

**(2004) 02 AHC CK 0106**

**Allahabad High Court**

**Case No:** Second Appeal No. 749 of 1986

Sheo Murat

APPELLANT

Vs

Ram Murat

RESPONDENT

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**Date of Decision:** Feb. 23, 2004

**Acts Referred:**

- Specific Relief Act, 1963 - Section 26, 26(2)

**Citation:** AIR 2004 All 263 : (2004) 2 AWC 1320

**Hon'ble Judges:** Umeshwar Pandey, J

**Bench:** Single Bench

**Advocate:** Faujdar Rai and Chandra Kumar Rai, for the Appellant; A.K. Singh and Hari Om Khare, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Umeshwar Pandey, J.

This second appeal arises out of a suit filed by the appellant-Sheo Murat for rectification of the sale deed u/s 26 of the Specific Relief Act.

2. The brief facts are that the appellant-Sheo Murat filed Original Suit No. 250/1978 in the Court of Munsif, Azamgarh for the rectification of the aforesaid sale deed executed by the defendant late Shital Dan in favour of the respondent-defendant Ram Murat in respect of his agricultural property. The plaintiff Sheo Murat and the defendant No. 1 are the real brothers and the defendant late Shital Dan was their real uncle. The appellant claimed rectification of the sale deed executed by his uncle on the ground that earlier to the execution of the aforesaid sale deed, he had executed an agreement of sale dated 8.11.1975 in respect of the same property in favour of these two brothers (plaintiff and defendant No. 1). He agreed for transfer of the said property for a total consideration of Rs. 12,000, out of which he received Rs. 8,000 by half and half from both the brothers as earnest money. He also agreed that after his coming back from religious pilgrimage, he would execute the sale

deed on receiving the remaining sale consideration of Rs. 4,000 from the plaintiff and defendant No. 1. On his coming back late Shital Dan, after receiving the remaining sale consideration of Rs. 4,000 for which the half contribution was done by the plaintiff, executed the sale deed but instead it being a sale deed in favour of both the brothers, it was executed only in favour of the defendant No. 1 Ram Murat. On coming back after execution of the sale deed, it was reported to the plaintiff by the defendants that the sale deed was executed in favour of both the brothers i.e., plaintiff and the defendant No. 1. But later on, the plaintiff came to know that by practising fraud and misrepresentation, the defendant No. 1, Ram Murat got the sale deed executed only in his favour which was later on confirmed by inspection of the record in the office of Sub-Registrar. The defendant No. 1 Ram Murat also accepted his mistake in getting the sale deed executed solely in his name.

3. The defendant No. 1 Ram Murat contested the suit and filed a written statement disputing the execution of agreement of sale dated 8.11.1975. He also pleaded that the agreement is forged and antedated and late Shital Dan as vendor had settled the deal of sale of his disputed property with him only and in pursuance thereto he executed the sale deed in question. There was no occasion for late Shital Dan to execute the sale deed of half of his property in favour of the plaintiff Sheo Murat. He further pleaded that late Shital Dan in connivance with the plaintiff, after execution of the sale deed, had executed the agreement by antedating it. The entire sale consideration was paid by him and no portion of it was paid by the plaintiff. The contesting defendant also pleaded that the plaintiff was not entitled for rectification of the sale deed.

4. Late Shital Dan, the defendant No. 2, was alive and he had filed written statement stating that he had executed agreement dated 8.11.1975 consenting to transfer his property in question to both of his nephews (plaintiff and defendant No. 1) for a sale consideration of Rs. 12,000. He also admitted that both brothers paid Rs. 4,000 each to him as earnest money and the remaining amount was to be paid after his coming back from the religious tour. After his return from the religious pilgrimage, he was told by the defendant No. 1 Ram Murat that the sale deed has to be executed in accordance with the agreement dated 8.11.1975. Late Shital Dan was satisfied with the assurance given to him by the defendant No. 1 about the sale deed having been executed in accordance with the earlier agreement. Late Shital Dan defendant No. 2 further pleaded that taking advantage of his illiteracy and ignorance, defendant No. 1 got the sale deed in question, executed solely in his favour and excluded the plaintiffs name from it.

5. After filling of the written statement, the defendant No. 2-Shital Dan died and he could not be available at the time of final hearing of the suit to record his evidence.

6. On the pleadings of the parties, the learned trial court framed as many as five issues. He after due appreciation of the evidence on record, found that the agreement dated 8.11.1975 was actually executed by late Shital Dan in favour of his

two nephews i.e., plaintiff and the defendant No. 1, and the earnest money of Rs. 8,000 paid at that time, was contributed half and half by both of them. He also held that subsequent execution of sale deed was the result of fraud and misrepresentation practiced upon the vendor-late Shital Dan by the defendant No. 1.

