

(2015) 01 AHC CK 0147
In the Allahabad High Court
Case No : Second Appeal No. 132 of 2002

Balwant Kumari Yadava

APPELLANT

Vs

Hari Shanker Yadava and Others

RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 40

Citation : (2015) 3 ADJ 599

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Veer Singh, Neeraj Tripathi and S.K. Pathak, for the Appellant; H.P. Dube, A.K. Singh, Rahul Chaudhary and Ram Krishna Mishra, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Neeraj Tripathi, learned counsel for the appellant and Sri Kunal Ravi Singh, Advocate for respondents. This is a defendant's second appeal having been filed by defendant No. 3, Smt. Balwant Kumari Yadav (since deceased and substituted by her legal heirs) wife Sri Sohan Lal.

2. The substantial questions of law which are required to be considered in this appeal are:

"(I) Whether the Lower Appellate Court was right in holding that the benefit of Section 40 of Transfer of Property Act, 1882 (hereinafter referred to as the "Act, 1882") will not be given to the appellant?

(II) Whether the Lower Appellate Court has rightly drawn the conclusion that the plaintiffs-respondents have always been ready and willing to perform the essential terms of the agreement as contemplated under Section 16 of the Specific Reliefs Act?"

3. Before advertng to aforesaid questions it would be necessary to have a brief

facts giving rise to present appeal.

4. The plaintiffs, Hari Shankar Yadav and Shiv Kali Devi (since deceased and substituted by her legal heirs), instituted Original Suit No. 400 of 1982 in the Court of Civil Judge (Senior Division), Allahabad seeking a declaration that the agreement dated 8.10.1980 registered on 16.10.1980, before Sub-Registrar, Chail, Allahabad, is void ab initio, illegal and unenforceable in law. They also prayed for a decree for specific performance directing defendants to execute sale-deed in favour of plaintiffs in view of agreement dated 8.2.1972.

5. The dispute relates to House No. 1, Western Side, situate in Mohalla North Malaka, Allahabad, boundaries whereof are given at the end of plaint.

6. The plaint case is that Sri Azizur Rahman entered into an agreement of sale of the house in dispute vide agreement dated 8.2.1972 for a consideration of Rs. 30,000/-, whereagainst Rs. 15,000/- was paid as earnest money and remaining was agreed to be paid at the time of execution of sale-deed. The sale-deed was to be executed within 10 years from the date of agreement. All the expenses towards registration etc. were to be borne by plaintiffs. Sri Azizur Rahman died on 4.11.1980, whereupon defendants No. 1 and 2 succeeded deceased's interest in suit property.

7. The plaintiffs approached defendants No. 1 and 2 to fulfill the terms of agreement to sale but they deferred for one or the other reason. The registered notice was given by plaintiffs to defendants through counsel asking to execute sale-deed and enforce terms of agreement. The defendants reply the same vaguely and denied to execute sale-deed. The plaintiffs then came to know that defendant No. 2, representing himself to be sole owner of suit property, executed a sale-deed on 27.5.1982 in favour of defendant No. 3 for a consideration of Rs. 50,000, allegedly to be in furtherance of agreement dated 8.10.1980, executed by late Azizur Rahman in favour of defendant No. 3. Both these documents are fraudulent, fictitious and vague. The defendant No. 2 had no right to sale suit property to defendant No. 3. The aforesaid sale-deed would not confer any right upon defendant No. 3. The plaintiffs are entitled for enforcement of agreement dated 8.2.1972 and execution of sale-deed in respect of suit property. It is also stated in para 14 of plaint that suit property was already in possession of plaintiffs, inasmuch as father of plaintiff No. 1 and his brother were tenants in the suit property. After death of father of plaintiff No. 1, the tenancy devolved upon plaintiff No. 1 and his brother who continued to occupy suit property as co-tenants. Therefore, on the date of agreement dated 8.2.1972, the suit property was in possession of plaintiffs, as a matter of fact. A notice dated 29.4.1982 was served upon defendants No. 1 and 2, received by them on 25.5.1982 and replied on 6.9.1982; the cause of action is continuing, hence the suit.

