

(1965) 11 BOM CK 0005
Bombay High Court
Case No: Appeal No. 1077 of 1959

Bhiku Keru Gade

APPELLANT

Vs

Dashrath and Others

RESPONDENT

Date of Decision: Nov. 17, 1965

Acts Referred:

- Specific Relief Act, 1877 - Section 18
- Transfer of Property Act, 1882 - Section 18, 43

Citation: AIR 1967 Bom 267 : (1966) 68 BOMLR 464 : (1966) ILR (Bom) 997

Hon'ble Judges: Naik, J

Bench: Single Bench

Advocate: V.V. Albal, for the Appellant; V.V. Divekar, for the Respondent

Judgement

(1) The suit giving rise to this appeal was filed by the plaintiff for specific performance of the agreement of sale. The material facts stand briefly as follows; Survey No. 42 A measuring for acres and forty-seven gunthas and assessed at Rs. 14 (plus water cess Rs. 5) situate in Moravale village originally belonged to the plaintiff. He had leased the said land to Keru Mahadu Gade, the father of defendants Nos. 3 to 5, and the name of Keru had been entered in the record of rights as a protected tenant. On 2-2-1955 the plaintiff executed a sale deed in favour of defendants Nos. 1 and 2 and Keru Mahadu. the father of defendants Nos. 3 to 5, for a sum of Rs. 2000 (Ext. 44). The same day, defendants Nos. 1 and 2 and defendant No. 3, who is the son of Keru Mahadu, executed an agreement of sale in favour of the plaintiff (Ext. 56). The agreement stipulated that the property would be reconveyed to the plaintiff on his payment of the sum of Rs. 2000, for which it was sold to the defendants Nos. 1 and 2 and Keru Mahadu. Keru Mahadu died in April 1956. On 5-5-56 the plaintiff gave a notice to defendants Nos. 1 to 3 calling upon them to execute a sale deed in pursuance of the agreement of sale dated 2-2-55. The plaintiff stated that he was prepared to pay the amount of Rs. 2000,. the stipulated consideration for the reconveyance. The defendants not having acceded to the request contained in the

notice, the plaintiff filed a suit on 15-6-56 against defendants Nos. 1 to 3 for specific performance. The plaintiff's case was that although the sale deed stood in the name of defendant Nos, 1 and 2 and Keru Mahadu, still Keru was a benamidar, and the real owner was defendant No. 3, Bhiku Keru. Alternatively, the plaintiff pleaded that assuming that the land was purchased for the joint family of Keru Mahadu and his sons, still the agreement was binding upon the entire family by reason of the fact that Bhiku executed the agreement for and on behalf of the joint family.

(2) Defendants Nos. 1 to 3 resisted the plaintiff's claim on several grounds. One of the contentions raised was that the agreement of sale was the result of misrepresentation, their signatures having been taken on a blank paper. Defendant No. 3 specifically contended that he had no title in the suit property at the time of the sale deed and, therefore, the agreement was not enforceable. He also asserted that he was not a member of the joint family and that all his brothers were divided in interest. He suggested that defendants Nos. 4 and 5 were necessary parties to the suit. Defendants Nos. 4 and 5 were added as parties to the suit. They contended that they were divided in interest and that defendant No. 3, Bhiku had no right to execute the agreement of sale so far as their shares were concerned.

(3) It was also contended that defendants Nos. 3 to 5 were tenants and, therefore, the civil Court had no jurisdiction to award possession as against the tenants.

(4) Appropriate issues were framed. The issue as to whether the Civil Court had jurisdiction to award possession was deleted as defendants Nos. 3 to 5 gave a purshis (Ext. 38) stating that they did not want to press their claim based on tenancy. The trial Court held that there was no evidence to show that the property was purchased for and on behalf of the joint family. That being the case, defendant No. 3 had no interest which he could agree to convey by the agreement dated 2-2-1955. On the question of misrepresentation, the trial Court recorded a finding against defendants Nos. 1 to 3. Consequently it awarded a decree for specific performance against defendants Nos. 1 and 2 on payment of two-third share in the purchase money, i.e., Rs. 1333-5-4 within a period of two months from the date of the decree. Against that judgment, the plaintiff went in appeal. The appellate Court modified the decree and awarded a decree for specific performance against defendant No. 3 also to the extent of his share in the joint family property, the appellate Court having held that the land was purchased by Keru for and on behalf of the joint family and therefore Bhiku, defendant NO. 3, had an interest in the property. As regards the prayer for partition and possession, the court referred the plaintiff to a separate suit. Against this Judgment,. defendant No. 3 has preferred this second appeal.

