

SUPREME COURT OF INDIA

Shivaji Yallappa Patil

Vs.

Sri Ranajeet Appasaheb Patil

C.A.No.5012 of 2008

(R.K.Agrawal and Abhay Manohar Sapre, JJ.,)

16.04.2018

JUDGMENT

R.K.Agrawal, J.,

1. The above appeal has been filed against the judgment and order dated 29.06.2005 passed by the High Court of Karnataka at Bangalore in Regular Second Appeal No. 568 of 2000 whereby learned single Judge of the High Court allowed the appeal filed by Respondent Nos. 1 and 2 herein (original plaintiffs) against the judgment and decree dated 25.02.2000 in Regular Appeal No. 29 of 1997 passed by the Court of Civil and the order dated 21.07.1992 in Original Suit No. 123 of 1986.

2. Brief facts:

“(a) The suit property is an agricultural land situated at Khavanewadi village in Hukeri Taluka bearing Survey No. 77, measuring 6 acres 8 guntas wherein several persons were owners of their defined shares and were in cultivation till 28.05.1981. Later on, the above suit land was divided into two parts as Eastern and Western measuring 3 acres 4 guntas each. In pursuance to the said partition, the joint owners gave a joint application to the Survey Department for demarcation of boundary line between the eastern and western land showing their respective names to their respective parts. The land in the ratio of 1/2, 1/6, 1/6 and 1/6 was given to Ashabai w/o Manohar Kulkarni, Yashwant Kulkarni (Husband of Respondent no. 3 herein), Dattaraya Kulkarni and Laxmibai Ganesh Kulkarni respectively in the eastern side.

(b) It is the case of the plaintiffs (Respondent Nos. 1 and 2 herein) that the above named persons agreed to sell their share to the plaintiffs (Respondent Nos. 1 and 2 herein). Though the exact division was not ascertained, it was decided to execute the sale deed only after the division. After settlement, the total price of 3 acres 4 guntas was fixed at Rs. 22,000/- and Rs. 2,000/- was paid in advance. The measurement was finally carried out and approved on 30.12.1983. By that time, Yashwant Kulkarni and Dattaraya Kulkarni expired. Sudha, wife of Yashwant Kulkarni got 1/6 share of her

husband in the eastern side and got her name entered in the record of rights for Survey No. 77.

(c) The co-owners (except Sudha, having 1/6th share) of the eastern side executed a sale deed in favour of plaintiffs on 13.02.1984 and they were put in actual possession of the land. On 21.03.1986, Respondent No. 3 herein (wife of Yashwant Kulkarni), the owner of 1/6th share of land in Survey No. 77, sold her share to Respondent No. 4 herein.

(d) Being aggrieved, the plaintiffs (Respondent Nos. 1 and 2 herein) filed an Original Suit being No. 123 of 1986 for specific performance against Respondent Nos. 3 and 4 herein before the Court of the Addl. Munsiff, Hukeri. Learned Addl. Munsiff, vide judgment and order dated 21.07.1992, dismissed the suit.

(e) Aggrieved by the decision dated 21.07.1992, the plaintiffs filed a Regular Appeal being No. 29 of 1997 before the Court of Civil Judge, (Sr. Dn.) Hukeri. During the pendency of the appeal, the appellant herein, purchased the suit property through a registered sale deed for valuable consideration. It is also alleged by the appellant herein that he was put in possession of the suit property. The appellant purchased the suit property as he is having his landed property adjacent to the suit property. Learned Civil Judge, vide judgment and order dated 25.02.2000, partly allowed the appeal while refusing to grant specific performance of the contract.

(f) Aggrieved by the judgment and order dated 25.02.2000, the plaintiffs preferred a Regular Second Appeal being No. 568 of 2000 before the High Court. Learned single Judge of the High Court, vide judgment and order dated 29.06.2005, allowed the second appeal in favour of the plaintiffs and ordered the specific performance of the contract provided plaintiffs shall pay prevailing market value within 6 (six) months from the date of judgment.

(g) Aggrieved by the judgment and order dated 29.06.2005, the appellant herein has preferred this appeal by way of special leave before this Court.”

3. Heard Mr. Shankar Divate, learned counsel for the appellant and Mr. S.N. Bhat, learned counsel for the respondents. Point(s) for consideration :-

4. Whether in the present facts and circumstances of the case the High Court was right in granting decree for specific performance to the original plaintiffs (Respondent Nos. 1 and 2 herein)?

Rival contentions:-

5. At the outset, learned counsel for the appellant contended that the High court erred in law while interfering in well considered, well reasoned judgments of the courts below refusing to grant discretionary relief under Section 20 of the Specific relief Act, 1963 (in short ‘the SR

Act5). It was further contended that the appellant was served with the notice of impleadment only on 02.06.2005 and when the appellant was making arrangements to enter and defend the matter, the appeal came to be decided vide judgment dated 29.06.2005. Hence, the principles of natural justice of the appellant stand violated.

6. Further, it was contended that the High court has seriously erred in relying upon the judgment dated 24.09.1987 passed by learned Additional Munsiff in Original Suit No. 129 of 1984 for permanent injunction by the original plaintiffs while upholding that the original plaintiffs were in possession of the entire extent of the land. At this juncture, it was contended that the Respondent No. 3 herein, who was the original owner of the suit property, was not the party to the said case. Hence, the judgment in the said Suit ought not to be considered for deciding the issue of possession of share of Respondent No 3. Learned counsel further contended that two fact finding courts have found no evidence that the possession of the suit land was handed over to the original plaintiffs and the plaintiffs even did not aver in plaint in original suit that they are ready and willing to perform their part of the contract before filing the suit.

