

**(2002) 01 CAL CK 0003****Calcutta High Court****Case No:** S.A. No. 383 of 1991

Maqbul Ahammed

APPELLANT

Vs

Mirja Mo. Jafar and Another

RESPONDENT

**Date of Decision:** Jan. 28, 2002**Acts Referred:**

- Contract Act, 1872 - Section 53
- Criminal Procedure Code, 1973 (CrPC) - Section 144
- Specific Relief Act, 1963 - Section 31, 34

**Citation:** 106 CWN 1194**Hon'ble Judges:** Pranab Kumar Chattopadhyay, J**Bench:** Single Bench**Advocate:** Sadananda Ganguly and S.K. Abu Safian, for the Appellant; Amal Baran Chatterjee, S.K. Nizamuddin and Abdul Atadi, for the Respondent**Judgement**

Pranab Kumar Chattopadhyay, J.

This appeal is at the instance of the defendant/appellant in a suit for declaration and injunction and is directed against the judgement and decree dated 21" February, 1990 passed by the learned Additional District Judge, Eight Court, Alipore, in Title Appeal No. 358 of 1988 thereby reversing the judgement and decree dated.13th April, 1988 passed by the learned Munsif, Fifth Court, Alipore in Title Suit No. 579 of 1980. The plaintiff/respondent brought the Title Suit before the trial Court claiming himself as owner of the suit property, which is a tank. Admittedly, the plaintiff/respondent entered into an agreement for sale with defendant/ respondent No. 1 on 19th July, 1979 at a total consideration of Rs. 32,000/- and after accepting a sum of Rs. 5,000/- as earnest money.

2. The further case of the plaintiff/respondent before the Trial Court is that if the title of the property contracted to be sold is not approved by the defendant/appellant, then, the plaintiff/respondent will refund the earnest money

and the defendant/appellant will not be bound to purchase the same and it was further agreed that the defendant/appellant with the permission of the plaintiff/respondent shall be entitled to fill up the property under the agreement which is a tank, by cinder at his own cost and plaintiff/respondent shall not be responsible for any such expenses incurred by the defendant/appellant.

3. It has also been stated by the plaintiff/respondent that the parties in the said agreement for sale agreed that in order to complete the transaction as per the agreement, the plaintiff/respondent shall handover the prescribed form to the defendant No. 1 for his signature and for swearing of affidavit as required under the Urban Land Ceiling (Regulations) Act. It is the specific case of the plaintiff/respondent before the Trial Court that as per the terms of the agreement, he handed over the prescribed form to the defendant/appellant and requested him to complete the necessary formalities. But, it is alleged that the defendant/appellant neither returned the said form nor sworn any affidavit as required under the provisions of Urban Land Ceiling (Regulations) Act. It is also the case of the plaintiff/respondent that the defendant/appellant No. 1 without performing his part under the contract started filling up the tank by placing rubbish, refuse etc. The plaintiff/respondent did not raise any protest in the expectation of the completion of the transaction. It has further been alleged that the defendant/appellant made false plea regarding defect of title in the property to be conveyed by the plaintiff/respondent and started making correspondences without fulfilling the terms of the contract as per the agreement. It has been specifically alleged by the plaintiff/respondent that the defendant/appellant has failed to perform his part of the contract within the stipulated period or within reasonable time by tendering the balance amount of the consideration money as per terms of the contract; and as such the contract should be declared as cancelled and the earnest money received by die plaintiff/respondent should be declared to have been forfeited.

4. According to the plaintiff/respondent, the defendant/appellant in spite of protest by the plaintiff/respondent was trying to possess the suit land forcibly and as such proceedings u/s 144 of Cr.PC had to be started against the defendant/appellant. But, as the order in the said proceeding would be vacated after the statutory period the plaintiff/respondent filed the suit for the relief as mentioned herein below. The defendant/appellant contested the suit by filing the written statement before the Trial Court.

5. The defendant/appellant in the written statement denied all die material allegations made by the plaintiff/respondent save and except execution of the agreement of sale, and payment of Rs. 5,000/- as earnest money to the plaintiff/respondent by the defendant/appellant.

6. It was also contended in the written statement that the defendant/appellant was and is always willing to perform his part of contract by paying the balance money as per the said agreement but the plaintiff/respondent has failed to satisfy his title in

respect of the property agreed to be sold and the defendant/respondent came to learn from reliable source that the plaintiff/respondent is not absolute owner to the schedule property and has a co-share, that there is no question of obtaining permission for transfer of the schedule property covered by the said agreement, from the Urban Land Ceiling authority as the schedule property is a tank, that there has been no failure on the part of the defendant/appellant to perform his obligation under the contract, that the defendant/appellant had filled up the tank by incurring heavy expenses and thus rendering the suit properly into a very valuable one and the petitioner/respondent is now trying to sell Out the suit property to other persons at a higher price and with this motive the plaintiff/respondent had filed the said suit which is not maintainable in its present form and in law, that the defendant/appellant is in actual possession of the disputed property and hence there can arise no question of preventing him from going upon the disputed land by issuing an order of injunction and as the plaintiff/respondent has not made any prayer for recovery of possession, the said suit was not maintainable and ought to be dismissed.

