

Nirmala Anand vs Advent Corporation Pvt. Ltd. & Ors on 10 May, 2002

Equivalent citations: AIR 2002 SUPREME COURT 2290, 2002 AIR SCW 2416, 2002 (6) SRJ 463, (2002) 3 ALLMR 582 (SC), 2002 SCFBRC 3 535, 2002 (5) SCC 481, 2002 (2) UJ (SC) 906, 2002 (4) SLT 74, 2002 UJ(SC) 2 906, 2002 (1) JT (SUPP) 522, 2002 (3) ALL MR 582, 2002 (4) SCALE 601, 2002 (2) ALL CJ 1464, (2002) 2 CURCC 256, (2002) 4 ANDHLD 3, (2002) 4 SUPREME 255, (2002) 2 RECCIVR 815, (2002) 3 ICC 686, (2002) 4 SCALE 601, (2002) WLC(SC)CVL 512, (2002) 2 UC 238, (2002) 3 CIVLJ 603, (2002) 6 BOM CR 134

Author: Ashok Bhan

Bench: Ashok Bhan

CASE NO.:

Appeal (civil) 574 of 1988

PETITIONER:

NIRMALA ANAND

Vs.

RESPONDENT:

ADVENT CORPORATION PVT. LTD. & ORS.

DATE OF JUDGMENT: 10/05/2002

BENCH:

Ashok Bhan

JUDGMENT:

Bhan, J.

I have carefully gone through the judgment proposed by my learned brother. I agree with him that the 4th plaintiff appellant is entitled to the specific performance of the agreement dated 8.9.1966 entered into by her with defendant Nos.1 and 2 for sale of Flat No. 71 on the 7th floor of the building known as "Divya Prabha" situated at No. 12 A, Foreshore Road, Bombay. I am also in agreement with term Nos. (iii), (iv), (v) and (vi) imposed and set out by my brother in the last paragraph of his

judgment. But after giving considerable thought and with due deference and respect I am unable to pursued myself to agree to the proposed term (ii) wherein the 4th plaintiff has been fastened with the liability to pay an additional sum of Rs. 40 lakhs over and above the payment already made as condition precedent to the execution of the sale deed in her favour in pursuance to the agreement to sell.

In my view she is entitled to get the sale deed executed in her favour on payment of the sum mentioned in the agreement to sell (already paid and balance, if any) plus the amount she becomes liable to pay under term (iv) and first portion of term (v) for completion of building in case the appellant agrees to get the building completed from 7th respondent on payment of the prevailing market rates as per mutual agreement.

Reasons as to why term No. (ii) requiring the 4th plaintiff-appellant to pay the sum of Rs. 40 lacs and consequent term (vii) should not imposed are:

Section 20 of the Specific Relief Act, 1963 provides that relief of the specific performance lies in the discretion of the Court and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion cannot be exercised arbitrarily. It has to be exercised in a sound and reasonable manner guided by judicial principles. Sub-Section (2) enumerates the circumstances in which the Court may exercise its discretion in not granting the decree of specific performance; sub-section (3) gives guidelines for proper exercise of the discretion in decreeing the relief of specific performance; and sub-section (4) does away with the requirement of mutuality as a condition for grant of relief of specific performance. The circumstances enumerated in sub-sections (2) and (3) are not exhaustive.

Grant of relief of specific performance being discretionary, it cannot be claimed as a matter of right. It is governed by sound judicial principles and one of the foremost principle is that the Court should be satisfied that circumstances are such that it is equitable to grant the relief of specific performance of the contract. Under this principle one of the questions which has been considered at times by the Courts is: as to whether due to delay in the grant of decree and the escalation of prices of the real estate during the period is a ground to deny the relief of specific performance. It has repeatedly been held that per se the delay or the escalation of price is no ground to deny the relief of specific performance. In certain cases the Courts in equity and to mitigate the hardship to the vendor have directed the vendee to pay further compensatory amount. But this is not a principle of universal application. It would depend upon the facts and circumstances of each case.

Although facts have been succinctly brought about by my learned brother but it would be necessary for me to recapitulate a few facts.

Respondent No. 1 sometime in February, 1962 advertised in newspapers thereby calling upon the public to apply for flats in the building sought to be constructed and

named as "Divya Prabha". Various agreements with bonafide flat purchasers were entered into during that time. The appellant similarly entered into an agreement for the purchase of Flat No. 71 (7th Floor). The consideration amount to be paid by the appellant was Rs. 60,000/-. The building was to be completed and possession of flats was to be handed over on 30.6.1969. On 27.6.1969 Bombay Municipal Corporation (for short "the BMC") served notices on the lessees thereby terminating the lease of the plot of land on which "Divya Prabha" was constructed. The notices, inter alia, claimed that the termination was done as the lessees have committed defaults in payment of the lease rent and have also violated other terms of the lease. The stage of the construction of 'Divya Prabha' at that time was incomplete. At this point, it is germane to point out that subsequent to 1969 the construction of the building was again resumed on or around 1998 which continued till 1999. The building is still incomplete.

