

Om Prakash

Vs

Amarjit Singh and Another

Civil Appeal No. 2582 of 1988

(A. P. Sen, M. N. Venkatachaliah JJ)

10.08.1988

ORDER

1. Special Leave granted. Arguments heard.
2. This appeal by the unsuccessful defendant who has suffered a decree of specific performance of an agreement to sell relating to a piece of immovable property, is Directed against the order dated August 6, 1987 of the High Court of Punjab and Haryana in RSA No. 2569 of 1987 dismissing, in limine, appellants second appeal.
3. Amarjit Singh, respondent 1, brought the Civil Suit No. 3397/82/259.80 in the Court of Sub-Judge 1st Class, Patiala for specific enforcement of an agreement to sell dated February 14, 1979 said to have been executed in his favour by the appellant respecting the suit property. After service of summons, appellant entered appearance and filed his written statement. But on December 7, 1981 he was placed ex parte for "default of non-appearance". On February 4, 1982, plaintiff (respondent 1) examined two witnesses on his side. But later the same day appellant appears to have filed an application presumably under Order 9, Rule 7 CPC to have the earlier order dated December 7, 1981 placing him ex parte set aside. This application was dismissed for default on September 25, 1982. On September 30, 1982 appellant filed an unsigned application for setting aside that order of dismissal dated September 25, 1982 and also for setting aside the order dated December 7, 1981 placing him ex parte. This application was dismissed by the trial court on February 25, 1983 on the ground that it had not been signed by the appellant. However, the High Court in revision allowed appellants prayer and remitted that application for a fresh disposal, after affording to the appellant the opportunity to sign that application. Pursuant thereto, that application was signed by the appellant on May 25, 1983; but on September 16, 1983 the application was again dismissed by the trial court on the ground that it was barred by time. The trial court took the view that the date of affixture of the signature was to be reckoned as the date of its filing and, accordingly found it out of time.
4. On the same day, the trial court on the basis of the evidence of the two witnesses examined earlier for the plaintiff, decreed the suit.
5. Against this decree, appellant filed an appeal in the Court of Additional District Judge, Patiala. The learned District Judge appears to have concurred with the trial court's view that the application dated September 30, 1982 was barred by time. Learned District Judge held :

For all these reasons I agree with the lower court that application dated September 30, 1982 was barred by limitation and deserves dismissal on this ground

6. The reason for holding that the application was statute barred was that :

Application dated September 30, 1982 was admittedly not signed when it was presented in court on that day but it was subsequently signed by defendant 1 on May 12, 1983. There was no application in the eyes of law on September 30, 1982 as it was not duly signed by defendant 2. It became a proper application only on May 12, 1983 when it was signed by defendant 1 and so it must be deemed to have been filed on that date ...

7. The understanding by both the courts of the directions of the High Court in the revision proceedings permitting appellant to sign the application may not be a correct one. But that order was not assailed by the appellant in the appropriate proceedings. However, the learned District Judge set aside the decree dated September 16, 1983 on some other ground and remitted the suit to the trial court for a fresh disposal. The operative part of the judgment dated February 14, 1986 of the learned District Judge is in the following terms :

In the result I accept the appeal set aside the judgment and decree passed by the lower court and remand the case to the lower court i.e. court of Shri J. R. Singla, which is successor court of the court of Shri G. K. Rai with the direction to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit afresh in the light of above observations by giving a clear finding according to law as to the suit property in respect of which any relief is granted to the plaintiff, nature of the relief declined or allowed to the plaintiff out of the reliefs prayed for and the conditions subject to which decree of specific performance and possession if any, is passed and the names of the defendants against whom it is passed. The lower court shall give proper opportunity of hearing to both the parties in accordance with law before passing afresh decree

8. Referring to the need for, and the points which require to be decided on, remand the learned District Judge said :

I have, however, found that in some other respects the decree passed by the lower court is not sustainable being not in conformity with law and not an executable decree due to the number of reasons

... The learned Sub-Judge has failed to give a clear finding as to what was the sale consideration for the dispute transaction of sale as entered into between defendant 1 and the plaintiff vide the agreement dated February 14, 1979 executed by defendant 1 and as to how much consideration had already been paid at the time of agreement and what was the amount which remained for payment and in what manner and by what date it was to be paid by the plaintiff to defendant 1. The learned Sub-Judge did not at all go into the question as to whether the property in suit was already mortgaged and what was the mortgage amount which was payable to the prior mortgagee. He has missed even to look into the admissions made by the plaintiff in this regard in the plaint. Again the lower court has failed to give any finding on the prayer of the plaintiff for possession of the suit property and as to if it [sic] any conditions this relief could be granted to him while passing the decree in his favour. No direction was given in the impugned decree about the payment of any sale consideration under the agreement in dispute and accordingly no time was fixed for

making the said payment as required under Rule 12-A of Order 20 CPC. Plan of the suit property in respect of which the decree for specific performance has been passed by the lower court has also not been got proved and referred to in the decree. In the absence of same, decree must be termed as vague and inexecutable ...

