Smt. Indira Kaur and Others

Vs

Sheo Lal Kapoor

Civil Appeal No. 3131 of 1984

(M.P. Thakkar, N.D. Ojha JJ)

28.03.1988

JUDGMENT

THAKKAR, J. –

1. The widow and legal heirs of the original plaintiff may be pardoned for their cynicism having lost the property as well as the bread winner who committed suicide on losing his meritorious matter at all levels.

2. A poor person (original plaintiff) owned a small house property in Bambagher, Ramnagar, District Nainital. His son was taken ill. He did not have sufficient liquid resources to enable him to incur the necessary expenditure for treating his ailing son. He thereupon entered into a transaction with the original defendant who was a resident of the same place on August 16, 1967. The essential features of the transaction were :

> (1) Plaintiff executed a document pertaining to ostensible sale of the property in question for a consideration of Rs. 7000, favouring the defendant.
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> (2) On the same day a contemporaneous document was executed by the defendant in favour of the plaintiff agreeing to sell the property in question for a sum of Rs. 7000 within 10 years of the date of the execution of the aforesaid document.
>
> (3) The possession of the property remained with the original plaintiff and he was to pay Rs. 80 per month as rent.
>
> (4) The municipal and other taxes in respect of the property were to be paid by the plaintiff.

It appears that while the sum of Rs. 7000 so raised was expended in the treatment of his son by the plaintiff it was of no avail inasmuch as the son died of the ailment notwithstanding expensive treatment given to him. Nearly 10 years passed. The deadline for getting the sale deed executed from the defendant on the expiry of 10 years in pursuance to the agreement of sale was approaching fast. According to the plaintiff he personally contacted the defendant and made a number of requests to the defendant to fulfil his obligation by executing the sale deed. But the defendant refused to honour his commitment. Five days before the deadline that is to say on August 11, 1977 he sent to the defendant who was residing at Ramnagar itself a notice through his advocate by registered post calling upon him to execute the sale deed in his favour as stipulated in the agreement of sale dated August 16, 1967. He had also sent a local telegram on August 11, 1977 calling upon the defendant

to remain present at the office of the Sub-Registrar on August 16, 1977 (deadline was August 16, 1977). The defendant did not reply to either of these notices. The defendant never conveyed in writing to the plaintiff that he was ready and willing to convey the property to the plaintiff to discharge the obligation undertaken by him by the agreement of sell either in response to the registered notice sent through the advocate or the local telegraphic notice sent on August 11, 1977, five days before the deadline. He maintained complete silence. On the crucial date the plaintiff remained present at the Sub-Registrar's office and made an application to the Sub-Registrar to make a record of the fact that he was so present. The defendant, such is the version of the plaintiff, did not care to attend the Sub-Registrar's office though the plaintiff was present throughout the day. On the next day, after the date of the deadline that is to say on August 17, 1977, the defendant sent a local telegram to the plaintiff to the effect that he had remained present at the office of the Sub-Registrar, but that the plaintiff had remained absent. Some one year later the plaintiff instituted the suit culminating in the present appeal seeking specific performance of the agreement to sell the property in question for Rs. 7000. In the plaint the plaintiff set out the circumstances pertaining to the transaction and asserted that it was a transaction of mortgage. The real intention of the parties was to create a mortgage but an ostensible transaction of sale was entered into and a contemporaneous agreement for selling the property to the plaintiff was executed by the defendant. However the relief sought was for a decree for specific performance of the agreement of 1967 to sell for Rs. 7000. The plaintiff asserted that he had made oral requests, sent a registered notice, a telegraphic notice, and had remained present at the Sub-Registrar's office for the whole day. The defendant in his written statement did not specifically controvert these averments made in the plaint. He rested content by saying in regard to each of these averments that the same was "not admitted". The most important feature of the written statement is that the defendant nowhere asserted that he had gone to the Sub-Registrar's office and had remained present thereat on August 16, 1977. His main defence was to the effect that the plaintiff had no funds and he was not ready and willing to perform his obligation.

