
(1997) 07 AHC CK 0116
In the Allahabad High Court
Case No : Second Appeal No. 460 of 1997

Rajeshwari Devi

APPELLANT

Vs

Ram Chandra Gupta

RESPONDENT

Date of Decision : 28-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (1997) 07 AHC CK 0116

Hon'ble Judges : D.C.Srivastava, J

Final Decision : Dismissed

Judgement

D. C. Srivastava, J.—The rejoinder affidavit was not called for nor it was presented in the Registry. It has been filed today directly in the Court.

2. Heard learned counsel for the appellant and Shri Radhey Shyam representing the respondent.

3. At the outset the respondent's counsel informed that the sale deed has been executed and registered on the motion of the court, namely, the execution court on 25th July, 1997. Learned counsel for the appellant states that he has no knowledge about it. The certified photostat copy of the letter issued by the Vth Additional Chief Metropolitan Magistrate, Kanpur to the Sub Registrar, Kanpur has been shown by the learned counsel for the respondent, from which it appears that the sale deed was sent by the court concerned for registration by the Sub Registrar. The statement of Shri Radhey Shyam in these circumstances has to be believed. Since the sale deed has been executed for all practical purposes, this second appeal has become infructuous.

4. Learned counsel for the appellant has challenged the judgment of the two courts below on various grounds. A suit for specific performance of agreement to sell was filed by the respondent, which was decreed by the trial court ex pane. The appellant filed written statement before the trial court, but did not appear thereafter to contest the suit. The suit was decided on affidavits and exparte

decree was passed. An appeal was preferred by the appellant which was dismissed. Now in this second appeal five substantial questions of law have been formulated. Learned counsel for the parties have been heard at length on these questions of law.

5. The proposed substantial question of law numbered at serial Nos. (iii) and (iv) in the memo of appeal are common and can be decided together. In brief, the contention has been that in a regular suit where appeal lies from the judgment and decree, it was obligatory for the lower court to record evidence of the parties and affidavit could not be substantive evidence to decide the suit. In view of this, the judgment of the trial court is based on no evidence, hence the decree cannot be sustained. This contention cannot be accepted in view of Allahabad Amendment to Rule 1 of Order XIX of the Code of Civil Procedure whereby Rule 1 A was introduced providing that where the case proceeds *ex parte*, the court may permit the evidence of the plaintiff to be given on affidavit. This amendment came into force with effect from 10th February, 1981. Since the suit proceeded *ex parte* in view of this Allahabad Amendment to Order 19 Rule 1 of the Code of Civil Procedure, affidavit could be accepted as evidence in a suit proceeding *ex parte* and it cannot be said that the suit was decreed without any evidence.

6. In the same connection it was contended that the affidavit is not in accordance with law, hence it is no evidence in the eyes of law. This plea has not been formulated as one of the questions in the memo of appeal, hence technically this point cannot be permitted to be argued. Moreover the photo state copy of the affidavit has been perused and on such hyper technical contention, the said affidavit cannot be excluded. Thus the so-called substantial questions of law formulated at serial Nos. (iii) and (iv) in the memo of appeal do not arise.

7. The next contention has been that besides the decree for specific performance, decree for permanent injunction was also sought in the plaint and in such cases, it is the duty of the plaintiff to establish possession over the property in respect of which prohibitory injunction is sought. On this plea substantial question of law numbered at serial No. (ii) has been formulated. Annexure V is a photostat copy of the affidavit of Ram Chandra Gupta filed on behalf of the plaintiff. In paragraph 5 of this affidavit it is mentioned that whatever has been written in the plaint and the replication is correctly written and is true. This general statement in the affidavit proves the averments that the plaintiff has been in possession of the property in dispute. The decree for permanent injunction in these circumstances cannot be set aside.

8. Another substantial question of law formulated at serial No. (v) is that the property in suit is not identifiable. Nothing was addressed on this substantial question of law, hence this question of law also does not arise for adjudication.

