

IN THE COURT OF ADDITIONAL DISTRICT JUDGE No. 2
SONITPUR: TEZPUR

Money Appeal No. 01 of 2007

Md. Sirajul Haque
Son of Late Isahar Ali
R/o Ward No.2,
Mangaldai Town
(now residing at : Village: Pariapara
PS & PO : Mangaldai
Dist: Darrang, Assam ... *Appellant/Defendant*

-Versus-

Sri Bijoy Rai
Son of Rajendra Roy
Resident of Jahajgjat
Station Road
PO: Tezpur
Dist: Sonitpur ... *Respondent/Plaintiff*

PRESENT

Aparna Ajitsaria, A.J.S.
Addl District Judge, Tezpur

Advocate for Appellant : Sri T.K.Moitra, Sri A Bhuyan

Advocate for Respondent: Sri S.K.Singh

Date of Argument: 27.11.2013, 12.12.2013, 2.5.2014

Date of Judgment: 3.5.2014

J U D G M E N T

1. The instant money appeal is directed against the Judgment and decree dated 15.12.06 passed by the learned Civil Judge, Sonitpur, Tezpur, in Money Suit No. 01 of 2004. By the said judgment the Money Suit was decreed, on contest with cost, for recovery of Rs.41,000/- along with interest at the rate of 6% per

annum from the date of institution of the suit till realisation of the decretal amount.

2. The case of the respondent/plaintiff, in brief, in the said Money Suit is, as under:

The respondent/plaintiff entered into a verbal contract with the appellant/defendant for purchase of a baby elephant named "Babulal" for a total consideration of Rs. 4,01,000/-. The said baby elephant's mother's name was "Maloti". Pursuant thereto, the Respondent/plaintiff paid to the appellant/defendant an advance amount in two instalments, that is, Rs. 31,100/- on 10.03.02 and Rs. 10,000/- on 23.07.02. It has been stated that the second instalment was paid to the appellant/defendant by the respondent/plaintiff through one Sri Binda Rai (PW 2) of Tezpur. However, the appellant/defendant having failed to produce from ownership certificate in respect of the baby elephant and obtaining necessary permission from the Department of Forest for transfer of the said baby elephant, the respondent/plaintiff issued a legal notice intimating the appellant/defendant about the termination of the agreement and calling upon the appellant/defendant to refund the advance amount paid to the appellant/defendant.

3. The appellant/defendant contested the suit by filing written statement stating, inter alia, to the effect that the suit was not maintainable, no cause of action had arisen in Tezpur, the suit was bad for non-joinder of one Sri Panchilal Rai of Bihar and Sri Binda Rai of Tezpur and that of the appellant/defendant's wife Musstt. Rasida Begum, who was stated to be the real owner of the baby elephant.

4. The appellant/defendant's case was that verbal agreement to sell the baby elephant was entered between his wife Musstt Rashida Begum and one Sri Panchilal Rai of Bihar. The appellant/defendant further stated that he was not a party to the

