

(2010) 02 RAJ CK 0051
In the Rajasthan High Court

Nabi Khan (since deceased) through LR.s. and Others	APPELLANT
Vs	
Roojdar and Others	RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Contract Act, 1872 — Section 215
Penal Code, 1860 (IPC) — Section 420

Citation : AIR 2010 Raj 128 : (2010) 3 CivCC 380 : (2010) 3 RLW 2072

Hon'ble Judges : Dalip Singh, J

Bench : Single Bench

Judgement

Dalip Singh, J.—This is a first appeal filed by the plaintiff-appellant whose suit for specific performance of the agreement dated 17.02.1986 (Exhibit-2) has been dismissed by the learned trial court but while dismissing the suit, the learned trial court has passed an order directing the plaintiff-appellant herein to handover the possession of the land in dispute to the legal representatives of the deceased defendant Chand Mal within a month and not to interfere in the possession and cultivation of the said land by the defendant-respondent. The operative portion of the decree dated 28.03.1992 passed by the learned trial court, A.D.J., Kishangarh Bas, District Alwar reads as follows:

vr% nkok oknhx.k f[kykQ izfroknhx.k e; [kpkZ [kkfjt fd;k tkrk gS ,oa funsZ"k fn;k tkrk gS fd oknhx.k fookfnr Hkwfe dk dCtk izfroknhx.k pkaney ds okfjlku dks ,d ekg dh vof/k eas laHkyk ns vkSj fdlh rjg dh :dKoV o n[kyankth izfroknhx.k ds dCts o dk"r esa u djsa] fookfnr Hkwfe esa A jktLo fjdkMZ esa izfroknhx.k ds gd esa tks bUnzkt gS] mlesa fdlh rjg dh rCnhyh u dh tkosa A ipkZ fM?h rnkuqlkj vyx ls eqfrZc gksA

2. The brief facts of the case are that the present suit was filed by the plaintiffs-appellant on 01.04.1987 against the original defendant Chand Mal son of Med Khan alleging there in that the defendant had entered into an agreement to sell his share of the land (half share) to the plaintiffs who were already the owners of the undivided half share of the land in dispute which the defendant Chand Mal

had agreed to sell by means of agreement to sell dated 17.02.1986 entered into on his behalf by Khurshid son of Nabi Khan, the general power of attorney holder of the defendant which was registered on 28.05.1984 with the Sub-Registrar. It was agreed that the defendant would sell his undivided share of the land in dispute to the plaintiffs for an amount of Rs. 1,34,000/- @ Rs. 6,000/- per bigha. It was also alleged that an amount of Rs. 1,25,000/- had been paid by the plaintiffs to the power of attorney holder Khurshid who in turn paid the said amount to Chand Mal, deceased defendant and only an amount of Rs. 9,400/- remained due which was to be paid at the time of registration of the sale-deed. It was further averred that the plaintiff approached the defendant several times for getting the sale-deed executed and the defendant and power of attorney holder both collusively avoided to get the sale-deed executed in favour of the plaintiff and, therefore, when the defendant refused to get the sale-deed executed, the plaintiff on 23.05.1987 sent a registered notice to the defendant in this behalf which the defendant despite having received the same did not reply nor did he execute the sale-deed and hence, the suit.

3. The defendant filed the written statement on 14.09.1987 and interalia submitted that while it was true that the defendant had appointed Khurshid as power of attorney holder but that was only with a view to carry out the necessary proceedings with regard to the partition of the land and for attending the various courts and offices in that behalf. It was stated that Khurshid was the son of the plaintiff himself and he, taking advantage of the

ignorance of the defendant Chand Mal put the endorsement in the power of attorney for the purpose of selling the land as well without the knowledge of the defendant. It was alleged that the document (agreement to sell) was also fabricated and had never been executed with the consent of the defendant nor had the defendant received any such amount of Rs. 1,25,000/-, as alleged by the plaintiff.

