
(1984) 07 CAL CK 0006
In the Calcutta High Court
Case No : S.A. No. 206 of 1976

Aptabaddin Mondal

APPELLANT

Vs

M.D. Belayet Ali and Others

RESPONDENT

Date of Decision : 24-07-1984

Acts Referred:

Specific Relief Act, 1963 — Section 10, 13, 17

Citation : 88 CWN 1042

Hon'ble Judges : Sukumar Chakravarty, J

Bench : Single Bench

Advocate : Manindra Nath Ghose and Dhruba Bhattacharyya, for the Appellant; Saktinath Mukherjee, Abu Jafar M.S. Alam and Sefali Mukherjee for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Sukumar Chakravarty, J.—This second appeal is directed against the judgment and decree passed by the learned Additional District Judge, Barasat, 24-Parganas, in Title Appeal No. 1053 of 1974 confirming the judgment and decree passed by the learned Munsif, 3rd court, Basirhat, in Title Suit No. 208 of 1969. Plaintiff filed the suit for specific performance of the contract for sale of the suit land. Plaintiff's case in brief was that the land in khatian no. 117 of mouza Farastpur measuring 1.69 acres in two plots belonged to Rakibuddin and Naimuddin in equal sharers. Naimuddin contracted with the plaintiff to sell. 86 acre of land out of 1.69 acres of land for Rs. 4000/- and accordingly a deed of agreement for sale of the land was executed on 19-5-68 and Rs. 3000/- as earnest money was paid by the plaintiff toward the consideration of Rs. 4000/- on that date. It was also alleged that within Chaitra of 1376 B.S. the plaintiff could get the sale deed executed on payment of the balance consideration money of Rs. 1000/-. Plaintiff offered the balance of the consideration money but the defendants who were the heirs of Naimuddin since deceased refused to execute and register the sale deed in favour of the plaintiff. Hence this suit.

2. Only the defendant no. 5 filed the written statement and contested the suit. It was contended inter alia that Naimuddin did not execute any agreement for sale in favour of the plaintiff on receipt of any earnest money towards the consideration and that Naimuddin had no saleable interest in the land at the time when the alleged agreement for sale was executed. It was further contended that Naimuddin and his brother Rakibuddin surrendered their tenancy right in the land to the landlords and thereafter this defendant no. 5 along with his two other brothers took fresh settlement of the land. The plaintiff was therefore not entitled to any relief in this suit.

3. The learned Munsif on the consideration of the evidence found that Naimuddin executed the deed of agreement for sale of the suit land in favour of the plaintiff on receipt of Rs. 3000/- towards the consideration of Rs. 4000/- and as per the agreement, although plaintiff was willing to perform his part of the contract by offering the balance of the consideration money, the defendants who were the heirs of Naimuddin refused to accept the balance of the consideration money and execute the sale deed. The learned Munsif found also that Naimuddin had saleable interest in the land when the deed of agreement for sale was executed. Accordingly, the learned Munsif decreed the suit. On appeal, the learned Additional District Judge confirmed the judgment and decree of the learned Munsif subject to the observation that the independent title of the defendants if any to the suit property pursuant to the alleged surrender of the tenancy by Naimuddin and his brother, being not within the scope of the suit for a decree for specific performance of the contract, will not be affected by the decree in this suit.

4. The defendant no. 5 being aggrieved by the judgment and decree of the court below, has preferred this second appeal on the ground that the court below has committed mistake in law in confirming the judgment and decree of the learned Munsif.

5. Mr. M.N. Ghosh with Mr. D. Bhattacharyya appearing for the appellant has submitted that it is true that there are concurrent findings of facts of both the courts below as to the execution of the deed of agreement for sale (Ex. 4) by Naimuddin in favour of the plaintiff in respect of the suit land on receipt of Rs. 3000/- towards the consideration of Rs. 4000/- and as to plaintiff's willingness to perform his part of the contract by offering the balance of Rs. 1000/- and defendant's refusal to execute the sale deed and that the said concurrent findings of facts can not be interfered with in this second appeal, but the agreement for sale itself being hit by the doctrine of frustration was not enforceable, as according to the defendants, Naimuddin had no saleable interest in the land in 1968 when the agreement for sale was executed. Mr. Ghosh has submitted that although the learned Munsif arrived at the finding that Naimuddin had saleable interest in the land when the deed of agreement for sale was executed, the learned Additional District Judge (1st appellate court) has kept this important question outside consideration and outside the scope of this suit and

accordingly committed mistake in law and this mistake necessitates the rehearing of the 1st appeal on remand. Mr. Ghosh has further submitted that the entries in the R.S. record of rights have got the presumption of their correctness and the same show the independent interest of the defendant no. 5 and some others in the suit land other than through Naimuddin and that the first appellate court did not consider this important piece of evidence also in his judgment. Mr. Ghosh in support of his submission with regard to the application of the doctrine of frustration, has relied on the decision in the cases reported in Lala Sri Ram and Another Vs. Dhani Ram Gupta, and Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, .

