Equivalent Citation: AIR 1922 Lah 461, (1922) ILR 3 LAH 376, 67Ind. Cas.700

IN THE HIGH COURT OF LAHORE

First Appeal No. 1274 of 1918

Decided On: 16.02.1922

Appellants: **Jaugal Singh and Ors.**
Vs.
Respondent: **Ghulam Mahomed and Ors.**

Hon'ble **Judges/Coram:**
Abdul Raoof and Campbell, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Sheo Narain

For Respondents/Defendant: Mahomed Iqbal and Niamat Rai

JUDGMENT

1. This is a first appeal arising out of a suit for the specific performance of a contract of a sale executed on the 28th April 1915 by Wadhawa Singh, defendant No. 1, in favour of the plaintiff, Ghulam Mahomed. Under the contract the plaintiff agreed to sell the property in dispute in lieu of Rs. 7,000, out of which Rs. 100, were paid as earnest-money, and the plaintiff undertook to get the deed of sale duly registered within one year and receive the remaining sale price, namely. Rs. 6,900. The following condition was entered in the agreement:-

In case of breach of the agreement I will pay Rs. 1,000 as damages besides refunding earnest money. Moreover, I will be bound for specific performance of the contract. If the vendee breaks the agreement, he shall also be liable for payment of Rs. 1,000 as damages and the earnest-money will be forfeited. In case of breach of promise on my part the vendee shall be competent to recover the damages by means of a suit, and by compelling me for specific performance of the contract he will get a compulsory registration of the deed effected.

2. From the above it is clear that a sale-deed was to be executed and completed by the 28th April 1916; but no sale-deed, however, was executed in favour of the plaintiff, and, on the contrary, defendant No. 1, in October 1917, sold the property in dispute to defendants Nos. 2 and 3. Thereupon the present suit was instituted on the 29th October 1917, against Wadhawa Singh and the vendees. Jaugal Singh and Jiwan Singh. The plaint averred that the plaintiff had repeatedly requested defendant No. 1 to execute and complete the sale-deed in favour of the plaintiff, and to take the balance of the sale money, but that defendant No. 1 always put it off on the pretext that he had no time; that ultimately, on the 25th April 1916, he sent a notice to the plaintiff calling upon the latter to get the sale ejected and have the sale-deed registered; that the said notice, dated the 25th April 1916, was received by the plaintiff on the 27th April 1916; that on the 28th April 1916 the plaintiff took the purchase money to Lyallpur, but defendant No. 1 did not come that the plain remained there for three days consciously waiting for defendant No. 1, but did not turn up ; and that, finally, the plaintiff sent a notice to the defendant c the 1st May 1916 under a registered cove and that in reply to the plaintiff's not defendant No. 1 sent a second notice dated the 23rd May 1916 by which the latter refused to perform the contract.

3. It is also alleged in the plaint that a notice was sent by the plaintiff to defendants Nos. 2 and 3, informing them that defendant No. 1 had contracted to sell the property in dispute to the plaintiff and that defendants Nos. 2 and 3 would be liable to be sued in Court if they purchased the property in spite of the information given. On the above allegations the plaintiff claimed the specific performance of the contract and Rs. 1,000 as damages. The suit was resisted by defendant No. 1 on the allegations that a breach of contract was committed by the plaintiff himself; that the plaintiff being heavily indebted was unable to pay the purchase-money, and that the plaintiff was not entitled to the relief claimed owing to the long delay in bringing the claim.

4. Defendants Nos. 2 and 3 eventually pleaded ignorance of the agreement of sale between the plaintiff and defendant No. 1 and averred that the notice given by the plaintiff was received by them after the sale had been executed by Wadhawa Singh in their favour, and that the plaintiff was estopped by his long silence from claiming any relief against them.

5. The following issues were framed by the Lower Court on the pleadings of the parties:-

(1) Was plaintiff ready to perform his part of contract, as incorporated in the agreement, dated 28th April 1915, and did defendant commit a breach with respect to it?

(2) Did defendants-vendees know about the existence of the prior contract to sell in favour of the plaintiff and did they, with this knowledge, obtain the sale in their favour?

