SUPREME COURT OF INDIA

BISHANDAYAL AND SONS

Vs.

STATE OF ORISSA & ORS.

07/12/2000

(V.N.Khare, S.N.Variava)

Appeal (civil) 2522 1992

JUDGMENT

S. N. VARIAVA, J.

This Appeal is against a Judgment dated 15th May, 1992. Briefly stated the facts are as follows: In an auction sale held by the Court Receiver, the 1st Respondent purchased, for a sum of Rs. 2.32 lacs, all the assets of one Mayurbhanj Spinning and Weaving Mills including plant and machinery and land measuring Ac. 419.14,. The 1st Respondent then proposed to sell off the Mill. The Appellant by a letter dated 14th November, 1992 offered to purchase the Mill with all its assets for consideration of a sum of Rs. 2.31 lacs. During this period the State of Orissa was under the President's Rule. The Appellants thus had a meeting with the Governor of Orissa wherein they were asked to enhance the consideration to Rs. 2.32 lacs. The Appellants by the letter dated 17th Marcy, 1973, addressed to the Governor, conveyed their acceptance to purchase the Mill with all its assets for Rs. 2.32 lacs. By a letter dated 9th April, 1973, addressed by the Deputy Secretary to the Government to the Director of Industries, the Director of Industries was informed that the Government had decided to sell the Mill to the Appellants for a sum of Rs. 2.32 lacs. It was, however, stated that the Director of Industries was to ensure that correct assessment, of the land required to run the unit by the Appellants, was made. This was an internal communication, not addressed to the Appellants yet the Appellants came to know of it. The Appellants, obviously with a view to pressurize, address a letter dated 18th April, 1973 to the Governor stating that they had accepted the offer to purchase the Mill at the cost of Rs. 2.32 lacs and purported to forward a Demand Draft in a sum of Rs. 1,32,000/-. The 2nd Respondent by his letter dated 21st April, 1973, addressed to the Appellants, informed them that the Government had approved the proposal to sell the Mill to the Appellant for a cost of Rs. 2.32 lacs and that they would be allotted land actually required for running the Mill. By their letter dated 23rd April, 1973, the Appellants informed the 2nd Respondent that they were surprised to learn that the land was to be allotted to the extent actually required. They insisted that the entire assets including the entire land was to be sold to them for a sum of Rs. 2.32 lacs. The 2nd Respondent by the letter dated 5th July, 1973 informed the Appellants that the Government was willing to sell the entire land provided they paid the full market value of the land and entered into a lease and paid the premium and abided by the terms and conditions of that lease. The Appellants on 17th July, 1973 gave an undertaking to apply to the local Tehsildar. On 2nd August, 1973 the Appellants undertook to pay full value of land and other charges and to abide by terms and conditions of lease. As till date no agreement had been finalised

by letter dated 22nd October, 1973 the 2nd Respondent returned the Demand Draft of Rs. 1.32 lacs to the Appellants. Thereafter some correspondence was carried on between the parties. Ultimately the Appellants gave a notice dated 26th October, 1974, purporting to be a notice under Section 80 of the Civil Procedure Code where under they claimed that a complete contract had been arrived at to sell the Mill with all lands to the Appellants for a sum of Rs. 2.32 lacs. The Appellant then filed Suit No. 108 of 1976 in the Court of Sub-Judge, Cuttack, claiming that a concluded contract had been arrived at to sell the Mill and all its assets, including Ac. 419.14 of land to the Appellants for a price of Rs. 2.32 lacs. The Appellants claimed that they had acquired valid right and title to the properties of the Mill. The Appellants also claimed that the undertakings given by them were void as they were obtained by misrepresentation, fraud, undue influence and coercion. The Appellants also sought an injunction against the Respondents from selling away the Mill and its properties. At this stage itself it is to be seen that the Appellants and the Respondents were at cross purposes. Whilst the Appellant was insisting on purchasing the Mill with all its land for a price of Rs. 2.32 lacs only, the Government was only offering the mill with such land as would be required for running the Mill. Thus upto this stage there had been no concluded contract or agreement. At the Appellate stage counsel for Appellants fairly conceded that the prayers in the Original Suit could not have been granted and that he was not pressing for the same. This is recorded in paras 8 & 9 of the impugned Judgment. Thus we are not now concerned with the Original Suit but with events which took place thereafter. After the suit was filed a meeting was held in the Chamber of Minister of Industries on 29th December, 1978. Minutes of the meeting of 29th December, 1978, inter alia, records as follows : "3. After discussion the following decision were taken :

(a) M/s. Bishandayal & Sons would pay the previously fixed price of Rs. 2.32 lakhs towards plant, machinery & building.

(b) They will be leased out an area of Ac. 40 of land.

(c) They would pay premium @ 1/3rd of the market value of land as prevailing in 1972.

(d) The suit will be withdrawn by the firm.

(e) After sale, the unit will be revived by the party."

