M/S. M. S. Bansal (Pvt.) Ltd. and Another

Vs

Bhagwan Swarup Mathur and Others

Civil Appeal No. 2744 of 1972

(CJI A. N. Ry, P. Jagmohan P.K. Goswmi, H. R. Khanna JJ)

10.12.1974

JUDGMENT

JAGANMOHAN REDDY, J. -

1. On a difference of opinion in the Allahabad High Court between Dwivedi, J. (as he then was and Gulati, J. in First Appeals Nos. 304/69 and 182/70, they were referred to Khare, J. from whose judgment in effect this is an appeal by certificate. The question for determination is, where in a suit for partition between co-owners, one of whom had constructed on the land which is the subject-matter of the suit buildings at considerable cost, should the remedy be a direction for partition or only for payment of compensation at the market value. The land in dispute admeasuring about 1731 1/9 sq. yds. is a valuable land situated on the Grand Trunk Road in the city of Aligarh. It belonged to the estate of Babu Bajrang Bahadur, the proprietor of Bhagwati Prasad's estate which was under the management of the Court of Wards. The Collector of Aligarh granted a lease of this land on February 10, 1931 to M. S. Bansal for a period of 10 years on a rental of Rs. 15 per month for the construction of a cinema house on that land. On September 9, 1937 before the expiry of the term of the first lease, another lease for 30 years was executed by the Collector in favour of M. S. Bansal at a monthly rent of Rs. 19. It was one of the terms in both the original and the subsequent lease that on the expiry of the term of the lease, the land would be restored to its original condition and the material and construction that may be existing, would be removed. In the course of the subsistence of these leases, Roop Narain, the grandfather of the respondents became the owner of this land. He executed a will in terms of which one half share in the aforesaid plot was bequeathed to the respondents and the remaining half share to Rajendra Narain. After the death of Roop Narain, the half share in the plot in question was sold by Rajendra Narain for Rs. 8,000 to M/s. M. S. Bansal (Private) Ltd., (hereinafter referred to as 'Bansals') by a sale deed dated September 13, 1958, and consequently Bansals became the owners of half share of the plot. Bansals who had been lessees of the entire plot, were after the sale, not only the lessees of the cinema hall known as the Ruby Theatre and buildings but were owners of half the land in which they were built. On the expiry of the second lease on September 8, 1967, the respondents gave a notice on September 12, 1967 to Bansals terminating the lease. Bansals, however, sent a reply on October 30, 1967 alleging that a 1961 there had been an oral agreement of sale of the half share of Mathur Brothers, the respondents, in its favour pursuant to which a sum of Rs. 2,500 had been paid as earnest money towards the consideration of Rs. 20,000. The respondents denied the oral agreement set up by the appellant Bansals, and on October 31, 1967 filed a suit for partition. Eleven months thereafter, on September 26, 1968 Bansals filed a suit for specific performance of the sale agreement alleged to have been arrived at between the parties in 1961 and offered to pay the consideration of Rs. 17,500. The trial Court dismissed the suit for specific performance on the ground that M. S. Bansals was not authorised to enter into the agreement on behalf of Bansals and consequently, the agreement is not

binding either on Bansals or on the respondents. In the suit filed by the respondents, it was held that no partition could be directed as the equity was in favour of Bansals. Accordingly both the suits were dismissed in respect of which two appeals were filed, one by each of them. First Appeal No. 304/69 was filed by the respondents who were plaintiffs in the partition suit and First Appeal No. 182/70 was filed by Bansals, plaintiff in the suit for specific performance. Both the learned Judges, Dwivedi, J. (as he then was) and Gulati, J. were agreed for different reasons that the suit for specific performance could not be decreed and accordingly that appeal was dismissed. In the appeal against the judgment dismissing the partition suit, as already adverted to, there was a difference of opinion between the two learned Judges. In view of his finding in the appeal relating to the appeal relating to the suit for specific performance (F. A. No. 182/70) that the eldest brother, namely, Bhagwan Swarup Mathur, the first respondent had agreed to sell the property to Bansals and consequently he had no equity in his favour to demand partition of his share by metes and bounds and that as the other two brothers, viz., respondents Nos. 2 and 3 stood by and allowed Bansals to spend a large sum of Rs. 1,22,000 in the renovation and re-modelling of the standing structure on the land there was no equity in their favour also for directing partition by metes and bounds, Dwivedi, J. held that compensation was the only remedy. Gulati, J., on the other hand held that there was no equity in favour of Bansals to stop the respondents from obtaining a decree for partition of their share by metes and bounds because in his view not only it was not proved that the money was not paid as alleged, for part payment of the consideration for sale of the land to Bhagwan Swarup Mathur, but that there was no equity in favour of Bansals because the amounts which were said to have been spent on the improvements and renovations of the cinema hall were spent without giving any notice to the respondents which Bansals would have been expected to give if their version that they had agreed to purchase the property was true. Even other-wise, according to Gulati, J., the improvement by way of renovation and re-modelling in the cinema hall was in the nature of a voluntary act on the part of the respondent and was undertaken presumably with a view to embarrass the appellants (respondents in this appeal) and create an equity in its favour. If the claim of the respondents for partition by metes and bounds was refused, it would amount of defeating the very terms of the lease under which the constructions were set up, and it was clearly contemplated under the lease deed which contained an express stipulation that any building so constructed shall have to be removed after the expiry of the lease. The subsequently improvement of the building, therefore, according to him, did not alter the position.

