

(1957) 07 PAT CK 0001
In the Patna High Court
Case No : A.F.O.D. No. 60 of 1948

Babu Kameshwar Prasad Singh and Others	APPELLANT
Vs	
Shahamat Mian and Others	RESPONDENT

Date of Decision : 12-07-1957

Acts Referred:

Contract Act, 1872 — Section 62
Specific Relief Act, 1877 — Section 21

Citation : AIR 1958 Patna 162 : (1957) 5 BLJR 620

Hon'ble Judges : Sinha, J;Dayal, J

Bench : Division Bench

Advocate : Ugra Singh, for the Appellant; D.N. Verma and K.N. Verma, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This appeal by defendants 1, 3, 7, 10 and 11 arises out of an action for specific performance of an oral contract.

2. The plaintiff's case is that defendants 1 to 9 are members of a joint Mitakshara Hindu family with defendant No. 1 as its karta, who entered into an agreement with the plaintiff for a permanent lease of 18 bighas of Bakasht land in village Piprarh for a consideration of Rs. 7,200/- which the defendants needed for paying off a decree and usufructuary mortgages and for household expenses in June, 1943, which roughly corresponds to Jeth of the Fasli year 1350. The rental agreed upon between the parties was at the rate of rupee one per bigha. According to the plaintiff the agreement was to make over to the plaintiff a registered permanent lease to take effect from the agricultural season of that year.

The consideration was payable as follows : a sum of Rs. 4,000/- was to be deposited in Court towards payment of the decree in Title Mortgage Suit No. 17 of 1939; Rs. 1,200/- was payable to Nathun Mahto on account of two rehan bonds; a sum of Rs. 1,675/- was payable to Nathu Singh on account or another

rehan bond; and Rs. 375/- was payable to defendant No. 1 in cash for being utilised towards household expenses. All these payments are proved, and accepted by the defence.

The plaintiff's case further is that, as the document was not executed, the plaintiff went to Dhruv Singh, defendant No. 1, and there for the first time the defendant disclosed that in July, 1943 there was a farzi sale deed in favour of defendant No. 10 in respect of properties including the suit land, and that, therefore, the lease would be executed by defendant No. 10. This talk took place in presence of defendant No. 10, who promised to execute the permanent lease, and it was agreed that it would be so done by the 24th July, 1943. Thereupon, the plaintiff paid a sum of Rs. 150/- for buying stamps, to defendant No. 10, and, in pursuance thereof, defendant No. 10 purchased several stamps at Arrah. The stamps, however, were such as could not have been used for execution of a permanent lease.

As the plaintiff was insistent upon execution of the document, defendants 1, 3 and 7 executed a handnote for Es. 7,200/- on the 25th July, 1943 for the satisfaction of the plaintiff and as an additional security for the plaintiff's money already advanced. The plaintiff, however, learnt later that the defendants in collusion with each other, had executed two farzi pattas in favour of defendants 11 and 12 on the 7th September, 1944 which, the plaintiff alleges, were all without consideration. It is also averred that defendants 11 and 12 are creatures of defendants 1 to 10, and they had full knowledge of the contract in favour of the plaintiff. On these allegations, the plaintiff prayed for specific performance of the contract and, in the alternative, for damages.

3. The defence of defendants 1 to 9 is that there was no contract for executing a permanent lease, that the suit is barred by the Bihar Money-Lenders Act, 1939, that defendants 1 to 9 are not members of joint Mitakshara Hindu family, that the sale in favour of defendant No. 10 is genuine and he is in possession, that these defendants and defendant No. 10 never promised to execute any mokarrari (permanent) lease and that the pattas in favour of defendants 11 and 12 are genuine, and further that the plaintiff filed the present suit in order to avoid the effect of the Bihar Money Lenders Act as to registration of moneylenders.

4. Defendant No. 10 also filed a written statement on the lines mentioned above. His case further is that the payments of money, as mentioned above, by the plaintiff for the purpose of paying the decree and the rehan bonds were, in fact, made from out of the payment made by him (defendant No. 10). It is also said that this defendant never purchased stamps and that the handnote in favour of the plaintiff is fraudulent and that the pattas in favour of defendants 11 and 12 are valid and for consideration. As the plaintiff is not a registered money lender, the plaintiff is not entitled to any decree even on the basis of the handnote.

5. The defence of defendant No. 11 also is that there was a genuine transaction with him and defendant No. 10, and that he is coming in possession of the land

settled with him. Defendant No. 12, however, is not affected by the relief claimed in the suit inasmuch as the land settled with him is different and not part of the land in suit.

