Sopan Baruku Patil Vs Satyanarayan Govindram Rathi

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Feb. 25, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 7 Rule 7
Specific Relief Act, 1963 â€" Section 10

Citation: (2011) 3 ALLMR 646 : (2011) 6 BomCR 212 : (2011) 3 MhLj 769

Hon'ble Judges: R.M. Savant, J

Bench: Single Bench

Advocate: R.L. Khapre, for the Appellant; Jugalkishore Gilda, for the Respondent

Judgement

R.M. Savant, J.
By the above Second Appeal, the Appellant challenges the judgment and decree dated 24th August, 1994 passed in

Regular Civil Appeal No. 19/90, by which the decree passed by the Trial Court dated 15th September, 1989 was modified. The above Second

Appeal raises the following substantial questions of law:

1) Whether decree on the basis of facts found can be granted by the Court under the provisions of Order VII Rule 7 of the Code of Civil

Procedure, 1908 ?

2) Whether the lower Appellate Court can give different finding on the evidence merely because it is permissible to do so without showing that the

approach of the Trial Court is perverse ?

3) Whether the learned Appellate Court having found that the circumstances shown by the Plaintiff in getting the agreement of sale executed in his

favour are doubtful and he has not cleared the doubt so as to establish genuineness of the agreement of sale is sufficient to hold that approach of

the Trial Court is correct for the purposes of giving finding that said transaction was a loan transaction and the Defendant had received Rs.

10,000/-as loan for his Banana business and executed a nominal agreement of sale as a security of loan ?

4) Whether the lower Appellate Court erroneously found that under the provisions of Section 10 of the Specific Relief Act the Court can either

decree the claim of specific performance or as to the decree the claim of refund of consideration and no other decree can be passed. It is

submitted that this approach is totally erroneous. In as much as Section 10 has no bearing on this aspect ?

2. The facts in brief can be stated thus:

The Appellant is the original Defendant, whereas the Respondent is the original Plaintiff. The parties would be referred to as per their status in the

Courts below. The suit property in question is Survey No. 98, admeasuring 6 Acres and 28 gunthas situated at village Shelapur-Khurd, Tahsil-

Motala, District-Buldhana. The suit property was owned by the family of the Defendant. It was the case of the Plaintiff that the Defendant in his

capacity as Manager of the joint family property had agreed to alienate the suit land in his favour. The consideration fixed was Rs. 40,000/-and as

per the earnest note (Isarpaoti) (Ex.37), an earnest amount of Rs. 25,000/-was paid to the Defendant on the date of the agreement i.e. 6th July,

1984. The remaining consideration was to be paid to the Defendant on the date of the sale-deed and the sale-deed was to be executed on 30th

January, 1985 i.e. after a period of seven months from the date of execution of the earnest note. The possession of the suit property was to be

handed over to the Defendant on the date of execution of the sale-deed. Pursuant to the agreement of sale dated 6th July, 1984, the Plaintiff paid

the earnest amount of Rs. 25,000/-to the Defendant for which the earnest note (Ex.37) was executed. Since the Defendant did not execute the

sale-deed of the suit property in his favour, the Plaintiff on 4th July, 1986 issued a notice to the Defendant calling upon him to execute the sale-

deed in his favour. However, on refusal of the Defendant to do so, the Plaintiff filed Special Civil Suit No. 83/86 seeking specific performance of

the agreement of sale dated 6th July, 1984.

3. The Defendant filed his written statement and it was his contention that he was carrying on business in Banana"s and was in need of money. He,

therefore, approached the Plaintiff, who was, according to him, doing money lending business and demanded loan of Rs. 10,000/-. The Plaintiff

advanced the loan of Rs. 10,000/-to the Defendant and for security of the said loan that the Defendant had executed the said earnest note dated

6th July, 1984. It was the case of the Defendant that in the year 1985, he repaid the loan amount of Rs. 5,000/-along with interest to the Plaintiff.

However, though he had offered to pay the balance loan amount of Rs. 5000/-to the Plaintiff, the Plaintiff refused to accept the same. It was his

case that there was no question of the property being joint family property, as his father and brother were staying separately. He denied that he

was acting as a Karta of the joint family.