8. The suit was contested by defendant No. 3 by filing a detailed written statement. It challenged agreement dated 8.2.1972 alleging that it was not executed by Sri Azizur Rahman. The disputed house was joint property of Sri

Azizur Rahman and his family members. There was a partition suit No. 09 of 1977 (Azizur Rahman v. Habibur Rahman) in the Court of Munsif Garvi, Allahabad, which was decided in terms of compromise dated 5.8.1980, pursuant where to the suit property came to the sole share of Sri Azizur Rahman. Having need for money, for marriage of his daughters, Sri Azizur Rahman agreed to sale disputed property to defendant No. 3 for a consideration of Rs. 50,000/-. A registered agreement was executed on 8.10.1980. Rs. 20,000/- was paid to Sri Azizur Rahman and remaining Rs. 30,000/- was to be paid at the time of execution of sale-deed. After sometime, however, Sri Azizur Rahman died, whereupon his legal heirs became owner of property. For settlement of rights in property the family members again got engaged in a litigation, i.e., Suit No. 986 of 1981, Mashoor Rahman v. Habibur Rahman and others, which was filed in the Court of Munsif Garvi, Allahabad. This was decided in terms of a compromise, whereupon suit property came to the share of defendant No. 2, who executed sale-deed in favour of defendant No. 3 on 27.5.1982.

9. The Trial Court formulated seven issues including issues No. 1 and 2, which were considered as preliminary issues:

English translation by the Court

"1. Whether the suit is undervalued and the Court fee is underpaid?

2. Whether the suit of the plaintiff suffers from non-joinder of necessary parties?

3. Whether Late Azizurehman, after accepting Rs. 15,000/- as advance, had on 8.2.1972 executed an agreement to sell the suit house for Rs. 30,000/- in favour of the plaintiffs? If so, its effect?

4. Whether the lady defendant No. 3 is a bona fide buyer for a consideration and without any notice being served?

5. Whether the suit is barred by the Doctrines of Estoppel and Tacit Consent?

6. Which relief, if any, the plaintiffs are entitled to?

7. Whether the plaintiffs have always been and are still ready and willing to comply with their part of the agreement?"

10. The preliminary issues No. 1 and 2 were answered in favour of plaintiffs vide order dated 22.10.1986. Issue No. 3 was considered and holding that evidence proved that Azizur Rahman had executed an agreement for sale on 8.2.1972 in respect of property in dispute for a total consideration of Rs. 30,000/-, whereagainst Rs. 15,000/- as advance was obtained by him, it was answered in favour of plaintiffs and against defendants.

11. While discussing issue No. 4 the Trial Court considered question of bona fide purchase, without notice, of disputed property, by defendant No. 3. It returned the said issue in favour of defendant No. 3 and against plaintiffs.

12. The issue No. 5 was not pressed by defendants, hence answered in favour of

plaintiffs.

13. Then the Trial Court considered issue No. 7 and decided the same against plaintiffs and in favour of defendants. In the result the suit was dismissed vide judgment and decree dated 29.1.1997.

14. Thereagainst the plaintiffs preferred civil appeal. The Lower Appellate Court reversed findings of Trial Court in respect of issue No. 4 with regard to question, whether defendant No. 3 is a bona fide purchaser without notice and held that on this aspect evidence of defendant No. 3 itself was necessary which has not been adduced. The statement of one, Sohan Lal, who deposed on behalf of defendant No. 3 cannot be relied on for this purpose. It held that benefit of Section 40 of Transfer of Property Act, 1882 (hereinafter referred to as the "Act, 1882") is not admissible to defendant No. 3. Similarly, coming to issue No. 7 the Lower Appellate Court held that another agreement for sale was executed by Azizur Rahmar in favour of defendant No. 3 on 8.10.1980, which shows that he had retracted from his earlier agreement for sale dated 8.2.1972, therefore, plaintiffs have a cause of action to institute suit for specific performance on and after 8.10.1980.

