(2015) 02 KAR CK 0242

In the Karnataka High Court

Case No : RSA No. 2160/2007

Syed Sadique Hussain and Others — APPELLANT

Vs

Subhadrabai and Others — RESPONDENT

Date of Decision : 02-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 35(A)
Limitation Act, 1963 — Section 19
Specific Relief Act, 1963 — Section 20
Transfer of Property Act, 1882 — Section 3

Citation : (2015) 02 KAR CK 0242

Hon'ble Judges : K.N. Phaneendra, J.

Bench : Single Bench

Advocate : B.D. Hangarki, for the Appellant; G.S. Biradar, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

K.N. Phaneendra, J.—This Regular Second Appeal is preferred against the judgment and decree passed in O.S. No. 128/1992 on the file of Additional Civil Judge (Sr.Dn) Gulbarga, confirmed in R.A. No. 20/2001 dated : 21-06-2007 passed by First Track Court-V, Gulbarga.

2. The brief facts that emanate from the records are that the plaintiffs in O.S. No. 128/1998 filed a suit against the defendants for specific performance of the contract and for permanent injunction restraining the defendants from interfering in their peaceful possession an enjoyment of the suit schedule property and also for declaring that the Regd. Sale deed executed by first defendant in favour of 2nd defendant in respect of the suit schedule property dated: 25-4-1992 as null and void.

3. As to the plaint allegations, the first defendant is the owner of 5-acres 15-guntas of land in sy. No. 23/3 of Sirasagi village in Gulbarga taluk, executed an agreement for sale for a sum of Rs. 9,000/- per acre, after receiving an amount

of Rs. 21,000/- as part performance of the agreement towards part payment of the consideration amount.

4. On the date of the agreement, the defendant No. 1 delivered possession of the suit land in favour of the plaintiffs. It was also agreed that the defendant No. 1 has to receive the balance sale consideration amount and execute a regd. Sale deed in favour of the plaintiffs but no specific date was fixed but it was agreed that as and when requested by the plaintiffs, the defendant No. 1 has to execute such sale deed.

5. It is also alleged that subsequent to the execution of the agreement, the plaintiff has also paid an amount of Rs. 1200/- to defendant No. 1. It is alleged that in spite of repeated requests and demand being made by the plaintiffs and ready and willing to perform his part of obligation put under the agreement, the defendant No. 1 did not choose to execute any sale deed, but, on the other hand, the defendant No. 1 executed a sale deed in respect of the suit schedule property in favour of the defendant No. 2 under regd. Sale deed dated : 25-4-1992. Therefore, the said sale deed sought to be declared as null and void and as such the suit was filed for various reliefs.

6. The defendants in fact after service of summons appeared through their counsels, contested the suit by filing their written statements In fact, the defendant No. 1 has denied even execution of the agreement and also fixing of the consideration amount and receiving of an amount of Rs. 21,000/- as advance payment and also denied receipt of Rs. 1200/- subsequent to the agreement. But, he admitted the execution of the sale deed in favour of defendant No. 2 for valuable consideration. The defendant No. 1 has also denied the fact of she filing any written statement in O.S. No. 420/1988 wherein it is alleged that she has agreed to have executed an agreement of sale in favour of the plaintiffs and delivered possession in favour of the plaintiffs.

7. The defendant No. 2 has taken contention that the defendant No. 1 has executed a regd. Sale deed on 25-4-1992 for a valuable consideration of Rs. 44,000/- and put the defendant No. 2 in possession of the suit schedule property. It is contended that the plaintiff suit is barred by Section 19 of Limitation Act. It is the specific contention of the defendant No. 2 that he has absolutely no knowledge of any transaction between the defendant No. 1 and the plaintiffs as alleged by the plaintiffs in the suit.

8. On the basis of the rival contentions, the trial Court has framed as many as six issues which are as follows:--

"1. Do the plaintiffs prove factum of agreement of sale of suit land, payment of amount of Rs. 22,200/- to defendant No. 1, execution of deed of agreement of sale and delivery of possession of suit land?