Copy of those minutes were given to the Appellants. The Appellants applied for and were allowed to amend the plaint on 11th September, 1981. It was now claimed that a fresh agreement to sell had been arrived at on the basis of the decision taken in the meeting of 29th December, 1978. The Appellants now sought Specific Performance of this agreement. The Respondents filed an additional Written Statement wherein they denied that there was any such agreement. On 19th March, 1982 this suit was decreed by the trial court. It was held by the trial court that there was a completed contract between the Appellants and the Respondents and that the Appellants had acquired rights over the mill and its lands. Having come to that conclusion the trial court still directed the Appellants to pay for 40 acres of land at the rate of Rs. 300 per acre. The trial Court concluded that the Appellant was ready and willing to perform its part of the contract and that the decision in agreement arrived at on the meeting of 29th December, 1978 were mere confirmations of the previous contract. The trial court also held that the condition regarding withdrawal of suit was not a condition precedent and that there was valid notice under Section 80 of the Code of Civil Procedure. The Respondents then filed First Appeal No. 261 of 1992 in the High Court of Orissa. This Appeal has been allowed by the impugned Judgment dated 15th May, 1992. As has been set out herein above, before the Appellate Court counsel for the Appellant fairly and correctly conceded that the

prayers in the original plaint were not maintainable and could not have been granted. As stated above counsel for the Appellants fairly conceded that he was not pressing the prayers in the original plaint. Thus clearly the decree of the trial court holding that there was a concluded contract was wrong and unsustainable, not only in law, but also on facts. Before the Appellate Court the question was whether the Appellants were entitled to specific performance of the agreement alleged to have been arrived at in the meeting of 29th December, 1978. The Respondents herein contended that there was no agreement. They also contended that even if there was an agreement the same was unenforceable in law as the provisions of Article 299 of the Constitution of India had not been complied with. It was also contended that by the amendment of the plaint, an entirely new case had been incorporated and no fresh notice under 80 of the Code of Civil Procedure having been given the amended suit was not maintainable. It was also contended that even if there was an agreement one of the pre-conditions was that the suit should be withdrawn and as the Appellants had not withdrawn the suit, it could not be said that they were ready and willing to perform their part of the contract and no relief should have been granted to them on this count also. The Appellate Court has, in the impugned Judgment held that an agreement was arrived at. The Appellate Court has however held that the agreement is not enforceable in law as it does not comply with the provisions of Article 299 of the Constitution of India. The Appellate Court has also upheld the contentions of the Respondents herein, on Section 80 Code of Civil Procedure and on precondition of withdrawal of Suit. Before us the Respondents have not disputed that, at the meeting of 29th December, 1978, an agreement as reflected in the minutes had been arrived at. Thus there is no challenge to the findings in this behalf. However, it has been contended that this is an agreement, which is unenforceable in law as the provisions of Article 299 of the Constitution of India have not been complied with. The contentions regarding Section 80, Code of Civil Procedure and precondition of withdrawal of suit have been pressed. On behalf of the Appellants it is contended that it is not open to the Respondents to take up the plea of non compliance with Article 299, Constitution of India as no such plea was taken in the written statement. In support of this reliance was placed on the case of Kalyanpur Lime Works Ltd. v. State of Bihar and other reported in AIR 1954 S. C. 165. In this case the question was whether the concerned contract conformed with the provision of Section 30 of the Government of India Act, 1915 Such a plea had not been raised in the pleadings or in the memorandum of appeal to the High Court but was taken for the first time during arguments in this Court. This Court held that such a question could not be allowed to be raised at the time of the arguments, as it was a mixed question of law and fact and no opportunity to adduce evidence was given to the other side. Reliance was also placed upon the case of Union of India vs. Surjit Singh Atwal reported in 1979 (1) S.C.C. 520. In this case there was a concluded contract for the construction of a hard runway, taxi tracks and dispersal roads The work under the contract had been completed and the dispute between the parties was whether the Contractor was entitled to special rates in respect of certain stone, which were not available at the site. It was claimed that at a meeting it had been agreed that the Plaintiff (therein) would be entitled to extra price. The plea regarding illegality of the contract had not been raised in the written statement. In the written statement there was total denial regarding the agreement to make payment of special price. Thereafter an application for amendment of the written statement was made to plead that there was failure to comply with the provisions of Section 175(3) of the Government of India Act, 1935. That application was dismissed but it was observed that the plea could be raised even without an amendment. The suit then went to trial. The trial court dismissed the suit on the ground that there was a new agreement in November 1947 and that this agreement did not comply with the requirements of Section 175(3) of the Government of India Act, 1935. In Appeal the Division Bench held that there was no new agreement. The Appellate Court held that the trial court was wrong in entertaining a plea which had not been taken in the written statement. The Appeal was accordingly allowed. This Court dismissed the appeal to this Court on

