Ranchhoddas Chhaganlal,

Vs.

Devaji Supdu Dorik and Others,

Civil Appeal No. 945 of 1972

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

17.01.1977.

JUDGMENT

Ray, C.J. –

1. This appeal is by certificate from the judgment dated October 15, 1969 of the Bombay High Court in First Appeal 420 of 1963.

2. The trial Court by its judgment dated June 24, 1963 decreed the suit in favour of the appellant. The High Court reversed the judgment of the trial Court.

3. The pre-eminent question in this appeal is whether the respondent has been ready and willing to perform the agreement entered into with the appellant. The case of the appellant is that there was an oral agreement for sale of property consisting of agricultural land admeasuring 23 acres approximately for a sum of Rs. 17,000. The respondent from time to time paid Rs. 12,000 to the appellant. The respondent was also in possession of the property. The appellant called upon the respondent to pay the full amount of purchase price. The respondent failed to do so. The plaintiff, on respondent's refusal to perform the agreement, filed the suit.

4. In the suit the reliefs claimed were possession of the property and in the alternative a decree for Rs. 10,500 consisting of the principal sum of Rs. 5000 as the balance amount of purchase price and interest thereon amounting to Rs. 5500.

5. The principal defence was that the agreement for sale was only for Rs. 12,000 and that the respondent paid the amount in full. The respondent characterised the suit as 'mean effort to recover illegally the additional price of the ostensible Rs. 5000'. The respondent also alleged that if the Court decided that the price of the property was agreed to be Rs. 17,000, then the respondent would ask the Court to take into account the sum of Rs. 12,000 paid by him and also the sum of Rs. 1500 paid by him from time to time thereafter.

6. At the trial one of the issues was whether the appellant proved that the respondent entered into a 'Sauda' on January 24, 1952 with the appellant's father to purchase for Rs. 17,000 the properties mentioned in Schedule 'A' to the plaint. The other issues were whether the defendant respondent proved that the properties were agreed to be purchased for Rs. 12,000. A corollary to the issue raised in the written statement was whether defendant proved the circumstances in which it was made to appear that the 'Sauda' was for Rs. 17,000. In short the defendant alleged fraud against the appellant. The charge is that the appellant changed the figure to Rs. 17,00. The trial Court held in favour of the appellant and rejected the defence of the respondent.

7. Counsel for the respondent contended that the suit of the appellant was not maintainable. It was said that the appellant was not competent to maintain the suit by reason of provisions contained in Sections 39 and 55 of the Indian Contract Act. The gist of the contention is that the appellant could not put an end to the contract if there was failure on part of the respondent to perform the agreement. The submission is fallacious. The case of the appellant has always been that the respondent refused to perform the agreement. The appellant all along asserted that the agreement was that the property was agreed to be sold only for a sum of Rs. 17,000. The respondent refused to perform the agreement. The suit therefore was competent and valid.

8. Another contention was raised by the respondent that the certificate was not competent because the value all along has not been over Rs. 20,000. This Court has held in the decision in State of Assam v. Basnta Kumar Das that the objection to valuation cannot be allowed to be taken at this late stage. But the graver objection to the respondent not being allowed to challenge the certificate is that if the respondent had taken this point at the time when the matter was heard in the High Court the appellant could have satisfied the High Court or the appellant would have failed. This Court in any event, if a certificate had been granted on a challenge being made, would have been in possession of facts and the judgment of the High Court on that question. That is the main reason why the respondent should not be allowed to challenge the certificate at this stage. The respondent has also not raised such a plea in the statement of case.

9. The remaining question is one of substance and is the real issue. It is whether the agreement has been performed. Counsel for the respondent submitted that it was open to the respondent to contend that the finding of the High Court that the agreement was for Rs. 17,00 should not be accepted. Counsel for the appellant rightly challenged the competency of such an objection. The respondent can certainly support the judgment on any ground which is open to him under the impugned judgment. The judgment is that the agreement was between the parties, and that the sale price was Rs. 17,000. The respondent did not file any cross objection on the finding in judgment on that point. It is therefore not open to the respondent to challenge that finding.

10. The principal hurdle in the way of the respondent is that the respondent has need been ready and willing to perform the agreement, as alleged by the appellant. The respondent alleged that the consideration for purchase was Rs. 12,000. The respondent has never been ready and willing to perform the agreement alleged by the appellant. The respondent relied on the doctrine of part-performance. One of the limbs of part performance is that the transfer has in the part performance of the contract taken possession of the property. The most important consideration here is the contract. The true principle of the operation of the acts of part performance seems to require that the act in question must be referred to some contract and must be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged. The doctrine of part performance is a defence. It is a sword and not a shield. It is a right to protect his possession against any challenge to it by the transferor contrary to the terms of the contract. The appellant is right in the contention that there was never any performance in part by the respondent of the contract between the parties.

11. In Fry on Specific Performance, Sixth Edition, at page 276 it is stated that "the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; and that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged".

12. The High Court found that the respondent performed in part the agreement alleged by the

appellant. It has been said by the appellant that the High Court should have appreciated that Section 53-A requires a positive act of readiness and willingness on part of the transferee to perform the agreement. In the present case the respondent who was the transferee under the agreement did not perform his part of the contract from 1952 till 1963 that is after the judgment was pronounced by the trial Court. The High Court wrongly found that there was an extension of the performance of contract by one year. There was no issue raised on that point. It is well settled that there should be specific issues on questions of fact. Parties did not go to trial on the question and there the High Court was in error in holding that there was an extension of time for performance of the contract. It is therefore erroneous to say as the High Court did that the respondent can take advantage of the period between 1953-54.

13. Some attempt was made by Counsel for the respondent that there was an admission by the appellant's father that the purchase price was Rs. 12,000. This contention canto be accepted in view of the finding of the High Court that the purchase price was Rs. 17,000.

14. One of the questions in the High Court was there should be no award of interest on the sum of Rs. 5000 which had been paid. The High Court rightly allowed interest at the rate of 6 per cent per annum. We are told the amount of Rs. 5000 has been deposited in the High Court.

15. For the foregoing reasons were are satisfied that the decree passed by the trial Court was correct and the High Court was in error in reversing the decree. The High Court should not have reversed the decree particularly when it was found that the respondent failed first in regard to the agreement alleged by the defendant and second in allowing the decree in favour of the respondent on the plea of part performance of a contract which was never pleaded by the defendant/respondent and was not a contract upon which there could be any performance in part.

16. The appeal is therefore accepted. The judgment of the High Court is set aside. The Judgment of the trial Court is restored. Parties will pay and bear their own costs in this Court and the High Court.

17. The respondent will be at liberty to withdraw Rs. 5000 deposited in the High Court.

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