(1956) 04 CAL CK 0001

Calcutta High Court

Case No: A.F.O.D. No. 20 of 1951

Nalini Nath Mitra and Another		APPELLANT
	Vs	
Bepin Behari Das and Others		RESPONDENT

Date of Decision: April 27, 1956

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33, 11
- Specific Relief Act, 1877 - Section 15

Citation: AIR 1956 Cal 525 : (1956) 1 CALLT 402

Hon'ble Judges: Renupada Mukherjee, J; P.N. Mookerjee, J

Bench: Division Bench

Advocate: Nirmal Chandra Chakravartty and Joygopal Ghose, for the Appellant; Apurbadhan Mukherjee and Tarak Nath Roy, for the Respondent

Final Decision: Allowed

Judgement

Renupada Mukherjee, J.
This appeal arises out of a suit for specific performance of an agreement for execution of a Dar Mourashi pattah by the defendants in favour of the plaintiff.

2. This litigation lay in its embryo in a deed of agreement alleged to have been executed by one Sailendra Nath Mitra, predecesor-in-interest of the defendants, in favour of plaintiff Bepin Behari Das as early as 7-3-1921. Admittedly, the plaintiff took settlement of 10 bighas of land in village Kon-nagar in Hooghly District from Sailendra Nath Mitra for a term of 25 years at an annual rent of Rs. 300/- for the first 12 years and thereafter at Rs. 450 /- per annum for the next 13 years. The relevant pattah and kabuliyat were executed by the two parties on 6-8-1918 (21st Sravan 1325 B.S.). The term of the lease wag to expire with the end of the Bengali year 1348. The suit land is used for the purpose of manufacture of bricks and tiles and it is admitted that the plaintiff''s predecessors had been in possession of the same at least from 1289 B. 3. The plaintiff alleged in his plaint that during the subsistence of

the lease Sailendra Nath Mitra executed an agreement in favour of Bepin Behari Das agreeing1 that either Bepin or his suc-cessor-in-interest will be entitled to take a permanent lease of the demised land on payment of Rs. 5,000/- at least as selami and an annual rent of Rs. 500/- if he made such an offer either within the period of the lease or immediately after the expiry of the period. The plaintiff''s case in the plaint was that Sailendra Nath Mitra died early in 1348 B. S. and before the expiry of that year he approached defendant 1, Nalini Nath Mitra, who acted as Karta of the joint i''amiiy constituted by the defendants who aie the heirs of Sailendra Nath Mitra and offered to take permanent lease of the demised land after some reduction of the selami and the rent because of the reduction of the area of the holding from 10 bighas to 6 bighas. The plaintiff further alleged in his plaint that after some negotiations the parties came to a settlement and Nalini Nath Mitra agreed in the first week of Aswin 1349 B. S. that permanent lease of the disputed land would be given on payment of a selami of RS. 4,250/- and at an annual rental of Rs. 470/-. The plaintiff further averred that in pursuance of this agreement he deposited Rs. 2,500/- with the defendants towards the selami and also paid the rent for 1349 B. S. at Rs. 450/- which amount had been fixed by the parties as rent for 1349 B. S. The time for executing the lease was fixed at one year from the date of the agreement but the defendants later on resiled from the contract and did not execute the necessary lease although requested in that behalf on several occasions by the plaintiff. Hence the present suit was instituted by the plaintiff.

3. The suit was contested in the Court below by the defendants. Their defence in substance was that they were not aware that Sailendra Nath Mitra had executed any agreement in favour of the plaintiff as alleged by the latter. It was further their case that after the expiry of the term of the lease the plaintiff approached defendant 1 and proposed to take Dar Mokarari settlement of the disputed land from him. This was not acceded to by defendant 1 and the plaintiff finally agreed to take settlement of the disputed land on payment of a selami of Rs. 5,000/- and at a rent of Rs. 700/- per year for a period of nine years. In pursuance of this agreement the plaintiff paid Rs. 2,5007- by instalments on account of selami, but as the balance of the amount was not paid in spite of repeated demands the contract stood cancelled.

4. The learned Subordinate Judge accepted the plaintiff''s version of the agreement and negatived the defence of the defendants. He decreed the suit and so defendants 1 aad 2 of the Court below have preferred this appeal.

