

## Subedar Dubey vs Madho Dubey And Anr. on 5 January, 1953

**Equivalent citations: AIR1953ALL529, AIR 1953 ALLAHABAD 529**

### JUDGMENT

Agarwala, J.

1. This is a defendant's second appeal arising out of suit for specific performance of a contract of sale. The facts are very brief,

2. On 30-9-1944, Narsingh Dubey and Singhasan Dubey, defendants first set and respondents in this appeal, entered into a contract of sale in respect of a fixed rate tenancy plot No. 1719 of 16 biswas area in village Manikpur in the district of Ghazipur, with Pt. Madho Dubey and Pt. Mahesh Dubey, plaintiffs-respondents. The sale deed was to be executed for a consideration of Rs. 900/- out of which Rs. 125/- were paid as earnest money. One of the terms of the agreement was that the vendors would obtain permission for sale from the Sub Divisional Officer as required by law and that within a week of their securing permission they would execute a sale deed in favour of the plaintiffs for the unpaid purchase money. It was further stipulated that in case the vendors failed to execute the sale deed & have it registered within the time fixed, the vendee would have the right to have the sale deed executed by the vendors and to have it registered according to law and that in case the vendee failed to get the sale deed effected within the stipulated time and prevaricated, they would forfeit the right to the return of the earnest money. The U. P. Agriculturist Credit Act, 1940 prohibits transfer of protected lands without the permission of the Sub Divisional Officer.

3. The vendors obtained the necessary permission on 15-11-1944. Plaintiff No. 1 was then at Calcutta and plaintiff No. 2 who seems to have got information of the fact that the permission had been granted wired on the same date to plaintiff No. 1 for sending the balance of the purchase money. The money was remitted without delay from Calcutta by plaintiff No. 1 to plaintiff No. 2 under an insured cover on 17-11-1944. It was, however, received by plaintiff No. 2 at his village on 23-11-1944. It may be noticed that one week after the grant of the permission expired on 22-11-1944. Plaintiff No. 3 then, as shown by his statement on oath, asked the defendants vendors to execute the sale deed. But they did not agree and instead they executed the sale deed in favour of Subedar Dubey appellant and Kanhaya Lal pro forma respondent for Rs. 1200/- on 25-11-1944. Plaintiff No. 2 made an application to the Sub-Registrar on the same date asking him not to register the sale deed and asked the appellant and Kanhaya Lal not to purchase the property as it had been contracted to be sold to the plaintiffs. The protest was unheeded and the sale deed was duly registered in favour of the appellant and Kanhaya Lal respondent. The plaintiffs then brought this suit on 7-12-1944 for specific performance of their contract.

4. The vendors did not make any appearance, but the vendees, contested the suit on the ground 'inter alia' that they were transferees for value without notice of the contract for sale and, secondly, that the plaintiffs themselves were not in a position to pay the purchase money, within one week of the permission being obtained as provided for in the agreement of sale. According to them, the period, of one week provided for in the agreement was of the essence of the contract. The trial court accepted the defence and dismissed the plaintiff's suit. The lower appellate court held against the defendants and decreed the suit.

5. In this second appeal before us, it has been urged that time was of the essence of the contract and that the plaintiffs, not having shown their readiness to have the sale executed in their favour on payment of the balance of the purchase money and not being in a position to pay the purchase money within the stipulated period could not maintain the suit. We are of opinion that this contention has no force.

6. It is well settled that, in contracts for sale of immovable property, time is ordinarily not considered to be of the essence of the contract unless there is an agreement to the contrary. Time is considered to be of the essence in mercantile contracts because prices may vary from day to day, nay even from hour to hour. That is not so in the case of prices of immoveable properties. In such cases, reasonable time is to be presumed to have been intended to be fixed by the parties. In the present case, the presumption cannot be said to have been rebutted as there is no specific clause suggesting that the period of one week was intended to be of the essence of the contract.

7. In a similar case, the Privy Council held that a period of two months stipulated in an agreement for sale was not of the essence of the contract, vide --'Jamshed Khodaram Irani v. Burjorji Dhunjibhai', AIR 1915 PC 83(A). Their Lordships pointed out that Section 55, Contract Act, does not lay down "any principles which differ from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time."

8. Time not being of the essence of the contract in the present case, it was immaterial that there was delay of one day in the plaintiffs going to the vendors and requesting them to execute the sale deed in their favour. It may be noticed that as soon as the permission was obtained by the vendors, plaintiff No. 2 asked plaintiff No. 1, who was at Calcutta, to send the money immediately. Plaintiff No. 1 sent the money under an insured cover. If the place or residence of the parties had not been a village, the amount would have been received within the stipulated time. But as it was a village more than ordinary time was taken for the insured cover to reach the hands of plaintiff No. 2. As soon as the money was received by him, he asked the vendors to execute the sale deed in their favour. The plaintiffs were, therefore, not guilty of any laches. In our opinion, there was no breach of the contract on the part of the plaintiffs and they were entitled to have the contract performed according to its terms.

9. The next point that has been raised before us by learned counsel for the appellant is that without the permission of the Sub Divisional Officer the vendors not being permitted by Section 12 of the aforesaid Act to make a voluntary alienation without the permission of the Sub Divisional Officer, the Court is powerless to order specific performance of the contract. .

