right to move for exemption, obtain exemption and transfer the property, the power of an owner of vacant land in excess of the ceiling limit to "alienate" such land is dormant in him and such power could be exercised by him in case he seeks exemption, satisfies the Government that the grounds for exemption exist and obtains such exemption. That being the case, a decree cannot be defeated on the ground that "transfer" inter-parties would not be possible. The possibility of obtaining exemption survives till the notification under Section 10(2) of the Act is issued. That being the situation, until then, a plaintiff seeking specific performance cannot be told that the terms of the contract cannot be fulfilled. KANUBHAI SANKALCHAND PATEL vs.

NAYANKUNJ CO OP HOUSING SO LIMITED, 1978 AIR(Guj) 140 held per incuriam BAI DOSABAI vs. MATHURDAS GOVINDDAS, 1980 AIR(SC) 1334, Relied on."

The contention of learned Advocate Mr. Nanavati is that in view of the specific provision of Section 54, Sub-section (1), Clause (c) of the Saurashtra Tenancy Ordinance, the suit agreement is not legal and valid. The amended provision of Section 54 of the Saurashtra Tenancy Ordinance reads as under :

"In the Saurashtra Gharkhed, Tenancy Settlement and Agricultural Lands Ordinance, 1949, as in force then in the Saurashtra area of the State of Gujarat, in Section 54.

(i) in Clause (b), the words "or" shall be added at the end.

(ii) after Clause (b), the following Clause shall be inserted, namely :- (c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein.

(iii) in the first proviso, after the words "lease, where lease is by law allowed, or mortgage" the words "or for such agreement" shall be inserted."

It is the contention of learned Advocate Mr. Mehta that, the amended provision does not, in any way, affect the ratio propounded by this Court, in the aforesaid Full Bench case, wherein, conditional decree subject to getting exemption had been passed. He has contended that if, ex-post-facto, permission could be obtained, why not conditional decree could be passed by the Court? It is, therefore, vehemently, contended that, conditional decree for specific performance should have been passed by the trial Court. He has also placed reliance on a decision of the Apex Court, rendered in, Bai Dosabai v. Mathurdas Govinddas and Ors., 1980 AIR(SC) 1334. This decision is relied on by this Court, in the aforesaid Full Bench case. The Hon'ble Supreme Court has held that suit for specific performance of

contract of sale of immovable property decreed by the High Court, can be moulded in the light of the subsequent events and changes in law occurring during the pendency of the appeal. The ratio propounded by the Apex Court is followed by this Court, in the aforesaid Full Bench decision.

[27] The aforesaid two decisions relied on by learned Advocate Mr. Mehta for the appellants would go to show that a conditional decree could be passed for the specific performance of a contract. However, in our opinion, the ratio propounded in the aforesaid two decisions will be inapplicable to the case on hand for the following reasons :

(i) That the suit agreement was frustrated and as such, was not subsisting;

(ii) That the question of passing decree for specific performance on condition to obtain permission from competent authority under the proviso attached to Section 54(1)(c) of the Saurashtra Tenancy Ordinance does not arise in the present case, as permission had already been refused by the competent authority ;

(iii) That, conditional decree for specific performance is not to be granted ipso-facto in all cases, in view of the mandate contained in provisions of Section 20 of the Specific Relief Act, 1963.

Section 20 of the Specific Relief Act empowers the Court with a discretion as to decreeing specific performance. It cannot be said that in every case wherever there is a valid contract or subsisting agreement, a decree for specific performance ought to be passed. It is a discretionary relief. The learned Advocate appearing for the respondents-original defendant Nos. 1 to 4 has, rightly, pointed out the latest case law on this point enunciated by the Apex Court. The provision of Section 20 of the Specific Relief Act, 1963, is examined by the Supreme Court. The Apex Court, in the judgment rendered in the case of N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao and Ors., 1995 5 SCC 115, has observed that, remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to the settled principles

of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963. This Court is not bound to grant specific performance decree because there is a valid agreement of sale. Discretion is with the Court. The Court can exercise such discretion equitably depending upon the facts and circumstances of each case. Therefore, relying upon the aforesaid Full Bench decision and the decision of the Apex Court, it cannot be contended that, irrespective of the provision of Section 20 in the facts of the case, a conditional decree for specific performance ought to be granted.

[28] It may also be noted that, specific performance is compelling a person to perform his contract or statutory obligation. The word "specific" requires careful scrutiny. It is settled proposition of law that, the expression "specific" means, it must be specific enough to avoid being vague and general. What is precise, exact, definite and explicit is specific. Again, a contract is an agreement which is enforceable at law. If any agreement is incomplete, inconclusive, incoherent and impossible, how could there be a specific performance thereof? There was frustration of contract as permission for conversion into N.A. land was refused by the competent authority. Therefore, the question of conditional decree of specific performance does not assume any survival value, in the present case.

In view of the aforesaid circumstances, the aforesaid two decisions are not attracted. Therefore, it would not be necessary to go into the other incidental submissions. Decisions cannot be pressed into service divorced from the context of factual scenario of the given case.

[29] As regards cross-objections, it may be mentioned that, the directions of the Court in decreeing an amount to Rs. 25,000/- against defendant No. 1- Society could not be said to be unjust or unreasonable. It is a settled proposition of law that the amount of earnest money must be returned to the party who has paid, who fails to get decree for specific performance on the promise that no unjust enrichment can be allowed. There is no dispute about the fact that defendant No. 1-Society was paid by the plaintiffs an amount of Rs. 15,000/- by way of earnest money, while entering into the suit contract, Exh. 71. It is true that, the trial Court has assessed and awarded damages of a sum of Rs. 10,000/- to the plaintiff. Considering the facts and circumstances and the smallness of the amount awarded by the trial Court towards the damages, we do not deem it necessary and expedient to interfere with the same.

[30] Having regard to the facts and circumstances and the above discussions, and evidence on record, and the proposition of law enumerated, hereinbefore, we are of the clear opinion that, the appeal filed by the appellants is devoid of any substance and is required to be dismissed and so also, the cross- objections. Accordingly, the impugned judgment and decree recorded by the trial Court are confirmed and the appeal and the cross-objections are dismissed. Having regard to the facts and circumstances, the parties are directed to bear their own costs. Obviously, the interim stay-order shall stand vacated.