5. The only point which requires decision in this appeal is whether there was an agreement between the parties that permanent lease of the disputed land would be given to the respondent according to the terms and conditions mentioned in the plaint and whether the plaintiff respondent is entitled to get that contract specifically enforced.

6. Mr. Chakravartty, appearing on behalf of the two appellants contend that the learned Subordinate Judge was wrong in rejecting the appellants'' version of the

contract because the case depends mainly upon a consideration of oral evidence of the parties themselves and the Court below has itself observed that the oral evidence of appellant Nalini Nath Mitra, D. W. 1, is to be preferred to the evidence of the plaintiff respondent. The trial Court has not, however, given an unconditional preference to the evidence of Nalini. It has observed, -- and in pur opinion rightly, -- that the value of the oral evidence adduced by the parties should be gauged and assessed in the light of the agreement, marked Ex. 5. The authenticity of that document was seriously mooted by the appellants in the Court below. We are, however, satisfied from the evidence adduced on behalf of the respondent that this document was executed by Sailendra Nath Mitra and there is no reason whatsoever for coming to a conclusion that the document is a forged one. In that document it was agreed by Sailendra Nath Mitra that on the expiry of the term of the lease with the end of the Bengali year 1348 or immediately thereafter lessee Bepin Behari Das would be entitled to take permanent lease of the disputed land on payment of a selami of Rs. 5,000/- at least and at an annual rental of Rs. 500/-. This document was in the possession of the plaintiff respondent and it may be presumed that he was conversant with its terms. It is not at all probable that with this document in his possession the respondent would agree to take settlement of the disputed land for a period of nine years only at it. rent much higher than what was stipulated in the agreement although there had been a substantial reduction in the area of the demised land during the period of the lease. In these circumstances the Court below wns justified in rejecting the appellants version of the agreement.

7. That, however, would not enable the respondent to get a decree straightaway. Mr. Mukh-erjee, appearing on behalf of the respondent contended that the Court below had two conflicting versions of the agreement before it, and if it considered the defendants'' version to be unworthy of acceptance then the plaintiff''s version should be accepted as a matter of course. In our opinion, this argument cannot be accepted because in a suit for specific performance of contract the falsity of the defence story does not necessarily establish the truth of the plaintiff''s story which must stand or fall on its own merits, independently of any inherent weakness in the defence case. So we shall have to examine whether the plaintiff respondent has succeeded in establishing his claim to get a decree for specific performance of the contract set forth in the plaint.

8. The Court below has held that the contract set forth in the plaint has been proved. For the present we may assume that this is so, although we must observe that the evidence on which the Court has arrived at this finding is rather insufficient and open to serious criticism. The main evidence on this part of the case is the evidence of plaintiff Bepin Behari Das, P. W. 1, and his son Ganesh Chandra Das, P. W, 4, both of whom are highly interested in the result of this case. Of course, there is the agreement of 1921 executed by Sailendra Nath Mitra (Ex 5). But then although the agreement purported to give the respondent a period of 22 or 23 years for taking a permanent lease on payment of a selami of Rs. 5,000/- and at a rental of Rs. 500/-

per year, the respondent did not think it feasible or proper to pay the money and bo take the lease within that period. The previous lease expired with the end of 1348 B. S. Sailendra Nath Mitra died in the early part of 1348 B. S. It was after his death that the plaintiff ap- proached Nalini for taking settlement of the disputed land on payment of a reduced selami and at a rent lower than what had been stipulated in the agreement of 1921. We shall assume for the present that Nalini agreed to give a permanent settlement of the disputed land on payment of a selami of Rs. 4,250/- and at rent of Rs. 470/,- per annum and shall address ourselves to the question whether at all material times the respondent was was ready and willing to perform his part of the contract.

9. According to the case of the plaintiff, the contract was finalised in the first week of Aswin 1349 B. S. (latter part of September 1942). It has been stated in para 8 of the plaint that necessary documents were to be executed within a year of the date of the conclusion of the contract and the balance of selami was also to be paid within that time.