3. The trial court came to the conclusion that the plaintiff did not have adequate funds to purchase the property. The trial court did not record a specific finding on the question as to whether or not the defendant had remained present at the Sub-Registrar's office in pursuance to the requisition made by the plaintiff by the registered notice and by the local telegram five days in advance. The trial court dismissed the plaintiff's suit holding that the plaintiff could not have been possessed of Rs. 7000 on the deadline stipulated for performance mainly on the ground that he was a poor person who could be earning Rs. 200 or so per month and could not have made any saving and that he had not produced his passbook (which he was never called upon to produce by the other side or by the court). The lower appellate court and the High Court successively dismissed the appeal preferred by the unsuccessful plaintiff on the same pattern of reasoning. The plaintiff having committed suicide in the wake of the judgment of the High Court, his widow and legal representatives have approached this Court by the present appeal by special leave.

4. The questions debated by the parties in this appeal are :

(1) Whether the transaction was really one of mortgage though apparently of sale in form ?

(2) Whether time was of the essence of the contract ?

(3) Whether it was the plaintiff, who had committed breach by not being ready and willing to perform his part of contract or whether it was the defendant who had committed a breach of contract by refusing to convey the property in question to the

plaintiff in pursuance to the agreement to sell executed by him in favour of the plaintiff ?

Was it a transaction of mortgage or one of outright sale ?

5. There is no manner of doubt that the transaction in question was one of mortgage in essence and substance though it was clothed in the garb of a transaction of ostensible sale. The factors adumbrated hereinunder leave no room for doubt on this score :

(1) The sale deed was for a sum of Rs. 7000. So also the agreement which could be enforced at any time within 10 years was also for an identical sum of Rs. 7000. If the defendant wanted to purchase an immovable property for the sake of investment would he have agreed to convey the very same property, for the same amount even after ten years ? In the first place he would have lost the advantage of appreciation in value of the property resulting in 10 years let alone erosion of his investment on account of inflation. In the second place he would not have been able to sell, mortgage, gift or will away the property for 10 years as the obligation to convey it to the plaintiff within 10 years for the very same amount was annexed to the property and he could have dealt with his property in any of the aforesaid modes only subject to this obligation. Why should he have locked up his funds in such a manner ?

(2) The stipulated period for conveying the property was a very long period of 10 years. The very length of the period is suggestive of a transaction of mortgage and not a transaction of absolute sale with a stipulation to reconvey the property in such peculiar circumstances, bearing on the relationship between the parties or some other relevant consideration.

(3) If he wanted to purchase the property for his personal occupation, why should he have allowed the plaintiff to continue as a tenant on payment of Rs. 80 p.m. which worked out to 13 1/2 per cent interest on the sum of Rs. 7000.

(4) Admittedly the property was never mutated to the name of the plaintiff (sic). If he had become an absolute owner, why should he not have got the property mutated to his own name ? It is not even his case that he had ever applied for mutation. The fact that he allowed the property to remain standing in the name of the vendor-plaintiff tells its own tale.

(5) The obvious reason for entering into such a transaction of ostensible sale coupled with a contemporaneous agreement to sell within 10 years was that if it was not garbed with this paraphernalia and was given the nomenclature of a mortgage the period of redemption would have been 30 years. This period could not have been curtailed without attracting the doctrine of clog on equity of redemption. This was obvious reason for resorting to this device.

These factors clearly spell out the real intention of the parties that it was a transaction of mortgage to secure the sum of Rs. 7000 at approximately 13 1/2 per cent. interest. But then it is not necessary to examine this dimension of the matter inasmuch as the plaintiff has not prayed for redemption though in the plaint an averment has been made that the real intention of the parties was to create a mortgage. As the plaint stands, and as the plaintiff himself has preferred to enforce the agreement

for specific performance, it is not necessary to examine the question as to whether or not the real nature of the transaction was mortgage though it was given an appearance of a transaction of a sale. For the same reason we need not examine the question as to whether or not Section 58(c) of the Transfer of Property Act would have disabled the plaintiff from claiming the relief of redemption on the basis that the real intention of the parties was to create a mortgage and not an absolute sale coupled with an agreement for reconveyance. This question will have to be dealt with at an appropriate time having regard to the fact that there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption within the prescribed period of limitation. In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan, obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property. We need not however probe the matter any further for the purpose of disposing of the present appeal for the reasons stated earlier.

Was time of the essence of the contract ?

