
(2000) 07 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 356/89

Mohammed Shereef

APPELLANT

Vs

Soma Rajan

RESPONDENT

Date of Decision : 05-07-2000

Acts Referred:

Evidence Act, 1872 — Section 91, 92

Citation : (2000) 3 CivCC 356 : (2000) 2 KLJ 387 : (2000) 4 RCR(Civil) 453

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : C.V. Vasudevan, for the Appellant; P. Sukumaran Nayar and G. Unnikrishnan, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Hariharan Nair, J.—The Respondent who was the Defendant in the Court below agreed to sell 29 cents of land belonging to him to the Appellant herein for a total consideration of Rs. 1,50,000. On the date on which he executed Ext. A-1 agreement, viz. 2nd April 1984 he also received from the Appellant a sum of Rs. 30,000 as advance. The conditions mentioned in Ext. A-1 are that the property would be measured to convince the Plaintiff of the actual extent and also that the Respondent would clear an outstanding encumbrance in favour of a Bank before executing the sale deed. The suit was laid alleging that in spite of Ext. A-2 notice wherein demand had been made that the Respondent should turn up in the Sub Registrar's Office concerned to receive the balance sale consideration and to execute the sale deed on 5th October 1984, the Respondent did not turn up. The suit was thus laid alleging violation of the agreement on the part of the Respondent and seeking return of the advance amount of Rs. 30,000.

2. The Court below, on the strength of the evidence of P.Ws. 1 to 3, D.Ws. land 2, Exts. A-1 to A-3 and B-I to B-6 found that the Appellant has failed to prove that he had sufficient funds for payment of the balance amount and that actually the breach of the agreement was on the part of the Plaintiff himself.

Consequently the suit was dismissed.

3. The learned Counsel for the Appellant submitted that there is no acceptable evidence to conclude that the Respondent fulfilled the two conditions mentioned in Ext. A-1, viz. to convince the Plaintiff of the actual extent and. to clear the encumbrance outstanding in favour of the Bank and in the circumstances, the breach was definitely on the part of the Respondent justifying refund of the advance amount. It was also argued that the Court below erred in accepting the Respondent's contention that subsequent to Ext. A-1 the Appellant himself represented to the Respondent that he would clear off the dues to the Bank subject to the condition that the said amount would be adjusted against the balance of sale consideration due to the Respondent. It is pointed out in this regard that Section 92 of the Indian Evidence Act is a clear bar to the acceptance of the said defence contention because the oral evidence adduced in that regard before the Court below was in effect to vary the written terms embodied in Ext. A-1 and that no such oral evidence in deviation of the written terms should have been allowed.

4. On the arguments advanced in the case the points that arise for decision are:

(i) Whether the oral evidence adduced in support of the Respondent's contention that the Plaintiff had agreed to clear the liability outstanding on the property can be accepted in view of the bar in Section 92 of the Indian. Evidence Act?

(ii) Whether it was the Plaintiff or the Defendant who violated the terms of Ext. A-1?

(iii) Whether the Plaintiff is entitled to get a decree as prayed for?

5. Point No. 1 and 2.-These are considered together. The fact that Ext. A-1 agreement was executed with regard to the property of the Defendant on 2nd April 1984; that the total sale consideration fixed therein was Rs. 1,50,000 and that on the same day the Defendant received from the Plaintiff a sum of Rs. 30,000 as advance stands admitted. The fact that Ext. A-1 contains a condition that in case breach is committed by the Plaintiff in getting the sale deed executed on payment of balance of sale consideration or Rs. 1,20,000, he would forfeit the advance of Rs. 30,000 is also not in dispute. The further clause in Ext. A-1 is that in case breach is committed by the vendor-Defendant in executing the sale deed, he would be liable, besides to the relief of the specific performance also to the refund of the advance amount.

6. Ext. A-1 also contains a specific undertaking that the Defendant would get release of the mortgage that he had created in favour of the Land Mortgage Bank, Kollam charging the property mentioned in Ext. A-1, before 2nd October 1984 and also that the properties would be measured and the exact extent fixed to the satisfaction of the Plaintiff before the said date.

7. Even though the Plaintiff contends that both the said conditions have been violated by the Defendant, I find that there is acceptable evidence with regard to

the fact that measurement had been carried out and the extent fixed to the satisfaction of the Plaintiff within the time fixed in Ext. A-1. P.W. 3, who is the brother-in-law- of the Plaintiff, deposed that D.W. 1 who was subsequently examined in the case had acted as broker with regard to the transaction and that he was aware of the details of the entire transaction and also as to what caused breach of Ext. A-1. D.W. 1 deposed categorically that the property was got measured by a Surveyor as per the terms of the agreement. The cross-examination of D.W. 1 has not brought out anything to discredit his evidence in the matter. The Court below which had the benefit of seeing the performance of P.W. 3 and D.W. 1 in the Box has chosen to accept the said evidence of D.W. 1. When the question for consideration for the appellate Court is one of fact, the decision of which depends up on appreciation of oral evidence, the appellate Court has to bear in mind that it has not had the advantage which the trial Judge had in watching the witnesses before him in action and to observe their demeanours and the manner in which they deposed before Court. Even though the appellate Court is not incompetent to reverse a finding of fact entered by the trial Court, the general rule of practice, prudence and caution is that unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient reasons to displace the opinion of the trial Court the appellate Court should not interfere with the finding of the trial Judge on a question of fact. On a perusal of the oral evidence of P.W. 3 and D.W. 1 bearing in mind the said principles I am of the view that the Court below was right in its conclusion that there is no merit in the Plaintiff's contention that there was failure on the part of the Defendant to get the properties measured to his satisfaction.

