

(2008) 12 UK CK 0012
In the Uttarakhand High Court
Case No : Second Appeal No. 7 of 2006

Thakur Singh and Others

APPELLANT

Vs

Sri Bhim Sen

RESPONDENT

Date of Decision : 22-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 20, 20(2)
Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2009) 1 UC 621

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Nand Prasad, for the Appellant; J.C. Belwal, for the Respondent

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 100 of Code of Civil Procedure, 1908, is directed against the judgment and decree dated 20-06-1995, passed by first appellate court (IInd Additional District Judge, Nainital), whereby said court has dismissed the Civil Appeal No. 34 of 1993, affirming the judgment and decree dated 16-03-1990, passed in Original Suit No. 76 of 1987, by the trial court (Civil Judge, Nainital). The trial court decreed the suit for specific performance of contract in favour of the Plaintiff, which is affirmed by the first appellate court.

2. Heard Learned Counsel for the parties and perused the Lower Court Record.

3. Facts giving rise to this appeal are that Plaintiff/Respondent instituted Original Suit No. 76 of 1987 before the trial court with the pleading that on 15-05-1985, Defendant Sewa Singh (since deceased) executed a registered agreement of sale in favour of the Plaintiff in respect of two and a half acres of land of Khasra No. 37M, Khata Khatoni No. 3, situated in village Ganeshpur, Tehsil Kashipur, District Nainital (now part of District Udham Singh Nagar), for a consideration of Rs. 32,500/-. It is further pleaded by the Plaintiff that out of the agreed consideration for sale, Rs. 12,500/- were paid to the Defendant Sewa Singh

before 15-05-1985, Rs. 11,000/- were paid on 23-01-1986 and Rs. 6,000/- were paid on 12-01-1987 (totaling Rs. 29,500/-). The Defendant had agreed to execute the sale deed by 15th May 1987, but when the Plaintiff approached the Defendant to execute the sale deed and gave notice to this effect, Defendant did not turn up in the office of the Sub Registrar to execute the sale deed. Hence, the suit. Lastly, it is also pleaded in the plaint that Plaintiff had always been and is ready and willing to perform his part of contract.

4. Defendant Sewa Singh (since deceased) filed written statement and contested the suit. He admitted that he had received Rs. 12,500/- by 15-05-1985, Rs. 11,000/- on 23-01-1986 and Rs. 6,000/- on 12-01-1987. However, it is pleaded in the written statement that the answering Defendant had taken loan of the aforesaid amount from the Plaintiff and the deed, which is being pleaded as agreement for sale was in fact nothing more than a security for repayment of loan. It is further pleaded by the answering Defendant that the value of the land in suit is about Rs. 1,00,000/- and the said land is not exclusively owned by the Defendant Sewa Singh, as Bachan Singh son of Tahal Singh, was also a co-tenure holder who had an un-partitioned share in the land. It is further pleaded by the answering Respondent that without permission of the Collector the answering Defendant had no right to transfer the land. It is also pleaded that Plaintiff does not possess the money lender's license. Lastly, it is pleaded by the Defendant that he is ready to pay the amount taken on loan in installments. (It appears that during the pendency of the first appeal original Defendant Sewa Singh died and his legal heirs Thakur Singh, Kulwant Singh and Amrik Singh were substituted, who have filed this second appeal).

5. The trial court after perusing the pleadings of the parties framed following issues in the suit:

(i) Whether the Defendant executed agreement dated 15-05-1985 to sell the land in suit as pleaded in para 1 of the plaint?

(ii) Whether Plaintiff paid Rs. 29,500/- to the Defendant as pleaded in the plaint?

(iii) Whether the Plaintiff had always been ready and willing to perform his part of contract?

(iv) Whether the alleged agreement of sale was executed as a security for loan as pleaded in para 11 and 12 of the written statement?

(v) Whether the Defendant had re-paid Rs. 12,000/-, as pleaded in para 14 of the written statement?

(vi) Whether the Defendant had no authority to execute agreement of sale of a land owned jointly with other tenure holders?

(vii) Whether suit is bad for non-joinder of Bachan Singh, as pleaded in para 16 of the written statement?

(viii) Whether Defendant had no right to execute the agreement as pleaded in

para 17 of the written statement?

(ix) To what relief, the Plaintiff is entitled?

