

# SUPREME COURT OF INDIA

Gauri Shankar Prasad

Vs.

Brahma Nand Singh

C.A.No.1756 of 2002

(Dr. Arijit Pasayat and P. Sathasivam JJ.)

11.07.2008

## JUDGMENT

### **Dr.Arijit Pasayat, J.**

1. Appellants' Second appeal in terms of Section 100 of the *Code of Civil Procedure, 1908* (in short the `Code') having been dismissed by the Jharkhand High Court, this appeal has been filed. The Title Suit No.17/92-49/93 was decreed by the learned Additional Munsif, Garhwa. The judgment and decree were upset by learned District Judge, Palamau in Title Appeal No.10 of 1997. Second Appeal was filed by the plaintiffs before the High Court.

2. The case of the plaintiffs-appellants is that the plaintiffs were in need of money, hence, offered to mortgage their land detailed in Schedule D of the plaint with condition to repurchase the same on consideration of Rs.36,600/- The defendant-respondent, namely, Brahmanand Singh and one Dasrath Prasad Keshri were willing to purchase jointly the land of Schedule D and, accordingly, the plaintiffs executed a registered deed of sale dated 5.2.1986. The respondent and Dasrath Prasad Keshri on the same day also executed a registered deed of agreement and agreed to re-convey the purchased land to the plaintiffs on payment of consideration money to them. It has been alleged that though the deed of sale was executed by the plaintiffs-appellants in favour of the respondent and Dasrath Prasad Keshri, they always remained in cultivating possession of the lands, as described in schedule D of the plaint. It is also alleged that the plaintiffs- appellants were in need of rs.15,000/-. The respondent and Dasrath Prasad Keshari became ready to keep the land in mortgage, but only after calculating the interest thereupon at the rate of 4 per cent for three years, the price was accordingly fixed at Rs.36,600/-. It is further alleged that the plaintiffs-- appellants in the first week of January, 1989, repaid Rs.5,500/- to the respondent in presence of the witnesses upon which he promised to re-convey the suit land, but even thereafter he did not re-convey the land and extended time for execution of the deed of re-conveyance. Ultimately on 10.4.1992, Dasrath Prasad Keshri received consideration money of his share i.e. Rs.18,300/- and executed the deed of sale re-conveying half of the land of Schedule D in favour of the plaintiffs. It is also claimed that the plaintiffs also requested the respondent to receive his consideration money and to re-convey the schedule D land of his share but he

delayed the matter, whereupon the plaintiffs sent registered legal notice to defendant No.1 but even then the respondent failed to perform his part of contract and hence, the plaintiffs filed the suit.

3. The respondent contested the suit and filed written statement alleging therein that the deed of agreement contained a specific terms that if the plaintiffs paid back the consideration amount at any point of time within three years then the respondent and Dasrath Prasad Keshri would re- convey the land of Schedule 'D' . It is also claimed that the plaintiffs remained in possession of the land after execution of the sale deed. The plaintiffs-appellants had never been willing to perform their part of contract nor they had paid money within the stipulated period of three years as contained in the agreement. According to him, the plaintiffs-appellants never paid any money to the defendant nor they had requested for extension of time nor the defendant ever orally agreed to extend the time. He has also denied that on 10.4.1992 the plaintiffs tendered any consideration money nor there had been any such occasion till date and, as such, the plaintiffs have lost their right of re-conveyance.

4. Ten issues were framed by the trial court and the witnesses were examined. After having heard both the parties and considering the evidence on record, the trial court decreed the suit in favour of the plaintiffs-appellants. The defendant- respondent preferred appeal before the District Judge against the judgment and decree of the court below, who after hearing both sides and considering the evidence on record, allowed the appeal after setting aside the judgment and decree of the court below.

5. The appellate court framed the following points for consideration:-

“I. Whether the suit of the plaintiffs is barred by law of Limitations?

II. Whether the plaintiffs-appellants were always ready and willing to perform their part of contract as envisaged u/s 16(c) of the *Specific Relief Act*?

III. Whether the time was essence of contract?

IV. Whether the plaintiffs-appellants are entitled to get decree of specific performance of contract, as prayed for?

V. Whether the judgment in question is fit to be set aside?”

6. The lower Appellate Court allowed the appeal by setting aside the judgment and decree of the trial Court. The question which was formulated by the High Court was as follows:

"Whether the time was an essence of agreement (Ext.2) and whether the plaintiffs/appellants were ready and willing to perform their part of contract."

