

FEDERAL HIGH COURT

Jainarain Ram Lundia

Vs

Surajmull Sagarmull

(B.K. Mukherjea, J.)

06.05.1949

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is directed against an appellate judgment of the Calcutta High Court, dated 18th June 1946, affirming, with slight variation, the decision of a single Judge of the Original Side of that Court, dated 14th August 1944.

2. The suit, out of which this appeal arises, was one for specific performance of a contract for sale of certain shares in a private limited company, together with fractional interest in a partnership business, and it was commenced by two plaintiffs, who are respondents 1 and 2 in this appeal, against four defendants, two of whom, viz., defendants 3 and 4, figure as appellants before us. Of the other two defendants, defendant 2 is not a party to this appeal at all, inasmuch as the suit against him was withdrawn and dismissed in the trial Court and his name was struck off from the list of defendants altogether. As regards defendant 1, though he was retained as a party, the plaintiffs gave up their claim against him before the hearing of the suit was concluded in the trial Court; and he has been made only a pro forma respondent in this appeal. The controversy in this, Court, therefore, lies entirely between the two plaintiffs on the one hand and defendants 3 and 4 on the other, and to appreciate the contentions that had been raised on behalf of the appellants, a short resume of the material facts would be necessary.

3. On 29th February 1936 a partnership firm, known as Marwari Brothers, was brought into existence on the basis of a partnership agreement, executed on that date by and between a number of parties. The parties were; (1) Lakshmi Devi Sugar Mills, (of which Kedar Nath Khaitan, plaintiff . 2, was the Managing Agent), (2) Kedar Nath Khaitan, (3) Bholi Ram, (4) Gobor. dhan Das and his brother Badri Prosad, (5) Jainarain Ram Lundia and (6) Biseswar Nath. Under the terms of the partnership deed, the first, second, third and fifth parties had each a three annas' share in the business, while the fourth and the sixth parties were each of them given a two annas' share. The main object of the partnership was to promote a private limited company, for the purpose of erecting and working a Sugar Mill in the district of Champaran in Bihar and securing for the firm the Managing Agency of the Mill. By a supplementary deed executed on

1st December 1936, certain modifications were introduced into the original terms, and it was provided inter alia that the partnership would be for a period of 90 years, and that in case of death of any of the partners, his heir or heirs would automatically step into his place and be taken as partners without effecting dissolution of the partnership.

4. In pursuance of this agreement, a sugar mill was started and incorporated as a private limited company under the name of Ganga Devi Sugar Mills Limited, with a share capital of ₹ 8 lakhs, which was divided into 800 shares of ₹ 1000 each. Of these 800 shares, the first three parties named above, all of whom belong to Pedrona in the district of Gorakhpur and have hence been described as the Pedrona group of partners in the judgment of the High Court, subscribed for and obtained a total of 450 shares; while the remaining 360 shares were acquired by the other three parties, who being residents of Bettia in the province of Bihar, have been referred to as the Bettia group in the judgment. One hundred out of these 350 shares were obtained by Gobordhan Das and his brother Badri Prosad (defendants 1 and 2), some of which were registered in their own names and others in the name of other members of their family; 150 shares were secured by Jainarain (defendant 3) and 100 shares by Biseswar Nath, the father of defendant 4. Biseswar Nath died on 29th November 1939, and his son Madanlal became a partner in his place. On 7th September 1940 Gobordhan Das and his brother Badri Prosad separated from each other and divided the family property amongst themselves.

