

Ayodhya Prasad Vs. Phulesara and ors.

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Court : Allahabad

Decided On : Apr-17-2008

Reported in : 2008(4)AWC3339

Judge : Poonam Srivastav, J.

Appellant : Ayodhya Prasad

Respondent : Phulesara and ors.

Advocate for Pet/Ap. : Sri. Aditya Narayan

Disposition : Appeal dismissed

Judgement :

Poonam Srivastav, J.

1. Heard Sri Aditya Narayan, learned Counsel for the plaintiff-appellant and Sri Namwar Singh advocate for the defendant-respondents. Counsel for the appellant and contesting respondents have agreed that the appeal may be heard finally at the stage of admission itself since the lower court record is available.

2. This is plaintiffs second appeal against the judgment and order dated 10.7.1998, passed by Vth Additional District Judge, Varanasi in Civil Appeal No. 42 of 1996 confirming the judgment and order dated 23.1.1996 in Original Suit No. 251 of 1983, passed by Vth Additional Civil Judge (Junior Division), Varanasi.

3. The relief claimed in the suit was for a decree of specific performance of contract. The plaintiffs case was that Timmal, ancestor of the defendant-respondents entered into an agreement for sale on 5.8.1974 for a consideration of Rs. 9,500, Rs. 3,500 was paid as earnest money and remaining amount of Rs. 6,000 was to be paid at the time of execution of the sale deed. A time frame was fixed and it was also agreed that the sale deed will be executed by 30.6.1980. The plaintiff-appellant also claimed that possession was handed over as a part performance of the contract but subsequently he died on 30.4.1977. Timmal had no son but only five daughters. After the death of Timmal, the defendant second set inherited his property. According to the plaint, the said defendants had full knowledge about the agreement to sell but refused to abide by the contract. However, only defendant No. 8 executed a sale deed of her 1/5th share on 6.4.1983 but the defendant Nos. 4 to 6 did not do so, on the contrary they executed a sale deed in favour of the respondent Nos. 7 to 9 on 27.1.1983 in respect of their shares. The suit was contested by the defendants and plaint allegation was denied. The suit was dismissed and appeal against the said Judgment also stands dismissed. A number of substantial questions of law has been raised on which the submissions were made by the respective counsels, are enumerated hereinbelow:

1. Whether in absence of pleading, the evidence of unregistered agreement dated 7.5.1977 can be looked into and made basis for decision of the case?
2. Whether the unregistered agreement for sale dated 7.5.1977 executed after 1.1.1977 requiring registration compulsory is inadmissible in evidence, and it's effect?
3. Whether in absence of any written statement of heirs of vendor Timmal and in absence of any pleading in written statement of purchaser, against the plaintiff's readiness and willingness, the findings are based on inadmissible, and misreading of evidence, the plaintiff can be held to have not been ready and willing to perform his part of contract, by agreement dated 5.8.1974?
4. Whether the suit is barred by limitation?

5. Whether the agreement dated 7.5.1977 after 1.1.1977 completely substitute, supersede the agreement dated 5.8.1974 within the scope of Section 62 of Contract Act?

4. The trial court framed seven issues. Issue Nos. 1 and 2 relate to the agreement to sell dated 5.8.1974 and whether the plaintiffs are in possession of the disputed plot pursuant to the aforesaid agreement. Issue No. 3 is regarding execution of the agreement by Timmal and if any right accrues to the plaintiff on its basis to get the sale deed executed. Issue No. 4 relates to the sale deed executed by other daughters in favour of the defendant No. 1 as well as other necessary issues regarding limitation, valuation and relief etc. It is admitted between the parties that the agreement to sell was not registered. The claim of the plaintiff is that prior to 1.1.1997 registration was not mandatory and, therefore, non-registration will have no difference on the rights of the parties.

