

(2003) 03 MP CK 0115
In the Madhya Pradesh High Court
Case No : First Appeal No. 69 of 1994

Krishna and others

APPELLANT

Vs

Bhagwan Swarup

RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 11, 12
Specific Relief Act, 1963 — Section 15

Citation : (2003) 2 MPLJ 594

Hon'ble Judges : R.B. Dixit, J

Bench : Single Bench

Advocate : R.D. Jain, with S.K. Jain, for the Appellant; A.M. Naik with B.K. Agarwal, for the Respondent

Judgement

R.B. Dixit, J.

The judgment in this appeal shall also govern disposal of First Appeal No. 70 of 1994, Smt. Krishnadevi vs. Bramh Swarup and others.

Respondent-plaintiff, Bhagwan Swarup, had filed a Civil Suit No. 33-A/1991 for specific performance of contract on the ground that plaintiff is occupying a portion of the house No. 46/120 situated in Tamakhuwali Gali, Madhoganj, Lashkar, Gwalior, as a tenant and on 3-4-1981 deceased Dwarkaprasad, owner of the house entered into an agreement to sell this house to the plaintiff for Rs. 40,000/- out of which Rs. 20,000/- was paid on the same day as advance and Rs. 10,000/- received on 2-8-1981 while the remaining amount of consideration was agreed to be paid at the time of execution of the sale-deed. It was also agreed that the seller would deliver vacant possession of the house after getting it vacated from the possession of other tenants and in case, if he fails to do so he would make a rebate of Rs. 5000/- from the amount of consideration for this purpose. Unfortunately, Dwarka Prasad expired on 14-8-1981 and his widow, appellant Bhagwatibai refused to perform her part of contract even after service of notice on her which compelled the plaintiff to file the suit for specific

performance.

The appellant-defendant denied execution of any agreement between the parties and alleged that deceased was sick and could not properly read because of defective eye-sight. In the circumstances the agreement, if any, is forged one. Dwarkaprasad had no legal necessity to sell the house which is an ancestral property and secondly it would cause undue hardship to the appellant-defendant as the deceased left behind him his widow and an adopted son, Harishanker who had no other residence or any means of livelihood for their own.

Appellants in the year 1991 had also filed a civil suit No. 34-A/91 for eviction from the rented portion of the house against respondent on the ground that they required the accommodation for their bona fide need of residence and also for arrears of rent which was resisted by the respondent on the ground that the sole owner of the house, deceased Dwarkaprasad had entered into agreement to sell the house and also to put him in possession after receiving the major amount of consideration which is subject matter of the civil suit No. 33-A/91 and, therefore, the question of vacating the house for the purpose of bona fide need does not arise.

The learned trial Court by the impugned judgment granted the decree of specific performance in favour of the respondents while rejecting the suit of the appellant regarding bona fide need of the house against which aforesaid appeals have been filed on behalf of appellant.

Learned Senior Counsel of the appellant has contended that the house in, dispute is situated in an important area of the business locality and in the heart of the city. Its valuation at the time of alleged execution of the agreement was not less than Rupees One lakh and in absence of any legal necessity on the part of the owner he had also no right to transfer the ancestral property without consulting other coparcenary members of the family. It can be noticed that instead of getting the agreement registered it has been got verified before the Executive Magistrate who had no authority to endorse the same and again without any necessity obtaining an affidavit in support of it and further getting a receipt of Rs. 10,000/-executed immediately before the death of the deceased are some of the instances indicating that the agreement is forged one. It has also been argued that ordinarily no seller bears the responsibility of executing the sale-deed at his own costs which has been ascribed to him in the present case. The application for transfer of the electric supply connection in the name of purchaser bears the date prior to the execution of the agreement also indicate the pre-planned design on the part of the alleged purchaser to grab the property of the deceased. It is also contended that stamp-papers to execute agreement can be easily acquired ante-dated. Reliance is placed in a Division Bench decision of this Court in case of Pritam Das Vs. Mst. Akbari and Others, .

Learned Senior Counsel of the respondent, however, on the other hand, has argued that the document of agreement was not registered in order to avoid

unnecessary payment of registration charges and preparation of affidavit in support of the agreement by the seller makes it abundantly clear that there was no foul play on the part of purchaser and purchasing of stamp-papers by the deceased has also been duly proved. Since the negotiations for purchase of the house were going on prior to execution of the agreement and in order to give a formal recognition of the possession of the house with the purchaser an application for transfer of the electric supply connection was moved earlier which was meant to take effect after execution of the agreement. In the year 1981 when the agreement to sell the house was executed the price of the house was in no way at the higher side. After payment of the advance-money the subsequent payment of Rs. 10,000/- was in accordance with the conditions of the agreement. Similarly, there was nothing wrong in specifying the amount of Rs. 5000/- as a cost for vacating the house from possession of other tenants. In the circumstances there was no reason to cast any suspicion regarding purpose of agreement to sell on the part of the owner. It has further been argued that admittedly there was family partition of the property between the deceased Dwarkaprasad and his brothers and he had agreed to sell the house for payment of loans secured for business purposes. He was, therefore, well within his right to transfer the house to the plaintiff.

