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Court : Patna

Decided On : Oct-19-2011

Judge : Mungeshwar Sahoo

Appeal No. : First Appeal No. 504 of 1982

Appellant : Mostt. Dularo Devi and Others

Respondent : Mostt. Asturna Devi and Others

Judgement :

Mungeshwar Sahoo, J.

(1) The defendants filed this First Appeal against the judgment and decree dated 23.08.1982 passed by the learned 2nd Additional Subordinate Judge, Sasaram in title suit no.236 of 1977/20 of 1982 decreeing the plaintiffs-respondent's suit for specific performance of contract dated 10.01.1977.

(2) The plaintiffs filed the aforesaid suit for specific performance of contract alleging that the defendant no.1, Basgit Pal being the karta of his family in the said capacity contracted to sell the suit property. The consideration was fixed at Rs.10,000. On the date of execution of the agreement to sell Rs.5,000 was paid and an agreement was executed on 10.01.1977. The defendant no.1 agreed to execute the sale deed after obtaining permission from the Chakbandi Officer. The plaintiffs were and are always ready to perform their part of the contract and to pay the balance consideration amount. The defendants in collusion with the enemies

of the plaintiffs were not willing to transfer the suit property in spite of demand by the plaintiffs. Therefore, the plaintiffs served a notice on the defendant no.1 on 22.08.1977. The defendant no.1 replied on 27.08.1977 stating that they will compromise the matter within 15 days but on 11.09.1977, the defendant no.1 refused to execute the sale deed. Therefore, the suit for specific performance was filed.

(3) The defendants appeared and filed contesting written statement. Besides taking various ornamental pleas, the defendants pleaded mainly that no such agreement was executed by the defendants. The defendants also denied receiving of Rs.5,000. It is stated that there was no legal necessity for selling the property nor the defendants were in need of money for agriculture purpose or for construction of house. In fact, when Rehan deed was returned to the plaintiffs, he obtained thumb impression of the defendant no.1 on three plain papers and the same might have been converted to the agreement.

(4) On the basis of the aforesaid pleadings of the parties, the following issues were framed: I. Is the suit as framed maintainable? II. Have the plaintiffs valid cause of action for the suit? III. Is the suit barred by limitation? IV. Is the contract of sale dated 10.1.1977 valid, genuine and for consideration? V. Have the plaintiffs been ready and willing to pay the consideration due to sale for the execution of the sale deed? VI. Are the plaintiffs entitled to a decree for specific performance of contract as claimed? VII. To what other relief or reliefs are the plaintiffs entitled?

(5) After trial, the learned Court below found that the agreement, Exhibit-4 dated 10.01.1977 is valid, genuine and for consideration and the plaintiffs were ready and willing to pay the balance part of the consideration money and, therefore, are entitled to get the sale deed executed vide paragraph 18 of the judgment.

(6) The learned senior counsel, Mr. Roy appearing on behalf of the appellants submitted that the learned Court below has wrongly relied upon the agreement to sell because forgery was committed. Specific pleading of the defendant was that when money was returned to the plaintiffs in the year 1975, he obtained thumb impression on three blank papers and the same might have been converted to so called agreement. The learned counsel further submitted that on the top of the

agreement, revenue tickets were pasted and some endorsement has been made on the revenue tickets which appears to be subsequently added, therefore, the learned Court below could not have found that the said agreement is valid and genuine. The scribe in his evidence stated that he has not written in the said agreement that Rs.5,000 was paid but the learned Court below did not consider this fact. The learned counsel further submitted that the condition in the agreement was that the sale deed will be executed after obtaining permission from the Chakbandi Officer but the plaintiffs never took any step for obtaining permission and, therefore, the plaintiffs were never ready and were not willing to perform their part of the contract. According to the learned counsel, unless permission is given, no sale deed could have been executed and, therefore, the so called agreement could not have been directed to be specifically enforced which is contrary to law. The learned counsel next submitted that the defendant had no occasion to sell the property because he was not in need of money. The defendant no.1 never received Rs.5000 as earnest money and the agreement is forged one. In support of his case, the defendants-appellants have adduced overwhelming evidences but the learned Court below disbelieved the same. The learned counsel next submitted that in fact, the so called reply to notice was not sent by the Advocate of the appellants rather it was sent by an Advocate who was instructed or appointed by the appellants. In fact, the said Advocate is relative of the plaintiffs but the learned Court below did not consider the case in this light and wrongly decreed the plaintiff's suit. The learned counsel next submitted that there is no time limit mentioned in the agreement within which the sale deed was to be executed and, therefore, there is uncertainty in the agreement so it cannot be enforced specifically. On these grounds, the learned counsel submitted that the impugned judgment and decrees are liable to be set aside and the plaintiff's suit for specific performance of contract be dismissed.