2. Do they further prove their lawful possession over suit land on the date of suit?

3. Do they further prove their readiness and willingness to perform their part of

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contract?

4. Whether the sale deed in favour of 1 by to 2 is liable to be declared as null and void?

5. Whether plaintiffs are entitled for the reliefs claimed?

6. What decree or order?"

9. The plaintiffs got examined plaintiff No. 1 as P.W.1 and two other witnesses as P.W.2 and 3 and got marked Ex. P-1 to Ex. P-6. The defendant No. 2 examined himself as D.W.1 and got marked 23-documents at Ex. D-1 to Ex. D-23.

10. After thorough appreciation of oral and documentary evidence on record, the trial Court answered the above said issues, i.e. to say Issue Nos. 1 and 5 Partly in the Affirmative and Partly in the Negative, Issue Nos. 2 and 4 in the Negative and Issue No. 3 in the Affirmative and ultimately dismissed the suit for specific performance. However, decreed the suit for refund of an amount of Rs. 22,200/- along with interest at the rate of 6% p.a. from 13-2-1987 till its realization in favour of the plaintiffs.

11. The above said judgment and decree was challenged before the First Appellate Court in R.A. No. 20/2001 by the plaintiffs. They claimed that the said suit ought to have been decreed for specific performance and the trial Court has committed serious error in not properly appreciating the materials on record. The First Appellate Court has also formulated several points for consideration. The judgement of the appellate Court also shows that defendant No. 2 has filed cross objections U/Or. 41 Rule 22 of CPC and ultimately the said appeal as well as cross objections came to be dismissed. The points for consideration formulated by First Appellate Court are as follows:--

"1. Whether the appellants being plaintiffs before the trial Court proved that the 1st defendant deceased Subhadrabai being absolute owner of the suit schedule property parted with possession of the suit schedule property to the intending purchasers under Ex. P-1 and since then they were in lawful possession of the property as alleged?

2. Whether the plaintiffs before the trial Court have further proved that they were ready and willing to perform their part of contract, but on the other hand, their vendor 1st defendant Subhadrabai breached the contract and sold the property to 2nd defendant and the suit agreement of sale of the plaintiffs was within the knowledge of purchaser 2nd defendant and as such, he is not a bonafide purchaser for valuable consideration without notice as alleged?

3. Whether the 2nd defendant Naganna has proved that he is a bonafide purchaser of the suit schedule property for valuable consideration from the 1st defendant Subhadrabai and he became the absolute owner and in possession of the property by virtue of the sale deed Ex. D-3 dated 25.4.1992 as alleged?

4. Whether the findings of the trial Court given on issues holding that the

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plaintiffs have proved the due execution of sale agreement Ex. P-1 and passing of consideration, but in spite of it, it has rejected for grant of decree for specific performance of the plaintiffs, is illegal, perverse and capricious and the same is not based on sound reasoning as per the oral and documentary evidence of the parties and as such, the impugned judgment and decree of the trial Court is to be set aside by interfering in this appeal in order to grant relief of specific performance of contract etc., as prayed in the suit by the plaintiffs?

5. Whether respondent No. 2 Naganna has proved that the findings of the Court below on issue Nos. 1, 3 and 5 is not correct and the same is against well established principles of law and as per the evidence on record and as such, his cross -objections filed under Order 41 Rule 22 C.P.C. is deserves to be allowed in order to modify the findings of the Court below on the above issues as prayed.

6. What order?"

and answered the said Point Nos. 1, 2, 4 and 5 in the Negative and Point No. 3 in the Affirmative and dismissed the appeal of the plaintiffs and cross objections of defendant No. 2.

