

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 12.01.2010

+ CS(OS) 953/2009, I.A. Nos. 6920/2009 (Under Order 39 Rule 1 & 2) & 16625/2009

SH. ANIL KUMAR

..... Plaintiff

Through : Mr. K.C. Mittal and Mr. Sujeet Kumar Singh, Advocates.

versus

SMT. SEEMA THAKUR & OTHERS

..... Defendants

Through : Mr. Vijay Kapoor, Attorney of Smt. Seema Thakur.

Mr. Dinesh Goyal, Advocate, for Defendant Nos. 5, 6 and 8.

CORAM:**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

S.RAVINDRA BHAT, J.

1. The plaintiff in this suit, seeks a decree for declaration that the preliminary decree issued by this court, in CS (OS) 2211 of 2003, ("the partition suit") dated 16.11.2005, is null and void, and that it was obtained by misrepresenting and playing a fraud. A decree for permanent injunction, restraining the defendants from seeking to dispossess the plaintiff, from interfering with his possession of the suit property, as well as Shop Nos. 121, 122 and 136, Shankar Road Market, New Rajinder Nagar, (hereafter "the shops") is sought.

2. The suit alleges that the plaintiff purchased the three shops from the first defendant, for Rs. 1 crore. It is contended that a bakery was run under the style "New Grand Bakery" from the shops, and the plaintiff purchased the entire property along with the assets of the bakery. It is stated that a sum of Rs. 5 lakhs was paid as advance, for which a receipt was executed by the said defendant, who is the wife of one late Bansi Lal. It is stated that though the receipt does not bear a date, the transaction took place on 10.12.2003. It is alleged that another amount of Rs. 25 lakhs was paid on 01.08.2004; the defendant was dilly-dallying the execution of the documents. The plaintiff says that a sum of Rs. 45,000/- was given through his brother-in-law to the first defendant's attorney, Mr. Vijay Kapoor, and deposited with the treasury, for purchase of non-

judicial stamp paper. According to the suit, the plaintiff was handed over possession of the properties; Shop No. 121 was owned by the defendants, whereas in the other shops, they were lessees. The plaintiff further submits that a partnership deed was executed between him and the first defendant, and that the firm is registered with the Registrar of Firms, Government of NCT of Delhi. It is stated that the plaintiff was thus in possession of the premises, ever since 2003, when on 16.11.2005, this Court passed an order in the partition suit.

3. The plaintiff has, in the suit, reproduced the order of court dated 16.11.2005. The Court noticed that the parties were embroiled in other litigation, and essentially the dispute pertained to the properties and assets of late Kanshi Ram Thakur (father of Bansi Lal, who was the defendant's husband). The first defendant in the partition suit was the widow of Kanshi Ram Thakur; the second defendant was the son, and the other two defendants, his daughters. The Court determined that the share of Bansi Lal's branch was 20% in the suit properties – the decree clearly mentioned them; they correspond to the properties that are subject matter of the suit. The plaintiff has described the parties to the suit, and also mentioned that an *ad interim* injunction restraining disposal of the property was issued by the Court, on 26th December, 2003. He however, alleges that this order was not within his knowledge. The suit also refers to an order of 25.02.2004, in a contempt petition, where the plaintiff was impleaded as an alleged contemnor. In the contempt proceeding, it was alleged that the present plaintiff had sought to disturb the possession and existing *status quo*.

4. It is submitted that the plaintiff became aware of the alleged baseless and frivolous statements made by the parties before the Court, in the partition suit, which led to the decree dated 16.11.2005, that none of them would create any third party interest. He submits that the parties played a fraud on this Court, while making the statement, since the property had already been transferred to him. On this premise, it is contended that the decree dated 16.11.2005 cannot stand, and has to be set aside as illegal and void.

