

(2014) 09 JH CK 0035

Jharkhand High Court

Case No: Appeal Against Original Decree No. 76 of 2012

Dakshayan
Constructions Private
Limited

APPELLANT

Vs

Bulakan Prasad

RESPONDENT

Date of Decision: Sept. 16, 2014

Citation: (2015) 1 AJR 1 : (2014) 4 JLR 399

Hon'ble Judges: Dhruv Narayan Upadhyay, J

Bench: Single Bench

Advocate: Rahul Gupta and Niyati Sah, Advocate for the Appellant; Amar Kumar Sinha,
Kundan Kumar Ambastha and Abdul Wahab, Advocate for the Respondent

Judgement

Dhruv Narayan Upadhyay, J.

This appeal has been preferred against the Judgment dated 04.01.2012, Decree dated 21.01.2012, passed and signed by Sub Judge-X, Ranchi in connection with Title Suit No. 259/2002 whereby the learned Sub Judge has been pleased to decree the suit for specific performance in favour of the respondent No. 1 and directed the appellant to execute Deed of Sale with respect to suit property after receiving the balance consideration amount with cost, failing which the Court will execute the Deed of Sale according to process of law. The appellants were defendants No. 2 and 3 whereas proforma respondent No. 2 was the defendant No. 1 in the Court below. The respondent No. 1 was the plaintiff who filed Title Suit No. 259/2002 in the Court of Sub Judge-I at Ranchi with following facts:

"I. The defendant No. 1 is the absolute owner of the property pertaining to M.S. Plot No. 1875 corresponding to present Municipal Holding No. 1031, area measuring 6 Katha 9 Chhatal within Ward No. VII of Ranchi Municipal Corporation situated a Mohalla - Tharpakhna, Town - Ranchi, P.S. - Lower Bazar District Ranchi.

II. The defendant No. 1 as land owner and the defendant No. 2 through its proprietor Surendra Kumar Singh, defendant No. 3 entered into a written agreement in favour of the plaintiff on 16th September, 1999 whereby and whereunder the defendant Nos. 2 and 3 are required to construct multi-storied building complex (G + 4) consisting of as many as thirteen flats besides parking space on the aforementioned land and name of the building complex would be Anjalika Awaas.

III. By the said agreement, the defendant No. 1 agreed to sell his proportionate share in the aforementioned land and the defendants No. 2 and 3 agreed to sell one flat being Flat No. 2 on the first floor of the proposed multi-storied building complex consisting of two bed rooms, one drawing-cum-dining room, two bathrooms, one kitchen and balcony measuring 1000 Sq. Ft. of super built-up area, morefully described in the schedule to the plaint for a consideration of Rs. 4,75,000/- (rupee Four Lacs Seventy Five Thousand) only and the plaintiff paid a sum of Rs. 5,000/- only as an advance to the defendants No. 2 and 3 on the date of execution of the said agreement i.e. on 16.09.1999.

IV. The plaintiff is a Government employee posted in the office of the Accountant General, Bihar, Hinoo, Ranchi, who had obtained loan to the extent of Rs. 1,75,000/- for purchasing a Flat and said sum of Rs. 1,75,000/- was paid to defendants No. 2 and 3 through Cheque No. 459159, dated 31.12.1999, and thus paid total sum of Rs. 1,80,000/- to the defendant as advance which was duly acknowledged by the defendant No. 3 who issued a receipt dated 26.01.2000.

V. The plaintiff further got sanctioned loan of Rs. 3,00,000/- (Rupees Three Lac.) by Punjab National Bank, Ranchi and by cash order bearing No. RRF 746291, dated 17.01.2001 for Rs. 1,00,000/- (Rupees One Lac.) drawn in favour of the defendant No. 2 and tendered the same towards part payment to the defendant No. 3 but it was refused. The plaintiff had also assured to pay balance sum of Rs. 2,00,000/- (Rupees Two Lac.) to the defendant within ten days.

VI. The plaintiff requested the defendant several times to receive balance consideration money and deliver possession of the flat and also to execute registered deed of sale in his favour for the suit property but the defendant went on postponing the issue on one pretext or the other.

VII. The plaintiff was also ready and willing to pay the balance consideration money and to meet necessary expenses towards registration and execution of deed of sale in pursuance of the agreement dated 16.09.1999 but the defendant refused and neglected to perform their part of obligation under the agreement and hence cause of action for filing of suit arose on and from 16.09.1999 and on 31.12.1999, 26.01.2000 and on subsequent dates when the plaintiff requested the defendant to receive balance consideration and execute the Sale Deed in favour of the plaintiff and lastly on 5th September, 2000, when the plaintiff failed to comply the terms of

agreement.

