
Malkhan Singh Vs Raghubir Singh

Second Appeal No. 1622 of 1976

Court: Allahabad High Court

Date of Decision: Nov. 20, 1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 9 Rule 13, 100#Evidence Act, 1872 " Section 33#Specific Relief Act, 1963 " Section 16, 20

Citation: AIR 1981 All 96

Hon'ble Judges: S.D. Agarwal, J

Bench: Single Bench

Advocate: G.C. Devedi, for the Appellant; G.N. Verma, for the Respondent

Final Decision: Dismissed

Judgement

S.D. Agarwal, J.

This is a defendant"s second appeal arising out of a suit filed by the plaintiff-respondent Raghubir Sineh for specific

performance of an agreement of sale dated 5-9-1970 by virtue of which it was alleged that the appellant had agreed to sell to the plaintiff-

respondent his Khata No. 15 area 8 Bighas 4 Biswas and 10 Biswansis for a sum of Rs. 16,000. The case of the plaintiff-respondent was that on

5th September, 1970 the appellant Malkhan Singh executed an agreement to sell the plots in dispute for a sum of Rs. 16,000, A sum of Rs.

11,000 was paid to the appellant as part payment of the agreed price. The appellant further agreed to execute the sale deed in respect of the

disputed land on payment of balance consideration of Rs. 5,000 within a period of nine months. It was alleged by the plaintiff-respondent that in

spite of several requests the appellant did not execute the sale deed and hence the plaintiff-respondent gave a notice on 6-5-1971 asking the

appellant to execute the sale deed. This notice was refused by the appellant and as such the suit was filed on 2-6-1971.

2. The defendant-appellant denied the execution of the agreement of sale D/- 5-9-"70. He denied having recorded (received?) a sum of Rs.

11,000 as advance money. It was further alleged by him that the property was worth Rs. 26,000 and as such there was no question of agreeing to

execute a sale deed for Rs. 16,000 only. In the additional pleas the case set up by the appellant was that the plaintiff-respondent Raghbir Singh

and his father Munshi Singh and brother intended to purchase a tractor, and for the said purpose they took loan from the State Bank of India, in

favour of Munshi Singh and the plaintiff-respondent and his father Munshi Singh and brother requested the appellant to accompany them to Iglas to

attest the mortgage deed securing the aforesaid loan from the State Bank of India. The said mortgage deed was attested by the appellant on 8th

September, 1970 and on that date the plaintiff-respondent, his father Munshi Singh and brother obtained the appellant's signatures on various

papers including some stamp papers under the pretext of the attestation of the mortgage deed. In substance the defence was that the appellant

never intended to agree to sell the property to the plaintiff-respondent when he put the signatures on the deed dated 5th September, 1970 but in

fact, he intended to sign as an attesting witness to the mortgage deed.

3. In the written statement no objection was taken by the appellant that the suit was premature or that it was barred by Section 16 of the Specific

Relief Act. Only two questions were urged firstly whether there was any agreement dated 5-9-1970 and as to whether the appellant was paid Rs.

11,000. On both these questions the trial court recorded a finding of fact that the agreement was entered into by the appellant on 5-9-1970 and

that he was paid a sum of Rs. 11,000. The suit was accordingly decreed by the trial court on 30th May, 1973. Against the said judgment an

appeal was filed before the lower court. In the appeal only these questions were reiterated. The lower appellate court agreed with the finding

recorded by the trial court and dismissed the appeal on 30th July, 1976. Aggrieved by the judgment dated 30th July, 1976, the present appeal has

been filed in this Court,

4. Learned counsel for the appellant raised three contentions before me. His first contention is that the finding recorded by the lower appellate

court in regard to the execution of the agreement is vitiated in law as the lower appellate court set up a new case. The appellant had never set up a

case that the agreement was executed? on a blank paper. His case was that, in fact, the agreement was executed by the appellant but it was sought

to be a surety deed and not an agreement of sale.

5. The second submission of the learned counsel is that the suit is barred by Section 16 of the Specific Relief Act and the third submission of the

learned counsel is that the suit is premature and as such is not maintainable in law.

