

(2011) 06 GAU CK 0076

In the Gauhati High Court

Case No : Regular Second Appeal No. 27 of 1999

Smt. Jayanti Paul and Others

APPELLANT

Vs

Shri Ranadhir Chandra Dey, Shri Sunil Chandra Dey and Shri
Bijoy Dey

RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 23, 51
Guardians and Wards Act, 1890 — Section 4A
Hindu Minority and Guardianship Act, 1956 — Section 6, 8, 8(1), 8(2)
Limitation Act, 1963 — Article 60
Specific Relief Act, 1963 — Section 16, 20

Citation : (2011) 3 GLT 262

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : D. Chakraborty, for the Appellant; D.C. Roy, for the Respondent

Final Decision : Allowed

Judgement

A.C. Upadhyay, J.—This second appeal is directed against the judgment and decree, passed by the learned Court of Additional District Judge, North Tripura, Dharmanagar, in Title Appeal No. 01 of 1997, whereby the judgment and decree passed by the learned Civil Judge, Senior Division, North Tripura, Dharmanagar in T.S. No. 07 of 1993 was set aside.

2. The basic facts, necessary for disposal of this appeal, may be stated in brief, as follows:

One Sunil Chandra Paul was the owner of a plot of land measuring 1.93 acres covered by Khatian No. 810 of Mouja Dhupirbandh of Dharmanagar. After the death of Sunil Chandra Paul, his wife, three sons and one daughter, inherited the said property. On 16.04.1993, Defendant-Appellants Nos. 1, 2 and 3 entered into a written agreement with the Plaintiff-Respondent for sale of the aforesaid land

for a consideration of Rs. 11,500/-(rupees eleven thousand and five hundred). The Defendant Appellant No. 1 received a sum of Rs. 6,500/-(rupees six thousand and five hundred) as advance, and in terms of the agreement, the rest of the amount of Rs. 5,000/-(rupees five thousand), would be paid within a period of two months from the date of the agreement. However, the amount of Rs. 5,000/-(rupees five thousand) was not paid by the Plaintiff-Respondent within a period of two months.

3. Subsequently, the Defendant-Appellant Nos. 1, 2 and 3 sold out the said land on 20.10.1993 to Shri Ajit Kumar Dhar,(Defendant/ Appellant) who in turn, sold the said land to one Shri Sunil Chandra Dey and Shri Bijay Dey, Defendant Respondent Nos. 2 and 3, respectively). However, it is pertinent to mention here that on the date of agreement with the Plaintiff Respondent and also at the time of sale of the property in favour of Defendant-Appellant No. 6, two successors of the original owner(Defendant-Appellant Nos. 4 and 5) both were minors.

4. On 15.06.1993, the Plaintiff-Respondent filed a suit for specific performance of contract, praying for a decree directing the Defendant-Appellant Nos. 1, 2 and 3 to execute the sale deed in respect of the suit land. It has also been alleged that the Plaintiff/ Respondent had paid an amount of Rs. 1,000/-(rupees one thousand), on 26.04.1993 totaling to Rs. 7,500/-(rupees seven thousand and five hundred) by assuring that he would pay the remaining amount of Rs. 4,000/-(rupees four thousand). Defendant-Appellant Nos. 1, 2 and 3 entered appearance before the learned trial Court and admitted having received of Rs. 6,500/-(rupees six thousand and five hundred), but denied receipt of Rs. 1,000/-, as stated by the Plaintiff Respondent.

5. The Plaintiff-Respondent also sought for injunction. However, the learned trial Court, rejected the prayer for injunction. After the sale of the land by the Defendant-Appellant to Shri Ajit Kumar Dhar on 20.10.1993, the Plaintiff-Respondent impleaded Shri Ajit Kumar Dhar, Shri Sunil Chandra Dey and Shri Bijoy Dey as Defendant-Respondent Nos. 4, 5 and 6, and also amended the plaint by incorporating a prayer for declaration that the sale deed executed and registered by Smti. Jayanti Paul(Defendant Appellant No. 1) and her son and daughter, to Shri Ajit Kumar Dhar (Defendant/Appellant No. 6) and the deeds executed and registered by Shri Ajit Kumar Dhar to Shri Sunil Ch. Dey and Bijoy Dey as null and void.

6. In the suit before the learned trial Court, the Defendant-Appellant entered appearance by filing written statement stating therein that the suit for specific performance of contract is barred under the provisions of the Hindu Minority and Guardianship Act. The Defendant-Appellant also denied payment of the dues in terms of the agreement and accordingly prayed for dismissal of the suit for specific performance contract for sale.

