

(2012) 10 CAL CK 0064**Calcutta High Court****Case No:** S.A. No. 291 of 2010

Smt. Kanak Majumdar and

Another

APPELLANT

Vs

Smt. Indrani Roy and Others

RESPONDENT

Date of Decision: Oct. 4, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, 100

Citation: AIR 2013 Cal 81 : (2013) 2 CHN 228**Hon'ble Judges:** Tarun Kumar Gupta, J**Bench:** Single Bench**Advocate:** Bidyut Kumar Banerjee, Mr. Saswata Gopal Banerjee and Mr. Bhaskar Seth, for the Appellant; Sudhis Dasgupta, Asit Baran Raut and Mr. Tuhin Subhra Raut, for the Respondent**Final Decision:** Dismissed**Judgement**

Tarun Kumar Gupta, J.

This second appeal is directed against judgment dated 5th December, 2009 and decree thereof passed by learned Additional District Judge, Fast Track Court (III) Sealdah in Title Appeal No. 12 of 2008 affirming in part the judgment dated 29th March, 2008 and decree thereof passed by learned Civil Judge (Senior Division) Sealdah in connection with Title Suit No. 108 of 1993. The original plaintiff Smt. Sunanda Roy filed said suit for specific performance of contract against the original defendant No. 1 Smt. Rama Chakraborty. During pendency of the suit both the plaintiff and defendant died and their heirs were substituted in their places. During pendency of the suit the present appellants were added as defendant Nos. 2 and 3 on the basis of their application under Order 1 Rule 10 of the Code of Civil Procedure.

2. The original plaintiffs" case, in short, is that the original defendant Smt. Rama Chakraborty being owner in possession of the suit premises made a registered agreement dated 14th of December, 1987 agreeing to sell the suit premises to the original plaintiff for a sum of Rs. 87,000/- and she received a payment of Rs. 12,000/- being earnest money out of said consideration amount. It is further case that as per terms of said registered agreement the registration of the sale deed should be completed within one year from the date of execution of said agreement subject to extension of further time if required due to unavoidable circumstances. It is further case that the original defendant could not execute the conveyance deed within one year and executed another agreement dated 14.12.1988 extending time for two years from said date with further stipulation that extension of further time would be made by the parties, if required. It is further case that though the original defendant received payments from the plaintiff of different denominations on different dates against receipts towards consideration money but she could not execute kobala. Though the plaintiff paid in total a sum of Rs. 62,700/- to the original defendant out of consideration money of Rs. 87,000/- and the plaintiff was all along ready and willing to make payment of balance amount towards execution and registration of sale deed, but the defendant could not execute the same in spite of repeated requests. Though the original defendant gave vacant possession of the two rooms of the suit premises to the original plaintiff but she could not execute a kobala and the plaintiff ultimately sent a registered letter to the defendant praying to fix a date for execution and registration of kobala but the original defendant did not pay any heed to said request. Hence was the suit for specific performance of contract and in the alternative for refund of the amount paid together with interest thereupon.

3. After addition of defendant Nos. 2 and 3 the plaint was amended by inserting that added defendant Nos. 2 and 3 knowing fully well about the agreement and the pendency of the Title Suit No. 108 of 1993 filed a suit being Title Suit No. 165 of 1995 in the same Court on 22.09.1995 against the heirs of Rama Chakraborty alleging that Rama Chakraborty had an agreement of the sale of the suit property to them and obtained an ex parte decree in said case suppressing the fact that the present suit being Title Suit No. 108 of 1993 on the self-same subject matter was pending. It is further case of the plaintiff that said added defendant Nos. 2 and 3 also filed a Title Execution Case No. 8 of 1997 and managed to obtain a kobala in respect of the suit property registered through Court. It is further alleged that said judgment of Title Suit No. 165 of 1995 was not binding upon the plaintiff and that plaintiff was entitled to get a decree for specific performance of contract or in the alternative a decree for Rs. 62,700/- together with interest against the defendants.

4. The original defendant Smt. Rama Chakraborty filed a written statement admitting execution of agreements dated 14.12.1987 as well as dated 14.12.1988 but averred that no further extension of time was given to the plaintiff as time was the essence of the contract. It is further asserted that the plaintiff failed to perform her part of contract within the stipulated time and that alleged receipts, if any, are

manufactured documents as she never granted said receipts to the plaintiff though she being dependent upon the plaintiff and her husband sometimes gave signatures on some blank papers on good faith. The suit was liable to be dismissed.