4. The parties went to trial. In so far as the present Second Appeal is concerned, issue Nos. 1, 2 and 4 are relevant which are reproduced

hereunder:

1) Does the Plaintiff prove that the Defendants had agreed to sell the suit property in the capacity of Manager of his joint family ?

2) Does he prove that the Defendant had executed Isarpaoti under his signature on 6th July, 1984 by accepting earnest amount of Rs. 25,000/-?

4) Is he entitled for the decree of specific performance of contract ?

5. The Trial Court on the basis of the evidence on record answered the said issues against the Plaintiff. The Trial Court was of the view that the

case of the Plaintiff that the Defendant had agreed to sell the property in his capacity as Karta of the family could not be accepted, as there was no

recital in the earnest note/Isarpaoti (Ex.37) in that behalf. The Trial Court was of the view that the case of the Plaintiff that there was an agreement

of sale of the suit property could not be accepted in view of the fact that in the earnest note though the Plaintiff claimed to be in possession, there

was no mention in the said earnest note stating that the possession was handed over to the Plaintiff. The Trial Court also held that the payment of

Rs. 25,000/-could not be said to be proved. The Trial Court was of the view that it was impossible to accept that a party to the agreement would

not press for possession after paying a substantial amount of Rs. 25,000/-. The Trial Court was also of the view that since there was no

independent evidence in the form of receipt for payment received, as also no other corroborative evidence in that respect, the mere oral testimony

of the witnesses for the Plaintiff could not be accepted. The Trial Court on considering the evidence on record reached to a conclusion that the

Defendant''s case that it was a money lending transaction was more probable as the Defendant had stuck to the said theory right from the written

statement to his oral deposition. The Trial Court, therefore, did not deem it fit to grant any relief to the Plaintiff in so far as specific performance of

the contract was concerned. However, the Trial Court in view to balance the equities between the parties directed the Defendant to repay the

amount of Rs. 5000/-with interest @ 12% per annum from the date of the suit till it realisation. This relief, as can be seen from the order of the

Trial Court, was granted as the Trial Court was of the view that though the agreement of sale could not be said to be proved, since it was the case

of the Defendant that it was a loan agreement and since the case of the Defendant was more probable the Trial Court had decreed the suit to the

said extent.

6. Being aggrieved by the decree passed by the Trial Court dated 15th September, 1989 refusing specific performance to him, the Plaintiff filed

Regular Civil Appeal No. 19/90. The said Appeal was partly allowed by the First Appellate Court and decree passed by the Trial Court was

modified to the extent that, the First Appellate Court directed that the Plaintiff would be entitled to recover the earnest amount of Rs. 25,000/-

along with interest @ Rs. 6% per annum from the date of suit till its realisation from the Respondent/Defendant.

7. The First Appellate Court, as can be seen from the impugned judgment and decree, came to a conclusion that the evidence on record proved

that there was an agreement of sale entered into between the Plaintiff and the Defendant. However, at the same time the First Appellate Court

mentioned the doubtful circumstances surrounding the said agreement. The First Appellate Court observed that though the amount of Rs. 25,000/-

was paid by the Plaintiff on 06-7-1984, he did not obtain possession of the suit property. The second doubtful circumstance according to the First

Appellate Court was that the Plaintiff had agreed to execute the sale-deed, seven months after execution of the agreement for sale. Therefore,

though the First Appellate Court held that the agreement to sale can be said to be proved, the First Appellate Court was of the view that the

decree of the Trial Court refusing to grant specific performance to the Plaintiff cannot be faulted with. However, the First Appellate Court

recorded a finding of fact that the Plaintiff had paid Rs. 25,000/-to the Defendant in the light of the evidence on record. The First Appellate Court

found fault with the decree passed by the Trial Court on the ground that the Trial Court had erred in decreeing the suit to the extent of Rs. 5000/-

on the basis of the theory of money lending transaction put up by the Defendant. The First Appellate Court was of the view that the said relief of

repayment of Rs. 5000/-to the Plaintiff at the interest mentioned in the decree of the Trial Court could not be sustained.

As indicated above, it is the aforesaid judgment and decree of the First Appellate Court, which is a subject matter of the above Second Appeal.

