

Patna High Court

Kumar Arun Nath Shah Deo vs Bodho Baraik on 30 July, 1975

Equivalent citations: AIR 1976 Pat 113

Author: H Agrawal

Bench: H Agrawal

JUDGMENT H.L. Agrawal, J.

1. This is a second appeal by the defendant arising out of a suit instituted by the plaintiff respondent for specific performance of a contract for sale of 8.20 acres of agricultural lands for a total consideration of Rs. 8,656/- or in the alternative, for a decree for the said amount by way of refund, said to have been paid in full by him.

2. The relevant facts are these. The case of the plaintiff was that on 8th April, 1962, the parties entered into a contract for sale of the above mentioned property; The further case of the plaintiff was that no time was fixed for payment of the consideration which was left at his convenience. However, a sum of Rupees 3,500/- was paid by him on the date of the agreement itself for which a receipt (Exhibit 4) was granted by the defendant's agent. He paid a further sum of Rs. 3,500/- on 6th May, 1962, and then the balance of Rs. 1,656/- on 26th January, 1963. But as the defendant failed to perform his part of the contract by executing the sale deed in his favour, he instituted the suit on 28th January, 1966.

3. The case of the defendant was that although there were some negotiations between the parties it had not reached the stage of a contract. He, however, admitted receipt of a sum of Rs. 3,500/- but by way of loan and not as a part of the consideration for the sale and further pleaded that he had paid up the said amount already by different instalments.

4. As before this Court Mr. J. C. Sinha appearing for the appellant has raised only one question, namely, of limitation. I need not state other facts of the case.

5. The trial court accepted the plaintiff's case that there was a valid contract between the parties for sale of the suit lands for the consideration mentioned and that the plaintiff had paid the total amount but, it refused to grant him a decree for specific performance of the contract in view of the abnormal delay in making the payments without there being adequate explanation and granted a money decree for the amount paid by him namely, Rs. 8,656/-

6. The defendant preferred an appeal and the court of appeal below did not accept the plaintiff's case of payment of the third instalment of Rs. 1,656/- on 26th January, 1963 and, accordingly, gave a decree in his favour for Rs. 7,000/- only.

7. Learned counsel appearing for the defendant-appellant in this Court against the decree of the court of appeal below has contended that in view of the finding of the, court of appeal below that the plaintiff had not paid the sum of Rupees 1,656/- on 26th January, 1963 his suit for recovery of the sum of Rs. 7,000/- on the basis of the two payments on 8th April, and 6th May, 1962, as instituted on 28th January, 1966, was certainly out of time.

8. Learned counsel for both the parties are ad idem that on the facts of this case, the relevant Article of the Limitation Act, 1963, would be Article 47 which reads as follows:

Description of suit Period of limitation Time from which period begins to run "47. For money paid upon an existing consideration which afterwards fails Three years The date of the failure."

The argument advanced by Mr. J. C. Sinha for the appellant is on the basis of a document (Exhibit 5 (b)) dated 17th July, 1962, a letter written by the defendant to the plaintiff asking to pay the balance price of the lands and get the necessary sale deed registered within a week of the receipt of this letter. The plaintiff had, however, filed this letter in order to support his case of payment of the third instalment on which the trial court was greatly impressed but, unfortunately for him, this letter is being rightly utilised in support of the argument on the question of limitation. Learned counsel contended that although there might be no time fixed for making the payment and the two instalments of Rs. 3500/ each even paid upon existing consideration, namely, the consideration for execution of a sale deed for the property in question which ultimately failed, the date of the failure must be fixed a week after the receipt of the letter (exhibit 5 (b)) by the plaintiff which must be sometime in the month of July, 1962. The defendant having fixed a period for making payment of the last instalment and the plaintiff having failed to perform his part of the contract, the date of the failure of this contract could be legitimately fixed on the failure of the plaintiff to perform his part of the contract as asked by the defendant and the period of limitation of three years fixed under Article 47 of the Limitation Act would run from that date. The point raised is of great substance and must be accepted.