7. The lower Appellate Court considered the question as to whether the plaintiffs-appellants had performed or had always been ready and willing to perform the essential terms of the

contract to be performed by him. The first Appellate Court held that the plaintiffs never offered the consideration amount within the period fixed by the contract. The other alleged vendee Dasrath was examined in the Court below as PW-7. The High Court noted that there was no material to show that the consideration amount was offered within the stipulated period of three years. With these findings, the appeal was dismissed.

8. In support of the appeal, learned counsel for the appellants submitted that the co-vendee had accepted the money. The first Appellate Court and the High Court should not have held that the suit was barred by time or that there was no evidence for offering payment of the balance money.

9. Learned counsel for the respondent on the other hand supported the judgment and submitted that the findings recorded by the first Appellate Court were arrived at after analysing the evidence in great detail. Therefore, the Second Appeal was really not competent.

10. Coming to the facts of the case it is to be noted that the evidence of PW-7 the co-vendee clearly shows that no payment was made in his presence. His evidence is to the following effect:

"After 3 years Gauri Shankar did not return the whole amount but returned 5-7 thousand in three instalments. How much in total he to me I do not remember. Like this only he paid money to B.N. Singh but the same was not paid in front of me.

That Gauri Shankar Bind and other failed to return the money till the date of 5.2.1989 as per the agreement said amount to me and B.N. Singh."

11. The evidence of PW-2 is also not of any assistance to the appellants. In his evidence in paras 3 and 6 it has been stated as follows:

"Dashrath Saav has returned the land to the petitioners when they have returned the money. But B.N. Singh has not returned the land to the petitioner in spite of the fact that they are ready to pay the money. The petitioners are also ready today to return the money.

I have knowledge about the negotiation about this land. I have no idea about the documents which are prepared. No talks about sale of the land were held in front of me. The paper are for the mortgage for the value of Rs.36, 000/-."

12. The High Court has rightly observed that the trial Court has made a new case which was not the case of the parties.

13. Learned counsel for the appellants fairly conceded that though the clinching evidence about the payment in the presence of the witnesses may not be there, according to him the evidence has been wrongly analysed by the first appellate court and the High Court. This

Court has in several cases held that if sale and agreement to repurchase are embodied in separate documents, it cannot be a case of the mortgage and in such cases relating to re-conveyance time is always the essence of the contract. (See *Chunchun Jha v. Ebadat Ali*<sup>1</sup>, *Bismillah Begum (Smt.) v. Rahmatullah Khan (dead) by Lrs.*<sup>2</sup>) it was held as follows:

"We may also add that in contracts relating to re-conveyance of property, time is always the essence of the contract as laid down by the Federal Court in the case of *Shanmugam Pillai v. Analakshmi Ammal*<sup>3</sup> and also laid down by this Court in *Caltex (India) Ltd. V. Bhagwan Devi Marodia*<sup>4</sup> . The relevant passage in the judgment of this Court in *Caltex (India) Ltd.* At page 407 in para 3 reads as follows:

"At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain. An option for the renewal of a lease, or for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose otherwise it will lapse."

14. In *Chunchun's* case (supra) it was observed as follows:

"If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage, whether the documents, are contemporaneously executed or not.

In the case of agreement of re-purchase, the conditions of repurchase must be construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as the time must be treated as being of the essence of the contract in the case of an agreement of reconveyance."

15. The High Court also noticed that the claim of the appellants that they paid the consideration amount on 10.4.1992 is also of no assistance because the period of limitation expired on 5.2.1992 and the suit was filed on 23.5.1992. As rightly noted by the High Court, there was an agreement for re-conveyance and there was specific stipulation for re-conveyance of the land within a period of 3 years which was admittedly not complied by the plaintiffs- appellants. It is to be noted that the question formulated by the High Court, by no stretch of imagination, is a substantial question of law.

16. The appeal is dismissed.

<sup>1</sup>(AIR 1954 SC 345)

<sup>2</sup>(AIR 1998 SC 970)

<sup>3</sup>(AIR 1950 FC 38)

<sup>4</sup>(AIR 1969 SC 405)