

Raghubir Singh Vs. Sher Singh

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Court : Allahabad

Decided On : May-04-2004

Reported in : AIR2004All320; 2004(3)AWC2114

Judge : Prakash Krishna, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 103; [Specific Relief Act, 1963](#) - Sections 20(2)

Appeal No. : Second Appeal No. 1573 of 1979

Appellant : Raghubir Singh

Respondent : Sher Singh

Advocate for Def. : A.N. Bhargava, Adv.

Advocate for Pet/Ap. : M.K. Gupta, ;M.D. Singh, ;V.K. Gupta and ;A.R. Dubey, Adv.

Judgement :

Prakash Krishna, J.

1. This is defendant's second appeal. It arises out of original Suit No. 287 of 1977 filed by Sher Singh, respondent for specific performance of an agreement dated 20.11.1973 with regard to a piece of land area 9 Biswa pukkha of the Khasra No.

581 in village Bhooken after getting Rs. 500 from the plaintiff.

2. The plaint was instituted on the pleas inter alia that the defendants are Bhumidhar of Khasra No. 581 area 9 biswa situate in village Bhooken of which the plaintiff had been in possession, but in revenue record the names of defendants were there. The defendants on 20.11.1973 agreed to sell the aforesaid piece of land for a sum of Rs. 3,000 out of which Rs. 2,500 was paid and it was received by the defendants towards part payment of the amount. Remaining Rs. 500 was to be paid at a time of the execution of the sale-deed. The defendants have failed to execute the sale deed within time stipulated in the agreement and the plaintiff has always been ready and willing to get the sale deed executed, filed a suit after giving registered notice dated 5.5.1977. The defendants having failed to execute the sale deed, hence the suit, for specific performance of contract to sell.

3. The defendants contested the suit by filing a joint written statement and they substantially denied the plaint allegation. The main defence was that the plaintiff and one Adia conspired for usurping the disputed land. The defendants were away in the city in connection with their employment, permitted the plaintiff who is related to them to look after land in question. The plaintiff informed the defendant that Adia, a Harijan will get the land as certain laws are giving into existence in favour of Harijans. To save the land on the advice of the plaintiff, the defendant executed an agreement to sell the land to him with the understanding that the agreement to sell shall be a showy agreement. The receipt of Rs. 2,500 by the defendant was denied. Adia did file an application before S.D.O., Ghaziabad for declaration of his right in the disputed land which was dismissed and the appeal is pending before the Commissioner, Meerut. The disputed land is not worth less than Rs. 15,000 and no question to sell it at a throw away price of Rs. 3,000 arises.

4. In the trial court five issues were framed. On material issues the trial court found that the defendants have executed an agreement, as stated by the plaintiff after obtaining Rs. 2,500. There was no fraud or collusion and the plaintiff has proved his case and suit was decreed on 24.1.1978. The said decree has been confirmed in Civil Appeal No. 118 of 1978 by the Addl. Civil Judge, Ghaziabad by judgment

dated 7.3.1979. Before the first appellate court an argument was raised that on 12.1.1978 the evidence of defendants was closed. The plaintiff in the list of witnesses mentioned the name of scribe as one of the witnesses to be examined by him. The plaintiff without examining scribe discharged him and thereafter the evidence of defendants was recorded on 12.1.1978 and the evidence was also closed on that day. The court below rejected an argument of the defendant that no proper opportunity was given to them to examine the scribe. It appears that subsequently an application after close of the evidence of the parties, was filed by the defendants for permission to examine the scribe. The application was rejected by the trial court, the court below also upheld the rejection of the said application by the judgment under appeal. The appellate court also confirmed the finding of the trial court with regard to the payment of Rs. 2,500 to the defendant.

5. This appeal was admitted and the ground Nos. 1, 3 and 13 were considered as substantial question of law, at the time of admission. When the appeal came up for final hearing an application dated 23.1.2004 being Civil Misc. Application No. 16743 of 2004 was filed seeking permission to amend the memorandum of appeal by adding the following grounds in the memo of appeal as ground Nos. 15 and 16 with a further prayer that aforesaid grounds involved, substantial question of law and may be permitted and was allowed to be raised at the time of hearing of the instant appeal :

'15. Whether the courts below have acted with material irregularity in exercise of their jurisdiction in decreeing the suit for specific performance without taking into consideration the provisions of Section 20(2) of the [Specific Relief Act, 1963](#) and in view of which the plaintiff respondent was not entitled for a decree for specific performance.

16. Whether the lower appellate court committed a manifest error of law in not taking into consideration ground No. 14 challenging the judgment of the trial court for the reason that the trial court had acted with material irregularity in decreeing the suit for specific performance to which the plaintiff was not entitled in view of the said relief being a discretionary relief.'

