

(2007) 12 AHC CK 0117

Allahabad High Court

Case No: None

Bhopal Singh

APPELLANT

Vs

Nepal Singh and Jaipal Singh,
Smt. Yashpal Kaur and Smt.
Samantra

RESPONDENT

Date of Decision: Dec. 12, 2007

Acts Referred:

- Specific Relief Act, 1963 - Section 16

Hon'ble Judges: Tarun Agarwala, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Tarun Agarwala, J.

The plaintiff instituted a suit for specific performance alleging that defendant No. 1 had executed a registered agreement to sell dated 4.1.1973 for a total consideration of Rs. 10,500/- in favour of the plaintiff and that a sum of Rs. 5,500/- was paid as advance. The plaintiff contended that this advance was paid basically to enable the defendant No. 1 to repay the bank loan. It was also agreed that the balance amount of Rs. 5000/- would be paid at the time of the registration of the sale-deed which was to be executed within a period of two years. The plaintiff contended that based on the registered agreement, he was given the possession of the land on 4.1.1973 itself and, since then is tilling the land. The plaintiff contended that he gave a notice dated 8.11.1974 to the defendant No. 1 to-execute the sale-deed and, inspite of the receipt of the notice, the defendant No. 1 did not turn up before the Sub Registrar for the execution of the sale-deed. The plaintiff contended that he was always ready and willing to perform his part of the agreement but the defendant No. 1, for reasons best known to him, did not come forward to honour his part of the agreement. The plaintiff contended that subsequently he came to know that the defendant No. 1 had sold the land to the defendant Nos. 2 and 3 by a registered

sale-deed which was nothing but a sham transaction. Consequently, the plaintiff prayed that the relief for specific performance be granted and, in the alternative, a decree of Rs. 10,000/- be passed.

2. The defendant No. 1 resisted the suit alleging that no agreement was ever executed by him and that no money was advanced by the plaintiff or was taken by him. Further, no possession of the land was ever given to the plaintiff. The defendant No. 1 contended that he was a simple rustic person whereas the plaintiff was a smart and a clever man, in whom the defendant No. 1 had deposited full trust and faith and who used to help the defendant No. 1 in various works. The defendant contended that he had in fact executed an agreement to sell in favour of the defendant Nos. 2 and 3 in the year 1971 for a sum of Rs. 20,000/- and pursuant to that agreement, a sale-deed dated 5.11.1974 was executed in their favour and, since then, the said defendants are in possession. The defendant No. 1 submitted that he had executed a security bond with the plaintiff for the purposes of securing a job and had not executed an agreement to sell. The plaintiff denied that he had signed the document knowing it to be an agreement for sale. The defendants further alleged that the suit was barred by Section 16 of the Specific Relief Act.

3. The defendant Nos. 2 and 3 also filed their written statement alleging that the plaintiff and the defendants belonged to the same family and were related and that the defendant Nos. 2 and 3 are bonafide purchasers for value and had no knowledge of any agreement being executed between the plaintiff and defendant No. 1. The said defendants further reiterated about the execution of the agreement of 1971 and the execution of the sale-deed of 1974 in their favour.

4. On the basis of the pleadings, various issues were framed and evidence was led by the parties. The trial court, after considering the evidence brought on the record, partly decreed the suit holding that an amount of Rs. 5,500/-, was advanced by the plaintiff to defendant No. 1, was liable to be returned along with 6% interest, pendelite and future. The trial court found that the suit was not barred u/s 16 of the Specific Relief Act and that the plaintiff was always ready and willing to perform his part of the agreement. The trial court held that the alleged agreement dated 4.1.1973 could not be proved since there were contradictions made by the various witnesses with regard to the point of time of the execution of the said agreement. The trial court further found that the payment of Rs. 5,500/- pursuant to the agreement was not fully proved though the advance given by the plaintiff to defendant No. 1 stood proved. The trial also found that the plaintiff was not in physical possession of the land in dispute.

5. The plaintiff, being aggrieved by the dismissal of the suit for specific performance filed an appeal. The defendant Nos. 2 and 3 also filed an appeal with regard to the recovery of the amount. Both the appeals were heard together by the lower appellate court. The lower appellate court, after reappraising the evidence, allowed the appeal of the defendant Nos. 2 and 3 and reversed the findings of the trial court

with regard to the recovery of the amount. The appeal of the plaintiff for specific performance was dismissed.

