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(2000) 04 AHC CK 0128

In the Allahabad High Court

Case No : Civil Revision No. (134) of 1998

Rajendra Prakash APPELLANT

Vs

Smt. Babita Gupta alias Pratiba Gupta and others RESPONDENT

Date of Decision : 19-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 115
Contract Act, 1872 — Section 17, 25
Transfer of Property Act, 1882 — Section 54 , 55(4)

Citation : (2000) 3 AWC 2253 : (2000) AWC 2253

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Prakash Krishna, for the Appellant; R.B.D. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—By means of this revision application u/s 115 of the Code of Civil Procedure, the order dated 24th August, 1998, passed by the learned Civil Judge. Senior Division. 2nd Court. Bareilly in O.S. No. 473 of 1994 has since been challenged.

2. The brief facts leading to the present situation may be summarised as hereinafter.

3. The plaintiff-opposite party had filed a suit praying for declaration that the plaintiff is the absolute owner in possession of the suit property declaring that the impugned sale deed being without consideration conferred no title to the defendant since the same is void, illegal and in-operative and not binding. The pleading made out in the plaint is that a deed of sale was registered by the plaintiff in favour of the defendant in consideration of a sum of Rs. 1,25,000 paid by cheque without any payment by cash. The cheque was dishonoured by the bank on the ground of insufficient fund. The plaintiff requested the defendant as well as by notice sent under registered post asking the defendants either to pay the consideration or to get the sale deed declared illegal and void. The defendant

did not pay any amount nor did take any steps for declaration of the sale deed void and thus the defendants had obtained the sale deed in a fraudulent manner. Hence, the suit.

4. The defendant had pleaded the defence that certain amount was due from the plaintiffs husband to the defendant which was to be adjusted against the payment of consideration and for such reason, the amount contained in the cheque was not paid since there was an assurance by the husband of the plaintiff that such amount would be adjusted.

5. The defendant had also made an application under Order VII, Rule 11 of the CPC for rejection of the plaint on the ground that the plaint does not disclose any cause of action. This application was dismissed by the impugned order dated 24th August, 1998. The Learned Civil Judge had found that on the face of the pleadings. It appears that a cause of action has been disclosed. The question that was raised cannot be conclusively decided at this stage without evidence being led. Therefore, the application was rejected at that stage.

6. Mr. Prakash Krishna, learned counsel for the revisionist contends that the learned Civil Judge had failed to exercise his jurisdiction in rejecting the application under Order VII. Rule 11 of the CPC or in other words had assumed jurisdiction in entertaining the suit illegally when on the face of the pleadings made out in the plaint, the same does not disclose any cause of action. In support of his contention, he had contended that in view of Section 54 of the Transfer of Property Act, 1882, even if the consideration is not paid, the sale deed would not become void if there is an intention to convey the property between the parties. The only remedy open to an aggrieved vendor is to sue for recovery of the consideration. Relying on Section 55, sub-section 4 (b) of the Transfer of Property Act. 1882, he contends that at best on account of non-payment of the consideration the amount of consideration would be a charge in the property sought to be conveyed. This provision clearly place a sale transaction under the Transfer of Property Act on a different footing from a contract which could be said to be void in view of Section 25 of the Indian Contract Act. The concept of a void contract under the Indian Contract Act could not be attracted straightaway to a sale transaction Within the meaning of Transfer of Property Act since sale having been defined in Section 54 of the said Act read with sub-section (4), clause (b) of Section 55 thereof. According to him, even if it is a contract it has to be governed by the provision of the Transfer of Property Act and if there is a conflict between the Contract Act and the Transfer of Property Act, the transaction being a transaction within the meaning of Transfer of Property Act which is a statute, especially meant for such transfer the provisions of Transfer of Property Act would definitely override those of the Contract Act in case of conflict and inconsistency between the two. He further contends that even if it is without consideration, still then it cannot be thrown away in view of clause (1) of Section 25 on account of the relation between the parties who are members of the family where such an agreement would be still

