
(1980) 06 CAL CK 0029
In the Calcutta High Court
Case No : Second Appeal No. 299 of 1972

Smt. Nirmala Bala Dasi and Another	Vs	APPELLANT
Sudarsan Jana and Others		RESPONDENT

Date of Decision : 04-06-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 6
Contract Act, 1872 — Section 10, 2, 45
Specific Relief Act, 1963 — Section 10, 15

Citation : AIR 1980 Cal 258

Hon'ble Judges : Monoj Kumar Mukherjee, J

Bench : Single Bench

Advocate : Prabir Kumar Samanta, for the Appellant; S.C. Das Gupta and Soumen Das Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Monoj Kumar Mukherjee, J.—This appeal is by the defendants in a suit for specific performance of contract, alternatively for injunction.

2. The case of the plaintiff/respondent, in short, is as follows : Abhoy Pada Jana was the owner of a holding comprising an area of 62 acre and recorded in district settlement Khatian No. 212 of Mouza Agunshi Bhunera. Abhoy Pada died leaving behind six sons, namely, Rameswar, Prankrishna, Harekrishna, Bharat, Kedar and Akhil as his heirs. Rameswar inherited 08 acre of the said property and made a gift of the same in favour of his second wife Nirmala Bala Jana (defendant No. 1) by a registered deed dated March 31, 1946. Nirmala Bala Jana instituted Title Suit No. 215 of 1961 in the Court of the Munsiff, Uluberia against Sudarshan Jana (the plaintiff), the pro forma defendant Nos. 3 and 4 and one Basudev Jana in respect of the said land and structures thereon. The suit was ultimately compromised between the parties and it was stipulated in the solenama that if the defendant No. 1 intended to sell the aforesaid property or any part thereof in future she would first offer it at the prevailing market price to the other parties

to the said solenama. In violation of the above express term of the solenama, the defendant No. 1 sold the said property, described in schedule "Ka" of the plaint, to Judhistir (the defendant No. 2) on March 31, 1967 without first offering it to the plaintiff and the other parties to the solenama. On such averments the plaintiff prayed for specific performance of the contract.

3. The plaintiff's alternative prayer for injunction was founded on the averment that in 1368 B. S. he purchased. 01 acre out of the said plot (schedule "Kha to the plaint) and raised residential structures thereon and that he had a right of way over the "Ga" schedule land of the plaint, which is a part and parcel of "Ka" schedule.

4. The defendants Nos. 1 and 2 contested the suit by filing a joint written statement wherein they denied the material allegations in the plaint. Their specific case is that the defendant No. 2 purchased the suit property from the defendant No. 1 for a consideration of Rs. 3,500/- by a registered Kobala dated March 31, 1967 and that before selling the property to the defendant No. 2, the defendant No. 1 had offered it to the plaintiff at the prevailing market price but the latter refused to purchase and that the defendant No. 2 was a bona fide purchaser of the property without notice of the earlier suit and the solenama allegedly filed in that suit.

5. The learned Munsiff, Additional Court, Uluberia, who tried the suit, found that the defendant No. 2 was a bona fide purchaser for value without notice of contract and accordingly disallowed the prayer for enforcement of specific performance of the contract made by the plaintiff. The alternative case made out by the plaintiff, however, found favour with him and he passed a decree for injunction as prayed for.

6. Against the judgment and the decree of the learned Munsiff the plaintiff preferred an appeal; and the defendant No. 2, in his turn, preferred a cross-objection against the finding of the learned Munsiff, in respect of the alternative case of the plaintiff. The learned Subordinate Judge, First Court, Howrah, disagreed with the finding of the learned Munsiff regarding the main case made out by the plaintiff and allowed the appeal and granted a decree for specific performance as prayed for. Consequently he also allowed the cross-objection preferred by the defendant No. 2. Hence this second appeal by the defendants.

7. Mr. Prabir Kumar Samanta, the learned Advocate appearing for the appellants, raised three points in support of the appeal. He firstly contended that a plain reading of the solenama would clearly show that it was not a concluded contract and as such the question of passing a decree for specific performance of contract on the basis of the solenama could not and did not arise. His second contention was that the suit at the instance of one of the copromisees for specific performance of the contract was not maintainable in absence of any pleading that the other copromisees refused to join him as plaintiffs and proof of such pleading. He lastly contended that the learned Court below erred in passing a

decree for specific performance in favour of the plaintiff on the face of his positive admission that he was not ready and willing to purchase the property at the prevailing market price. Mr. Dasgupta, the learned Advocate appearing for the plaintiff/respondent, refuted all the above contentions raised by Mr. Samanta. Mr. Dasgupta also raised as a preliminary objection as to the maintainability of the appeal on the ground that all the pro forma defendants, were not made party-respondents in the instant appeal.