6. I have heard the learned counsel for the parties at great length.

7. In the written statement the appellant had taken the plea that when the plaintiff-respondent, his father Munshi Singh and brother went to attest

the mortgage deed executed by Munshi Singh in favour of the State Bank of India, the signatures in question on the documents were obtained on

the pretext that the appellant was attesting the deed of mortgage. When the defendant Mal-khan Singh came in the witness box, he changed his

case and further set up a case that at the time when he went to attest the mortgage deed some signatures were obtained from him on blank paper.

It was in view of this statement of the appellant Malkhan Singh that the counsel for the appellant argued before the trial court that the deed in

question was prepared on blank paper containing the appellant's signatures and it was urged that it was so prepared in collusion with the scribe

Dhurva Kumar and the attesting witness Rawati and Babu Lal. This was the own case of the appellant which was argued by his counsel before the

trial court. Both the defences set up by the appellant were rejected by the trial court and it was held that the agreement of sale was executed by the

appellant voluntarily after having taken a sum of Rs. 11,000 as consideration for the agreement of sale. In the lower appellate court, the learned

counsel for the appellant again urged that the agreement in question was executed on the Blank paper on which signatures have been obtained

fraudulently by the plaintiff-respondent, his father Munshi Singh and brother. This question was considered by the lower appellate court in the light

of the circumstances and evidence on the record and the submission made by the learned counsel for the appellant was rejected by the lower

appellate court. The case of Blank paper having been set up by the appellant himself in the evidence which was led before the trial court and the

said case having been argued before both the lower appellate court as well as the trial court it cannot be said that the lower appellate court had

acted illegally and with material irregularity in setting up a new case for the appellant. This submission of the learned counsel is wholly without any

substance. The trial court as well as the lower appellate court clearly recorded a finding of fact that the agreement of sale was executed by the

appellant on 5-9-1970 and that he had also received a sum of Rs. 11,000 as part payment of the price of the land in dispute. These are clearly

findings of fact and I do not find any error of law in these findings.

8. The second submission made by the learned counsel is on the basis of Section 16 of the Specific Relief Act. It is urged by the learned counsel

for the appellant that the plaintiff has failed to aver and prove that he has performed or has always been ready and willing to perform the essential

terms of the contract and as such the suit is barred by Section 16(c) of the Specific Relief Act, 1963. At the out set it may be stated that neither

this plea was taken by the defendant-appellant nor any issue was got framed nor this question was argued either before the trial court or the lower

appellate court. In any case since this question was a pure question of law. I permitted the learned counsel to argue on this question.

9. In paragraph 4 of the plaint it has been specifically averred by the plaintiff-respondent as follows:--

That the plaintiff has been and still is ready and willing to specifically perform the contract on his part of which the defendant has had notice.

10. Thereafter the statement of the plaintiff-respondent Raghubir Singh was recorded on 11th October, 1971 and in this statement he categorically

stated that he was ready and is still ready to pay the money to the appellant and get the sale deed executed. The plaintiff was again examined on

24th March, 1972 but the appellant had not cross-examined the plaintiff-respondent on this question at all. In the circumstances on the record it is

clear that the plaintiff-respondent has not only offered but also proved that he has always been ready and willing to perform the essential terms of

the contract. There is in the circumstances complete compliance of Section 16(c) of the Specific Relief Act and this submission, therefore, made by

the learned counsel for the appellant has also no substance.

11. Learned counsel for the appellant has further contended that the statement of the plaintiff-respondent which was recorded on 11th of October,

1971 was not admissible in evidence as it was an ex parte statement and since the ex parte decree had been set aside, this statement could not be

relied upon. In support of this contention he has relied upon two cases, one of this court Mst. Lakshmi Devi Vs. Roongta and Co. and Others, and

the other case of Andhra Pradesh High Court, Aziz Ahmed Khan Vs. I.A. Patel, which is a Full Bench decision of that court.

