RAM KHILONA AND ORS. A

v.

SARDAR AND ORS.

JULY 16, 2002

[D.P. MOHAPATRA AND K.G. BALAKRISHNAN, JJ.] B

Code of Civil Procedure, 1908—Section 100—Second appeal—Agreement of sale of land by covenantors—Alteration made in the agreement deed by introducing two independent marginal witnesses subsequently—Suit for specific performance of contract of sale on basis of agreement deed decreed and suit for declaration of rights of vendees dismissed—Upholding of decrees of lower court, High Court holding alterations in the agreement deed as material alterations—Correctness of—Held, order of High Court not sustainable since alterations made subsequently did not bring about any change in validity and enforceability of agreement of sale—Deeds—Material alterations. C D

Covenantors entered into an agreement of sale of land. However, they did not execute the sale deed in favour of the appellants-covenantees. Subsequently alterations were made in the agreement deed by introducing two independent marginal witnesses. Appellants-covenantees then filed suit for specific performance of contract of sale on the basis of the agreement and it was decreed. Respondent Nos.1 and 2 filed suit for declaration of rights of the vendees over the land against the appellants and respondent Nos.3 and 4, which was dismissed. Appeals were also dismissed. Aggrieved, respondents filed second appeals. High Court held that the interpolation for introducing the two independent marginal witnesses in the agreement of sale was made so as to give authenticity to the said agreement of sale. It held that the alteration made in the agreement deed by the covenantors is material alteration which had the result of avoiding the agreement, and rendering it *void ab initio* having no binding effect on the vendor and thus the agreement cannot be enforced. Hence the present appeals. E F G

Allowing the appeals, the Court

HELD: 1.1. The approach of the High Court in the second appeal was clearly against the law and spirit of Section 100 of the Code of Civil Procedure. Further, the view taken by the High Court that the H

A **interpolation said to have been made by the covenantees in the agreement of sale does not stand scrutiny under law. Also such alteration, assuming that it was made subsequently, did not bring about any change in the validity and enforceability of the agreement of sale. The finding recorded by the High Court appears to be based on surmise. Therefore, the**
B **judgment is clearly unsustainable. [197-F-H]**

1.2. High Court observed that the covenantees-appellants might have had an apprehension that as the marginal witnesses in the original document were persons closely related to them, the court may not readily accept the case of the appellants regarding the agreement of sale and,
C **therefore, they subsequently introduced two independent persons as marginal witnesses in the document after its execution, which amounted to interpolating with the documents. This was considered by the courts and was not believed. The observations of the first appellate court were mere observations, which was not taken as a substantial matter against the credibility and acceptability of the case of the appellants in the suit**
D **for specific performance. Trial Court and the First Appellate Court had concurrently accepted the case of the appellants in the suit for specific performance and had rejected the case of the respondents in suit for declaration of rights. Courts in exercise of the discretionary jurisdiction vested in them had decreed the suit for specific performance of the**
E **agreement of sale. The High Court in its impugned judgment did not discuss any legality by the courts below in taking the decision. [197-B-E]**

M.S. Anirudhan **v.** *Thomco's Bank Ltd.,* **AIR (1963) SC 746 and** *Kaliana Gounder* **v.** *Palani Gounder and Anr.,* **AIR [1970] SC 1942, referred to.**

F *Halsbury's Laws of England, 4th Edition at page 552 para 1378,* **referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 238-39 of 1997.

G From the Judgment and Order dated 24.9.1996 of the High Court of Allahabad in S.A. 1974/78 and 1975/78.

E.C. Agrawala and M.P. Shorewala for the Appellants.

D.B. Vohra, Roopendra Singh, K.K. Gupta and Sanjeev Anand for
H the Respondent.

The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. The judgment dated 24.9.1996 passed by the High Court of Allahabad in Second Appeal Nos. 1974/78 and 1975/78, is under challenge in these appeals filed by Ram Khilona, Charni, Smt. Kishni W/o Ratni, Hari Ram @ Harbans s/o Ratni, Smt. Mukhtary w/o Buddhi, Sher Singh s/o Buddhi, Shyam Lal s/o Buddhi and Praye Lal s/o Het Ram, against Sardar and Sher Singh, sons of Kanha Jaat, Nehal Singh s/o Todar and Ram Khilari s/o Todar (deceased) by his Legal Representatives Veerpal and Khemo.