9. On remand, the trial court dismissed the suit by its judgment dated May 30, 1986. The District Judge in appeal confirmed this decree of dismissal. The High Court by its order dated August 6, 1987, now under appeal, rejected appellant's second appeal in limine.

10. Appellant's main grievance in this appeal is that pursuant to and in terms of the order of remand dated February 14, 1986 the trial court, should have tried the suit de novo by affording an opportunity to both the parties to adduce evidence afresh and that the scope of the remand also entitled appellant to have the two witnesses examined earlier for the plaintiff recalled for cross-examination. The trial court however understood the order of remand dated February 14, 1986 differently. It held that the order having upheld the dismissal of the appellant's application for setting aside the order, placing appellant ex parte must be understood to have clearly excluded from the scope of the proceedings on remand, any entitlement of appellant to recall the witnesses examined at a time when appellant was ex parte.

11. This view of the trial court as to the scope of the proceedings on remand was endorsed by the first appellate court and must be held to have been approved by the High Court. Appellant assails its correctness here.

12. Appellant's entitlement to adduce fresh evidence and to have plaintiff's witness recalled for cross-examination turns upon and is circumscribed by the order of remand. The order of remand dated February 14, 1986, not having been appealed against by either side had assumed finality. As observed by this Court in *Nainsingh v. Koonwarjee* ((1970) 1 SCC 732 : (1971) 1 SCR 207) an order, which is appealable under Order 43, CPC, if not appealed against, becomes final and its correctness is no more open to examination in view of the provisions of Section 105(2) of the Code which provides that where any party, aggrieved by an order of remand from which an appeal lies, does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. It is true that the correctness of the view taken by the District Judge in the course of the remand order that the date of the signing of the application and not the date of its initial filing was the relevant date for purposes of reckoning limitation is open to doubt in the light of the directions of the High Court permitting appellant to sign that application. But that order of remand, as stated earlier, was not appealed against by the appellant. The trial court was right in its view that its jurisdiction on remand was circumscribed and fettered by the terms of the order of remand.

13. The appeal to the principle in *Sangram Singh v. Election Tribunal, Kotah, Bhurey Lal Baya* ((1955) 2 SCR 1 : AIR 1955 SC 425 : 10 ELR 293) in the circumstances, is not much of assistance to the appellant. It is true it would not be necessary for a party to get rid of an order placing him ex parte if the party wishes to participate in the proceedings at any particular stage onwards, provided that he does not seek to be relegated to the position he would have occupied if he had appeared at the earlier hearing or hearings and does not seek to set back the hands of the clock. It means that he must accept all that has gone before and be content to proceed from the stage at which he has come in. [See also : *Arjun Singh v. Mohindra Kumar* ((1964) 5 SCR 946 : AIR 1964 SC 993)]. In the present case, appellant did seek to set the hands of the clock backwards; he wanted the witnesses to be recalled for cross-examination. This, unfortunately, was not permissible having regard to the finality the order of remand had assumed.

14. But that does not appear to be the end of the matter. This is a suit for specific performance on an agreement to sell. The grant of relief is discretionary. The court after consideration of all relevant circumstances must be persuaded to exercise its equitable and discretionary jurisdiction in favour of specific enforcement. The jurisdiction is subject to all the conditions to which all discretionary jurisdictions are subject. There are certain personal bars to relief. Respondent 1, who was the plaintiff in the suit, did not enter the box and tender evidence. The Subject matter of the suit is a small piece of property of 68 sq. yds. and is said to be the only worldly goods of the appellant.

15. Having regard to all the circumstances of the case and in order that complete justice is done, the order that commends itself as appropriate is to set aside the decrees of the courts below and remit the suit for a fresh disposal after affording an opportunity to both parties to adduce fresh evidence on their respective sides. Appellant shall also be entitled to have the witnesses examined in his absence recalled for cross-examination.

16. The relief we grant might look a little over-liberal; we think that the appellant should have another opportunity to have his case put forward and examined on the merits. This is done by compensating the first respondent as to on costs which we determine at a sum of Rs. 1000 which appellant shall pay to the first respondent in the trial court after the suit goes back before it.

17. Accordingly, the appeal is allowed, the decrees of the courts below set aside and the suit is remitted to the trial court to be re-registered in its original number and disposed of in accordance with law and in the light of the observations made in the course of this judgment. Both the parties are directed to appear before the trial court on September 30, 1988, for further proceedings in the suit on remand without the requirement of service of fresh notices to them from the trial court in this behalf. The trial court is directed to call this matter on September 30, 1988, for this purpose.

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