
(1919) 01 CAL CK 0052
In the Calcutta High Court

Bijoya Kanta Lahiry Chowdhury

APPELLANT

Vs

Kailash Chandra Bhowmik and Others

RESPONDENT

Date of Decision : 10-01-1919

Acts Referred:

Transfer of Property Act, 1882 — Section 110

Citation : 52 Ind. Cas. 575

Hon'ble Judges : Syed Shamsul Huda, J;Richardson, J

Bench : Division Bench

Judgement

Richardson, J.—This is a second appeal arising out of a suit for specific performance of an agreement for the grant of a lease. The suit has had a long history, Specific performance was granted by the decree of the trial Court dated 26th April 1911. On first appeal that decree was reversed by a decree dated 5th March 1912, the Court holding that the agreement was incomplete inasmuch as it did not fix the date from which the lease should commence and farther holding that the plaintiffs had failed to prove that they had tendered the balance of the premium within the period stipulated. The plaintiffs preferred a second appeal to the High Court (No. 1183 of 1912 (See Kailas Candra Bhaumick v. Bijoy Kanta Lahiri 50 Ind. Cas. 177-Ed.)), which came before Mookerjee and Roe, JJ. By a judgment dated 13th May 1915 those learned Judges held that it was 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 should take effect from the date of the execution of the instrument. On the question of tender, the learned Judges held that no time having been fixed for payment of the balance of the premium the plaintiffs were at liberty to make, and on the facts found had made, their tender within a reasonable time. The result was that the decree of the lower Appellate Court was set aside, and the suit was remanded to that Court in order that the appeal thereto might be re-heard on other points which had not been dealt with. The appeal has accordingly been re-heard by the Second Additional District Judge of Mymensingh, who has made a decree dated 29th November 1916 confirming,

with some modifications, the decree of the trial Court for specific performance. From that decision the present appeal has been taken by the defendant No. 1. The appellant is the owner of a fractional share of the property to which the suit relates. The case for the plaintiffs is that he contracted orally to give them a patni lease of the share. A close approach to an agreement to that effect is admitted, but it has been contended in defence that for various reasons other than those already dealt with by the High Court in the judgment of May 1915, the agreement was incomplete and is incapable of specific performance.

2. Some of the questions in controversy in the Court below have been finally disposed of in the judgment appealed from and I shall confine myself to the matters discussed in the argument before us.

3. As the suit is based on an oral agreement, no question arises as to the construction of any document. The terms of the agreement and the intention of the parties are questions of fact depending on oral evidence and unless the Judge in the Court below has misapplied any principle of law to the facts which he has found, we cannot in second appeal quarrel with his conclusions. Moreover, the Judge is not bound by the language in which he states the terms of the agreement, as gathered by him from witnesses speaking to their recollection of conversations, in the same way in which the parties would be bound by the language of a written document to which they had subscribed their names. The statement of the terms by the Judge can only be regarded as approximating more or less closely to the words which the parties actually used at the time, and the Judge may look at the evidence as a whole for the purpose of elucidating the intention of the parties on any particular point.

4. Now, the Court below has found that negotiations having been going on for some time, on the 15th Pous 1315 an agreement was arrived at between the parties, comprising in substance four terms or conditions as follows:

(1) That defendant No. 1 would grant to the plaintiffs a patni lease of his 3 annas and 15 gandas share in Mouzas Ranigaon, Telipara and Pabai.

(2) That the rent payable by the lessors should be Rs. 50 annually.

(3) That a sum of Rs. 1,300 should be paid as nazar or premium.

(4) That a draft lease was to be prepared accordingly and approved by the defendant's Pleader, Babu Shyama Charan Roy.

5. It has further been found that on the same day, the 15th Pous, Rs. 400 was paid by the plaintiffs to the defendant by way of earnest money. The argument advanced in the Court below that the agreement was incomplete because it made no express provision in regard to certain particulars said to be essential in a patni lease has been pressed before us only in reference to three particulars. It is contended that the agreement is deficient in not providing

(1) for the kists or instalments in which rent should be paid.

(2) for the rate at which interest should run on arrears of rent, and

(3) whether security should or should not be given by the lessees for the due payment of the rent.

6. As to kists and interest on arrears, I agree with the Court below that in the absence of express agreement, the parties presumably intended that such matters should be regulated by the tenancy law of the country. As to security there seems no reason why any provision should be made. This contention fails.

7. The learned Vakil for the defendant, however, directed himself mainly to the fourth of the conditions above set out. It has been urged upon us that inasmuch as the preparation of a formal instrument of lease was contemplated, there was no concluded agreement. The effect of a reference to a formal document in connection with an agreement which is being negotiated was considered in the case of *Hyam v. Gubbay* 32 Ind. Cas. 53 : 20 C.W.N. 60 by the late Chief Justice and two learned Judges of this Court. The result of the English authorities there cited appears to be that it is a question of the intention of the parties whether there is to be no binding contract till the document is executed or whether the document is merely to commemorate, it may be in a manner required by law, the terms of a bargain already complete.

