
(1971) 09 DEL CK 0002

In the Delhi High Court

Case No : Regular Second Appeal No. 270 of 1967

Through Vidya Dave and Others

APPELLANT

Vs

Delhi Cloth and General Mills Co., Delhi

RESPONDENT

Date of Decision : 03-09-1971

Acts Referred:

Citation : (1971) ILR Delhi 374

Hon'ble Judges : P.S. Safeer, J

Bench : Single Bench

Advocate : H.R. Sawhney, Y.K. Sabharwal and Ravinder Sethi, for the Appellant;

Judgement

Pritam Singh Safeer, J.

(1) The plaintiffs, who are the appellants before me, instituted a suit, which is the foundation of this litigation. The suit was instituted on the 12th of February, 1963, for specific performance of the contract pleaded therein. The provisions of the Specific Relief Act, 1877, were applicable at the date of the institution of the suit. The plaintiffs alleged that the Delhi Cloth and General Mills, Company, Limited, the defendant to the suit and the respondent before me, had erected a show room bearing Municipal No. 5523 on the platform belonging to the plaintiffs situated in the courtyard of their Katra known as Moti Katra or Katra Moti Ram, Nai Sarak, Delhi. As on the date of the suit it was stated in para 1 of the plaint that the covenants enumerated therein were in force between the parties. Clause (b) in that para of the plaint is:-

"(B) This arrangement would continue for a period of 3 years commencing from Miti Mah Sudi 2 Sambat 2015 corresponding to 9th February 1959."

One of the terms of contract between the parties pleaded specifically in the plaint was that on the expiry of the terms of the said agreement, which was to run for three years as from the 9th of February, 1959, in case no fresh agreement of the like nature was entered into the defendant was to receive Rs. 3,500 and on that the plaintiffs were to obtain the ownership of the property comprised in the show

room. If the pleas raised in para 1 to 8 of the plaint are taken into consideration then the present appellants expressly pleaded that there was an agreement of sale under which the property was liable to be transferred in consideration of the payment of a sum of Rs. 3,500. The prayer in paragraph 12 of the plaint remains:-

"12. The plaintiffs, Therefore, pray for a judgment and a decree directing the defendant to specifically perform the said agreement for sale of the said show room in favor of the plaintiffs and to pay the costs of the suit unto the plaintiffs."

The defendant, in the written statement raised several pleas. By the time those pleas were raised the plaintiffs had filed the document the interpretation whereof has been the subject-matter in controversy. That document bears the date 16th of February, 1959. In the course of the hearing of this appeal the document has been read out several times by the counsels appearing for the respective parties and they have advanced their own interpretations of its various parts.

(2) Taking into consideration the various pleas which came in for determination the trial court framed the following issues:-

"(1) Whether the document marked X is admissible into evidence? O.P.P. (2) Whether the agreement contained in marked "X" can be specifically enforced. O.P.P. (3) Whether the land under the show room is. on lease with the defendant? O.P.D. (4) If issue No. 3 is proved, can the plaintiffs obtain possession of the land under the specific performance of the agreement? O.P.P. (5) Whether the suit is pre-mature? O.P.D. (6) Relief."

In the course of its judgment dated the 28th of September, 1963, the trial court dealt with all these issues. Its finding in respect of issues Nos. 1 and 2 was that the document marked X was inadmissible in evidence and, Therefore, no contract pleaded by the plaintiffs on the basis of the said document could be specifically enforced. I find that the court of first appeal spent its entire attention on the determination of Issue No. 1. It was expressly stated in paragraph 12 of the judgment, on which impugned decree is founded:

"12. In view of the findings of the lower court on this issue and in view of my confirmation thereof, it is neither necessary, nor proper to enter into discussion of issue No. 3 as the question whether the lease-hold rights in the site underneath the show room would stand relinquished on payment of a sum of Rs. 3,500 "by the appellants. is directly concerned with the document marked X. which cannot be taken as evidence of the transaction."

