
(2009) 12 UK CK 0012
In the Uttarakhand High Court

Shri Dutt Ram (since deceased) (Smt. Kalawati Devi and Others) APPELLANT

Vs

Prem Ballabh
 Prem Ballabh Vs Shri Dutt Ram (since deceased) (Smt. Kalawati Devi and Others) RESPONDENT

Date of Decision : 10-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 46
Registration Act, 1908 — Section 17
Specific Relief Act, 1963 — Section 22

Citation : (2009) 12 UK CK 0012

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 100 of Code of Civil Procedure, 1908, is directed against the judgment and decree dated 12.04.1988, passed by District Judge, Almora, in Civil Appeal No. 5 of 1986, whereby the judgment and decree dated 17.03.1986, passed by the trial court (Civil Judge, Almora) in Suit No. 1 of 1985, is affirmed. [This second appeal was earlier decided by this Court on 11.12.2003 but the apex court has set aside the same vide order dated 25.04.2007, passed in Civil Appeal No. 5473 of 2004, and remitted the matter back for fresh decision].

2. Heard learned Counsel for the parties and perused the Lower Court Record.

3. Brief facts of the case giving rise to this appeal are that plaintiff/respondent entered into an agreement with defendant Dutt Ram (since deceased) on 02.12.1964, after accepting Rs. 3,000/-as consideration on the condition that on his failure to repay the said amount within three years, the defendant shall sell the three shops in suit situated in Mauja Kurchaun. The plaintiff/respondent's case is that he was delivered possession of the shops and the plaintiff let out the shops to the tenants. The defendant/appellant w.e.f. 05.12.1964 became tenant of the plaintiff in two shops. Plaintiff/respondent has pleaded in the plaint that

the defendant failed to repay the amount of loan and also failed to pay the rent. On this, the plaintiff earlier instituted Suit No. 35 of 1967 for recovery of rent and ejectment of the defendant. It appears that the defendant paid the amount of arrears of rent amounting Rs. 840/- on which the plaintiff got said suit dismissed. It is further pleaded by the plaintiff in the plaint that plaintiff requested several times to the defendant to execute the sale deed in terms of the agreement dated 02.12.1964, but the defendant failed to do so. It is also pleaded that in 1971, the plaintiff spent large amount of money in repairing the shops. In 1984, the defendant filed a suit seeking permanent injunction against the present plaintiff not to change the nature of the property. This made the intention of the defendant/appellant clear that he is not willing to execute the sale deed in his favour. Hence the plaintiff, after giving notice to the defendant to execute the sale deed, when he failed to do so instituted Suit No. 1 of 1985 before the trial court for specific performance of agreement dated 02.12.1964.

4. The suit was contested by the defendant/appellant who filed written statement before the trial court. The fact relating to execution of deed dated 02.12.1964 in favour of the plaintiff was not denied but it is pleaded that the amount of Rs. 3,000/- was taken as a loan and the possession of the two of the three shops in question was given to the plaintiff at the time of the execution of the deed. As such, the deed was a mortgage deed and not that of agreement of sale. It is also pleaded by the defendant in the written statement that the suit is barred by limitation. In view of the finding recorded in Suit No. 62 of 1984 filed by the defendant it is further pleaded that the suit is barred by principle of res judicata.

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

- (i) Whether the plaintiff is entitled to have a decree for specific performance of agreement dated 02.12.1964, executed by defendant in favour of plaintiff?
- (ii) Whether the defendant is estopped from making objection to execution of sale deed on the basis of agreement dated 02.12.1964 as pleaded in Para 15 of the plaint?
- (iii) Whether the suit is barred by limitation?
- (iv) Whether the suit is barred by principle of res judicata?
- (v) Whether the plaintiff is estopped from claiming himself to be the owner of the house in question?
- (vi) Whether the possession of the plaintiff in the house in question is permissible as alleged in Para 23 of the written statement?
- (vii) To what relief if any, the plaintiff is entitled?

