

Abdul Khader Rowther

VS

P. K. Sara Bai and Others

Civil Appeal No. 862 (n) of 1973

(M. H. Kania, Dr. T. K. Thommen JJ)

28.08.1989

JUDGMENT

THOMMEN, J. -

1. This appeal by certificate granted by the High Court of Kerala arises from the judgment and decree dated July 26, 1972 in A. S. No. 65 of 1967 whereby the High Court reversed the judgment and decree of the trial court in O.S. No. 65 of 1965 which was a suit filed by the present appellant, Decreeing the suit the learned trial Judge held that the appellant/plaintiff was entitled to recover possession of the plaint scheduled properties on payment by him of a sum of Rs. 35,000 and the value of improvements due to defendants 3 to 14. That decree was challenged in appeal by defendants 3 to 14, being the legal representatives of the deceased first defendant. The High Court, reversing the decree, held that in view of the pleadings of the parties and particularly the specific allegations contained in the plaint, the plaintiff was not entitled to succeed in the suit. The High Court found that the plaintiff's suit did not conform to the requirement of Forms 47 and 48 of the First Schedule to the Civil Procedure Code and he was, therefore, not entitled to a decree for specific performance of the covenant contained in Ex. A-1 for reconveyance of the suit properties.

2. The case of the plaintiff, as disclosed by his pleadings, has been that the suit properties had been mortgaged by the plaintiff in favour of the first defendant as per Ex. B-1 dated June 15, 1953, but at no time was possession of these properties handed over to the mortgage. Although it is stated in Ex. B-1 that the properties had been mortgaged for a sum of Rs. 22,000 no such amount was in fact received by the plaintiff, Subsequently, these properties were assigned by the plaintiff in favour of the first defendant under Ex. A-1 dated June 29, 1953. The sale consideration stated in Ex. A-1 is Rs. 35,000. However, no such consideration was received by the plaintiff. Both these transactions, as evidenced by Exs. B-1 and A-1, were sham and intended to protect the suit properties from creditors who were pressing the plaintiff for various amounts due from him. The plaintiff, who was conducting a chitty business, was heavily in debts and it was, therefore, necessary for him to create documents with a view to showing that the properties were no longer in his possession or ownership. However, despite the clear understanding between the plaintiff and the first defendant that no right or interest passed under the documents, the first defendant fraudulently dispossessed the plaintiff of the suit properties. It was in such circumstances that the plaintiff brought the suit for reassignment of the properties in terms of Ex. A-1.

3. It was the definite case of the defendants that Exs. B-1 and A-1 were not sham transactions, but were intended to come into effect, and did come into effect, in terms thereof. All the liabilities shown in the mortgage deed were correct and true. Since the plaintiff required more monies for payment of his debts other than those which the mortgage had undertaken to pay, the first defendant

accepted assignment of the property in his favour on payment of adequate consideration in the sum of Rs. 35,000. It was, however, stipulated that the plaintiff was entitled to repurchase the property within the stipulated period on payment of the aforesaid sale consideration of Rs. 35,000 together with the value of improvements. The allegation that no monies had been paid by the first defendant to the plaintiff was totally untrue.

4. The trial court framed various issues. An additional issue was subsequently raised as to whether the transaction dated June 29, 1953 (Ex. A-1) was a mortgage by conditional sale or a sale with an agreement to recovery.

5. The trial court found that Exs. B-1, mortgage deed, and A-1, sale deed, were not sham, but were intended to come into effect, and were supported by consideration. The court further held that Ex. A-1 did not evidence a mortgage by conditional sale, but it did evidence sale of the suit properties with a covenant for reconveyance of the same. So stating, the court found that the suit was properly instituted as one for specific performance of the contract evidenced by Ex. A-1 and the plaintiff was thus entitled to recover possession of the suit properties on payment by him of the sale consideration of Rs. 35,000 together with the value of improvements due to defendants 3 to 14.

6. The defendants appealed to the High Court. One of their main grounds of appeal was that insofar as the plaintiff had all along contended that Ex. A-1 was a sham document, not intended to be acted upon, and never acted upon, and insofar as he had not stated that he was ready and willing to pay back to the defendants the entire sale consideration and value of improvements, the plaintiff was not entitled to a decree for reconveyance of the properties. This ground was accepted by the High Court.

