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YasIn and Others Vs. Mohd. Siddique and Others

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Court : Allahabad

Decided On : Sep-17-1997

Reported in : 1998(1)AWC465

Judge : D.C. Srivastava, J.

Acts : Specific Relief Act, 1963 - Sections 20, 20(2) and 25; Indian Limitation Act, 1963 - Schedule - Article 54

Appeal No. : Second Appeal No. 1115 of 1994

Appellant : YasIn and Others

Respondent : Mohd. Siddique and Others

Advocate for Def. : Rajesh Tandon, Adv.

Advocate for Pet/Ap. : Shiv Shankar Pandey, Adv.

Judgement :

D.C. Srivastava, J.

1. This is defendants' second appeal.

2. The brief facts are that plaintiff Mohammad Siddique filed a suit against the defendant Rahimuddin for specific performance of agreement to sell. The trial court dismissed the suit. An appeal was preferred, which was allowed. The

appellate court reversed the judgment and decree of the trial court and decreed the suit. It is, therefore, this second appeal.

3. At the time of admission of this appeal, only two questions of law were formulated. The first was whether the suit was premature and the second waswhether the above plea of the suit being premature, which was not taken in the written statement, can be raised in the second appeal.

4. Another application was moved on 3rd March, 1997 wherein additional substantial question of law was formulated. Since the appeal was already admitted only on two substantial questions of law, any other substantial question of law can be permitted to be raised and argued only with the permission of the court.

5. Coming to second substantial question of law formulated at the time of admission of the appeal, it has to be answered in negative from the written statement. In para 9 of the same, it was already pleaded that the suit was premature. Consequently, when the plea on this point was already there in the written statement, it can be permitted to be raised in this second appeal. Question No. 2 is answered accordingly.

6. Coming to question No. 1, it has been argued by the learned counsel for the appellants that the suit is premature because date was fixed in the agreement to sell for executing the sale-deed and since the suit was filed before the date fixed, tt was premature and liable to be dismissed. The agreement (paper No. 6A) which has been proved but has not been exhibited by the trial court shows that it was executed on 3rd March, 1975. Condition No. 3 of this agreement is relevant and material for deciding whether the suit was premature or not. Translation of condition No. 3 is as under:

'That from today till 1st September, 1977 the first party shall execute a sale-deed in favour of second parry or in favour of a person directed by the second party and shall get the same registered.'

It is thus to be seen that from condition No. 3 it is manifest that the first party, namely, the defendants agreed to execute the sale-deed between 3rd March,

1975 to 1st September, 1977. 1st September, 1977 was not the actual date fixed for execution and registration of the sale-deed. On the other hand, the only reasonable interpretation of this clause is that the sale-deed could be executed any time between 3rd March, 1975 to 1st November, 1977. Consequently, it cannot be accepted that specific date as 1st September. 1977 was the date for execution of the sale-deed and prior to that execution of the sale-deed could not be demanded by the plaintiff.

7. Learned counsel for the appellants has referred to Article 54 of the Limitation Act. In this connection, two things have to be borne in mind. The first is what is the period of limitation for filing the suit and the second is when the cause of action accrues. Accrual of cause of action and period of limitation are not synonymous terms. Likewise the suit being premature cannot be equated with the contention that the suit is time-barred.

8. Learned counsel for the appellants contended that two situations are contemplated under Article 54 of Limitation Act. The first is that cause of action accrues on the date fixed for performance of contract and the second is that if no such date is fixed, when the plaintiff has notice that performance is refused. According to the learned counsel for the appellants since date was fixed for execution of sale-deed, the first part shall apply and not the second part. Contrary to this, learned counsel for the respondent contended that second part applies and his submission can be accepted because it is in consonance with clause (3) of the agreement. It has, therefore, to be seen whether cause of action accrued when the plaintiff had notice that performance is refused. For this, certain dates are material. On 10th November, 1975, first notice was sent by the plaintiff to the defendants calling upon them to execute the sale-deed, hut this notice was refused by the defendant-appellants. Second notice was issued on 20th December, 1976. This notice was accepted by the defendants. They sent a reply dated 28th December, 1976, in which they denied the execution of agreement to sell and also refused to execute any sale-deed. Another notice, namely, third notice, was sent by the plaintiff on 6th January, 1977 fixing 2ndFebruary, 1977 as the date for appearance of the parties before the Sub-Registrar for receiving payment and for executing and registering the sale-deed. This notice was served on 8th January, 1977. This

was replied on 10th January, 1977 denying the execution of agreement and refusing to execute the sale-deed. Consequently, on 8th August, 1977 the suit was filed. From the above dates. It is clear that atleast on two dates from the reply notices of the defendants, the plaintiff had notice that performance of agreement to sell was refused by the defendants. The suit Tiled on 8th August was, therefore, not premature.

