

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

SECOND APPEAL No. 218 / 1992
SMT. REKHA W/O GHANSHYAM AND OTHERS
VS.
KANHAIYALAL S/O AMARSINGH AND ANOTHER

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INDORE, Dated : 09/08/2018

Mr. Nitin Phadke, learned counsel for the appellants.

Mr. Bhagwan Singh, learned counsel for the respondent
No.1.

Arguments heard.

The present Second Appeal u/S. 100 of the Code of Civil Procedure, 1908 is filed against the judgment dated 20/12/1983 passed in C.S.No. 146-A/1971 (Kanhaiyalal Vs. Madanlal and one another) by which the trial Court has decreed the suit for specific performance of the contract.

02. The first appellate Court has dismissed the appeal of the defendants vide judgment dated 29/7/1992 passed in C.A.No. 34-A/1986, against which the present appeal has been filed.

03. Facts of the case reveal that the suit was filed by the respondent – plaintiff Kanhaiyalal for specific performance of the contract against the defendants – Madanlal and his wife Smt. Ramkunwarbai, both are deceased and now they are represented by their legal representatives. Facts of the case further reveal that the property in question i.e., land bearing Survey No. 205/1, Area 5.13 Acre was purchased by the defendants from one Kishan s/o Hira on 17/2/1971. It was stated in the plaint that in the month of February, 1971 as the defendants were in need of money, therefore, they have entered into an oral agreement to sell the suit land to

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the plaintiff for a sum of Rs.8,000/-; out of which Rs.3000/- was paid on 27/2/1971; Rs.1,000/- was paid on 18/3/1971; and, Rs.2000/- was paid on 6/5/1971. It was further stated that on 6/5/1971 the defendants handed over vacant possession of the suit land to the plaintiff and on 6/5/1971 it was agreed between the parties that the balance amount would be paid in a day or two and thereafter sale deed would be registered in favour of the plaintiff.

04. Plaint averments further reveal that the defendants did not execute the sale deed and, therefore, the plaintiff issued notice to defendant No.1 Madanlal and again orally Madanlal expressed that he would execute the sale deed only if the sum of Rs.3,000/- is paid to him. Plaintiff has further stated that he did agree to the additional demand and prepared a sale deed and also went to the Office of the Sub Registrar, however, the defendants did not appear before the Sub Registrar on 18/5/1971 and, therefore, necessity arose to file a suit for specific performance of the contract.

05. Before the trial Court, the plaintiff has produced as many as six witnesses namely; Mohanlal (PW 1), Kanhaiyalal (PW 2), Rajaram (PW 3), Satyanarayan (PW 4), Bhawanisingh (PW 5) and Harisingh (PW 6). The plaintiff's witnesses have stated that there was an oral agreement between the parties and money was also received by the defendants, though there was a plaint averment stating that

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possession was also delivered to the plaintiff, but no revenue record was produced nor any document in respect of delivery of possession was brought on record and the plaintiff also stated that later on he was dispossessed. The plaintiff has produced certain documents also before the trial Court ie., Draft Sale Deed (Annexure P/1), receipt of Advocate's fee for drafting sale deed (Annexure P/2), sale deed (Annexure P/3), notice (Annexure P/4) and postal receipt / AD (Annexure P/5). However, none of the documents filed by the plaintiff establish that there was any agreement between the parties. The defendants have also produced witnesses namely; Rajkunwar (DW 1), Ibrahim (DW 2), Omprakash (DW 3), Rameshchandra (DW 4), Pannalal (DW 5) and Madanlal (DW 6) and two documents were brought on record ie., Police Report (Ex.D/1) and reply to the notice (Ex.D/2). The defendants have stated before the trial Court that the original sale deed dated 17/2/1971 which was executed by Kishan s/o Hira in his favour was stolen by the plaintiff and a Police Report was also lodged in the matter. It was also stated that the plaintiff used to work with the defendants and he was In-Charge of the shop from where he has stolen the sale deed and in those circumstances, a prayer was made for dismissal of the suit.

06. Heard learned counsel for the parties at length and perused the record.

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07. This Court has minutely scanned the evidence and observed that the trial Court has simply, based upon the oral evidence, without there being any supportive documentary evidence and only because four people have said that there was an agreement for sale, decreed the suit. In respect of the payment received by the plaintiff, again there is only oral evidence and there was no documentary evidence to establish that money was received by the defendants.

08. Hon'ble the Supreme Court in the case of Ouseph Varghese Vs. Joseph Aley and ors., reported in (1969) 2 SCC 539 has dealt with a similar issue wherein again there was an oral agreement. Paragraphs 2, 4, 8 and 9 of the aforesaid judgment reads as under :

2. The suit was for specific performance on the basis of an oral agreement alleged to have been entered into on 9.9.1121 (Malayalam Era) between the plaintiff and the 1st defendant who died very soon after the filing of the suit. The suit was contested by the second defendant, his widow. The trial court decreed the suit as prayed for but in appeal the High Court did not accept the agreement pleaded by the plaintiff but still granted a decree directing the defendant to execute a sale deed in favour of the plaintiff in respect of item No. 1 of the plaint schedule properties less one acre of paddy field at its east for a sum of Rs. 11500/-.