(5) Defendants Nos. 1 and 2 had not preferred any appeal from the decree passed against them by the trial Court. The suit was dismissed so far as defendant No. 3 was concerned. It was partly allowed by the appellate Court against defendant No. 3. The plaintiff did not prefer any appeal from the part of the decree referring him to a separate suit for partition and possession. The only question, therefore, that arises

for consideration in this appeal is whether any decree for specific performance could be passed against defendant No. 3.

(6) The plaintiff came to the Court with a specific case that the sale was meant for the benefit of defendant No. 3, Bhiku, and the sale deed was taken in the name of his father, Keru, because Keru's name stood in the record of rights as a protected tenant. In substance, the plaintiff's case was that Keru was a benamidar and Bhiku was the real owner. It was not the case for the plaintiff that the sale deed was taken for and on behalf of the family of Keru and his three sons. Nor was it suggested that the sale deed was taken in the name of Keru, because he was the Manager of the Joint Hindu family. It was also not pleaded that the money which went towards the purchase of the property came out of the joint family funds. The case put forward really stood in conflict with the position viz., that the property was purchased for and on behalf of the joint family and in the name of the Manager of the Joint Hindu family. It was also asserted that Bhiku was the real manager of the joint family. It was on that basis that it was contended that the agreement which Bhiku executed was binding on the entire joint family. An alternative case was faintly put up as follows: Assuming that the sale deed was taken on behalf of the joint family, the agreement executed by Bhiku on 2-2-55 was for and on behalf of the joint family and is, therefore, binding on them. There was no evidence led on behalf of the plaintiff to show that the property was purchased for on behalf of the joint family. Nor was there any evidence to show that any part of the money came from the joint family funds. It was in this state of the pleadings and the evidence that the trial Court was constrained to hold that the property did not belong to the joint family. The learned Assistant Judge disagreed with the view taken by the trial court and observed that the decision depended upon the analysis of the evidence before the Court. He then relied upon certain circumstances viz., (1) the family possessed other property as is clear from Exs. 36 and 37, (2) Keru was an old man of 70 years at the time of the purchase and (3) It is not possible to hold that Keru intended to have a separate property at that age. Having referred to these circumstances, the Assistant Judge observed:

"... From all these circumstances I think in the present case, there is enough evidence to come to the conclusion that Keru did not make the purchase individually, but on the contrary it was for the family."

In arriving at this finding, the learned Assistant Judge has ignored the specific case that was put forward on behalf of plaintiff. It was not the plaintiff's case that the property was purchased by Keru as the manager of the joint family and for and on behalf of the joint family. On the other hand, the plaintiff's case was that the property was purchased for the benefit of Bhiku, defendant No. 3, and the sale was taken in the name of his father, Keru, because Keru's name appeared in the record of rights as a protected tenant. This case was destructive of any suggestion that the property belonged to the joint family. Of course the plaintiff had put forward a sort

of alternative case. But, the alternative was not put forward in clear terms. All that it suggested was that if it is held that the property was purchased for on behalf of the joint Hindu family, then the agreement executed by Keru would be binding on all the members of the Joint family. This assumes that somebody put forward the case that the property belonged to the joint family and led evidence in such a case. The plaintiff has neither led any evidence to show that the property was purchased for and on behalf of the joint Hindu family nor did he even make an assertion in the witness box that the sale was taken in the name of Keru for and on behalf of the joint Hindu family. Not a word was said about the source of the purchase money. Had he stated that the property was purchased for and on behalf of the joint family, then it is obvious that very little evidence would have sufficed to make that assertion good. In fact, the circumstances to which reference has been made by the learned Assistant Judge would also have sufficed to prove that case. As it is there is not an iota of evidence to show that the property was purchased for and on behalf of the joint family. It was not the case for the defence that the sale deed was taken for and on behalf of the joint family. It was, therefore, wrong on the part of the learned Assistant Judge to have recorded a finding of fact that the property was purchased for and on behalf of the joint Hindu family comprising Keru and his three sons. That is a finding not only without evidence but that is finding contrary to the pleadings and also the evidence in this case.

(7) The position, therefore, comes to this that the property was purchased in the name of Keru along with two others (with whom we are not concerned in this appeal). Presumably, it was Keru's self-acquired property. That being the case, defendant No. 3 had no interest in the property at the time he purported to execute the agreement on 2-2-55. He got an interest in the property only after the death of Keru which took place in April 1956, that is to say, after the execution of the agreement of sale. It is on the basis of this finding that we have to investigate the question of law as to whether by reason of the subsequent acquisition of interest in the property, the agreement should be enforced against Bhiku, defendant No. 3, so far as his share in the property is concerned. The learned Assistant Judge has relied upon the provisions of S. 18(a) of the Specific Relief Act, 1877 which runs thus:

"Where a person contracts to sell... having only an imperfect title thereto, the purchaser... has the following right;

(a) if the vendor... has subsequent... to the sale... acquired any interest in the property the purchaser... may compel him to make good the contract out of such interest."