7. The learned Munsif, 5th Court, Alipore was pleased to dismiss the said Title Suit No.579 of 1980 in his order dated July 13. 1988 holding, inter alia, that the plaintiff/respondent was not entitled to a declaration of injunction and thus not entitled to get any relief arid that the plaintiff/ respondent had miserably failed to prove his case.

8. Being aggrieved by and dissatisfied with the said judgment dated July 13, 1988 of the learned Munsif. 5th Court, Alipore. the plaintiff/ respondent filed an appeal in the Court of the learned Additional District Judge, Alipore. being Title Appeal No. 358 of 1988 and Shri S. Chakraborty, learned Additional District Judge Alipore. by a judgement and decree dated February 21, 1990 in Title Appeal No; 358 of 1988 was pleased to allow the said appeal on contest with cost against the defendant/appellant by setting aside the judgement and decree passed by the learned Munsif, 5th Court. Alipore, in Title Suit No. 579 of 1980 and passed decree in favour of the plaintiff/respondent declaring that the agreement dated July 15, 1979 entered by and between the plaintiff/respondent and defendant/ appellant for sale of the land as described in the schedule of the plaint stood cancelled and the plaintiff/respondent further got a decree for permanent injunction restraining the defendant/appellant from interfering with the peaceful possession of the plaintiff/respondent in the suit property, though he is not possessing according to his own case.

9. Being aggrieved by and dissatisfied with the said Judgement and decree passed by the learned Additional District Judge, Alipore, on February 21, 1990 in Title Appeal No. 358 of 1988, the defendant/appellant has filed the instant appeal which was admitted by this Hon"ble Court on the grounds mentioned in the Memorandum of Appeal, but. no questions were formulated as substantial questions of law for the

purpose of deciding, the instant Second Appeal. Considering the grounds mentioned in the Memorandum of Appeal following questions of law are formulated as for the purpose of deciding the instant Second Appeal :

1. Whether the finding of the First Appellate Court regarding the maintainability of the suit is based on correct appreciation of legal position.
2. Whether the suit was liable to be dismissed in view of the provision of Section 34 of the Specific Relief Act.
3. Whether the learned Judge of the Lower Appellate Court was right in arriving at a different finding on facts on the basis of the evidence on record.

10. Mr. Sadananda Ganguly, learned Senior Counsel appearing on behalf of the defendant/appellant submits that the suit is for declaration and injunction and the same is not maintainable in view of the fact, that there is no prayer for recovery of possession. The learned Judge of the lower Appellate Court although held that the plaintiff/respondent could not establish by satisfactory evidence of having 16 Annas title in the suit property but erred in holding that the defendant/appellant sat tight over the matter inspite of having option under the agreement to rescind it or to repudiate it. The learned Counsel of the appellant also contended that it was the plaintiff/respondent who filed the suit against the defendant/appellant for obtaining a decree declaring that the agreement stood cancelled and earnest money paid to the plaintiff/respondent by the defendant/appellant stood forfeited. The plaintiff/respondent also prayed for a permanent injunction restraining the defendant/appellant, his mam agent from coming upon the suit land and/or disturbing the possession of the plaintiff/respondent in the suit land. Mr. Ganguly, also submitted that the learned Judge of the lower appellate Court should have confined himself within the ambit of the prayers as made by the plaintiff/respondent and ought not to have found fault with the defendants/ appellant for alleged non-repudiation of the said agreement. Mr. Ganguly, further, submits that the learned Judge of the lower Appellate Court failed to take note of the fact that the defendant/appellant was willing to abide by the terms of the said agreement of sale and consequent upon finding the defect of the title of the plaintiff/respondent in the suit property requested him repeatedly to rectify the defect and to show marketable title in the suit property to the defendant/appellant so that the defendant/ appellant could complete the purchase by execution of the Deed of Conveyance.

11. According to the learned Counsel of the appellant, learned Judge of the lower Appellate Court failed to appreciate that the defendant/ appellant would derive no benefit by repudiating the said agreement particularly when the plaintiff/respondent also admitted in the cross-examination before the Trial Court that the defendant/appellant had filled up the tank at his own cost. Mr. Ganguly, learned Senior Counsel of the Appellant further contended that the learned Judge of the Lower Appellate Court failed to take into consideration the fact that the plaintiff/

respondent was not in possession of the suit property and as such the suit for declaration and injunction was not maintainable as had been rightly held by the learned Munsif of the Trial Court. Mr. Ganguly submitted that plaintiff/respondent has instituted the suit for a mere declaration and injunction without any prayer for recovery of possession and in absence of the prayer for recovery of possession, instant suit filed by the plaintiff cannot be held to be maintainable.