4. The learned trial court on the basis of the pleadings framed the following issues:

1- D;k izfroknh pkaney us [kqj"kh n ds i{k esa tks eq[R;kj ukek vke fy[kok;k Fkk og dsoy "kkfey [kkrs dks vyx vyx djus dh uh;r ls vnkyrh dk;Z ds fy;s fu;r fd;k Fkk ijUrj [kqj"kh n us pkaney dh o`)koLFkk vui< ,oa xzkeh.k gksus rFkk utnhdh fj"rs dk voS/k ykHk izkir djus dh uh;r ls vius i{k esa gLrkUrj.k ds vf/kdkj Hkh ntZ djf fy;s tks /kks[ks ls o diViw.kZ rjhds ls ntZ djf;s\\

2- D;k eq[R;kj vke us lkSnk 134000@& :- esa izfroknh dh lgef r ls ugha fd;k Fkk 125000@& :- izfroknh pkaney us izkIr ugha fd;s\\

3- D;k oknhx.k viuk ikVZ iwjk djus ds fy, ges"kk rS;kj Fks o gS\\

4- D;k izfroknh us vkjkt h fooknxzLr dks lkSnk ekg tuo jh lu~ 86 esa 350000@& :- esa gqLSu [kkWa iq= lwjtey eso fuoklh eqMSrk ls djds 10000@& :- ysdj jlhn ml ds i{k esa fy[knh vkSj bldh lwpu k Hkh eq[R;kjvke dks ns nh rFkk mlls vU; fdlh

cspku dk lkSnku djus ds fy;s Hkh funsZ"k ns fn;k Fkk\\

5- D;k izfroknh fo"ks"k gtkZ 5000@& :- ikus dk vf/kdkjh gS\\

6- vuqrks"k A

5. It may be stated here that in the written statement, the defendant never filed any counter claim or made any prayer with regard to the return of possession or for any permanent injunction restraining the plaintiffs after return of possession from interfering in the possession of the defendants.

6. The plaintiffs examined as many as ten witnesses including the stamp vendor PW-1 Mahendra Kumar; PW-2 Khurshid, the power of attorney holder, who executed the agreement dated 17.02.1986 in favour of the plaintiffs on behalf of the defendant Chand Mai; PW-3 Suraj Mal, who was one of the witnesses to the agreement; PW-4 Aasin, who is also one of the witnesses to the execution of the power of attorney by the defendant Chand Mal in favour of Khurshid; PW-5 Ramesh Chand, the stamp vendor; PW-6 Ishaq; PW-7 Dilavar; PVV-8 Ghyan Chand; PW-9 Ramavatar; and PVV-10 Nabi Khan.

7. During the pendency of the suit, the original defendant Chand Mal died. From the side of the defendant DW-1 Jooharu; DW-2 Noor Mohammad; and DW-3 Deen Mohammad were examined.

8. The learned trial court decided issues No. 1 and 2, quoted above, together and came to the conclusion that the power of attorney executed by the defendant Chand Mal in favour of Khurshid was tainted with fraud taking advantage of his old age and ignorance of the defendant Chand Mal and move over on account of the fact that Khurshid was the son of the plaintiff and his antecedents as per the police record were also not very good. The agreement, therefore, executed by the power of attorney holder Khurshid in favour of the plaintiff, father of Khurshid, was tainted with fraud and it was also held that the payment of part consideration of Rs. 1,25,000/- by the plaintiff is also not proved.

9. Learned Counsel for the appellant assailing the above findings contended that there was ample proof on record to suggest that the agreement dated 17.02.1986 (Exhibit-2) was executed by Khurshid for and on behalf of the defendant Chand Mal acting as his power of attorney holder. The parties i.e., the plaintiff Nabi Khan and the defendant Chand Mal were brothers and co-sharers of the land with each of them having half share. The case of the defendant is that the power of attorney was given by the deceased defendant Chand Mal in favour of Khurshid only with a view to facilitate the partition of the land and get the necessary entries made in the revenue records and for the appearance on behalf of the defendant Chand Mal in the revenue courts for the aforesaid purpose as the defendant Chand Mal was the resident of Moodeta in the State of Haryana and looking to his age of 75 years it was not possible for him to attend the courts and offices for the aforesaid purpose. He, therefore, appointed Khurshid (his brother Nabi Khan, plaintiffs son) as his power of attorney holder for effecting

the aforesaid partition. It is not in dispute that the plaintiff and the deceased defendant Chand Mal were the co-sharers in the land in dispute. It is also not in dispute that so soon as the deceased defendant Chand Mal came to know about the fact that Khurshid had entered into the agreement for sale collusively and fraudulently in favour of the plaintiff i.e., father of Khurshid, the deceased defendant Chand Mal immediately by a registered document canceled the power of attorney on 14.01.1987.

