
(1962) 08 MP CK 0018

In the Madhya Pradesh High Court

Case No : Second Appeal No. 132 of 1960

Prabhu Ramchandra Balai and Others

APPELLANT

Vs

Sukha Nanda and Others

RESPONDENT

Date of Decision : 20-08-1962

Acts Referred:

Registration Act, 1908 — Section 49

Citation : AIR 1963 MP 292

Hon'ble Judges : V.R. Newaskar, J

Bench : Single Bench

Advocate : S.P. Jagadhri, for the Appellant; G.M. Chafekar, for the Respondent

Judgement

V.R. Newaskar, J.—This second appeal arises out of a suit for specific performance of contract executed by defendant No. 1 Sukkha S/o. Nanda on Asad Badi 2 Samvat year 2011 (18-6-1954) in favour of the plaintiffs agreeing to sell his house for a consideration of Rs. 700/-. The case of the plaintiffs is that at the time of executing the agreement the defendant No. 1 received the entire consideration of Rs. 700/- and delivered possession to the plaintiffs and it was agreed that the vendor should secure registration of the sale-deed within a month; that however later on the defendant No. 1 changed his mind and dishonestly sold away the house to defendants Nos. 2 and 3 Tarachand and Gordhan for an apparent consideration of Rs. 800/- and executed in their favour a registered sale-deed; that at the time of this latter sale-transaction the defendants 2 and 3 were fully aware of the agreement made by Sukkha in plaintiffs' favour and that he had delivered possession of the suit house to the plaintiffs in part-performance of the same; that the defendants Nos. 2 and 3 had not actually paid any part of the consideration to defendant No. 1 but had kept Rs. 500/- with themselves in deposit for payment to the plaintiffs and had credited Rs. 150/- towards the Khata of defendant No. 1 with them which too was bogus. The plaintiffs on these allegations claimed specific performance of the agreement of sale in their favour and they sought decree against the defendants.

2. The defendant No. 1 admitted the execution of the agreement and to have received Rs. 500/-. According to him the plaintiffs have been living in the suit house as his tenant since about a year and three quarters before and that he had received from the plaintiffs rent upto 7-8-1955. He however in his later part of the written statement denied the agreement referred to in para 4 of the plaint regarding his having agreed to secure registration of the sale-deed within a month. According to him he had entered into the agreement of sale not in plaintiffs' favour but in favour of Saligram Bohra. He de-Died to have made any conspiracy with defendants Nos. 2 and 3. He had in fact received considerations of Rs. 800/- from defendants Nos. 2 and 3 and had executed the sale-deed in their favour and had it registered. But subsequent to this he came to know of the fraud played upon him by Saligram and the plaintiffs in securing the deed not in the name of Saligrarh with whom he had a talk about the sale but in plaintiff's name. There was thus, according to him, no genuine and enforceable agreement between him and the plaintiff.

3. As regards defendants Nos. 2 and 3, they denied knowledge about the transaction of sale in plaintiff's favour and asserted that they were bona fide purchasers for value without any notice of the plaintiffs' transaction. They also contended that the plaintiffs were in the occupation of the house as a tenant and not under the alleged transaction of sale. They asserted that they paid full consideration, Rs. 150/- having been adjusted towards their Khata with them and Rs. 650/- paid in cash. The plaintiffs, it is said, were under a duty to speak when they knew of the sale-transaction with them. They having kept silent are estopped from challenging the same. Material issues which were framed in the case were --

(1) Whether Sukkha had executed an agreement of sale in plaintiffs' favour dated 18-6-1954 after receiving Rs. 700/-?

(2) Whether the plaintiffs were in occupation of the suit house as its owners?

(3) Whether the defendants Nos. 2 and 3 had entered into a bogus transaction of sale for a consideration of Rs. 800/- in spite of their having knowledge of the sale-transaction in plaintiffs' favour ?

4. The trial Court found that Sukkha had executed the document dated 18-6-1954 after receiving Rs. 700/- and the possession of the plaintiffs was that of owner from that date. It further held that the fact of plaintiffs' possession of the suit house ought to have put the defendants Nos. 2 and 3 upon enquiry and in that circumstance they will be deemed to have notice of the plaintiffs' transaction. Reliance in this connection was placed by the learned Judge upon illustration 3 to Section 27(b) of the Specific Relief Act. Plaintiffs' suit was accordingly decreed against all the three defendants and they were directed to execute sufficient deed of sale in plaintiffs' favour and to have it registered.