15. With respect to question, whether plaintiffs were ready and willing, the Lower Appellate Court relied on the averments made in paras 4, 7, 8 and 16 of the plaint and held that requirement of Section 16 of Specific Reliefs Act, 1963 (hereinafter referred to as the "Act, 1963") stood complied and it cannot be said that plaintiffs were not ready and willing. In view of aforesaid findings, the Lower Appellate Court allowed appeal vide judgment and decree dated 31.1.2002 and setting aside judgment and decree of Trial Court, it decreed suit and directed defendants to enforce the agreement dated 8.2.1972. The cross-objection filed by defendants were rejected and the sale-deed dated 27.5.1982 executed by defendant No. 2 in favour of defendant No. 3 was declared illegal and inoperative.

16. The findings of Lower Appellate Court in respect to applicability of Section 40 of Act, 1882 and Section 16 of Act, 1963 has given rise to the two substantial questions of law formulated above.

17. Learned counsel for the parties have addressed this Court on the aforesaid two questions at length.

18. From the plaint I find that the case set up by plaintiffs is that the sale-deed dated 27.5.1982 is a fake and fraudulent document, and not a bona fide deed of transaction for value, without notice. Para 10 of the plaint, as amended vide Court's order dated 31.1.1987, reads as under:

"10. That the plaintiffs came to know later on that the defendant No. 2 representing himself to be the sole owner of the house in suit executed a fake and fictitious sale-deed on 27.5.1982 of the house in suit in favour of the defendant No. 3 for a fictitious amount of Rs. 50,000/-. The original agreement deed dated 8.10.80 reported to have been executed by late Azizur Rahman in

favour of the defendant No. 3 is also fake and fraudulent document. It was not bona fide deed of transaction for value without notice."

(emphasis added)

19. Again it was stated in para 11 of the plaint that sale-deed dated 27.5.1982 is fraudulent and fake document because defendant No. 2 has no right to sale suit property in view of existing agreement between Azizur Rahman and plaintiffs. There was a charge on the said transaction.

20. Then in para 12 and 13 of plaint, it is said that sale-deed executed by defendant No. 2 would not confer any valid right or title upon defendant No. 3 since the factum of execution of agreement dated 8.2.1972 and payment of advance money to Azizur Rahman was directly in the notice and knowledge of defendants No. 1 and 2 as also defendant No. 3. The manner in which knowledge has been imputed to aforesaid defendants is elaborated in para 13 of the plaint as under:

"13.....because the money was given to Azizur Rahman for the celebration of the marriage of the daughter of the defendant No. 1 deceased and sister of the defendant No. 2. Secondly because the plaintiffs transaction was well within the notice of the defendant No. 3 and her husband as they are residing together with their family in a portion of the house in suit."

(emphasis added)

21. With respect to possession of disputed premises, in para 14 of the plaint, he said that father of plaintiff No. 1 and his brother were original tenants in disputed house. On the death of father the tenancy devolved upon plaintiff No. 1 and his brother and they continued to occupy suit property. On the date of execution of agreement dated 8.2.1972 the plaintiffs were in actual possession over the entire house in suit.

22. From the aforesaid averments it is evident that there is no pleading of direct or specific knowledge to defendant No. 3 about the agreement dated 8.2.1972. It is also not pleaded anywhere that defendant No. 3 was informed of earlier agreement dated 8.2.1972 in any other manner. It is also not the case of plaintiffs-respondents that any evidence in this regard was adduced before Court below.

23. The oral deposition of PW-2, Hari Shanker Yadavs, i.e., plaintiff No. 1 clearly shows that at the time of filing of suit (plaint is dated 23.11.1982) he was not aware of execution of sale-deed by Azizur Rahman in favour of defendant No. 3, Smt. Balwant Kumari Yadava in 1980. He has also stated that he is residing in the western side of disputed house presently and also at the time of his father. The statement in regard reads as under:

English translation by the Court

"I am presently residing in the western part of house No. 1 and has been

residing as such since the times of my father?"

