

# SUPREME COURT OF INDIA

Hemanta Mondal & Ors.

Vs.

Sri Ganesh Chandra Naskar

C.A.No.7893 of 2015

(Dipak Misra and Prafulla C.Pant,JJ.,)

23.09.2015

## JUDGMENT

**Prafulla C.Pant,J.,**

SLP(Civil)No.27657 of 2014

1. Leave granted.
2. This appeal is directed against judgment and order dated 01.08.2013, passed by High Court of judicature at Calcutta in Second Appeal No. 430 of 2004, whereby said court has modified the decree passed by Additional District Judge 3 rd, Howrah in Title Appeal No. 139 of 2002.
3. We have heard learned counsel for the parties and perused the papers on record.
4. Brief facts of the case are that plaintiff/respondent filed Title Suit No. 4 of 1993 for specific performance of agreement, possession and injunction before Civil Court at Howrah, in respect of 'Danga' land measuring 8 cottahs 14 chittacks 24 sq. ft., recorded as 16 shatak in R.S. Dag No. 271 Khatian No.74, and in recent settlement record the same has been recorded in Dag No. 273, Khatian No. 602 within Mouza-Pakuria, P.S. Domjur, District Howrah. As per the agreement dated 04.02.1992, defendant (Mishrilal Mondal) agreed to sell the land at the rate of Rs.15,000/- per cottah in favour of plaintiff (Ganesh Chandra Naskar), and received Rs.60,000/- as earnest money, and rest of the consideration was agreed to be paid at the time of the execution of sale deed. It was also stipulated in the agreement that, if entire area comes out as 10 cottah, the lump sum consideration would be Rs.1,50,000/-. According to plaintiff, measurements were made on 07.03.1992, by surveyors in the presence of parties, and it was found that the area of land was 8 cottah 14 chitaks 24 sq.ft., as such amount of consideration was Rs.1,33,125/-, i.e., at the rate of Rs.15,000/- per cottah. It is pleaded in the suit that plaintiff was/is always ready and willing to pay balance amount of Rs.73,125/- to get the sale deed executed, but the defendant declined to execute the same. On this, the plaintiff gave notice to the defendant to execute the sale deed but he questioned the

correctness of the measurements, and offered to pay back Rs.60,000/- accepted by him as earnest money. Consequently, the suit for specific performance, possession and injunction was filed by the plaintiff.

5. The original defendant contested the suit and filed his written statement. It appears that during the pendency of suit due to the death of the original defendant his heirs were substituted. The case of the appellants as contained in amended written statement is that Mishrilal Mondal had undivided share in the property and he was owner in respect of only 16 V2 shataks of the land out of 33 shataks of Dag no. 271.

6. The trial court framed issues, and after recording evidence of the parties disposed of the suit directing the defendant to refund the earnest money of Rs. 60,000/- to the plaintiff. Said judgment and decree dated 29.06.2002, passed by the Civil Judge (senior division), 3rd Court, Howrah, was challenged by the plaintiff who filed Title Appeal No. 139 of 2002. The same, after hearing the parties, was allowed, and it was directed by the first appellate court that the defendants shall execute sale deed after accepting balance amount of Rs.73,125/- from the plaintiff.

7. The judgment and decree dated 22.12.2003, passed in Title Appeal No. 139 of 2002 was challenged by the defendants in Second Appeal no. 430 of 2004, and the High Court passed impugned judgment, modifying the decree passed by the first appellate court. It is directed by the High Court that the decree of specific performance of contract shall stand affirmed in respect of the agreement dated 04.02.1992, but not on the basis of measurements taken by PW-2. The High Court remanded the matter to first appellate court, with further direction that the defendant shall be allowed to apply for appointment of a Commissioner for doing the survey of the land to be transferred. It is also clarified by the High Court that if no such application is moved the suit shall stand decreed, as per the measurements made by PW-2. Unsatisfied with the modified decree, passed by High Court, the defendants are before us, in this appeal, through special leave.

8. Copy of the agreement between plaintiff Ganesh Chandra Naskar and original defendant Mishrilal Mondal (since died) is annexed as Annexure P-8 with affidavit dated 16.09.2014, filed by Dilip Mondal (appellant no.2), which discloses that Mishrilal Mondal agreed to sell 16 shataks or 10 cottahs of land mentioned in the schedule, to the plaintiff, on payment of Rs.15,000/- per cottah which was the market rate. It is also mentioned in the agreement that Mishrilal Mondal (original defendant) accepted Rs. 60,000/- as part payment. The terms and conditions mentioned in the agreement contains following relevant stipulation:-

“3. After executing this Advance Agreement, while measuring the land if it is found that the total area of the land which will be sold is less than 10 Cottahs as mentioned in schedule below, you will pay the balance amount which will be calculated for the less area of land @ Rs.15,000/- and I alongwith my heirs and representatives shall remain bound to register the Sale Deed in your favour for the land as mentioned in the schedule below.”

