R. C. Chandiok and Another

Vs

Chuni Lal Sabharwal and Others

Civil Appeal No. 1776 of 1966

(J. C. Shah, A. N. Grover JJ)

12.10.1970

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from a decree of the Punjab High Court (Circuit Bench, Delhi).

2. On July 18, 1955, the appellants entered into an agreement with the respondents for the purchase of plot No. 8 measuring 1,500 sq. yds. in Jangpura B, New Delhi for Rs. 22,500/-. The contract was evidence by receipt Exhibit P-6 which was in the following terms :

> "Received with thanks from Messrs. Ramesh Chander Chandiok and Kailash Chander Chandiok the sum of Rs. 7,500/-(Rupees Seven thousand and five hundred only) as earnest money of the purchase money of Rs. 22,500/- (Rupees twenty-two thousand and five hundred) for the sale of Plot No. 8 measuring 1,500 sq. yds. in Jangpura B, purchased from the Rehabilitation Ministry and owned by us. The balance of Rs. 15,000 (Rupees fifteen thousand only) shall be paid to us by them within one month of the execution of this receipt on the execution of the sale deed by us in their favour."

It is common ground that the aforesaid plot had been allotted by the Rehabilitation Ministry to the respondents and that its possession was to be delivered after payment of rent of lease money up-to-date after execution of the lease deed. The lease deed was actually executed in favour of the respondents on April 21, 1956. Meanwhile on August 11, 1955 the respondents wrote a letter to the appellants as follows :

> "With reference to the receipt, dated 18-7-55 executed by us in your favour, acknowledging receipt of Rs. 7,500/- as earnest money for the sale of Plot No. 8 measuring 1,500 sq. yds. in Jungpura B, owned by us and agreed to be sold to you by us, since it will take about a month more to obtain sanction of the Rehabilitation Ministry, the execution of the sale deed by us cannot be complete without the said sanction, it is hereby mutually agreed between us or orally that the period for execution of the sale deed shall remain extended till the time of the receipt of the said sanction and we hereby confirm the said oral agreement. We will inform you as soon as the said sanction is received and within a week thereof, we will execute the necessary saledeed in your favour and get the same registered against payment of the balance money. Please sign the duplicate of this letter in confirmation of the said oral agreement."

A notice, dated June 15, 1956 was served by counsel for the respondents on the appellants saying that the balance of consideration according to the terms of the agreement, dated July 18, 1955 was to be paid by the appellants and the sale deed was to be got registered within one month of July 18, 1955. It was further stated that extension had been given as desired by the appellants but the balance amount had not been paid. In Para 3 it was stated "my clients are not prepared to wait indefinitely and therefore cancel your agreement for want of certainty and hereby give you an offer, without prejudice to their legal rights, to receive back the sum of Rs. 7,500/- paid by you as earnest money less the amount of loss suffered by them on account of lease and interest etc. within one week of the receipt of this letter, failing which my clients would be entitles to forfeit the earnest money and treat the agreement cancelled."

3. A reply, dated June 22, 1956 was sent by counsel for the appellants in which reference was made to the letter, dated August 11, 1955 and it was pointed out that no information had been sent by the respondents about the sanction having been obtained from the Rehabilitation Ministry. The respondents were called upon to obtain the requisite sanction and to execute the sale deed against receipt of balance of purchase money. On July 4, 1956 counsel for the respondents sent a reply saying that sanction had not been granted till then and inquiries made by respondents revealed that it might not be forthcoming for an indefinite period and that it was absolutely uncertain as to when I would be granted. It was claimed that the agreement had become void on account of uncertainty and without prejudice to their legal rights the respondents were prepared "exgratia" to have the sale deed registered on payment of the balance within a week of the receipt of the letter without waiting sanction of the Rehabilitation Ministry. On November 11, 1956 the respondents are stated to have applied for sanction for transfer of the plot and it was granted on November 20, 1956. The appellants had themselves made inquiries from the Housing and Rent Officer on August 9, 1956 to ascertain whether sanction had been granted and how much time it would take to accused the sanction. By a letter, dated 27/29th November, 1956 the aforesaid officer informed the appellants that permission to transfer had been given on November 20, 1956. The appellants had also taken steps to inform other prospective buyers about the existence of the agreement as they apprehended that the respondents intended transferring the same to some other party. On July 29, 1956 an advertisement was published by them in the 'Times of India declaring the existence of the agreement entered into between the appellants and the respondents with regard to the sale of the aforesaid plot. On December 4, 1956 the suit out of which the present appeal has arisen was filed by the appellants claiming specific performance of the contract, dated July 18, 1955 and in the alternative for refund of Rs. 7,500/- being the amount of earnest money and Rs. 15,000/- as damages together with interest.