10. We shall now refer to some receipts for the purpose of showing how much selami was actually paid by the plaintiff and within what period. The receipt marked Ex. 2-B, would show that a sum of Rs. 1,000/- was paid on 25-9-1942, which is presumably, the date of the alleged contract. Another receipt, marked Ex. 2-C, would show that a sum of Rs. 500/- way paid on 9-10-1042. All these amounts were kept in deposit by the landlords. Reference may now be made to a letter addressed by Nalini Mitra to respondent Bepin Behari Das on 29-10-1942 (Ex. 3). In this letter Nrilini made a peremptory demand for the selami money from the respondent. There are also some statements in the letter which would throw a good deal of doubt on the conclusive nature of the contract. However, we are not discussing that question as it is unnecessary for us to discuss the same. Suffice it to say that Nalini was making insistent demand for selami money. It seems that in response to this letter the plaintiff deposited another sum of Rs. 500/- on 31-10-1942, and a further sum of Rs. 500/- on 14-11-1942 (Vide Ex. 2(d) and Ex. 2 (c". The total amount of selami paid upto 14-11-1942, was thus Rs. 2,500/-. The facts and circumstances of this case would disclose that the respondent did not pay the balance of the selami, whatever might have been the amount of the balance, within the time stipulated, namely, within one year from the first week of Aswin, 1349 B. S. Instead of paying the entire balance which was due after Nalini had sent his letter dated 29-10-1942, the plaintiff could manage to pay only Rs. 1,000/- in two instalment''s and the admitted balance of Rs. 1,750/- remained due. This amount was not paid within the time stipulated. We must, therefore, hold that the respondent was not in a position to perform his part of the contract and so the appellants were entitled to treat the contract as cancelled. Of course they have alleged an altogether separate kind of contract. But that will not matter so far as the decision of this suit is concerned. We are of opinion that the respondent was unable to perform his part of the contract and so the suit for specific performance of the contract should have been dismissed

by the Court below on that ground.

11. Mr. Mukherjee, appearing on behalf of the respondent, raised a new contention in this Court that the appeal must be considered to be barred by res judicata. This contention arises in the following way. During the pendency of the suit for specific performance of the contract in the trial Court which shall henceforth be called the title suit, the two appellants and their co-sharers, the pro forma respondents of this appeal, instituted a suit, namely, Rent Suit No. 3 of 1950, for recovery of arrears of rent against the plaintiff. Rent for the disputed land was claimed at Rs. 700/- per year for the years 1353 to 1356 B. S. (vide plaint Ex. 11). The defence of the plaintiff respondent who was also the sole defendant in the Rent Suit was that the rent of the holding was Rs. 470/- per year. The Rent Suit was decreed at the latter date on 25-7-1950, on the basis of the judgment under appeal. It may be mentioned here that the title suit of Bepin Behari Das had been decreed ten days earlier on 15-7-1950, and the present appeal from that decree was filed on 20-11-1950. In this Court Mr. Mukherjee filed an application for putting in some documents by way of additional evidence. Those documents include the judgment and decree passed in the rent suit mentioned above. The appellants of course objected to the reception of any additional evidence in this Court on the ground that they would be prejudiced thereby.

12. In our judgment there would be no prejudice if the judgment) and decree of the rent suit are admitted by way of additional evidence. So we accept them as such and they are marked High Court Exs. 1 and 2. We are not inclined to receive the remaining documents as additional evidence as the appellants will be highly prejudiced if they are accepted as evidence at this stage of the proceedings.

13. It is an admitted fact that no appeal was preferred by the appe''llants and their co-sharers from the decree passed in the rent suit. Mr. Mukherjee contended that no appeal having been taken by the appellants from the decision made in the rent suit and the same matter which was in controversy in Bepin Behari Das''s title suit, having been heard and decided in the rent suit, the latter decision would operate as res judicata and the question canvassed in this appeal must be taken to ''have been concluded once for all between the parties. In support of this contention Mr. Mukherjee relied on two decisions of this Court, one of which is reported in Gangadhar Kalwar Vs. Musammat Sekali Telini and Others, and another in Isup Ali and Others Vs. Gour Chandra Deb, . These two cases seem to be authority for the proposition that where two suits involving some common issues are tried together and the unsuccessful party against whom the common issues are decided prefers an appeal from the decree passed in one of the suit but not from the decree passed against him in the other suit, the latter decision would stand as ft bar against the prosecution of the appeal. In this connection Mr. Mukherjee also cited another case reported in Ganga Prasanna Mukhopadhaya and Others Vs. Kumar Brahma Niranjan Chakravarty and Another , wherein the case reported in Isup Ali and Others

Vs. Gour Chandra Deb, '', has been quoted with approval. On the authority of these cases Mr. Mukherjee contended that in the pre ent case the inter-partes decision in the rent suit which has not been challenged in appeal must be taken to be a bar against the prosecution of the appeal.