the ground that such a plea not having been taken in the written statement could not be raised after several years after the institution of the suit as it would greatly prejudice the plaintiff. This Court held if such a plea had been taken at the earlier stage, the plaintiff could have come out with a certain alternate case or raised certain other pleas, which right he had now lost. This Court also held that such a plea was a mixed plea of fact and law. Reliance was also placed upon the case of Nirod Baran Banerjee vs. Dy. Commissioner of Hazaribagh reported in 1980 (3) S.C.C. 5. In this case it was held that the question whether Article 299 of the Constitution of India was complied with is not a pure question of law but a question depending on facts and since the point was not pleaded either before the trial court or the High Court, it cannot be raised in this Court for the first time. There can be no dispute with the preposition of law. The question whether a contract complies with Article 299 of the Constitution of India or not is a mixed question of law and fact. Undoubtedly in this case the plea has not been taken in the written statement and not been urged before the trial court. However, it was squarely urged before the Appellate Court. At the stage i.e. when it was urged before the Appellate Court, a contention could have been taken that such a plea cannot be raised. Instead the Appellants took out an application under Order 41, Rule 27, Code of Civil Procedure, for a direction to the Respondents to produce the original minutes in Court. That application was allowed by the Appellate Court and the Respondents were directed to produce the original minutes in Court. Thus the Appellate Court made sure that no prejudice was being caused to the Appellants. The Appellate Court made sure that Appellants were not deprived of an opportunity to lay all facts before the Court. The minutes were then produced in Court. It was found that the original minutes did not contain the signatures of either of the parties. The original minutes were shown to the counsel for the Appellants and they were satisfied that the minutes had not been signed by the parties. Thus the Appellants themselves, on such a plea being raised, called for the additional evidence and the Appellate Court permitted it. The original minutes clearly indicated that the provisions of Article 299 had not been complied with. Further the witness of the Appellant had, during his cross examination, admitted that apart from the minutes there was no other written agreement between the parties. It is not the case of the Appellants that the agreement arrived at in the meeting of 29th December, 1978 had thereafter been approved or sanctioned either by the President or the Governor. It is, therefore, clear that even though there may have been some agreement the same was not in compliance with the constitutional requirement under Article 299 of the Constitution of India and is therefore unenforceable in law. In a case such as this there is no alternate plea that could be taken. None has been taken. For this reason the Appellants would not be entitled to specific performance of such an agreement. It must be seen that all the cases relied upon by the Appellants were cases where such a plea was not allowed to raised, for the first time in this Court or in the Appeal Court on the ground that the concerned party did not have an opportunity to meet such a case. In this case the Appellants, on their application, were permitted to have brought in Court the original minutes. Unfortunately this did not assist them. Now they can not be permitted to argue that such a plea could not be raised. The next question for consideration is whether the amended suit was not maintainable for want of notice under Section 80 of the Code of Civil Procedure. In this behalf the Appellants have relied upon the cases of Amar Nath Dogra vs. Union of India reported in AIR 1963 S.C. 424, State of Punjab vs. M/s. Geeta Iron & Brass Works Ltd. reported in 1978 (1) S.C.R. 746, Ghanshyam Dass and others vs. Dominion of India and others reported in 1984 (3) S.C.C. 46 and Vasant Ambadas Pandit vs. Bombay Municipal Corporation and others reported in AIR 1981 Bombay 394. In these cases it has been held that a notice under Section 80 C.P.C. or equivalent notices under Section 527 of the Bombay Municipal Corporation Act are for the benefit of the Respondents and the same can be waived as they do not go to the root of jurisdiction in a true sense of the term. There can be no dispute to the proposition that a notice under Section 80 can be waived. But the question is whether merely because in the amended written

statement such a plea is not taken it amounts to waiver. This contention was argued before the Appellate Court. Even otherwise we find that in the suit itself Issue No. 4 had been raised as to whether or not there was a valid and appropriate notice under Section 80. Such a point having been taken in the original written statement and an issue having been raised, it was not necessary that in the amended written statement such a plea be again taken. On behalf of the Respondents, reliance has been placed on the case of Gangappa Gurupadappa Gugwad vs. Rachawwa and others reported in AIR 1971 S.C. 442, wherein it has been held that where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 was served, it would be duty of the Court to reject the plaint. In this case the original notice was only in respect of a claim under the plaint as it originally stood. That claim was on the basis that there was a concluded contract and that the Appellants had already acquired rights in the mill and the lands. As has been fairly conceded those reliefs were not maintainable and were given up before the Appellate Court. The amended plaint was on an entirely new cause of action. It was based on facts and events which took place after the filing of the original plant. It was a fresh case. Now the claim was for specific performance of the agreement alleged to have been entered into on 29th December, 1978. Admittedly no notice under Section 80 CPC was given for this case. As there was an Issue pertaining to Notice under Section 80, the trial court should have dealt with this aspect. The trial court failed to do so. It was then pressed before the Appellate Court. In our view the finding in the impugned Judgment that the suit based on this claim was not maintainable is correct and requires no interference. If a new cause of action is being introduced a fresh notice under Section 80 CPC would be required to be given. The same not having been given, the suit on this cause of action was not maintainable. We also find ourselves in agreement with the findings in the impugned judgment that the condition regarding withdrawal of the suit was a condition precedent. As the Appellants did not withdraw the suit they could not be said to be ready and willing to perform their part of the agreement arrived at on 29th December, 1978. For this reason also the claim for specific performance could not have been enforced. In this view of the matter, we see no reason to interfere with the impugned Judgment. The Appeal stands dismissed. There will, however, be no order as to costs.