

Pradip Kumar Roy Vs. Smt. Bimala Banerjee and Anrs.

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SooperKanoon Citation : sooperkanoon.com/870306

Court : Kolkata

Decided On : Jul-16-1999

Reported in : (1999)2CALLT599(HC)

Judge : Bhaskar Bhattacharya and ;Amit Talukdar, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 16 and 34

Appeal No. : Civil Appellate Jurisdiction F.A. No. 310 of 1992

Appellant : Pradip Kumar Roy

Respondent : Smt. Bimala Banerjee and Anrs.

Advocate for Def. : Mr. S.P. Roychowdhury and ;Mr. Anit Rakshit, Adv.

Advocate for Pet/Ap. : Mr. P.K. Roy and ;Mr. R.C. Das, Adv.

Disposition : Appeal allowed

Judgement :

B. Bhattacharya, J.

1. This appeal is at the instance of a plaintiff in a suit for specific performance of contract and is directed against the judgment and decree dated July 7, 1989 passed by the learned Assistant District Judge, 7th Court, Alipore in Title Suit No. 59 of 1987 thereby refusing the prayer for specific performance of contract but

granting a decree for refund of earnest money.

2. The appellant filed the aforesaid suit for specific performance of contract against the respondents herein and the case made out by the plaintiff was inter alia as follows :

3. The respondent were Joint owners of land measuring more or less 2 blghas 4 cottahs 6 chitaks and 34 sq.ft. appertaining to R.S. Plot No. 343 of Khatian No. 329 of Mouza Dakshin Behala. By an agreement dated July 24, 1984 the respondents agreed to sell 10 cottahs of land out of the aforesaid land @ Rs. 6,500/- per cottah. Accordingly, earnest money of Rs. 25,000/- was paid by the appellant out of the total consideration. Subsequently, the appellant further paid a sum of Rs. 2,000/- on October 3, 1984. In course of lime, the appellant spent about Rs. 40,000/- for filling up a portion of the suit properly and after such filling up in May, 1985 the appellant approached the defendant for completion of the sale on taking appropriate permission from the authorities and accepting the balance sum of Rs. 38,000/-. The defendant for reason best known to them deferred the completion of the transaction by pleading personal inconvenience. Ultimately, the appellant by a letter dated February 16. 1987 sent through his learned advocate called upon the respondents to execute and register the sale deed in terms of the agreement. By an advocate's letter dated February 28, 1987 the respondents informed the appellant that the said agreement dated July 24, 1984 was cancelled and the amount paid as earnest money was forfeited. Hence the suit for specific performance of contract.

4. The aforesaid suit was contested by the respondents by filing written statement thereby denying the material allegations made in the plaint and the defence of the respondents was as follows :

According to the agreement dated July 24, 1984 time was essence of the contract as stipulated in paragraph 2 of the said agreement. The appellant not having agreed to purchase the property within the lime specified therein, was not entitled to get a decree for specific performance of contract. It was specifically denied that the appellant filled up any portion of the land as alleged in the plant: on the contrary the defendant asserted that inspile of repeated requests and reminders

the appellant failed and neglected to perform his part of the agreement. Although the respondents supplied xerox copies of the documents relating to the land so that the execution and registration of the deed of conveyance would be completed within the time specified in the agreement, the appellant remained silent. As the appellant was not at all ready and willing to perform his part of the contract, he was not entitled to the relief claimed in the suit.

5. At the time of hearing of the aforesaid suit, the appellant alone gave evidence in support of his case while two witnesses were examined by the respondents in support of their defence.

6. The learned trial Judge on consideration of the materials on record held that although time was not the essence of the contract, the appellant having failed to show his readiness and willingness to perform his part of contract was not entitled to get a decree for specific performance of contract.

7. The learned trial Judge however passed a decree for refund of earnest money amounting to Rs. 27,000/- within a specified time.

