

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.917 of 2010

=====

Sarswati Devi, wife of Sri Baleshwar Thakur, resident of Village Pupari alias Noorpur, Tola Birnagar, P.O. Dariyapur Kafan, P.S. Kurhani, O.P. Turki, District Muzaffarpur

.... Appellant/s

Versus

1. Shri Kapildeo Rajak @ Bachchan Choudhary,
2. Pramod Prasad Choudhary, both sons of late Gonour Choudhary
- 3(i) Kunj Bihari Choudhary, son of late Gonaur Choudhary
- 3(ii) Most. Girja Devi, wife of late Umashankar Choudhary, son of late Gonaur Choudhary,
- 3(iii) Alok Prakash Choudhary, son of late Umashankar Choudhary, son of late Gonaur Choudhary
4. Shri Raj Nandan Singh, son of late Nathni Singh, all resident of Village Pupari alias Noorpur, P.O. Dariyapur Kafan, via Turki Railway Station, P.S. Kurhani, District Muzaffarpur.

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. KRISHNA KANT SINGH, Advocate.

For the Respondent/s : Mr. Nachiketa Jha, Advocate.

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 16-10-2015

Heard the parties.

2. In the present appeal the appellant is plaintiff challenging the judgment and order dated 9.8.2010 passed by the District Judge, Muzaffarpur in Title Appeal No. 6 of 2009 by which the appellate court has remanded back the case for fresh consideration on the issue of date of tendering the part of consideration amount to defendant no.1-respondent no.4 as the court below has recorded that in the plaint it has not been specifically mentioned that on which date the husband of the plaintiff offered the remaining consideration amount and so much so Munsif has not recorded as to when the plaintiff made

offer to pay the remaining amount of consideration to the defendant, on that account without giving the finding on the point of tendering the remaining consideration amount, the case was remanded back to decide the aforesaid date of tender and offer of remaining consideration amount.

3. In the present case the plaintiff has filed a suit for specific performance of contract by asking defendant no.1- respondent no.4 to receive the rest consideration amount of Rs.2,000/- and hand over the registration receipt dated 8.5.1995 and also hand over the original sale deed as well as the possession of the suit land. Further prayer has been made for setting aside the deed of cancellation dated 29.5.1995 in respect of the suit land executed by defendant no.1 whereby he cancelled the sale deed in favour of the plaintiff executed on 8.5.1995 and subsequent sale deed executed by defendant no.1 in favour of defendant no.2 with regard to the suit land, be declared illegal, void and inoperative. He has further sought relief in alternative that the consideration amount paid be returned to the plaintiff with interest.

4. In the present case Raj Nandan Singh defendant no.1 agreed to sale the suit land to Sarswati Devi. It appears from the record that Raj Nandan Singh, Ram Balak Singh and Chandeshwar Singh are own brothers. Raj Nandan Singh had



already sold his share measuring 36 decimals of land of RSP no.1591 to the plaintiff and defendant used to borrow money from the plaintiff which came to Rs.4,000/-. It has further been averred that plaintiff agreed to purchase the land for consideration amount of Rs.6,000/- and it was decided that her previous outstanding dues against the defendant be kept in abeyance and Rs.4000/- was paid to defendant at the time of execution of sale deed and loan amount would be adjusted in the total amount of consideration i.e. Rs.6,000/- and remaining amount of Rs.2,000/- would be paid at the time of exchange of registration receipt when the defendant no.1 will fix the ridge and handover the suit land to the plaintiff. Admittedly on 8.5.1995 defendant no.1 executed the sale deed after receipt of Rs.4,000/ in presence of witnesses. He has admitted that execution of sale deed before the Registrar. On the next date the plaintiff approached the defendant no.1 through her husband for measurement and demarcation of land and receipt of the remaining consideration amount, also requested to hand over the registration receipt after receiving the balance amount, the defendant no.1 the request of plaintiff-appellant evaded on one pretext or other. The plaintiff was always ready to pay the remaining consideration amount. Later on Raj Nandan Singh, Defendant no.1 disclosed the husband of the plaintiff that he had

already cancelled the sale deed executed on 29.5.1995 and executed another sale deed in favour of Somaria Devi and later on after death her heirs and successors were substituted, namely Kapildeo Rajak and others.

5. Kapildeo Rajak alias Bachchan Choudhary Defendant I and party appeared and refuted the claim of plaintiff said that they have no knowledge that defendant no.1 executed sale deed in favour of the plaintiff on 8.5.1995. Raj Nandan Singh, defendant no.1 approached them and after taking consideration amount executed the sale deed in favour of Somaria Devi. When the plaintiff and her husband refused to pay the consideration amount to defendant no.1 at the time of marriage of the daughter of defendant no.1, ultimately cancelled sale deed on 29.5.1995 and executed another sale deed in favour of Somariya Devi.

6. Altogether nine issues were framed by the court below. Issue nos. 5, 6 and 7 are dealing with the issue involved in the present case for its consideration which are as follows:

“ 5. Whether the story of plaintiff about the execution of sale deed executed by defendant no.1 on 8.5.1995 and payment of consideration amount is true and whether the plaintiff is entitled to get title and possession on the basis of sale deed executed on 8.5.1995?

6. Whether the cancellation deed executed by defendant no.1 with regard to suit land on 29.5.1995 is legal, in accordance with law, effective and binding upon the plaintiff?

7. Whether the sale deed executed by defendant no.1 in favour of defendant no.2 on 3.6.1995 is valid, legal and effective?

7. The appellate court has considered different points of all the issues and dealt with as to whether the title has passed without payment of entire consideration amount. This Court is not inclined to discuss the case on merit as has been argued by the appellant and has not been refuted by the other side that sufficient materials are available with regard to offering and tendering the rest consideration amount by the plaintiff to defendant no.1 in such view of the matter, the appellate court instead of remanding the case, in view of Order 41 Rule 24 of the Code of Civil Procedure which is as follows should have decided issue of its own:

“ 24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.”

8. From the aforesaid provision it is clear if the materials are sufficient to examine and decide the issue, the appellate court was competent and capable to frame that issue and decide the same. The issue that has been dealt with by the appellate court with regard to date of payment of consideration amount no finding has been recorded by the trial court, on which date the plaintiff

has offered and tendered the rest consideration amount. On perusal of the record it appears that the materials are available on record but this Court is not inclined to give any finding on that issue, in such view of the matter, the appellate court instead of remanding back the matter ought to have decided that issue.

9. Accordingly the judgment and order dated 9.8.2010 is set aside and matter is remanded back to the appellate court. The office is directed to send back the lower court records to the appellate court and the appellate court is directed to hear and decide the matter as soon as possible preferably within a period of nine months from the date of receipt/production of a copy of this order.

10. Accordingly this appeal is allowed.

(Shivaji Pandey, J)

Vinay/-

U			
---	--	--	--