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not void even if it is without consideration. He then contends that since it has been held by different High Courts subsequently supported by the Supreme Court that even if there was non-payment of consideration still then if there is an intention to convey or transfer, the execution and registration of a document in pursuance of such intention would effectively pass on the title of the vendor to the vendee. It is the execution and the registration of the sale deed that effects the passing on of the title, the payment of consideration is not a sine qua non for the passing of such title. As such according to him, title having passed if there is non-payment of consideration. It is open to the vendee to sue for possession and in that event, it is not open to the vendor to sue for cancellation of the deed and declaration thereof as void and protect his possession by means of a suit when only remedy open to the vendor is to recover the consideration. Thus, on the basis of the various decisions cited by him at the Bar, which will be referred to at appropriate stage, Mr. Prakash Krishna submits that it is abundantly clear that the plaint does not disclose any cause of action and as such, it is to be rejected under Order VII, Rule 11 of the Code of Civil Procedure. He had relied on some decisions in support of his contention in this respect as well. Those decisions would be dealt with at appropriate stage.

7. Mr. Murlidhar. Senior Advocate appearing with Mr. Rakesh Ch. Agarwal on the other contends that the pleadings in the plaint clearly discloses a cause of action to the extent that the transaction was without consideration and as such, would be void within the meaning of Section 25 of the Indian Contract Act. Inasmuch as, the consideration was paid by cheque which was dishonoured indicating that there was an attempt on the part of the vendee to suppress certain facts that though he would handover a cheque, but the said cheque would never be encashed on account of insufficiency of funds and as such on account of such fraud, the vendee cannot claim any right when he is guilty of fraudulent transaction. It is next contended that Section 54 defines "sale" means transfer of property in exchange of consideration paid or promised to be paid or partly paid and or partly promised to be paid. In the present case, there was no promise to pay or neither there was any part payment or promise for part payment. On the other hand, the vendee had purported to impress upon the vendor that the consideration is being paid by cheque. Therefore, on account of bouncing of the cheque, there was no payment. There being no promise to pay and there being no exchange of price so there was no sale within the meaning of Section 54 of the Transfer of Property Act. It is further contended by him that in the plaint, it was disclosed that despite having received notice through registered post requesting payment to the consideration, the payment have not been made. There was no intention between the parties or ad idem for bona fide transfer. On the other hand assuming that there was bona fide intention to transfer on the part of the vendor even without receipt of payment of consideration but there was no bona fide intention on the part of the vendee to obtain the transfer of the property through sale upon payment of consideration since he had never intended to pay the consideration. Mr. Murlidhar further contends that though for

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the purpose of deciding the question under Order VII. Rule 11. It is only the pleading in the plaint that is to be looked into and no part of the written statement is required to be looked into, still then he points out from the written statement that the defendant had sought to defend his stand by raising a plea that there was an assurance by the husband of the plaintiff that certain amounts due from the plaintiffs husband to the defendant would be adjusted against the consideration therefore the defendant did not pay. This conclusively shows that the defendant had never intended to pay the consideration. There cannot be any sale without exchange of consideration. Therefore, according to him, the paint clearly discloses a cause of action by reason thereof Order VII, Rule 11 cannot be attracted. Alternatively, he contends that even if there might be some substance in the submission of Mr. Prakash Krishna that will relate to the merit of the case which can be ascertained only after issues are framed and evidence is adduced. Even if there be a bona fide intention between the parties to effect transfer that can be ascertained only upon the evidence being led and not otherwise. Therefore. It is not a question which can be decided at this stage and the plaint should be rejected on the ground of absence of cause of action. He lastly contended that in view of the proviso to Section 115 of the Code of Civil Procedure, the order having not conclusively determined the right between the parties and having not resulted into any injustice or failure of Justice, the order cannot be interfered with in exercise of Jurisdiction u/s 115 of the Code of Civil Procedure.

8. Mr. Prakash Krishna in reply had contended that the question very well comes within the scope and ambit of Section 115 of the Code to the extent that this question affects the right of the party to the extent that if the suit is allowed to continue, in that event, it would definitely cause failure of justice and cause injustice on the defendant. Therefore, this question can very well be gone into in exercise of Section 115 of the Code of Civil Procedure.