6. Aggrieved by the decision of the court below, the plaintiff has preferred the second appeal which was admitted on the following substantial question of law, namely:

Whether the finding of the lower appellate court on the issue of execution of the agreement in question is vitiated in law by reason of its having failed to appreciate the legal effect of the defendant No. 1 having admitted his signatures and thumb impressions on the deed of agreement but failed to establish the circumstances in which the signatures and thumb impressions were appended to the deed of agreement.

7. Heard Sri K.R. Sirohi, the learned senior Counsel for the plaintiff-appellant assisted by Sri Deo Kant Pandey, Advocate and Sri B. Malik, the learned Counsel for the defendant-opposite parties.

8. During the pendency of the appeal before the second appellate court, the defendant No. 1 died leaving behind defendant Nos. 2 and 3 as his legal heirs and representatives. Needless to say, defendant Nos. 1 and defendant No. 2 are real brothers and defendant No. 3 is the wife of defendant No. 2. Further, the plaintiff is a cousin of defendant No. 1.

9. The learned Counsel for the appellant submitted that the plaintiff had been non-suited on the ground of contradictions given by various witnesses. The learned Counsel submitted that the contradictions were minor in nature, which could not vitiate the validity or the execution of the agreement dated 4.1.1973. Further, the finding of the court below with regard to the pronote and its payment, based on the advance given by the plaintiff was totally irrelevant and perverse and against the material evidence on the record. The learned Counsel submitted that the alleged agreement was duly proved, and based on the said agreement, an amount of Rs. 5,500/- was advanced which was utilised by the defendant No. 1 towards the clearance of the bank dues. The learned Counsel submitted that the courts below failed to appreciate the evidence that was brought on the record. The learned Counsel submitted that even the appellate court had found that the money was advanced to the defendant No. 1, inspite of which the claim of the plaintiff had been rejected directing the plaintiff to seek a remedy for the recovery of the amount in a separate suit.

10. On the other hand, Sri Malik, the learned Counsel for the opposite parties, submitted that the statements given by the witnesses clearly indicated major contradictions not only on the point of time of the execution of the alleged agreement but also on the question of payment of the alleged advanced towards the performance of the agreement. The learned Counsel submitted that the contradictions were not minor but were major contradictions which was sufficient to

throw out the case of the plaintiff and which evidence could not be relied upon by the Court. The learned Counsel submitted that the defendant Nos. 2 and 3 were bonafide purchasers for value and, in view of Section 19(b) and Section 20(2)(a) of the Specific Relief Act, the court, in any case, was justified in not granting the relief of specific performance. The learned Counsel further submitted that the payment of Rs. 5,500/- was not proved by any evidence and therefore, the lower appellate court was justified in reversing the findings of the trial court and had rightly dismissed the suit.

11. I Having considered the submission of the learned Counsel for the parties at some length, the moot question that arises for consideration is, whether any agreement for sale was ever executed between the plaintiff and defendant No. 1? Both the courts below have rejected the theory of the alleged execution of the agreement on the ground that there are contradictions in the point of time of the execution of the alleged agreement between the plaintiff and defendant No. 1. According to the findings of the courts below, the contradiction is that one of the witnesses submitted that the oral agreement with regard to the sale of the land was made in the morning whereas another witness stated that the alleged agreement took place in the afternoon. It is only on this contradiction of the point of time that the court held that the execution of the agreement could not be proved to the hilt. Another aspect which led the courts below to hold that no such agreement took place was the utilization of the alleged advance given by the plaintiff to defendant No. 1. Both the courts below have laid great emphasis on the clearance of the debt of defendant No. 1 with regard to the pronote given by Chidda Singh. The court held that the pronote was discharged on 30.12.1972 whereas the agreement and the plaint contemplated that the money was advanced two days" prior to the execution of the agreement dated 4.1.1973. In the light of this fact, the trial court held that if the money was advanced to defendant No. 1 on 2.1.1973, the question of clearing the loan given by Chiddha Singh on 30.12.1972 could not have been done and therefore, disbelieved the plaint case of the plaintiff.

12. In my view, both the courts below have committed a manifest error in ousting the claim of the plaintiff on this score. The findings arrived at are perverse. From a perusal of the statement of P.W. 1 and P.W.-2, the consistent stand is, that the defendant Nos. 1 was in trouble with regard to the recovery of the loan taken by him from the bank and that the bank officials were sitting at his residence and that the plaintiff offered to bail him out by giving him an advance. Both the witnesses are consistent to the effect that some talks with regard to the sale of the land had also taken place and that certain talks had also taken place with regard to the mode and the exact amount of the money to be paid. The mere fact that one of the witnesses had stated that the alleged agreement took place in the morning and the other witness alleged that the agreement took place in the afternoon would not make much of a difference. The fact remains that some talks of agreement for sale had taken place on 2.1.1973.