6. The trial court after recording evidence and hearing the parties found that the agreement of sale was executed by the defendant in favour of the plaintiff on 02.12.1964, wherein he agreed to sell the property for Rs. 3,000/- already

received by the defendant, on the condition that he failed to repay the same within a period of three years. The trial court also gave finding that the suit is neither barred by limitation nor barred by principle of res judicata. Other issues were also decided in favour of the plaintiff. Aggrieved by the judgment and decree dated 17.03.1986, passed by the trial court (Civil Judge, Almora), in Suit No. 1 of 1985, the defendant filed Civil Appeal No. 5 of 1986 before the District Judge, Almora. The said court after hearing the parties vide impugned judgment and decree dated 12.04.1988 affirmed the judgment and decree passed by the trial court and dismissed the appeal. Hence, this second appeal was filed before Allahabad High Court on 09.05.1988. The appeal was admitted by the Allahabad High Court on 19.05.1988 on following substantial question of law:

Whether the defendant was estopped from making objection regarding the execution of the sale deed on the basis of the so-called agreement dated 02.12.1964 and what is the nature of the document, which is referred as the agreement, and whether the suit is barred by limitation?

This appeal is received by transfer u/s 35 of U.P. Reorganization Act, 2000 (Central Act 29 of 2000), for its disposal.

7. Learned Counsel for the defendant/appellant pressed this appeal only on the point of limitation and as to nature of document, and argued that the suit is barred by period of limitation and the courts below have committed error of law in holding that the suit is not barred by limitation.

8. Before further discussions, this Court thinks it just and proper to mention the provisions relating to period of limitation mentioned in Schedule of the Limitation Act, 1963. Article 54 of the Schedule of said Act reads as under:

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The date fixed for the performance years performance, or, if no such of a date
is fixed, when the contract. plaintiff has notice that performance is refused.

The aforesaid provision contained in the Schedule of the Limitation Act, 1963, has two limbs-the first provides period of three years from the date fixed for the performance, and second when no period prescribed, the period of three years from the date when the plaintiff has notice that performance is refused. To see as to which limb of the two is applicable to this case it is necessary to see the contents of the agreement of sale between the parties. The agreement of sale dated 02.12.1964 between the parties reads as under:

ESak fd nRrjke mej 48 lky iq= Jh eksrhjke ekStk dqjpkSu iVVh rYyh fr[kwu ftyk
vYeksM+k okyk ;g bdjkjukek cgd vki Jh izseoYyHk iq= Jh fd?kukuUn ekS0 n;ksyh
[kku iVVh rYyk fr[kwu ds bl rjg ls fy[k nsrk gwW fd esjh eks0 dqjpkSu ds rksd
dBiQfM+;k esa rhu nj nqdkus ftuesa ls 2 nks nj nqdkus nks eatyh o rhljh nj ,d
eatyh gS e; pkSd lesr gSA bu rhuksa njksa dh pkSgnnh bl rjg ls gS fd iwoZ esa
dBiQfM+;k lhry[ksr eksVj ekxZ if?pe esa vYeksM+k jkuh[ksr eksVj ekxZ mRrj esa

taxykr foHkkx dk jsLV gkml o nf{k.k esa Jh Hkokuh nRr dh nqdku gS bu rhuksa nqdkuksa o pkSd dk eSa ekfyd o dkfct gwW fygktk vkt vkils eSusa eqofyx 3000@& :Ik;s bl "krZ ij fy;s gS fd eSa vkt ls rhu lky ds vUnj :i;s 3000@& vkidks okil dj nwxx rks bu rhuks nj nqdkuksa dk dCtk eSa vkils ys ywxkA vkt ls vkidks dCtk rhuksa njksa dk ns fn;k gS ;fn eSa rhu lky vUnj vkids 3000@& rhu gtkj :Ik;k vkidks okil u dj ldwxk rks vki ckn rhu lky ds bu rhuksa njksa nqdkuksa e; pkSd dk cSukek blh dher ij djok ldsaxsa] ;kfu eSa vkidksa c; dj nwWxkA ;fn eSa vkils bdjkj ckn c; djus ls eqdj tkmWxk rks vkidks tfj;s vnkyr eq>ls rhuksa nj nqdkuksa e; pkSd dk cSukek djy ysus dk gd gksxk] ,slh gkyr esa esjk dksbZ mtz lek;r ugha gksxk] cfYd eSa cSukek ls eqdjus dh gkyr ij vkids vnkyrh [kpsZ dk Hkh nsunkj jgwxk rhu lky ds vUnj ftl oDr eSa vkidks rhu gtkj :Ik;k vnk d:Wxk] mlh oDr vkidks bu nqdkuksa dk dCtk NksM+us dk gd gksxkA :Ik;k 3000@& vkt eSa vkils udn ik pqdk gwW] ftldh eSus vkidks vkt vyx jlhn Hkh fy[k nh gS] fygktk bdjkjukek lkFk jtkeanh jkth [kq?kh gks?k gokl vius :c: xokgu ds fy[kok fn;k] lun jgs] dkfrc eksgu pUnz tks?kh vjk;tuohl vYeksM+k] rkjh[k&2@12@1964