I have considered the rival submissions of the learned senior counsel of the parties and have carefully perused the records.

Ex. P/1 is the agreement to sell the house written on a stamp paper which was said to have been purchased by deceased Dwarkaprasad and in support of which an affidavit, Ex.P-3, was also filed before the Executive Magistrate on the same day. Rs. 20,000/- were paid as advance while ex.P-2 is the receipt of further payment of Rs. 10,000/- which was signed by the same witnesses before whom agreement was executed. These documents have been proved by the plaintiff Bhagwan Swarup (PW-1) and witnesses Narayan Prasad Sharma (PW-4) and Ramautar Sharma (PW-5). The purchase of stamp papers by the deceased Dwarkaprasad were recorded in the Register of Stamp-vendor which was requisitioned from State Treasury and was proved by Stamp Depot Keeper, Veersingh Rathore (PW-2). Agreement and affidavit were drafted by Chaturilal Baradhiya, Advocate (PW-3). There is nothing in the evidence of these witnesses which may adversely affect their testimonies and in the circumstances the learned trial Court has rightly come to the conclusion that the agreement and affidavit were duly executed by Dwarkaprasad who had received Rs. 20,000/- as advance at the time of execution of agreement and Rs. 10,000/- through receipt, Ex.P-2, on the subsequent day i.e. on 2-8-1981.

Dwarkaprasad had also agreed to transfer the electric supply connection of the house in the name of the plaintiff about which he received an intimation, Ex. P-5, from the Electricity Board. The application for transfer of the connection (Ex.D-5) was signed not only by deceased Dwarkaprasad but also by his brother, Narayan Das, who has admitted the same in his evidence recorded in connection with Civil

Suit No. 34-A/91. Narayan Das in that case has also admitted family partition of the deceased and the fact that the disputed house had fallen in the share of the deceased in the said family partition.

Appellant Bhagwatibai who was examined as D.W.1 has admitted that the house fell in the share of Dwarkaprasad in the family partition. She has also admitted that respondent had got constructed a toilet in the house and fitted it with the doors. In so far as adoption of Harishanker by her in para 8 of her cross-examination she has stated that Harishanker was adopted after a month or so of the death of Dwarkaprasad. However, surprisingly, according to her, nobody else was present at that time. Contrary to her statement it has been recited in the adoption-deed (Ex.P-7) that Harishanker at the time of adoption was given to Dwarkaprasad and was also placed in lap of Dwarkaprasad. It is to be noticed that according to Bhagwatibai adoption had taken place after about a month or so from the death of Dwarkaprasad, then the question of Dwarkaprasad taking Harishanker as an adopted son does not arise. In the circumstances the adoption of Harishanker was rightly disbelieved by the learned trial Court.

Learned counsel of appellant has strenuously argued that even after receiving the house in family partition its nature as an ancestral property cannot be divested and, therefore, Dwarkaprasad had no right to execute an agreement for its sale without consulting other members of the family and without legal necessity for the same. Reliance is placed on a decision of Nagpur High Court in the case of Shamlal vs. Yesaram, reported in 1954 NLJ 587 : AIR 1954 Nag 334, wherein it has been laid down that the managing member of a joint Hindu family who, for purposes not binding upon other coparcenaries and without their concurrence, agrees to convey a specific item of the joint family property, cannot perform the contract in its entirety and the suit for specific performance falls u/s 15 of the Specific Relief Act.

It has been observed by the Hon"ble Supreme Court in case of Balmukand Vs. Kamla Wati and Others, , that for a transaction to be regarded as of benefit to the family it need not be a defensive character so as to be binding on the family. In each case the court must be satisfied from the material before it that it was in fact such as conferred or was reasonably expected to confer benefit on the family at the time it was entered into. Where adult members are in existence the judgment is to be not that of the Manager of the family alone but that of all the adult members of the family, including the manager.

The Apex Court in case of State Bank of India Vs. Ghamandi Ram (Dead) through Gurbax Rai, has further made it clear that a coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except insofar that on adoption the adopted son becomes a coparcener with his adoptive father as regards ancestral properties of latter. The incidents of co-parcenership under the Mitakshara law are : first, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person, secondly, that such descendants can at anytime work out their rights by asking

for partition, thirdly, that till partition, each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparcenaries, and sixthly, that the interest of a deceased member lapses on his death to the survivors.

In case of *Ramkunwar Bai vs. Controller of Estate Duty, Bhopal*, reported in 7977 (2) MPWN 320, it has been pointed out that a male member along with his wife can constitute a Hindu Joint family and on the death of the husband only the share of the husband which is half of the whole property passes.

In a Division Bench decision of this Court in the case of *Dhirendra Nath Verma and Others Vs. Yashwant Rao Ramchandra Ogale*, where Karta of the family entered into agreement to sell a part of joint Hindu property and where it was found that sale was neither for family necessity or benefit nor for clearing antecedent debt and where other coparcenaries were not supporting the sale it was held that decree for specific performance cannot be granted.