5. It appears that ever since the Bugar mill was started, there was dissension amongst the partners who were arrayed in two opposite factions or groups, and there was constant friction and quarrel between what has been called the Pedrona and the Bettia groups. It was realised that the business could be carried on properly if one of the groups would walk out of the partnership, leaving the field entirely to the other group. Early in December 1940, the parties met at Pedrona and there was a talk at that meeting that the Bettias might sell out their interest to the Pedronas, but no final agreement was arrived at. It is clear from the evidence, and not disputed before us, that towards the end of December 1940, Kedar Nath Khaitan (plaintiff 2) instructed Bhuramull, his head Gomostha, to go to Calcutta and negotiate, on behalf of the holders of 450 shares in the sugar mill, the purchase of the shares and interests of the Bettia group in the mill as well as in the partnership business. It is not disputed that on 28th December 1940 Gobordhan Das, Jainarain Ram and Madan Lal (defendants 1, 3 and 4) wrote a letter to Mr. Probhu Dayal Himatsingka, a well known Solicitor of Calcutta, authorising the latter to sell to the "Khaitans or anybody else" the 350 shares held by them at a price not less than ₹ 700 per share, the purchaser to get by his purchase also the interest of the vendors in the partnership firm of Marwari Brothers. Badri Prosad, the brother of Gobordhan Das, admittedly did not sign this letter. Bhuramull met Himatsingka in Calcutta on 30th December 1940 and the case of the plaintiffs, as made in the original plaint, was that on 1st January 1941 there was an agreement come to, between Bhuramull, representing the two plaintiffs and Himatsingka, as representatives of the four defendants, by which the latter agreed to sell to the former 350 shares in the Ganga Devi Sugar Mills Limited and seven annas' share in the firm of Marwari Brothers on the terms and conditions

set out in the letter, dated 2nd January 1941, written by Himatsingka to the plaintiffs. In substance, the terms were that those 350 shares would be sold at the price of ₹ 700 per share and the purchasers, would by the purchase acquire the seven annas share of the vendors in the partnership business as well; all monies appertaining to the seven annas' share in the firm would go to the plaintiffs, but the amount deposited by the defendants, which stood to their credit in the books of the firm, would be returned to them. These terms, the plaintiffs averred, were confirmed by their Solicitor by a letter, dated 2nd/3rd January 1941. It appears that soon after this exchange of letters, Gobordhan Das, defendant 1, repudiated the contract and declined to sell any shares held by him. The other two partners, Jainarain and Madanlal, however, reiterated their desire and willingness to abide by the agreement and sell the 250 shares belonging to them on the terms and conditions set out in the letter of their Solicitor. Later on, they too resiled from the agreement and refused to comply with its terms, and this led to the institution of the present suit.

6. The plaint was filed on 18th August 1941, and the two plaintiffs averred that they were ready and willing to perform their part of the agreement and claimed specific performance of the contract for sale of 360 shares in Ganga Devi Sugar Mills and seven annas' share in Marwari Brothers as against the four defendants, to wit, Gobordhan Das, Badri Prosad, Jainarain and Madanlal, all of whom it was alleged, were bound by the agreement entered into on 1st January 1941. There was an alternative claim for damages, in case no decree for specific performance was given.

7. The claim was resisted by all the four defendants. There were separate written statements filed by Gobordhan Das and Badri Prosad, and one joint written statement was put in on behalf of defendants 3 and 4. All the defendants traversed the allegations in the plaint and denied that there was any concluded agreement which could be enforced specifically. It was also asserted that the shares of the Ganga Devi Sugar Mills could not be sold except in the manner laid down in the Articles of Association of the Company. Gobordhan Das, defendant 1, took the further plea that he was not the owner of 100 shares which were purchased by him out of the funds of a joint Mitaksbara family. The family had separated since then and as a result of the partition, only 19 shares were allotted to him. Badri Prosad adopted the same defence and alleged further that so far as he was concerned, there was no authority given to Himatsingka or anybody else to enter into a contract on his behalf and as he had separated from his brother Gobordhan Das long before, there was no authority left in the latter to bind him by any agreement. All these facts, it was said, were fully known to the plaintiffs.

8. The suit was heard by Sen J. On the second day of hearing, the counsel for the plaintiffs stated to the Court that he would not proceed against Badri Prosad, defendant 2. Upon this, the Court made an order directing that the suit would stand dismissed as against defendant 2. Four witnesses were examined on behalf of the plaintiffs and their evidence was closed on 8th February 1944. No oral evidence was adduced on the side of the defendants. On 11th February 1944, the plaintiff's counsel, in course of his arguments, prayed for leave to amend the plaint which he said was necessary in view of the fact that the suit against Badri Prosad was withdrawn

