

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.390 of 2001

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1. Smt. Sunaina Sinha wife of Hari Nath Singh @ Hari Nath Sinha.
 2. Sri Hari Nath Singh @ Hari Nath Sinha son of Late Ganga Prasad Singh.
- Both residents of Mohalla-Bhaagwanpur Gobarsahi Chowk, P.O._Muzaffarpur
Munsifi, Muzaffarpur East, District-Muzaffarpur.

.... Appellant/s

Versus

1. Sri Jaleshwar Prasad Singh, son of Late Jayantri Pd. Singh.
2. Sunaina Devi, wife of Jaleshwar Pd. Singn.
3. Shashi Bhushan Pd. Singh.
4. Prem Kumar Singh.

Both sons of Jaleshwar Pd. Singh.

All residents of village Rampur Bakhra, P.s.-Lalganj, District-Vaishali, at
present Gobarsahi, P.S.-Sadar Munsifi, Muzaffapur, District-Muzaffarpur.

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. A.B.OJHA, Sr. Adv.
For the Respondent/s : Mr. Nand Kishor Pd. Sinha, Adv.
Mr. Kailash Nath Diwakar, Adv.
Mr. Raju Kumar Goshwami, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 10-04-2015

Appellant-defendant being aggrieved by the judgment
dated 17.04.2001 and decree dated 26.04.2001 passed by Sub-Judge,
Vth, Muzaffarpur in Title Suit No.143 of 1995 decreeing the suit for
specific performance with cost, has preferred instant appeal.



2. Respondent-plaintiff (plaintiff for brevity) filed suit for specific performance of contract against the appellant-defendant (defendant for the brevity) relating to the land bearing S.P. No.1367(M) appertaining to Khata No.570, Area 2 Kattha 15 Dhurs boundary North-Road, South-Defendant, East-Road, West-Road, detailed under Schedule-I of the plaint lying at mohalla-Bhaganwanpur Gobarsahi Chowk, P.S.-Sadar, District-Muzaffarpur and for that pleaded that the aforesaid land was purchased by the defendant vide registered sale deed dated 06.07.1984 and came over the land. In due course of time, defendants have constructed market over it and major portion is under tenancy. It has also been pleaded that on account of falling under urgent need of money for meeting the family expenses as well as for repayment of loan borrowed from Bihar State Housing Co-operative Federation, Patna, defendants aired their intention to sell and under aforesaid situation, plaintiff also became one of the intender, entered into negotiation which was finalized on a consideration amount of Rs.3,50,000/-.

3. During course of negotiation, as has been averred, the defendant disclosed that the premises happens to be under mortgage and on account thereof, there happens to be some sort of barrier in having the sale deed executed unless the mortgage is redeemed. Furthermore, to facilitate the defendant to meet out other expenses, a



sum of Rs.2,72,000/- was paid by the plaintiff and in token thereof, deed of Mahadnama was executed in favour of plaintiff by the defendant. It was also agreed that soon after redemption, defendant will executed sale deed in favour of plaintiff and the maximum time so stressed upon this score was three months. However, defendant failed to deposit the amount before Bihar State Housing Co-operative Federation, Patna. On query made by the plaintiff the defendant had requested to the plaintiff to get the amount cleared which will be allowed to be adjusted in the residuary amount and in terms thereof, plaintiff approached the Bihar State Housing Co-operative Federation, Patna, paid the dues, obtained the original sale deed which was deposited by the defendant. Furthermore, as per instruction of the defendant, stamp was procured, execution was made, remaining amount was accepted and the document was presented before the Registrar for registration however, as it became late, on account thereof registration could not materialized. Delivery of possession was given on the same day i.e. 05.10.1991. However, the documents were handed over to the plaintiff by the defendant so that it could be properly cared of.

