

Sujan Singh Vs Lalsahab and Another**F.A. No. 36 of 1987**

Court: Madhya Pradesh High Court**Date of Decision:** April 29, 1991**Acts Referred:**

Civil Procedure Code, 1908 (CPC) â€” Order 7 Rule 7#Evidence Act, 1872 â€” Section 103, 17, 34#Transfer of Property Act, 1882 â€” Section 54, 55, 55(4), 55(5)

Citation: (1993) J LJ 552**Hon'ble Judges:** T.N. Singh, J**Bench:** Single Bench**Advocate:** K.K. Lahoti, for the Appellant; K.K. Singh, for respondent No.1, for the Respondent**Final Decision:** Allowed

Judgement

T.N. Singh, J.

Defendant has appealed, being aggrieved by the judgment and decree allowing Plaintiff's claim and cancelling the sale-deed

dated 13.6.1984. Plaintiff/Respondent had impugned that sale-deed being void as consideration, though stated as paid thereunder, had not been

paid in fact.

2. During the course of hearing of the appeal, prayer is made by Defendant/Appellant for leave to amend the written statement by adding para 12

to include the averment that without prejudice to other defence claimed if the Court finds and concludes that consideration had not in fact been

paid, then, direction be made to the Plaintiff/Respondent to accept the same because merely on the ground of non-payment of consideration, the

sale-deed could not be cancelled. That prayer is seriously opposed for valid reason, but that is to be disposed of at the outset before dealing with

the appeal on merits.

3. Shri K.K. Singh, counsel appearing for the Respondent, cited Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and

Co., to submit that an entirely new case cannot be set up by way of amendment as would destroy any valuable right accrued to the Plaintiff. Their

Lordships held in that case that it is impermissible by amendment to introduce entirely different new case as a result of which the Plaintiff would be

completely displaced from admissions made by the Defendant's written statement. He also relied on a decision of a learned single Judge of this

Court in Ramprasad 1980 JLJ 809 about which it will suffice to say this much that it relies fully on Supreme Court's decision which the counsel

cited. In Anr. decision of this Court in Kartar Singh and Others Vs. Kanhai Singh (deceased by L.R's) and Others, it was noted that although

under Order 7 Rule 7, Code of Civil Procedure, Plaintiff could pray for inconsistent relief, he must show that the alternative plea was maintainable

in law and for that, reliance was placed on Apex Court's decision in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, The

settled law that ""the test for allowing the amendment is to find whether the proposed amendment works any serious injustice to the other side"" was

also noted.

4. In the instant case, two things are very clear. The new plea, though proposed to be set up as an alternative plea, if accepted, would tantamount

to legalising an illegality. If the sale-deed is found void for want of consideration, the Court having no jurisdiction to enforce the contract would be

required, if the amendment is allowed, to enforce a void contract by compelling the Plaintiff to accept the consideration and validate the sale which

was void ab initio. The new plea apparently is not maintainable in law. Secondly, by efflux of time, the value of the land purported to be sold under

the impugned sale-deed has appreciated by metes and bounds; as such, if now the Plaintiff is compelled to accept a depreciated value to put a

premium on an illegal act, he is likely to suffer doubly and irreparably. For these reasons, in my view, the valuable right which has accrued to the

Plaintiff/Respondent cannot be allowed to be defeated and, therefore, the application for amendment of written statement made in this appeal is

rejected.

5. Now, on merits. One of the two contentions which Shri Lahoti has urged confidently and vehemently is that Defendant's evidence beyond his

pleadings should not have been read by the trial Court and in this appeal also, that cannot be read. Counsel has cited decisions to support that

contention. In Trojan and Co. Ltd. Vs. M. N.N. Nagappa Chettiar, it has been held that decision of a case cannot be based on grounds outside

the pleadings of parties and it is the case pleaded that has to be found. In Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, variance

between pleadings and proof is decried and their Lordships held that on the failure of the Defendant to prove his case, the Court cannot make out

a new case for him which is not only not made in the written statement, but which is wholly inconsistent with the title set up by the Defendant.

About the proposition of law canvassed by Shri Lahoti, there can be no dispute.