8. The conclusion of the Court below in the present case is that the lease to be drawn up was only to put into more formal shape the terms agreed upon between the parties with the insertion of usual legal phraseology and terms necessary in *patni patta*." It is said that the mere fact that a formal document was contemplated was *prima facie* an indication that the party did not intend to be bound till it was executed. That may be so, but there was other evidence before the Court. There was, for instance, the payment of earnest money. Such payment may not be conclusive to show a binding contract but it was a fact which the Court was entitled to take into consideration. It cannot be said that there is no evidence to support the conclusion at which the Court arrived. That being so, the conclusion must be accepted.

9. Stress is laid on the draft lease having to be approved by the defendant's Pleader, but what difference does that make in the circumstances of the present case? The parties arranged to put their agreement in writing and the writing was to be approved by the defendant's Pleader. The two things go together and the whole question is whether there was a concluded agreement, It is settled, as I have said, that there may be a concluded agreement though a document is to be executed embodying its terms. In such a case the contents of the document have, of course, to be approved by both parties before the document is executed, but merely from the point of view whether the document correctly and formally gives effect to the settled terms of the agreement. If it does, it represents the agreement which either party can be compelled to perform. A reference to a Pleader in this connection does not necessarily alter the position. The function of the Pleader may be merely to say whether the draft correctly

carries out the agreement. The defendant, therefore, is not entitled to assert, as he has attempted to do, that merely because mention was made of a draft lease and his Pleader's approval thereof, therefore, there never was a binding agreement. It was open to the Court to find, and the - Court has found, a binding agreement, and all objections on the score of uncertainty and so forth have been rejected. That being so, the defendant cannot resile from the agreement, nor can he or his Pleader refuse assent to a properly drawn instrument. If it be said that he or his Pleader might refuse assent to a draft not in accordance with the agreement, I quite agree. But the defendant has never met the plaintiffs fairly on that ground. He has contended from the first that there was no agreement. No doubt the draft filed by the plaintiffs with the plaint has been found to be open to exception as going beyond the agreement. But the plaintiffs, it appears, have throughout been willing to any reasonable modification of their draft. As modified by the directions contained in the decree of the Court below, the draft will apparently meet the requirements of the case.

10. There is no ground for our interference in second appeal and I would dismiss the appeal with costs.

Huda, J.

11. This appeal arises out of a suit for specific performance of a contract. The facts, so far as they have any bearing on the questions raised before us, are shortly these; plaintiffs alleged that the defendant No. 1 agreed with the plaintiffs Nos. 2, 4 and 5 to grant to them and to other plaintiffs a murasari lease of the defendant's share in certain Mauzas at a fixed annual jama of Rs. 50 and for a premium of Rs. 1,300, out of which the plaintiffs paid Rs. 400 at the time of the agreement and promised to pay the rest within a month, that the plaintiffs were ready and willing to pay this amount within the time stipulated but the defendant refused to accept the balance due and perform his part of the contract.

12. The defence, inter alia, was that although there were negotiations for a lease they had not ripened into a contract, that no portion of the premium was paid, although the plaintiffs had made a deposit of Rs. 400 with the defendant's cashier in anticipation of a contract, that all the terms and conditions of the lease had not been settled and plaintiffs were not, therefore, entitled to a decree for specific performance.

13. The Courts below have found that there was a binding oral agreement between the parties, that there was no uncertainty either as regards the land to be leased or as regards the rent or the premium and that the plaintiffs' allegation regarding the payment of a portion of the premium was true, and have upon these findings decreed the plaintiffs' suit.

14. Admittedly there was an understanding between the parties that the draft of the patta would have to be approved by the defendant's Pleader. Plaintiffs' case is that they prepared such a draft at defendant's request and submitted it to the

defendant's Pleader for approval and that the draft was so approved after certain alterations. This is denied by the defendant and there is no clear finding on this point.

15. The learned Vakil for appellant has argued in the first instance that the agreement is incapable of being specifically enforced as all the terms and conditions of the lease had not been settled. This agreement is completely disposed of by the finding of the lower Appellate Court, that all the material terms of the lease had been settled, that as regards those not expressly settled it was understood that these would be in accordance with the provisions of the law in that behalf in the absence of an express agreement to the contrary. Accordingly the lower Appellate Court has directed the defendant No. 1 to execute a patni patta in favour of plaintiffs Nos. 2, 4 and 5 in respect of 3 annas and 15 gundas share in Mouzas Ranigaon, Telipara and Pabai in terms agreed upon between them on 15th Pous 1315, other terms not agreed upon being provided by law.