On 30th July, 1969, the appellant along with 7 other similar purchasers instituted a suit for specific performance of their flat purchase agreements. However, when the suit was finally adjudicated upon by the learned single Judge of the Bombay High Court (as trial Court on original side), all the plaintiffs except plaintiff No. 4 (appellant herein) and plaintiff No. 7 had settled their disputes with defendants-respondent Nos. 1 and 2. The Trial court in its order dated 23.3.1981 came to factual conclusion that the appellant had always been and is ready and willing to carry out her part of the agreement. The agreement was still valid and subsisting and Defendant No. 1 had committed breach of the agreement. Trial Court did not grant the specific performance of the agreement for the reasons that a Court ought not to grant a decree of specific performance in circumstances when the lease of the land on which the building stood terminated and the building was incomplete.

Appellant along with plaintiff No. 7 preferred an appeal before the Division Bench of the Bombay High Court. During the pendency of the appeal plaintiff No. 7 also entered into a settlement with the defendant No.

1. Appeal filed by appellant was dismissed on 15.7.1987. Appellate Court reasoned that the decree of specific performance could not be granted as the lease was yet to be secured from the Corporation; building plans were to be revived; and the entire building was to be completed before possession of the completed flat could be handed over to the appellant. It was held that in the circumstances the relief of the specific performance could not be granted. Thereafter, the appellant approached this Court in appeal by way of special leave petition which was granted.

It was brought to the notice of this Court, which fact is noted in the order dated 28.7.1999, that the building known as "Divya Prabha" had been sold by respondent Nos. 1 and 2 in favour of someone else. The Court directed the respondents to place on record the documents showing the sales/assignments of the said building or the respondents' rights therein. Subsequent purchaser of the building M/s Gaurva Overseas Pvt. Ltd. was thereafter added as Respondent No. 7. State of

Maharashtra was added as Respondent No. 8.

Another fact which needs to be mentioned is that the Government of Maharashtra promulgated an ordinance thereby amending Section 91B of the Mumbai Municipal Corporation Act. The said ordinance makes it lawful for the State Government to lease afresh to the Mumbai Municipal Corporation of any land specified in Schedule W for a term not exceeding 30 years. Counsel appearing for the BMC on 27.2.2002 made a statement before this Court that BMC now has a right to grant lease and revise the building plans of "Divya Prabha". The lease and the revised plan, on an application filed, can be granted provided the conditions laid down are fulfilled.

Another fact which needs to be noticed is that the parties during the pendency of the appeal tried to come to an amicable settlement of their dispute. Respondents offered to pay a sum of Rs. 60 lakhs to compensate the appellant in lieu of the specific performance of the agreement. The counsel for the respondents had taken the stand that the market value of the flat as on today was Rs. 1.80 crores and the appellant was prepared to accept a sum of Rs. 1.50 crores by way of damages. He later on scaled down the demand to Rs. 1.20 or 1.25 crores which was not acceptable to the respondents.

It is well-settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

My learned brother has already enumerated the reasons with which I agree that the appellant in the circumstances of the case is entitled to the specific performance of the agreement irrespective of the fact that certain permissions are required to be taken from the Government authorities for completing the building. I need not re-emphasise the same. The appellant had come to the Court for seeking specific performance of an agreement promptly. The Trial Court as well as the appellate Court have recorded a finding that the appellant was ready and willing, at the time of filing of the suit as well as later, to perform her part of the agreement and it was the defendants who were not prepared to perform their part of the contract. The appeal has been pending in this Court for the last 15 years. Delay by itself due to pendency of the suit/appeal in the courts is no ground to refuse the relief of specific performance unless certain compelling circumstances are brought on record to take a view to the contrary.

Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case.

In *Gobind Ram Vs. Gian Chand*, 2000 (7) SCC 548, this Court did grant an additional amount by way of compensation to be paid to the vendee. In the said case the vendor who was appellant had agreed to sell the disputed property situated at Lajpat Nagar IV, New Delhi, for a consideration of Rs. 16,000/- to the vendee, who was the respondent on 24.1.1973. A sum of Rs. 1,000/- was paid as earnest money. As the appellant did not execute the sale deed in spite of the time granted, the

respondent filed the suit for specific performance of the contract which was decreed. Immediately, on the decree of the suit the respondent deposited a sum of Rs. 15,000/- in the trial Court. The vendee filed the appeal in the High Court which was dismissed. However, to mitigate the hardship to the appellant and as the respondent agreed to pay more sum, the High Court directed the respondent to deposit a further sum of Rs. 1,00,000/- which was to be released to the vendor on giving possession of the suit property. The said sum was also deposited in the Registry of the High Court. The vendor came up in an appeal before this Court by way of special leave petition. Senior counsel who appeared for the vendor offered to pay a sum of Rs. 1,16,000/- to the vendee to cancel the contract and get out of the decree. The vendee after his appearance in this Court offered another sum of Rs. 50,000/- so as to make the total consideration of Rs. 1,50,000/-. This Court came to the conclusion that the vendor was trying to wriggle out of the contract due to escalation in prices of real estate properties and therefore under circumstances the vendor is entitled to get a decree as he had not taken any undue or unfair advantage over the appellant. On a concession made the vendor was directed to deposit a further sum of Rs. 3 lakhs. The conclusion recorded by this Court in para 9 is:

