

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10545 OF 2011
(arising out of SLP(C)No.5161 of 2007)

JOGENDRA RAM

... APPELLANT

Versus

PHULLAN MIAN (D) BY LRS. & ORS.

... RESPONDENTS

J U D G M E N T

Delay condoned. Leave granted.

2. The only question for consideration in this appeal is whether the High Court should have interfered into a finding of fact arrived at by the trial court and the first appellate court under Section 100 of the Civil Procedure Code.

3. The suit is preferred by the appellant (plaintiff) for specific performance and declaration against respondent No.5 (defendant-first party) and respondent Nos.1 to 4 (defendants-second party).

4. The case of the plaintiff was that on 20th January, 1982 the defendant-first party sold 1 katha 6 dhurs of land in Plot No.29 of village Motihari to one Mahender Ram by registered sale deed. Subsequently, on 28th January, 1984 the defendant-first party entered into an agreement (Mahadanama) with the plaintiff for sale of rest of the land admeasuring an area of 5 kathas 6 dhurs of Plot No.29 of village Motihari as fully described in Schedule I of the plaint for which total

consideration amount was fixed at Rs.3,000/- and an earnest money of Rs.1,500/- was paid by the plaintiff to the defendant-first party. The defendant-first party agreed to execute the sale deed by 15th March, 1984 after receiving the rest of the consideration amount. The plaintiff was put in possession of the suit land. The plaintiff was always requesting the defendant-first party to accept rest of the consideration money and execute the sale deed but on one pretext or the other she avoided execution of the sale deed. A legal notice was issued by the plaintiff on 5th March, 1984 to defendant-first party asking her to execute the sale deed. Pursuant to which, defendant-first party by letter dated 13th March, 1984 intimated that defendants-second party had forcefully got a sale deed executed in their favour on 22nd February, 1984.

5. The further case of the plaintiff was that the sale deed executed by defendant-first party in favour of defendants-second party on 22nd February, 1984 for an area admeasuring 6 kathas 3 dhurs in plot No.29 was not valid as land to that extent was not available with the defendant-first party. The sale was brought in existence without payment of consideration money and the defendants-second party had full knowledge about the earlier agreement dated 28th January, 1984 executed by defendant-first party in favour of the plaintiff. A suit for specific performance and declaration, being Title Suit No.31 of 1984 was filed.

6. The defendants filed their separate written statement. Defendant-first party fully supported the case of the plaintiff and she admitted that she had executed the agreement for sale prior to execution of the sale deed in favour of defendants-

second party. The defendants-second party on false pretext had got executed the sale deed registered in their favour by putting undue pressure and without payment of consideration money. She challenged the maintainability of the suit against the defendants-second party on the ground that she never performed her part of the agreement and she was ready and willing to execute the sale deed in favour of the plaintiff. The defendants-second party, the main contesting party opposed the suit on the following grounds:

- (i) The suit was not maintainable as it was filed for declaration and title and recovery of possession under the garb of the suit for specific performance of contract;
- (ii) the said suit cannot proceed without paying proper court-fee;
- (iii) the suit was barred under the provisions of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956; and
- (iv) a collusive suit has been brought by the plaintiff in collusion with the defendant-first party and antedated the agreement for avoiding the execution of sale deed in favour of defendants-second party.

The following issues were framed by the trial court:

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff got any cause of action or right to sue?
- (iii) Whether the Mahada in question is legal, valid and for consideration or it is collusive and antedated?
- (iv) Whether defendant 2nd party had knowledge of Mahada in question?
- (v) Whether sale deeds alleged to have been executed by Rita Devi in favour of defendant 2nd party are fraudulent?

- (vi) Is the plaintiff entitled to get the reliefs as prayed for?
- (vii) To what other relief or reliefs, if any, the plaintiff is entitled?

7. After recording the oral and documentary evidence supplied by the parties, the learned trial court came to the conclusion that the agreement between the plaintiff and the defendant-first party is genuine, legal, valid and for consideration. The defendants-second party failed to prove that the agreement between the defendant-first party and the plaintiff was antedated. The defendant-second party had prior knowledge of the agreement dated 28th January, 1984 and plaintiff was in possession of the suit premises. The plaintiff could not prove that the sale deed executed by the defendant-first party in favour of defendants-second party was obtained fraudulently but the trial court held that the sale deed was executed without paying any consideration amount. The trial court decreed the suit for specific performance ex parte against the defendant-first party and on contest against the defendants-second party.

