

(2003) 08 BOM CK 0108
In the Bombay High Court
Case No : Second Appeal No. 35 of 1988

Bhaurao Game

APPELLANT

Vs

Natthu Mirashe

RESPONDENT

Date of Decision : 13-08-2003

Acts Referred:

Citation : (2003) 08 BOM CK 0108

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : V.D. Muley, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—Heard Shri Muley, learned Counsel for the appellant. None for the respondent though served.

2. This Second Appeal has been filed by the original plaintiff, being aggrieved by the judgment and decree dated 10.04.1987 passed by the Additional District Judge, Nagpur in Regular Civil Appeal No. 334 of 1981, allowing the appeal of the defendant, and setting aside the judgment and decree passed by the Trial court in Regular Civil Suit No. 59 of 1976, directing the defendant to refund the earnest money of Rs. 2000/- with interest at the rate of 6% p.a. from the date of the suit.

3. The substantial question of law sought to be raised in this appeal is formulated by this Court while admitting this appeal on 01.02.1988, as under :

"Whether the plaintiff is entitled to relief of money decree on the basis of the case specifically pleaded by the defendant, even though the relief of specific performance of contract is refused."

4. Brief facts are as under :

The plaintiff had instituted suit for specific performance of contract for the

agreement of sale dated 16.01.1975, on the condition that the defendant is the owner of the agricultural land bearing survey no. 23/1 and 24/1, and he had agreed to sell the said land for consideration of Rs. 5000/- on receiving the earnest amount of Rs. 2000/-, and therefore executed agreement of sale. It was agreed between the parties that the balance consideration of Rs. 3000/- would be paid on or before 25.11.1975. Though time was not the essence of the contract, the plaintiff was ready and willing to perform his part of the contract, and defendant was called upon to execute the sale deed on receiving the balance consideration, but in vain. Since the defendant avoided to execute the sale deed, the plaintiff was constrained to file suit for specific performance of the contract with an alternative prayer that in case if grant of relief of specific performance is not possible, the defendant may be directed to refund the earnest amount of Rs. 2000/-.

5. The defendant combated the claim of the plaintiff by filing his written statement and contended that he had executed an agreement of sale by way of security for the price of grocery articles purchased by him on credit from the shop of the plaintiff, and therefore, the question of granting specific performance of contract or refund of earnest money does not arise.

6. The trial court framed issues and recorded the findings that the plaintiff has failed to establish that the defendant had entered into the agreement of sale for his land for a consideration of Rs. 5000/-. The learned Trial Court refused to grant specific performance of contract, and the suit of the plaintiff was dismissed so far as this relief of specific performance of contract is concerned. This part of the decree was not challenged by the plaintiff in appeal, and the findings of the trial court so far as this part of the decree is concerned has become final. However, the trial court in the alternative granted decree of refund of earnest amount of Rs. 2000/- with interest @ Rs. 6% from the date of the suit with costs. This part of the impugned decree was challenged by the defendant in Regular Civil Appeal. The learned 4th Additional District Judge, Nagpur reversed the decree of the trial court regarding refund of earnest money. It is this judgment and decree passed by the learned Additional District Judge is under challenge in this appeal.

7. Mr. V.D.Muley, the learned Counsel appearing for the plaintiff contended that the Appellate Court has committed an error of law while reversing the decree of the trial court so far as the grant of relief regarding refund of earnest money is concerned. He contended that the plaintiff is entitled to the relief of money decree on the basis of the case specifically pleaded by the defendant, even though the relief of specific performance is refused. In support of this contention he has relied on the decision of the Apex Court in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, .

8. I have given thoughtful consideration to the contentions canvassed by the learned Counsel for the plaintiff. In the aforesaid case Firm Srinivas Ramkumar (cited supra), the Apex Court observed in para no.9 - "A plaintiff may rely upon

different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit. Thus wherein a suit for specific performance of a contract in part performance of which the plaintiff alleges to have paid the defendant some money, the defendant denies the contract and pleads that the money was taken by him as a loan, the Court can pass a decree for recovery of the loan in favour of the plaintiff on his failure to prove the contract even though the plaintiff had failed to plead, and claim relief on, this alternative case."

9. In the present case, it is not in dispute that the trial court has refused to grant a decree for specific performance of the agreement of sale claimed by the plaintiff, and this part of the decree has not been challenged by him. He had specifically pleaded that in the alternative he was entitled to refund of the earnest amount of Rs. 2000/-. The trial court had clearly recorded the finding that on the agreement of sale (Exh.44) there was an acknowledgment in the handwriting of the defendant that he has received the amount of Rs.2000/- and secondly, he granted decree of refund of earnest amount of Rs. 2000/-. The Appellate Court has taken a Hyper technical view of the matter and observed that admittedly, the defendant used to purchase grocery articles from the shop of the plaintiff on credit, and he had executed the agreement of sale as a security. The Appellate Court was of the view that unless the accounts of the shop are settled nothing certain can be said about the payment of earnest money of Rs. 2000/by the plaintiff to the defendant on 16.01.1975. This view is clearly erroneous, as it is not based on any evidence and has resulted in miscarriage of justice, especially when the defendant had made an acknowledgment in his own handwriting on the agreement of sale itself, that he had received the amount of Rs. 2000/-, it was not open for the Appellate Court to say that the defendant is not liable to refund the same unless accounts of shops are settled.

10. The finding of the Appellate Court is based on presumption and not on the evidence adduced in the trial. It would not be proper to direct the plaintiff to recover the amount due from the defendant for the purchase of grocery articles

on credit by a separate suit, and therefore, I am of the considered opinion that the substantial question of law formulated by this Court is squarely covered by the decision of the Apex Court in the case Firm Srinivas Ram Kumar (cited supra). In that view of the matter, I am of the considered view that the judgment and decree passed by the Appellate Court, is not sustainable in law, and deserves to be quashed and set aside, and is accordingly set aside, and that of the trial court is restored. The appeal is allowed. In the circumstances, there shall be no order as to costs.