
(2007) 07 CAL CK 0017
In the Calcutta High Court
Case No : F.A.T. No. 4056 of 2005

Sanghamitra Ghosh

APPELLANT

Vs

Rashmoni Gupta and Others

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 8 Rule 10, Order 9 Rule 13
Income Tax Act, 1961 — Section 230A
Limitation Act, 1963 — Section 3
Specific Relief Act, 1963 — Section 16
Urban Land (Ceiling and Regulation) Act, 1976 — Section 33

Citation : (2007) 4 CHN 538

Hon'ble Judges : Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Judgement

Kalyan Jyoti Sengupta, J.—This was an appeal against a decree dated 6th April, 2004 passed in the suit for specific performance of an agreement for sale by the learned Civil Judge (Sr. Division) 3rd Court, Alipore, 24 - Parganas, ex parte. The appellant was unsuccessful in getting the decree set aside by their proceedings under Order 9 Rule 13 of the CPC right up to the Appeal Court. Now the present appeal is preferred against the decree itself.

2. It appears from the records the defendants despite having taken time on several occasions to file written statement did not do so, however, the interlocutory application of the plaintiffs for injunction was contested by filing written objection. On 6th April, 2005 an application was made for adjournment of hearing of the suit and, after this prayer having been refused the suit was taken up for hearing. The case made out in the plaint is that the plaintiff Nos. 2 to 5 and their elder brother Prakash Chandra Gupta, since deceased, who was the husband of the present plaintiff No. 1 entered into an agreement for sale with the appellant who was absolute owner amongst others of the premises No. 3/1B, Chetla Hat Road, Kolkata - 700027, comprising a land measuring about 4 Cottahs 8 chittacks together with kachcha structures standing thereon at the agreed price

of Rs. 2,40,500/- on or about 8th October, 1986. At the time of agreement a sum of Rs. 75,000/- was paid as and by way of advance and/or part of the consideration amount. Thereafter, on several occasions the plaintiff Nos. 2 to 5 and their elder brother paid an aggregate sum of Rs. 18,000/- as and by way of part consideration out of the agreed consideration as above. It is alleged that in the said suit premises one Sri Pramad Praharaj had been in possession pursuant to another agreement for sale of the said structure. The said Pramad Praharaj alias Das on 30th October, 1987 duly and lawfully entered into an agreement with the defendant to vacate his occupied portion by accepting a sum of Rs. 25,000/- on or before 1st April, 1988. The defendant paid the said amount to the said Pramad for his vacating and he vacated the same accepting the consideration money paid by the plaintiffs and thereafter the plaintiff Nos. 2 to 5 and their deceased elder brother came into possession pursuant to the said agreement, but the conveyance could not be executed in spite of the agreement because while the defendant was trying to obtain clearance u/s 230A of the Income Tax Act, 1961, the competent authority Land and Land Reforms Department under the Urban Land (Ceiling and Regulation) Act, 1976 initiated suo motu case bearing No. 187 of 1989 against the defendant in respect of premises No. 3/1B, Chetla Hat Road and declared the excess land of the said premises vested. The defendant contested the said case and ultimately the competent authority by its letter dated 28.10.1991 addressed to the defendant/appellant indicating extent of excess vacant land held by her, and asking her to exercise option for retention of land within ceiling limit. The defendant preferred appeal against the said order of vesting of the competent authority u/s 33 of the said Act however the said appeal did not succeed. As a result whereof the agreement could not fructify in execution and registration of conveyance because of the aforesaid proceedings. The defendant neither returned the said part consideration nor took any step for execution of the conveyance, rather on 6th February, 1997 again in writing agreed to sell to the plaintiffs part of the said premises wherein the plaintiffs have been in possession. Thereafter one Tapan Jyoti Sarkar and his friends decided to purchase half of the said property and the defendant executed an agreement on 8th October, 1986 for assignment in their favour and modified the original agreement dated 6th February, 1997. Finally the defendant agreed to sell the land comprising an area about 3 cottah 10 chittaks at an agreed price of 1,10,000/- per cottah of the half portion of the land. It was further agreed that the parties would appoint surveyor for survey of the plot of land, demarcation and preparation of map showing passage and boundaries.

