

Ratan Pal Singh Vs. Kunwar Pal Singh and Another

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Court : Allahabad

Decided On : Apr-10-2001

Reported in : AIR2001All224

Judge : U. S. Tripathi, J.

Acts : [Specific Relief Act, 1963](#) - Sections 20; [Transfer of Property Act, 1882](#) - Sections 58

Appeal No. : Second Appeal No. 1662 of 1998

Appellant : Ratan Pal Singh

Respondent : Kunwar Pal Singh and Another

Advocate for Def. : Harish Chandra, Adv.

Advocate for Pet/Ap. : K. K. Arora, Adv.

Judgement :

U. S. Tripathi, J.

1. This second appeal has been directed against the judgment and decree dated 24.8.1998 passed by 2nd Additional District Judge. Moradabad in Civil Appeal No. 70 of 1995 dismissing the appeal and confirming the judgment and decree of 1st Additional Civil Judge. Moradabad dated 25.4.1994 passed in Original Suit No.

1062 of 1991 decreeing the suit of respondents for specific performance of contract.

2. Kunwar Pal Singh and Chandra Pal Singh respondents(hereinafter called plaintiff) Jointly filed Original Suit No. 1062 of 1991 against the appellant [hereinafter called 'defendant') for specific performance of contract dated 20.11.1990 after receiving remaining sale consideration amounting to Rs. 5,000 and in the alternative, refund of earnest money amounting to Rs. 35,000 along with interest at the rate of Rs. 17% p.a. The case of plaintiffs in brief, was that the defendant was owner Bhumidhar of plot No. 124/1 area 3.13 acre. He agreed to sell the above plot in favour of plaintiffs for a consideration of Rs. 40,000 and in lieu of it. executed a registered agreement to sell on 20.11.1990 after receiving a sum of Rs. 35,000 as earnest money. He promised to execute the sale-deed by 30.11.1991 after receiving remaining sale consideration. The plaintiffs reminded the defendant several times to execute sale-deed and also served registered notice for executing sale-deed by appearing on 30.11.1991 before the Office of the Sub-Registrar, Chandausi. But the defendant did not appear to execute the sale-deed In pursuance of agreement, hence the suit.

3. The defendant filed written statement and contested the suit. His defence was that he never executed any agreement to sell nor received any sale consideration from the plaintiffs. He also denied receipt of any notice. He further contended that the plaintiffs were well known to him from before. They approached him on 19.11.1990 to become surety of one of their relative and in that connection extract of khatauni relating to him (defendant) was also required. The defendant went to tahsil Chandausi along with plaintiffs on 20.11.1990. Gajlu Singh and Jodha Singh also met him there. They got seated him in the office of Munsif. Chandausi and after some times brought a written paper and obtained his signature on it and also got affixed his photograph over it. The contents of document had not been read over and explained to him. They also took him before an officer and obtained his thumb impression there. Thereafter they sent him to his house saying that the bail had been granted. The defendant had no necessity to sell his plot and the price of land in the area at the relevant time was not less than of Rs. one lac.

4. It was further contended that defendant had taken loan from UCO Bank for plantation of popular plants and had mortgaged, hypothecated the plot in suit with the above bank in lieu of the said loan and therefore, no agreement to sell in respect of land in suit could be executed.

5. The learned Additional Civil Judge framed necessary issues arising out of pleadings of the parties and on considering the evidence of the parties held that the plaintiffs has successfully proved that the defendant agreed to sell the plot in suit in their favour for a consideration of Rs. 40.000 and in lieu of it executed agreement to sell on 20.11.1990 after receiving a sum of Rs. 35.000 as earnest money. The plaintiffs were ready and willing to perform their part of agreement. He further held that though it had been shown that the land in suit was hypothecated with the UCO Bank, but there was no evidence on record to show that the plaintiffs had knowledge about it and the said hypothecation was also not registered and this fact was concealed from the plaintiffs. With these findings the trial court decreed the suit for specific performance of contract.

6. Aggrieved with the above judgment and decree, the defendant preferred Civil Appeal No. 70 of 1995. The learned 2nd Additional District Judge. Moradabad. who decided the appeal, concurred with the findings recorded by the trial court holding that the above findings were based on evidence on record. Accordingly, he dismissed the appeal.