14. As regards this contention of Mr. Mukherjee we may mention that the view of this Court on the question whether a decisTon, unchallenged in appeal under circumstances mentioned above, would operate as res judicata is by no means uniform and as an instance we may only mention a comparatively recent case reported in Bahadur Singh Singhee Vs. Rani Jyotirupa Debi and Others . It would have become necessary for us either to reconcile these divergent opinions or to make a reference to the Full Bench if we were satisfied that all the essential ingredients for bringing into operation the rule of res judicata were present in this case. But before we take up this question we must dispose of a contention put forth by Mr. Chakra- vartty on behalf of the appellants- that the judgment in the rent suit is not a final judgment and so it cannot operate as res judicata in this appeal.

15. In support of his contention that the decree passed in the rent suit is not a final decree Mr. Chakravartty drew our attention to the following lines in the judgment passed in the rent suit :

"The judgment of that Court is Ex. A in this suit. That decision must be taken as conclusive so long as it stands. I would, therefore, decide this point in favour of the defendants."

16. Mr, Chakravartty contended that the Court which tried the rent suit did not attach any finality to its own judgment but made its validity conditional to the final decision of the title suit. He, therefore, argued that the decision iii tne rent suit should not be regarded as a final decision. In support of this contention Mr. Chakravartty relied on the Privy Council decision in the case of '' AIR 1942 8 (Privy Council) , where it has been held that a subsequent decision, which is expressly made subject to the final decision of a Privy Council appeal pending between the parties, is not a final decision within the meaning of Section 11, Civil P. C. In our judgment the present case cannot be covered by the authority of the Privy Council case cited by the learned Advocate for the appellants, because in the latter case the decision which was sought to be put forward as founding a claim of res judicata was made expressly subject to the final decision of a pending Privy Council appeal. In the present case, no appeal was pending from the decree of the title suit at the time the rent suit was heard and decreed. The decree in the rent suit was not made subject to or dependent on the result of any appeal which might be preferred from the decree of the title suit. So it cannot be said that the Court which passed the decree in the rent suit did not attach any finality to it. In our judgment in the absence of any sure indication that the decree in the rent suit was made dependent on the final decision of the title suit, it cannot be safely said that the decree in the rent suit was not a final decree.

17. Reverting now to the question whether all the ingredients necessary for attracting the principle of res judicata were present, we may say, after a full examination of the materials on record, that the respondent has failed to satisfy us that all the ingredients necessary for the application of the rule of res judicata are present here. We are by no means satisfied that the matter which was directly and substantially in issue'' in the title suit was also directly and substantially in issue in the rent suit. In this connection we may say that the respondent who relied on res judicata in this appeal failed to place before us the written statement which was filed by him in the rent suit. In the absence of the written statement it is impossible for us to make any conjecture as to what exactly was the case raised by the respondent in the rent suit. Then again, the matter which was substantially in issue in the title suit was the contract alleged by the present respondent and an issue to that effect was specifically framed in the title suit. In the rent suit the only material point for decision framed by the Court was "What is the actual rent of the land." The parties did not adduce any evidence in the rent suit and the Court decreed the the suit in part holding that the rent of the dispute ed land was Rs. 470/- per year. In these circumstances it is impossible to say that the whole contract which was the subject-matter of an issue in the title suit was also put in issue in the rent suit. That being the case, one of the essential ingredi- ents for the application of the rule of res judieata is wanting here and we are not prepared to accept the contention of Mr. Mukherjee that the present appeal is barred by res judicata.

18. In the result, we are of opinion that the appeal should be allowed and the plaintiff''s suit for specific performance of the contract must be dismissed. At the same time, we are of opinion that the amount of selami namely, Rs. 2,500/-, which has admittedly been paid by the respondent and received by the appellants must be refunded and a direction to that effect should be given in the decree.

