

Jethalal Nanshah Modi Vs Bachu

Court: Bombay High Court

Date of Decision: Nov. 17, 1944

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 21 Rule 54(1), 64
Specific Relief Act, 1877 – Section 22

Citation: AIR 1945 Bom 481 : (1945) 47 BOMLR 460

Hon'ble Judges: Weston, J; Lokur, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Lokur, J.

This is a Letters Patent appeal against a decision of Mr. Justice Macklin, and the facts out of which it arises are not now in

dispute. The father of defendant No. 2 filed against defendant No. 1 a suit in the Court of the First Class Subordinate Judge at Ahmedabad to

recover Rs. 5,000 and applied for attachment before judgment of defendant No. 1's share in the houses in suit. Defendant No. 1, however, put in a

plea that he was not going to sell or encumber the said property and that he would not do so. Thereupon the property was not attached and the

suit ended in a decree in favour of defendant No. 2's father and was confirmed in appeal by the High Court on April 8, 1937. Defendant No. 1

borrowed some amounts for that litigation from the plaintiff, who is his cousin, and within five days after dismissal of the appeal by the High Court

he agreed to sell his share in the property in the suit to the plaintiff for Rs. 2,100 due to him in respect of the advances already made. The sale-

deed in pursuance of the agreement was to be executed within one month, but in the interval defendant No. 2 sought the execution of his decree in

darkhast No. 325 of 1937 and on May 5, 1937, got defendant No. 1's share in the property in suit attached. The plaintiff then made an application

under Order XXI, Rule 58, of the Civil Procedure Code, to have the attachment raised on the ground that he had already acquired an interest in

the properties attached. But his application was rejected on the ground that the agreement by itself did not create any interest in the properties and

that the proper course for the plaintiff was to obtain a decree for specific performance of that agreement. The plaintiff, therefore, filed this suit for

specific performance of that agreement and to have a registered sale-deed executed in his favour and also to obtain a declaration that defendant

No. 1's share in the properties in suit was not liable to be attached and sold by defendant No. 2 in execution of his decree against defendant No. 1.

Defendant No. 1 admitted the plaintiff's claim and expressed his willingness to pass the agreed sale-deed, but stated that he could not do so as a

prohibitory order had been issued against him in the darkhast of defendant No. 2 under Order XXI, Rule 54, of the Civil Procedure Code.

Defendant No. 2, however, objected to the specific performance of the contract of sale on the ground that he had already got the property

attached in execution of his decree. The trial Court held that the agreement of sale was fraudulent and brought about with a view to defeat or delay

defendant No. 2 and that the plaintiff was not, therefore, entitled either to obtain specific performance of that agreement or to have defendant No.

2 restrained from executing his decree against defendant No. 1. The suit was, therefore, dismissed. In appeal the learned District Judge held that

although the agreement might have the effect of giving preference to the plaintiff, and thereby perhaps delaying other creditors, the agreement was

not vitiated and that defendant No. 1 was bound to pass the sale-deed in accordance with that agreement. But though defendant No. 1's share in

the properties in suit had already been attached, the sale-deed passed in pursuance of the antecedent agreement would not be affected by the

intervening attachment and, therefore, the plaintiff was not entitled to have defendant No. 2 restrained from proceeding with his darkhast against

defendant No. 1. As a result, the decree of the trial Court was modified and the plaintiff was given a decree for specific performance of the

agreement by defendant No. 1, but the suit as regards the prayer for injunction against defendant No. 2 was dismissed. In second appeal it was

held that there was no reason why an agreement for sale, even when untainted with any fraud, should prevail over an attachment already made in

execution of a decree and, therefore, the appeal was allowed and the decree of the trial Court dismissing the suit was restored.

2. Section 64 of the CPC provides that where an attachment has been made, any private transfer of the property attached shall be void against all

claims enforceable under the attachment. A large number of rulings were cited at the bar regarding the effect of the attachment of Immovable

property on its sale subsequent to the attachment but in pursuance of an agreement of sale entered into before the attachment. Out of those rulings

we may refer to the decisions in Basappa Chanbasappa Chekki Vs. Hanmappa Ramappa Manaur, , Rango Ramchandra v. Gurlingappa

Chinnappa (1940) 43 Bom. L.R. 206 Yeshvant Shankar v. Pyaraji Nurji (1942) 45 Bom. L.R. 208 and Diraviyam v. Veeranan [1939] Mad.

853. The effect of these rulings may be said to be that where a purchase is subsequent to the attachment, but the agreement in pursuance of which

the purchase is made is prior to the attachment, the purchase prevails against the attachment and in such a case the party attaching the property will

not be entitled to the benefit of Section 64. This question, however, is really immaterial for the purpose of this appeal, since Section 64 affects only

private sales after attachment and does not cover the enforced execution of a conveyance in obedience to a decree of a Court. In the present case

there has been no private sale following upon the agreement to sell. The plaintiff wants that the agreement should be enforced and if a decree for

specific performance of the agreement is passed, and a sale-deed is executed in accordance with that decree, it will not be affected by Section 64.

