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Ajit Singh Vs. Mohd. Salim

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Court : Allahabad

Decided On : Sep-07-2007

Reported in : 2008(1)AWC301

Judge : Poonam Srivastava, J.

Appellant : Ajit Singh

Respondent : Mohd. Salim

Advocate for Pet/Ap. : Sri. B.K. Narayana

Disposition : Appeal dismissed

Judgement :

Poonam Srivastava, J.

1. Heard Sri B.K. Narayana, learned Counsel for the appellant and Sri T. P. Singh, senior advocate, assisted by Sri Anupam Kumar, advocate for the respondent.

2. The instant second appeal is preferred against the judgment dated 5.10.1999, passed by IIIrd Additional District Judge, Allahabad dismissing the Civil Appeal No. 663 of 1985 confirming the judgment of 1st Additional Civil Judge, Allahabad dated 5.10.1985 in Original Suit No. 172 of 1975.

3. The plaintiff-appellant instituted original suit against the defendant-respondent for specific performance of agreement to sell executed on 19.7.1974 in favour of the plaintiff in respect of plot situated in village Sadiapur, Pargana Chail, district Allahabad. The sale consideration was agreed for an amount of Rs. 20,000, out of which Rs. 5,000 was paid as earnest money and remaining amount was to be paid at the time of execution of the sale deed. At the relevant time U.P. Ceiling Act was in force and there was a restriction in execution of the sale deed without seeking permission from the Ceiling Authority and, therefore, it was agreed between the parties that the permission will be obtained within six months from the date of execution of the agreement to sell and thereafter sale deed shall be executed. The claim of plaintiff-appellant is that he was always ready and willing to perform his part of contract but the defendant-respondent somehow avoided on one or the other ground. Finally a notice dated 7.11.1975 was sent by registered post which failed to yield any result. Consequently the suit was instituted on 18.1.1975. Initially the suit was filed in deficiency but subsequently deficiency was made good and summons were issued. The defendant-respondent filed his written statement and he asserted that the permission was obtained from the Ceiling Authorities on 8.3.1975 and permission certificate was issued on 25.3.1975. The plaintiff-appellant was contacted by the defendant but he expressed inability to get the sale deed executed immediately on account of paucity of funds. The defendant-respondent gave a registered notice to the plaintiff requiring him to appear in the office of Sub-Registrar on 31.3.1975 for executing the sale deed. It is submitted that the plaintiff-appellant refused to receive the notice and also failed to reach at the office of Sub-Registrar on the relevant date and time. The defendant-respondent arrived in the office of Sub-Registrar on the appointed date, i.e., 31.3.1975 at 11.00 a.m. and continued in the office of Sub-Registrar till 4.00 p.m. But since the plaintiff-appellant did not come to get the sale deed executed, the defendant is not responsible for the delay in execution of the sale deed. After exchange of the pleadings, the trial court framed as many as seven issues. The plaintiff examined himself as P.W. 1 and one Sitaram as P.W. 2. The documentary evidence comprising of original agreement to sell, postal receipt, copy of the notice, self envelope returned after refusal and also extract of khatauni and khasras were exhibited. The defendant-respondent examined himself as D.W. 1,

Anis Khan and Iqbal Khan as D.W. 2 and D.W. 3 respectively. The original notice acknowledging receiving of the application filed before the Sub-Registrar, receipt issued by the Sub-Registrar and order permitting transfer of land and certified copies of the sale deeds were adduced in evidence. The trial court dismissed the suit of the plaintiff-appellant coming to a conclusion that the plaintiff-appellant was never ready and willing to perform his part of contract nor there was sufficient money with him to pay for sale consideration and, therefore, terms of the agreement to sell was violated by the plaintiff himself and not the defendant-respondent. The trial court came to a conclusion that since registered notice dated 22.3.1975 was sent at the correct address of the plaintiff which was returned with an endorsement of refusal on the envelope, it shall be presumed that the notice has been served on the plaintiff and the plaintiff-appellant failed to turn up in the office of Sub-Registrar on the date fixed to execute the sale deed, it shall be deemed that the plaintiff-appellant was never ready and willing to perform his part of contract. The trial court had also taken into consideration that the institution of the suit in deficiency is a significant factor which indicates the poor financial capacity of the plaintiff and, therefore, he came to the conclusion that the sale deed could not be executed on account of the plaintiff himself. The finding of the trial court was confirmed in appeal and both the judgments have been challenged.

4. The present appeal was admitted on the following two substantial questions of law:

(1) Whether the judgment and decree passed by the lower appellate court is vitiated and rendered nugatory by failure of the lower appellate court in complying with the mandatory requirement of Order XLI, Rule 31 (a), C.P.C.?

(2) Whether the finding of the lower appellate court on the compliance by the appellant of the requirement of Section 16 (1) (c) of the Specific Relief Act is vitiated by mere conjecturers speculation and against law laid down by this Hon'ble Court?

