

## SUPREME COURT OF INDIA

Hemraj

Vs.

Rustomji

C.A. No. 127 of 1951

(M. Patanjali Sastri, C.J.I., Mehr Chand Mahajan, S. R. Das and N. Chandrasekhara Aiyar, JJ.)

14.02.1952

### JUDGEMENT

#### **CHANDRASEKHARA AIYAR, J.:-**

1. This is an appeal by the defendant against the decree of the High Court of Nagpur, which reversed the decree of the Additional District Judge. Khamgaon, dismissing the plaintiff's suit. Leave to appeal was granted as the value of the subject matter of the suit in the trial Court was Rs. 35,006 and as there were substantial questions of law.

2. The property involved is a Ginning and a pressing factory situated at Khamgaon and the case for the plaintiff is that they belonged originally to Sir Hukumchand and his son RajkumarSing from whom he purchased the factories for a sum of Rs. 35,000 under a registered sale deed dated 26-11-1939. Prior to the sale, there was a letter or note on 3-11-1939, setting out the agreement between the parties relating to the sale. On the next day, possession of the factories was handed over to one Seth Chausi Dhanji at Khamgaon on behalf of the plaintiff. Two days afterwards, i.e. on the 6th of November, Sir Hukumchand entered into a fresh agreement to sell with the defendant, but this was behind the back of the plaintiff. On the 7th of November, the defendant's men attempted to take forcible possession of the factories from Chapsi Dhanji, plaintiff's representative on the premises.

Ultimately, the defendant's agent one Nathmal resorted to the police and this led to proceedings before the 1st class Magistrate under Section 145, Criminal P. C. The Magistrate appointed Receivers to take charge of the properties. On these allegations, the plaintiff sought a declaration that he was the owner of the properties and that the defendant had no right, title or interest in the same.

3. The defendant did not admit the plaintiff's agreement or the subsequent taking of possession by Chapsi Dhanji. He set up his own agreement of the 6th November with Messrs Sarupchand-Hukumchand of Bombay of which Sir Hukumchand Sarupchand is the sole proprietor and alleged that it came into existence with "the consent or approval" or "knowledge or acquiescence" of the plaintiff. Towards the consideration of Rs. 45,000/-, a cheque was given for Rs. 5,000/- to the firm of solicitors who acted in the matter for both the vendor and the purchaser. The defendant's munim Nathmal Chunilal Agarwal went to Khamgaon on the 7th of November and took peaceable

possession of the properties in the presence of Chapsi Dhanji.

According to the defendant, the sale deed in plaintiff's favour by Sir Hukumchand and his son Rajktumarsing was fraudulent and collusive. Owing to plaintiff's knowledge of the defendant's agreement, and the taking of possession in the presence of the plaintiff's representative Chapsi Dhanji, the plaintiff. it was pleaded. was estopped from disputing the defendant's title. The allegation of the plaintiff that the defendant took his agreement with knowledge of the plaintiff's agreement to purchase was not true. As a matter of fact, the plaintiff never took possession of the factories. There was a suit for specific performance filed by the defendant in the High Court at Bombay against Messrs. Sarupchand Hukumchand and the plaintiff. The plaintiff's suit for a bare declaration without seeking the consequential relief of possession was not maintainable.

4. As many as 15 issues were knit on these pleadings, but it is unnecessary to deal with most of them. It is enough for the disposal of the present appeal to state the findings of the trial Court and the High Court on the material points in controversy as they were presented and discussed before this Court by the learned counsel for the appellant,

5. The District Judge held that the agreement to sell in favour of the plaintiff was true and that the plaintiff paid the full consideration of Rs. 35,000/-, but that Exhibit P-15, on which reliance was placed for its proof, was not admissible in evidence as it amounted to a sale deed and required registration. The plaintiff took possession of the factories through his gumasta Chapsi Dhanji who remained in possession till the 7th November. There was a contract of sale (Exhibit D-83) between Sir Hukumchand and the defendant in respect of which a cheque for Rs.5,000/- was given in part payment, Hazari Lal on behalf of the vendor delivered possession of the factories to Nathmal the munim of the defendant, on 7-11-1939 in the presence of Chapsi Dhanji. The defendant's agreement to buy was without knowledge of the plaintiff's contract; on the other hand. it was with the consent and knowledge of the plaintiff that the defendant's contract of sale came into existence. The plaintiff was estopped from pleading his title by reason of his own acts and conduct and by the acts and conduct of Chapsi Dhanji. On those findings, the plaintiff's suit was dismissed.