and dismissed. This prayer was granted and an amended plaint was filed on 14th February next in which the name of Badri Prosad was omitted from the list of defendants and the agreement sought to be enforced was alleged to have been entered into between the plaintiffs and the three defendants only. In answer to this amended plaint, additional written statements were filed on behalf of defendants 3 and 4 and in them they took the additional plea that as the alleged agreement to sell the shares or transfer the interest of the defendants in the Managing Agency business was made entirely on the basis that all the four defendants, including Badri Prosad, would join in the transfer and as Badri Prosad did not join, the proposed agreement had never been perfected; and even if it could be taken to be a concluded agreement no decree for specific performance should be given in view of the fact that the suit was withdrawn against Badri Prosad. Arguments were heard on all these points and the hearing of the suit was concluded on 18th February 1944. Towards the close of the hearing, the plaintiffs gave up their claim against Gobordhan Das also and prayed for a decree in respect of 250 shares belonging to defendants 3 and 4 and their five annas' share in the Managing Agency business on payment of the full consideration money as contemplated by Section 15, Specific Relief Act. By his judgment delivered on 14th August 1944, Sen J. negatived the various contentions of the defendants and substantially accepting the plaintiffs' story as correct, gave them a decree. Although the claim against Gobordhan Das was abandoned, it appeared that due to oversight the suit was decreed against him as well in respect of his 19 shares in the sugar mill and his fractional interest in the partnership firm. There were two appeals taken against this decision, one by defendant 1 and the other by defendants 3 and 4. Both the appeals came up for hearing before an appeal bench, consisting of Gentle and Das JJ. The appeal of defendant 1 was not resisted by the plaintiffs, and it was allowed and the decree of Sen J., so far as it affected defendant 1, was set aside. The appeal of defendants 3 and 4 was heard fully on its merits and the learned Judges, by their judgment dated 18th June 1946, dismissed the appeal and affirmed the judgment of Sen J., with this modification that agreeably to the decision in the other appeal, the decree for specific performance was to be confined to 250 shares belonging to defendants 3 and 4 and their five annas' share in the firm of Marwari Brothers and these shares and interests were ordered to be transferred to the plaintiffs on payment of the full consideration money stipulated in the original agreement. Against this decision, defendants 3 and 4 applied for and obtained leave to appeal to the Privy Council, but as before the records could be transmitted to England the jurisdiction of this Court was enlarged by Act I [1] of 1948, the appeal has come up for hearing before us. It may be noted that Madanlal, defendant 4, died after this appeal was admitted and his mother and heiress Dhupeswari Debi has been substituted in his place.

9. Sir Tek Chand, who appeared in support of the appeal, has contended before us, firstly, that there was no complete or concluded agreement in the present case which could be specifically enforced. The correspondence between the parties, it is said, would show that the parties were still negotiating in regard to the terms of the contract and no finality had been reached. His second argument is that the whole basis of the agreement between the parties was that all the four persons, who represented, what has been called the Pedrona group of partners, would join in transferring their shares and interests to the plaintiffs. This being the essential condition of the

contract, no perfected agreement could come into being so long as Badri Prosad stood out and did not join in the agreement. The third contention raised by the learned Counsel is that the contract being joint and indivisible, it was not open to the plaintiffs to claim relief against some of the parties to the contract to the exclusion of the rest. Lastly, it is said that as damages would be an adequate remedy in a case like this, no decree for specific performance should have been given.