In the impugned judgment the High Court allowed the appeals and set aside the judgment and decree passed by the Courts below. The operative portion of the judgment reads :

> "In the result, both the appeals succeed and are accordingly allowed. The judgment and decree passed by the courts below in both the suits are accordingly set aside. Suit No. 58 of 69 which was filed by covenators for specific performance of the agreement deed (Ext.12) is dismissed with costs throughout whereas suit No.58 of 71 which had been filed for declaration of the rights of the vendees over the land in suit is decreed with costs throughout. The vendees are accordingly declared owners of the land in suit by virtue of the sale deed which was executed by the vendors transferring the land in suit in their favour on 7.5.69."

The factual back drop of the case leading to the present proceeding may be stated thus :

The appellants herein filed suit no. 58/1969 in the Court of the Civil Judge, Mathura against the respondents herein seeking the following main relief :

> "(A) That the suit of the plaintiffs for specific performance of the contract for sale on the basis of agreement for sale dated 19.4.1969 be declared in favour of the plaintiffs and against the defendants, and it be directed in the decree that all the defendants shall execute the sale deed in favour of the petitioners after taking Rs. 2,000 (balance), in respect of the land details whereof have been given at the foot of this plaint, and in case, they do not execute the sale deed within the time given by the Court, the court may execut the sale deed, in favour of the plaintiffs.

A (B) That the defendants be ordered by means of injunction that they shall not interfere in the possession of the plaintiffs over the land details whereof are given at the foot of this plaint and shall not take the land in their own possession after dispossessing the plaintiffs."

The case pleaded by the plaintiffs was that defendants 1 & 2 entered B into an agreement for sale of the suit land measuring 23.83 acres situated in village Khitawata, Tehsil Chhata, District Mathura, U.P. on 19.4.1969 for a consideration of Rs. 14,000. The plaintiffs paid Rs. 12,000 to the defendants 1 and 2 at the time of the execution of the agreement for sale. In pursuance of the said agreement the defendants 1 and 2 put the plaintiffs in possession C of the suit property and they continued with the possession by carrying on agricultural activities on the land. Despite several reminders defendants 1 and 2 did not execute the sale deed in favour of the plaintiffs. Subsequently, the plaintiffs came to know that defendants 3 and 4 had got a sale deed executed in their favour from defendants 1 and 2 in respect of the same property in a clandestine manner on 7.5.1969 without the knowledge of the plaintiffs. The D plaintiffs asserted in para 7 of the plaint that they had been and were ready and willing to get the sale deed executed from the defendants 1 and 2 after paying the balance amount of sale consideration.

Since the defendants 1 and 2 failed to keep their promise for sale of the E suit land to the plaintiffs the later had to file the suit seeking reliefs noted above. The defendants 1 and 2 filed their written statement refuting averments made by the plaintiffs in the plaint. It was their case that they had sold the suit land to defendants 3 and 4 on 7.5.1969 for Rs. 15,000. It was their further case that on that date they were in possession of the land and delivered possession of the same to defendants 3 and 4 in pursuance of the sale deed. F Thereafter the defendants 3 and 4 possessed the land and made certain improvements thereon. In para 7 of the written statement it was averred, inter alia, that defendants 1 and 2 did not execute any sale deed in favour of the plaintiffs nor did they take any amount as advance money. It was the further case of the said defendants that they had executed the sale deed in favour of defendants 3 and 4 openly and to the knowledge of the plaintiffs; that the so G called agreement was forged and fictitious and the thumb impressions therein were obtained by fraud and defendants 1 and 2 did not receive any amount towards consideration.

Defendants 3 and 4 filed separate written statements countering the H averments made in the plaint. They also took the stand that the so called

agreement for sale said to have been executed by the defendants 1 and 2 was a forged and fictitious document and it was doubtful that they bore the signature and thumb impressions of defendants 1 and 2. It was also averred in the written statement that the plaintiff by exerting influence on defendants 1 and 2 and by playing fraud on them got the thumb impression on blank stamp paper after the sale deed was executed in their (defendants 3 and 4) favour. Defendants 3 and 4 asserted in para 9 of the statement that one of the witnesses of the so called agreement i.e. Harchandi happens to be father in law in distant relationship and they are very intimate to each other, the other witness hails from the plaintiff's party and bears malice for the defendants. All the defendants prayed for dismissal of the suit. Respondents 1 and 2 herein filed original suit no. 58 of 1971 against the appellants and respondents 3 and 4 herein and against one Dharam Lal in the Court of Civil Judge, Mathura seeking the following main reliefs:

> "That it may be declared that the land in suit described at the foot of this plaint has been in possession of the plaintiffs and is held in custodia legis by the Sub-Divisional Magistrate Chhata in the proceedings u/s 145 of the Criminal Procedure Code Ram Khilona Versus Sardar and others for the benefit of the plaintiff and is liable to be released in their favour and is not liable to be released in favour of the defendants no. 1 to 5 as observed by the learned Munsif Mathura in Criminal Reference No.41 of 1970 under section 146 Cr.P.C. on 12.5.1971."

