

Durgadan Vs. Devidan

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Court : Rajasthan

Decided On : Apr-10-1974

Reported in : 1974WLN314

Judge : Kan Singh, J.

Appeal No. : S.B. Civil Second Appeal No. 612 of 1972

Appellant : Durgadan

Respondent : Devidan

Judgement :

Kan Singh, J.

1. This is a defendant's second appeal arising out of a suit for specific performance of a contract of sale of an agricultural land measuring 7 Bighas 5 Biswas comprised in Khasras Nos. 488 and 489 situated in village Padu, Tensil Meita, District Nagaur.

2. The plaintiff came forward with the case that on 29 6 67 the defendant agreed to sell him his agricultural land for Rs. 1,001/- and executed a sale deed on a stamp paper, but he refused to have it registered. He further averred that he was always ready and willing to perform his part of the contract for bearing the expenses for registration. In the alternative the plaintiff prayed for refund of the money paid by

him to the defendant.

3 The defendant contested the suit. He denied that he entered into any contract of sale with the plaintiff, as alleged. He further denied the execution of the sale document as also the receipt acknowledging the payment of Rs. 1,001/- to him. He further raised the plea that the suit was triable exclusively by a revenue court.

4. On the pleadings of the parties the learned Additional Munsif, Merta, by whom the suit came to be tried, framed the following issues:

1. Whether the defendant sold his Khatedari land Khasara Nos. 488 489 to the plaintiff located within limits of Riya Badi for a sum of Rs. 1,001/- and executed an agreement in favour of the plaintiff?

2. Whether the plaintiff is entitled to have the possession of the land in specific performance of the contract?

3. Whether the plaintiff is entitled to have the registration from the defendant?

4. Whether the agreement is inadmissible in evidence?

5. Whether the plaintiff had more land than the ceiling limit, consequently agreement of sale of land is illegal and defendant had no right to sell?

6. Relief.

5. Both the parties produced their evidence. Issue No. 4 was decided by the learned Additional Munsif as a preliminary issue and he held that on payment of sufficient stamp duty the document could be received in evidence. The requisite duty seems to have been paid. On consideration of the evidence, the learned Additional Munsif came to the conclusion that the sale document had been executed by the defendant and he had further received the consideration. Issue No. 3 was also decided in favour of the plaintiff. Issue No 2 came to be deleted subsequently when the plaint was amended by the plaintiff.-

6. I may mention here that whereas the plaintiff amended the plaint, the defendant did not choose to file any fresh written statement, but submitted before the trial

court that the written statement in reply to the un-amended plaint be taken to be the written statement to the amended plaint. While amending the plaint the plaintiff had confined his prayer to one for specific performance of the contract only and the prayer for possession was not included.

7. No evidence was led by the defendant regarding issue No. 5 and, therefore, it was decided against the defendant. In the result the learned Additional Munsif decreed the suit for specific performance and ordered the defendant to execute a regular sale-deed for the land in question & have it registered.

8. Aggrieved by the decree of the Seamed Additional Munsif the defendant went up in appeal to the Court of the Civil Judge, Merta, who dismissed the appeal. It is in these circumstances that the second 3ppeal has been filed by the defendant to this Court.

9. Leraned Counsel for the appellant has challenged the decree of the court below mainly on two grounds. Li the first place he contended that the civil court had do jurisdiction to try the suit as the same was exclusively triable by a revenue Court. In the second place he contended that a suit for specific performance of the contract of sale without asking for the relief of the possession of the land was not maintainable. Leraned Counsel placed reliance on a number of cases, which I propose to deal with hereinafter.

10. I may take up the second contention first as its determination will be helpful in disposing of the first contention as well.

