
(2009) 01 CAL CK 0054
In the Calcutta High Court
Case No : F.A. No. 213 of 1995

Shyam Sundar Sharma (Gour) APPELLANT
Vs
Suresh Sharma and Others RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Hindu Succession Act, 1956 — Section 6
Specific Relief Act, 1963 — Section 12(3)

Citation : (2009) 1 CALLT 521 : 113 CWN 804 : (2010) 7 RCR(Civil) 2420

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Bidyut Kumar Banerjee and Shila Sarkar, for the Appellant; Bhaskar Ghosh and Nilanjan Bandopadhyay, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a plaintiff in a suit for specific performance of contract and is directed against the judgment and decree dated 29th June, 1994 passed by the learned Assistant District Judge, Purulia in Title Suit No. 54 of 1987 thereby dismissing the said suit.

2. Being dissatisfied the plaintiff has come up with the present first appeal. The plaintiff-appellant filed a suit being Title Suit No. 54 of 1987 in the Court of learned Assistant District Judge, Purulia, thereby praying for specific performance of agreement for sale of the suit property alleged to have been executed between the plaintiff and the predecessor-in-interest of the defendants.

3. The case made out by the plaintiff may be summed up thus:

a) The suit property situated within Purulia Municipality was purchased by Shyam Sundar Sharma (Thakur) (hereinafter referred to as SSS), the predecessor-in-interest of the defendants, by a registered sale-deed dated 10th March, 1970. The said property was a self-acquired property of SSS.

b) The said SSS died on 1st December, 1996 leaving the defendants as his legal

heirs and representatives. The defendant Nos. 1 and 2 are the sons, the defendant No. 3 is the widow and the defendant Nos. 4 to 6 are the daughters of the said SSS.

c) The said SSS while in possession of the property wanted to sell the same and the plaintiff agreed to such purchase and the consideration money was fixed at Rs. 1,00,000/-.

d) By an agreement dated 27th October, 1986 and registered on 29th October, 1986 the said SSS duly executed an agreement in favour of the plaintiff to sell the property on consideration of Rs. 1,00,000/- and on furtherance of the said agreement, he took Rs. 35,000/- as an earnest money. By that agreement, the said vendor agreed and undertook to register an appropriate sale-deed in favour of the plaintiff by 31st January, 1987 and to take balance amount of Rs. 65,000/-.

e) As the said SSS died on 1st December, 1986 he could not complete the transaction and as such, the plaintiff requested the defendants several times to execute and register the sale-deed and to take the balance amount of the consideration money. The defendants, however, delayed the matter on some pretext or the other.

f) The defendants being the heirs and legal representatives of SSS were bound by the agreement and to sell the property to the plaintiff in terms of the agreement.

g) The plaintiff was all along ready and willing to perform his part of the contract but due to the refusal on the part of the defendants to perform their part of the agreement, the plaintiff had been compelled to file the said suit.

h) The suit property is a three-storied building and the plaintiff was in occupation of the top floor as a tenant previously under SSS and then, under the defendants. The other portion of the building is in occupation of the defendants. Hence the suit.

4. Subsequently, by way of amendment, the plaintiff incorporated the fact that the predecessor-in-interest of the defendants initially offered to sell the property at Rs. 1,00,000/- and the defendants accepted such offer and paid Rs. 10,000/- on 30th January, 1986 but subsequently the said SSS decided to shift to his native village and he wanted a further sum of Rs. 25,000/- to prepare his residence and a further sum of Rs. 25,000/- was paid to SSS by the plaintiff and he thereafter executed and registered a fresh agreement to sell the property on 27th October, 1986 which is the subject-matter of the agreement.

5. The suit was contested by the defendants by filing written statement thereby denying the material allegations made in the plaint and their defence may be summed up thus:

a) The suit was not maintainable and was barred by limitation and was also bad for non-joinder of necessary party, namely, Bhagawati Devi, the mother of

deceased SSS.

b) The time was the essence of contract and the plaintiff having neither offered to pay within time stipulated in the agreement nor having given any notice to the defendants, the suit was not maintainable.

c) It was denied that the property was the self-acquired property of SSS. It was his ancestral property inherited from his father along with the other members of the family comprising a joint Mitakshara family. The suit property was acquired by Baldeo Sharma, the paternal grandfather of SSS by registered sale-deed dated 11th April, 1910 and after his death, the same devolved upon his son, namely, Ghasiram Sharma and grandson, namely, SSS under the provision of the Mitakshara School of Hindu Law. They along with the other members of the family held and possessed the joint property as coparceners. On the death of Ghasiram on or about 1957, the property devolved upon his son and the wife and not upon his only son as the sole owner thereof. The said SSS held and possessed the property along with the defendants and Bhagawati Devi as coparceners and it was never his exclusive property.