8. I shall now take up the question of alleged lapse on the part of the Defendant to clear the dues to the Bank. The defence is that as against the undertaking in that regard available in Ext. A-1 the Plaintiff himself told the Defendant subsequently that he would take the sale subject to the liability on his own part to clear the dues at his convenience as that would give him more time to find the required money. That plea obviously is in variance of the written terms available in Ext. A-1. The undertaking made by the Defendant in Ext. A-1 is that he would himself clear the encumbrance in favour of the Land Mortgage Bank, Kollam and convince the Plaintiff of his clear title to the property. The Plaintiff would contend that the oral evidence adduced by the Defendant in support of his contention as above is liable to be eschewed, in view of the interdict in Section 92 of the Indian Evidence Act, which provides as follows:

92. Exclusion of evidence of oral agreement.-When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

9. At first blush it would appear that there is some merit in the Plaintiff's contention based on Section 92, but a deeper analysis of the question would convince that there is actually no bar with regard to the defence contention. Section 92 afore-mentioned, no doubt places an interdict on the .admissibility of parole evidence in variance of or contradicting the terms of a written contract or document. But, unlike Section 91, Section 92 deals only with those matters which the law requires to be reduced to the form of a document, and which are contracts, grants or other dispositions of property. When there is no law requiring a written document, the section has no application. This will be clear from a joint reading of Section 92 along with Section 91 of the Indian Evidence Act as also proviso-No. 4 appearing u/s 92 which reads as follows:

Proviso (4)-The existence of any distinct subsequent oral a agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

10. The proof of a distinct subsequent oral agree mint to modify the .contract, grant or disposition of property is prohibited under proviso (4) only in cases where the contract, grant or disposition is required by law to b; in writing or has been registered according to the law in force for the time being as to the registration of contracts. The said proviso makes it clear that in other cases, existence of a distinct subsequent oral agreement to rescind or modify the contract can very well be proved.

11. The question whether as against the terms in an agreement to sell to the effect that a particular amount was paid as advance, it was open to the vendor to lead oral evidence to the effect that no consideration was actually received arose for decision in Mathew v. Lekshmanan 1989 (2) KLT S.N. 66 Case No. 79. That was a case where the agreement was made for no consideration except natural love and affection. The consideration for the contract was hence not a term of contract. It was therefore found that it is open to the vendor to lead oral evidence to the effect that no consideration or only part thereof was actually received, notwithstanding recitals in the contract to the contrary. Section 92 of the Evidence Act was held to be no bar to let in oral evidence in support of the specific plea of the Defendant, that the advance, recited in the document was actually not paid.

12. As far as the present case is concerned, the contract in question is an "agreement to sell" which is not compulsorily registrable. It is not even required by any law to be in writing. An agreement to sell immovable -property can very well be oral as well. Under these circumstances, the proof of a distinct subsequent oral agreement to modify the terms in the agreement is not at all prohibited u/s 92 of the Indian Evidence Act.

13. D.W. 2 deposed before Court that subsequent to the execution of Ext. A-1

the Plaintiff agreed to purchase the property subject to the liability to the Land Mortgage Bank. The cross-examination of witness could not demolish the said version given in chief examination. D.W. 2 has corroborated this version. The Plaintiff also failed to establish that he was having sufficient funds to pay the entire sale consideration. In the circumstances, the Court below was right in placing reliance on the defence evidence as above to conclude that there was a subsequent arrangement between the parties where-under the Plaintiff had agreed to take the property subject to the encumbrance in favour of the Land Mortgage Bank on condition that the balance of sale- consideration payable to the Defendant would be adjusted suitably. The Court below has also recorded the fact that at the time of argument the defence counsel submitted that the Defendant was ready even at that time to execute the sale deed on the said conditions if the Plaintiff was ready to pay the balance amount. The Plaintiff was not prepared to take the said offer on the ground that he had already purchased some other property. In the circumstances, it has to be found that the Defendant was willing to perform his part of the agreement and that the breach of the agreement was actually on the part of the Plaintiff.

14. The Plaintiff had issued notice to the Defendant requiring registration of the sale deed as per Ext. A-1. What is mentioned in Ext. A-2" notice dated 1st October 1984 is that the father of the Plaintiff would attend the Sub Registrar's office on 5th October 1984 with balance of sale consideration and that he would wait there from 8 a.m. to 5 p.m. However, P.W. 2 who is the father deposed before Court that he left the Sub Registry Office by 11"30a.m. on that day. On the other hand, Ext. B-1 shows that the Defendant had attended the Sub Registry Office on the said day. Ext. B-2 notice also had been issued by the Defendant to the Plaintiff requiring presence in the Sub Registry either on 1st October 1984 or on 5th October 1984. Ext. B-3 shows that the Defendant actually was present in the Sub Registry even on 5th October 1984. All these show that the Defendant was willing to perform his part of the agreement and that the recalcitrance was on the part of the Plaintiff.

15. Point No. 3.-In view of the findings as above, the Plaintiff has to be found disentitled to get back the advance amount, the reason being that the parties had specifically mentioned in the agreement that in case the default was on the part of the purchaser, the Defendant would be justified in retaining the advance amount. While the total consideration is Rs. 1,50,000, the amount, which could be retained as above is only 1/5th thereof viz. Rs. 30,000. The; amount is reasonable in the nature of the transaction. I, therefore, agree with the finding of the Court below that the Plaintiff is disentitled to get back the advance amount as claimed in the suit.

The appeal, in the circumstances, is found to be without merit and it is, dismissed.

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