11. Leraned Counsel referred me to Bimal Kumari v. Ashok Mitra : AIR1955 Cal402 . It was a suit filed in the original side of the Calcutta High Court It was for (a) specific performance of an agreement for sale of a property situated outside the jurisdiction of the Calcutta High Court, (b) for leave under Order 2, Rule 2, CPC, in respect of possession of the said premises, (c) for a decree for a sum of Rs. 30,000/- with interest thereon at 12 percent, from 2211948 until payment, if title be not found good on such enquiry. Other reliefs were also prayed for. Now in the agreement to sell the property it was mentioned that the vendor would execute and register a proper deed of conveyance & simultaneously deliver possession to

the purchaser Learned Judge, who tried the suit, refused leave under Order 2, Rule 2 CPC. He observed that the cause of action for possession was the same as the cause of action for the specific performance. It was pointed out that on the same averments in the plaint, he would be entitled to ask for possession also. He need allege nothing more, he need not prove anything more. In the circumstances leave was not given. The learned Judge observed:

If the plaintiff succeeds in this cause and a conveyance is executed in her favour by the defendants or by the Court, in the plaint which will follow in the suit for possession the same allegations would have to be made. On the agreement in suit the plaintiff does not even have to make a demand for possession after the conveyance. Her claim to possession arises simultaneously with the execution of the conveyance. If she was to file a suit to embrace the relief as to specific performance in the first instance she would only have to state what she has stated in the present plaint & merely add a relief as to possession. The plaintiff in his case has omitted to sue for possession in order to get an adjudication by this Court and if the Court has any direction in the matter in order to avoid multiplicity of proceedings, leave should not be given in such a case under Order 2, Rule 2. If something more had to be done under the agreement before the plaintiff could get possession, then the cause of action for the suit for possession might have been different or there might at least have been some ground for the plaintiff not asking for possession; but in this case she seeks to keep the sword hanging on the defendants in respect of her claim to possession merely because she finds it impossible to obtain that relief in this Court. It might have been open to her to give up her right to possession under the agreement and she could have asked for it. If and when the document was executed on the strength of that conveyance, but that is not a course which she has chosen to adopt. It may be that in that case there would be other difficulties in her way. However that may be, on the facts of this case I am not prepared to hold that the discretion of the Court should be exercised in favour of the plaintiff in giving leave under Order 2, Rule 2.

The observations in the above passage to the effect that 'It might have been open to her (plaintiff) to give up right to possession under the agreement & she could have asked for it if and when the document was executed on the strength of that

conveyance, but that is not a course which she had chosen to adopt', I am afraid, do not lend support to the contention of the learned counsel that without asking for the relief of possession the relief for specific performance alone could not have been asked for.

12. In *Krishnaji v. Sangappa* AIR 1925 Bom 181, the learned Judges of the Bombay High Court observed:

In a suit for specific performance of a contract of sale though a claim for possession might be made it is not obligatory upon the plaintiff to make such a claim. Under Section 54 of the Transfer of Property Act, the contract for sale of immovable property itself creates no interest or charge upon the immovable property, and until the claim for specific performance is decreed in favour of the plaintiff it cannot be said that he is entitled to possession bought for the sake of convenience, to avoid multiplicity of suits, it might be open to the plaintiff to make a claim for possession in the same suit.

The same view prevailed in the Madras High Court vide *T. Rangayya Reddy v. V.R. Subramanya Aiyar and Ors.* (1917) 40 Indian Cases 429.

13. I am in respectful agreement with the observations in the Bombay case.

14. Section 54 of the Transfer of Property Act defines sale & contract for sale as follows:

54, 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of the immovable property is a contract that a sale of such property shall take place on terms settled between the parties.'

It does not, or itself, create any interest in or charge on such property.

15. A sale of immovable property of the value of Rs. 100/- & upwards, could be made only by a registered instrument. Therefore, the sale document found to have been executed by the defendant in favour of the plaintiff purported to be a sale alright in every way, but according to its tenor, in law it could not be a sale, without the sale document being registered legal title in the property would not be transferred to the vendee. Right to get possession by the vendee arises only when the title is conveyed with the registration of the sale document. It is only for the sake of convenience and for avoiding multiplicity of suits that even in a suit for specific performance of a contract for sale with respect to immovable property a prayer for possession is made, but it is far from saying that without such a prayer the suit for specific performance of the contract will not be maintainable. Therefore, the second contention has no force.

16. Now I may turn to the first contention. Section 207 of the Raj. Tenancy Act, 1955, lays down what suits & applications are exclusively triable by a revenue court. It provides:

Section 207. Suit and applications cognizable by revenue court only:

(1) All suits and applications of the nature specified in the Third Schedule shall be heard and determined by a revenue court.

