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DHARMABIRI RANA

v.

PRAMOD KUMAR SHARMA (D) THR. LRS. & ANR.

(Civil Appeal No. 9906 of 2010)

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OCTOBER 05, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

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Specific performance: Suit for specific performance of agreement to sell property – Denial of title by defendant – Held: The Court can order specific performance of an agreement only when it is proved that a person allegedly executing an agreement to sell has right of transferring the property – When defendants deny their entitlement and right, title and interest in the suit property, the said question is necessary to be answered before decreeing the suit – In the instant case, the trial court after noticing the said pleading on behalf of the defendants did not enter into this question or returned any finding as to ownership of the suit property – It was not proved that any power of attorney was executed so as to enable defendant no.2 to enter into agreement to sell and further the execution of agreement was also not proved – Although, copy of alleged power of attorney was filed by appellant before this Court but both the Courts having not considered the same, it was not necessary for this Court to consider the same in this appeal – Suit was rightly dismissed by first appellate court – No interference called for.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No.9906 of 2010.

From the final Judgment and Order dated 19.07.2005 passed by the High Court of Delhi at New Delhi in R.S.A. No.171 of 2005.

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Rakesh Khanna, Sr. Adv., Dr. L. S. Chaudhary, Ajay Chaudhary, Ms. Rakhi Tomar, Anurag Tomar, Parambir Singh, Viresh Chaudhary, Ms. Manju Jetley, Advs. for the Appellant.

P. N. Gupta, Ms. Bharti Gupta, Manish Aggarwal, Ms. Runal Rastogi, Advs. for the Respondents.

Respondent (in-person).

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The Order of the Court was delivered by A

ASHOK BHUSHAN, J. This Civil Appeal by the plaintiff has been filed against the judgment of High Court of Delhi dated 19.7.2005 dismissing the Regular Second Appeal of the appellant. Brief facts of the case necessary to be noted for deciding this Civil Appeal are:-

- (a) The parties shall be referred to as described in the plaint. The plaintiff filed Suit No. 541 of 1990 praying for specific performance of a contract dated 04.01.1987. Plaintiff's case in the plaint was that defendant No. 2 representing himself to be power of attorney holder of defendant No. 1, his brother, entered into an agreement to sell dated 04.01.1987 for a plot of land measuring 150 sq. yds. for a consideration of Rs.60,000/- Rs.5,000/- was paid by the plaintiff towards earnest money to defendant No.2. Plaintiff claims that possession was also handed over. On 07.01.1987, the terms of the agreement to sell were modified by enhancing the consideration from Rs.60,000/- to Rs.65,000/-. Plaintiff claimed to approach the defendant No.2 on 25.01.1987 for execution of Sale Deed, which was declined by defendant No.2 on the pretext of his brother having gone abroad and so defendant No.2 refused to accept the balance consideration. The defendant No.2 and his father when sought to dispossess the plaintiff of the suit property, a suit was filed for Permanent Injunction against defendant No.2 and his father. On the above pleading, suit was filed for specific performance of the contract. B
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- (b) Written Statement was filed both by defendant Nos. 1 and 2. Defendant No.1, in his written statement, pleaded that he is neither the owner of the suit property nor entered into an agreement with the plaintiff. The agreements dated 04.01.1987 and 07.01.1987 were denied. It was pleaded that defendant NO. 1 having no right, title or interest of any nature in the suit property, there is no question of him acting in any manner to transfer the suit property to the plaintiff. Defendant No.2 in his written statement denied execution of agreement dated 04.01.1987. It was further denied that defendant No. 1 is the owner of the property. It was further denied that defendant No.2 is the attorney of defendant No.1. Alleged original agreement dated 04.01.1987 as well as modified agreement dated 07.01.1987 were F
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A also denied. It was pleaded that defendant No.2 is neither the owner of the suit property nor attorney. Oral evidence was also led by the plaintiff and defendants. The trial court framed the following four issues :-

B “1. Whether the plaintiff has locus standi to file the Present Suit?