5. The plaintiff lastly mentions that he had filed an application, IA 10275/2008 to be made a party in the partition suit, as the decree issued there and the further proceedings were prejudicing him. It is submitted that another application for recalling the order and decree dated 16.11.2005, was also moved before Court. Both the said applications were dismissed –as withdrawn, to enable the plaintiff to seek appropriate remedies to challenge the said decree. It is submitted by

the plaintiff, through his counsel, who reiterated the averments in the suit and other applications, that the decree questioned in this case cannot stand legal scrutiny. The plaintiff contends that the defendant was conscious of the fact that the plaintiff had acquired title and interest in respect of the suit property, by virtue of the transaction entered into with her in 2003, and later, having received substantial amounts, to the extent of Rs. 30 lakhs, and therefore, was duty bound not to make any statement that would have affected his rights. On the contrary, she did so, and that was the foundation of the decree impugned in the case.

6. It is next contended that an act of fraud unravels the entire transaction; the first defendant having accepted a substantial amount of Rs. 30 lakhs, could not have taken any step that would have injured an innocent third parties' interest, as in the plaintiff's case. Counsel contends that such agreement or transaction (injuring a third party's interest) is void, by virtue of Section 23 of the Contract Act, and any decree, which is based on such agreement or contract, cannot stand judicial scrutiny. The plaintiff also contends that the documentary evidence – in the form of the registered partnership deed further corroborates the creation of his rights, which the first defendant was bound to honour, and not affect in any manner whatsoever. He also relies on the receipts allegedly executed by the first defendant, while receiving the sum of Rs. 30 lakhs.

7. The defendants submit that the suit, as existing is liable to be rejected as barred in law. It is claimed that even if the averments in the plaint are taken on their face value, the plaintiff has not established how, in the absence of any Will or other instrument, conferring exclusive title to the first defendant, she could have passed it on to him. It is submitted that the suit is one for declaration. Counsel points out that the plaintiff does not seek specific performance of any agreement to sell; nor does he contend that any conveyance, or registered document of title, in respect of the suit properties, was executed in his favor. It is submitted that the plaintiff was also aware that the property was not owned exclusively by the first defendant, but she was a mere owner of an undivided, and later, a defined share. Under these circumstances, in the absence of any transaction with the other owners of the property (who were defendants in the partition suit, and are defendants in the present suit) there can be no question of his claiming any legitimate or enforceable right in the said properties. It is submitted that besides, the allegation by the plaintiff about having entered into an agreement to sell the property (with the defendant No. 1) is highly dubious and questionable. Counsel stressed that the plaint is entirely lacking in any particulars

about the said agreement to sell, apart from mentioning the alleged consideration. The other essential ingredients that make a valid agreement to sell, such as the time frame within which the sale deed was to be executed, the party required to bear the expenses for execution of conveyance, and such like essential terms of the bargain do not appear from the pleadings or any other document, placed on the record.

8. The defendants also object to the maintainability of the suit, contending that it is time barred, having been filed beyond the period of limitation prescribed for the purpose, under the Limitation Act. Here, it is stated that Part III of the schedule to the Limitation Act, pertains to suits for declaration; Articles 56 to 57 deal with specific situations, states that for obtaining any “other” declaration, the period of limitation prescribed is three years, which commences when the right to sue accrues.

9. The above discussion shows that the plaintiff seeks a declaration that this Court’s decree in the partition suit is void. The challenge is based on the assertion that the defendants (the first defendant and her children being plaintiffs in that suit, and the other defendants being the contesting parties in the said suit) could not have made a statement on 16.11.2005, which led to the preliminary decree, since the plaintiff’s right to the property had accrued, by virtue of the Agreement to Sell, the Partnership deed, and possession having been handed over to him. The defendants argue that the suit is not maintainable; one, that the plaintiff does not have any enforceable right, title or interest in respect of the suit properties, and that the suit is time barred.

10. Now, the above narrative would disclose that the plaintiff nowhere asserts that the first defendant had *exclusive* right, or title to the suit properties. He does not ascribe knowledge on the part of the other defendants (who were co-sharers, held entitled to specific shares in the property, by the Court’s decree of 16.11.2005), to the Agreement to Sell, relied upon in the suit. He does not also disclose how, in the absence of any Relinquishment, or even a testamentary disposition favouring the first defendant, she could have conveyed title in respect of the entire property. Facially, therefore, he does not anywhere deny the ownership of the other co-sharers, and that the first defendant could at best have represented a 1/5th or 20% share in respect of the suit properties. In these circumstances, the Court is of opinion that the plaintiff has not articulated any legally enforceable right, to claim declaration that the previous partition decree of this Court is vitiated by fraud, or any other legally sustainable factor, invalidating it.

