

Dilip Kumar Sarkar Vs SK. Abdul Maleque

Court: Calcutta High Court

Date of Decision: July 10, 1990

Acts Referred: Specific Relief Act, 1963 " Section 12
Transfer of Property Act, 1882 " Section 55(a)(b)

Citation: (1992) 2 ILR (Cal) 432

Hon'ble Judges: S.S. Gangul, J; S.P. Rajkhowa, J

Bench: Division Bench

Advocate: S. Das Gupta, S.P. Roy Chowdhury, S.K. Mukherjee and D. Roy, for the Appellant; S.K. Mukherjee and N. Banerjee, for the Respondent

Final Decision: Allowed

Judgement

S.P. Rajkhowa, J.

This appeal is directed against the judgment and decree dated January 31, 1987, passed by Sri M.M. Sen, Assistant

District Judge, First Court at Alipore, in Title Suit No. 7 of 1981 whereby the learned Judge decreed the Plaintiffs suit in part on contest with cost

against the Defendants Nos. 1 to 4 and 6. The suit was decreed for recovery of the sum of Rs. 22,030 from the said Defendants and the prayer

for a decree for specific performance of the contract for sale was refused.

2. The Plaintiff filed Title Suit No. 7 of 1981 for specific performance of the contract for sale dated August 15, 1978 against the Defendants,

alternatively for refund of advance and realization of compensation on enforcement of charge valued at Rs. 68,000 only. The Plaintiff's case is that

the Defendants offered to sell and the Plaintiff agreed to purchase 2-75 29/80 acres of raiyati land in Mouza Undayrajpur, Barasat P.S., Dist. 24

Parganas, as fully described in the schedule of the plaint, for a consideration of Rs. 66,800 only. Pursuant to the said agreement a baina-patra was

executed on August 25, 1978, by the Defendants Nos. 1 to 4 and 6 on receipt of Rs. 20,000 only as earnest money and part payment of

consideration. The said Defendants acted also on behalf of the Defendant No. 5 in this regard and undertook to make her join in the deed or

deeds. The terms of the agreement for sale have been fully described in para. 2 of the plaint. It is stated therein inter alia that the Plaintiff or his heirs

would pay the balance consideration of Rs. 46,800 within February 13, 1979, and the Defendants or their heirs shall be bound to execute a

registered sale deed of the said property in favour of the Plaintiff or his nominee. The Defendants have made the agreement for sale of the property

free from all encumbrances and if on search by the Plaintiff any defect in title was found then the Defendants and their heirs would refund to the

Plaintiff or his heirs the earnest money of Rs. 2,00,000 and all expenses. It is further averred that Defendant No. 1 had represented that he would

seek permission from the competent authority under Urban (Ceiling and Regulation) Act, 1976, for selling the suit property in due time. Pursuant to

the agreement, the Defendants received various amounts on different dates from the Plaintiff totaling Rs. 17,000 up to March 2, 1980. The Plaintiff

pressed for the execution and registration of the sale deed but the Defendants tried to evade the matter. The Plaintiff then got the information that

the Defendants or some of them were trying to sell some portion of the said property agreed to be sold to the Plaintiff. So he was obliged to

publish in newspaper the fact of the said agreement made by the Defendants to sell the property to the Plaintiff, with a note of caution to all persons

intending to purchase. The Plaintiff also served pleader's notice on the Defendant requesting them to complete the transaction and to execute the

deed of sale but the Defendants were not coming forward to execute the same. Hence he filed the suit praying for a decree for specific

performance of the contract for sale dated August 15, 1978, directing the Defendants to convey the property in suit to the Plaintiff and register the

document on receipt of the balance of consideration and for delivery of the possession of the suit property, alternatively, for a decree for the

recovery of the sum of Rs. 37,000 and a further sum of Rs. 5,000 as damages on enforcement of a charge on the property u/s 55(a)(b) of the

Transfer of Property Act plus interest and cost.

