

(2012) 02 AHC CK 0374

Allahabad High Court

Case No: Second Appeal No. 254 of 2012

Daya Shanker

APPELLANT

Vs

Umesh Chandra

RESPONDENT

Date of Decision: Feb. 29, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11
- Evidence Act, 1872 - Section 120
- Specific Relief Act, 1963 - Section 22, 22(2)
- Transfer of Property Act, 1882 - Section 58
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 155, 164, 166, 167

Citation: (2012) 4 ADJ 434 : (2012) 3 AWC 2993**Hon'ble Judges:** S.U. Khan, J**Bench:** Single Bench**Advocate:** Sukesh Kumar and S.N. Yadav, for the Appellant;**Final Decision:** Dismissed

Judgement

Hon'ble S.U. Khan, J.

Heard learned counsel for the appellant at the admission stage. This is defendant's second appeal arising out of O.S. No. 374 of 2006, which was filed on 11.12-2006 for specific performance of an agreement for sale dated 28.4.2005. The suit was dismissed on 6.5.2010 by III Additional Civil Judge (S.D.)/ Additional C.J.M., Etawah. Against the said decree plaintiff filed Civil Appeal No. 27 of 2010, which was allowed by the A.D.J. Court No. 6, Etawah on 4.1.2012, judgment and decree passed by the trial Court was set aside and suit of the plaintiff was decreed for specific performance of the agreement for sale (reconveyance) on payment of Rs. 1 lac as balance sale consideration.

2. The property in dispute is 8/35 part of agricultural land comprised in Plot No. 508, area 1.412 hectares (3.49 acres). Initially plaintiff was bhoomihdhar of the land in dispute. He sold the same to the defendant on 28.4.2005. Copy of the sale-deed dated 28.4.2005 is Annexure-I to the affidavit filed in support of the stay application in this second appeal. Condition of reconveyance is mentioned in the sale-deed itself. It was mentioned that the conditional sale-deed was being executed and in case seller returned the amount of Rs. 1 lac, the purchaser would execute back the sale-deed of the property in favour of the same. In fact it was mortgage by conditional sale in accordance with 1929 Amendment to Section 58 of Transfer of Property Act. The lower appellate Court in this regard has discussed several authorities including some authorities of the Supreme Court.

3. The trial Court had held that u/s 155 of U.P.Z.A. & L.R. Act mortgage was prohibited and u/s 164 of the Act, it is mentioned that any transfer by which possession is transferred to the transferee for the purposes of securing any payment of money shall be deemed to be a sale. If the provisions of U.P.Z.A. & L.R. Act are to prevail upon Transfer of Property Act, then the result would be that the deed in question would be treated to be an out and out-sale and not conditional mortgage. In such contingency also plaintiff was entitled to specific performance of agreement for re-conveyance, which was mentioned in the sale-deed itself.

4. Accordingly, whether the deed in question is treated to be mortgage by conditional sale or an out and out-sale clubbed with agreement for re-conveyance; in both the contingencies, plaintiff was entitled to buyback the property.

5. The plea of defendant that transfer being hit by Section 155 of U.P.Z.A. & L.R. Act, hence by virtue of Sections 166 and 167 land vested in State was utterly misplaced. Firstly by virtue of Section 164 of U.P.Z.A. & L.R. Act, mortgage is treated to be an out and out-sale. Secondly, even if it is assumed that the land should have vested in State, defendant who had purchased the property could not claim its benefit without surrendering the land to the State. Only State could claim benefit of the vesting under the said sections. In the absence of any claim by the State; in between the plaintiff and defendant, the agreement of re-conveyance would be perfectly binding.

6. The basic difference between sale-deed and separate agreement for re-conveyance on the one hand and mortgage by conditional sale by providing condition of re-conveyance in the sale-deed itself on the other hand is of limitation. For redemption of mortgage limitation is 30 years from the date when right to redeem or recover possession accrues, according to Article 61 of Schedule to the Limitation Act. Limitation to file suit for specific performance of an agreement for sale is three years from the date fixed for the performance or when the plaintiff has notice that performance is refused (Article 54). In the instant case the suit was filed within three years from the date of sale-deed containing the condition of re-conveyance. The argument that by virtue of Sections 155 and 164 of U.P.Z.A. &

L.R. Act, the deed of 2005 amounted to out and out-sale and not mortgage by conditional sale could be relevant only if the suit had been filed after more than three years from the date fixed for performance of the agreement or refusal of the defendant to perform the agreement.

7. The fact that plaintiff did not examine himself but his wife gave evidence on his behalf was not at all fatal for the plaintiff. Firstly, u/s 120, Evidence Act, husband wife are competent witnesses for each other and secondly the deed is admitted to the defendant.

8. The next argument of learned counsel for the appellant is that neither the relief of possession was claimed in the plaint nor it was decreed by the lower appellate Court hence decree passed by the lower appellate Court only for specific performance of the agreement for sale is illegal. By virtue of Section 22, Specific Relief Act, the Court can grant relief of possession also provided that it has specifically been claimed. Under Proviso to Section 22(2), it is provided as under:

Provided that where the plaintiff has not claimed any such relief in the plant, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief."

In the following authorities it has been held that relief of possession etc. may be claimed even at the stage of execution proceedings by getting the plaint amended.

(i) AIR 1976 Del 56

(ii) AIR 1976 Del 181

(iii) 1987 ALJ 148

(iv) 1984 ALJ 976

Accordingly, plaintiff respondent if so advised may seek possession by getting the plaint amended even in execution.

I do not find least error in the impugned judgment. The question of law has rightly been decided by the lower appellate Court. Second appeal is therefore dismissed under Order XLI Rule 11, C.P.C.