
(1986) 04 CAL CK 0007
In the Calcutta High Court
Case No : F.A. No. 526 of 1970

Brojendra Badan Goswami

APPELLANT

Vs

Tapan Kumar Chakravarty

RESPONDENT

Date of Decision : 07-04-1986

Acts Referred:

Specific Relief Act, 1963 — Section 15

Citation : 90 CWN 849

Hon'ble Judges : S. Chakravarty, J;A.M. Bhattachaarjee, J

Bench : Division Bench

Advocate : T. N. Roy, for the Appellant; Ajit Kumar Ganguli and Rathin Dey for Respondent No.1 and G. P. Trivedi for Respondent. No. 5, for the Respondent

Final Decision : Allowed

Judgement

Sukumar Chakravarty, J.—This appeal is directed against the judgment and decree passed by Shri S. N. Ghosh, the learned Subordinate Judge, 4th Court, Alipore in Title Suit No. 54 of 1969. Plaintiff filed the aforesaid suit for specific performance of the contract and in the alternative for recovery of Rs. 20,300/-by way of damage.

2. It was the case of the plaintiff in brief that the suit land measuring.42 decimal in C.S. plot no. 2530 of khatian no. 872 in mouza Raipura belonged to the defendant no. 1 who agreed to sell one bigha land out of the said land to proforma defendants 2 to 4 for a price at the rate of Rs. 800/- per cottah and accordingly executed a deed of agreement for sale on 14.12.64 in favour of the proforma defendants 2 to 4 after taking the earnest money of Rs. 1001/-. It was further stipulated in the said deed of agreement for sale that on payment of the balance consideration money by the proforma defendants 2 to 4 within 2nd Magh 1371 B.S., the defendant no. 1 would sell the land to them and execute the kobala in favour of the proforma defendants 2 to 4 or in favour of their nominee, and that in default of the payment of the balance consideration money within the time as specified, the earnest money paid to the defendant no. 1 would stand

forfeited.

3. Because of some difficulty in demarcating and getting possession in the proposed one bigha land out of .42 decimal of land, the agreement for sale was modified on 10.1.65 to the extent that defendant no. 1 would sell the entire .42 decimal of land which is the suit land and the time for getting the kobala executed on payment of the balance consideration money was extended for a month and an endorsement to that effect was made on the back of the agreement for sale under the signature of the defendant no. 1. It was further alleged by the plaintiff that in the original agreement for sale there was a condition that the defendant no. 1 would execute the kobala on receipt of the balance consideration money from the plaintiff-defendant nos. 2 to 4 or from their nominee: The preformed defendants 2 to 4 on 29.8.65 took Rs. 2000/- from the plaintiff" and appointed him as nominee in terms of the agreement for getting the kobala executed by the defendant no. 1 in his favour on receipt of the balance consideration money from the plaintiff and made an endorsement to that effect on the back of the agreement for sale- On the basis of such assignment, the plaintiff requested the defendant no. 1 to execute the kobala in his favour after taking the balance consideration money from the plaintiff but the defendant no. 1 deferred the same on various pretexts. The plaintiff then sent a demand letter through his lawyer in this respect but to no effect. Hence this suit.

4. The defendant no. 1 filed the written statement and contested the suit. It was contended inter alia that the plaintiff was not the assignee of the agreement for sale for any valuable consideration and that no notice of the alleged transfer of the agreement for sale was served upon the defendant no. 1. It was further contended that there was no agreement for sale between the plaintiff and the defendant no. 1 in respect of the suit land. The agreement for sale between the defendant no. 1 and the proforma defendants, having been duly cancelled by the notice after the expiry of the time as mentioned in the agreement itself long before the alleged transfer of the agreement for sale in favour of the plaintiff, the plaintiff did not acquire any right to enforce the said agreement for sale either as representative or nominee of the proforma-defendants 2 to 4. The defendant no. 1 in the Title Suit No. 132 of 1965 brought by him against the proforma-defendants 2 to 4 got a declaration about the cancellation of the agreement for sale. Plaintiff therefore was not entitled to get any relief in the suit.