Subsequently, the plaint was amended to include the prayer for recovery of possession of the suit land in favour of the plaintiffs. The gist of the case pleaded by the plaintiffs in that suit is that on 7.5.1969 defendants 6 and 7 executed a sale deed of the suit land, having an area of 23.83 acres under Chhak No.92 of village Khitawata, Pargana Chhata, District Mathura in favour of the plaintiffs for a sum of Rs. 15000 and delivered possession of the land to them. Immediately after getting the possession of the land on 7.5.1969 the plaintiffs irrigated a portion of said chak from tubewell situated in chak no.99 belonging to one Lekhi s/o Hiralal and his brothers Dharam Lal and Ramlal, and sowed the sugarcane crop in the said portion. The plaintiffs applied for mutation of their names in the revenue records which was duly made on 13th June, 1969. The plaintiff asserted that defendants 1 to 5 were personally aware of the execution of sale deed; of the possession of the plaintiffs over the said chak and also of the mutation proceedings. The further case of the plaintiffs was that in order to deprive them of the property the defendants 1

A to 5 made some manipulations and got a document manufactured which is alleged to be an agreement of sale in their favour. In para 12 of the plaint the plaintiffs averred that on 10.7.69 the defendants 1 to 5 filed civil suit no.58 of 1969 in the Court of Civil Judge, Mathura for specific performance of the alleged agreement of sale and obtained an ad-interim injunction. The injunction order was vacated by the civil Judge on 29.7.1969. In appeal the District B Judge by the order dated 2.8.1969 issued direction for maintenance of status quo. In paragraphs 18 to 24 the plaintiffs made averments regarding injunction against the proceeding under section 145 Cr. P.C. on the basis of the police report dated 23.12.1969 of the apprehended breach of peace; the preliminary order passed by the Sub-Divisional Magistrate, Chhata on 30.12.1969 and the C order dated 21.3.1970 attaching the land, and the order passed by the learned Magistrate on 9.11.1970 referring the dispute to the Civil Court under Section 146 of the Criminal Procedure Code. In para 23 of the plaint it is stated that on 12.5.1971 learned Munsif, Mathura gave his finding holding that defendants 1 to 5 were in possession of the land in dispute on 13.12.1969 and within two months before the said date. The plaintiff apprehending that on the basis of D the finding of the Munsif the Sub-Divisional Magistrate is likely to deliver the possession of the land in dispute to defendants 1 to 5 by 3.6.1971, filed a suit for declaration and injunction.

In the written statement filed by the appellants herein the averments E and the allegations made in the plaint were denied. The case pleaded by the said defendants in the plaint or original suit No.58/1969 was reiterated in the written statement filed by them. The learned Additional Civil Judge, Mathura in the judgment dated 21.12.1974 decreed suit no.58 of 1969 and dismissed suit no.58/1971. The operative portion of the judgment reads as follows:

F "The suit no.58/1971 is dismissed with costs payable to the covenantees who are defendants no. 1 to 5. The other defendants would get no costs. The suit no. 58 of 1969 is decreed with costs payable by all the defendants of that suit. The 5 covenantees Ram Khilona and others who are plaintiffs of suit no.58/1969 will deposit Rs. 2000 in 45 days from the date of this order. In default their suit G is to stand dismissed with costs to the defendants of that suit. Upon the deposit of the amount within the time allowed the original owners and vendees who are the defendants of suit no.58/1969 would execute the sale deed in favour of the covenantees on a date notified by the latter by registered mail. If the original owners and vendees do not H comply with the covenantees notice appointing the date for the

execution of the sale deed the deed would be executed by the court at the instance of the covenantees and at the expenses of the owners and the vendees. A

Let a copy of this judgment be placed upon the record of the original suit no.58 of 1971."

B

The respondents 1 and 2 herein filed civil appeal Nos. 3 and 4 of 1975 challenging the judgment of the learned Additional Civil Judge. The appeals were dismissed by the learned Additional District Judge, Mathura by the judgment rendered on 6.5.1978 and decrees of the trial court in both the suits were confirmed. Being dissatisfied with the decision of the Courts below C respondents 1 and 2 herein filed second appeal Nos. 1974/78 and 1975/78 in the High Court which were decided by the Judgment dated 24.9.1996 of the single Judge allowing both the appeals, as noted earlier. The said judgment is assailed by the appellants in the present appeals.

