
(2010) 09 PAT CK 0131
In the Patna High Court
Case No : First Appeal No. 404 of 1986

Ashok Kumar

APPELLANT

Vs

Kali Prasad (deceased), Uma Kant Varma and Others

RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Citation : (2010) 09 PAT CK 0131

Final Decision : Allowed

Judgement

Mungeshwar Sahoo, J.—This first appeal has been filed by the defendant-appellant against the judgment and decree dated 9.5.1986 passed by Sri Ganga Ram, the learned 1st Subordinate Judge, Gaya in Title Suit No. 30 of 1984 decreeing the plaintiff-respondent's suit for specific performance of contract.

2. The original plaintiff-respondent Kali Prasad (since deceased) had filed Title Suit No. 30 of 1984 for specific performance of contract dated 23.11.1983. The plaintiff's case in short is that the defendant-appellant entered into a contract for sale dated 23.11.1983 with the plaintiff to sell the holding for a sum of Rs. 65,000/-. The agreement to sell was executed and Rs. 10,000/- was paid as advance consideration. It was agreed between the parties that the sale deed would be executed on payment of balance consideration of Rs. 55,000/- on or before 31.3.1984. The further case is that since after the execution of the agreement the plaintiff approached the defendant several times and requested to receive the balance consideration amount of Rs. 55,000/- but the defendant avoided in one pretext or other. The plaintiff issued notice but the defendant did not execute the sale deed. The plaintiff was always ready and willing to perform his part of contract.

3. The appellant on being noticed appeared and filed a contesting written statement. Besides taking various ornamental pleas, the defendant stated that plaintiff never approached the defendant and never tendered the balance consideration money. The further case of the defendant is that he entered into an agreement with one Bishwanath Prasad on 24.11.1983 to purchase an oil mill

and the last date for registering the sale deed was 1.4.1984. Because the plaintiff failed to pay the balance consideration amount the defendant could not pay the consideration amount to Bishwanath Prasad as such the sale deed for purchasing oil mill could not be obtained and the earnest money which the defendant had paid to Bishwanath Prasad was forfeited. The defendant also denied all other allegations. The readiness and willingness on the part of the plaintiff was also denied.

4. The learned court below framed 8 issues. The material issues are issue Nos. 6 and 7 i.e. issue No. 6 "Was the plaintiff ready and willing to perform his part of contract within the period prescribed?" and issue No. 7 "Is the plaintiff entitled to a decree for specific performance of contract, or for a decree of Rs. 10000/-, the part of the consideration amount?"

5. After trial the learned court below found that the plaintiff was ready and willing to purchase the property after payment of full consideration amount as such he was always ready and willing to perform his part of the contract but it is for the fault on the part of defendant in discharging his part of obligation the sale deed could not be executed. On this finding the learned court below decreed the plaintiff-respondent's suit.

6. The learned Counsel for the appellant submitted that the original plaintiff Kali Prasad was tenant in the suit premises. An eviction suit was filed against him being Eviction Suit No. 35 of 1994 which was decreed by the judgment and decree dated 11.1.19986 passed by Munsif 1st Gaya. Kali Prasad the original plaintiff filed Title Appeal No. 13 of 1986/20 of 1990 which was dismissed by judgment dated 16.12.1990 by 8th Additional District Judge, Gaya and Kali Prasad filed Second Appeal No. 38 of 1991 before the High Court. The High Court dismissed the said second appeal on 1.08.2007. The learned Counsel further submitted that during the pendency of the suit all the judgments were not pronounced and, therefore, the appellant could not file the same in the case. An application under Order 41 Rule 27 C.P.C. has been filed for bringing on record these judgments. The said application has been filed on 24.9.2008. The learned Counsel submitted that there is an order that this application shall be heard at the time of final hearing of this appeal.