Aforesaid agreement clearly shows that the defendant had agreed to sell the property on the condition that he is unable to make repayment of Rs. 3,000/- taken from the plaintiff. As such, the deed in question is in fact a clear mortgage of the property as a security for the repayment of loan and it cannot be said to be a simple agreement of sale. Since possession of the property was also given to the plaintiff at the time of the execution of the deed this further makes it clear that this mortgage was mortgage with possession. That being so, the agreement dated 02.12.1964, which is sought to be specifically enforced by the plaintiff must have been got registered u/s 17 of the Registration Act. Prior to 01.01.1977 a simple agreement of sale was not required to be registered, but the present document as quoted above clearly shows that it was not an agreement of sale but basically a loan transaction for which deed of mortgage with possession was executed. Therefore, this suit for specific performance on unregistered document relating to mortgage of immovable property was not maintainable and both the courts below have erred in law in misinterpreting the nature of the deed as simple agreement of sale.

9. Assuming for a moment that the deed in question is agreement of sale, even then the suit for specific performance of contract is barred by time. Mr. Jitendra Chaudhary, learned Counsel for the respondent drew attention of this Court to the principle of law laid down in Gunwantbhai Mulchand Shah and Others Vs. Anton Elis Farel and Others, and pointed out that a suit filed even after 29 years of execution of the deed for specific performance of contract was held by the apex court as not barred by time. I have gone through the said case law. In said case there was a condition in the agreement that within three months of the date of getting due permission for sale, the defendant agreed to sell the property to the plaintiff. In such a suit, the plaintiff (the purchaser) was very much well within his rights to plead that he was not given any intimation as to the permission taken by the defendant and as such suit for specific performance even after 29 years was held to be within time. In the present case facts are

otherwise. Here, from the contents of the deed itself it is very clear that if within three years defendant fails to repay the loan the plaintiff was entitled to get the sale deed executed. That being so on 1st of December 1967, when three years completed, the plaintiff knew that he can get the sale deed executed from the defendant. But he preferred to wait for 17 years before filing the suit for specific performance of contract. In view of Section 46 of the Indian Contract Act, 1872, where no time for performance of contract is specified, it is required to be performed within a reasonable time. From no stretch of imagination can it be said that the period of 17 years for which the plaintiff waited before filing the suit, was a reasonable time for performance of contract by the defendant.

10. On behalf of the plaintiff/respondent attention of this Court is also drawn to the case of Usman Koya Vs. Santha, and Ram Karan and Others Vs. Govind Lal and Another, and it is contended that merely for the reason that the suit for specific performance of contract was filed after a period of 17 years, it cannot said to be barred by time as no period for execution of the sale deed was mentioned in the deed in question. On going through the case of M.K. Usman Koya (supra) this Court finds that the execution of the sale deed in said case was contingent on the condition of finality of a decision in a partition suit. After said event took place the defendant never informed to the plaintiff as such when the plaintiff filed the suit in the year 1996 in respect of the deed executed in the year 1988, the Court held that the same is not barred by time. Similarly in the case of Ram Karan (supra) the delay in execution of the sale deed was attributable to the conduct of the defendant who willfully avoided execution of the sale deed. In the present case the plaintiff never served any notice for 17 years on the defendant to get the sale deed executed in terms of the agreement dated 02.12.1964. In this case there was nothing in the conduct of the defendant which estopped the plaintiff from getting the sale deed executed earlier by serving a notice or by filing a suit.

11. For the reasons as discussed above, this Court is of the view that the nature of the deed in question is that of a mortgage deed and not simple agreement of sale. Also, being unregistered mortgage deed it could not have been got specifically enforced as prayed by the plaintiff. Apart from this, the suit was barred by time as discussed above. Substantial question of law stands answered in favour of the appellant. Accordingly, the appeal is allowed. The impugned judgment and decree passed by the first appellate court (District Judge, Almora) in Civil Appeal No. 5 of 1986 and judgment and decree dated 17th March, 1986, passed by the trial court (Civil Judge, Almora) in Suit No. 1 of 1985, are hereby set aside. The suit filed by the plaintiff stands dismissed for specific performance, however, in view of provisions contained in Section 22 of the Specific Relief Act, 1963, it is directed that the defendant shall pay Rs. 3,000/- along with 6% interest per annum thereon from 02.12.1964 till date, to the plaintiff with proportional costs.