12. Being aggrieved by the said judgments, the present Regular Second Appeal is preferred.

13. The learned counsel for the appellants herein raised two important aspects, that is to say by virtue of the agreement of sale the possession of the property had been delivered in favour of the plaintiffs and the Trial Court and First Appellate Court have come to the conclusion with regard to the execution of the agreement of sale being proved by the plaintiffs. Further the Trial Court and First Appellate Court have also accepted the plea of the second defendant that the said property was sold by defendant No. 1 by way of registered sale deed, but both the Trial Court and First Appellate Court have failed to properly consider the admission of the defendant No. 1 in some other suit that he has delivered possession of the suit scheduled property and executed the agreement of sale in favour of the plaintiffs. Therefore, when the possession was with the first defendant and the same was within the knowledge of the subsequent purchaser. Therefore the Trial Court and First Appellate Court ought to have framed an issue as to whether defendant No. 2 was a bonafide purchaser for valuable consideration, that has not been done.

14. The learned counsel also further contended that when agreement of sale was in favour of the plaintiffs by defendant No. 1, it creates a prior interest in favour of the plaintiffs. Therefore, once the execution of such agreement is proved to the satisfaction of both the Courts, the Courts ought to have considered the priority of the interest created by defendant No. 1 in favour of the plaintiffs. Therefore, whatever the said transaction taken place between the defendant No. 1 and defendant No. 2 is subject to the rights and interest of the plaintiffs over the suit scheduled property acquired under the agreement of sale. This also has not been properly appreciated by both the Courts.

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15. On careful perusal of the oral and documentary evidence adduced by the parties before the Trial Court, it is clear that the plaintiffs have established the execution of agreement of sale in favour of the plaintiffs by defendant No. 1. The conduct of the defendant No. 1 that she denied the entire transaction and ultimately the defendant No. 1 after execution of the agreement of sale in favour of the defendant No. 1 executed a sale deed in favour of the defendant No. 2 suppressing the fact of previous agreement, defendant No. 2 has purchased without any knowledge of the previous agreement.

16. The question of bonafides on the part of the defendant No. 2 as argued by the learned counsel does not arise in this case, because of the simple reason the plaintiffs have to show to the Court that in any manner the existence of previous agreement between the plaintiffs and defendant No. 2 can be imputed to the knowledge of defendant No. 2. Admittedly, the agreement of sale between the plaintiffs and defendant No. 1 is an unregistered document, only defendant No. 1 and plaintiffs were having knowledge of such transaction between them. The documents produced before the Court by the plaintiffs i.e. Ex. P1-Deed of agreement, Ex. P3-Sale deed, Ex. P4-is the ROR. These documents does not disclose that by virtue of the agreement of sale any entries have been changed in the record of rights so as to impute knowledge of the agreement to the defendant No. 2. On the other hand, it clearly goes to show that by virtue of the documents produced by the defendants i.e. Ex. D3-Registered sale deed, Ex. D4-Mutation entry, Ex. D5-Land revenue records, Ex. D6 and D7-ROR''s, Ex. D8-Land revenue receipt, Ex. D9 to D12 ROR''s, Ex-D14-Krishi Pass book etc and up to D23-documents. Revenue documents discloses that after the sale deed the revenue records have been made out in the name of defendant No. 2. Admittedly, prior to the filing of the suit the said sale deed was executed on 25.04.1992 itself. Therefore, on the basis of the revenue records also any knowledge can be imputable to defendant No. 2 that he had any knowledge regarding any such possession of the plaintiffs. As the agreement of sale was an unregistered document Section 3 of the Transfer of Property Act also does not come to the help of the plaintiffs that, any notice or knowledge can be imputed by legal implication on defendant No. 2 with regard to the transactions between the plaintiffs and defendant No. 1. Though no issue was framed, the appellate Court infact formulated this point also for its consideration and in fact held that defendant No. 2 is a bonafide purchaser for consideration.

