

(2007) 08 AHC CK 0218
In the Allahabad High Court

Jamil Ahmad

APPELLANT

Vs

Sayeed Ahmad and Others

RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Specific Relief Act, 1963 — Section 14(1)(a), 20

Citation : (2008) 1 AWC 736

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—The plaintiff filed a suit for specific performance of the agreements dated 27.12.1972 and 18.7.1973 against the defendant No. 1. It was alleged that in the first agreement it was agreed, that the total sale consideration would be for a sum of Rs. 2,550 for plot No. 2684. It was also contended that if the defendant failed to execute a sale deed for plot No 2684, in that event, the defendant would execute the sale-deed for plot No. 2668 and , in case the sale-deed was not executed, then the defendant would return double the amount by way of damages. At the time of this agreement, a sum of Rs. 500 was paid in advance. Subsequently, by another document dated 15.5.1973, a further sum of Rs. 300 was paid to the defendant and, by another document dated 15.4.1974, Rs. 1,500 was paid. In view of the said payments only a sum of Rs. 250 remained in balance. in the receipt dated 15.7.1974, It was stated that the possession of the said plot was being handed over to the plaintiff upon receiving a sum of Rs. 1,500. It is alleged that the plaintiff soon thereafter constructed a house in due course of time. By the second agreement dated 18.7.1973. it was agreed that the defendant would sell plot No. 2746 for a total consideration of Rs. 1,397.50 and a sum of Rs. 400 was paid in advance. By a document dated 12.12.1973, time for the execution of the sale-deed was extended. Since the defendant failed to execute the sale-deed, the plaintiff filed the present suit for specific performance. Subsequently, the defendant No. 2 was impleaded as a party on the allegation that the defendant No. 1 had sold the

property to defendant No. 2 vide sale deed dated 12.5.1977 and 27.5.1977. It was alleged that defendant No. 2 was the nephew of defendant No. 1 and the same was made without any consideration only to defeat the suit. The defendant No. 1 resisted the suit and contended that he had never executed any agreement for specific performance though he had admitted that he had borrowed a sum of Rs. 500 and Rs. 400 from the plaintiff as a loan and had executed two documents for that purpose. The defendant contended that the two documents dated 27.12.1972 and 18.7.1973 were only executed for the purpose of the loan and that the plaintiff played a fraud by incorporating the words of specific performance which the defendant had never agreed. The defendant also denied the execution of the receipts dated 15.5.1973 and 15.4.1974 and also submitted that no possession was handed over to the plaintiff.

2. The defendant No. 2 also filed his written statement alleging that he was a bona fide purchaser in good faith and had no notice of any agreement executed between the plaintiff and defendant No. 1 and, further denied that he was a relative of defendant No. 1 and submitted that the suit was barred by limitation.

3. On the basis of the pleadings, the trial court framed various issues and after considering the evidence, dismissed the suit holding that the plaintiff was unable to prove the two agreements and that the expert could not prove the thumb impression of defendant No. 1 on the alleged documents. The trial court further found that the consideration fixed in the two documents was inadequate. Whereas the price fixed in the document was at the rate of Rs. 5 per yard, the existing price was Rs 40 per yard and therefore, the plaintiff had played a fraud in converting the agreement of loan into an agreement for specific performance. The trial court further found that the defendant No. 2 was a bona fide purchaser in good faith and had no knowledge about the two agreements executed between the plaintiff and the defendant No. 1 and further the trial court held that the plaintiff did not have sufficient amount to pay the consideration fixed in the agreement, and this finding, came on the strength that the plaintiff could not deposit the Court fee at the time of the filing of the suit, and consequently, the trial court came to the conclusion that the plaintiff did not have sufficient funds.

