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Court : Allahabad

Decided On : Nov-03-1998

Reported in : 1998(4)AWC715

Judge : R.H. Zaidi, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100; [Specific Relief Act, 1963](#) - Sections 21; [Contract Act, 1872](#) - Sections 73

Appeal No. : Second Appeal No. 891 of 1981

Appellant : Mool Chand

Respondent : Sanwat Ram and Another

Advocate for Def. : P.N. Mathur, Adv.

Advocate for Pet/Ap. : Umesh Chandra, ;Krishna Chandra and ;Ram Karan Agrawal, Adv.

Judgement :

R.H. Zaidi, J.

1. This is plaintiffs second appeal arising out of suit for specific performance of agreement of sale dated 23.2.1968, for recovery of damages for use of machinery in question and also for pendants lite and future damages and is directed against

the judgment and decree dated 21.7.1981 passed by the Additional District Judge, Lucknow.

2. The facts of the case giving rise to the present appeal, in brief are that Original Suit No. 86 of 1974 was filed by the plaintiff-appellant pleading that father of the plaintiff Shri Ved Prakash was the owner of 21 Durvijai Ganj, Aminabad Road, Lucknow, and he used to run Soap business on the ground floor of the said premises. The said business was not yielding profits, he, therefore, entered into partnership with the defendants-respondents to run Oil Mill and Flour Mill in the said premises in the name and style Ashok Oil and Flour Mill. It was pleaded that plaintiff purchased the said premises from his father in the name of Shri Indra Chand. (brother-in-law of the plaintiff), benami and permitted the partnership business to continue. On 23.2.1968 the said partnership was dissolved. The machinery of the said mill was valued at Rs. 15,000, the defendant executed an agreement to sell the machinery for Rs. 15,000 on 23.2.1968. On the same date an amount of Rs. 5,000 was paid as earnest money and balance was agreed to be paid at the time of delivery of machinery latest by 31.12.1975. It was pleaded that simultaneously a lease deed was executed in favour of defendants for a limited period of seven years, in respect of the ground floor of the building in question. On 1.1.1976 the plaintiff, became the owner of the said machinery but the same was not handed over to him by the defendant although plaintiff was ready and willing to perform his part of the contract and to pay the balance of sale consideration amounting to Rs. 10,000 to the defendant. The terms of lease (seven years) also came to an end on 23.2.1975 but in spite of the notice dated 23.2.1975 the defendant did not hand over the machinery and did not pay the damages for the loss suffered by him, at the rate of Rs. 10 per day. Hence the suit for the above mentioned reliefs.

3. The defendants-respondents filed the written statement denying the claim of the plaintiff-appellant. The execution of agreement of sale was also denied. It was pleaded that plaintiff was not entitled to any relief and the suit filed by him was liable to be dismissed.

4. The trial court, on the basis of the pleadings of parties, framed relevant issues. The parties have produced evidence oral and documentary in support of their cases. The trial court recorded findings on issue No. 1 which related to the execution of agreement of sale dated 23.2.1968 in favour of the plaintiff-appellant. It was held that after accepting an amount of Rs. 5.000, the agreement of sale in respect of machinery was executed by the defendants-respondents to sell the machinery for an amount of Rs. 15.000, but on the issue No. 2 which related to the claim of damages, it was held that plaintiff was not entitled to decree of damages for want of evidence. Having recorded the said findings, the trial court decreed the suit of the plaintiff-appellant in part, i.e., for specific performance of contract of sale only. It was directed that defendants shall perform their part of the agreement by transferring machinery in question after receiving the balance of money within a period of one month from the date of passing of the decree failing which it shall be open for the plaintiff to get the same executed through the agency of Court. The suit for recovery of damages and compensation and for pendants lite and future damages was dismissed by Judgment and decree dated 3.8.1979. Aggrieved by the Judgment and decree to the extent it stood against the plaintiff, passed by the trial court Civil Appeal No. 435 of 1979 was filed. The defendants-respondents did not file any appeal or cross-appeal against the decree passed by the trial court. The Court below affirmed the findings recorded by the trial court and dismissed the appeal by impugned judgment and decree dated 21.7.1981. The plaintiff-appellant thereafter approached this Court and filed the present appeal as stated above.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the appellant vehemently urged that it was pleaded and proved by the plaintiff-appellant that he has suffered loss as the machinery was not handed over to the plaintiff and was illegally used by the defendants-respondents, therefore, it was obligatory upon the Courts below to decree the suit for damages and compensation in view of the provisions of Section 21 of the Specific Relief Act read with Section 73 of the Contract Act. The Courts below according to him have acted illegally in dismissing the plaintiffs suit for recovery of damages and compensation as well as appeal filed by him.

7. On the other hand, learned counsel appearing for the contesting respondents supported the validity of the judgments and decrees passed by the Courts below. It was submitted that the Courts below have recorded concurrent findings of fact on the question of damages and compensation, which are based on relevant evidence on record and do not suffer from any infirmity or illegality. It was submitted that the plaintiff-appellant has not produced any evidence to substantiate his claim for compensation for use of the machinery in question by the defendants. As the factum of user of the machinery was not proved, therefore, the Courts below committed no mistake in dismissing the suit for damages and compensation.

8. I have considered the rival submissions made by the learned counsel for the parties and also perused the record.

9. In the present appeal, only it has to be determined as to whether plaintiff-appellant was entitled to the decree for damages and compensation or not.