9. I have heard the learned counsel for the parties at length.

10. Section 54 of the Transfer of Property Act defines sale as a transfer of ownership in exchange of price paid or promised or part-paid and part-promised. In the present case, there was a recital in the deed that the price has been paid through cheque, which had since bounced on account of insufficient funds. There was no recital that it was promised or part-promised or part-paid in the deed itself. Whether the delivery of the cheque amounts to promise or not, cannot be decided at this stage. Since the question depends on the intention of the parties, which is to be gathered from the conduct of the parties and surrounding circumstances which can be had only after parties go to trial after the issues are framed and evidence are led. The majority of the decisions cited at the Bar by Mr. Prakash Krishna proceeds on the footing that whether nonpayment of consideration would make sale deed invalid is a question that is to be gathered from the intention of the parties. If there is intention of the parties to effect transfer by means of execution and registration of the sale deed in that event,

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there is a transfer by reason whereof there is a passing of title. From the pleadings made out in the plaint at least prima facie, it appears that the defendant did not intend that the cheque should be encashed or price is to be paid. On the other hand, it appears from the pleadings that despite notice to pay the consideration, defendant did not pay the amount. Even tilt today, the amount has not been paid which fact may not be gone into at this stage. But still then, it appears from the pleadings in the written statement that the defendant had been sought adjustment of certain amount due to the husband of the plaintiff. Whether this payment of consideration is again a question which is to be decided on the basis of the materials that might come in evidence. At least at this stage, it is not possible for this Court to conclusively determine that the title had passed on account of the intention of the parties which is evidenced by reason of the execution of the deed and the registration thereof. It is also a question whether Section 54 would be attracted if there is any amount of fraud within the meaning of Section 17 of the Indian Contract Act.

11. Section 17 of the Indian Contract Act defines that "fraud" means when a person induces anyone to enter into a contract on the suggestion of a fact which is not true by the person himself who does not believe it to be true or who acts in an active concealment of fact having knowledge or belief of the fact or had made a promise without any intention of performing it or in other act fitted to deceive.

12. In the present case, it cannot be conclusively determined that whether there was a fraud or not. But apparently, it appears from the pleadings that the cheque was delivered in exchange of the price being paid on the suggestion that the cheque would be honoured, when the defendants had reason to believe that he did not have sufficient funds and the cheque would be dishonoured which fact was not disclosed while inducing the vendor to execute and register the document. In not disclosing the fact that he docs not have sufficient fund to honour the cheque, it can be prima facie said that the defendant had concealed the fact that he had knowledge and believed that the cheque would be dishonoured. It is also prima facie apparent that even after the notice he did not pay. Therefore, he had issued the cheque with an intention that he would not perform the part for honouring the cheque by making fund sufficient. On the pleadings, it is also prima facie apparent that he had issued the cheque to deceive the vendor. Thus, it appears on the face of the pleadings that there are certain elements of fraud. If there is an element of fraud, how the same will affect the definition of sale given in Section 54 which makes a contract valid even when consideration is not paid at the time of transaction is a question to be answered and which is possible only when issues are framed and evidence is adduced or other materials are produced. Sale is definitely a contract but it stands on a different footing because of the provision contained in the Transfer of Property Act defining sale in Section 54 thereof read with sub-section (4) of Section 55 of the said Act, where nonpayment of consideration makes it a charge on the property. Therefore, by expressed provision contained in Section 54

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despite sale being a contract, there has been a departure from the provision contained in the Indian Contract Act particularly. Section 25 thereof. By reason of special provision relating to special statute governing transfer or sale, Section 25 of the Indian Contract Act if comes in conflict or is inconsistent in that event, it would yield to the extent of the special statute contained in the Transfer of Property Act. But still then, it would not to be completely overridden by reason of the definition contained in Section 54 of the Transfer of Property Act, having regard to the question of fraud defined in Section 17 of the Indian Contract Act. Sale defined in Section 54 of the Transfer of Property Act has to be bona fide with an intention between the parties to pass on the title even on non-payment of the consideration.