24. Though in examination-in-chief he said that information regarding agreement and payment of Rs. 15,000/- to Azizur Rahman was with Sohan Lal, his brother and Smt. Balwant Kumari Yadava wife of Sohan Lal, who were residing in the same house. However, in cross-examination he said that his father, Mahadev and his five sons were residing in disputed house but plaintiff, Hari Shanker Yadava separated from his father in 1962-63. His elder brother, Sohan Lal was in service since 1972 but where he was working is not known to plaintiff No. 1. He also deposed that Sohan Lal's wife, Smt. Balwant Kumari, i.e., defendant No. 3 was a Teacher but where she was working as Teacher was also not known. Sohan Lal was residing with father, Mahadev in the disputed house in 1972. Plaintiff, Hari Shanker Yadava's father died in 1973. It is then said that transaction for purchase was finalized by mother-in-law of plaintiff, Hari Shanker Yadava and at that time, he is not aware, that any other person was present. He then admits that his relations with his brother, Sohan Lal and Smt. Balwant Kumari were not cordial, since separation. His statement in cross-examination, reads as under:

English translation by the Court

"Before institution of the claim, I was not on good terms with Balwanti Kumari and Sohan Lal. Since the separation preceding the institution of the claim, I was not on good terms. I would talk with them only when needed." 25. It is further said that information regarding agreement, was not given by him even to his father and the agreement document was kept by plaintiffs mother-in-law. This statement reads as under:

English translation by the Court

"I have never given information as to the disputed transaction 11-A to my father. 11-A was with my mother-in-law; I had not kept the same with me."

26. The entire statement of Hari Shanker Yadava, therefore, makes it clear that he did not inform about the agreement of 1972 even to his father. His relations with his brother and his wife were strained. In these circumstances, at what point of time plaintiff No. 1 informed his brother, Sohan Lal or brother's wife, Smt. Balwant Kumari, i.e., defendant No. 3, has not come in evidence at all. The mere assertion in the plaint and that too vague and presumptive, therefore, is not sufficient to hold that defendant No. 3 had full knowledge or information about the said agreement. The assertion in the plaint constitute a mere pleading and unless proved by adducing evidence, it cannot be said that the factum stated in the pleading stands proved, particularly when it has not been admitted by other side. The Lower Appellate Court has clearly misread the evidence. The mere fact that plaintiff No. 1 and defendant No. 3 were residing in the same house, therefore, she must have information or knowledge about the said agreement of 1972 is an observation made by Lower Appellate Court on mere conjectures and surmises, ignoring evidence on record. When plaintiff No. 1 did not inform even his father about the said agreement, knowledge of agreement

cannot be imported to the brother or brother's wife, particularly when it was also admitted by plaintiff in his oral deposition that he had strained relations with them.

27. Therefore, the findings of Lower Appellate Court about the knowledge of defendant No. 2 or about defendant-appellant is clearly based on no evidence, perverse and cannot be sustained.

28. Now I propose to consider application of Section 40 of Act, 1882, in the case in hand.

29. It enables a person to enforce a right or obligation against a transferee of an immovable property if that person is entitled to the benefit of an obligation arising out of a contract but only when the transferee had notice thereof or the transfer is without any consideration. The provision further says that such obligation cannot be enforced upon a transferee for consideration and without notice of the right or obligation, nor against such property in his hands. It has been explained by illustration, which reads as under:

"A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A."

30. Therefore, to seek protection under Section 40 of Act, 1882 the person claiming benefit of obligations arising out of contract, in order to succeed against transferee of immovable property in question has to show that transferee had notice of the right or obligation arising out of such contract and the transfer was made without consideration.

31. As already discussed, the plaintiffs did not adduce any evidence to prove that defendants No. 2 and 3 had knowledge or were under notice of the agreement dated 8.2.1972 executed by plaintiffs with Sri Azizur Rahman. On the contrary, it has been admitted by plaintiff No. 1 himself, who deposed as PW-2, that he did not inform about the agreement even to his father and his relations with his brother and his wife were strained. It is also admitted by him that he had separated from his father and brothers in 1962-63. Meaning thereby, plaintiff No. 1 was not residing with his father and brothers in the disputed house in 1972. Therefore, to impute knowledge of agreement dated 8.2.1972 to defendants No. 2 and 3, by Lower Appellate Court, is not only illogical but conjectural and contrary to evidence on record.

