

Mugneeram Bangur & Co.

Vs

Sardar Gurbachan Singh

Civil Appeal No. 180 of 1962

(K. N. Wanchoo, J. R. Mudholkar JJ)

16.12.1964

JUDGMENT

MUDHOLKAR, J. -

This appeal, like Satyabrata Ghose v. Mugneeram Bangur & Co. and another ([1954] S.C.R. 310.) relates to the effect of requisitioning orders made by the Government during the last war under which they took possession of land belonging to the appellant company which had been divided into building plots by them in pursuance of what is known as the Lake Colony Scheme, by constructing roads and drains. The plaintiff-respondent was one of the various persons who had entered into contracts with the company for purchase of plots, in pursuance of the public offers made by the company. This he did by addressing the following letter to the company and paying Rs. 202/- by way of earnest money.

"To

Mugneeram Bangur and Company Land Department. Russa Road, South, Tollygunge, Calcutta.
No. 499, Phone : South 135.##

Through Babu -

Re : Plots Nos. New Nos. 245 and 246 on 30 feet road in the premises No. Lake Colony Scheme
No. 1, Northern Block.

Area measuring-10 ks. x ch. x sq. ft more or less.

Dear Sir,

I am willing to purchase the above plot of land from you at the average rate of Rs. 1,075/- (Rupees one thousand and seventy-five only) per katta irrespective of the condition of the soil and I am ready to deposit Rs. 202/- of the actual value as an earnest money at once. I undertake to complete the transaction within one month from the date on (?) (of) completion of road on payment of the balance of the consideration money and time must be deemed as essence of the contract. If I fail to do so within the said period the earnest money deposited by me will be forfeited and you will be free to resell the land and I shall be liable for all damages that may result thereby. I also agree to sign a formal agreement in the form required by you if you so desire.

Yours faithfully,

Name, Gurbachan Singh,

Address: 48/1, Chakraberia Road, North.

Dated the..... 19.....

Witness : (Illegible)

Address.....

N.B. I agree to pay half of the value at the time of registration of the deeds and the balance within 6 years bearing interest at the rate of 6 per cent. annum with half yearly rests and the said plots Nos : 245 and 246 purchased by me shall remain charged for the payment of the balance of the purchase money in manner as aforesaid and the necessary security deed charged should be executed and registered by me at my own cost.

Name : Gurbachan Singh

Address :

Witness (Illegible)

4, Baktiar Shah Road, Tollygunge.

The letter does not bear any date : but probably it was written on May 14, 1941 which is the date on which the company issued a receipt in his favour. Different portions of the land covered by the scheme were requisitioned by Government between November 12, 1941 and July 25, 1944. The plots which the respondents had contracted to purchase are said to form part of the land which was requisitioned by virtue of an order made by the Government of February 18, 1944.

According to the company, on December 24, 1943, a circular notice was sent to all those persons who had entered into contracts for purchase of plots from them stating that a considerable portion of the land comprised in the Lake Colony Scheme area had been requisitioned under the Defence of India Rules and was taken into possession by the Government. It was not possible to say how long the Government would continue to be in possession and, therefore, it was not possible for the company to carry on the work of the construction of roads and drains during the continuance of the war and possibly for many years even after the termination of the war. The circular then proceeded to state as follows :-

"In these circumstances we have decided to treat the agreement as cancelled and give you the option of taking of the refund of the earnest money deposited by you within one month from the receipt of this letter.

In the event of your refusal to treat the contract as cancelled, we are offering you, in the alternative, to complete the registration of the conveyance of the sale deed within one month from the receipt of this letter. In such a case you have to take the lands as it is now, the road and drain will be made by us as soon as circumstance will permit after the termination of the War.

If you do not exercise your option in any of the two ways mentioned above the

agreement will be deemed to have been cancelled and your earnest money forfeited."