17. Looking from any angle neither the possession over the suit scheduled property nor the transaction between the plaintiffs and defendant No. 1 was well within the knowledge of defendant No. 2 before purchasing the said property. Therefore, the question of he proving or taking up any contention that he was a bonafide purchaser for consideration does not arise. Even on plain reading of plaint averments there is no specific averments made by the plaintiffs that in spite of knowing fully well the agreement between the plaintiffs and defendant No. 1 the defendant No. 2 has purchased the said property. Therefore, in my opinion, such issue does not arise for consideration. It cannot be a question of

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law holding that the Trial Court has committed any error in not framing such issue.

18. The second contention raised by the learned counsel is that the first defendant in the previous suit has admitted in O.S. No. 420/1988 between himself and third party that he has executed an agreement of sale in favour of the plaintiffs and delivered possession of the suit scheduled property. This particular aspect has not properly appreciated by the Trial Court and the First Appellate Court. But the learned counsel also accepted that though the defendant has taken up the contention but subsequently he resiled from the said admission and therefore the Trial Court and First Appellate Court have rightly put the burden again on to the plaintiffs to prove that by virtue of the agreement of sale the plaintiffs were put in possession of the suit scheduled property. Both the courts opined that the plaintiffs by any cogent and convincing evidence on facts did not establish the possession as on the date of the suit, muchless the possession over the suit scheduled property as on the date of the agreement. Therefore, when both the Courts on the basis of the facts, documentary and oral evidence have arrived at a conclusion on facts with regard to the possession of the suit scheduled property, no substantial issue arises with regard to that aspect.

19. Last but not least the contention of the learned counsel with regard to the conduct of the defendant No. 1. The learned counsel is right in submitting that the defendant No. 1 as to his knowledge executed the agreement received the consideration amount and also subsequent to the agreement received a sum of Rs. 1,200/- but belatedly denied the said transaction before the judicial Court the conduct clearly goes to show that he want to make himself wrongful gain at the cost of the plaintiffs such attitude of the defendant No. 1 should have been seriously considered by the Trial Court and First Appellate Court while awarding the refund of the consideration amount along with interest at 6% the Court would have awarded compensatory cost against defendant No. 1 in favour of the plaintiffs.

20. In view of the above said facts and findings of the fact by the Trial Court and First Appellate Court it is clear that the plaintiffs have proved that the agreement of sale was executed by defendant No. 1 by receiving an amount of Rs. 21,000/- and also received an amount of Rs. 1,200/- subsequent to the agreement and he was always ready and willing to perform their part of obligation due under the agreement. Therefore, it is contended that the Trial Court ought to have been decreed the suit for specific performance. Section 20 of the Specific Relief Act make it clear that the granting of specific performance is a discretionary power vested with the Court. Even if the Court comes to the conclusion that all the ingredients for granting of specific performance decree have been established by the plaintiffs still Court may refuse to grant specific performance depending upon the facts and circumstances of the case. The exercise of discretion by the Trial Court and First Appellate Court cannot be at any such of imagination called as an illegal error because discretion word itself presupposes that it is only on the basis

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of analyzing and accepting the materials on record and finding of facts by the Trial Court and First Appellate Court. In this particular case as I have already noted above the execution of the agreement between the defendant No. 1 and the plaintiffs was not well with the knowledge of the defendant No. 2 and defendant No. 1 appears to, has been not disclosed the same to the defendant No. 2 and further no documents which emanate subsequent to the agreement are in the name of the plaintiffs. On the other hand these documents are in the name of the defendants. Both the Courts on facts found that on the date of sale deed the possession of the suit scheduled property was delivered in favour of the defendant No. 2. These facts discloses that defendant No. 2 has purchased the property for valuable consideration of Rs. 44,000/- and get executed the sale deed from defendant No. 1. Under the Transfer of Property Act, the right title interest over the suit scheduled property vested in favour of defendant No. 2. Therefore, in order to deviate the vested rights there should be some specific right should have been acquired by the plaintiffs. As I have narrated that the execution of agreement in favour of the plaintiffs did not create any right title interest over the suit scheduled property. Therefore, the higher right that was created in favour of the defendant No. 2 has to be respected. Under the above said circumstances, both the Courts have rightly come to the conclusion that the discretion has to be exercised in order to refuse the grant of specific performance decree. Under the above circumstances, I do not find any serious legal error committed by the Courts below.

