Prem Raj

Vs

D. L. F. Housing & Construction Pvt. Ltd. & Another

Civil Appeal No. 37 of 1966

(J. C. Shah, V. Ramaswami – I JJ)

04.04.1968

JUDGMENT

RAMASWAMI, J.-

The sole question involved in this appeal is whether a plaintiff suing for a declaration that a certain contract against him is void and inoperative having been obtained by undue influence, can in the same suit in the alternative ask for the relief of specific performance of the same contract.

On October 26, 1956 Pt. Prem Raj, the appellant entered into an agreement with Shri Moti Ram Bhalla, respondent no. 2 for the purchase of lands from Shri Lila Ram, father of the appellant at the price of Rs. 1025/- per bigha on the terms and conditions mentioned therein. On December 18, 1956, the appellant and respondent no. 2 entered into a partnership to carry on the business of buying and selling lands and developing the same under the name and style of "L.M.G. Colonisers & Traders". Subsequently, on January 2, 1957 the said firm "L.M.G. Colonisers & Traders" entered into a deed of partnership with D.L.F. Housing & Construction (P) Ltd., respondent no. 1 herein to carry on the business of purchasing and developing the lands into a residential colony and to sell the same in plots either by auction or by tenders or in any other manner as the company, respondent no. 1 may find expedient after getting the scheme for development approved by the competent authority. On the same day i.e., January 2, 1957 the newly formed partnership between the respondent no. 1 and L.M.G. Colonisers & Traders entered into an agreement for the purchase of the same land with Pt. Lila Ram on the terms and conditions set out therein. On June 11, 1958 the parties cancelled the new partnership and agreement dated January 2, 1957 and entered into a fresh arrangement and executed the following four documents :

> "(i) A deed of dissolution of the new partnership between L.M.G. Colonisers and Traders (consisting of the appellant and respondent nos. 2 and 1 entered into on 2nd January 1957 (Ex. P. 1)).
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> (ii) A deed of cancellation of agreement of sale of land between Lila Ram and the said new partnership firm of L.M.G. Colonisers and respondent no. 1.
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> (iii) A new Agreement of sale of these same lands by Lila Ram in favour of respondent no. 1.
>
> (iv) An agreement to sell 22 plots out of the land agreed to be purchased from Lila Ram under the agreement stated in (iii) above by respondent no. 1 in favour of the appellant."

By virtue of these documents the new partnership dated January 2, 1957 between L.M.G. Colonisers & respondent no. 1 came to an end as also the agreement dated January 2, 1957 by which Lila Ram had agreed to sell his lands to the said new partnership firm and there was a fresh agreement by Lila Ram to sell the same lands to D.L.F. Housing and Construction (Private) Ltd., respondent no. 1 at a certain price and out of the land thus to be bought, respondent no. 1 agreed to sell 22 plots of land to the appellant. After about 3 years, on or about June 8, 1961, the appellant gave notice to respondent no. 1 repudiating the arrangement dated June 11, 1958 as void and claimed that the documents were not binding upon him. The appellant alleged that the deeds executed on June 11, 1958 were unlawful and void and inoperative against him as they were executed as a result of undue influence and coercion exercised upon him. In the alternative the appellant prayed for a decree for specific performance of the agreement dated June 11, 1958 to sell the aforesaid 22 plots of land and for damages in addition thereto. A preliminary objection was raised by the contesting respondent no. 1, D.L.F. Housing and Construction (P) Ltd. to the effect that the appellant having claimed that the agreement dated June 11, 1958 was void and inoperative, cannot in the same suit pray for specific performance of the same agreement. The Subordinate Judge, First Class, Delhi rejected the preliminary objection by his order dated February 26, 1962. Respondent no. 1 filed a Civil Revision Application no. 228-D of 1962 in the Circuit Bench of the Punjab High Court at Delhi. By his order dated February 14, 1964, Dulat, J. allowed the Revision Application holding that the appellant having sued for a declaration that the agreement of June 11, 1958 was void, cannot in the alternative be permitted to sue for specific performance of the agreement and therefore the suit must fail so far as the relief for specific performance was concerned.

This appeal is brought by special leave from the order of the Punjab High Court dated February 14, 1964 in Civil Revision Application no. 228-D of 1962.

In support of this appeal it was argued, in the first place, that under O.7 r. 7, Civil Procedure Code the appellant was entitled to claim a relief in the alternative on the facts stated in the plaint and it was open to him to pray to the Court that a decree for specific performance should be granted if the Court did not accept his case that the impugned agreement dated June 11, 1958 was illegal and void. It is true that under O.7, r. 7, Civil Procedure Code it is open to a plaintiff to pray for inconsistent reliefs. But it must be shown by the plaintiff that each of such pleas is maintainable. So far as the relief of specific performance is concerned, the matter must be examined in the light of the provisions of the Specific Relief Act. In this connection reference may be made to s. 37 of the Specific Relief Act (Act No. 1 of 1877) which is to the following effect :

> "A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly."

