Neutral Citation No. - 2024:AHC:140413

Reserved on 20.08.2024

Delivered on 31.08.2024

AFR

Court No. - 36

Case :- SECOND APPEAL No. - 540 of 2024

Appellant :- Mahavir Prasad
Respondent :- Balveer Singh And Another
Counsel for Appellant :- Prem Prakash Chaudhary
Counsel for Respondent :- Abhishek Gupta,Chandra Bhan Gupta

Hon'ble Kshitij Shailendra,J.

The Appeal

1. The instant appeal has been filed by the defendant of Original Suit No. 974 of 2014 challenging the concurrent judgments and decrees whereby, respectively, the suit for specific performance of a registered agreement for sale dated 25.04.2014 filed by the plaintiffs-respondents, has been decreed and Civil Appeal filed against the said decision has been dismissed.

Plaint case

2. The plaintiffs-respondents filed the aforesaid suit on the basis of registered agreement for sale dated 25.04.2014 said to

have been executed by the defendant-appellant agreeing to sell 500 Sq. yards of his Bhumidhari land bearing Arazi No. 129-A covered by Khata No. 179. It was stated that despite the agreement, sale deed was not executed by the defendant-appellant and when the plaintiff-respondents issued notice dated 29.09.2014 asking him to execute sale deed and, thereafter, presented themselves on 22.10.2014 before the Sub Registrar's office with remaining sum and miscellaneous expenses, the defendant-appellant did not appear for executing the sale deed and, hence, the suit was filed.

Defence

3. The defendant-appellant filed written statement stating that execution of agreement for sale was a fraudulent exercise, inasmuch as, the plaintiffs carried him to the Registrar's office for witnessing some sale deed but, under the garb of said act, an agreement was got executed. It was further pleaded that the land in dispute being co-owned by various persons and having not been partitioned so far, no necessity to execute the sale deed ever arose. Payment of part of sale consideration was also denied.

Defence case dislodged by both the courts

4. The trial court, after framing seven issues and after discussing oral and documentary evidence, decreed the suit by judgment dated 15.12.2022 granting a decree for specific performance of the agreement. Civil Appeal No. 3 of 2023 filed against the said decision has also been dismissed by the judgment and decree dated 14.03.2024.

Counsel heard

5. I have heard Shri Prem Prakash Chaudhary, learned counsel for the defendant-appellant and Shri Chandra Bhan Gupta, learned counsel for the plaintiff-respondents on the point of admission.

Submissions on behalf of appellant

6. Learned counsel for the appellant submits that suit could not be decreed for various reasons; first, that the statement contained at page No. 3 of the agreement for sale as regards cash payment of Rs.5,00,000/- (rupees five lac) by the plaintiffs to the defendant was not proved; secondly, the land forming subject matter of the agreement having not been a specific portion of the land co-owned by various co-sharers, no sale could be executed and, therefore, agreement becomes invalid; thirdly, the witnesses produced by the plaintiffs' side made inconsistent statements regarding payment of advance money; fourthly, bare affidavit filed by PW-1 would not be admissible in evidence unless it is acknowledged by him on appearing in witness box; fifthly, there was no evidence to prove payment of Rs.5,00,000/- before the Sub Registrar and, lastly, burden to prove that the agreement was validly executed would lay upon the plaintiffs, but the same has wrongly been shifted upon the defendant-appellant, who had termed execution of the agreement as a fraudulent act. In support of his submissions, reliance has been placed upon the judgement of Supreme Court in the case of **Ameer Trading Corporation Ltd. Vs Shapoorji Data Processing Ltd, (2004) 1 SCC 702**, particularly, paragraph No. 31 thereof and also judgment of this Court in **Kishan Chand**

and others vs Dr. Kailash Chandra Gupta and others, 2010 (2) ADJ 666, particularly, paragraphs No. 37 and 38 thereof.

