

**(2012) 01 CAL CK 0003**

**Calcutta High Court**

**Case No:** A.P.O. No. 435 of 2010 and APOT No. 577 of 2010

Terai Tea Company Limited

APPELLANT

Vs

Nathmal Kedia

RESPONDENT

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**Date of Decision:** Jan. 11, 2012

**Citation:** (2012) 4 CHN 49

**Hon'ble Judges:** J.N. Patel, C.J; Sambuddha Chakrabarti, J

**Bench:** Division Bench

**Advocate:** Abhrajtt Mitra, for the Appellant; Ahin Choudhuri, Roibat Banerji and S.S. Khanra, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

1. This is a plaintiffs appeal against the judgement and order dated October 6, 2010 dismissing its application for interim reliefs and also vacating all interim orders, if any. In connection with a suit for specific performance the plaintiff had filed an application for injunction before the learned Trial Judge. The case of the plaintiff/petitioner inter alia was that the respondent No. 3 herein was the owner of a tea estate of which before August, 2009 the proforma respondent No. 4 along with others held 98 per cent share capital. In August, 2009 the respondents Nos. 1 and 2 acquired those shares of the respondent No. 3 company and were thus in a position to control and manage the said company. On a representation being made by the respondents Nos. 1 and 2 to the plaintiff/appellant company the latter had become interested to purchase the said shares of the respondent No. 3 and held final negotiations with them on February 17, 2010 when according to the petitioner it was ultimately inter alia agreed that the respondents Nos. 1 and 2 would transfer and sell those shares of the respondent No. 3 to the plaintiff/appellant at a total consideration of Rs. 4.11 crores out of which Rs. 67 lacs would be treated as the consideration for transfer of those shares and the balance amount would be utilized for liquidating the entire unsecured loans of the respondents Nos. 1 and 2. In terms of the said agreement the plaintiff/appellants had prepared four pay orders for an

aggregate sum of Rs. 4.11 crores in favour of the respondent No. 3. Subsequently further meetings were held between the representatives of the plaintiff/appellant and the respondents Nos. 1 and 2 at the office of the solicitor of those respondents wherein the learned Advocate for the appellant was also present. At the said meeting on behalf of the plaintiff/appellant those pay orders were produced and the respondent No. 2 herein was requested to make over the share scripts along with duly executed valid transfer deeds.

2. The further case of the plaintiff/appellant as made out in the application for injunction was that the respondents Nos. 1 and 2 expressed their inability to complete the transaction on that date and the meeting was deferred to a future date. Thereafter, the plaintiff/appellant through its Advocate issued letters to the respondents Nos. 1 and 2 calling upon them to complete the transaction. But the respondents did not reply nor did they take any step for the completion of the transaction relating to sale of those shares in the respondent No. 3 company.

3. The appellant, therefore, had filed a suit before this Court being Civil Suit No. 106 of 2010 inter alia claiming for a decree for specific performance of the agreement dated February 17, 2010, perpetual injunction restraining the defendants therein either by themselves or through their agents, assigns etc. from registering the said shares of the company in the name of any person other than the plaintiff or from dealing with or disposing of or alienating or otherwise creating any third party interest over and in respect of those shares and for other reliefs. In the said suit the plaintiff had taken out an application being G.A. No. 1331 of 2010 inter alia for the appointment of a Special Officer over and in respect of those shares, an order of injunction restraining the defendants Nos. 1 to 3 therein either by themselves or through their agents etc from registering those shares in the name of any person other than the plaintiff and also for injunction in terms of the perpetual injunction prayed for in the suit.

4. Initially an interim order of status quo was obtained by the plaintiff ex parte. Such order was thereafter extended from time to time.

5. The said application for injunction was contested by the respondents Nos. 1 and 2 by filing an affidavit-in-opposition affirmed by the defendant No. 2, wherein the allegations made by the plaintiff were denied. It was inter alia denied that any of the respondents made any representation to the petitioner company or to its Director. It was specifically mentioned in the said affidavit that Shri Rajendra Kanodia, Director of the plaintiff company approached the respondents Nos. 1 and 2 and enquired whether it would be possible for them to arrange for transferring the controlling interest in the respondent No. 3 company for a consideration to be agreed upon. The respondents say that they explained to him that it was not possible for them to persuade all the shareholders to sell or transfer their shares and even they were not willing to sell their shares. A lot of pressure was brought to bear upon the answering respondents to coerce them to come to a deal but it was