3. It was further agreed the plaintiffs would pay price for the passage at the rate of Rs. 1,10,000/- per cottah and the western half of the said retained part would be allotted to the plaintiffs. After repeated demands and requests the plaintiffs and the defendants in the month of January, 2001 jointly appointed one Utpal Das for preparation of the map or plan and demarcation of the land as above. Thus finally the price of the land with structure was settled at Rs. 4,11,125/- and value of the half of the private common passage was Rs. 47, 820/- aggregating to

Rs. 4,58,945/- in spite of repeated demands and requests the defendant failed and neglected to execute conveyance despite the plaintiffs' readiness and willingness to get the sale deed executed and registered on payment of balance consideration of Rs. 3,40,945/-.

4. Mr. Sudhish Dasgupta, learned Senior Advocate, appearing for the appellant contends that the learned Trial Judge could not pass ex parte decree as a matter of course and just because written statement has not been filed. It is the obligation of the learned Trial Judge who examined the plaint whether the plaint has disclosed cause of action or not. In a suit for specific performance there must be averment and statement in real sense of readiness and willingness of the plaintiff. No such averment is to be found in the plaint. He further contends that that learned Trial Judge has ignored, that the claim of the plaintiff of the suit as a whole is barred by limitation. This plea ought to have been examined by the Court itself under the provision of Section 3 of the Limitation Act regardless such plea being taken. The alleged agreement for sale was entered into on 8th October, 1986 and that the modification thereof took place on 6th February, 1997 whereas the instant suit has been filed on 16th January, 2003. The suit is patently barred by limitation, as such the ex parte decree was obtained by practising the fraud upon the Court. Besides there is no evidence to prove the case of the plaintiffs. The decree is not always passed having face value of the plaint by reason of non-filing of written statement. In support of his contention he has relied on the following decisions:

39 CLJ 279 24 CLJ 90, AIR 1985 Cal 217, 32 CWN 953, 2003 (10) SCC 390, 1999 (8) SCC 396, 1995 (5) SCC 115, 1997 (3) SCC 1, 2003 (8) SCC 745.

5. Mr. S.P. Roy Chowdhury, learned Senior Counsel appearing on behalf of the respondent/decreed holder submits that conduct of the appellant all the time was and still is mala fide before the learned Court below. In spite of opportunity being given no written statement was filed, and the learned Judge was compelled to pass ex parte decree. Thereafter an application was filed as a harassing tactics to get the decree set aside under the provision of Order 9 Rule 13 of Civil Procedure Code. An appeal was preferred from the dismissal of the application unsuccessfully. Thereafter, the present appeal has been filed against the decree itself. According to him the appeal is hit by the principle of issue estoppel.

6. He contends that it was lawful for the learned Trial Judge to pass ex parte decree for specific performance in exercise of discretion. When such discretion is not exercised by the learned Trial Judge, the Appellate Court should not interfere with such a decree.

7. He contends further that as far as the plea of absence of averment of readiness and willingness is concerned the plaint has to be read as a whole. Such statement and averment is to be found, if the plaint is read as a whole.

8. He further contends that it will appear from the language of Section 16(c) of the Specific Relief Act that it does not require in specific phraseology that the

plaintiff must aver that he has performed or has always been continuously ready and willing to perform his part of the contract. In this case, he contends after entering into agreement the plaintiff was put into possession, nothing was left to be performed by the plaintiff except to pay the balance consideration amount but this could not be done because of failure of the defendant to make the property marketable. The defendant could not do so because of pendency of proceedings under Urban Land (Ceiling and Regulation) Act. Thereafter the property became marketable. The plaintiffs always agreed rather came forward to conclude the deal by appointing surveyor and in fact survey was done and in spite of such action on part of the plaintiffs the defendant did not execute and register conveyance.