7. The learned Counsel for the appellant further submitted that the appeal being the continuation of suit the appellate court should take into consideration the subsequent development of the facts and circumstances of the case and mould the relief accordingly. The learned Counsel further submitted that in the second appeal one Parwati Devi filed application for being substituted in place of Kali Prasad on the death of Kali Prasad who died on 22.5.1993. During the pendency of that application Parwati Devi died on 15.11.1996. Another I.A. was filed by Ram Chandra Prasad for being transposed as appellant on the ground that he is son-in-law of Kali Prasad but the said Ram Chandra Prasad also died. One Dhiraj Kumar Verma filed another application on 17.8.1993 claiming himself to be the adopted son of Shanti Devi the only daughter of Kali Prasad but the interlocutory

application was rejected and ultimately the second appeal was dismissed and thereafter the appellant got delivery of possession of the suit premises.

8. The learned Counsel further submitted that in this case the original plaintiff Kali Prasad died issueless without leaving behind any heirs/legal representatives. Interlocutory application i.e. I.A. No. 6613 of 2007 filed on behalf of Umakant Verma, Prakash Verma and Biku Verma, all sons of Lalbabu Prasad under Order 1 Rule 10 for being added as party in place of deceased Kali Prasad is devoid of any merit and they are neither necessary nor proper party as such they cannot be added as party in this case. The learned Counsel further submitted that the appellant had filed application for substituting the sons of Kali Prasad father's brother namely Bishun Sao, Babu Lal Sao and Mangal Chand, sons of Ram Prasad Sao who also filed application for substitution on 2.5.1994 but during the course of hearing they never appeared and did not press the application. By terms of order dated 22.9.2008 the application of Umakant Verma and others was only pressed and heard.

9. In view of the above facts and circumstances of the case admittedly the original plaintiff Kali Prasad, in whose favour a decree for specific performance of contract has been passed, died in 1993 leaving behind no class I or class II heirs. The appellant filed application for substituting the uncle's sons of Kali Prasad who are agnates of Kali Prasad. The said agnates also filed separate application for being substituted in place of Kali Prasad but they did not press the said application. The only application which is being pressed at the time of hearing is I.A. No. 6613 of 2007 filed by Umakant Verma, Prakash Verma and Bhiku Verma. According to them Parwati Devi, the sister of Kali Prasad executed a deed of gift including the suit property in favour of Ram Chandra Sao. Ram Chandra Sao was the son-in-law of Kali Prasad. The said Ram Chandra Sao died on 11.3.2001 and the interveners Umakant Verma and others are sons of brother of Ram Chandra Sao.

10. In view of the above facts, the interveners are claiming to be added as party on the ground that they have acquired title by gift deed executed by Parwati Devi, sister of Kali Prasad in favour of Ram Chandra Sao, the son-in-law of Kali Prasad and on the death of Ram Chandra Sao who died issueless the property devolved on the brother's son of Ram Chandra Sao.

11. In this case admittedly, the appellant is the owner of the suit property. The agreement to sell did not create any title in favour of Kali Prasad. Till the registered sale deed is executed in favour of Kali Prasad no title passed. By the decree Kali Prasad has got a right to get a sale deed executed in his favour but he had no right, title or interest on the property till the execution of the said sale deed. In such circumstances, in my opinion the sister of Kali Prasad could not have gifted the suit property in favour of Ram Chandra Sao, the so called son-in-law of Kali Prasad and, therefore, claim of the present interveners i.e. Verma brothers that they acquired the suit property by gift is devoid of any merit. It is admitted fact that the appellant has got eviction decree against the original

plaintiff kali Prasad and in execution he obtained the delivery of possession. The judgments filed with I.A. No. 5991 of 2008 are available on record. Since the judgments of the trial Court and the appellate court and the second appellate court were not available at the time of trial of the suit, the appellant could not file the same. Therefore, the application under Order 41 Rule 27 C.P.C. read with Section 151 C.P.C. i.e. 5991 of 2008 filed on behalf of the appellant on 24.9.2008 is allowed and the judgments are marked as exhibits in this case on behalf of the defendant appellant. The office is directed to mark the same as exhibits and put serially on behalf of the appellant-defendant.

12. The learned Senior counsel appearing on behalf of the interveners submitted that they are the legal representatives within the meaning of Section 2 of Sub-section 11 C.P.C. and in the present case the suit property devolved on them including the other property of Kali Prasad so they are necessary party in this first appeal. So far this submission is concerned as stated above Kali Prasad himself had not acquired title in the suit property, therefore there is no question of inheritance by his sister Parwati Devi. The interveners are also not in possession of the suit house.

