

IN THE HIGH COURT OF ORISSA AT CUTTACK

Second Appeal No.262 of 1991

In the matter of an Appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree 22.04.1991 and 08.05.1991 respectively passed by the learned Additional District Judge, Bhadrak in S.J. Appeal No.35/14 of 1986/1987 setting aside the judgment and decree dated 09.04.1986 and 21.04.1986 respectively passed by the learned Sub-Judge, Bhadrak in O.S. No.52 of 1979-I.

Siba Charan Panda

....

Appellant

-versus-

Krupasindhu Panda & Another

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellant

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Mr.Manoj Ku. Agrawalla

For Respondents

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CORAM:

JUSTICE D.DASH

Date of Hearing : 08.12.2022 : Date of Judgment:23.12.2022

D.Dash,J. The Appellant, in this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree 22.04.1991 and 08.05.1991 respectively passed by the learned Additional District Judge, Bhadrak in S.J. Appeal No.35/14 of 1986/1987.

By the same, the Appeal filed by the Appellant (Plaintiff) under section 96 of the Code in challenging the judgment and decree dated 09.04.1986 and 21.04.1986 respectively passed by the learned Sub-

Judge, Bhadrak in O.S. No.52 of 1979-I in decreeing the suit filed by the Appellant as the Plaintiff have been set aside.

The Appellant, as the Plaintiff, had filed the suit for specific performance of contract for sale in respect of the suit land with further prayer for confirmation of his possession over the same and in the alternative, for recovery of possession in case of dispossession. The suit, having been decreed directing the Defendants 1 & 2 (Respondent No.1 & 2) to execute a sale deed in favour of the Plaintiff on receipt of consideration of Rs.500/- (Rupees Five Hundred) within the time stipulated or else the sale deed to be executed in favour of the Plaintiff through Court, the same has been set aside in the First Appeal carried by the aggrieved Defendants 1 & 2.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiff's case is that he entered into an agreement with Defendants 1 & 2 for sale of the suit land measuring Ac.0.162 decimals for a consideration of Rs.3,000/- (Rupees Three Thousand) on 21.07.1978. Pursuant to the said agreement, the Defendants 1 & 2, while agreeing to sale the suit land received a sum of Rs.2,500/- (Rupees Two Thousand Five Hundred) as advance consideration leaving a balance of Rs.500/- (Rupees Five Hundred) towards the consideration to be paid at the time of execution and registration of the sale deed within one month thereof. It is stated that the Defendant No.3, having the knowledge of the agreement for sale, had purchased the land from Annexure-2 to the extent of Ac.0.99½ decimals and it is said that it was without any

consideration. The Plaintiff further states that pursuant to the said agreement, the possession of the suit land had been delivered to him by Defendants 1 and 2 and he is in possession of the same. Having come to know about the subsequent sale deed executed by Defendant No.2 in favour of Defendant No.3 in respect of a portion of the said land covered under the agreement, the suit came to be filed.

4. The Defendants 2 & 3 contested the suit. Defendant No.3, denying his knowledge about the said agreement as to have been entered between the Plaintiff and Defendants 1 and 2, asserted himself to be a bona fide purchaser for value without notice of the agreement.

5. The Defendant No.2, in his written statement, submitted to have never entered into any agreement along with Defendant No.1 for sale of the suit land to the Plaintiff. He also denies to have received any consideration. It is stated that he and his brothers were in dispute for partition of their land. Accordingly, he and his brothers approached some of the villagers for amicable partition of their landed properties. As per the direction of the Panchayat, they executed Ekrarnama and for that purpose, stamp papers had been purchased and he had signed on some blank papers. Since his brother, namely, Jagabandhu did not agree to sign on stamp papers, those remained with Defendant No.1 and subsequently, as he had dispute with him, the Plaintiff and Defendant No.1 prepared the collusive document and the suit has been filed. He admits to have sold Ac.0.99½ decimals of land to Defendant No.3 on receipt of the valuable of consideration.