2. Whether the suit has not been properly valued for the purpose of court fee and Jurisdiction?

3. Whether the plaintiff is entitled to decree as claimed?

C 4. Relief”

D (c) The trial court vide its judgment dated 30.11.1999 decreed the suit for specific performance of contract in favour of the plaintiff. A Regular First Appeal was filed by both the defendants, i.e. defendant Nos. 1 and 2. The appeal was allowed by Additional District Judge on 16.09.2000 dismissing the suit. The judgment dated 16.9.2000 was subsequently recalled and the appeal was heard afresh. The Additional District Judge vide its judgment dated 02.04.2005 again allowed the appeal, dismissing the suit. Aggrieved by the judgment of the Additional District Judge dated 02.04.2005, the Regular Second Appeal was filed before the High Court by the plaintiff/appellant, which has been dismissed on 19.07.2005. Aggrieved against judgment of the High Court, this appeal has been filed.

E 2. Shri Rakesh Khanna, learned senior counsel has appeared for the appellant and Shri P.N. Gupta, Advocate has appeared for the
F respondent.

3. Learned senior counsel appearing for the appellant contends that plaintiff had proved by leading oral evidence that agreement was executed by defendant No. 2 as power of attorney holder of defendant No.1 and payment of earnest money had also been made. The trial
G court has rightly granted the decree of specific performance of the contract. He contended that execution of agreement having been proved, the First Appellate Court has erred in law in holding that agreement was not executed, relying on some inconsistencies in the oral evidence, which is unsustainable. He submits that defendant No.1 in his written statement has not pleaded that he never executed any power of attorney in favour
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of defendant No.2. Further, the handing over of the possession to the plaintiff on 04.01.1987 clearly proves the factum of agreement. He further submits that Court below have erred in not looking to the copy of the power of attorney dated 04.11.1986 executed by defendant No.1 in favour of defendant No.2, which was on the record of trial court, which has also been filed in this appeal as Annexure-P-12.

4. Learned counsel for the respondent refuting the submission of counsel for the appellant contends that the First Appellate Court has rightly held that agreement dated 04.01.1987 is not enforceable. Learned counsel for the respondent submits that on consideration of entire facts, First Appellate Court has rightly held that execution of agreement was not proved by the plaintiff. He further submits that in fact, neither defendant No.1 nor defendant No.2 were owner of the property and owner of the property was father of defendants Shri Prabhu Dayal Sharma. Defendants, being not owner of the property, there is no question of entering into any agreement for sale of the property. The defendant No.2 has denied being power of attorney holder of defendant No.1, hence there was no question of entering into any agreement of sell by the defendant No.2 on 04.01.1987. It is further submitted that the alleged power of attorney is an unregistered document, which was not relied by plaintiff before the Courts below; he cannot be allowed to place any reliance on the said unregistered power of attorney before this Court.

5. We have considered the submissions of the learned counsel for the parties and perused the records.

6. As noticed above, the trial court has framed only four issues. The defendant No.2 has clearly pleaded that he is not the power of attorney holder of defendant No.1 and further both the defendants having pleaded that they are not owner of the property, the trial court ought to have framed a specific issue so as to focus its judgment on relevant issues, which have come before it for consideration. However, the Appellate Court has adverted to the non-framing of the specific issue and having taken the view that the Issue No.3 was a wide issue, which covers the entire case of the plaintiff seeking execution of agreement to sell, we now proceed to consider the findings recorded by the First Appellate Court.

7. It is relevant to notice that before the trial court in spite of there being denial of title to the property by the defendants, no finding was

A returned by the trial court that defendants are the owner of the property, competent to enter into agreement to sell. The trial court also noticed that defendant No.1 in the written statement has pleaded that he has no right, title or interest of any nature in the suit property but no finding was returned that defendant No.1 is the owner of the property. The entire discussion by the trial court is in Para 10 of the judgment, which is as follows:-