13. In a decision reported in Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, the Hon''ble Supreme Court has held in paragraph 14 that Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. Therefore, granting of relief by a decree for specific performance is a discretionary jurisdiction of the court which should be exercised judicious taking into consideration of all the facts and circumstances of the case. In the present case, the subsequent fact shows that the original plaintiff Kali Prasad died. There is no class I or Class II heirs. Many persons are claiming to be the legal representatives of Kali Prasad without there being any semblance of title with regard to*the suit property. The question is therefore, whether in such circumstances it will be in the interest of justice to grant a decree in favour of either the agnates or the present interveners who are claiming on the basis of so called gift said to have been executed by sister of kali Prasad in favour of son-in-law of Kali Prasad who also died and the interveners are brother''s son of said son-in-law of Kali Prasad.

14. In the case of Pasupuleti Venkateswarlu Vs. The Motor and General Traders, the Hon''ble Supreme Court at paragraph 4 has held as follows:

4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-r-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes

the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the juridical process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice - subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict, in view of the inhibition written into Section 10(3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact.

15. The division bench of Hon"ble Madras High Court in the case of M. Shanmugha Udayar Vs. Sivanandam and Others, has held that ordinarily a decree in a suit should accord with the rights of the parties as they stand on the date of its institution but this principle is not of universal application. Where it is shown that original relief claimed as, by reason of subsequent change of circumstances, become inappropriate or that it is necessary, to base the decision of the Court on the later circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon the court of Justice to take notice of events which have happened since the institution of the suit and mould its decree according to the circumstances as they stand at the time the decree is made.

16. In the present case as discussed above because of the subsequent facts due to passage of time which have taken place during the pendency of this appeal, in my opinion allowing this litigation between the parties to continue will be like flogging a dead horse. The interveners or the other so called legal representatives cannot be allowed to use this litigation as an instrument to have an unfair advantage. Because of this subsequent event in my opinion the discretionary jurisdiction for the grant of a decree in favour of those remote persons who are not even remotely connected with the disputed property cannot be granted. In this case, it appears that because of subsequent event the original proceedings i.e. suit and the decree has become now infructuous. In similarly situated case, the Hon"ble Supreme Court in the case of Shipping Corporation of

India Ltd. Vs. Machado Brothers and Others, relying upon the case of Pasupuleti Venkatesharlu (Supra) and also other various decisions held in paragraphs 23, 24 and 25 as follows:

23. In the very same case, this Court quoted with approval a judgment of the Supreme Court of United States in Patterson v. State of Alabama 294 US 600 wherein it was laid down thus:

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

24. Almost similar is the view taken by this Court in the case of J.M. Biswas Vs. N.K. Bhattacharjee and Others, wherein this Court held:

The dispute raised in the case has lost its relevance due to passage of time and subsequent events which have taken place during the pendency of the litigation. In the circumstances, continuing this litigation will be like flogging a dead horse. Such litigation, irrespective of the result, will neither benefit the parties in the litigation nor will serve the interests of the Union.

25. Thus it is clear that by the subsequent event if the original proceeding has become infructuous, *ex debito justitiae*, it will be the duty of the Court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For the said purpose it will be open to the parties concerned to make an application u/s 151 of CPC to bring to the notice of the Court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the Court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not.

17. In view of the above discussions, in my opinion in the present case the settled principles of law laid down by the Apex Court is fully applicable. Here the subsequent facts are admitted. I therefore, find that the cause of action giving rise to the suit has become now infructuous and the discretionary jurisdiction of granting a decree for specific performance of contract should not be exercised in favour of the interveners. Therefore, this is a fit case where the court should exercise jurisdiction u/s 151 C.P.C. and mould the relief accordingly.

18. In view of my above discussions, the interveners' application No. 6613 of 2007 is hereby rejected on the ground that the interveners are neither necessary party nor proper party nor they are legal representatives or heirs of deceased Kali Prasad so far the suit property is concerned the other application for substitution are also rejected. The first appeal is allowed. The impugned judgment and decree are set aside and it is held that the cause of action giving rise to the suit itself has become infructuous as such the suit of the plaintiff-

respondent is dismissed. In the facts and circumstances of the case, there shall be no orders as to costs.