4. It has also been submitted that subsequently thereof, defendant began to adopt dilly delaying tactics and one pretext or other, deferred the matter of registration. Smacking some sort of foul



smell, defendants were served with an advocate notice but without any fruitful result. Consequent thereupon, following the other paraphernalia so required, plaintiff filed instant suit asking for relief of passing of decree of specific performance of contract in favour of plaintiff and against the defendant, defendant no.1 be directed to present the sale deed before the District Sub-Registrar and admit its execution with respect to Schedule-I within a time fixed by the court, failing which the sale deed be executed and registered by the court at the cost of the plaintiff to be realized by the defendants. (b) That the plaintiff be put in possession of Schedule-I below (c) The cost of the suit be allowed to the plaintiff. (d) Any other relief or reliefs to which the plaintiff be found entitled for.

5. From the judgment impugned more particularly at para-3 there happens to be an exposure with regard to the conduct of the appellant-defendant. From perusal of relevant orders sheets, it is apparent that having appeared before the learned lower court on 14.09.1998, the defendant adopted lethargic attitude in order to prolong the trial, by filing time petition to allow them adjournment to facilitate filing of W.S. and lastly, vide order dated 06.05.1999 time petition filed on behalf of defendant was rejected giving them an adjournment by way of last chance to file W.S. positively and for that 01.06.1999 was date fixed. On 01.06.1999 Hajari was filed on



their behalf. On 26.06.1999 defendant was absent. On 20.07.1999 again time petition was filed on behalf of defendant which was rejected and the case was posted for hearing. Then thereafter, as it appears the proceeding sailed and ultimately, by the judgment and decree impugned finally disposed of decreeing the suit.

6. During course of argument, at an earlier occasion there was absence of respondent-plaintiff and on account thereof, the appeal was fixed for ex-parte hearing. However, after appearance of respondent-plaintiff as well as after filing of I.A. petition, the same was recalled and both the parties have been heard at length.

7. Learned counsel for the appellant /defendant assailed the judgment and decree, mainly on two grounds. The first relates with the incidence, of lapses on the part of defendant, whereunder they could not be able to challenge the pleading as well as having ignorant of procedural law, whereunder they were quite competent to challenge by having their participation during trial, but again failed. Therefore, though admitting that there happens to be lapses, but not an intentional one, as the time petition filed on behalf of appellant/ defendant discloses the fact that on account of ailment of eye appellant / defendant had gone to Shankar Netralaya, Madras for treatment. The factual aspect has not been controverted. Referring Order VIII Rule 10 of the CPC, it has been submitted that learned

lower court should have adopted other options as permitted instead of the present one, which has caused hardship to the appellant/defendant.

8. During course of argument it has also been submitted that appellant/defendant is ready to compensate the respondent/plaintiff for the inconvenience caused to him on account of in attentiveness of appellant/defendant.

9. In an alternative, the matter has also been argued on the merit to show that the judgment and decree impugned happens to be bad in law as well as on facts.

10. While striking upon the finding recorded by the learned lower court, it has been submitted that the suit is barred by the law of limitation because of the fact that soon after expiry of period of three months after redemption, cause of action, as per version of plaintiff accrued and the subsequent event is to be guided in terms of Article 54 of the Limitation Act.

11. Furthermore, submitted that deed of Mahadanama happens to be unregistered one, and on that very basis its genuineness also comes under dispute in the background of the fact whether there was any genuine cause to justify sell of the land under dispute.

12. Not only this, it has also been argued that under specific

relief act, the recognition of suit as well as grant of relief happen to be discretionary one. In the aforesaid background, the learned lower court should have considered the viability of other options as prescribed under Section 16 of the Act.

13. It has also been submitted that for want of presence of appellant/ defendant during trial, the court was unable to perceive the major deficiencies persisting in the case, and that being so, in case the matter is not remitted back, then in that event, appellant / defendant will suffer irreparable loss.

14. On the other hand, respondent / plaintiff supported the judgment and decree passed by the learned lower court. It has also been submitted that in terms of decree, sale deed at the end of court had already been registered. Hence the appellant / defendant has got no legal and valid plank to stand by.

