Bijey Singh And Ors. vs Bhawani Singh And Ors. on 10 September, 1951

Equivalent citations: AIR1953ALL365, AIR 1953 ALLAHABAD 365

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Bench: V. Bhargava

JUDGMENT

Mushtaq Ahmad, J.

1. The appeal first mentioned was filed by the plaintiffs and the other appeal by the defendants, each in a different suit. The former arose out of suit No. 2227 of 1946 of the Court of Munsif, Meerut, for specific performance of a contract of sale dated 4-4-1946, and in the alternative for recovery of us. 3600 together with interest in circumstances to be hereinafter mentioned. The latter arose out of suit No. 83 of 1947 of the same Court filed by Bhawani Singh, defendant 1, of the earlier suit against the plaintiffs, Bijai Singh and others, of that suit for an injunction restraining the latter from interfering with the possession of the former.

2. On 4-8-1943, the property in dispute was sold by its owner Chatersen to one Harbal and others for Rs. 7,200. The case of the plaintiffs in the earlier suit was that they and defendant 2, Run Singh, wanted the property for themselves, and therefore, had a suit filed for pre-emption ostensibly in the name of defendant 1, Bhawani Singh, they and defendant 2 being the real pre-emptors. That suit was decreed on 13-2-1946 on payment of the entire sale-consideration of RS. 7,200, one half of which was alleged to have been deposited in Court by the plaintiffs and the other half by defendant 2.

3. These plaintiffs further alleged that in token of his undertaking to transfer the property to them and defendant 2, defendant l executed a deed of agreement on 4-4-1946 to the effect that, after mutation of his name as the owner of the property, he (defendant l) would convey the same to the plaintiff's and defendant 2. Suit no. 2227 of 194.6 was for the specific performance of this very agreement. Along with this, a promissory note was also executed by defendant l in favour of the plaintiff's and defendant 2, acknowledging his liability to re-pay the amount of Rs. 7200 to those persons. In the deed of agreement just mentioned and also in this promissory note the advance of this amount by the plaintiff and defendant 2 to defendant 1 was mentioned as a loan pure and simple, though made with the object of enabling defendant 1 to deposit the amount in Court as the pre-emption money under the decree dated 13-2-1946 aforesaid. It is said by the plaintiffs-appellants that, while defendant l did transfer a half share in the property to defendant 2,

he refused to make a transfer of the remaining share to the plaintiffs and that, aggrieved by this refusal, the latter had to bring the suit out of which the first mentioned appeal has arisen. Neither the alleged sale-deed nor a certified copy of it was filed, so as to enable this Court to come to a definite finding that there was in fact a sale of half a share by defendant l in favour of defendant 2. The question whether such a sale ever took place was itself of some importance, because a particular argument was addressed to us by the learned counsel for the plaintiffs-appellants on the assumption that it had actually taken place.

4. The defence of defendant l who virtually was the sole contesting defendant was that he had paid the pre-emption money out of his own pocket, that there had never been an understanding between him on the one side and the plaintiff's and defendant 2 on the other that he would transfer the property to those persons in case a decree for pre-emption was passed in his favour in respect of the sale-deed dated 4-8-1943 aforesaid. He also denied execution of the promissory note relied upon by the plaintiffs and that any amount had been advanced to him as a loan thereunder. There were other pleas also, namely that, as this defendant paid less than Rs. 250 as land revenue, he could not be asked to make a sale of the property to the plaintiffs or defendant 2 in view of the bar of Section 12, U. P. Regulation of Agricultural Credit Act, 14 of 1946, that the agreement of 4-4-1946, was without consideration and illegal and that, in view of the promissory note mentioned by the plaintiffs, no suit for specific performance could lie.