6. On appeal, the learned Judges of the High Court upset most of these findings. According to them, Exhibit P-15 was an agreement to sell and not a sale and was, therefore, admissible in evidence. There was a mass of evidence other than Exhibit P-15 to show that there was such an agreement. Possession was handed over to Chapsi Dhanji on 4-11-1939. The bargain with the defendant was evidenced by Exhibit D-83 and was contingent on Sir Hukumchand being able to complete the sale by making out a good title. The defendant knew of the plaintiff's prior contract.. The plaintiff did not consent to the defendant's contract, but on the contrary he protested. Chansi Dhanji was not dispossessed. On these conclusions, the suit of the plaintiff was decreed.

7. At the hearing of this appeal Shri N. C. Chatterjee, the learned counsel for the appellant, took us through the relevant documents in great detail. He urged three points in the main. Firstly, that the plaintiff, who was the lawyer of Sir Hukumchand and who was actually in Calcutta from the 3rd November to the 8th November living in the same house, must have known of the contract of said with the defendant at the Bombay end and that it was with his consent active or passive, that it took place. Secondly, that the factories did not really pass into the possession of Chapsi Dhanji, the plaintiff's representative, on the 4th November as was the plaintiff's case. Thirdly, that possession was taken by Nathmal on behalf of the defendant on the 7th November in the presence of and without any protest from Chapsi Dhanji. He also contended that Exhibit P-15 was a sale and not a mere contract of sale and that the defendant's title under Exhibit D-83 must prevail over that of the

plaintiff by reason of the provisions of S. 53-A, T. P. Act.

8. We are unable to accept any of these contentions. As pointed out by the High Court, Exhibit P-15 is a mere contract of sale creating no interest in or charge on the property, as distinguished from an actual sale. The mention of some matters which do not usually find any place in a formal deed of sale, and the reference to the execution in future of a sale deed on a registered stamp paper are circumstances which support this view.

9. Both the Courts have concurrently held that the plaintiff's contract of sale is true and that it was concluded on the 3rd November. The defendant whom contract came into existence only on 6th November, is not in a position to urge that his contract should prevail over the earlier contract of the plaintiff which was later perfected by a regular conveyance Exhibit P-30 on 26-11-1939, unless of course, he is in a position to establish that the plaintiff consented to the defendant's transaction and is, therefore, estopped. There is, however, no proof of any such consent, or knowledge implying acquiescence. The fact that the plaintiff was in Calcutta with Sir Hukumchand on the 6th is not sufficient by itself to bring home to the plaintiff any such consent or knowledge. On the other hand, we have clear documentary evidence furnished by Exhibit P-74 to the contrary. As soon as the plaintiff came to know that Sir Hukumchand was trying to negotiate through his Bombay branch for a fresh contract of sale with other parties, he sent a telegram on the evening of the 6th November to "Raoraja" which is the telegraphic address of Sir Hukumchand's firm at Bombay, to the following effect:

"KHAMGAON FACTORY ALREADY PURCHASED BY ME. YOU CANNOT SELL WITHOUT ASKING ME WIRE BEST OFFER, OVER FIFTY THOUSAND AND SELL ONLY AFTER SECURING MY CONSENT."