The Hon'ble Supreme Court in the case of *Vasant and Another Vs. Dattu and Others*, , while interpreting the proviso (c) of section 12 of the Hindu Adoptions and Maintenance Act observed that the introduction of a member into a joint family, by birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. The joint family continues to hold the estate, but with more members than before. There is no fresh vesting or divesting of the estate in any one. It cannot be said that on the death of a member of a joint family the property must be considered to have vested in the remaining members by survivorship, but there is no question of any vesting or divesting in the sense contemplated by section 12 of the Act.

Yet in another decision of the Apex Court in the case of *Sitabai and another vs. Ramchandra*, reported in 1969 MPLJ 868 : 1969 JLJ 1028, it has been pointed out that the true effect and interpretation of sections 11 and 12 of Hindu Adoptions and Maintenance Act is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses. Where a widow adopts a son after the death of her husband, the adopted son becomes the son of the deceased husband also.

Insofar as the present case is concerned it has to be noticed that the house in question was received in partition by the deceased Dwarkaprasad who became its absolute owner and admittedly at the time of his entering into an agreement to sell the house, no adoption of Harishanker had taken place. Even subsequently after the death Dwarkaprasad the adoption was not found to be proved according

to the evidence available on record. Secondly, insofar as legal necessity to sell the house is concerned it has been specifically mentioned in the agreement, to sell itself that the owner was required to sell the house because for the payment of the loans in the market. Thus, it was a legal necessity justifying the agreement to sell on the part of the owner. It was, therefore, clearly a sale for the benefit of the entire coparcenary family including the wife.

The learned counsel of the appellant has led stress on the fact of hardship in specific performance of the contract on the ground that it has been clearly mentioned in the agreement itself that on failure to get the accommodation vacated by the other tenants or non-performance of the contract on the part of the owner the purchaser is entitled for return of consideration together with interest at the rate of 2 per cent per month and also special cost of Rs. 10000/-. In view of this specific condition there is no necessity to grant a decree for execution of the sale-deed. It has been submitted by the learned counsel of the appellant that in case of breach by virtue of provisions envisaged under sections 73 and 74 of the Contract Act the purchaser is entitled only to compensation stipulated under the contract itself.

However, the learned counsel of respondent on the other hand, has submitted that the breach of contract was not committed by respondent and, therefore, the question of payment of compensation on his part as contemplated under the provisions of sections 73 and 74 of the Contract Act does not arise and the question of hardship on the part of appellant also no longer exist as the widow of the deceased, Dwarkaprasad, has expired during the pendency of the appeal. His only daughter, appellant Smt. Krishna is married and the adoption of Harishanker has not been proved.

Insofar as the value of the property in question is concerned appellant had examined a retired Municipal employee, Yeshwant Singh (DW-3) in this respect, who had neither any technical knowledge nor any experience to examine any building for the purpose of valuation. However, according to him, he had valued the house without any authority. He has admitted that the house is situated in a narrow lane and on a dirty place and about 250 or 300 feet away from the road. He has not consulted any Rules or Regulations of the Public Works Department in connection with the valuation of the building and had recorded the valuation of Rs. 98000/- after consulting the property agents. However, no certificate of any property agent has been annexed with the report. It is surprising that no house number has been mentioned in his valuation report (Ex.D-1) nor it has been mentioned that the house belongs to Dwarkaprasad instead he has admitted that the valuation was done of the house of Narayan Das. The evidence of this witness, therefore, was rightly disbelieved by the learned trial Court.

Another witness of the appellant is Laxminarayan (DW-4) who resides in neighbourhood of Dwarkaprasad has admitted the sale of one of his house in the same locality in Rs. 50,000/- only. Therefore, from the evidence of appellants themselves it does not appear that the price of Rs. 40,000/- of the dispute house

constructed on an area of about 26 feet x 19 feet, was in any way at the lower side.

In the case of Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, , it was been made clear that relief of specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. It is again well settled that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain. While normally it is permissible to grant relief on the basis of what emerges from the evidence - even if not pleaded, provided that is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. Where there has been a part performance, the Court may struggle with apparently conflicting evidence rather than dismiss the suit.

The Hon''ble Apex Court in the case of Prakash Chandra Vs. Angadlal and Others, , has held that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief.

In a Division Bench decision of this Court in the case of Smt. Kamalrani and others vs. Kumari Pinki and another, reported in 2001(2) MPLJ 677 : 2001 (II) MPJR 137, it has been pointed out that the continuous readiness and willingness at all stages from the date of the agreement till the date of hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging the readiness and willingness to perform the plaintiffs part of the contract. It is also pertinent to note here that to judge whether the plaintiff is ready to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available.

From this point of view it has to be noticed in the present case that the plaintiff-respondent had proved payment of advance of Rs. 20,000/- at the time of execution of the agreement and Rs. 10,000/- was also paid before stipulated time of payment and a receipt for which was duly obtained. He had also served the concerning parties after death of the owner to perform their part of the contract and has also deposited some of the amount in the trial Court, therefore, the readiness and willingness on the part of the plaintiff-respondent is clearly found proved. The learned trial Court, in the circumstances, has committed no error in passing a decree for specific performance.

For the reasons discussed hereinabove, this appeal fails and is dismissed.