(3) If issues Nos. 1 and 2 are proved in plaintiff's favour to what amount for damages, if any, is he entitled in addition to the relief for specific performance?

(4) Is plaintiff estopped from bringing the present claim by his long silence, if any?

(5) To what relief is the plaintiff entitled, and against which of the defendants?

6. Upon all these issues the Trial Court found in favour of the plaintiff and against the defendants, with the result that the claim for specific performance has been decreed, but the claim for damages has been disallowed.

7. The vendees-defendants have preferred this appeal, but defendant No. 1, vendor, has remained quiet. Pandit Sheo Narain, counsel for the appellants, has argued the case before us very fairly and has pressed all the points that can fairly be put forward. He has fairly admitted that the notice sent by the plaintiff had been received by his clients in time, and that it was not open to them to plead that they were bona fide purchasers without notice, and as such protected by the proviso attached to Section 27 of the Specific Relief Act. The main contentions put forward by the learned counsel are as follows:-

(1) that a sale-deed has not been executed in favour of the plaintiff owing to his own fault, and that he himself has been guilty of a breach of contract;

(2) that there has been considerable delay on the part of the plaintiff and the evidence in the case shows that the delay was of such a nature from which it ought to be inferred that the plaintiff had abandoned his claim under the agreement;

(3) that in any case having regard to the long delay in preferring his claim the Court, in the exercise of its discretionary power under Section 22 of the Specific Relief Act, should refuse to grant specific performance in this case.

8. In support of the first contention the learned counsel has relied upon the following circumstances, namely, that Wadhawa Singh sent the first notice on the 25th April 1916, and the plaintiff paid no attention to it, and that he sent the second notice dated the 23rd May 1916 to the plaintiff finally informing him that the contract between the parties would be considered to be at an end and that the plaintiff had not even then moved in the matter.

9. On behalf of the plaintiff-respondent, in reply to this contention, it has been argued that on receipt of the notice of the 25th April 1916 the plaintiff, at once, proceeded to Lyallpur and there awaited the arrival of Wadhawa Singh, but he did not turn up and that eventually on the 1st May a notice was sent by the plaintiff to Wadhawa Singh under a registered cover. The notice, however, is not forthcoming, nor has the plaintiff been able to produce a copy of it. He has, however, given evidence to prove that the notice was sent by him on the 1st May 1916. At page 6 of the paper-book is to be found a copy of the postal registered receipt No. 447, dated the 1st May 1916, marked as Exhibit P. 9 in the following words:-

Received a registered P.C. addressed to Wadhawa Singh, Chak No. 159, R.B.

10. At the same page is to be found a translation of a memo for the receipt of a notice of Wadhawa Singh, dated the 5th May 1916, marked as Exhibit P. 6. This is a note alleged to have been made by the plaintiff in his pocket-book on the 5th May 1916 after seeing the Post Office record of receipt by Wadhawa Singh.

11. Mohan Lal (P.W. No. 1) was called to depose as to receipt No. 447, Exhibit P. 9, and he made the following statements:-

On No, 447 is record of a registered post card sent to Wadhawa Singh of Chak No. 159, Rakh Branch, acknowledgment due on 1st May 1916. Sunders name is not mentioned as if; is not required. I remember that Ghulam Mahomed, plaintiff, sent this notice. I have taken his house on rent and so I remember it.

12. Barkat Ram (P.W. No. 2), Sub-Post Master, Chak Jhumra, was called to depose to the circumstances under which the note Exhibit P. 6, was made in the pocket book of the plaintiff. He stated that about seven months ago the plaintiff went to him making enquiry regarding a notice said to have been sent by him in May 1916, and that the plaintiff told him that the notice had been sent to Wadhawa Singh of Chak No. 159 R.B. The witness further stated that he inspected the village postman's book and told the plaintiff that his notice had been received by the addressee; that he did not give him a copy as it was not permissible under the rules, that there was a thumb impression of the addressee, Wadhawa Singh, on the postman's book and that the plaintiff made a note in his pocket-book which the witness did not see. It is true that the postal receipt obtained by the plaintiff for the registered notice has not been produced as the plaintiff has lost it. It is also true that the original entries in the postal register have not been proved, because, admittedly, they have been destroyed under the Post Office Regulations; but if we can believe Mohan Lal (P.W. No. 1) and Barkat Ram (P.W. No. 2) there is sufficient evidence to prove that the plaintiff had sent the notice in reply to Wadhawa Singh's notice of the 25th April 1916.