Apart from taking all the necessary pleas it was averred in the plaint that the plaintiffs-appellant had always been ready and willing to perform their part of the contract. The suit was contested by the defendants-respondents and among the material issues which were framed by the Trial Court were the following :

> "(5) Whether the specific performance of the agreement in suit should be refused under Section 21 or 22 of the Specific Relief Act ?
>
> (6) Whether the plaintiffs were ready and willing to perform their part of the contract ?"

The admitted case of the parties was that according to the conditions of the lease granted to the respondents, which had, however, not been produced the transfer of the lease-hold rights could be

affected only with the sanction of the Rehabilitation Ministry. The Trial Court was of the opinion that in spite of this condition the respondents had a subsisting though defeasible interest in the lease-hold rights which could very well be the subject-matter of sale. It was held that the appellants did not perform the contract for about 1 1/2 years even though the respondents had repudiated it much earlier. Any party to the contract could subsequently make time the essence of the contract by a reasonable notice and this had been done by the respondents by Exhibits P-8 and P-12, namely the letters, dated June 15, 1956 and August 24, 1956. Issue No. 5 was thus decided against the appellants. On issue No, 6 the Trial Court found that the appellants were not ready and willing to pay the balance of consideration in accordance with the original agreement as they insisted on sanction of the Rehabilitation Ministry being obtained before the completion of sale though no such condition existed in the original contract. However, a decree was granted to the appellants in the sum of Rs. 7,500/- on the ground that the same constituted part payment of consideration and was not liable to be forfeited. On March 31, 1959 the appellants filed an application before the Trial Court stating that they intended to prefer an appeal against the dismissal of the suit for specific performance but as the respondents were trying to dispose of the plot they should be restrained by an injunction from doing so. It appears that no injunction was granted by the Court. An appeal was filed to the High Court, and during the pendency of the appeal, the amount of Rs. 7,500/- was deposited by the respondents in satisfaction of the decree passed by the Trial Court. According to the respondents the appellants had taken out execution of the decree and it was for that reason that the said amount was deposited. It was not, however, withdrawn by the appellants during the pendency of the appeal.

4. The High Court found that both the respondents were bound by the letter Exhibit P-7, dated August 11, 1955 to which reference has already been made. It was notices that sanction of the Rehabilitation Ministry was required before the sale could be completed but it was held that there was nothing to indicate that the absence of such a sanction invalidated the transfer an initio or rendered it void. In agreement with the Trial Court the High Court held that even a defeasible interest could be the subject-matter of sale; in other words the sale could be effected without the sanction having been previously obtained. The view of the High Court was that Exhibit P-7 did not contain any such language which would justify the importing of a condition that until the respondents obtained sanction for the transfer of the property the appellants were not bound to get the sale completed. It was also decided that the appellants had not satisfactorily shown that they had sufficient funds to pay the balance amount of Rs. 15,000/- from which it could be concluded that they were not ready and willing to perform their part of the contract. Yet another point was decided against the appellants on the basis of certain execution proceedings stated at the Bar to have been taken during the pendency of the appeal. According to the High Court once the appellants had obtained satisfaction of the decree for Rs. 7,500/- they became disentitled to a decree for specific performance.