8. Heard the learned Counsel for the parties. On behalf of the Appellant, it is sought to be contended by the learned Counsel that the well

reasoned judgment passed by the Trial Court refusing specific performance to the Plaintiff is sought to be reversed by the First Appellate Court

without any reasons therefor. The learned Counsel contended that the First Appellate Court having recorded a finding that there were doubtful

circumstances relating to the said agreement of sale and thereafter had erred in decreeing the suit to the extent of repayment of the earnest amount.

The learned Counsel further contended that there was no iota of evidence on record except the bare testimony of the witnesses of the Plaintiff to

support the case of the Plaintiff that he had paid an amount of Rs. 25,000/-. The learned Counsel further contended that the decree passed by the

Trial Court was just and proper in the facts and circumstances of the case.

9. Per contra, it is submitted by Shri Gilda, learned Counsel for the Respondents that the decree passed by the Trial Court was beyond the reliefs

sought in the said suit. The learned Counsel further contended that the decree on the premise that it was a money lending transaction, was

unsustainable and would tantamount to giving legality to a transaction, which was hit by the provisions of the Central Provinces Moneylenders Act,

1934. The learned Counsel for the Defendant contended that for the reasons mentioned in the impugned decree, the First Appellate Court has

thought it fit to decree the suit to the extent of the decree passed by the First Appellate Court.

10. Having heard the learned Counsel for the parties, I have bestowed my anxious consideration to the rival contentions.

In the instant case, it is relevant to note that both the Courts below have expressed their grave doubts or suspicion as regards the said agreement of

sale. This was in the context of the theory put up by the Defendant that it was a loan agreement and the agreement of sale dated 06-7-1984 was

executed only to secure the loan given by the Plaintiff to the Defendant. In fact, the First Appellate Court has itself mentioned the doubtful

circumstances surrounding the said agreement of sale. Those are the self-same circumstances, which the Trial Court took into consideration to

arrive at a finding that the Plaintiff failed to prove that there was, in fact, an agreement of sale in respect of the suit property. The First Appellate

Court, on the basis of the said circumstances, has held that the theory of the Defendant was more probable as the Defendant had stuck to his

theory right from the averments made in the written statement to his oral deposition. The First Appellate Court after mentioning the doubtful

circumstances surrounding the agreement of sale, had thereafter misdirected itself by relying on the said agreement to direct the refund of Rs.

25,000/-to the Plaintiff. In so far as the payment of the earnest amount is concerned, it is required to be noted that except the bare testimony of the

witnesses of the Plaintiff, there was no iota of evidence by way of documentary evidence that the said amount has actually been paid. The Trial

Court had, therefore, rightly recorded a finding on consideration of the evidence on record that the Plaintiff had failed to prove the payment of the

said amount of Rs. 25,000/-.

It is also required to be noted that lending of money on stray occasions cannot be said to be a money lending business and it is well settled by the

pronouncement of this Court in the context of the Central Provinces Moneylenders Act, 1934 that there has to be a continuous or a chain of

transactions in the regular course of business so as to dub a person as a money lender. Applying the said principle, the Trial Court has rightly

balanced the equities between the parties by decreeing the suit to the extent of the amount, which was directed to be repaid by the Defendant to

the Plaintiff. The submission of the learned Counsel for the Defendant Shri Gilda, therefore, cannot be countenanced in the teeth of the fact that no

contra evidence was led by the Defendant that the Plaintiff was carrying on money lending business.

11. As can be seen from the judgment of the First Appellate Court, the First Appellate Court has modified the decree passed by the Trial Court

without assigning any reason. More so, in view of the fact that the First Appellate Court can be said to be ad idem as regards the doubtful

circumstances surrounding the said agreement of sale. As held in the case of Santosh Hazari v. Purushottam Tiwari 2001(2) Mh.L.J. 786 case, that

the First Appellate Court comes to close quarters with the findings of the Trial Court. In the instant case without doing so, the First Appellate

Court has thought it fit to modify the decree passed by the Trial Court by directing the refund of the earnest amount. In my view, therefore, the

above Second Appeal is required to be allowed. In the light of what has been stated aforesaid, the questions of law stand answered accordingly.

Resultantly, the decree passed by the First Appellate Court stands set aside and the decree passed by the Trial Court is confirmed.