

(2015) 02 GAU CK 0023

In the Gauhati High Court

Case No : Regular Second Appeal No. 115 of 2004

Abdul Kalam Sheikh and Others

APPELLANT

Vs

Nurul Islam

RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 34, Order 7 Rule 7
Specific Relief Act, 1963 — Section 19(b)

Citation : (2015) 2 GLT 696

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : M.A. Sheikh, for the Appellant; S.K. Barkataki, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J.

1. This Second Appeal has been preferred against the judgment dated 04.03.2004 passed by the learned District Judge, Goalpara in Title Appeal No. 02/2002 allowing the appeal of the respondent/plaintiff preferred against the judgment and decree dated 07.02.2001 passed by the learned Civil Judge (Senior Division), Goalpara in Title Suit No. 34/99(New). The factual matrix of the case may be noticed as follows. The plaintiff had entered into an agreement for sale i.e. "baina-nama" dated 18.04.1994 with the defendant No. 1 for purchase of a plot of land measuring 3 bigha 1 katha 5 lechas covered by dag No. 97 of Khatian No. 8, Touji No. 157, Circle Lakhipur in the district of Goalpara, more fully described in the schedule to the plaint. The defendant No. 1 was the owner of the said plot of land and, therefore, on the basis of the "baina-nama" dated 18.04.1994 the plaintiff had paid an amount of Rs. 500/- as the earnest money and thereafter in part performance of the contract the defendant No. 1 had delivered possession of the suit land to the plaintiff. As per the terms of the "baina-nama" it was agreed that the price of the land would be Rs. 13,301/- per

bigha and that the plaintiff would be required to pay the second installment amounting to Rs. 15,000/- on 22.04.94 pursuant where to the defendant No. 1 would initiate the necessary steps for execution of the sale deed after receipt of the balance amount of Rs. 27,000/- within a reasonable time after 22.4.94. According to the terms of the agreement the plaintiff had offered Rs. 15,000/- to the defendant No. 1 on 22.4.94 but the defendant No. 1 declined to accept the same and on the contrary asked the plaintiff to pay the entire balance amount at a time within a period of two months. The plaintiff agreed to the aforesaid demand made by the defendant No. 1 and promised that he would pay the entire balance amount within the period of two months as demanded by the defendant No. 1. However, the defendant Nos. 2 to 5 dispossessed the plaintiff from the suit land in the first week of June, 1994 and on the basis of enquiry made by him the plaintiff could come to know that the defendant No. 5 in collusion with the defendant No. 1 had got a registered sale deed executed by the defendant No. 1 on 27.05.94 transferring the suit land in favour of defendant Nos. 2, 3 and 4 who are the sons of the defendant No. 5. It is the case of the plaintiff that he has been ready and willing to perform his part of the contract but due to the aforesaid illegalities committed by the defendant No. 1 in collusion with the defendant No. 5 thereby fraudulently executing the registered deed of sale in favour of the defendant Nos. 2, 3 and 4 and the consequent dispossession, the plaintiff has been compelled to file the suit seeking specific performance of the "baina-nama" dated 18.4.94. In the suit filed by the plaintiff he has prayed for a relief in the form of a decree for specific performance of the contract by directing the defendant No. 1 to execute and register the sale deed in favour of the plaintiff pertaining to suit land upon accepting the balance amount out of the total amount of Rs. 42,800/- being the price of the land; on the failure of the defendant to execute the registered deed of sale, a deed be executed in accordance with the provisions of Order XXI Rule 34 of the CPC by the Court; for recovery of possession of the suit land and for other consequential relief.

2. Despite receipt of summons in connection with the aforementioned title suit the defendant No. 1 did not appear or contest the suit. The defendant Nos. 2 to 5 contested the suit filed by the plaintiff by presenting a joint written statement whereby they have denied that there was any cause of action for the suit or that there was any valid agreement for sale made on 18.04.94. The said contesting defendants also denied the fact that the plaintiff had ever paid Rs. 500/- as earnest money to the defendant No. 1 or that the plaintiff had ever been put in possession of the suit land. It is the case of the defendant Nos. 2 to 5 that the suit land was initially taken over by them in the year 1987 on the basis of an oral mortgage by paying a consideration amount of Rs. 3000/- per year to the defendant No. 1 and the said land has remained in their possession without any interruption since 1987 until the time the same was purchased by the registered deed of sale No. 957 of 1994 at a consideration amount of Rs. 30,000/-. It is the case of the contesting defendants that they are bonafide purchasers of the suit land without any notice of the agreement for sale dated 18.4.94 and as such

their interest as purchaser, of the suit land would remain protected under Section 19(b) of the Specific Relief Act, 1963.

3. On the basis of the pleadings of the parties the learned trial Court had framed as many as 12 issues which are as follows:--

"1) Whether the Plaintiff has cause of action for this suit?

2) Whether the Defendant No. 1 Moinul Hoque entered into a contract in writing dated 18.4.94 for sale of the suit land to the Plaintiff?

3) Whether the defendant No. 1 received a sum of Rs. 500.00 as earnest money?

