

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FAT 318 of 2018

Md. Mukhtar
versus
Mahesh Kumar & Anr.

For the Appellant : *Mr. Suraj Mitra,*
Mr. Amal Kr. Sen,
Mr. Lal Mohan Basu,
Mr. S. Bhattacharjee.

Hearing is concluded on : *14th September, 2022.*

Judgment On : **29th September, 2022.**

Partha Sarathi Chatterjee, J.

1. Order and decree dated 04/06/2018 passed by the Learned Civil Judge (Senior Division) 3rd Court Alipore in Title Suit no. 1844 of 2016, whereby the learned Court below dismissed the suit for specific performance of contract and permanent injunction ex-parte, has been impugned in this appeal.

2. Here, in the case at hand, one Md. Mukhtar had filed a suit for specific performance of contract and permanent injunction which was registered as Title Suit no. 1844 of 2018.

3. Facts projected in the plaint in a nutshell are that one Jagadish Prasad Roy along with his co-sharers was the owner of the suit properties and other properties and by virtue of registered deed of partition *vide* no. 435 of 1987, Jagadish Prasad Roy acquired the absolute ownership of the suit properties mentioned in schedule 'Kha' appended to the plaint.

4. Jagadish Prasad Roy died leaving behind his only daughter namely, Sharda Devi, since deceased, who happened to be the wife of Mr. K Mahato.

5. It was further pleaded therein that the Sharda Devi, being the absolute owner of the suit properties, through her son as constituted attorney entered into agreement for sale with the plaintiff to sell out the suit property at a consideration amount of Rs. 50 lakhs on 14/04/2013 and Sharda Devi received Rs. 33 lakhs and in the agreement, Sharda Devi and her son put their respective signatures on the agreement and it was agreed by and between the parties thereto that deed of conveyance would be executed and registered within 2nd week of June, 2013 upon payment of balance consideration amount being Rs. 17 lakhs.

6. It was claimed therein that on 15th day of June, 2013 Sharda Devi refused to receive the said balance amount and she also refused to execute and register the deed and she along with her sons left the locality to some

undisclosed destination which forced the plaintiff to file one complaint under section 156(3) Cr.P.C. before the competent court of law and treating the said complaint as an F.I.R., one Metiabruz P.S. Case no. 149 dated 22.8.2013 U/ss. 420/406/120B IPC was initiated.

7. However, I.O. concerned could not apprehend the accused persons and it was stated therein that in the meantime, Sharda Devi died leaving behind her two sons, the defendants/respondents herein. They did not take appropriate steps to execute and register the deed of conveyance though the plaintiff was ready and willing to perform his part of the agreement dated 14/5/2013. Hence, the suit.

8. Records postulate that service could not be effected upon the defendants since they were absconding and hence, plaintiff took recourse of substituted service under Order 5 Rule 20 of CPC and ultimately, the suit was fixed for *ex-parte* hearing.

9. Records further speak that to substantiate his claim made in the plaint, the plaintiff adduced his oral testimony and was examined as PW-1 and plaintiff tendered some documents say, certified copies of three orders dated 20.8.2013 (Ext-1), certified copies of FIR and Charge sheet (Ext-2), certified copy of the complaint (Ext.-3) and agreement for sale (Ext-4). The agreement was impounded and thereafter exhibited.

10. From the order impugned, it transpires that the learned Court below observed that two sons of Sharda Devi put their respective signatures and

Sharda Devi put her LTI on the agreement as vendors whereas in the memo of consideration of the agreement (which was written in English) Sharda Devi and defendant no. 1, Mahendra Kumar put their signatures as vendors whereas defendant no.2 put his signature as witness. Learned Court below further observed that in absence of the best evidence and when the suit is being heard *ex-parte*, documents produced by the plaintiff would be such so that case of the plaintiff is proved on the degree of preponderance of probability. Learned Court below raised one suspicion on the facts that on one portion of the agreement Sharda Devi put her signature and on one portion, she put her LTI and plaintiff even could not produce the power of attorney and hence, the learned Court below refused to exercise its discretion to grant equitable relief say, grant of decree of specific performance of contract and dismissed the suit *ex parte*.

11. Hence, being aggrieved by and/or dissatisfied with the order and decree impugned herein, the instant appeal has been preferred, *inter alia*, on the grounds that the learned Court erred in disbelieving the uncontroverted statement of the plaintiff and the learned Court below erred in relying upon the decision of the criminal court and learned Court below has erroneously drawn adverse inference against the plaintiff for non-production of Sharda Devi on dock as witness and the learned Court below erred in raising suspicion regarding genuinity of the agreement for sale.

12. Now, during course of hearing of the appeal, main plank of argument of Mr. Mitra, learned senior advocate and Mr. Bhattacharya, who were

appearing for the plaintiff/appellant was that the learned Court below erred in not accepting the uncontroverted statement of the plaintiff and the learned Court below erred in taking adverse inference against the plaintiff for non-production of Shrada Devi on dock as witness and lastly, Mr. Mitra urged that if this bench thinks it fit, it can sent back the matter on remand.

