

Ashutosh Jana Vs. Ananta Kumar Jana and Others

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Court : Kolkata

Decided On : Aug-08-1998

Reported in : (1999)3CALLT195(HC)

Judge : Bhaskar Bhattacharya, J.

Acts : [Specific Relief Act, 1963](#) - Sections 16 and 34;; [Code of Civil Procedure \(CPC\), 1908](#) - Section 100 - Order 41, Rule 11

Appeal No. : Civil Appellate Jurisdiction, S.A. No. of 1988

Appellant : Ashutosh Jana

Respondent : Ananta Kumar Jana and Others

Advocate for Def. : Mr. Jyotirmoy Bhattacharya and ;Mr. Supriya Chattapadhyay, Adv.

Advocate for Pet/Ap. : Mr. S.P. Roychowdhury and ;Mr. Subhrakamal Mukherjee, Adv.

Disposition : Appeal allowed

Judgement :

B. Bhattacharya, J.

1. This second appeal is at the instance of defendant No.2 In a suit for specific performance of contract and is directed against the Judgment and decree dated March 10, 1988 passed by the learned Additional District Judge, 3rd Court. Midnapore in other Appeal No. 500 of 1986 thereby reversing those dated April 30, 1986 passed by the learned Munsif. Additional Court at Contal in other Suit No. 35 of 1986.

2. The parties to the instant proceeding are all brothers. The plaintiffs, two of the brothers, filed the aforesaid suit for specific performance of contract of sale of the property which was admittedly owned by defendant No.1. According to the plaintiffs, the defendant No. 1 on November 6, 1976 entered into an Agreement for Sale of the suit property in their favour at the price of Rs. 2,500/- after receiving Rs. 2,000/- as earnest money. Subsequently the said defendant No. 1 sold away the suit property by a registered deed dated July 18, 1979 at a consideration of Rs. 4,490/- on the basis of an agreement for sale between defendant No.1 and defendant No.2 dated May 27. 1979.

3. The aforesaid suit was not contested by defendant No.1 but defendant No.2, the subsequent purchaser, contested the same thereby disputing the case of the plaintiffs. The defendant No.2 specifically asserted that the alleged agreement between plaintiffs and defendant No. 1 was a collusive ante-dated document and was created for the purpose avoiding the sale deed executed in favour of defendant No. 2. The further defence of the defendant No. 2 was that he was a bonafide purchaser for value without notice of any agreement for sale executed earlier by the defendant No. 1 and as such the suit was liable to be dismissed.

4. The learned trial Judge on consideration of the materials on record disbelieved the case of the plaintiffs that any such prior agreement was entered into by defendant No. 1 in their favour agreeing to sell the suit property.

5. Being dissatisfied, the plaintiffs preferred an appeal being other Appeal No. 500 of 1986 which was ultimately heard by the learned Additional District Judge. 3rd Court. Midnapore and by the judgment and decree Impugned in the instant appeal the learned first appellate court set aside the judgment and decree passed by the learned trial Judge and decreed the suit for specific performance of contract in

favour of the plaintiffs.

6. Being dissatisfied, the defendant No. 2 has preferred the instant second appeal.

7. At the time of admission of the instant second appeal, the Division Bench admitting the appeal under Order 41 Rule 11 of the Code decided to hear out the Instant appeal on all grounds taken in the Memorandum of Appeal. At the time of hearing of the instant appeal before this court, Mr. Roychowdhury, the learned senior advocate appearing in support of the instant second appeal prayed for permission to argue an additional ground, Mr. Roychowdhury contended that in the absence of any finding as to whether the appellant herein was a bona fide purchaser for value without notice of earlier agreement, the learned first appellate Court erred in law in passing a decree for specific performance of contract simply after holding that there was a valid agreement for sale between plaintiffs and defendant No.1. Since the aforesaid question is a pure question of law, I permitted Mr. Roychowdhury to agitate the said point and accordingly a new point has been formulated to the aforesaid effect.

8. Apart from the aforesaid point, Mr. Roychowdhury further submitted that the finding of the learned first appellate court that the agreement for sale between the plaintiffs and defendant No. 1 was a genuine one is based on total misconsideration of evidence on record, inasmuch as the witness for the plaintiffs gave evidence that the said agreement was made sometime In the year 1983 whereas the alleged agreement shows that the same was made in the year 1976. Thus, Mr. Roychowdhury contends that the finding of the learned first appellate court is based on non consideration of vital piece of evidence and as such in this second appeal he was entitled to pray for setting aside such finding.

9. Mr. Bhattacharya, the learned advocate appearing on behalf of the plaintiffs has on the other hand contended that in view of the decision of the apex court in the case of Jugraj Singh and Anrs. v. Labh Singh and Ors. reported in (1995)2 SCC 31. the appellant was not entitled to dispute the genuineness of the agreement between plaintiffs and defendant No.1 inasmuch as the said defendant No.1 has neither contested the suit nor has preferred any appeal against the judgment and decree passed by the learned first appellate court.

10. As regards the additional point formulated by this court at the time of hearing, Mr. Bhattacharya fairly concedes that in the absence of any definite finding that the appellant is not bona fide purchaser for value without previous notice, no decree for specific performance of contract can be passed. Mr. Bhattacharya however contends that the onus of proving bona fide upon the person who takes such plea. Mr. Bhattacharya contends that from the materials on record it will appear that the appellant has failed to discharge such onus.