verbal contract dated 09.03.02 between Musstt Rasida Begum and Sri Panchilal Rai. The appellant/defendant stated that Sri Panchilal Rai, desirous of purchasing the baby elephant entered into verbal contract with his wife Rasida Begum and the said Sri Panchilal Rai paid Rs. 31,100/- to his wife Rasida Begum on 10.03.02 at their Mongoldoi residence. The said amount was received by the appellant/defendant on behalf of his wife. Musstt Rasida Begum undertook to train the baby elephant and to obtain necessary permission and ownership documents from the Department of Forest, Govt. of Assam. It was further stated that the said Sri Panchilal Rai agreed to pay the balance purchase money of Rs. 3,69,000/- only to Musstt Rasida Begum as soon as the said permission and ownership certificate were obtained. As per the oral agreement dated 09.03.02 it was agreed between Sri Panchilal Rai and Musstt Rasida Begum that all future correspondences and/or transactions would be made with the appellant/defendant who would act as an agent on behalf of Musstt Rasida Begum. The appellant/defendant admitted that he had received Rs. 10,000/- only from Sri Binda Rai. However he stated that the said amount was paid by Sri Binda Rai on instructions of Sri Panchilal Rai and not on behalf of the respondent/plaintiff. Further, it was stated that pursuant to the oral agreement, Musstt Rasida Begum obtained the ownership certificate and permission from the Department of Forest on 29.05.02. Thereafter when Sri Panchilal Rai was contacted in this behalf, the said Sri Panchilal Rai asked the appellant/defendant to obtain balance consideration money from Sri Binda Rai (PW 2). When the appellant, contacted Sri Binda Rai, he paid an amount of Rs. 10,000/- only to the appellant/defendant towards maintenance of the baby elephant and informed him that he would make the payment of the balance amount after making arrangements for collecting the balance amount from Sri Panchilal Rai in the form of bank draft. It has been stated that Sri Panchilal Rai did not make any further correspondence with the appellant/defendant. It has been stated that the respondent/plaintiff was not the person with whom the

appellant/defendant entered into any contract. It was further stated that since the alleged contract was not in writing therefore rescission of the contract under Section 27 of the Indian Contract Act, 1872 was not permissible. Hence, under such circumstances the appellant/defendant prayed for dismissal of the suit with compensatory cost of Rs. 3000/- only.

5. On the basis of the pleadings, the learned Civil Judge, Sonitpur, Tezpur, framed the following issues:

- 1) Whether the suit is maintainable in its present form?
- 2) Whether the cause of action for the suit arose, either in whole or in part at Tezpur ? If not, whether this Court has territorial jurisdiction to try the suit?
- 3) Whether the suit is bad for non-joinder of Panchilal Rai, Binda Rai and Rasida Begum who are necessary parties in the suit?
- 4) Whether the defendant is the owner of the suit elephant? If, not whether he could enter into any contract for sale of the suit elephant with the plaintiff ?
- 5) Whether notice of rescission of contract cum demand notice dated 03.12.03 is legal and valid?
- 6) Whether the plaintiff was a party to the oral contract dated 9.3.2003? If not, what is the effect?
- 7) Whether the plaintiff paid Rs. 31,100/- only at Mongoldoi to the defendant ?
- 8) To what relief or reliefs the plaintiff is entitled ?

6. The respondent/plaintiff examined three witnesses and exhibited certain documents. The appellant/defendant adduced evidence of five defence witnesses.

7. Subsequently, the impugned judgment dated 15.12.06 was passed and the suit was decreed with cost for recovery of Rs. 41,100/- only with interest at the rate of 6% per annum from the

date of institution of the suit till realisation of the decretal amount.

8. Being aggrieved by the impugned judgment and decree, passed by the Ld. Civil Judge, Sonitpur, Tezpur, the appellant/defendant has preferred the instant appeal.

9. I have heard the Ld. Counsels for the Appellant and the Respondent.

10. PW 1, Sri Bijoy Roy, the respondent/plaintiff in his evidence stated that he entered into oral agreement with the appellant/defendant to purchase his elephant and paid to the appellant/defendant advance amount of Rs. 31,100/- only on 10.03.02 and an amount of Rs. 10,000/- only through Sri Binda Rai on 23.07.02 with condition that the appellant/defendant would obtain necessary permission and ownership certificate from the concerned Forest Department and thereafter would receive the balance amount and sell the baby elephant. The version of PW 1 was corroborated by PW 2, Binda Rai, on the point of payments being made to the Appellant in the office of PW 2 at Jahajghat, Tezpur. PW 3, Ram Tiwari, too has also deposed that the Appellant was present in their office on 10.3.2002 and discussions with regard to the purchase of elephants took place.