VIII. On the basis of averments made in the plaint, the plaintiff sought for a decree for specific performance of agreement dated 16.09.1999 and prayed that the defendant be directed to execute and register deed of sale in favour of plaintiff with respect to suit premises after receiving balance consideration amount, cost of the suit, interest pendente lite and future and any other relief or reliefs to which the plaintiff may be found entitled."

2. The defendant No. 1 did not appear and hence the suit proceeded against him ex-parte. Defendant No. 3 for himself and on behalf of defendant No. 2 filed written statement admitting therein the agreement dated 16.09.1999 (Ext.-1) executed by and between the parties and also acknowledged receipt of Rs. 1,80,000/- paid by the plaintiff against sale of suit property.

Further case of the defendant is that due to non payment of instalments as per the schedule, the agreement dated 16.09.1999 was cancelled and that too, with the consent and approval of the plaintiff. The defendant was always ready and prepared to return the part payment received by him to the plaintiff provided he gives back the original agreement and "No Objection Certificate" or the certificate issued by the office of the Accountant General, Bihar and Jharkhand to the effect that they had no objection.

It was contended that on the basis of agreement dated 16.09.1999, the plaintiff had taken housing loan to the extent of Rs. 1,75,000/-. In the event of cancellation of agreement, the said amount was liable to be refunded to the Government. To avoid any encumbrances on the suit property, the defendants No. 2 and 3 had also made correspondence with the office of the Accountant General and letters to this effect were sent.

The defendants have further made out a case that as per payment schedule of said agreement, the possession of suit premises was to be delivered by the defendants to the plaintiff/purchaser on or before 31.03.2000 and at the time of handing over of flat, the plaintiff was under obligation to clear all the balance consideration amount i.e. last 10% of the balance consideration amount. Since the plaintiff failed to pay the balance consideration amount as per schedule of the agreement and he had given consent to cancel the agreement (Ext.-1), the defendants No. 2 and 3 executed another agreement for sale for the said flat in favour of Mrs. Bishakha Saha (Ext.-D).

Further pleading of the defendant in the written statement were that no cause of action ever arose, the payment schedule as agreed by the plaintiff was not followed and he failed to pay the balance consideration amount. The suit was liable to be dismissed for non-joinder of necessary party.

3. The learned Sub Judge framed issues on the basis of pleadings of the parties.

The plaintiff as well as contesting defendants had adduced evidence, oral and documentary in support of their contention and after considering the same, the learned Sub Judge has been pleased to decree the suit in favour of the plaintiff as aforesaid and hence this appeal by the defendants no. 2 and 3.

4. The appellants have assailed the impugned Judgment and Decree mainly on the ground that the plaintiff himself was defaulter in making payment towards balance consideration amount as per the Schedule. After being failed to perform his part of obligation under the agreement, he himself requested for cancellation of the agreement and also for return of the advance amount. Conceding the requests, the appellant asked the plaintiff to hand over original agreement and other documents and also to submit "No Objection" issued from the office of the Accountant General from where the plaintiff had taken loan to the extent of Rs. 1,75,000/- against purchase of suit property. When the plaintiff failed to do so, the defendants had executed another agreement for the suit property in favour of Mrs. Bishakha Saha vide Ext. -D. This fact was brought to the notice of the plaintiff but the plaintiff was not amended nor the prospective purchaser of suit property has been made party.

Learned Sub Judge has wrongly considered the evidence and documents for passing a Decree in favour of the plaintiff and no discussion on the documents and evidence produced and adduced by the defendants has been done and, therefore, the impugned Judgment and Decree are liable to be set aside.

5. I have gone through the lower court record, impugned Judgment and Decree, evidence and documents available on record. The learned Sub Judge has decided the main issue i.e. the Issue Nos. 5, 6 and 7 in paragraphs 13 to 15 of the Judgment. It appears that payment of Rs. 1,80,000/- made by the plaintiff to defendants No. 2 and 3 and execution of Ext. -1 is admitted and, therefore, the facts remained to be considered are -

"(I) Whether the plaintiff had failed to perform his part of obligation envisaged under the agreement?

(II) Whether plaintiff had failed to pay the balance consideration money to the defendants as per the schedule of payment indicated in Ext. -1?

(III) Whether the plaintiff himself had cancelled the agreement dated 16.09.1999 and allowed the defendants to sell the said flat to any other person, especially in favour of Mrs. Bishakha Saha as per Ext. -D?

(IV) Whether the suit was liable to be dismissed for non joinder of necessary party?