15. Furthermore, it has been submitted that appellant / defendant is victim of own negligence. Had there been sincerity at her end, it was expected to have her presence even during trial, would have cross-examined the witnesses, placed the material during course thereof to justify her case. Now, she appears to be precluded to raise those issue.

16. Coming over merit of the case, it has been submitted that by way of ample oral as well as documentary evidence, the

respondent/plaintiff succeeded in proving its case and on account thereof, judgment and decree of the learned lower court, did not justify interference.

17. Because of the fact that during submission made on behalf of respective parties, the sole issue has been raised and pressed relating to remand of instant appeal after setting aside the judgment and decree impugned on account of having passed in tune with Order VIII Rule 10 of IPC, hence no other issue is formulated.

18. Admittedly, in the present proceeding there was appearance of appellant/defendant before the learned lower court by way of filing of Vakalatnama and since thereafter, on one pretext or other, neither W.S. has been filed nor the appellant-defendant chosen to participate during trial. In such situation, virtually Order VIII Rule-10 is found applicable. After going through Order VIII Rule-10 of the CPC, apart from liberty to pronounce judgment followed by decree, the court has been authorized to pass other kinds of appropriate order in the facts and circumstances of the case, such as imposing cost etc. From the order sheet of the learned lower court, it is apparent that trial court did not opt to pass other kinds of order than that of fixing the suit for hearing. Therefore, it is evident that court had not granted an opportunity furthermore, even by inflicting cost upon the appellant /defendant. Hence, by such action

the court had blocked an opportunity, in case, an appropriate order would have been passed by the court at that very moment, instead of fixing hearing of the suit.

19. Now coming to merit of the case, from the averments of the plaint there happens to be conflicting case. As is evident, from para 13 of the plaint there happens to be specific disclosure that the land under dispute has been given under peaceful possession of respondent-plaintiff on 05.10.1994, contrary to it relief has been sought for with regard to putting the plaintiff in possession of the disputed land. The matter did not rest here. While examining as PW.2, the respondent, plaintiff did not utter a single word on this score.

20. While the judgment impugned has been gone through on this crucial factual assiduity, it is apparent that neither the learned lower court took notice by framing issue nor gave finding on this score at the other end shrouds with vagueness. That means to say, the matter became clumsy and needs proper attention appreciation as well as clarification which could only materialized after having presence of respondent / defendant, as well as after reappraisal. Furthermore, its ignorance, in facts and circumstances of the suit, is not permissible.

21. Dealing with this important point in articulately manner



by the respondent/plaintiff as well as by the learned lower court has adverse impact because of the fact that mere registration of sale deed is not going to brighten fate of respondent/plaintiff for want of delivery of possession, which, as is found circumvent with legal jugglery even application of res judicata more particularly constructive res judicata.

22. In *Dineshwar Prasad v. Parmeshwar Prasad* reported in *AIR 1989 Pat. 139* it has been observed:

“19. It may further be observed that in passing a decree in terms of O. VIII, R.10 of the Civil P.C., the Court must exercise the same with due care and caution and its discretion must be based on relevant circumstances, before it proceeds to pronounce its judgment without going into the merits of the plaintiff’s case.”

23. Taking into account, totality of events, the judgment and decree impugned did not justify its nicety and on account thereof is set aside. Matter is remitted back to learned lower court subject to payment of Rs.50,000/- (Fifty thousand) as cost. The aforesaid amount must be deposited by the appellant / defendant on the first date fixed by the learned lower court in presence of both the parties. As the instant judgment has been dictated in presence of respective learned counsel hence the presence of parties are expect before the learned lower court just after arrival of lower court

record. W.S. must be filed by next date fixed by the learned lower court. After framing of issue, the trial must be completed within five months without giving undue adjournment to either of the party. In case there happens to be failure on behalf of appellant / defendant then, in that event, the judgment and decree of the lower court will stand. Appeal is allowed in the aforesaid terms. Office is directed to transmit lower court record through special messenger at the cost of respondent / plaintiff as submitted at their end.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated, the 10th day of April, 2015
Prakash Narayan

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