6. Mr. S.N. Mukherjee with Mr. Abu Jafar M.S. Alam appearing for the respondent-plaintiff has submitted that in the facts of the present case, the doctrine of frustration has got no application and that in a suit for Specific Performance of the contract for sale, the first appellate court rightly kept outside its consideration the defendants plea (Vendors plea) that Naimuddin had no saleable interest in the land at the time when the deed of agreement for sale was executed, and that the first appellate court rightly observed while confirming the decree of the trial court that the decree in this suit for specific performance of the contract will not affect the independent title of the defendants if any in the suit land. Mr. Mukherjee while discussing the scope for the enforcement of the specific performance with reference to Sections 10, 13 and 17 of the Specific Relief Act, 1963 has drawn the attention of this court to the decision in the cases reported in Deenanath Vs. Chunnilal, .

7. Both the courts below had their concurrent findings of facts that the deed of agreement for sale (Ext. 4) was executed by Naimuddin in favour of the plaintiff in respect of the suit land on 19.5.1968 on receipt of Rs 3000/- towards the consideration of Rs. 4000/- and that the plaintiff was willing to perform his part of the contract by offering the balance of the consideration money in accordance with the agreement for sale and that the defendants being the heirs of Naimuddin refused to perform their part of the contract by accepting the balance of the consideration money and by executing the sale deed. Such concurrent findings of facts of both the courts below based on relevant evidence can not be interfered with in the second appeal.

8. Section 10 of the Specific Relief Act, 1963 (hereinafter referred to as the Act) deals with cases in which specific performance of contract is enforceable. Section 13 of the Act deals with rights of purchasers or lessee against a person with no title or imperfect title. Section 17 of the Act provides that the contract to sell or let property by one who has no title can not be specifically enforced in favour of the vendor or lessor. The discussion of the aforesaid provisions of the Act clearly show that the intending purchaser can specifically enforce the contract for sale against the vendor even if the vendor had no title to the land in question at the time of executing the agreement for sale. In the case of Deenanath Vs. Chunnilal reported in AIR 1975 Rajasthan 69 it has been held, "In

my Opinion, the vendor can not be permitted to set up a defence in a suit for specific performance brought by the purchaser that he had no title or had defective title to the property which he had agreed to sell." This opinion has got its support from the decision in the case of C.V. Muni Samappa Vs. Kolaba Gurunaniappa reported in AIR 1950 Madras 90, wherein it has been held as follows : "Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the Vendor's title and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing take such title as the vendor has.

9. In view of the principle of law as stated and discussed above, plaintiff's instant suit for enforcing the specific performance of the contract for sale can not be challenged as non-maintainable on the ground that Naimuddin had no saleable interest in the land at the time when the deed of agreement for sale was executed unless the contract is hit by the doctrine of frustration by any subsequent event of development. It has been held in the case of Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, as follows : "The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56.

10. In the instant suit, it is not the case of the defendants that the contract for sale became impossible to be performed because of any subsequent changed circumstances. The defence plea is that Naimuddin had no title to the suit land when he executed the deed of agreement for sale in favour of the plaintiff. The doctrine of frustration has got no application in the facts of the present case. The facts of the cases reported in Lala Sri Ram and Another Vs. Dhani Ram Gupta, are quite different and there the performance of the contract became impossible because of the subsequent changed circumstances making the performance of the contract impossible. So the decision in the aforesaid cases as relied on by Mr. Ghose, learned Advocate for the appellant does not help the appellant to successfully challenge the judgment and decree of both the courts below in the present suit.

11. The learned Munsif incidentally went into the question of title of Naimuddin to the suit land by observing that the question of Naimuddin's title can not be decided within the present framing of the suit for specific performance of contract and that the question of title can be gone into incidentally. The learned Munsif while going into the question of title incidentally found that Naimuddin

had title to the land when he executed the deed of agreement for sale in favour of the plaintiff. The learned first appellate court has rightly kept the question of title outside the consideration of the present suit for specific performance of the contract and has rightly held that independent title of the defendants if any to the land in question will not be affected by the decree of specific performance of the contract in the present suit. The learned Additional District Judge therefore has not committed any mistake in law in confirming the judgment and decree of the learned Munsif subject to the observations as made by him in the judgment. In the result, this second appeal is dismissed on contest. I make no order as to costs. The judgment and decree of the court of appeal below are confirmed. Let the lower court records be sent immediately.