On May 8, 1946 the respondent's attorneys, acting under instructions, wrote to the company saying that the respondent had learnt from the company's office that the government would be de-requisitioning lands taken over by them and inquiring of the company as to when it would be possible for the company to deliver possession of the plots to the respondent. In reply to that letter the company wrote on May 29, 1946 drawing his attention to their circular letter and said that by reason of the failure of the respondent to exercise the options given by them therein the agreement stood cancelled and the earnest money had been forfeited.

On June 13, 1946, the respondent's attorneys expressed surprise at the company's reply and stated that the respondent had not received the circular referred to in the company's reply and ended by saying as follows :

"That my said client, therefore, now hereby asks you as to when you are going to complete the roads, so that he may do the needful for completion of the conveyances within one month from such date of completion of the roads.

That my said client hereby calls upon you to intimate to him within seven days from date the expected exact date of completion of roads to enable him to complete the conveyance as per agreement, failing which he will be forced to take legal steps against you in the matter as he may be advised in the matter, without further reference which please note."

Apparently the company did nothing with the result that the present suit was instituted by the respondent on August 8, 1946 in the court of the Second Subordinate Judge at Alipore. The company resisted the suit on various grounds but only two are material for the purpose of this appeal because Mr. Sen has confined his argument only to those matters. One is that the contract has been discharged by reason of frustration and the second is that the suit was premature. The suit was decreed and that decree was upheld by the High Court in appeal. A certificate that the case was fit for appeal to this Court having been refused by the High Court the company sought and obtained from this court special leave to appeal. That is how the matter comes up before us.

This case would really appear to be covered by the decision of this court to which we have referred at the outset. Mr. Sen, however, points out that the question as to whether the contract could be said to have been discharged because of the fact that its performance was rendered unlawful as a result of the requisitioning orders made by the Government which was sought to be raised before this Court in that case was not permitted to be raised by it and has been left open. He admits that certain observations made by this Court towards the concluding portion of the judgment would indicate that this Court was not prepared to accept the contention sought to be urged before it. But, Mr. Sen says that as the contention was not permitted to be raised, the observations of this Court could be said to have been made merely in passing and at best be regarded as a tentative expression of its views. We think Mr. Sen is right in the sense that the question has been actually left open by this Court. But even so, we will have to consider whether the grounds upon which the previous decision rests would not be relevant for consideration in connection with the argument advanced by Mr. Sen.

In so far as discharge of contract by reason of frustration is concerned there is no question of implying a term in the contract a term fundamental for its performance, as is done by the courts in England because we have here the provisions of section 56 as well as those of section 32 of the

Contract Act. This is what was held by this Court in the earlier case and that decision binds us. No doubt, a contract can be frustrated either because of supervening impossibility of performance or because performance has become unlawful by reason of circumstances for which neither of the parties was responsible. In the earlier case this Court has held that where the performance of an essential condition of the contract has become impossible due to supervening circumstances the contract would be discharged. This Court has further held that the impossibility need not be an absolute one but it is sufficient if further performance becomes impracticable by some cause for which neither of the parties was responsible. It, however, held that the mere fact that the performance of an essential term of the contract that is to say, of undertaking development of the area under the scheme could not be undertaken because the land had been requisitioned, did not have the effect of frustrating the contract. For though the term regarding development was an essential term of the contract, the requisitioning of the land was only for a temporary period. Further the parties had deliberately not placed any time limit within which roads and drains had to be made apparently because they were aware of the difficulties in carrying on the work on account of scarcity of materials and the various restrictions which the Government had placed on such activities. This Court also pointed out :

"Another important thing that requires notice in this connection is that the war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period." (pp. 326-327).

Though these observations were made while dealing with the argument that the contract has been frustrated by reason of impossibility of performance they would not be wholly out of place while considering the argument based upon the ground that continued performance of the contract had been rendered unlawful.