11. As regards the decision of Jugraj Singh and Anr. (supra) Mr. Roychowdhury in reply firstly contends that the said decision of the apex court has been passed per incuriam. because the apex court did not take note of section 16(c) of the Specific Relief Act. Mr. Roychowdhury contends that section 16(c) of the aforesaid act gives mandate to the court not to pass any decree unless the plaintiff avers and proves that he was all along ready and willing to perform his part of the contract. Therefore notwithstanding the fact that the principal defendant has failed to contest the suit, such plea should be available even to a subsequent purchaser. Mr. Roychowdhury next contends that the said decision has no application to the fact of the present case because in that decision Supreme Court has never said that a bona fide purchaser for value without notice cannot take the plea of absence of any contract between plaintiff and the principal defendant.

12. In the aforesaid decision of Jugraj Singh and Ors. (supra) the subsequent purchasers after suffering a decree for specific performance of contract preferred an appeal and contended that the plaintiff had failed to prove that he was all along ready and willing to perform his part of the contract. The learned first appellate court did not permit the subsequent purchasers/appellants to take such a plea and with a finding that they are not bona fide purchasers for value without notice dismissed their appeal. Hence those subsequent purchasers preferred an appeal before Supreme Court by special leave. The Supreme Court in that context on consideration of section 16(c) of the aforesaid Act held that the plea that the plaintiff has not complied with the provision of section 16(c) of the Act is not available to a subsequent purchaser. In paragraph 5 of the said Judgement, the apex court held that the subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of agreement for

sale with the plaintiff and they are bona fide purchasers for valuable consideration. According to the apex court though they are necessary parties to the suit since any decree obtained by the plaintiff would be binding on subsequent purchasers, the plea that plaintiff was not always ready and willing to perform his part of the contract must be available only to the vendor or his legal representative but not to subsequent purchasers.

13. In my opinion, in view of the aforesaid Supreme Court decision a subsequent purchaser is not entitled to take any other plea than that they are bona fide purchasers for value without notice. Whether there was really any agreement between plaintiff and the principal defendant can be questioned only by the principal defendant. As indicated earlier. In the Instant case the principal defendant No.1 did not contest the suit and after the decree of the learned first appellate court has not preferred any second appeal. Defendant No. 1 having accepted the finding of the first appellate court, in my opinion, in view of the aforesaid apex court decision, the appellant herein, a subsequent purchaser.cannot dispute such finding. I am unable to accept the contention of Mr. Roychowdhury that the said decision of the the Apex Court does not stand in the way of a subsequent purchaser In taking the plea that there was no prior agreement between the plaintiff and the principal defendant.

14. Compliance of section 16(c) of the aforesaid Act by a plaintiff gives jurisdiction to a court to pass a decree for specific performance in his favour. Since the apex court by the aforesaid decision has deprived a,subsequent purchaser of such a plea relating to Jurisdiction of the court, It goes without saying that a plea of non-existence of a prior agreement should also be available only to a principal defendant and not to a subsequent purchaser.

15. After reading the said judgement I find that the sum and substance of the law laid down therein is that in any appeal by a subsequent purchaser the only point to be considered by a court is whether the subsequent purchaser is a bona fide purchaser for value without notice. I find no substance in the contention of Mr. Roychowdhury that 1 should ignore the said decision as a per incurtum. As already mentioned, in paragraph 3 of the said Judgment the apex court has

specifically taken note of section 16(c) of the [Specific Relief Act, 1963](#) and as such the said decision cannot be said to have been passed without taking note of the said provision as contended by Mr. Roychowdhury.

16. Moreover, the learned first appellate court on consideration of the material on record having drawn adverse Inference against defendant No. 1 for not disputing the allegation of the plaintiffs and for not giving any evidence and after taking such adverse inference having found that there was a valid prior agreement between plaintiff and the defendant No.1, this court does not find any reason to interfere with such finding of fact within the limited scope of section 100 of the Code of Civil Procedure.

17. As regards the other point argued by Mr. Roychowdhury. I find that the learned courts below neither framed any issue nor did arrive at any finding as to whether the appellant was a bona fide purchaser for value without notice or not. Thus, merely because a prior agreement between plaintiffs and defendant No. 1 has been established, a decree for specific performance of contract cannot be passed in favour of the plaintiffs unless it is further proved that the subsequent purchaser is not a bona fide purchaser for value without notice.

18. Thus, in my opinion, this is a fit case where the judgment and decree passed by the learned first appellate court should be set aside and the matter should be sent back on remand to the learned trial Judge with a direction to frame an issue as to whether the defendant No.2 was a bona fide purchaser for value without notice of the agreement between plaintiffs and defendant No. 1 and to arrive at a finding on such issue after giving the parties an opportunity to lead evidence.

19. Thus, this appeal is allowed, the judgment and decree passed by the learned first appellate Court is set aside and the matter is sent back on remand to the learned trial Judge with a direction to frame an additional issue as to whether the defendant No. 2 was a bonafide purchaser for value without notice of the agreement between plaintiffs and defendant No. 1 and to decide the said issue. The learned trial Judge is also entitled to rely upon the evidence already on record. I, however, affirm the finding of the learned first appellate court that there was a prior agreement between plaintiffs and defendant No. 1 for sale of the suit

property. The learned trial Judge will dispose of the main suit after recording a finding on the said issue and in accordance With his decision thereon.

20. Appeal thus allowed. No order as to costs.

21. Appeal allowed

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