19. The appeal is, therefore, allowed and the Judgment and decree of the Court below are hereby vacated. The claim of the plaintiff for specific performance of the contract hereby stands dismissed. But the plaintiff will get a decree against all the defendants for refund of the selami money of Rs. 2,500/-. If this amount be not paid within two months of this date, the plaintiff respondent will be entitled to recover the same by executing the decree.

20. In the circumstances of this case, we direct that both parties will bear their own cost''s throughout.

P.N. Mookerjee, J.

21. I agree in the order proposed by my learned brother.

22. Mr. Mukherjee, appearing for the plaintiff respondent, contended that, upon the cases of the two parties, there was admittedly some agreement for lease, although the parties differed as to the nature and terms of this agreement and, accordingly, upon the defendants'' failure to establish their case on the point, the plaintiff''s

version ought to be accepted. In the circumstances of this case, I am prepared to accept this argument, but, even then, upon the plaintiff''s own case, the selami money under the said agreement for lease had to be paid within a year from the date of the agree-ment, that is, within 8th Aswin, 1350 B. S., and that, admittedly, was nob done. On the materials, produced by the plaintiff himself and in the light of the defendants'' letter, Ex. 3, there can be no doubt that this payment of the selami money within one year was a vital term of the alleged agreement which was intended to be performed by the parties within the stipulated time of one year from the date of agreement, namely, 8th Aswin, 1349 B. S., so that the document of lease might be executed and the transaction completed within that period. This is confirmed by the circumstances of the case and the conduct of the parties themselves. In this context, the above stipulated time for payment of the selami money must be regarded as of the essence of the contract and, the plaintiff having failed to perform this essential part of the contract and his explanation for his failure in that behalf being utterly unsatisfactory and wholly unworthy of acceptance, he will certainly not be entitled to specific performance of the disputed agreement for lease. On the merits, therefore, his suit for specific performance must fall.

23. On the question of additional evidence, sought to be adduced in this Court, I was not inclined to admit any of the documents, tendered for the purpose, into evidence. This question was mooted almost at the conclusion of the arguments, and even then, reference was made only to the decision in the rent suit. The actual application, however, included various other documents. There was no explanation why this prayer for reception of additional evidence could not be made earlier and, in the circumstances of this case, I was reluc- tant to grant this Indulgence to the defaulting respondent, particularly when the additional evidence was intended to shut out a decision of the appeal on the merits and thus to defeat justice instead of aiding it and when its reception would have caused prejudice to the respondents which they, had no time to retrieve. I do not for a moment doubt''that, in appropriate cases, the Court has the power to admit additional evidence or to take note of subsequent events. But that power should be very cautiously exercised and it should not be used to assist one who is grossly negligent and who invokes the power at a very late stage to the irretrievable prejudice of the other party and for defeating justice by preventing a trial on the merits. On the above view, I would have rejected the respondents'' application for additional evidence in toto.

24. As, however, my learned brother was in favour of admitting the judgment and decree of the rent suit as additional evidence and as the admission of those two documents did not affect the ultimate conclusion, I allowed the said two documents to be admitted into evidence. It is clear, however, from the judgment in the rent suit that, although it was intended to be a final decision for that suit, it did not purport to conclude, -- and cannot be held to have the effect of concluding --between the parties the question of enforcibility of the disputed agreement for lease. We have not before us the written statement in the rent suit and the short judgment only

indicates that the point at issue in the rent suit was the amount of rent. It is difficult to hold merely from that judgment that it would operate as res judicata on the question of specific performance of the agreement for lease. In this context, the rent decree also cannot be of any greater assistance to the respondent.

25. In holding as above, I have not overlooked the decisions, cited before us during argument. Those decisions, however, are not strictly relevant for our present purpose and do not require much discussion in this case in view of our finding on the merits on the question of res judicata. As, however, my learned brother has chosen to discuss them in his judgment, I would just record my brief comment on those cases.