It is expressly provided by this section that a plaintiff suing for specific performance of the contract can alternative sue for the rescission of the contract but the converse is not provided. It is therefore not open to a plaintiff to sue rescission of the agreement and in the alternative sue for specific performance. Section 35 of the Specific Relief Act, 1877 states the principles upon which the rescission of a contract may be adjudged. But there is no provision in this section or any other section of the Act that a plaintiff suing for rescission of the agreement may sue in the alternative for specific performance. In our opinion, the omission is deliberate and the intention of the Act is that no such alternative prayer is open to the plaintiff. This view is borne out by the following passage in "Fry On Specific Performance, 6th Edn., p. 493" :

> "It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled, provided that the alternative relief is based on the same state of facts, though with different conclusions as to law. When the action is brought by the vendor, and the purchaser has been in possession, this alternative claim may embrace an account of the rents and profits. But, for the reason already stated, a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise could not be sustained in the Court of Chancery. And notwithstanding the provisions of the Rules of the Supreme Court as to alternative claims for relief, it seems probable that the same conclusion would still be arrived at, on the ground that the claims were inconsistent and embarrassing."

The same principle is enunciated in Cawley v. Poole [71 E.R. 23] in which it was held by the Court of Chancery that in a case where a bill alleges a judgment obtained by fraud, and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or in default to have the compromise carried out, and the Court is of opinion that the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed.

There is also another reason for holding that the appellant has made out no cause of action with regard to the relief of specific performance of the contract. It is well-settled that in a suit for specific performance that plaintiff should allege that he is ready and willing to perform his part of the contract. In the present case, no such averment is made in the plaint. On the other hand, the plaintiff has alleged that the agreement was a result of fraud and undue influence and was not binding upon him. For these reasons it must be held that so far as the relief of specific performance is concerned, the plaintiff has no cause of action. The legal position has been stated by Lord Blanesburgh in pronouncing the opinion of the Judicial Committee in Ardeshir Mama v. Flora Sassoon [55 I.A. 360, at p. 372 as follows :

> "Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it inevitable dismissal of his suit. Thus it was that commencement of an action for damages being, on the principle of such cases as Clough v. London and North Western Rly. Co. [(1871) L.R. 7 Ex. 26], and Law v. Law [(1904) I Ch. 140], a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had, by his election precluded himself even from making the averment just referred to, proof of which was essential to the success of his suit. The effect upon an action for damages for breach of a previous suit for specific performance will be apparent after the question of the competence of the Court itself to award damages in such a suit has been touched upon."

It was pointed out by Lord Blanesburgh that the Indian law on the subject as contained in the

Specific Relief Act, 1877 is not different from the English law. At page 375 of the same Report Lord Blanesburgh states :

> "Although, so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in English [s. 24(b) is the nearest], it seems invariably to have been recognized, and, on principle, their Lordships think rightly, that the Indian and English requirements in this matter are the same : see, e.g., Karsandas v. Chhotalal (25 Bom. L.R. 1037, 1050)."

In the present case there is absence of an averment of the part of the plaintiff in the plaint that he was ready to perform his part of the contract. In the absence of such an averment it must be held that the plaintiff has no cause of action so far as the relief for specific performance is concerned.

It was next contended on behalf of the appellant that in any event the High Court should have given the appellant an option to elect either of the two reliefs and ought not to have dismissed the suit at a preliminary stage so far as relief for specific performance was concerned. We do not think there is any substance in this argument. The question of election between the two reliefs would have arisen only if the appellant could have shown that in respect of specific performance he had a cause of action. As we have already pointed out, the appellant has not made out a cause of action so far as the relief of specific performance is concerned and hence the appellant is not entitled to be put to election with regard to the two alternative reliefs. We accordingly reject the argument of the appellant on this aspect of the case.

Lastly, it was argued on behalf of the appellant that the High Court had no jurisdiction to interfere with the order of the trial court under s. 115 of the Civil Procedure Code. It was said that the finding of the trial court did not involve any question of jurisdiction and the High Court has fallen into an error in reversing the finding of the trial court on issue No. 4, whether the relief for specific performance was open to the appellant in the alternative. In our opinion, there is no warrant for the argument put forward on behalf of the appellant. It is manifest that in holding that the appellant was entitled in the alternative to ask for the relief of specific performance, the trial court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of s. 115(c) of the Civil Procedure Code. It was therefore competent to the High Court to interfere, in revision, with the order of the trial court on this point. To put it differently, the decision of the trial court on this question was not a decision on a mere question of law but it was a decision on a question of law upon which the jurisdiction of the trial court to grant the particular relief depended. The question was therefore on which involved the jurisdiction of the trial court; the trial court could not, by an erroneous finding upon that question, confer upon itself a jurisdiction which it did not possess and its order was therefore liable to be set aside by the High Court in revision.

For these reasons we hold that there is no merit in this appeal which is accordingly dismissed with costs.

# Appeal dismissed.##

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