d) SSS in distressed condition was forced to transfer the suit property to one Shankar Lal Jhajheria by a registered sale-deed dated 21st February, 1959 to meet the urgent monetary requirement with an agreement for reconveyance on repayment of the consideration money taken by way of loan. SSS never sold the property absolutely nor had any right to do so and the said sale was a mortgage in substance and not an outright sale. Such deed was created by way of security for the loan advanced.

e) In spite of such transaction, SSS with his mother and the defendants, used to possess the suit property as before and even after such sale on payment of interest to the said Shankar Lal Jhajheria. Subsequently, the said Shankar Lal Jhajheria reconveyed the suit property to SSS on getting back the money advanced by him by registered sale-deed dated 16th March, 1970.

f) The suit property being joint ancestral coparcenary of the defendants, their father and grandmother, the transaction could not be specifically enforced. SSS never executed any agreement for sale nor did he take Rs. 35,000/- by way of earnest money to sell the property. No reasonable and prudent person could agree to sell such a valuable property at such a low and inadequate price.

g) The plaintiff had been in occupation of a portion of the suit property since long as a monthly tenant under the defendants and SSS at a rental of Rs. 300/- a month. The plaintiff, being a man of substantial means and on being approached by SSS in January, 1986 with a request to advance him a loan of Rs. 10,000/-, provided SSS executed an agreement for sale of the property in his favour by way of security. SSS agreed to the said proposal and executed a deed of agreement for sale of the property in favour of the plaintiff and obtained the loan of Rs. 10,000/- only from the plaintiff. The said agreement was never a contract for sale.

h) The said SSS paid the said loan amount of Rs. 10,000/- to the plaintiff sometime in June, 1986 and took back the original agreement from the plaintiff. SSS executed the said agreement for sale of the suit property in favour of the plaintiff on clear understanding that it would never be enforced for selling the property.

i) SSS had another emergency in October, 1986 and this time, he again approached the plaintiff with request to accommodate him by advancing a loan of Rs. 25,000/-. The plaintiff agreed to the proposal and demanded execution of similar agreement for sale of the property as executed earlier with clear understanding that it would never be enforced by the plaintiff. SSS agreed to the proposal and executed the agreement by way of security of loan in favour of the plaintiff on 27th October, 1986 and accepted Rs. 25,000/- as loan. The plaintiff asked SSS to produce the agreement dated 30th January, 1986 to facilitate the drafting of the agreement dated 27th October, 1986 with reference to it. SSS accordingly made over the said agreement dated 30th January, 1986 to the plaintiff and did not take it back in view of close and friendly relationship. The agreement dated 27th October, 1986 was never an agreement for sale was a device to protect the loan money only and the contrary allegations are absolutely false. Rs. 35,000/- was never advanced by the plaintiff on the basis of this document. No cause of action has arisen for filing the suit and the suit was liable to be dismissed.

6. At the time of hearing of the suit, the plaintiff himself and one Chandra Sekhar Tewari deposed in support of the claim case while the defendant No. 1 and two other witnesses gave evidence in opposing the prayer of the plaintiff. As indicated earlier, the learned Trial Judge by the judgment and decree impugned herein has dismissed the suit mainly on the ground that SSS being only a coparcener of a joint Hindu Mitakshara family, an agreement executed by such a person for sale of the coparcenary, without the consent of other coparceners was not legal.

7. Being dissatisfied, the plaintiff has come up with the present first appeal. Mr. Banerjee, the learned senior advocate appearing on behalf of the appellant, has made twofold submissions in support of this appeal. First, he has tried to impress upon us that the SSS was the absolute owner of the suit property as would appear from the deeds dated 21st February, 1959 executed by SSS in favour of Sanker Lal Jhajheria and the subsequent deed dated 16th March, 1970 executed by Sanker Lal in favour of SSS and thus, the suit property was not the coparcenary property of a joint Hindu Mitakhsara Family. Secondly, Mr. Banerjee contended that after the passing of the Hindu Succession Act 1956, even the female heirs of the Karta of the coparcener inherits and therefore, the concept of Mitakhsara Coparcener is no longer in vogue and the Court was competent to grant decree for specific performance of the agreement executed by SSS and by virtue of such decree, his client, at least, would acquire the undivided share of SSS in the property, if we hold that the property was not the absolute property of