3. The Defendants Nos. 1 to 4 and 6 resisted the claim of Plaintiff by filing a joint written statement denying all the material allegations of the

Plaintiff. In short, the defense case is that the Plaintiff and his wife are the owners of the brick business known as "Rock Field (India)". Defendant

No. 1 came to know that there was a vacancy in this business and he approached the Plaintiff for a post. The Plaintiff represented that employment

would be given provided the said Defendant gave security of the landed property as he was to deal with cash. The said Defendant No. 1 agreed to

the proposal and accordingly he handed over the title deed and other papers to the Plaintiff and there was a talk for security deed for the service.

Being persuaded by the assurance of the Plaintiff, the Defendants Nos. 2 to 4 and 6 along with Defendant No. 1 executed a document believing

the same to be a security deed. The Plaintiff in collusion with the deed writer, attesting witness and other person or persons had manufactured the

agreement. The Defendants never agreed to sell the suit property at Rs. 66,800 and they never took any earnest money. According to the

answering Defendants the deed is forged, fictitious, void and collusive and no consideration passed. After execution of the said deed, Defendant

No. 1 was employed in the service of the Brick Field of the Plaintiff. After few months, the Plaintiff employed his nephew Shyamal Sarkar and

dismissed the Defendant No. 1 from service. Thereafter, the Defendant No. 1 on his behalf and on behalf of other Defendants approached the

Plaintiff to return the said security deed and other relevant papers which were handed over to him earlier. Dispute arose between the parties over

that issue and so, it is averred, the suit was filed by the Plaintiff for wrongful gains.

4. On the above pleadings of the parties, altogether six issues were settled out of which issue No. 5 reads as follows:
""Is the Plaintiff entitled to the

decree as prayed for ?"" On the basis of the evidence on record as produced by the parties, the learned trial Judge has opined that the execution of

the document, i.e. the agreement for sale, Ex. 1, was complete and that the Defendants also admitted the execution of the document although they

had set up a case that they thought it to be a security deed. The learned Judge also found the existence of the contract between the parties but that

Defendant No. 5 Mstt. Suratannessa Bibi did not participate in the transaction and the Court could not compel her to execute the sale deed with

other Defendants in terms of the bainapalra. Her share was included in the said document. The Court could not enforce the contract piece-meal.

The entirety of the contract was to be enforced. The learned Judge, further, observed that there was nothing on record to show the extent of the

share of Suratannessa Bibi in the suit property and the earnest money was paid in lump. It was not paid to the vendors proportionately to their

shares. So Section 12(4) of the Specific Relief Act could not be attracted as the present contract was not divisible into two parts Thus observing,

the learned trial Judge concluded that the Plaintiff was not entitled to get the refund of the earnest money paid by him to the Defendants and

accordingly he decreed the suit in part for refund of the earnest money and rejected the Plaintiff's prayer for enforcement of the performance of the

contract as per provision of the Specific Relief Act.

5. Being aggrieved thereby, the Plaintiff has come up before this Court in this appeal. The learned Counsel for the Appellant has submitted that the

learned trial Judge has erred in law as he erroneously came to the conclusion that the contract could not be enforced. According to the learned

Counsel, the learned trial Judge ought to have decreed the suit for specific performance of the contract by excluding the share of Suratannessa

Bibi. In support of his contentions he has relied on Fry's Treatise on the Specific Performance of Contracts (6th Ed.) and reported decisions which

we are going to discuss presently.

6. Section 473 of Fry's Treatise says:

where the vendor has not substantially the whole interest which he contracted to sell he cannot enforce the contract against the purchaser, and yet

the purchaser can generally enforce it against him by compelling him to convey what he can, with an abatement of the purchase money as

compensation for the deficiency.

7. Section 1257 of the same Treatise says:

Although, as a general rule, where the vendor has not substantially the whole interest he has contracted to sell, he, as we have seen, cannot enforce

the contract against the purchaser, you're the purchaser can insist on having all that the vendor can convey, with a compensation for the difference.