12. The learned Counsel of the defendant/appellant specifically urged that the suit ought to have been filed for recovery of possession otherwise the same would be hit by the proviso of Section 34 of the Specific Relief Act. The learned Counsel of the defendant/appellant submitted that it is the concurrent finding of the Courts below that the suit should have been filed by the plaintiff/respondent u/s 31 of the Specific Relief Act. The learned Judge of the lower Appellate Court also categorically observed that in order to avoid limitations the plaintiff/respondent has filed the suit u/s 34 of the Specific Relief Act. Further according to the learned Counsel of the defendant/appellant, plaintiff/ respondent cannot be allowed to do anything indirectly what he cannot achieve directly.

13. Mr. Ganguly, submitted that in the instant case, the plaintiff/ respondent could not have filed the suit u/s 31 of the Specific Relief Act on the ground of limitations, but, with a view to achieve the same relief plaintiff/respondent though according to the appellant/ defendant filed the suit u/s 34 of the Specific Relief Act but the same is also not permissible as in absence of the prayer for recovery of possession, the suit would be hit by the proviso of Section 34 of the Specific Relief Act

14. The learned Counsel of the defendant/appellant submits that the finding of the lower Appellate Court is perverse. The learned Judge of the lower Appellate Court though held that the only remedy available to the plaintiff/respondent was to bring suit for cancellation of the contract u/s 31 of the Specific Relief Act but the plaintiff/respondent filed the declaratory suit in order to avoid the question of limitations in the matter of filing a suit for cancellation under the provision of Section 31 of the Specific Relief Act

15. Mr. Ganguly, the learned Senior Counsel of the defendant/appellant specifically contended that the defendant/appellant is in possession of the suit property and as such question of restraining the defendant/ appellant by permanent injunction cannot and does not arise and the plaintiff/respondent had no other option but to pray for recovery of possession. The learned Counsel of the defendant/appellant submitted that the suit land namely the tank in question was admittedly filled up by the defendant/appellant and for the purpose of filling up the tank the defendant/appellant got the possession in respect of the suit property and after filling up the tank, the plaintiff/respondent never got back the possession nor the same has been claimed or pleaded by the plaintiff/ respondent at any stage. Accordingly, it was contended by Mr. Ganguly that the defendant/appellant remains in continued possession of the suit property as the plaintiff/respondent never got

back the possession of the same. In the aforesaid circumstances, the learned Counsel of the defendant/appellant submits that when the defendant/appellant is in possession in respect of the suit property, question of restraining the defendant/appellant by permanent injunction does not arise. The learned Counsel of the plaintiff/respondent" however, asserted that possession in respect of the, suit property never passed on to the defendant/appellant at any point of time and as such question of making any prayer for recovery of possession cannot and does not arise.

16. The learned Counsel of the plaintiff/respondent further submits that in terms of the agreement defendant/appellant was allowed to enter upon the suit land for the purpose of filling up the water body and the defendant/ appellant entered upon the suit property as per the agreement and only for the limited purpose of filling up the tank as was specifically permitted under the agreement.

17. Mr. Amal Baran Chatterjee, the learned Senior Counsel appearing on behalf, of the plaintiff/respondent further contended that the defendant/ appellant had no scope to get the possession of the suit property from the plaintiff/respondent nor it was pleaded as such by the defendant/ appellant. Mr. Chatterjee submitted that only for the purpose of filling up the tank the defendant/appellant entered upon the suit property and filled up the water body with rubbish. The learned Counsel of the plaintiff/ respondent contended that the filling up of the tank was done after obtaining permission of the plaintiff/respondent and as such there is no scope on the part of the defendant/appellant to claim possessory title on the plea that the defendant/appellant is in possession of the suit property after filling up the tank.

18. The learned Counsel of the defendant/appellant referred to and relied on the decision of the Supreme Court reported in Sarju Pershad vs. Jwaleshwari AIR 1951 SC I20; in support of the contention that the finding of the Trial Court ought not. to have been interfered With by the learned lower Appellate Court. In the instant case, learned Judge of the lower Appellate Court arrived at a finding on the basis of the evidence on record that the defendant/appellant besides filling up the tank with rubbish at his own cost never exercised any other Act of possession on the suit land nor any other case has also been mentioned in the written statement. The learned Munsif also held that the defendant NO. 1 is in possession in view of the fact that the plaintiff/respondent gave permissive possession to the defendant in terms of the agreement so that the defendant can fill up the unfilled portion of the tank at his own cost which the defendant No. 1 did in the present case.

