

Ram Bilas Ojha and Others

Vs

Bishwa Muni and Others

Civil Appeal No. 2165 of 1968

(N. L. Untwalia, P. S. Kailasam JJ)

03.02.1978

JUDGMENT

Kailasam, J. -

1. The unsuccessful defendants (defendants 2 to 7) in all the courts below in a suit for specific performance are the appellants by special leave before us.
2. The first defendant (4th respondent) on receipt of a sum of Rs. 1,300 executed a sale in favour of the first plaintiff with condition that the first plaintiff would enter into possession of the said plot in lieu of the interest of the debt. After some time the fourth respondent gave up his residence and moved to a different place and while so doing expressed the desire that he wanted to dispose of the plot aforesaid and made a request to the plaintiff that he should purchase the same. The first plaintiff had already entered into possession and occupied the land. After some time the 4th respondent settled with the plaintiff for the transaction of sale in respect of that plot for a sum of Rs. 1,700. On June 2, 1964 he received a sum of Rs. 100 as earnest money from the plaintiffs. On June 3, 1964 the 4th respondent executed an agreement for sale also in favour of the plaintiffs. As plaintiffs had to pay an additional sum of Rs. 300 and as they did not have that amount they stated that they would get the sale deed executed after payment. According to the plaintiffs, the defendants 2 to 7 who are appellants before us because of grievance against the plaintiffs, by a sale deed dated June 4, 1964 purchased the properties for a sum of Rs. 2000. The plaintiffs who are respondents 1 to 3 in this Court filed the suit for specific performance of their agreement for sale alleging that the sale in favour of defendants 2 to 7 appellant herein, was not bona fide and was with notice. The trial Court raised certain issues. The issue relating to this question is issue 7 which is in the following terms :

Whether the defendants 2 to 7 are bona fide purchasers for value without notice ? If so its effect.
3. The trial Court answered the issue in the negative that as respondent 1 to 3 were in possession from 1960 it must be held that they were in possession on June 4, 1964 when the sale deed in favour of the appellants was executed. The respondents' possession would have put the appellants on enquiry which if prosecuted would have disclosed a previous agreement and hence they cannot be called the transferees without notice.
4. In the result the suit was decreed by the trial Court with costs with a direction for performance of the contract to sell the disputed properties. An appeal was taken by the appellants to the Court of Civil Judge, Gorakhpur. The learned Judge also agreed with the reasoning of the trial Court and dismissed the appeal. The second appeal to the High Court also failed and hence this appeal by

special leave.

5. In this appeal, Mr. Raju Ramachandran, counsel for the appellants, submitted that the courts below proceeded on an entirely different basis than the pleadings in coming to the conclusion that the defendant-appellants purchased in the property without bona fides and with notice. He referred to paragraph 10 in the plaint where according to plaintiff the agreement dated June 3, 1964 was executed in the presence of defendants 2 to 7 and they fully knew it. The plea was reiterated in paragraph 14 where the plaintiffs stated :

As the defendants have full knowledge of the agreement for sale dated June 3, 1964 they should not have got the sale deed executed. Having deceived the plaintiffs, in order to cause loss to the plaintiffs, they intentionally and maliciously got the sale deed executed on June 4, 1964 and that has no binding upon the plaintiffs.

6. On the pleadings the learned Counsel submitted that the plaintiff having failed in that plea that the defendants were present at the time of the agreement, they cannot rely on any constructive notice to them. The learned Counsel further submitted that taking the facts of the case the agreement by respondent 4 in favour of respondents 1 to 3 was between 5 and 6 p.m. on June 3, 1964 while the sale deed in favour of the appellants was executed on the next day, there was no opportunity for the appellants to have had knowledge of the transaction which took place on the previous evening that is a few hours before the sale. The contention as presented to us ably by the learned Counsel appeared quite attractive, but unfortunately, for the appellants the case set up at the trial and spoken to in their evidence was that after the execution of the sale deed in favour the contesting respondents had never been in possession of the property, and that after the execution of the sale deed the appellants entered possession of the property in dispute. This plea is obviously false because the evidence discloses that there was a registered usufructuary mortgage executed by the 4th respondent in favour of respondents 1 to 3 which was in existence on the day of sale in favour of the appellants. This registered usufructuary mortgage should have put the appellant in notice of the possession of the respondents. It was sought to be contented by the learned Counsel that even if we (they) had notice of the possession, it would only mean that they were in possession in pursuance of a usufructuary mortgage and not in pursuance of an agreement of sale. This defence would have had some substance if it was taken in the pleadings and spoken to in the evidence. His plea on the other hand was that the respondents 1 to 3 were not in possession. The usufructuary mortgage was not referred to in the sale deed in favour of the appellants. On the facts, therefore, we have no hesitation in coming to the conclusion that all the courts below were right in holding that the appellants were not bona fide purchasers without notice. The appeal is dismissed with costs.

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