6. The Defendant No.1, in his written statement, admitted to have executed the agreement for sale of the suit land in favour of the Plaintiff.

He, however, states that when he was all along ready and willing to execute the sale deed on receiving the balance consideration and it is Defendant No.2, who did not come forward for the purpose and he was having the dispute with him. Thus, the Defendant No.1 says to be ready and willing to execute the registered sale deed in fructification of the object set-out in the agreement.

7. The Defendants 4 & 5, in their joint written statement, have not claimed any portion of the suit land. They state that the Plaintiff is entitled to purchase the same from Defendant No.1 & 2 in terms of the agreement.

8. On the above rival pleadings, the Trial Court, having framed nine issues, has rightly taken up issue no.3 as to the genuineness of the agreement for sale, which has been projected as the basis of the claim by the Plaintiff first for decision. Upon examination of the evidence and their evaluation, the finding has been rendered in favour of the Plaintiff that said agreement (Ext.1) is a genuine one. Then coming to the other issues, the answers have been given in favour of the Plaintiff that he is entitled to a decree for the purpose of the agreement for sale and accordingly, it having been held that Defendant No.3 is not a bona fide purchaser for value without the notice of the agreement, the suit has been decreed.

9. The Defendants 2 & 3, being aggrieved by the said judgment and decree passed by the Trial Court, had filed the First Appeal. The Appellate Court has finally held that the Plaintiff is not entitled to the reliefs claimed and accordingly, dismissed the suit.

10. This Appeal, at the instance of unsuccessful Plaintiff, has been admitted to answer the substantial question of law as at Ground No.L, which reads as under:-

“ XX XX XX

i) Whether the lower appellate court is correct in recording a finding that the plaintiff was not put in possession of the suit property pursuant to the agreement to sale in his favour by defendant Nos.1 and 2 particularly when there were materials on record to come to a contrary finding and the trial Court on consideration of the same cause to a finding that the plaintiff was in possession of the suit property?;

ii) Whether the lower appellate court is correct and justified in holding that defendant no.3 is a bona fide purchaser for value without notice of the prior agreement to sale of defendant nos.1 and 2 with the plaintiff particularly when the lower appellate court affirmed the finding of the trial court about the genuineness of the said agreement (Ext.1) and possession was delivered to plaintiff and such possession amounted to notice of defendant no.3 of the prior agreement in favour of the plaintiff?;

iii) Whether the lower appellate court is correct in recording a finding that the plaintiff had not performed his part of contract particularly when the plaintiff asserted in his plaint that in spite of his repeated demands defendants 1 and 2 did not execute and register the sale deed on acceptance of the balance consideration from him which he was always ready and willing to pay and thus he was always ready to perform his part and defendant no.1 supported such a plea and there was evidence on record to establish the fact that the plaintiff was always ready and willing to perform his part of contract?; and

v) Whether the lower appellate Court is correct and justified in holding that the sale deed executed and registered by defendant no.2 in favour of defendant no.3 is valid with respect to the properties (Ac.99½) out of Ac.1.62 decimals particularly when defendant no.2 had only 50% interest and

the sale deed was in respect of properties in excess of his share?”

11. Learned counsel for the Appellant (Plaintiff) submitted that when the Trial Court, having considered the evidence adduced by the parties and upon their just and proper appreciation, had arrived at a conclusion that the deed of agreement (Ext.1) is legal and valid and had been acted upon followed by delivery of possession of the suit land to the Plaintiff on receipt of consideration of Rs.2,500/- by Defendants 1 and 2, the First Appellate Court has accepted the said finding. He also submitted that the views taken by the First Appellate Court on the basis of the evidence that the Plaintiff was not ready and willing to perform his part of the contract and that the Defendant No.3 is a bona fide purchaser for value without the notice in respect of the land measuring Ac.0.99½ are contrary to and against the weight of the evidence on record. In this connection, he with much stress has invited the attention of this Court to the evidence on record. He, therefore, submitted that the decree of specific performance of the agreement for sale under Ext.1 having been rightly passed by the Trial Court, the same has been unjustifiably set aside in the First Appeal.

