

(1966) 11 OHC CK 0002
In the Orissa High Court
Case No : First Appeal No. 54 of 1963

Jogesh Chandra Hota

APPELLANT

Vs

Bibhutibhusan Sahani and Others

RESPONDENT

Date of Decision : 05-11-1966

Acts Referred:

Hindu Succession Act, 1956 — Section 23
Specific Relief Act, 1877 — Section 15, 17
Specific Relief Act, 1963 — Section 12(1), 12(3)

Citation : AIR 1967 Ori 95 : (1967) 33 CLT 379

Hon'ble Judges : S. Barman, Acting C.J.; R.K. Das, J

Bench : Division Bench

Advocate : U.N. Rath, for the Appellant; R.C. Misra, for the Respondent

Final Decision : Dismissed

Judgement

Barman, A.C.J.

1. This is the plaintiffs appeal from a decision of the learned Subordinate Judge, Sambalpur by which the plaintiffs (intending purchaser) suit for specific performance of a contract executed by defendant No. 1 Bhibhutibhusan Sahani to sell the suit property a dwelling house of the defendants' family was dismissed. The other defendants in the suit are defendants 2 and 3 two widows of defendant No. 1 Bhibhutibhusan's deceased father Parsuram Sahani; defendants 4, 5 and 6 are three married daughters of the deceased Parsuram Sahani.

2. The plaintiff was the owner of a house adjacent to the suit house which belonged to defendants family governed by Mitakshara School of Hindu Law. From time to time between September 9, 1956 and April 7, 1957 the plaintiff advanced loans to Parsuram Sahani and his son defendant No. 1. Bhibhutibhusan Sahani on nine several promissory notes of the total sum of Rs. 2,600/-without interest. On April 29, 1957 the plaintiff, advanced a further loan of Rs. 1,200/-. On the same date Parsuram Sahani and his son defendant No. 1 Bhibhutibhusan

executed a registered mortgage Ext. 2 in favour of the plaintiff in respect of the suit house as security for the loan of Rs. 3,750/-. On September 29, 1957, January 16, 1958 and August 24, 1958 the plaintiff advanced further loans of Rs. 150A, Rs. 100A and Rs. 550/- respectively; the total amount of such further loans after the mortgage was Rs. 800/- as mentioned in paragraph 4 of the plaint. On August 24, 1958 there was an agreement under which defendant No. 1 Bhibhutibhusan agreed to mortgage to the plaintiff the "B" Schedule property being another part of the house.

3. In 1959 Parsuram Sahani died leaving him surviving his son defendant No. 1 Bhibhutibhusan, defendants 2 and 3 widows, and defendants 4, 5 and 6 married daughters. On January 23, 1959 the plaintiff further advanced on promissory note Rs. 1200/- to defendant No. 1 Bhibhutibhusan. About a year thereafter on January 26, 1960 defendant No. 1 Bhibhutibhusan took a further loan of Rupees 1000/- for his own marriage. On that date there was an agreement Ext. 3 between the plaintiff and defendant No. 1 Bhibhutibhusan for sale of the suit house by which the defendant No. 1 agreed to sell the suit house to the plaintiff within one month from the date of the agreement for a consideration of Rs. 6798A which the plaintiff already advanced. It is said that in part performance of the said contract the plaintiff was put in possession of the house.

4. Under the agreement it was understood that the necessary sale deed will be executed within one month from January 26, 1960. The sale deed was not having been executed within time the plaintiff's lawyer sent a registered notice Ext. A dated October 20, 1960 to the defendants as heirs of Parsuram Sahani deceased to execute the requisite sale deed or refund to the plaintiff his money with damages or compensation from February 26, 1960 at the rate of Rs. 60A per month on the basis that that was the amount which the plaintiff would have been able to get if the sale deed would have been registered and that portions of the suit house still in the occupation of the defendant No. 1 be vacated as agreed. In the said notice it was also stated that if the defendants failed to execute the sale deed in respect of the house, Bari and courtyard as aforesaid, or refund the amount of Rupees 6798/- with damages at Rs. 50/- per month then the plaintiff had no other alternative but to proceed in a court of law for enforcement of the contract.

5. In the reply dated December 14, 1960 Ext. B from the lawyer for defendant No. 6 Srimati Pramodini Bohidar to the lawyer for the plaintiff it was stated that defendant No. 6 had no knowledge of any loan either by her father, brother or sister or of any alleged agreement; that defendant No. 6 is a legal heir of Parsuram Sahani and is in joint possession of the properties; she is not bound to execute, any sale deed in favour of the plaintiff.

6. Thereafter on February 4, 1961 the plaintiff filed the suit against the defendants for specific performance of the contract for sale of the suit house; alternatively, for a decree of the sum of Rs. 7300/- against the defendants, for damages at the rate of Rupees 50/ per month and other incidental reliefs as

prayed for in the plaint

7. The suit was contested by defendant No. 6 Promodini Bohidar, daughter of Parsuram Sahani deceased. Her defence, in substance, was this: She had no knowledge of the loans alleged to have been taken by her brother defendant No. 1 Bhibhutibhusan or by his deceased father Parsuram Sahani; there were no legal necessities for the loans alleged to have been taken by them in any capacity; She is not a party to the promissory notes all alleged to have been executed after the passing of the Hindu Succession Act, 1956; similarly, she is not bound by the mortgage deed Ext. 2 D/- April 29. 1957 for Rs 3,750/- as not incurred for legal necessities and because she was not a party to the said mortgage deed she is also not bound by any of the promissory notes mentioned in paragraph 4 of the plaint as they were not for legal necessities. Defendant No. 6 also stated that she is not bound by the agreement for sale of the suit house to the plaintiff dated January 26. 1960 Ext. 3 as the monies said to have been borrowed were not for legal necessities as stated in paragraph 6 of the written statement

8. On these pleadings several issues were raised including issues 1 and 2 which are these:

i) Is the agreement for sale executed by defendant No. 1 in favour of the plaintiff on 26-1-60 in respect of Schedule C house specifically enforceable against all the defendants or any or them?.

