A. RAMA RAO AND ORS. A

v.

RAGHUNATH PATNAIK AND ORS.

APRIL 24, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.] B

Notice—unregistered agreement for sale of suit property between plaintiff and one defendant—Plaintiff came to know that defendant entering into agreement with other two defendants in respect of the same property— Notice by the plaintiff by post to all the defendants regarding subsistence of earlier agreement—Refusal to accept—Suit for specific performance of earlier agreement—Absence of specific plea regarding dispatch of the notice by post and/or its refusal—Courts below passing decree of specific performance holding that in view of the refusal, knowledge about earlier agreement to the defendants could be inferred—On appeal, held: The finding regarding refusal to accept the notice is vague—Several pleas in respect of the issue had not been considered by Courts below—Direction to High Court to record its finding on the question of service of notice and on the effect of the absence of specific plea regarding dispatch of notice or its refusal—The findings to be placed before Supreme Court. C D E

Respondent No. 1-Plaintiff filed a suit for specific performance of contract against the appellant defendant no.1. It was alleged therein that there was unregistered agreement for alienation of the suit property in favour of the plaintiff by defendant No. 1. When the plaintiff came to know that despite the earlier agreement, defendant No.1 wanted to sell the suit property to defendant Nos. 2 and 3, he sent notice to the defendants by post intimating about the subsistence of the earlier agreement. The notices returned unserved on their refusal. Trial Court decreed the suit and single Judge of High Court dismissed the appeal thereagainst holding that once there was refusal to receive the notice, it is presumed that the defendants had notice of the earlier agreement. In Writ appeal, Division Bench of High Court also concurred with the finding of the courts below. F G

In appeal to this court, appellants contended that in absence of examination of postman it was not permissible to draw an inference of refusal; H

A and that there was no specific plea regarding dispatch of notice by post and/ or its refusal.

Adjourning the matter, with direction to High Court to place its finding on certain questions before this court, the Court.

B HELD: 1. The conclusions of the High Court on the issue of refusal to accept the notice claimed to have been sent by registered post, is rather vague. The High Court has merely concluded that all other points have been considered by Single Judge. But it has been brought on record that effect of a decision of this Court had not been considered though specifically argued. The pleas that when the defendant No.1 on oath stated that he did not receive C the notice allegedly sent by post, the same would prevail over the postal remarks that it was "refused" unless the postman was examined; and that there was no specific averment regarding sending the notice by post or its refusal, had not been considered. [Paras 8 and 9] [530-G, H; 531-A]

D 2. High Court is directed to record its findings on the question of service of notice and also the effect of the absence of any definite and specific plea regarding dispatch of notice by post and/or its refusal after granting opportunity to the parties to place their respective stand. [Para 11] [531-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5130 of 2005.

E

From the Judgment and Order dated 17.10.2001 of the High Court of Orissa in A.H.O. No. 96 of 1995.

Vinoo Bhagat and Rutwik Panda for the Appellants.

F R.L. Khurana, M.C. Dhingra and Sanjay Jain for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment rendered by a Division Bench of the Orissa High Court dismissing the Letters G Patent Appeal filed by the appellants.

2. A brief reference to the factual aspects would be necessary in view of the order proposed to be passed.

3. The suit which forms the subject matter of controversy in the present H appeal was one for specific performance of contract filed by respondent No.1-

Raghu Nath Patnaik as the sole plaintiff.

