SUPREME COURT OF INDIA

Vimlesh Kumari Kulshrestha

Vs.

Sambhajirao

C.A.No.2976 of 2004

(S.B. Sinha and Harjit Singh Bedi JJ.)

05.02.2008

JUDGMENT

S.B. Sinha, J.

1. Plaintiff, in a suit for specific performance of contract, is the appellant herein. She was a tenant in a portion of the premises in respect whereof the agreement of sale dated 1.4.1986 is said to have been entered into by and between the parties hereto. The relevant clauses of the said agreement read as under:-

> "It was settled down in between the above parties that house of party No. 1, in which party No. 2 is living, party No. 1 will sell for Rs. 48,000/- (Forty eight thousand only) and as a part payment received Rs. 24,000/- (Rupees twenty four thousand) by cheque by party No. 2 from party No. 1 on 20.3.86.
>
> (2) Party No. 1 will obtain permission for sale of the house from Ceiling Officer and will give information to party No. 2 and within three months of the information the party No. 2 will get executed the Registry and will make the payment of balance amount.
>
> (3) That Party No. 1 assured to Party No. 2 that regarding the rights of ownership and transfer of the house there is no dispute and if need arises then party No. 1 will get permission from the Court and Party No. 2 will have the right that on the error of party No. 1 will get registry executed through court and the expenses will have to be borne by party No. 1. Therefore, this agreement wrote down and received Rs. 24,000/-(Rupees twenty four thousand). The map of residential house prepared and will remain with this document. The boundaries are written down under:
>
> North : House Sambhajirao Angre.

West : Property of Sambhajirao Angre

East : Road

South : House Hariram Kapoor"

2. A suit for specific performance was filed on 9.9.1986 which was marked as O.S. No. 228A/1986. Proper court fees were not paid thereupon. Having regard to an objection taken in that behalf by the first respondent herein in his written statement, allegedly another suit was filed by her on 23.3.1987, which was marked as O.S. No. 13A of 1987. O.S. No. 228A of 1986, on the premise that another suit has been filed, was sought to be withdrawn. The application for withdrawal was allowed.

3. Respondent No. 1, however, had entered into another agreement of sale with the respondent No. 2. He filed an application for imp leading himself as a party in the suit. It was allowed.

4. The learned Trial Judge decreed the suit. By reason of the impugned judgment, however, the High Court has reversed the same, holding:

> "(i) In view of Order XXIII Rule 1 of the Code of Civil Procedure, the permission for filing another suit on the same cause of action having not been obtained, the second suit was not maintainable; and;
>
> (ii) The agreement of sale dated 1.4.1986 being vague, no decree for specific performance could be granted. "

5. Mr. P.S. Narasimha, learned counsel appearing on behalf of the appellant in support of the appeal raised the following contentions:

> "(a) The High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration that the second suit having been instituted during the pendency of the first suit, Order XXIII Rule 1 of the Code of Civil Procedure was not applicable.
>
> (b) The agreement was required to be read in its entirety and so read, it would be evident that the subject matter of sale was the entire house and not a part there of."

6. Mr. S.S. Khanduja, learned counsel appearing on behalf of the respondent, on the other hand, would support the judgment.

SpotLaw

7. It is not in dispute that O.S. No. 13A of 1987 was filed during pendency of O.S. No. 228A of 1986. Order XXIII Rule 1 of the CPC strict sense therefore, was not applicable, the relevant provision whereof reads thus:

> “1. Withdrawal of suit or abandonment of part of claim. (1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :
>
> 1. Where the Court is satisfied, -
>
> (a) That a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.
>
> Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the appellant in regard to payment of proper court fee. We, therefore, are of opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case.”

8. A somewhat similar question came up for consideration in *Mangi Lal Vs. Radha Mohan*[1], wherein it was held;

> "Order 23, Rule 1, refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. Order 23, Rule 1, cannot be read so as to bar a suit which has already been instituted before the other suit has been abandoned or dismissed. The rule is clear and can only be applied to suits instituted after the withdrawal or abandonment of previous suits".

9. The said view was followed by the *Karnataka High Court in P.A. Muhammed Vs. The Canara Bank and another*[2]

10. An identical view was also taken in *Girdhari Lal Bansal Vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Others*[3] wherein it was held;

> "4. The earlier application was filed on 6th Oct, 1982 and the present application was fixed on 26th Oct., 1982 and the first application was withdrawn vide order dt. 18-11-1982. the learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions

> clearly say that if second suit is filed before the first suit is withdrawn then O. 23, C.P.C. is not attracted and the second suit cannot be dismissed under O. 23, R. 1(4) of the Civil P.C. Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under O. 23, C.P.C. We agree with said views of the High Court."

11. The application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. Respondent, therefore was aware thereof. They objected to the withdrawal of the suit only on the ground that legal costs there for should be paid. The said objection was accepted by the learned Trial Court. Respondent even accepted the costs as directed by the Court, granting permission to withdraw the suit. In a situation of this nature, we are of the opinion that an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the Order passed by the Court. It is trite that even a presumption of implied grant can be drawn.

12. In *Hari Basudev Vs. State of Orissa and Others*[4] a Division Bench of the Orissa High Court held;

> "7. As already indicated, the cause of action accrued to opposite party No. 4 to file the election dispute u/S. 30 of the Act only after publication of the result of the election. Opposite party No. 4 in his petition made out a case for grant of permission to withdraw M.J.C. No. 14 of 1997. He had also stated in the petition that he reserved his right to file a fresh case, if necessary. The learned Civil Judge having permitted him to withdraw the said case, we are inclined to hold that permission to institute a fresh case in the circumstances was impliedly granted."