9. The only question left for adjudication is noncompliance of Section 16(c) of Specific Relief Act. Learned counsel for the appellant has vehemently contended that the ingredients of Section 16(C) of Specific Relief Act are not averred in the

plaint nor proved in the affidavit, hence the initial cause of action is missing and the plaint should have been rejected under Order VII, Rule 11 of the Code of Civil Procedure. The copy of the plaint has been annexed. Paragraph 10 of the plaint disclosed accrual of cause of action. Cause of action rests on bundle of facts. In this paragraph, it is mentioned that the cause of action accrued to the plaintiff on or about 9th March 1992 when the plaintiff asked the defendant for execution of the sale deed and she failed to comply with the same and lastly on 5th April, 1992 when the plaintiff again asked her to convey the property and when she totally refused to do so. There is thus clear disclosure of cause of action in paragraph 10 of the plaint. In face of such disclosure the plaint could not be rejected by the trial court under Order VII, Rule 11 of the Code of Civil Procedure nor it could be rejected by the appellate court nor by this Court in second appeal. It is another thing whether the plaintiff has been able to make compliance of Section 16(C), of Specific Relief Act or not. On his failure to do so, naturally the suit for specific performance could not be decreed. This, therefore, takes up to the consideration of question whether compliance of Section 16(c) of Specific Relief Act has been made in the plaint and has been proved in the affidavit.

10. Learned counsel for the appellant made special reference to paragraph 6 of the plaint (Annexure I) and argued that in this paragraph only word willingness is mentioned and not readiness and according to the learned counsel unless the words readiness and willingness to perform the plaintiff part Of the contract and obligation are averred in the plaint, the suit could not have been decreed rather it should have been dismissed. In the same context he contended that replication does not form part of pleading and if something was added in the replication after filing of the written statement, that would not cure the initial defect in the plaint in making averments of plaintiff's readiness and willingness to perform his part of obligation under the contract. Number of cases were cited by the two sides on this point. I have gone through those cases carefully and the ultimate conclusion is that on straight jacket formula can be laid down in what manner the words readiness and willingness on the part of the plaintiff to perform his part of the obligation under the agreement are to be averred in the plaint. The plaintiff's readiness and willingness is to be gathered from entire allegations made and averments contained in the plaint as well as in the replication, from the conduct of the parties, from the intention of the parties and also from attending circumstances emerging from the evidence of the parties.

11. Learned counsel for the appellant referred the case of Jagamath Misra and others v. Umar Misra and another, 1984ALJ 1. The Division Bench of this Court laid down that where in a suit of specific performance there was an omission of the averments in the plaint that the plaintiff was ready and willing to perform his part of the contract, the omission rendered the plaint without a cause of action for the suit and the suit was liable to be dismissed. In this very case it was clearly mentioned that when there is omission of the averments in the plaint about the plaintiff's readiness and willingness to perform his part of the contract,

the suit is to fail. In this case no such occasion arose where in the plaintiff's willingness was specifically averred, but there was omission to aver readiness on the part of the plaintiff, as such this case is distinguishable.

12. The next case of T. L. Muddukrishana and another v. Smt. Lalitha Ramchandra Rao, AIR 1997 SC 772 is also distinguishable on facts. Here the suit was initially filed for permanent injunction. There was no pleading necessary for granting relief for specific performance of agreement to sell. Subsequently a time barred application for amendment of the plaint was moved, which was rejected. It was on these facts the Supreme Court held that the cause of action which was required to be stated initially in the plaint was not pleaded hence rejection of amendment application was improper. In the case before me the pleadings were already there and it is to be seen what is the effect of omission on the part of the plaintiff.