(7) On the other hand, the learned counsel for the plaintiffs-respondents submitted that the learned Court below has considered all the evidences materials produced before the Court below. After appreciating the oral evidences, the learned Court below found that there was negotiation between the parties and that at the instance of the defendant no.1, the agreement was executed and Rs.5,000 was paid to the defendants by the plaintiffs. The learned Court below also found that

the plaintiffs were always ready and willing to perform his part of the contract. So far time limit is concerned, according to the learned counsel, the defendants were required to obtain permission from the competent authority and, therefore, no time frame could have been mentioned in the agreement. It has been mentioned in the agreement that after obtaining permission, the defendants shall execute the registered sale deed but the defendants did not obtain the permission and lastly refused to execute the sale deed. In the agreement itself, it has been specifically mentioned that Rs.5,000 was paid to the defendant no.1. Only because there is clause that after obtaining permission, sale deed will be executed, it cannot be said that there is impediment in the grant of specific performance of the contract. Considering all these aspect of the matter, the learned Court below decreed the plaintiff's suit. So far the defendants is concerned, in the evidence, he denied the execution of the agreement and, therefore, the plaintiffs examined expert which compared this L.T.I. of the defendant no.1 and found that the L.T.I. appearing on the agreement is of defendant no.1. In such circumstances, the appeal has got no merit and it is liable to be dismissed with cost.

(8) In view of the above rival contentions of the parties, the following questions arise for consideration:

I. As to whether the agreement dated 10.01.1977, Exhibit-4 is genuine, valid and whether Rs.5,000 was paid to the defendants by the plaintiffs or not?

II. Whether the plaintiffs were always ready and are still ready and willing to perform their part of the contract?

III. Whether the agreement is contingent agreement and whether it can be enforced specifically without the permission of competent authority under Consolidation Act?

Point No.1.

(9) As stated, the plaintiff's case in short is that agreement was executed on 10.01.1977 and Rs.5,000 was paid to the defendants. On the contrary, according to the defendant, he denied the execution of the agreement and also receiving of

Rs.5,000. According to the defendants, there was no legal necessity for selling the property and that the defendants were not in need of money. To prove their respective cases, the parties have adduced evidences. It may be mentioned here that the said agreement has been marked as Exhibit-4 which was proved by P.W. 3, Kailash Singh. This P.W. 3 has specifically stated that he scribed the Mahada on the instruction of Basgit Pal, defendant no.1. He read it over and explained the contents thereof to both the parties. Indradeo Rai paid Rs.5,000 to defendant no.1.

(10) The learned counsel, Mr. Roy invited my attention to paragraph 4 of cross-examination of this witness where he has stated that in the Mahada, he has not written about the payment of Rs.5,000. It appears that the Mahada is dated 10.01.1977 and this witness deposed before the Court in 1982. It further appears that without going through the document, he has given this statement. From perusal of Exhibit-4, it appears that it has been specifically mentioned in the body of it that Rs.5,000 was paid to defendant no.1. In the cross-examination at paragraph 6, witness has also specifically stated that the said amount of Rs.5,000 was paid by the plaintiffs to this witness i.e. scribe who in turn gave the same to the defendant no.1.

(11) P.W. 2 has also stated that in his presence, negotiation took place between the parties and agreement was executed. At the time of execution of the Mahada, Rs.5,000 was paid to the defendant no.1 in presence of the witnesses.

(12) P.W. 4 is the plaintiff himself. He has fully supported the case as pleaded in the plaint. P.W. 5 has also stated that Exhibit-4 was executed in his presence and he had signed on Exhibit-4 as a witness. He has also stated that Rs.5,000 was paid by the plaintiff. P.W. 8 is the plaintiff no.2. He has also supported the case regarding execution of Mahada and payment of Rs.5,000. P.W. 11 is the expert who has proved his report, Exhibit-11. According to this witness, the disputed L.T.I. occurring on the Mahada is the L.T.I. of defendant no.1.

