SUPREME COURT OF INDIA

Subhadra

Vs.

Thankam

C.A.No.291-292 of 2006

(Dr.B.S.Chauhan and Swatanter Kumar JJ.)

08.07.2010

JUDGEMENT

Swatanter Kumar, J.

1. Ramakrishna Menon, who unfortunately died during the pendency of the litigation, entered into an agreement to sell, dated 20th June, 1979, in favour of Thankam for sale of the full rights over the property measuring about 5 cents of land in Sy. No. 460/3 in Peringavu Village and all improvements purchased and processed by him under the Document No. 1887 of 1969 and registered in Paras 283 to 285 of Book No. 1 Volume 54 of Thrissur, Sub Registrar Office for a total consideration of Rs.45,250/-. A sum of Rs.5,000/- was paid by way of earnest money and it was agreed that the sale deed would be executed in favour of the predecessor, within six months from the date of the execution of the Agreement. It was also stated in the Agreement, which came to be exhibited as Ext.A1 during the course of recording of evidence, that all receipts, encumbrance certificate etc. should be taken and handed over to the predecessor at the time of execution of the sale deed. In other words, the sale deed was to be executed on or before 20th December, 1979. Thankam served the Registered Notice dated 10th December, 1979 upon the seller stating that they were always ready and willing to purchase the property and were ready to execute a sale deed, free of encumbrance, in their favour. A reply to the above notice was given on 12th December 1979, saying that the seller was prepared to give the land lying within the four well-defined boundaries, but only 5 cents would be given to the plaintiff. Thereafter, the defendant tried to demolish the northern boundary wall and tried to shift it towards the south. A suit was instituted by Thankam as O.S. No. 1387 of 1979 simply to prevent this mischief in which a commissioner was appointed to file a report after making an inspection of the property. Thereafter, the predecessor in interest and her husband approached the defendant with the balance consideration to get the sale deed executed, which was not so done and they, then, filed a suit for specific performance, which came to be registered as O.S. No. 3 of 1980.

2. Thankam, the plaintiff in this Suit is the respondent before this Court, while the applicants are the legal representatives of the deceased seller who, as already noticed, were brought on record. The Learned Trial Court framed the following issues:

> "(i) What is the correct extent or identity of the property agreed to be sold? (ii) Whether the defendant had committed breach of the agreement? (iii) Whether the plaintiff is entitled to specific performance of the agreement?"

3. Both the above suits were tried together and finally, vide its judgment and decree dated 24th March, 1994, a decree was passed in favour of the respondent in both the suits. While granting a decree for specific performance, the Court directed the payment of the balance price of Rs.45,250/- at the time of registration of the sale deed. In the event the appellant failed to get the sale deed executed, the same was to be executed through the Court at the cost of the appellant. This judgment and decree of the trial Court was challenged by the appellants by filing two separate appeals being Appeal Nos. 354 of 1994 and 667 of 1995 before the High Court of Kerala at Ernakulam. The High Court rejected both the appeals and while relying upon the report of the commissioner Ext.C1, it held that in the agreement, the intention of the parties was to sell the entire property obtained by him as per Ext.B1, in which the property had been fully described and 5 cents did not refer to the entire subject matter agreed to be sold under the terms of Agreement Ext.A1. Being aggrieved by the judgment of the High Court dated 11th November, 2003, the appellant has filed the present two appeals being Civil Appeal Nos. 291-292 of 2006. The main contentions raised before us are that the language of Agreement Ex.A1 is ambiguous, uncertain and that the respondent ought to have sought rectification of the deed in relation to that extent of the property in terms of Section 26 of the Specific Relief Act 1963 (hereinafter refer to as `the Act'). It is further argued that the Courts in the judgments under appeal have failed to appreciate the documentary and oral evidence in its correct perspective inasmuch as only 5 cents of land have been agreed to be sold to the respondent by the appellant and/or their predecessor in interest and that much of land was not available.

