

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(S.B.: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Second. Appeal No. 681/2005

Kedar

Appellant

Vs.

Rameshwar & another

Respondents

 Shri Subodh Abhyankar learned counsel for the appellant.

Shri Vaibhav Jain, learned counsel for the respondent No.1.

Whether approved for reporting :

J U D G M E N T

(Delivered on 30th Day of August, 2013)

1/ This appeal under Section 100 of CPC is at the instance of the defendant in the suit challenging the concurrent decree of the trial Court as well as the first appellate court for specific performance of the contract. The trial court by the judgment dated 6th December 2004 had decreed C.S. No. 26A/1998 and granted decree of specific performance in favour of respondent No.1 and first appellate court by the judgment dated 29/3/2005 by dismissing the civil appeal No. 38A/2004 has affirmed the said decree.

2/ Respondent No. 1 had filed the suit for specific performance pleading that appellant had agreed to sell the suit land to respondent No. 1 by oral agreement dated 22/12/1976 and had received full consideration amount and

had also handed-over the possession and original title document. Thereafter respondent No. 1 had started paying the land revenue and had continued in possession. On 1/12/1991, the written agreement for sale of the suit land was also executed by the appellant in favour of respondent No. 1. Respondent No. 1 was always ready and willing to perform his part of the contract. He had given the notice dated 3/8/1998 requiring the appellant to execute sale deed within eight days of receipt of the notice. The notice was served on 7/8/1998 but the appellant did not execute the sale deed. On the contrary, he had tried to dispossess respondent No. 1 therefore, the present suit was filed. The appellant had denied the plaint averment and had raised the plea that the appellant is the owner in possession of the suit land and that no agreement to sell was ever executed by the appellant in favour of respondent No. 1.

3/ Trial court by judgment dated 6th December 2004 had decreed the suit on reaching to the conclusion that the oral agreement dated 22/12/1976 was executed by the appellant in favour of respondent No. 1 for sale of the suit land. It was also found that the appellant by executing the written agreement dated 1/12/1991 had agreed to sell the suit property to respondent No.1. The trial court also found that the appellant did not show any willingness to execute the sale deed in spite of the notice by respondent No.1. Accordingly, the suit for specific performance was decreed.

4/ This court vide order dated 6/3/2006 had admitted the appeal on following substantial questions of law:-

“(i) Whether both the Courts have committed an error of law in relying on Exhibit P-2 and decreeing the suit for

specific performance of contract?

(ii) Whether the Exhibit P-2 falls within the mischief of S.171(1)(b) of the Registration Act, 1908 under which the document is compulsorily registrable?

(iii) Whether the Exhibit P-2 which is an unregistered document cannot be received as evidence of the transaction affecting the disputed property as provided under S. 49 of the Registration Act, 1908?

(iv) Whether the finding of the Appellate Court that the Exhibit P-2 is actually signed by the defendant is ex facie perverse?"

The above questions are answered as follows:

Questions No. 1 & 4.

5/ Learned counsel appearing for the appellant submits that trial court has committed an error in accepting the photocopy of the agreement Exhibit P-2 in evidence, whereas learned counsel for respondent No. 1 has submitted that original document was produced before the trial court and that no objection was taken at the stage when the photocopy was exhibited in the suit.

6/ Having heard learned counsel for the parties and on perusal of the record, it is found that the original document was produced by respondent No. 1 before the trial court on 25/9/98 and it was admitted by the appellant. Nothing has also been pointed out by counsel for the appellant to show that at the time when photocopy of the agreement was marked as Exhibit P-2, any objection was raised by the appellant. There is substance in the submission of learned counsel for respondent No. 1 that since the original

agreement was already examined and admitted by the appellant therefore, he had not raised any objection when its photocopy was marked as Ex. P-2. It is settled position in law that the objection relating to the mode of proof of the document cannot be raised after the document has been admitted in evidence and marked as an exhibit, such an objection is required to be raised when the evidence is tendered. (See: **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another, reported in (2003) 8 SCC 752**). A perusal of the judgments of the courts below also indicate that they have taken into account the relevant material before placing the reliance upon Ex.P-2. Thus, the objection of the appellant that the photocopy of the agreement has wrongly been exhibited which could not have been relied upon by the courts below has no merit.

