HIGH COURT OF TRIPURA
AGARTALA

RSA No.9/2017

1. Sri Pradip Chandra Shil,
   S/o Late Jiban Chandra Shil.
2. Smti Pinki shil,
   W/o Shri Dipak Chandra Shil,

Both of North Tulamura, P.S. Kakraban,
Udaipur, Gomati District.

…….. Appellant(s).

Vs.

Sri Shankar Som,
S/o Late Suken Som,
R/o Uttar Tulamura, P.S. Kakraban,
Udaipur, Gomati District.

…….. Respondent(s).

_B_E_ F_O_R_E_

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

For Appellant(s) : Mr. R Pal, Advocate.

For Respondent(s) : Mr. D Chakraborty, Sr. Advocate,
Mr. H Laskar, Advocate.

Date of hearing & judgment : 19th February, 2020.

Whether fit for reporting :

Yes	No
	√

J U D G M E N T (O R A L)

This appeal is filed by the original plaintiffs by which the appeal of the present respondent-original defendant came to be allowed. This appeal was admitted for consideration of following substantial questions of law :

> "[i] Whether consideration of the pleading made in the separate suit being Title Suit No.26 of 2013 by the trial court is sustainable?

[ii] Whether agreement dated 26.07.2012 itself creates estoppel against the defendants from disputing the ownership of the suit land?"

[2] Short facts may be noted at the outset :

The appellants had filed Suit No.TS.21 of 2013 against the defendant. Their case was that the defendant is the sole owner of suit property mentioned in the schedule comprising of a shop situated at Tulamura, Udaipur Sub-Division. Defendant's name is also reflected in the property records. On 26th July 2012, an agreement to sell the said property was executed between the plaintiffs and the defendant Sankar Som for a total consideration of Rs.2,00,000/-, out of which Rs.60,000/- was paid at the time of execution of the agreement and the rest of amount Rs.1,40,000/- would be paid within 3(three) months from the date of the agreement. The plaintiffs tendered the remaining payment on multiple occasions to the defendant who however, refused to receive the same, nor he executed the sale deed as promised in the agreement. On 21st December 2012, the plaintiffs issued a legal notice to the defendant in which these aspects were reiterated. He was called upon to accept the remaining payment of Rs.1,40,000/- and execute the sale deed within 15 days, failing which the plaintiffs would approach the Court of law. There was no reply from the defendant to the said notice. Thereupon the plaintiffs filed the said suit and prayed for a decree of specific performance directing the defendant to execute the sale deed after receiving the remaining payment of Rs.1,40,000/-. The

plaintiffs offered to deposit the said sum in the Court if the defendant refused to receive it.

[3] The defendant appeared and filed a written statement in which he did not dispute execution of the agreement to sell or acceptance of part consideration of Rs.60,000/- at the time of such execution. His defence, however, was that he was not the sole owner of the suit property. The other co-owners being his brother, mother and sister, they refused to dispose of the property. He was, therefore, unable to execute the sale deed. A meeting was, therefore, held between the plaintiffs and him during which he returned the sum of Rs.60,000/- which the plaintiffs also accepted. The agreement of sale, however, remained in the custody of the plaintiffs which they are misusing for filing the suit.

[4] Plaintiff No.1, Sri Pradip Shil, was examined as PW.1. In his sworn deposition he had reiterated the contents of the plaint. In his cross-examination, he stated that though the father of the defendant was the original owner, he was shown partition deed but did not know whether all legal heirs of the father of the defendant had signed such deed. Wife of the plaintiff No.1 was examined as PW.2. Her deposition and cross-examination were along similar lines. It is, therefore, not necessary to refer to it at length. Sri Rajib Bhowmik, PW.3, was a Deed Writer. He deposed that the plaintiffs and defendant had approached him for preparation and execution of the agreement. The plaintiffs had paid Rs.60,000/- to the defendant. After receiving such sum, the

parties had put their signatures on the document. He was not cross-examined by the defendant. PWs.4 and 5, Sri Sanjit Baidya and Sri Narayan Shil respectively were the witnesses to the said agreement. They also supported the plaintiffs stating that in their presence the agreement of sale was executed and the defendant received a sum of Rs.60,000/-. In the cross-examination, these witnesses had denied that in a meeting held in the market area the defendant had paid over Rs.50,000/- to the plaintiffs and it was decided not to act upon the agreement to sell.

[5] The plaintiffs had produced the legal notice dated 21st December, 2012 as well as the agreement to sell dated 26th July, 2012. In this agreement, the defendant had declared that he was the owner of the suit property. He needed money for running his family expenses. He had agreed to sell the said property to the plaintiffs for sum of Rs.2,00,000/-, out of which Rs.60,000/- he had already received. Within 3(three) months the plaintiffs would pay rest of the money, on which the defendant would execute the sale deed and handover possession. If the defendant refused to do so, it would be open for the plaintiffs to take recourse to law.