We are, therefore, concerned only with the plaintiff's right to have the agreement of sale enforced by a decree for its specific performance and not

with the nature or extent of the rights created by it in view of the attachment of the property after the agreement.

3. Prima facie the agreement of sale passed by defendant No. 1 to the plaintiff being proved and valid, the plaintiff ought to get a decree for its

specific performance, especially when defendant No. 1 does not resist the claim and is willing to pass a sale-deed as agreed upon. But the claim

for a decree for specific performance of a contract is not a matter of right. Section 22 of the Specific Relief Act, 1877, provides that the

jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so ; but

the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles. The Court has to consider the whole of the

surrounding circumstances and the conduct and position of the parties and then consider whether in the exercise of its discretion it should grant the

relief of specific performance. The section itself does, therefore, contemplate cases where specific performance ought not to be decreed, and the

present is, we think, a case of that kind. When the property agreed to be sold was attached in the suit filed by defendant No. 2's father, a

prohibitory order was issued by the executing Court under Order XXI, Rule 54(1), of the Civil Procedure Code, prohibiting defendant No. 1 from

transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge That prohibitory order is still in

force and it would not be right for the same Court to order defendant No. 1 in another suit to pass a sale-deed in violation of the prohibitory order

and thereby enable defendant No. 2 to purchase the attached property in similar violation of the prohibitory order. Moreover it would be helping

the parties to the agreement to successfully carry out the device of evading the provisions of Section 64 by clothing the transaction with the

character of a Court sale. Specific performance of a contract being an equitable relief, within the discretion of the Court, he who seeks equity must

come with clean hands. When the father of defendant No. 2 filed this suit against defendant No. 1, he wanted to have the property now in suit

attached before judgment, alleging that defendant No. 1 was going to alienate it in order to defeat his claim. Defendant No. 1 then passed a purshis

giving him assurance that he would not sell or encumber the property. On that assurance the property was not attached. It is true that the purshis

may not have the legal effect of a binding undertaking not to alienate the property for all time to come. But it was understood by the parties that the

property should not be alienated and rendered unavailable to the decree-holder for the satisfaction of his decree, but defendant No. 1 did not keep

that promise. The plaintiff is the son of defendant No. 1's mother's sister and admits to have financed the litigation between him and defendant No.

2's father. The latter succeeded in obtaining a decree against defendant No. 1, and within five days after it was confirmed by the High Court,

defendant No. 1 passed an agreement to sell the property for Rs. 2,100 said to have been due to him on account of the advances taken during the

litigation. No consideration was received by him in cash and the plaintiff admits that he did not even make an entry in defendant No. 1's khata in his

account books that Rs. 2,1100 had been received from him by way of consideration for the sale of the property. In view of the help he was

rendering to defendant No. 1 in his litigation, he must have been aware of the purshis passed by defendant No. 1, and in spite of that, as soon as

the decree of defendant No. 2's father was confirmed in appeal, the agreement of sale was collusively brought into existence in unseemly haste as

an obstacle in the way of the execution of that decree.

4. The learned District Judge has rightly pointed out that it is permissible to a debtor to give preference to one creditor over another and, therefore,

though the agreement may amount to a fraudulent preference of the plaintiff to the detriment of defendant No. 2, the validity of the agreement

cannot be impeached. The specific performance of such an agreement, however, need not be decreed merely because it is lawful. Courts can take

into consideration the conduct of the parties to the agreement and the circumstances attending its execution and can refuse to order specific

performance in their discretion and we think that this is a preeminently fit case for such refusal. The first instance cited in Section 22 of the Specific

Relief Act where the Court may properly exercise a discretion not to decree specific performance is where the circumstances under which the

contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there be no fraud or misrepresentation on the

plaintiff's part. Here the specific performance of the agreement in suit would certainly give the plaintiff an unfair advantage over defendant No. 2.

Really defendant No. 2 was not a necessary party to the suit for specific performance of the agreement between the plaintiff and defendant No. 1.

But in spite of the objection taken by defendant No. 2, the plaintiff insisted upon having a decree against both the defendants and this gave

defendant No. 2 an opportunity of resisting his claim and pointing out the circumstances under which the agreement was entered into. As pointed

out in Halsbury's Laws of England (Hailsham edition), Vol. XXXI, para. 418, p. 368, one species of unfairness which may stay the hand of the

Court is that the contract, if enforced, would be injurious to third parties. Here, though defendant No. 2 is not a party to the agreement, its specific

performance will be injurious to him as it will deprive him of the benefits of his attachment of the property in execution of his decree. It is open to

defendant No. 1 to give preference to his cousin and defeat or delay defendant No. 2 or any other creditor, but we are not prepared to assist him

in doing so when we are given a statutory discretion to refuse his request for assistance. There is no question of compensation in this case since the

plaintiff has not parted with any consideration in consequence of the agreement of sale and no damages have been claimed in the suit.

5. The appeal is dismissed with costs.