5. The relief of specific performance as set up in the plaint was on the basis of agreement to sell dated 5.8.1974. The defendants filed their written statements and denied plaintiffs claim on the basis of the agreement to sell dated 5.8.1974. The claim of the daughters of Timmal, defendant IInd set is that before the death of their father, he executed a Will in favour of his daughters in the month of June, 1974 and on its basis as well as the natural survivors they inherited the property. Subsequently the plaintiff executed another agreement to sell on 7.5.1977 for an amount of Rs. 11,000. Rs. 1,000 was paid as earnest money and remaining Rs. 10,000 was to be paid at the time of execution of sale deed. The defendants brought the agreement to sell which incidentally was also not registered on record and it was numbered as paper No. 58-Ka. This document has not been disputed either by the plaintiff or by the defendants. In fact it is admitted in the statement of the plaintiff and other witnesses examined on behalf of the plaintiff. The trial court came to a conclusion that since the suit is instituted for specific performance of contract dated 5.8.1974 without there being even a mention of the subsequent agreement to sell dated 7.5.1977. It is apparent that the plaintiff was never ready to get the sale deed executed on the basis of agreement entered into with the defendants, i.e., daughters of late Timmal. The plaintiff filed the previous agreement to sell dated 5.8.1974 as paper No. 27-Ka and the suit was also

instituted on its basis. The trial court recorded a finding after appraisal of oral evidence of the plaintiff himself that he was never ready to get the sale deed executed on the basis of agreement dated 5.8.1974 and it is because of this reason, subsequent agreement was entered into otherwise there was no necessity to execute a second agreement. P.W. 1 Ayodhya has also admitted that he sent some money by money order to the defendants-respondents Inri Devi and Rajkali Devi. P.W. 2 Ram Chandra has also admitted in his statement that the previous agreement was cancelled in the year 1977 when the second agreement to sell was executed. P.W. 4 Ram Lal also admitted in his statement that the daughters and son-in-law of late Timmal entered into an agreement to sell in the year 1977 in respect of the same land for which Timmal had executed the previous agreement to sell on 5.8.1974. P.W. 4 Jeet Ram has also given similar statement and therefore, the Court recorded a categorical finding and came to a conclusion that no relief can be granted to the plaintiff on the basis of first agreement to sell dated 5.8.1974. The reason to arrive at such a conclusion was because of the admission by the plaintiff and his witnesses regarding subsequent agreement to sell, when he was confronted by the defendants in their cross-examination. This fact was not mentioned in the plaint, thus it is a case where the plaintiff did not come with clean hands and since a decree for specific performance is an equitable relief, the plaintiff should have come forward with clean hands. The second reason for not granting the relief was that Section 62 of the Contract Act provides that whenever a subsequent contract in respect of same subject-matter is entered into, the previous contract stands rescinded. The trial court also held that the plaintiff has not been able to establish his possession on the disputed land and, therefore, the plaintiff was not entitled to any relief whatsoever.

6. The next submission of the learned Counsel is regarding the question of limitation. The submission is that in the agreement to sell with late Timmal dated 5.8.1974 the period for execution of sale deed was till 30.6.1980 and the suit was instituted on 16.5.1983. Thus, it was within three years period after 30.6.1980 and it cannot be said that the suit is time barred. On the contrary, the finding of the trial court on the question of limitation is that in the event, the relief of execution of sale deed was to be allowed on the basis of the agreement to sell dated 5.8.1974 then it could be accepted that the period of limitation would start only after June, 1980

but since in the instant case the basis of the suit, i.e., agreement to sell dated 5.8.1974 stands obliterated, in view of the subsequent agreement to sell dated 7.5.1977 it is clear that there was no refusal on the part of the vendors to abide by terms of the agreement dated 5.8.1974, therefore, in view of Article 54 of the Indian Limitation Act, the period of limitation would start running from the date of refusal. Admittedly, the subsequent agreement was executed on 7.5.1977, therefore, the only conclusion is that there was refusal on the part of the vendor before 7.5.1977 and the subsequent agreement came in existence. Thus, the period of limitation will start running from the date of refusal and issue No. 5 was also decided against the plaintiff and the trial court dismissed the suit with cost. A regular appeal was preferred by the plaintiff before the learned District Judge who confirmed the findings of the trial court and dismissed the appeal, against which the instant second appeal has been preferred.