Learned counsel for the appellant has submitted that the learned trial court erred in law while deciding the issue of readiness and willingness as contemplated under Section 16 (1) (c) of the Specific Relief Act and findings of the Courts below

stands vitiated in law. The statement of P.W. 1 Ajit Singh, plaintiff-appellant has completely been ignored whereas he had categorically stated that he was always ready and willing to perform his part of the contract and also denied that any notice was served to him whatsoever. There was no question of refusal on his part. The registered notice dated 22.3.1975 alleged to be sent by the defendant-respondent indicating that he has obtained permission from the Ceiling authorities is absolutely false and without any substance. The findings against the appellant by the trial court is ignoring the material evidence and drawing wrong conclusion on the basis of presumption. The Court completely failed to take into consideration that service by refusal as provided under Section 114 (1) of Evidence Act and Section 27 of the General Clauses Act is rebuttable presumption and once it is specifically denied, onus shifts upon the person claiming benefit of such refusal. The defendant was liable to adduce reliable evidence and if he failed to do so, the courts below were left with no option but to hold that the notice was not served.

5. In support of this argument, learned Counsel has cited two decisions; Casto Chandra Chatterjee v. Chandra Pal Singh and Ors. 1981 ARC 281. Paragraphs 11 and 12 of the said judgment is quoted below:

11. The trial court disposed of the issue by observing that the burden of proof lay upon the defendant to have summoned the postal official to disprove the endorsement. The trial court clearly misconceived the law there. In order to rebut the presumption, the petitioner was not required to produce the postal official. At any rate, it would not be correct to say that without the production of the postal official, the petitioner could not be said to have rebutted the presumption. The petitioner had both in his written statement as well as subsequently in his statement on oath categorically denied having refused to accept any notice. Not only that, the petitioner had further stated that throughout the relevant periods and in particular on 28.2.1970, the petitioner was regularly attending his office, and that he was not at his residence during the hours when money orders are normally tendered. He had further produced a certificate from the Head of his office, namely, the Deputy Registrar of the High Court, in support of his assertion that the petitioner had been regularly attending his office and was not on leave on the relevant date or dates. All this was legal evidence by which presumption attaching

service of the notice could in law be rebutted. The trial court, therefore, erred in law in taking the view that the defendant failed to discharge the burden of proof which lay upon him because he had not had the postal official summoned to disprove the endorsement. The trial court has also observed that the petitioner had not led evidence to disprove the endorsement. Obviously, the trial court failed to consider the evidence of the petitioner mentioned above.

6. The second decision relied by the counsel is Smt. Bachchi Devi and Anr. v. 1st Additional District Judge and Ors. 1983 ARC 849. This is again in support of the argument regarding presumption regarding service of notice and consequently the findings on the question of willingness in favour of the plaintiff. The learned Counsel has also assailed the findings of the trial court regarding the unavailability of funds with the plaintiff since the suit was filed in the deficiency and, therefore, it is evident that the plaintiff was not monetarily sound and not in a position to get the sale deed executed and, therefore, the willingness and readiness contemplated under Section 16 (1) (c) of the Specific Relief Act was against him. This finding is also challenged on the basis of a number of decisions; Nathu Singh v. Jagdish Singh, : AIR1992 All174 , this Court had ruled that the Court should not have come to a conclusion that there was paucity of fund only because the suit was filed in deficiency which can happen for a number of reasons, some times due to non-availability of court fee, stamps or due to mistaken impression about the exact court fee but this alone cannot be a sufficient factor to hold otherwise. The second relied upon is, Ganesh Prasad v. Saraswati Devi and Ors. : AIR1982 All47 . In this case, the suit was filed in forma pauperis and on account of this reason the Courts had come to a conclusion that the plaintiff could not pay the Court fee and, therefore, he had no money to get the sale deed executed. This Court held that the words ready and willing in Clause (c) of Section 16 are simple words and all what they mean is that a plaintiff, in order to succeed in a suit for specific performance must aver and prove that he has performed or has throughout been prepared to do his part under the contract. The plaintiff does not have in such a case to go about jingling money to demonstrate his capacity to pay the purchase price.

7. Learned Counsel for the Respondent has countered each and every argument of the learned Counsel for the appellant. It is submitted that initially when the plaint was filed, there was no pleading regarding readiness and willingness on the part of the plaintiff to respect his part of the contract. It was introduced only by way of an amendment but the plaintiff though incorporated the amendment. He has failed to establish the fact by means of cogent evidence. Reliance has been placed by Sri T. P. Singh, senior advocate in the case of Jugraj Singh and Anr. v. Labh Singh and Ors. AIR 1995 SC 945. The Apex Court ruled that the readiness and willingness was to be proved at all stages from the date of agreement till date of hearing of the suit. This burden has not been discharged by the plaintiff, on the contrary, it is the defendant-respondent who has established by means of cogent evidence that since the time of permission for sale was granted by the competent authority, he continuously approached the plaintiff for execution of the sale deed but the sale could not be completed on account of the plaintiff who was all along shown laxity to perform his part of the contract and also had no means to pay balance amount. Not only the oral request but a registered notice was also sent calling upon the plaintiff to be present on the appointed date before the Sub-Registrar which was not complied and, therefore, it cannot be said that the plaintiff was always willing to perform his part of contract. Reliance has also been placed on a decision of the Apex Court in the case of P. T. Thomas v. Thomas Job (2005) 6 SCC 478 : 2005 (3) AWC 3048 (SC). On the basis of this decision, it is argued that since the registered notice was sent on the correct address, despite intimation by post office it was not accepted and the notice was returned unserved, the presumption would be that it was refused.