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

7. Sri M.K. Gupta, learned counsel for the appellant fairly stated that he is not in a position to challenge the findings recorded by the courts below on the question of genuineness of the agreement, in suit and passing of the consideration of Rs. 2,500 to the defendants, as payment of part payment under the said agreement. The only argument which was pressed by him was with respect to Section 20(2) of the Specific Relief Act. He submitted that both the courts below were duty bound before passing a decree of specific performance of contract to sell to consider the question as to whether it is a fit case for exercise of discretion vested in the Court to pass a decree for specific performance of contract to sell. Elaborating the argument it was submitted that since the courts below did not examine the question of discretion vested in them, by virtue of Section 20(2) of the Specific Relief Act, no decree for specific performance of contract should be passed against the appellant. In contra, Sri A.N. Bhargava, the learned counsel for the respondents submitted that findings recorded by the courts below are findings of fact and no interference is called for by this Court under Section 100, C.P.C., as no substantial question of law is involved in the appeal.

8. Thus, in view of the rival submissions of the counsel for the parties, the only question left to be decided in this appeal is about the applicability and its observance of Section 20 of Specific Relief Act.

9. Section 20 of the Specific Relief Act says that jurisdiction to decree the specific performance is discretionary. A court is not bound to grant specific relief merely because it is lawful to do so. However, the discretion of the Court is not to be exercised arbitrarily but on sound and reasonable ground guided by judicial principles. Sub-section (2) of Section 20 enumerated the case in which the Court may exercise discretion not to decree the specific performance. They are as follows :

(a) Where the term of the contract or the conduct of the parties at the time of entering into contract or the other circumstances under which contract was entered into are such that the contract, though not avoidable, 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 non performance would not involve no such hardship to the plaintiff, or

(c) Where the defendant entered into the contract under circumstances which though not render the contract avoidable, makes it inequitable to enforce specific performance.

10. Sri M.K. Gupta, learned counsel for the defendant submitted that it has come in evidence that the parties are cousin brothers. The defendants were out of the village in connection with their employments and permitted the plaintiff to look after the land in dispute. The agreement was executed by the defendants simply to defeat claim of Adia (ARIYA) a Harijan who started setting up his title over the land in suit. The plaintiff also filed an application before Tahsildar, Ghaziabad which was registered as case No. 60 of 1973 for recording his name in revenue record. The said application was dismissed in default of the parties on 20.11.1973. This very day disputed agreement to sell was executed. From these facts an attempt was made by learned counsel for the appellant to show that the defendants executed the agreement in question under some pressure. Therefore, the court below should have exercised the discretion and the decree for specific performance of contract should be refused.

11. In contra Sri A.N. Bhargava, learned counsel for the plaintiff/respondents submitted that the plea now sought to be raised by the appellant was never raised before the courts below and as such the appellant should not be permitted to raise a new plea for the first time in the appeal. It was further submitted that the appeal is concluded by findings of fact and no interference under Section 100, C.P.C. is called for. The plaintiff was illiterate person who died during the litigation while defendant No. 1 Raghubir was teacher and M.A. in English. Therefore, the discretion in favour of the plaintiff/respondents be exercised by dismissing the appeal.

12. At one stage the case was adjourned on 13.1.2004 to find out any possibility of amicable settlement between the parties. The plaintiff has filed an affidavit that five houses, after investment of several lacs of rupees have been built on the land in

question. He has also stated in the affidavit that the defendants have executed several sale deeds of the adjoining plots and the copy of two such sale deeds dated 3.1.2001 and 18.11.2000 are with the counsel. Therefore, the talk of compromise could not proceed further and ultimately failed.

13. I have scrutinized the record of the case in the light of the provision of Section 20 of Specific Relief Act. There is some substance in the argument of the learned counsel for the appellant that when the terms and contract was entered into it gave unfair advantage to the plaintiff over the defendants. In the agreement in question it is mentioned that the first party namely, the defendants are in possession of the land in question. In oral deposition plaintiff Sher Singh, P.W. 1 in the cross-examination denied the possession of, the defendants/ appellant over the land in question and claimed his possession over it. This along with other circumstances show that the plaintiff was in advantageous position being in permissive possession on behalf of defendants as pleaded by them. The plaintiff has also admitted in the deposition that he had filed an application before the revenue court for recording his name and 20.11.1973 was fixed on which date the disputed agreement was executed. P.W. 1 has also deposed that the defendants had come on that day and put their signatures and thumb impression on the disputed agreement. All though in the oral deposition the plaintiff has pleaded ignorance about Adia (Harijan) who was claiming disputed property as sub-tenant. The defendants have filed certified copy of the order dated 7.12.1977 of Additional Commissioner Meerut, Division Meerut in Revision Petition No. 31 of 1976 Ariya son of Kale v. Raghubir and Ors.. From this order it is clear that Ariya filed some application not only for recording his possession on the plot in question but also recording his name as sub-tenant. The Tahsildar gave his report dated 12.11.1975. The Additional Commissioner confirmed the order of the trial court rejecting the application filed by Adiya holding it that it was not an application for correction of papers of long standing entries on the basis of such vague claim. These circumstances do clearly show that the plaintiff positively made attempt to some how grab the property of the defendants being in permissive possession. The defendants as pleaded by them entered into the agreement in question under such circumstances. It is to be noted that Adiya and Ariya is one and the same person and he is son of Kale. It was not the case of the plaintiff that Adiya or Ariya

