

Mr. Subhash Chand Garg And 7 Others vs M/S H.K.S. Developers Private Ltd. And ... on 5 June, 2020

Equivalent citations: AIRONLINE 2020 ALL 1117

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Bench: Anjani Kumar Mishra

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Reserved on 28.02.2020

Delivered on 05.06.2020

In Chamber

Case :- CIVIL REVISION No. - 111 of 2015

Revisionist :- Mr. Subhash Chand Garg And 7 Others

Opposite Party :- M/S H.K.S. Developers Private Ltd. And 20 Others

Counsel for Revisionist :- Tarun Agrawal,Dinesh Tiwari

Counsel for Opposite Party :- Manu Khare,Pavan Kishore,Pawan Kishore

Hon'ble Anjani Kumar Mishra,J.

Heard Shri H.N. Singh, learned Senior Advocate for the revisionists and Shri Navin Sinha, learned Senior Advocate for the opposite parties in this revision, which is directed against the order dated 12.01.2015 rejecting the defendant-revisionists' application under Order VII Rule 11 C.P.C.

The plaintiff-opposite parties filed a suit for prohibitory injunction restraining the defendants from developing the site or interfering in the actual physical possession of the plaintiffs' over immovable

properties situated in village Nizampur and Raghunathpur.

The relief for mandatory injunction seeking a direction to the defendants to furnish to the plaintiff land use certificates of their respective lands, as also, their documents of title, to enable the plaintiffs to get sale deeds executed in their favour. Damages for the losses caused by the act and conduct of the defendants was also sought.

The aforesaid reliefs were claimed on the basis of two memorandums of understanding, entered into between the parties in the year 2001.

An application under Order VII Rule 11 C.P.C. was filed on behalf of the defendants 1 to 15 and 26 and another application was filed on behalf of the defendants 16 to 20 and 22 on identical allegations that the plaint did not disclose any cause of action and was premature; the suit was also barred in view of Section 41-h of the Specific Relief Act, 1963, and by the provisions of the Transfer of Property Act and the Registration Act. The plaint was, therefore, liable to be rejected. It was also averred that the plaintiffs had failed to perform their part of the contract. The plaint was, therefore, liable to be rejected with cost of Rs. 2 lacs in favour of the defendants.

The trial court rejected the application under Order VII Rule 11 C.P.C. holding that the suit was within time, having been filed for permanent and mandatory injunction within three years from the refusal to act in accordance with the memorandum of understanding and that the suit did not seek specific performance of the memorandum of understanding.

Assailing the impugned order, the contention of learned counsel for the revisionists is that although the relief as worded in the plaint is one for restraining the defendants from interfering in the development of the property, and for delivery by the defendants of their documents of title and their land use certificates, but, in effect, the relief is one for execution of sale deeds in favour of the plaintiffs.

It is contended that the suit is barred by Section 34 of the Specific Relief Act as no declaration has been sought by the plaintiffs. Reliance has been placed upon Section 41-h of the Specific Relief Act to state that the relief prayed for in the suit cannot be granted.

Learned counsel has also relied upon Section 17 of the Indian Registration Act, read with Section 53-a of the Transfer of Properties Act, to submit that the memorandums of understanding, which are the basis of the suit, not being registered documents, the suit is clearly barred.

In rebuttal, the submission of Shri Navin Sinha, learned Senior Advocate is that the memorandum of understanding, which is the basis of the suit falls within the ambit of Section 17(2)(v) of the Indian Registration Act. It therefore, did not require registration. He has also referred to paragraphs 4, 5, 6 and 8 of the memorandum of understanding, stated to have been filed along with the plaint, to submit that the suit is not barred. He has next submitted that the defendants in the suit are required to get some land transferred in their favour and, thereafter, to transfer the same to the plaintiffs. Therefore, the memorandum of understanding cannot be construed as an agreement to

sell. In any case from the perusal of Section 49 of the Indian Registration Act, it is clear that the memorandum of understanding, which is an unregistered agreement can be looked into, for collateral purposes.