6. Reference to pleadings first and then to evidence is evidently necessary. In the plaint, filed on 6.8.1985, Plaintiff/Appellant stated that on

13.6.1984, he had executed the sale-deed in favour of the Defendant in respect the agricultural land situated in village Nathankhedi of which area

was 6.096 hac. on the understanding given to him by the vendee that the price settled would be paid to him by Baishakh Sudi 3, Samvat 2042 as

he had no ready money. In case he was not able to pay the price, he would reconvey the land and execute sale-deed in Plaintiff's favour. The

vendee/Defendant also assured him that in the meantime, he would not take any step for mutation or for possession of the land proposed to be

sold and that the land shall remain in possession of the Plaintiff/vendor. On one pretext or other, the defendant/vendee postponed payment from

time to time but eventually on 25.7.1985, he informed the Defendant/vendor that the land was of his title and he would forcibly occupy it and he

would also get mutation. In his written statement, the Defendant pleaded that the full price for the land sold under the document in question was

paid to the Plaintiff prior to 13.6.1984, at village Nadankhedi, in presence of witnesses. It was an out and out sale and Plaintiff had sold the land as

he needed money. Before the Sub-Registrar, Mungavali, the Plaintiff admitted receipt of consideration. He also stated that possession on the land

was his and not of Plaintiff and that he had started proceedings for mutation. At the instance of one Ghasiram Yadav of village Nadankhedi, false

suit was instituted by Plaintiff because Jairam Yadav of Khiriya who was the attesting witness of the sale-deed was a close relative of the said

Ghasiram and all three had joined hands to hatch conspiracy against the Defendant/vendee.

7. It is true that in his own evidence, the Plaintiff gave the reason why he had executed the sale-deed which he had not stated in the plaint. He

wanted to purchase land in village khiria and shift to that village from Nathankhedi because Defendant had made that suggestion and in

understanding was given to him by Defendant Sujansingh that if he executed sale-deed in his favour of his Nandankhedi land, he would arrange for

him to purchase lands in Khiria and to get sale-deed registered of those lands in his favour. It was also agreed that if Khiria lands are not

purchased, the Defendant would execute sale-deed in Plaintiff's favour for the Nandankhedi land sold to him. It is in that connection that the

Plaintiff examined Ratansingh (P.W.1) who stated that he resided in Khiria and that he owned and possessed agricultural land at Khiria. About sale

of his land, Defendant Sujan had talks with him when he agreed that he will sell his lands to Plaintiff for which price would be paid by Sujan. Out of

Rs. 93,000/- settled as consideration for the land to be sold, Rs. 4,000/- Defendant Sujan had paid him. That money, he still retained though he

had not executed sale-deed of his Khiria land in Plaintiff's favour because Defendant Sujan had not paid the balance. He also stated that a

document was executed in connection therewith at Mungavali.

8. P.W. 2, Jairam, also resided at Khiria and he corroborated P.W. 1 and also Plaintiff's version which he latter gave, deposing as P.W. 4. It is

this witness who had signed the disputed sale-deed, Ex. D/I, as an attesting witness; and about him in written statement, allegation was made, as

earlier alluded, He categorically suited that no payment was made by Defendant Sujan to Plaintiff but the sale-deed was executed by the Plaintiff

on the understanding that the Defendant Sujan would buy him the land at Khiria of P.W. 3 Ratansingh. His evidence is also that although in the

sale-deed Rs. 28,000/- was written as the price, actually that was Rs. 93,000/- because for that amount, Defendant had to purchase for Plaintiff

land at Khiria belonging to P.W. 3, Ratansingh. He proved payment to Ratansingh by Defendant. He also proved the fact regarding execution of a

document in that connection by Ratansingh and to his and also P.W. Sultan subscribing their signatures to that document. He denied the suggestion

that he was giving false evidence at the instance of Ghasiram, but nothing else was enquired of him as to his relationship with Ghasiram or about his

motive to support falsely Plaintiff's version.