7. I have heard the respective counsels at length and perused the judgment and gone through the entire record. Learned Counsel has placed reliance on a decision of the Apex Court, Smt. Chander Kali Bail and Ors. v. Jagdish Singh Thakur and Anr. : [1978]1SCR625 . The submission is that the Apex Court has ruled that where a claim has never been made in defence before the court below, no amount of evidence can be looked into upon a plea which is put forward at the stage of Section 100, C.P.C. I have perused the original plaint. It is specifically stated in paragraphs 11 and 12 that the defendants started demanding more money than the original agreed amount of Rs. 9,500 and, therefore, the plaintiff had no option but to agree for the higher amount. It was only when the plaintiff was going to institute the suit, the defendant No. 8 executed a sale deed of her 1/5th share in his favour. Besides, the plaintiff himself has admitted in his statement before the Court and admitted in his cross-examination regarding execution of the subsequent agreement relating to the year 1977 and, therefore, the argument of the learned Counsel is without any force. I have perused the statement of P.W. 1, P.W. 2, P.W. 3, P.W. 4 and all of them have admitted undeniably execution of a Satta pertaining to the year 1977 with the defendants and the said document has also been adduced in evidence as Paper No. 58-Ka, therefore, it cannot be said that the subsequent agreement is a new fact which is being taken into consideration at the stage of second appeal. Both the courts below have

specifically and categorically recorded a finding regarding subsequent agreement dated 7.5.1977 where it was agreed that the sale deed would be executed within a period of one year but despite second agreement, the suit was instituted in the year 1983. The argument of the counsel for the appellant is that the subsequent agreement to sell pertaining to the year 1977 is an unregistered document and according to Section 49 of the Indian Registration Act, unregistered document neither could be relied upon nor read in evidence. Since the trial court has given a finding on the basis of subsequent agreement pertaining to the year 1977 which is admittedly an unregistered document, the finding stands vitiated and amounts to substantial error of law. I am not in agreement with the submission made by the counsel for the appellant. The court below has looked into the subsequent agreement only because the plaintiff as well as other witnesses on his behalf have unequivocally admitted the subsequent agreement between the parties and, therefore, in view of Section 62 of the Indian Contract Act which relates to effect of novation, rescission and limitation of contract, the arguments to the contrary cannot be accepted. In the Instant case the parties have entered into a new contract in respect of the same land for which the previous contract and the agreement was entered into, therefore, the Judgment under challenge does not suffer from any error whatsoever. A perusal of the second agreement dated 7.5.1977, it transpires that the new agreement has an effect of altering the terms of the original contract, completely extinguishes the pervious contract which is admitted by the plaintiff himself and thus the findings recorded by the courts below cannot be said to be illegal. Learned Counsel for the appellant has placed another decision of the Apex Court in the case of Lata Construction and Ors. v. Dr. Rameshchandra Ramnik Shah and Anr. 2000 (1) AWC 451 (SC) Paragraph 11, regarding novation of contract as provided under Section 62 of the Indian Contract Act, which is quoted below:

One of the essential requirements of 'Novation' : as contemplated by Section 62 of the Contract Act, 1872, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract

should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.

8. Similar view was taken by Madhya Pradesh High Court in the case of Brijmohandas and Anr. v. Punjab National Bank and Anr. AIR 1982 NOC 65 (MP). I am not in agreement with the argument of the learned Counsel for the appellant that the document pertaining to the year 1977 cannot be looked into for the reason that it was unregistered because it is clear and undoubtedly admitted by the plaintiff and its witnesses, the document can very well be taken into consideration for collateral purposes. I cannot lose sight of the fact that the suit was instituted for specific performance of contract on the basis of agreement dated 5.8.1974 and not the agreement dated 7.5.1977, though the fact that the defendants had demanded an enhanced amount and the plaintiff had agreed to it has been mentioned and pleaded in the plaint itself but the plaintiff deliberately avoided to mention the subsequent agreement for obvious reason. I am of the considered view that the courts below could very well look into Paper No. 58-Ka 1.

