
(1987) 11 AHC CK 0050
In the Allahabad High Court
Case No : First Appeal No. 22 of 1977

Ram Rati

APPELLANT

Vs

Fakira

RESPONDENT

Date of Decision : 09-11-1987

Acts Referred:

Contract Act, 1872 — Section 55
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Specific Relief Act, 1963 — Section 16, 22

Citation : AIR 1988 All 75

Hon'ble Judges : R.P. Singh, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal, for the Appellant; Tej Pal, for the Respondent

Final Decision : Partly Allowed

Judgement

R.P. Singh, J.—This appeal is directed against the judgment and decree passed by the Civil Judge Roorkee at Saharanpur dated 30-10-76 dismissing the suit.

2. The appellant filed a suit for specific performance of contract for sale with the allegations that the defendant had agreed to execute a sale deed in respect of the property in suit in pursuance of the agreement dated 23-6-75 for a consideration of Rs. 25,774/-. A sum of Rs. 6,000/- was paid on the date of the execution of the agreement for sale before the Sub-Registrar and the defendant agreed that on payment of the remaining amount of Rs. 19,774A from the plaintiff at the time of execution of the sale deed, he would execute the sale deed and it was further agreed that the last date for the execution of the registered sale deed will be 15-11-75. The plaintiff further alleged that it was further agreed that in case the defendant failed to execute the registered sale deed in favour of the plaintiff after receiving the remaining consideration of Rs. 19,774A, it would be open to the plaintiff to get the sale deed executed and registered through the process of Court at the expense of the defendant. On

payment of the remaining sale consideration by 15-11-75, in case the plaintiff failed to get the sale deed executed by the said date, the sum of Rs. 6,000/- within (sic) was paid as earnest money to the defendant would be lost. It was further averred in the plaint that in pursuance of the said agreement, the plaintiff was all along ready to pay the remaining sale consideration of Rs. 19,774/- and to get the sale deed executed in his favour but the defendant failed to execute the sale deed in spite of the request and hence the plaintiff sent a registered notice to the defendant to come to the Sub-Registrar's Office at Saharanpur on 15-11-75 to execute a registered sale deed after receiving the remaining sum of Rs. 19,774/- in pursuance of the agreement for sale but in spite of the same the defendant deliberately did not take the notice and got it returned with a wrong endorsement. The plaintiff went to the Sub-Registrar's office on 15-11-85 and remained there throughout the day with the remaining sale consideration and had all along been ready to fulfill his part of the contract as mentioned in the agreement dated 23-6-75 but the defendant evaded to execute the sale deed after receiving the sale consideration and committed the breach and hence the suit for specific performance of contract for sale was filed in the case.

3. The defendant Fakira contested the suit inter alia alleging that the plaintiff never asked the defendant orally or in writing to execute the sale deed within the specific time nor any notice was received by the defendant or was ever returned by him as alleged in the plaint; that the plaintiff himself could not make arrangements for the remaining amount of Rs. 19,774/- as per terms of the agreement for sale and hence he himself could not get the sale deed executed and himself breached the terms of the agreement. Since no notice was ever received by the defendant for reaching the Sub-Registrar's Office on 15-11-75 to execute the sale deed after receiving the remaining sale consideration and hence there was no question of the defendant's going to the Sub-Registrar's Office. Thus, it is alleged that the plaintiff himself was defaulter and committed breach of the terms of the agreement for sale dated 23-6-75 and that the present suit was filed with wrong allegations and was liable to be dismissed with costs.

4. On the pleadings of the parties the following issues were framed by the trial court:

"1. Whether plaintiff is entitled to get the execution of the sale deed as per terms of the contract for sale vide deed dated 26-6-75 as alleged in plaint?

2. Whether the plaintiff himself has been defaulter and as such not entitled to enforce the contract for sale vide the said deed?

3. Whether the plaintiff is entitled to get Rs. 6000/- earnest money paid by him or not in view of the alleged breach of contract by the plaintiff himself as alleged by the defendant in W.S.?

4. Whether the suit is barred by time?

5. Whether the suit is bad for want of valid and legal notice as alleged in W.S.?

6. Whether the plaintiff had not made arrangement for the payment of consideration as alleged in paras 18 and 19 of W.S.?

7. Whether the plaintiff went to the office of the Sub-Registrar after serving notice upon the defendant vide notice dated 13-11-75 as alleged by the plaintiff, if so its effect?

