

(1949) 11 CAL CK 0013
In the Calcutta High Court
Case No : A.F.A.O. No. 94 of 1948

Ram Kalpa Kundu

APPELLANT

Vs

Kasi Nath Dutta and Others

RESPONDENT

Date of Decision : 17-11-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92, 104, 47
Contract Act, 1872 — Section 55

Citation : AIR 1950 Cal 582 : 54 CWN 690 : (1951) 1 ILR (Cal) 216

Hon'ble Judges : Sen, J

Bench : Single Bench

Advocate : Ram Krishna Pal, for the Appellant; Panchanan Pal, for the Respondent

Final Decision : Allowed

Judgement

Sen, J.—This is a second appeal by one of the decree-holders and it arises in the following circumstances. The appellant obtained a decree and in execution of it put certain property to sale. The sale was held on 31-10-1948. In the year 1945 the judgment-debtors made an application under O. 21, R. 90, Civil P. C. for setting aside the sale on the usual grounds. That application was imposed of upon compromise on 16-12-1945. By the terms of the compromise the judgment-debtors were to deposit either in Court or amicably with the knowledge of the Court the sum of Rs. 260 within the month of February 1946, the sum of Rs. 245 within the month of February 1947 and the sum of Rs. 245 within the month of February 1948 and also to deposit the sanja paddy and cash rent for the years 1353 and 1354 B. S. within the month of Chaitra of those years respectively. Upon this being done the sale would be set aside. The judgment-debtors were (to be ?) put in possession of the auction sold property as licensees until the solenama was carried out. There was a further clause that if the judgment-debtors failed to pay any of the kist money or failed to pay the sanja paddy and cash rent in terms of the provisions of the solenama, then the sale would stand good. There was a footnote to the solenama to this effect, namely, that if any

money in respect of the three first mentioned kists which were payable under the solenama were paid and if the sale were not set aside the decree-holders would be entitled to withdraw the same and would not be liable to refund the money which would be forfeited. There is another provision in the footnote which need not be set out as it is not relevant for the purpose of this appeal. The judgment debtors paid the first of the two kists within time but failed to pay the sanja paddy and cash rent in time. Thereupon the decree-holders made an application purporting to be one u/s 47 Civil P. C., claiming that as the terms of the solenama had not been fulfilled there should be a declaration that the sale stands good. The judgment-debtors opposed this application and the only ground taken by them which is pressed before this Court is that time was not of the essence of the contract so far as the payment of the sanja paddy and cash rent is concerned and therefore the failure of the judgment-debtors to pay the sanja paddy and cash rent within time did not entitle the decree-holders to the relief prayed for.

2. Both the Courts below have held in favour of the judgment-debtors and have refused to grant the prayer of the decree-holders. Against this decision the present appeal has been filed by one of the decree-holders.

3. A preliminary objection is taken on behalf of the respondents that no second appeal lies. The argument was this : The application of the decree holders was virtually an application for confirming the sale made in accordance with the provisions of Order 21, Rule 92, Civil P. C. The Court has refused to confirm the sale. Against such an order of refusal an appeal lies in accordance with the provisions of Order 43 Rule 1 (j) of the Code. Section 104, Civil P. C., prohibits a second appeal from such an appellate order. It was argued that although the application was instituted as one being u/s 47 of the Code, it was really an application made under Order 21, Rule 92.

4. On behalf of the appellant it was contended that this was not an application which fell within the purview of Order 21, Rule 92 of the code but it was an application for a declaration by the executing Court that in accordance with the terms of the solenama the sale stood good. Such an application was not contemplated by Order 21, Rule 92. It related to a matter of execution and was between the parties to the suit. It therefore fell within the purview of Section 47, Civil P. C. and a second appeal would therefore lie.

5. There can be no question that the application relates to questions arising between the parties to the suit in which the decree was passed. There can also be no question that the application relates to the execution of that decree. It thus comes within the purview of Section 47, Sub-section (1). A second appeal would therefore lie from the decision in a proceeding upon the application unless there is some prohibition in the Code which would bar a second appeal. Now, an application by a judgment-debtor against a decree-holder for setting aside a sale in execution would come undoubtedly under the provisions of Section 47 of the Code and if there were no other provisions, a decision upon such an application by which the sale was either set aside or confirmed would be subject to two

appeals, but Section 104, Civil P. C., in my opinion, would make a decision on such application subject to one appeal only. I refer to Section 104, Sub-section (1) (i) and Sub-section (2). If those sub-sections are read, it will be seen that they provide that an appeal shall lie from an order made under the rules from which an appeal is expressly allowed by rules and that no second appeal shall lie from an appellate order passed in an appeal u/s 104. Now, if an application under Order 21, Rule 90 is allowed, then the Court in accordance with the provisions of Order 21, Rule 92 shall set aside the sale. If it is disallowed, it shall make the sale absolute. An order passed under Order 21, Rule 92 is appealable as an order by virtue of Order 43, Rule 1 (i). It is thus an order which is described in Section 104(1)(i) namely, an order made under rules from which an appeal is expressly allowed by rules. That being so, by virtue of Sub-section (2) of Section 104 of the Code no second appeal lies against an order on appeal. It does not matter how the application is instituted. What must be ascertained is the substance of the application. The question which therefore arises in this preliminary objection is whether the order passed in favour of the decree-holders is an order under Order 21, Rule 92. If it does not come within that rule, then the preliminary objection must fail because it would then be an order u/s 47 which has the force of a decree and which is not governed by the provisions of Section 104 which deals with appeals from orders made under the rules of the Code. It is contended that the order comes within either Sub-rule (1) or Sub-rule (2) of Order 21, Rule 92. The sub-rules are as follows ;

"(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby."

