
(1995) 09 MP CK 0058
In the Madhya Pradesh High Court
Case No : L.P.A. No. 23 of 1992

Dhirendra Nath Verma and Others

APPELLANT

Vs

Yashwant Rao Ramchandra Ogale

RESPONDENT

Date of Decision : 05-09-1995

Acts Referred:

Specific Relief Act, 1963 — Section 12(2)

Citation : (1996) J LJ 249 : (1996) 1 MPJR 150 : (1996) 41 MPLJ 527 : (1996) MPLJ 527

Hon'ble Judges : U.L. Bhat, C.J.; S.K. Dubey, J

Bench : Division Bench

Advocate : Ravish Agarwal, for the Appellant; N. Nagrath, for the Respondent

Final Decision : Allowed

Judgement

U.L. Bhat, C.J.

Defendants in the suit for specific performance are the appellants herein. Plaintiff is respondent herein. Respondent herein on the one hand and the first appellant (first defendant) on the other hand entered into an agreement dated 14-12-1982, wherein the first defendant agreed to sell to the plaintiff for a consideration of Rs. 40,000/-, 0.20 acres of land together with a house situated therein, in which the plaintiff's father was then a tenant. A sum of Rs. 2,000/- was paid on that day. On 9-1-1983, further agreement was entered into on payment of Rs. 18,000/-. After waiting in vain for the first defendant to execute the sale-deed, plaintiff instituted a suit for specific performance. The first defendant contended that the property was ancestral property and was allotted along with other items of the property to his share, that is, to the share of his Branch family and that he was only the Karta of the joint family. He also contended that the plaintiff should have impleaded the other coparceners, namely, his sons (defendants Nos. 2 and 3). An issue was framed in this behalf and the trial Court ultimately held that the plaintiff should implead defendants Nos. 2 and 3. Plaintiff did so. Defendants Nos. 2 and 3 contended, among other

things, that the property being joint family property and there being no family benefit or necessity in support of the proposed sale, the Karta could not execute either the agreement or the sale-deed, and, therefore, the agreement is not enforceable. The trial Court upheld this contention of defendants Nos. 2 and 3, declined to grant decree for specific performance, but directed the first defendant to refund the consideration received by him with interest. The plaintiff challenged this decree by way of an appeal in this court. Learned Single Judge, who heard the appeal agreed with the finding that the agreement of sale is not supported by any family benefit and necessity but nevertheless granted a decree for specific performance on the ground that defendants Nos. 2 and 3 who were aware of the agreement did not protest against the same and that if partition of the joint family property is effected, the share of the first defendant would be much more than the subject matter of the agreement. The defendants now challenged this decree passed by the learned Single Judge.

The concurrent finding in the case is that the sale proposed under the agreement is not supported by family necessity or benefit. Therefore there can be no controversy that if the sale has been effected, defendants Nos. 2 and 3 as non-alienating coparceners could have specifically avoided the sale. Plaintiff has no case that the transaction was sought to be entered into in order to clear any antecedent debt of the father-karta.

Learned counsel for the respondent contended that assuming that the proposed sale is vitiated for want of family necessity or benefit such a defence cannot be permitted to be raised in a suit for specific performance and the remedy of defendants Nos. 2 and 3, if at all, is to wait for execution of the sale deed and then seek appropriate remedy by filing a suit. Learned counsel for the respondent placed reliance on a decision of the Supreme Court in *Sushil Kumar and Anr Vs. Ram Prakash and Ors*,

In *Sunil Kumar v. Ramprakash* (supra), Karta of the family entered into an agreement of sale with third party. A suit for specific performance was filed. The non-alienating coparcener filed a suit for a decree for permanent injunction restraining the sale of the joint family property. The Court held that a suit for injunction in such circumstances would not be maintainable. Ray, J. who delivered the main judgment, stated as follows -

"At the outset it is to be noticed that in a suit for permanent injunction u/s 38 of the Specific Relief Act by a coparcener against the father or Manager of the joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property. Sub-section (b) of Section 38 of Specific Relief Act bars the grant of such an injunction in the suit....Thus the relief sought for is to restrain by permanent injunction the Karta of the Joint Hindu Mitakshara family, i.e. defendant No. 1 from selling or alienating the house property in question. The defendant No. 1 as Karta of the joint Hindu family has undoubtedly, the power to alienate the joint family property for legal necessity or for the benefit of the

estate as well as for the meeting antecedent debts. The grant of such a relief will have the effect of preventing the father permanently from selling or transferring the suit property belonging to the joint Hindu undivided family even if there is a genuine legal necessity for such transfer. If such a suit for injunction is held maintainable the effect will be that whenever the father as Karta of the joint Hindu coparcenary property will propose to sell such property owing to a bona fide legal necessity any coparcener may come up with such a suit for permanent injunction and the father will not be able to sell the property for legal necessity until and unless that suit is decided."

In the concurrent judgment, Shetty, J. observed as under :-

"A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality.

If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by Karta, but that right is not inclusive of the right to obstruct alienation.

"Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights." _____ Therefore, he cannot move the Court to grant relief by injunction restraining the Karta from alienating the coparcenary property."

We do not think that the aforesaid observations are of much assistance to the respondent since we are not dealing with a suit for injunction. We are dealing with a suit for specific performance where the relief claimed is essentially an equitable one which is to be granted in the discretion of the Court on consideration of the totality of the facts and circumstances brought in a given case. We may, in this connection refer to a decision of a Division Bench in *Shamlal Yadarao Shau v. Yesaram Lodku Powar* 1954 NLJ 587 : AIR 1954 Nag. 334 where it has been held that if the agreement was not for a purpose binding on the coparcenary, then the alienating coparcener when he purports to alienate the whole of the property must be held to be a person unable to perform the whole of his part of the contract within the meaning of Section 15 of the Specific Relief Act. The chance of his getting the properties allotted to himself on partition is not in such cases equivalent to his ability to perform the contract. The Court cannot act on the chance of the alienating coparcener or his alienee getting the property allotted in a suit for partition.

We may also refer to a decision of the Supreme Court in *Balmukand Vs. Kamla Wati and Others*, where the facts are exactly similar to the facts of the case in hand. It was held that the transaction was not for the benefit or necessity of the family, on a defence raised by non-alienating coparceners. The Supreme Court held that in such circumstances, the Court below were right in dismissing the suit

for specific performance. The Court observed that granting specific performance is always in the discretion of the Court and in such cases the Court would be exercising its discretion rightly by refusing specific performance.

In view of what is indicated above, it must follow that the learned Single Judge was not right in granting the decree for specific performance. The trial Court was right in declining to grant a decree for specific performance and at the same time in passing the decree for refund of the consideration paid. We, therefore, set aside the decree passed by the learned Single Judge and restore the decree passed by the trial Court. The appeal is allowed accordingly, but, in the circumstances, we direct the parties to bear their own costs.