2011 PLRonline 0007

SUPREME COURT OF INDIA

Before: Justice P. Sathasivam and Dr. Justice B.S. Chauhan

H. SIDDIQUI (D) By Lr

versus

A. RAMALINGAM

Civil Appeal No. 6956 Of 2004

04.03.2011

(i) Civil Procedure Code, 1908 (V of 1908), O. 41 R. 31, Section 96 – High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of the Code – The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case – The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration.

Held, thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. *(Vide Sukhpal Singh v. Kalyan Singh [AIR 1963 SC 146] , Girijanandini Devi v. Bijendra Narain Choudhary [AIR 1967 SC 1124], G. Amalorpavam v. R.C. Diocese of Madurai [(2006) 3 SCC 224] , Shiv Kumar Sharma v. Santosh Kumari [(2007) 8 SCC 600] and Gannmani Anasuya v. Parvatini Amarendra Chowdhary [(2007) 10 SCC 296 : AIR 2007 SC 2380] .)" [Para 18]*

(ii) Evidence – Documents – Examination of – Probative value – It is the duty of the court to examine whether documents produced in the Court or contents thereof have any probative value – Respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the

contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value.

Held, Trial Court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the Trial Court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother R. to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant/plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother R. and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property. In our humble opinion, the Trial Court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value. [Para 11]

Judgment

Dr. B.S. CHAUHAN, J. – This appeal has been preferred against the judgment and order dated 3.2.2004 passed by the High Court of Karnataka at Bangalore in Regular First Appeal No. 265 of 1999.

2. FACTS:

(A) The Appellant who had been inducted as a tenant at an initial stage filed suit No. 30/1981 on 1.1.1981 for specific performance of contract in the City Civil Court, Bangalore alleging that the power of attorney holder of the respondent entered into the agreement dated 25.6.1979 to sell the suit property i.e. 1/3rd share of the respondent in the property being No.43, Mission Road, Shanti Nagar, Bangalore-27 to him for a consideration of Rs.40,000/- by receiving an advance of Rs.5,000/-.

(B) The said agreement was duly registered and according to the terms incorporated therein, the sale deed was to be executed on or before 30.12.1980. The respondent failed to take necessary steps to act according to the agreement. Thus, the appellant/plaintiff issued notice to the respondent on 5.3.1980 through his lawyer.

(C) The appellant/plaintiff allegedly paid the balance amount on 15.5.1980. As the time limit for the execution of the sale deed had expired, and the sale deed was not executed, the appellant/plaintiff filed the suit for specific performance.

(D) The respondent denied the execution of any power of attorney in favour of his brother

with regard to alienation of the property. In fact the power of attorney had been given only for management of the property and not creating any right to transfer the same.

(E) In view of the pleadings, the Trial Court framed issues and after conclusion of the trial decreed the suit vide judgment and decree dated 3.11.1998.

3. Being aggrieved, the respondent preferred Regular First Appeal No. 265 of 1999 before the High Court of Karnataka which has been allowed by the impugned judgment and decree dated 3.2.2004. Hence, this appeal.

4. Shri K. K. Mani, learned counsel appearing for the appellant has submitted that as the appellant had proved that the agreement to sell dated 25.6.1979 was not obtained by the appellant through any kind of fraud, there was no justification for the High Court to set aside the judgment and decree of the Trial Court for specific performance on the grounds: the property was situated in Bangalore; the sale consideration was inadequate; and as a result of a long lapse of time on account of pendency of the case before the courts there has been a steep rise in the market value of the property. There can be no justification for not giving effect to the registered agreement to sell. The appellant had paid a sum of Rs.65,500/-, though the consideration as per the agreement had been only to the extent of Rs.40,000/-. The judgment and order of the High Court is liable to be set aside for the reasons that geographical location of the property or inadequate consideration and rise/escalation of price during the pendency of the case in court cannot be the grounds for reversal of the judgment and decree of the Trial Court.