7. During the trial, the Plaintiff-Respondent examined two witnesses, whereas the Defendant-Appellant also presented as many as five witnesses and also

produced material documents in support of their stand. The learned trial Court framed the following issues for just decision of the case:

- (1) Is the suit maintainable in its present form?
- (2) Is there any cause of action for the instant suit?
- (3) Have the Defendants No. 1 to 3 executed a "Baina Patra"/deed of agreement on 16.4.93 in favour of the Plaintiff to sale suit land and received Rs. 6,500/- as advance/earnest money?
- (4) Are the deeds of schedule 2 and 3 of the plaint fraudulent, void, invalid & inoperative?
- (5) Is the Plaintiff entitled to get a Kabala/deed of transfer for three fifth of the suit land in the share of the Defendants No. 1 to 3 in the suit land?
- (6) Is the Plaintiff is entitled to get a decree as prayed for?
- (7) To what relief/relief"s the parties are entitled?

8. During the course of trial, the Plaintiff-Respondent further amended the plaint by impleading two minor sons of Smti. Jayanti Paul, namely, Shri Ranjit Paul and Shri Jhantu Paul as Defendant Nos. 7 and 8, who also had their shares to the undivided property of their late father in the suit land.

9. The Defendant-Appellant contended that the agreement between the Defendant-Appellant and Plaintiff Respondent is not enforceable in law without partition, since the suit land in question, is also inherited by two other minor sons of the deceased original owner of the property. It has been further contended that the minor children of the deceased original owner was not represented in the said agreement dated 16.04.1993 by any guardian appointed by the Court, as provided u/s 8(2)(a) read with Section 6(a) of the Hindu Minority & Guardianship Act, 1956 and also in view of the provisions of the Contract Act, 1872.

10. It was also contended that the Plaintiff-Respondent failed to pay the balance amount of Rs. 5,000/-(rupees five thousand) within the stipulated period. Rather filed a suit purportedly and prematurely on 15.06.1993, even before due date, to harass and embarrass the Defendants-Appellants.

11. The Defendants-Appellants further contended that the Plaintiff-Respondent miserably failed to prove the payment of Rs. 1,000/- on 26.04.1993 and in absence of payment of the agreed amount in terms of the contract the prayer for specific performance of contract is premature and not enforceable in the eye of law.

12. The learned trial Court on completion of the trial dismissed the suit filed by the Plaintiff-Respondent by holding that the agreement dated 16.04.1993 is not enforceable, as the agreement has been made in clear violation of the provisions of law, since the interest of two other minor share holders in the undivided

property were not represented by the guardians appointed by the Court as per law. Learned trial Court also rejected the prayer of the Plaintiff for specific performance of the contract by directing the Defendant Nos. 1, 2 and 3 to execute the sale deed in favour of the Plaintiff, instead directed the Defendant Nos. 1, 2 and 3 to refund Rs. 6,500/- to the Plaintiff along with costs of the suit. Learned trial Court further ordered that the sale deed executed and registered by Smti. Jayanti Paul and her son and daughter to Shri Ajit Kumar Dhar(described in Schedule-2) and the deeds executed and registered by Shri Ajit Kumar Dhar to Shri Sunil Chandra Dey and Shri Bijoy Dey(described in Schedule-3) be treated as null and void on payment of necessary court fees by the Plaintiff on the valuation of the deeds.

13. Being aggrieved by the aforesaid order of the learned trial Court, the Plaintiff preferred an appeal before the first appellate Court which was registered as Title Appeal No. 01 of 1997. Learned first appellate Court, after hearing the learned Counsel for the parties, set aside the judgment and decree passed by the learned trial Court and directed the Defendant Nos. 4, 5 and 6 to execute the sale deed in favour of the Plaintiff, within a period of three months after taking Rs. 5,000/- (rupees five thousand) from the Plaintiff and to divide the amount among them according to their respective shares. It was further ordered by the learned appellate Court that if the Defendant Nos. 4, 5 and 6 failed to execute the sale deed within the said period, the Plaintiff would be entitled to get the sale deed executed by the Court after depositing the amount of Rs. 5,000/-(rupees five thousand) and the Defendant Nos. 4, 5 and 6 would be at liberty to receive the amount from the Court.

14. Being aggrieved by the order passed by the learned appellate Court, the Defendant-Appellant preferred the second appeal, which has been admitted for hearing on the following substantial questions of law:

(a) Whether the agreement for sale of the suit land entered into between the Plaintiff Respondent and the Defendant-Appellant Nos. 1 to 3 is valid and enforceable in view of the fact that the aforesaid agreement was barred by the provision of Section 6 and 8 of the Hindu Minority and Guardianship Act, 1956?

(b) Whether the purported agreement between the Plaintiff Respondent and the Defendant Appellants No. 1 to 3 for the sale of the suit property is not valid and not enforceable in view of the provision of Section 23 of the Indian Contract Act, 1872?