5. Proforma defendants 2 to 4 filed a joint written statement denying the material allegation of the plaintiff, and, contending inter alia that they never appointed the plaintiff as their nominee and that they did not assign the agreement for sale in favour of the plaintiff. It was further contended that the plaintiff took the agreement for sale from the proforma defendants 2 to 4 with their signatures thereon by way of security as the plaintiff advanced a loan of Rs. 1500/- to the proforma defendants. The proforma defendants 2 to 4 admitted also that defendant no. 1 by a notice to proforma defendants 2 to 4 cancelled the agreement for sale. In spite of the knowledge of such cancellation the plaintiff for

making a wrongful gain got the endorsement made without the knowledge of the proforma defendants 2 to 4. The plaintiff therefore was not entitled to get any relief in this suit.

6. Proforma defendant no. 5 filed a separate written statement and contested the suit. This proforma defendant No. 5 supported the averment of the defendant no. 1 and contended that he was a bonafide purchaser for value with the knowledge that the defendant no. 1 cancelled the agreement for sale and intimated such cancellation to the proforma defendants 2 to 4 and that the defendant no. 1 got also a direction to that effect in the Title Suit no. 132 of 1965 brought by defendant no. 1 against the proforma defendants 2 to 4. Further case of the proforma defendant no. 5 was that he was a bonafide purchaser for value without notice of the contract for sale in favour of the plaintiff.

7. On a trial of the suit, the learned Subordinate Judge found that the plaintiff was not a mere nominee of the proforma defendants 2 to 4 to get the kobala executed in his name but he was actually the assignee of the agreement for sale for value as he accepted the plaintiff's case that the defendant no. 1 agreed to execute the kobala in favour of the proforma defendants 2 to 4 or in favour of the nominee on receipt of the balance consideration money from either of them within the stipulated time and as he found that the proforma defendants 2 to 4 assigned the agreement for sale by endorsement in favour of the plaintiff after accepting Rs. 2000/- from the plaintiff. The learned Subordinate Judge found also that proforma defendant no. 5 was a purchaser of the suit land with notice of the contract for sale between the plaintiff and the defendant no. 1. The learned Subordinate Judge accordingly decreed the suit and gave direction upon the plaintiff to deposit the balance consideration money. The defendant no. 1 being aggrieved by the judgment and decree has preferred this appeal.

8. Mr. T. N. Toy, appearing for the appellant-defendant no. 1 has confined his submission on three points. His first point is that in view of the original agreement for sale Ex.1 as it stands, the plaintiff being a mere nominee for getting the kobala executed in his name, cannot bring the suit for specific performance of the contract for sale between the defendant no. 1 and the proforma defendants no. 2 to 4. His second point is that the alleged assignment of the agreement for sale by the proforma defendants 2 to 4 in favour of the plaintiff on 29.8.65 by an endorsement to that effect on the back of the agreement for sale Ex.1 without any consideration, does not entitle the plaintiff to bring a suit for specific performance of the contract for sale against the defendant no. 1. His important third point is that as the proforma defendants 2 to 4 did not pay the balance consideration money within the specified time as stipulated in the agreement for sale Ex.1 modified on 10.1.65, the defendant no. 1 cancelled the agreement for sale on 29.4.65 by a notice to that effect to the proforma defendants 2 to 4. The agreement for sale having been cancelled on 29.4.65, the proforma defendants 2 to 4 had no subsisting contract for sale with the defendant no. 1 after 29.4.65, and accordingly the plaintiff did not acquire

any right to enforce such contract for sale as transferee even by assignment of the agreement for sale by the proforma defendants 2 to 4 in favour of the plaintiff on 29.8.65 as per the endorsement to that effect and even as a nominee as per the original agreement for sale, even if it be assumed for the sake of argument that the assignment by endorsement was for consideration and that a nominee can endorse an agreement for sale. His fourth point is that the sale of the suit land by the defendant no. 1 to the proforma defendant no. 5 long after the cancellation of the agreement for sale cannot be challenged.

9. Mr. G. P. Trivedi for respondent-proforma defendant no. 5 has supported the submission of Mr. T. N. Roy.

10. Mr. A. K. Ganguli, appearing for the respondent-plaintiff has submitted that time being not the essence of the contract the defendant.no. 1 cannot cancel the agreement for sale and the cancellation if any, cannot legally debar the plaintiff from enforcing the agreement for sale as the plaintiff became the assignee and nominee of the proforma defendants 2 to 4 in respect of the agreement for sale.