9. On the plea of limitation he submits that the agreement dated 8th October, 1986, was modified on 6th February, 1997. The time being essence of the contract was given go by both the parties by their acts and conduct and particularly as the property was not marketable because of the pendency of the proceedings initiated under the provision of Urban Land (Ceiling and Regulation) Act. As such no action could be taken. The defendant by her act and conduct has acknowledged claim and contention of the plaintiffs. In the month of January, 2000 the plaintiff and defendant jointly appointed surveyor and the defendant had prepared map showing area location, boundary and common passage of the property to be sold to the plaintiffs. The said plan was handed over on 29th March, 2000 to the defendant. In spite of the aforesaid when the defendant did not take any step the suit had to be filed in 2003. In support of his contention he has relied on the following decisions of the Supreme Court:

Motilal Jain Vs. Smt. Ramdasi Devi and Others, Syed Dastagir Vs. T.R. Gopalakrishnasetty, , Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another, , Bhanu Kumar Jain Vs. Archana Kumar and Another, .

10. We have heard arguments of both learned Counsels and examined the material placed before us. It appears grounds mentioned in the memorandum of appeal and substance of the argument of Mr. Dasgupta are directed against legality and validity of an order placing the said suit for ex parte hearing. We are of the view that such plea and contention cannot be allowed to be adjudicated at this stage, simply because it is not permissible under the law after dismissal of an application under Order 9 Rule 13 and also the appeal preferred against such order. All the pleas are deemed to have been adjudicated upon and as such the same has reached its finality on dismissal of the application under Order 9 Rule 13. This legal plea is based on not only the principle of res judicata but also the principle of issue estoppel. In a fairly recent Supreme Court decision rendered in case of Bhanu Kumar Jain Vs. Archana Kumar and Another, , a three-Judges Bench of the said Court paragraph 37 held that:

...an application under Order 9 Rule 13 of the Code is dismissed, the defendant can only avail a remedy available thereagainst viz. to prefer an appeal in terms of Order 43 Rule 1 of the Code. Once such an appeal is dismissed, the appellant

cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.

11. Therefore the plea raised as to legality and validity of the order setting down the suit for ex parte hearing and the order dismissing the application for setting aside ex parte decree under Order 9 Rule 13, cannot be entertained by this Court in the first appeal preferred against the decree itself as the same is hit by the principle of res judicata. The phrase "res judicata" has been amplified by the Supreme Court by the same judgment in a different way in paragraph 30 of the same judgment which is set out hereunder:

Res judicata debars a Court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine, issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estopped by accord.

We therefore, decline to entertain such plea in this appeal.

12. We have gone through the judgment and decree passed by the learned Trial Judge and we think that learned Trial Judge has not examined the case on its merit nor discussed the same which ought to have been done. It seems to us the judgment has been passed in haste. The learned Trial Judge should have done some thing more than passing a mechanical judgment and decree simply because written statement was not filed.

13. As correctly submitted by Mr. Dasgupta that in a fit case the First Appellate Court can examine and reappraise the evidence if the judgment is found to be perfunctory though it was passed ex parte. His contention is supported by a Supreme Court decision reported in 2003 (8) SCC 74 Narbada Devi Gupta v. Birendra Kumar Jaiswal and Anr. At paragraph 19 of the said judgment the Supreme Court observed as follows:

The High Court being the first Court of Appeal was fully within its powers to re-examine and re-appreciate the documentary and oral evidence. It could come to a conclusion contrary to the one reached by the Trial Court.

14. In the case of Balraj Taneja and Another Vs. Sunil Madan and Another, , the Supreme Court has also cautioned not to pass any decree and judgment even in absence of written statement mechanically. It is apposite to quote language of the judgment of Supreme Court:

...In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 of CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be mentioned in the plaint. It is a matter of the Court's

satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed written statement. But if the case regarding which two different versions are set out in the plaint itself, indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy.

