

Peeraji and Others Vs. Hariba and Others

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Court : Mumbai Aurangabad

Decided On : Mar-20-2014

Judge : T.V. Nalawade

Appeal No. : Second Appeal No. 568 of 1991

Appellant : Peeraji and Others

Respondent : Hariba and Others

Judgement :

Judgment :

1. The appeal is filed against judgment and decree of Regular Civil Appeal No. 191/1984 which was pending in the Court of Additional District Judge, Latur. The appeal of the present respondent against the judgment and decree of Regular Civil Suit No. 157/1979 decided by Joint Civil Judge, Junior Division, Latur is decided in favour of the respondent. The relief of specific performance of contract and permanent injunction are granted to the respondent by the First Appellate Court. Both the sides are heard.

2. The respondent (plaintiff) had filed suit in respect of agricultural land bearing Gat (Block) No. 141 and 153 situated at Ankoli, Tahsil and District Latur. The area of first land is 5 Acres 35 Gunta and area of second land is 4 Acres 10 Gunta. It is the case of plaintiff that defendant - Peeraji was in need of money and so, he agreed to sell the suit property to plaintiff for consideration of Rs. 12,500/-. It is

contended that on 25.12.1978 the agreement was written and it was scribed by daughter of defendant. It is contended that on the same day, the amount of Rs. 1,000/- was given as earnest money by the defendant to the plaintiff and the possession of land was given to the plaintiff under the agreement.

3. It is the case of plaintiff that he was ready and willing to perform his part of contract and he requested many times to defendant to accept the balance consideration and to execute the sale deed. It is contended that the defendant avoided to execute the sale deed and lastly he denied the contract itself on 25.3.1979. The suit came to be filed on 29.3.1979.

4. By filing written statement, Peeraji/defendant denied the agreement. He contended that plaintiff had joined hands with daughter of defendant and by making false representation that the thumb impression of defendant was required on security bond in respect of employment of the daughter, his thumb impression was obtained on the document. He denied that he has received consideration and he has handed over the possession to the plaintiff.

5. The issues were framed in accordance with the aforesaid pleadings. For proving the case, the plaintiff examined himself and he examined witnesses on agreement like Kishan Jadhav and Shaikh Jameer. The execution of document was admitted by defendant though he took the defence of fraud. In defence, the defendant examined himself. He examined his daughter Shashikala, who had written the document and he examined one Dattatraya Talikhedkar.

6. The defendant has given evidence that his thumb impression was obtained by Shashikala by making false representation that it was necessary for obtaining loan. He has deposed that he had never agreed to sell the suit property to the plaintiff. He has deposed that he had not given possession to the plaintiff. This evidence regarding fraud has no basis of pleadings and the particulars in respect of fraud mentioned in the written statement were different. In the cross examination, the defendant admitted that the document was already written when his thumb impression was obtained. In the cross examination, he contended that if the amount of Rs. 12,500/- was given to him, he would have executed the sale deed in favour of the plaintiff. He then contended in the evidence that he would still

execute the sale deed, if plaintiff was ready to give Rs. 40,000/-.

7. In the cross examination, the defendant admitted that his wife and his daughter wanted to sell the suit property to the plaintiff. He admitted that in the presence of witness Kishan, plaintiff had agreed to pay Rs. 12,500/-. He has also admitted that in his presence there was a talk about the execution of agreement of sale when thumb impression was obtained. He has admitted that besides the suit land, he was having other agricultural land admeasuring 11 Acres.

8. Shashikala, daughter of defendant, who scribed the document has given evidence that she had made false representation that thumb impression of defendant was required for service purpose. Her evidence further shows that she had agreed to sell the property to plaintiff and she had scribed the document accordingly. However, she has tried to say that no amount was paid to her by the plaintiff.

9. The evidence of Shashikala, in the cross examination shows that she was S.S.C. and she had passed D.Ed. She was serving as a Teacher at the relevant time. Her evidence shows that she had collected the information from others about the manner of writing agreement of sale. She has given evidence that witnesses Jameer and Kishan put their signature and thumb impression as witnesses on the document in her presence. She admits that she was in need of money, so the document was executed. Shashilaka and witness of defendant - Dattatraya have given evidence that on the date of deposition, the defendant was in possession of the land.