13. In Mulla's The Code of Civil Procedure, Seventeenth Edition, page 674, it is stated

> "(g) Permission need not be Express the permission mentioned in this section need not be given in express terms. It is sufficient if it can be implied from the order read with the application on which the order was made. No formal order is necessary for withdrawal of a suit. But the proceedings must show that the plaintiff has withdrawn the suit or part of the claim. However, if either from the application of the plaintiff or from the order permitting withdrawal, it transpires that while permitting withdrawal, the court had also granted liberty to institute fresh suit, the subsequent suit would be barred. Thus, in a case, the Delhi High Court held that the words 'without prejudice to the right of plaintiff' endorsed on the application for withdrawal would only mean that the suit was sought to be withdrawn as compromised and not on merits. An application for withdrawal of suit was made, seeking liberty to file a fresh suit. The order passed by the court was that 'The application is, therefore, allowed while permitting the plaintiff to withdraw the suit'. It was held that this should be construed

as an order also granting liberty, as prayed. The court cannot split the prayer made by the applicant."

14. For the reasons aforementioned, we are of the opinion that the High Court was not correct in applying the provisions contained in Order XXIII Rule 1 of the Code of Civil Procedure in the facts and circumstances of the case.

15. It is no doubt true that ordinarily an endeavor should be made by the court to give effect to the terms of the agreement but it is also a well settled principle of law that an agreement is to be read as a whole so as to enable the court to ascertain the true intention of the parties. It is not in dispute that no plan was prepared. A purported sketch mark was attached with the plaint, which was not proved. Evidences brought on record clearly lead to the conclusion that the appellant was not the tenant in respect of the entire house. She, in her deposition, even did not claim the same. Another tenant was occupying some rooms in the same premises. Appellant herein in her evidence also admitted that no map was attached to the agreement.

16. The very fact that the premises sought to be transferred could not adequately be described; a plan was sought to be attached. According to the appellant herself, she had been residing only in the ground floor, along with open land on the northern side and had been using two rooms, a Patore along with open land of the upper portion. She had not received the possession of the disputed house. It is, therefore, evident that she did not claim herself to be a tenant in respect of the entire house and, thus, the same was not agreed to be sold.

17. It is in the aforementioned context, the meaning of the words used in the agreement must be determined. It refers to the property where the appellant was living and not any other property. If the appellant was living in a part of the property, only the same was the subject matter of sale and not the entire premises. Reliance, has been placed by Mr. Narasimha on a decision of the *House of Lords in Hillas & Co. Ltd. Vs. Arcos, Ltd.*[5] wherein it was held;

> "It is the duty of the court to construe agreements made by business men - which often appear to those unfamiliar with the business far from complete or precise- fairly and broadly, without being astute or subtle in finding defects; on the contrary, the court should seek to apply the maxim verb it sent intelligent magic valet quam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract."

18. There is no dispute with regard to the aforementioned legal proposition. However, we have not been called upon to construe an agreement entered into by and between two businessmen. The maxim, centum est quod certum redid poets instead of being of any assistance to the appellant, runs counter to her submission. It means that is certain which can be made certain. In relation to 'uncertainty' it is stated:

> "The office of the agendum is a deed is to limit, explain, or qualify the words in the premises; but if the words of the agendum are manifestly contradictory and repugnant to those in the premises, they must be disregarded. A deed shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient; as, if he grant to a city all liberties which London has, without saying what liberties London has. An agreement in writing for the sale of a house didnot describes the particular house, but it stated that the deeds were in the possession of A. The Court held the agreement sufficiently certain, since it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A., and, consequently, the house might easily be ascertained, and id chetrum's quod chetrum redid poets. Again, the word "certain" must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim. [See Trayner's Latin Maxims, Fourth Edition, Page 76]"

19. Reference to the said legal maxim is, in our opinion, is not apposite in the facts and circumstances of this case. By reference to the boundaries of the premises alone, the description of the properties agreed to be sold did not become certain. For the purpose of finding out the correct description of the property, the entire agreement was required to be read as a whole. So read, the agreement becomes uncertain.

20. An agreement of sale must be construed having regard to the circumstances attending thereto. The relationship between the parties was that of the landlord and tenant. Appellant was only a tenant in respect of a part of the premises. It may be that the boundaries of the house have been described but a plan was to be a part thereof. We have indicated hereinbefore that the parties intended to annex a plan with the agreement only because the description of the properties was inadequate. It is with a view to make the description of the subject matter of sale definite, the plan was to be attached. The plan was not even prepared. It has not been found that the sketch of map annexed to the plaint conformed to the plan which was to be made a part of the agreement for sale. The agreement for sale, therefore, being uncertain could not be given effect to.

21. In *Plant Vs. Bourne*[6] where upon Mr. Narsimha relied upon, the Court of Appeals held that oral evidence is admissible. In this case, oral evidence adduced by the appellant herself suggests that the entire property was not to be sold as she was not a tenant in respect of the entire premises.

22. For the reasons aforementioned, we do not find any infirmity in the judgment of the High Court. The appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

Cases Referred

[1] *1930 L.5992*
[2] *AIR 992 Kar. 0085*
[3] *AIR 1985 Pun. and Har 0219*
[4] *AIR 2000 Orissa 0125*
[5] *(1932 All. E. R. 0494*
[6] *(1897) 2 Ch. 0281*