13 The plaintiff in his statement had categorically stated that an advance was given to the defendant No. 1 to clear the bank loan. The plaintiff had categorically stated in his deposition that the amount paid by him to the defendant No. 1 was not made to clear the debt of Chiddha Singh. The plaintiff categorically stated that he does not know as to how the debt of Chiddha Singh was discharged by defendant No. 1. The Courts below has unnecessarily dwelt at length in drawing adverse conclusion in holding that the loan given by the plaintiff could not have cleared the pronote of Chiddha Singh on 30.12.1972. The plaintiff had neither averred nor stated that the amount paid by him as advance had cleared the pronote of Chiddha Singh. In fact he had categorically stated that the amount did not clear the loan given by Chiddha Singh and that the advance given by the plaintiff was only for the purposes of clearing the bank loan. Therefore, this Court holds that the findings of the court below on the point of time and on the point of clearance of pronote of Chiddha Singh is perverse and against the material evidence on record.

14. This leads to the question of payment of money advanced by the plaintiff. The plaintiff had come before the Court with a categorical plea that when the deal was materialised, he had asked the defendant No. 1 to call two persons so that they could witness the whole deal and, pursuant to this, the defendant No. 1 called one person known as Baleshwar. This witness was produced by the plaintiff before the court below, who deposed that the money was given in front of him. This witness in my view cannot be said to be an interested witness since admittedly, the defendant No. 1 had called this person to witness the deal and this fact has not been denied anywhere by defendant No. 1. Consequently, the findings of the court below that no amount was paid to defendant No. 1 is incorrect. Sufficient evidence has come to light to hold that the plaintiff had advanced a sum of Rs. 5500/- to defendant No. 1 for the purposes of clearing the bank loan of defendant No. 1 and in lieu thereof an agreement for sale was executed.

15. Admittedly, the defendant No. 1 has not denied his signatures on the alleged agreement to sell dated 4.1.1973. The defendant No. 1 has only stated that he had signed the document treating it to be a security bond for the purposes of obtaining a job. On the other hand, the courts below have given a finding that the defendant Nos. 1, 2 and 3 could not produce any evidence to show that an agreement for sell was executed between them in the year 1971 which ultimately led to the execution of the sale-deed of 1974 executed by defendant No. 1, in favour of defendant Nos. 2 and 3. The courts below found that no agreement exists between defendant No. 1 and defendant Nos. 2 and 3.

16. In the light of the aforesaid, the question to be answered is, whether the court should be inclined to grant the relief of specific performance or not? Section 20 of the Specific Relief Act contemplates as under:

20. Discretion as to decreeing specific performance.- (1) 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 and capable of correction by a Court of appeal;

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1. Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advance with the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2.- The question whether the performance of a contract would involve hardship on the defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

17. A perusal of the aforesaid provision indicates that a decree of specific performance is discretionary and the Court is not bound to grant such a relief merely because it was lawful to do so. The discretion of the court is required to be sound and reasonably guided by a judicial principles. Considering the minor contradictions and the alleged conduct of the parties, this Court is reminded of the fact that there is also a contradiction of the point of time of the payment made by the plaintiff to defendant No. 1. As per the contents of the agreement and the deposition made by various witnesses, the amount had been paid by the plaintiff to defendant No. 1 on 2nd January, 1973 whereas, the endorsement of the Sub

Registrar shows that the amount was paid before him on 4.1.1973 Further, there are minor contradictions with regard to the point of time of the execution of the agreement. Further, clear evidence has not come forward on the fact as to whether the defendant Nos. 2 and 3 were bonafide purchasers are not. However, the money advanced by the plaintiff-defendant No. 1 stands proved, but whether it was in pursuance to the agreement to sell or towards repayment of the bank loan, the same could not be proved to the hilt.

18. In the light of the aforesaid, the appeal of the plaintiff is allowed. The order and judgment of the lower appellate court is set aside and the order and the judgment of the trial court is affirmed. The suit for specific performance of the plaintiff fails but the plaintiff is entitled to recover the amount of Rs. 5,500/- along with interest as decreed by the trial court. In the circumstances of the case there shall be no order as to cost.