Submissions on behalf of respondents

7. Per contra, learned counsel for the plaintiff-respondents argues that the agreement for sale being a registered document, strong presumption exists as regards its validity, both on the point of execution as well as its contents and, hence, the plea of the defendant-appellant that the agreement was got executed fraudulently, cannot sustain. As regards payment of advance money, it is contended that the sum was received in presence of witnesses produced by the plaintiffs and the Sub- Registrar's endorsement made on the agreement is conclusive proof of such payment. Shri Gupta further submits that both the courts below have recorded pure findings of fact based upon oral and documentary evidence and the contention of the appellant that there was no proof of payment of advance money stands dislodged in view of non-putting a suggestion from PW-1 to that effect during the course of his cross-examination.

Analysis of rival contentions

8. Having heard learned counsel for the parties, I find that execution of agreement for sale was admitted by the defendant-appellant. Though, a plea was taken that the agreement was got executed under the garb of witnessing a sale deed, evidence to that effect was seriously lacking so as to dislodge validity of a registered document. It is not the case of the defendant-appellant that he was an illiterate person unable to understand the contents of a document or purpose for which it was being executed. Bare plea that the document was fraudulently got

executed without any sufficient oral and documentary evidence to dislodge a registered document could not suffice dismissal of the suit. As regards payment of advance money of Rs. 5,00,000/- (rupees five lac), it is found that the Sub Registrar had made an endorsement on the registered agreement to the following effect: -

> "निष्पादन लेखपत्र वाद सुनने व समझने मज़मून व प्राप्त धनराशि रु प्रलेखानुसार उक्त विक्रेता"

The recital as regards payment of Rs. 5,00,000/- is contained at internal page No. 3 of the agreement in the following words:

> "स्टाम्प पत्र कीमती मुबलिग 20,100/- रुपये इस इकरारनामा के साथ में संलग्न हैं तफसील जरे ब्याना मुबलिग 5,00,000/- रुपये फरीक अव्वल ने फरीक दोयम से नगद समय रजिस्ट्री इकरारनामा समक्ष गवाहान के प्राप्त कर लिए हैं।"

9. As regards plea of non-partition amongst co-sharers of the land, paragraph No. 26 of the written statement reads as follows:

> "यह कि भूमि प्रतिवादी व उसके सहखातेदारों की है सहखातेदारों व प्रतिवादी के मध्य कोई विभाजन हुआ है ऐसी स्थिति में कोई आवश्यकता भूमि को विक्रय करने के अनुबन्ध की नहीं थी।"

As such, no plea was taken that for non-partition of property, the agreement would not be executable or sale deed cannot be executed, rather the statement was that no necessity arose to execute the agreement as there was no partition amongst co-sharers. This Court cannot read anything which was not pleaded before the courts below and, hence, the contention advanced against executability of the agreement or the sale deed on this score cannot be accepted.

10. As far as submission that bare affidavit would not be treated as evidence unless the witness appears in witness box and acknowledges filing of the affidavit, it is to be noted that after the Code of Civil Procedure, 1908 was amended by Act No. 46 of 1999 w.e.f. 01.07.2002, examination-in-chief is done in the form of affidavits and cross-examination is done after the witness concerned appears in the witness box. In the instant case, both the plaintiffs filed their affidavits in examination-in-chief and their cross-examination would show that no suggestion was made on behalf of the defendant-appellant as regards filing or non-filing of the affidavit in examination-in-chief.

11. It would be apt to observe that whenever a witness appears for cross-examination, he answers only those questions, which are asked from him. That is why, putting of suggestion is of quite significance and if a particular relevant and significant suggestion is not made to the witness, his testimony cannot be discarded for not making a statement during cross-examination. In the present case, such suggestions are completely missing from cross-examination of both the P.Ws. Similar is the position with respect to payment of part of sale consideration. Therefore,

when no specific suggestions were made on both the aforesaid counts, testimony of P.Ws. cannot be discarded, rather such circumstances would go against the defendant-appellant and, hence, argument advanced on that line also does not have any force.