7. The above Judgment of the appellate court has been challenged in this second appeal.

8. Heard learned counsel for the parties and perused the record.

9. The first contention of the learned counsel for the appellant was that the agreement to sell was obtained by fraud under the pretext that the defendant was executing a surety bond. In order to prove the execution of agreement deed the plaintiffs had examined Kunwar Pal Singh plaintiff (P.W. 1) attesting witnesses of the deed Gajju Singh (P.W. 2) and Jodha Singh (P.W. 3) and also relied on registered agreement to sell dated 20.11.1990. The trial court meticulously scrutinised the evidence of above witnesses as well as the evidence of defendant

Ratan Pal (D.W. 31. He had also taken into consideration the facts and circumstances of the case. He relied on the evidence of the plaintiff Kunwar Pal Singh (P.W. 1) and his witnesses Gajju Singh (P.W. 2) and Jodha Singh (P.W. 3) and also had taken into consideration the fact that the agreement to sell was produced before the Sub-Registrar who made inquiry about payment of earnest money from the defendant who accepted the same and recorded a finding of fact that defendant executed deed dated 20.11.1990 knowing that he was executing agreement to sell his property for a consideration of Rs. 40,000 and received earnest money amounting to Rs. 35,000. The first appellate court on reappraisal of the evidence concurred with the above finding of the evidence recorded by the trial court. Both the courts below have disbelieved the case of the defendant that he had executed only surety bond. The above findings of fact recorded by the courts below are based on evidence on record and do not suffer from perversity. Therefore, the above concurrent findings of fact cannot be interfered with in this second appeal.

10. The next contention of the learned counsel for the appellant was that the land in suit was previously hypothecated with the UCO Bank in lieu of loan taken by the defendant for plantation of popular plants and this fact had been proved by his witnesses Tej Narain Mehrotra (D.W. 1) and, therefore, no agreement to sell could be executed as the property was already under the mortgage. The trial court has held that the factum of mortgage was not known to the plaintiffs nor there was any evidence to show that the defendant disclosed this fact to them. It further held that mortgage deed was not registered and, therefore, there could be no presumption of its notice to the plaintiffs. The first appellate court held that the alleged pledge of the land with the UCO Bank prior to alleged agreement to sell had no effect on the agreement to sell.

11. The mortgage has been defined under Section 58 of the Transfer of Property Act, which reads as under :

'A mortgage is the transfer of an interest in specific 'immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may

give rise to a pecuniary liability.'

The mortgage may be a simple or by conditional sale or by deposit of title-deed.

12. According to evidence of Tej Narain Mehrotra. Manager of UCO Bank (D.W. 11 the defendant had taken loan of Rs. 78.650 on 13.8.1990 and in lieu of it. hypothecated his plot Nos. 115 and 124/1. There is nothing on record to show that the plaintiffs had knowledge about the above mortgage. Assuming that the property in question was hypothecated or mortgaged with the UCO. Bank in lieu of loan, the title of property in question was not transferred to the bank and it remained with the defendant. The above hypothecation or mortgage simply created a charge over the property and its effect was that the UCO Bank had 1st charge over the property for realisation of debt and nothing more than it. The above hypothecation mortgage in any way did not create any bar in execution of agreement to sell or transfer of the property by the defendant. Moreover, the plaintiffs had no knowledge of the said hypothecation and obtained agreement to sell for consideration. The learned counsel for the appellant also could not show any provision of law under which the defendant was debarred from executing agreement to sell in view of the previous hypothecation of the property in favour of UCO Bank. Therefore, hypothecation was no bar to execute agreement to sell.

13. Lastly, it was contended by the learned counsel for the appellant that the plaintiffs had sought an alternative relief for refund of earnest money and therefore, the relief for specific performance which was a discretionary relief should have not been granted and instead of it. the plaintiffs would have been granted alternative relief for refund of earnest money. In support of the above contention, he placed reliance on Apex Court decision, in 'Kanshi Ram v. Om Prakash Jawal and others, 1996 (28) ALR 111'.

14. I have gone through the above decision. It was held in the said case that the rise in prices of the property during the pendency of the suit may not be the sole consideration of refusing to decree the suit for specific performance. But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. it is one of discretion to be exercised on sound principles. When the Court gets into equity jurisdiction, it would be guided

by Justice, equity, good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the defendant had claimed alternative relief for damages to be thanked. The Apex Court held that the Court would have been well justified in granting alternative decree for damages of Rs. 10 lacs while the sale consideration was Rs. 16,000. In the above case law. no principle was laid down that the decree for specific performance should not be granted and only the relief for damages will be equitable relief in a suit for specific performance. In view of peculiar facts and circumstances of the said case. the Apex Court granted alternative relief for damages for a sum of Rs. 10 lacs, while sale consideration was only Rs. 16,000. The appellant in this case could not show any circumstance by which the relief for specific performance could be refused and instead of it relief for refund of earnest money only be granted. The contention of the learned counsel for the appellant was that since alternative relief of refund of earnest money has been sought, therefore, only that relief could be granted, has no force in view of the facts and Circumstances of the case. No basis of above contention could be shown and therefore, this Court is not persuaded to accept the above contention.

15. In this way, I find that points in controversy in this appeal have been concluded by concurrent findings of the fact. No substantial question of law is involved in this appeal. The second appeal has. therefore, no force and liable to be dismissed.

16. The appeal is. accordingly, dismissed summarily. There is no order as to costs.