7. It was further contended by learned counsel for the appellant that the High Court failed to see that the owner of 1/6th share of the suit property sold the same to Respondent No. 4 herein with the possession way back in 1986 through a registered sale deed for valuable consideration and the appellant purchased the same in 1999 for valuable consideration through a registered sale deed and he was put in possession of the suit land also. Hence, directing the execution of the sale deed in favour of the original plaintiffs after the lapse of a considerable long period is unjustified and will cause grave injustice to the appellant herein. Learned counsel finally contended that the ends of justice demand that decree for specific performance should not have been granted.

8. Per contra, learned counsel for the respondents submitted that the courts below had failed to appreciate the materials on record in proper perspective and their findings contained manifest error while refusing to grant decree for specific performance to the plaintiffs. The dispute raised is a matter of appreciation of evidence and the High Court was right in granting the same.

9. Learned counsel for the respondents further submitted that the appellant herein was brought on record and impleaded as a party to the proceedings but the appellant herein never represented himself before the High Court or defended the case. Learned counsel further submitted that the trial court and the lower appellate court had proceeded to arrive at the conclusion that there was no delivery of possession in favour of the original plaintiffs as per the agreement to sell dated 28.05.1981 on the ground that there was no mention of delivery of possession in the exhibits produced before it whereas the High Court was right in arriving at the conclusion with regard to the decree for specific performance while setting aside the erroneous findings arrived at by the courts below it. Learned counsel finally submitted that in view of the peculiar circumstance of the case, no interference is sought for by this Court in the matter. Discussion :-

10. It is a well settled law that the power to order specific performance of contract is discretionary and parties cannot claim it as a matter of right although it is lawful but such discretion should be exercised judicially and prudently. Section 20 of the SR Act reads as follows:

“20. Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree 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.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation 2.— The question whether the performance of a contract would involve 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 to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

11. The possibility of injury to the interest of third party does not, by itself, disentitle the plaintiff from specific performance but it depends upon the facts and circumstances of each case which will be considered by the court in the exercise of its discretion. The court may

properly exercise discretion to decree specific performance, in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

12. In the instant case, Respondent Nos. 1 and 2 filed an original suit for the specific performance of the contract on the ground that owners of the suit property transferred the entire possession of property to them after agreement to sell and it was done in pursuance of part performance. Hence, plaintiffs are entitled for the benefit of Section 53A of the Transfer of Property Act, 1882 (In short 'the TP Act'). Section 53 A which was added in 1929 and imports into India a modified form of the equity of part performance as developed in England in *Elizabeth Maddison vs. John Alderson*¹. The following postulates are sine qua non for basing a claim on Section 53 A of the TP act, 1882:

- There must be a contract to transfer for consideration any immovable property.
- The contract must be in writing signed by the transferor, or by someone on his behalf.
- The writing must be in such words from which the terms necessary to construe the transfer can be ascertained.
- The transferee must be in part performance of the contract take possession of the property, or of any part thereof.
- The transferee must have done some act in furtherance of the contract.
- The transferee must have performed or be willing to perform his part of the contract.

13. It is well settled law that Section 53A of the TP Act confers no right on a party who was not willing to perform his part of the contract. A transferee has to prove that he was honestly ready and willing to perform his part under the contract.

14. In the present case, during the course of hearing, it is brought to our knowledge that both the trial court as well as the lower appellate court had proceeded to arrive at the conclusion that there was no delivery of possession in favour of the Respondent Nos. 1 and 2 herein as per the agreement to sell dated 28.05.1981 on the ground that there was no mention of delivery of possession. It is submitted that the said courts below had failed to appreciate the said judgment and decree dated 24.09.1987 of the learned Additional Munsiff, Hukkeri in O.S. No. 129 of 1984 in proper perspective which clearly shows that the said court having found the possession of Respondent Nos. 1 and 2 herein in respect of the said entire property including suit property had granted injunction in the matter and restrained the third party to interfere with the possession of Respondent Nos. 1 and 2 herein. Henceforth, Respondent Nos. 1 and 2 have been in possession of suit land against all other persons and can claim right of possession even against the subsequent purchaser.

15. In the present case, the whole case revolves around the one question whether Respondent Nos. 1 and 2 got the possession of entire suit land. It is undisputed fact that deceased husband of Respondent No.3, along with other owners in Survey No. 77, entered into an agreement with the Respondent Nos. 1 and 2 but later on Respondent No. 3 refused to execute the said agreement. In pursuance of the same, it is alleged that the possession of the entire land got transferred to Respondent Nos. 1 and 2. However, Respondent No. 3 herein denied this fact and alleged that possession of her share never transferred to the original plaintiffs. After perusal of the factual matrix of the entire case and peculiar facts, we are of the considered view that on the basis of the finding in OS No. 129 of 1984, it is well established that the present Respondent Nos. 1 and 2 were put into the possession of entire land. The decree passes by the Munsiff in the year 1987 regarding possession in an independent suit filed in the year 1984 is indicative of the fact that the plaintiffs/respondent Nos. 1 and 2 were in possession.

Conclusion :-

16. In view of the foregoing discussion, we do not find any reason for not granting specific performance in favour of Respondent Nos. 1 and 2. Hence, in the interest of justice and since the Respondent Nos. 1 & 2 are in possession of suit land for long time, we do not find any illegality with the reasoned judgment passed by the High Court in granting specific performance in their favour subject to paying of the sale consideration by them as per the present prevailing market value within six months from today. The appeal is dismissed with no order as to costs.

Judgment Referred.

¹(1883) 8 App Cases 0467