10. In paragraph 17 of the plaint, the damages were claimed by the plaintiff-appellant at the rate of Rs. 10 per day which comes to Rs. 300 per month. Para 17 of the plaint is quoted below :

'That the defendants were duty-bound to deliver the goods by putting the plaintiff in possession over the machinery and the plaintiff has been deprived of the profits which would; have accrued to him for such delivery which ought to have been made latest by 31.12.1975. As such the plaintiff is entitled to compensation for withholding the same from 1.1.1976 at the moderate rate of Rs. 10 per day as the defendants are using the said machinery and deriving profits therefrom. The compensation by way of damages from 1.1.1976 till the date of suit comes to Rs. 15 which the plaintiff is entitled to get from the defendants.'

The trial court while dealing with issue No. 2 has held as under :

'In the plaint plaintiff claimed damages at the rate of Rs. 10 per day on account of non-fulfilment of promise by the defendant. But it is surprising that plaintiff has not produced any evidence in this respect. It was very necessary for the plaintiff to

prove the fact of damages by positive evidence. Plaintiff allegations on this score have been denied by the defendant. As such plaintiff is not entitled to any damages in absence of evidence. Issue is accordingly decided.'

The appellate court has affirmed the findings recorded by the trial court, and has held as under :

'The plaintiff-appellant in the present case had not shown that specific performance alone was not sufficient to satisfy the justice of the case nor the plaintiff had shown the amount of actual loss or damages suffered by the plaintiff by the breach and which naturally arose in the usual course of things from such breach.'

.....

'What the plaintiff in para 17 of the plaint claimed was compensation for wrongful use and occupation of the machinery by the defendant-respondents after the date the goods ought to have been delivered to the plaintiff-appellant. Such damages for use and occupation in the present case which were also not proved could not be claimed as being remote and indirect loss of damages sustained by reason of the breach. Thus, after considering the oral and documentary evidence led in this case. I find that the defendant-respondents were not responsible for the damages as claimed in this case nor any loss was proved as caused to the plaintiff by the alleged breach of non-delivery of the machinery by the stipulated date. The findings of the trial court on the point appears to be correct and there is no ground for interference in this appeal.'

11. Section 21 of the Specific Relief Act and Section 73 of the Contract Act, are relevant for determination of the aforesaid question, which are quoted below :

'21. Power to award compensation in certain cases.--(1) in a suit for specific performance of a contract the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If , in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by

the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award 'him such compensation accordingly.

(3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian [Contract Act, 1872](#).'

' 73. Compensation for loss or damage caused by breach of contract. --When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.--When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.--in estimating the loss or damage, arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.'

12. The two Courts below have recorded concurrent findings of fact that no evidence oral or documentary was produced by the plaintiff-appellant to substantiate his claim for recovery of damages. In his statement on oath only, it has been stated that he has claimed only normal damages at the rate of Rs. 10 per day. As observed by the Court below, the basis for the said claim was not at all

disclosed. The questions as to whether the machinery in question was used by the defendants-respondents and the said use resulted in any financial loss to the plaintiff-appellant were questions of fact which were subject-matter of issue No. 2. The plaintiff had to prove his case as stated in paragraph 17 of the plaint by producing oral and documentary evidence. No such evidence, as stated above, was at all produced, therefore, the Courts below did not commit any error of law in dismissing the suit and rejecting the claim of the plaintiff-appellant for recovery of damages and compensation. Thus, although claim for recovery of damages and compensation can be made in a suit for specific performance of contract of sale but under the facts and circumstances noted above, the said claim was rightly rejected and the suit, in part, was rightly dismissed by the Courts below.

13. Learned counsel for the plaintiff-appellant has. In support of his submission for the decree of damages and compensation, referred to and relied upon the decision in *M/s. A. T. Brij Paul Singh v. State of Gujarat*, 1984 (4) SCC 59. In the said decision. It was held by the Apex Court as under :

'Whether the party entrusted the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What would be the measure of proof would, however, depend upon facts and circumstances of each case. While estimating the loss of profit for the breach of contract, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. A broad evaluation would be sufficient.'

14. In the present case, no work was entrusted to the defendants to be done by him. Here the question was only regarding the use of the machinery in dispute by the defendants and consequential loss of the plaintiff. The plaintiff ought to have firstly proved the user of the machinery by the defendants-respondents and thereafter, the consequential loss, by oral or documentary evidence. In the present case, no evidence was at all produced by the plaintiff in support of his claim for damages, therefore, the Courts below were right in rejecting the claim of the appellants for recovery of damages and compensation. The aforesaid decision is thus distinguishable and has got no application to the facts of the present case.

15. While parting with the case, it may be noted that the suit for specific performance of contract of sale was decreed by the trial court in favour of the plaintiff-appellant. Against that part of the decree, no appeal was filed by the defendants-respondents. The judgments and decrees passed by the Courts below have thus become final. The plaintiff-appellant was legally entitled to execute the said decree and to take possession over the machinery in dispute after getting the sale deed executed through the agency of Court even if the sale deed was not executed by the defendants-respondents. The plaintiff-appellant did not put the decree in execution and did not try to take possession over the machinery in dispute. He, on the other hand, preferred ,to file the appeal before the Court below and after dismissal of the said appeal, the second appeal before this Court. From the said facts, it is evident that plaintiff-appellant was not Interested in taking possession over the machinery in question and to use the same. The plaintiff-appellant is alleged to have applied for execution of the decree in case No. 3 of 1998 filed on 28.8.1998 as it is evident from the material on the record. In view of the said facts, the plaintiff-appellant was not entitled to the damages for the alleged deprivation and user of the machinery in question, by the defendants-respondents which has also not been proved in accordance with law.

16. In view of the aforesaid discussion, this appeal has got no merit. No substantial question of law is involved in it. The same is concluded by findings of fact which are based on relevant evidence on the record. The appeal, therefore, fails and is dismissed ; but without any order as to costs.

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