He has next submitted that even if for the sake of argument, it is assumed that the memorandums of understanding required registration, even then, the suit cannot be barred. He has lastly submitted that no relief for transfer of title in favour of the plaintiffs has been sought in the suit. It is only once the land use certificates and the document of title in favour of the defendants regarding the land are made available to the plaintiffs can a sale deed be executed in their favour and not otherwise. This is also specifically recorded in the memorandum of understanding. Any prayer or relief for specific performance regarding execution of a sale deed in favour of the plaintiffs would arise only after the relief claimed in the suit is granted to the plaintiffs.

Shri H.N. Singh, learned Senior Advocate in rebuttal, relying upon the memorandum of understanding filed on page 63 of the paper book, submitted that this document is actually an agreement to sell. He has submitted that the memorandum of understanding is to be construed as a whole and since enforcement of only a portion thereof, has been sought, the suit is barred under Section 12 of the Specific Relief Act.

With regard to the bar of Section 12 of the Specific Relief Act, the contention of Shir Navin Sinha is that the suit is saved by sub-section 4 of Section 12 of the specific Relief Act. He has also submitted that the proviso to Section 34 of the Specific Relief Act, as submitted by Shri H.N. Singh, is not attracted as no declaration has been sought in the suit.

I have considered the submissions made by learned counsel for the parties and perused the record.

For deciding the controversy in this revision, it is necessary to refer to the various memorandums of understanding entered into between the plaintiffs and various defendants. They state that the first party thereto has entered into agreement to sell, of property mentioned in the MoU and that after getting a sale deed it shall be transferred to the second party, subject to the condition that the value of the land would be calculated at the rate of Rs. 1190/- per sq. yard. The money for the same, advanced to the defendant (second party), is also mentioned in the MoU. The time for the execution of the sale deed is fixed as eight months.

Under the memorandum of understanding, the plaintiff (second party) was entitled to get the map sanctioned and to develop the land and launch a residential housing scheme. In case, the sale deeds were not executed within five months, it was open for the plaintiff (second party) to sue for specific performance. As many as four memorandum of understandings, which are similarly worded, have been filed on record.

Thus, from the perusal of the memorandum of understanding, it appears and has been so averred in the plaint that the defendants approached the plaintiffs for development of a housing scheme over 400 bighas of land. Regarding part of the land, the persons who approached the plaintiffs had a clear title and regarding the remainder, they had entered into agreements to sell with the land

owners and it was agreed that once the sale deeds were executed in their favour, they would transfer the entire land to the plaintiffs for implementation of the housing scheme.

On the basis of the submissions made by learned counsel for the parties and upon a perusal of the memorandums of understanding, in my considered opinion, the following questions arise for consideration.

1. Whether the memorandums of understanding are in fact agreements to sell and were, therefore, necessarily required to be registered as provided by Section 17-b of the Indian Registration Act before they could be specifically enforced.

2. Also inherent is the question whether the agreement is liable to be enforced as a whole or it is open for the plaintiffs to sue only for part performance of the said memorandums of understanding.

With regard to the above issues, the contention of learned counsel for the revisionists is that the memorandums of understanding, in effect, being agreements to sell, regarding property having value in excess of Rs. 100/-, they were necessarily required to be registered and since they are not registered, the suit is not maintainable and the plaint therefore, has to be rejected.

As noted above, the contention of Shri Navin Sinha is that the memorandum of understanding did not require registration in view of Section 17(2) (v) of the Indian Registration Act and, therefore, the plaint cannot be rejected. The application under Order VII Rule 11 C.P.C. has rightly been dismissed by the trial court.

As regards the second question framed above, the submission of Shri Navin Sinha is that the memorandums of understanding are in two parts and that it was open for the plaintiffs to sue for part only thereof, in view of Section 12(4) of the Specific Relief Act.

The parties are not at issue that an agreement to sell is necessarily required to be registered. The parties are however at issue as to whether the memorandums of understanding are agreements to sell or not.