5. We are unable to concur with the reasoning or the conclusions of the High Court on the above main points. It is significant that the lease deed was not executed in favour of the respondents by the Government until May 21, 1956. So long as their own title was incomplete there was no question of the sale being completed. It is also undisputed that according to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry before transferring the plot to any one else. The respondents were fully aware and conscious of this situation much earlier and that is the reason why on August 11, 1955 it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The statement contained in Exhibit P-7 that the execution of the sale deed "by us cannot be complete without the said sanction" was unqualified and unequivocal. The respondents further undertook to

inform the appellants as soon as sanction was received and thereafter the sale deed had to be executed within a week and got registered on payment of the balance amount of consideration. We are wholly unable to understand how in the presence of Exhibit P-7 it was possible to hold that the appellants were bound to get the sale completed even before any information was received from the respondents about the sanction having been obtained. It is quite obvious from the letter Exhibit P-8, dated June 15, 1956 that the respondents were having second thoughts and wanted to wriggle out of the agreement because presumably they wanted to transfer it for better consideration to some one else or to transfer it in favour of their own relation as is stated to have been done later. The respondents never applied for any sanction after August 11, 1955 and took up the position that they were not prepared to wait indefinitely in the matter and were therefore cancelling the agreement "for want of certainty". We are completely at a loss to understand this attitude nor has any light been thrown on the uncertainty contemplated in the aforesaid letter. It does not appear that there would have been any difficulty in obtaining the sanction if the respondents had made any attempt to obtain it. This is obvious from the fact that when they actually applied for sanction on November 11, 1956 it was granted after almost a week. The statement contained in Exhibit P-10, dated July 4, 1956 that the sanction was not forth-coming has not been substantiated by any cogent evidence as no document was placed on the record to show that any attempt was made to obtain sanction prior to November 11, 1956. Be that as it may the respondents could not call upon the appellants to complete the sale and pay the balance money until the undertaking given in Exhibit P-7, dated August 11, 1955 had been fulfilled by them. The sensation was given in November, 1956 and even then the respondents did not inform the appellants about it so as to enable them to perform their part of the agreement of sale. There was no question of time having ever been made the essence of the contract by the letters sent by the respondents nor could it be said that the appellants had failed to perform their part of the agreement within a reasonable time.

6. On behalf of the respondents it has been urged that in spite of the letters of the respondents by which the agreement had been cancelled the appellants did not treat the agreement of sale as having come to an end and kept it alive. They were therefore bound to send a draft of the conveyance and call upon the respondents to execute the sale deed and get it registered on payment of the balance of the sale price as soon as they came to know directly from the Housing and Rent Officer that sanction had been granted. This they failed to do and it must be inferred that they were not ready and willing to perform their part of the agreement. Our attention has been invited to a statement in Halsbury's Laws of England. Vol. 34, Third Edn. at page 338 that in the absence of agreement to the contrary it is the purchaser who has to prepare the draft conveyance and submitted in to the vendor for approval. No such point was raised at any prior stage and in any case we do not consider that after the cancellation of the agreement by the respondent it was necessary or incumbent on the appellants to send any draft conveyance. The very fact that they promptly filed the suit shows their keenness and readiness in the matter of acquiring the plot by purchase. It mush be remembered that the appellants had not only put in an advertisement in newspapers about the existence of the agreement but had also sent a letter Exhibit P-13 on September 12, 1956 declaring their readiness and willingness to pay the balance of the purchase price not the respondents procuring the sanction. The appellants further made enquiries directly from the authorities concerned about the sanction. Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract. The High Court had taken another aspect of readiness and willingness into consideration, namely, the possession of sufficient funds by the appellants at the material time for payment of the balance of the sale price. Ramesh Chand P.W. 6