4) Whether the Defendant No. 1 in part performance of the Contract, delivered possession of the suit land to the Plaintiff?

5) Whether the Plaintiff was willing to perform part performance of the contract?

6) Whether the defendants dispossessed the Plaintiff from the suit land as alleged in the plaint?

7) Whether the Defendant No. 5 in collusion with the Defendant No. 1 got a Registered Sale Deed in favour of the Defendant Nos. 2, 3 and 4?

8) Whether the defendant No. 1 fraudulently executed and Registered a Sale Deed in favour of the defendant Nos. 2, 3 and 4?

9) Whether the defendant No. 2, 3, 4 and 5 have acquired right, title to the suit land?

10) Whether the Plaintiff is entitled to Specific Performance of the said Contract?

11) Whether the Plaintiff is entitled to recover possession of the suit land?

12) To what other relief or reliefs the parties are entitled to law and equity?"

4. Thereafter upon hearing the parties the learned trial Court decreed the suit in favour of the plaintiff by the judgment and decree dated 07.02.2001. Being aggrieved by the said judgment and decree dated 7.2.2001 passed by the learned trial Court the defendant Nos. 2 and 5 had preferred an appeal before the learned First Appellate Court. Having regard to the grounds taken in the said appeal the learned First Appellate Court had framed an Additional Issue, viz:

"Whether the defendant No. 5 is a bonafide purchaser for value and paid his money in good faith without notice of the contract of sale between defendant No. 1, Moinul Hoque and the plaintiff?"

The matter was thereafter remanded to the trial Court for a decision on the said issue by giving opportunity to the parties for adducing evidence. Eventually, the learned trial court decided the said issue against the plaintiff and in favour of the defendants by the judgment dated 14.05.2003 and forwarded the same before the First Appellate Court.

5. On perusal of the judgment and decree passed by the learned trial court as well as after examining the materials on record the learned First Appellate Court decreed the suit filed by the plaintiff, inter alia, holding that the defendant Nos. 2 to 5 did have notice of the "baina-nama" dated 18.4.94 (Ext.-1) prior to execution of the sale deed dated 27.5.94 (Ext.-Ka). It was also held that the "baina-nama" dated 18.4.94 was duly executed by the defendant NO. 1 after proper receipt of the earnest money of Rs. 500/- and therefore the plaintiff was entitled to a decree for specific performance of contract as prayed for.

6. Being aggrieved by the aforesaid judgment and decision of the learned First Appellate Court rendered on 04.03.2004 the defendant Nos. 2 and 5 as appellants had approached this Court by filing the instant Second Appeal which was admitted to hearing by the order dated 18.11.2013 on the following substantial question of law:

"Whether the finding recorded by the first appellate Court against additional issue No. 5, that the defendant Nos. 2 to 5 are not the bonafide purchaser for value without notice, is perverse, being not based on the evidence on record?"

7. I have heard Mr. M.A. Sheikh, learned counsel for the appellants/defendants and have also heard Mr. S.K. Barkataki, learned counsel appearing for the respondent/plaintiff

8. Mr. M.A. Sheikh, learned counsel appearing for the appellants submits that although there is evidence on record to show that the defendants were in fact aware of the execution of the "baina-nama" dated 18.4.94 before the sale deed Ext.-Ka was executed in their favour, yet, no effective decree can be passed in the suit as because the "baina-nama" itself does not clearly mention the dag No. pertaining to the land. He further points out that there is no mention in the "baina-nama" regarding any undertaking on the part of the defendant No. 1 to execute a sale deed by mentioning any specific and/or definite timeframe, which, according to Mr. Sheikh, was fatal in nature rendering the "baina-nama" itself not actionable in the eye of law. He further submits that the plaintiff despite being aware of the execution of the registered deed of sale (Ext.-Ka) at the time of institution of the suit did not challenge the same nor did they pray for any declaration pertaining to the said sale deed. In that view of the matter, he submits that even if the plaintiff's suit is decreed the decree passed in the Title Suit would be a futile one as it cannot be executed against the defendant Nos. 2 to 5.

9. Per contra, Mr. S.K. Barkataki, learned counsel appearing for the respondent/plaintiff, submits that the plaintiff has categorically pleaded as to the contents and terms of the agreement for sale between the plaintiff and the defendant No. 1 and has also narrated the circumstances under which the defendant No. 1 refused to accept the second installment amount of Rs. 15,000/- giving rise to the cause of action for filing the present suit. Mr. Barkataki further submits that the plaintiff has not only pleaded in the plaint that he was ready and willing to

perform his part of the contract at all material times, but the plaintiff side had also led evidence in support of the said averment made in the plaint. He submits that on the basis of cogent evidence available on record the learned Court below has recorded categorical finding of fact holding that the defendants were aware of the execution of the "baina-nama" prior to registration of the sale deed Ext.-Ka and therefore would not be entitled to any protection under Section 19(b) of the Specific Relief Act. He further submits that not to speak of the plaintiffs witnesses, even the witnesses called by defendants' side have admitted the execution of the "baina-nama" and the fact that the defendants were aware of the same. In such view of the matter there was no justifiable ground to interfere with the finding of facts as well as the conclusion drawn by the learned Court below in decreeing the suit of the plaintiff.