5. The suit out of which the other appeal no. 1447 of 1948 arose was, as we have said, Suit No. 83 of 1947 of the same Court by defendant l of the earlier suit against the plaintiffs of that suit, for an injunction restraining the latter from interfering with the possession of the former. It is obvious that, if the plaintiffs in the earlier suit failed so that the possession of defendant 1 was maintained and if it was found that that possession had been interfered with by the said plaintiffs, the later suit would be decreed. On the other hand, if the plaintiffs in the earlier suit are held entitled to a decree for possession by specific, performance of a contract of sale, there would be no question of granting a decree for injunction to the plaintiff of the later suit. Of course, the defence taken by the defendants in the later suit was the same as was their case as plaintiffs in the earlier suit. Besides, they also pleaded that they had already obtained possession over the property in pursuance of the agreement dated 4-4-1946. This was of course an independent ground for defeating the claim for injunction.

6. The trial Court, while decreeing the earlier, dismissed the later suit, finding that the promissory note and the agreement, each of 4-4-1946, had been proved as duly executed, that defendant 1 in the earlier suit could not have himself provided the money required for payment of the pre-emption money, that the pre-emption suit had been for the benefit of the plaintiffs and defendant 2 of the earlier suit, they being the persons who had paid the amount and that, therefore, there was no question of the execution of a sale-deed by defendant l being barred by S. 12, U. P. Act, 14 of 1946.

7. The lower appellate Court reversed this decree. While affirming the findings of the trial Court on the first three questions, it held that defendant 1 could not be required to transfer the property in favour of the plaintiffs in the earlier suit because of the bar of Section 12 of the said Act. The learned Civil Judge gave a number of reasons for dismissing the plaintiffs' claim, to a decree for specific

performance of a contract, even though, as we have said, he had found that it was the plaintiffs who had provided the pre-emption money and that it was for their benefit and on their behalf that the pre-emption suit had been filed. He first of all held that, even though there had been an agreement between the plaintiffs and defendant 2 on the one side and defendant l on the other, to the effect that defendant l, after obtaining a decree for pre-emption, would convey the property to the first two parties, the bar of Section 12, U. P. Regulation of Agricultural Credit Act, 14 of 1940, was absolute. The learned Judge relied on the case of Sri Narain Dubey v. Jang Bahadur, 1947 ALL. w. R. (H.C.) 155 also reported in 1947 ALL. L. J. 190. There, in a suit for specific performance of a contract of sale, a compromise decree was passed to the effect that different portions of the property would bo transferred to particular parties. Neither by the time of the agreement of sale nor by the date this decree wag passed had the Act mentioned above come into force. The compromise decree, in so far as it permitted certain parties to claim transfers of different portions of the property from the opposite party, was put into execution. Then it was objected that the property being protected land could not be transferred in view of the prohibition contained in Section 12 of the aforesaid Act. The objection prevailed. That is to say, in spite of the fact that by agreement and indeed by a decree one party was under an obligation to transfer the property to another, the transfer being forbidden by statute was disallowed by the Court. In another case Gaya Prasad v. Durga Singh, 25 ALL. L. J. 1065 arising under the Bundelkhand Encumbered Estates Act also there was an agreement to sell property contrary to the provisions of Section 10 of that Act. A suit for specific performance of the agreement was filed and decreed. Ultimately, on the suit of the sons of the transferee after the latter's death for recovery of the property, it was held that the agreement was void ab initio and could not be rectified by the subsequent cessation of disability.

8. The second reason for refusing a decree to the plaintiff was that the agreement could either be enforced in its entirety or not at all and that the suit being for the enforcement only of ono part of the agreement could not succeed. Learned counsel for the plaintiffs-appellants answered that defendant 2 having already transferred a half share in the property to defendant 1 and the suit being for the enforcement of the agreement only in respect of the remaining half, that being the only part left unperformed, the objection conceived by the learned Civil Judgo should not be affirmed. This clearly assumed that there had in fact been a transfer of a half share by defendant 2 to defendant l. As we have already remarked, there is nothing to show whether such a transfer has ever been made, the original sale-deed or even a copy of it not being on the record. We must in the circumstances give effect to the view taken by the lower appellate Court.