15. Learned Counsel for the Appellant submitted that there cannot be any estoppels against law. The agreement dated 16.04.1993 is not enforceable in law and the question of giving direction to execute sale deed as per the said non-enforceable agreement results in error in law. According to the Appellant, the decision of the learned trial Court dismissing the suit for specific performance of contract is just and proper, since the agreement dated 16.04.1993, for sale is not enforceable in law and, therefore, the claim of the Plaintiff for getting the sale

deed executed was rightly rejected. Though it has also been alleged by the Plaintiff that, further amount of Rs. 1,000/- was paid on 26.04.1993, but the Plaintiff miserably failed to prove such payment. This conduct of the Plaintiff has not at all been taken into consideration by the appellate Court below.

16. Learned Counsel for the Appellant further submitted that Court cannot make out a third case to award the relief sought for. After amendment by adding another relief ultimately the Plaintiff sought for only two relief's: (a) for getting the sale deed executed by Defendant Nos. 1,2 and 3 and (b) for declaring the sale deed described at Schedule 2 and 3 as void and unenforceable. But unfortunately, the Court below in the appeal most erroneously held that the said agreement is enforceable and in doing so, the learned First Appellate Court miserably failed to appreciate the spirit of law enacted in Hindu Minority and Guardianship Act,1956, read with the Contract Act, 1872.

Learned Counsel for the Appellant further pointed out that apart it was prayed for declaring the sale deeds described at Schedule 2 and 3 as void, the Court below has considered the said sale deeds in favour of the Plaintiff by realizing the amount of Rs. 5,000/- from the Plaintiff and to appropriate the said amount among themselves in accordance with their share, which is totally unreasonable, self contradictory and against the law on all scores.

17. On a careful consideration of the entire gamut of facts discussed above, it is required to be seen whether agreement for sale between the Plaintiff/ Respondent and the Defendant/ Appellant Nos. 1, 2 and 3, was invalid and not enforceable in view of the bar created by provision of Sections 6 and 8 of the Hindu Minority & Guardianship Act, 1956.

18. In order to appreciate the submission advanced by the learned Counsel for the parties, the relevant extract of Section 6 and 8 of the Hindu Minority & Guardianship Act, 1956 is hereby depicted, which reads as follows:

6. Natural guardians of a Hindu minor.-The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother ;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit

(vanaprastha) or an ascetic (yati or sanyasi).

Explanation.-In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

....

8. Powers of natural guardian.-(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate ; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in Sub-section (2) except in case of necessity or for an evidence advantage to the minor.

(5) The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under Sub-section (2) in all respects as if it were an application for obtaining the permission of the court u/s 29 of that Act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section 4-A thereof ;

(b) the court shall observe the procedure and have the power specified in Sub-sections (2), (3) and (4) of Section 31 of that Act ; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in Sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section "court" means the city civil court or a district court or a court empowered u/s 4A of the Guardians and Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits

of whose jurisdiction any portion of the property is situate.

19. In *Nangali Amma Bhavani Amma v. Gopalkrishnan Nair*, (2004) 8 SCC 785, Hon''ble Supreme Court dealt with the issue which arose for determination in these appeals as to whether a sale entered into by the natural guardian of a minor without obtaining the prior permission of the court u/s 8(2) of the Hindu Minority and Guardianship Act, 1956 (for short "the Act") was void or voidable. Wherein the Hon''ble Supreme Court held that the transaction entered into by the natural guardian in contravention of Sub-section (2) was not void but merely voidable at the instance of the minor. The relevant extract of the decision reads as follows:

Section 8(1) empowers the natural guardian of a Hindu minor to do all acts which are necessary or reasonable and proper for the benefit of a minor or for the realisation, protection or benefit of the minor's estate subject to two exceptions of which we may only note the exception carved out in Sub-section (2) of Section 8.

Section 8(2) provides that the natural guardian shall not without the previous permission of the court, inter alia, transfer by way of a sale any part of the immovable property of a minor. The effect of violation of this provision has been provided for in the section itself under Sub-section (3). This Sub-section reads:

8. (3) Any disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the minor or any person claiming under him.

8. In view of the express language used, it is clear that the transaction entered into by the natural guardian in contravention of Sub-section (2) was not void but merely voidable at the instance of the minor. To hold that the transaction in violation of Section 8(2) is void would not only be contrary to the plain words of the statute but would also deprive the minor of the right to affirm or ratify the transaction upon attaining majority. This Court in *Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another*, has also held that such transactions are not void but merely voidable. It was also held that a suit must be filed by a minor in order to avoid the transaction within the period prescribed under Article 60 of the Limitation Act.