As the view taken was that the document was inadmissible issue No. 2 was not attended to. Issues Nos. 3 and 4 were connected with each other. The decision in respect of issue No. 4 was to depend upon the finding which may have been recorded in respect of issue No. 3. The court of first appeal should have, out of caution, attended to all the issues. In respect of issue No. 1 it has been strenuously contended by Mr. H. R. Sawhney that the court below while reaching

the crucial point for determination seriously erred while recording its finding in paragraph 11:-

"11. The learned counsel for the appellants has urged in the alternative that according to the proviso to section 49, this document can be received as evidence of contract in a suit for specific performance, and Therefore, it should be so received. It is true that in an appropriate case even an unregistered deed of sale which required compulsory registration, can be received as evidence of a contract to sell in a suit for specific performance of the contract for sale, if the language used yields to etc. carving out of a prior and independent agreement to sell. In the instant case, however, the language used is such that it does not allow carving out such an agreement to sell."

After hearing the learned counsel it is not only that I find force in the submission but I am persuaded also to the conclusion that the court below did not deal with the effect and scope of the proviso in such detail as it should have done. When the matter came up before the court of first appeal it became concerned with the determination as to whether the document marked X was admissible in evidence or not. While hearing this appeal I am concerned with both issues 1 and 2. While determining as to whether the document is admissible in evidence or not it has of necessity to be seen as to whether the contract comprised in it can be specifically enforced or not. Leaving issue No. 2 out of determination would be inimical to the interests of the parties who have been heard in respect of both the issues.

(3) The court of first appeal after noticing the provisions contained in section 17(l)(b) of the Registration Act" became concerned with the adjudication as to whether the document as such as to have required compulsory registration. In paragraph 11 the argument based on the scope of the proviso to section 49 of the Registration Act was noticed. The submission on behalf of the appellants is that even if the document was compulsorily registerable it was in any case admissible in evidence within the scope of the proviso to section 49 of the Indian Registration Act. Section 49 is :-

"49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall- (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter 11 of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument".

(4) The proviso enacts a well-considered exception. The exception applies to a

suit for specific performance under Chapter II of the Specific Relief Act, 1877. It also extends to a case where the document may be received as evidence of part-performance of a contract for the purposes of section 53-A of the Transfer of Property Act. The document may also be received as evidence of any collateral transaction not required to be affected by registered instrument. The argument urged before me is concerned with the first part of this proviso. It is expressly provided by the Legislature that even where there is an unregistered document affecting immovable property, which, according to the requirements of the Indian Registration Act or the Transfer of Property Act, 1882, should have been registered, it will still be open to the court to receive the same as evidence of contract in suit for specific performance covered by Chapter II of the Specific Relief Act. It is contended on behalf of the respondent that the proviso, in its relevant part, contains a limitation in it. It is urged that the document contemplated by the proviso would be a document which may have come into being after the original contract may have been made as an oral contract. The terms of the proviso rule out such a submission. It is then contended that the document can be received within the scope of the proviso only for collateral purposes. Reliance is placed on *K. Hutchi Gowder v. H. Bheema Gowder*, AIR 1960 Mad 330. While dealing with the proviso the learned Judges Constituting the Division Bench observed that the words "may be received as evidence of a contract" occurring in the proviso mean "may be received in evidence to prove a contract". That observation, to my mind, does not in any way advance the contention raised on behalf of the respondent. The Division Bench, however, did not rest the ores there. It proceeded to observe that the words in the proviso "may be received as evidence of a contract" do not mean that the document may itself be read as a contract to execute a document in future. That observation was of necessity contemplating a situation where a document may be indicating that it was in the nature of a contract binding a certain party to execute yet another document in future. With the utmost respect I find myself disinclined to follow the observation noticed by me. The learned Judges in the Division Bench did not have the occasion to deal with the various provisions sprinkled in various parts of different statutes which become concerned with the scope of the proviso to section 49 of the Indian Registration Act. The document to be received within the scope of that proviso is to be received as evidence. "Evidence" is defined in section 3 of the Indian Evidence Act. It is provided:-

"3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :- "Evidence." "Evidence" means and includes-- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence: (2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

The question is what would be the evidence constituted by a document? The conclusion is that where "all documents produced for the inspection of the court" can constitute evidence within the meaning given to the word "evidence" by the

