

(2010) 02 MP CK 0076
In the Madhya Pradesh High Court
Case No : S.A. No. 169 of 2000

Parwat (dead) through L.Rs. Smt. Kesar Bai and others	APPELLANT
Vs	
Pyarelal and others	RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 33
Penal Code, 1860 (IPC) — Section 52
Specific Relief Act, 1963 — Section 19, 19(a), 19(b), 19(l)(b), 27
Transfer of Property Act, 1882 — Section 3

Citation : (2010) ILR (MP) 1146 : (2010) 2 MPLJ 377

Hon'ble Judges : Abhay M. Naik, J

Bench : Single Bench

Advocate : Deepak Khot, for the Appellant; J.P. Mishra with R. Bohre, for the Respondent

Judgement

Abhay M. Naik, J.

This is plaintiffs appeal against judgment and decree passed by the Courts below, denying thereby decree for specific performance of contract.

Short facts involved herein are that the plaintiff/appellants instituted a suit for specific performance of agreement to purchase agricultural land comprised in Survey No. 145 in area 17 bigha 9 biswa, situated at Village Kanjwaha, Tahsil Khaniyadhana, District Shivpuri with allegations that the suit land belonged to Dhansingha (defendant No. 2), who was Bhumiswami and occupant of it. He agreed to sell it to the plaintiff for a consideration of Rs. 8500/-. He received entire consideration on 7-6-1984 and delivered possession of the suit land on the same day. He further executed an agreement of sale on the same day. The suit land was inherited by defendant No. 2 from Gajua, whose name was recorded as Bhumiswami. After the death of Gajua, the suit land was inherited by defendant No. 2 but his name was not entered in the record of rights in place of Gajua, therefore, it was agreed that registered sale deed would be executed by

defendant No. 2 after getting his name mutated in the record of rights in place of Gajua. Later on, defendant No. 2 despite mutation in his favour did not execute registered sale deed in favour of plaintiff and, instead, executed, a registered sale deed in favour of defendant No. 1 (Pyarelal) on 11-12-1987 despite having already contracted with the plaintiff, hence, the alleged sale deed dated 11-12-1987 is incompetent void and ineffective vis-a-vis plaintiffs interest in the suit land. The alleged sale deed dated 11-12-1987 is fictitious and without consideration. Plaintiff has been ready and willing to get the registered sale deed executed in his favour in accordance with the above mentioned agreement. Plaintiff issued the notice, requiring defendants No. 1 and 2 to execute the registered sale deed on 20-4-1988. They did not turn up on the said date to execute the registered sale deed in favour of plaintiff. It is further pleaded that the plaintiff onwards 7-6-1984 constructed a well on the suit land by spending Rs. 2,000/- and has been cultivating it since then. With the aforesaid allegations he sought a decree for specific performance in his favour and prayed that defendants No. 1 and 2 may be directed to execute a registered sale deed in respect of the suit land in his favour. He also prayed for perpetual injunction that they be restrained from interfering into plaintiffs possession.

Defendants No. 1 and 2 submitted a joint written statement refuting thereby the claim of plaintiff. They inter alia, stated that defendant No. 2 is not in receipt of Rs. 8500/- as consideration from the plaintiff and has not executed the alleged sale agreement dated 7-6-1984. Possession of the suit land was also not handed over to the plaintiff. Thus, the alleged agreement in favour of plaintiff was totally denied. Instead, it was stated that defendant No. 2 has sold the suit land to defendant No. 1 after receipt of consideration of Rs. 15,000/- vide registered sale deed dated 11-12-1987 and has also delivered possession to defendant No. 1. Alleged construction of well by the plaintiff on the suit land was also denied. Possession of the plaintiff on the suit land was equally denied. It was further objected that the suit of plaintiff for want of prayer for restoration of possession is bad in law. The alleged agreement dated 7-6-1984 was opposed as a forged and concocted document. Thus, dismissal of the suit of plaintiff was prayed for.

Learned trial Judge after recording the evidence held that defendant No. 2 had executed a sale agreement in favour of plaintiff on 7-6-1984 after receipt of consideration of Rs. 8500/-. However, delivery of possession at the time of execution of sale agreement was not believed. Learned trial Judge accordingly granted a decree for refund of Rs. 8500/- in favour of plaintiff vide judgment and decree dated 9-8-1991.

Aggrieved by the aforesaid, plaintiff preferred Civil Appeal No. 1-A/1992. Defendant/respondents No. 1 and 2 submitted cross-objections under Order 41, Rule 27 of CPC against granting a decree in favour of plaintiff for refund of Rs. 8500/-.