4. The 1st question that arises for decision is whether the agreement pleaded in the plaint is true. The burden of proving that agreement is naturally on the plaintiff. The agreement in question as mentioned earlier is said to be an oral agreement. Therefore the plaintiff's task is all the more difficult. The sale deed Exh. P. 1 proceeds on the basis that it evidences an outright sale. It does not either specifically or by implication lend support to the case put forward by the plaintiff. On the other hand it records the following condition stipulated by the vendor :

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Subject to the stipulation that during my life time the schedule properties shall not be mortgaged or assigned to anyone else without my knowledge and consent, I completely convey and surrender to you all my remaining rights and possession, and the properties are given to your possession on receipt of the sale consideration of Rs. 24,500. From this clause it is clear that the plaintiff conveyed all his rights, title and interest in the suit properties to the vendee subject to the afore-mentioned stipulation. It is not necessary to consider whether the restriction in question is a valid one. Even if we assume that the same is valid, it does not support the plaintiff's case. On the other hand, by implication it negatives his case. At best the clause referred to above merely confers on the vendor a right to pre-empt. Hence by implication it negatives the plaintiff's case that there was an agreement to reconvey the suit properties. The plaintiff has not given any satisfactory explanation why the contract relating to reconveyance was not incorporated in the sale deed. To explain this important omission he has examined P.W. 2, who claims to be a document writer of considerable experience. He claims that the document in question was written by one of his assistants. His evidence is to the effect that the vendor and the vendee wanted to incorporate the agreement as regards re-conveyance in Exh. P. 1 itself but he advised them that it could not be done. This is a strange legal advice. This evidence is on the face of it unbelievable. There is also no satisfactory explanation why the alleged agreement was not reduced into writing.

8. It appears likely that neither side has come forward with the true version. But before a court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence. Rarely a decree for specific performance is granted on the basis of an agreement supported solely by oral evidence. That apart, as mentioned earlier, in this case the oral testimony adduced in support of the agreement pleaded is a highly interested one. We do not think that the trial court was justified in relying on that testimony for granting the decree prayed for. The trial court itself observed in the course of its judgment (para 12) that "there is no clear cut evidence for proving the terms of the oral contract which is alleged to have been entered into by the plaintiff and the 1st defendant". This finding alone should have been sufficient to non-suit the plaintiff. Therefore we agree with the High

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Court, though for reasons other than those mentioned by it that the plaintiff has failed to prove the agreement pleaded in the plaint.

9. This takes us to the decree passed by the High Court in respect of plaint item No. 1. This decree is purported to have been passed on the basis of the admission made by the defendant. It may be noted that the agreement pleaded by the defendant is wholly different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not at any stage accept the agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff is said to have been entered into at the time of the execution of Exh. P-1 whereas the agreement put forward by the defendant is one that is said to have been arrived at just before the filing of the suit. The two are totally different agreements.

The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in Pt. Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and Anr. MANU/SC/0039/1968 : [1968]3SCR648 that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable.

09. In the light of the aforesaid judgment whenever there is an oral agreement and based upon the oral agreement a prayer for decree of specific performance of the contract is

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made, there should be some clinching evidence to prove the agreement pleaded. In the present case, there is no such clinching evidence except for the oral testimony of the witnesses.

10. The apex Court in the case of V. R. Sudhakara Rao and ors., Vs. T. V. Kameswari reported in (2007) 6 SCC 650, while dealing with Specific Relief Act, 1963, in paragraph 13 has held as under :

13. The High Court has rightly concluded that there is no clear proof relating to the other terms of condition. The relief of specific performance is discretionary relief and except the oral evidence, there is no clear evidence to prove several of the essential terms which have been taken note of by the High Court. The High Court, on analyzing the evidence, has come to hold that except Exhibit B-1 and the oral evidence of DW 1 and DW2, there is no other clear proof relating to the other terms and conditions of the contract which can be termed as essential conditions like delivery of possession and also the obtaining of permission from the Urban Land Ceiling Authorities and therefore, it cannot be said that all the essential terms and conditions of a well concluded contract had been established in the case at hand.

11. In the light of the aforesaid, as there was no clear proof relating to the terms and conditions of the agreement, the trial Court has certainly committed an error in holding the existence of oral agreement.

12. Learned counsel for the appellant has placed reliance upon the judgment delivered by the apex Court in the case of Brij Mohan and ors., vs. Sugra Begum and ors., reported in (1990) 4 SCC 147. It was again a case of oral agreement and decree for specific performance of contract was prayed. The

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apex Court has held that heavy burden lies upon the plaintiff to prove the terms and conditions of oral agreement.

13. In the light of the aforesaid judgments, it can be safely gathered that the trial Court without there being any clinching evidence, has relied upon the oral testimony and has passed the judgment and decree for specific performance of the contract which deserves to be set aside. The first appellate Court below has affirmed the judgment and decree passed by the trial Court. Learned counsel for the applicant has argued before this Court that the appeal has been dismissed in a mechanical manner. He has placed reliance upon the judgment delivered by the apex Court in the case of Vinod Kumar Vs. Gangadhar reported in **(2015) 1 SCC 391**. The apex Court in paragraph 18 of the aforesaid judgment has held as under :

18. Again in Jagannath v. Arulappa and Anr. (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court (at pp. 303-04) observed as follows: (SCC para 2)

2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....

14. In the light of the aforesaid judgment, the judgment and decree passed by the first appellate Court also deserves to be set aside.

15. This Court while admitting the appeal has framed the following substantial question of law :

“Whether the courts below were justified in passing a decree for specific performance of contract in absence of a cogent

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proof of the agreement, as contemplated by Sec. 16 of the Specific Relief Act” ?

16. In light of the aforesaid question of law, the answer is that, both the courts below were not at all justified in passing the judgment and decree for specific performance of the contract in absence of any cogent proof of agreement, as contemplated by Sec. 16 of the Specific Relief Act.

17. As a result, the present second appeal stands allowed. The judgment and decree passed by the Courts below are hereby set aside. A decree be drawn up accordingly.

(S. C. SHARMA)
J U D G E

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