The provisions of Section 18(a) of the Specific Relief Act, 1877, are analogous to the provisions of Section 43 of the Transfer of Property Act, which is based on the principle of feeding the grant by estoppel. Section 43 of the Transfer of Property Act provides:

"Where a person fraudulently or erroneously represents that he is authorized to fesses to transfer such property for consideration such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

Section 43 pre-supposes (1) a fraudulent or erroneous representation regarding the authority of the transferor to transfer the property, (2) the property is transferred for consideration (3) Subsequently, the transferor has acquired interest in the transferred property and (4) The contract of transfer is subsisting. Section 18(a) of the Specific Relief Act, 1877, does not speak about any fraudulent or erroneous representation. No kind of representation is necessary for the applicability of S. 18(a) of the said Act. Section 18(a) also does not refer to the agreement of sale being for consideration. The first point that arises for consideration in considering the applicability of S. 18(a) of the Specific Relief Act is whether it is open to the intending purchaser to ask for specific performance of a contract of sale when the person who has agreed to sell, has subsequently acquired title or fraction of title in the suit property. The second and incidental question for consideration is whether the principle applies to a case where there was no title vested in the person entering into an agreement and that person has acquired title later. The answer to the section question depends upon interpretation of the expression "imperfect title" In other words, the question is whether imperfect title includes absence of title.

(8) The answer to the first question is provided by the wording of clause (1) of Section 18(a) of the Specific Relief Act, 1877, which clearly suggests that there must be a sale or lease as the case may be and the person who had agreed to sell or lease had acquired interest in the property subsequent to the sale or lease. Mr. Divekar, for the respondents, contend end that the words "sale or lease" meant contract of sale or contract of lease. He pointed out that the same clause contains the expression "puchaser or lessee" may compel him to make good the contract out of such interest. It is true that the wording of clause (a) of Section 18(a) of the Specific Relief Act is somewhat clumsy. Reference to other sections of the Specific Relief Act and in particular to Section 53A of the Transfer of Property Act will show that the words "purchaser" and "transferee" have been used to connote persons in whose favour there has been an agreement of sale or transfer. At the same time, it is clear from the opening words of clause (a) of Section 18(a) of the Specific Relief Act. that there must be completed sale or lease before the acquisition of interest for entitling the purchaser or lessee to call upon the vendor or lessor to make the contract good. It is impossible to hold that the expression "has subsequent to the sale or lease" contained in clause (a) of Section 18(a) of the Specific Relief Act must mean subsequent to the agreement of sale or lease. It means a completed sale of a completed lease. Section 18(a) of the said Act does not refer to the right of specific performance of the contract of sale. It refers to the right of the purchaser for calling upon the vendor to make the contract of sale good. Every sale presupposes a contract of sale and if after the completion of sale the vendor acquired any interest

may ensure for the benefit of the purchaser. Viewed in that light the absence of the word "for consideration" in Section 18(a) of the Specific Relief Act, does not introduce any element of difference in principle in the application of Section 18(a) of the Specific Relief Act and that of Section 43 of the Transfer of Property Act. A sale necessarily means a sale for consideration. The rights of a person in whose favour there is only an agreement of sale have been defined in Section 15 of the Specific Relief Act. It is open to a person who holds a contract in his favour to call upon the contracting party to perform that part of the contract, which is capable of performance on fulfilment of certain conditions. One of the conditions is that he must pay the entire consideration and must relinquish his claim to compensation for the deficiency or for the loss or damage sustained by him through the default of the defendant. This suggests that there is no unconditional right vested in a person, who has taken a contract, of enforcing the contract merely on the ground that the contracting party has acquired certain interests in the property subsequent to the contract. It is only the purchaser, who has a right to call upon the contracting party to make the contract good. In this connection, reference may be made to a decision of the Orissa High Court in [Silla Chandra Sekharam Vs. Lalita Shahuani and Another](#). It was a decision of the Division Bench and the question was specifically raised before it. It was held:

"The language of Section 18(a) clearly shows that there must, first be a sale of the property by a person having an imperfect title thereto before the applicability of this section can be considered. If after such a sale that person acquires any interest in the property the vendee may compel him to make good the original contract out of such interest. If, however, there was no sale at all and the transaction between the two remain in the stage of a mere agreement to sell, this section cannot in term apply."