10. The Trial Court held that there was the agreement of sale. The Trial Court held that part of consideration, amount of Rs. 1,000/- was given on the date of agreement. The Trial Court held that fraud was not proved by the defendant. The Trial Court held that the possession was not given. The Trial Court, however, did not give reason for not giving the relief of specific performance of contract. The First Appellate Court has considered the record of inquiry prepared by revenue authority to ascertain as to whether possession was given to the plaintiff. On the basis of that record, the First Appellate Court has held that the possession was given to the plaintiff. The First Appellate Court has held that no reason is given for

denying the relief of specific performance to the plaintiff and so, the suit is decreed as prayed.

11. Argument was advanced by the learned counsel for the appellants on the grounds mentioned in the appeal memo. The argument was mainly on the following grounds which are treated as substantial questions of law :-

(i) Whether the Appellate Court has committed error in interfering the decision of the Trial Court which is based on exercise of discretionary power ?

(ii) Whether the point of readiness and willingness ought to have been answered in favour of plaintiff in view of nature of evidence ?

(iii) Whether the defendant, appellant is entitled to market price on the ground of equity ?

12. It was mainly submitted by the learned counsel for the appellants that granting or refusing the relief of specific performance is within discretionary powers of the Civil Court as provided under section 20 of Specific Relief Act. It was submitted that in view of the fact that the small amount of consideration was given, it was not proper for Appellate Court to interfere in the decision of the Trial Court. It was also submitted that the plaintiff ought to have been made to pay market price on the ground of equity and that could have done justice to both the sides as possession is with the plaintiff.

13. Present appeal is prosecuted by the husband of Shashikala and widow of deceased defendant. The evidence given by the defendant with regard to the intention of Shashikala and widow of deceased defendant is already quoted. Shashikala had scribed the document and in view of the evidence given by the defendant in the cross examination, it can be said that it is not open to Shashikala to deny that there was agreement of sale. Shashilala had taken lead in execution of the agreement. As the evidence shows that the wife also wanted to sell the land to the plaintiff, after the death of original defendant, the Court is expected to keep in mind the scope available to Shashilaka and widow of defendant to refuse to execute the sale deed. Further, from the evidence of defendant, it can be said that

he has dispute that entire consideration was not given in lumpsum on the date of agreement. The defendant wanted more consideration, amount of Rs. 40,000/- and for that reason, he was refusing to execute the sale deed. These circumstances are considered by the First Appellate Court and they cannot be ignored. This material was not considered by the Trial Court. Being the First Appellate Court, it was necessary for the First Appellate Court to consider all the evidence and to appreciate it. The Trial Court has also given decision in favour of the plaintiff in respect of two issues and it is held that there was the agreement of sale and there was no fraud played.

14. The judgment and decree of Trial Court shows that there is no discussion at all which needs to be there for refusal to grant specific performance of contract when section 10 of Specific Relief Act shows that ordinarily relief of specific performance needs to be granted when the contract is for sale of immovable property, it becomes necessary for the Court to say, why such relief cannot be granted. Further, the refusal to grant such relief can be only on the grounds mentioned in section 20 of Specific Relief Act. The relevant provisions of section 10 and 20 of Specific Relief Act are as under :-

10. Cases in which specific performance of contract enforceable.-Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(a) When there exists no standard for ascertaining actual damage caused by the nonperformance of the act agreed to be done; or

(b) When the act agreed to be done is such that that compensation in money for its nonperformance would not afford adequate relief.

Explanation.- Unless and until the contrary is proved, the court shall presume. “

(i) That the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and"

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 nonperformance would involve no such hardship on the plaintiff, or

(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 advantage within 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."

15. The aforesaid provisions show that contract to transfer immovable property is as a rule specifically enforceable. The refusal of such relief is possible only when the grounds mentioned in section 20 are made out. There was no pleading at all in the written statement with regard to the grounds mentioned in section 20 and the defence of fraud was taken. The burden of proof in respect of these grounds was

on defendant. The Trial Court has not discussed either these grounds and has not given any specific reason for refusal to give relief to the plaintiff. Thus, the Trial Court has committed error in exercising the jurisdiction. If the Court does not give reasons for refusing the specific relief, in such a case, it can be said that error is committed in exercising the discretionary power and such error can be corrected in the appeal. Reliance can be placed on this point on the case reported as AIR 1973 SC 2457 [M.L. Devender Singh v. Syed Khaja] on this point. In view of the aforesaid discussion and position of law, the First Appellate Court has not committed any error in interfering the decision of the Trial Court. Thus, the first substantial question of law is answered against the appellant/defendant.

