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Court : Allahabad

Decided On : Sep-18-1936

Reported in : AIR1937All161

Appellant : Mt. Gaindo Devi

Respondent : Shanti Swarup and ors.

Judgement :

1. This is an appeal by Mt. Gaindo Devi, defendant 2, in a suit for specific performance of a contract for sale. The plaintiffs to the suit were Shanti Swarup and his two brothers. It was alleged in the plaint that Farid Bakhsh, defendant 1, entered into an agreement on his own behalf and on behalf of his sister, Mt. Momina Bibi, for the sale of a shop in Ghaziabad for a sum of Rupees 8,150. Mt. Momina Bibi had 46 out of 173 sihams in the shop and Farid Bakhsh had the remaining 127 sihams. Out of the sale consideration a sum of Rs. 2,167 would be payable to Mt. Momina Bibi and the balance to Farid Bakhsh. According to the evidence of the plaintiff Shanti Swarup, the defendant Farid Bakhsh was indebted to Shanti Swarup and brothers on the basis of three promissory notes, and a notice was given to Farid Bakhsh on 8th June 1932 to pay off the moneys due under the promissory notes, and in that connection the deponent had to go several times to the house of Farid Bakhsh, when it was proposed that the shop belonging to him and his sister might be purchased by Shanti Swarup. The negotiations were completed by 15th July 1932, when Farid Bakhsh received a sum of Rs. 100 as earnest money for the sale of the shop in question. It was agreed that a sale deed

would be executed within a few days, and although in the Court below there was some controversy as to the time within which the sale deed was to be executed, there is no such controversy before us, and it might be taken that the agreement was that within a reasonable time the transaction would be effected.

2. Farid Bakhsh had to leave Meerut for Cawnpore on or about 18th July, and on 22nd July two telegrams were sent by Shanti Swarup to Farid Bakhsh, one at Meerut and one at Cawnpore, demanding the completion of the sale deed. The telegrams were not answered, and by 26th July 1932 the plaintiffs came to know that Farid Bakhsh was negotiating for the sale of the shop with Bhikan Lal, the husband of Shrimati Gaindo Devi, the appellant before us, and a letter was, therefore, sent to Farid Bakhsh reminding him of the contract between the plaintiffs and himself and warning him that the sale should be completed at an early date. A copy of this notice was sent to Bhikan Lal and Hari Shanker, the son of Shrimati Gaindo Devi. A suit (1096 of 1932) for the recovery of moneys due under the three promissory notes had already been instituted in the Court of the Munsif at Meerut on 12th July 1932, and in the agreement of sale which was evidenced by means of a letter sent by Farid Bakhsh to one Hargulal Singh, it was mentioned that Farid Bakhsh would take the proportionate price in respect of his share (127 sihams) after deducting the costs and the amount of debt due under the three notes of hand to Lala Shanti Swarup and others in respect whereof Farid Bakhsh had come to know that a suit had been filed.

While the suit was pending, when the plaintiffs came to know that Farid Bakhsh was resiling from his agreement, the plaintiffs filed an application on 28th July 1932 in the suit on the basis of the promissory notes for attachment before judgment of the shop in question, and a great deal of discussion has centred round this application which we shall consider after we have narrated the other facts which have led to the institution of the present suit for specific performance. On 3rd August 1932, Mt. Momina Bibi executed a sale deed of her share of 46 sihams in the shop in favour of Shanti Swarup and others and took Rs. 2,167 as her share of the purchase money. On 6th August 1932 another notice was sent by Shanti Swarup to Farid Bakhsh which also was not replied.

