

Calcutta High Court

Sunil Krishna Ghosh And Anr. vs Calcutta Improvement Trust on 17 April, 2001

Equivalent citations: AIR 2001 Cal 199

Author: Sengupta

Bench: Sengupta

JUDGMENT Sengupta, J.

1. This is a suit for. In substance, specific performance of an agreement for sale of three plots of land being plot No. 27 of premises No. 6 Nayan Krishna Saha Lane, plot No. 40 out of premises No. 29 Durga Charan Mukherjee Street and plot No. 25 out of premises No. 6 Nayan Krishna Lane. The aforesaid three plots of land are measuring about 6 Katthas 15 Chataks, 2 Katthas 14 Chataks and 6 Kathas 7 Chataks respectively hereinafter referred to as the suit properties.

2. One Mr. Asit Kumar Ghosh since deceased was offered by the defendant for purchase of the said three plots of land in terms of Section 81 of the Calcutta Improvement Act, 1911 as the original offeree was the previous owner of the aforesaid plots of land which were previously acquired by the Calcutta Improvement Trust. There is no dispute to the aforesaid fact that the original offeree can exercise his statutorily preemptive right enshrined in Calcutta Improvement Act, 1911 (hereinafter to as the said Act). There is no dispute that the full consideration has been paid long ago.

3. The original plaintiff namely Pallav Kumar Banerjee, since deceased, and the present two plaintiffs filed the aforesaid suit in the capacity of the Joint Executors in terms of the last Will dated 28th August, 1994 made and published by the said Asit Kumar Ghosh since deceased. The probate has been obtained by the executors being Ext. E. During the pendency of the suit, the original plaintiff No. 1, Pallav Kumar Banerji, died. The other two surviving executors are now continuing with this action. The defendant has entered appearance and filed written statement. The suit is being tried on the following issues :--

"ISSUES

1. Is the suit maintainable for non-compliance of mandatory provisions under Section 156 of the C.I. Act, 1911?
2. Is the suit barred by the provisions of Law of Limitation?
3. Is the plaintiff entitled to get the relief as claimed in the plaint?
4. Whether the plaintiff has performed his part of obligation in completing the conveyance?
5. Whether the claim of the plaintiff is barred by the principles of waiver and ac-' quiescence?
6. What other reliefs, if any, the plaintiff is entitled to have?"

4. The plaintiff has examined one witness in order to prove its case and whereas the defendant has examined two witnesses to defend the suit. From bare reading of the aforesaid issues and upon the evidence adduced and so also averment of the plaint and written statement, it will appear that factually there is not much dispute, only dispute is as to the law and further dispute is regarding delivery of the physical possession of the property. Mr. Roy Chowdhury, learned Counsel for the defendant, contends that first of all the suit is not maintainable in view of non-service of statutory notice as required under Section 156 of the aforesaid Act. He contends that there must be a notice followed by pleadings in the plaint. There is none. On the face of it the suit is liable to be dismissed. His next contention on the question of law is that even if the suit is held to be maintainable then the claim of the plaintiff is barred by limitation as admittedly the agreement was concluded sometimes on or about 27th July, 1965 whereas the suit has been filed in the year 1999. The suit should have been brought within three years from the date of execution of the aforesaid agreement. He contents that if it is held by this Court that the suit is otherwise maintainable, both on the question of limitation as well as other statutory provisions then his client is prepared to execute and register conveyance but physical possession thereof cannot be given as the physical possession thereof had been given to the predecessor in interest of the plaintiffs. Therefore, question of passing decree for physical demarcation of the property and delivery of physical possession thereof does not and cannot arise. In support of his contention as to the service of notice, he has relied on an unreported decision of this Court. He contends that this purchase in exercise of pre-emption right has been made under the provision of the statute, so transaction squarely comes within the provision of Section 156 of the said Act. This agreement was entered in exercise of power under Section 81 of the said Act, Therefore, notice is mandatory. He draws my attention to the unreported Division Bench Judgment of this Court passed in Appeal No. 156 of 1979 on 31st August, 1998 (Sardarmall Kankaria v. The Trustees for the improvement of Calcutta).

5. Mr. Pramit Roy, learned Counsel appearing on behalf of the plaintiff, submits that no notice is required to be served in this case as the claim of the plaintiff is not based on and/or pursuant to any act which purports to have been done under the said Act. He contends that agreement for sale of the aforesaid three plots of land is not the act that falls within the provision and/or meaning of the Calcutta Improvement Act, 1911, up to the stage of making offer to sell the aforesaid three plots of land if this exercise can be termed to be an act purporting to be done under this Act. After the offer is accepted and the formal agreement is entered into, the transaction becomes absolutely independent and outside the purview of the provision of the aforesaid Act. In support of his contention, he has relied on a decision and (1983) 1 Cal HN page 1 equivalent to (1983) 87 Cal WN 216. He contends alternatively even if it is held by this Court that the aforesaid notice is required to be served then a letter addressed to M/s. A. N. Dawn has been served upon the Board on 26th November, 1998 and much before institution of the suit. Therefore, substantial compliance of Section 156 has been done.

6. As far as the question of limitation is concerned, he contends that Article 55 of the schedule of the Limitation Act will be applicable in this case. There is no fixed time to execute conveyance sought to perform in the agreement and when there is no fixed time, the suit has to be brought within three years from the date of the refusal to perform the agreement. In this case, as on today, there is no refusal expressly until written statement was filed.