4. In the suit it was contended that on 7.11.1983 defendant No.1 executed an unregistered plain paper agreement in respect of the suit scheduled house site agreeing to alienate the same in favour of the plaintiff for a consideration of Rs.25,000/- and as a part payment Rs.5,000/- was paid. Violating the terms of the agreement, he entered into another agreement for the same site with defendant Nos.2 and 3 on 14.3.1984. After coming to know of the said arrangement, plaintiff issued notice to all the defendants on 29.3.1984 intimating about the subsistence of the earlier agreement between him and defendant No.1 and requesting them not to enter into any sale transaction. The notice issued to defendant No.1 returned unserved while the notices issued to defendants Nos.2 and 3 returned unserved on their refusal. When the plaintiff came to know that the defendants were going ahead for execution of sale deed, he instituted a suit for specific performance of the contract and other ancillary reliefs. The defendant No.1 filed a written statement while the other two defendants filed separate written statements. The plea was one of denial of the execution of the purported earlier unregistered agreement. The Courts below took the view that once there was refusal by defendant No.1 to receive the notice, it has to be held that he had notice of the earlier agreement. The trial Court decreed the Suit and the learned Single Judge dismissed the appeal. Letters Patent Appeal was preferred where several pleas were taken. It was pleaded that the plaintiff had failed to establish the fact that defendant Nos.2 and 3 had knowledge about the existence of the agreement prior to the execution of the sale deed/agreement to sale dated 14.3.1984 and on that ground alone the suit should have been dismissed. It was pleaded that defendant Nos.2 and 3 are *bona fide* purchasers for value without notice of the so called previous unregistered agreement. A plea relating to absence of pleading or evidence of the plaintiff to prove that he was always ready and willing was also taken. Several other pleas were raised regarding the acceptance of the documents. It was pointed out that there was no specific averment about the refusal of the defendants to receive the notice because it is only stated that the defendants evaded to receive the notice. Further, the postman had not been examined. Therefore, the presumption of the refusal as allegedly endorsed cannot be raised. The High Court has erroneously held that the presumption is not rebutted by specific denial. The High Court, as noted above, held the appeal deserved to be dismissed without discussing various stands on merit. It did not specifically deal with the plea relating to non-service of notice.

A 5. The only observation so far as that issue is concerned is to the following effect.

> "We also find that all other points raised by Mr. Mukherjee have been answered by the trial Court as well as Hon'ble Single Judge in First Appeal. After examining the evidence and considering the
B submissions, we agree with the findings arrived at by the court below and the Hon'ble Single Judge, that Ext.-1 was a valid document and was duly executed by the defendant No.1 and that a decree to specifically perform the terms of the agreement (Ext.1) can be passed. We also confirm the finding that the time stipulated in the agreement
C not having expired, there was no occasion for the appellants to initiate any proceeding and the pleading regarding appellant's readiness and willingness is adequate, as the same has not been specifically traversed in the written statement."

6. In support of the appeal, learned counsel for the appellants submitted
D that in the absence of examination of the postman it was not permissible to draw an inference of refusal. In the plaint there was no averment that the appellants had refused to receive the notice. It was only stated that they had evaded. It does not even speak of sending the notice by post or endorsement by postman. It was further pointed out that the notice is purported to have been refused on 8.4.1984 which was a Sunday. That itself shows falsity of
E plaintiff's claim.

7. In response, learned counsel for the respondents submitted that the statutory presumption about the correctness of the postman's endorsement has been rightly held to be applicable by the Courts below. In fact, the
F evidence led was to the effect that the refusal was on 5.4.1984 and not on 8.4.1984 as claimed by the appellants. Since the suit was filed on 5.4.1984 a specific stand regarding the refusal has not been taken.

8. We find that the conclusions of the High Court on the issue of refusal to accept the notice claimed to have been sent by registered post, is rather
G vague. The High Court has merely concluded that all other points have been considered by learned Single Judge. It has been brought on record that effect of a decision of this Court in *Puuuada Venkeshwara Rao* v. *Chidamana Venkataramana,* [1976] 3 SCR 551 has not been considered though specifically argued.

H 9. It appears that stand was that when the defendant No.1 on oath

stated that he did not receive the notice allegedly sent by post, the same would prevail over the postal remarks that it was "refused" unless the postman was examined. Further, the plea that there was no specific averment regarding sending the notice by post or its refusal has not been considered. Learned counsel for the respondents has submitted that suit was filed on 5.4.1984 i.e. the date of refusal overlooks the plea raised to the effect that the same could have been brought in by way of an amendment and/or that the alleged date of refusal was 8.4.1984.

10. Learned counsel for the appellants has produced before us original paper books filed before the High Court which show the endorsement that their refusal was 8.4.1984.

11. In above view of the matter, we direct the High Court to record its findings on the question of service of notice and also the effect of the absence of any definite and specific plea regarding dispatch of notice by post and/or its refusal. Even if it is accepted that the refusal was on 5.4.1984 i.e. the date of filing of the suit nothing prevented the plaintiff to at least mention that the notice has been sent by post. The findings shall be recorded by the High Court after granting opportunity to the parties to place their respective stand. The High Court shall send its findings to this Court after recording the same within a period of three months. Call this matter after four months.

K.K.T. Appeal Adjourned with directions.