

Nur Mahomed Peerbhoy and another - - - - *Appellants*

v.

Dinshaw Hormasji Motiwalla and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER, 1922.

Present at the Hearing :

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

The suit in which these two consolidated appeals have arisen was brought in the Court of the First Class Subordinate Judge of Thana on the 11th August, 1913, by Dinshaw Hormasji Motiwalla against Adam Haji Jacob, alias Adam Abdulla Patel, Nur Mahomed Purbhai Damji, who is defendant 2, and Waman Ganesh Desai, the defendant 3, to obtain under the Specific Relief Act, 1877, a decree for the specific performance of a contract of sale of the 17th July, 1912, by which it was agreed that Adam Haji Jacob should sell and convey to Motiwalla, and Motiwalla should purchase :—

“ All that piece or parcel of land with the bungalow, trees, plants, shrubs, etc., and a well standing thereon, situate lying and being at Hill Road, Bandra, in the Thana District, Sub-District Bandra, admeasuring about 5,000 square yards, bearing Municipal No. 139 and City Survey No. 136, and bearing Collector's Survey No. 17, Pôt Nos. 2, 3, 4 and 5, admeasuring 25 Gunthas, and bounded on the East by property of Rustomji Muncherji Jasawala, on the West by property of Burjorji Ghamat, on the South by Government Hill Road, and on the North by the land of Mr. Dias, and which said premises are particularly described in the title-deed now in the possession of the mortgagees Sorabshah and Pirojsha Framji Bandrawala,”

for the price of Rs. 15,600, of which Rs. 1,000 were, in compliance with the contract, paid as earnest money by Motiwalla to Adam Haji Jacob on the execution of the contract. The purchase was to be completed within two months from the 17th July, 1912. The contract was registered by the Sub-Registrar of Bandra on the 22nd July, 1912. The only relief prayed for, to which it is necessary to refer, may, in effect, be briefly stated as follows :—That it should be decreed that Adam Haji Jacob, and the defendants 2 and 3, should execute a deed of sale in favour of Motiwalla, of the property described as bearing Municipal Number 139, and that Adam Haji Jacob should execute a deed of sale, in favour of Motiwalla, of the property described as bearing Collector's Survey Number 17, Pôt Numbers 2, 3, 4 and 5.

Adam Haji Jacob, by his written statement, admitted that the contract of the 17th July, 1912, was made and that he had received as earnest money Rs. 1,000, and pleaded, in effect, that he was ready and willing to convey to Motiwalla the property bearing Collector's Number 17, Pôt Numbers 2, 3 4 and 5, but that he was unable to convey to Motiwalla the property bearing Municipal Number 139, as it had been sold on the 25th April, 1913, to the defendant 2, in execution of a decree against him, Adam Haji Jacob.

The defendants 2 and 3, who claimed title under the Court-Sale of the 25th April, 1913, separately filed written statements, in which they pleaded that the contract of the 17th July, 1912, was void under Section 64 of the Code of Civil Procedure, 1908. They also pleaded that all the property in respect of which specific performance was claimed by Motiwalla, was purchased at the Court-Sale of the 25th April, 1913, by the defendant 2, and they further pleaded several other matters, which, in the view that their Lordships take of the case, need not be considered by them.

To the allegation that the whole property was included in the Court-Sale the plaintiff replied that on the face of the Sale only the property being Municipal Number 139 was included.

The history of the various executions as regards the lands in question are as given by the learned Judges of the Court of Appeal as follows :—

“ On the 19th of August, 1911, an attachment was levied by a judgment-creditor under Darkhast No. 32 of 1911, and in June, 1912, the property was put up for sale after being attached. On the 29th of August, 1912, the judgment-debtor, that is, the first defendant, paid in the whole of the decretal amount and costs, and therefore the sale was not confirmed, and the Darkhast proceedings were struck off on the 1st of October, 1912. Before the payment of the decretal amount, namely, on the 9th of August, 1912, another Darkhast was taken out by another decree-holder, being Darkhast No. 120 of 1912, and on the 10th of August the property was attached under that Darkhast. On the 12th of August the new decree-holder applied for rateable distribution of the proceeds of sale of the property. That application was refused on the ground that the money which had then been lodged in Court was not money realised in

execution, but paid him in order to avoid the completion of execution, and there were, therefore, no assets rateably distributable. His application having been refused, the second decree-holder applied for sale of the attached property, which was accordingly sold on the 25th of April, 1913. It was purchased by the second defendant for a sum of Rs. 11,500. On payment of the purchase-money by the second defendant, it became distributable under the provisions of Section 73 of the Code, and would be assets which those entitled to rateable distribution would look to so far as there had been execution under the attachment at that time subsisting."