11. The averments in the suit would show that the plaintiff is claiming title to the suit properties, on the basis of an Agreement to Sell. The precise terms of such Agreement to Sell, allegedly entered into with the first defendant, are unknown. A contract to sell immovable property is one *species* of contract. No provision of law obliges such contracts to be in writing. The judgments of the Supreme Court have repeatedly emphasized that there can be binding oral agreements to sell immovable property (Ref. *V.R. Sudhakara Rao v. T.V. Kameshwari*, 2007 (6) SCC 650; *Kollipara Sriramulu v. T. Aswathanarayana*, AIR 1968 SC 1028; etc). The question is not whether the plaintiff has proved existence of an agreement to sell, with the plaintiff, but if the materials and pleadings on record show that such contract had come into existence.

12. The rulings of this Court in *Aggarwal Hotels (P) Ltd. v. Focus Properties (P) Ltd.*, 63 (1996) DLT 52; and *Amarjit Singh Johar & Company (DC) v. Shri Prakash Chand Brahmin*, 79 (1999) DLT 289, state what are essential ingredients to an agreement to sell immovable property. Those were cases where the plaintiff had *inter alia*, relied on a receipt of money. The Court held that the following four essential ingredients should be necessary for an inference about *prima facie* existence of a contract to purchase property:

(i) particulars of consideration;

(ii) certainty about identity of parties

(iii) certainty about to the property to be sold; and

(iv) certainty as to other terms relating to probable cost of conveyance, time, etc.

The Court also held that in the absence of any of the above elements, it could be concluded that there was no binding agreement. This view was endorsed, and followed *High Way Farms v. Sh. Chinta Ram*, 85 (2000) DLT 355.

13. In *Mool Chand Bakhru v. Rohan*, (2002) 2 SCC 612, the Supreme Court held that when an oral agreement is put forward, for purchase of property (in that case an inference was drawn from letters which adverted to such oral agreement), the terms of the agreement should be ascertained with reasonable certainty. Essential terms of the agreement to sell, such as the time-frame within which the sale deed is to be executed, and also who would pay the registration charges etc. should be discernable.

14. As noticed earlier, barring the total consideration and the subject matter, the plaint – and indeed the documents filed along with the suit- do not disclose what were the other essential conditions, such as the time frame for payment, the party required to bear the cost of conveyance, or the party responsible for seeking approvals, etc. Therefore, the plaintiff has not shown an enforceable right even to claim conveyance. Admittedly, the total consideration payable was Rs. 1 crore out of which Rs. 30 lakhs were paid. The plaintiff does not even state that any other amount was tendered, nor discloses any particulars in that regard. In these circumstances, the Court infers no *locus* subsisting or inhering in the plaintiff, to claim a declaration as sought.

15. As far as the objection to maintainability of the suit on the ground of limitation is concerned, the defendant's arguments here are well founded. The plaintiff does not suggest that he became aware of the decree recently; on the contrary, the suit is specific that he was served with notice in the contempt proceedings, after the decree dated 16.11.2005; he appears to have contested it. He also sought impleadment in that suit, through an application, which was not pressed, and rejected in April, 2009. It is only thereafter, that he has filed this suit, on 20th May, 2009. It is not as if the plaintiff was unaware about the decree; he did not choose, however, to take any remedies within the time prescribed under the Limitation Act- be it either Article 58 or Article 59 of the Schedule to the Limitation Act.

16. It has been held by the Supreme Court, in *T.Arvindandam v. T.V. Satyapal* AIR 1977 SC 2421, that the Court should look at the materials on record, and go beyond cleverly drafted pleadings, in an attempt to nip frivolous litigation at the bud, or cases which are plainly not tenable or maintainable. Here, the averments and materials disclose that the suit is not only time barred, but also that the allegations, taken together project a case, which disclose admissions that render the suit liable to be rejected, as barred in law.

17. For the above reasons, the suit is not maintainable, as barred in law; the same is, along with the applications, rejected.

**S. RAVINDRA BHAT
(JUDGE)**

JANUARY 12, 2010