12. None appeared on behalf of the Respondents (Defendants) despite opportunities.

13. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statements and have travelled through the evidence both oral and documentary.

14. Admitted position stands that Defendants 1 & 2 are brothers and the Defendants 1 & 2 had 1/3rd interest over the said suit land whereas

Jagabandhu had $\frac{1}{6}^{\text{th}}$ interest and Bhagaban of $\frac{1}{2}$ interest over that. It is stated that the Defendants 1 and 2 had entered into the agreement for sale with the Plaintiff to sale Ac.1.62 decimals of land out of said Khata for the agreed consideration of Rs.3000/-. The agreement for sale has been admitted in evidence and marked Ext.1. It is said to have come into being in the month of Ashadha/Shrabana in the year 1978. The scribe to the agreement for sale is Banchhanidhi Sethi and the witnesses are Ananda Mohapatra and Surendra Pani. The scribe has been examined as P.W.2 whereas P.W.3 is the witness. The Plaintiff has examined himself as P.W.1. The Courts below have held the agreement for sale (Ext.1) to have been duly executed. Thus, on this score, the findings of the Courts below are concurrent. It appears that on a detail discussion of the evidence on record, the Courts below have declined to accept the claim of the Defendant No.2 that the agreement was a manufactured one. In fact, on this finding, there is neither any Cross-Appeal nor Cross-Objection.

15. Having held above, the First Appellate Court, upon examination of the evidence and their evaluation, in the backdrop of the pleadings advanced in the plaint by the Plaintiff, has held that the Plaintiff has failed to perform his part of contract and was never ready and willing to do so. This conclusion has led the First Appellate Court to non-suit the Plaintiff.

16. In a suit for specific performance of contract, the person, seeking the decree on the basis of the agreement for sale, is under the legal obligation to plead and prove that he was all along ready and willing to

perform his part of the contract right from the time he was required to perform upto the institution of the suit and even thereafter.

Now, examining the case at hand in this light to judge the sustainability of the finding of the First Appellate Court, the averments of the plaint being seen, it appears that the Plaintiff states that according to the said agreement, he asked the Defendant No.2 to execute the sale deed and registered the same, but the Defendant No.2 avoided to do so on some plea or other. The Plaintiff (P.W.1), in his evidence, has further stated that he is ready to pay the balance consideration of Rs.500/- along with the expenses to be met for registration of the document. He states to have demanded the Defendants to execute the sale deed. P.W.1 thus neither state the date when he first asked the Defendant No.2 to execute the sale deed and in which mode, he so demanded. It is also not stated that whether when he called upon Defendant No.2 to execute the sale deed someone else was present or not. He is also silent as to when he had offered the balance consideration to Defendants 1 and 2 and who was to receive the same. The Defendant No.1, in this case although admits to have executed the agreement, has not come forward to say as to why he did not proceed to execute the sale deed and what was the reason for him not to do so as to whether the other brother, i.e., Defendant No.2 avoided to do so and if so, for what reason. The Trial Court, having not touched upon all these features appearing in the evidence let in by the Plaintiff, who was under the legal obligation to plead and prove his readiness and willingness to perform his part of the contract all along, the First Appellate Court, in my considered view, in judging the sustainability of the decree for specific performance of contract, has rightly taken care of the same.

The evidence on the score, being not so sufficient to arrive at a conclusion by preponderance of probability that the Plaintiff was ready and willing to perform his part of the agreement to get the sale deed executed from the Defendants 1 and 2 by paying the balance consideration of Rs.500/- and when for the purpose, the bald statements given do not receive the support from any document, there appears no reason or justification to upset the view taken by the First Appellate Court by saying that the same is not the outcome of just and proper appreciation of evidence and being contrary to the settled principles of law holding the field.

Accordingly, the substantial question of law is answered against the Appellant (Plaintiff).

17. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

(D. Dash)
Judge

Basu