3. The claim for the recovery of money on the basis of the promissory notes was decreed on 30th August 1932, and on 1st September 1932 Farid Bakhsh executed a sale deed in favour of Mt. Gaindo Devi for Rs. 6,600, and left in deposit with the vendee a portion of the consideration money for full payment to Shanti Swarup of the principal and interest and costs due under Suit No. 1096 of 1932. It was agreed that the remaining sum of Rupees 1,066 would be received in cash before the Sub-Registrar by the vendor. Before the execution of this sale deed, when the plaintiffs came to know of the same, a telegram was sent to the Sub-Registrar requesting him that the purchaser of Shop No. 204, Wrightganj, Ghaziabad, should be informed that Farid Bakhsh, vendor, had contracted to sell the same to Shanti Swarup, and that a suit was being filed. Over and above this, an application was given to the Sub-Registrar by one Indar Singh on behalf of Shanti Swarup stating the circumstances of the contract between Farid Bakhsh and Shanti Swarup, and requesting that the vendee of the property might be informed that he should desist from purchasing it and that Sheikh Farid Bakhsh might also be informed that he should refrain from getting it registered. The Sub-Registrar informed the parties of the telegram and the application and made a note to that effect in the endorsement at the back of the sale deed in favour of Mt. Gaindo Devi. A telegram was also sent to the scribe of this sale deed requesting him not to write out the sale deed on 1st September 1932. As we mentioned before, Mt. Gaindo Devi is the wife of Bhikan Lal and the mother of Hari Shanker, and from the facts which we have given above, it is clear that Bhikan Lal and Hari Shanker were informed on more occasions than one of the contract of sale between Farid Bakhsh and the plaintiffs, and one cannot escape the suspicion that the negotiations of sale were conducted by Bhikan Lal and Hari Shanker, and the lady's name was introduced in the sale deed so that a defence might be available, in case a suit for specific performance was instituted that the vendee was a bona fide transferee for value without notice of the earlier contract.

4. The suit has been decreed by the Court below, and in appeal before us learned Counsel for the appellant has frankly conceded that on the state of the evidence it is impossible to argue that Mt. Gaindo Devi was a transferee in good faith without notice of the contract of sale in favour of the plaintiffs, nor has it been argued that the contract was broken by Shanti Swarup himself. It is difficult to conceive of any

better steps than what were taken by Shanti Swarup in order to protect his rights and in order to apprise the vendor Farid Bakhsh and the possible vendees of the earlier agreement and of the desire to abide by the same. The point which was, however, strenuously argued before us was that the plaintiffs had debarred themselves from getting the discretionary relief in the nature of specific performance by reason of their conduct and by reason of the fact that they had elected to avail themselves of a different remedy inconsistent with the remedy by way of a suit for specific performance. The bar flowing from the doctrine of election is very much in the nature of a bar by estoppel, and the principles underlying election have been, enunciated in a number of cases beginning perhaps from what might be considered to be the leading case in *Benjamin Scarf v. Alfred George Jardine* (1882) 7 A.C. 345 but it is equally true, as observed in *Rowell v. Smith* 102 N.W. 1, that failure to note the true test, whether the doctrine of election applies or not, has led to so many inconsistent and improper references thereto that great care must be exercised in the selection of judicial guides in a given circumstance OE one will be liable to go astray. In the present case it is said that in pursuance of the sale deed in favour of Mt. Gaindo Devi, the lady deposited a sum of Rupees 4,087-6-0 in Suit No. 1096 of 1932, *Lala Shanti Swarup V. Hafiz Sheikh Farid Bakhsh*, on 8th November 1932, and this amount was actually withdrawn by the plaintiffs towards the end of November before the institution of the present suit on 30th November 1932 for specific performance, and the argument is that the plaintiffs recognizing the validity of the sale deed in favour of Mt. Gaindo Devi elected to withdraw the money deposited by her and, as such, they are debarred from pursuing the remedy by way of specific performance of contract; As was pointed out in *Mt. Gulab Koer v. Badshah Bahadur* (1909) 13 C.W.N. 1197 at p. 1216:

Where different remedial rights arise out of the same facts, the question whether the party aggrieved is bound to make an election depends upon the circumstance whether the remedies are in their nature inconsistent. The essence of the matter is that a litigant cannot come before a Court of Justice and 'have recourse to repugnant remedies; in other words, election is the choice between two or more co-existing and inconsistent remedies.'

5. It must at the same time be borne in mind, as was pointed out by Rogers, G.J. in *Bowen v. Mandeville* 95 N.Y. 237 that:

A party may prosecute as many remedies as he legally has, provided they are consistent and concurrent.