8. To what relief, if any, is the plaintiff entitled."

Both the parties produced oral and documentary evidence in support of their case. The trial court dealt with issues Nos. 1, 2, 6 and 7 together as they were interconnected and held that it was admitted between the parties that the execution of the deed of agreement for sale was executed but on a consideration of evidence on record it was not proved that the notice Ex. 4 sent on 13-11-75 to the defendant to execute the sale deed on 15-11-75 was ever received by the defendant and hence the defendant was not a defaulter in not coming to the Sub-Registrar's office in pursuance of the said notice. There was no evidence on the record that the plaintiff before 15-11-75 was ready to get the sale deed executed in terms of the contract for sale and further that the plaintiff does not appear to be ready to pay the entire consideration to the defendant before 15-11-75 and hence the plaintiff himself had been a defaulter in fulfilling his part of the agreement and hence was not entitled to enforce the contract for sale in respect of the property in suit, against the defendant who has not been found to have committed any breach of contract for sale and on these findings dismissed the suit. The main controversy between the parties is whether the defendant had received the notice Ex. 4 alleged to have been sent on 13-11-75 which was said to have been served on the defendant on 14-11-75 asking the defendant to come to the Sub-Registrar's Office to execute the sale deed on 15-11-75, the last date for execution of the sale deed, after receiving the remaining sale consideration. This notice is alleged to have been sent on 13-11-75 and bears an endorsement of the postman that the addressee has gone out of station and is alleged to have been served on 14-11-75. The contention of the learned counsel for the plaintiff is that the defendant deliberately avoided to receive this notice and got wrong endorsement made on the same and this notice itself was a sufficient indication of the willingness on the part of the plaintiff to perform his part of the contract by the last date fixed for execution of the sale deed i.e. 15-11-75. As has been stated earlier, the notice was, sent on 13-11-75 and there was little possibility of its having been received by the defendant in such a short time. The conduct of the plaintiff in not waiting to see the effect of the service of notice Ex. 4 and his going to the Sub-Registrar's Office is thus not free from suspicion. Unless the service of notice on the defendant is established by the plaintiff it does not appear to be reasonable to expect the defendant to reach the Sub-Registrar's Office for execution of sale deed by the specified date.

5. The learned counsel for the Appellant strenuously urged that it being admitted that the registered letter containing the correct address of the defendant was sent to him and received back with the endorsement of refusal or gone out, the

presumption of due service of that notice can be made u/s 114 of the Evidence Act and Section 27 of the General Clauses Act and it was not incumbent on the plaintiff to prove the endorsement on the notice sent by registered post and in support of his contention placed reliance on Ganga Ram Vs. Smt. Phulwati, . In support of his contention the learned counsel for the appellant also relied upon Har Charan Singh v. Shiv Rani AIR 1981 SC 1284 wherein it was held that when a registered envelope is tendered by a postman to the addressee but he refused to accept it, there is due service effected upon the addressee by refusal; the addressee must, therefore, be imputed with the knowledge of the contents thereof and, this follows upon the presumptions that are raised u/s 27 of the General Clauses Act and S. 114 of the Evidence Act.

6. The learned counsel for the respondent, however, contended that the presumption both u/s 27 of the General Clauses Act as well as u/s 114 of the Evidence Act are rebuttable. The contention of the learned counsel for the respondent is that since in the present case the presumption has been rebutted by the statement of the defendant on oath, the plaintiff in absence of any further evidence, could not succeed. Hence, the crucial question that has to be decided in the present case is whether the presumption in the circumstances of the case has been rebutted in the present case.

7. In the Full Bench case of Ganga Ram Vs. Smt. Phulwati, relied upon by the learned counsel for the appellant, the question whether the presumption stood rebutted on the denial by the addressee was not at all considered. The question whether presumption is rebutted, is always a question of fact and the Court has to consider it having regard to all the surrounding circumstances and the conduct of the party concerned. In the case of Har Charan Singh v. Shiv Rani (supra) also it was held that the presumption u/s 27 of the General Clauses Act as well as S. 114 of the Evidence Act are rebuttable and hence we have to see in the present case whether this presumption has been sufficiently rebutted by the denial of the defendant about the service of notice on him on oath. In Jamal Khan v. Haji Yusuf Ali 1978 All LJ 993 it was held by this Court that -

"The consensus of the various decisions is that where a registered letter containing correct address of the addressee is sent to him by the registered post and if the same is received back with the endorsement of refusal, in such a case the Court would be entitled to raise a presumption that the notice was duly served on the addressee

In view of the above discussion the conspectus of opinion appears to be that the presumption would stand rebutted on the denial by the addressee on oath, but the veracity of the statement must be considered by the court in the light of the evidence available on record having regard to the conduct of the party concerned. No exhaustive principles can be laid down, each case must be considered on the facts and circumstances of the case as available on the record. It is open to the Court to judge the veracity of the denial of the party against whom the presumption of service of notice is raised". In a particular case a mere

denial of service, of notice may be sufficient to rebut the presumption, while in other case such denial may not be worthy of credence having regard to the conduct of the party and the circumstances of the case."

8. The conflict was resolved by the Supreme Court in *Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana*, where the Court observed that the presumption may stand rebutted by the statement of the defendant on oath so that the plaintiff could not succeed without further evidence.