(13) Exhibit-1 is the Advocate notice given by the plaintiffs to the defendant no.1 calling upon him to receive Rs.5,000 and to execute and register sale deed. Exhibit-5/B is the reply by the defendant wherein he has stated that he will compromise the matter within 15 days. So far this reply is concerned, the learned

counsel submitted that the Advocate was never engaged by the defendant no.1. Except this denial, there is no other evidence on record to show that the Advocate was never engaged by this defendant. On the contrary, the vakalatnama has been proved by the plaintiffs in this case which has been marked as Exhibit-5/A which shows that he engaged Mr. Murlidhar Singh who has signed the reply. These are the evidences on the point of genuineness of the agreement i.e. Exhibit-4.

(14) The defendants also examined 4 witnesses. D.W. 1 is defendant no.1. He has stated that he was not in need of money either prior to 10.01.1977 or on 10.01.1977 for the purpose of development of agriculture or for construction of house. He has clearly stated at paragraph 2 that he had not put his L.T.I. on the Mahada i.e. Exhibit-4. The Mahada filed by the plaintiffs is forged. He has also denied that he gave reply of the notice through Murlidhar, Advocate, therefore, his evidence is denial only. In the last 3-4 lines of his examination-in-chief, he has admitted the fact that he had applied for permission before the Chakbandi Officer to sell the suit property. From the evidence of this witness, it appears that in one hand he is saying that he was not in need of money and that there was no agreement to sell and on the other hand, he is admitting the fact that he had applied for permission to sell the suit property.

(15) This defendant no.1 further at paragraph 3 of his cross-examination has clearly admitted that he has taken loan from Musafir and Ram Prasad Yadav. He has admitted also the fact that in 1970, he had sold 10 katthas of land. He has also admitted that he took loan from Khelawan and gave him land 3-4 years ago. According to the plaintiff who has been examined as P.W. 4, the defendant was indebted and, therefore, he agreed to sell the property. No doubt in the written statement and examination-in-chief, the defendant has stated that he was not in need of money but in the cross-examination, he has indirectly admitted that he was in debt. This proves the plaintiff's case that the defendant agreed to sell the suit property for legal necessity for the benefit of family. In my opinion, therefore, the learned Court below rightly found this fact.

(16) D.W. 2 has only stated that plaintiff obtained L.T.I. of defendant no.1 on three blank papers. As stated above, the defendant no.1 himself in the evidence denied

to have put L.T.I. on Mahadanama. Therefore, the evidence of this witness is neither here nor there. Exhibit-11 proved by the finger print expert clearly proves that the L.T.I. of the defendant no.1 is on Exhibit-4. D.W. 3 and 4 are formal witnesses.

(17) So far the submission of the learned counsel for the appellants that on the top of the agreement, revenue stamp has been pasted and something has been written on it which is not general practice which creates grave doubt about the genuineness of the agreement. So far this submission is concerned, it may be mentioned here that there is no prescribed form for the agreement. The agreement can be in any form. Merely because the agreement is not in a particular form no suspicious can be raised. In *Aloka Bose vs. Parmatma Devi*, A.I.R. 2009 S.C. 1527, it has been held that an agreement of sell comes into existence when the vender agrees to sell and the purchaser agrees to purchase for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both the parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a significance of which the purchaser has the copy signed by the vender and a vender has a copy signed by the purchaser or it can be by the vender executing the document and deliver it to the purchaser.

(18) In view of the above settled principles of law, the substance is to be seen and not the form of the agreement. The intention is to be gathered and emphasis should not be given on the manner of writing of the agreement.

