

(1927) 07 CAL CK 0042
In the Calcutta High Court

Mahim Chandra Saha and Others

APPELLANT

Vs

Esahak Sikdar and Others

RESPONDENT

Date of Decision : 21-07-1927

Acts Referred:

Citation : AIR 1927 Cal 954

Hon'ble Judges : Roy, J;B.B. Ghose, J

Bench : Full Bench

Judgement

B.B. Ghose, J.—This is an appeal by the plaintiffs which arises out of a suit for recovery of possession of a certain land. The defendants admitted the title of the plaintiffs but pleaded that an agreement in favour of them was executed by the plaintiffs dated 16th May 1919, to sell the property to them and they received Rs. 50 as the earnest money. Afterwards the plaintiffs put the defendants in possession of the property and, therefore, the plaintiffs are incompetent to sue for recovery of possession. The suit was instituted on the 12th January 1923. The trial Court disbelieved the story of the execution of the bainapatra, and also held that the defendants had entered into forcible possession. Upon that finding it decreed the suit and directed the defendants to remove their huts and other belongings from the suit lands within 15 days from the date of the decree and also allowed the plaintiffs mesne profits. From that decree defendant 2 appealed, and in that appeal the Subordinate Judge has reversed the decision of the Munsif and dismissed the suit altogether. From that decree the plaintiffs have appealed to this Court.

2. The points taken before us on behalf of the appellants are : Firstly, that all the plaintiffs did not enter into any agreement or sign the alleged deed of agreement and they alleged that only plaintiffs 4 and 5 executed it; secondly, that the plaintiffs did not deliver possession of the land to the defendants in pursuance of any contract but, on the other hand, the defendants took forcible possession and that the plaintiffs had recourse to the criminal Court and complained against defendants" high handed acts ; thirdly : that the plaintiff 4 who is alleged to

have signed the bainapatra was not an agent of the other plaintiffs and the fourth point urged is the doctrine of part performance of the contract on which the Subordinate Judge has based his judgment is not applicable to the case as the defendants' suit for specific performance of the contract is barred by limitation.

3. It is unnecessary for us to discuss other points except the last. If the defendants' right to enforce specific performance was barred at the time of the suit, in our opinion, he could not in resisting the plaintiffs' suit raise the plea of the doctrine of part performance of a contract. It is, however, contended on behalf of the respondents that the claim of the defendants for part performance was not barred at the date of the suit and that no time being fixed for the performance of the contract, time would run from the date of refusal of the contract and that as the date of refusal is not within 3 year's of the date of the suit, the doctrine can be invoked. He also relies upon the case of *Mehr Ali Khan v. Aroatannessa Bibi* 25 C.W.N. 905 decided by a single Judge of this Court for the proposition that the doctrine of part performance can be invoked in aid of the defendants even if the suit for specific performance is barred by limitation. As regards the question whether the suit for specific performance brought by the defendants would be barred by limitation or not, the finding of the trial Court is relevant. The learned Munsif in dealing with the evidence on behalf of the defendants makes this observation that the defendant 2 said that the plaintiffs promised to execute and register the kobala in 3 or 4 days from the date when the agreement was entered into. Then again disbelieving the evidence of the defendants as to the date of execution of the kobala the learned Munsif observes that there was no reason why the plaintiffs would surreptitiously go away from Parerhat after having agreed to execute the kobala on that date without informing the defendants about it. That clearly shows, as the defendants state that the kobala was to be executed within 3 or 4 days of the agreement. Before the Subordinate Judge this matter appears to have been raised and the Subordinate Judge brushes it aside by this observation:

It is contended on behalf of the plaintiffs that as the defendants' remedy for getting kobola is time barred they should not be allowed to stand upon the doctrine of part performance of contract. It is an equitable relief. In my opinion limitation should not be allowed to stand in the way of giving equitable relief.

4. Then he recites certain cases and comes to the conclusion that it was held that limitation could not stand in the way when equitable relief is given to a party. The question, therefore, resolves itself into this : whether this plea can be taken by the defendants if the right to sue for specific performance is lost by the expiry of time. It is unnecessary for me to discuss the cases in detail which lay down that in order to invoke the aid of this doctrine, defendant must show that he has the right to claim specific performance of contract. The cases have been collected and dealt with elaborately by my learned brother Mr. Justice Mukerji in the case of *Kalipada Basu and Others Vs. Fort Gloster Jute Manufacturing Co.*

Ltd., . The principle is well settled except for a slight deviation in one or two cases that in order to give equitable relief to the plaintiff on the ground that the contract has been partly performed the defendant must be in a position to get equitable relief by way of specific performance of contract. If that plea does not come to the aid of the defendants, they cannot resist the plaintiffs' title by reason of that plea.

5. This appeal, therefore, must succeed upon that sole ground and decreed with costs. The result, therefore, is that the judgment and the decree of the Subordinate Judge are reversed and those of the Munsif restored with costs of both the appellate Courts.

Roy, J.

6. I agree.