8. Section 1264 of the same Treatise says:

So where vendors contracted to sell the entirety of certain free holds, and it was afterwards discovered that they were entitled to an undivided

moiety only, the purchaser obtained a decree for the specific performance of the contract by the vendors to the extent of their moiety, with

abatement from the purchase money of one half the amount.

9. *Rai Promothonath Mitter v. Gostha Behari Sen* 33 C.W.N. 314 is a suit for specific performance. The 12 as co-sharers of certain lands granted

a lease of the entire interest on receipt of a kabuliyat and the full amount of the selami, but the remaining co-sharers refusing to recognize this lease,

the lessee brought a suit against all the co-sharers, praying for an amalnama, possession and mesne profits. The Court, delivering the judgment of the

Court observed that the suit was not for the specific performance of a contract but for declaration of title and possession, and the Plaintiff was

entitled to a decree to the extent of the share of the actual lessors the contract with whom was complete.

Suhrawardy J. presiding over the Division Bench observed that even if the suit were one for specific performance, a similar decree which would be

one for partial performance could properly be made u/s 15 of the Specific Relief Act.

10. *Harendra Chandra Das and Ors. v. Nahda Lal Ray* 36 C.W.N. 1002 is another case on specific performance of the contract. In this reported

case, two persons acting as agents of five other persons entered into a contract with the Plaintiff for sale of the share of four of these persons in

certain immovable properties and of the ijara interest of the fifth, but it was found that they had entered beyond the scope of their authority. Three

of these principals ratified the contract but two did not. Under the facts and circumstances of the case, it was held that the contract was divisible

one and could be specifically enforced as against the shares of the satisfying principals.

11. In *Abdul Karim Basma v. Gladys Muriel* 54 C.W.N. 770 it was held by the Privy Council that where there are more vendors than one and

one of them cannot complete the contract and convey his interest, there is nothing to prevent the conveyance of the interests which belong to the

others and a specific performance of a part of the contract.

12. In AIR 1949 211 (Federal Court) it was observed that-

Unlike English law, the Indian law makes all joint liability, joint and several, in the absence of any agreement to the contrary. It is, therefore, open

to promises to sue anyone or some of the joint promises and it is no defense to such a suit that all the promisors must have been made parties.

Moreover, when the Plaintiffs pray ultimately for specific performance for a part of the contract in the manner contemplated by Section 15,

Specific Relief Act, and express their readiness to pay the entire consideration for the part, the Defendants cannot be said to be prejudiced in any

way.

13. The learned Counsel for the Appellant has relied on a recent decision of the Supreme Court in *Kartar Singh Vs. Harjinder Singh and others*,

The facts of this case are that the Respondent and his sister owned some properties and the Respondent entered into a written agreement with the

Appellant for himself and on behalf of his sister for sale of all properties for consideration of Rs. 20,000. He undertook to get the sale deed

registered. It was specifically mentioned in the agreement that he had agreed to sell not only his entire share in the property but also of his sister and

that he would be responsible for getting the sale deed executed from his sister. The sister refused to sell property coming to her share. In a suit for

specific performance of agreement a decree was granted in respect of half share of the suit property This was set aside by the High Court of

Punjab and Haryana by taking into consideration the provisions of Section 12 of the Specific Relief Act (sic) the Supreme Court disagreed with the

High Court and held that this is not a case which is covered by Section 12 of the Act.

The present (case) is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party,

namely, the Respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of

his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact,

these was no contract between the Appellant and the Respondent's sister and the only valid contract was with the Respondent in respect of his

share in the property.

It was, further, observed by the Supreme Court that the specific performance in respect of share of property owned jointly cannot be refused on

the ground that the property will have to be partitioned. It is not a legal infirmity and the vendee has the right to apply for partition and get the share

demarcated.