9. The document which Ratansingh is said to have executed in favour of Lal Saheb (Plaintiff) contemporaneously on 13.6.1984 has come on

record as Ex. P/I, but Defendant Sujansingh, in his cross-examination denied his having signed that document and also denied that P.Ws. Jairam

and Sultan had attested the document as witnesses of the transaction. He even denied that he paid there for Rs. 4,000/- to Ratansingh. He stated

that he did not know why the Plaintiff has sold the land to him under the impugned sale-deed. Another witness who played an important role is

P.W. 1, Sultansingh, aforementioned, who signed as an attesting witness the impugned sale-deed, Ex. D/I. He too corroborated Plaintiff's evidence

and supported the other attesting witness Jairam, P.W.2, in all material particulars. He too proved that in respect of the impugned sale-deed, no

consideration was paid to Plaintiff by Defendant Sujan. According to his own evidence, he resided neither at Nadankhedi nor at Khiria, but at Jatoli;

he proved the execution of the agreement in respect of Khiria land to be purchased by Defendant Sujan for the Plaintiff and stated that along with

P.W. Jairam, he had signed that document.

10. In his cross-examination, the Plaintiff was asked why about the other contemporaneous transaction in regard to agreement by P.W. Ratansingh

in his favour for sale of Khiria land with the interposition of the Defendant, there was no mention in the plaint. He stated that to his lawyer, he had

told everything and he did not know if that fact was written or not in the plaint. Although Plaintiff was illiterate and that fact is undisputed because in

all documents and also in pleading, he has affixed his thumb impression, it cannot be disputed that in respect to the evidence regarding the

contemporaneous transaction manifested by Ex. P/I his plaint is silent. However, on that account, the maximum penalty that he may suffer is

exclusion from consideration of the evidence that has come for which there is no pleading. On that ground, he is not liable to be non-suited. If it is

held proved and established that the deed which he had executed; Ex. D/I, in favour of Defendant/Appellant was without consideration, he is

entitled to have a decree for cancellation of the sale-deed as that was a void transaction.

11. As discussed above, the two attesting witnesses of the document support him that the sale-deed was without consideration. He also gave his

own evidence that he had not received any money from Defendant/vendee and that he was continuing in possession of the suit land which he was

cultivating and was also paying Lagan for that land. It is true that the endorsement of the Sub-Registrar on the sale-deed is that the vendor has

admitted receipt of consideration, but that endorsement loses all sanctity inasmuch as Plaintiff has not denied that he made that statement to the

Sub-Registrar. Indeed, his case is that arrangement between the parties was that though sale-deed shall be executed, price shall be paid within the

stipulated period and if there was default of the vendee in making payment, then he shall execute a sale-deed in vendor's favour.

12. Defendant gave his own evidence proving payment of the consideration contemplated in the sale-deed, but he is disbelieved and, in my

opinion, rightly. He was confronted with Ex. P/I, but he denied his signature on the document. He went so far to deny also his signature on the reply

to I.A. No. 3 and his affidavit. Only on the Vakalatnama, he accepted his own signature. Where and how he got money, Rs. 28,000/-, for

payment to Defendant, he did not say. How and where the agreement to sell the land was made, he did not say. On the other hand, he admitted

that the sale-deed was attested by P.Ws. Sultan and Jairam. He examined one Dulhaju, D.W. 3 and Jairam of village Pataria, D.W. 2, as his

witnesses to prove payment of consideration by him to Plaintiff at latter's house. He admitted, however, that when he paid the money to Plaintiff,

he obtained no receipt for the payment made though the sale-deed was drafted, prepared and executed subsequently at Mungavali just before its

execution and registration.

13. His both witnesses D.Ws.2 and 3 have also been rightly disbelieved and, in my view, their evidence inspires little confidence for reason which,

I would like to recount. D.W. 3 Dulhaju clearly and categorically admitted that he was a chance- witness. He was passing by the front of Plaintiff's

house when he was called in by Defendant Sujan to witness the payment. He also admitted that he came to depose in Defendant's favour without

being summoned. He also stated that when payment was made, no writing was executed and after payment, the parties left village for execution of

the sale-deed. About delivery of possession, he stated that that was perhaps done at Tahsil; he only knew about payment which was made in his

presence. The other witness, D.W.2, was a daily wage-earner and he was from a different village. In his own evidence, he deposed that, he had

protested to the Defendant for making him a witness to the transaction as he was not from the village, but from outside. He had told him that he did

not know Plaintiff and he also deposed that before his coming to Nadankhedi, where he was employed as a labourer for making bricks, he did not

know Defendant Sujan. He lived in village Pataria. When he was called by Defendant, at that time, he was making bricks for Adharsingh by the

side of his house. He gave out his name to Defendant on being asked. He saw Defendant Sujan's son Tilak Singh bringing Rs. 28,000/- in a bag

which was paid to Plaintiff. He admitted that he did not ask Sujarsingh or Tilak Singh, their names. No wonder, the trial Court found this witness

to be unreliable. Accordingly, there is no escape from the conclusion that no independent evidence worth its name has been adduced by

Defendant/Appellant to establish payment of consideration.

