
(1975) 09 OHC CK 0001
In the Orissa High Court
Case No : First Appeal No. 115 of 1968

Simanchal Mahapatro and Another	Vs	APPELLANT
Budhiram Padhi and Another		RESPONDENT

Date of Decision : 29-09-1975

Acts Referred:

Contract Act, 1872 — Section 188
Specific Relief Act, 1963 — Section 19

Citation : AIR 1976 Ori 113 : (1975) 41 CLT 1335

Hon'ble Judges : P.K. Mohanti, J;K.B. Panda, J

Bench : Division Bench

Advocate : G. Rath and N.C. Panigrahi, for the Appellant; H.G. Panda, for the Respondent

Final Decision : Dismissed

Judgement

Mohanti, J.—This appeal, by defendants 2 and 3, arises out of a suit for specific performance of a contract of sale dated 16-2-1967 executed by defendant No. 1 Sobhabati Panigrahi in favour of the plaintiff (respondent No. 1) agreeing to sell the suit lands measuring 5.17 acres for a sum of Rs. 7,600/-.

2. The plaintiff's case was that the suit lands are situated at a distance of 120 miles from Parlakhemundi where defendant No. 1 ordinarily resides. She desired to dispose of the land and requested her cousin brother Gobinda Panigrahi (P. W. 5) to find out a suitable purchaser. On 16-2-1967 she executed the deed of contract (Ex, 1-D) in favour of the plaintiff on receipt of a sum of Rs. 1,000/- as earnest money and agreed to execute the sale deed by 31-3-1967; but instead of selling the lands to the plaintiff as agreed upon, she executed two sale deeds (Exhibits A-2 and B-2) in favour of defendants 2 and 3 on 17-3-1967. It was alleged that the defendants 2 and 3 are not bona fide purchasers for value and that the sale deeds in their favour were created in order to defeat the rights of the plaintiff. It was further alleged that the plaintiff was all along ready and willing to perform his part of the contract.

3. Defendant No. 1 filed written statement contending that the plaintiff got the deed of contract executed by her by fraud and misrepresentation and that she became aware of the fraud on receipt of a telegram from D. W. 5 Banamali Misra to the effect that he had offered Rs. 9,200/- for the suit lands to the said Gobinda Panigrahi. She issued a notice of cancellation of the suit contract calling upon the plaintiff to take refund of the sum of Rs. 1,000/- and then sold the lands to defendants 2 and 3 for valuable consideration.

4. Defendants 2 and 3 filed a joint written statement supporting the plea of defendant No. 1 about fraud and misrepresentation. They claimed to have purchased the suit lands for valuable consideration without prior notice of the plaintiff's contract.

5. The trial Court on a consideration of the evidence led by the parties held that the contract in favour of the plaintiff was genuine; that D. W. 5 Banamali Misra who acted as agent of defendants 2 and 3 had full notice of the plaintiff's contract before execution of the sale deeds Exts. A-2 and B-2 and that the transferees had not paid the full consideration money. Accordingly it came to the conclusion that defendants 2 and 3 were not entitled to the benefit of the exception as provided u/s 19(b) of the Specific Relief Act and decreed the plaintiff's suit for specific performance of contract.

6. The finding about the genuineness of the plaintiff's contract is not assailed in this appeal. It is supported by ample evidence on record. The question that falls for our consideration is whether the defendants 2 and 3 are bona fide purchasers for value without prior notice of the contract of sale in favour of the plaintiff.

7. At this stage it may be convenient to read Section 19 of the Specific Relief Act of 1963 so far as it is relevant for our purpose. It runs as follows:

"Section 19. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

XX XX XX XX"

8. On a plain reading of the above provision it appears that a subsequent purchaser in order to successfully resist a suit for specific performance of a prior contract of sale must establish that -

(a) he is a bona fide purchaser for value,

(b) he had no notice of the prior contract, and

(c) before he had notice of the prior contract of sale, he paid the consideration money to the owner.

9. It is now to be seen whether the appellants have fulfilled the above conditions. On a review of the recorded evidence we are inclined to concur in the finding of the trial court that D. W. 5 Banamali Misra who acted as agent of the appellants in the sale transaction had prior notice of the contract in favour of the plaintiff.