10. Learned Counsel appearing for the defendant-respondents drew the attention of the court to the fact that Khurshid, the alleged power of attorney holder and son of the plaintiff who executed the agreement to sell in favour of his father-the plaintiff, has virtually created an interest in his own favour without having obtained the expressed consent of the principal i.e. the defendant Chand Mal. Learned Counsel further contended that in the instant case the price of the land was ascertained as Rs. 6,000/- per bigha in the agreement whereas it has come in the evidence that the land in dispute at the relevant time could fetch a price of Rs. 20,000/- per bigha. On the basis of the above, it is contended that the dealings made by the power of attorney holder Khurshid, son of the plaintiff, on behalf of the defendant Chand Mal, the principal, were totally disadvantageous to the defendant, the principal. This submission has been made assuming without admitting in the alternative that the execution of the agreement by Khurshid in favour of the plaintiff Nabi Khan stands proved. Attention of the court was also drawn to the statement of PW-10 Nabi Khan himself who has admitted that the agreement was entered into for the sale of the land for Khurshid in his favour at the relevant time for Rs. 6,000/-. The relevant portion of the statement reads as follows:

tehu dk lKSnk [qk"khZn us N% gtkj :i;s izfr ch?kk ds fglkc ls gels fd;kA

11. In his cross examination the witness admitted as follows:

tehu dk Hkko vktdy gekjs xkao esa 50]000@& :- ch?ks dk gSA

12. The aforesaid statement was recorded on 29.01.1992 i.e. about six years after the agreement (Exhibit-2) was entered into. On the basis of the above statement, it was contended that the value of the land determined in the agreement (Exhibit-2) by Khurshid, the power of attorney holder, in favour of the plaintiff was disadvantageous and, therefore, the alleged act of power of attorney holder in entering into the agreement (Exhibit-2) for the sale of the land belonging to the defendant Chand Mal in favour of the plaintiff is hit by the provisions contained in Section 215 of the Indian Contract Act, 1872 and, therefore, the defendant having repudiated the transaction on coming to know of the same, the plaintiff cannot seek specific performance of the such agreement.

13. I have given my thoughtful consideration to the rival submissions and I have perused the record. In the present case it is not in dispute that as per the plaintiff Nabi Khan, an agreement for sale was entered into by Khurshid, the power of attorney holder of the defendant Chand Mal for the sale of the land in

dispute. Khurshid is the son of the plaintiff and on the basis of the power of attorney executed by the defendant Chand Mal in favour of Khurshid, the agreement to sell of the land in dispute has been executed by the Khurshid on behalf of the defendant Chand Mal. Even if the other evidence and the fact as to whether the deceased defendant Chand Mal only executed the power of attorney for the purpose of effecting the partition of the land in dispute and for representing the deceased defendant in various courts and offices for the said purpose in favour of Khurshid as the deceased defendant Chand Mal was residing in the State of Haryana at the relevant time is ignored for the time being and only the validity of the agreement and whether specific performance of the same can be asked for in the facts of the case read with Section 215 of the Contract Act, 1872, I am inclined to agree with the submissions of the learned Counsel for the defendant-respondents that the provisions of Section 215 of the Indian Contract Act, 1872 are attracted in the present case. Section 215 of the Indian Contract Act, 1872 reads as follows:

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.- If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

14. A look at the above provision together with the Illustration (a) below the Section 215 of the Indian Contract Act, 1872 which is as follows:

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C, A, "on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

15. It is clear that the said provision is attracted to the facts of the present case.

16. It is not the case of the plaintiff nor so stated by the power of attorney PW.2 Khurshid that he had apprised Chand Mal about the transaction with Nabi, the plaintiff, and obtained his consent because the power of attorney holder PW-2 Khurshid was none other than the son of the plaintiff Nabi Khan. In the transaction the interest of Khurshid, the agent of the defendant, was inherent at the land was agreed to be sold to his father.

