
(2005) 09 UK CK 0039

In the Uttarakhand High Court

Case No : Second Appeal No. 1464 of 2001

Shri Vishnu Saran Agrawal (since deceased) and Others

APPELLANT

Vs

Sri Avadhesh Kumar

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 54
Specific Relief Act, 1963 — Section 16

Citation : (2006) 1 UC 205

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Sudhir Kumar and Pankaj Miglani, for the Appellant; Suresh Kumar Mishra, for the Respondent

Final Decision : Allowed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 100 of Code of Civil Procedure, 1908, is directed against judgment and decree dated 13-05-1976, passed in Civil Appeal No. 75 of 1973, by learned First Additional District Judge, Nainital whereby the said appeal (arising out of original suit No. 21 of 1972) is dismissed.

2. Brief facts of the case are that original suit No. 21 of 1973 was instituted by Plaintiff Shri Avadhesh Kumar with the pleading that on 27-04-1965, Defendant/Appellant Shri Vishnu Saran agreed to sell his house to the Plaintiff for Rs. 9,500/- and executed deed after receiving Rs. 1,000/- as advance part payment. It was agreed between the parties that the sale deed would be executed within six months after obtaining the permission for sale from District Magistrate, Nainital as the house is situated on Nazul land (Government lease land). Defendant failed to obtain necessary permission within six months and executed another deed on 24-10-1965 extending period of execution of sale deed by further three months i.e. up to 27-01-1966. Again when the permission was not obtained by the Defendant, he further agreed to extend time to execute the sale

deed till the permission is received from the District Magistrate. It is further pleaded by the Plaintiff that he is always ready to perform his part of contract. But the Defendant failed to perform his part of contract. The Plaintiff in furtherance of agreement not only got possession of the house but also spent Rupees five thousand in renovation of the house with the consent of the Defendant. It is also pleaded by the Plaintiff that before the execution of agreement, he was tenant in the house in question. The Defendant instead of executing sale deed, instituted civil suit No. 166 of 1968 against the present Plaintiff for his ejectment after terminating his tenancy. The said suit was decreed on 07-05-1970 and appeal arising there from was dismissed on 18-12-1971. Defendant then promised that he would not evict the Plaintiff but later on 21-04-1972 served a notice asking the present Plaintiff to vacate the house. Treating said notice as cause of action, the Plaintiff filed present suit for specific performance of contract.

3. The Defendant contested the suit on the ground that neither the agreement in question is sufficiently stamped nor registered, it is pleaded in written statement that terms contained in deed dated 24-10-1965 are at variance with those in agreement dated 27-04-1965 as such the agreement is not enforceable. It is further pleaded by the Defendant that since permission has not been received from the District Magistrate as such the suit for special performance is premature. It is also alleged that in a decree passed in civil suit No. 166 of 1968, the present Plaintiff is liable to vacate the house as he is no more a tenant in it. It is further pleaded in the written statement, the present suit is barred by limitation. Lastly, it is pleaded that neither the Plaintiff served the present Defendant with notice, asking him to execute sale deed nor had he shown any readiness and willingness to perform his part of contract.

4. Learned trial court, after framing issues, recording evidence and hearing the parties, decreed the suit on 31-03-1973 for specific performance of contract. Aggrieved by which Defendant preferred civil appeal No. 75 of 1973. However, the same was also dismissed. Hence, this Second Appeal.

5. I heard learned Counsel for the parties and perused the record.

6. It is pertinent to mention here that this Second Appeal was admitted in the Allahabad High Court in the year 1976. i.e. before Section 100 of Code of Civil Procedure, 1908, was amended w.e.f. 01-02-1977, as such no substantial question of law was required to be formulated in this appeal. However, on the basis of grounds of appeal following questions of law emerge which are required to be answered:

1. Whether the suit is decreed by the courts below in violation of provisions of Section 16(c) of Specific Relief Act, 1963?

2. Whether the learned courts below erred in law ignoring form 47 and 48 of plaint provided in Schedule W of Code of Civil Procedure, 1908, which was not adhered by the Plaintiff?