6. The Court below has found in favour of the plaintiff as to the payments already referred to above and about the oral contract alleged by the plaintiff, and has decreed the suit.

7. Mr. Ugra Singh, learned Counsel appearing on behalf of the defendants-appellants, has submitted :

(1) that there is no evidence to support the oral agreement which is vague both in regard to the description of the land and the date agreed upon between the parties for the execution of the lease:

(2) that the sale in favour of defendant No. 10 is not farzi, it is a genuine transaction, and that in ordinary course of business defendant No. 10 made settlement of a portion of the land in suit with defendant No. 11.

(3) that the subsequent execution of a hand-note for the amount advanced by the plaintiff amounts to novation of contract, and, therefore, the Court below was wrong in giving effect to the alleged oral agreement of lease; and

(4) that Section 4 of the Bihar Money-Lenders Act, 1939 is a bar to the plaintiff getting a decree even on the basis of the handnote.

8. The plaintiff, in support of his case of oral agreement has examined himself as P.W. 10 as also P.Ws. 3, 5 and 6. The evidence on behalf of the defendants consists of the evidence of D.W. 2, who is defendant No. 1, regarding the contract. The learned Subordinate Judge, who had the advantage of seeing the witnesses depose in his presence, has relied upon the plaintiff's witnesses who have, in his view, proved the oral contract, and Mr. Singh, in my opinion has not been able to displace that finding. His only comment is that no reliance should have been placed on the plaintiff's witnesses mentioned above --(After discussing the evidence His Lordships proceeded).

I have no manner of doubt, therefore, that the plaintiff has been able to prove his case for specific performance of the contract, and as there is no reason, much less a compelling reason, to differ from the estimate of the oral evidence made by the Court below, I am not in a position to set aside the finding of the Court below on this point, It is true that the plaintiff candidly admitted the fact that, at the time of the agreement, he had not seen any documents in the shape of Khatian or other village papers as to the description of the land, but, as the plaintiff resides in a village not far distant from the land in suit and as the plaintiff and his witnesses have said that they had seen the land the very evening of the negotiation, it is not surprising that without looking into documents, the plaintiff agreed to accept the lease of the lands in suit from the defendant No. 1.

It is in evidence that the plaintiff and his witness P.W. 3 saw the lands in suit the very evening when the talk of settlement took place, and, as the lands are almost at one place and in one khata, it is not surprising, that, after having seen the lands, the plaintiff was satisfied about their description. So, there is no substance in the contention that the description was vague. It must be remembered that the lands being almost in the locality about two miles away from the plaintiff's house, the lands were, more or less, known to the plaintiff's men. P. W. 5 Megha Koeri has deposed to the effect that he has got lands near the lands in suit.

So far as the vagueness about the date of execution of the document is concerned, Mr. Singh contends, upon the authority of the Privy Council case in AIR 1921 71 (Privy Council) and also in Khushi Ram v. Munshi Lal AIR 1940 Lah 225 (B), that, as no date was mentioned for execution of the lease, the suit should be dismissed on the ground of vagueness of the time of fulfilment of the agreement. It should be remembered, as I have already indicated, that the negotiation took place in the month of Jeth, 1350 Fasli, and all the payments by the plaintiff towards the consideration, except the sum of Rs. 325/-, were made in the month of Jeth, and, therefore, it is more than probable that, as the agricultural season started in that month, the parties had agreed to give effect to their agreement by the end of that month, or early next month, namely, Asarh of that year. Therefore, I would hold that the parties intended their agreement to be given effect to in the month of Jeth or latest by the following month. In the Privy Council case, their Lordships said-

"It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement, either expressly or impliedly to be granted fixes the date from which the term is to run."

This observation of their Lordships was on the facts of that particular case where the term was as follows:

"In consideration whereof I do hereby promise and agree to execute a permanent Ijara hereafter."