At the time of admission of the appeal, the High Court formulated the D question of law for examination in following terms :

"Whether the transfer in favour of the defendant-appellants (vendee for this judgment) was protected by Section 41 of Transfer of Property Act and/or Section 19 of the Specific Relief Act"?

E

In the impugned judgment the learned Judge has observed that : "Shri Murlidhar, learned Senior Advocate who appeared for appellants (vendees) in both the appeals has not given emphasis to challenge the finding of fact which have been recorded by the courts below for decreeing the suit No.58 of 69 and for dismissing Suit No.58 of 71 against which review can be F legally sought by the appellants in substantial question of law having been either wrongly decided or left undecided though it was required to be decided for having arisen in the case."It has been further observed in the judgment that "Shri Murlidhar also did not press the appeal on the question of law on which the appeal was admitted for hearing by this court at the stage of Order G 41 Rule 11 of the Code of Civil Procedure." After discussing the merit of the question of applicability of Section 41 of the Transfer of Property Act, the High Court observed "On the findings of fact finally settled by the courts below, concedes Mr. Murlidhar also, vendees cannot invoke the provisions of Section 41 of the Transfer of Property Act. Protection of the said provision for saving the transfer of the land in suit in their favour therefore cannot be H

availed of by the vendees on the facts finally settled by the courts below Section 41 is not attracted."

Regarding Section 19 of the Specific Relief Act, the High Court observed that the said section has no application to the case at all. The resultant position after discussion of the substantial question of law framed was: "the result of the above discussion therefore is that this appeal cannot succeed on the points raised in its support in the memo of appeal". Thereafter the High Court proceeded to consider the contention raised by Shri Murlidhar, learned counsel for the appellant, that in view of the observations made by the lower appellate Court which has been quoted in the impugned judgment the position was clear that previously the witnesses in the document were Harchandi and Tuhi Ram but subsequently by making some over-writings the names of Mool Chand and Ram Swarup were made witnesses in the document. The relevant observation stated to have been made by the lower appellate Court to this effect reads :

> "A mere look to this stamp reveals that previously the witnesses were somebody else and by doing overwriting Mool Chand and Ram Swarup were made witnesses. If really Mool Chand and Ram Swarup were the attesting witnesses of the deed, their thumb impression and signatures respectively should also have been on the first stamp paper. It appears that originally Harchandi and Tahi Ram were the witnesses even on the second stamp paper, but subsequently the names of Mool Chand and Ram Swarup were introduced by doing overwriting. This raises a strong suspicion against the genuineness of the fact that Mool Chand and Ram Swarup were really the attesting witnesses originally and in their presence the deed was executed. Keeping this fact in view, the evidence of Mool Chand and Ram Swarup will be judged."

From the observations of the lower appellate Court the High Court inferred that the case of the appellants that alterations had been made by the covenantors in the agreement of sale (Ext.12) for introducing Ram Swarup and Mool Chand, two independent persons, as marginal witnesses of the said agreement. The High Court took the view that the interpolation for introducing the two independent marginal witnesses in the agreement of sale was made so as to give authenticity to the said agreement of sale. Then the High Court considered the question whether the interpolation made in the document was a material alteration or not? The High Court took note of the decisions of this Court in the case of *M.S. Anirudhan* v. *Thomco's Bank Ltd.*, AIR (1963) SC 746

which was cited by the learned counsel for appellants before the Court and the case of *Kaliana Gounder* v. *Palani Gounder and Anr.*, AIR (1970) SC 1942 which was cited by the learned counsel for the respondent. The High Court also took note of the rule laid by the Supreme Court to the effect :

> "The Supreme Court, however, proceeded to lay down the law on the subject presuming that the change complained of by the defendant was made subsequently by an unilateral act of the plaintiff or on his behalf. The Supreme Court held that since the additions made in the instrument were inconsequential as it merely expresses that which was implied by law in the deed as originally written, or which carries out the intention of the parties to the agreement already apparent on the face of the deed and that the alteration does not otherwise prejudice the party who is liable under the agreement deed. The alteration was not a material alteration."