11. DW 1, Md Sirajul Haque, the appellant/defendant herein admitted the execution of Ext. 1 and Ext. 2 but he stated that he executed the same upon being instructed by one Sri Panchilal Rai with whom his wife (actual owner of the baby elephant) entered into a verbal contract to sell the baby elephant at Mongoldoi. The appellant/defendant denied that he executed Ext. 1, that is, the money receipt of Rs.31,000/- on a stamp paper of Rs.50/-, at Tezpur. He further stated in his cross examination that he did not mention in his pleadings that Sri Panchilal Rai had instructed him to execute Ext. 1 in favour of respondent/plaintiff.

12. DW 2 Musstt. Rasida Begum corroborated DW 1 and stated that she was the owner of the baby elephant 'Babulal' and mother elephant 'Maloti' and that her husband DW 1, exclusively dealt with the issues in respect of the elephants. She stated in her evidence that ownership certificate in her name was obtained from the Forest Department. In cross examination, she admitted that no document had been exhibited to show that the elephant belonged to her. DW 3 and DW 5 corroborated appellant/defendant's case and stated that one Sri Panchilal Rai had desired to purchase the baby elephant. In their cross examination, they denied having any knowledge of monetary transactions in respect of the elephant.

13. Learned Senior Counsel for the Appellant strenuously argued that there was no privity of contract between the Appellant and the Defendant. The Senior Counsel submitted that no rescission of contract could be said to have taken place vide Ext 3, the legal notice and the contract, if at all, still subsists. Ld Sr Counsel has relied upon the judgments in Grandhi Subramanyam vs Vissamsetti Visweswara Rao reported in AIR 2002 AP 71 (FB) and H.Iyer -vs- Mathew George reported in AIR 1965 Kerala 187 in support of his arguments.

14. Ld Counsel for the Defendant has submitted that the impugned judgment needs no interference, the same having been delivered, after due appreciation of materials on record.

15. The elements to be decided in the present appeal, is whether the conclusions of the Ld Civil Judge, Sonitpur with regard to, inter alia, the existence of contract between the appellant and the defendant for sale/purchase of a baby elephant; part of the cause of action having arisen in Tezpur; breach of contract by the appellant and rescission by the defendant are correct.

16. Admittedly there was a verbal contract for sale of the elephant named "Babulal". In support of the fact that the said contract was entered into between the respondent and appellant, the respondent relied upon the money receipts being Ext 1 and Ext 3. Ext 1 is the money receipt issued by the appellant in favour of the Respondent wherein the appellant has stated as follows: '*Received from Sri Bijoy Roy son of Sri Rajendra Roy of Jahajghat, Station Road, Tezpur, Dist Sunitpur Assam, is Rs.31,100.00 (Rupees Thirty one thousand one hundred) only against for sale of my Elephant culf name Babulal, mother of Maloti, on today the 10th March/02.*' Again in Ext 2, issued by the appellant it has been recorded that the appellant received Rs.10,000/- from Sri Binda Rai (PW2) towards sale of the elephant named Babulal.

17. In cross examination, DW 1, the appellant has admitted that the said Ext 1 and Ext 2 were written by him in his own handwriting.

18. It is the contention of the appellant that the said verbal agreement was between his wife, Musstt Rashida Begum and one Sri Panchilal Rai of Patna and on being instructed by the said Sri Panchilal Rai, the appellant issued the money receipts vide Ext 1 and Ext 2 in the name of the Respondent and Sri Binda Rai. In support of the same, the Appellant has exhibited one visiting card bearing the name and address of the said Sri Panchilal Rai. In cross examination, DW 1/appellant admitted that in Ext 1 and Ext 2, he had not written that the amount was being received by him from the Respondent/plaintiff and Sri Binda Rai (PW 2) on behalf of Sri Panchilal Rai. On the contrary, Binda Rai (PW 2) has fully supported the case of the Respondent/plaintiff. PW 2 could not be demolished by the Appellant in cross examination.

