

International Contractors Ltd.

Vs

Prasanta Kumar Sur

Civil Appeal No. 205 of 1956

(J. L. Kapur, J. C. Shah JJ)

25.01.1961

JUDGMENT

KAPUR, J. -

This is an appeal against the judgment and decree of the High Court of Judicature at Calcutta. The appellant was the defendant in the suit out of which this appeal has arisen and respondent No. 1 was the plaintiff, and the second respondent was a proforma defendant. The facts of this case are these :

On February 4, 1941, the respondent sold the property in dispute to the appellant for a sum of Rs. 10,000. On February 10, 1941, there was an agreement for reconveyance within a period up to February 10, 1943, for a sum of Rs. 10,001. The relevant clause of this agreement was the third clause which was as follows :-

"Clause 3. - The purchase shall be completed by the purchasers within two years, i.e., to say on or before the 10th day of February, 1943, time being the essence of the contract. If the purchasers shall on or before the 10th day of February, 1943, pay to the vendor a sum of Rs. 10,001 the vendor shall at the cost of the purchasers execute such conveyance as may be necessary for conveying and transferring its right, title and interest in the said property free from encumbrances, if any, created by it."

On November 26, 1942, the solicitor for respondent No. 1 wrote a letter to the appellant stating that that respondent was ready and willing to have the purchase completed as early as possible on payment of Rs. 10,001. Along with that letter a draft conveyance was sent for approval but all this was subject to the result of a search as to the encumbrances, if any, created by the appellant. On November 30, 1942, the solicitors for the appellant company wrote back saying that immediate arrangements should be made for giving inspection of the agreement of sale on which the respondents were relying as the appellant was unable to trace the copy of the said agreement from its record. Again on December 11, 1942, the respondent's solicitor sent a letter stating :

"My client is very eager to complete the purchase and the full consideration money therefore is lying idle in his hand awaiting the return of the relative draft conveyance as approved by you on your clients' behalf."

To this the reply of the appellant's solicitors dated December 18, 1942, was :-

"Our clients deny that there was any concluded or valid agreement for sale with your client or with any other person in respect of the above premises."

On June 10, 1943, respondent No. 1 filed a suit for specific performance and in the alternative for redemption on the footing that the transaction was in reality a mortgage. The trial court dismissed the suit on May 16, 1950, holding that the transaction on the basis of which the suit was brought was not a mortgage but was out and out sale with an agreement for repurchase and as the vendor had not paid the money "punctually according to the terms of the contract, the right to repurchase was lost and could not be specifically enforced", and the court had no power to afford any relief against forfeiture of this breach. The plaintiff-respondent took an appeal to the High Court and it was there held that the failure on the part of the respondents to actually tender the amount of the consideration does not bar a suit for specific performance because after the repudiation of the contract by the appellant, the tender would have been a useless formality. The appeal was therefore allowed and the suit for specific performance decreed. It is against this judgment and decree that the appellant has come in appeal to this Court.

The correspondence which has been proved in this case shows that when the respondent's solicitor called upon the appellant to reconvey the property in dispute to the respondent and also sent a draft conveyance, the appellant denied that there was any concluded or valid agreement for sale in respect of the property in dispute. This was a complete repudiation of the contract to reconvey which the appellant had agreed to by cl. 3 of the agreement which has been set out above. As the appellant had repudiated the contract and had thus failed to carry out his part of the contract it was open to the respondent to sue for its enforcement. But it was argued on behalf of the appellant that the respondent did not tender the price, i.e., Rs. 10,001 nor was he in a position to do so and in that view of the matter the respondent is not entitled to get a decree for specific performance. In cases of this kind no question of formal tender of the amount to be paid arises and the question to be decided is not whether any money was within the power of the respondent but whether the appellant definitely and unequivocally, refused to carry out his part of the contract and intimated that money will be refused if tendered. The principle laid down in *Hunter v. Daniel* [(1845) 4 Hare 420; 67 E.R. 712] is applicable to cases of this kind. In that case *Wigram, V.C.*, stated the position as follows :-

"The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

Lord Buckmaster in *Chalikani Venkatarayanim v. Zamindar of Tuni* [(1922) L.R. 50 I.A. 41, 47] accepted this statement of the law and observed :-

"Their Lordships think that that is a true and accurate expression of the law, and the question therefore is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money."

This principle applies to the facts of the present case also and the question is whether the answer sent on behalf of the appellant amounted to an unequivocal refusal to carry out its part of the contract which in our opinion it was.

It was next contended that the offer made by a solicitor is not a proper offer in law and therefore when the solicitor for the respondent called upon the appellant to execute the documents they were not bound to do so. We are unable to accord our assent to this proposition. The case upon which the Counsel for the appellant relied, i.e., *Ismail Bhai Rahim v. Adam Osman* [I.L.R. [1938] 2 Cal. 337], in our opinion has no application to the facts and circumstances of this case. It was held in that case

that the offer made by a promisor through a solicitor to pay a debt with interest thereon at the date of the offer does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing to perform his promise. Unless there is something peculiar in the circumstances of that case that case does not lay down good law. It is difficult to see why a tender made through a solicitor who is for that purpose an agent, is not a proper tender.

In our opinion the High Court rightly held that the respondents were entitled to a decree for specific performance and we therefore dismiss this appeal with costs.

Appeal dismissed.

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