

Raja Baikunth Nath De and ors. Vs. Benode Behari De

Raja Baikunth Nath De and ors. Vs. Benode Behari De

SooperKanoon Citation : sooperkanoon.com/875021

Court : Kolkata

Decided On : Apr-24-1913

Reported in : 51Ind.Cas.13

Judge : Asutosh Mookerjee and ;Beachcroft, JJ.

Appellant : Raja Baikunth Nath De and ors.

Respondent : Benode Behari De

Judgement :

1. This is an appeal by the defendants in a suit for specific performance of a contract of sale of immoveable property. On the 19th January 1891, the respondents transferred to the appellants one-half share in a Zemindari for a consideration of Rs. 9,000. On the 21st January 1891, the purchasers entered into an agreement with the vendors under which they undertook to re-convey the property on these terms:

Whenever you or your heirs shall, within a period of 31 years from the date hereof, pay in any year one anna price out of the price stipulated above, we and our heirs and representatives shall, at the end of every such year, convey to you and your heirs, by a registered deed of sale, at your cost, the share in the said Zemindari proportionate to the price paid out of the aforesaid Kismat Zemindari purchased by us from you; and in the manner, we shall convey to you by many of deeds of sale one anna shares of Kismat Zemindari on payment of the price of such one-anna

shares of the Zemindari. Except at the close of a year, in no other times, we shall accept money or execute the deed of sale. If you or your heirs pay the price after entering into a contract for sale to any other person or for transferring the same by any other means, we and our heirs and representatives shall not convey to you and your heirs.

2. The case for the plaintiffs is that, on their behalf, a tender was made of one-eighth of the sum of Rs. 9,000, together with cost, to the defendants, but that the latter unlawfully refused to accept the money and to execute a conveyance in respect of one-eighth share of the Zemindari. The plaintiffs accordingly prayed for specific performance of the contract stated. The Courts below have made a decree in favour of the plaintiffs. That decree has been assailed before us, on this ground amongst others, namely, that as the tender was not valid in law, the plaintiffs have not an enforceable right to claim specific performance of the contract. It has been contended that upon a true construction of the agreement, the plaintiffs were entitled to tender, at the end of any year, only one-sixteenth of Rs. 9,000, neither more nor less, and to claim a reconveyance of one-sixteenth of the Zemindari originally transferred by them to the defendants. It has been argued on behalf of the plaintiffs respondents, on the other hand, that they were entitled to tender one-eighth of Rs. 9,000 and claim re-conveyance of one-eighth share of the Zemindari transferred to the defendants. In our opinion the construction put by the plaintiffs is erroneous and is not borne out by the language of the instrument.

3. It cannot be disputed indeed, it has not been disputed, that the opening sentence of the paragraph already set out provides for payment in any year of one anna share of the price stipulated, that is, one-sixteenth of Rs. 9,000. The clause then lays down that upon tender of this sum, the purchasers would re-transfer the share in the Zemindari proportionate to the amount so paid. This obviously signifies that upon payment of one sixteenth of Rs. 9,000, one sixteenth of the share which had been transferred, namely, one-sixteenth of the half share of the Zemindari, would be re transferred to the original owners. It has been contended that this view is contradicted by the next sentence, and that what was intended was that one-sixteenth of the entire Zemindari, that is one-eighth of the half share, should be re-conveyed upon tender of the proportionate price. This argument is

obviously fallacious. In the first place, the purchasers had acquired an interest in one half share of the Zemindari. It was that share alone which they were competent to re-transfer and there is no reason why reference should be made to the other half share of the Zemindari of which they were not the owners and with which they were not competent to deal. In the second place, there is no reason why the second sentence should be so construed as to contradict what precedes. The governing part of the clause provides that the plaintiffs are at liberty in any one year to pay one-sixteenth of Rs. 9,000, neither more nor less; upon payment so made, all that they can reasonably demand is a re conveyance of the proportionate share of the Zemindari. In this view it is clear that they tendered more than they were entitled to offer and they claimed re-conveyance of a share in excess of what they were entitled to claim. The refusal of the defendants to accept their offer was consequently fully justified. It need not be disputed that, as observed by Ashurst, J., in *Douglas v. Patrick* (1790) 3 T.R. 683 : 1 R.R. 793 ; 100 F.R. 803 'there is no doubt that a tender of the greater includes the smaller': *Dean v. James* (1833) 4 B. & Ad. 546 ; 1 N. & M. 303 ; 2 L.J.K. B. 94 ; 110 E.R. 561. But the real difficulty of the plaintiffs is that they called upon the defendants to perform a contract different from the real agreement between them, they have adhered to it in this suit up to the very last stage, and, they cannot consequently now turn round, accept the defendants' version of the contract and claim performance thereof.

4. We may add that a question was raised before us as to the application of the rule against perpetuities to the agreement for re-conveyance. in the view we take of the rights of the parties as they stand in the present litigation, it is not necessary for us to express any opinion upon this interesting question.

5. The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.