19. No prudent man would issue money receipt in the name of a stranger nor would a person have a money receipt issued in the name of another without indicating in the receipt as to on whose

behalf the transaction is being entered into. Exhibiting a visiting card of one Sri Panchilal Rai in support of the contention that contract to sell the baby elephant named 'Babulal' was not with the Respondent/plaintiff but with the said Sri Panchilal Rai does not serve the cause of the appellant. Thus, from Ext 1 and Ext 2 coupled with the evidence of PWs it is apparent that the Appellant had, in fact, entered into a verbal contract to sell the baby elephant Babulal to the Respondent. In the cross examination of Mustt Rashida Begum , DW 2 she has categorically stated that the Appellant/DW 1 used to look after the official works and various dealings in respect of the elephant.

20. Again, Ext 1, money receipt has been issued by the appellant in a stamp paper issued by the Sonitpur Revenue Circle, Tezpur. PW 2, Sri Binda Rai deposed that the payments were received by the Appellant in his office at Jahajghat, Tezpur and Ext 1 and 2 were issued by the appellant in his said office.

21. DW 2 in her cross examination admitted that her husband/Appellant had collected the advance money at Tezpur.

22. Thus weighing the evidences, it is apparent that the Respondent has been able to establish that the Appellant received the advance payment for the sale of the elephant Babulal at Tezpur. Hence, part of the cause of action having arisen in Tezpur, the Courts at Tezpur has the jurisdiction to adjudicate the matter.

23. The substance of Ext 3, Legal Notice issued to the appellant by the Respondent is that, inspite of having received a total advance of Rs.41,100/- towards the sale of baby elephant Babulal, the appellant failed to obtain necessary permission from the Department of Forest for transfer of the said baby elephant and also failed to produce the ownership documents of the elephant Babulal, thereby committing breach of contract. By the

said legal notice, the Appellant claimed to have rescinded the contract and demanded the Appellant to reimburse the amount advanced by the Respondent.

24. In reply dated 24.12.03 vide Ext 5, the appellant stated that the appellant had never met the Respondent and that the advance was paid by one Sri Panchilal Roy at his residence. It was further stated that on 29.5.2002, ownership certificate of the elephant Babulal was obtained from the Forest Department and the appellant informed Panchilal about the same over telephone and asked him to pay the balance amount and take the elephant. Later he met Sri Binda Rai who "was referred to him by Panchilal Roy for contract" and Binda Rai paid Rs.10,000/- on 23.7.2002 towards maintenance of the elephant. Thereafter inspite of repeated requests neither Panchilal nor Sri Binda Rai came forward to take the elephant. The appellant further asked the Respondent to contact Sri Panchilal Rai and request him to pay the balance amount of Rs.3,70,000/- and receive the elephant along with documents. The appellant stated that due to the delay on the part of Panchilal the appellant had to incur expences for the elephant and its Mahut and that if the parties concerned failed to pay the balance amount and take the elephant within 15 days of the reply, the agreement for sale would automatically lapse and the appellant would not be responsible for the consequences.

25. What is striking in the reply of the appellant vide Ext 5 is the admission on the part of the appellant that he received consideration towards the elephant. The Appellant has stated that he received the first amount from one Panchilal and the second from Binda Rai (PW 2). However, the reply is silent about the money receipts issued by the appellant in the name of the Respondent and Binda Rai. In fact, in Ext 5, the appellant has stated that he had never met or seen the Respondent. The appellant in his evidence on affidavit, admitted having issued Ext 1 in the name of the Respondent albeit on instructions of the so

called, Panchilal Rai. The Appellant's entire defence revolves around one Panchilal Rai but the Appellant did nothing to prove his existence, except exhibiting a visiting card wherein name of one such person was printed along with an address. There is nothing on record to suggest that the Appellant took steps to communicate with the said Panchilal inspite of his address being within his knowledge. The Respondent/plaintiff having proved with oral as well as documentary evidence, the monetary transactions between him and the appellant, the onus was on the Appellant to disprove the same, which the latter has miserably failed to do.

26. The Hon'ble Supreme Court in Nathulal v. Phoolchand reported in (1969) 3 SCC 120 held inter alia, that " In considering whether a person is willing to perform his part of the contract the sequence in which the obligations under a contract are to be performed must be taken into account..... If, therefore, under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier."