3. Whether suit is barred by limitation and is the finding of courts below thereon is erroneous in law?

4. Whether the courts below have erred in law by decreeing the suit for specific performance of contract without fulfillment of contingency (i.e. permission of District Magistrate) agreed between the parties.

7. Answer to Question of law No. 1 and 2:

Section 16(c) of the Specific Relief Act, 1963 provides as under:

16. Personal bars to relief : Specific performance of a contract can not be enforced in favour of person-

(a).....

(b).....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms performance of which has been prevented or waived by the Defendant.

Explanation For purposes of Clause (c)-

(i) Whether a contract involves the payment of money, it is not essential for the Plaintiff to actually tender to the Defendant or to deposit in court any money except when so directed by the court.

(ii) The Plaintiff must aver performance of, or readiness and willingness to perform, the contract, according to its true construction.

At the end of para 7 of the amended plaint, the Plaintiff has pleaded that he was ready and still ready to perform his part of contract and it is the Defendant who is not obtaining the necessary permission of District Magistrate (as the land is Nazul land i.e. Government lease land) and avoiding execution of sale deed. However no mention of "willingness" on the part of Plaintiff is pleaded in the plaint. The plea relating to readiness has been specifically denied in the additional written statement (paper No. 27C in trial court's record) by the Defendant in para 4 of said written statement which is filed in response to amended plaint. There are nine issues framed by the trial court but no issue has been framed on the point of readiness and willingness on the part of the Plaintiff. However, learned lower appellate court has taken up this point as point No. 6 in his judgment and held that since in the amended plaint readiness is pleaded, therefore in view of para 9 of the case reported in Ouseph Varghese Vs. Joseph Aley and Others, , the suit is maintainable. P.W. 2 Avadhesh Kumar has adduced evidence as to his readiness but did not say a word that he is willing too. In the opinion of this Court both the courts below have erred in law for the reason that Plaintiff was not only required to plead "readiness" but also "willingness". Secondly, assuming for a moment that from entire plaint it can be gathered that

he has; in pith and substance pleaded willingness also, both the courts below have completely ignored para 2 of the form No. 47 (and also para 2 and 3 of form No. 481 of plaint provided in the Code of Civil Procedure, 1908, which requires Plaintiff to plead that the Plaintiff has applied to the Defendant to perform his part of contract or tendered money and demanded the execution of sale deed. From perusal of record it appears no notice was given by the Plaintiff to the Defendant demanding him to execute sale deed. That is not even pleaded.

8. In the circumstances, the present suit for specific performance of contract appears to have been filed by the Plaintiff to only save himself from decree of eviction passed against him, without complying provisions of Section 16(c) of Specific Relief Act, 1963 and also ignoring the form 47 and 48 of Code of Civil Procedure, 1908. The question of law No. 1 and 2 are accordingly answered against Plaintiff/Respondents.

9. Answer to question of law No. 3:

Trial court framed issue No. 5 as to whether suit is barred by limitation and gave finding that since Vishnu Saran, Defendant, did not return advance part consideration received by him nor gave notice to Avadhesh Kumar (Plaintiff) to get sale deed executed as such the suit is not barred by time. This approach of trial court is erroneous. The lower appellate court has discussed this point as point No. 4 and held that since no date was specified for execution of sale deed after the endorsement of the Defendant which he made on 27-01-1966, therefore the suit is not barred by time. Again the view taken by the learned lower appellate court is erroneous in law. Here, it is pertinent to look into Article 54 of Schedule of the Limitation Act, 1963, which provides as under:

Description of Period of Time from which

Suit limitation period begins to run

54. For Specific performance of contract Three years The date fixed for the performance or if no such date is fixed, when the Plaintiff has notice that the performance is refused.