13. It is axiomatic that in case of hearing a suit *ex-parte*, the Court must be vigilant and decree passed *ex-parte* must be supported by cogent and sufficient evidence to the satisfaction of the Court. It is well settled that merely, because the defendant does not choose to appear in the case that by itself is not sufficient to entitle the Court to jump to the conclusion that the plaintiff has succeeded to prove his case. In a regular civil suit, merely for want of written statement by a defendant, it is not necessary that a judgment would always follow in favour the plaintiff without proof of basic facts and without making out a clear case of right to relief. In a situation where no written statement has been filed by the defendant, the court has been given the discretion to pass such order as it may think fit as an alternative.

14. Admittedly, grant of decree of specific performance is not automatic and a decree of specific performance of contract is an equitable remedy and such remedy is discretionary and mere existence of any right is insufficient to attract an equitable remedy and there must be additional facts, events and relations which will confer an absolute right and the contract should be unobjectionable in nature.

15. Section 20 of the Specific Relief Act, 1963 has extended the scope of discretion of the court and it lays down that the court is not bound to grant specific performance merely because it is lawful. However, it is trite law that while exercising equity jurisdiction, it would be guided by justice, equity and good conscience and fairness to both the parties. In a suit for specific performance of contract, evidence and proof of agreement must be absolutely clear and certain and in like case, a greater degree of certainty is required. A contract of sale can be specifically enforced only if the seller is competent to sell the property on the date of decree and at least, it is to be proved that the vendor had marketable title on the date of decree. Even if there is defect in title, court can exercise its discretion to enforce the contract since the purchase has chosen to accept such title but if the title of the vendor is in dispute or doubt, court shall not specifically enforce the contract. Such contract, only if it is proved to be genuine, can be enforced. The court is empowered to take into account as to whether contract, although not voidable but is giving unfair advantage to the plaintiff or not or as to whether contract is onerous to the defendant or improvident in its nature or not.

16. Now, coming to the present case, here, the plaintiff was required to prove the basic facts. Here, basic facts are as follows :

- i) Sharda Devi was absolute owner of the suit property ;
- ii) Sharda Devi had executed one power of attorney empowering the defendant no.1 to enter into agreement for sale in respect of the suit property ;

iii) Sharda Devi or the defendant no.1 had entered into agreement for sale and Rs. 33 lakhs was received by and/or on behalf of the Sharda Devi with an assurance that within 2nd week of June, 2013, deed of conveyance would be executed and registered.

17. Now, it goes without saying that such facts are to be proved on the degree of preponderance of probability. Basically, material facts are to be proved to be probable and such proof shall form the basis upon which one prudent man can suppose that fact in issue has been proved and here, supposition of the prudent is the standard.

18. Here, it has not been proved that Sharda Devi had marketable title on the date of decree. Mere, making of averments in the plaint will not be suffice. Here, it was claimed that Sharda Devi during her life time had executed one power of attorney. Such power of attorney has not been proved.

19. Moreover, here, in the agreement for sale, Sharda Devi put her thumb impression on one page and put her signature on one page. Had Sharda Devi been an illiterate lady, benefit available to one pardanashin lady would have been applicable and plaintiff taking advantage from the contract entered into with one illiterate and/or pardanashin lady was required to prove in clear terms that such lady understood the nature of disposition and had voluntarily executed the agreement.

20. Here, if the same person put her thumb impression on one page and put her signature on one page, then obviously, suspicion will arise in the mind of every prudent man and plaintiff has failed to remove such suspicion.

21. Here, at a glance of the agreement, it will transpire that same person has put two signatures of Mukesh kumar and Sharda Sharma on the last page of the agreement and in the last but previous page also, signatures of the witnesses shall create doubt in the mind of every prudent man.

22. Now, regarding prayer of Mr. Mitra to send the matter back on remand, it can be stated that it is a well stated proposition of law that no remand ought to be made only to enable a party to produce additional material. Basically, a remand is neither mechanical nor a routine affair. If the conditions contained in Order 42 Rule 23 and 23A CPC are not fulfilled, court should not send the matter back on remand. Here, we did not find any reason to set the clock back.

23. Here, although the learned Court below made a comment that plaintiff could not produce best evidence say, Sharda Devi but ultimately, the learned Court observed that in absence of best evidence, documents and evidence of plaintiff would be such so that his case proves to be probable to any prudent man.

24. So, in this conspectus, we do not find any reason to interfere with the order and decree impugned. We are inclined to hold that learned Court below

has not committed any error in refusing to exercise its equitable jurisdiction to enforce the specific performance of contract.

25. Consequently, the appeal being devoid of merits is dismissed, however, without any order as to the costs.

26. Order and decree impugned herein are hereby affirmed.

27. Let a decree be drawn up accordingly.

28. Urgent xerox certified copy, if applied for, be given on priority basis upon completion of all requisite formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)