SSS. Mr. Banerjee further contends that his client was at least entitled to get a decree for refund of the earnest money with interest. Mr Ghosh, the learned senior advocate appearing on behalf of the respondents, has, on the other hand, opposed the contention of Mr. Banerjee that SSS was the absolute owner of the property and has relied upon the R.S. Record of Right showing that the name of Ghasiram, the father of SSS, appeared along with SSS. Mr. Ghosh points out that it has been established from the evidence on record that Ghasiram died in the year 1957 leaving not only SSS, his son, but also his widow who was alive even after the death of SSS. Thus, Mr. Ghosh continues, all the heirs of SSS are coparceners of the property and an agreement for sale by describing the property as the absolute property was not maintainable. Mr. Ghosh further contends that the transaction dated 21st February, 1959 was a loan in substance and for that reason, Sankar Lal reconveyed the property at the same price as indicated in the deed of 1959 while executing the deed dated 16th March, 1970. Mr. Ghosh contends that the plaintiff having admitted that he was a tenant from 1956 should have produced rent receipts granted by Sankar Lal if the transaction was really a sale. He contends that notwithstanding the execution of the deed of SSS, the defendants were all along in the possession of the property and even realised rent from the plaintiff.

8. Mr. Ghosh further submitted that the amount taken by SSS was really Rs. 25,000/- and not Rs. 35,000/- mentioned in the agreement which was really a loan transaction. Mr. Ghosh contends that at the most the plaintiff is entitled to get a decree for recovery of Rs. 25,000/-.

9. Therefore, the first point that arises for determination in this appeal is whether the suit property was owned absolutely by SSS or was the coparcenary of the Mitakshara family of which SSS was a coparcener.

10. After going through the materials on record, we find that the suit property was purchased by Baldeo, the grandfather of SSS, in the year 1910. Baldeo died leaving Ghasiram, the father of SSS. The said Ghasiram thus inherited the property from his father and died in the year 1957 leaving SSS and his mother, the added defendant No. 7. It appears that the defendant No. 1 was aged 39 years in the month of June, 1994 the date of his deposition. Thus, he was born in the year 1955. That the parties hailed from Rajasthan and was governed by Hindu Mitakshara law was not disputed by the plaintiff by either leading any evidence of his own or by giving any suggestion in cross-examination of the D.W.-1. The plaintiff happened to be the brother-in-law of SSS. From the aforesaid fact, it is established that at the time of death of Ghasiram, the father of SSS, the suit property was a coparcenary property of which at least Ghasiram, SSS, the defendant No. 1 and the mother of SSS were coparceners in accordance with the provisions contained in Section 6 of the Hindu Succession Act, 1956 as it then stood. It is, therefore, apparent that in the year 1959, there was no scope of selling the property as a self-acquired or individual property of SSS to Sankar Lal.

11. The plaintiff in his cross-examination admitted that he was a tenant in a portion of the suit property from the year 1956 and was continuing as such till the presentation of the plaint. If the transaction between SSS and Sankar Lal of the year 1959 was really a genuine transaction of out and out sale, the plaintiff should have become a tenant under Sankar Lal from 1959 till 1970 when Sankar Lal reconveyed the property to SSS. In that event, it was the duty of the plaintiff to produce the rent receipt granted by Sankar Lal for the relevant period. No such rent receipt has been produced by the plaintiff. It is the case of the defendants that the said transaction was a loan transaction and that notwithstanding the execution of such document, they were all along in possession of the property. The fact that the suit property is the only residential house of the defendants has been admitted by the plaintiff in his evidence. Therefore, we find that the learned Trial Judge rightly concluded that the property was not the absolute property of SSS and was the coparcenary of a joint Mitakshara family.

12. The next question is whether after the passing of Hindu Succession Act, 1956 conferring the right of inheritance upon the female heirs, the concept of coparcener of a joint Mitakshara family was in existence at the relevant point of time in the year 1986.

13. The above question has already been settled by the three-Judges-Bench of the Supreme Court in the case of State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh and Others, by holding that when a female member who inherits an interest in the joint family property u/s 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which would have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But, according to that decision, it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. According to the Apex Court, a legal fiction should no doubt ordinarily be carried to its logical end for giving effect to the purposes for which it is enacted but it cannot be extended beyond that. It is no doubt true, the Supreme Court proceeded, that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member u/s 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs.