11. Ex.1 is the certified copy of the registered deed of agreement for sale executed by the defendant no. 1 in favour of the proforma defendants no. 2 to 4 on 14.12.64. By this agreement for sale dated 14.12.64, it was agreed that defendant no. 1 would sell one bigha of land out of the suit land measuring.42 decimal for a price at the rate of Rs. 800/- per cottah to proforma defendants no. 2 to 4 who paid the earnest money of Rs. 1001/- to defendant no. 1 on the date of agreement. It was further agreed that on, payment of the balance consideration money by the proforma defendants no. 2 to 4 within 2nd Magh, 1371 B.S., the defendant no. 1 would sell the land under agreement to proforma defendants no. 2 to 4 and execute the kobala in favour of proforma defendants no. 2 to 4 or the person or persons nominated by them and that in default of such payment of the balance consideration money within the stipulated time, the earnest money would stand forfeited. On consent of the parties to the contract, by the endorsement dated 10.1.65 under the signature of the defendant no. 1, the original agreement was modified to the extent that the entire.42 decimal viz. the suit land would be sold and that time for getting the kobala executed on payment of the balance consideration money was extended for a month. It is therefore clear from the agreement for sale Ex.1, as modified by the endorsement dated 10.1.65, that the nominee if appointed by the proforma defendants no. 2 to 4 for getting the kobala executed in his name was under no obligation to pay the balance consideration money. According to the terms of agreement, it is the proforma defendants who were under obligation to pay the balance consideration money and get the land sold to them, although the kobala according to their option could be executed in the name of their nominee. It appears that the plaintiff made an incorrect allegation in the plaint when the plaintiff stated that the defendant no.1 agreed to execute the kobala. in the name of proforma defendant no. 2 to 4 or their nominee on receipt of the balance consideration money from proforma defendants no. 2 to 4 or their

nominee. The learned Subordinate Judge also proceeded on that wrong allegation and found that in such circumstances the nominee under the agreement for sale Ex.1 acquired the right to enforce the agreement. As the terms of the agreement for sale Ex.1 stand, the learned trial court is not justified to hold so.

12. The contract for sale of any land between the parties to the contract does not create any interest or charge on the land but creates an obligation upon the contracting parties. As a general rule a contract cannot be enforced except by a party to the contract. This rule is however subject to some exception. u/s 15 of the Specific Relief Act, 1963, Specific performance of a contract for sale of the immovable property viz. land may be obtained by any party thereto or by the representative-in-interest or the principal of any party thereto. It is well known that ordinarily the benefits and obligations under a contract are claimable by and enforceable against not only the parties to the contract but also by or against the representatives-in-interest of such parties, unless there is contrary intention expressly made in the contract itself. The representative-in-interest may be (a) an assignee of the contract from the original promisee or (b) his legal representative after his death. It is not the case of the plaintiff that he was the principal of the proforma defendants 2 to 4 who were party to the agreement for sale Ex. 1 in this case.

13. It is the plaintiff's case and it has been so submitted before us that the plaintiff as representative-in-interest of the proforma defendants 2 to 4 by assignment of the contract for purchase, has filed this suit for specific performance of the contract. It has already been shown that, under the terms of the agreement for sale Ex.1 the nominee of the proforma defendants 2 to 4 to be named under the agreement was not under any obligation to pay the balance consideration money. Under the terms of the agreement for sale Ex.1, the defendant no. 1 was under obligation to sell the land to proforma defendants 2 to 4 on receipt of the balance consideration money from them and to execute the kobala either in favour of them or in favour of their nominee to be named by them within the stipulated time. Under the said agreement for sale Ex-1, the plaintiff is a mere nominee without any obligation and not an assignee of any benefit or obligation and not an assignee of any benefit or obligation under that agreement. A suit at the instance of such a nominee of the proforma defendants for enforcement of the contract for sale can not be maintained.

14. Plaintiff however claims his right to enforce the agreement for sale Ex.1 on the basis of the endorsement Ex.1(a) dated 29.8.65 on the back of Ex.1, which according to the plaintiff assigns the agreement for sale of the suit land in favour of the plaintiff under the signature of the proforma defendants 2 to 4. It is also the case of the plaintiff that the proforma defendants 2 to 4 made such assignment in favour of the plaintiff on plaintiff's payment of Rs. 2000/- to them. The endorsement Ex.1(a) however does not say so. There is nothing in the said endorsement Ex.1(a) to show that the said assignment was for any

consideration. The said endorsement Ex. 1(a) not only names the nominee but also assigns the obligation of the proforma defendants 2 to 4 in favour of the plaintiff for payment of the balance consideration money and assigns also the benefit of those proforma defendants in favour of the plaintiff to, acquire the purchaser's interest in the land by getting the kobala executed in his name. The defendant no. 1 is not a party to such assignment nor any notice of such assignment was given to the defendant no. 1 at the time of such assignment. The said assignment by endorsement Ex.1(a) has been found to be without any consideration, although plaintiff has made out a case of the payment of consideration of such assignment in pleading and evidence. Having considered all the facts and circumstances, we are of the view that the plaintiff has failed to prove that he has acquired the right to enforce the contract for sale either as a nominee being the principal of the contracting party or as a nominee without contractual right and obligation or as an assignee of the agreement for sale in question.

