Kailas Chandra Bhaumick and Others Vs Bejoy Kanta Lahiri Chowdhury and Another

Court: Calcutta High Court

Date of Decision: May 13, 1915

Citation: 50 Ind. Cas. 177

Hon'ble Judges: Roe, J; Ashutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for specific performance of an agreement to grant a permanent lease, made orally on the 30th

December 1908. There is no dispute as to the identity of the property, the annual rent fixed and the premium payable. A sum of Rs. 400 was paid

on account of the premium on the day following the agreement but, though subsequently the plaintiffs tendered the balance, Rs. 900, the defendant

declined to execute the lease. The plaintiffs were consequently driven to seek the assistance of the Court. The Court of first instance overruled the

objections taken by the defence and made a decree for specific performance. On appeal the District Judge has set aside that decision on the

ground that there was no concluded agreement, first, because, the time of the commencement of the please was not specified, and secondly,

because the plaintiffs have failed to prove that they had tendered the balance of the premium within the period stipulated. Before this Court, the

view taken by the District Judge upon each of these questions has been assailed by the plaintiffs as erroneous in law.

2. As regards the first question, the District Judge has held that in a contract for the grant of a lease, the date of the commencement of the lease is a

material term, and if it does not appear in the contract, either expressly or by inference, the agreement is incomplete and incapable of specific

performance. This view is in accord with that taken in the cases of Blore v. Sutton (1817) 3 Mer. 237 : 17 R.R. 74 : 36 E.R. 91 Nesham v. Selby

(1872) 7 Ch. App. 406 : 41 L.J. Ch. 551 : 26 L.T. 568 and Lord Ormond v. Anderson (1813) 2 Ball.B 363 : 12 R.R. 103. Now, as was pointed

out in White v. McMahon (1886) 18 L.R. Ir. 460 where reference was made to the decision in Marshall v. Berridge (1882) 9 Ch. D. 233 : 51

L.J. Ch. 329 : 45 L.T. 599 : 30 W.R. 9 : 46 J.P. 279 in English Courts this question has arisen principally in connection with the application of the

Statute of Frauds. But as was explained by Sir Francis Maclean, C.J., in Ambica Prosad Dass v. J.C. Galstaun 4 Ind. Cas. 85 : 13 C.W.N. 326 :

6 M.L.T. 368 the Statute of Frauds has no application to this country and where there is an oral agreement to grant a lease, Section 92 of the

Indian evidence Act does not stand in the way of proof that there has been an agreement, by implication or inferable from the circumstances, for

the time of the commencement of the lease. Even in England sash inference has been permitted to be drawn from the surrounding circumstances;

as, for instance, in the cases of under & Bailey''s Contract, In re (1892) 3 Ch. 41 : 67 L.T. 521 : 61 L.J. Ch. 707 and Phelan v. Tedcastle (1885)

15 L.R. Ir. 169. We must consequently examine whether the circumstances of this case furnish an indication of what date was intended by the

parties for the commencement of the lease, and here we must bear in mind that there was no suggestion at any stage in the primary Court that the

contract was not complete because the date of the commencement of the lease had not been expressly stipulated; the objection was taken for the

first time in the Court of Appeal below. It is plain, in view of the provisions of Section 110 of the Transfer of Property Act, that the intention of the

parties must have been, in the absence of indication to the contrary, that the lease would take effect from the date of the execution of the

instrument. This was formulated expressly in the plaint and was not challenged in the written statement. We are of opinion accordingly that the

contract cannot be treated as other than a concluded agreement, though there was an absence of an express stipulation for the commencement of

the lease. We may add that the Judicial Committee held in the case of Moulvie Mahomed Ikramull Huq v. Wikie 1 C.W.N. 946 : 17 M.L.J. 454 :

4 A.L.J. 740 : 6 C.L.J. 682 : 2 M.L.T. 448 that there was a concluded agreement, although the time of commencement of the lease was not

expressly mentioned. The first ground by the District Judge in support of his decree cannot consequently be upheld.

3. As regards the second question, it has been urged that the plaintiffs have failed to prove that they tendered the balance of the premium within the

period stipulated. The parties are agreed that there was a stipulation that the balance of the premium should be paid within a fixed period.

According to the plaintiffs, the balance was to be tendered within one month from the date of the agreement, that is, on or before the 30th January

1909. According to the defendant the balance was to be tendered within two weeks, that, is, on or before the 13th January 1909. The District

Judge has found it impossible on the evidence to hold that either party has proved his allegation. He has, on the other hand, referred to the

evidence of one of the witnesses examined on behalf of the plaintiffs, whose deposition shows that there was no time fixed for payment of the

balance of the premium. What happened was that the plaintiffs suggested that they might be permitted to complete the agreement within one month.

The defendant stated that it would be min convenient if it was completed earlier; that is, within two weeks. Nothing further was said, and the period

was left open. Consequently, the plaintiffs were at liberty to perform their part of the agreement within a reasonable time. Now can we say that

there has been such a lapse of time as bars-the remedy of the plaintiffs. No doubt, as a general rule, delay by the plaintiff in the performance of his

part of the contract is a bar to his claim for specific performance, provided that time was originally of the essence of the contract or has been made

so by subsequent notice or that the delay has been so great as to be evidence of abandonment of the contract. The present case is not covered by

either of the first two alternatives, nor has there been unreasonable delay. The tender was made within a month from the date of the agreement and

clearly there was no such delay as would evidence an intention on the part of the plaintiffs to abandon the contract. The plaintiffs are entitled to

succeed on proof that they indicated their willingness to perform the condition precedent within a reasonable time, Noble v. Edwards (1877) 5 Ch.

D. 378 : 37 L.T. 7. The second ground assigned by the District Judge cannot thus be maintained.

4. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be

heard on the other points raise therein. The costs of this appeal will abide the result.