26. The appellant relied very strongly upon the decision of the Judicial Committee in the case of '' AIR 1942 PC 8 (10) (V 29) (E)'' and pressed Us to hold that in the light of that decision, the rent suit judgment, -- and necessarily the decree also, -- must be regarded not to be a final pronouncement even for purposes of the rent suib. We do not think that this extreme contention ought to succeed. The case before the Judicial Committee had its own special features. There two rent suits went up on appeal to the Judicial Committee. The dispute was as to the construction of a lease. A plea of res judicata was raised by reason of the decision in a title suit and also of a third rent suit. The title suit was pending in appeal before the Judicial Committee at the time when the three rent suits were decreed and the decree in the third rent suit was expressly made subject to the final decision of the Privy Council in the tittle suit. In these circumstances, the Judicial Committee, while holding that, in view of certain facts before them, the plea of res judicata, based on the decision in the title suit did not at all arise in the case, held further that the decision in the third rent; suit also, pleaded in bar, was not a final decision so as to constitute res judicata on the disputed question. The facts before us are entirely different. When the rent suit was decided in the present case, there was no appeal from the title suit. The learned Subordinate Judge also did certainly intend to decide the question of rent for the suit period bet- ween the parties, relying upon the trial Court''s decision in the title suit which, as already said, was not pending in appeal at the time and which he rightly took as binding between the parties so long as it stood. He did not intend to make a provisional or tentative finding which was not to ba regarded as a final pronouncement for purposes of res judicata. There was no reservation, express or implied, that the determination of rent for the period in suit and the decree, made for it, in the rent suit, was to be subject to the ultimate decision in the title suit. If, therefore, the rent suit decision had been otherwise res judicata on the question of the specific enforceability of the present disputed agreement for lease, I would not have refused Co give it that effect, upon the ground of its not being a final decision. The appellants'' submission, based on '' AIR 1942 PC 8 (10) (V 29) (E)'', must, therefore, fail.

27. I have pointed out above why the decision in the rent suit would not operate as res judicata in the present case and would not prevent a decision of this appeal on the merits. But for that, the respondent had much to say in favour of the application here of the principle, underlying the decisions, cited by his learned Advocate, namely Gangadhar Kalwar Vs. Musammat Sekali Telini and Others, ; '' Isup Ali and Others Vs. Gour Chandra Deb, '', and Ganga Prasanna Mukhopadhaya and Others Vs. Kumar Brahma Niranjan Chakravarty and Another might have demanded at least a reference to the Pull Bench in view of the contrary opinion expressed by this Court in the cases, reported in ''Abdul Majid v. Jew Narain'' 16 Cal 233 (F); ''Mariamnessa Bibee v. Joynab Bibee'' 33 Cal 1101 (G); Man Mohan Das Vs. Shib Chandra Saha and Another, and Bahadur Singh Singhee Vs. Rani Jyotirupa Debi and Others ''. In such event, it would have been necessary also to consider the Privy Council case of ''Shama Purshad Roy v. Hur-ro Purshad Roy'', 10 Moo IA 203 (I) and the Full Bench case of this Court ''Jogesh Chunder v. Kali Churn'' 3 Cal 30 (J), explaining and applying that decision, and the effect of the later pronouncement of the Judicial Committee in ''Naganna Naidu v. Ravt Venkatapayya'' AIR 1923 PC 167 (V 10) (K), on the said two decisions as also the senes of cases, by no means uniform, represented by ''Jaharia v. Debi'' 33 All 51 (PB) (L), ''Ghanshain Singh v. Bho-la Singh AIR 1923 All 490 (2) (V 10) (PB) (M); ''Panchanada Velan v. Vaithinatha1 29 Maa 333 (P. B.) (N). ''Mt. Lachhmi v. Mt. Bhulli'' AIR 1927 Lab 289 (V 14) (PB) (O) and the like. For reasons, already given, such necessity, however, does not arise in the present case and there is no occasion for any reference to a Full Bench and the appeal, so far as specific performance is concerned, falls to be decided, as already indicated by me, in favour of the appellants. I do not, therefore, propose to continue this unnecessary discussion.

28. In the result then, I agree that this appeal should succeed and the respondent''s suit for specific performance should fail. I agree also that the respondent should get instead a decree for refund of the selami money of Rs. 2,500/- as against all the defendants including those who have not appealed from the trial Court''s decree for specific performance. This is plainly permissible under Order 41, Rule 33 of the Code and the present case is certainly a fit one for the exercise of our powers under that Rule.

29. The parties will bear their own costs throughout as ordered by my learned brother.