9. Sri Namwar Singh has disputed the argument of the counsel for the appellant and submitted that the Apex Court has held in the case of Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo and Ors. : [1982]1SCR417 . Para 22, that Section 17 read with Section 49 of the Registration Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall affect any immovable property but proviso to Section 49 permits the use of the document, even though unregistered, as evidence of any collateral transaction not required to be effected by registered instrument. In view of this principle laid down by the Apex Court, the agreement to sell could very well be looked into for arriving at a Just conclusion. The proviso to Section 49 is enumerated below:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received [* * *] as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 (4 of 1882), or

as evidence of any collateral transaction not required to be effected by registered instrument.

10. In view of the aforesaid decisions and proviso to Section 49, I do not find any illegality or error of law committed by the courts below while reading the document 58Ka. The agreement to sell dated 7.5.1977 which was a subsequent agreement was on record and very well admitted by the plaintiff and his witnesses be read in evidence for collateral purposes and to arrive at a conclusion that the pervious agreement of contract dated 5.8.1974 stands completely obliterated and extinguished. There was no other option left for the Courts as the original party to the contract was dead and on the own showing of the plaintiff as averred in the plaint, the heirs of late Timmal were not ready to abide by terms and therefore, the plaintiff-appellant had entered into a new agreement on the new terms of contract. So far the last submission of Sri Aditya Narayan regarding his readiness and willingness to perform his part of the contract, there was no such assertion in the plaint that the plaintiff had ever given any notice to Timmal showing his willingness and readiness to perform his part of the contract. in absence of any such assertion even if no issue was framed on Section 16(c) of the Specific Performance Act, it cannot be said that the judgment of the courts below suffer from any illegality whatsoever. A perusal of the two judgments, it is clear that the specific and clear findings have been recorded that the plaintiff has neither pleaded nor adduced any evidence to establish that he was ever ready or willing to perform his part of the contract and the sale deed could not be executed for any lapse on his part. In absence of any pleadings to the said effect, the judgment cannot be said to suffer from any illegality whatsoever, more so since the basis of the suit was an agreement dated 5.8.1974 which stood altered, the question of taking into consideration the readiness and willingness is beyond consideration.

11. Learned Counsel for the appellant has also placed certain decisions of the Apex Court in support of his argument that a suit for specific performance of agreement to sell, the Court in exercise of jurisdiction under Section 100, C.P.C. is liable to construe and interpret Article 54 of the Limitation Act fairly, reasonably and liberally. Reliance has been placed in the case of Bhagwan Bala Mahanavar v. Sandipan Laxman Shinde and Ors. : (2002)9SCC532 . Learned Counsel has

also submitted that certain finding of fact can be Interfered and is permissible in exercise of jurisdiction under Section 100, C.P.C. where material or relevant evidence has not been considered. In support of this argument, reliance has been placed in the case of Ishwar Das Jain (dead) through L.Rs. v. Sohan Lal (dead) by L.Rs. : AIR 2000 SC426 . Learned Counsel has also cited two more decisions in the cases of Jugraj Singh and Anr. v. Labh Singh and Ors. AIR 1995 SC 945 and Messrs Trojan and Company v. R.M.N.N. Nagappa Chettiar : [1953]4SCR789 .

12. After taking into consideration the entire facts and circumstances of the case, I am of the considered view that the plaintiff is not entitled for any relief whatsoever, specially since the relief for specific performance one being discretionary, it cannot be allowed in a suit which is instituted at a belated stage, coupled with the fact that the plaintiff has failed to come with clean hands before the Court inasmuch as the subsequent agreement has not been mentioned in the plaint, though the terms agreed between the plaintiff and heirs of late Timmal has been clearly narrated in the plaint in paragraphs 11 and 12. Besides, there is clear admission in the statement of the plaintiff himself and other witnesses. There appears to be no illegality in the two judgments and does not call for any interference in the Instant second appeal.

13. The Apex Court in the recent case of Santosh Hazari v. Purshottam Tiwari : [2001]251ITR84(SC) , ruled that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' question of law it must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.

14. It will therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case, or not? The same view has been expressed by the Apex Court in the cases of Rqjeshwari v. Puran Indoria : (2005)7SCC60 and Govinda Raju v. Mariamman : AIR 2005 SC1008 .

15. In view of what has been stated above, I am not inclined to interfere in the present second appeal in exercise of Jurisdiction under Section 100, C.P.C. The appeal lacks merit and is accordingly dismissed. Cost on parties.

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