14. It has been urged on behalf of the Defendant/Appellant that the sale was not void even if sale-price was not paid when the sale-deed was

executed. Reliance is placed on Section 54, Transfer of Property Act, to support the contention. It is submitted that there can be a sale for

deferred payment because ""sale is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised"", according to

Section 54. The argument overlooks the clear distinction which is made in Section 54 between a ""sale"" and a ""contract for sale"" of any Immovable

property. Evidently, it is that provision which makes it clear that ""contract for sale"" (oral or written) precedes ""sale"" as it is meant to provide for

terms settled"" between parties in regard to the proposed ""sale"" that has to"" take place"" in accordance therewith or pursuant thereto. In such, a

contract, it may be settled that payment of the ""price"" is to be deferred or it may be paid fully or it to be partially paid and partially deferred.

Essence of a ""sale"" is the immutable requirement of cash consideration (""purchase-money"", as per Section 55(5)(b) of the said Act) paid or

intended to be paid, without any string attached, for ""transfer of ownership"", of the immovable property, sold or proposed to be sold. There must

be, therefore, an inexorable stipulation in the contract in question saddling an indefeasible obligation on the vendee in that regard. Bereft of that

condition duly settled for ""sale"", there would be no sale.

15. Apparently Anr. crucial element of ""sale,"" evidently, is ""ownership"" to be transferred; and there has to be, accordingly, transfer of all rights and

incidence thereof to the vendee as indicated clearly in Section 55 of the said Act dealing with the rights and Liabilities of buyer and seller. While

Section 55(5)(b) obligates the buyer to ""pay or tender, at the time and place of completing the sale, the purchase-money to the seller.... "" , Sub-

section (4) (a) entitles the seller ""to the rents and profits of the property till the ownership thereof passes to the buyer"". Consequently, therefore,

notwithstanding any recital made in the registered document executed, purporting to make ""sale"" of any Immovable property, it shall be open still to

parties to show that a ""sale"" was not intended. The requirement of execution of a registered document for sale of Immovable property valued at

Rs. 100/- contemplated u/s 54 is only one of the requirements of a valid sale; the execution of a registered document is not conclusive of the

intention of parties. If the ""price"" was not paid or was not intended to be paid and the seller had retained possession of the property to enjoy ""its

rent and profits"", it may be contended that ""ownership"" was not intended to pass on the execution of the document.

16. In the instant case, trial Court has rightly held that possession of the land was not delivered to the Defendant/Appellant as discussed above;

except his bare statement, there is no corroborative evidence. On the other hand, the two attesting witnesses of the sale-deed, P.Ws. Sultan and

Jairam, both supported the Plaintiff that the agreement between the parties, which immediately preceded execution of the sale-deed, was that

possession will remain with Plaintiff until such time as the price was not paid within the stipulated period and that in default, the Defendant would

execute a sale deed in Plaintiff's favour. That evidence has been accepted by the trial Court and in my opinion, rightly because the two attesting

witnesses were the only persons who could depose to the ""contract for sale"" or for that matter, the terms settled for ""sale"" by parties before

execution of the sale-deed. They have been believed by the trial Court and I see no reason to reject their testimony. It is true that they both, as

well as P.W. Ratansingh and the Plaintiff also, in his evidence, deposed further about the contemporaneous transaction manifested in Ex. P/I about

which there is no mention in the plaint. However, on that account, their entire testimony cannot be rejected. What cannot be excluded from

consideration is their evidence as also Plaintiff's own evidence to prove the case stated in the plaint, that as per agreed terms of ""sale"" for which

Ex. D/I was executed, Plaintiff had reserved the right to accept price if paid within the stipulated period and the Defendant had agreed to execute

sale- deed in Plaintiff's favour in default of payment within the stipulated period. This crucial evidence proved intention of the parties (Plaintiff and

Defendant) that title in the land proposed to be sold as per Ex. D/I, was not to pass with the execution of the document. Neither was the

possession delivered; nor was the obligation of the Defendant to pay ""price"" made indefeasible.