"In view of the above clear finding of the High Court that the appellant tried to wriggle out of the contract between the parties because of escalation in prices of real estate properties, we hold that the respondent is entitled to get a decree as he has not taken any undue or unfair advantage over the appellant. It will be inequitable and unjust at this point of time to deny the decree to the respondent after two courts below have decided in favour of the respondent. While coming to the above conclusion we have also taken note of the fact that the respondent deposited the balance of the consideration in the trial court and also the amount in the High Court, as directed. On the other hand the appellant, as held by the High Court, tried to wriggle out of the contract in view of the tremendous escalation of prices of real estate properties. However, to mitigate the hardship to the appellant we direct the respondent to deposit a further sum of Rs. 3,00,000/- within 4 months from today with the Registry of this Court and the amount shall be kept in short term deposit in a nationalised bank. While giving the above direction we have taken note of the offer made to us on behalf of the respondent. This amount is to be paid to the appellant on his giving possession of the suit property to the respondent within 6 months from the date of the deposit of the above amount.

The appellant shall also be entitled to withdraw the amount already deposit in the trial court and the amount of Rs. 1,00,000/- which has been kept in interest-bearing fixed deposit in the Registry of the High Court. "

[Empahsis supplied] It would be seen from the perusal of the judgment and the findings recorded by this Court that the amount by way of compensation was ordered to be paid by the vendee to the vendor on a concession made by the vendee.

In K.S. Vidyanadam & Ors. Vs. Vairavan, 1997 (3) SCC 1, this Court refused to grant the relief of specific performance of the contract due to escalation of price because the agreement stipulated that the vendee was required to purchase the stamp papers, tender the balance amount and call upon the

defendant to execute the sale deed and deliver possession of the property within a period of six months. It was after a lapse of 2-1/2 years that the proposed vendee issued a notice through his advocate to the proposed vendor -defendant stating that he had always been ready and willing to perform his part of the contract, requiring the defendants to execute the sale deed on payment of the balance amount. The Court while taking note of delay in filing the suit by the plaintiff came to the conclusion that the exercise of discretion vested in the Court may not be exercised in granting the relief of specific performance because of the escalation in price and the advantage sought to be taken by the plaintiff by filing the suit at a belated stage though within limitation. It was held:

"In the present case, the case of the defendants is acceptable. In the agreement of sale there is no reference to the existence of any tenant in the building. No letter or notice was issued by the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11.7.1981. From 15.12.1978 till 11.7.1981, i.e., for a period of more than 2-1/2 years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement. It is thus not a case of mere delay. It is a case of total inaction on the part of the plaintiff for 2-1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices according to defendants, three times between the date of agreement and the date of suit notice. They delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."

In V.Pechimuthu Vs. Gowrammal, 2001 (7) SCC 617, it was held that rise in price of the land agreed to be conveyed may be a relevant factor in denying relief of specific performance where the Court is considering whether or not to grant a decree for specific performance for the first time.

It would be seen in none of the above noted cases this Court has laid an absolute rule that the proposed vendee would be required to compensate the proposed vendor for the escalation of price of the land and building during the pendency of the proceeding in Court at different level.

The appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant.

Requiring the appellant to pay further sum of Rs. 40 Lakhs would/may amount to frustrating the agreement itself as the appellant may not be in a position to pay the sum of Rs. 40 lakhs. Respective counsel for the parties had quoted the figure of a particular sum which could be paid to the appellant in lieu of avoiding the decree of specific performance. The appellant had not made an offer to pay any additional sum over and above the quoted price to sell by way of compensation. It does not indicate the financial position of the appellant to pay the additional sum of Rs. 40 lakhs. With due respect, in my view, it would be unfair to grant the decree of specific performance by one hand and

take it back by the other.

For the reasons stated above, I am of the view that the appellant is entitled to the specific performance of agreement to sell the flat No. 71 on 7th floor of Divya Prabha Building on the price mentioned in the agreement to sell which would be subject to the terms (iii), (iv), (v) and (vi) of the last paragraph of the judgment of my learned brother. There would be no order as to costs.

.J. (Ashok Bhan) May 10, 2002