Learned lower appellate Judge dismissed Civil Appeal as well as cross-objections vide impugned judgment and decree dated 23-12-1999, hence the present

appeal, which has been heard on the following substantial questions of law along with application under Order 41, Rule 27, CPC (I.A. No. 322/09) :

Whether the Courts below were justified in refusing a decree for specific performance of the agreement Ex.P/1 in the facts and circumstances of the case ?

Whether a decree for refund of consideration only can be awarded without awarding any damages and compensation ?

Shri Deepak Khot, learned counsel for the appellants and Shri J. P. Mishra, Advocate with Shri R. Bohre, Advocate for respondent No. 1 made their respective submissions on merits as well as on the application under Order 41, Rule 27, Civil Procedure Code.

Shri Deepak Khot learned counsel contended that the documents accompanying the application under Order 41, Rule 27, CPC are certified copies issued by the Court of Naib Tehsildar, Khaniyadhana, District Shivpuri and are liable to be taken into consideration while appreciating the plaintiffs case with regard to delivery of possession at the time of alleged sale agreement dated 7-6-1984. According to the respondent's counsel documents are not necessary for deciding the controversy involved in the suit and the application for additional evidence is, therefore, liable to be dismissed.

Suit for specific performance was instituted on 13-5-1998 with specific allegation that the sale agreement was executed by defendant No. 2 in favour of plaintiff on 7-6-1984. Simultaneously, possession of the suit land was handed over by defendant No. 2 to the plaintiff. Proposed documents reveal that the plaintiff submitted an application in the month of July, 2002 to record his possession. The application was dismissed on 24-7-2002 by the Court of Naib Tehsildar on account of pendency of civil litigation. Report of revenue inspector dated 9-5-2002 is without issuing notice to the defendants/respondents. Likewise Panchnama was also prepared in the absence of respondents No. 1 and 2. This being so, the proposed documents cannot be taken into consideration as additional evidence. Likewise, statement of Chirnma and Devlal are also not liable to be considered because they were not subjected to cross-examination by respondents No. 1 and 2. Accordingly, application under Order 41, Rule 27, CPC (I.A. No. 322/09) is hereby dismissed.

On merits, it has been contended by Shri Deepak Khot, learned counsel for the appellants that execution of agreement dated 7-6-1984 is duly proved and has been so found by the Courts below. This being so, the suit for specific performance ought to have been decreed in plaintiffs favour and defendant/respondents No. 1 and 2 ought to have been directed to execute the registered sale deed in his favour. It is further contended that defendant No. 1 despite being subsequent purchaser has not taken the plea of bona fide purchaser without notice of earlier agreement. This apart, the attending facts and circumstances clearly reveal that he was aware of the sale agreement in favour of plaintiff and is bound by it. Moreover, defendant No. 1 did not choose to appear in the witness

box and an adverse inference ought to have been drawn against him about knowledge of prior agreement. This being so, impugned judgment and decree denying thereby decree for specific performance is not sustainable in law. The suit ought to have been decreed in plaintiffs favour in toto.

On behalf of respondents No. 1 and 2, it has been contended that the Courts below have concurrently found that the defendant No. 1 is bona fide purchaser without notice of prior agreement. These findings do not warrant interference for want of infirmity.

Considered the submissions and perused the record.

Proven facts of the case are that the defendant No. 2 has executed an agreement of sale in respect of the suit land in favour of plaintiff on 7-6-1984 vide Ex-P/1 for consideration of Rs. 8500/-. It is clearly recited in Ex-P/1 that the entire consideration of Rs. 8500/- was received by defendant No. 2 and possession of the suit land was delivered to plaintiff on the same day. Ex-P/1 contained stipulation that the suit land was entered in the revenue papers in the name of deceased Gajua and defendant No. 2 would execute the registered sale deed in favour of plaintiff after getting his name mutated in place of Gajua. It is equally found proved that defendant No. 2 has executed the registered sale deed dated 11-12-1987 (Ex-D/1) in favour of defendant No. 1 in respect of the suit land which is subsequent in point of time in comparison to Ex-P/1. Thus, plaintiffs case would be governed by section 19(b) of the Specific Relief Act, 1963 which reads as under :

Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

In view of the aforesaid, it was obligatory on part of the respondent No. 2 to establish that he was transferee for value who had no notice of the earlier contract and has paid his money in good faith. If the evidence on record establishes that the subsequent purchaser was bona fide purchaser for value without notice of earlier agreement with the plaintiff, latter would not be entitled for the relief of specific performance against subsequent purchaser. Reference to the settled proposition of law may be found in so many cases, one successful reference may be made to the decision of Hon"ble Supreme Court in the case of Jagan Nath Vs. Jagdish Rai and Others, . Similarly, it is equally true that if the evidence shows that the subsequent purchaser had notice of prior agreement, he would be bound by the prior agreement. Reference for this purpose may be made to the decision of Supreme Court in the case of Dr. Govinddas and Another