17. In so far as admission of Plaintiff about receipt of consideration (which he made before the Sub-Registrar) is concerned, by filing the suit, that

was withdrawn and he was entitled to do that. Indeed, Section 34, Evidence Act negates conclusiveness of admissions. It is settled law that proof

of admission merely shifts the onus. See, Kishori Lal Vs. Mst. Chaltibai, An admission is a statement, as per Section 17, Evidence Act, which

suggests an inference as to any fact in issue or relevant fact. Evidence may be given to prove motive for, or circumstances necessitated making of,

an incorrect statement. See, Nagubai Ammal and Others Vs. B. Shama Rao and Others, Plaintiff, as the executant of Ex. P/I and the two attesting

witnesses (P.W. 1 and 2, respectively, Sultan and Jairam) have given the requisite evidence to destroy the effect of the admission. Indeed, in the

suit filed, the main fact in issue being whether actually any price was paid (though so stated in the document), onus was on the Defendant to prove

positively and affirmatively the fact in issue. Section 103, Evidence Act and Section 55(5)(b), T.P. Act, require him to do so. However, he failed

miserably to discharge his onus. His both witnesses D. Ws. Dulhaju and Jairam are chance-witnesses and are totally unreliable. Their evidence has

been rightly discarded by the trial Court and Defendant's own evidence is also unconvincing; he is also circumstantially unsupported and isolated.

He did not prove source of money to give credit to his version or the prior agreement between him and the Plaintiff settling terms of the sale.

Indeed, though his definite case in the written statement was that Plaintiff was in need of money, and he had made outright sale of the land, he still

failed to prove that fact.

18. Case-law cited in support of the contention may, however, be referred to. In Sukaloo 1961 JLJ 138 it was held on the construction of the

deed and the surrounding circumstances of the case that the deed was intended to operate as a conveyance immediately after execution and title

passed to the vendee and the sale was not void because the parties so intended. On facts, it was found that possession was delivered and mutation

was duly effected. Shrawan Kumar 1960 JLJ 1004 is a decision of a learned Single Judge this Court considering a sale-deed executed by father

and son in a Joint Hindu family. It was held that when there is no condition-precedent recited in the sale-deed, that the title shall not pass till price is

paid, the seller cannot on that account, set aside the conveyance and he can only sue for the price. This holding too is wide off-the mark as it does

not apply to the case like the Plaintiff's inasmuch as Plaintiff in the instant case has proved and established that passing of title was conditional on

payment of consideration and that he had a right to reconveyance in default of payment. Another learned Single Judge of this Court in Amar

Singh's case, shortnoted as 1983 (I) CCLJ (MP) 92, has expressed the similar view. In that case, not only part-payment was established, delivery

of possession was also established. Gurubari Lenka AIR 1971 Ori 147 is, no doubt, also on Section 54, T.P. Act, but therein also it is stressed

that Court is required to determine the intention of parties executing a document. Only when the parties agree, title would pass even though the

payment is deferred; the title must be deemed to have passed even without passing pari passu of consideration. That is not established in the instant

case on evidence. Defendant/Respondent's own case is not of deferred payment. Official Receiver of Salem Vs. Chinna Goundan and Another,

Official Receiver v. Chinna Goundouis also cited, but that is on a different point. It was held that when property is sold and possession is delivered

to vendee, but no consideration is paid, the vendor is entitled to consideration and interest till date of payment. In my opinion, this ruling also clearly

states the legal position that when contract of ""sale"" has been proved and in that case intention of parties to the contract in question is manifested in

the fact of delivery of possession.

19. On pleadings and evidence, the conclusion reached by the trial Court that there was no ""sale"" contemplated in Ex. D/I, I find unassailable.

While Plaintiff/Respondent has proved convincingly and satisfactorily that no price was paid for the land purported to be sold and that even no

indefeasible obligation was saddled on the Defendant to pay the ""price"" under the ""contract for sale"" that \ preceded the execution of document, the

contrary has not been proved. The suit has accordingly been rightly decreed cancelling the sale-deed as that was hit by Section 54, T.P. Act and

was void ab initio.

20. For all the aforesaid reasons, I am clearly of the opinion that there is no scope at all for my interference with the impugned judgment and

decree passed by the trial Court. These are upheld and affirmed. The appeal stands dismissed, but without costs.