16. The first contention, therefore, fails.

17. It is next argued that as the parties contemplated the execution of a formal lease to be approved by them, specific performance cannot be granted of the original agreement. In support of this contention reliance has been placed on *Winn v. Bull* (1878) 7 Ch.D. 29 : 47 L.J. Ch. 139 : 26 W.R. 230, *Hampshire v. Wickens* (1878) 7 Ch. D. 555 : 17 L.J. Ch. 243 : 38 L.T. 408 : 26 W.R. 491 and *Hyam v. Gubbay* 32 Ind. Cas. 53 : 20 C.W.N. 60 and on the decisions referred to in the last mentioned case. It seems to me that the cases cited are clearly distinguishable from the present case.

18. In *Winn v. Bull* (1878) 7 Ch.D. 29 : 47 L.J. Ch 139 : 26 W.R. 230 there was a written agreement whereby the defendant had agreed to take a lease of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract." No such formal contract was, however, entered into and it was held that there was no final agreement of which specific performance could be enforced. Sir George Jessel laid down the law in these terms: "If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'we will have the terms put into form'; then all the terms being put into writing and agreed to, there is a contract."

If two persons agree in writing that up to a certain point the terms shall be the terms of "the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

19. In *Hampshire v. Wickens* (1878) 7 Ch. D. 555 : 17 L.J. Ch. 243 : 38 L.T. 408 : 26 W.R. 491 the defendant offered to take a sub-lease from the plaintiff of a house at a particular rent on all usual covenants and provisos. The plaintiff accepted the offer. Afterwards plaintiff insisted that in the lease there should be inserted a covenant to the effect that the defendant would not without the

previous consent of the lessor assign, under-let or part with the possession of the said premises, but such consent was not to be withheld to a respectable and responsible tenant. The same learned Judge held that such a covenant was not an ordinary or usual covenant and that the plaintiff could not insist on specific performance on such terms, defendant never having agreed to them.

20. In *Hyam v. Gubbay* 32 Ind. Cas. 53 : 20 C.W.N. 60 specific performance was claimed of an agreement for sale. Certain terms and conditions were agreed to between the parties and earnest money was paid. It appeared, however, that all the terms had not been settled and the parties contemplated the execution of a formal written agreement to be approved by them embodying, in addition to the usual terms and conditions, special terms and conditions as to which no agreement had been arrived at before. It was also found that there were terms and conditions not agreed to or discussed which were embodied in the draft of the formal agreement prepared by the vendor's solicitor and submitted for the approval of the purchaser, which the purchaser did not approve. It was held that there was no completed contract between the parties capable of being enforced.

21. The present case is different from all the oases above cited. In the first and the third oases it was clearly agreed between the parties that the exact terms of the preliminary agreement should be incorporated in a more formal document, and it was held that this was a clear indication that the first agreement was incomplete and so long as a formal "document was not agreed to by the parties and a complete agreement arrived at between them there was no contract. Even in such cases the farther question arises whether the execution of a more formal agreement is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, go through, "In the former case," observed Jenkins, C.J., in *Hyam v. Gubbay* 32 Ind. Cas. 53 : 20 C.W.N. 60, "there is no enforceable contract either, because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored." In the present case there is nothing to show that the parties intended the execution of a formal document embodying the terms of the verbal agreement or that the verbal agreement had left any matters for future settlement. No doubt, the parties intended that to give effect to the agreement a formal lease would be executed after being approved by the defendant's Pleader, but this is very different from a formal document embodying the terms of the original verbal agreement and superseding such earlier oral agreement which was complete in itself. In this case the law required a written and registered lease and the claim for specific performance is a claim to obtain such a document. If the parties had said we are entering into an agreement provisionally but it is not to bind us so long as the lease itself is not drawn up and approved," it is obvious that neither party, could enforce Such an agreement. But this is not the case here. The lower Appellate Court says that "it was nobody's case and it was not definitely expressed and understood by the

parties that there was to be no contract until the draft lease was made and approved." The whole question resolves itself into this: was there a final agreement in this case? Upon the findings I think this question must be answered in the affirmative.

22. This case is also different from the case of *Hampshire v. Wickens* (1878) 7 Ch. D. 555 : 17 L.J. Ch. 243 : 38 L.T. 408 : 26 W.R. 491, as the plaintiff in that case insisted on specific performance upon terms to which the defendant had not agreed, and those terms were not the ordinary and usual terms as to which an implied agreement could be inferred.

23. In all cases of an agreement for sale or for lease where a registered document is necessary to complete the transfer, the approval and execution of such a document is always in the contemplation of the parties. To hold that in all such cases there is no contract capable of specific performance till the document itself is executed would lead to results which clearly the law never contemplated. The cases cited lend no support to any such proposition.

24. The appeal fails and is dismissed with costs.