10. It is clear therefore that far from agreeing to the defendant's contract of sale, the plaintiff was insisting on his rights under his own contract. After agreeing to sell the properties to the plaintiff, why should Sir Hukumchand go back upon it and enter into a fresh contract of sale with the defendant is it legitimate question requiring an answer. It is indeed difficult to divine into the minds and motives of business men. After the sale to the plaintiff, Sir Hukumchand did not want a single pie to be spent on his own account in the factory Chapsi Dhanji, who was living at a short distance from the factory in one of Sir Hukumchand's houses, was to vacate the house, and even; the furniture in that house was to be sold away. One, who was so careful even as regards small sums of money might well have thought that notwithstanding the agreement in favour of the plaintiff, he could go in for a fresh transaction, if it brought him more than the price paid by the plaintiff. After all, he was on terms of intimate friendship with the plaintiff and he possibly believed that the plaintiff could be persuaded to give up his rights. In fact, this is suggested in one of the telegrams, Exhibit P-63, sent by Sir Hukumchand at Calcutta to Hazarilal at Khamgaon to the following effect in terms which are somewhat quaint :

"Though sold Jalesab me owner Jalesabs property and Jallsab ours try best it gin press offer forty thousand or more take pakka offer advertise all papers our name stating send pakka offer shall receive remittances and give possession at once comply instructions dont delay".

11. Even after the contract with the defendant was concluded, Sir Hukumchand sent Exhibit D-29 to his Bombay branch asking them to secure a still better price over Rs. 45,000/-

12. Realising, however, that the plaintiff was unexpectedly proving recalcitrant, Sir Hukumchand

sent the telegram Exhibit D-21 to the Bombay branch :

"Don't consider Jallsabs telegrams we accepted your offer take money writ Hazarimalji Dammanji Khamgaon to give purchaser possession this our final telegram wire."

It is obvious that the expectations of Sir Hukumchand as regards plaintiff's tractability were not fulfilled ; and from the afternoon of the 6th each was pursuing his own interest, probability without the knowledge of the other.

13. There can be little doubt that Chapsi Dhanji took possession on behalf of the plaintiff as held by both the Courts below. The correspondence between the plaintiff and Chapsi Dhanji and between Hazarimal and Hukumchand at Calcutta, Bombay and Indore establishes this fully and it is unnecessary to refer to the documents in detail. It is equally clear that on the 7th of November, Nathmal, the representative of the defendant, entered into possession on the strength of a letter which he carried from the Bombay branch addressed to Hazarilal. Hazarilal could do nothing as he had to obey the orders of his master, whether right or wrong and irrespective of his own approval. Chapsi Dhanji, who was frequenting the factories even after the 7th, was more or less a silent spectator of what was happening. He says in his evidence that he protested to Hazarilal about possession being handed over to the defendant's man but that Hazarilal told him that probably the second sale must have taken place with the consent of the plaintiff and he was advised to write to his own master.

This evidence is apparently true, as it is supported by Chapsi Dhanji's letter to the plaintiff dated the 7th November 1939, and marked P-26. The plaintiff asked him by telegram P-28 dated 11-11-1939, why he vacated possession without his permission and he directed him to take possession immediately. This elicited the reply Exhibit P-29,

"Received I did not give possession of ginpress factory have posted men Anandilals men are there. . . . . Chapsi "

The High Court was justified in holding on these facts that there was no dispossession of Chapsi Dhanji. At any rate, the dispossession, if any, was not with his consent.

14. Section 53-A, T. P. Act has no application. It specifies and regulates, in the case of contracts of transfer of immovable property in writing, but unregistered, the rights and obligations of the transferor or any person claiming under him on the one hand and the transferee or any person claiming under him on the other. The person claiming under the transferor referred to in the section is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. The proviso to the section saves the right of a transferee for consideration who has no notice of the contract of which there was part performance, that is to say, any rights which the transferee under the unregistered document may have on the strength of part performance of the contract against the transferor would not be of any avail against a bona fide transferee for value from the transferor who had no notice of the transaction.

Here we have no such parties. The plaintiff claims under a good and genuine contract of sale earlier in date to the defendant's contract. Under S. 27, Specific Relief Act, had the plaintiff not secured the registered conveyance he could have filed a suit for specific performance against Sir Hukumchand and the defendant who claims under him by a title arising subsequently to the plaintiff's contract. The defendant is not a transferee for value who has paid money in good faith. As stated already, all

that he has got is a contract of sale but not a sale and out of the consideration of Rs. 45,000. only Rs. 5,000/were paid by way of a cheque. The High Court has found further that he took his contract with the knowledge of the plaintiff's earlier title.

15. We agree with the conclusion reached by the High Court and dismiss the appeal with costs.

Appeal dismissed.

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