(ii) Is the plaintiff entitled to recover Rs. 7300/- as damages from the defendants In the alternative?

9. The learned trial court found that the suit for specific performance of the contract was not maintainable by the plaintiff on the ground that the contract as per agreement for sale Ext. 3 cannot be specifically enforced against defendants 2 to 6, the latter not being parties to the contract; further that the plaintiff has failed to show readiness or willingness to perform his part of the contract at any time after the date of the contract and as such the suit so far as it seeks to obtain specific performance of the contract is liable to be dismissed. Under issue No. 2 the trial court held that defendant No. 1 Bhibhutibhusan is alone liable to refund the advance of Rs. 5,700/- to the plaintiff and that none of the other defendants are liable for the same. Accordingly the plaintiff's suit was decreed in part for Rupees 6,700/- ex parte against defendant No. 1 with proportionate cost and was dismissed on contest against defendant No. 6 and ex parte against defendants Nos. 2 to 5 without costs; that the plaintiff will recover Rs. 5700/- as compensation from defendant No. 1 Bhibhutibhusan Sahani alone; in other respects the suit was dismissed. Hence this First Appeal filed by the plaintiff against the judgment of the trial court dismissing the plaintiff's suit for specific performance of the agreement for sale of the suit house.

10. The question is : Is the plaintiff entitled to enforce specific performance of the agreement for sale Ext. 3 dated January 26, 1960 against the defendants 1

to 6? The agreement shows that defendant No. 1 Bhibhutibhusan Sahani and his sister defendant No. 4 Sm. Kuntalini Bohidar signed the same as intending sellers. In the body of the document Ext. 3 there is mention of the names of defendant No. 4 Sm. Kuntalini Bohidar, defendant No. 5 Sm. Nalini Pattanaik and defendant No. 6 Sm. Pramodini Bohidar purporting to show that their shares also will be sold. It is to be noted that neither defendant No. 5 Sm. Nalini Pattnaik nor defendant No. 6 Sm. Pramodini Bohidar has signed the agreement. That apart, there is also not even any mention of either defendant No. 2 Sm. Mayabati Sahani or defendant No. 3, Sm. Haripritya Sahani two widows of Parsuram Sahani anywhere in the agreement.

11. The cause of action as pleaded in paragraph 16 of the plaint is stated to be this:

" 16. That for the cause of action of the present suit arose on or after 16-2-1960 when the Defendants 1 and 4 failed to get the sale deed executed and registered by the defendants and lastly on and after 20-10-1960 when the Defendants in spite of Notice failed to pay either the money claimed or to execute sale deed."

Although the question of legal necessity was raised in the written statement, it is significant that there is no issue on legal necessity. It is thus clear that the scope of the suit was confined to the determination of the question of enforceability of the agreement for sale Ext. 3 executed by the defendant No. 1 Bhibhuti Bhusan Sahani alone against all the defendants including defendant No. 4 Sm. Kuntalini Bohidar who signed the agreement in respect of the suit house which admittedly was joint family property. Therefore, the question of legal necessity was beyond the scope of this suit for specific performance.

12. In the facts and circumstances of the case, it cannot be said that after the death of Parsuram there was any joint family consisting of the defendants, namely the son defendant No. 1, the two widows defendants 2 and 3, and the three married daughters defendants 4, 5 and 6 of Parsuram, Sahani who admittedly died in 1959. u/s 23 of the Hindu Succession Act 1956, the right of the married daughters as included in Class I of the Schedule is a restricted or contingent right to claim partition of the dwelling house if the male heir chooses to divide his share therein; a female heir shall be entitled to a right of residence therein. It cannot be said that the married daughters, defendants 4, 5 and 6 are members of joint family along with the son defendant No. 1, and defendants 2 and 3, the two widows of Parsuram Sahani.

That being the position, defendant No. 1 Bhi-buti Bhusan Sahani cannot be said to have entered into the agreement for sale Ext. 3 dated January 26, 1960 in his capacity as manager of the property. Therefore, other defendants are not bound by the said agreement for sale Ext. 3 to which defendant no 1 Bhibhuti Bhusan Sahani alone was a party and which was signed by defendant No. 4 Sm. Kuntalini Bohidar.

13. That apart, the plaintiff failed to prove continuous readiness and willingness,

from the date of the contract to the time of bearing, to perform the contract on his part. In fact, there is no averment in the plaint that the plaintiff was all along ready and willing to perform his part of the contract; nor is there any evidence on the side of the plaintiff in this respect. Under the terms of the contract, the registered sale deed was to be executed within a month from the date of the contract at the expense of the plaintiff.

There is no evidence of any demand by the plaintiff for performance of the contract within the stipulated period nor has the plaintiff otherwise shown any readiness or willingness to perform his part of the contract: the plaintiff never offered to bear the expenses of the sale deed either to defendant No. 1 or to any of the other defendants. In the notice of demand Ext. A dated October 20, 1960 for specific performance of the contract, there is also no offer of readiness or willingness by the plaintiff to provide the necessary expenses for the purchase of stamp papers etc. so as to enable the defendants to execute the contract

14. In these circumstances, the learned trial court was justified in finding that the plaintiff has failed to show readiness or willingness to perform his part of the contract at any time after the date of the contract and as such the suit for specific performance of the contract must fail.

15. Thus, in the ultimate analysis, in this view of the position of law and on facts, the decision of the learned trial court is upheld. The First Appeal is accordingly dismissed.

Das, J.

16. I agree