Vs. Shrimati Shantibai and Others,

Learned counsel for the respondent No. 1 submitted that the plaintiff has nowhere averred in the plaint that defendant No. 1 purchased the suit property subsequent to the sale agreement in his favour with notice of such earlier agreement. Learned counsel relying upon a single Bench decision of this Court in the case of Harikishan Udai Singh and Another Vs. Jaswant Singh and Others, . Submitted that it ought to have been averred with specific pleadings and in absence of such pleadings evidence about knowledge of earlier agreement to the subsequent purchaser cannot be looked into. This Court is not impressed with this submission because of specific language of section 19 of Specific Relief Act, 1963.

Grant of decree for specific performance has already been held as a rule with its denial an exception by the Apex Court in the case of Prakash Chandra Vs. Angadlal and Others, Clause (b) (supra) of section 19 is worded in a manner that a subsequent transferee has to establish that he is bona fide purchaser for value without notice of the earlier agreement. This makes it clear that in order to avoid a decree for specific performance, subsequent purchaser is bound to establish the aforesaid facts. Long back Privy Council in the case of AIR 1946 97 (Privy Council) has already observed :

Their Lordships have found it unnecessary to examine the evidence which was called on behalf of the plaintiff to show that these defendants in fact had notice of the earlier contract, since a decision of this Board is clear authority for the proposition that the burden of proving good faith and lack of notice lay upon the defendants.

Both the Courts have concurrently found that defendant No. 2 has executed an agreement of sale on 7-6-1984 in-favour of plaintiff after having received the entire consideration to the tune of Rs. 8500/-. Subsequently, he executed a registered sale deed in respect of the suit land in favour of defendant No. 1 on 11-12-1987 for a consideration of Rs. 15,000/- which is found to be mala fide on the part of defendant No. 2 by the trial Court while deciding issue No. 10. This finding is not found disturbed by the learned lower appellate Judge.

Case of the plaintiff is that while executing the sale agreement (Ex-P/1) on 7-6-1984, possession of the suit land was delivered to the plaintiff who has been continuing in its cultivating possession since then. Contrary to this, defendant No. 2 stated in written statement as well as in his statement on oath that possession over the suit land was delivered to defendant- No. 1 on 11-12-1987 while executing the registered sale deed. Defendant No. 1 has not appeared in the witness box to assert his possession. Plaintiff and his three witnesses have appeared in the witnesses box to prove plaintiffs possession. Defendant No. 2 has stated in paragraph 4 of his statement that Pyarelal (defendant No. 1) had obtained the money from Chandrabhan Singh and had paid to him. Chandrabhan Singh while appearing as DW-2 has stated, that police report was lodged against

him by the plaintiff somewhere in the year 1985-86. Thus, it seems more probable that plaintiff was in possession of the suit land pursuant to the sale agreement dated 7-6-1984 and effort was made to snatch away possession from him. Since there was a dispute about possession, it was obligatory on the part of defendant No. 1 to make enquiry about nature of dispute with regard to possession and the claim, with respect thereto.

In order to establish bona fide subsequent purchase for value without notice of earlier agreement, a subsequent purchaser shall have to establish that he made the requisite enquiry, If the vendor is not in physical possession of the property, the intending purchaser is bound to make enquiry from the occupant in the present case, there was a dispute about possession with the plaintiff, as admitted by Chandrabhan Singh (DW-2). If defendant No. 1 had made an enquiry from occupant i.e. Parwat, present plaintiff, he would have come to know about earlier agreement dated 7-6-1984. It is worthwhile to reproduce the relevant observations from the decision of the Apex Court in the case of R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, (equivalent to AIR 2001 SC 1658) :-

Section 19 of the Specific Relief Act, 1963, to the extent it's relevance, reads :

Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c)-(e)

As may be seen from section 19 (a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the earlier contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasizes due care and attention in relation to the good faith. In the General Clauses Act emphasis is laid on honesty.

Notice is defined in section 3 of the Transfer of Property Act it may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or

gross negligence, he would have known it. Explanation II of said section 3 reads :

Explanation II:- Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Finally the Apex Court has summed up in paragraph 19 as under:

In view of what is stated above, it is clear that the defendants 2 to 5 were not bona fide purchasers for value without prior notice of the original contract and that they were required to make inquiry as to the nature of possession or title or further interest, if any, of the plaintiff over the suit property at the time when they entered into sale transaction notwithstanding they were already aware that the plaintiff was in possession of the property as the tenant. What is material is the inquiry at the time when subsequent sale transaction was entered into.