6. The contention, therefore, on behalf of the respondents is that in circumstances like these, where a contract has been broken by one of the contracting parties, the other party has a remedy to proceed either by way of specific performance or to sue for damages, and these are the two remedies that are co-existent, but are alternative and inconsistent, and if the aggrieved party proceeds to elect one of these two remedies he cannot be permitted to avail himself of the second one at a later stage. Election must be exercised at once, and having been exercised it is final and cannot be retracted. The submission, therefore, is that from the mere fact that the plaintiffs withdrew certain money deposited by Mt. Gaindo Devi in pursuance of the sale deed executed by Farid Bakhsh in her favour, the doctrine of election cannot be said to operate against the suit for specific performance of contract. Assuming without deciding - let it be clearly understood that we do not propose to decide between these two contending arguments - that the doctrine of election could be invoked by Mt. Gaindo Devi, we are of the opinion that the argument is not available to the appellant, because of the fact that it was never taken in the Court below, and further we have not got sufficient materials before us to determine this controversial point. The question before us, which is the subject of discussion, is after all a mixed question of fact and law the plaintiffs in their plaint stated the facts which entitled them to relief; in para. 13 they stated that:

The proportionate price of the share of defendant 1 is Rs. 5,983.... Defendant 1 has deposited in Court the amount of decree No. 1096 of 1932 of the Court of the Munsif of Meerut due to the plaintiff and so Rs. 100 only, which were given to defendant 1 as earnest money, should be deducted from Rs. 5,983, sale consideration.

7. They nowhere said that the plaintiffs had withdrawn the money that was in deposit in Court, and it is to be noted that they asserted that defendant 1, namely Sheikh Farid Bakhsh, had deposited the money. They did not say that it was

Shrimati Gaindo Devi who had deposited the money. In the whole of the written statement filed by Mt. Gaindo Devi, there is no mention of the doctrine of election, but it is said that it can be spelled out of para. 22 of the written statement. That paragraph is to the following effect:

The sale deed, in favour of the defendant was executed for Rs. 6,600 and defendant 1 left the amount in deposit with the defendant for payment to the plaintiff and other creditors and Rs. 1,066 has been paid to defendant 1 by means of a cheque. The amount which was left in deposit for being paid to the plaintiff has been deposited in Court by the defendant and the plaintiff realized the same from Court. The plaintiffs' allegation that they are entitled to get the agreement enforced on payment of Rs. 5,983, the proportionate price only, is altogether wrong and groundless.

8. For the first time, therefore, a mention of the withdrawal of the deposit was made on 13th February 1933 and here too it was not stated that the money was withdrawn before the institution of the suit. It is not possible to say that this was a definite plea based on the doctrine of election. The words in the vernacular make it clear that para. 22 of the written statement was really a reply to para. 13 of the plaint, and the defendant was asserting that the plaintiffs were not entitled to obtain specific performance on payment of Rs. 5,983 only, but on payment of Rs. 6,600, the amount of the sale consideration entered in the sale deed of Mt. Gaindo Devi, who had paid the entire amount either by means of a cheque in favour of Farid Bakhsh or by means of deposit in Court to the credit of the plaintiffs. That this is so is further evident from the fact that no issue was struck in the Court below on this point, and it is difficult to believe that if the defendant insisted on availing herself of this plea she would not have protested against the issues that were actually struck in the case. Throughout the whole of the judgment of the learned Subordinate Judge we find no mention of this particular defence, and when the appellant came to draw her grounds of appeal for this Court, no grievance was made of the fact that the Court below had not struck any issue on the question of election.

9. It is true that in grounds Nos. 2 and 3 it is contended that the plaintiff's remedy of specific performance of his contract was no longer available by reason of the withdrawal of the decretal amount, but it is not said that the point was taken in the Court below and was not adjudicated upon. We are, therefore, of the opinion that it would not be fair to the respondents if we permit this plea to be taken at this late stage. The materials for the determination of the plea are also not upon the record. The most important link in the chain is missing. There is no document from which we can infer that the money was withdrawn by the plaintiffs on a particular date, nor do we know the circumstances under which the money was withdrawn, if it was ever so withdrawn. It is then said that there is an affidavit on the file of the present appeal from which it is clear that the money was withdrawn by the plaintiffs prior to the institution of the present suit. It appears that the defendant applied for stay of execution of the decree of the Court below and in connection with that application filed an affidavit in which it was stated that the money deposited by the applicant was withdrawn by the plaintiffs prior to the institution of the suit, and it is said that as there was no denial of this fact in the affidavit filed on behalf of the plaintiffs it should be assumed that the withdrawal was admitted. The proceedings in connection with which the affidavit was filed were proceedings for stay of execution of the decree of the Court below and it was not necessary for the plaintiffs to affirm or to deny a statement made in the affidavit filed on behalf of Mt. Gaindo Devi. On this fact alone, therefore, it is not possible to base a definite finding that the money was withdrawn by the plaintiffs before the institution of the present suit.