13. The pronouncement of Madras High Court reported in the case of Gurusanthayya v. Setra Veerayya and others, AIR 1952 Mad. 825 is also distinguishable inasmuch as it lays down that there is no provision of law in the Code of Civil Procedure for filing rejoinder after the written statement has been filed and findings have been given on certain issues. Another pronouncement of Madras High Court in Nanjan v. Selai and others, AIR 1958 Mad., 303 is likewise distinguishable on facts. In this case it was laid down that a court should not direct suo motu the amendment of the pleadings like the filing of additional written statement by the respondent in an appeal. In the case before me no such amendment has been permitted by the lower appellate court, as such this case is also distinguishable.

14. As against this the verdict of the Supreme Court and the views of this Court in various cases cited is that no straight jacket formula can be laid down to test the readiness and willingness of the plaintiff to perform his part of obligation under the contract and entire material has to be looked into, namely, the entire pleadings, conduct of the parties, their intention and the evidence on record so also the circumstances of the case. It should also be borne in mind that there should be continuous readiness and willingness of the plaintiff right from the date of the agreement to the date of the execution of the decree likely to be passed. In the case before me the plaintiff's readiness and willingness to perform his part of obligation under the contract can be gathered from the plaint as well as from the replication and affidavit filed by him. The fact that the balance amount has been deposited in court after the ex parte decree and the plaintiff took all steps to get the sale deed executed through the agency of the court below further shows plaintiff's readiness and willingness continuously at all times right from the date of the agreement till 25th July, 1997 when the sale deed was actually executed and registered. In face of this neither the plaint could be rejected nor the suit could be dismissed on mere omission to specifically aver readiness in the plaint. The Allahabad view on this point is contained in the case of Maqsood Khan v. Lala Balwant Prasad, AIR 1982 All. 41 which has also placed reliance upon

Supreme Court cases reported in AIR 1951 SC 477 and AIR 1967 SC 526 besides 1952 ALJ 46. The second case in the same line which can be referred is Dhian Singh v. Tara Chand and another, AIR 1984 All. 4 and also Anwarul Haq v. Nizam Uddin, AIR 1984 All. 136. The third and the latest case of this Court is Smt. Kamla Devi and another v. Vimal Kumar Jain and others, 1997 AIR 154.

15. The view expressed and the rule propounded by the Apex Court on the point is contained in Ramesh Chandra Chandiok and another v. Chunni Lai Sabharwal, AIR 1971 SC 1238.

16. Coming to the factual aspects regarding omission on the part of the plaintiff, it is true, that in paragraph 6 of the plaint the word readiness is missing. If paragraphs 6 and 9 of the plaint are read together, the only inference is that the plaintiff has always been ready and willing to perform his part of the obligation under the contract. Actually there was no real contest from the side of the appellant. Paragraph 8 of the written statement (Annexure III) can be referred, in which she expressed her readiness to accept the balance price and execute the sale deed provided the plaintiff performed his Part of the obligation under the agreement. Paragraph 5 of the affidavit on behalf of the plaintiff clearly establishes his readiness and willingness to perform his part of the obligation under the contract and the contention to the contrary cannot be accepted. Paragraph 8 of the replication (Annexure C.A. I) also furnishes enough material to conclude that the plaintiff was ready and willing to perform his part of obligation. So is the case in paragraph 20 of the replication.

17. Not much time is needed to repel the contention of the learned counsel for the appellant that within the meaning of Order VI, Rule 1 of the Code of Civil Procedure pleading it shall include only plaint or written statement. Rule 5 of Order VI of the Code of Civil Procedure provides that a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered upon such terms, as to costs or otherwise, as may be just. This provision, therefore, permits admission of replication in the nature of better particulars in relation to plaint. Learned counsel for the appellant failed to show that replication was accepted without permission of the court. Moreover, since replication was already admitted, it cannot be rejected at this stage in this second appeal. I again do not find force in the contention that in view of Order VIII, Rule 9 of the Code of Civil Procedure, in the absence of the order of the court, replication could not be accepted.

18. For the reasons given above, this substantial question of law also does not arise for adjudication in this second appeal. In the result no substantial question of law arises in this second appeal. The appeal is hereby dismissed. No order as to costs.