4. At the very outset, we may notice that at page 18 of the paper book translated copy of Ext.A1 has been filed.

> "This document does not contain any reference or mention about 5 cents of land of the Sy. No. argued to be sold.
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> However, the original document which was shown to us during the course of the hearing does indicate measurement of land as 5 cents. The Learned Counsel appearing for the respondent stated that the land agreed to be sold was 5 cents, but in addition thereto, the other structures as contemplated in Ex.B1 were also to be sold for the consideration stated in Ex.A1. Thus, according to the Learned Counsel appearing for the respondent, there was hardly any dispute or appropriate defence raised to the claim of the respondent before the Trial Court, as such decree in favour

of the respondent has been passed in accordance with law and did not call for any interference by this Court."

5. At the very outset, we may notice that there are concurrent findings of facts recorded by the Courts in the impugned judgments as such we do not propose to interfere in such findings of facts. We would only refer to the necessary factual matrix of the case for the purpose of determination of the legal controversy as to whether the agreement suffers from any ambiguity and whether rectification of the document, in the facts and circumstances of the case, was a condition precedent for passing a decree for specific performance. We may refer to the findings recorded by the Learned Trial Court in regard to the description of the property and other facts which may be of relevance for the purposes of determining the main controversy between the parties which reads as under:

"16. This document is marked as Ext.B1. The description of the property given in Ext. B1 would show that it is about 5 cents of land comprised in Sy. 460/3. It is the southern portion of the property of the entire extent that was sold. In the document there is the reference to the building in the property and the right to collect the rent from the occupants.....

.....The commissioner on the basis of the above said document tried to fix the northern boundary of the property promised to be sold. When he measured 5 cents of land, it is his report that the northern old boundary wall was found to be about > dannu to .16 dannu further north to the boundary fixed by measuring the property to the extent of 5 cents. The eastern property of Kuttappan Master was found to be 2.4 dannu away from the eastern boundary of the 5 cents of land.

But the commissioner was not directed to find out the length and breadth of the property which is given in Ext. B1 as 4 dannu and 6 < dannu. It is also the report of the commissioner that when the 5 cents of land was separately measured, the northern boundary so fixed would pass through the existing latrine and bath room, which was an old construction near to the northern boundary. Thus it is very clear that when the property is measured on the basis of the extent shown in Ext. B1, there is discrepancy with respect to the description of the property in Ext. B1 document. In Ext. B1 document there is the mentioning of occupation of the building by tenants and it is the admitted case that there are old latrine and bath room existing on the northern side of the property that being in the use of the tenants. It is the case of the plaintiff that there are two tenants in the property occupying the two portions of the building constructed under the same roof. It is the admitted case of the defendant that he renewed the rental transactions with the tenants occupying the building. The earlier commission report shows that on the northern wall there is a gap for entering into the plaint schedule property from the rest of the property owned by the mother-in-law of the defendant. In Ext.C1 report the commissioner has made it very clear that the property is having about 4 dannu and 1 = kole width. In the second report it is stated that the length of the property is more than 2.4 dannu than what is stated in Ext.B1. But as far as eastern

boundary is concerned, it is clearly stated in Ext. B1 document that it is the property owned by Kuttappan Master.

As far as the width of the property is concerned, the measurement of 4 dannu is almost accurate. When there is discrepancy among Sy. No., extent and boundaries of a property, the more certain one is to prevail upon that.

17. The vender of the property was not examined to ascertain that she is having property further south to her southern compound wall mentioned in the plaint as the northern compound wall. So long as the vendor was not examined, it cannot be said that she is claiming to have any property beyond the southern compound wall which is the northern boundary of the property sold by Ext. B1. It is already found that there is no separate description of the property in Ext. A1 karar. The mentioning is that of the property purchased on the basis of Ext. B1 document. Nothing is stated in Ext.B1 document regarding the balance of the property to be retained by the intended seller obtained on the basis of Ext. B1. There is no mentioning of value of the property per cent. Thus Ext. A1 karar was executed with the intention to sell the entire property obtained by the defendant on the basis of Ext. B1 document. It that is so, the assertion of the plaintiff that he was willing to execute the document after parting with the balance of consideration is to be upheld.