6. It is remarkable that the defendant has not even made an assertion in the written statement or in his evidence to the effect that time was of the essence of the contract and yet the courts below have so concluded. It is not the case of the defendant that time was made the essence of the contract by giving an intimation to this effect to the vendee. The law is well settled that in transactions of sale of immovable properties, time is not the essence of the contract. The courts below have in holding so held exactly contrary to the law declared by this Court in unambiguous terms in the following passage in Govind Prasad Chaturvedi v. Hari Dutt Shastri ((1977) 2 SCR 877 :(1977) 2 SCC 539 : AIR 1977 SC 1005) the facts wherein were almost on all fours with the facts of the present case : (SCC pp. 544-45, para 6)

> Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract. In the plaint the allegation was that the appellant has always been ready and willing to perform his part of the contract and he did all that he was bound to do under the agreement while the respondents committed breach of the contract. The respondents did not set up the plea that the time was of the essence of the contract. In paragraph 32 of the written statement all that was stated was that the appellant did not perform his part of the contract within the stipulated time and that the contract thereafter did not subsist and the suit is consequently misconceived. The parties did not go to trial on the basis that time was of the essence of the contract for no issue was framed regarding time being the essence of the contract. Neither is there any discussion in the judgment of the trial court regarding this point. The trial court after considering the evidence came to the conclusion that appellant was always ready and willing to perform his part of the contract while the respondents were not. In the circumstances therefore the High Court was in error in setting as one of the points for determination whether time was of the essence of the contract. The High Court after referring to the agreement was of the view that the agreement was entered into between the parties during the course of a litigation between the appellant and the respondents and in pursuance of the agreement the parties were directed to withdraw their cases and were directed further

not to take fresh legal steps during the period of two months within which the sale deed was to be executed. On taking into account the circumstances of the case and the conduct of the parties of serving on each other notices, counter-notices and telegrams the High Court inferred an intention on the part of the parties to treat the time as of essence of the contract. We will refer to the terms of the contract and the correspondence between the parties in due course but at this stage it is sufficient to state that neither the terms of the agreement nor the correspondence would indicate that the parties treated time as of essence of the contract. In fact, according to the agreement the sale deed ought to have been executed by May 24, but it is the admitted case that both the parties consented to have the document registered on May 25. On the question whether the time is of the essence of the contract or not we are satisfied that the High Court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raised before the trial court and when the case of time being the essence of the contract was not put forward by the respondents in the trial court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents that the time was of the essence of the contract.

Whether or not time was of the essence of the contract would have also to be judged in the context and circumstances of the case. In a given case the vendor can go away from his usual place of residence or business or go abroad without leaving his address. If time were to be treated as the essence in such a contract the rightful claim of the vendee could always be defeated by going away at the material time so that the vendee could not enforce his claim. Reliance was placed by the learned counsel for the defendants on the majority view in Shanmugam Pillai v. Anantalakshmi Amma (AIR 1950 FC 38) and on two High Court judgments (Bahadur v. Motiram, AIR 1972 Raj 250 and H. N. Malak v. Mohansingh, AIR 1974 Bom 136) wherein the principle laid down in the aforesaid decision has been followed. In Shanmugam Pillai case (AIR 1950 FC 38) the Federal Court has by majority judgment taken the view that the reciprocal promise was made by way of a 'concession' and that the compliance with the reciprocal obligation could be secured strictly within the stipulated time frame. In the present case having regard to the facts and circumstances highlighted in the course of the discussion pertaining to the question as to whether or not the transaction was a transaction of mortgage having regard to the real intention of the parties it would be difficult to hold that the agreement to sell executed by the defendant in favour of the plaintiff was by way of a 'concession'. It was a transaction entered into by the defendant who was a hard-headed businessman and the documents in question have been carefully framed in legal terminology taking into account the relevant provisions of law. The transaction also discloses the awareness of the defendant about Section 58(c) (Where the mortgagor ostensibly sells the mortgaged property -

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on condition that on such payment being made the buyer shall transfer the property to the seller

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale) of the Transfer of Property Act as is evident from the fact that the reconveyance clause is not embodied in the sale deed itself. In the agreement to sell, no reference has been made to the transaction of sale though it has been

executed contemporaneously. The defendant who has permitted the plaintiff to continue in possession on payment of rent equivalent to about 13 1/2 per cent. interest and was evidently aware of all the dimensions of the matter would not have granted any concession or executed the agreement by way a concession. The agreement was executed evidently because the plaintiff would not have executed the sale deed unless an agreement to sell by a contemporaneous document was also executed to enable the plaintiff to enforce specific performance within ten years. It was therefore a transaction entered into with open eyes by the defendant and there was no question of granting any concession. Even so it is not necessary to examine the matter in depth or at length for it is not considered necessary to rest our decision on this point. We have referred to the debate which has centred on this issue and made observations called for by the circumstances of the case, but we do not propose to rest our decision in this matter on this aspect. Hence it is unnecessary to examine the question any further.