[6] The defendant examined himself as DW.1. In his deposition, he had stated that without the knowledge of his brother, mother and sister he had executed the said agreement. While this came to the knowledge of the other family members, they objected to the sale of the ancestral property. He had, therefore, returned the advance money of Rs.60,000/- very next

day of the agreement. The plaintiffs had received such sum and agreed that they would not insist on execution of the agreement. A meeting was also held in the market in presence of other villagers where the plaintiffs agreed that they shall not seek execution of the sale since they had already received the sum of Rs.60,000/-. In the cross-examination, he was questioned about not being the sole owner of the property as also his theory that he had returned the sum of Rs.60,000/-. His stand that it was a distressed sale since he needed urgent money for the treatment of his wife who had met with an accident. In his cross-examination, he admitted that his wife met with an accident on 12th March, 2013 whereas the agreement was entered into on 26th July, 2012. He admitted that he had received the legal notice issued on behalf of the plaintiffs.

[7] The defendant examined one Sri Badal Paul as DW.2 who claimed that a meeting in the market area was held in his presence where the defendant had returned the sum of Rs.60,000/- to the plaintiffs and it was decided that the defendant would not be required to execute the sale deed. In the cross-examination, he denied that he was favouring the defendant. DW.3, Sri Sukdev Baidya, also gave the similar version of being present during such meeting when defendant had returned the sum of Rs.60,000/- to the plaintiffs.

[8] The trial Court had raised following issues :

"(I) Whether the suit is maintainable in its present from and nature?

(II) Whether the plaintiffs are entitled for a decree directing the defendant to execute a Registered Sale Deed in favour of the plaintiffs after receiving the rest amount of consideration money of Rs.1,40,000/- from the plaintiffs and to deliver the vacant possession of the suit land to the plaintiffs?

AND Alternatively, if the defendant does not receive the balance consideration money then the plaintiffs be asked to deposit the same in the Ld. Court and to direct the defendant to receive the said money?

(III) Whether the plaintiffs are entitled for any other relief/reliefs?"

Issues No.1 and 2 were answered in favour of the plaintiffs. Final decree was ordered to be drawn directing the defendant to execute the sale deed in favour of plaintiffs after receiving sum of Rs.1,40,000/- within 2(two) months failing which it would be open for the plaintiffs to execute the sale through the Court.

[9] At this stage, it may be noted that the brother, sister and mother of the defendant had filed suit No.Title Suit 26 of 2013 against the defendant in which the prayer made was for declaration of their preferential right and for cancellation of the agreement dated 26th July, 2012. In this suit, the plaintiffs therein had averred that the suit property was the property of Sopen Som, father of the defendant and after his death, his two sons,

daughter and widow became joint owners thereof and as per the family understanding, in case anyone of them wanted to sell his or her share, the rest of the co-owners would have a preferential right to purchase the same. It appears that there was no formal application for consolidation of these two suits. No order was passed by the trial Court consolidating these suits. However, both the suits proceeded parallelly. They were fixed on the same date and also decided on the same day, though two separate judgments.

[10] In the present case, the trial Court while passing the judgment, placed reliance on a family settlement which was produced in the Title Suit 26 of 2013 and exhibited and commented that there was a family settlement, pursuant to which the members of the family had received their respective shares and the sister had relinquished her share in favour of the rest of the family members. It was observed that in the agreement to sell there is a reference to the family partition. The learned Judge recorded that the plaintiff had received the part sale consideration of Rs.60,000/- at the time of execution of the agreement to sell. The plaintiffs were, therefore, entitled to seek a decree of specific performance of the contract.

[11] The defendant challenged the said judgment of the trial Court before the District Court. The District Court by the impugned judgment while allowing such appeal, found that the trial Court could not have relied upon the documents produced in the

connected suit in absence of an order of consolidation. The learned Judge held that the plaintiffs failed to prove that the defendant was a sole owner and in possession of the suit land by adducing cogent evidence that he had the exclusive right to enter into the agreement for transferring the suit property. The reference to the family partition dated 22nd June, 2010 was not found to be conclusive evidence. It was held that there was insatisfactory evidence of the defendant being the sole owner. It was observed that there is suspicion that other co-owners of the defendant may also be joint owners and hence, it would not be safe to pass a decree of specific performance of contract in favour of the plaintiffs. The learned Judge, however, agreed that the reasons cited by the defendant for executing the agreement, namely, of being dire need of funds to tend to the accidental injuries of his wife was falsified since the wife met with the accident on 12th March, 2013 as per the admission of the defendant and the agreement to sell was executed on 26th July, 2012.

