

(2011) 09 CAL CK 0045

In the Calcutta High Court

Case No : F.A. No. 59 of 1990 with C.O.T. No. 405 of 1990

Amarendra Nath Ghosal

APPELLANT

Vs

Brij Mohan Agarwal

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Evidence Act, 1872 — Section 91, 92
Specific Relief Act, 1963 — Section 16

Citation : (2011) 5 CHN 179

Hon'ble Judges : Subhro Kamal Mukherjee, J;Mrinal Kanti Sinha, J

Bench : Division Bench

Advocate : Kasinath De, for the Appellant;

Final Decision : Dismissed

Judgement

Subhro Kamal Mukherjee, J.—This is an appeal by the defendant No. 1 assailing a decree, inter alia, directing him to pay Rs. 30,000/- (Rupees thirty thousand) only to the plaintiff together with interest at the rate of 10% (ten) per centum per annum from December 25,1983 till the payment to the plaintiff. A suit for specific performance of contract was instituted by the plaintiff/ respondent No.1. He alleged that the defendant No.1, who is the appellant before this Court, agreed, for self and on behalf of his children, to convey two cottah of land at premises Nos. 54 and 55, Ballygunge Gardens, Calcutta, to the said plaintiff. The price was fixed at Rs.75, 000/- (Rupees seventy five thousand) only per cottah. However, the defendant No.1 was not agreeable to enter any formal agreement for sale, but accepted Rs. Rs. 30,000/- (Rupees thirty thousand) only as earnest money by executing a document. Although the document was described as a demand promissory note, but, in fact, the defendant no. 1 accepted the said sum towards earnest money for self and on behalf of his children. Subsequently, the defendant No.1 for self and on behalf of his children agreed to convey the entire four cottah seven square feet of land in the said premises in favour of the plaintiff. When the defendant No. 1 refused to execute the deed, the plaintiff

instituted the suit for specific performance of contract, alternatively, for refund of the earnest money.

2. The defendant No.1 contested the suit by filing a written statement. He denied that there was ever any agreement between the defendant No.1 and the plaintiff to convey two cottah of land or four cottah seven square feet of land to the plaintiff.

3. The defendant Nos. 2 to 5, also, filed their separate written statement and denied the plaint allegations.

4. Admittedly, there was no written agreement between the parties to convey the property. The exhibit 1 is a demand promissory note. The defendant No.1 in his letterhead executed a promissory note for Rs. 30,000/- (Rupees thirty thousand) only promising to pay the said sum to the plaintiff together with interest at the rate of 10% (ten) per centum per annum. There was no whisper that the defendant No. 1 agreed to convey his property to the plaintiff.

5. Ordinarily under sections 91 and 92 of the Indian Evidence Act, 1872, a written document is a sole repository of the transaction between the parties. Section 91 is based on the best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required u/s 91 in proof of its contents. Section 92 only excludes parol evidence as between the parties or their representatives to the instrument. The normal rule is that the contents of the document must be proved by primary evidence, which is the document itself in original. Oral evidence may guide the Court in unravelling the true intentions of the parties and tendering all extrinsic evidence as to acts, conducts, and surrounding circumstances to enable the Court to assume the real intention of the parties. However, when the intention of the parties to the document are express and clear from the terms of the document, oral evidence cannot be taken into consideration to find out the nature of the transaction.

6. Mr. De, learned Advocate appearing for the appellant, submits that the plaintiff, on the reading of the plaint, was not entitled to a decree for specific performance of the alleged contract. He submits that the plaintiff has failed to aver and prove that he has performed or has, always, been ready and willing to perform the essential terms of the alleged contract that on his part were to be performed by him. Not only that the plaintiff has failed to prove the alleged agreement, but, the plaintiff has, also, failed to prove that the defendant No.1 was authorised by his children, by a registered power of attorney, as alleged by the plaintiff in the plaint, to enter into an agreement for transferring the property in favour of the plaintiff. Admittedly, the property belonged to the wife of the defendant No.1 and the mother of the defendant Nos. 2 to 5. On the death of the original owner, the property devolved upon her heirs, namely, all the said defendants.

7. Section 16(c) of the Specific Relief Act, 1963, requires that the plaintiff must

plead and prove continuous readiness and willingness to perform his part of contract between the dates of the agreement till the date of hearing. Reception of evidence in this behalf is not permissible if such plea is found absent in the plaint.

8. The learned Judge was right in holding that there was no specific averment that the plaintiff was continuously ready and willing to purchase the property on the basis of the alleged agreement. The learned Judge, however, found that the plaintiff paid Rs. 30,000/- (Rupees thirty thousand) only to the defendant No.1 on execution of a demand promissory note. In fact such payment and acceptance is admitted.

9. Therefore, the learned Judge, although dismissed the suit for specific performance of contract, but granted a decree for refund of Rs.30, 000/- (Rupees thirty thousand) only with interest at the rate of agreed 10% (ten) per centum per annum to the plaintiff by the defendant No.1.

10. Mr. De submits that the learned Judge could not have passed such decree in this suit for specific performance of contract.

11. The defendant No.1 denied and disputed the contention of the plaintiff that he had received any sum as earnest money for executing a deed of sale, but admitted that he had taken Rs. 30,000/- (Rupees thirty thousand) only from the plaintiff on execution of a demand promissory note. He, also, admitted that he was ready to pay interest at the rate of 10% (ten) per centum per annum for the said sum of Rs. 30,000/- (Rupees thirty thousand) only. There was a specific averment in the written statement that the defendant No.1 was, always, ready and willing to refund the said sum with interest.

12. It is pertinent to note that there was a prayer for a decree for refund of the purported consideration money and in view of the stand taken by the defendant No.1, the learned Judge, in our view, rightly moulded the prayer by directing refund of the said sum with interest for ends of justice. We are not inclined to upset such a decree when the defendant No.1, admittedly took Rs. 30,000/- (Rupees thirty thousand) only by executing a promissory note and categorically stated in the written statement, particularly in paragraph 29 thereof, that he was ready to pay back the said sum with interest.

13. In such circumstances, we hold that the learned Judge has not exceeded his jurisdiction, either in fact or in law, in passing a decree for refund of Rs. 30,000/- (Rupees thirty thousand) only with interest at the rate of 10% (ten) per centum per annum by the defendant No.1 to the plaintiff.

14. However, there was a cross-objection by the plaintiff. None appears for the plaintiff/respondent at the time of hearing of the appeal in spite of repeated opportunities to press the cross-objection.

15. Therefore, the appeal is dismissed. The cross-objection is dismissed for default. We, however, direct the parties to bear their respective costs in this

appeal and, also, in the cross-objection.

Mrinal Kanti Sinha, J.

I agree.