7. Learned trial court in accordance with the aforesaid finding held that the plaintiff-appellant though was not party actually shown in the sale deed dated 29.3.1978, was however entitled for rectification of the same and the suit was decreed. Aggrieved with the aforesaid judgment and decree passed by the trial court, the respondent defendant No. 1 Ram Murat preferred First Appeal No. 296/1980 before the District Judge which was ultimately decided vide impugned judgment and order dated 20.11.1985 by the 1st Additional District Judge, Azamgarh. The first appellate court found that the plaintiff-Sheo Murat, not being a party to the impugned sale deed dated 29.3.1978, is not entitled to maintain a suit for rectification of the same u/s 26 of the Specific Relief Act and also held that the particulars of fraud in execution of the said sale deed having not been given in the plaint, the decree passed by the trial court was reversed and the suit was dismissed by the impugned judgment. Thereafter, this second appeal has been brought by the plaintiff against the aforesaid judgment and decree dated 20.11.1985 passed by the Additional District Judge.

8. Learned counsel for the parties have been heard at length and substantial question of law which needs determination in this appeal was framed as following :

"Whether a suit for rectification of instrument u/s 26 of the Specific Relief Act, 1963 is maintainable on behalf of a person who is not a party to the said instrument, sought to be rectified."

9. A perusal of the impugned judgment of 1st appellate court shows that the aspect of plaintiff being not a party to the disputed sale deed, has weighed a lot in dismissing the suit filed u/s 26 of the Specific Relief Act. This Court is not going into the finding of the facts recorded and from the evidence, it is clear that in the present context there is hardly any scope to hold that on the basis of the material available on record, there was no agreement in existence prior to the execution of the impugned sale deed dated 29.3.1978. The original agreement is on record which stood proved by the sufficient evidence led in the trial court by the plaintiff and on that basis only the trial court recorded that the agreement dated 8.11.1975 is a genuine document which was also admitted in his pleadings by its executants the late Shital Dan, the defendant No. 2 before his death. In the face of this agreement, how and under what circumstances the sale deed in question was got scribed and registered in favour of defendant No. 1-Ram Murat only, is not explainable and circumstances present in the case lead to irresistible conclusion that the defendant No. 2 had taken Shital Dan to the Office of Sub-Registrar for execution of this sale deed dated 29.3.1978, in pursuance to the earlier agreement dated 8.11.1975 only.

If it was the actual state of affairs, the impugned sale deed executed only in favour of Ram Murat has to be treated either a result of commission of fraud and misrepresentation as pleaded by the plaintiff or under some mistake of both the defendants. There could not be any other conclusion than this and if such fraud and mistake has resulted into some incorrect averment appearing in the instrument, the same needs rectification.

10. The finding of the learned lower appellate court that the particulars of fraud having not been pleaded in the plaint and as such the rectification of the sale deed sought for, on that ground cannot be permitted, appears to be patently misconceived. The learned Judge has failed to peruse paragraphs 8 to 11 of the plaint, which specifically deals with the details of the commission of fraud and misrepresentation practised by defendant No. 1 against the plaintiff as well as against the executant of the sale deed, late Shital Dan. There is ample of evidence on record to prove this factum that it is by practising fraud and misrepresentation the name of plaintiff-appellant, Sheo Murat, was omitted from the impugned sale deed.

11. The principal question in the present case which thus, remains is "if the plaintiff, Sheo Murat who is not a party to the sale-deed, has a right for rectification of the said instrument and maintain the present suit". Learned lower appellate court relying upon *Durga Prosad Sureka and Ors. v. Bhajan Lal and Ors.* 1931 ILR Cal 614 (also in ILR Vol. XXXI IA 122) held that such right of rectification cannot be available to the plaintiff in the present case. The reliance placed by the learned Judge upon the aforesaid case in the manner stated in the impugned judgment, appears to be wholly erroneous. In the aforesaid judgment of *Durga Prosad Sureka's* case (supra), Lord Robertson while delivering the judgment for the Bench has negated the finding of the High Court challenged before the Privy Council in the aforesaid appeal. The relevant portion of the judgment is being extracted as below :

"On the case coming by appeal before the High Court a view of the case was taken which their Lordships consider much too narrow. The High Court treated the action as founded on the bought and sold notes ; and, holding the appellant to his reference to them by date (November 1, 1899), in prayer (a) and to his application, in prayer (c), that those should be rectified, they pointed out that he had been refused this relief and had not appealed against the refusal, or objected to the decree u/s 561 of the Code of Civil Procedure. Accordingly the High Court expressed their rather surprising conclusion as follows : "We think therefore, that, inasmuch as under the circumstances it is not now competent to us to rectify the bought and sold notes, and since the plaintiff is precluded from proving his contract by any evidence other than the document itself, the appeal must be allowed and the suit dismissed.