The learned Judges have also referred to the distinction between Section 18(a) and Section 43 of the Transfer of Property Act and have observed:

"It is true that there is some overlapping between section 43 of the Transfer of Property Act. and section 18(a) of the Specific Relief Act, but there is an essential difference between the two Section. Section 43 of the Transfer of Property Act applies only where there is fraudulent or erroneous representation by the transferor and there is a transfer of property for consideration. Then at the option of transferee such transfer may operate on any interest which the transferee may acquires in the property at any time. Section 18(a) of the Specific Relief Act is however restricted to two classes of transfers only, namely, sale or lease, and not to any other class. Moreover, it is unnecessary that there should be either a fraudulent or erroneous misrepresentation by the transferor. It applies where there is a sale or lease by person having an imperfect title, irrespective of the representation that he might have made to the purchaser or lessee. Merely because there is some overlapping between the two sections, it will not be proper to give an artificial

construction to section 18 of the Specific Relief Act ignoring the meaning of the words "subsequently to the sale" which clearly show that there must be a completed sale before the section be applied."

Reliance was placed before the Orissa High Court on certain observations made by the Patna High Court in [Dalmia Jain and Co. Ltd. Vs. Kalyanpore Lime Works Ltd. and Others](#), . The learned Judges of the Orissa High Court pointed out that although reference was made to this aspect of the matter in the judgment, the Patna High Court did not consider it necessary to decide the question, as it held that "apart from the language of Section 18(a) of the Specific Relief Act, a pray to a contract may ask for specific performance if the other party whose title was originally imperfect acquires perfect title later on". Reliance was also placed on the observations of the Supreme Court in [Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another](#), (which was an appeal from the decision of the Patna High Court in [Dalmia Jain and Co. Ltd. Vs. Kalyanpore Lime Works Ltd. and Others](#), The Supreme Court also did not decide the question at issue but proceeded to grant the relief u/s 15 of the Specific Relief Act.

(9) So far as the meaning of the expression "imperfect title" is concerned, reliance was placed on the decision of the Nagpur High Court in AIR 1949 83 (Nagpur) . The facts of that case were:

"A purchased certain fields at a revenue sale and agreed to sell them to B after the sale had been confirmed. It was stipulated that in the event of the revenue sale being set aside the contract to sell would not operate and the earnest money paid was not to be refunded. On confirmation of the sale, B sued A for specific performance.

Held that Section 18(a) being applicable to the case the contract was capable of specific performance and that its performance should be enforced.

In the course of the judgment, the learned Chief Justice observed (vide page 84)

"In my opinion, the words "imperfect title" in section 18 include "the absence of a title". This observation was made in the context of the facts of that case. It is therefore, necessary to refer to the entire passage containing the above observation:

"In my opinion, the words "imperfect title" in section 18 include the absence of a title and certainly include the very contingent interest for greater than a spes successionis which exists when a person who has bid at an auction sale has deposited the money and has done everything that is necessary for him to do and has only to wait for the confirmation of the sale when possession, except for unforeseen circumstances, would come to him."

Although the first part of the observations states the legal position in wide words. the learned Chief Justice intended to apply the principle to the peculiar facts of that

case. The sale was already held, money had been deposited and everything that was necessary to be done was done. That being the case, the confirmation was only a question of time. It was in the background of these facts that the observation of the learned Chief Justice that the contracting party has imperfect title would be justified. It is difficult to say that this was a case of absence of title, as the first observation seems to suggest. As a matter of fact, after the confirmation, the title of the purchaser dates back to the date of the auction sale. That being the case, after the confirmation when the suit for specific performance was filed, the vendor had title to the suit property. There is no question of any absence of title and in any case, it was not open to the contracting party to plead before the Court that when he entered into the agreement, he had no title. This was clearly a case of person having entered into an agreement with imperfect title and not absence of title. No authority except the decision of the Single Judge of the Nagpur High Court was cited before me in support of the proposition that imperfect title includes absence of title. It is true that Sir. Dinshaw Mulla in his commentary on the Specific Relief Act. has referred to the decision of the Nagpur High Court, and has made no comment about the correctness or otherwise of the said decision, I find it difficult to hold, without doing violence to the ordinary language, that imperfect title includes absence of title. Considering the question from any point of view, I felt no hesitation in holding that the contract cannot be enforced against defendant No. 3 and the interest, which he subsequently acquired in the property, after entering into the agreement of sale with the plaintiff.

(10) The result is that the appeal succeeds, the decree of the Appellate Court is set aside and the decree of the trial Court is restored. In the circumstances of the case, I direct the parties to bear their respective costs. The plaintiff to deposit the amount of Rupees 1333-5-4 within two months from today, if he has not already done so.

(11) Appeal allowed.