10. Appellant No. 2 Lingaraj Mo-hapatra is the minor son of appellant No. 1 Simanchal Mohapatra. D. W. 5 Banamali Misra is the natural father of appellant No. 1. He stated that he was in need of a piece of land for his natural son defendant No. 2; that he negotiated with defendant No. 1 for purchase of the suit lands; that he fixed the consideration at Rs. 10,000/-; that he paid the earnest money of Rs. 800/- to defendant No. 1 and arranged the transaction of sale. Thus it is clear that he acted as an agent of the appellants in the transaction in question.

11. Notice to an agent is notice to the principal. The conduct of D. W. 5 Banamali Misra throughout reveals that he had notice of the earlier contract in favour of the plaintiff before he entered into the transaction under Exts. A-2 and B-2. The evidence of P. W. 1 Nityananda Panigrahi clearly establishes that D. W. 5 had knowledge of the plaintiff's contract by 14-3-1967. He stated that sometime after execution of the deed of contract in favour of the plaintiff, defendant No. 1 went to him with a telegram and a letter received from D. W. 5. He advised defendant No. 1 to consult the plaintiff before taking any step on the said telegram and the letter. D. W. 5 admitted in his evidence that he sent a telegram to defendant No. 1 on 17-2-1967 and as he did not get any reply, he sent the letter Ext. A-1. The letter (Ext. A-1) bears the postal seal dated 20-2-1967. In this letter D. W. 5 has mentioned that there were higher offers for the suit land and that defendant No. 1 was going to be duped by the plaintiff and P. W. 5 Gobinda Panigrahi. He has also mentioned: in this letter that if he would not get any reply, he would go to the place of defendant No. 1 and settle up the transaction. The evidence of P. W. 1 reveals that on 14-3-1967 defendant No. 1 and D. W. 5 went to his house and D. W. 5 told him that he had consulted with lawyers at Berhampur that both civil and criminal cases could be started against the plaintiff and that he had gone there to get the plaintiff's contract cancelled and to issue a registered notice. This evidence of P. W. 1 gains ample corroboration from the fact that on 15-3-1967 defendant No. 1 issued a notice (Ext. 4) to the plaintiff and P. W. 5 Gobinda Panigrahi cancelling the earlier agreement and calling upon the plaintiff to take refund of the sum of Rs. 1,000/- advanced by him. This notice has been signed by Shri K. C. Panigrahi, an Advocate of Parlakhemundi on 15-3-1967. Defendant No. 1 has also signed the same. Thus it is clear that the notice was issued from Parlakhemundi on 15-3-1967 and defendant No. 1 was present there on that date. The evidence of D. W. 6 Kali Charan Panda shows that D. W. 5 paid the earnest money of Rupees 800/- to defendant No. 1 on 15-3-1967. He however wants us to believe that defendant No. 1 was at Chatrapur on that date. This evidence is obviously false in view of the fact that defendant No. 1 has signed the notice (Ext. 4) at Parlakhemundi on 15-3-1967. All these facts and circumstances lead to the irresistible inference that the notice

(Ext. 4) was issued by defendant No. 1 at the instance of D. W. 5 Banamali Misra. The evidence of P. W. 1 Nityananda Panigrahi to the effect that defendant No. 1 and D. W. 5 went to his house at Parlakhemundi on 14-3-1967 and that D. W. 5 told him that he had gone there to get the plaintiff's contract cancelled and to issue the registered notice has not been denied by D. W. 5. Defendant No. 1 did not step into the box to give a denial. P. W. 1 is the husband's brother of defendant No. 1 and an attesting witness to the deed of contract. He is a retired Government servant and an old man of 76 years. There is nothing to disbelieve his sworn testimony. The learned Subordinate Judge relying on the evidence of P. W. 1 came to the finding that D. W. 5 had notice of the original contract in favour of the plaintiff. We see no reason to differ from his finding.

