

(1922) 06 CAL CK 0014
In the Calcutta High Court

Gonesh Ram and Others

APPELLANT

Vs

Ganpat Rai and Others

RESPONDENT

Date of Decision : 14-06-1922

Acts Referred:

Specific Relief Act, 1877 — Section 22

Citation : 72 Ind. Cas. 651

Hon'ble Judges : Chotzner, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for specific performance of a contract of sale of a house. The plaintiffs came into Court on the allegation that a completed contract for sale was made on the 26th September 1917 by a person named Sidhi Gopal Misser, who acted for the first defendant and had authority to enter into a valid agreement on his behalf for the sale of the house and the land. The first defendant repudiated the allegations of the plaintiffs while the second and third defendants claimed the protection accorded to bona fide purchasers for value without notice. In the Trial Court the plaintiffs produced a document which was marked Exhibit. I and purported to embody the agreement which the plaintiffs sought to enforce specifically. The Court held an elaborate investigation and came to the conclusion that this document, which purported to be an agreement to sell and was alleged to have been written by Sidhi Gopal Misser on the 26th September 1917, was not in existence at the date of the institution of the suit, and, further, that it had been manufactured collusively during the progress of the trial. On this finding, the Subordinate Judge declined to make a decree for specific performance. He further stated that, in any event, as the plaintiffs had not sought equitable relief with clean hands, he must decline to exercise in their favour the discretion vested in him by Section 22 of the Specific Relief Act. Upon appeal, the District Judge affirmed the findings of the Court of first instance as to the document mentioned and the authority of Sidhi Gopal Misser to complete the contract. The District Judge held that Sidhi Gopal was not authorised to complete the contract and that he did not do so in fact. On the

invitation of the plaintiffs," however, the District Judge considered the antecedent correspondence between the parties and came to the conclusion that only negotiations had taken place, which had not matured into a completed contract. In this view the District Judge affirmed the decree made by the Trial Court.

2. On the present appeal, the finding of the Courts below as to Exhibit T has not been questioned; but we have been invited to examine the correspondence which preceded the execution of that document and to hold that they disclose a completed contract between the parties. The respondents have taken exception to the adoption of this course. We are of opinion that we should not accept the invitation of the appellants to examine the correspondence with a view to determine whether they do or do not disclose a concluded agreement between the parties antecedent to the exhibit already mentioned.

3. The plaintiffs came into Court on the allegation that the negotiation culminated in a contract on the 26th September 1917 and that such contract was made by Sidhi Gopal Misser on behalf of the first defendant. No doubt, the document was not annexed to the plaint. But it was produced the trial and was made the foundation of the case for the plaintiffs. That case has completely broken down. The plaintiffs cannot, in such circumstances, be permitted to abandon the case they made in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of the antecedent correspondence. The Court would not in a case of this description, permit the plaintiffs to depart from the case made in the plaint, as the Court discourages, as a rule, variance between pleading and proof. The test applied in such cases is, whether if the variance were permitted in favour of the plaintiffs, defendants would be taken by surprise and be prejudiced thereby. *Jalim Singh v. Choonee Lal* 11 Ind. Cas. 540 : 15 C.W.N. 882; *Nabadwipendra Mokerjee v. Madhu Sudan Mandal* 16 Ind. Cas. 741 : 18 C.W.N. 473; *Sital Das v. Partap Chunder Sarma* 3 Ind. Cas. 408 : 11 C.L.J. 2; *Satish Kantha Roy v. Satis Chandra* 55 Ind. Cas. 689 : 30 C.L.J. 475 : 24 C.W.N. 662; *Ishan Chandra Dhupi v. Nishi Chandra Dhupi* 41 Ind. Cas. 378 : 29 C.L.J. 1 : 22 C.W.N. 853; *Hira Lal v. Gribala Debi* 34 Ind. Cas. 444 : 23 C.L.J. 429; *Haji Umai Abdul Rahiman v. Gustadji Muncherji Cooper* 34 Ind. Cas. 268 : 20 C.W.N. 297 : 3 L.W. 308 : (1916) 1 M.W.N. 137 : 30 M.L.J. 444 (P.C.); *Motabhoy Mulla Essabhoy v. Mulji Haridas* 29 Ind. Cas. 402 : 42 I.A. 103 : 17 M.L.T. 402 : 28 M.L.J. 589 : 13 A.L.J. 529 : 19 C.W.N. 713 : 21 C.L.J. 507 : 17 Bom. L.R. 460 : 2 L.W. 524 : (1915) M.W.N. 522 : 39 B. 399 (P.C). This rule is applied with special strictness in cases of specific performance of contracts. *Hawkins v. Maltby* (1868) 3 Ch. App. 188 : 37 L.J. Ch. 58 : 17 L.T. 397 : 16 W.R. 209 one contract was alleged and another was proved, with the result that the bill was dismissed. No doubt where there has been a part performance the Court may struggle with apparently conflicting evidence rather than dismiss the--suit. This appears to have been the view adopted by Lord Cottenham in *Mundy v. Jolliffe* (1839) 5 My. & Cr. 167 : 9 L.J. Ch. 95 : 3 Jur. 1045 : 48 R.R. 262 : 41 E.R. 334. In the case before us, there is no question of part performance. On the other hand, the findings of the Courts below make it

abundantly clear that the conduct of the plaintiffs has been throughout of such a character as to disentitle them to assistance from the Court.

4. The result is, that the decree made by the District Judge is affirmed and this appeal dismissed with costs.