9. Mr. L.K. Choudhuri appearing for the plaintiff respondent, however, wanted to salvage the case of the plaintiff on an argument that the question of limitation must be decided on the allegations made in the plaint and that the finding of the court of appeal below in regard to the payment of the third instalment was itself a doubtful finding. It is difficult to accept either of the contentions of Mr. Choudhuri. He cannot rely upon the findings of the trial court on the question of the payment of 26th January, 1963. In the absence of any cross-objection against this finding by the court of appeal below, the same has become final and conclusive. The position, therefore, remains that the suit of the plaintiff is now confined on the basis of the two payments made by him on 8th April, 1962 and 6th May, 1962, of Rs. 3,500/- each. Learned counsel for the respondent then placed reliance upon a single Judge decision of this Court in Mahabir Choudhary v, Gaiadhar Sahu, (1968 BLJR 473) and contended that an action for the money paid by the plaintiff upon an existing consideration in question which failed afterwards, was not barred until three years after the date of his failure to get it specifically performed by a decree of the court. Raj Kishore Prasad, J.. in that case was dealing with a situation where a sale deed had been executed in favour of the plaintiff and. as usual, the sale deed contained a stipulation that should the purchaser be dispossessed or, in any way, the title of the vendee be affected, the vendor would pay back the entire consideration with interest to the plaintiff purchaser, The property was in possession of a tenant who had agreed to pay rent to the plaintiff purchaser after his purchase but he did not pay rent and thereupon the plaintiff had brought the suit for recovery of the arrears of rent. That suit was ultimately dismissed and thereupon the plaintiff brought another suit inter alia claiming an alternative relief of refund of the consideration money. In answer to the question of limitation the learned Judge held that the cause

of action for the subsequent suit arose only upon the dismissal of the earlier suit for rent. With great respect to the learned Judge. I feel myself unable to agree with the view taken by him in the said decision but as the situation in that case was entirely different. I would rather distinguish the case of facts themselves as in this case the contract was an executory contract and so on the failure to pay the consideration thereunder, the contract became unenforceable in law as the plaintiff himself was in breach to perform his part of the contract in paying the entire consideration and the date of the failure in this case was not dependent upon any declaration by the court upon the failure to perform the respective parts of the obligations of either of the parties to the contract which I have got no difficulty to fix with reference to Ext. 5 (b) in this case, as already indicated above.

10. In the case of Mohammad Hussain v. Firm Andani Co., (AIR 1959 Madh Pra 30) A had paid an advance to B agreeing to purchase from him corrugated iron sheets who. in his turn, had agreed to sell the same by a certain date, time being the essence of the\_ contract. B applied for extension of the time for supplying the goods as he could not secure the sheets within time to which A did not agree and refused extension and put an end to the contract. It was held that the suit for refund of advance must have been filed when the contract came to an end an the default of B (defendant).

11. In the case of Jagat Kishore Prasad Narain Singh v. Parmeshwar Singh, (AIR 1951 Pat 348) a decree-holder was accepting money from the judgment-debtor out of court but he did not get the payments certified by the court. In a suit for refund of those payments made to the decree-holder by the judgment-debtor, it was held that the breach of the contract took place and the consideration fell through when the decree-holder did something inconsistent with the carrying out of the contract and filed execution case for the full decretal amount ignoring the payments.

12. No decision was cited at the Bar which would apply with better force to the facts of the present case. But from the two decisions that I could find referred to above, give ample support to the view that I have taken that the failure of the consideration in this case can be very well fixed in view of the letter dated 17th July, 1962 (Exhibit 5 (b)). Once this view is taken that the period of limitation started running in this case for the suit of the plaintiff sometime in July, 1962, when the consideration fell through, the suit instituted on 28th January, 1966, obviously beyond three years, the period fixed for such a suit, must be held to be barred by limitation.

13. I would, accordingly, allow this appeal and dismiss the plaintiff's suit. But as the appeal is being allowed on the point of limitation I direct the appellant to bear his own cost.