9. The third and the last ground for dismissing the suit was that the plaintiffs and defendant 2 had committed fraud on the Court in the earlier suit by filing a claim for pre-emption not in their own names but in the name of defendant 1. The learned Judge remarked :

> "The defendant Harbal and others failed in that case to prove it (the fact of defendant 1 not baing-able to provide the pre-emption money on account of his poverty, and his having been set up by Bijai Singh and others, plaintiffs in the earlier suit, to file that suit) and the pre-emption suit was decreed. Thus clearly a fraud was practised both, on the Court and on the vendees and a decree obtained."

> The learned Judge, relying in this connection on a decision of the Chief Court, Lucknow, held that the agreement relied upon by the plaintiffs was in such circumstances against public policy and, therefore, illegal. We, therefore, agree with him and the plaintiffs in the earlier suit were not en-titled to a decree for specific performance o(sic) contract.

10. The last point dealt with by the learned Civil Judge was whether the plaintiffs were entitled to a decree for refund in respect of the sum of Rs. 3600 paid by them to defendant l under the promissory note of 4-6-1946. The learned Civil Judge answered the question in the negative because the suit had not been filed on the basis of a loan evidenced by the promissory note but only on the strength of an agreement to sell property. At the same time the plaintiffs' right to file another suit was left intact,

11. We have given anxious consideration to this part of the case, and we have come to tbe conclusion that we should not lend our assent to this view of the learned Judge. On the findings arrived at by himself we are of opinion that he could well grant a decree to the plaintiffs in respect of this amount. He found as a fact that there had been an agreement between the plaintiffs and defendant 2 on the one side and defendant 1 on the other that, after defendant l had obtained mutation in his favour, he would convey the property to the plaintiffs and defendant 2 in equal shares. This agreement the learned Judge found to be illegal, being contrary to the provisions of Section 12, U. P. Act, 14 of 1946. Admittedly, along with the agreement there was an advance of RS. 7200 made by the plaintiffs and defendant 2 in favour of defendant l, for which a promissory note of a contemporaneous date was executed. The position, therefore, was that there was an agreement to sell property and in that connection there was also an advance of money made to the person who, after a certain event, had to sell it to the advancers. The agreement being found or rather discovered to be void within the meaning of Section 65, Contract Act, the question remains what is to happen to the amount advanced. The amount itself remained in the hands of the person to whom it had been advanced. It was even utilised by him as he deposited it in payment of the amount due under the pre-emption decree. The plaintiffs and defendant 2 who had made the advance on their part got no benefit under the same. They neither got any portion of the property nor till this day have received any advantage from the money paid by them. Section 65 reads :

> "When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract, is bound to restore it or to make compensation for it to the person from whom he received it."

This section, we think, in terms applies. It applies even more effectively in view of the findings recordod by the lower appellate Court, from which naturally the conclusion at which we have arrived follows. It is in consequence of the finding that there was in fact an agreement of the description alleged by the plaintiff but that the same was invalid that it follows, as a matter of legal inference as also of natural justice, that the plaintiffs should get a decree for refund of the amount they paid.

12. We, accordingly, allow this appeal in part modify the decree of the lower appellate Court by granting to the plaintiffs against defendant 1 a decree for recovery of Rs. 3600 without interest. In

other respects the decree passed by that Court would stand. In view of the fact that the plaintiffs had not claimed this amount in the alternative as a loan evidenced by the promissory note set up by them and that our finding that they may be allowed a decree for this amount is entirely consequential on the findings recorded by the lower appellate Court, we are not inclined to grant the appellants their costs against the respondents who would be entitled to their own costs from the appellants in all the Courts.

13. In consequence of this decision, the connected second appeal No. 1447 of 1948 stands dismissed with costs.