8. To appreciate the first contention raised by Mr. Samanta it will be necessary to detail some of the undisputed facts and circumstances leading to the filing of the compromise petition and the decree passed in terms thereof (Ext. 4).

9. The property in dispute is a parcel of land measuring .08 acre and included in the bastu plot No. 851. This piece of land is a part of the bigger bastu plot recorded in plot No. 851 of D. S. Khatian No. 212. Rameswar and his five brothers were co-sharers of this plot and the residential building standing thereon. Rameswar had four sons by his first wife, namely, Suren, Basudeb (since deceased), Khagen and Jagannath. Sudarshan (the plaintiff) is the son of Suren while Judhistir (defendant No. 2) is the son of Kedar, one of the brothers of Rameswar. Jagannath, minor Khokaram (son of Khagen) and the heirs of Basudeb figure as the pro forma defendants in the suit out of which the instant appeal arises. Nirmala Bala, the second wife of Rameswar and the defendant No. 1 in the suit, had no issue. In Title Suit No. 215 of 1961 Nirmala Bala prayed, inter alia, for a declaration of her title in respect of the property in dispute and for a further declaration that the record of rights in respect thereof showing the names of the defendants of the said suit therein were not correct. That suit ended in a compromise and in the solenama the defendants, including Sudarshan Jana (the plaintiff herein), admitted the title of the plaintiff, namely, Nirmala Bala Devi, in respect of the disputed property and also admitted that the entries in the record of rights in respect of the said property were incorrect and that it should have been recorded in the name of the plaintiff. The other relevant term of the solenama was that if Nirmala Bala intended to sell the said property in future the defendants Nos. 1 to 4 will have the first choice of purchasing the same at the fair market price and if only they declined to purchase, Nirmala Bala would be at liberty to sell it to others.

10. Mr. Samanta contended that the said solenama was not a concluded contract and it only recorded some offers and counter offers made by the parties. According to Mr. Samanta the fact that the promisees were not obligated to purchase the property when offered to them clearly showed that it was not a concluded contract. Mr. Samanta to bring home his point relied upon the judgment of this Court in the case of Baijnath Vs. Kshetrahari Sarkar and Others, which has laid down the tests to determine whether an agreement was concluded or not. He also relied upon the judgment of the Privy Council in the case of Narain Das v. Ramanuj Dayal, reported in (1882) ILR 20 All 209. Considering the facts and circumstances of the instant case I am unable to accept the contention

of Mr. Samanta.

11. Reading the terms of the compromise in the background of the above facts and circumstances appearing on the record there cannot be escape from the conclusion that an agreement enforceable by law was arrived at between the parties. Nirmala Bala Dassi's right to the property, which she obtained by gift from her husband, was clouded by the wrong entries made in the settlement record of rights which compelled her to file the suit against her stepsons. To set at rest any controversy about her right to the property she entered into a compromise whereby her stepsons acknowledged her right and admitted that the entries in the, record of rights were wrong, on condition that if she wanted to sell the property in future she would first offer it to them to enable them to purchase at the prevailing market price. It is for this consideration that her sons entered into the compromise and consequently all the requirements to make the said term of compromise on agreement enforceable by law, within the meaning of Section 2(h) of the Contract Act, were fulfilled. The contention of Mr. Samanta that the fact that the promisees to the said contract, namely, the plaintiffs and the pro forma defendants could waive their right to purchase the property when offered indicated that the contract was not a concluded one cannot be accepted in view of the judgment of this Court in the case of Baijnath Vs. Kshetrahari Sarkar and Others, on which Mr. Samanta himself relied. In paragraph 20 of the said judgment Renupada Mukherjee, J. speaking for the Court stated as under :--

"Mr. Gupta on behalf of the appellant contends that his client is not insisting upon proof of defendant's title, and is ready to take the property with such title as the defendant has got. In other words the plaintiff is waiving his right of investigating defendant's title. But subsequent waiver of any of his rights by the plaintiff cannot afford any criterion for determining whether there was a binding contract between himself and the defendant at the date of the alleged contract. The true test for determining whether there was such a binding contract is whether the parties were of one mind on all material terms of the contract at the time it is said to have been finalised between them and whether they intended that the matter was closed and concluded between them."

12. I have therefore no hesitation in concluding that the appellant No. 1 entered into a contract with the plaintiff and others to offer the property to them first for purchasing in ease she decided to sell the same. The ease of Narain Das (1882 ILR 20 All 209) (PC), (supra) is of no assistance to Mr. Samanta as on the facts presented before it the Court found that there was no contract or agreement between the parties, but only an expectation on each side.