Indian Evidence Act, then the court would be necessarily concerned with every part of the document so produced and with every consequence flowing out of its construction. For what purpose is the court to consider oral or documentary evidence? The word "prove" is also given a meaning by the Indian Evidence Act. It is provided :-

""Proved". A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Evidence is produced by each one of the parties to a litigation to prove the pleas which may have been raised. If the court is entitled to the inspection of a document and to utilise it as evidence for concluding whether the subject-matter in controversy concerned with one or more of the facts is proved or not then I am of the view that the court has to consider all parts of the document and from all possible angles. While doing so the court is concerned with the facts which a document seeks to establish. Being concerned with law which may apply to the proven facts, if any legal conclusions arise out of a document the court cannot ignore them. It is clear from the proviso, referred to above, that the document is to be received as evidence "of a contract". "Contract" is defined in section 10 of the Indian Contract Act:-

"10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. * * *"

(5) The foregoing is the relevant part of section 10 of the Indian Contract Act, 1872. When the court receives as evidence of a contract a document within the scope of the proviso then it has to find out as to what agreement is contained in the document. It has to construe all the terms employed by the parties in the contract. In terms of the law applicable it has of necessity to give effect to the conclusions arising out of the construction of "the document". The document marked "x", which has also been proved on the record as Exhibit P. 2, as observed earlier, was executed under the date 16th of February, 1959. In its opening part it describes the relations between the parties which preceded the agreement which was arrived at between them on Miti Mah Sudi 2 Sambat 2015. This is how the date is mentioned in the plaint itself and the corresponding date, according to the English calendar mentioned therein is 9th of February, 1959. As I have observed earlier, I gave every facility to the learned counsel appearing for the parties to read any part of the document and give me their interpretations. After hearing them I have come to the conclusion that the document in its operative part reduced to writing the terms which were to govern the parties as from the 9th of February, 1959. It has been contended on behalf of the respondent that the document should be confined to a contract made on the 16th of February, 1959. The submission is not attractive even at the surface. That the contract was to prevail is clear from the citation wherein the date is

mentioned. For the purposes of issues 1 and 2 it remains immaterial whether it was to operate as from the 9th of February, 1959, or the 16th of February, 1959. What has at once to be appreciated is that in terms of the ultimate part of the contract the parties agreed that on the expiry of three years from the date of the agreement either they could have a fresh agreement continuing their previous relationship or the plaintiffs-appellants could offer the payment of Rs. 3,500 to the defendant, on which the defendant was to lose all their rights in respect of the show room which had admittedly been constructed upon the property which belonged to the former. The document did not stop there. It was agreed that the owners of the property underneath, on payment of Rs. 3,500 were to become the owners of the show room. The unambiguous language used in Exhibit P. 2 leads to that inevitable conclusion.

(6) The question is whether the document was admissible in evidence or not. I am of the view that the proviso suffers from no limitation. The Legislature enacted a very stringent provision in section 49 of the Act. No document requiring compulsorily to be registered was to affect any immovable property comprised therein or to confer any power to adopt or could be received as evidence of any transaction affecting such property or conferring such power. Clause (c) of section 49 is :-

(C) be received as evidence of any transaction affecting such property or conferring such power."

(7) The exception contained in the proviso to section 49 must of necessity mean that in case there is a suit for specific performance covered by Chapter II of the Specific Relief Act, 1877, then although the document may not be registered it can be received in evidence for those very purposes which stood ruled out by clause (c). The Legislature "was surely aware of clause (c) of section 49 when it enacted the exception contained in the proviso. 1. Therefore, am persuaded to hold that the document which may be received as evidence within the proviso can be so received for determining its effect in respect of the immovable property with which it may be concerned. It would obviously be the evidence of the transaction comprised in it. In terms of Exhibit P.2, the plaintiffs appellants achieved the right to obtain the ownership of the show room built on the site which, to start with, belonged to them. from the defendant, on payment of a determined sum of Rs. 3.500. The grievance raised by the plaintiffs was that they once tendered the amount which the respondent refused to receive. In such a situation with the averments contained in paras 1, 5 and 8 of the plaint the plaintiffs made the prayer contained in para 12 thereof. They were helpless in the situation. They had the right to obtain the ownership, which they could get through sale in their favor. Section 54 of the Transfer of Property Act, while defining "sale" provides in its opening part: -

"54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part- promised."