10. So far as the first point is concerned, Sir Tek Chand argues that the letters exchanged between the parties or their solicitors subsequent to 1st January 1941 would clearly show that there was no completed agreement on that date. It is said that when there is no document in writing signed by the parties and the contract has got to be gathered from a series of letters exchanged between them, the whole of the correspondence must be looked at. It is not permissible to stop at one particular point and say that there was a concluded agreement, when the subsequent correspondence might disclose that the letters relied on were merely part of an incomplete negotiation. In support of this contention Sir Tek Chand relies upon the decision of the House of Lords in the well known case of *Hussey v. Horne-Payne*¹, We do not think that the principle of law enunciated in that case, and about the correctness of which there could hardly be any doubt, is of any assistance to the appellants. In *Hussey v. Horne-Payne*, (1879) 4 A.C. 311 (*Suupra*), there was an action for specific performance of a contract for sale of land. To prove the contract in accordance with the requirements of the Statute of Frauds, the plaintiff relied on two letters which seemingly concluded a contract of sale in the sense that the property to be sold was specified and the price to be paid as well as the names of the vendor and purchaser were mentioned. It transpired from the evidence that in the previous negotiations there was a verbal suggestion by one of the parties which was acquiesced in by the other that the purchase money should be paid by instalments. What these instalments would be were left to be settled later on. There was subsequent correspondence between the parties in the matter of fixing the instalments, but before any final decision could be reached, one of the parties died. It was held that, in these circumstances, there was no completed agreement between the parties which could be specifically enforced. Lord Cairns in course of his judgment observed as follows:

We have here the appellant himself telling us that the two original letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded Agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence therefore of the whole is, that it appears to me not only that there is no note in writing, according to the Statute of Frauds, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties.

11. This decision cannot possibly help the appellant. Here we have not to spell out a contract from a bundle of letters. According to the evidence of Bhuramull which stands uncontradicted

and has been accepted as correct by both the Courts below, there was an oral agreement finally concluded between the parties, acting through their representatives at the interview in Calcutta on 1st January 1941. The terms of this contract, according to the plaintiffs, are those set out in the letter of P.D. Himatsingka and Co. dated 2nd January 1941 which were confirmed by Khaitan and Co., on behalf of the plaintiffs by their letter addressed to Himatsingka on the day following. What Sir Tek Chand attempts to show is, that by this letter Khaitan and Co. wanted to introduce certain new terms in the contract which were not mentioned in the letter of P.D. Himatsingka. There were further correspondence and negotiations between the parties since then and as the parties were not ad idem on these terms no concluded contract could possibly come into existence, We do not think there is any substance in this contention. Khaitan and Co. addressed their letter of 2nd/3rd January 1941 to P.D. Himatsingka and Co. in the following manner:

Dear Sirs,

Adverting to your letter No. B-24 of the 2nd instant addressed to our clients, please note that we have been instructed to confirm the arrangement therein referred to. We wish to make dear the following points which have also been arranged.

Then followed eight clauses which set out the different terms upon which the parties, according to this letter, had already come to an agreement. It is admitted that there are two new matters in this letter which did not find a place in the letter of P.D. Himatsingka and Co. and with regard to which there was no agreement between the parties before. One of these relates to the claim against Mirless Watson and Co. and the other to the liability of the parties regarding the stamp duty to be paid on the transfer deeds. Regarding the claims against Mirless Watson and Co., it appears from a letter of Himatsingka, dated 8th January 1941, that although there was no express reference to this matter in any previous negotiation, it was implied in the agreement that the purchasers would get all the benefits of the vendors appertaining to the shares and interests transferred by them and consequently the benefits of this claim also would go to the purchasers. This point, therefore, is of no importance and it cannot be said that the parties were not ad idem on this point. As regards stamp duty, it is not disputed that there was no previous talk between the parties on this point, though ordinarily and as a matter of law in case of transfer of shares it is the vendor by whom the stamp duty is payable. It must be held on the evidence adduced in this case that on the question of stamp duty there was no agreement between the parties on 1st January 1941 and they did not intend to make it a term of the bargain at all. Khaitan and Co., were apparently labouring under a mistake when they stated in the letter mentioned above that it was already arranged that the stamp duty was payable by the clients of Messrs. Himatsingka. This being the position, the question arises whether or not there was a concluded agreement between the parties on 1st January 1941. In our opinion, the answer would clearly be in the affirmative. In *Hussey v. Horne-payne (1879) 4 A.C. 311* it was established by oral evidence as well as from the subsequent correspondence between the parties that all the terms of the contract were not contained in the two letters on the basis of which the action was brought. The parties

intended that the instalments in which the purchase money was to be paid should be an essential part of the bargain and yet there was no agreement on this point either prior or subsequent to the two letters upon which the contract was founded. In the case before us, it must be taken that nothing was proposed or mentioned at the time when the contract was entered into, regarding the payment of stamp duty on the deeds of transfer. It was not an essential part of the bargain nor was it intended to be so. There was agreement between the parties on the terms which are necessary in law to constitute a contract of sale and there was agreement on other terms as well which they themselves considered material. The question of stamp duty was not one of the terms of the agreement and if Khaitan and Co. mistakenly and quite unnecessarily introduced this matter in the letter referred to above, that cannot affect the completed agreement already arrived at.

