
(1962) 01 MP CK 0027
In the Madhya Pradesh High Court
Case No : F.A. No. 44 of 1959

Shambhudayal

APPELLANT

Vs

Aliya Bi

RESPONDENT

Date of Decision : 20-01-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (1963) JLJ 85

Hon'ble Judges : S.P. Bhargava, J; N.M. Golvalker, J

Bench : Division Bench

Advocate : S.C. Dube, for the Appellant; A. Razak, for the Respondent

Judgement

N.M. Golvalker, J.—This is an appeal by the Plaintiff whose suit claiming specific performance of sale of certain houses by Defendant has been dismissed by the lower Court.

2. It is the Plaintiff's case that Defendant by a written contract dated 1-10-1957 had contracted to sell her four houses to him for a cash consideration of Rs. 12,000/-; that an earnest amount of Rs. 1500/- was paid to her on the date of contract, and that the transaction of sale was to be completed within two months in default of which the Defendant was entitled to forfeit the same terminating the contract; that he had been calling upon the Defendant, by registered notice, notice under certificate of posting, telegraphic notice, publication in a newspaper and finally by attempting to deliver notice personally and failing which affixing the same on her house, to execute the deed of conveyance and to receive the consideration as agreed upon but it was all in vain. The Defendant simply would not receive any notice or pay any heed to his demand. Hence his suit.

3. The Defendant, as we read her written statement, disputed the claim in suit on one ground that it was the Plaintiff who himself did not come forward to have the sale deed executed within the stipulated period and hence has lost his rights under the contract entitling her to forfeit the earnest amount. She therefore,

claimed dismissal of the suit.

4. The lower Court held that it was the Plaintiff who had committed breach of contract in not taking any steps to have the sale deed executed within the stipulated period from the Defendant and hence was not entitled to claim any relief. Accordingly it dismissed the suit. Hence this appeal.

5. In our opinion, the judgment of the lower Court is manifestly perverse and has to be set aside.

6. To enable us to show how the lower Court has been perverse in the assessment of evidence on record, it will be proper to reproduce hereunder the issues that arose out of the pleadings of the parties:

1. Did the Plaintiff himself fail to get the sale deed registered in his favour, and thus:

(i) forfeited the earnest money, and

(ii) Plaintiff himself committed the breach of the contract ?

2. Did the Plaintiff take undue advantage of the fact that the Defendant was a pardo nasheen illiterate lady ? If so, what would be its bearing upon the case ?

3 Did the Plaintiff serve notices etc. upon the Defendant as mentioned in plaint para No. 4 and 57 ?

4. Is the Plaintiff entitled to a decree as prayed for ?

7. It will thus be seen that the only issue that really mattered was whether the Plaintiff was in any manner at fault in not taking steps within the stipulated period of two months. It could not be disputed that the Plaintiff did send several notices by different methods e. g. by registered post, under certificate of posting and telegrams but none of them were received by the Defendant. It is not the case of the Defendant that all those communications were incorrectly addressed. The Plaintiff could, therefore, lead no better proof than that of filing in Court all those communications returned unserved. It is well settled that unless contrary is established by reliable evidence, normal presumption is that a communication properly addressed and posted must have reached the addressee. Hence if it is returned unserved as a result of refusal to receive it and bearing an endorsement to that effect on the communication, the addressee will be deemed to have received it and the sender will be deemed to have fulfilled his part of duty in the matter (See *Banwarilal v. Mahesh* AIR 1918 P. C. 102. *Bhagwan Radha Kishen Vs. Commissioner of Income Tax*, , *Sushil Kumar Chakravarty Vs. Ganesh Chandra Mitra*, and *Hukum Chand v. Dulichand* 1958 MPLJ Note 62 distinguishing, *Jankiram arhari v. Damodhar Ram-Chandra* 1956 NLJ 441.