10. I have considered the rival submissions made by and on behalf of the parties and also examined the records. It appears that the plaintiff's witness Nos. 1, 2 and 3 have deposed in one tone regarding the execution of the agreement for sale of the suit land by the defendant No. 1 in favour of the plaintiff. Although the defendant No. 1 did not file any written statement yet on being called as a witness by the defendants, he had deposed as DW 4 confirming the fact that Ext.-1 was in fact executed by him on 18.4.94 after taking an advance of Rs. 500/-. The plaintiff's witnesses, more particularly the plaintiff Nurul Islam had himself deposed that as per the terms of the "baina-nama" he had offered the second installment of Rs. 15,000/- to the defendant No. 1 on 22.4.94 but the defendant No. 4 declined to accept the same. He has further deposed that the plaintiff was ready and willing to comply with the terms as regards payment and other conditions but it was the defendant No. 1 who had acted contrary to the terms of the agreement. The defendants' side could not bring out anything in the cross-examination to shake the aforesaid testimony of the plaintiff.

11. The DW 1, Mujibur Rahman, had deposed that two days after the execution of the "baina-nama" there was a Mel (meeting) convened by the defendant No. 5, Abubakkar himself wherein discussions were held pertaining to the "baina-nama" in question in presence of 20/25 persons. The DW 3 i.e. defendant No. 5 has also confirmed in his deposition that there was a meeting held to discuss the issues arising out of the suit land and that the meeting was invited by Abubakkar himself. DW 2, Md. Sirajul Sheikh, had also admitted in his testimony that the defendant No. 1 had entered into an agreement to sell the suit land in favour of the plaintiff and he was also aware about the "baina-nama" from the plaintiff.

12. The aforesaid testimony led by the defendants when read in conjunction with the evidence led by the plaintiff, unequivocally go to show that the defendant Nos. 2 to 5 were aware about the execution of the "baina-nama" dated 18.4.94 (Ext.-1) before they had purchased the suit land by means of Ext.-Ka. Question of good faith and without notice are matters of fact which the defendant Nos. 2 to 5 were required to prove and establish by leading evidence, which burden they have failed to discharge. Therefore, the findings recorded by the learned

court below on the aforesaid fact is valid and does not call for any interference. Consequently, the conclusion drawn by the court below to the effect that the defendant Nos. 2 to 5 would not be entitled to the protection of Section 19(b) of the Specific Relief Act, 1963 is also valid and correct proposition of law.

13. Once it is held that the execution of the "baina-nama" was genuine and that the plaintiff has pleaded and proved his readiness and willingness to perform his part of the contract, the only question of law that was required to be answered in the present appeal was as to whether the defendants would be entitled to the protection of Section 19(b) of the Specific Relief Act, 1963 which has been answered in the negative and in favour of the plaintiff/respondent. Having done so, it will now be necessary to deal with the arguments made by the learned counsel for the appellant raising objections to the contents of the "baina-nama" insofar as the absence of dag No. and an undertaking recorded on behalf of the defendant No. 1 for execution of a sale deed. The learned counsel for the appellants has also submitted that in the absence of any challenge made to the sale deed dated 27.5.94 the plaintiff could not be entitled to the decree prayed for. On a meticulous examination of the records it can be seen that nowhere in the proceedings before the Courts below or even in the grounds taken in the memo of appeal, has the appellant raised any of these objections. The correctness of description of the land as well as the narration in the "baina-nama" being questions of facts the appellant cannot be allowed to raise such questions of fact for the first time at the second appellate stage. As regards the omission to challenge the sale deed dated 27.5.94, it is evident that once the court finds that the "baina-nama" dated 18.4.94 was a valid document enforceable in the eye of law, the subsequent transaction in the form of execution of Ext.-Ka sale deed would automatically be rendered null and void in the eye of law, such an outcome being consequential in nature. Even otherwise, Order VII Rule 7 of the CPC empowers the Court to grant relief even if the same is not asked for generally. Order VII Rule 7 of the CPC is quoted herein below:

"7. Relief to be specifically stated.-

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

14. The relief of specific performance of contract is no doubt a relief granted in equity at the discretion of the Court. Having regard to the conduct of the defendant Nos. 1 to 5, this Court is not inclined to extend any equitable consideration in their favour. Since the appellants/defendants had never raised this objection during the proceedings held before the Court of first instance as well as the First Appellate Court they cannot be allowed to agitate these points for the first time at this distant point of time. In any event, having regard to the provisions of Order VII Rule 7 this Court will be well within its jurisdiction to

grant such a relief by declaring the sale deed Ext.-Ka as null and void, the same being consequential in nature pursuant to the granting of decree for specific performance of contract. In that view of the matter there is no merit in this appeal and the same is accordingly dismissed subject to the observations made herein before. It is however, made clear that the Defendant Nos. 2, 3 and 4 would be entitled to recover the price of the land from the Defendant No. 1 as per law.

Having regard to the facts and circumstances of the case, there would be no order as to cost.

Registry to send back the lower Court records at the earliest.