not possible for them to come any concluded contract with regard to the transfer of shares. The specific case of those defendants was that there was no concluded contract or deal between the plaintiff and any of the respondents. With regard to the allegations of preparing the pay orders it was specifically mentioned that there was never any occasion for any such pay order to be prepared. The answering defendants also never informed the plaintiff that they were willing and ready to transfer those shares to it or its nominees or to perform any obligation. The offer made by the plaintiff was made with a view to creating an impression that there was a concluded deal while in fact there was none. There was also no obligation on the part of these defendants for completing the sale of the shares or for transferring the control and management of the respondent No. 3 company along with the tea estate and as such the question of repudiating a non-existent contract did not and could not arise nor could the question of the readiness and willingness on the part of the plaintiff to perform any obligation did or could arise.

6. In the affidavit the respondents Nos. 1 and 2 took a very specific point that the respondent No. 3 was a listed company and as such the plaintiff company was required to comply with the SEBI (Substantial Acquisition of Shares and Take Over) Regulations, 1997 if it really had entered into a contract for acquiring 98 per cent shares of the respondent No. 3. The allegation that the answering defendants were negotiating the terms for the disposal of those shares secretly was also denied. Those defendants, therefore, prayed for the dismissal of the said application with costs.

7. The respondent No. 4 also affirmed an affidavit-in-opposition before the Trial Court.

8. As mentioned earlier the learned Trial Judge had dismissed the plaintiff/appellant's application for injunction by the impugned judgement and order. The learned Trial Judge held that there was no concluded contract between the parties and the parties were still at a negotiating stage. It was further held that from the conduct of the plaintiff it appeared that it was never serious about the purchase of the shares and the plaintiff was not entitled to any interim relief. The other reason for not passing any interim order was that the oral agreement pleaded was between the two limited companies and it was unknown how individuals could treat the properties of a limited company as their personal properties. No resolution of the companies had been produced whereby one agreed to purchase and the other agreed to sell the shares. The learned Trial Judge further held that the terms and conditions raised a doubt whether the same were to the benefit of the respondent No. 3 as the money which was to be paid was being received by the respondent No. 3 which on transfer of shares would belong to the petitioner.

9. Mr. Mitra, the learned Senior Advocate for the appellant submitted that there was no bar under Specific Relief Act, 1963 that specific performance of an oral agreement was not permissible. What was material was the intention of the parties

and their conduct. If the oral agreement is legal and valid a decree for specific performance of the same can most certainly be claimed by way of a suit. In support thereof Mr. Mitra has relied on a single Judge decision of this Court in the case of [I. Poppan and Another Vs. Karia Gounder and Others](#), for a proposition that the value of an oral agreement is as good as a written agreement. He has further relied on another Single Judge judgement of the Andhra Pradesh High Court in the case of Moturi Seeta Ramabrahmam vs. Bobba Ramamohana Rao and Others, reported in AIR AP 504.

10. The further submission of the appellant was that it had made out a prima facie case. Even otherwise the respondents Nos. 1 and 2 have not denied that meetings between the parties had not been held and as there was no response to the letters written by the learned Advocate for the appellant there was no denial of the contents of such letters which, according to the appellant, amounted to an admission of the existence of the agreement. The appellant further argued that the SEBI (Substantial Acquisition of Shares and Take Over) Regulations, 1997 are not attracted in the present. The appellant strenuously argued that the conduct of the parties demonstrated that an agreement for the sale of the shares was considered and was agreed to be in force and it had taken all reasonable steps towards the effective implementation of the same.

11. Mr. Choudhury, the learned Senior Advocate appearing for the respondents Nos. 1 and 2 has argued that his clients never held more than 4 per cent share in the respondent No. 3 company. The respondent submitted that there was no concluded contract with regard to the transfer of shares. Moreover, if there was at all any agreement it is most unlikely that there would be no document signed by and on behalf of them in connection with the said agreement. This is all the more so as one public company was seeking to acquire 98 per cent shares of another public company and the same would be concluded verbally without creating any document. The respondents Nos. 1 and 2 relied on three letters written on behalf of the appellant to submit that these letters clearly suggest that there was no concluded contract between the parties.

12. The respondents Nos. 1 and 2 also mentioned that the terms of these letters were such that it was most unlikely that any prudent man would accept them. The terms of these letters suggest that out of Rs. 4.11 crores only Rs. 67 lacs would be paid as consideration for the shares and the balance would be paid to the respondent No. 3 company the control of which would be acquired by the appellant company simultaneously with the payment of Rs. 67 lacs. The respondents further argued that it was also improbable that transaction of this sort contemplated by the appellant would be concluded without complying with the formalities of law.