The description of the property as given in the prohibitory order of the 19th August, 1911, was as follows :—

Creditors of Adam Haji Jacob had obtained against him a money decree, and in execution of that decree they, on the 19th August, 1911, obtained from the Court executing that decree a prohibitory order and attachment of the following immovable property of Adam Haji Jacob :—

" 1 One tiled house on the Hill Road at Kasba Bandra in Taluka Salsette, District Thana, having four slopes and walls of earth and stones (together with) the ground and the tenement, the front yard and the rear yard and the out-house and (together with) the room for preparing food and the kitchen and a hut of (*i.e.*, thatched with) palm-leaves for Mali (gardener) and (together with) one other small stable (roofed) with Mangalore tiles and a water-well and a privy and the pipe and (all) the appurtenances thereto. This house bears Municipal No. 139. (The house) including the fruit-bearing and flower-bearing trees and shrubs standing in the compound of this house and together with the fences and hedges. The four boundaries hereof are as follows :—The same is bounded on the east partly by a stone wall and partly by a Mendi hedge, and beyond that there is the property of Jehangir Rustomji Jasawala ; on the west by the stone wall belonging to the defendant himself, and beyond that there is the property of Burjorji Navroji Ghamat ; on the south by the public road and on the north by the following Survey Nos. in the Saja of Kasba Bandra :—

Survey No.	Pôt No.	Fa(lni) No.	Land.	Assessment.
			Acres. Gunthas.	Rs. a. p.
17	2	.....	0 4½	1 0 0
17	3	.....	0 4½	1 0 0
17	4	.....	0 12½	3 0 0
17	5	.....	0 4½	1 0 0."

Now the schedule of the prohibitory order of the attachment of the 10th August, 1912, specifies the property as being Municipal Number 139, and gives first the description of the property as given in the order of the 19th August, 1911, without specifying the boundaries. It is clear, therefore, that the sale of the 25th April, 1913, which forms the title of defendants 2 and 3, cannot include the land described as Survey No. 17, Pôt Numbers 2, 3, 4 and 5.

The Subordinate Judge dismissed the suit upon the ground that the contract of which the plaintiff asks specific performance

was made unavailable in respect of Section 64 of the Code of Civil Procedure, 1908. That section is as follows :—

“ Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.”

“ *Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.”

With Section 64 should be read Section 73 of that Code, which, so far as it is material in considering the facts of this case, is as follows :—

“ (1).—Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons.”

The Court of Appeal reversed this judgment and gave decree for specific performance.

The difference of opinion lay in this. The learned Subordinate Judge, relying on a judgment reported in 13 Bombay L.R., 1189, held that as Section 64 with its explanation made any transfer to follow on the contract void in a question with persons having a claim for rateable distribution, and as the executing creditor under the attachment of the 9th August, 1912, had applied for rateable distribution under the attachment of the 19th August, 1911, before the proceedings under that attachment were finally closed, that kept, so to speak, any transfer in respect of the contract of July, 1912, void until it was made finally void against him by the prohibitory order under his own attachment of the 9th August, 1912.

The Court of Appeal held that as the contract of July, 1912, was only a contract to sell, and not a transfer with delivery of any property or interest, Section 64 had no application. They then held that Section 40 of the Transfer of Property Act directly applied, and that in the terms of that section the plaintiff was a person entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, and as such entitled to enforce it against a transferee with notice ; and they held that the buyers at the Court-Sale had notice of the contract.

The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have to be considered whether what was said in the case of *Mina Kumari v. Bijoy Singh Dudhuria*, 44 I.A., p. 72 and p. 78, has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology of Section 64 of the Civil Procedure Code of 1908 from Section 276 of the Code of Civil Procedure of

1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the plaintiff's case fails on another ground.

Assuming that Section 64 has no effect, and that Section 40 of the Transfer of Property Act has full scope, it is only if the purchaser at the Judicial Sale bought with notice of the contract that it could be enforced against him. Now on this point the evidence seems to their Lordships quite unsatisfactory. Judicial Sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. The notice given here is said to have been given by a Mr. Kirtikar, a pleader acting on behalf of the plaintiff. But Mr. Kirtikar did not arrive at the sale until 4 p.m., the sale being begun before 3 p.m. He says he read the agreement, which was in English, but that he made a general statement in the vernacular that his client would claim on the property; further that the plaintiff himself would bid at the sale. Kirtikar's statements are denied by the defendants' witnesses. But taking them at their best, they seem to their Lordships far short of such unequivocal notice as ought, they think, to have been given in the case of a Court-Sale.

Their Lordships think that the plaintiff fails in his case. The result is that, inasmuch as their Lordships have already held that the appellants have not purchased plots Pôt Numbers 2, 3, 4 and 5, and have no *locus standi* to resist the plaintiff's claim in respect of those plots, but that, on the other hand, they have made out their claim to retain plot Municipal Number 139, the decree for specific performance cannot stand, and the appeal must be allowed; but the first respondent should have liberty to apply in the High Court, if so advised, to have a decree for specific performance in respect of plots Pôt Numbers 2, 3, 4 and 5 upon such terms as to the Court may seem just. The order of the Subordinate Judge that Adam Hadji Jacob should repay Motiwalla Rs. 1000 should stand. The appeal from the Decree of the High Court in Adam Haji Jacob's appeal to the High Court should be dismissed. The appellants will have the costs of the consolidated appeals. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

NUR MAHOMED PEERBHOY AND ANOTHER

vs.

DINSHAW HORMASJI MOTIWALLA
AND ANOTHER.

DELIVERED BY LORD DUNEDIN.

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