10. It is further pointed out that the permission granted being for the sale to be made within fifteen days only, the permission had expired before the suit was instituted, and as such also, specific performance could not be decreed. In our opinion, this argument also has no force.

11. Permission to sell is obtained under Section 24 of the Act. That section requires that an application for permission will be made by the proprietor, who wishes to make a permanent alienation of the whole or any part of the protected land, to the Assistant Collector in charge of the Sub-division in which his protected land or that part of it which is assessed to the largest amount of local rate, is situated. The Assistant Collector shall make such inquiry as appears necessary and shall decide the application in accordance with rules made by the Provincial Government in this behalf. An enquiry was made, and it was found that it was a case in which permission was to be granted and the permission was actually granted. In accordance with their contract the vendors were bound to execute the sale deed in favour of the plaintiffs. In executing the sale deed in favour of the appellant and Kanhaya Lal pro forma respondent, they committed a breach of the contract. The vendees took the sale as found by the court below and which finding has not been challenged before us, with notice of the contract in favour of tile plaintiffs. Their sale deed is, therefore, liable to be set aside at the instance of the plaintiffs. There is nothing in the Regulation of Agricultural Credit Act to prevent the vendors from applying for the extension of time fixed in the permission which was granted to them on the 15th November 1944. Further, there is nothing in the Act to prevent the vendors from making a fresh application for permission to sell in view of the fact that the sale deed in favour of the vendees has to be declared to be void. There being no absolute prohibition from making a permanent alienation of a protected land, it is open to the court to do what justice requires, that is, if it is found that the plaintiffs are entitled in law to have the contract of sale performed, to order its performance subject to such condition as may be found necessary to impose so that the law may be complied with. The only condition, which is necessary to lay down in decreeing the plaintiffs' suit for specific performance seems to be to require that, before the sale deed is executed, permission of the Sub-Divisional Officer shall be obtained.

12. Learned counsel for the appellant has referred us to a decision of a learned Judge of this Court in --'Raj Bahadur Singh v. Ram Sumiran Misra', AIR 1950 All 692(B). The facts of that case were similar to the facts of the present case. It was held by the learned Judge that the plaintiff could not be granted the relief of specific performance of a contract of sale of the land because in doing so the court would be acting contrary to the provisions of Section 12 of the Act. Apparently, it was not urged before the learned Judge that the decree could be made conditional upon the permission of the Sub-Divisional Officer being first obtained. So far as the judgment of the learned Judge goes, namely, that if an unconditional decree for specific performance were passed, it would be contrary to the provisions of Section 12 of the Act, we are in entire agreement. But it appears to us that if a conditional decree were to be passed, there would be nothing in it which would contravene any provision of the Act. Reference was also made to two cases referred to in the judgment of the learned

Judge. These are --'Hakim Enayat Ullah v. Khalil Ullah Khan', AIR 1938 All 432(C) and --'Sri Narain Dube v. Jang Bahadur', AIR 1947 All 431 (D). Both these cases are cases in which an unconditional decree for specific performance of the contract had been passed and was to be executed according to its terms. In 'Enayat, Ullah's case', the execution of the decree according to its tenor would have been contrary to the provisions of Section 7, Encumbered Estates Act, which lays down that a landlord could not alienate his land without the sanction of the Collector. In 'Sri Narain Dube's case' also there was an unconditional decree for specific performance of a contract of sale and it was held that the decree could not be executed in view of Section 12, Regulation of Agricultural Credit Act. The question whether a conditional decree avoiding conflict with the provisions of the two Acts viz., the Encumbered Estates Act & the Regulation of Agricultural Credit Act, could be passed was not raised in either of the two cases. We are of opinion that these two cases do not decide the point which falls to be considered in the present case.

13. The result, therefore, is that we allow this appeal in part, modify the decree of the court below and direct that the plaintiffs' suit for specific performance of the contract of sale be decreed subject to the condition that permission for making the transfer is given by the Sub Divisional Officer.

14. Defendants Nos. 1 and 2, vendors, are directed to apply to the Sub Divisional Officer to grant them fresh permission for the execution of the sale deed in favour of the plaintiffs or in the alternative to extend the period of permission which was granted by him by his order dated 15-11-1944.

15. Defendants Nos. 1 and 2 will make the necessary application to the Sub Divisional Officer within three months of this date. On their failure to do so, the plaintiffs will be entitled to make the necessary application to the Sub Divisional Officer on behalf of defendants Nos. 1 and 2. If the time for the execution of the sale deed is extended or a fresh permission is granted by the Sub Divisional Officer, the sale deed shall be executed by defendants Nos. 1 and 2 in favour of the plaintiffs in accordance with the terms of the contract of sale dated 30-9-1944.

16. On failure of the defendants to execute the sale deed in favour of the plaintiffs, the sale deed shall be executed by the court on behalf of defendants Nos. 1 and 2 in favour of the plaintiffs.

17. The declaration granted By the court below that the sale deed dated 25-11-1944 in favour of defendants Nos. 3 and 4 is null and void shall stand.

18. The plaintiffs shall be entitled to get their costs of both the courts below from the appellant. The costs of this appeal shall be borne by the parties.

19. If the time is not" extended or a fresh per mission is not granted by the Sub Divisional Officer, the plaintiffs' suit shall stand dismissed and in that event parties shall bear their own costs in all the courts.