21. Last but not least a question of law as raised by the learned counsel that the conduct of the defendant No. 1 has not been properly appreciated by both the Courts though this has not been specifically taken up before the Trial Court or before the First Appellate Court. But before this Court also though not specifically taken, but in a vague manner it is addressed that the Court may grant any such other relief likewise such relief was also sought before the Trial Court as well as First Appellate Court. It is not that the Courts have granted specific performance of the agreement but awarded the refund of the amount along with interest. Under such circumstances Trial Court and First Appellate Court ought to have considered the conduct of the defendant No. 1 while awarding refund of the money. Whether the plaintiffs were entitled for any compensatory cost though it is not open to parties but desecration of the Court under Section 35(A) of CPC, whether the conduct of the parties make the Court to award compensatory cost, in my opinion this can be framed as substantial questions of law in this case. Hence the following substantial questions of law framed.

"Whether the Trial Court and First Appellate Court have committed any serious error in not awarding compensatory cost against the defendant No. 1?" 22. At the admission stage itself, I have framed the above said substantial question of law. As both counsels already argued on merits, there is no need to again post the case for final hearing.

23. The conduct of the defendant No. 1, in my opinion, is not up to the mark at

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the initial stages when the written statement was filed countering the allegations of the plaint averments, the defendant No. 1 has denied the entire transaction with the plaintiffs but ultimately the Courts have held that such an agreement was in fact executed by the defendant No. 1 and received an amount of Rs. 22,200/-. This conduct of defendant No. 1 clearly goes to show that if possible she can enrich herself at the cost of the plaintiffs. Further added to that knowing fully well that she has executed an agreement for sale in favour of the plaintiffs but suppressing the said fact without intimating the same to the defendant No. 2 she has executed the registered sale deed in favour of defendant No. 2 and collected a valuable consideration of Rs. 44,000/-. Therefore, two transactions which were within the knowledge of defendant No. 1 were not disclosed properly even before the judicial courts that shows the greedy conduct of defendant No. 1. This conduct should have been seriously viewed by the Trial Court as well as First Appellate Court. Therefore, I am of the opinion the Trial Court and First Appellate Court have committed a legal error in not awarding compensatory cost in favour of the plaintiffs against the defendant No. 1. Though the Trial Court has decreed the suit against the defendant No. 1 for refund of the said amount in favour of the plaintiffs for refund of amount of Rs. 22,200/- @ 6%. In my opinion, it would not suffice because the defendant No. 1 not only executed sale deed in favour of the plaintiffs but also did not settle the advance sale consideration amount to plaintiff but made the plaintiffs to come to the Court and run from pillar to post in order to secure the refund of the said amount. Therefore, such conduct on the part of the defendant No. 1 should have been met with an iron hand. Therefore, I am of the opinion this substantial question of law to be answered in the affirmative in favour of the plaintiffs. Therefore, this regular second appeal deserved to be partly allowed only to the extent of awarding compensatory cost in favour of the plaintiffs against the LR''s of defendant No. 1.

24. Apart from the cost of the suit awarded by the Trial Court, in my opinion, the plaintiffs are also entitled to an amount of Rs. 10,000/- as compensatory costs.

25. With these observations, I proceed to pass the following;

ORDER

"This Regular Second Appeal is partly allowed. In view of the findings given to the substantial of law framed above the plaintiffs are entitled to recover an additional amount of Rs. 10,000/- as compensatory costs from the LR''s of defendant No. 1 and this amount shall be treated as part of the decree of the trial court." Accordingly, Regular Second Appeal is disposed of.

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