

(2017) 12 OHC CK 0084

In the Orissa High Court

Case No : 68 of 2001

Anirudha Panda (dead) through his L.Rs

APPELLANT

Vs

Jyotshnamayee Panda and other

RESPONDENT

Date of Decision : 18-12-2017

Acts Referred:

Citation : (2017) 12 OHC CK 0084

Hon'ble Judges : A.K.Rath

Bench : SINGLE BENCH

Advocate : Satyabadi Mantry, P.K.Mohanty, S.K.Dash

Final Decision : Allowed

Judgement

1. This appeal is by the plaintiff against a reversing judgment. The suit was for Specific Performance of Contract.

2. The brief facts of the case are that the defendants have 1/3rd share in the suit schedule property. To press their legal necessity, the defendants proposed to sell their 1/3rd interest of the suit property to the plaintiff. The plaintiff agreed to the proposal. Consideration amount was fixed at Rs.75,000/-. The plaintiff paid an amount of Rs.55,000/-. It was agreed upon between the parties that the balance amount of Rs.20,000/- would be paid within a year. The defendants executed an agreement for sale on 28.12.1988. In terms of the agreement, the plaintiff paid an amount of Rs.17,000/-. Defendant no.1 received the amount and agreed to execute the sale deed registered after receipt of the balance amount of Rs.3,000/-. He was ready and willing to pay the balance amount of Rs.3,000/- but the defendants did not turn up to execute the sale deed. He sent a letter to the defendants on 21.12.1991 to receive Rs.3,000/- and execute the sale deed.

3. Defendant no.1 filed written statement admitting execution of the agreement for sale and receipt of part consideration of Rs.55,000/- on the date of agreement and Rs.17,000/- out of the balance consideration amount subsequently. The specific case of defendant no.1 was that the defendants

entered into a contract with the plaintiff for sale of their 1/3 interest of their agricultural land situated at mouza-Uthuli in different villages. The defendants have denied to have entered into any agreement for sale of property situated in Mansing Bazar. The plaintiff with the help of the scribe included the property of Mansing Bazar clandestinely and played fraud. Defendants 2 to 5 have adopted the written statement filed by defendant no.1. Defendant no.6 filed written statement denying the assertions made in the plaint.

4. Stemming on the pleadings of the parties, the learned trial court struck five issues. The parties led evidence. The learned trial court came to hold that the property situated in Mansing Bazar was in the agreement and the same was not subsequently inserted to. The plaintiff was ready and willing to perform his part of contract, but the defendants failed to perform their part of contract. Held so, it decreed the suit. The defendants 1 and 6 filed S.J.Appeal No.74 of 1996-I before the learned District Judge, Balasore-Bhadrak. The appellate court, on scanning of the agreement for sale, vide Ext.1, held that there are number of insertions, alteration and scorings in the agreement, which are not supported by any signature or initial of either parties or the scribe. The property of Mansing Bazar had been subsequently inserted in the agreement. The agreement was executed in respect of agricultural lands situated in other mouza. It further held that there is a stipulation in Ext.1 to pay the balance consideration amount within a year, whereafter the defendants would execute the sale deed. When there is a stipulation in contract itself with regard to time of payment of balance consideration money, on failure of the same, the plaintiff cannot claim execution of sale deed in his favour by the defendants. Time is the essence of contract. As per the contract, the plaintiff had neither paid nor offered payment of consideration amount to the defendants within a year of the execution of the agreement for sale, vide Ext.1. Thus, he failed to perform the part of contract. Held so, it allowed the appeal.

5. The Second Appeal was admitted on the substantial questions of law enumerated in ground nos.A, B & C of the appeal memo. The same are:- "A. Whether the normal presumption that time is not essence of contract for sale of immovable property accordingly to A.1967 S.C.868 and A.1977 S.C. 1005 has been rebutted in the defendants" pleading, evidence and Ext.1?

B. Whether the judgment of reversal is vitiated due to total non-application of mind to the terms 1 to 6 of contract quoted in para-6 at page-215 of 1993(1) OLR (S.C) 205 which contained a default clause whereas the terms of Ext.1 quoted in para-9 of the memorandum of appeal does not contain such clause or any other stipulation about intention of parties that time was essence of Ext.1.?

C. Whether the ratio in 1993(1) OLR (S.C.) 205 also applies to the plaintiff's case ?

6. Heard Mr.Satyabadi Mantry, learned Advocate for the appellants and Mr.P.K.Mohanty-2, learned Advocate along with Mr.S.K.Dash, learned Advocate

for the respondents.

7. The subject matter of dispute is no more res integra. In Chand Rani (Smt.) (Dead) by LRs. vs. Kamal Rani (Smt) (dead) by LRs. (1993) 1 SCC 519, the apex Court held: "The law is well-settled that in transactions of sale of immovable properties, time is not the essence of the Contract."

xxx xxx xxx

".....even where the parties have expressly provided that time of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

xxx xxx xxx

".....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."

8. The defendants had received an amount of Rs.55,000/- on 28.12.1988 on the date of execution of agreement for sale vide Ext.1. There is a stipulation in the agreement that the plaintiff shall pay the rest amount within a year whereafter the defendants shall execute the sale deed. In the event, the defendants failed to execute the sale deed within the time stipulated, the plaintiff shall approach the Civil Court for execution of the sale deed on payment of Rs.20,000/-. After receipt of consideration amount, the defendants will get the sale deed executed through process of the court. The plaintiff had paid an amount of Rs.17,000/-. In view of the same, this Court is of the view that parties never intended to make time as essence of contract.

9. The apex Court in Parakunnan Vetill Joseph's Son Mathew v. Nadumbara Kuruvila's Son and others, AIR 1987 SC 2328, held : "14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance

merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff."

10. Benjamin N. Cardozo whose "Nature of Judicial Process" shall surpass all ages made a pregrant remark on the discretion of a Judge. Cardozo proclaimed: ".....a judge even when he is free, is still not wholly free; he is not to innovate at pleasure; he is not a knighterrant roaming at will in pursuit of his own ideal of beauty or of goodness; he is to draw inspiration from consecrated principles....".

11. Judged on the touchstone of the decisions cited supra, this Court is of unhesitant opinion that the plaintiff is not entitled to any relief of Specific Performance of Contract since there are several scorings and insertions of one of the property at subsequent stage. The materials available on record indicate that in terms of the contract, conduct of the parties at the time of entering into the agreement and circumstances under which the contract entered into gave the plaintiff an unfair advantage over the defendants. Thus, he is not entitled to any relief of Specific Performance of Contract.

12. The next question crops up as to whether the plaintiff is entitled to refund of Rs.72,000/-, when there is no alternative prayer for refund of the amount. The defendants admitted that they received Rs.72,000/- from the plaintiff.

13. The apex Court in the case of Firm Srinivas Ram Kumar vs. Mahabir Prasad, AIR (38) 1951 SC 177 held : "xxx xxx xxx

The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

xxx xxx xxx"

The same view has been taken by this Court in Khali Panigrahi vs. Kamala Devi, AIR 1967 Ori. 100.

14. In the result, the impugned judgment is set aside. The plaintiff's suit for Specific Performance of Contract is dismissed. The plaintiff is, however, to get refund of Rs.72,000/- from the defendants with interest @12% per annum from

the date of advance till the date of realization. The amount shall be paid within a period of three months. The substantial questions of law are answered accordingly.

15. The appeal shall stand allowed in these terms. There shall be no order as to costs.