At this stage it is pertinent to see para 11 of the plaint, in which it is pleaded that cause of action arose to the Plaintiff on 27-04-1965 when original agreement was executed, thereafter on 24-10-1965 when time of six months was extended by three months, again on 27-01-1966 when the period was further extended till the permission of District Magistrate and lastly on 21-04-1972 when Defendant served notice on the Plaintiff for his ejectment Exh A 1, copy of judgment dated 07-05-1970 (in trial court record) passed in civil suit No. 166 of 1968, shows that the present Defendant filed said suit after serving notice dated 11-01-1968 terminating tenancy of the Plaintiff Avadhesh Kumar which was served on him on 20-01-1968. After the said suit decreed, Sri Avadhesh Kumar, aggrieved by said decree of ejectment preferred civil appeal No. 36 of 1970 which was dismissed on 18-12-1971 to vacate premises else he would execute the decree cannot be

said to be the notice by which the Defendant Vishnu Saran refused to perform the contract. If any such notice which could be stretched to mean refusal to perform contract on the part of Defendant (seller), it is one dated 11-01-1968 served on Plaintiff on 20-01-1968, by which the present Defendant terminated the tenancy and thereafter instituted suit in 1968. As such both the courts below have erred in law by holding the suit is not barred by time. Even if the period of limitation is calculated from January 1968, it expired in January 1971, while the present suit is filed in 1972.

10. Learned Counsel for the Plaintiff/Respondent drew my attention to the principle of law contained in Mohan Lal Vs. Nihal Singh, and Govindaraju Vs. Mariamman, and contended that High Court should not interfere with the concurrent finding of fact. I'm unable to accept the contention of the learned Counsel for the reason that the finding of courts below on limitation, is not finding of fact but a question of law, finding regarding which this Court finds erroneous as discussed above. Accordingly the question of law No. 3 is answered in favour of Defendant/Appellant.

11. Answer to question of law No. 4:

Admittedly, the execution of sale deed was contingent on the condition that the permission of District Magistrate was to be obtained by the Defendant Vishnu Saran Agarwal. The alleged agreement dated 27-04-1965 Exh-4 (paper No. 38 C in trial court record) shows that it is a simple undertaking, on unstamped paper (unregistered too), by Defendant Vishnu Saran that he has agreed to sell his house situated in Mandi, Ramnagar, Thenga Parao, for Rs. 9,500/- in favour of Plaintiff Avadhesh Kumar and that he has received Rs. 1,000/- as advance part consideration in this regard. The time provided in this deed, for execution of sale deed was six months and if he failed to do so, the Plaintiff was entitled either to get specific performance done or to the damages of Rs. 2,000/-. Another document Exh. 3 (paper No. 6C in trial court record) shows on 24-10-1965, the aforesaid Defendant agreed to extend time by three months to executed sale deed as the permission of District Magistrate could not be obtained. One more sheet appears to have been added to this document on 25-01-1966, extending the period of execution of sale till the permission is received from the District Magistrate. These papers are signed only by the Defendant and are not registered. However, one thing is clear that there was no permission accorded by the District Magistrate for sale of house in question situated over Nazul land (Government lease land), when the Plaintiff filed suit for specific performance of contract.

12. Learned Counsel for the Plaintiff/Respondents drew my attention to case law reported in R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, and argued that the learned courts below rightly decreed the suit for specific performance of contract with the direction that the permission for sale is obtained from the District Magistrate. I agree with the submission of learned Counsel to the extent that if the Defendant knowingly does not apply for

necessary permission, the suit can still be maintained for specific performance of contract subject to such necessary sanction. And in this regard, I see no illegality in the impugned judgments and decree passed by the courts below. Accordingly, the question of law No. 4, is answered in favour of Plaintiff/Respondents.

13. In view of above discussions, particularly as to the suit is barred by limitation, the findings of courts below there on are reversed and the judgments and decree passed by both the courts below are liable to be set aside. Apart from this, the suit could not have been decreed for specific performance of contract in violation of Section 16(c) of Specific Relief Act, 1963.

14. Therefore, the appeal is allowed. Impugned judgments and decree passed by both the courts below are set aside. The original suit No. 21 of 1972 is dismissed. However, costs easy.