14. Countering the argument of the learned Counsel for the Appellant, the learned Counsel for the Respondent has submitted that the Plaintiff is not

entitled to a decree for specific performance of the agreement to sell on the grounds that the agreement to sell was neither registered nor signed by

all the Respondents nor there was anything in the agreement to show that the share of Respondent No. 5 stood on a separate footing from the rest

of the land and, therefore, the agreement itself cannot be acted upon. His further contention is that from the date of the agreement to sell till the time

of filing of the suit a considerable period of time had elapsed and the Plaintiff has failed to explain the inordinate delay in filing the suit. According to

the learned Counsel for the Respondent, time was the essence of the contract as per the terms of the agreement and so the Plaintiff is not entitled to

any relief inasmuch as he had brought the suit for enforcement of the agreement beyond the stipulated time. His further submission is that the

Respondents are tillers of land and if they are to Part Company with their land, in enforcement of an invalid agreement for sale, they would suffer

irreparable loss. In support of his contentious he has also relied on a number of decisions of various High Courts.

15. He has cited the case of Kuraun Hajra Vs. Gokul Chand Brajabashi and Another, While going through the facts of this reported case we find

that the facts of the case in our hand are not similar. In that reported case, the Plaintiff contracted to purchase from the Defendant a plot of land

and paid certain sum as earnest money. Subsequently, part of the plot in question was sold to a third person, who was a purchaser for value

without notice. There was nothing in the contract between the Plaintiff and the Defendant to suggest that part of it stood on separate and

independent footing from another part Nor could it be said that the part sold was equal in value to the balance. Under the circumstances it was

held that the specific performance of the part of the contract could not be granted.

16. The learned Counsel for the Respondent wants to draw further support from Bhaurao Shamrao Bhalme and Others Vs. Mahadeo Raghu

Yelekar, In that reported case, the Bombay High Court dealing with Section 12 of the Specific Relief Act has observed that in a suit for specific

performance of the whole contract, the Plaintiff cannot seek decree for part only. However, it has been held by that High Court that the specific

performance of the contract in part may be enforced if the Plaintiff fulfils the condition laid down in Clauses (i) and (ii) of Sub-section (3) of Section

12. In the case before us the Plaintiff is all the time showing his readiness to pay the entire amount agreed upon minus the earnest money already

paid and he has expressed his readiness to purchase the land from Defendants leaving the share of Respondent No. 5. The learned Counsel for the

Appellant has even gone a step further in course of argument, to forgo that consideration money which relates to the shares of Respondent No. 5.

In our opinion, the case before us stands on a different footing from that of the Bombay case.

17. Learned Counsel for the Respondent has relied on another decision of this Court in Mst. Sahida Bibi Vs. Sk. Golam Muhammad, But we find

that the facts of the said reported case can be very well distinguished from the facts of the case in hand and, therefore, the said ruling is not

attracted to the instant case. In that case it was found that the Plaintiff was at variance with the real contract between him and the Defendant

regarding payment of the balance consideration money for sale of the suit property to the Plaintiff and not only he had purported to falsely claim

that he had paid another sum of certain amount in addition to a sum paid by him at the time of the execution of the agreement for sale but also

claimed that he was entitled to deduction of another sum of certain amount for the cost of structures built by him inside the suit property. In that

case the specific performance of the contract could not be enforced in favour of the Plaintiff because of his failure to aver and prove his readiness

and willingness to pay the balance of amount of the consideration money.

18. Learned Counsel for the Respondent has also relied on Diwali Lal and Others Vs. Sardar Baldev Singh and Another, We find that this ruling is

also not attracted to the case in hand. In this reported case the agreement was that Rs. 72,000 was required to be paid before asking the other

party to perform his part of the contract but Rs. 45,000 only was offered. Under the circumstances it was held that as the Plaintiffs had not

performed their part fully, they were not entitled to a decree. In the case before us the deed of agreement dated August 15, 1978, (Ex. 1) shows

that the earnest money of Rs. 20,000 had been received by the Defendants and the receipt of the same had been acknowledged in the body of the

agreement itself.