5. On the contrary, Shri Rajiv Dutta, learned senior counsel appearing for the sole respondent has vehemently opposed the appeal contending that the respondent never executed the power of attorney in favour of his brother enabling him to transfer the suit property. Power of attorney had never been filed before the Trial Court nor had it been proved. The photocopy of the same was shown to the respondent during the time of his cross-examination wherein he has admitted his signature thereon only. The respondent had never admitted its contents or genuineness of the same. Therefore, the power of attorney itself had not been proved in terms of Sections 65 and 66 of the Indian Evidence Act, 1872 (hereinafter called Act 1872) and, thus the question of proceeding further by the Trial Court could not arise. More so, it is not probable that the appellant paid a sum of Rs.65,500/- instead of Rs.40,000/- as consideration fixed in the agreement to sell. The agreement dated 25.6.1979 contained clause 11 according to which if the sale deed was not executed, the earnest money of Rs.5,000/- received by alleged power of attorney holder would be refunded to the purchaser together with the like amount of Rs.5,000/- as liquidated damage for breach of contract. Thus, at the most, the appellant was entitled to receive a sum of Rs.10,000/- but the question of decreeing the suit could not arise. The appellant had been a tenant. He never paid any consideration. Earlier there has been a prior sale of 1/3rd share in the same property (share of the brother of the respondent) in favour of D. Narendra and the appellant had filed the suit against him also claiming that the said part of the property could have been sold to him. The alleged payment of Rs.65,500/- or Rs.40,000/- as a sale consideration is nothing but mis-representation by showing forged receipts prepared by the appellant in collusion with the son of the alleged power of attorney holder at the time of

litigation with D. Narendra. The appeal lacks merit and is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

7. Admittedly, there had been litigation between the appellant and other co-sharers when 1/3rd share of the said property was sold in favour of D. Narendra by the brother of the respondent. Appellant herein has lost the said case. Before the Trial Court, the appellant while filing the suit has impleaded the respondent and his brother, R. Viswanathan, the alleged power of attorney holder. In the First Appeal, before the High Court, both of them had been the parties. However, before this Court the alleged power of attorney holder, R. Viswanathan, has not been impleaded as respondent for the reasons best known to the appellant.

8. The Trial Court taking into consideration the pleadings had framed the following issues:-

"1. Whether the defendants prove that the agreement of sale dated 25.6.1979 was taken by the plaintiff by practicing fraud on the II defendant as per the written statement of D1 and D2?

2. Whether the plaintiff proves payment of amount as alleged in the plaint?

3. To what relief the plaintiff is entitled to.

Additional Issues:

1. Whether the suit is bad for non-joinder of necessary parties?

2. Whether the agreement dated 25.6.1979 is unenforceable?"

9. In view of the pleadings, as the respondent has specifically denied the execution of a power of attorney in favour of R. Viswanathan, defendant No.2 in the suit (not impleaded herein), the main issue could be as to whether the power of attorney had been executed by the respondent in favour of R. Viswanathan enabling him to alienate the suit property and even if there was such power of attorney whether the same had been proved in accordance with law.

10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The

court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: *The Roman Catholilc Mission & Anr. v. The State of Madras & Anr., AIR 1966 SC 1457 ; State of Rajasthan & Ors. v. Khemraj & Ors., AIR 2000 SC 1759 ; Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen, (2010) 4 SCC 491 ; and M. Chandra v. M. Thangamuthu & Anr., (2010) 9 SCC 712*).

11. The Trial Court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the Trial Court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother R. Viswanathan to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant/plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (R. Viswanathan, second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property.

12. In our humble opinion, the Trial Court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value.

13. In *State of Bihar v. Sri Radha Krishna Singh*., AIR 1983 SC 684 , this Court considered the issue in respect of admissibility of documents or contents thereof and held as under:

“Admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.”

14. In *Madan Mohan Singh v. Rajni Kant*, AIR 2010 SC 2933 , this Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt. Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years

of age.

Therefore, it is the duty of the court to examine whether documents produced in the Court or contents thereof have any probative value.

15. The Trial Court rejected the contention of the respondent that the appellant/plaintiff had paid more than what had been agreed in the agreement to sell, and hence changed the terms of agreement unilaterally, observing that in such a fact-situation it cannot be said that the terms of the agreement had been unilaterally altered by the appellant/plaintiff. Such a remark/observation could not have been made without any explanation furnished by the appellant, as under what circumstances the appellant-purchaser, without being asked by the respondent-seller, to enhance the consideration amount has paid more and it cannot be held to be natural human conduct in public and private business. Such conduct of the appellant remains most improbable.