17. Applying the facts of the present case, it is clear from the evidence of the plaintiff himself that at the relevant time of the execution of the alleged agreement for sale on 17.02.1986 the price of land was much higher than Rs. 6,000/- per bigha which was agreed to by the power of attorney holder Khurshid, the son of the plaintiff while entering into the agreement for sale with the plaintiff. Thus, the agreement having been made at a price much below what was

the price of land at the relevant time, as admitted by the plaintiff of Rs. 50,000/- in 1992 the price could safely have been Rs. 20,000/- as determined by the learned trial court in 1986. The said agreement was definitely disadvantageous to the principal in the facts and circumstances of the case. On account of the above, the principal (deceased defendant Chand Mai) was entitled to repudiate the contract.

18. Looking at it from another angle, the son Khurshid, the power of attorney holder had entered into an agreement with the plaintiff Nabi Khan who is none other than the father of the power of attorney holder Khurshid it can safely be inferred that the agreement had been entered into by the agent creating an interest in his own favour. There is no evidence in the present case to suggest that Khurshid while doing so had taken the consent of the deceased defendant Chand Mal. Thus, both the conditions which are there u/s 215 of the Indian Contract Act, 1872 are attracted to the facts and circumstances of the present case. In that view of the matter, the plaintiff is not entitled to have the specific performance of the agreement (Exhibit-2).

19. Apart from the above, I am in agreement with the findings given by the learned trial court on re-appreciation of the evidence itself and I find that the plaintiff has failed to prove the passing of the consideration of Rs. 1,25,000/-. The averments to this effect are that the said amount was received by Khurshid but there is no definite evidence to suggest that Khurshid made payment after receiving the amount of Rs. 1,25,000/- to the deceased defendant Chand Mal. There is no receipt executed by either Khurshid or by Chand Mal, the defendant of having received the said amount. In the facts and circumstances, quoted above, I find that the learned trial court has not committed any error while deciding the issues No. 1 and 2 against the plaintiff after a thorough examination of the entire evidence and its appreciation.

20. The antecedents of Khurshid son of the plaintiff which have come on record in the evidence of PW-2 Khurshid that he was an employee of the Bilaspur Cooperative Bank and he was suspended from service, also that a case u/s 420 I.P.C. is pending against him. He has also admitted that he is facing proceedings before the Joint Registrar of Cooperative Societies for embezzlement. Even in the entry of the register of the Stamp Vendor there is cutting and overwriting in Exhibit A-I where the stamp for writing the agreement was purchased by Khurshid. This has been admitted by PW-5 Ramesh Chand. The finding of the learned trial court that probably the entries have been antedated by Khurshid in collusion with PW-5 Ramesh after the register was deposited in the collectorate is probablised when the totality of the circumstances are seen.

21. There is also contradiction in the plaintiffs evidence about the execution of the agreement and the receipt of payment. PW-3 Surajmal is the witness to the execution of the agreement and he has deposed that Chand Mal, the defendant had put his thumb impression on the same. In fact the agreement (Exhibit-2) does not bear the thumb impression of Chand Mal. Moreover, if Chand Mal was

present, there was no need for Khurshid, the power of attorney holder, to execute the agreement on behalf of Chand Mal. Thus, in the facts and circumstances, the findings arrived at by the learned trial court which are based upon the appreciation of evidence, in my opinion, do not call for any interference.

22. Learned Counsel for the appellant contended that in the instant case in the absence of any counter claim or prayer made by the defendant with regard to the return of possession or permanent injunction restraining the plaintiff from interfering with the possession of the defendant, the learned trial court could not have passed a decree to that effect in favour of the defendant respondent.

23. The aforesaid contention of the learned Counsel for the appellant was not opposed by the learned Counsel for the respondent also.

24. In the present case also, since the defendants had failed to plead and make any prayer in the written statement to the above effect nor having paid any court fee to that effect, the learned trial court was not justified in passing a decree in the manner it has been passed by the impugned judgment, as has been quoted above, for return of possession and consequent permanent injunction in favour of the defendant. The aforesaid submission of the learned Counsel for the plaintiff-appellant, therefore, deserves to be accepted.

25. In the facts and circumstances, therefore, while maintaining the judgment and its findings on issues No. 1 and 2 and dismissing the suit filed by the plaintiff, the directions contained in the operative portion in favour of the defendant to the effect that the plaintiff is directed to return the possession of the disputed land to the defendant-respondents within one month and not to interfere in the peaceful possession and enjoyment of the land in dispute and further that necessary entries in the revenue record in favour of the defendant be made is accordingly set aside.

26. Subject to the above, this appeal is partially allowed, as indicated above.

27. There shall be no order as to costs.