13. It is argued that it is difficult to believe that Mohan Lal, Sub-Post Master, should have retained in his memory the fact of the plaintiff sending a notice to Wadhawa Singh so far back as 1st May 1916. The witness, however, has given reasons for remembering the incident stating that he had taken the plaintiff's house on rent, and that was the reason why he remembered the incident. There is nothing strange or unnatural in this, Mohan Lal being the Sub-Post Master and a tenant of the plaintiff; in all probability the plaintiff told him about the matter at the time, and thus the witness was able to retain this in his memory.

14. We see no reason to disbelieve the evidence of Mohan Lal. The evidence of Barkat Ram, Sub-Post Master, as to the circumstances relating to the note made in the pocket-book also appears to be straightforward and convincing, and we are inclined to believe that in all probability the plaintiff had made a note of the entry as to the delivery of the notice to Wadhawa Singh, addressee.

15. This fact is made quite clear by a reference to the contents of the notice of the 23rd of May admittedly sent by Wadhawa Singh to the plaintiff. Wadhawa Singh made the following assertions in the body of the notice:-

When there was some time to complete the term given in the agreement, you gave

me a notice. At that time you ought to have deposited the money in the Government Treasury or paid the same to us, you had given the notice so that you might not be liable for payment of Rs. 1,000. But you did not care about it. Now the time of your promise has expired. Now you should arrange for payment of Rs. 1,000. Now you should make the settlement with us about the land, etc., etc.

16. There is a clear admission of the notice being sent by the plaintiff. Objection has been taken by Pandit Sheo Narain as to the correctness of the translation of this notice of the 23rd May 1916, and it has been contended by him that for "you gave me notice" the translation ought to have been" I gave you notice." In the registered post card there is a word which is read by Pandit Sheo Narain as "tum ko," while Dr. Iqbal, for the plaintiff-respondent, reads it "mujhko." We have scrutinized the writing of the post card carefully, and have considered its contents, and we are unable to say that the translator has made a wrong translation. The translation fits in with general contents of the letter. In addition to this, there is a certain amount of oral evidence given on behalf of the defense to prove that the plaintiff had himself refused to purchase the land. To this effect is the evidence given by Sher Singh, who stated that in the first week of Baisakh he went to the plaintiff along with the vendor and saw him in his garden and that the plaintiff told them that he had no money and asked for the return of the earnest-money. The witness is Wadhawa Singh's own brother. The land in question was leased to him. To the same effect is the evidence of Lahna Singh, son of Kishen Singh. He also stated that in the middle of Baisakh last he accompanied Wadhawa Singh to the plaintiff's baithak in the city that Wadhawa Singh asked the plaintiff to pay the sale money and get the sale registered and that the plaintiff replied that he did not want to purchase the square and asked for the return of the earnest-money, Bhag Singh also made a similar statement and stated that the, too, had gone to the plaintiff's baithak with Wadhawa Singh and had heard the plaintiff saying that he had no money and would not like to purchase the land. This class of evidence is altogether worthless and cannot be believed for a moment.

17. The rest of the evidence for the defense consists of depositions of witnesses who have come forward to prove the plaintiff's indebtedness. The plaintiff has not denied this fact and has admitted his indebtedness to the extent of Rs. 12,000 or Rs. 13,00. On the other hand, the evidence clearly shows that the plaintiff is the owner of at least five squares which is a very valuable property, and that he could easily raise the sum by mortgaging it.

18. The evidence of Ghulam Rasul (P.W. No. 6) makes it quite clear that he was ready to advance Rs. 7,000 on mortgage to the plaintiff. In fact, this witness went to Lyallpur on the 27th April 1916 with Rs. 7,000 for getting the mortgage executed in his favour, but as Wadhawa Singh did not come, the money was kept in deposit with Diwan Dhanpat Shah at Lyallpur.