(2) No court other than a revenue court shall take cognizance of any such suit or application based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.

Explanation-If the cause of action is one in respect of which relief might be granted by the revenue court, it is immaterial that the relief asked for from the civil court is

greater than, or additional to, or is not identical with, that which the revenue court could have granted.

17. In construing a similar provision in the statute that was in force before the Rajasthan Tenancy Act, 1955, Modi, J., observed in Chandmal v. Dawar 1954 RLW 184 as follows:

I am of opinion that in order to determine whether a suit is triable by a revenue court, or by a civil court, certain basic principles must be borne in mind. One such principle is that it should be readily inferred that the jurisdiction of the civil courts is barred unless such an inference can be raised by an express provision of law or by necessary implication. Another thing which should be borne in mind is that the question of jurisdiction must be initially determined by the allegation made in the plaint. Thus, whether a suit for possession of land is cognizable by a civil court or not depends entirely upon the frame of the suit and the allegations contained in the plaint. A further principle which should be kept in view is what is the substance of the suit and what is its main object, or, in other words, what is the real contest between the parties. In order to determine this the principle is well settled that one must look to the substance of the plaint and not merely to its outward form. If this is not done, it is obvious that it may be open to exclusiveness of jurisdiction. It is of course to be remembered that care should be taken not to introduce anything into the plaint which may not really be found there or which may be foreign to its main purpose.

In a later case in Asala v Narain 1963 RLW 323 he again observed as follows:

Now, it has been laid down in a number of decisions of this Court to many of which I have been a party, that the question of jurisdiction namely, whether a suit is exclusively triable by a revenue court or civil courts can take cognizance of it, has to be decided on the allegations made in the plaint taken in their essence. The guiding test according to these decisions, put in a nutshell is : what is the true nature of the suit, or what is the object as disclosed by the allegations contained in the plaint? If the answer to these questions is that the plaintiff seeks the establishment of reliefs which essentially fall within the scope of the Tenancy Act, that is, the Act of 1955, with which we are concerned here, then the conclusion as

to the proper jurisdiction of such a suit is and must be that it is one which is exclusively triable by revenue court, and that the jurisdiction of the civil courts to try and dispose of such suits is wholly barred. That is the gist of Section 207 of the said Act which lays down that all the suits and applications 'of the nature:' specified in the Third Schedule thereof shall be heard and determined by a revenue court, and here I would underline the phrase 'of the nature' occurring; in this section if only to emphasize that the intention of the Legislature in using the phrase definitely seems to be that suits which not only squarely fall within the four walls of the various items specified in the Third Schedule but also those which may not so fall but which may partake of the nature thereof can be heard and determined by a revenue court only. This section further enacts that no court other than a revenue court shall take cognizance of any such suit or application or of any suit or application which is based on a cause of action in respect of which any relief could be obtained by means of any such suit or application in a revenue court. Further there is an Explanation to the section which provides that where the cause of action is one in respect of which the relief can be granted by the revenue court, that the factor that the relief asked for from the civil court is greater than or additional to, or is not identical with, that which revenue court could have granted would be of no consequence.

There was yet another case decided by Modi, J, (Shankar Lal v Dhulilal 1973 WLN 654, in which he reiterated the same principles.

18. Now the first principle that one has to keep in view is that it should not be readily inferred that the jurisdiction of a civil court is barred unless such an inference can be raised by an express provision of law or by necessary implication. The second principle which should be borne in mind is that the question of jurisdiction must be initially determined by the allegations made in the plaint. The third principle is as to what the substance of the suit is and as to what is its main object or in other words what is the real contest between the parties.

19. If one looks to the plaint in the case in hand it appears that it is a suit for specific performance of a contract for sale though in respect of an agricultural land. It does not contain any prayer for possession of the agricultural land as such.

In this context one has, therefore, to see as to whether relief of specific performance of the contract could have been given by a revenue court. What suits and applications are triable by a revenue court, are specified in the third schedule of the Rajasthan Tenancy Act, 1955. There is, however, no serial in the schedule which makes provision for a suit or application for getting the relief of specific performance of a contract for sale in respect of an agricultural land. That being so, in my view, the civil court is not debarred from entertaining the suit for specific performance of contract for sale in respect of agricultural property.