Whether it was plaintiff who had committed breach by not being ready and willing to perform his part of contract or whether it was the defendant who had committed a breach of contract by refusing to convey the property in question to the plaintiff in pursuance to the agreement to sell executed by him in favour of the plaintiff ?

7. A last ditch effort has been made to press the argument to the utmost stretchable limit by contending that the question as to who was not prepared to perform his part of the contract, the plaintiff or the defendant, is essentially a question of fact and that having regard to the concurrent finding recorded by the High Court, the exercise to re-examine the issue on the basis of the evidence on record should not be undertaken at this level. Particularly in the context of the fact that this is an appeal by special leave under Article 136 (136. Special leave to appeal by the Supreme Court.- (1) Notwithstanding anything in this Chapter the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

> (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces) of the Constitution of India. There are many answers to this argument. Article 136 of the Constitution of India does not forge any such fetters expressly. It does not oblige this Court to fold its hands and become a helpless spectator even when this Court perceives that a manifest injustice has been occasioned. If and when the court is satisfied that great injustice has been done it is not only the 'right' but also the 'duty' of this Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed thrice. There is no warrant to import the concept of the conclusiveness of divorce on the utterance of "Talaq" thrice in interpreting the scope of the jurisdiction of this Court under Article 136. It is not the number of times that a finding has been reiterated that matters. What really matters is whether the finding is manifestly an unreasonable, and unjust one in the context of evidence on record. It is no doubt true that this Court will unlock the door opening into the area of facts only sparingly and only when injustice is perceived to have been perpetuated. But in any view of the matter there is no jurisdictional lock which cannot be opened in the face of grave injustice. This view has been taken in Variety Emporium v. Mohd. Ibrahim Naina ((1985) 1 SCC 251) to which one of us (Thakkar, J.) was a party. The relevant passage in the words of Chandrachud, C.J. may be quoted with advantage : (SCC p. 255, para 6)

It cannot be overlooked that three courts have held concurrently in this case that the respondent has proved that he requires the suit premises bona fide for his personal need. Such concurrence undoubtedly, has relevance on the question whether this Court should exercise its jurisdiction under Article 136 of the Constitution to review a particular decision. That jurisdiction has to be exercised sparingly. But, that cannot possibly mean that injustice must be perpetuated because it has been done three times in a case. The burden of showing that a concurrent decision of two of more courts or tribunals is manifestly unjust lies on the appellant. But once that burden is discharged, it is not only the right but the duty of this Court to remedy the injustice. Shri Tarkunde, who appears for the respondent, argued that this may lead and, in practice, does lead to different standards being applied by different courts to find out whether a concurrent decision is patently illegal or unjust. That, in the present dispensation, is inevitable. Quantitatively, the Supreme Court has a vast jurisdiction which extends over matters as far apart as Excise to Elections and Constitution to Crimes. The court sits in benches and not en banc, as the American Supreme Court does. Indeed, even if the entire court were to sit to hear every one of the eighty thousand matters which have been filed this year, a certain amount of individuality in the response to injustice cannot be avoided. It is a well known fact of constitutional history, even in countries where the whole court sits to hear every case, that the composition of majorities is not static. It changes from subject to subject though, perhaps, not from case to case. Personal responses to injustice are not esoteric. Indeed, they furnish refreshing assurance of close and careful attention which the judges give to the cases which come before them. We do not believe that the litigating public will prefer a computerised system of administration of justice; only, that the Chancellor's foot must tread warily.