7. Mr. Roy further contends that from the evidence and deposition of DW as well as the plaintiff that physical possession of the property was not given to the plaintiffs or to their predecessors-in-interest. The aforesaid fact of not giving physical possession is corroborated by the judgment and order passed by Justice S. B. Sinha in the writ petition filed by his client whereby the demand for payment of the rates and taxes raised by the Municipal Authorities was set aside.

8. Having heard the respective contentions of the learned Counsel, in order to decide the suit, I am of the view that it would be suffice to answer two issues namely Issue Nos. 1 and 2. Therefore, I take up Issue No. 1 first i.e. as to whether there is non-compliance of mandatory provisions under Section 156 of the Calcutta Improvement Act, 1911 or not. First I will have to decide whether Section 156 will be applicable in this case or not and thereafter question of compliance of the aforesaid Section will come. I am unable to accept the submission of Mr. Roy that the offer to sell the property under the provision of Section 81 of the said Act will not come within the purview of the aforesaid Act. The very basis of agreement is offer, that has been put forward under Section 81 of the said Act and this will appear from the admitted documents that the offer was made pursuant to the said provision. So I hold that the action taken by the Board is an act purporting to be under the provision of the aforesaid Improvement Act. As far as refusal is concerned, the same is culmination of the statutory action taken by the Board. The decisions cited by Mr. Roy are absolutely distinguishable on factual aspect. In those cases, transaction took place not in relation to Act or action pursuant to the aforesaid Act. Those transactions relate to absolutely ordinary commercial transactions. Therefore, those decisions are not applicable in this case.

9. Accordingly, I hold that notice was required to be served under Section 156 upon the defendant Board.

10. Now the question remains whether the plaintiff has complied with the provision or not. Admittedly the plaintiff has served a notice upon the Board on 26th November, 1998, through their Advocate-on-Record M/s. A. N. Dawn. The purpose of Section 156 is to give notice upon the Board stating grievance that is to say, the cause of action and redressal and/or relief sought for. These are the basic requirements to be communicated in writing and which is the real Intention and purport of the provision of Section 156. The whole idea to incorporate the aforesaid Section as in case of Section 80 of the Code of Civil Procedure and also in other similar statute is to give a prior notice so that the Board and/or the Government department may get a chance to examine the demands made by the plaintiff and the defendant concerned may not be driven to unnecessary litigation in case of a genuine claim. The statutory body and the Government departments are not expected like ordinary litigants to fight litigation for genuine and clear claim. In order to eliminate these eventualities, the legislator has intended to make a provision and that is why some sort of periodic bar is created. The compliance of Section 156 is not required in strict sense and manner, the substantial compliance is good enough to enable the plaintiff to file suit. It has to be examined, whether the Government or statutory authority has understood the grievance and reliefs claimed by the notice. In this case the defendant understood.

11. Therefore, I am of the view that in this case the plaintiff has complied substantially with provision of Section 156, so I answer the Issue No. 1 in favour of the plaintiff and in the

affirmative.

12. Now taking up the Issue No. 1 whether the suit is barred by limitation or not, I am of the view that the suit is not barred by limitation for the following reasons :--

According to the defendant's version that will appear in their evidence in questions Nos. 32, 83 of DW 1. Ram Prasad Mitra that the paper possession has been given and the consideration money has been received. According to the version of the plaintiff, neither paper possession nor physical possession has been given. In this case, there is no stipulated date of performance of the contract. The plaintiffs have performed their part of contract whereas the defendant has not. The defendant has not in writing refused either to execute the conveyance or to perform their part. Moreover in my view, this is a continuous breach on the part of the defendant by not handing over physical possession. Therefore, I hold not only Article 55 of the Schedule of the Limitation Act but Section 2 of the Limitation Act will also be applicable as this is a continuing cause of action because in each and every day the breach is being committed by the defendant. So I hold that this suit is not barred by limitation. As Mr. Roy Chowdhury has conceded that in the event it is held by this Court the suit is otherwise maintainable his client is prepared to execute the conveyance, so acting on this concession. I direct the defendant to execute and register necessary conveyance within three months from the date of putting forward the draft conveyance, in default thereof the Registrar, O.S.. of this Court will execute and register the conveyance on behalf of the defendant.

13. The next question remains for delivery of physical possession of the property. According to Mr. Roy Chowdhury, the possession both physical and paper, have been given and such fact is denied and disputed by Mr. Roy Chowdhury. Mr. Roy Chowdhury further submits that in fact physical possession of the property was never taken by his client. I am unable to accept this contention at this stage as the property was admittedly acquired. So possession follows acquisition and this is what is exactly recorded in the judgment and order of Justice Sinha passed in the writ petition. Since there is a question as to who is in physical possession, in fact it may so happen by passage of time some other person or person might or might not sneak into property. In order to ascertain actual physical possession of properties in question, this Court for the ends of justice thinks that a fit and proper person be appointed for this purpose. So I appoint Mr. Shyamal Sanyal, a practising Advocate of this Court as Special Officer who shall visit upon notice to both the parties the said properties in question and shall submit a report to this Court as to who are in physical possession of the aforesaid three plots of land and since when and what is the status claimed by the persons who are occupying the said premises. The Special Officer shall be paid remuneration assessed at 500 G.Ms, to be paid by the plaintiff at the first instance.

14. Let this matter appear in the list under the heading marked for further orders fortnight hence.

15. Upon furnishing a xerox copy of the original Register being Ext. A, it is permitted to be taken away by the defendant. Accordingly, the same is returned. Similarly upon furnishing a xerox copy of the probate, the same is allowed to be taken away. The same is returned accordingly.

16. Special Officer, Registrar. Original Side, Department and all parties to act on a xeroxed signed copy of this dictated order upon usual undertaking.