had stated that his father was a Head Master since 1922 in a High School and he was also doing import business. He gave up service in 1934. The son joined the father in his business in the year 1928 and his other brother appellant No. 2 also joined that business some years ago. The bank account was produced which showed that between July 18, 1955 and December 31, 1955 the appellants' father had in his account a credit of over Rs. 15,000/- but thereafter between January, 1956 and March, 1956 an amount of Rs. 16,000/- odd had been withdrawn. According to the High Court after these dates there was nothing to show that the appellants had any funds. The evidence of Romesh Chand P.W. 6 that the family had an amount of Rs. 40,000/- lying at the house was not believed. Now in the first place the relevant period for determining whether the appellants were in a position to pay the balance of the sale price was after November, 1956 when sanction had been obtained by the respondents for transfer of the plot from the Rehabilitation Ministry. The appellants had admittedly paid without any difficulty Rs. 7,500/- as earnest money and the bank account of the father showed various credit and debit entries from time to time. On March 5, 1956 an amount of Rs. 12,720/- had been withdrawn by a cheque in favour of Romesh Chand P.W. 6. According to his statement this amount was withdrawn because his father was very ill and it was decided to withdraw the amount at that time. It was deposited with his mother and remained with her throughout. There is no material or evidence to show that this amount had been expended or spent and that the statement of Romesh Chand was false on the point. Even if the version that Rs. 40,000/- in cash were lying at the house of the appellant is discarded at least an amount of Rs. 12,720/- must have been available at the material and relevant time. The appellants were carrying on business and there is nothing to indicate that they were not in a position to arrange for the remaining sum to make up the total of Rs. 15,000/-. We are therefore, unable to accept that the appellants, who had all along been trying their utmost to purchase the plot, did not have the necessary funds or could not arrange for them when the sale deed had to be executed and registered after the sanction had been obtained.

7. Coming to the last point, the High Court has held that the appellants were disentitled to a decree for specific performance because a statement was made at the Bar that during the pendency of the appeal they had executed the decree of the Trial Court and an amount of Rs. 7,500/- had been deposited by the respondents pursuant to the execution proceedings. It is true that the appellant could not accept satisfaction of the decree of the Trial Court any yet prefer an appeal against that decree. That may well have brought them within the principle that when the plaintiff had elected to proceed in some other manner than for specific performance be cannot ask for the latter relief. This is what Scrutton, L.J., said in Dexters Limited v. Hill Crest Oil Company, Bradford Ltd. ((1926) 1 KB 348, 358) at page 358 :

> "So, in my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."

It was further observed :

> "It startles me to hear it argued that a person can say the judgment is wrong and the same time accept payment under the judgment as being right."

This illustrates the rule that a party cannot approbate and reprobate at the same time. These propositions are so well known that no possible exception can be taken to them. In the present case, however, the above rule cannot apply because the appellants had, by consistent and unequivocal conduct, made it clear that they were not willing to accept the judgment of the Trial Court as correct. It has already been mentioned at a previous stage that after the decision of the Trial Court the appellants had even applied on March 31, 1958 for an injunction restraining the respondents

from selling or otherwise disposing of the plot as it was apprehended that they were trying to do so. It was stated in this application that the plaintiffs would be preferring an appeal but it would take time to secure certified copies. As appeal was in fact preferred and seriously pressed before the High Court on the relief relating to specific performance.

8. This relief is discretionary but not arbitrary and discretion must be exercised in accordance with the sound and reasonable judicial principles. We are unable to hold that the conduct of the appellants, which is always an important element for consideration, was such that it precluded them form obtaining a decree for specific performance.

9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same an indicated at page 369 in Lala Durga Prasad and Another v. Lala Deep Chand and Others ((1954) SCR 360 : AIR 1954 SC 75) viz., "to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff". We order accordingly. The decree of the courts below is hereby set aside and the appeals is allowed with costs in this court and the High Court.

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