13. Thus, on the basis of the pleadings of the plaint, at this stage it cannot be conclusively said that there was an intention between the parties to effect the transfer and passing of the title by reason of the execution and registration of the sale deed or that there was a promise to pay or that there was any payment. Therefore, at this stage the plaint cannot be rejected under Order VII, Rule 11 of the Code of Civil Procedure.

14. Mr. Prakash Krishna had relied on a passage from Mulla on the Transfer of Property Act, 1882 at page 303 of the Sixth Edition. The said passage proceeds as follows :

"The payment of price is not necessarily a sine qua non to the completion of the sale. If the intention is that property should pass on registration, the sale is complete as soon as the deed is registered whether the price has been paid or not, and the purchaser is entitled to sue for possession although he has not paid the price. This is clear from the words of the Section, "price paid or promised or part-paid or part-promised". But when although the deed recited that the price was not paid, and it was not in fact paid and so also possession was not delivered, it was held that the inference was irresistible that no title passed. A condition that price shall be paid in a year provided that possession was given within that time does not invalidate the sale deed. If the price is not paid, the seller cannot on that account set aside the conveyance. He can only sue for the price ; and he will have a charge on the property for the unpaid purchase-money. This is a non-possessory charge as explained in the note u/s 55(4)(b) and it will not justify the seller refusing to give possession." See note "Non-possessory" u/s 55(4)(b).

15. The above passage makes it clear that the payment of price is not necessarily a sine qua non t o complete the sale. If it is a sale, the intention of the parties is that the property would pass on registration, the sale is complete as soon the deed is registered whether the price has been paid or not as has been held in the case of Kashidas v. Chaithuru (1914) Cal LJ 289 and Ghosh v. Rohini 13 C WN 692. This observation was made on the basis of the expression used in the definition of sale in the Transfer of Property Act to the extent, namely, price paid or promised or part-paid or part-promised. But when although

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the deed recited that the price was not paid, and it was not in fact paid and possession was not delivered, then no title would pass. Thus, the question is dependent on the intention of the parties to pass the property which can be gathered only at the trial stage not at this stage particularly when the pleading clearly depicts that there was no intention to pass on the property without payment of consideration which was paid by a cheque which had since been dishonoured, when sought to be encashed by the plaintiff, which fact prima facie reflects the intention of the vendor to sell the property only on receipt of the consideration.

16. Mr. Prakash Krishna had relied on a decision of this Court in the case of Raj Nath Singh v. Paltu and others. 1908 All U 96, where it was held that non-payment of consideration would not invalidate the deed of sale. This was a case deciding the question on merit after evidence was led and this decision is not a proposition that whenever there is a pleading that sale deed was executed and registered, it would not disclose cause of action for being thrown out under Order VII, Rule 11. Mr. Prakash Krishna had cited the decision in the case of Gayatri Prasad v. Board of Revenue and others. 1973 All LJ 412 , which also has taken the same view. Both the suit of Raj Nath Singh and Gayatri Prasad were suit for possession by the vendee on the strength of sale deed though consideration was not paid. In these cases, admittedly consideration was paid in part. Therefore, these decisions do not help the present case where admittedly the cheque containing the full consideration was dishonoured. Mr. Prakash Krishna had relied on a decision of the Andhra Pradesh High Court in the case of Kutcherlakota Vijaylakshmi Vs. Radimeti Rajaratnamba and others, , where in paragraph (8) same view was taken. But this decision was also a decision on merit not at the stage of Order VII. Rule 11 and that too, on the question whether the vendee could maintain a suit when the consideration is not paid. He also relies on the decision in the case of Narain Prasad v. Deputy Director of Consolidation. Allahabad and others. 1997 All LJ 2111 , which had also followed the judgment cited by Mr. Prakash Krishna and had taken the same view. In paragraph 13, it was held that if the intention of the vendee was not to pay, it will be only a colourable transaction and will have no effect. The Court has to examine as to what was the intention of the parties on the basis of the evidence which may be produced in the case. The title to the property will pass on the execution and registration of the sale deed even if the whole or part of the sale price was not paid unless the intention of the vendor was that the title should not pass till the sale price is paid. Thus, at this stage, the plaint cannot be thrown out under Order VII. Rule 11 without ascertaining the intention of the vendor which is reflected on the pleading that he did not deliver possession since the price was not paid, for which had issued a notice, thereby meaning that the vendor never intended to pass on the title without the price being paid, even though some amount might be due to the defendant from her husband. In Umakanta Das and Another Vs. Pradip Kumar Ray and Others, , same view was taken to the extent that it is the intention as to whether the property is to pass merely by the

