(1993) 01 MP CK 0002

In the Madhya Pradesh High Court

Case No : Civil Second Appeal No. 215 of 1979

Premnarayan and Another APPELLANT

Vs

Kunwarji and Another RESPONDENT

Date of Decision : 27-01-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4
Contract Act, 1872 — Section 16
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1993 MP 162 : (1993) 1 MPJR 176 : (1993) 38 MPLJ 448 : (1993) MPLJ 448

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : G.M. Chafekar, for the Appellant; Dagaonkar, for the Respondent

Final Decision : Allowed

Judgement

R.C. Lahoti, J.

Plaintiff-appellants have come up in second appeal feeling aggrieved by the judgment and decree of the lower appellate Court directing their suit for recovery of possession and mesne profits over a piece of land to be dismissed in reversal of the decree of the trial Court, which had decreed the suit.

On 13-9-1979 this Court admitted the appeal for hearing parties on the following substantial question of law.

Whether considering the facts and circumstances of the case, the lower appellate court, has correctly and properly decided the case on the basis of oral and documentary evidence, produced by the parties?

The suit property is Order 423 hectares, area of land, survey No. 160, situated at village Bawan Heda, Tahsil Shujalpur, delineated in red in the map filed with the plaint. The case of the plaintiffs was that they had purchased the suit property under a registered deed of sale dated 13-1-72, however, possession was not delivered to the plaintiffs. The suit was for possession on the basis of their title along with the relief of recovery of mesne profits. It appears that there were two deeds of sale executed on the same day between the parties. While the plaintiff transferred a piece of land to the defendant, the defendant too transferred the suit land to the plaintiff. Both the documents recite a consideration of Rs. 500/- each, said to have been paid anterior to the execution and registration of the deed of sale. The trial Court found that in reality there was an exchange of the two pieces of land between the parties which exchange was outwardly evidenced by executing two separate deeds of sale. This theory of exchange has been discarded by the lower appellate Court holding thai the contents of the two documents indicated two separate transactions having been entered into between the parties. The lower appellate Court further held that in so far as the documents executed in favour of the plaintiff-appellants was concerned, the same was vitiated for want of consideration and also by excicise of undue influence.

Having heard the learned counsel for the parties, this Court has formed an opinion that the appeal descrxes to be allowed, restoring the decree of the trial Court, for the reasons to follows.

The learned counsed for the appellants has tightly submitted that even if the theory of exchange set up by the appellants was to be discarded and even if the document was to be seen and acted upon as a deed of sale, as styled, even then the plaintiffs'' right to recover possession could not have been defeated in spite of the finding of the lower appellate Court of absence of consideration being upheld by this Court.

First it has to be seen whether the defendant-respondents had succeeded in proving that the document was vitiated by undue influence. At the very outset let it be noted that the lower appellate Court has not recorded any specific finding as to how, and in what manner there was undue influence, within the meaning of Section 16 of the Contract Act, 1872, exercised by the vendee over the vendor.

Whenever a plea of undue incluence is taken in pleadings, Rule 4 of Order 6 of the Civil. P.C. provides for particulars of such plea being given so as to enable the plea being tried. In Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, their Lordships have held (at page 283):

"In cases of fraud, undue influence and coercion, the parries pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be departure from them in evidence. General allegations arc insufficient even to amount to, an averment of fraud of which any Ct. ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

In Afsar Sheikh and Another Vs. Soleman Bibi and Others, their Lordships have laid down the law in the following terms (at page 169):

"It is not sufficient for a person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, ''undue''." Upon a determination of the issue at the second stage, a third point emerges which is of the "onus probandi". If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other."

In Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, also their Lordships have mandated the coufts scrutinising pleadings to find out if the plea of undue influence had been made out and whether full particulars thereof were given before examining whether undue influence was exercised or not.

Suffice it to observe by reference to the present case that the pleadings of the defendants are extremely deficient. There is no relationship or set of facts pleaded and proved to make out the vendee having been in a position to dominate the will of the vendor. The transaction on its face does not appear to be unconscionable nor is alleged to be so. The onus did lay on the defendants which they have certainly failed in discharging.

The next question which arises is how the document would be affected adversely or dented by the finding recorded by the lower appellate Court that there was no passing of consideration. The document on its face is a deed of sale, duly executed and registered. It is not the plea of the defendants that title in the suit property was not intended to pass to the vendee and was postponed to be passed until the consideration was paid. The defendants have neither alleged nor proved that the intention of the parties was to postpone the operation of the sale-deed, as transferring interest in the property sold thereunder, to a date other than the date of its execution. On the contrary the document specifically recites transfer of interest from the vendor to the vendee simultaneously with the execution, of the document.

A Division Bench of this Court held in Sukaloo and Another Vs. Punau, (at page 178):

"It is the intention of the parties which has to be looked into to decide whether the sale- deed operated as a transfer of interest from the vendor to the vendee on the date of its execution. If this was the intention, then it does not matter whether the whole of the consideration or part of it remained unpaid. Further, where a registered deed of sale purporting to operate as a conveyance on the face of it exists, the burden of proving that it was not so intended is on the party who asserts this fact."

Earlier a single Bench of this Court also had an occasion to lay down the law in the following terms in Shrawan Kumar v. Satyanarain 1960 JLJ 1004 :

"The rule is well established that if the price is not paid and its payment was made a condition precedent for passing the title, then the title cannot pass. Where there is no such condition in the sale-deed, if the full price is not paid the seller cannot on that account set aside the conveyance. He can only sue for the price; the payment of price u/s 54, Transfer of Property Act, is not necessarily a sine qua non to the completion of the sale."

Even if the possession was not delivered and the price was not paid, on the contents of the document (there being nothing brought out to the contrary in the oral evidence adduced by the parties) the title passed to the vendee. If the vendee was deprived of possession he was well justified in asking for the same. The remedy of the vendor lay in asking for payment of price.

In Balkrishna v. Shripatsingh 6 NLR 98 it was held:

"Notwithstanding the transfer of ownership in immovable property by execution of a proper conveyance, if the purchase money or any part thereof remains unpaid, the buyer will not be entitled to a decree for possession except on condition of first paying the purchase money in full."

Section 55(4)(b) of the Transfer of Property Act provides for a charge on the property sold being created in favour of the unpaid vendor for the amount of purchase money.

In the opinion of this Court the judgment and decree of the lower appellate Court deserves to be set aside, but at the same time the decree of the trial Court too deserves to be modified by making it conditional on payment of unpaid purchase money. At the same time it is considered inequitable to award mesne profits to the appellants looking to their conduct in not paying the purchase price, but insisting on delivery of possession without even affording or volunteering for payment of the unpaid purchase price.

For the foregoing reasons the appeal is allowed. The judgments and decrees of the Courts below are set aside. Instead it is directed that the plaintiff-appellants shall be entitled to recovery of possession over land survey No. 160 (old No. 380 and 411/1; total area 3.104 hectares) area 0.423 hectares demonstrated in red lines in the map annexed with the plaint subject to payment of Rs. 500/- (five hundred) to the defendants. Costs shall be borne by the parties as incurred throughout. Let a decree be drawn accordingly. The plaint map shall form part of the decree.