13. The matter can be viewed from a different angle. At the time the solenama was executed the appellant No. 1 represented that in case she wanted to sell the property in future she would first offer the same to the plaintiff and others to enable them to purchase the same at the market price. For such representation they accepted the title of the plaintiff and also admitted that the record of rights were wrong and such acceptance and admission enabled the plaintiff to obtain

the reliefs prayed for in the earlier suit. In other words, for a representation that something will be done in future, the person to whom the representation was made, acted upon it. Such a representation would amount to an agreement enforceable by law and the person to whom the representation was made would be entitled to the equitable relief of specific performance of contract. This position has been made amply clear by the following observation of the Supreme Court in the case of Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, :--

"There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in the future may result in a contract, if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation express or implied -- to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agreement shall be in a certain form, no contract may result from the representation and acting therefore but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation."

14. The second contention of Mr. Samanta, in my view is one of form not of substance. It is of course, essential that when there are joint promisees all of them must be before the Court. But it is not essential that they must join as plaintiffs when one of such joint promisees files a suit for specific performance as they can be made party defendants. In ease however those of the joint promisees, who have been added as defendants, also intend to assert their right under the contract it may be necessary to transpose them as plaintiffs and the Court may have to give judgment in favour of all of them. But there is nothing in Section 15 of the Specific Relief Act 1963 which forbids one of the joint promisees to institute a suit for enforcing a contract and on the contrary the words "any party thereto" appearing in Clause (a) thereof clearly envisages that one or some of the joint promisees can institute such a suit. If the intention of the legislature was that the joint promisees should have to be clubbed together as plaintiffs it could have read "either party thereto" instead of "any party thereto". In that view of the matter I am unable to accept the contention of Mr. Samanta that in absence of a specific averment in the plaint that the other promisees refused to join the plaintiff and proof of such averment, the suit was liable to be dismissed for non-joinder of parties. In the instant case all the other

joint promisees had been made party defendants and nothing prevented them from being added as plaintiffs so as to enable them to assert their right under the contract and to obtain the relief which the plaintiff asked for, jointly with him. Any dispute the purchasers may have amongst themselves in such a case, was not for the Court to decide in the suit, nor was the Court being asked to make a new contract for the parties. On the contrary, the Court was being asked to enforce the contract as it was originally made. The decision of this Court in the case of *Sm. Katip Bibi Vs. Fakir Chandra Ghosh and Others*, , on which Mr. Samanta relied, is of no assistance to him; on the contrary, on reading the same I find that it supports the view I have taken. In that case the promisee was one and after his death all his heirs were not joined as parties. It was in that context that this Court held that one or more of the several heirs of the original promisee, a single individual, could not by himself or themselves institute a suit for specific performance of the contract and reconveyance by making the remaining heirs as defendants to the suit as on the death of the original promisee his heirs did not become themselves several joint promisees. While so deciding this Court specifically pointed out that the position would have been otherwise if there were several joint promisees. Reliance in this connection may also be placed on the following passage from the judgment of Privy Council in the case of AIR 1939 170 (Privy Council) :--

"It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as (1879) 11 Chn D 121 and (1898) 2 QB 380 are examples of this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action : See (1902) 2 KB 485. Once all the parties are before the Court, it can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants."

15. That brings us to the last contention of Mr. Samanta. Relying upon the following statement made by the plaintiff (P. W. 4) in cross-examination "I am not willing to pay Rs. 3,500/- as the price of the property. I am ready to pay Rs. 500/- as the price of the property and not more than that", Mr. Samanta submitted that the learned Court below was not justified in allowing the plaintiffs prayer for specific performance of the contract as he expressed his unwillingness to purchase the property at the prevailing market price. Read in isolation the above statement made by the plaintiff undoubtedly supports the contention of Mr. Samanta but the evidence of the plaintiff when read as a whole negatives the same. The plaintiff was all along asserting that Rs. 3,500/- shown as the price of the property in the conveyance executed by the appellant No. 1 in favour of the appellant No. 2 was a highly inflated figure and market value of the property was not more than Rupees 600/-. It is in that context that the plaintiff made the above statement while reiterating that he was always ready and willing to purchase the property at the market price. I, therefore, find no substance in this

contention of Mr. Samanta.

16. In view of the above discussions, the appeal fails and the same is hereby dismissed. No order therefore is necessary on the application filed by the plaintiff-respondent challenging the maintainability of the appeal which stands disposed of. In the circumstances of the case, there will be no order as to costs.