(V) Whether plaintiff had shown readiness and willingness to get the sale deed executed in his favour in respect of the suit property by making payment of balance consideration money?"

6. From perusal of the impugned Judgment, it is evident that these issues were covered under Issue Nos. 5, 6 and 7 and the learned Sub Judge has elaborately discussed the evidence and documents on record. Even then being the First Appellate Court, it would be desirable to deal with the facts available on record.

According to Ext. -1, a sum of Rs. 5,000/- was required to be paid at the time of execution of the agreement i.e. 16.09.1999 and it was accordingly paid by the plaintiff which also stood acknowledged by the defendant. 35% of the consideration amount was to be paid at the time of booking of the flat. In this context a sum of Rs. 1,75,000/- was paid by the plaintiff to the defendant and it was also acknowledged. By way of second instalment, 30% of consideration amount was to be paid up to 2nd Floor roof casting. By way of 3rd instalment, 25% of consideration amount was to be paid after casting of 3rd floor of the roof. By way of 4th instalments, 10% of the balance amount was to be paid at the time of handing over of the flat. The Flat was agreed to be handed over by 31.03.2000.

The appellants/defendants have failed to bring on record any demand letter by which 2nd and 3rd instalments have been asked to be paid. The construction progress of the building was never communicated to the plaintiffs. The appellants have submitted that the plaintiffs, according to his version, had come to tender balance consideration amount on 17.01.2001, that itself indicates that it was beyond the due date on which final payment was required to be paid i.e. 31.03.2000. In this context, the counsel for the respondent/plaintiff has drawn my attention towards Ext. - D, which was executed on 2nd August, 2000 in favour of Mrs. Bishakha Saha for the suit property. The aforesaid admitted document of the defendants itself goes to show that no construction was proceeded ahead, what to say about roof casting of 2nd and 3rd floor. In this agreement again it was agreed by the defendants that they would construct the building for the purchaser after receipt of payment. This admitted document (Ext-D) is suggestive of the fact that construction of the building was not commenced and, therefore, contention that the plaintiff had failed to comply his part of obligation and he did not follow the payment schedule, has no leg to stand.

7. The appellants have tried to bring on record that the agreement was cancelled by the plaintiff himself and for that Ext. -A, Ext. -C and Ext. -C/1 have been brought on record -

"(i) Ext. -A is the letter addressed to the plaintiff whereas Ext. -C and C/1 are the letters sent by the appellant S.K. Singh to Principal Accountant General, Bihar and Jharkhand, Doranda, Ranchi.

(ii) Ext. -C and C/1 are alleged to have been written by the appellant S.K. Singh to show that allotment of flat to which the plaintiff had agreed to purchase, has been cancelled and to refund advance sum of Rs. 1.75,000/-, the appellants need no objection certificate from the office."

It has to be made clear that these correspondences were not required to be done by the appellants because no officer or representative of the office of Accountant General was party to that agreement and the office of the Accountant General have never raised any claim over the suit property nor it was in any manner encumbered with them. The grant of loan in favour of the plaintiff by his employer was by and between them and for that, rules and regulations would be followed and the appellants have nothing to do with that. Not a single chit of paper has been brought on record to show that the plaintiff had ever made any request to cancel the agreement (Ext.-1) and to refund the amount advanced by him. The plaintiff is not a confirming party to Ext. -D and, therefore, the pleading that Ext. -D was executed with the consent of the plaintiff, cannot be admitted to be true and it cannot be considered. It would not be out of place to mention here that alleged prospective purchaser - Mrs. Bishakha Saha only on the basis of an agreement without being any Sale Deed executed in her favour, had not acquired any right, title, interest in the property and therefore, in the case of specific performance of contract, she does not appear to be necessary party.

8. Besides the above, learned Sub Judge has elaborately discussed other facts and evidence while deciding Issue Nos. 5, 6 and 7 in the Judgment to which this Court affirms. The learned Sub Judge has further discussed other Issues properly which need no discussions. I do not find any merit in this appeal and, therefore, the same stands dismissed. The appellants and proforma respondent No. 2 are directed to execute and register Sale Deed in favour of the plaintiff/respondent No. 1 with respect to the suit property after receiving balance consideration amount within 60 (sixty) days from today. The plaintiff shall bear all the expenses of stamp and registration fee as per requirement of law. Failing compliance, the Sale Deed with respect to the suit property shall be executed by process of Court on deposit of balance consideration amount by the plaintiff in court.

The appeal is dismissed with cost. The Judgment dated 04.01.2012, Decree dated 21.01.2012, passed and signed by Sub Judge-X, Ranchi in connection with Title Suit No. 259/2002, is hereby affirmed.