7. The High Court held that the definite case of the plaintiff was that Exs. B-1 and A-1 were sham and inoperative documents, unsupported by any consideration, and intended to shield the properties from the plaintiff's creditors; the first defendant fraudulently and in collusion with the lessees took possession of the properties (other than Items 2 and 26) and committed waste thereon; and it was in such circumstances the plaintiff brought a suit for reconveyance of the properties. The High Court observed that the defendants, on the other hand, contended that Exs. B-1 and A-1 were genuine, fully supported by consideration, and they were acted upon; and the defendants in any case were not liable to surrender them without obtaining repayment of Rs. 35,000 and the value of improvements effected by them on the properties. The High Court further found that the plaintiff, as respondent in the appeal before the High Court, did not challenge the correctness of any of the findings entered against him by the trial court. The only question for decision before the High Court, therefore, was whether the contract for reconveyance evidenced by Ex. A-1 could be specifically enforced. On consideration of the respective contentions of the parties, their pleadings and evidence, the High Court held that the plaint did not contain the necessary averments to grant a decree for specific performance of the covenant for reconveyance.

8. Counsel for the plaintiff/appellant, Shri. G. Vishwanatha Iyer raises two contentions. He submits that Ex. A-1 evidenced a mortgage by conditional sale. He further submits that the plaintiff's suit was in essence and substance properly instituted in terms of Forms 47 and 48 of the First Schedule to the Civil Procedure Code. Although the plaint language was not in strict conformity with those Forms, there was substantial compliance with their requirements, and the suit was, therefore, effective and proper to specifically enforce the covenant for reconveyance.

9. It is not open to the appellant/plaintiff to agitate in this appeal the contention regarding mortgage by conditional sale insofar as the issue regarding that contention was specifically considered and

found against him by the trial court and that finding was not challenged by him as respondent in the defendants' appeal before the High Court. In the circumstances, we hold that that contention fails.

10. As regards the second contention, namely, the question of specific performance, the High Court says :

"Even by putting a liberal construction on the various statements contained in the plaint, it is difficult to hold that there has been even a faint attempt to make it to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code, that the plaintiff had applied to the defendants specifically to perform the agreements and that he had been and is still ready and willing to specifically perform his part of the agreement...."

11. The High Court is, in our view, justified in coming to this conclusion. While it was the definite case of the plaintiff that the documents in question passed neither possession nor title from the plaintiff to the defendant and no consideration was paid thereunder, the trial court rejected that contention and accepted the contention of the defendant that possession and title passed under the documents and the stipulated consideration had been fully paid to the plaintiff. These findings were not challenged by the plaintiff in answer to the defendants' appeal in the High Court. His sole contention in defence of the impugned judgment was that the trial court rightly held that the plaintiff was entitled to a decree for specific performance of the covenant for reconveyance. It is thus clear that this is a case where the plaintiff seeks specific performance of a contract stated to be evidenced by an allegedly sham document which did not come into effect. His plaint does not contain the requisite pleadings necessary to obtain a decree for specific performance. This equitable remedy recognised by the Specific Relief Act cannot be had on the basis of such pleadings and evidence.

12. In *Ouseph Varghese v. Joseph Aley* ((1969) 2 SCC 539, 543), this Court stated; (SCC p. 543, para 9)

"This takes us to the decree passed by the High Court in respect of plaint Item No. 1. This decree is purported to have been passed on the basis of the admission made by the defendant. It may be noted that the agreement pleaded by the defendant is wholly different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not at any stage accept the agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff is said to have been entered into at the time of the execution of Ex. P-1 whereas the agreement put forward by the defendant is one that is said to have been arrived at just before the filing of the suit. The two are totally different agreements. The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is till ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Prem Raj v. D.L.F. Housing and Construction (Private) Ltd.* ((1968) 3 SCR 648 : AIR 1968 SC 1355 : 71 Punj LR (D)

1) that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable."

13. Following the above principle, we dismiss this appeal. However, in the circumstances of case, we do not make any order as to costs.

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