If the plaintiffs of the suit raised the grievance that the property should have been sold to them on payment of Rs. 3,500.00 then they raised it for the purpose of achieving transfer of ownership. Such sale they were seeking for the specific performance of the specific agreement contained in the ultimate portion of Exhibit P.2 That agreement gave a right to the plaintiffs to obtained ownership of the property on payment of Rs. 3,500.00 and placed the defendant-respondent under the corresponding obligation to perform his part of the contract. Chapter Ii of the Specific Relief Act which is mentioned in the proviso contained in section 49 of the Indian Registration Act, starts with section 12. Clause (c) in section 12 is :-

"(C) When the Act agreed to be done. is such the pecuniary compensation for its non-performance would not afford adequate relief;"

It cannot be said in this case that on payment of any pecuniary compensation the right which vested in the plaintiffs of the suit could have been repelled within the meaning of the foregoing clause of section 12 of the Specific Relief Act. This is more so if the true impact of the ultimate part of Exhibit P.2 is borne in mind. There the parties of their free consent, within the meaning of section 10 of the Contract Act, agreed that it would be the plaintiffs who on payment of Rs. 3,500.00 would be entitled to obtain ownership of the show room. The parties could have provided otherwise also as to what the defendant to the suit would pay for retaining the show room if it was desired to do that. The site underneath the show room always belonged to the plaintiffs. It was pleaded specifically in paragraph 5 of the written statement that even if the contract contained in Exhibit P. 2 could be enforced the defendant-company was holding the property on lease-hold basis. That plea by itself yielded that the ownership in the site always was that of the plaintiffs of the suit. That being so, Exhibit P. 2 clarifies that the plaintiffs of the suit, owners of the site underneath the show room, at no point of time wanted to part with the ownership of the site and had on the other hand clearly provided in the agreement Exhibit P. 2 that they would be entitled to obtain the ownership of the show room built on the site owned by them on payment of A Rs. 3,500.00 after the expiry of the period of three years as from the date of the contract. It is nobody's case before me that the contract was renewed. It is the document Exhibit P. 2 which at every time is receiving slashes of interpretation from the counsel appearing before me. I hold that the suit was a suit for specific performance covered by the provisions of Chapter Ii of the Specific Relief Act.

(8) The relief which may be granted by way of specific performance is discretionary. The discretion, however, is controlled by well-established judicial principles. An effort was employed while coining the statute to provide guidelines for exercising the discretion. In section 22 of the Specific Relief Act of 1877. the statute indicates how discretion is to be exercised. Item 3 enacted therein discloses an illustration where the court may properly exercise the discretion to decree a suit for specific performance. Item Iii is:-

"III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."

Item Iii, Therefore, clarifies that discretion may be exercised where the plaintiff may have either done substantial acts or suffered losses in consequence of a contract capable of specific performance. The document Exhibit P.2 discloses that the plaintiffs of the suit had arrived at an agreement allowing the defendant to construct a show room on a site belonging to the plaintiffs. The plaintiffs had performed a substantial act keeping in view that sometimes in the future they may obtain ownership of the show room. In such a case the court's discretion must of necessity be exercised in their favor. I hold that the document Exhibits P. 2 was at all times admissible in evidence in" terms of the proviso to section 49 of the Act and the contract contained therein is specifically enforceable.

(9) As noticed in an earlier part of this judgment, the court of first appeal did not deal with issues Nos. 3 and 4. Having heard the appeal at length and having made the observations contained in this judgment it is with sufficient regret that I am sending back the case to the court below for rehearing of the appeal in respect of the issues other than issues I and 2. I must observe that the relief which may ultimately be given under the sixth issue is sufficiently indicated in this judgment.

(10) The parties are directed to appear before Shri O.N. Vohra. Additional District Judge. Delhi, who originally made the judgment on which the impugned decree is based, on the 16th of September, 1971. He will hear the appeal within the limits of this judgment". There will be no order as to costs.