20. In *Kallathil Sreedharan and Another Vs. Komath Pandiyala Prasanna and Another*, Hon''ble Supreme Court observing that the trial court noticing that the Appellant had not had the sanction of the civil court to alienate the property of the minor in terms of Section 8 of the Hindu Minority and Guardianship Act, 1956, held that the agreement of sale to the extent of half share of the minor was not valid in law and the discretionary relief, for specific performance of the contract, deserved to be declined to protect the interest of the minor. The relevant observation of the decision in *Kallathil Sreedharan (supra)* reads as follows:

It would be obvious that since the mandatory requirement of sanction from the Court for alienating the property of the minor, as required u/s 8 of the Hindu Minority and Guardianship Act, had not been obtained, the contract of sale to the extent of the half share of the minor is void and it does not bind the minor. The courts have rightly declined to exercise discretion on sound principle of law to protect the estate of the minor.

9. Section 20 of the Specific Relief Act, 1963 deals with discretion and jurisdiction to the court. It says that the court is not bound to grant such relief merely because it is lawful to do so, but at the same time it enjoins that the discretion of the court should not be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. It would thus be seen that the discretion given to the court of equity is required to be exercised not arbitrarily but on sound and reasonable basis guided by judicial principles.

21. Hon'ble Supreme Court, in *Kallathil Sreedharan v. Komath Pandiyala Prasanna*, (supra) while approving refusal of the discretionary relief by the High Court for specific performance of contract, declined to interfere and concluded as follows:

It is seen that the cinema theatre is a joint property between the first Respondent and her minor son. Considered from this perspective and in view of the finding recorded by the High Court on appreciation of the evidence, we are of the view that the High Court has not committed any error of law in declining to exercise the discretion in favour of the Appellant by granting decree for specific performance. Instead, it granted decree for refund of the amount advanced by the Appellant to discharge the decree debt which she owed to salvage the theatre from being confirmed in the court auction. Considered from this perspective, we are of the opinion that the discretion exercised by the High Court is on sound principles and, therefore, it does not warrant interference.

22. Further, the evidence on record clearly showed that the payment of amount of Rs. 1,000/- was not made to Defendant Appellant Nos. 1, 2 and 3, in terms of the agreement. In a suit for specific performance of a contract involving payment of money, the requirement of Section 16(c) of the specific Relief Act, 1963, is not that the Plaintiff must prove that he has actually tendered payment of money to the Defendant, but to aver and prove that he was always ready and willing to perform the essential terms of the contract, which were to be performed by him. This position of law would be clear from Section 16(c) read with explanation (i) and (ii) of the specific Relief Act, 1963, as well as Section 51 of the Indian Contract Act, 1872. The question, therefore, is as to whether the Plaintiff was ready and willing to perform the essential terms of the contract, namely payment of balance consideration for execution of the sale deed and this is a question of fact to be determined by the Court on the basis of oral and documentary evidence produced before it. In the present case, there is no proof of payment of Rs. 1000/- as claimed by Plaintiff-Defendant. The above finding of fact, on the

question of proof of performance of his part of the contract by the Plaintiff-Respondent is an essential term of the contract.

23. However erroneous it may be it cannot be interfered with by this Court in a second appeal u/s 100, CPC , which is confined to only substantial questions of law.

24. The trial court noticing the above facts and also that the Appellant had not had the sanction of the civil court u/s 8 of the Hindu Minority and Guardianship Act, 1956, held that the agreement of sale comprising the share of the minor was not valid in law. There is no reasonable ground to interfere with the finding recorded by the trial Court.

25. On the top of it, Section 20 of the Specific Relief Act, 1963, deals with discretion and jurisdiction of the court as to decreeing specific performance. It says that the court is not bound to grant such relief merely because it is lawful to do so; but at the same time it enjoins that the discretion of the court should not be arbitrary, but it should be backed by sound and reasonable cause, guided by judicial principles, and capable of correction by a court of appeal. It would thus be seen that the discretion given to the court of equity is required to be exercised not arbitrarily, but on sound and reasonable basis guided by judicial principles. Therefore, the trial court has not committed any error of law in declining to exercise the discretion in favour of the Plaintiff/ Respondent by granting decree for specific performance. Instead, the trial Court rightly granted decree for refund of the amount advanced by the Appellant. Therefore, the agreement of sale of the suit land entered in between the Plaintiff-Respondent and the Defendant-Appellant Nos. 1 to 3 is not valid and enforceable on sound principle of law, to protect the interest of the minor, since the agreement was made ignoring the provisions of Section 8(2) of the Hindu Minority and Guardianship Act, 1956, which was apparently against the interest of the minor. Furthermore, the Plaintiff-Respondent having failed to perform essential terms of contract is not entitled to the relief of specific performance of contract as sought for.

26. In view of the above discussion, the substantial question of law formulated in the second appeal is decided against the Plaintiff/ Respondent. Accordingly, the second appeal is allowed and the judgment and Order passed by the first appellate Court is hereby set aside and the judgment and decree passed by the trial Court is affirmed. No costs.