27. Thus the sequence of obligations, in the instant case are (i) agreement to sell the baby elephant was entered into between the parties (ii) the Appellant accepted the advance amount and issued money receipt (iii) the balance amount was payable to the Appellant at the time of execution of the sale deed, with simultaneous handing over of possession. The obligation of the Appellant for transfer of the baby elephant was (i) to obtain the ownership certificate and (ii) to obtain a Permission to sell the baby elephant from the Department of Forest.

28. In the instant case, there is nothing on record to suggest that the Appellant carried out his part of the agreement to sell

the baby elephant, in as much as, no proof of having procured ownership certificate or the Permission for Sale by the Appellant has been laid before this Court (or for that matter produced before the Respondent/plaintiff), inspite of the fact that the Appellant all along maintained that the said two documents had been procured. Nothing on record too has been placed by the Appellant to show that he had procured the said two certificates and inspite of the same, there was unwillingness on the part of the Respondent to part with the balance money because of which the deed of transfer could not be executed.

29. Having accepted the advance amount, it was incumbent on the part of the Appellant to obtain ownership certificate and the requisite Permission to sell the elephant. Only when the latter was done, could the Respondent/plaintiff be called upon to pay the balance consideration and then the turn would have come for the Appellant to execute the Deed of Sale. Viewed thus, it is established that there was breach of contract on the part of the Appellant.

30. Thus in view of the discussions hereinbefore, the Issue Nos. 1, 2, 3, 4, 6 and 7 are held to be correctly decided by the Ld trial Court.

31. Coming to the submission of rescission of contract by the Respondent vide Ext 3, legal notice. Ld Sr Counsel for the Appellant submitted that there cannot be unilateral rescission of contract and at best, Ext 3 can be understood to be an offer to rescind the contract. Ld Counsel for the appellant submitted that the said offer having not been accepted by the Appellant, the contract still subsists.

32. Indeed, there cannot be unilateral rescission of contract. Nevertheless, even if the contention of the Ld Counsel for the appellant that Ext 3 is an offer to rescind the contract is to be accepted, the subsequent conduct of the Appellant in not taking

any steps for performance of the contract or filing a suit or counter claim for damages, indicates that the appellant had in fact accepted the proposal to terminate the contract. Again, it is to be noted that in Ext 5, reply legal to the notice, the Appellant offered the "persons concerned" to pay the balance amount and take the baby elephant within 15 days from the date of reply, failing which the contract would stand terminated and the Appellant would not be responsible for the same. Thus the Appellant himself having stated in his reply, Ext 5, that in the event on the part of the "concerned persons" failing to take the baby elephant within 15 days of the reply, the contract would stand terminated, the contention of the Ld Counsel for the Appellant that the contract still subsists cannot be accepted. Thus, even if it cannot be said that the contract stood rescinded vide Ext 3, it is apparent that the same stood terminated by the Appellant himself and once the latter is accepted, the Respondent/plaintiff cannot be held not entitled to recover the money advanced for purchase of the elephant to the Appellant/defendant.

33. Moreover, there is nothing in Ext 5 or anywhere else on record to suggest that the parties had agreed to forfeiture of the money advanced to the Appellant, in the event of the agreement for sale not being successfully concluded.

34. Though the appellant in his reply and in his evidence, stated that on 29.5.2002 he obtained the ownership certificate from the Department of Forest, but, as stated hereinbefore, no such document on record has been placed by the Appellant. There is not a whisper by the appellant as to the steps taken by the appellant to give effect to the verbal contract of sale after having received the advance amount, except the averment that he requested "Panchilal" to pay the balance amount and take the elephant. That a person would pay advance for purchasing an elephant to the appellant and thereafter completely disappear from the scene and would take no steps for recovery of the said

amount, seems to be against human behaviour and un-comprehensible.

