
(1998) 05 AHC CK 0107
In the Allahabad High Court
Case No : C.M.W.P. No. 17234 of 1998

Ganga Ram

APPELLANT

Vs

Second Additional District Judge, Muzaffar Nagar and others

RESPONDENT

Date of Decision : 20-05-1998

Acts Referred:

Contract Act, 1872 — Section 69
Specific Relief Act, 1963 — Section 13, 17
Stamp Act, 1899 — Section 2(10)
Transfer of Property Act, 1882 — Section 54, 55, 55(1), 55(1)(g)(2)

Citation : (1998) 3 AWC 2015 : (1998) 3 CivCC 658 : (1998) RD 572

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Km. Usha Kiran, for the Appellant;

Final Decision : Dismissed

Judgement

D. K. Seth, J.—Original Suit No. 625 of 1975 was instituted before the Munsif, Muzaffarnagar for specific performance of a contract by the plaintiff-decree holder against the defendant-petitioner. The suit was decreed on 30th September. 1980. After the decree became final, an execution was levied. Execution Case No. 32 of 1984 was registered thereupon. In the said execution process, a draft deed was prepared and submitted to the Court for approval. The judgment debtor objected to one of the clauses being incorporated in the draft deed. The objection was overruled by an order dated 24th March, 1998 passed by the learned Civil Judge (J.D.), Muzaffarnagar in said Execution Case No. 32 of 1984. Thereupon, the petitioner preferred an appeal being Misc. Appeal No. 58 of 1998. It was partly allowed by an order dated 21.4.1998 passed by the learned Additional District Judge, IInd Court, Muzaffarnagar. It is this order which has since been challenged in the present writ petition.

2. Km. Usha Kiran, learned counsel for the petitioner had argued that in the decree it was directed that the deed should be executed within a period of one

month. The judgment debtor did not execute the deed within one month, and therefore after expiry of one month, the decree holder had lost his right to execute the decree. Levy of execution beyond the said period of one month, is therefore not maintainable. She also contends that the agreement enforceable under the decree did not contain the clause which has been sought to be stipulated in the deed itself and therefore the executing court while approving the draft deed, had sought to modify the decree and thereby proposed to go behind the decree which is otherwise impermissible by the executing court.

3. Mr. P. N. Saxena, learned counsel appearing with Km. Usha Kiran while supporting her contention, submits in addition that unless the agreement contains a specific stipulation to the extent of an undertaking binding the judgment debtor, the same cannot be incorporated in the deed itself, which would amount to going behind the decree by the executing court. Inasmuch as the decree did not permit stipulation of any such undertaking which is not incorporated in the decree itself.

4. I have heard both Km. Usha Kiran and Mr. P. N. Saxena, who later on led. Km. Usha Kiran in arguing the case, at length. In my view, the point that the execution was levied beyond the period of one month stipulated for executing the decree by the judgment debtor, cannot be sustained. Inasmuch as the decree had provided that the judgment debtor will execute the decree within one month and in default it would be open to the decree holder to get the deed executed through Court. A decree of the Court remains executable for the whole period as has been provided in the relevant articles in the Limitation Act which cannot be circumscribed by any stipulation in the decree itself. Though it is not so provided, yet, even if it is assumed that it is so provided in the decree, such part of the decree which is lesser or wider than the period as provided in the Limitation Act. is redundant and is to be ignored. However in the present case. it was time fixed for execution by the judgment debtor on his own volition. If the judgment debtor had failed to volunteer to execute the deed, it was open to the decree holder to put the decree into execution within the period of limitation even on the last date when the limitation was expiring. This is a case where execution was levied within the period of limitation, therefore, I am unable to agree with the contention of Km. Usha Kiran to the above extent.

5. So far as the other contention that by incorporating the concerned stipulation, the executing court had gone behind the decree, is concerned. I have not been able to find any substance in the submission made by Km. Usha Kiran and then further advanced by Mr. P. N. Saxena. The decree was for specific performance of a contract. The contract was a contract for sale of a particular property. By the decree the judgment debtor was directed to perform his part of the contract by executing the deed. An agreement for sale normally did not contain the stipulation that are contained in the deed of sale. The terms of the agreement are confined to the contract agreeing to sale.

6. Sale is effected through a document or instrument, which is non-testamentary

in nature and inter vivos purporting to or operate to create, declare, assign, limit or extinguish right, title or interest by way of transfer or conveyance of movable or immovable property. Conveyance defined in Section 2(10) of the Indian Stamp Act (Act II of 1899) includes a conveyance on sale.

7. According to the provision of Section 54 of the Transfer of Property Act, 1882 (Act 1 of 1882), sale is a transfer of ownership in exchange for a price paid and can be made only by a registered instrument if the value exceeds rupees one hundred. Whereas a contract for sale does not create any interest in or charge on such property and is only a contract that a sale of such property shall take place on terms settled between the parties. Section 55 of the Transfer of Property Act defines the rights and liabilities of buyer and seller. It requires the seller under sub-section (1) clause (a) to disclose to the buyer any material defect in the property or in his title which the buyer is not aware and could not with ordinary care discover. Clause (c) thereof requires the seller to take proper care of the property between the date of contract and the delivery of the property. He is required to give possession of the property to the buyer or his representative in view of clause (f) thereof. By reason of clause (g) thereof, the seller is required to pay all public charges, rent accrued due upto the date of the sale, interest on all incumbrances due on such date, in respect of the property and to discharge all incumbrances on the property then existing except in case where the property is sold subject to encumbrances. Under subsection (2) the seller is deemed to contract with the buyer that the interest which the seller proposes to transfer to the buyer subsists and that he has power to transfer the same.