In the case of Jagan Nath Vs. Jagdish Rai and Others, The Apex Court while dealing with the matter of subsequent purchaser has observed:

It is well settled that the initial burden to show that the subsequent purchaser of suit property covered by earlier suit agreement was a bona fide purchaser for value without notice of the suit agreement squarely rests on the shoulders of such subsequent transferee. In the case of Bhup Narain Singh vs. Gokul Chand Mahton the Privy Council relying upon earlier section 27 of the Specific Relief Act of 1877 which is in pari materia with section 19(I)(b) of the present Act, made the following pertinent observations at p.70 of the Report in this connection : Section 27 lays down a general rule that the original contract may be specially enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and therefore it is for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which prima facie, he had no right to get:

However, it has to be kept in view that once evidence is led by both the sides the question of initial onus of proof pales into insignificance and the Court will have to decide the question in controversy in the light of the evidence on record.

It is not at all impossible but little improbable to prove by direct evidence that a subsequent purchaser had notice of earlier agreement. This is to be gathered from the attending facts and circumstances. Subsequent purchaser is also required to have acted with bona fide. Absence of bona fide may also be gathered from absence of enquiry as well as absence of publication of public notice for intended/proposed purchase. Admittedly, defendant No. 1 has not issued any public notice expressing his intention to purchase the suit land from defendant No. 2. Had he issued such public notice, plaintiff would have definitely objected to it in writing. He has not appeared in witness box to prove that he has made any enquiry with respect to the suit land on spot or otherwise.

Now coming to the case in hand, it may be seen that agreement of sale dated 7-6-1984 is found proved by both the Courts below in concurrent manner.

Accordingly, defendant No. 2 has executed an agreement to sell in respect of suit land in favour of plaintiff after receiving entire consideration of Rs. 8500/-. It has already been found by the trial Court that defendant No. 2 executed a registered sale deed on 11-12-1987 with mala fide intention of unduly gaining more money. Defendant No. 1 being subsequent purchaser was bound to prove that he acted in good faith by purchasing the suit land from defendant No. 1 for value without notice of earlier agreement. Admittedly, he has not chosen to appear in the witness box to prove bona fide on his part. Similarly, he has not appeared in the witness box to assert his possession pursuant to the registered sale deed dated 11-12-1987. According to law laid down by the Apex Court at times and again it was obligatory on his part to establish bona fide on his part which could have been proved by establishing that he had made requisite enquiry. Existence of dispute on account of possession on the suit land is already established as admitted by DW-2. This dispute occurred with Parwat, the plaintiff who was put into possession of the suit land as per Ex-P/1. Delivery of possession has already been recited in Ex-P/1 which has been found proved by the Courts below in concurrent manner. Defendant No. 1 who is stated as per written statement to have obtained possession pursuant to the registered sale deed dated 11-12-1987 has not appeared in the witness box to establish his possession despite being defendant. Thus, adverse inference is liable to be drawn against him about possession as well as about absence of knowledge of earlier agreement in view of law laid down by the Apex Court in the case of Vidhyadhar Vs. Manikrao and Another, wherein it is observed :

Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.

Learned Courts below have not focused on the aforesaid law laid down by the Apex Court in the matter of burden to be discharged by subsequent purchaser, in the present case, defendant No. 1 being subsequent purchaser was bound to prove that the purchase made by him falls in the exception envisaged under clause (b) of section 19 of Specific Relief Act, 1963. He has not even dared to appear in the witness box. This being so, he is not found to be bona fide purchaser without notice of the prior agreement and is not found to have paid money in good faith. Learned Courts below ought to have granted decree for specific performance against the defendant No. 2 as well as defendant No. 1. Accordingly substantial question of law No. 1 is answered in favour of appellant.

In view of answer to substantial question of law No. 1, substantial question of law No. 2 need not be answered.

In the result, the appeal is hereby allowed. Suit for specific performance instituted by the plaintiff is hereby decreed in his favour against defendant No. 1 as well as defendant No. 2. Both these defendants are directed to execute registered sale deed in favour of plaintiff within a period of three months at the cost and expenses of plaintiff. Decree be modified accordingly, impugned

judgment and decree are hereby set aside.

In exercise of power under Order 41, Rule 33, Civil Procedure Code, this Court further directs defendant No. 2 to refund the amount of consideration of Rs. 15,000/- to the defendant No. 1 within the aforesaid period, in case of failure, defendant No. 1 shall be entitled to recover this amount from defendant No. 2 with interest @ 6% p.a. after expiry of three months.

Defendants No. 1 and 2 shall bear the costs of litigation of the plaintiff throughout up to the stage of this appeal.