Testing the case on hand in the light of the principles noted by him, the learned Judge observed : "In this background if we test the alteration in question there should be no iota of doubt left to conclude that by the said alteration the covenantors tried to add sanctity to the instrument (Ext.12) which in their opinion, with the signatures of their relatives and enemies of vendees who were originally projected as witnesses of the execution of that instrument, was not likely to pass the test of genuineness with the tough scrutiny of the law courts therefore, they thought it necessary to introduce new names of other two marginal witnesses in place of the original one's to rule out any doubt about its genuineness." The learned Judge further observed in the judgment : "the alteration made by the covenantors in the agreement deed was thus a material alteration as it was to the prejudice of the vendors who, in view of the testimony of those two witnesses, whose names were subsequently introduced in it, were faced with a difficult situation of failing in their endeavour to prove that the said agreement deed was fraudulently manufactured by covenantors on a document and their signatures were obtained on the pretext of transfer of some other property". The learned Judge summed up his findings in the following words :

> "On the facts, circumstances and the legal position already discussed in detail herein above I am of the view that the alteration which was made in the agreement deed by the covenantors must be held to be a material alteration which had the result of avoiding the agreement

A at the option of the vendors and was rendered void ab initio having no binding effect on the vendors. The agreement, therefore, cannot be enforced against the vendors for the reason of its having been altered without their knowledge and consent."

B From the discussions in the impugned judgment the sole question that arises for consideration in these appeals is whether the High Court was right in setting aside the concurrent decision of the courts below on recording a finding that the alterations found to have been made in the agreement of sale by introducing two more marginal witnesses was a material alteration of the document?

C

In Halsbury's Laws of England, 4th Edition at page 552 para 1378 it is observed :

"A material alteration is one which varies the rights, liabilities, or
D legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

E The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed."

In paragraph 1383 at page 555 it is observed :

F "An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed; and this is equally the case whether the alteration was made by a stranger or by a party to the deed. Thus the date of a deed may well be filled in after execution; for a deed takes effect from the date of
G execution, and is quite good though it is undated. So, also, the names of the occupiers of land conveyed may be inserted in a deed after its execution, where the property assured was sufficiently ascertained without them. It appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally
H written, or which carries out the intention of the parties already

apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable under it." A

It has not been held by the High Court and indeed it was also not contended before us that the agreement of sale, as it stood originally, was invalid for any reason. Indeed the position is accepted that the document did not require any marginal witnesses for validity in law. All that has been observed by the B High Court is that the covenantees, appellants herein, might have had an apprehension that as the marginal witnesses in the original document were persons closely related to them the Court may not readily accept the case of the plaintiffs regarding the agreement of sale; therefore, they subsequently introduced two independent persons as marginal witnesses in the document C which amounted to interpolating with the documents. We find from the discussions in the judgment of the trial Court and the first appellate Court that the question of addition of marginal witnesses in the document after its execution was considered by the Courts and was not believed. The observations of the first appellate Court quoted by the High Court in the impugned judgment were mere observations which, as the judgment shows, was not taken as a D substantial matter against the credibility and acceptability of the case of the plaintiffs in Civil Suit No.58 of 69. As noted earlier, the trial Court and the first appellate Court had concurrently accepted the case of the plaintiffs in C.S.No.58 of 69 and had rejected the case of the plaintiffs in C.S.No.58 of 71. The Courts in exercise of the discretionary jurisdiction vested in them E under Section 20 of the Specific Relief Act had decreed the suit for specific performance of the agreement of sale. The High Court in the impugned judgment has not discussed any legality by the courts below in taking the decision. It appears that the High Court has decided the second appeal on a question neither taken in the memorandum of appeal nor taken in that form before the courts below and has upset the concurrent decisions of the courts F on a finding recorded by it. The approach of the High Court in the second appeal was clearly against the law and spirit of Section 100 of the Code of Civil Procedure. Further, as discussed earlier, the view taken by the High Court that the interpolation said to have been made by the covenantees in the agreement of sale does not stand scrutiny under law. As observed earlier such G alteration, assuming that it was made subsequently, did not bring about any change in the validity and enforceability of the agreement of sale. We are constrained to observe that the finding recorded by the High Court appears to be based on surmise. Therefore, the judgment is clearly unsustainable.

Accordingly, the appeals are allowed with costs. The common judgment H

A and decree passed by the High Court on 24th September, 1996 in Second Appeal Nos.1974 of 1978 and 1975 of 1978 is set aside and the judgment and decree passed by the First Additional District Judge, Mathura in Appeal Nos.3-4 of 1975 confirming the judgment and decree in Suit Nos.58 of 1969 and 58 of 1971 is restored. The appellants shall be entitled to a sum of Rs. 20,000 as hearing fee from the respondents.

B

N.J. Appeals allowed.