14. Therefore, in this case in absence of any plea or evidence that the mother and the other members of coparcenary left by Ghansiram alienated themselves by way of partition which is not the case of anybody, the coparcenary continued notwithstanding the coming into operation of the Hindu Succession Act. The

question that is next required to be answered is whether an agreement entered into by a member of coparcenary to sell the entire property without taking consent of the other coparceners is void as found by the learned Trial Judge.

15. As pointed out by the Supreme Court in the case of Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, , although a gift of a share of a coparcener in a Mitakshara family without the consent of all the coparceners is a void document, a sale of a share of coparceners is not invalid and the purchaser of such share definitely derives title of the coparcener without, however, any right of immediate possession before suing for partition. (See: also Hardeo Rai Vs. Sakuntala Devi and Others,). Therefore, by virtue of the agreement between SSS and the plaintiff, the latter acquired the right to purchase at least to the extent of right of SSS in the coparcenary and the agreement was not altogether void as held by the learned Trial Judge.

16. The most important question now before us is whether on the basis of the materials on record, we can as a first Appellate Court grant a decree for specific performance for sale of the share of the SSS in this appeal.

17. The pleading and the evidence that has been adduced indicate that the plaintiff prayed for sale of the entire property and not the right of SSS and has also prayed for possession of the suit property but has not prayed for partition.

18. There is no indication in the plaint that the plaintiff was even at all material time ready and willing to purchase the limited right of SSS in the coparcenary. We are quite conscious that in view of the provision contained in Section 12(3) of the Specific Relief Act, 1963, a Court dealing with a suit for specific performance of contract is entitled to grant lesser relief than the one claimed in the suit; but the law is equally clear that in such a situation, the plaintiff must come up with the prayer for amendment of plaint disclosing his intention of being satisfied with the lesser relief than the one claimed in the suit and indicating his intention of relinquishing his original claim. Such amendment of plaint can also be filed before the Appellate Court. (See: Surinder Singh Vs. Kapoor Singh (Dead) th. Lrs. and Others,)

19. In the case before us, the plaintiff all through fought out as if he was entitled to get a decree for specific performance of contract to sell the entire property as SSS was the absolute owner thereof. In the memorandum of this appeal, there is no ground taken that the Court ought to have at least granted the decree for sale of the right of SSS in the coparcenary of which he was a coparcener. Even at the time of hearing, the appellant did not come up with the prayer of amendment of plaint claiming lesser relief and modifying the prayer of possession by substituting the same with a prayer for partition. Therefore, we are unable to grant any decree for specific performance of contract of sale of the interest of SSS only. Mr. Banerjee, the learned advocate appearing on behalf of the appellant had relied upon a decision of the Supreme Court in the case of Kartar Singh v. Harjinder Singh reported in AIR 1990 SC in support of his contention

that a Court can grant the relief of partial performance of the relief if the full relief cannot be granted. The said decision of the Supreme Court in the case of Kartar Singh (supra) has been explained by the three-Judges-Bench of the Supreme Court in the case of Surinder Singh v. Kapoor Singh (supra) where the Court specifically held that such relief can only be granted by amending the plaint. In the absence of amendment we are not in a position to ascertain whether the plaintiff was really all along ready and willing to get even the lesser relief and will be satisfied with the mere right of partition. We are, therefore, in the absence of amendment of plaint not entitled to consider the prayer of grant of modified relief.

20. Although the plaintiff is not entitled to the relief of specific performance of contract of sale, in our view, the learned Trial Judge ought to have granted a decree of refund of earnest money of Rs. 35,000/- indicated in the registered agreement for sale. We are, in this connection, not impressed by the submission of Mr. Ghosh, the learned senior advocate for the respondents, that SSS merely took Rs. 25,000/-. SSS having admitted in the document the receipt of Rs. 35,000/- as advance and the D.W.-1 having admitted in evidence that he was not present at the time of transaction and at the same time, there being no cogent evidence of return of Rs. 10,000/- earlier taken by SSS, we propose to abide by the statement of SSS in the registered document.

21. We, therefore, set aside the judgement and decree passed by the learned Trial Judge and grant a decree of refund of Rs. 35,000/- with interest at the rate of 12 percent per annum from the date of institution of the suit till 31st December, 1999 and thereafter, at the rate of 8% per annum from 1st January, 2000 till this date. From today till realisation, the plaintiff would be entitled to get interest at the rate of 12 percent per annum. The appeal is, thus, allowed to the extent indicated above.

22. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

23. I agree.