The trial court after recording the evidence and hearing the parties decided all the issues in favour of the Plaintiff and decreed the suit for specific performance of contract directing the Defendant to execute the sale deed within a period of three months after taking the remaining consideration as agreed between the parties. Aggrieved by said judgment and decree dated 16-03-1990, passed by Civil Judge, Nainital, in Suit No. 76 of 1987, the Defendant Sewa Singh preferred first appeal (No. 34 of 1993) before the lower appellate court. After hearing the parties, the first appellate court (IInd Additional District Judge, Nainital) vide its judgment and order dated 20-06-1995 dismissed the appeal. Hence this second appeal was filed before Allahabad High Court by the legal representatives of original Defendant on 06-07-1995, where it was admitted on 30-11-1996 without formulating substantial question of law. The appeal is received by transfer to this Court u/s 35 of U.P. Reorganisation Act, 2000 (Central Act 29 of 2000) and following substantial question of law was later formulated:

Whether, the courts below have erred in law in decreeing the suit for specific performance of contract by misinterpreting the document which was alleged to be security towards the loan advanced by the Plaintiff to the Defendant, and have the courts below further erred in law by not considering the alternative relief sought by the Plaintiff in the suit ?

6. There is concurrent finding of fact of the courts below that the Defendant Sewa Singh executed registered agreement of sale on 15-05-1985 in favour of the Plaintiff in respect of 2.5 acres of agricultural land of Khasra No. 37-M, Khata Khatoni No. 3, situated in village Ganeshpur, Tehsil Kashipur, District Nainital, for a consideration of Rs. 32,500/-. It is admitted to the parties that Rs. 12,500/- before 15-05-1985, Rs. 11,000/- on 23-01-1986 and Rs. 6,000/- on 12-01-1985 (total amounting Rs. 29,500/-) paid by the Plaintiff to the Defendant. The only dispute raised by the Defendant/Appellants is that the nature of transaction was loan and not the sale of the land. The trial court as well as the lower appellate court have discussed the evidence on record and held that the transaction between parties was not a loan as no interest was agreed to be paid by the Defendant to the Plaintiff. The courts below have also noticed that the receipts issued by the Defendant relating to abovementioned payments did not indicate that the transaction was that of loan. The witnesses on behalf of the Plaintiff duly proved the receipts on record. On behalf of Defendant D.W.1 Sewa Singh and D.W.2 Babu Ram were got orally examined and no documentary evidence was produced. The oral testimony of the Defendant's witnesses was rightly not found by the courts below, sufficient to rebut the documentary evidence produced and proved on behalf of the Plaintiff.

7. Sri Nand Prasad, Learned Counsel for the Defendant/Appellants drew attention of this Court to Section 20 of the Special Relief Act, 1963, which provides that

jurisdiction to decree specific performance of the contract is discretionary and the court is not bound to grant such relief merely because it is lawful to do so. In this connection he further argued that the courts below have erred in law in ignoring said provision of the Specific Relief Act and decreeing the suit for specific performance instead of decreeing the suit for repayment of amount received. The justice could have been met by directing the Defendant to repay the amount with some interest. I do not find much substance in the submission advanced on behalf of the Appellants for the reason that the transactions in question is found to be purely that of the agreement of sale of the land in suit. Though it is directed in Sub-section (2) of Section 20 of Specific Relief Act, 1963, that where the Plaintiff takes unfair advantage over the Defendant or where serious hardship are faced by the Defendant which he could not have foreseen, it is not necessary for the court to decree the suit for specific performance of contract. But Explanation 1 to Sub-section (2) clarifies that mere inadequacy of consideration (as pleaded by the Defendant in this case) shall not be deemed to constitute an unfair advantage. Explanation 2 to Sub-section (2) further clarifies that either hardship which the Defendant would face must have resulted from any act of the Plaintiff subsequent to the contract else the hardship must be determined with reference to the circumstances as it existed at the time of the contract. There is nothing on the record which proves that the Plaintiff had taken unfair advantage or hardship was caused to the Defendant at the time of the contract, or thereafter by the Plaintiff.

8. As far as the argument relating to the property in question being jointly owned by the Defendant Sewa Singh with another co-tenure holder is concerned, it is sufficient to mention that Defendant/Appellants are bound to transfer only their share in the property in dispute. Accordingly, substantial question of law stands answered in favour of the Plaintiff/Respondent.

9. For the reasons as discussed above, this appeal is liable to be dismissed. The appeal is dismissed. Costs easy.