16. The High Court while dealing with the First Appeal has framed only the following two issues:

"(a) Whether the findings and reasons recorded on issue Nos. 1 and 2 and Addl. Issue Nos. 1 & 2 by the Trial Court in holding that defendants have not proved that they have not executed agreement of sale in favour of plaintiff and the same has been obtained by the plaintiff by making use of power of attorney holder of second defendant which amounts to fraud and mis-representation warrant interference with the same by this court in exercise of its Appellate power and jurisdiction?

(b) Whether the Trial Court was right in not exercising its discretionary power under sub-section (2) of Section 20 while granting judgment and decree for specific performance in favour of plaintiff if it has not exercised its power under the above provisions of the Act, whether, this Court has to remand the case to the trial court after setting aside the judgment and decree for the consideration regarding this aspect of the case?"

17. The High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of the Code of Civil Procedure, 1908 (hereinafter called CPC) and once the issue of alleged power of attorney was also raised as is evident from the point (a) formulated by the High Court, the Court should not have proceeded to point (b) without dealing with the relevant issues involved in the case, particularly, as to whether the power of attorney had been executed by the respondent in favour of his brother enabling him to alienate his share in the property.

Order XLI, Rule 31 CPC:

18. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the

material on record. It would amount to substantial compliance of the said provisions if the appellate courts judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (*Vide: Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., AIR 1963 SC 146 ; Girijanandini Devi & Ors. v. Bijendra Narain Choudhary, AIR 1967 SC 1124 ; G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors., (2006) 3 SCC 224 ; Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600 ; and Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380)*

19. In **B.V. Nagesh v. H.V. Sreenivasa Murthy, JT (2010) 10 SCC 551**, while dealing with the issue, this Court held as under:

"The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put- forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide Santosh Hazari vs. Purushottam Tiwari, (2001) 3 SCC 179 and Madhukar v. Sangram, (2001) 4 SCC 756]"

20. More so, none of the courts below had taken into consideration Clause 11 of the agreement dated 30.6.1979 which reads as under:

"11. In the event of any default on the part of the vendors in completing the sale the earnest money paid herewith shall be refunded to the purchasers together with a like amount of Rs.5,000/- (Rupees five thousand only) as liquidated damages for breach of contract."

Thus, in case of non-execution of the sale deed, the appellant could get the earnest money with damages.

21. So far as the issues of inadequate consideration and rise in price are concerned, both the parties have argued the same at length and placed reliance on a large number of

judgments of this Court, including: *Chand Rani (Smt.) (dead) by Lrs. v. Kamal Rani (Smt.)(dead) by Lrs., AIR 1993 SC 1742 ; Nirmala Anand v. Advent Corporation (P) Ltd. & Ors., (2002) 8 SCC 146 ; P. DSouza v. Shondrilo Naidu, (2004) 6 SCC 649 ; Jai Narain Parasrampuria (dead) & Ors. v. Pushpa Devi Saraf & Ors., (2006) 7 SCC 756 ; Pratap Lakshman Muchandi & Ors. v. Shamlal Uddavadas Wadhwa & Ors., (2008) 12 SCC 67 ; and Laxman Tatyaba Kankate & Anr. v. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717.*

22. In view of the above, as we are of the considered opinion that the courts below have not proceeded to adjudicate upon the case strictly in accordance with law, we are not inclined to enter into the issue of inadequate consideration and rise in price. However, the judgment impugned cannot be sustained in the eyes of law.

23. In the facts and circumstances of the case, we remit the matter to the High Court setting aside its judgment and decree (impugned) and request the High Court to decide the same afresh in accordance with law, as explained hereinabove. As the case has been pending for three long decades, we request the High Court to decide it expeditiously. However, it is clarified that any observation made herein shall not adversely affect the cause of either parties.

24. With the above observations, the appeal stands disposed of. There shall be no order as to costs.