

Bhaiyalal Vs. Ram Din

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Court : Allahabad

Decided On : Nov-30-1988

Reported in : AIR1989All130

Judge : Amarendra Nath Varma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 96; [Evidence Act, 1872](#) - Sections 67; [Specific Relief Act, 1963](#) - Sections 10

Appeal No. : Second Appeal No. 2939 of 1977

Appellant : Bhaiyalal

Respondent : Ram Din

Advocate for Def. : M.P. Singh and ;Shashi Nandan, Adv.

Advocate for Pet/Ap. : K.N. Saxena, ;C.B. Misra and ;Srikant, Adv.

Disposition : Appeal dismissed

Judgement :

Amarendra Nath Varma, J.

1. This is to plaintiffs second appeal arising out of a suit for specific performance of an agreement to sell the property said to have been executed by the defendant in favour of the plaintiff. The trial Court had decreed the suit. On appeal, the learned

District Judge reversed the decree of the trial Court and dismissed the suit.

2. Shortly stated, the plaint case was that on 14-4-69 he hold the house belonging to him in favour of the defendant for a sum of Rs. 4,000/- under a sale deed executed by the former in favour of the defendant The same day, the defendant executed an agreement to resale in favour of the plaintiff in respect of the said house. According to the terms set out in that agreement, the defendant was to execute the sale deed in favour of the plaintiff within two years, i.e. by 13-4-71 for the same amount, namely Rs. 4,000/-. Yet another document was executed by the plaintiff in the shape of rent note in favour of the defendant, the rent fixed thereunder being Rs. 30/- per month payable by the 14th of each succeeding month. The plaintiff was ready and willing to perform his part of the contract at all material times but the defendant declined to retransfer the property and hence the suit.

3. The defence set up by the respondent was that he had not executed the deed of agreement for the retransfer of the property in favour of the plaintiff on the basis of which the suit has been filed. He had executed another document which has not been filed by the plaintiffs. That document incorporated an agreement' of resale in favour of the plaintiff within 8 months. It is not necessary to set out the other pleas taken in defence.

4. The trial Court believing the plaintiffs' evidence held that the agreement of resale set up by the plaintiff had in fact been executed by the defendant. It further found that the plaintiff was willing to perform his part of the contract and had indicated his intention through successive notices but the defendant did not execute the sale deed as he was bound to do under the said agreement. The trial court rejected the defence version on the ground that the defendant had not produced a copy of the agreement which was alleged to have been executed for the retransfer of the property as asserted by him. On these findings the suit of the plaintiff-appellant was decreed.

5. The lower appellate court on appeal set aside the finding of the trial Court and held that the plaintiff-appellant had failed to establish the execution of the document Ext. 11 which purports to be an agreement of sale executed in favour of

the plaintiff-appellant by the defendant-respondent. This finding of the appellate Court is based on a consideration of the entire evidence on record. The other ground on which the appellate court dismissed the suit was that the plaintiff had not fulfilled the conditions laid down in Ext. 11 even assuming that the same was executed by the defendant. It has held that the plaintiff having allowed the rent to remain in arrears for more than three months he forfeited the right to claim specific performance of the agreement for the resale of the property.

6. For the appellant the first ground urged was that the appellate court committed a patent error of law in holding that the plaintiff had not proved the execution of the agreement Ext. 11 by the defendant. He invited my attention to the statement of the plaintiff to the fact that the paper (which was later exhibited as Ext. 11) had been signed by the defendant-respondent in his presence and that the signature appearing at the foot of that paper were those of the defendant. This was sufficient to constitute proof of due execution of the agreement for resale (Ext. 11).

7. I am unable to agree. Reading the finding of the appellate Court as a whole it is apparent that the conclusion of the appellate court is not that Ext. 11 had not been formally proved but that the evidence adduced by the plaintiff was entirely insufficient. Thus the lower appellate Court stressed that the expert whose report was filed by the plaintiff was not examined. Besides neither the scribe nor the witnesses of the deed were produced by the plaintiff to prove that the document had been signed by the defendant. From the mere fact that the document had been exhibited it does not follow that the court stands precluded from examining the question on the basis of the evidence led by the parties whether the document in question was executed by the party by which it purports to have been executed. The fact that document is exhibited only establishes that it has been formally proved. But where as here the execution of the document is challenged, a court of fact is clearly entitled to weigh the evidence led by the parties to find out whether the document was really executed by the party who is alleged to have executed the same. The lower appellate Court was, therefore, entitled to draw adverse inference against the plaintiff-appellant from his failure to examine the scribe and the witnesses of the deed.

8. Upon the finding of the lower appellate Court that the document (Ext. 11) had not been executed by the defendant the suit may liable to be dismissed.
9. Learned counsel for the appellant, however, made an attempt to show that on the date of the filing of the suit, i.e. on 12-3-70 he had cleared the entire arrears due up to that date. That being so, the appellate court was wrong in holding that the plaintiff had not complied with the terms and conditions, laid down in Ext. 11, it is unnecessary to go into this issue as the plaintiff appellant's suit is liable to be dismissed on the ground that he failed to establish that Ext. 11 had been exhibited by the defendant-respondent.
10. Learned counsel next submitted that even if the defendant respondent's version that according to the agreement for resale which was actually executed between the parties, the right to claim enforcement of the agreement could be exercised within eight months and not two years, is accepted, the plaintiff was entitled to the decree for specific performance inasmuch as he had given a notice to the defendant to execute the sale deed within eight months.
11. I find no merit in this contention. The plaintiff was claiming specific performance of a particular agreement, namely, Ext. 11. The suit could, therefore, be decreed for specific performance of only that agreement and no other. Further in the absence of the agreement referred to by the defendant in his defence and in the absence of the terms and conditions laid down therein. The suit could not be decreed for specific performance.
12. Lastly, relying on the decision of the Supreme Court in the case of Smt. Indira Kaur v. Sri Sheolal Kapoor, reported in AIR 1988 SC 1074 learned counsel submitted that in view of the fact that the three documents the sale deed executed in favour of the defendant, the agreement for resale, viz. Ext. 11 and the rent note being contemporaneous, constituted a transaction of mortgage and consequently appropriate relief could be granted to the plaintiff on that basis.
13. The contention cannot be accepted The decision cited by the learned counsel has no application to the present case in view of the finding of the appellate court and affirmed by this Court that Ext. 11 has not been proved to have been executed

by the defendant respondent.

14. In the result, the appeal fails and is dismissed. But I make no order as to costs.

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