19. I am unable to understand how the defendant/appellant can claim the right of possession in the suit property when the said defendant/ appellant was admittedly in permissive possession of the suit property as was given by the plaintiff/respondent in terms of the agreement. The defendant/appellant was permitted to enter upon the suit property admittedly for the purpose of filling up the tank with cinder under the specific terms of the agreement and the

defendant/appellant admittedly exercised the right under the contract and entered upon the suit property.

20. Accordingly, it cannot be said that the right to enter upon the property under the contract has subsequently matured into a right of possession in the suit property. The learned Judge of the lower Appellate Court correctly held that the conclusion of the learned Munsif was wrong in this regard and the right under the contract permitted the defendant/ appellant to enter upon the suit property and such permissive possession given to the defendant/appellant in respect of the suit property never matured into a Right of Possession in the suit property by the defendant/ appellant. The finding of the learned Munsif of the Trial Court was erroneous in this regard and the learned Judge of the lower Appellate Court rightly held that the decision as reached by the learned Munsif regarding the possession of the suit property by the defendant No. 1 was incorrect.

21. In order to consider the point of maintainability of the suit provision of Section 31 and Section 34 of the Specific Relief Act should be considered properly. The aforesaid sections of Specific Relief Act are set out hereunder:

Section 31. When cancellation may be ordered.-(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Section 34. Discretion of Court as to declaration of status or right. - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief :

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

22. I have already observed, concurring with the view as expressed by the learned Judge of the lower Appellate Court that the defendant/ appellant was given permissive possession of the suit property by the plaintiff/respondent in terms of the agreement and right to enter into the suit property in terms of the agreement never matured into Right to Possession in the suit property by the defendant/appellant and therefore, defendant/appellant cannot claim any possessory title in respect of the suit property and as such the plaintiff/respondent

had no scope to claim for recovery of possession. In the present case, plaintiff/respondent has filed the suit for declaration that the contract between the parties be declared cancelled and I do not find any illegality or irregularity on the part of the plaintiff/respondent in filing such suit for declaration and the proviso of the said Section 34 cannot be a bar in the instant case.

23. Furthermore when the contract contains reciprocal promises, and when one party to the contract prevents the other from performing his promise in terms of Section 53 of the Contract Act such contract becomes voidable at the option of the party so prevented. In the present case also the contract could not be performed as according to the plaintiff/respondent, the defendant/appellant No. 1 was responsible for non-completion of the transaction and accordingly the plaintiff/respondent had no other option, save, the except to file a suit for declaration claiming the contract between the parties by declared as cancelled which the plaintiff/respondent has done in the present case.

24. The learned Counsel of the defendant/appellant, further, cited decisions of the Supreme Court and Privy Council in support of the contention that law respects possession even if there is no title to support it and except by due process of law no withdrawal of possession can be made. The cases cited by the learned Counsel of the appellant in this regard are mentioned hereunder:

1. Yeshwant Singh vs. Jagdish Singh, AIR 1968 SC 620

2. Midnapur Co. vs. Naresh Narain, AIR 1924 Privy Council 144 at pages J47 and 148.

25. I fail to understand how those citations are applicable in the present case particularly when it is observed that the permissive possession given to the defendant/appellant never matured into a right of possession in the suit property by the defendant/appellant and it is the finding of the learned Judge of the lower Appellate Court that the defendant/appellant never exercised any other act of possession on the suit land except filling up the tank in terms of the agreement as was permitted by the plaintiff/respondent in terms of the agreement.

26. In the circumstances, I am of the opinion that the suit filed by the plaintiff/respondent before the Trial Court is maintainable and there is no scope to interfere with the finding of the lower Appellate Court. I concur with the decision of the learned Judge of the lower Appellate Court and I am also of the view that no substantial question of law is involved in this appeal. Thus, I find no substance in the instant Second Appeal and the same is dismissed accordingly.

27. Having regards to the facts and circumstances of this case, there will be, however, no order as to costs.

In Re : S. A. No. 396 of 1991

Mansoor Ali

Vs.

Mirja Md. Jafar & Anr.

This appeal was heard analogously with the other appeal being S.A. No. 383 of 1991, (Maqbul Ahammed us. Mirja Md. Jafar & Anr.) pursuant to the earlier direction of this Court as both the aforesaid appeals arise out of the same judgment and decree. The other second appeal being S.A. No. 383 of 1991 has since been dismissed, the fate of this appeal cannot be different. Accordingly, the instant second appeal also stands dismissed for the identical reasons as have been mentioned in the judgment passed in S.A. No. 383 of 1991.

28. There will be, however, no order as to costs.

LATER

Let urgent xerox certified copy of this judgment be given to the learned Advocate for the parties.