(19) We have discussed above that the plaintiffs-witnesses have clearly stated that Rs.5,000 was paid in their presence to the defendant no.1 by the plaintiffs. The agreement, Exhibit-4 also clearly speaks that Rs.5,000 was paid to the defendants. The defendants have adduced only negative evidence. It is well settled principles of law that negative cannot be proved. Therefore, the plaintiffs were required to prove about the valid execution of Exhibit-4 and payment of Rs.5,000. From the discussion of the evidences, as stated above, it appears to me that the plaintiffs have been able to prove that Exhibit-4 was scribed at the

instance of the defendant no.1 in presence of the witnesses and Rs.5,000 was paid by the plaintiffs to defendant no.1. I, therefore, find that the plaintiffs have been able to prove the fact of execution of the Exhibit-4 and also have been able to prove payment of Rs.5,000. Accordingly, it is held that the Exhibit-4 is genuine, valid and legal document. Thus, the finding of the learned trial court on this point is hereby confirmed. Point No.2.

(20) From perusal of the plaint, it appears that the plaintiff specifically pleaded in the plaint in terms of the requirement as provided under Section 16(c) of the Specific Relief Act that he was and is still ready and willing to pay the balance consideration amount and get the sale deed executed and registered. In support of this pleading, the plaintiff in his evidence also clearly stated that he is still ready and willing to perform his part of the contract. Further, the legal notice served on the defendant has been proved by the plaintiff which indicate the intention of the plaintiff that he was always ready and willing to perform his part of the contract. The reply to the notice was given by the defendant saying that he will compromise within 15 days and the defendant requested the plaintiff not to take any legal action. After the expiry of said period, when the defendant refused to execute and register the sale deed, the instant suit has been filed in the same year which shows that the plaintiff was always ready. Moreover, this is not the case of the defendant that the plaintiff never approached him. On the contrary, we have seen what is the defence of the defendant. I, therefore, find that the plaintiffs-respondents have been able to prove that they were and are still ready and willing to perform their part of the contract. The finding of the learned Court below on this point is therefore, confirmed. Point No. 3.

(21) According to the learned counsel for the appellants, there is no time limit within which the sale deed was to be executed and registered and, therefore, there is uncertainty. According to the learned counsel, unless the permission is obtained from the Consolidation Officer, no sale deed can be executed. Therefore, the agreement cannot be specifically enforced. The learned counsel relied upon A.I.R. 1977 Calcutta 361 (Taherbhoy Feeda Ally vs. State of West Bengal) and submitted that without permission, no transfer can be made. It appears that in the said decision, the question regarding specific performance of contract was not involved.

(22) In A.I.R. 1986 S.C. 1912(Rojasara Ramjibhai Dahyabhai vs. Jani Narottam Das Lallubhai), the Apex Court has held at paragraph 14 as follows:

“14. It was contended before the Privy Council that a decree for specific performance of the agreement of sale could not be made, because such performance would necessitate an application by or on behalf of the vendor to the Revenue Officer for sanction to transfer the cultivating rights in the sir land, and that the court had no jurisdiction to require the vendor to make such an application. In repelling the contention, the Privy Council observed that in view of their construction of the agreement, namely, that the vendor agreed to transfer the cultivating rights in the sir land: [T]here was, in their Lordships’ opinion, an implied covenant on the part of the vendor to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer.

It was further observed that it was not necessary for their Lordships to decide whether in that case the application for sanction to transfer must succeed, but that it was material to mention that no facts were brought to their Lordships’ notice which would go to show that there was any reason why such sanction should not be granted. After making the said observations, the Privy Council held that in those circumstances the court had jurisdiction to enforce the contract under the Specific Relief Act, 1877 and Order 21, Rule 35 of the Code of Civil Procedure, 1908 by a decree ordering the vendor to apply for sanction and to execute a conveyance on receipt of such sanction. The decision of the Privy Council in *Motilal v. Nanhelal*, therefore is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. See also *Mrs Chandnee Widya Vati Madden v. C.L. Katial and R.C. Chandiok v. Chuni Lal Sabharwal* where this Court following the Privy Council decision in *Motilal v. Nanhelal* case, reiterated the same principle.”

(22) In view of the above settled principles of law laid down by the Apex Court, I find no force in the submission of the learned counsel for the appellants. I, therefore, find no reason to interfere with the impugned judgment and decree. The Court has the jurisdiction to direct the defendants to obtain permission within specified period and then execute and register the sale deed. Therefore, the learned Court below has rightly decreed the plaintiff's suit for specific performance of contract.

(23) In the result, I find no merit in this First Appeal and accordingly, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

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