8. The next substantial question of view raised in this appeal is non-compliance of Order XLI, Rule 31 (a), C.P.C. It is submitted that the lower appellate court has failed to state specific points for determination in the first appeal and also for failure in not stating specific reason for his findings on those points. I am not satisfied with the submission of the learned Counsel regarding non-compliance of Order XLI, Rule 31 (a),

9. I have gone through the judgment of the appellate court. It is a judgment of confirmation and the Additional District Judge, Allahabad, has taken into

consideration the issues framed by the trial court. The conclusions recorded by the trial court and, thereafter the arguments advanced by the respective counsels assailing the findings of the trial court, have also been discussed in the judgment of the lower appellate court. Reasoning has been given that the plaintiff even after incorporation of the amendment has not tried to lead any evidence to establish that he was in a position to pay the sale consideration and to establish his willingness, therefore, I am not in agreement with the argument advanced by the learned Counsel that the judgment of the lower appellate court suffers for want of procedure laid down in Order XLI, Rule 31 (a), C.P.C. The intention is that the points raised by the respective counsels should be considered by the Court and evidence should be weighed by the lower appellate court as well; but there is no yardstick laid down as to how and in what manner the points for determination should be written out in the judgment. I am satisfied on perusal of the lower appellate court judgment that the provision of Order XLI, Rule 31, C.P.C. has not been violated. The judgment is a well considered and reasoned Judgment and the second substantial question of law raised does not arise in the present second appeal. So far the question of willingness and readiness is concerned, it is true that merely filing of a suit in deficiency of court fee is not sufficient to arrive at a conclusion that the plaintiff did not have sufficient means and, therefore, he was not ready to get the sale deed executed. At the same time, I have also examined the findings of the two courts below. No doubt, the plaintiff has stated that he did not receive any notice whatsoever but the fact that the permission from the Ceiling authority was obtained within time and nothing has been brought on record by the plaintiff to show that he approached the defendant for executing the sale deed or there was any effort on his part. It was the burden of the plaintiff to establish the ingredient of Section 16 (1) (c) of the Specific Relief Act. The two courts below have recorded a concurrent finding of fact that there was no willingness and the plaintiff was not ready to get the sale deed executed. These findings recorded by the two Courts of fact are on the basis of evidence available. This finding of fact cannot be interfered in exercise of jurisdiction under Section 100, C.P.C. The Apex Court in the case of H. P. Pyarejan v. Dasappa (2006) 2 SC 496 : 2006 (2) AWC 1134 (SC), it was held that in a suit for specific performance of contract, the trial court and the first appellate court concurrently came to a conclusion that the

plaintiff failed to establish that he was ready and willing to perform his part of contract and therefore, he denied the relief claimed. The High Court could not upset the finding on the question of readiness and willingness which is in fact a mixed question of law and fact. It was further held that the interference under Section 100, C.P.C. by the High Court is unwarranted specially if it involves-reappreciation of evidence.

10. Similar view was expressed in the case of Mst. Sugani v. Rameshwar Das and Anr. : AIR 2006 SC2172 . Paragraph 26 of the said judgment is quoted below:

It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last Court of fact. It is true that the lower appellate court should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible. One drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

11. Similar view has been expressed in another decision of the Apex Court in the case of Veerayee Ammal v. Seeni Ammal : AIR 2001 SC2920 .

12. In view of what has been discussed above, I am of the considered view that the substantial question of law raised in the instant appeal does not arise by the two courts below. The plaintiff must establish his readiness and willingness to perform his part of contract on the basis of the pleadings and/evidence and this would depend on the question where the defendant is doing everything which was required for him in terms of agreement to sell. This question in the instant case has been gone in detail by the two courts below and though it is a mixed question

of law and fact, this Court cannot enter in the realm of reappraisal of evidence. Learned Counsel for the appellant could not point out any such glaring defect such as material evidence was ignored or documents have been wrongly interpreted, misconstrued and the same amounts to a question which can be termed to be a 'substantial question of law', which calls for interference by this Court in exercise of jurisdiction under Section 100, C.P.C.

13. In view of what has been Stated above, I do not find any merit in this second appeal. No good ground or interference is made out. The substantial question of law raised is devoid of merits. The appeal is dismissed. Cost on parties.

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