12. Once execution of registered agreement is admitted to the defendant-appellant, endorsements made by Sub Registrar would be presumed to be correct under sections 58, 59 and 60 of Registration Act, 1908. Further, on a careful and complete reading of sections 91 and 92 of the Evidence Act, 1872 such a presumption qua contents of the written disposition of property as contained in the agreement could be rebutted, but in the instant case, this Court does not find anything on record sufficient to rebut the said presumption. Both the courts below have examined the pleadings of the parties and oral and documentary evidence led by them and have taken a view against the defendant-appellant. This Court, in exercise of second appellate jurisdiction, cannot upset the findings of fact recorded by the trial court and the first Appellate Court, unless shown apparently perverse.

13. The judgment of Apex Court in ***Ameer Trading Corporation Ltd.*** (supra), as cited form the appellant side had arisen out of civil suit filed in the year 2001 when Code of Civil Procedure had not been amended and the examination-in-chief was done when the witnesses used to appear in witness box and not by way of the affidavit. Paragraph 31 of the said judgment, as relied upon by learned counsel for the appellant, in fact, is quoted version of the judgment of Bombay High Court in ***F.D.C. Ltd. vs. Federation of Medical Representatives***

Association India (FMRAI) and others, AIR 2003 Bombay 371. The said paragraph deals with the provisions of Order XVIII C.P.C. as stated prior to C.P.C. Amendment Act 46 of 1999 and even State amendments made in the State of Uttar Pradesh were not considered as the matter had arisen from the State of Maharashtra. Though the view taken by the Bombay High Court was approved by the Hon'ble Supreme Court, considering the amended provisions of C.P.C. read with non-putting of suggestions during the course of cross-examination of P.Ws., oral testimony of the said witness cannot be dislodged and the appellant shall not get any benefit of the judgment in the case of ***Ameer Trading Corporation Ltd.*** (supra).

14. In the judgment of ***Kishan Chand*** (supra) relied upon from the appellant side, a co-ordinate Bench of this Court held the suit for specific performance of an agreement as barred by Section 22(2) of the Specific Relief Act read with Order II Rule 2 of Code of Civil Procedure on the ground that the plaintiffs had failed to identify the shares of alleged vendors, who had entered into an agreement. Here, it would be prudent to refer the said provision itself. Section 22, as stood before amendment made in the Act of 1963, reads as under:

> "22. **Power to grant relief for possession, partition, refund of earnest money, etc.**—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—
>
> (a) possession, or partition and separate possession, of the property, in addition to such performance; or
>
> (b) any other relief to which he may be entitled, including the refund of any earnest money or

> deposit paid or made by him, in case his claim for specific performance is refused.
>
> (2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:
>
> Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.
>
> (3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."

15. A bare perusal of Section 22 would show that it does not refer to any bar against the suit for specific performance. The provision only says that no such relief would be granted, unless it has been specifically claimed. In the present case, such a question would not arise at all as neither any relief in terms of Section 22 (1) (a) of the Specific Relief Act was claimed nor has been granted by the courts below. Therefore, the argument that the suit was barred by Section 22 of the Act, does not have any force and, even otherwise, facts of the instant case are entirely different from those which formed subject matter of the discussion in ***Kishan Chand*** (supra). Further, in the instant case, neither any issue or point of determination was framed with regard to bar of suit under any said provision nor was there any pleading to that effect in the written statement except a bare statement that in view of non-partition amongst the co-sharers necessity to execute the agreement did not arise. Moreover, once the execution of agreement is admitted to the defendant-appellant, he cannot get advantage of any recital made therein, which would confer benefit upon him and be read against the plaintiff-respondents. Interestingly, the defendant-appellant

never disclosed as to who were other co-sharers in the property forming subject matter of the agreement and, hence, even necessity to implead alleged co-sharers did not arise. The flaw in the agreement on that ground, if any, would be attributable to the defendant-appellant and in the facts of the case, it would not defeat the claim of the plaintiff-respondents in whose favour different areas of the concerned gata were agreed to be sold by the defendant-appellant himself. For all the aforesaid reasons, with due respect, the judgment in **Kishan Chand** (supra) is if no help to the defendant-appellant.