8. The word "sale" has been defined in the Transfer of Property Act having a particular connotation whereby transfer is effected in respect of the property held by the vendor. By virtue of such sale, the property is conveyed by the vendor to the purchaser. The purchaser derives title to such conveyance as belonging to the vendor. Such conveyance cannot reserve any right to the vendor. On the other hand, conveyance binds the vendor in the matter of conveying whatever title of the vendor to the purchaser. For the performance of terms of said conveyance, every deed on conveyance contains certain clauses, one of which is indemnity clause indemnifying the purchaser with regard to the title asserted by him and the title which is being conveyed to the purchaser through the deed. This indemnity clause is a common clause which is there in every deed in view of clause (g) of Section 55 of the Transfer of Property Act unless the property is sold-subject to existing encumbrances or that it was agreed to be sold subject to such encumbrances. It is not the case of the petitioner that there is any encumbrances or that it was agreed to be sold subject to such circumstances. The conditions as indicated in Section 55 of the Transfer of Property Act are subject to contract to the contrary. No such contract contrary to those of sub-section (1) of Section 55 of the said Act has been pleaded in this case.

9. Whatever property in the form of immovable property is conveyed by the sale it carries with it the title of the vendor conveyed to the purchaser to the extent

as is sought to be conveyed for the consideration received. The consideration is paid by the purchaser in consideration of the conveyance of title of the property of vendor to the purchaser. The vendor is not supposed to receive the consideration and convey something else than what is being conveyed in the deed of sale. Thus, the vendor remains bound to indemnify the purchaser for any default on his part in the matter of conveyance of title of the property to the purchaser.

10. "Defects in title are always latent. For the sellers title is the matter exclusively within his own knowledge and is bound to state it explicitly and tell the truth and all the truth which is relevant to the matter," is the observation made in the case of Bai Dosibai Vs. Bai Dhanbai, In the absence of words to the contrary, the presumption is that the seller has given a title free from reasonable doubt and this rule is employed in Section 17 of the Specific Relief Act, 1963. A title free from reasonable doubt is marketable title which can all times be forced upon an unwilling purchaser, vide Rajendrakumar Bhandari Vs. Poosammal and Others, .

11. If before he has accepted the conveyance, the buyer discovers a material defect which has not been disclosed he may, claim damages or rescind the contract for misrepresentation. He may also resist the suit for specific performance. Duty of disclosure merges in the conveyance, but if the buyer has accepted the conveyance, he has remedy in damages on the covenant for title. Turner v. Moon 1901 2 CH 825.

12. The fact that buyer knew the defect in title of the seller prior to purchase, does not prevent him from suing for damages for breach of covenant. Thammmeni Paparao and others v. Dhavala Polinaidu and another AIR 1945 Mad 205.

13. Liability Imposed upon the seller by Section 55(1)(g) of T. P. Act is collateral to the contract and may be enforced after completion. In Nathu Khan and others v. Burtonath Singh and others. AIR 1992 PC 176 : 26 CWN 514 the Privy Council had held the purchase deed contained express declaration that the property was sold free from encumbrances and consequently by Section 55(1)(g) of sub-section (2) of the Transfer of Property Act, vendor must have been deemed to contract with the buyer that he had power to transfer the property so sold, and consequently that the property was free from burdens." If the buyer has to discharge such encumbrances owing to the seller's default, the seller is liable u/s 69 of the Contract Act for the money paid by the buyer to secure his title. But when the buyer has agreed to discharge encumbrances, he cannot claim to be reimbursed by the seller. u/s 13 of the Specific Relief Act, 1963, buyer has a right to compel the seller to discharge the encumbrances. In such a situation, indemnity clauses are incorporated as covenant in the deed. Existence of covenant in the sale deed guaranteeing non-existence of encumbrances would entitle the buyer to indemnity, vide Imam Din v. Bhag Singh AIR 1936 Lah 746.

14. Therefore, the indemnity clause which has been objected to by the vendor cannot be said to be outside the scope of deed of sale. Such clause is not required to be included in the agreement for sale which is a part of the sale deed, though it may contain clause that it is being sold subject to encumbrances, or condition contrary to the condition contained in clause (g) of Section 55(1) of the Transfer of Property Act. The very expression "sale" indicates incorporation of such terms which effectuate effective conveyance and there cannot be any objection to such clauses that are normally contained in the sale deed.

15. What would be the terms of conveyance cannot be indicated in the argument particularly in respect of those implied conditions which are not reflected in the decree itself. The decree is a decree for specific performance of contract which is a contract for sale. It encompasses all the conditions implied by Section 55 of the Transfer of Property Act. Incorporation of such stipulation particularly indemnity clause, therefore, can never be treated to be an alteration or modification in the decree as contended by the learned counsel for the petitioner. Thus, it cannot be said that it is a case of going behind the decree by the executing court.

16. Then again, the appellate court had modified the indemnity clause by which the vendor was made liable in case he is unable to deliver possession of the whole property or part of it being in possession of someone else. Then the vendor would be entitled to indemnify such property out of the property of the judgment debtor. On the other hand, it had simplified the indemnity clause that if the whole property is not conveyed or if there is any defect in the title as is being conveyed, in that event the vendor is indemnifying the purchaser that he had conveyed a perfect title to the purchaser.

17. Therefore, in my view, there is no infirmity in approving the incorporation of indemnity clause as approved by the appellate court.

18. Thus, it appears that there is no infirmity in the order impugned. The writ petition, therefore, fails and is accordingly dismissed. There will be no order as to costs.

19. It will be open to the decree holder to present the sale deed in the modified form as directed by the lower appellate court as early as possible or within the date that might be fixed or may be fixed, as the case may be.