5. On appeal a new point was sought to be raised before the appellate Court namely that the deed dated 18-6-1954 in plaintiffs' favour was not merely an

agreement of sale but it was a sale-deed and that consequently the same is inadmissible for want of registration. The appellate Court accepted the interpretation sought to be put on behalf of the defendant-appellants and held that it was a deed of sale and not a mere agreement to sell and consequently it was inadmissible in evidence in the absence of registration and had not the effect of affecting the immovable property namely the house in suit. It further held relying upon AIR 1956 Gau 154 Ram Kissan v. Muktinath Sarma, that a suit for specific performance of contract to sell was not competent on the basis of that document. It repelled the contention of the counsel for the plaintiffs based on the decisions reported in Vakacherla Venkatasubbamma and Another Vs. Gobbooru Subbiah, and Jhaman Mahton Vs. Amrit Mahton and Others, , that the said document was admissible in a suit for specific performance. It was mentioned by the appellate Court in its judgment that the counsel for the defendants had concentrated his argument upon the aforesaid new point raised by him and had not laid considerable stress upon the other points. As a result of his view indicated above on the new point as to the effect of non-registration of the deed dated 18-6-1954, it held the suit to be incompetent. It accordingly allowed the appeal and dismissed the plaintiffs' suit.

6. In this second appeal Mr. Jagadhri for the appellants contended that the view taken by the Court below as regards the inadmissibility of the deed dated 18-6-1954 even for supporting a claim for specific performance of the contract to sell is erroneous. The learned counsel relied upon the proviso to Section 49 of the Registration Act and the decisions of the Madras High Court in N.M.S.S. Subramanian Chettiar Vs. S.M.A.M. Arunachalam Chettiar and Others, : Manicka Goundan Vs. Elumalai Goundan and Others, , Gulab Singh Hamir Singh Rajput Vs. Tarabai Bhilala and Others, and Rajan Patro Vs. Akur Sahu and Others, .

7. On the other hand the learned counsel for the respondents Mr. Chaphekar relied upon the decisions of the Madras High Court in Komiresetti Satyanarayana Vs. Yeeranki Chinna Venkatarao and Others, , Venkadari Somappa Vs. The Official Receiver of Bellary, and AIR 1956 Gau 154.

8. In order to appreciate the controversy raised in these conflicting views it will be necessary to examine the legal position obtaining prior to the introduction of proviso to Section 49 of the Registration Act by the Transfer of Property (Amendment) Supplementary Act No. XXI of 1929 and the exact impact of the aforesaid proviso. The legal position prior to the inclusion of the proviso is well indicated in the decision of their Lordships of the Privy Council in 56 Ind App 363 : (AIR 1929 PC 269) James R. R. Skinner v. R. H. Skinner. In that case the plaintiff brought a suit for specific performance of a contract to sell an Immovable of the value of more than Rs. 100/-. The document which incorporated the terms of this transaction was construed by their Lordships to amount to a deed of sale and not a mere agreement to sell the property. On this construction placed upon the deed by them the question which they were called upon to consider was whether the document could be availed of for supporting a

suit for specific performance? Their Lordships examined this question in view of the terms of Section 49 of the Registration Act and particularly the terms "affect" and "affecting" used in the Section. After quoting the Section their Lordships observed :-

"If an instrument which comes within Section 17 as purporting to create by transfer an interest in Immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to "affect" the property and it is not to be received as evidence of any transaction "affecting" the property.

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale-deed, and it is contended for the respondent 1 that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of Immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provisions of Section 17(2)(v) which exempts from registration, and therefore frees from the restriction of Section 49, a document which does not itself create an interest in Immovable property, but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act."

9. Their Lordships thus affirmed the view expressed in some of the Indian decisions viz. Sanjib Chandra Sanyal Vs. Santosh Kumar Lahiri and Others, , Komiresetti Satyanarayana Vs. Yeeranki Chinna Venkatarao and Others, and Ramling Parvataya Samble Vs. Bhagvant Sambhuappa, . This decision was given on the 16th of July 1929. The Indian Legislature then passed the Transfer of Property (Amendment) Supplementary Act No. XXI of 1929. The proviso was added to Section 49 of the Registration Act by that Act which is in the following terms :-

"Provided that an unregistered document affecting Immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.""