20. Learned Counsel invited attention to a recent judgment of Lodha, J., reported as *Jagan Singh v. Chotey Lal* 1973 WLN 654. In that case the suit was for avoiding a sale in respect of agricultural land. It was alleged that the sale was void ab initio being in contravention of Section 42 of the Rajasthan Tenancy Act, 1952, as the plaintiff was a member of Scheduled Tribe, whereas the defendant vendee was not a member of Scheduled Tribe. It was prayed that the sale deed be declared void ab initio and a decree for possession of the land in dispute be granted in favour of the plaintiff. Lodha, J., thought that the real contest between the parties and which was also the object of the suit, was for possession of the property. Consequently, he held that the suit was triable by a revenue court only. The case is easily distinguishable as in the present suit the relief prayed for is only for the specific performance of contract and not for possession. Even if the relief for possession were taken to have been implied in the relief for specific performance then too the main and substantial relief is one for specific performance so that the plaintiff could get his legal title in the property on the registration of the sale-deed in his favour.

21. Learned Counsel also contended that the document was in every sense a sale-deed and could not be construed to be a contract of sale. He pointed out that it even contains a recital that possession had been delivered to the plaintiff and that all rights that belong to the vendor have passed on to the plaintiff vendee. Learned Counsel invited my attention to *K. Santhakumari v. Suseela Devi* : AIR 1961 AP424 and two cases of the Privy Council referred to there in, viz., *Dayal Singh v. Indar Singh* AIR 1926 PC 94 and *J.R.R. Skinner v. R.H. Skinner* AIR 1929 PC 369. In that case it was observed:

In construing an instrument in order to decide whether it is an agreement to sell or a contract for sale the cumulative effect of all the recital contained therein and the relevant facts have to be taken into account. The mere offer to execute and register a sale deed at a later date does not take away the effect of a clear recital transferring the title and interest of the vendor to the vendee or change the character of a document from a sale to an agreement to sell. The mere use of the word agreement is not conclusive also.

Observations were made with a view to deciding how stamp duty was leviable on the document; whether on the footing that it was a contract or agreement of sale or sale itself, namely, document of conveyance. Stamp Act, is a fiscal statute and for seeing what stamp duty is leviable on a particular document or instrument one has to go by its tenor, but when its validity has to be examined as sale within the meaning of Section 54 of the Transfer of Property Act, it will have to be seen whether it was registered or not. It is only when a document of sale in respect of a property exceeding of Rs. 100/- in value is registered that it becomes a sale within the meaning of Section 64 of the Transfer of Property Act. Even for a sale-deed which is yet to be registered, the stamp duty will be realisable taking it to be a sale-deed. Whether in law it will constitute a sale within the meaning of Section 54 of the Transfer of Property Act, will have to be seen in the light of whether the document is a registered one or not. Therefore, this case is of no help to the learned Counsel.

22. The Privy Council cases were considered by a Division Bench of this Court in a case reported as *Sampatraj v. Pokar* 1955 RLW 232. It was observed therein:

We should like to point out that so far as *Skinner's* case referred to above is concerned, their Lordships held the view that the document in that case was a sale deed and on that question preferred the opinion of the Subordinate Judge who had held that it was a sale deed to that of the High Court which on appeal had differed from the conclusion of the Subordinate Judge and had held that it was an agreement for sale rather than a sale-deed. In that view it was held that the document fell within the provisions of Section 17 of the Registration Act and, therefore, was compulsorily registrable. Though that was the main finding upon