12. The next question that arises for consideration is whether the appellants are persons who have paid their money before they had notice of the prior contract of sale. In order to appreciate what the expression "has paid his money" occurring in Section 19(b) of the Act means it is necessary to examine some decided cases on the point. In the case of *Himatlal Motilal v. Vasudev Ganesh Mhaskar* ILR (1912) 36 Bom 446, there was an agreement of sale in favour of the plaintiff on 9th February, 1906 executed by defendants 1 and 2. On 21st May, 1906 defendants 1 and 2 executed a sale-deed in respect of the same property in favour of defendants 3 and 4. Some balance of the consideration money was still to be paid by the subsequent purchasers. They gave two chittis as security for the payment of the balance consideration money. It was only a case of promise to pay without actual payment. Under these circumstances, their Lordships held that giving of two chittis as security for payment of the balance of the purchase money by defendants 3 and 4 to defendants 1 and 2 did not amount to actual payment of money and, therefore, defendants 3 and 4 were not entitled to the benefit of Section 27(b) of the Specific Relief Act (corresponding to Section 19(b) of the new Act.)

The Bombay case discussed above was quoted with approval in the decision of *Veeramalai Vanniar v. Thadikara Van-niar* AIR 1968 Mad 383, the facts of which are that a portion of the price had been paid and for the balance it was provided in the sale-deeds that it is to be paid in convenient instalments. By the time of trial of the suit for specific performance, there was admittedly a balance of Rs. 7,000/- due under the three sale deeds. Under these circumstances, it was held that the subsequent purchaser was not entitled to claim the benefit of Section 27(b) of the Specific Relief Act. Their Lordships pointed out that the words "who has paid his money" are not equivalent to "who has agreed to pay his money" and observed that it is the actual payment of the money which alone confers the right so as to prevail over a prior agreement of sale. We are in respectful agreement with the view expressed in the above decisions.

13. The sale deed Ext. A-2 shows that a sum of Rs. 1,000/- only was paid out of the consideration of Rs. 5,000/-. Admittedly, the balance of Rs. 4,000/- has not yet been paid. But the entire consideration of Rs. 5,000/- appears to have been

paid under the sale deed Ext. B-2. Mr. H. G. Panda, the learned counsel for the respondent No. 1 is right in his submission when he says that both the sale-deeds form one transaction. This is clearly established by the evidence of D. Ws. 5, 6 and 7. D. W. 5 said "The bargain for the sale of the suit lands was struck at Rs. 10,000/-. D. 2 and D. 3 are yet to pay Rs. 4,000/- as we have not been able to arrange the amount." D. W. 7 (defendant No. 2) said "We are still to pay Rs. 4,000/- towards the sale price. D. W. 6 also said that the price of the suit lands was fixed at Rs. 10,000/- and a sum of Rs. 800/- was paid as earnest money. This evidence leaves no room for doubt that the two sale-deeds are one transaction and out of the total consideration of Rs. 10,000/-, a sum of Rs. 4,000/- has not yet been paid by the appellants.

14. It follows from the foregoing discussions that the appellants are not persons who have paid money in good faith and without notice of the prior contract. They are therefore not entitled to get the benefit of Section 19(b) of the Specific Relief Act. We accordingly hold that the decree for specific performance of contract is unassailable.

15. The next question that arises for consideration is who should execute the conveyance. The learned subordinate Judge has directed that defendant No. 1 alone should execute the conveyance and that in the event of her failure the Court will execute it. The proper decree in a suit for specific performance of a contract of sale of land when the same has been sold to a third party subsequent to the contract with the plaintiff is to direct the subsequent purchaser as well as the contracting party to execute the conveyance (vide *Lala Durga Prasad and Another Vs. Lala Deep Chand and Others*, . In modification of the direction contained in the lower Court's decree we therefore direct that the conveyance in favour of the plaintiff will be executed by defendants 1, 2 and 3 and that the court will execute it in case they do not do it within three months of the receipt of the records from here by the lower court. The plaintiff (respondent No. 1) is directed to deposit in the lower court the balance consideration money of Rs. 6,600/- in favour of defendant No. 1 within one month from the date of receipt of the records in the lower court. The plaintiff (respondent No. 1) will be entitled to his costs here as well as in the trial court as against the defendants 2 and 3. He will also be entitled to recover possession of the suit lands.

16. Subject to the above modifications in the trial court's decree, this appeal stands dismissed.

Panda, J.

17. I agree.