[12] Having thus perused the materials on record and having heard the learned counsel for the parties, I am in agreement with the view of the first appellate Court that the trial Court could not have relied upon the evidence adduced in the connected suit since there was no order of consolidation of the two proceedings. The reliance on the deed of family partition produced in the connected suit was, therefore, not permissible. The matter, however, does

not rest here. The main question is, did the first appellate Court address the issues correctly? In this respect, in my opinion, the appellate Court has committed serious errors which need to be corrected, even in exercise of powers of second appeal.

[13] Firstly, it may be recalled that the appellate Court had observed that the plaintiffs had failed to prove that the defendant was a sole owner and in possession of the suit property which according to the appellate Court, they ought to have done by adducing cogent evidence. It was also observed that where is a suspicion that there may be other co-owners and therefore, it would be unsafe to issue a decree of specific performance. I find that the approach was erroneous. The defendant had executed an agreement to sell in which he had referred to a family partition claiming that under such partition, he had received the suit property by way of exclusive title. He had accepted part sale consideration of Rs.60,00/-. He neither denied execution of this agreement nor having received such money. If thereafter he projected a case that he was not the sole owner but there were other co-owners from the family, heavy burden lay on him to prove the same through cogent evidence. The appellate Court committed an error in shifting the burden on the plaintiffs to prove the negative. In the agreement of sale, the defendant had referred to a family partition deed. It was his duty to produce the sale before the trial Court. Not having done that, the Court ought to have drawn adverse inference. None of the brothers, sister or

the mother were examined as a defendant witness. These persons would be the best people to state on the status of the joint family property or its partition, if at all.

[14] Even otherwise, he was not a witness of reliable quality. His case was that he was forced to execute the agreement to raise money for the treatment of his wife who had met with an accident. In the cross-examination, he admitted that the accident took place long after the agreement was executed.

[15] The appellate Court placed the entire question of the joint ownership on the pedestal of suspicion. As in the civil proceedings, it was necessary to decide on the preponderance of probabilities as to whose version is more believable and acceptable. The Court could not have accepted the version of the defendant without any evidence basing its conclusions on suspicion and possibilities.

[16] Even if, the appellate Court was of the opinion that the defendant was not the sole owner but a joint owner, to the extent of his undivided share in the suit property a decree for specific performance should have followed. There is no cogent evidence of the defendant having cancelled the sale agreement by returning the advance consideration. As noted, the defendant had not shown himself to be a reliable witness, prevaricating at all stages of the suit. Even the appellate Court has not come to the conclusion that the advance money was returned in view of cancellation of the contract and that therefore, the contract was

not executable. His claim to have returned such money without any writing and allowing the plaintiffs to retain the original agreement to sell runs contrary to the normal human conduct.

[17] Only question that needs to be answered is whether, in view of the Court's discretionary powers in the suit concerning specific performance of agreement as provided in Section 20 of the Specific Relief Act, present is a case where such discretionary relief should be refused. I do not find any grounds on which the decree for specific performance should be refused to the plaintiffs. The agreement to sell was executed in the year 2012 and therefore, the event is not all that old. Secondly, passage of time cannot be the sole consideration for refusing the decree for specific performance, as observed by the Supreme Court in case of ***Satya Jain(Dead) through LRS. and Others Vs. Anis Ahmed Rushdie(Dead) through LRS. and Ors.*** reported in ***(2013) 8 SCC 131***. In the said judgment, it was observed as under:

> "40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the

> experienced judicial mind can perceive without any real difficulty. It must however be emphasized that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in ***P. S. Ranakrishna Reddy v. M. K. Bhagyalakshmi, (2007) 10 SCC 231*** and more recently in ***Narinderjit Singh v. North Star Estate Promoters Ltd., (2012) 5 SCC 712*** may be usefully recapitulated.
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> 41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalizing the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour. From another perspective it may also indicate the inadequacies of the law to deal with the long delays that, at times, occur while rendering the final verdict in a given case. The aforesaid two features, at best, may justify award of additional compensation to the vendor by grant of a price higher than what had been stipulated in the agreement which price, in a given case, may even be the market price as on date of the order of the final Court."

[18] While, therefore, agreeing in principle that the plaintiff must receive a decree of specific performance of the said agreement, the same cannot be by merely tendering the remaining sale consideration. The passage of time and appreciation in property values will have to be born in mind. Under the circumstances, while reversing the impugned judgment of the first appellate Court, it is held that the plaintiffs would be

entitled to a decree of specific performance of the agreement dated 26th July, 2012. It shall, however, be subject to the plaintiff's paying the remaining sale consideration of Rs.1,40,000/- with simple interest @ 15% from the date of the agreement till actual payment. That shall be done within a period of 3(three) months from today. If the defendant refuses to receive the same and execute the sale deed, the plaintiffs shall deposit the same before the trial Court within a period of 1(one) month thereafter upon which the sale deed would be executed through the Court process.

Appeal is allowed in the above terms and disposed of accordingly. Pending application(s), if any, also stands disposed of.

(AKIL KURESHI), CJ

Sukhendu