12. If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive. Once completed, the contract can be got rid of only with the concurrence of both parties. Sir Tek Chand did not make any serious attempt to show that the contract which was entered into on 1st January 1941 was rescinded or reopened with the consent of both parties subsequently. The material evidence, which has been discussed fully in the judgment of Gentle J., clearly proves that Messrs Khaitans' letters of 2nd/3rd January 1941 did not affect in any way the agreement in suit. Himatsingka, by his letter of 8th January 1941, definitely told his clients that under the law the seller would be liable to pay the stamp duty on transfer deeds and as the matter was not discussed with the purchasers at any previous stage, it would be difficult to realise the cost from the latter. The subsequent refusal of defendant 1, to comply with the agreement was not on the ground that the agreement had terminated by reason of any new term being sought to be introduced by the purchaser, and there is clear evidence to show that in spite of the letter of Messrs Khaitan and Co. defendants 3 and 4 strongly insisted upon the contract being carried out.

13. An attempt was made by Sir Tek Chand to raise a contention on the authority of the English decision in *Bristol Cardiff and Swansea Aerated Bread Co. v. Maggs*² where Kay J. went to the length of saying that if after a contract is concluded, one of the parties starts fresh negotiations with a view to introduce new terms, then even if the subsequent negotiations fail, it would be inequitable to allow the party, who attempted to reopen the contract, to enforce it specifically. This view seems manifestly unsound and has been expressly dissented from in later cases: vide *Bellamy v. Debenham*³ and *Perry v. Suffields*⁴ As a matter of fact, the decision is based not on the ground of the contract being incomplete and not final, but on the ground of some equitable estoppel which was deemed to arise by reason of the conduct of the plaintiff. Even assuming the decision to be sound, the appellants would get little comfort from it. Here the new term sought to be introduced by the plaintiffs' solicitor was only done under a mistake but it had no effect whatsoever in altering the conduct or position of the defendants in any way. In these circumstances, the first contention raised by Sir Tek Chand cannot possibly succeed.

14. As regards the second point, the argument of Sir Tek Chand is that in the present case it was the common intention of the parties and condition of the contract that all the defendants, including Badri Prosad, should join in the agreement. As Badri Prosad did not join, no contract in fact came into existence and there could be no liability on the part of any of the other persons, even though they entered into the agreement. In support of this contention, the learned Counsel relies upon the following statement of law in Halsbury's Laws of England (Edn. 2) vol. 7, page 72:

Where a promise is intended to be made by several persons jointly, if any one of such persons fails to enter into the agreement there is no contract, and no liability is incurred by such of them as have entered into the agreement.

15. We have been referred to a number of decisions, both English and Indian, where this principle has been applied and stress has been laid by the learned Counsel upon a passage in the judgment of Sir George Jessel in *Luke v. South Kensington Hotel Co*⁵. where the learned Master of Rolls observed as follows:

It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind any equity if the third refuses to execute and consequently on that ground the deed could not have bound the two.

16. In a recent pronouncement of the House of Lords in *Naas v. Westminster Bank Ltd. 1940 A.C. 366(supra)* it was held that these observations of Sir George Jessel could not rank higher than obiter and that the law stated therein is too broad and general to be of any service. It is to be noted that Sir George Jessel in this passage speaks of an equitable principle. When parties enter into an agreement on the clear understanding that some other person should be a party to it, obviously no perfected contract is possible so long as this other person does not join the agreement. This would be the position in law apart from any rule of equity. The proposition laid down by Sir George Jessel goes much further than this. He speaks of two persons executing a deed on the faith that a third will do so and if this is known to the other party, equity will refuse to fasten any liability on the executing parties if the third party does not join in the act. It has been pointed out in the judgments of the various Law Lords who decided the case of *Naas v. Westminster Bank Ltd. 1940 A.C. 366(supra)* that there is much that is indefinite and vague in the words of the learned Master of Rolls. The word "faith" cannot be taken to refer to a mere subjective expectation or intention in the mind of a particular party. It must be a matter not of conjecture but of positive proof; and in order that a relief might be claimed in equity, it is necessary to prove that substantial injustice would result if the deed is enforced unconditionally against the executing parties. Relief, therefore, could be given in those cases where the strict enforcement of law would lead to the executing parties being saddled with heavier liability than they otherwise would incur or would make the transaction substantially different from what it would have been if all the parties had joined.