35. The Appellant's stand, in the reply to the legal notice (Ext 5) and subsequently in the pleadings and evidence is inconsistent and unbelievable. The appellant has sought to take a back seat in the entire story by stating that Rashida Begum (PW 2) was the owner of the elephant and that Panchilal had entered into a verbal agreement with her. However this effort of the appellant stood countered by DW 2, who in her cross examination stated that the appellant took all the decisions with regard to the elephant and that she did not have knowledge about the same. Thus, this Court while differing with the reasoning given by the Ld trial Court with regard to the Issue No.5, nevertheless concurs with the conclusion so reached and upholds the decision on Issue No.5, for the reasons discussed hereinbefore.

36. Ld Counsel for the appellant relied on the judgment in (i) ABC Laminart Pvt Ltd vs AP Agencies, Salem reported in AIR 1989 SC 1239 in support of the contention that this Court does not have the jurisdiction to try the suit. A perusal of the said judgment would go to show that the Hon'ble Supreme Court held, inter alia, that "*in the matter of a contract there may arise causes of action of various kinds.....Part of cause of action arises where money is expressly or impliedly payable under a contract.*" In the instant case, having held that, the Appellant issued the money receipts, in token of having received the advance amount, in Tezpur and thus part of the cause of action having arisen in Tezpur, the said contention of the Appellant that this Court does not have the jurisdiction, cannot be accepted. The judgment thus supports the case of the Respondent/plaintiff.

37. Ld Counsel also referred to the judgment in (ii) **Grandhi Subramanyam vs Vissamsetti Visweswara Rao reported in AIR 2002 AP 71 (FB)**: This judgment has been relied upon by

the Appellant in support of his contention to the effect that there being no rescission of contract in the eye of law and the Appellant/defendant being willing to part with the elephant on being paid the balance sale price, the order decreeing the suit for refund of the advance amount paid by the Respondent/plaintiff was not proper.

38. The facts of the instant case is clearly distinguishable from the issue which was there before the Hon'ble Division Bench. It has been held by the Hon'ble Division Bench that the plaintiff in that case had *neither expressly nor by necessary implication accepted the repudiation* and, as such, the Hon'ble Division Bench held that plaintiff could not claim refund when the defendant *was all along willing to perform his part of the contract*. On the contrary, in the instant case, as has been discussed above, even if the legal notice (Ext 4) of the Respondent/plaintiff is held to be an offer to rescind, it is seen that the Appellant by implication and his subsequent action/inaction had, in fact, accepted the offer. Not only that, the Appellant himself repudiated the contract by giving fifteen days notice to the Respondent/Plaintiff. That the Appellant having declared the termination of the contract on the failure on the part of the "concerned persons" to pay the balance amount and take the elephant within 15 days of the reply (Ext 5), cannot now turn around and contend that he had neither expressly nor by necessary implication, repudiated the contract. Thus the said judgment of the Hon'ble Division Bench of the High Court of Andhra Pradesh and also that of Hon'ble Kerela High Court in **H.Iyer -vs- Mathew George reported in AIR 1965 Kerala 187** does not serve the cause of the Appellant.

39. Thus the conclusion of the Ld Civil Judge, Sonitpur, Tezpur, in the considered opinion of this Court does not call for interference, for the reasons as stated hereinabove.

40. In view of the aforesaid discussion, the present appeal is held to be devoid of merit and the judgment and decree dated 15.12.2006 passed by the Ld Civil Judge, Sonitpur, Tezpur in Money Suit No.1 of 2004 is upheld.

ORDER

The appeal stands dismissed with cost.

The judgment and decree passed by the Ld Civil Judge, Sonitpur, Tezpur in Money Suit No.1 of 2004 is hereby affirmed.

Return the original case record of Money Suit No. 1 of 2004 to the Court of the Ld Civil Judge, Sonitpur, Tezpur along with a copy of this judgment.

Given under my hand and the seal of this Court on this the 3rd day of May, 2014.

Additional District Judge No. 2
Sonitpur, Tezpur