8. On carefully perusing the pleadings and the evidence and also the findings recorded by the courts below, we are fully satisfied that the trial court was entirely in error in recording a finding adverse to the appellant-plaintiff on the ground that the plaintiff was not ready and willing to perform his part of the contract. The finding is contrary to the evidence and is palpably unreasonable. Two serious errors have been committed in reaching this conclusion. The first error which has been committed is that of drawing an adverse inference against the plaintiff as to whether plaintiff had the means to pay the amount of Rs. 7000 being the consideration stipulated in the agreement to sell. The plaintiff has stated that in January 1977 he had collected the requisite amount. He had borrowed a sum of Rs. 3000 from his brother and a sum of Rs. 2000 from his brother-in-law and he had the rest in cash. He stated that he had deposited a sum of Rs. 8000 in the bank. The defendant did not enquire from the plaintiff either the name of the bank in which he had deposited the amount or whether he had any passbook in respect of the said bank account. Nor was the plaintiff called upon to produce the passbook either by the defendant or by the court, at the instance of the defendant or on its own. Even so the trial court recorded as finding against the plaintiff on this point, as under :

> Amar Dass PW 1 has though stated that he arranged a sum of Rs. 3000 from his brother Attar Chandra and Rs. 2000 from his brother-in-law Ishwar Das and he has saved a sum of Rs. 4000 and thus he had arranged a sum of Rs. 8000 for execution of the sale deed and deposited the same in the bank but he had not filed any passbook to show it satisfactorily that he had arranged a sum of Rs. 8000 before August 16, 1977 and that the said money was in deposit in his account in the bank on August 16, 1977 or before it.....

In drawing such an adverse inference the trial court has been oblivious to the law declared by this Court in Mst. Ramrati Kuer v. Dwarika Prasad Singh (AIR 1967 SC 1134, 1137 : (1967) 1 SCR 153) wherein this Court had an occasion to observe :

> Fourthly, it is urged that the respondents did not produce any accounts even though their case was that accounts were maintained and that Basekhi Singh used to give maintenance allowance to the widows who were messing separately. It is urged that adverse inference should be drawn from the fact that accounts were not produced by the respondents and that if they had been produced that would have shown payment not of maintenance allowance but of half share of the income to the widows by virtue of their right to the property. It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts. But it is urged that even so that the accounts would have been the best evidence to show that maintenance was being given to the widows and the best evidence was withheld by the plaintiffs and only oral evidence was produced to the effect that the widows were being given maintenance by Basekhi Singh. Even if it be that accounts would be the best evidence of payment of maintenance and they had been withheld, all that one can say is that the oral evidence that maintenance was being given to widows may not be acceptable; but no adverse inference can be drawn (in the absence of any prayer by the appellant that accounts be produced) that if they had been produced they would have shown that income was divided half and half in accordance with the title claimed by the appellant.

The same error has crept into the judgment of the lower appellate court which has inter alia found fault with the appellant in this behalf :

> The plaintiff had not filed any passbook to show that he had a total sum of Rs. 8000 before August 16, 1977 in the bank and that the said money was in deposit in his account in his name on August 16, 1977 or before it....

9. The High Court also committed the same error of drawing an adverse inference against the plaintiff for not producing the passbook in disregard of the fact that neither the defendant had called upon him to do so nor had the court ordered him to do so at his instance or on its own. The relevant passage from the judgment of the High Court may be quoted in this context :

> The court noticed that the plaintiff had stated that the amount had been deposited in the back. There was no passbook of the bank to show that the plaintiff had the aforesaid amount in 1977.

Thus all the three courts have committed a serious error in drawing an adverse inference against the plaintiff which it was impermissible in view of the law declared by this Court in Mst. Ramrati Kuer v. Dwarika Prasad Singh (AIR 1967 SC 1134, 1137 : (1967) 1 SCR 153).

10. The second serious error which has crept into the judgment of the courts below is shutting their eyes to the question whether the defendant was ready and willing to perform his part of the contract and whether he had remained present at the Sub-Registrar's office on the appointed day. On the other hand the courts have been obsessed by the issue as regards the income of the plaintiff and the question as to whether and how the plaintiff could have effected a saving as stated by him on oath.