which their Lordships based their decision, they further pointed out that even an agreement for sale of immovable property would be a transaction affecting the property within the meaning of Section 49 of the Registration Act and would, if carried out, bring about a change in ownership. Reference was then made to Section 17(2)(v) which exempts from registration a document which does not itself create an interest in an immovable property but merely creates a right to obtaining another document which will do so. As the view of their Lordships, however, was that the document in that case itself created an interest in an immovable property, it was held that to allow such document to be used as the foundation of the suit for specific performance was little more than an evasion of the Act. With utmost respect, we may point out that the last clause of Section 54 of the Transfer of Property Act, which we have already quoted above, was not brought to their Lordships' notice and there is no discussion in Skinner's case as to the implications thereof. It appears to us that it abolishes the English Doctrine that a contract for sale transfers an equitable estate to the purchaser. A contract for sale, where the Transfer of Property Act is in force, would, therefore, merely amount to being a document creating a right to obtain another document and would not require registration according to Section 17(2)(v) It appears to us that even before the enactment of the Transfer of Property Act, the legislature when enacting the Registration Act of 1877, did not regard an instrument for sale as itself creating an interest in land. See Clause (v) of Section 17(2) of the Act of 1908 which corresponds to Clause (h) of Section 17 of the Act of 1877. Reference may be made in support of this view to Chunni Lal Panna Lal v. Bomaji Mancher Modi AIR RLW 313, Shree Gopal Mullik v. Ram Churn Nuskur (1917) WLN 654, Pertab Chunder Ghose v. Mahendra Purkait 1954 RLW 184 and Hurnandan Singh v. Jawad Ali 1963 RLW 323. This state of law, however, did not find favour with their Lordships of the Privy Council in Dayal Singh's case 1963 RLW 313. That was a suit for specific performance of a contract to sell and it was held by their Lordships that where the buyer had paid earnest money and so far from refusing to accept delivery was pressing for specific performance, the agreement in itself created an interest and did not allow of the application of Section 17(2)(v), and was therefore, compulsorily registrable and not having been registered was inadmissible in evidence under Section 49. This view is also supported by the dictum of their

Lordship in Skinner's case already cited above. We would most respectfully point, however, that in neither of these cases there is a reference to the last clause of Section 54 of the Transfer of Property Act which provides that a contract for the sale of immovable property does not of itself create any interest in or charge on such property. Skinner's case was cited in various High Courts in India, e.g., before the Allahabad High Court in Sohan Lal v. Atal Nath 1973 WLN 654, before the Madras High Court in Jagannadha v. Lakshmi Narayan : AIR 1961 AP424 and in Patna High Court in Abdul Latif v. Debi Mahton AIR 1926 PC 94, and it was explained that a mere contract for the sale of immovable property, which did not create any interest in such immovable property, did not require registration. Thus in Sohanlal v. Atal Nath 1973 WLN 654, Sulaiman C.J. observed that: If a document on the face of it purports to create an interest in immovable property then it cannot be used in evidence for the purpose of showing any transaction affecting such interest. We do not think that their Lordships meant to lay down that even where a document does not purport to create an interest in immovable property it falls under Section 17 and is therefore altogether inadmissible under Section 49 for either purpose. Nor do we think their Lordships have laid down in their judgment that a mere contract for sale of immovable property purports to create interest in such property and falls within Section 17, Registration Act, so as to be compulsorily registrable. We think that the view of this Court that a mere contract for the sale of an immovable property and require registration has not been overruled by this pronouncement of their Lordships.

Thus according to the Division Bench case which is binding on me, no right, title or interest in the property could be conveyed by a document if it is not in accord with Section 54 of the Transfer of Property Act. In the circumstances the document cannot be construed to be a sale for the purposes of Section 54 of the Transfer of Property Act, but would be only a contract for sale within its meaning. In R. Reddy v. Addl. Custodian, Evacuee Property : [1966]3SCR214 , cited by learned Counsel for the respondent their Lordships of the Supreme Court, inter alia, observed that no registered sale deed was executed in the case and, therefore, the property did not pass from Abdul Aziz Khan (vendor in that case) to the appellant (vendee) even upto the time when Abdul Aziz Khan became an evacuee. Their Lordship went on to say that even though Section 53A of the Transfer of Property Act would

come to the aid of the appellant in defence, yet he cannot file the suit to establish himself as owner of the property. Therefore, this contention too has no force.

23. The result is that the appeal fails and is hereby dismissed. The parties are left to bear their own costs of this Court.

24. Leraned Counsel for the appellant orally prayed for leave to appeal under Section 18 of the Rajasthan High Court. Ordinance 1949, but as it is a second concurring judgment and the valuation involved is not much, I refuse the leave.

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