10. The position was appreciated by learned Counsel for the appellant and he, therefore, sought permission to file additional evidence in appeal, and in the alternative prayed that we should remit an issue to the Court below for the determination of the point after taking evidence that might be relevant to the issue. We are of the opinion that it would not be fair to adopt either of the two methods suggested by learned Counsel for the appellant. It is really late in the day for such a course to be taken in appeal. It is then said that on another point there is sufficient material on the record and that we should come to the conclusion that the plaintiffs have disentitled themselves from the relief claimed, and our attention is drawn to the application of 28th July 1932 when the plaintiffs applied for

attachment of the disputed shop in connexion with suit No. 1096 of 1932. The argument is that this conduct of the plaintiffs makes it clear that they did not wish to avail themselves of the remedy by specific performance because they sought to attach the property, as the property of their judgment-debtor, capable of being sold in execution of such decree as might be passed in the suit. The case in the Court below was not approached from this point of view, because all that the learned Subordinate Judge observes on this point is that it was obviously to safeguard their interest that the plaintiffs were forced to make that application and not by way of the breach of contract. The application was invoked in the Court below as a piece of evidence to prove that the plaintiffs themselves and not the defendant Farid Bakhsh had broken the contract. Before us the contention is that the application should be interpreted as implying that the plaintiffs no longer intended to avail themselves of the right of specific performance. In the application the contract of sale with the plaintiffs is distinctly mentioned, and it is said that the plaintiffs had come to know that the defendant in order to evade payment of the amount claimed was making great haste in selling the house to Bhikan Lal Hari Shanker, commission agents of Ghaziabad.

11. It is true that there is no mention of the fact that the plaintiffs intended to bring a suit for specific performance, but it is equally true that there is no mention of the fact that the plaintiffs had waived that right. The plaintiffs might very well have thought that the best way by which the defendant Farid Bakhsh could be prevented from selling the property to another was by attaching the property before judgment, and then under Section 64, Civil P.C., a private transfer of the property attached would be void as against all claims enforceable under the attachment. It might also be a sort of lever to induce the defendant Farid Bakhsh to sell the property to the plaintiffs according to the contract, and indeed Farid Bakhsh did understand that application in that light. In para. 4 of the reply to the application he says that after the contract of sale with the plaintiffs, the plaintiffs resiled from the contract and the defendant was, therefore, compelled to negotiate elsewhere and such negotiations were nearing completion, and in para. 5 it is stated that the plaintiff, simply in order to exercise undue pressure on the defendant, has instituted the suit and has applied for attachment before judgment. Be that as it may, it is impossible to give effect to the doctrine of election on the

basis of such a slender foundation. Even after this application of 28th July 1932, the plaintiffs went on asserting their rights up till 1st September 1932 when the sale was executed by Parid Bakhsh in favour of Mt. Gaindo Devi by sending a notice to Farid Bakhsh on 6th August 1932, a telegram to the scribe of the sale deed in favour of Mt. Gaindo Devi on 1st September 1932 and another telegram and application to the Sub-Registrar on the same date, and all this is inconsistent with the view that on 28th July 1932 the plaintiffs had given up the idea of instituting a suit for specific performance; and we further know that soon after, i.e., on 0th November 1932, the suit was actually filed.

12. Finally, it is argued that 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 it must be understood that the discretion of the Court is not to be arbitrarily exercised but guided by judicial principles. We fail to see what judicial principles can be invoked in order to refuse a decree for specific performance. Our attention was also drawn to Section 24, Clause (c), Specific Relief Act, but, as stated before, we have come to the conclusion that the plaintiffs had not already chosen a different remedy and obtained satisfaction for the alleged breach of contract. They were making frantic efforts for the preservation of their rights. It is also not possible to say that any other relief can be given to the plaintiffs in lieu of the relief claimed for. The explanation to Section 12, Specific Relief Act, makes it clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. The discretion to grant this specific relief was granted by the Court below, and before a Court of appeal thinks of interfering with that discretion, it should come to the conclusion that the discretion was exercised by the Court below arbitrarily. We are further of the opinion that this was quite a fit case on the materials on the record in which a decree for specific performance ought to have been granted. For the reasons given above, we dismiss this appeal with costs.