16. On the point of readiness and willingness, no issue as such was framed in view of defence taken in written statement. The relevant provision, the portion of section 16 of Specific Relief Act is as under :-

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relations intended to be established by the contract; or

(c) who fails to aver and prove that he has or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.-For the purposes of clause (c), -

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

17. As per the aforesaid provision, there was averment in the plaint. The plaintiff came to the Court with specific case that the defendant had repudiated the contract. The suit was filed within period mentioned in the agreement. In view of these circumstances, it can be said that plaintiff accepted the repudiation and acted upon it by filing the suit. In view of these circumstances and nature of evidence given by defendant, which is already quoted, it cannot be inferred that plaintiff was not ready and willing to perform his part of contract. Thus, on this point also there are no merits in the appeal. This point involves questions of fact and both the Courts below have not decided this point against the plaintiff and there was also no need of decision on this point in view of the nature of defence taken in the written statement. On this point, reliance can be placed on the case reported as 1989 (4) SCC 313 [Abdul Khader Rowther Vs. P.K. Sara bhai]. For respondents reliance was placed on following two reported cases (i) (2012) 5 Supreme Court Cases 712 [Narinderjit Singh Vs. North Star Estate Promoters Limited] and (ii) (2008) 4 Supreme Court Cases 212 [Ramkrishna Pillai and Anr. Vs. Muhammed Kunju and Ors]. The learned counsel for the appellant placed reliance on the case reported as 2013 (1) ALL MR 433 (S.C.) [Satya Jain (D) thr. Lrs. and Ors. Vs. Anis Ahmed Rushdie (D) tr. Lrs. and Ors.].

18. On the third point, it was submitted by the learned counsel for the appellants that for last so many years, plaintiff has been in possession of the suit property and he had given consideration of only Rs. 1,000/-. It was submitted that in view of these circumstances and the fact that the matter is being decided after many years, equity needs to be done to the defendant and direction needs to be given to the plaintiff to pay market price. In this regard, it can be said that as per the judgment and decree of the First Appellate Court, the remaining amount of consideration was deposited by the plaintiff in the Court. The suit was filed also immediately within period prescribed in the agreement. It is due to the aforesaid conduct of the defendant, the sale deed could not be executed. It cannot be said that the suit remained pending due to conduct of the plaintiff. On this point, reliance was placed on case reported as 2011 ALL SCR 1597 (Vimaleshwar

Nagappa Shet Vs. Noor Ahmed Sheriff and Ors.). In this case, the Apex Court has discussed the provision of section 20 of Specific Relief Act. In the reported case due to the circumstance like filing of suit after lapse of long period, the relief was not given to the plaintiff and it was held that the prices of property in that urban area had increased very fast. In the case reported as Satya Jain cited supra while discussing the provision of section 20, the Apex Court considered the escalation in prices. The Apex Court has laid down that escalation of prices of property cannot be valid ground for refusing the relief of specific performance. The Apex Court however made order to give market price to the defendant. Similar directions were made in the case reported as 2011 (6) Mh.L.J. 84 [Preetam Kaur Vs. Prakash Ramdeo Jaiswal] by this Court.

19. The facts and circumstances of each and every case are always different. The facts of the present case are altogether different and this Court has considered the conduct of both the parties. Grounds mentioned in section 20 of Specific Relief Act are not made out. The conduct is also relevant for using principle of equity. In the reported cases AIR 2004 Supreme Court 4472 (1) [P. D'Souza Vs. Shondrilo Naidu] at paragraph No. 47 following observations are made :

"47. The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision"

20. In this reported case statement of law from the case of M.L. Devender Singh cited supra is considered by the Apex Court. In view of this position of law, this Court holds that last substantial question of law also needs to be answered against the appellant.

21. In the result, the appeal stands dismissed.

22. The learned counsel for appellant submitted that he wants to challenge the decision of this Court. He requested for time of six weeks. In view of the facts and circumstances of this case, this Court holds that time of four weeks can be given.

The stay is given to the execution of the decree for four weeks.

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