15. Although the defendants have taken up the definite plea both in the written statement and evidence to the effect that the defendant no. 1 cancelled the agreement for sale on 29.4.65 for failure on the part of the proforma defendants to perform their part of the contract within the time as stipulated in the agreement for sale, the learned Subordinate Judge has not at all considered that question in his judgment.

16. Ex.A is the letter dated 29.4.65 sent by solicitor Shri S. Dhar on behalf of the defendant no. 1 to proforma defendants 2 to 4 intimating that the agreement for sale has been treated as cancelled and the earnest money has been forfeited due to the failure on the part of the proforma defendants to pay the balance consideration money and perform their part of the contract within the time as stipulated in the agreement for sale. Ex.H to H(2) which are postal receipts of the registered letter show that to each of the proforma defendants 2 to 4, the letter like Ex.A was sent by registered post and Ex.G to G(2) which are acknowledgement receipts show that proforma defendants 2 to 4 received the respective letters under their signature. The evidence of D.W. 1, Solicitor Shri S. Dhar and the evidence of defendant no. 1 (D.W. 2) also prove the same. The proforma defendants 2 to 4 have admitted this fact in their written statement. We therefore find that the agreement for sale was cancelled on 29.4.65. Such being the position, the assignment of the said agreement for sale on 29.8.65 in favour of the plaintiff which was not subsisting after its cancellation on 29.4.65 could not create any right in favour of the plaintiff for enforcing the same.

17. The question is whether the time was the essence of the contract in the instant case and whether the defendant no. 1 could legally cancel the contract for sale on 29.4.65. In a contract for sale of the land generally time is not the essence of the contract even though a time limit is stipulated in the agreement itself for performance of the contract, unless on intention to make time the essence of the contract is expressed in unmistakable language and the same

may be inferred from what passed between the parties before the contract is made. We have considered the oral evidence as given by the parties and intrinsic evidence of the agreement for sale Ex.1. We find from the evidence of the defendant no. 1 (D.W.2) that he was in need of money and accordingly he was eager to sell the land. In spite of such evidence, we are not inclined to hold that time was the essence of contract in this case regard being had to all facts and circumstances. It appears that the defendant no. 1 treated the contract as cancelled on 29.4.65, although the stipulated time expired in the middle of February, 1965. It appears that in a case of this nature where the defendant no. 1 was under the pressure of urgency, the defendant no. 1 cancelled the contract for sale after waiting for a reasonable time. The matter would have been different if the defendant no. 1 would not have cancelled the contract for sale. In that case, the plaintiff if otherwise legally entitled, could have enforced the contract for sale within the period of limitation. From the materials and evidence available in the record, it appears that the plaintiff knew about the cancellation of the contract by the defendant no. 1 when endorsement Ex.1(a) making the assignment in his favour was made on 29.8.65. The plaintiff therefore did not acquire the right to enforce the contract for sale by such endorsement.

18. The proforma defendant no. 5 purchased some portion of the suit land from the defendant no. 1 by the kobala Ex.A(1) dated 18.5.66. The recitals in the said kobala [Ex.A(I)] and the evidence of D.W.2 (defendant no.1) and proforma defendant no. 5, read with compromise decree in Title Suit No. 132 of 1965. Ex.B(1) together with compromise petition Ex.1 which was made part of the decree, prove that the proforma defendant no. 5 bonafide purchased the land for value knowing that the agreement for sale between the defendant no. 1 and proforma defendants 2 to 4 stood cancelled and defendant no. 1 got also a declaration to that effect from the court in Title Suit No. 132 of 1965. On due consideration of all materials in the records, we find that the plaintiff is not entitled to get any relief in this suit and that the learned trial court was not justified in decreeing the suit.

We accordingly allow the appeal and set aside the judgment, and decree passed by the learned Subordinate Judge and dismiss the suit. We make no order as to costs both in the suit and appeal.

A.M. Bhattacharjee, J.

I agree.