32. Section 40 would be attracted only if it can be shown that subsequent transferee had notice. In *Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others*, AIR 1967 SC 978 : (1967) 1 SCR 873 , the Court said that subsequent transfer with notice of prior agreement to sell is in a fiduciary position holding the property in trust for the prior agreement holder.

33. To the same effect is the view taken in *Bai Dosabai Vs. Mathurdas Govinddas and Others*, AIR 1980 SC 1334 : (1980) 3 SCC 545 : (1980) 3 SCR 762 : (1980)

12 UJ 655 . The Court said that a contract for sale of immoveable property does not by itself create any interest in or charge on such property. But by virtue of Section 40 of Act, 1882 such a contract creates an obligation annexed to the ownership of immoveable property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice of a contract or a gratuitous transferee of the property.

34. It is not the case that defendant No. 3 had purchased the land in dispute from defendant No. 2 without any consideration or it is a gratuitous transfer. Therefore, unless notice of agreement dated 8.2.1972 is proved, the benefit of Section 40 could not have been claimed by plaintiffs. As already discussed, except of bare vague assertions in the plaint no evidence has been produced before Courts below and none has been shown to this Court during course of argument by learned counsel for plaintiffs-respondents to support the findings recorded by Lower Appellate Court otherwise.

35. I find that the Lower Appellate Court has passed a judgment of reversal on conjectures and surmises and without going through the record to find, whether there existed any evidence to prove the said fact or not. The question No. 1, therefore, is answered by holding that Lower Appellate Court was not right in holding that benefit of Section 40 cannot be given to appellant. This question is answered in favour of appellant.

36. Now coming to the second question, again I find that Lower Appellate Court has completely gone berserk and recorded absurd and wholly irrational finding. It is admitted by learned counsel appearing for both the parties before this Court that the first notice given by plaintiffs to defendants No. 1 and 2 was on 29.4.1982, i.e., after expiry of 10 years period. The agreement was executed on 8.2.1972 and as per the terms of agreement the sale-deed was to be executed within 10 years, i.e., by 7.2.1982. The Lower Appellate Court has completely failed to consider that during the period of 10 years, from the date of agreement dated 8.2.1972, no notice was ever given by plaintiffs to defendants No. 1 and 2 or to Sri Azizur Rahman calling upon to execute sale-deed. It is also admitted and it is on record, when notice was given by plaintiffs, they were short of money required to be paid to defendants No. 1 and 2.

37. In the plaint though it has been said that plaintiffs requested defendants to execute sale-deed on various dates but no evidence has come on record, except the notice dated 29.4.1982, which has clearly been given after expiry of 10 years from the date of agreement though the sale-deed as per agreement was to be executed within 10 years.

38. When confronted on this aspect, learned counsel appearing for plaintiffs-respondents could not dispute that as per evidence available on record this is the only notice given by defendants and on that date also plaintiffs were short of money though of few hundreds rupees. Looking to both these aspects of the matter, no person of ordinary prudence can say that plaintiffs can be said to be

ready and willing for execution of sale-deed throughout so as to satisfy the requirement of Section 16 of Act, 1963 for succeeding in suit of specific performance of enforcing an agreement for sale. The Lower Appellate Court here also has proceeded to reverse well considered findings of Trial Court, in a very strange manner and without looking into the evidence on record. It has simply observed that plaintiffs requested defendants No. 1 and 2 on several occasions to go for execution of sale-deed and notice was also given in 29.4.1982, which shows that they were ready and willing for execution of sale-deed throughout. This finding recorded is apparently perverse. Question No. 2, therefore, is also answered in favour of defendant-appellant.

39. In the result, the appeal succeeds and is allowed. The judgment and decree dated 31.1.2002/4.2.2002 passed by Additional District Judge, Allahabad in Civil Appeal No. 48 of 1997, is hereby set aside and the judgment of Trial Court is hereby confirmed. The appellant shall be entitled to costs throughout.