15. Therefore, the approach of the first Court would be to examine the plaint in a suit for specific performance in its entirety and not find a flaw in one or two paragraphs and also to see whether the suit is *ex facie* barred by laws of limitation or not. The learned Judge has not discussed nor examined whether the claim of the plaintiff is barred by limitation or not. This question of limitation has to be addressed first. The original agreement was entered into by and between the parties on 8th October, 1986 for sale of a part of suit premises between the appellant/defendant with the plaintiff Nos. 2 to 5 and their elder brother Prakash Chandra Gupta the predecessor-in-interest of the plaintiff No. 1. Thereafter it was modified by another agreement dated 6th February, 1997. This period has to be taken into consideration in view of the proceedings initiated under the provisions of the Urban Land (Ceiling and Regulation) Act. Ultimately when this land was cleared the same was to be demarcated into two halves and fresh negotiation took place regarding the rate. It was thereafter agreed that the map demarcating boundary line would be prepared and the sale would be executed within 20th April, 1999. It is stated in the plaint that ultimately in the month of January, 2000 the said demarcation was made and map was prepared and after demarcation it was decided that an area of 3 Cottah 11 Chittak 36 Sq.ft out of the larger plot with common passage was to be sold to the plaintiff at a price of Rs. 4,58,945/- so it is clear that time was not the essence of the contract. The sale could not be completed because of the difficulty that arose as observed above. It is pleaded that since 29th March, 2000 the plaintiffs had been saying the defendants for completion of the deal demanding from time to time and such last demand was made on 17th January, 2003. The suit was filed on 16th of January, 2003. The aforesaid statement and averment remains unrebutted in view of non-filing of written statement. We are of the view that it is difficult to hold that the suit is barred by limitation. Accordingly this plea has no foundation hence overruled. It appears from the records the case of the plaintiff was proved by affidavit evidence. In the affidavit evidence-in-chief it has been stated specifically and with documents that the plot of the land was made ready for delivery after surveying in the month of March, 2000 and the surveyor was appointed mutually by the parties. It is also proved by affidavit evidence that part payment was made long time back. On the plea of readiness and willingness the law has now become firmly settled by the Supreme Court by this time. In the case of *Motilal Jain Vs. Smt. Ramdasi Devi and Others*, Supreme Court while following earlier decisions of the same Court reported in *Molly Joseph alias Nish*

Vs. George Sebastian alias Joy, Ouseph Varghese Vs. Joseph Aley and Others, and Abdul Khader Rowther Vs. P.K. Sara Bai and Others, and further relying on earlier decision of that Court rendered in case of R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, had held amongst others that:

...It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale.

16. The decision of the Supreme Court cited by N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, , rendered by two-Judges" Bench of the Apex Court laying down the law of strict adherence to continuous readiness and willingness on the part of the of the plaintiff and also proof thereof as a precondition for granting relief, is in our view not good law in view of the aforesaid recent Supreme Court decision in Dastagir case decided by a larger bench and subsequently followed by Supreme Court in Motilal Jain's case (supra). A subsequent decision of the Supreme Court rendered in case of Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, in substance has not taken any different view from that of one taken in case of Dastagir's case. Rather, the ratio on this point laid down in Dastagir's case was relied upon by Supreme Court in Manjunath's case taking note of the Matilal's case. From the above Supreme Court decisions we find that approach of the Court would be to examine the plaint as a whole to understand in substance whether the plaintiff was ready and willing, and expressed mechanical statement and averment of continuous readiness and willingness is not required. In the case on hand in paragraph 16 it is averred that the plaintiffs were ready and willing to get the conveyance executed and registered in their favour on payment of consideration of Rs. 3,40,945/-. The parties themselves could not reach the final conclusion nor could complete the deal as originally contended by both the parties because of the proceedings initiated by the Urban Land Ceiling Act and re-scheduling of the price. It appears from the evidence as well as the pleading that the plaintiffs took all initiative to complete the deal by engaging surveyor and getting the property demarcated in two plots. The plaintiffs have proved that there was no response on behalf of the defendant notwithstanding above steps having been taken. In a suit where plea of readiness and willingness has not been denied and disputed by filing written statement of the plaintiff still there is proof aliunde, what more is needed to establish the case?

17. We, therefore, hold that the relief granted by the learned Court below is just, but the judgment rendered in support of the decree was not satisfactory. As we find sufficient materials before us to record our findings we thought it expedient to do so instead of sending back this matter to the learned Court below.

18. Thus the appeal fails.

19. The decree is now affirmed.

20. There will be an order as to costs.

Sanjib Banerjee, J.

21. I agree.