

RAJASTHAN HIGH COURT

Ganga Ram

Vs.

Kamal Chand

Civil Special Appeal No. 2 of 1996
(Rajesh Balia and R.S. Chauhan, JJ.)

14.07.2005

JUDGMENT

Rajesh Balia, J.

1. At the request of learned counsel for the parties, the preparation of Paper Book in the present appeal is dispensed with.
2. This appeal is directed against the judgment of the learned Single Judge dated 26-5-1994 [reported in (1995)1 Civil Court C 384] dismissing the Appeal No. 20/80 against the judgment and decree passed by the learned District Judge on 5-2-1980 in Civil Suit No. 5/73.
3. The suit was filed by respondent-Kamal Chand (since deceased) against the appellant-Gangaram for recovery of possession of property in question *inter alia* on the ground that the plaintiff was in occupation of the property in question as licensee from the defendant.
4. The defendant pleaded in defense that the plaintiff is stopped from recovering the possession of the property in question *inter alia* on the ground that the defendant was in possession of the property in question in part performance of an agreement to sell which came into existence between the plaintiff and the defendant.
5. The property in question is 2000 Sq. Yards of land situated at Nagore forming part of a bigger plot purchased by Kamal Chand in the year 1950 for Rs. 2500/-.
6. According to defendant-Gangaram. Kamal Chand-plaintiff had agreed to sell 2000

Sq.Yards of land out of the said plot to defendant at the rate of 8/- per Sq. Yard in the month of Oct., 1967 and he had paid Rs. 3,000/- as earnest money. The total plot admeasured 2752.25 Sq. Yards.

7. Amongst other issues, Issue No. 7 was framed on the aforesaid pleadings of the defendant whether defendants have purchased from the plaintiffs 2000 Sq. Yards of land out of the Patasudh land of plaintiff admeasuring 2752 Sq. Yards at the rate of Rs. 8/- per Sq. Yard in October, 1967 and has paid Rs. 3,000/- as earnest money against it, if so, what is its effect on the suit?

8. The learned trial Court decided the Issue No. 7 against the defendant by holding that the defendant has not been able to prove the alleged agreement to sell in his favor. Consequently, the suit of the plaintiff was decreed on the basis of title which was otherwise proved on defendant's own admission. Along with the decree for possession, a decree of manse profits for three years till filing of the suit was also passed.

9. Aggrieved with the aforesaid judgment and order, defendant filed Civil First Appeal No. 20/80.

10. The plaintiff has urged before the learned Single Judge that admittedly, there being no written document of agreement to sell, Section 53-A cannot be invoked by the defendant for the purpose of avoiding the decree for possession in favor of plaintiff as owner of the plot.

11. This plea found favor with the learned Single Judge that essential condition of invoking defense to protect one's possession against true owner under Section 53-A of the Transfer of Property Act is that agreement to sell under which a person is put in possession of the immovable property must be in writing. That being so, on admitted stand that even as per defendant there was no written agreement between the parties, the defendant could not have avoided the decree of possession in terms of Section 53-A of the Transfer of Property Act on the ground of alleged oral agreement.

12. It was only on this ground that first appeal was dismissed holding that no interference was called for in the decree passed by the learned trial Judge.

13. This led to filing of the present appeal.

14. During the pendency of these proceedings, another happening that took place is that the defendant in the present case Gangaram filed another civil suit for enforcing the alleged oral agreement to sell by claiming a decree for specific performance of contract for executing the sale in his favor by defendant-Kamal Chand.

15. The said suit has since been decreed by the learned District Judge, Nagore on 18-9-87 by holding that oral agreement between the parties stands proved. S.B. Civil Regular First Appeal No. 14/88 is pending against that judgment and decree.

16. The appellant in his First Appeal has challenged the finding of the learned trial Court about not proving the existence of any agreement between the parties by Ganga Ram. However, in view of the legal position, noticed above, that in absence of a written document evidencing the agreement to sell, provisions of Section 53-A cannot be invoked for the purpose of avoiding a decree for possession on the basis of oral agreement, the learned Single Judge did not enter into the said question and decided that issue.

17. The appellant in the present appeal has again raised a ground challenging the finding arrived at by the learned trial Court about existence of oral agreement.

18. The provisions of Section 53-A are unequivocally clear in this regard. It opens with the sentence "where any person contracts to transfer for consideration any immovable property by writing signed by him on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty".

19. Thus, on the plain reading of provisions of Section 53-A of the Transfer of Property Act, it is clear that writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained is *sine qua non* before a person in possession can defend his possession on the principle of part performance of contract against a person who holds title to such immovable property. There being no case set up by either of the parties that there was any writing signed by the alleged transferor, and only oral agreement has been sought to be proved by the defendant, the question of invoking Section 53-A did not arise. The existence of oral agreement between the parties was not an issue which was necessary to be decided between the parties in the suit out of which this appeal has arisen. As a matter of fact, in the defense of appellant, existing title of plaintiff in the suit land, until alleged

agreement with him was impliedly admitted. Hence, if his defense under Section 53-A failed, he could not have avoided the decree for possession, notwithstanding oral agreement existing. In fact, the learned Single Judge has rested his decision only on this principle without going into the other challenges made by the appellant. Other issues were inferred not necessary to be decided.

20. In the present circumstances, as we notice, the defendant-appellant in the present proceedings had pursued his remedy of enforcing the alleged oral agreement to sell of seeking a decree of specific performance and it appears that no plea of pendency of the issue about the existence of oral agreement in previously instituted suit was raised seeking stay of subsequent suit under Section 10, Civil Procedure Code.

21. In these circumstances, we are of the opinion that so far as the decree of the learned trial Judge as affirmed by the learned Single Judge in favour of plaintiff-respondent for possession on the basis of title by ignoring the plea of defendant under Section 53-A which was not founded on a written agreement, does not call for interference.

22. Any finding recorded by the learned trial Judge about the existence or non-existence of oral agreement being wholly unnecessary for the purpose of deciding this appeal or the suit on admitted facts must be held to be not necessary for decision of the suit and not binding on the parties in the way to burden their remedies in a subsequent suit for specific performance. That suit has to be decided independently on the basis of material available.

23. In these circumstances, this appeal is dismissed.

24. No order as to costs.

Appeal dismissed.