are different persons.

14. The Supreme Court in *Her Highness Mohan Rao Shanti Devi P. Gaikwad v. S. Karji Bhai Hari Pai Patel and Ors.*, JT 2001 (4) SC 43 has held that the grant of decree for specific performance is a matter of discretion under Section 20 of the [Specific Relief Act, 1963](#). The Court is not bound to grant such relief merely because it is lawful to do so but the discretion is required to be exercised on sound and settled judicial principle. One of the grounds on which court may decline to decree the specific performance is where it would be inequitable to enforce the specific performance. Similar view has been reiterated in *V. Muthu Shami v. Angammal and Ors.*, 2002 (2) AWC 1402 (SC) : JT 2002 (2) SC 410.

15. The learned counsel for the appellant has placed reliance upon following three ruling in support of his contention :

(1) *A.C. Arulappan v. Smt. Ahalyanaik*, 2001 (3) AWC 2456 (SC) : AIR 2001 SC 2783,

(2) *Manohar Lal v. Maya*, AIR 2003 SC 2362,

(3) *K. Narendra v. Rivera Apartments (P.) Ltd.*, 1999 (3) AWC 2, 104 (SC) (NOC) : AIR 1999 SC 2309.

16. The Supreme Court in the case of *A.C. Arulappan (supra)* has held that the terms and conditions of the agreement showed that plaintiff is trying to take unfair advantage over defendants and also not approached court with clean hands, is not entitled to decree of specific performance of contract. The Court can consider from various circumstances to decide whether such relief is to be granted. Court should not grant the relief of specific performance merely because it is lawful to grant it. The plaintiff, in the case in hand firstly made an attempt by filing application for recording his name in the revenue record on the basis of possession and expunging the names of the defendants therefrom. The said attempt was made as the defendant No. 1 was away from the village in connection of his employment as a teacher. The plaintiff has admitted in the oral deposition that the defendants are sons of his uncle. Regarding possession of disputed plot the two stands taken by

the plaintiff is self contradictory. In the agreement in question the possession of the defendants is admitted. On the other hand, in the oral deposition the plaintiff has stated his possession over the disputed land.

17. The defendants also filed by way of an instance an agreement of sale dated 25.1.1974 paper No. 39-Ka in respect of plot No. 61, for 150 Sq. Yards executed by one Girdhar in favour of Smt. Shanti Devi for Rs. 2,850. The market value of the disputed land, thus if calculated in accordance with the above rate comes to Rs. 15,000.

18. Thus, the courts below have failed to examine the case before passing a decree, in the light of Section 20(2) of the Specific Relief Act and I invoke Section 103 of C.P.C. for this purpose, to do justice between the parties. The trial court has held that since execution of the agreement has been proved the agreement cannot be brushed aside that the consideration was insufficient or inadequate.

19. Sri M.K. Gupta, learned counsel for the appellant stated at the bar that the appellants are prepared to pay rupees one lac and to return the advance money to adjust the equities between the parties. The Supreme Court in the case *Veluyudhan Satyahyades v. Govindan Dhakshyan*, 2002 (4) AWC 2781 (SC) : JT 2002 (5) SC 357, has held that in such circumstances the proper course for the High Court is to set aside the decree made by the trial court as affirmed by the first appellate authority and remit the matter to the Court for fresh consideration in so far as this aspect of the matter is concerned. Following the aforesaid law laid down by the Supreme Court the judgments and decrees of the courts below are modified and the matter is remitted to the trial court for fresh consideration only on aspect of grant of discretionary relief to the plaintiff. The findings recorded on all other issues shall remain intact. It is made clear that if ultimately the trial court refuses to grant the decree for specific performance of contract it shall impose as a condition to pay (Rs. 1,00,000) one lac to the plaintiff/ respondents as a condition precedent for reversing the decree of specific performance.

20. In the result the appeal is allowed in part as indicated above, The trial court shall reconsider the matter in the light of the observation made above.