12. In the case of Mst. Lakshmi Devi Vs. Roongta and Co. and Others, a Division Bench of this Court had opined that since the evidence of

Goverdhan had been recorded in the absence of the defendant and the defendant had no opportunity of cross-examining the witnesses, the

evidence of Goverdhan should not be relied upon. The ratio of the decision is that the evidence recorded in the absence of a party could not be

relied upon and as such was inadmissible in evidence as the party against whom the statement was recorded did not have an opportunity of cross-

examining the witness. In my opinion this principle would not apply in the present case. Here the plaintiff-respondent Raghubir Singh was examined

as P.W. 1 on 11th October, 1971. Thereafter an ex parte decree was passed against the appellant. The ex parte decree was set aside. After

setting aside the ex parte decree Raghubir Singh was again produced as a witness and he was cross-examined at length on behalf of the appellant.

It is not a case where once a witness has been examined ex parte and the witness was not called thereafter, again after setting aside the ex parte

decree. In this view of the matter, I am of the opinion that the statement of P.W. 1 which was recorded on 11-10-1971 would be admissible in

evidence as P.W. 1 was recalled, was examined in court and the appellant had full opportunity of cross-examining him. P.W. 1 was not cross-

examined on the statement that he was always ready and willing and was still ready to perform his part of the contract. In the Full Bench decision

of Andhra Pradesh High Court, also the Full Bench at page 5 had observed as follows:--

The question therefore is can the previous statement on oath of the plaintiff recorded in the absence of the defendant before the ex parte decree

was passed be used per se as legal evidence against the defendant at a later stage after the ex parte decree is set aside. Of course, no such

question would have arisen had the plaintiff been called once again and his statement recorded even though it may be in the absence of the

defendant as the proceedings were set ex parte.

13. The case, therefore, of the Andhra Pradesh High Court, was a case where the plaintiff was not called once again to record his statement. In the

circumstances, the Full Bench of the Andhra Pradesh High Court does not, in fact support the appellant but supports the plaintiff-respondent. In

view of the above, I am of the opinion that the evidence of P.W. 1 dated 11-10-1971 was clearly admissible in evidence and both the cases Mst.

Lakshmi Devi Vs. Roongta and Co. and Others, as well as Aziz Ahmed Khan Vs. I.A. Patel, do not help the appellant.

14. There is another aspect of this matter. Even if it is taken that the statement dated 11-10-1971 was not admissible in evidence. Then too in the

instant case when the plaintiff-respondent Raghubir Singh was recalled as a witness, he again stated on 24-3-1972 that he repeatedly asked the

appellant to execute the sale deed in his favour and on 6-5-1971 he sent a registered notice asking the appellant to execute the sale deed. This

notice was proved by him. In the notice it has been clearly stated that he is prepared to get the sale deed executed after the payment of the balance

consideration. The notice was served by refusal and only a few days thereafter the suit was filed on 2-6-1971. It is, therefore, clearly established

that the appellant had proved even on the basis of the second statement dated 24-3-1972 that he has always been ready and willing to perform the

essential terms of the contract. In this view of the matter the second submission of the learned counsel, in my opinion has no substance.

15. In regard to the last submission made by the learned counsel for the appellant that the suit was not maintainable as it was premature. In regard

to this submission also, In my opinion, it has no substance. In regard to this question also there was no plea in the written statement nor any issue

for any argument either before the trial court or the appellate court nor any grounds was taken before the lower appellate court or before this

Court. The only argument which is now sought to be made is that the appellant could have executed the sale deed by 4th June, 1971 and since the

suit was filed on 2-6-1971, the suit was premature. This argument is also fallacious. In the agreement the appellant had agreed to execute the sale

deed by 4th June, 1971. On 6th May, 1971 a notice was sent to the appellant to execute the sale deed by virtue of the agreement dated 5-9-

1970. This notice was not accepted by the appellant and was served by refusal. The case of the appellant throughout had been that he had not

executed the agreement at all. In the circumstance, the suit cannot be said to be premature as it was filed after the appellant had clearly refused to

execute the sale deed in favour of the plaintiff-respondent. In the circumstances, I do not find that the suit is premature. There is another aspect of

the matter. On the date when the decree was passed by the trial court, the suit was clearly maintainable and even till that date the appellant had not

signified his assent to execute the sale deed, therefore, it cannot be said that the decree passed by the trial court was in any manner illegal.

16. In the result, I do not find any force in this appeal. It is accordingly dismissed but in the circumstances of the case parties are directed to bear

their own costs.