9. In *Hub Lal v. Bhudeo Prasad Sharma* 1980 All LJ 437 it was held that it is well settled that when a registered notice is sent on the correct address a presumption about its service arises even though the registered cover is returned back with an endorsement of refusal but in case the addressee states on oath in the evidence that he did not receive the notice or he did not refuse to accept notice, then the said presumption is rebutted and thereafter it is the burden of the plaintiff to establish that the notice was served on the addressee. In that case the addressee had categorically stated that no notice was received by him and neither he refused to accept any notice as shown in the endorsement of the post office. In cross-examination it was, however, admitted that he had no enmity with the postman and it was further admitted that the address-given in the notice was the address on which he normally receives his letters. The plaintiff, however had admitted the fact that he did not go along with postman to serve the notice on the defendant. The postman had not been examined. In the circumstances of the case it was held that the said presumption was clearly rebutted by the denial of the defendant on oath that he did not receive the notice. The same view was expressed in the case *Kesto Chandra v. Chandra Pal Singh* 1981 All LJ 151. Hence now in view of the consensus of the various decisions we have to examine the evidence in the case to see if the presumption in the case is rebutted by the statement of the defendant on oath so that the plaintiff could not succeed without further evidence.

10. Coming to the evidence of the case I find that defendant has examined himself as D.W. 1 and had categorically denied the receipt of any notice by him. He has stated that he was never asked by the plaintiff to execute the sale deed after receiving the sale consideration and in fact he has stated that the plaintiff could not arrange for the payment of the balance sale consideration and in cross-examination he has stated that he has got trouble in his leg due to which he never goes out of the village and that he did not go out during the month of November 1975 during which period the alleged notice Ex. 4 was sent by the plaintiff at the address of the defendant. There is nothing in his deposition to cast any doubt on the veracity of his statement. It is noteworthy to see that notice Ex. 4 was sent on 13-11-75 and it is too much to expect the service of notice on the defendant the very next date on 14-11-1975, so as to expect the defendant to come for execution of the sale deed to the Sub-Registrar's Office on 15-11-1975 i.e. the last date for execution of the sale deed. On the other hand if we turn to the statement of the plaintiff, what is very significant in his

examination-in-chief is that he has stated that the endorsement made on the envelope by the postman that the defendant had gone out of station, was correct but immediately thereafter in the very next line he states that" this endorsement made by the postman was wrong. The plaintiff admittedly had not accompanied the postman who is said to have gone for service on the defendant and made the endorsement and hence he could not be in a position to state that the endorsement was wrong. In any case, if the endorsement of the postman was wrong on the registered letter, then obviously the letter does not appear to have been offered to the defendant and there is no satisfactory evidence of the tender of notice on the defendant on 14-11-75. Hence, the presumption in the case is clearly rebutted by the clear statement of the defendant on oath and the plaintiff having not produced any further evidence in support of his case of the tender of notice to the defendant on 14-11-75, the denial on oath by the defendant was worthy of credence as there exists no other circumstance to discredit his testimony. Therefore, I see no error committed by the trial court when it held that there is no evidence on record that the plaintiff before 15-11-75 was ready to get the sale deed executed in terms of the contract for sale after paying the entire sale consideration to the defendant, and I find, in absence of satisfactory evidence of the service of notice on the defendant, as stated above, that the plaintiff was himself a defaulter in fulfilling his part of the agreement and in not getting the sale deed executed within the period fixed by the parties vide agreement of sale dated 23-6-75 and, therefore, the plaintiff is not entitled to enforce the contract for sale in respect of the said property,

11. Next comes the question of the alternative relief claimed by the plaintiff for the return of the earnest money of Rs. 6,000/-The learned counsel for the appellant in support of his plea for the return of the earnest money has placed reliance on *Kamal Rani v. Chand Rani* AIR 1980 Del 188 wherein it was held that although the earnest money is not meant to compensate loss and is not in lieu of damages, nonetheless on equitable principles if a party has not suffered but gained on account of the frustration of the contract the earnest money should not be allowed to be forfeited. I find that since 1975 the value of the property has gone up considerably. The defendant has not suffered any loss nor has any proof of loss been placed on the record. On equitable principles, therefore, I think it would not be proper to forfeit the earnest money and hence though the appeal is dismissed in regard to the relief for execution of the sale deed after receiving the balance of sale consideration, it is partly allowed only insofar as return of the earnest money of Rs. 6,000/- to the plaintiff.

12. In the result, the appeal is partly allowed and decree passed by the trial Court is modified thereby decreeing the plaintiffs suit for Rs. 6,000/- against the defendant-appellant. The rest of the decree dismissing the suit for specific performance of contract for sale is, however, maintained. The parties shall bear their own costs throughout.