2. The third learned Judge agreed with Gulati, J. holding that there was no agreement to sell because he not only disbelieved the oral agreement but also that there was any payment of Rs. 2,500 for the purchase of the half interest of the respondents in the land. It was further pointed out that the failure to obtain a written agreement was significant. The explanation gives for omission to do so was due to mutual confidence between Bansals and Mathur Brothers was rejected because the course of conduct between the parties showed, as disclosed by the fact that every time a sum a money was advanced to Bhagwan Swarup his signatures were obtained on a stamped paper, that an oral agreement alone would not have been relied upon. The plea set up by Bansals that during the years 1964-67 Rs. 1,22,000 was spent in renovation of the Ruby Theatre which they would not have done unless they were sure that the remaining half portion of the land would be transferred to them by the year 1967, was rejected because the cinema house was with them for 36 years or more, as such renovation was not only absolutely necessary but Bansals would not be out of pocket as the amount spent would be offset by additional profits earned during that short period. He also rejected the contention that the case set up by the other two brothers that the amount of Rs. 2,500 paid to the elder brother Bhagwan Swarup was a loan was not true. Disagreeing with Gulati, J., Khare J. held that

the improvements by way of renovation and reconstruction in the cinema building was in the nature of voluntary act on the part of the respondent and was undertaken presumably with a view to embarrass the appellants (respondents in this appeal) and to create an equity in its favour.

Once he came to the conclusion that there was no equity in favour of the appellants, he gave effect to the principle set out in 68 Corpus Juris Secundum at p. 227 :

If a co-tenant purposely covers the whole of the estate with valuable improvements in such a manner as to render it impossible to assign the shares of the others without including parts of such improvements, he will be considered as a volunteer as to them, and when they were made without the consent of his co-tenants he is not entitled to compensation.

Agreeing with the ratio in Mahadei Bewa v. Keluni Dei (AIR 1962 Ori 71), and Mammathu v. Kathihumma Umma (AIR 1965 Ker 207), he held that the respondents are entitled to a partition of the land by metes and bounds without paying any compensation for the cinema building.

3. Along with this appeal the appellants had filed another appeal, Civil Appeal No. 176/73 against the judgment dismissing the suit for specific performance. Both these appeals came up for the appellants withdrew the appeal challenging the decision in the specific performance suit and the appeal accordingly dismissed as not pressed.

4. In this appeal it appears to us that the judgment of the Allahabad High Court cannot be assailed having regard to the facts and circumstances of the case. The learned Advocate for the appellants has tried to persuade us that the equity was in favour of the appellants who had spent a large sum on renovation of the cinema hall because when the amounts were being spent for renovation etc. during the period of four years the respondents stood by and allowed them to do so. In these circumstances, to direct partition now would be unjust inasmuch as the appellants will have to demolish all the buildings constructed over the period of years at a high cost. It is difficult for us to accept this contention because firstly, the two agreements had contained an express stipulation that on the expiry of the period of the lease, the lessee would deliver the land in the same condition as was leased out and that the lessee would further remove all materials and structures that may be standing on it. As long as the lease subsists it is open to the lessee to construct whatever structures he considered necessary for this business and it would have been contrary to the terms of the lease for the lessors to have objected to any such constructions during the currency of the lease. If this is the legal position, and it could not be controverted, then there is no question of the respondents standing by without protest or objection when the lessee was renovating the cinema hall or constructing other buildings. The facts as found by the High Court on the other hand show that the appellant has deliberately tried to create an equity in its favour after purchasing the half share of Rajendra Narain and again by spending large sums in renovating and constructing the cinema hall for the purpose of creating an impediment in the way of the respondents claiming a partition of the land without the structures. The appellants have even gone to the extent of taking advantage of the sum of money paid to the elder brother to set up a case of oral agreement to purchase the land. Having set up this case, the appellant carefully avoided giving evidence on the ground that he was an old man. The learned Advocate had no answer when he was asked why, if he was an old man unable to come to the Court to give evidence, he did not apply to be examined on commission. The further contention that once the courts have found that the amount was not a loan they should have held that it was part payment of the amount for which the half share of the respondents was agreed to be sold is contrary to the well established and accepted notions of burden of proof that it is for the person who asserts a particular fact, to affirmatively establish it. From whatever angle this case may be viewed, we find

no justification for discovering any equity in favour of the appellants. On the other hand, any decision to the contrary would be inequitable.

5. The appeal is accordingly dismissed with costs.

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