5. The defendant Nos. 2 and 3 submitted written statement alleging inter alia that Smt. Rama Chakraborty during her life time executed an agreement dated 20.06.1993 in favour of these defendants agreeing to sell the suit property at a consideration of 1,75,000/- out of which Rs. 1,50,000/- was paid to her and that Smt. Rama Chakraborty during her life time handed over the peaceful vacant possession of the suit premises in favour of the present defendants by executing a document dated 28.06.1993. It is further case that after death of Rama Chakraborty on 28.05.1995 these defendants obtained possession of rooms lying under possession of Rama Chakraborty in terms of order of the learned Executive Magistrate. It is further case of these defendants that the plaintiff manufactured documents to suit her purpose. It was further asserted that they already filed a suit being Tile Suit No. 165 of 1995 against heirs of Rama Chakraborty for specific performance of contract.

6. However, Rama Chakraborty died and her legal heirs did not contest the suit. The added defendant Nos. 2 and 3, however, contested the suit. Learned Trial Court framed several issues and decreed the suit in favour of the plaintiff after contested hearing by judgment dated 29.03.2008. The added defendants preferred an appeal being Title Appeal No. 12 of 2008. Learned Lower Appellate Court affirmed the judgment of the learned Trial Court with modification that the further amount to be deposited by plaintiff was Rs. 37,700/- and not 24,300/- as decided by learned Trial Court.

7. Said added defendant Nos. 2 and 3 have filed this second appeal. At the time of admission of this second appeal the following substantial questions of law were formulated.

(1) Whether the learned Judge in the Courts below committed substantial error of law in not deciding the case of the added defendants/appellants to the effect that they are purchasers for value without notice and as such are not bound by agreement dated December 14, 1988 between plaintiff/respondent and substituted defendants/respondents 2(a) and 2(b).

(2) Whether the learned Judges in the Courts below committed substantial error of law in directing the added defendants/appellants to execute and register the deed of conveyance in respect of the suit property in favour of plaintiff/respondent when the case made out by added defendant/respondent has not at all been considered and decided.

During hearing of this second appeal two more substantial questions of law were framed as follows:

(3) Whether learned Courts below substantially erred in law by observing that the previous agreement dated 14.12.1987 was not cancelled by the subsequent agreement dated 14.12.1988 and that time was not the essence of the contact particularly when those were against the evidence on record;

(4) Whether learned Courts below substantially erred in law by observing that time for performing the contract in terms of agreement dated 14.12.1988 was extended by exbt. 4(d), without applying the correct legal test.

8. During hearing Mr. Bidyut Kumar Banerjee, learned senior counsel appearing for the appellants, did not make any submission regarding substantial questions of law being Nos. 1 and 2 which were framed at the time of admission of the appeal vide order 2nd of July, 2010. So, no detailed discussion is required relating to those substantial questions of law. However, it can be noted that in terms of an alleged agreement dated 20.06.1993 executed in between Rama Chakraborty and the present appellants, these appellants filed a suit for specific performance of contract being Title Suit No. 165 of 1995 against the heirs of Rama Chakraborty. It also came out that on 22.09.1995 these appellants filed an application under Order 1 Rule 10 of the CPC for being added as defendants in Title Suit No. 108 of 1993 (present suit) and were allowed to be added as defendant Nos. 2 and 3. Said Title Suit No. 165 of 1995 was decreed ex parte on 21st of March, 1997. Thereafter, said decree was put into execution and the appellants obtained a sale deed through executing court on the strength of said ex parte decree dated 21.03.1997. It is thus apparent that long before passing of said ex parte decree in Title Suit No. 165 of 1995 these appellants being aware of the present Title Suit being No. 108 of 1993 prayed to be added as parties in this suit. As such it cannot be said that these appellants were purchasers of the suit property for value without notice. It also appears from the impugned judgment and the materials on record that these appellants did not disclose to the learned Court that a previous suit being Title Suit No. 108 of 1993 over the self-same property praying for specific performance of earlier contract executed by Rama Chakraborty in favour of plaintiff was pending. Learned Courts below took note of all these circumstances and made observations to that effect. Hence, it cannot be said that learned Courts below did not take note of the case as made out by the present appellants and did not decide the same.