9. The description of the schedule property for which advance is taken, gives following details at the end of the terms mentioned in the agreement (Annexure P-8):-

“DESCRIPTION OF SCHEDULE PROPERTY FOR WHICH ADVANCES TAKEN Under District-Howrah, District Registrar Office-Howrah, Sub-Registry Office-Domjur, P.S. Domjur and within Mouza-Pakura mentioned in old ‘Parcha’ (record) in Khatian No. 177 (one hundred seventy seven) in Dag No. 271 (Two hundred seventy one), high land measuring 33 (thirty three) shataks under permanent tenancy right, half portion from the western side which is according to Revisional Settlement’s ‘Parcha’ (record) in Khatian No. 746 (seven hundred forty six), Dag No. 271 (two hundred seventy one) and in Parcha (Record) of present Revisional Settlement it is recorded in Khatian No. 602 (six hundred two), Dag No. 273 (two hundred seventy three) under permanent tenancy right as high land measuring 16 (sixteen) shataks”.

10. In the second para of the agreement, following declaration is made by the original defendant:-

“I am the absolute Owner and possessor of the said property. Besides me, there is no co-sharer or heir. I have never transferred or joint liability with any person. It is absolutely free from all sorts of liability and encumbrances. If any type of liability reveals, you will get time till it is made free from liability and encumbrances and in this condition I and my successors are bound to execute the deed.”

11. Admittedly, the appellant no. 1 to 4 are sons, appellant no. 5 is widow, and appellant no. 6 is daughter of Mishrilal Mondal (original defendant). Appellant no. 8 and appellant no. 9 are son and daughter of Netai Mondal (brother of Mishrilal Mondal), appellant no. 10 wife of Basudev Nasakar and appellant no. 11 is wife of Natabar Mondal, the relatives of original defendant.

12. On behalf of the plaintiff/respondent, copy of challan depositing Rs. 73,125/- on 13.01.2004/16.01.2004 with the Civil Court, in favour of the appellants, is annexed with the counter affidavit.

13. Though the appellants have pleaded that Mishrilal Mondal was not absolute owner of the land, however, said plea appears to have not been accepted by none of the courts below. Moreover, the legal heirs of the original defendant are not only bound by the agreement executed by him, but also by the pleas taken by the original defendant in his written statement before the trial court.

14. Having heard learned counsel for the parties, we are not inclined to interfere with the findings affirmed by the High Court. On consideration of submissions of rival parties in the present appeal the only point before us is whether in the facts and circumstances of the case, a decree of specific performance of agreement of sale should have been passed, or the decree of refund of part consideration received by the defendant, with interest, would have served the ends of justice.

15. Section 20 of Specific Relief Act, 1963 gives discretion to the court, and provides that the court is not bound to grant relief of specific performance merely because it is lawful to do so. It further provides that the discretion is not to be exercised arbitrarily but guided by judicial principles. Sub-section (2) of Section 20 enumerates three conditions when discretion is not to be exercised to grant decree of specific performance:-

“(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.”

Explanation (1) to sub-section (2) provides that mere inadequacy of consideration shall not be deemed to be an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation (2) provides that the question whether the performance of a contract when involved hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent in the contract, be determined with reference to the circumstances existing at the time of contract. Sub-section (3) provides that court may properly exercise discretion to decree specific performance in any case where plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.”

16. In the present case, it appears that possession was not given to the plaintiff at the time of execution of the agreement, nor the area of land agreed to be sold was clear, as such, it cannot be said that the plaintiff has done substantial acts or suffered losses due to expenditure in constructions etc., in consequence of a contract capable of specific performance. The direction given by High Court in the impugned order shows that the measurements of land actually agreed to be sold, are not final.

17. In the above facts and circumstances of the case, we are of the view that instead of affirming the decree of specific performance as modified by High Court, it will be equitable, just and proper to direct the appellants to pay back amount of Rs.60,000/- accepted by the original defendant with interest @ 18% per annum to the plaintiff/respondent from 04.02.1992 till date, within a period of three months from today, failing which this appeal shall stand dismissed. We order accordingly. The amount of Rs.73,125/- deposited by the plaintiff may also be withdrawn by him after appellants pay or deposit the sum in favour of plaintiff as directed above. Appeal stands disposed of.

J.