9. Coming to the cases cited by the learned counsel for the parties on almost on identical facts, this Court In Malkhan Singh v. Raghubir Singh, AIR 1981 All 96, had held that such argument that the suit was premature on the facts of the case was fallacious. The facts in that case were that the appellant under the agreement could have executed the sale-deed by 4th June, 1971 which is equated to 1st September, 1977 according to the agreement before me. The suit was filed on 2nd June. 1971. On 6th May, 1971, a notice was sent to the appellant to execute the sale-deed by virtue of the agreement. Notice was not accepted by the appellant of that case and it was served by refusal. On these facts the plea that the suit was premature was turned down. Similar are the facts before me, hence the plea of the learned counsel for the appellants that the suit is premature cannot be accepted.

10. Learned counsel for the appellants has also cited few cases in support of his contention, that the suit is premature. In Harihar Prasad and others u. Udaibir Singh and another. 1978 AWC 79. This case is distinguishable because in this case it was held that the cause of action for such suit arises only after the time for performance of contract expires. In the case before me, since specific time was not fixed, the verdict of this case cannot help the appellants.

11. The view of. Karnataka High Court in Mahboob Pasha u. Syed Zaheeruddin and others AIR 1988 Kar 83, is also distinguishable. In this case. It was laid down that where the date for performance of the agreement is fixed as per first part of Article 54, the limitation begins to run from the date fixed for the performance, It was not held in this case that the suit was premature. The starting point of limitation is to be computed in the instant case before me according to the second part of Article 54 and not according to first part, hence this case is also distinguishable. On similar grounds the case of Sumerchand Hukumchand and

others v. Hukumchand Mathuradas and others, AIR 1965 MP 177, can also be distinguished.

12. Learned counsel for the appellants tried to raise more pleas, namely, wrong and incorrect appreciation of evidence regarding execution of agreement. This is not open in second appeal specially when specific substantial questions of law were formulated at the time of admission of the appeal. The question whether agreement was executed or not has been determined by the two courts below, which requires no interference.

13. Placing of onus of proof not in accordance with law was also raised, but this question also cannot be permitted to be raised in this second appeal. After the parties have led evidence, the question of onus of proof retains academic character only and loses its significance.

14. Learned counsel for the appellants in the separate application has attempted to introduce one more substantial question of law that the discretion of the trial court, which was exercised under Section 20 of the Specific Relief Act, was wrongly interfered with by the lower appellate court, hence the decree of the lower appellate court cannot be maintained. This plea also has no legs to stand because in the written statement no plea taking the benefit of Section 20 of the Specific Relief Act was specifically raised. Unless it is specifically pleaded and proved that one of the conditions mentioned in Section 20(2) exists, the decree for specific performance could not be refused by the courts below. Those three situations are;

'(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;

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.'

15. It has not been pleaded how and in what manner the plaintiff got unfair advantage over the defendant at the time of execution of the agreement to sell. In absence of specific plea and proof of such plea on the point, benefit of clause (a) of sub-section (2) of Section 20 of the Specific Relief Act cannot be afforded to the appellants.

16. The second ground is where the performance of contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff. This plea has also not been raised that it was not foreseen by the appellants at the time of execution of agreement to sell that they will suffer unforeseen consequences by executing the sale-deed and no hardship would be caused to the plaintiff if performance is refused. In the absence of plea and proof on this point, the benefit of other clause (b) also cannot be given to the appellants.

17. The third is where the defendant entered into contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. Nothing has been pleaded that equities have not been balanced in the agreement to sell or it would be inequitable to seek enforcement of specific performance of the agreement to sell. Thus benefit of clause (c), sub-section (2) of Section 20 of the Act also cannot be given to the appellants.

18. It may also be mentioned that the trial court never in exercise of its discretion under Section 20 aforesaid granted any benefit to the defendant-appellants, as such it cannot be said that the lower appellate court acted arbitrarily in setting aside the said discretion and the judgment and decree of the trial court.

19. For the reasons given above, no merit is found in this appeal which is hereby dismissed with costs.

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