The defence in this revision is that the memorandum of understanding falls within the purview of Section 17(2) (v), which reads as follows:-

"(v) any documents other than the documents specified in sub-section (1-A) other than contract for sale not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

In the afore-extracted provision, the words 'other than contract for sale' have been inserted by U.P. Act No. 57 of 1976 w.e.f. 01.01.1997.

Upon a consideration of the terms of the memorandum of understanding, it can be said that it consists of two parts; one part pertains to the acquisition of title by the first party thereto by means of sale deeds on the basis of existing agreements to sell in their favour, followed by transfer in favour of the plaintiff (second party) in the memorandum of understanding, at rates aggrieved upon therein. Certain consideration is stated to have been paid by the second party, the plaintiff, to the first party for such transfer. This part of the memorandums, definitely constitutes an agreement to sell.

For determining the second question framed above, the Court is required to consider as to whether the afore-noted two parts of the memorandum of understanding are distinct and separate or constitute one composite whole.

Section 12 of the Specific Relief Act, especially sub-section 4 thereof, which has been relied upon by Shri Navin Sinha, reads as follows:-

"(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

The afore-quoted provision permits the Court to enforce part performance of a contract where the part sought to be enforced can and ought to be specifically performed but stands on a separate and independent footing from the other part, which cannot or ought not to be specifically enforced.

It is nobody's case and definitely not the plaintiffs' case that the second part regarding execution of a sale deed in favour of the plaintiff, on agreed terms and conditions, cannot or should not to be specifically performed. Therefore and since case of the plaintiffs is only that they are not seeking specific performance as regards execution of sale deeds because such sale deeds can be executed only after the first part has been specifically enforced, clearly takes the case of the plaintiffs outside the purview of sub-section 4 of Section 12 of the Specific Relief Act.

Such being the case and since specific performance of only part of the contract is being sought, without seeking specific performance of the entire contract, the relief prayed for in the suit cannot be granted in view of Section 12 (4) of the Specific Relief Act. Besides, in my opinion, Section 17 of the Specific Relief Act may also come into play in the case at hand.

Such being the position, the plaintiffs should have also sued for specific performance, which relief has not been sought manifestly because the memorandums of understanding, at least in part, are agreements to sell and necessarily requiring registration, but are not registered.

Under the circumstances, in my considered opinion, the distinction of the memorandums of understanding being in two parts, has been pleaded only because of the legal impediment as the memorandum of understanding was not a registered document.

Since an agreement to sell necessarily requires registration before it can be enforced, but the memorandum of understanding are not registered documents, the same renders the suit not maintainable.

Having held as above, this Court is also required to consider the effect of Section 49 of the Registration Act, which reads as follows:-

"49. Effect of non-registration of documents required to be registered.- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882) or of any other law for the time being in force to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power or create any right or relationship, or

(c) be received as evidence of any transaction affecting such property or conferring such power or creating such right or relationship unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received, or as evidence of any collateral transaction not required to be effected by registered instrument.]"

Section 49 of the Indian Registration Act has been considered in S. Kaladevi Versus V.R. Somasundaram and others, 2010 (110) RD 427. In para 12 of the judgment, it has been held as follows:-

"This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an

important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance."

The question therefore, is whether the memorandums of understanding, filed along with the plaint have been annexed for a collateral purpose or the main purpose in the suit.

In my considered opinion, the memorandums of understanding are the very basis of the suit for the purposes of the relief claimed therein. They have not been annexed with the plaint for any collateral purpose and, therefore, plaintiff is not entitled to any benefit under Section 49 of the Indian Registration Act.

In view of the foregoing discussion, the Court below has committed jurisdictional error in rejecting revisionists application under Order VII Rule 7 CPC. The impugned order dated 12.01.2015, therefore, is liable to be and is hereby set-aside and applications 17Ga-2 and 18-Ga-2 filed by the revisionists are allowed.

Subject to the above, the revision stands allowed.

Order Date :- 05.06.2020 Mayank