7/ The next objection in respect of Ex.P-2 is about finding of the courts below in respect of signature of the appellant in Ex.P-2. The said finding is essentially a finding of fact. Both the courts below have found that Ex.P-2 contains the signature of the appellant. The submission of counsel for the appellant is that the first appellate court could not have compared the signature of the appellant in Ex. P-2 but such course is permissible under Section 73 of Evidence Act. Even otherwise, the courts below have noted the relevant circumstances indicating execution of Ex.P-2 by the appellant. The appellant even after receiving the notice Ex.P-3 had not sent the reply or raised any objection or taken action on the ground that the alleged agreement dated 1/12/1991 mentioned in the notice was a forged document. Infact, the original document was produced

before the trial court and it was admitted by the appellant in the proceeding dated 25/9/1998. The execution of the agreement Ex.P-2 has also been proved by the respondent No. 1 by examining the witness of said document. Even otherwise, the decree of specific performance has been granted not only on the basis of written agreement Ex. P-2 but the trial court has also answered the issue No. 1 in favour of respondent No. 1 by holding that execution of the oral agreement dated 22/12/1976 is also proved and the said finding has not been disturbed by the first appellate court. The fact that respondent No. 1 is in possession of the original document is also relevant circumstances indicating the execution of the agreement to sell. Counsel for the appellant has placed reliance upon the judgment of the Supreme court in the matter of **O. Bharathan Vs. K. Sudhakaran and another**, reported in **AIR 1996 SC 1140**, but the said judgment has rightly been distinguished by counsel for respondent No. 1 by pointing out that it was a matter relating to the election petition whereas strict proof beyond reasonable doubt is required.

8/ In view of the aforesaid analysis, the questions No. 1 and 4 are answered in favour of respondent No. 1 and against appellant by holding that the courts below have not committed any error in relying upon Ex. P-2 and the finding of the courts below that Ex.P-2 was signed by the appellant is not perverse.

Questions No. 2 & 3.

9/ Learned counsel for appellant has submitted that he does not wish to press questions No. 2 and 3 even otherwise it has been pointed out by counsel for the

respondent No. 1 that Section 17 of Registration Act has been amended w.e.f. 24/9/2001 requiring the registration of agreement to sell whereas in the present case, the agreement to sell was executed on 1/12/91 much prior to the said agreement therefore its registration was not required. He has also referred to the judgment of this Court dated 22/4/1994 passed in **SA No. 346 of 1986 (Taturam Vs. Johar)** reported in **1995 MPLJ (33)**, wherein referring to proviso to Section 49, it has been held that the said proviso recognises right of the vendee to file suit for specific performance on the basis of a document which is unregistered. In view of this, the questions No. 2 & 3 are answered against the appellant.

10/ Counsel for the appellant has further submitted that additional question of law arises in the matter since in the suit for specific performance the respondent No. 1 has not prayed for decree of possession. It has been pointed out by counsel for respondent No. 1 that no such issue at any earlier stage was raised by the appellant and that no question of law has been formulated in this regard and also that new plea cannot be raised in the second appeal. (See: **Hardayal Gir Vs. Sohna Ram**, reported in **1970(3) SCC 635**; **Jadon and Company Vs. Vikas Goudha**, reported in **2013(II) MPWN 87**). Even otherwise, it is settled position in law that in the decree for specific performance if there is no direction for delivery of possession, the executing Court can direct delivery of possession (See: **Bata Shoe Co.(P) Ltd. Vs. Preetamdas Dhakumal Sindhi and others**, reported in **1982 MPLJ 560**; **Sunderlal and others Vs. Gopal Sharan**, reported in **2002(5) MPLJ 145**; **Shrikrishna Gupta Vs. Sitaram Mohanswaroop Nigam**, reported in **1997(2) MPLJ 501**; **Mohd. Yakub S/o Mohd. Ishaq Vs.**

Abdul Rauf S/o Abdul Kareem, reported in **2002(1) MPLJ 475)**

In view of this, no additional question of law arises in the matter.

In view of the aforesaid analysis, I find that appeal has no merit which is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
JUDGE

BDJ