Even after the introduction of this proviso the Madras High Court in a later

decision reported in Venkadari Somappa Vs. The Official Receiver of Bellary, , took the view that the proviso would only be applicable where there is separate contract found in the unregistered document purporting to effect the transfer or is otherwise proved and not to cases where there is no such contract. The underlying reasoning was that the contract to transfer, implied in every transfer, must be taken to be superseded as soon as the same is reduced to writing and took the shape of a document of transfer and in case the latter, though required by law to be registered, is not registered, the transferee cannot fall back upon the implied contract to transfer. The reasoning is that after the execution of the completed deed in writing the implied agreement to transfer gets merged into it and cannot afterwards be revived merely because a subsequent legal requirement, to make it valid and operative namely its registration, has not been fulfilled. The only remedy in such a case according to this view would be to get the document registered in accordance with the provisions of the Registration Act (vide Section 77) and within the time limit provided for therein and for any reason if this time limit is passed over the party is left without any remedy. Their Lordships Madhavan Nair and Stodart JJ. observed in this connection :

"If an instrument is executed in my favour, which is, in terms, and is intended to be, a transfer of immovable property, then, provided it is a document which is required to be registered, I must in order to give it validity get it registered by employing the procedure laid down in the Registration Act. It is not open to me to ignore the provisions of the Registration Act and, treating the instrument as a contract to transfer, which it is not, compel the transferor to execute a formal transfer which he has already done".

Their Lordships quoted with approval the observation of Coutts-Trotter C. J. In an earlier Madras decision in Komiresetti Satyanarayana Vs. Yeeranki Chinna Venkatarao and Others, to the following effect:

"I should have thought it very vicious method of construction to say that a document which purports to be one thing is to be allowed to be treated as a valid document of a different order altogether".

While considering the effect of the proviso their Lordships observed after quoting the proviso:

"But that is not the same thing as saying that the unregistered instrument is itself the contract".

10. The correctness of this view was doubted by Abdur Rahman J., in Venkata Seshayya v. District Board, East Godavari AIR 1939 Mad 391. The learned Judge observed at page 392:

"The learned counsel for the appellant has urged that the words "document affecting immovable property" were meant to cover the documents containing agreements such as a contract to lease or a contract to sell and were not intended to cover documents which conveyed or purported to convey title to

immovable properties. I do not agree with this contention. There is nothing in the language of the Proviso which would justify one to place such a narrow construction. The words are unambiguous and there is no reason why full effect should not be given to them. On the other hand, this interpretation would defeat the very purpose for which the amendment was effected. If the matter were res integra, I would have no hesitation in construing the language of the Proviso in a manner which would make all the documents affecting immovable property admissible as evidence of contracts in suits for specific performance, particularly when we find that documents conveying title to immovable property do not ordinarily come into existence without prior contracts".

11. It was pointed out by his Lordship that on the view by the Division Bench in Venkadari Somappa Vs. The Official Receiver of Bellary, the position of a person who happens to have a duly executed deed of sale or mortgage in his favour is worse than that of the person who holds merely written contract to sell or mortgage in his possession.

12. The controversy was finally resolved by the decision of the Full Bench of the same High Court reported in N.M.S.S. Subramanian Chettiar Vs. S.M.A.M. Arunachalam Chettiar and Others, . Their Lordships did not accept the view expressed in Venkadari Somappa Vs. The Official Receiver of Bellary, , as the correct one. Leach C. J., who gave the leading judgment in the case observed at page 762 of the report :

"The decisions of this Court which preceded the introduction of the proviso to Section 49, no longer have application, and we do not agree that an unregistered instrument affecting immovable property is not sufficient to support a suit for specific performance. In such a suit, the production of the document and its proof will be sufficient to support the plaintiff's case if it embodies the whole agreement between the parties and there are no other factors to be taken into consideration. The proviso in express terms says that it may be received as evidence of a contract in a suit for specific performance."

13. In spite of the view thus expressed by the Full Bench it was held in Kakarla Venkatasubbayya and Another Vs. Sravanam Venkatarathnamma, by Govinda Menon and Basheer Ahmed Sayeed JJ., that the earlier view in Venkadari Somappa Vs. The Official Receiver of Bellary, , was not affected by the later Full Bench decision which according to the learned Judge was distinguishable on facts. The controversy thus raging in Madras was not at an end by this decision and the decision in Manicka Goundan Vs. Elumalai Goundan and Others, Rajamannar C. J. and Pancha-pakesa Ayyar J., again reviewed the authorities of that Court and they held :

"On a consideration of all the authorities it appears to us that there is no need to subscribe to either of two extreme propositions. One is that a party to an agreement has no right whatever in any circumstances to seek specific performance of the agreement once a document has been executed in

pursuance of the agreement but the document is not registered. The other is that party to an agreement is entitled to compel the other party who has duly executed a document in pursuance of the agreement to go on executing fresh documents by resorting to a suit or suits for specific performance so long as no document has been registered.