I have underlined the important word (here into " ") "hereafter", which, in my opinion, was as vague and indefinite as possible, and it was on this case that their Lordships made the above observation, In the present case, however, as I have held, the implied condition was that the contract of lease was to be executed either in the month of Jeth or in the following month and the lease was to take effect from the date of its execution. In the Lahore case also, in my opinion, the facts were quite different. While considering the question of limitation, their Lord-Ships held as follows:

"The plaintiff is on the horns of a dilemma. If he contends that a specific date was fixed for the performance of the contract in the deed and that that date was the date when the property demised was vacated by the previous tenants, his suit is clearly time-barred, inasmuch as the plaintiff had himself stated in the

plaint that this event occurred on the 8th April, 1934. If on the other hand, he urges that no date was fixed and that he had no notice that performance was ever refused, his suit fails on the ground that those contracts of lease in which no date for delivery of possession is fixed cannot be specifically enforced."

and reliance was placed on the abovementioned Privy Council case. That is not the case here. I would hold, therefore, that the time for the execution of the document of lease and for its commencement can be impliedly gathered from the surrounding facts and circumstances as already indicated, and, therefore, this agreement does not suffer from the infirmities pointed out by their Lordships of the Privy Council.

9. Now so far as the farzi character of the sale deed in favour of defendant No. 10 and settlement by defendant No. 10 in favour of defendant No. 11 are concerned, defendant No. 12 being not affected by the present litigation, the burden has been rightly thrown upon the plaintiff by the Court below for proving the farzi nature of these transactions. The plaintiff has examined P. Ws. 4, 5 and 6 in support of the farzi character of these transactions, and it has been proved, without any manner of doubt, by these witnesses that it was defendant No. 1 and not the defendant No. 10 or defendant No. 11 who was in possession of the lands in suit. (After discussion of evidence the judgment proceeds.)

I am, therefore, of the view that the finding that defendant No. 10 is merely a farzidar, as recorded by the Court below, is a correct finding.

10. So far as the question of novation of the contract is concerned, it was not pleaded in the written statement nor was there any issue raised in this regard. Apart from this, however, I do not think there is any question of novation of contract in this case for the reason that in the plaint in paragraph 5 it was definitely stated by the plaintiff that the handnote was executed for the mere satisfaction (the vernacular word being "Itminan1") of the plaintiff, and, therefore, as I have already indicated, it was by way of a collateral or additional security; the intention was that defendant No. 1 on behalf of himself and his family should execute a permanent lease (mokarrari) of the lands in suit, and, if for any reason that contract was not fulfilled, then in that case the plaintiff could fall back upon the handnote.

The question of novation of contract comes in for consideration when the original contract is substituted by another contract but in cases where the original contract stands and is merely re-enforced by a subsequent agreement, there can be no question of novation of contract. In the present case, I have held that the parties entered into an agreement for specific performance of contract and the plaintiff never gave any indication to give up his rights under that contract, and the handnote was executed merely as a collateral security for the money already advanced and not in substitution of the original contract for a permanent lease. I, therefore, rule out this contention of Mr. Singh and hold that there is no novation of contract in the present case. Mr. Singh has referred to the case of Ram Nath

Vs. Mannu Lal and Another, , and that of Ram Singh v. Tek Chand-Niamat Rai AIR 1933 Lah 464(D), and I would briefly deal with these two cases. In the Allahabad case, it was held as follows:

"For ourselves we do not think that in the circumstances of this case the plaintiffs were entitled to revert to the original contract. They agreed to accept settlement of their claim for damages on the basis of the scheme which was laid down by the cloth merchants" committee and we think they ought to be bound thereby."

It is apparent that in this case the original contract was substituted by some agreement brought about by the cloth merchants" committee and, the plaintiffs having accepted the scheme of the cloth merchants" committee; it was held that they were not entitled to revert to their original contract. In the Lahore case, the placitum reads as follows:

"A executed a bond for a debt due by B. But subsequent to this a settlement was effected by which B was to pay part of debt in certain instalments and executed a mortgage for balance and in default B was to continue to be liable as before. B paid some instalments but failed to carry out the terms of settlement.

Held: under the terms of the settlement, that A's liability under the bond was absolved by the settlement and that it was not revived on B's default as there was no term in the settlement to that effect."

In other words, the original contract having been replaced by a subsequent settlement and which was given effect to, the parties were not entitled to "revert" to their original contract as was said in the previous Allahabad case. The law on this point is embodied in Section 62 of the Contract Act, and it reads:

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

In my opinion, no conditions, as mentioned in Section 62, have been brought about so far as the original contract between the parties in the present case is concerned. In that view of the matter, this contention also must fail.

11. In the view which I have taken, the question of application or otherwise of Section 4 of the Bihar Money-lenders Act, 1939 is not called in question. No other point was taken in this case.

12. In my opinion, the plaintiff's suit has been rightly decreed by the Court below. I, would, therefore dismiss this appeal with costs.

DAYAL J.

13. I agree.