

07.09.2022
SL No.33
Court No.8
(gc)

SAT 120 of 2015
CAN 1 of 2015 (Old No: CAN 12367 of 2015)

Abdul Gani
Vs.
Dipu Mallick

With

SAT 121 of 2015
CAN 1 of 2015 (Old No: CAN 12368 of 2015)
CAN 2 of 2020 (Old No: CAN 1385 of 2020)

Mr. Kamlesh Jha,
Ms. Srabani Biswas,
...for the Appellant.
Mr. Santanu Chatterjee,
Mr. Priyabrata Ghosh,
...for the Respondent.

The application for condonation of delay being CAN 2 of 2020 (Old No.CAN 1385 of 2020) was disposed of by the order dated 23rd September, 2021.

Both second appeals have come up for admission.

We have heard the learned Counsel for the appellant.

The second appeal is arising out of a judgment and decree of affirmation of the judgment of the Trial Court dated 31st May, 2004 disposing of two suits. The Appellate Court affirmed the order of the learned trial court in its judgment dated 16th September, 2014. The learned Trial Judge passed a decree in favour of the respondent in this appeal in respect of T.S. No.98 of 1996 and dismissed T.S. 17 of 1998 filed by the appellant.

Shorn of details, the original relationship between the parties was of landlord and tenant. Subsequently, an agreement for sale was entered into between the parties on 17th April, 1996 in terms whereof the respondent advanced a

sum of Rs.55,000/- towards earnest money. The respondent was in possession of the suit property. The execution of the agreement is not in dispute. It further transpired during the trial that the respondent by reason of default on the part of the appellant to complete the construction constructed first floor at his own expense. The appellant after two years from the date of filing of the suit for specific performance filed a suit for eviction. In the appeal, the appellant has taken a plea that the agreement for sale is in effect an agreement for loan and the rents for the future period were adjusted against the said amount. This evidence could not be established at the trial of the appellant. Admittedly, no rent was paid after said agreement was entered into. By reason of the execution of the sale agreement, the parties have altered their position in respect of the suit property and it is no more open for the appellant to treat the respondent as a tenant. Moreover, the respondent has performed his part of the obligation and, in fact, has completed the construction at his own expense.

On a clear finding of fact by both the Courts below that it was not a loan transaction but payment in terms of the sale agreement and the fact that the respondent has partly performed his obligation and thereafter has completed construction at his own cost, we do not find any reason to admit the second appeal and no substantial question of law is involved in the second appeal.

The learned Counsel for the appellant has relied upon a judgment of the Hon'ble Supreme Court in ***N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao & Ors.***

reported at **(1995) 5 SCC 115, Paragraph 5** in order to argue that the respondent has not fulfilled his obligation under Section 16(C) and 20 of the Specific Relief Act, 1963. We are of the opinion that the appellant cannot approbate and reprobate. The appellant has to take specific stand with regard to the execution of the sale agreement in relation to the appellant contends that there was no sale agreement, reliance on this judgment is redundant. However, it is true that in deciding a suit for specific performance, the Court has to come to a finding that the plaintiff is ready and willing to perform his part of the contract. In the instant case, the evidence on record would show that the plaintiff was ready and willing to perform his part of the obligation. The appellant never contended that there has been any denial in breach on the part of the respondent in performing his obligation. On the contrary, the appellant was on the denial mode with regard to the said agreement.

Accordingly, the second appeal being SAT 120 of 2015 stands dismissed

This order also disposes of SAT 121 of 2015. Accordingly, SAT 121 of 2015 stands dismissed.

In view of dismissal of the second appeal, the connected applications are, accordingly, dismissed.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Uday Kumar, J.)

(Soumen Sen, J.)