8. Being dissatisfied, the plaintiff has preferred the instant first appeal.

9. Mr. Roy, the learned senior advocate appearing on behalf of the appellant has drawn our attention to the depositions and has contended that the learned trial Judge erred in holding that the appellant was not ready and willing to perform his part of the contract. Mr. Roy strenuously contended that his client had paid a sum of Rs. 27,000/- out of the total consideration of Rs. 65,000/- and having further spent a sum of Rs. 40,000/- towards filling up of the land, the learned trial Judge ought to have granted a decree for specific performance of contract. According to Mr. Roy, the learned trial Judge himself having found that time was not the essence of contract, ought to have allowed the prayer for specific performance of contract.

10. The admitted position is that the agreement was entered into on July 24, 1984 and at that time the appellant paid Rs. 25,000/- as earnest money towards the total consideration of Rs. 65,000/-. There is no dispute that a further sum of Rs. 2,000/- was paid by the appellant in the month of October, 1984 towards

consideration money. In the agreement for sale there is no provision authorising the appellant to take possession or fill up the land prior to the date of execution of sale deed; on the other hand, there is a clause providing delivery of possession at the time of execution of sale deed itself.

11. The appellant being his sole witness proved receipts showing payment of money to one Sankar Das. According to the appellant the said sum of Rs. 40,000/- was paid to Sankar Das for filling up the land. Ext.-3 is the agreement alleged to have been executed by the said Sankar Das for filling up the land. Mr. Roy contends that Ext.-3 and Ext.-6 (series) prove that at the instance of the appellant the land was partially filled up.

12. In our opinion, by merely proving the signature of Sankar Das on Ext.-3 and Ext.-6 (series) the veracity of the contents of those exhibits cannot be proved. The evidence of the contents of a document is hearsay evidence unless the author thereof is examined before the court. An attempt to prove the contents of a document by providing the signature or the handwriting of the author thereof is to set at naught the well recognised rule that hearsay evidence cannot be admitted. (See Sir Md. Yusuf and Anr. v. D and Anr, : AIR1968 Bom112 , Madholal v. Asian Assurance Co : AIR 1954 Bom 305, Dwijesh v. Naresh : AIR1945 Cal492 .

13. In this case the appellant in cross-examination stated that he would examine Sankar Das. After the cross-examination was over he was recalled for further examination-in-chief and proved Ext.-6 (series) but did not examine Sankar Das nor was any reason assigned for non-examination of Sankar Das. Therefore, in our opinion, the learned trial Judge rightly disbelieved ext.-3 and Ext.-6 (series). We are also of the view that without giving opportunity to the respondents to cross-examine Sankar Das on the question of filling up of land, the contents of Ext.-3 and Ext.-6 (series) are not binding upon the respondents.

14. In this case, the respondents has examined D.W.-2 showing that the land has been filled up by the said witness at their instance. After going through his deposition we do not find any ground to disbelieve his testimony.

15. As rightly pointed out by the learned trial Judge, in order to obtain a decree for specific performance of contract, a plaintiff must prove that he was at all material times ready and willing to perform his part of the contract. In this case, even if we believe the case of the appellant that after filling up land, from the month of May, 1985 he was ready to purchase the property, not a single scrap of paper has been shown demanding execution of the deed till February 1987. Under the aforesaid circumstance, we do not find any reason to come to a conclusion different from the one taken by the learned trial Judge that the appellant failed to prove his readiness and willingness at all material times.

Therefore, in our view, the learned trial Judge rightly disallowed the prayer of specific performance.

We, however, find substance in the contention of Mr. Roy that a decree for refund of earnest money having been passed in favour of his client, the learned trial Judge ought to have also passed a decree for interest on that amount. In the circumstances, we modify the decree passed by the learned trial Judge by directing the respondents to pay interest @ 12% per annum on Rs. 27,000/- for five years as the decretal amount has already been deposited by the respondents. Such interest must be paid or deposited in the trial court within a month from date otherwise compound interest will be payable at the aforesaid rate till realisation.

The appeal is thus allowed in part. The decree is modified to the extent indicated above.

No order as to costs.

A. Talukdar, J.

I agree.

16. Appeal allowed