

(2006) 05 MP CK 0028

In the Madhya Pradesh High Court

Case No : Second Appeal No. 1485 of 1999

Smt. Dayawanti Bai

APPELLANT

Vs

Smt. Sarula Bai and Others

RESPONDENT

Date of Decision : 09-05-2006

Acts Referred:

Evidence Act, 1872 — Section 103

Transfer of Property Act, 1882 — Section 54

Citation : (2007) 2 CGLJ 16 : (2007) 2 CGLJ 1

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : S.K. Karan, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Shrivastava, J.—This second appeal has been filed by the Plaintiff against the impugned judgment and decree dated 21.9.1999 passed by the 1st Additional District Judge, Balaghat in Civil Appeal No. 62-A/98, whereby the judgment and decree dated 25.11.1994 passed by 1st Civil Judge, Class-II, Balaghat decreeing the suit of Plaintiff has been reversed and set aside and the suit (Civil Suit No. 82-A/88) filed by Respondent No. 1 Sarula Bai has been decreed.

2. In brief the suit of Plaintiff Dayawanti Bai is that Defendant No. 1 Sarula Bai and Defendant No. 2 Shisola Bai are her real sisters. Defendant No. 3 Sakharam is the husband of Defendant No. 1. Sarula Bai and Defendant No. 4 Guha is the husband of Defendant No. 2 Shisola Bai. On 28.11.1979 after making payment of consideration of Rs. 3,000/- she purchased disputed land Khasra No. 136 area 1.68, Khasra No. 194 area 0.42 and Khasra No. 195 area 0.10, totalling 3.20 acres of village Thema from her father Parasram. The land is in possession of Plaintiff and is being cultivated by her. Similarly, on same date i.e. 28.11.1979 she bought another suit land Khasra No. 195 area 0.26 hectare of village Gudru for a consideration of Rs. 1,000/- from her father Parasram. A house which is

built in area 0.15 decimal of Khasra No. 137 of village Thema was also purchased by her from her father for a consideration of Rs. 1,000/-. The Defendants have no right, title and interest on these disputed properties. However, they forcibly dispossessed Plaintiff from the suit lands as well as the suit house. Hence the civil suit for declaration and possession has been filed by Plaintiff. The Plaintiff further sought a decree of Rs. 2,250/- towards damages of the crop and for mesne profits Rs. 240/- w.e.f. 1 st July, 1983 to 1st July, 1984 and thereafter Rs. 20/- per month till the possession of the suit house is delivered to her.

3. The Defendants have filed written statement refuting the averments made in the plaint. In the special pleas they have pleaded that the suit property was of their father Parasram, who was also the father of Plaintiff. The Plaintiff after abandoning the company of her husband Netlal for last several years was residing with her father. By taking undue advantage of old age of the father, by keeping him in dark and by playing fraud got the sale-deed executed. A specific plea has been raised by the Defendants that the sale-deed is without payment of consideration. On the date of sale Parasram was under paralysis.

4. The village Patwari told Parasram that in place of Will, the Plaintiff got the sale-deed executed from Parasram, as result of which he (Parasram) through his counsel sent notice to Plaintiff on 21.7.1980. The Plaintiff earlier to 21.7.1980 left the house of Parasram on 10.7.1978 after stealing certain articles as well as Rs. 800/- cash and started living with Tulsiram of that village as his wife. The objections were raised so that mutation of Plaintiff may not take place. Till Parasram passed away he (Parasram) remained in possession of the suit property and after his death Defendants are possessing the suit property.

5. Specific objection in the written statement has been raised that the impugned sale-deeds are fictitious and void ab initio and are not binding upon the Defendants.

6. Defendant-Respondent No. 1 Mst. Sarula Bai also filed another suit (Civil Suit No. 82-A/88) against present Plaintiff Dayawanti Bai for declaration that the sale-deeds dated 23.11.1979 are nul and void. The trial Court consolidated both the suits and after recording evidence, decreed the suit of Plaintiff Dayawanti Bai.

7. Mst. Sarula Bai filed first appeal before the lower appellate Court which has been allowed by the impugned judgment and decree and suit of Plaintiff Dayawanti Bai has been dismissed. Hence this second appeal has been filed by Plaintiff-Appellant Dayawanti Bai before this Court.

8. On 5.3.2001 this Court admitted this second appeal on the following substantial question of law:

Whether on non-payment of consideration of sale price, sale deed can be held to be invalid.

9. It has been vehemently argued by Shri Karan, learned Counsel appearing for the Appellant-Plaintiff that all the three sale-deeds Exs. P-1, P-2 and P-3 are

registered sale-deeds. In the document of these sale-deeds, factum of receiving consideration has been endorsed by the Sub-Registrar and, therefore, it is to be presumed that the consideration was paid to the vendor by the Plaintiff (vendee). In support of his contention, learned Counsel has placed reliance on Single Bench decision of this Court Mewalal Kanhaiyalal Vs. Jankibai and Others, , wherein it has been held by this Court that if the sale-deed is registered and there is endorsement by Sub-Registrar that consideration is paid it will be presumed that consideration was paid to the vendor. By placing reliance on another Single Bench decision of this Court Premnarayan and Another Vs. Kunwarji and Another, , it has been submitted that at the most it can be directed to pay the consideration but the sale-deed cannot be held to be null and void.