Not one question was put in order to elicit this information from the plaintiff. Even so the trial court came to the conclusion that the plaintiff could not have saved the amount as he was selling earthen pots and his income was of the order of Rs. 100 to Rs. 150 per month. It was overlooked that a sum of Rs. 7000 was obtained by the plaintiff when he entered into the transaction with the defendant in 1967 and the son for whose treatment the said amount had been raised by recourse to this transaction had died. No question was put to him whether the entire amount had been spent for the treatment and in payment of other debts etc. No question was put to him about the extent of the income of his children from labour work. No question was put to him as to the amount of his expenses. Notwithstanding these salient circumstances, the trial court came to the conclusion that the plaintiff could not have saved the amount. The lower appellate court and the High Court also mechanically confirmed the finding. The real test as to whether or not the plaintiff was ready and willing to perform his part of the contract was for the defendant to call his bluff, in case it was a bluff, by remaining present at the Sub-Registrar's office on the appointed day that is to say on August 16, 1977 as he was bound to do if he on his part was ready and willing to execute the sale deed. In fact the lower courts ought to have considered whether the defendant himself was willing and ready to perform his part of the contract by executing the sale deed in favour of the plaintiff in discharge of the obligation undertaken under the agreement of sale executed in 1967 in favour of the plaintiff. The plaintiff had sent a notice through his advocate on August 11, 1977. He had also sent a local telegraphic notice on August 11, 1977 requiring the defendant to remain present at the Sub-Registrar's office on August 16, 1977. The defendant was a resident of the same place namely Ramnagar. In fact he was a neighbour of the plaintiff. The defendant did not specifically deny the receipt of this notice. All that he mustered the courage to say in his written statement was that it was not admitted that the notice was received within time. In his written statement he did not even say on what date he received the notice. In his examination-in-chief, he stated that till August 16, 1977 he did not receive any telegram or notice from the plaintiff. The registered notice sent through the advocate and the local telegraphic notice sent to the defendant in the same town five days earlier on August 11, 1977 must have been received by him in due course in any case before August 16, 1977. He was placed in a tight corner when he was cross-examined in the context of the fact that according to him he had gone to the Sub-Registrar's office on August 16, 1977 but that the plaintiff was not present at the Sub-Registrar's office. Why did he go to the Sub-Registrar's office on August 16, 1977 if he had not received the local telegraphic notice dated August 11, 1977 requiring him to remain present on August 16, 1977 ? The defendant has not cared to explain why and how he remained present on the 16th as stated by him in his telegram dated August 17, 1977 sent to the plaintiff wherein he had asserted that the defendant himself had been present but the plaintiff had not remained present. In his deposition dated May 16, 1979 the defendant stated that he remained present at the Sub-Registrar's office. If he had not received any notice, then there was no question of the defendant remaining present at the Sub-Registrar's office. Even so in his cross-Examination he made bold to say that he had not received the notice from the plaintiff till the limitation period expired that is to say till the expiry of August 16, 1977. He did not mention as to on what date he received the notice. His oral evidence betrays complete disregard for truth. The conclusion is therefore inevitable that the defendant was not ready and willing to perform his part of the contract and had deliberately abstained from remaining present at the Sub-Registrar's office on the last day for performance though he was called upon to do so by the plaintiff within the stipulated time. Regarding receipt or non-receipt of notice, the defendant says :

> I received the notice after the limitation expired. I do not remember when I received it at the moment. That notice was brought to me by the postman after the limitation expired. I did not give the plaintiff any reply to that notice. I do not remember

> whether the notice was of August 11, 1977 or not. Ram Nagar is 18 miles away from Kashipur. From Kashipur to Ram Nagar or from Ram Nagar to Kashipur it takes about 3, 4, 5 days to get the registry delivered. I do not know whether the telegram is delivered the same day or not. I did not receive the telegram of the plaintiff. I do not remember whether I had specifically stated this in my written statement or not as to whether I had received the telegram of the plaintiff.... When I received the notice of the plaintiff I was not ready to get the sale deed executed because the limitation had expired.

11. The underlined portion read in the context of the earlier discussion makes it impossible to believe the defendant's evidence.

12. What emerges from this evidence is that he had in fact received the notice, but he had not replied to the notice. It also emerges that according to him the notice was not received before the stipulated date namely August 16, 1977 and he was not prepared to execute the sale deed because he had not been called upon to perform his part of the contract before August 16, 1977, the deadline. He found himself in an inconvenient position when he was asked questions as regards the telegram sent by him that he had remained present in the Sub-Registrar's office which was inconsistent with his earlier stand that he had never received any intimation requiring him to remain present on August 16, 1977. This is what he had to say in his evidence :

> On August 17, 1977 I gave the plaintiff a telegram that on August 16, 1977 I had gone there but you did not come there.