“ISSUE NO.3, the onus is on the plaintiff to show that she is entitled for a decree of performance of a agreement to sell. In the written statement defendant No.1 has stated that he has no right title interest of any nature whatsoever in respect of suit property and he has been unnecessarily dragged. It is stated that the defendant No.1 is neither the owner of the suit property nor ever entered into agreement called respect to the same with any person what to talked, of the alleged agreement with the plaintiff. The defendant No.2 has also deliberately denied the averments of the plaintiff. DW2 Krishan Kumar has even denied his signature on EX.PW1/4. In the written statement they have not disclosed that Rakesh Kumar is the owner of the property and earlier Prabhu Dayal Sharma was the owner of the suit property, DW3 Naveen Gautam has also stated in his testimony about the document having been executed in his presence. He has admitted his signature at Mark ‘C’ in Ex.D1 mark ‘C’ Ex.D2 and mark ‘C’ in Ex.D3. He further stated that he cannot be said if the document D1, D2 and D3 are forged and genuine documents. DW1 is Rakesh Kumar has stated that he is owner of the suit property and earlier Sh. Prabhu Dayal was owner of the suit property and he had purchased the same for a sum of Rs.70,000/- on 12.12.1986. He has stated in his cross examination that he does not remember the same from Sh.Prabhu Dayal at the time of execution of Power of Attorney as to whether there is any litigation on the plot in question. He has further stated that he did not receive any receipt of Rs.70000/- as consideration of the suit property nor it was ever executed. From the testimony of DW1 & DW2 and DW3, it is clear that the document D1, D2 and D3 were manipulated at a later stage. The testimony of DW1, DW2 and DW3 does not inspire any confidence. Therefore, I hold that he plaintiff is entitled for a decree of specific

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performance of agreement to sell. Issue No.3 is decided in favour of plaintiff and against the defendant.” A

8. The First Appellate Court has after considering the entire evidence have returned following findings:-

- (i) It is not established that agreements had actually been executed by defendant No.2. B
- (ii) There is no evidence on record to prove the title of the defendant No.1 in respect of the suit land.
- (iii) There is no evidence to establish that the defendant No.1 had ever authorized defendant No.2 to enter into agreement to sell. C

9. In paragraph 12 of the judgment, after considering the entire oral evidence, the First Appellate Court held that it is not established that the agreement had actually been executed by appellant No.2 (defendant No.2). Further following findings have been recorded in paragraph 15:- D

“The result of the aforesaid discussion is that in the absence of any evidence coming on record that appellant No.1 was owner of the suit property or appellant No.2 was having any power of attorney on behalf of appellant No.1 execute the agreements in favour of the respondent, no documents for transfer of title in respect of suit land can be directed to be executed by the appellants by way of a decree for specific performance of agreement of sell vide Ex.PW1/1 and PW1/3. The agreements are thus illegal, unenforceable and to decree for specific performance can therefore be passed in favour of the respondent.” E F

10. That after returning the aforesaid findings, the appeal was allowed and suit was dismissed. The High Court vide its judgment dated 19.07.2005 has confirmed the findings recorded by the First Appellate Court. The High Court held that alleged agreement claimed by the plaintiff was not enforceable. The High Court held that there is no substantial question of law, hence the Second Appeal was dismissed. G

11. The Court can order specific performance of an agreement only when it is proved that a person allegedly executing an agreement to sell has right of transferring the property. When defendants have denied H

- A their entitlement and right, title and interest in the suit property, the said question was necessary to be answered before decreeing the suit. The trial court after noticing the said pleading on behalf of the defendants did not enter into this question or returned any finding that defendants are owner of the suit property. Further, essential findings pertaining to right of the defendant to transfer the property being not there, the passing of
- B a decree of specific performance was clearly erroneous. The Appellate Court has rightly set aside the decree of specific performance of contract after recording the finding that defendant No.1 is not the owner of the property. It is not proved that any power of attorney was executed so as to enable defendant No.2 to enter into agreement to sell and further
- C the execution of agreement has also not been proved. Although, copy of alleged power of attorney dated 04.11.1986 which is admittedly an unregistered document has been filed by appellant before this Court as Annexure-P12, but both the Courts having not considered the same, it is not necessary for this Court to consider the same in this Civil Appeal.
- D 12. In view of the above findings recorded by the First Appellate Court, the suit was rightly dismissed. The High Court has also rightly dismissed the Regular Second Appeal holding that it does not contain any substantial question of law. We do not find any substance in the submissions of the learned counsel for the appellant. With the result, the
- E Civil Appeal is dismissed.

Devika Gujral

Appeal dismissed.