

(2010) 10 MP CK 0042
In the Madhya Pradesh High Court
Case No : First Appeal No. 778 of 2006

Krishna Murari

APPELLANT

Vs

Dr. Murlimanohar Dubey and The State of Madhya Pradesh

RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 96
Specific Relief Act, 1963 — Section 20

Citation : (2010) 10 MP CK 0042

Hon'ble Judges : Gulab Singh Solanki, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.S. Solanki, J.—Defendant/Appellant being aggrieved by the judgment dated 31.3.2005 passed by Fourth Additional District Judge, Sagar, Camp Rehli in Civil Suit No. 2-A/ 2003 whereby Defendant/Appellant has been directed to pay Rs. 32,000/-with interest at the rate of 8% per annum with effect from 1.3.2001 to Plaintiff/Respondent No. 1, hence Defendant/Appellant has preferred this appeal u/s 96 of the Code of Civil Procedure.

2. Plaintiff/Respondent No. 1 had filed a suit for specific performance of contract. It is pleaded that Plaintiff/Respondent No. 1 is the owner of the land Khasra No. 3/3, Rakba 0.60 hectare of village Khadi, Tehsil Garhakota, District Sagar and he had entered with an agreement to sell this land of Rs. 52,000/-and received Rs. 32,000/-in advance. He executed the agreement to sell the land on 1.3.2001. It was also agreed that Defendant/Appellant will execute a registered deed after receiving the balance amount of Rs. 20,000/-.

3. According to the Plaintiff/Respondent No. 1, he was ready and willing to perform his part of contract but Defendant/Appellant failed to comply his part of contract, therefore, he had filed the suit for specific performance of contract.

4. Defendant/Appellant denied to execute the agreement to sale dated 1.3.2001

and pleaded that he had never agreed to sell the disputed land to Plaintiff/Respondent No. 1. He further pleaded that there was a loan transaction between his father and Plaintiff/Respondent No. 1. According to him, he had repaid the loan amount of Rs. 40,000/-on 29.9.2001 and got receipt Ex.D/1, therefore suit filed by Plaintiff/Respondent No. 1 was misconceived and liable to be dismissed.

5. Learned trial Court on appraisal of evidence on record, refused to pass the decree of specific performance in favour of Plaintiff/Respondent No. 1 but alternatively passed the judgment and decree against Defendant/Appellant and directed to repay the amount of Rs. 32,000/-with interest as mentioned hereinabove.

6. Learned Counsel for the Appellant contended that Plaintiff/Respondent No. 1 has failed to prove the execution of agreement dated 1.3.2001 Ex.P/1. He further contended that Defendant/Appellant refunded the amount on 29.9.2001 and produced the receipt Ex.D/1 before the trial Court but trial Court has not properly appreciated the evidence led by Defendant/Appellant and grossly committed error in passing the impugned judgment and decree against the Defendant/Appellant, therefore, he prays for setting aside the impugned judgment and decree dated 31.3.2005.

7. On the other hand, learned Counsel for the Plaintiff/Respondent No. 1 contended on the basis of his cross-objection under Order 41 Rule 22 of the CPC that the trial Court has committed error in not properly judged the hardship of Appellant as on the date of transaction. He further contended that defendant/appellant has failed to prove that the hardship has resulted from any act of the respondent/plaintiff subsequent to the contract.

8. I have heard the learned Counsel for the parties and perused the impugned judgment and the evidence and other material on record.

9. Plaintiff/Respondent No. 1 deposed that Defendant/Appellant had executed the agreement to sale dated 1.3.2001 and received Rs. 32,000/-in advance and further agreed to execute sale deed after receiving the balance amount of Rs. 20,000/

10. According to Ex.P/1, Defendant/Appellant Krishna Murari had signed "A" to "A" on Ex.P/1 in presence of witnesses. Ramesh Bhai Raikwar (PW2) corroborated the version of Plaintiff/Respondent No. 1 and stated that Defendant/Appellant had executed Ex.P/1 on 1.3.2001, received Rs. 32,000/-in advance and signed the paper before him. He denied suggestions of Defendant/Appellant that transaction was not taken place before him. On the contrary, he further categorically stated that Defendant/Appellant was present in the clinic of Plaintiff/Respondent No. 1 and executed Ex.P/1.