And he stated that :

> I had given intimation to the plaintiff that I shall be present in the office of the Sub-Registrar on August 16, 1977 and had gone there to get the sale deed executed. I had given this information orally. I had on August 11, 1977 given information that I shall go to the office of the Sub-Registrar on August 16, 1977. I again said that the plaintiff had said that he would go there on that day. The plaintiff had said that he was arranging for the money and he would bring money with him for getting the registration done. On August 16, 1977 I did not see the plaintiff there.

This part of his evidence makes it clear that his stand in the written statement that he had not received the notice was false. So also his stand in the written statement that the plaintiff had never contacted his and requested him to remain present at the Sub-Registry on August 16, 1977 was also false. He had in terms now had to say that the plaintiff had orally told him that he would remain present, at the Sub-Registry on August 16, 1977 with the money. His evidence is entirely incredible and manifestly false. When this aspect is viewed in the context that in his examination-in-chief he did not say one word about attending the Sub-Registrar's office and in his written statement also he had taken a false stand, there is no manner of doubt that the defendant was never willing to perform his part of the contract, that he had not gone to the Sub-Registry at all, and that he merely wanted to defeat the claim of the plaintiff by refusing to remain present at the registry on the day on which deadline for conveying the property was to expire, that is to say on August 16, 1977. The trial court has shut its eyes to this dimension of the matter. Surely the plaintiff cannot be expected to do more than what he did. Admittedly he had orally contacted the defendant and by two notices conveyed to him that he would attend the Sub-Registry with the money and that the defendant should remain present at the Sub-Registry. It is established that the plaintiff had gone to the Sub-Registry and

remained present there. He had also made an application to make record about his presence in respect of which documentary evidence in the shape of receipt issued by the Sub-Registrar's office has been placed on record. This part of the plaintiff's evidence has not been disbelieved by the trial court or by the lower appellate court. Apparently therefore, the plaintiff had done everything in his power to perform his part of the contract by requiring the defendant to remain present at the Sub-Registry and by himself remaining present in the Sub-Registry. The defendant did not remain present at the registry as is evident from an appreciation of his evidence in the light of the averments contained in the written statement and his own statement to the effect that he had never received any information to remain present on the 16th. This crucial aspect has been entirely overlooked by the trial court, the lower appellate court, and the High Court. If the defendant was not willing to perform his part of the contract what more could the plaintiff have done ? The courts below have therefore failed to apply themselves to this crucial aspect of the matter and have been carried away by the confusion created in the context of the extent of income of the plaintiff and his failure to produce the passbook. On an appreciation of the evidence on record, on other view is possible. The finding recorded by the trial court is contrary to the record and is based on an entirely wrong view of law in disregard of the law declared by this Court, in respect of the circumstances in which the adverse inference can be drawn. The finding is rendered also in total disregard of the circumstances that the defendant was never willing to perform his part of the contract and had not cared to remain at the Sub-Registrar's office, notwithstanding the intimation given through the advocate by registered post and by a local telegram. The only conclusion which can be reasonably drawn is that the defendant wanted to defeat the claim of the plaintiff and wanted to wriggle out of the obligation undertaken by him. Under the circumstances the finding recorded by the courts below must be unhesitatingly set aside.

13. In the result the plaintiff must succeed. The decree passed by the trial court as confirmed by the lower appellate court and the High Court is set aside and the suit of the plaintiff is decreed as prayed for. The plaintiff has already deposited a sum of Rs. 10,000 in this Court in accordance with the direction of this Court issued at the time of granting special leave. This amount will be transmitted to the trial court. From out of this amount the trial court will pay the sum of Rs. 7000 to the defendant and will permit the plaintiff to withdraw the remaining amount in order to purchase the stamp papers etc. and to prepare a draft of the sale deed to be executed. The defendant shall execute the sale deed in favour of the plaintiff on receiving the aforesaid sum of Rs. 7000 from out of the amount deposited in this Court by the plaintiff, within six months from today. On his failure to do so the trial court will appoint an official of the court to execute the sale deed in favour of the plaintiff. The trial court will be at liberty to grant reasonable time to the plaintiff if and when necessary in order to make further deposit or to comply with the directions of this Court if necessity arises in this behalf.

14. The appeal in allowed. The judgment of the trial court as confirmed by the lower appellate court and the High Court is set aside. The suit is decreed in the aforesaid terms. There will be no order regarding costs throughout.

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