9. Mr. Bidyut Kumar Banerjee, learned senior counsel for the appellants, has assailed the impugned judgment of the courts below on the following grounds.

(1) Previous agreement dated 14.12.1987 was cancelled by agreement dated 14.12.1988 in terms of clause 15 of the said agreement of 1988.

(2) The observation of learned Trial Court that the agreement dated 14.12.1988 was extension of earlier agreement dated 14.12.1987 was without any basis and perverse.

(3) Money receipts (Ext. 4 series) were of doubtful character and were relating to agreement dated 14.12.1987 which was already cancelled by agreement dated 14.12.1988 and hence it cannot be said that in terms of nothings in said money receipts the time for completion of sale was extended.

(4) Time was the essence of the contract of agreement of sale dated 14.12.1988 and there was no extension.

(5) The plaintiff was not ready to perform her part of contract by payment of entire balance consideration money as it was evident that she paid parts of consideration money in installments on different dates.

(6) As per terms of agreement dated 14.12.1988 the plaintiff was required to send a draft copy of sale deed to the original defendant within two years but no such draft copy of sale deed was forwarded at any point of time not to speak of within two years from said date.

(7) Both the Courts below substantially erred in law by observing that the time was not the essence of the contract dated 14.12.1988 and that plaintiff was all along ready and willing to perform her part of the contract.

10. In support of his contention he refers case laws reported in [Smt. Chand Rani \(dead\) by LRs. Vs. Smt. Kamal Rani \(dead\) by LRs., , P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.,](#) and [Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others,](#)

11. Mr. Sudish Dasgupta, learned senior counsel appearing for the respondent plaintiff, on the other hand, submits that in case of sale of immovable property there is a presumption that the time is not the essence of the contract. According to him, this is more so in this case when there were specific averments in the contracts that time could be further extended and said time was extended by the conduct of the parties, namely, acceptance of part payments by the original defendant Rama Chakraborty from time to time from the plaintiff on executing receipts (Ext. 4 series). Time was, according to him, further extended till 31.12.1992 while accepting a further payment of Rs. 15,000/- vide Ext. 4 (d).

12. Mr. Dasgupta further submits that from the averments of the plaint as well as evidence it is clear that the plaintiff was all along ready to perform her part of contract and that rather the original defendant Rama Chakraborty was not in a position to execute the sale deed on receipt of balance consideration money and to hand over possession of the entire suit property to the plaintiff. He further submits that both the Courts below came to concurrent findings of fact on this score and that this Court while hearing a second appeal u/s 100 of the CPC should not disturb said concurrent findings of fact. In support of his contention he has referred case laws reported in [Santosh Hazari Vs. Purushottam Tiwai \(Dead\) by Lrs.,](#) and [Gurdev Kaur and Others Vs. Kaki and Others,](#)

13. There is no denial that both the Courts came to the concurrent findings that time was not the essence of the contract dated 14.12.1988 and that Rama Chakraborty received payments of different denomination from the plaintiff on different dates under receipts (Ext. 4 series) and that the time for completion of the contract was extended till 14.12.1990 vide Ext. 4(d) and that plaintiff issued notice under registered post to the original defendant for execution of the kobala which was duly received by defendant but without taking any reciprocal action. It appears from Ext. 4 series that original defendant Rama Chakraborty received money on different dates from the plaintiff by putting her signature thereupon. It is true that Rama Chakraborty in her written statement alleged that plaintiff and her husband sometimes obtained her signature on some blank papers but she did not state as to why her signatures were obtained on blank papers or as to why she put her signatures on blank papers. Again it appears from those receipts (Ext. 4 series) that the amounts received by Rama Chakraborty were also written under her handwriting. No explanation was given in the written statement as to why Rama Chakraborty received those payments from the plaintiff on different dates. Admittedly, present appellants being defendant Nos. 2 and 3 had no idea as well as knowledge as to why those receipts (Ext. 4 series) were executed by Rama Chakraborty. The heirs of Rama Chakraborty being defendant Nos. 1A and 1B did not come forward before the Court to deny receipt of said amounts as disclosed in those receipts (Ext. 4 series) by their mother Rama Chakraborty. It appears from the copy of notice dated 01.12.1992 (Ext. 5 G) that the original plaintiff asked the original defendant Rama Chakraborty to intimate as to whether said Rama Chakraborty was ready to execute the kobala and on receipt of necessary information plaintiff would send the draft copy of kobala. It appears that said notice was sent under registered post (Ext. 5 H) and that it was duly received by Rama Chakraborty by putting her signature on the postal A/D card (Ext. 5 I). In this connection it is pertinent to note that the case laws referred by learned senior counsels for the appellants are not of much help to the appellants in the facts and circumstances of the present case.