8. Title Appeal No.22 of 1985 was preferred by defendants-second party. The first appellate court on re-appreciation of evidence held that the plaintiff had been able to prove the validity and genuineness of the agreement for sale entitling him to a decree for specific performance of contract. The defendants-second party had full knowledge of the earlier agreement but even thereafter they got the sale deed executed without payment of consideration amount. The appeal was dismissed on contest with cost in favour of the plaintiff and against the defendants-second party.

9. In the second appeal preferred by the defendants-second party, the learned Single Judge of the High Court framed the following two substantial questions of law at the time of the admission:

“(i) Whether the courts below were right in decreeing the suit for specific performance of the contract without holding that the plaintiff was able to prove that he was prepared to perform his part of contract; that necessary evidence in this regard was led, and the courts below accepted this contention of the counsel of the plaintiffs and gave a finding to that effect?

(ii) Whether the findings of the learned trial court that the sale deeds (Ext. A series) were valid and genuine can be reversed by the learned lower appellate court without filing the cross-appeal?”

At the time of the hearing of the second appeal, the following additional substantial questions of law were framed by the High Court:

“(i) When the defendant No.1 did not deny to enforce the alleged agreement to sale, the courts below erred in law in not holding that the plaintiff has got no cause of action ?

(ii) Whether the findings of the courts below are perverse due to collusive nature of the alleged agreement for sale and collusive nature of the suit?

10. By the impugned judgment, the High Court held that the plaintiff has failed to prove the readiness and willingness on his part and he did not get the sale deed executed despite the offer made by the defendant-first party. No cause of action arose for filing the suit in favour of the plaintiff, as defendant-first party always agreed to execute the sale deed. The suit was collusive in nature and agreement for sale dated 28th January, 1984 was doubtful.

11. Learned senior counsel appearing on behalf of the appellant submits that the High Court was not justified in upsetting a concurrent finding of fact on the issue of readiness and willingness of the appellant as the same not being a question of law which could be upset in second appeal. Whether a suit is collusive in nature or not is essentially a question of fact and no finding can be returned in the second appeal on this issue unless and until an issue has been framed before the trial court and evidence are led on that count. No new issue can be framed at the time of hearing of the case and entire material and evidence on record cannot be re-appreciated by the second appellate court in exercise of jurisdiction under Section 100 C.P.C.

12. Per contra, according to the contesting respondents/defendants-second party, the plaintiff had failed to prove readiness and willingness on his part to get the sale deed executed made by defendant-first party. Further, according to them the suit was not maintainable in absence of any cause of action and was collusive in nature and the agreement for sale is also doubtful.

13. We have heard Mr. Amarendra Sharan, learned senior counsel appearing for the appellant-plaintiff and Mr. Arindam Mukherjee, learned counsel appearing for the respondents- defendants-second party. Having given our anxious attention to the rival contentions, we find ourselves unable to sustain the decision rendered by the learned Single Judge of the High Court for the reason as follows:

- (a) In a second appeal, the Court can exercise jurisdiction only on the basis of substantial question of law framed at the time of admission as held by this

Court in *Dnyanoba Bhaurao Shemade vs. Maroti Bhaurao Marnor* reported in **(1999) 2 SCC 471**. But in the present case, the High Court framed more issues at the time of hearing without giving any opportunity to the parties to lead their respective evidence.

(b) The question whether the plaintiffs were always ready to perform their part of the contract and entitled for a decree for specific performance does not raise any question of law, (Refer: *Harjeet Singh vs. Amrik Singh* reported in **(2005)12 SCC 270**), but such questions have been framed and concurrent finding of trial court and the first appellate court has been reversed by the impugned judgment.

(c) The question whether a proceeding was collusive or not is essentially a question of fact, and it cannot be considered in a second appeal, as held by this Court in *Nagubai Ammal and others vs. B. Shama Rao and others* reported in **AIR 1956 SC 593**, but by the impugned judgment learned Single Judge decided such questions though there was no such issue framed.

(d) In a second appeal the re-appreciation of evidence and interference with the finding of fact ignoring the question of law is not permissible but such interference has been made by the impugned judgment.

14. In the result, the appeal is allowed. The impugned judgment dated 8th August, 2006 passed by the High Court is set aside. The judgment of the trial court

as approved by the first appellate court is restored. The suit is decreed accordingly.

But in the facts and circumstances, there shall be no order as to costs.

.....J.
(G.S. SINGHVI)

.....J.
(SUDHANSU JYOTI MUKHOPADHAYA)

NEW DELHI,
DECEMBER 01, 2011.