16. As regards interference by the High Court in second appellate jurisdiction, the Supreme Court has, in ***Kshitish Chandra Purkait vs Santosh Kumar Purkait,*** AIR 1997 SC 2517, held that raising of a new plea at the second appellate stage would not be proper and that would not give rise to a substantial question of law. In ***Bholaram v. Amirchand*** (1981) 2 SCC 414, a three Judges' Bench of Supreme Court reiterated the statement of law and set aside the judgment by which the High Court had upset the decisions of trial court and first appellate court by reappreciating the evidence.

17. In ***Kamti Devi (Smt.) and Anr. v. Poshi Ram*** (2001) 5 SCC 311, the Supreme Court came to the conclusion that the finding reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding. In ***Thiagarajan v. Sri Venugopalaswamy B. Koil,*** (2004) 5 SCC 762, the Supreme Court has held that the High Court in its jurisdiction under Section 100 C.P.C. is not justified in interfering with the findings of fact and that it is the obligation of the courts of law

to further clear intendment of the legislature and not frustrate it by excluding the same and where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

18. Similar view has been taken in ***Kondiba Dagadu Kadam vs Savitribai Sopan Gujar and others,*** (1999) 3 SCC 722 by observing that disturbance in findings of fact would be contrary to limitations imposed by section 100 C.P.C. The Supreme Court again reminded in ***Commissioner, Hindu Religious & Charitable Endowments vs. P. Shanmugama*** (2005) 9 SCC 232 that the High Court has no jurisdiction in second appeal to interfere with the findings of fact. The Apex Court, in ***State of Kerala v. Mohd. Kunhi*** (2005) 10 SCC 139 reiterated the same principle by observing that by such interference, the High Court would go beyond the scope of Section 100 of the Code of Civil Procedure.

19. In ***Madhavan Nair v. Bhaskar Pillai*** (2005) 10 SCC 553, the Supreme Court observed that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same. In ***Harjeet Singh v. Amrik Singh*** (2005) 12 SCC 270, the Apex Court, with anguish, observed that the High Court had no jurisdiction to interfere with the findings of fact arrived at by the trial Court and the lower appellate Court regarding readiness and willingness to perform part of contract in its jurisdiction under Section 100 C.P.C.

20. The view taken in the aforesaid decisions has been reiterated by the Apex Court in ***Gurdev Kaur and others vs.***

Kaki and others, 2007 (1) SCC 546. In ***Dalip Singh vs. Bhupinder Kaur,*** 2018 (3) SCC 677, the Apex Court was dealing with a case arising out of suit for specific performance of an agreement for sale and set aside the judgement of High Court that had interfered with findings of fact.

Conclusion

21. In view of the above referred decisions of the Supreme Court it is clear that even when two views are possible, out of which one view has been taken by the courts after appreciating evidence on record, second Appellate Court would not substitute that view by its own view. Re-appreciation of evidence to arrive at a different conclusion is quite restricted in exercise of jurisdiction under Section 100 of Code of Civil Procedure and in the present case, finding on executability of the agreement, proof of its contents, question of readiness and willingness on the part of the plaintiff-respondents to get the sale deed executed, are pure findings of fact based upon the material available on record. This Court does not find any apparent perversity in the view taken by both the courts below so as to upset the impugned decisions.

22. No substantial question of law arises for consideration.

23. The second appeal has no force and is, accordingly, **dismissed** at the stage of admission itself.

Order Date :- 31.08.2024
Sazia

(Kshitij Shailendra,J.)