The insistence of the defendant that the property should be measured so as to fix the extent i.e 5 cents, is only an attempt to evade the execution of the document.

The parties never intended to execute any document only for 5 cents as the intention is to sell the entire property covered by Ext. B1. If that is so, the plaintiff is entitled to get a decree for specific performance of contract. The prohibitory injunction sought by the plaintiff is also to be upheld as tampering with the northern boundary wall is only with the intention to defeat the legitimate right of the plaintiff to get the document executed on the basis of Ext. A1 agreement. Therefore, both the suits are to be decreed. The issues are answered accordingly."

6. The above finding of facts was confirmed by the High Court in the exercise of its appellate jurisdiction. Both the suits filed have been decreed by a common judgment dated 31st January, 1984. The decree was set aside by the High Court vide its order dated 22nd August, 1990 wherein it remanded the suit for fresh disposal after fixing the boundaries of the property in dispute. The Trial Court conducted fresh trial in furtherance to this direction and passed a decree afresh vide its judgment dated 24th March, 1994.
The relevant para of Ex. P1 reads as under:

"The first party hereby argues (sic = agrees) to sell his full rights over the property Sy. 460/3 of Peringavu Village and all improvements purchased and possessed by 1st party under document No. 1887 of 1969 and resisted in Paras 283 to 285 of Book 1

Volume 54 of Thrissur Sub Registrar office to the Second party will and any encumbrance for a price of Rs.45,250/-."

7. The bare reading of this portion shows that something in addition to the bare land was intended to be sold. The description of the entire property has been given in Ext.B1.

"In other words, 5 cents and complete description of Ext. B1 was the subject matter of the sale in terms of Ext.A1. This aspect of the case stands fully clarified and Ext.A1 has been completely clarified with certainty by the report of the Commissioner, which was relied upon by the trial Court. In face of the matters being beyond ambiguity, there is no occasion for this Court to interfere with this finding of fact.

Furthermore, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases.

The provisions of this Section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument. Even then the party claiming will have to make specific pleadings and claim an issue in that behalf."

8. The Learned Counsel appearing for the appellant placed reliance on the case of *Puram Ram v. Bhaguram*[1], and contended that since no relief for rectification has been prayed, the decree for specific performance ought not to be granted. This submission is based upon the misreading of the judgment of this Court.

"All that has been stated in the judgment is that Section 26 (4) of the Act only says that no relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed. However, proviso to Section 26 (4) of the Act makes it clear that when such a relief has not been claimed by the concerned parties, the Court shall, at any stage of the proceedings allow him to amend the pleadings on such terms, as may be just, for including such a claim and it would be necessary for the party to file a separate suit. The legislative intent in incorporating this provision, therefore, is unambiguous and clear. The purpose is not to generate multiplicity of litigation but to decide all issues in relation thereto in the same suit provided the provisions of Section 26 of the Act are attracted in the facts of a given case. We have already stated that the provisions of Section 26 of the Act are not attracted in the facts and circumstances of the present case. On the contrary, the respondent had specifically taken up the plea that Ext. A1 and B1 relate to sale of specific property and there was no ambiguity or mutual mistake. The Courts have returned a concurrent finding in favour of the respondent and we see no reason to disturb the said finding. The High Court has specifically noticed that perusal of Ext.

> B1 shows that the eastern boundary is the property owned by one Kuttappan Master and the northern boundary is shown as rest of the property as old one. There is no controversy in the appreciation of evidence and the Courts have recorded the concurrent finding on the basis of evidence documentary and oral, adduced before them and have taken a view which is permissible and in accordance with law. The contention of law raised before us on behalf of the appellant, in any case, has no merit as aforestated."

9. For the reasons afore recorded, we see no merit in the present appeals and same are dismissed. While declining to interfere in the concurrent judgment of the courts, we dismiss these appeals. The parties are, however, left to bear their own costs.

[1]*(2008) 4 SCC 102*