What section 56 speaks of is a contract, the performance of which has become unlawful. Now, it is true that no order was made under the Defence of India Rules prohibiting the company from carrying on the work of construction of roads and drains. The actual order served upon the company, among other things, provides :

"The owner/occupier of the said land :

(a) shall place the said land at the disposal and under the control of the Military Estates Officer Bengal Circle on and from the 14th November, 1941 at 1 P.M. Bengal time until six months after the termination of the present war unless relinquished earlier."

In consequence of this order the company lost possession of the land and automatically lost access thereto. Without getting on to the land company could not carry out its obligation to the purchasers of constructing the roads and drains. If, in disobedience of this order, the company's servants, agents or contractors were to carry on the work of construction of the roads and drains by entering on the land of which the possession was with the government, they would have been liable to punishment under sub-r. (7) of r. 75(a) of the Defence of India Rules and also the company. We were informed that the land was used by the Government for military purposes. It is, therefore, possible that the land might have been declared as a protected place under r. 7 of the Defence of India Rules. Even, however, without such a declaration, we agree with Mr. Sen that it would not have been possible for the company, its agents, servants or contractors to go on the land during the continuance in force of

the order of requisition without being rendered liable at law.

Even so it is clear that all that had become unlawful was to construct roads and drains while the land was bound to be given up by the Government sometime or other and, therefore, in essence the activities which were rendered unlawful were not forbidden for all time but only temporarily. It may be that the duration of the embargo was uncertain but not permanent. It would, therefore, be relevant to enquire whether a contract could properly be held to be frustrated because for a certain period of time its performance has become unlawful. According to Mr. Sen the moment it became unlawful for one of the parties to the contract to continue with the performance, the contract was discharged and in this connection he referred us to certain observations of Lord Wright in *Denny Mott & Diskson Ltd. v. James B. Fraser & Co. Ltd.* ([1944] A.C. 265, 274.), and certain other portions of the report. We put to him the question as to what would be the effect of a requisitioning, say, for a period of one month. Would that operate as discharge of the contract? To that his answer was in the negative and we think that the answer was right. The question then would be: would it make any difference if unlawfulness would attach to the performance of the contract for an indeterminate period? In our judgment if time is of the essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed. Thus, where the performance of a contract had been rendered unlawful by reason of some subsequent event the contract would stand discharged but such discharge will take place not necessarily from the date on which the further performance was rendered unlawful, unless further performance was rendered unlawful, unless further performance was rendered unlawful for all time. If the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time the contract would not stand discharged unless the ban on its performance existed on the day during the time in which it has to be performed. Here it is pointed out by Mr. Sen that the respondent had made time the essence of the contract but that only applies to the grant of conveyance after the completion of the roads and drains. As already pointed out, parties were wholly silent as to the time within which the roads and drains were to be completed. Therefore, in so far as this aspect of the contract is concerned time was in no sense made the essence of the contract. According to Mr. Sen, however, where the parties have failed to specify in the contract time within which it has to be performed section 46 of the Contract Act comes in and the parties may be presumed to have agreed that contract will be performed within reasonable time. To that the answer would be the same as that given in the earlier case, that is, the parties when they entered into the contract, knew the prevailing circumstances and must have borne in mind the possibility that something like what actually happened may happen and, therefore, did not specify the time within which the land had to be developed. In other words, the parties intended to exclude from the computation of reasonable time such time as was taken up in procuring the necessary material which was not easy to obtain and such as may be taken up if the land were requisitioned by government. Thus, in our view it cannot be said that because of the requisitioning orders which had the effect of making entry by or on behalf the company on the land illegal - during the subsistence of the period of requisitioning the contract stood discharged.

Then remains the other point argued by Mr. Sen. He said that the suit for specific performance was premature because under the agreement the respondent did not get a right to obtain a sale deed till after the development of the land comprised in the scheme was completed. That is perfectly true. But the fact remains that this work had been completed when the appeal was heard by the High Court. The Court would in such a case be justified in taking notice of subsequent events in moulding its relief accordingly.

In our judgment the courts below were right in upholding the respondent's claim. The appeal is dismissed with costs.

Appeal dismissed.

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