The decisions in *Nynakka Rowthen v. Vavana Mahomed Naina Rowthen* 5 Mad HCR 123 and *Chinna Krishna Reddi v. Doraisami Reddi* ILR Mad 19 clearly demonstrate the untenability of the first proposition. The acceptance of the second proposition would mean that a party can take advantage of his own negligence or laches. In our opinion, the correct view to take, which also seems to us to be just and equitable, is this.

Taking the case of an agreement to sell, it cannot be said that the contract has been fully performed till there is a properly executed document which is also registered. It cannot be said that the moment a document is executed the contract ceases to be in force. The purchaser is always entitled to insist upon his right to have a proper registered instrument. Every vendor is bound to do all that is necessary to perfect the title of the purchaser, which includes the execution and registration of a proper conveyance.

It is true that the purchaser can resort to proceedings under the Registration Act and the special statutory remedy u/s 77 of that Act to obtain registration of the executed document. But if for any reason it becomes impossible to obtain registration after resort to such proceedings or because of other circumstances which prevent any resort to such proceedings under the Act, then undoubtedly the vendee is entitled to bring a suit for specific performance of the agreement to sell in his favour. This does not however mean that every such suit should be decreed.

Being an equitable remedy, a Court is not bound to grant specific performance in every case in which an agreement has not been carried out in its entirety. Well established equitable considerations would justify a Court refusing to grant this relief of specific performance."

14. In *Gulab Singh Hamir Singh Rajput Vs. Tarabai Bhilala and Others*, *Dixit, J.*, expressed the view that a plaintiff who has an unregistered sale-deed in his favour is not precluded from bringing a suit for specific performance even if he did not file a suit u/s 77 of the Registration Act for securing the registration of the sale-deed. The decision of the Patna High Court in *Jhaman Mahton Vs. Amrit Mahton and Others*, was approved and followed where *Fazl Ali C. J.* had held that the two remedies one by a suit u/s 77 of the Registration Act and the other of filing a fuller and more comprehensive suit for specific performance of the contract of sale are alternative ones and a suitor who does not have recourse to the first is not precluded from bringing in the second.

15. In the third decision relied upon by the Court below and also on behalf of the respondent namely *AIR 1956 Gau 154 of Ram Labhaya, J.*, there is no reference

to decided cases. The learned Judge held that the purpose of the proviso to Section 49 is that the document which has not conveyed or passed title may be used as evidence of the terms. Where, according to him, a document of sale remains unregistered and the title does not pass, the arrangement between the parties which preceded the ineffective document still remains and may be enforced. The learned Judge thus observed:

"A suit for specific performance of an agreement of sale would lie when the document of sale has remained unregistered. It may also lie where no document of sale has been executed."

16. But according to him, a suit for specific performance cannot be founded upon the unregistered sale-deed although where a suit for specific performance of an antecedent agreement of sale is filed the document can be merely used as evidence of the contract.

17. In my opinion as long as the arrangement (sic agreement) between the parties for sale is held enforceable by means of a suit it is immaterial whether the suit is founded on the agreement evidenced in the sale-deed or upon the sale-deed itself. In either case the effect is the same. The question, on this view, reduces itself to one of form and not of substance. Where such is the case then in the absence of any statutory impediment it is open for the Court to ignore any error in form.

18. Thus having regard to the view expressed in these decisions and particularly the terms of the proviso to Section 49 of the Registration Act which are wide enough to include every unregistered document affecting immovable property irrespective of the fact whether it is preceded by or makes reference to an independent agreement to transfer or not, and a suit for specific performance of the contract contained or evidenced in it is maintainable. The proviso of course will not have the effect of abrogating limitations which the provisions of the Specific Relief Act have placed in the matter of obtaining the relief of specific performance of a contract.

19. The decision of the Court below is therefore erroneous and ought to be set aside.

20. In the present case the lower appellate Court non-suited the plaintiff simply on the ground that a suit for specific performance of contract for the sale of the house in question is barred as the document was a sale-deed out and out and not merely an agreement to sell. It certainly stated that the other points were not seriously pressed. But from this statement it is difficult to hold, as urged by the learned counsel for the appellant, that they were abandoned by the appellants. I have therefore no alternative but to send back the case to the lower appellate Court after setting aside its decision regarding, the maintainability of the present suit. It shall proceed to hear the parties after due notice to them on other points in the case in accordance with law. The appellants are entitled to costs of this appeal from the respondents. The costs of the Courts below will be

governed by the order which the Court below will pass hereafter.