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execution and registration of the document which is a matter to be gone into only at the trial. This decision was followed by the same High Court in Basanti Mohanty v. Brahmanand Das and others AIR 1996 Ori 86 . In this case, it was held that if the intention is that property should pass on registration, the sale is complete as soon as the deed is registered, whether the price has been paid or not, and the purchaser is entitled to sue for possession although he has not paid the price. Therefore, again the question has come to the determination of the intention. He had relied on the decision in the case of State of Kerala Vs. Cochin Chemical Refineries Ltd., , where in a case of mortgage though the loan was not advanced, the deed of mortgage was held to be valid and not void and ineffective. But the said question having been related to mortgage may not help us. But then it is not an absolute proposition that whenever in such a situation suit is filed by the vendor for declaration of a deed void, is to be thrown out in limine under Order VII. Rule 11 of the Code of Civil Procedure. Mr. Prakash Krishna had also relied on the decision in the case of Vidhyadhar Vs. Manikrao and Another, , in which the proposition was settled by the Supreme Court that too, in relation to a mortgage. In that case in paragraph 37, it was held as follows :

The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in futuro. The intention is to be gathered from the recital of the sale deed, conduct of the parties and the evidence on record."

17. Thus, this decision also does not help Mr. Prakash Krishna to the extent he wanted to draw support from this decision. On the other hand, it supports the view that I have taken that such question can be gone into only at end and not before the trial.

18. Mr. Prakash Krishna had relied on a decision in the case of T. Arivandandam Vs. T.V. Satyapal and Another, , in support of his contention that the plaint should be rejected under Order VII. Rule 11 of the Code.

19. In view of the observation made above. I am afraid that Mr. Prakash Krishna would be able to draw inspiration from his decisions, since in these cases, the plaints disclose a cause of action as has been found here-in-before, since the question that has been raised, is dependent on materials to be produced in the Court in support of the respective contention. In the same manner, the other decision in the case of I.T.C. Ltd. v. Debts Recovery Tribunal on the question of Order VII. Rule 11 of the Code does not help us in the present case.

20. Mr. Prakash Krishna had relied on the decision in the case of Smt. Mania Vs. Deputy Director of Consolidation, U.P. and Others, , in order to contend that if the parties are near relation, then the exception in clause (1) of Section 25 of the Indian Contract Act would be attracted. Whether it would be attracted or not, is a question to be gone into at the trial after appropriate issue is framed on the basis

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of the pleadings. Then that is also with regard to a question of an agreement without consideration- But in this case as apparent on the face of the pleadings. It is not an agreement without consideration but with consideration, which was not paid. Therefore, this decision does not help him in the present purpose.

21. So far as the question raised by Mr. Murlidhar to the extent that the civil revision is not maintainable because of the provision of Section 115 of the Code as amended in U. P. is not necessary to be gone into at this stage since on merit the revision petition cannot succeed and the matter has been argued at length on merit as a whole which has since been dealt with hereinbefore.

22. In the result. I am not inclined to interfere with the order impugned and this revisional application falls and is, accordingly, dismissed.

23. However, all the observations made in the process of this decision are all tentative for the purpose of deciding the question put before this Court, and in no manner shall influence the learned trial court in deciding the merit of the case. It is expected that the learned trial court shall make all endeavour to decide the suit as early as possible preferably, within a period of one year from the date a certified copy of this order is produced before it.

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