4. Aggrieved by the dismissal of the suit, the plaintiff filed an appeal which was allowed and the judgment of the trial court was set aside and the suit was decreed in terms of the relief claimed by the plaintiff. The appellate court found that the two agreements had been admitted by the defendant No. 1 himself and therefore, the question that the agreement was not proved was patently baseless. The appellate court found that the defendant himself admitted the execution of the two agreements as a loan agreement and not as a document for specific performance. Consequently, the question of the two documents not being proved by the plaintiff did not arise since the defendant himself admitted the said documents. The appellate court further found that the trial court has wrongly placed the burden upon the plaintiff to prove that the said agreements were not a loan agreement and that it was an agreement for specific performance,

whereas the burden was upon the defendants to prove that the plaintiff had played fraud upon the defendant in making the agreement of loan into an agreement for specific performance. The appellate court further found that no evidence was led by the defendant on the question of fraud being played by the plaintiff and therefore, concluded that the defendant was unable to prove that fraud was played by the plaintiff. The appellate court further found that the expert had given a categorical finding that the signatures in the agreement as well as in the receipts were that of the defendant. The appellate court itself perused the thumb impression in the agreement, receipts and compared with the thumb impression in the sale-deed executed in favour of the appellant and also concluded that the thumb impression was that of the defendant No. 1. The appellate court found that the receipt dated 15.4.1974 for Rs. 1,500 was rightly rejected by the trial court on the ground that the name of the defendant was not disclosed below the thumb impression, whereas the said document was proved by P.W. 5 who deposed that he had written the documents and that the defendant No. 1 and the plaintiff had placed their thumb impression and signatures respectively before him. The appellate court further found that D.W. 1 had also admitted the execution of the two agreements dated 27.12.1972 and 18.7.1973 by defendant No. 1 in his presence. The appellate court further found that defendant No. 2 had nowhere stated in his written statement that he had constructed the house on the plot in question after the execution of the sale-deed and therefore, concluded that the plaintiff was in possession of the plot and that, he had constructed the house on it. The appellate court further found that the address of the defendant No. 2 given in the sale-deed executed in his favour was the same address as that of defendant No. 2 and therefore, concluded that they were living in the same house and therefore, there was a relationship between the two. The appellate court further found that no consideration had been paid for the execution of the sale-deed by defendant No. 1 in favour of defendant No. 2. In view of the aforesaid findings, the appellate court reversed the decision of the trial court and decreed the suit of the plaintiff.

5. Aggrieved, the defendant No. 2, i.e., the purchaser, filed an appeal. The defendant No. 1 did not file any appeal.

6. Heard Sri B. Malik, the learned Counsel for the appellant and Sri Dinesh Rai, the learned Counsel holding brief of Sri Vinod Sinha, the learned Counsel for the plaintiff-opposite party.

7. The learned Counsel for the appellant submitted that the suit for specific performance could not be decreed in view of Section 14 (1) (a) of the Specific Relief Act and in view of the contents made in the agreement which provided that in the event the sale-deed was not executed, the plaintiff would be entitled to double the amount by way of damages. Consequently, the Court below committed an error in decreeing the suit when compensation could have been the adequate relief as contemplated u/s 14 (1) (a) of the Specific Relief Act. In support of his contention the learned Counsel for the appellant placed reliance

upon a decision of this Court in Hari Krishna Agarwala Vs. K.C. Gupta, wherein the Court held that the damages was an adequate relief instead of the specific performance. In my view, it is no longer open to the defendant No. 2/appellant to urge this ground. The Judgment cited is totally distinguishable and is not applicable. In the case cited, the plaintiff himself at one stage offered to accept the damages as adequate compensation and, in view of this admission, the Court declined to grant the relief of specific performance which, is a discretionary relief. However, in the present case, the Court finds that the defendant No. 1 had accepted 90% of the sale consideration and also handed over the physical possession of the house in question, after which the plaintiff made certain constructions on it. Further, it has also come on record, that the sale made by defendant No. 1 in favour of defendant No. 2 was without consideration. It was a sham transaction and further, it has been found, that the defendant Nos. 1 and 2 were close relatives. Consequently, compensation as an adequate relief was not the proper relief to be granted in this case. In the opinion of the Court, the provisions of Section 14 (1) (a) of the Act is not applicable. The lower appellate court rightly decreed the suit for specific performance. The discretion exercised was appropriate, sound and reasonable and guided by judicial principles as per the provisions of Section 20 of the Specific Relief Act.