10. In order to appreciate the contention of learned Counsel for the Appellant I have perused the record. Having heard the learned Counsel and going through the record, I am of the view that this appeal deserves to be dismissed.

11. On going through para 10 of the written statement it is gathered that a specific plea has been raised that consideration was not paid to Parasram and by playing fraud, since Parasram was paralytic, sale-deeds were got executed. In para 10(c) it has been specifically pleaded that Parasram, till he passed away, was possessing the disputed property. Since specific objection in regard to non-payment of consideration to the vendor as well as possession of Parasram was pleaded by the Defendants, u/s 103 of the Evidence Act it was incumbent upon the Plaintiff to prove that consideration was duly paid to the vendor. Thus there should be specific evidence in that regard.

12. On bare perusal of testimony of Plaintiff Dayawanti (P.W. 3) it is gathered that nowhere in her entire testimony she has specifically stated that she paid the consideration to her father. Her evidence is that she purchased the agricultural suit property for a consideration of Rs. 3,000/- and Rs. 1,000/-. The disputed house of village Thema was purchased for Rs. 1,000/-. Since a specific plea of nonpayment of consideration is there, u/s 103 of the Evidence Act, the burden of proof was on Plaintiff that she paid the consideration to Parasram. Thus there should be a clear statement of her that she paid the consideration. The Plaintiff also examined scribe of the document Pannalal (P.W. 1) who has not stated anything in regard to payment of consideration to Parasram. The Plaintiff was residing with her father as she left the company of her earlier husband. According to her she was cultivating the lands of Kashiram and of some other villagers, but none of them were examined. Therefore, it is very difficult to hold that the Plaintiff was having sufficient money with her to purchase the suit property. The first appellate Court on the basis of evidence placed on record arrived at a pure finding of fact that consideration was never paid to the vendor.

13. Single Bench of this Court in the case of Sujan Singh v. Lalsahah and Anr. 1993 J LJ 552, has held that crucial element of "sale" evidently, is "ownership" to be transferred. It was further held that if the possession remains with the vendor and the price is not paid, it cannot be said to be sale of any immovable property

and it will be open to show that sale was not intended. I am of the view that if the consideration was not paid or was not intended to be paid and the seller had retained possession of the property to enjoy the same, it cannot be said that ownership is passed on the execution of the document of sale deed. On going through the judgment of the first appellate Court it is gathered that there is categorical finding of fact that Parasram remained in possession of the suit property. This is a pure finding of fact and cannot be assailed in this second appeal. Apart from this, whether Parasram was possessing the suit property after execution of impugned sale-deeds, no substantial question of law has been framed on this point. Thus the finding in regard to possession over the suit property of Parasram attained finality.

14. In the case of Mangala Kunhimina Umma and Others Vs. Puthiyaveettil Paru Amma and Others, , it has been held by the Supreme Court that to consider circumstances and conduct of the parties to ascertain the true character and content of the transaction evidenced by any document, the mere description of the deed held to be not decisive of the essence of the transaction.

15. Apart from this I have perused the reasoning's assigned by the first appellate Court in para 15 in which the first appellate Court after appreciating the evidence came to hold that Plaintiff was not having sufficient funds with her, she stated in her testimony that she was cultivating the land of Kashiram and other villagers on Adhbatai, but neither Kashiram nor any other villager in that regard was examined. It was further held that sale was dependent upon her father Parasram only. The documents of sale-deeds were never acted upon. The possession of the disputed property never remained with the Plaintiff.

16. In the case of Mewalal Kanhaiyalal Vs. Jankibai and Others, this Court has held that there is presumption in regard to receiving of the consideration because Sub-Registrar endorsed this fact in the sale-deed unless it is rebutted by strong evidence. I have already discussed hereinabove that specific objection of Defendants is that consideration was never paid and, therefore, it was incumbent upon Plaintiff to say in her testimony positively that she paid the amount of consideration. This fact is totally lacking from her testimony that she paid the amount of consideration to the vendor. Similarly there is nothing in her testimony in order to show that how and in what manner and on which date the payment was made. Though it has been mentioned in the sale-deed that payment has already been made at the house, but since specific objection was raised by the Defendants and the burden of proof was on Plaintiff to prove that consideration was paid to the vendor, I am of the view that there should be specific evidence of the Plaintiff in this regard. Thus, the decision of Mewalal Kanhaiyalal Vs. Jankibai and Others, is not applicable in the present case.

17. The decision of Premnarayan and Another Vs. Kunwarji and Another, is also not applicable in the present case because the document of sale was never acted upon.

18. As per Section 54 of the Transfer of Property Act "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The delivery of possession is also an essential ingredient in this section. In the present case both the ingredients are lacking. It be seen that in all sales it is evident that price is an essential ingredient, and that where it is neither ascertained or rendered ascertainable, the contract is void for incompleteness and incapable of endorsement.

The substantial question of law is thus answered accordingly.

19. For the reasons stated hereinabove, I do not find any merit in this appeal and the same is hereby dismissed. However, looking to the facts and circumstances, the parties are directed to bear their own costs.