14. In Smt. Chand Rani's case (supra) it was held as follows:

In the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are :

(1) from the express terms of the contract;

(2) from the nature of the property; and

(3) from the surrounding circumstances, for example: the object of making the contract.

15. In P. Purushottam Reddy's case (supra) reliance was placed on Chand Rani's case to determine as to whether time was essence of the contract of sale of an immovable property.

16. In the case in hand, it came out that in both the contracts, one of 14.12.1987 and the other of 14.12.1988, it was specifically laid down that the time of performance of contract as noted therein could be extended by the mutual consent of the parties. As such, it is obvious that both the parties were aware that the time was not the essence of the contracts. It is true that in Clause 15 of the contract dated 14.12.1988 it was stated that the earlier contract dated 14.12.1987 is hereby cancelled though in reality said subsequent contract of 14.12.1988 was nothing but extension of earlier contract dated 14.12.1987 by two more years with a further clause that the time can further be extended as per convenience of the parties. It is true that the money receipts (Ext. 4 series) were shown to be relating to contract dated 14.12.1987 though by this time the earlier contract of 14.12.1987 was replaced by the subsequent contract dated 14.12.1988. But that cannot make those subsequent payments through Ext. 4 series to the original defendant Rama Chakraborty as non-est. As the agreement dated 14.12.1987 was replaced by the subsequent agreement dated 14.12.1988 it has to be accepted that those subsequent payments through these receipts (Ext. 4 series) were relating to the subsisting contract i.e., contract dated 14.12.1988 in absence of any evidence that those payments were made to Rama Chakraborty on any other count or for any other purposes. As such, neither from the expressed terms of the contract, nor from the nature of the property, nor from the surrounding circumstances it can be inferred that the time was the essence of the contracts of 14.12.1987, or of 14.12.1988. As such, the findings of learned courts below that time was not the essence of the contract was based on evidence, and was also according to the settled legal principles.

17. It is alleged that the plaintiff was not in a position to perform her part of contract as she paid amounts to Rama Chakraborty in installments and not at a time. It came out from the evidence on record that Rama Chakraborty wanted payments to meet her different necessities and that she was not in a position to deliver the vacant possession of the entire suit premises to the plaintiff by executing the kobala on receipt of entire balance consideration money. There is also specific averments in the plaint that plaintiff was all along ready and willing to perform her part of the contract. The case of Manjunath Anandappa (supra) has no application in the facts of this case as facts of said case materially differ from the facts of the present case. In said case there was no averment in the plaint that plaintiff was all along ready and willing to perform his part of obligation and the notice was served upon the power of attorney holder of the defendant which was already revoked to the knowledge of the plaintiff. But in this case I have already stated that there was specific averment to that effect in the plaint and there was also evidence to that effect. Again in this case the notice was served upon the original defendant who received the same by putting her signature on the A/D card.

18. Perused the case laws referred by Mr. Dasgupta in connection with scope of application of Section 100 of the Code of Civil Procedure.

19. Admittedly, the concurrent findings of fact of learned courts below can be interfered by this Court while hearing a second appeal u/s 100 of the CPC only when it can be shown that said findings were not based on evidence, or were based on extraneous matters or were not following settled legal principles. In the case in hand, it has already been observed that the findings of learned Courts below were based on evidence and were according to the settled principles of law as laid down by Hon"ble Apex Court in Chand Rani"s case (supra).

20. Accordingly, I find and hold that the impugned judgment of learned Lower Appellate Court does not call for any interference by this Court during hearing of this second appeal u/s 100 of the Code of Civil Procedure.

21. As a result, the appeal is hereby dismissed on contest.

22. However, I pass no order as to costs.

23. Send down Lower Court records along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to the learned counsels of the parties, if applied for.