19. Ghulam Rasul (P.W. No. 12), son of the plaintiff, is a Barrister-at-Law practicing at Lyallpur. He has proved the value of the square owned by the plaintiff, his father, and has made the following statement in his re-examination:-

Income of the square which we would mortgage to Ghulam Rasul (P.W.) in lieu of Rs. 7,000 was about Rs. 400 per annum as my father tells me, and the income of the other square intended to be mortgaged for Rs. 5,000 was Rs. 300 per annum. The income from the garden and the rest of three squares is about Rs. 700 per annum and about Rs. 2,500 per annum respectively.

20. One of Wadhawa Singh's own witnesses, Mr. J.R. Khosla, advocate, has stated that if plaintiff and his son mortgaged their squares to him, he would be ready to advance Rs. 20,000 to them. In addition to the above evidence, there is the evidence of Ghulam Ahmad Khan (P.W. No. 10) which also proves that Ghulam Rasul, his step-brother, was ready to take on mortgage one of the squares of the plaintiff for Rs. 7,000.

21. In our opinion, there is overwhelming evidence on the record to show that the plaintiff could pay the price of the property which Wadhawa Singh had promised to sell to him, and that it was quite easy for him to obtain funds by mortgaging a portion of his property. The evidence produced by the defendants is not sufficient to prove that the plaintiff had refused to purchase the land. On the other hand, there is a good deal of evidence for the plaintiff which goes to show that the plaintiff was ready to make the purchase.

22. As regards the second contention, there is no question but that delay may, in certain cases, be evidence of abandonment or acquiescence; but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of defendants, does not disentitle the plaintiff to sue for specific performance.

23. This view is fully supported by authorities. See for example Kisen Gopal Sadaney v. Kally Prosonno Sett (1906) 33 Cal. 633. The learned Judge, who decided the above case made the following observation in his judgment:-

When a right is not in fact actually abandoned, delay to enforce it may induce a reasonable belief that the right is foregone and the party, who acts upon the belief so induced and whose position is altered by this belief to his prejudice, may plead delay as an answer to a claim made against him. But, in my opinion, mere delay is not a sufficient reason for debarring the plaintiff from relief by way of specific performance.....In my opinion delay is not material so long as matters remain in statu quo, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted.

24. The real question, therefore, which we have to decide in this case is, whether the delay on the part of the plaintiff is evidence of abandonment by him of his rights under the agreement or not. The evidence given by the defendants already referred to does not satisfy us that the plaintiff intended to abandon his rights. On the contrary as we have already said, he had made preparations to make the purchase and for that purpose had gone to Lyallpur. In the face of direct evidence, we are not prepared to accept the contention of Pandit Sheo Narain that the delay of a year and six months in this case necessarily implied that the plaintiff had given up his intention of enforcing his rights under the agreement.

25. It has been feebly contended by Pandit Sheo Narain that time was of the essence of the contract in this case and the plaintiff having failed to have the sale completed before the date fixed, it was no more open to him to ask the defendant to execute the sale-deed in his favour. Here the learned counsel was not able to show how the time was of the essence of the contract in this case. From the circumstances of the case it is not an illegitimate conclusion to draw that the defendant, Wadhawa Singh, himself had resiled from the agreement and was himself guilty of a breach of contract. The present case is fully covered by the rule laid down in Chamarti Suryaprakasharayadu v. Arardhi Lakshminarasimhacharyulu MANU/TN/0070/1914 : (1914) 26 M.L.J. 518 = 23 I.C. 560 on which the Lower Court has relied.

26. The third contention also raised by Pandit Sheo Narain cannot prevail. This contention is that, having regard to the long delay on the part of the plaintiff to bring the suit, we ought to refuse to grant the equitable relief claimed by him. The suit is within time, and the delay is not so great as to induce us to hold that the plaintiff has forfeited his right under the agreement.

27. We see no grounds to differ from the view taken by the Lower Court. We acts accordingly dismiss the appeal with costs.