13. The learned Trial Judge relied on two letters, dated March 19, 2010 and March 26, 2010 respectively written on behalf of the appellant. A bare reading of those two letters strongly goes against the contention of the appellant about the existence of

a concluded contract In the first letter dated March 19, 2010 the respondents Nos. 1 and 2 were intimated that the amount of Rs. 411 crores would be deposited by the appellant on March 22, 2010 on their ensuring simultaneous sale of shares. The next paragraph of the letter clearly mentioned that in case of completion of the transaction the appellant was agreeable to bear and pay the labour wages and other costs and expenses relating to the tea estate incurred after February 17, 2010 In paragraph 4 also certain things were mentioned to be done by them on the completion of the transaction. In paragraph 8 of the letter the solicitor of the respondents was requested to countersign a copy of the letter as a token of acceptance and confirmation and it was mentioned in paragraph 9 that after receiving acceptance and confirmation from and on behalf of the respondents the learned Advocate for the appellant would make over the payment of the said sum of Rs. 4.11 crore on March 22, 2010.

14. Likewise in the letter dated March 26, 2010 the learned Advocate on behalf of the appellant informed the solicitor of the respondents that no reply to his earlier letter or acknowledgement thereof was received and accused them of taking no step for the completion of the transaction. The solicitor of the respondents Nos. 1 and 2 was again requested to advise his client to take immediate and appropriate steps for completing the sale of the shares of the respondent No. 3 company.

15. These two letters unmistakably suggest that the transaction was yet to be completed as the words "on the completion of the agreement" were repeatedly used evincing a stage of an incomplete agreement. The learned Trial Judge had rightly held from these two letters that the parties were still at a negotiating stage and that since there was no acceptance or confirmation as sought for in the letter dated March 19, 2010 the transaction could not be said to have been completed.

16. There is no doubt that an oral contract, if it is concluded, can be specifically enforced. This is very much known to law. But on the facts of the case the question that fell for consideration was whether there was any concluded contract. The two judgements relied on by Mr. Abhrajit Mitra, the learned Senior Advocate for the appellant, do not really apply to the facts of this present case. So far as the Calcutta case is concerned it was a second appeal from a decree passed by the Appellate Court. Evidence was already adduced and the Court after examining the evidence concluded that the plaintiff had proved the existence of the oral evidence and payment of earnest money. It was only in this context that the principle reiterated in that case must be understood.

17. So also is the judgement of the Andhra Pradesh High Court. That too was an appeal from a judgement and decree of the Trial Court passed in a suit for specific performance of an oral agreement for sale. There also oral and documentary evidence were adduced by both the parties and the Trial Court disbelieved the oral agreement of sale. In appeal the High Court after appreciating the entire evidence on record found that an oral agreement for sale had actually taken place. Here also

the principle of law re-stated that an oral agreement is as much legal and valid as a written agreement for sale has to be understood in the context that the existence of an oral agreement was proved clearly.

18. But in this case it cannot be said that the plaintiff could establish the existence of a concluded contract on the basis of the materials filed so far. This all the more so as the defendants have specifically denied the existence of a concluded contract in their affidavit. In a suit based on a oral contract for sale the burden is on the plaintiff to prove by cogent evidence that such agreement took place between the parties. The stage of evidence had not yet arrived in the suit and it is for the plaintiff to thrash it by adducing evidence to establish the existence of a concluded contract. But, an application for injunction filed by the plaintiff is decided on the basis of a prima facie case based on the pleadings and documents filed by the parties. It cannot be held that the plaintiff has been able to prove the existence of an oral contract between the parties or to make out a prima facie case for the grant of an interim injunction. The appellant's own letters apparently go against the case sought to be made by them making them disentitled to the interim relief as prayed for.

19. We thus hold that the learned Trial Judge has rightly dismissed the application and we find no infirmity in it.

20. The appeal is thus, dismissed.

21. Needless to say, this finding is merely for the purpose of considering the appellant's entitlement to an interim relief and the appellant will be at liberty to adduce all further evidence in support of the case. The learned Trial Judge will not be influenced by our present finding while deciding the suit on merit.

22. There shall, however, no order as to costs. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

J.N. Patel, C.J.

I agree.