8. In the instant case there is in addition one communication posted under a certificate of posting which it will have to be presumed to have reached the Defendant. However, in the face of the legal position so well settled the lower

Court has still the temerity to observe throughout its judgment in the following strain:

The notice Ex. P/2/A. Ex P./7, 6, 7/A with the postal receipts etc. and the receipts showing that telegrams were given have been filed in this case. Plaintiff admits that they were not received by the Defendant. The Defendant denies knowledge of those documents altogether. Without going into the necessary (sic) discussion, suffice it to say that the Plaintiff has failed to prove that the Defendant or her husband had any knowledge of them No postman or the person serving the notices etc. has been produced in this case. The Plaintiff in his statement says that he did go once with the "Tar-wala" to deliver the telegram but the son of the Defendant quarrelled with them and abused them. Neither the "Tar-wala" is produced, nor any report to the police was made, as admitted by the Plaintiff Therefore, the version of the Plaintiff is not relied upon. Merely because the notices were returned as unserved it cannot be presumed that "the Defendant had the knowledge of the contents of those documents. The notices were actually opened in the Court from the closed cover." The endorsements on the cover cannot and do not prove themselves and unless so proved or inadmissible in evidence.

Similar is the state of affair with regard to publication of the notice in Nadeem and with regard to the sending of notice through a letter, the postal certificate of which is said to be Ex P-11, according to the statement of the Plaintiff. It cannot be said that they did reach the Defendant or her husband. Nor can it be presumed that the Defendant or her husband had the knowledge of the contents of those notices either in the Nadeem or in the letter sent under postal certificate.

The aforesaid observations unmistakably indicate how perversely the lower Court has approached the documentary and oral evidence on record. No wonder, therefore, that it concluded that the Plaintiff having failed to establish that he took necessary steps in the direction of obtaining a deed of conveyance from the Defendant, had himself committed breach of contract.

9. Then apart from the perverse approach to the evidence on record as aforesaid, the lower Court committed further illegality in considering the financial liability of the plain-tiff, to perform his part of the contract with respect to payment of consideration, without there being any plea whatsoever to that effect even impliedly. As has been already pointed out the only plea, as is clear from the issues framed, was the failure on the part of the Plaintiff to call upon the Defendant within the stipulated period to execute the agreed deed of conveyance. Therefore in the absence of any such plea, no kind of evidence, as to whether the Plaintiff was possessed of requisite funds or not, could be admissible much less liable to be considered. That evidence has, there-fore, to be ignored. In these circumstances it is not at all necessary to consider the judgment and decree in Civil Suit No. 34 of 1959 between the Plaintiff and one Rajendra Prasad. Apart from being irrelevant it is also inadmissible. Accordingly we reject the application of the Respondent under Order 41 Rule 27, CPC Code.

(I. A. No. 1154/61 dated 4-10-1961).

10. If, therefore, the defence as is only raised is considered in the light of evidence on record, it cannot but be held that it is conclusively established that the Plaintiff did all that he could possibly do to have the agreed deed of conveyance from the Defendant, and it was the Defendant who, for reasons best known to her only, avoided to do so. In this view, therefore, disagreeing with the lower Court we hold that it was the Defendant and not the Plaintiff who committed breach of contract.

11. Then, the lower Court has found fault with the notices served by the Plaintiff on the ground that they merely asked the Defendant to execute the sale-deed without specifying therein if the sale-deed was to be executed in his own name or in the name of some one else as could be done under the contract. We are unable to follow this reasoning and the best treatment that it need receive at the hands is to call it foolish and ignore it. We are constrained to observe in this manner but as they are we could find no other appropriate word in order to ignore them.

12. Then, for no apparent reasons the lower Court has come to the conclusion that no findings on any other issue are called for. In this view the finding recorded against the Plaintiff on the question whether he committed breach of contract or not was enough to dismiss his claim and accordingly it dismissed it. We have already shown how this finding is perverse and in our view there could be no adverse finding on other issues against the Plaintiff the State of evidence on record. We have, therefore, no hesitation in holding that the Plaintiff had taken no undue advantage of the Defendant being a parida nasheen women, in fact she has not pleaded how and in what manner such an advantage was taken.

13. The result, therefore, is that we set aside the judgment and decree of the lower Court and instead grant a decree in his favour for the claim as laid down in the suit with costs of both the Courts. A decree accordingly be drawn up in favour of the Plaintiff ordering the Defendant to execute the sale-deed of the four houses and deliver possession thereof as agreed in favour of the Plaintiff on his depositing in the lower Court the balance of consideration of Rs. 10,500/- less the costs payable to him within 3 months from the date of this judgment. It is further ordered that on failure of the Defendant to carry out the terms of this decree within one month from the date of deposit as aforesaid, the lower Court shall execute the registered sale-deed in favour of the Plaintiff and place him in possession of the property conveyed.