19. On the point of time when it is of the essence of the contract, the learned Counsel for the Respondent has relied on Sriram Cotton Pressing

Factory (P) Ltd. Vs. K.E. Narayanaswami Naidu, It was also a case for specific performance of agreement for sale. A period of two months was

fixed for performance of the contract but the time was extended from time to time. The Plaintiff was sleeping on his right for nine months though

time was the essence of the contract there was subsequent rise in the price of the suit lands. Under the circumstances waiver or abandonment

could be inferred and, therefore, the Plaintiff was not entitled to a decree for specific performance of agreement for sale and that the Plaintiff was

only entitled to the refund of Rs. 5,000 paid as advance to the Defendant. Accordingly, the trial Judge passed a decree for Rs. 5,000 only and

dismissed the rest of the Plaintiff's claim. Being aggrieved thereby, the Plaintiff came up before the High Court and the High Court concurred with

the finding of the trial Judge and dismissed the appeal. In our considered opinion this ruling is also not attracted to the case in hand because time in

it was not the essence of the agreement. However, the Counsel tried to draw support from a recital in the deed of agreement which was to the

effect that if the Plaintiff paid the remaining sum of consideration amounting to Rs. 46,800 within the month of Magh, 1385 B.S. (i.e. corresponding

to February 13, 1979), then the Defendants and their heirs would remain bound to execute and register a deed of absolute sale of the suit property

in favour of the Plaintiff. We do not agree that this recital means that time was the essence of the contract. It was a mere stipulation. On this point

the learned Counsel for the Appellant has submitted that time was not the essence of the contract and as the Plaintiff was always ready and willing

to perform his part of the contract, he is entitled to a decree for specific performance. To bring home this point he has cited Govind Prasad

Chaturvedi Vs. Hari Dutt Shastri and Another, It was a suit for specific performance of the agreement of sale. Neither in the pleadings nor during

the trial the Defendants contended that time was of the essence of the contract. The parties did not go to trial on that basis and no issue was

framed in that regard. Neither the terms of agreement nor the correspondence indicated that the parties treated time as of essence of the contract.

Under the premises, the trial Court held that the Plaintiff was always ready and willing to perform his part of the contract and so granted the relief

sought for by the Plaintiff. The High Court at Allahabad in appeal inferred an intention on the part of the parties to treat time as of essence of the

contract. But the Supreme Court negative this inference. We find that this ruling is attracted to the case in hand and supports the Plaintiff's case.

20. Not being confident with Sriram Cotton Pressing Factory v. Narayanswami (Supra) learned Counsel for the Respondent has tried to fortify

himself with a latest decision of the Allahabad High Court in Bishambhar Nath Agarwal Vs. Kishan Chand and others, In that case Plaintiff was

ready and willing to perform his part of the contract but the Plaintiff was not making payment in terms of the mode as provided in the agreement.

So it was held that the Plaintiff could not be deemed to be ready to get the deed executed. But in the case before us we do not find any mention of

the mode of payment in the deed of agreement (Ex. 1) and we are sorry to say that this ruling does not in any way come to the aid of the

Respondents.

21. At the end we would like to recapitulate the argument of the learned Counsel for the Appellant vis-a-vis the decision of the Supreme Court in

Kartar Singh's case (Supra) In the case in hand the suit property was agreed to be sold by the Respondents in favour of the Appellant. The

earnest money was also paid at the time of the agreement. Admittedly all the Respondents owned the suit property jointly but the Respondent No.

5 was not a signatory to the agreement for sale. Therefore, Respondent No. 5 who was not a party to the agreement, could not be compelled to

execute the deed of sale. But specific performance in respect of the shares of Respondents Nos. 1 to 4 and 6 cannot be refused on the ground that

the property was owned jointly by all the Respondents. This may necessitate partitioning of the property to exclude the share of Respondent No. 5

but such partition may be lawfully enforced if the Appellant applies for the same.

22. In the result, the appeal is allowed. The impugned judgment and decree are set aside. The Plaintiff/Appellant do get a decree for specific

performance of the agreement for sale in respect of the shares of Respondents Nos. 1 to 4 and 6 in the suit property upon payment of the balance

of the consideration money and deducting the proportionate value of the share of Respondent No. 5. Under the facts and circumstances of the

case, we leave the parties to bear their respective cost.

S.S. Ganguly, J.

I agree.

Appeal allowed.