11. Defendant / Appellant deposed that Plaintiff / Respondent No. 1 has taken his signature on a plain stamp paper and later on he typed in the form of agreement to sale, but these particular facts are not pleaded in his written-statement,

therefore, evidence without pleading has no force. On the contrary, he admitted in his cross-examination that after 20-21 days of execution of document he informed the Plaintiff/Respondent No. 1 that he would not sell the land and repay the amount. This admission is also indicative of the fact that agreement document Ex.P/1 was executed in presence of witness Ramesh Bhai Raikwar (PW2). After considering the above mentioned evidence on record, it is proved that Defendant/Appellant signed Ex.P/1 in presence of independent witness Ramesh Bhai Raikwar (PW2) and received the advance of Rs. 32,000/-.

12. Second contention of learned Counsel for the Defendant/Appellant was that Appellant repaid the amount on 29.9.2001 by paying Rs. 40,000/-and taken receipt Ex.D/1 which was signed by Plaintiff/Respondent No. 1.

13. Defendant/Appellant Krishna Murari (DW1) deposed that he repaid the aforesaid amount in two installments, first time he paid Rs. 8,000/-and second time paid Rs. 32,000/-in presence of witness Ram Rani (DW2). Ram Rani (DW2) denied this fact and stated that repayment was made in one time. In these circumstances, Defendant and his witness Ram Rani (DW2) are not consistent regarding the fact of repayment. Secondly from perusal of Ex.D/1, it reveals that it has a different signature in the name of Plaintiff as Dr. M.M. Dubey. It further reveals that there is an improvement as to the effect that Plaintiff/Respondent No. 1 could not file the suit against Defendant, who wrote this fact had not explained by Defendant/Appellant. Plaintiff/Respondent No. 1 categorically denied his signature on Ex.D/1 and deposed that Defendant/Appellant has used to visit his dispensary because his nephew was working as compounder in the dispensary of Plaintiff/Respondent No. 1., from where he got a blank letter pad and prepared a receipt on them.

14. Trial Court after appreciating the evidence on record comes to the conclusion that this receipt was not executed by Plaintiff/Respondent No. 1.

15. After careful scrutiny of evidence on record, I am also of the view that Defendant/Appellant failed to prove the repayment of amount and execution of receipt Ex.D/1 by Plaintiff/Respondent No. 1.

16. Learned Counsel for the Defendant/Appellant also contended that there was no issue in regard to pass alternative decree, but there is no force in this argument because Court always has power and discretion u/s 20 of Specific Performance Act to pass alternative decree in the event when it feels that specific performance of the contract will substantially cause damage to other party.

17. As far as contention of learned Counsel of Respondent is concerned, Section 20 of the Specific Relief Act, 1963 granted jurisdiction to court to exercise discretion not to decree specific performance. In this case, learned trial Court exercised his discretion u/s 20(2)(b), explanation 2 regarding this provision is as follows:

Explanation 2.-The question whether the performance of a contract would involve

hardship on the Defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the Plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

From a bare reading of this explanation, it is clear that the question whether the performance of a contract would involve hardship of Defendant within the meaning of Clause (b) shall...be determined with reference to the circumstances existing at the time of the contract. In this case certainly hardship was not resulted by the act of Plaintiff subsequent to contract but circumstances shows that hardship was existing at the time of the contract.

18. Considering the facts on record that Defendant/Appellant is a poor farmer and has only two acres of land, in the event of specific performance of contract, Defendant/Appellant will face trouble in maintaining of his family and on the basis of equity where Plaintiff/Respondent No. 1 is a doctor by profession and he will suffer lesser inconvenience, trial Court granted the alternative decree. In these circumstances, I am of the view that trial Court did not commit any error in granting the alternative decree in favour of Plaintiff/Respondent No. 1.

19. Further more it is admitted fact that in this case Plaintiff/Respondent No. 1 had already executed the decree and Defendant/Appellant had already deposited the decretal amount in the trial Court. It is well settled position of law that party cannot approbate and reprobate at the same time. These prepositions are so well known that no possible exception can be taken to them.

20. In the result, I affirm the judgment and decree passed by the court below in Civil Suit No. 2-A/2003. The appeal, filed by the Defendant/Appellant and the cross-objection filed by the Plaintiff/Respondent No. 1, fail and are dismissed.

21. Defendant/Appellant shall bear his cost and pay the cost of Plaintiff/Respondent No. 1. Counsel fees as per rules and certificate (whichever is less).

22. Decree be drawn accordingly.