17. The law being thus fairly well settled, it is difficult to see how on the findings concurrently arrived at by both the Courts below the appellants can make out a case which would enable them

to call into aid the principles mentioned above.

18. It cannot be disputed that the plaintiffs all along desired to secure the whole lot of shares that was held by the Pedrona group and it was certainly to their interest to do so, as otherwise the cause of dissension would not be entirely removed. The three defendants on their part, when they signed the letter dated 28th December 1940 addressed to Himatsingka, agreed to sell all the 350 shares including the shares held by Badri Prosad.

19. Whether Gobardhan Das thought rightly or wrongly that he had authority to dispose of the shares standing in the name of his brother as well, is not material for our present purpose. All that we can say is this that there is nothing in this letter which would show that it was the intention of the signatories that they would sell their shares and interests to the plaintiffs if and only if Badri Prasad sold his. Badri Prosad was not in the picture at all and although Gobardhan Das apparently agreed to sell his shares as well, there is no evidence of any understanding, either express or implied, even amongst the defendants inter se that unless Badri Prosad actually came and joined the agreement, the contract would not be perfect or complete. None of the defendants or even their Solicitor was examined as a witness in this case and no questions on this point were put to the plaintiff's witnesses during their cross-examination. The letter of 28th December 1940 if it shows anything shows unmistakably that the vendors were anxious to dispose of their shares by any means possible and they did not care whether the shares were purchased by Khaitans or anybody else. The letter of both the appellants written to Himatsingka on 5th January 1941 practically clinches the matter and proves conclusively that the promise to sell their shares and interests in the business was not in any way dependent upon anybody else's joining with them in the transaction. Thus there was no intention on the part of the defendants that the contract would not be binding unless Badri Prosad became a party to it and there has been no suggestion made on behalf of the appellants either here or in the Courts below that any injustice would be done to them if they are compelled to perform the agreement which they made. On the other hand, as the trial Judge has rightly observed, it would be doing very great injustice to the plaintiffs if the defendants are allowed to resile from the contract. The second contention of the appellants must, therefore, fail.

20. The third point raised by the appellants does not appear to us to be at all sound. The argument is that the contract being joint and indivisible, it was not open to the plaintiffs to give up one of the defendants and proceed against the other two. In our opinion, Section 43, Contract Act is a complete answer to this contention. Unlike English law the Indian law makes all joint liability, joint and several, in the absence of any agreement to the contrary. It is, therefore, open to the promisee to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors must have been made parties. As the plaintiffs in this case prayed ultimately for specific performance of a part of the contract in the manner contemplated by Section 15, Specific Relief Act, and expressed their readiness to pay the entire consideration for 350 shares, the appellants are not prejudiced in any way.

21. The fourth and the last point is not of any substance. The subject matter of contract in the

present case consists of certain shares in a private limited company and a fractional interest in a partnership business. Illustration (iii) under Clause (e) of Section 12, Specific Relief Act clearly shows that when shares are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares. Specific performance is undoubtedly a discretionary remedy but we are totally unable to say that the discretion has been wrongly exercised in the present case by the Courts below.

22. The result is that all the contentions raised by Sir Tek Chand fail and the appeal stands dismissed with costs.

Cases Referred.

1(1879) 4 A.C. 311

2(1890) 44 Ch. D. 616

3(1891) 45 Ch. D. 481

41916-2 Ch. 187

5(1879) 11 Ch. D. 121 at p. 125