8. The learned Counsel for the appellant further submitted that the defendant No. 1 had specifically denied the execution of the agreement in paragraph 15 of its written statement. Consequently, the plaintiff was required to prove the two agreements which had not been proved and therefore, the finding of the lower appellate court was patently perverse and against the material evidence on record. The submission of the learned Counsel for the appellant is bereft of merit. From a perusal of the written statement, it is clear that the defendant No. 1 had executed two agreements dated 27.12.1972 and 18.7.1973. The said documents was duly admitted by the defendant No. 1 himself. The only question was, whether the said agreements were agreements for specific performance or was a simplicitor agreement for a loan. The defendant No. 1 alleged that the plaintiff had played a fraud by incorporating the words for specific performance. Since the defendant No. 1 had made this allegation, the burden was upon the said defendant to prove that the plaintiff had played a fraud. The lower appellate court has given a categorical finding of fact that no evidence was led by the defendants on this aspect. Consequently, the submission of the learned Counsel for the appellant that the documents were denied by defendant No. 1 is patently erroneous. Further, the submission that the two documents, namely, the agreements for specific performance was not proved is erroneous. The lower appellate court found that D.W. 1 admitted the execution of the two agreements by defendant No. 1 in his presence. In view of the aforesaid, the submission of the learned Counsel for the appellant that the documents were not proved is patently erroneous.

9. The learned Counsel further submitted that the lower appellate court was not justified in taking a different view when the trial court had taken a particular

view in the matter and submitted that where two views are possible and the trial court takes a particular view, then the lower appellate court should not take a different view. In support of his submission, the learned Counsel placed reliance upon a decision of the Supreme Court in *Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others*, wherein it was held that if two views were possible and the Court of Small Causes had taken a particular view, then the High Court would be exceeding its jurisdiction while exercising its revisional powers in substituting its own view in place of that of the court below. Similar view was reiterated by the Supreme Court in *Navaneethammal v. Arjuna Chetty* AIR 1996 SC 3521.

10. In my view the submission of the learned Counsel for the appellant is misconceived and patently erroneous. The aforesaid judgment of the Supreme Court are not applicable in the present case. The Supreme Court held that the High Court while exercising its revisional jurisdiction or while acting as the Court of Second Appeal should not reappreciate the evidence or substitute its own views with that of the view of the court below because it considers it to be a better view. In the present case, the position is totally different. The court of second appeal is not taking a different view. The first appellate court has taken a different view with that of the view taken by the trial court. The first appellate court has all the powers to examine the evidence on record and reappraise the matter and arrive at its own conclusion. The first appellate court, being the last court of fact, has all the powers under the CPC to examine and appreciate the evidence and the facts and arrive at its own conclusion and take a different view, if necessary. The first appellate court was justified in coming to that conclusion. The submission of the counsel that the first appellate court had committed an error in taking a different view is patently erroneous. In my opinion, the findings given by the first appellate court was based on material evidence on record which the lower appellate court has elaborately considered in its judgment and which requires no interference.

11. The learned Counsel for the appellant has also made a feeble attempt alleging that the suit was barred by limitation and that the suit could only be filed within three years under Article 54 of the Limitation Act. The submission of the learned Counsel is bereft of merit. The time of three years, for filing a suit begins to run from the date fixed for the performance and if no such date is fixed, then from the date when the plaintiff had noticed that the performance was refused.

12. In the present case, the date fixed for the performance was extended at the behest of the defendant and when the sale-deed was not being executed, the plaintiff gave a notice which was duly received, in spite of which, the sale-deed was not executed. The suit was immediately filed thereafter. Consequently, in the opinion of the Court, the suit was filed within the period of limitation.

13. In view of the aforesaid, this Court is of the opinion that no substantial questions of law arises for consideration. The second appeal fails and is dismissed. In the circumstances of the case, the parties shall bear their own cost.