If Sub-rule (1) is to apply, there must be a disallowance of the application, under Order 21, Rule 90. In the present case the application under Order 21, Rule 90 was not disallowed. The case, therefore, does not fall within the ambit of Sub-rule (1). Under Sub-rule (2) the application under Order 21, Rule 90 must have been allowed. In the present case that application was not allowed. Sub-rule (2) therefore will not apply. What happened in the present case has not been contemplated by Order 21, Rule 92. In the present case the order was passed not according to the provisions of Order 21, Rule 92 but in terms of a solenama and the decree-holders have applied not to enforce any rights which they alleged that they have acquired under the provisions of Order 21, Rule 92 but they have applied u/s 47 for relief on the ground that the terms of the solenama have not been carried out by the judgment-debtors. The order therefore in my opinion is one u/s 47 of the Code which is unaffected by the provisions of Section 104. That

being so I hold that a second appeal does lie and disallow the preliminary objection.

6. The next point for consideration is whether the Courts below were right in refusing to grant the relief prayed for by the decree-holders.

7. Learned advocate on behalf of the respondents argued that the terms of the solenama clearly showed that so far as the payment of the sanja paddy and cash rent was concerned time was not of the essence of the contract and therefore the relief prayed for by the decree-holders should not be granted. He referred me to the well-known decision of the Judicial Committee in the case of Jamshed Khodaram v. Burjorji Dhunjibhai 43 I. A. 26 : (A. I. R 1915 P. C. 83) where the provisions of Section 55, Contract Act, were interpreted. He also referred me to a decision of this Court in the case of Mahadeo Prosad Agarwala Vs. Narain Chandra Chakravarti and Another where the decision of the Judicial Committee was noticed. The rights of the parties to the solenama, must be decided in accordance with the provisions of Section 55, Contract Act, and that section says that if a party to a contract promises to do a certain thing at or before the specified time and fails to do such thing, the contract becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. It further says that if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time but the promisee would be entitled to compensation from the promisor for any loss occasioned to him by such failure. It is clear from this section, apart from any case law, that the intention of the parties is what matters. This intention must be deduced from the words of the contract, from the surrounding circumstances at the time that the contract was entered into and from the subject-matter of the contract. The Judicial Committee says nothing more than this. What the Judicial Committee says is that the mere insertion of a term in a contract that a certain act shall be done within a particular period would not necessarily indicate that time was of the essence of the contract. The intention to make time an essence of the contract must be expressed in unmistakable language. The question is whether in this case such an intention is expressed in unmistakable language.

8. I find that the learned lower appellate Court has come to its conclusion upon an entirely erroneous interpretation of the terms of the contract. It has stated the terms of the contract incorrectly and thereafter it has come to the conclusion that the payment of the sanja paddy and cash rent within time was not an essential term of the contract. I have set out at the inception of the judgment what the terms of the solenama are. The learned Judge says this :

"On going through the terms of the solenama, I find that the solenama would be liable to be rescinded only if the judgment-debtors failed to pay the three kist moneys within the time appointed. But no such condition was attached to the payment of the sanja paddy and cash rent. * * * I am satisfied that the

solenama does not provide that the non-payment of the sanja paddy and cash rent by the dates fixed would carry with it the consequences of rescission of the solenama, as it does in the case of the three kist moneys."

In my opinion this is an entirely erroneous construction of the solenama. The provisions in the contract regarding the payment of the three sums of Rs. 260, Rs. 245 and Rs. 245 which are termed the "kist money" and the payment of sanja paddy and cash rent for the years 1353 and 1354 B.S. are in the same terms. There is no difference made in the solenama as to the consequences which would follow from the nonpayment of these two respective amounts within time. The solenama clearly says in the last portion of the second paragraph that if the judgment-debtors failed to pay the kist money or the sanja paddy and cash rent in accordance with the terms of the solenama, then the sale would stand good. There is no differentiation made between the kist money and the sanja, paddy and cash rent. The terms of the solenama have been entirely misconstrued. Had the terms been correctly stated and had the learned Judge after a correct statement of the terms drawn his conclusion regarding the intention that would have been a different matter. But here I find that the learned Judge has misstated the terms of the solenama. His conclusions therefore are not based upon the terms of the solenama as they are, but upon the terms which are incorrectly stated. Be that as it may, what I have to decide is whether the solenama evidences an intention in express terms that time shall be of the essence of the contract. I am unable to see how such an intention could be more expressly stated. The sale was held many years before the solenama was entered into and it is obvious that the decree-holders were insisting upon something being done promptly. From the surrounding circumstances as also from the terms of the contract. I am of opinion that the intention of the parties was to make time the essence of the contract not only with respect to the payment of the kists but also with respect to the payment of the sanja paddy and cash rent.

9. In these circumstances I set aside the order passed by the learned District Judge and grant the application of the decree-holders with costs throughout.