The learned counsel for the respondents did not support this ground of judgment. The High Court was completely possessed of the case of the appellant Sureka ; his

case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence which, while disproving the bought and sold notes, proved the contract which they falsely purported to record. For this case no rectification was needed, and it was not touched by the 92nd Section of the Evidence Act, Nor did the misconception which led to the mention of November 1, 1899, create any substantial obstacle in the way of justice being done or necessitate so unsatisfactory a conclusion as that which has led to this appeal."

The High Court had held that it was not competent to rectify the agreement but it had not held that either of the two parties which challenged the agreement, was not party to the said agreement. On some other ground, the High Court had found that it was not competent for it to rectify the "bought and sold notes". The Privy Council in view of the fact situation of that case, held in appeal against the judgment of the High Court that no rectification was needed and it was not touched by Section 92 of the Evidence Act.

12. Section 26, Sub-section (2) of the Specific Relief Act provides as following :

"(2) If any suit in which a contract or other instrument is sought to be rectified under Sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far ,as this can be done without prejudice to rights acquired by third person in good faith and for value."

13. In the aforesaid context, the learned counsel for the appellant-plaintiff has cited the case law of [Ram Suchit and Another Vs. 1st Additional District Judge, Gorakhpur and Others](#) , which recognises the right of third party to the instrument also in a suit for rectification of the same u/s 26 of the Specific Relief Act. It has been observed by the learned single Judge :

"It is, thus, clear that where rights have accrued in favour of a third person who has acted in good faith and has paid value, rectification may be refused. The petitioners claim to be such third person and they are entitled to bring relevant facts to the notice of the Court."

14. In the case of Chandan Singh v. Atma Ram and Ors. 1979 ALJ 430, also the right of third party in a suit u/s 26 of the Specific Relief Act, has been recognised. In this case, there was mistake in the instrument of lease about plot number which was sought to be rectified by the lessee in the suit filed against a third party.

15. In the case of Balaprasad Asaram Charkha and Ors. v. Asambi AIR 1954 Nag 328, also, a Division Bench has held that the Courts in such cases are supposed to find out the true intentions of the parties in executing the document.

16. While incorporating the earlier provision of Specific Relief Act (1877) in Section 31, the Privy Council in case of AIR 1946 42 (Privy Council) , it has been propounded

that the Court is to find out if there has been a mistake in framing the instrument and it must ascertain the real intention of the parties in executing the instrument. On being satisfied by those two elements, it is in the discretion of the Court to grant rectification. Lord Thankerton while delivering the judgment for the Bench has observed as below :

"The plaintiffs (the present respondents) must prove that it was through a mutual mistake of the parties that the three contracts in question did not truly express the intention of the parties ; and the duty of the Court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument, and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements, it is in the discretion of the Court to grant rectification."

17. In the present case, the obvious factor for a decree . of correction of the instrument granted by the trial court which is based on the evidence recorded, is that there was an agreement of sale dated 8.11.1975 executed prior to the date of the sale deed dated 29.3.1978. The agreement being in favour of both the brothers i.e., plaintiff and defendant No. 1, the subsequent sale deed could not be in the name of defendant No. 1/respondent only and it is definitely, as reflected from the evidence, is a result of fraud and misrepresentation acted upon the executant of the sale deed-Shital Dan by the respondent No. 1 Ram Murat. As such, the error had crept in the sale deed by excluding the name of the plaintiff-appellant as a beneficiary of the transaction. If a prayer by such third party has been made before the Court u/s 26 of the Specific Relief Act and keeping in view the principle of the case law of Ram Suchit and Anr. v. Ist Additional District Judge, Gorakhpur and Ors. (supra) and Chandan Singh v. Atma Ram and Ors. (supra) the desirability of considering the right and interest of such third party to the instrument cannot be questioned by adopting a straitjacket formula that third party to an instrument does not have a locus u/s 26(2) of the Specific Relief Act. Section 26 aforesaid should be deemed to be carrying a broader scope of even permitting a third party also to the instrument to appeal and pray to the Courts for rectification of such mistake deliberately created by practice of fraud.

18. In the aforesaid view of the matter and the circumstances as are appearing in this case, the appellant-respondent cannot be deprived of his right for rectification of the sale deed which was to be executed in favour of both the brothers but one of the brothers got it executed solely in his favour by committing fraud against his uncle, the executant of the sale deed. This sale deed could not be executed in accordance with the agreement earlier reached between the defendant No. 2 (Sheetal Dan) on one side and the appellant-plaintiff and defendant No. 1 on the other side. If one of the beneficiaries of that agreement has filed a suit for correction of the subsequent sale deed u/s 26 of the Specific Relief Act, his right to that extent has to be recognised. The trial court took a right view of the matter and

decreed the suit for the reliefs, prayed for. The learned appellate court taking erroneous view of the whole aspect had arrived at a wrong conclusion and without acceptable justification had reversed the decree granted by the trial court.

19. In the result, the appeal is allowed with cost through out. The impugned judgment and order dated 20.11.1985 passed by the lower appellate court is set aside and the decree of the trial court is restored.