

K. Saraswathy Alias K. Kalpana (Dead) By Lrs

Vs

P.S.S. Somasundaram Chettiar

Civil Appeal No. 111 (N) of 1981

(CJI R. S. Pathak, Rangath Misra, Sabyasachi Mukharji JJ)

01.05.1989

JUDGMENT

PATHAK, C. J. –

1. The appellant herein filed Civil Suit No. 18 of 1968 in the High Court for specific performance of a contract to sell the suit property by the respondent herein to her. A question which arose for decision was whether the appellant should discharge the mortgage of the suit property created by the respondent in favour of the South Indian Bank. The High Court held that the appellant was liable to discharge the mortgage and directed her to deposit in court a sum of Rs. 3,50,000 with interest for the purpose. The appellant paid the amount direct to the mortgagee. The High Court refused to accept the payment made directly to the mortgagee as due compliance with its decree and against that order of the High Court the appellant preferred Civil Appeals Nos. 1993-1994 of 1977. This Court disposed of the said appeals by the following order dated November 29, 1979 ((1980) 1 SCC 630) (SCC p. 634, para 7) :

"We direct that a decree be passed that the plaintiff-appellant do deposit within six months from today the entire sum of Rs. 3,45,000 together with interest due up to date at the rate of 11 per cent. together with a undertaking that she would give up all her rights under the mortgage decree passed in her favour in O.S. No. 154 of 1968, except to the extent of the amount actually paid to the South Indian Bank for taking the assignment. If these two conditions are fulfilled, the appeals will stand allowed and a final decree for specific performance passed. In the event of non-compliance with either of these conditions the appeals will stand dismissed with costs."

2. Purporting to comply with the above order of this Court, the appellant deposited a sum of Rs. 2,42,822.19 on April 11, 1980 in the High Court with the undertaking to give up all her rights decreed in C.S. No. 154 of 1968 and filed C.M.P. Nos. 2424 and 2425 of 1980 in the High Court for a declaration that the payment as mentioned above was in compliance with the order of this Court and she claimed a set off of the amount of Rs. 5,96,687.19 paid by her earlier to the South Indian Bank which she was entitled to recover from the respondent in accordance with the second condition of the order of this Court dated November 29, 1979. The time limit fixed for fulfilling the two conditions set out in this Court's order dated November 29, 1979 having fallen on May 29, 1980 and the High Court not having passed orders on her C.M.Ps. Nos. 2424-2425 of 1980 till then, she paid into the High Court a sum of Rs. 6,02,000 on May 29, 1980 by cheque purporting to comply with the first condition set out in this Court's order aforesaid.

3. C.M.Ps. Nos. 2424 and 2425 of 1980 filed by the appellant in the High Court were dismissed by

a Single Judge by an order dated June 6, 1980 against which the appellant preferred petitions for special leave to Appeal Nos. 947-48 of 1981. The appellant also filed another C.M.P. No. 2875 of 1980 in the High Court for a declaration that she had complied with the aforesaid order of this Court dated November 29, 1979 which was dismissed by the High Court. Civil Appeal No. 111 of 1981 has been preferred against the judgment and order of the High Court in C.M. P. No. 2875 of 1980.

4. The only question decided against the appellant by the High Court in C.M.P. No. 2875 of 1980 was with regard to the deposit of the amount stipulated in the first condition of the order of this Court dated November 29, 1979. The crucial issue was whether the payment made by the appellant on May 29, 1980 by cheque of the amount of Rs. 6,02,000 together with the amount deposited earlier on April 11, 1980 was in due compliance of the first condition of this Court's order dated November 29, 1979. The High Court found that the simple delivery of the cheque on May 29, 1980 could not be deemed to be deposit of the specified sum on May 29, 1980 in satisfaction of the order of this Court when the amount of the cheque had been realised only on June 16, 1980. The High Court held that the appellant was bound to comply with the Original Side rules of the High Court within prescribed the procedure to be followed in depositing the money in court and, in particular, Order 31, Rules 1 to 6 thereof which were aimed at securing the deposit of the money in the Reserve Bank of India to the credit of a particular proceeding on or before the specified date. Accordingly, the High Court refused to grant the declaration that the appellant had complied with the order of this Court dated November 29, 1979.

5. It is contended before us on behalf of the appellant that the cheque for Rs. 6,02,000 was tendered in court on May, 29, 1980 and that it was duly honoured by the bank and money was realised under the cheque, and therefore it must be taken that payment had been effected by the appellant on May 29, 1980 within the time stipulated by this Court in its order dated November 29, 1979. In *CIT v. Ogale Glass Works Ltd., Ogale Wadi* (AIR 1954 SC 429 : (1955) 1 SCR 185 : (1954) 25 ITR 529) it was laid down but this Court that payment by cheque realised subsequently on the cheque being honoured and encashed relates back to the date of the receipt of the cheque, and in law the date of payment is the date of delivery of the cheque. Payment by cheque is an ordinary incident of present day life, whether commercial or private, and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course. There is nothing in the order of this Court providing that the deposit by the appellant was to be in cash. The terms of the order dated November 29, 1979 are conclusive in this respect and it is the intent of that order which will determine whether payment by cheque within the period stipulated in that order was excluded as a mode in satisfaction of the terms of that order. The time for payment is governed by the order of this Court.

6. It is alleged on behalf of the respondent that there was no money on the date of delivery of the cheque to support payment of it and that it was subsequently when arrangements were made that the cheque was realised. Now, the High Court has not found that if the cheque was presented for encashment on the date it was delivered the cheque would not have been encashed. There is nothing to suggest also that the cheque was not honoured in due course and that the bank had at any time declined to honour it for want of funds in the ordinary course. In any event, there is nothing to suggest that, under the arrangements made for payment of the cheque, even if it had been encashed on the date it was delivered the cheque would not have been encashed. There is no finding by the High Court that on May 29, 1980 the cheque would not have been realised. That being so, the question whether the appellant had wrongly stated that her counsel had offered to pay cash to the High Court office on May 29, 1980 ceases to be relevant. We also see no substance in the objection

taken before the High Court that in the letter dated May 29, 1980 addressed by counsel for the appellant forwarding the cheque for Rs. 6,02,000 there was request for the return of the cheque in case it was found that the appellant was entitled to the set-off claimed by her. The application of the appellant was claiming adjustment was pending in court, and no conclusion can be drawn against her on the ground that she had requested a return of the cheque in the event of the adjustment being allowed by the court.

7. We are of the view that the conditions set forth in the order of this Court dated November 29, 1979 in the facts and the circumstances of the case have been complied with by the appellant substantially and she is entitled to the benefit of that order.

8. The appeal is allowed, the order dated October 21, 1980 of the High Court is set aside and the application by the appellant for of direction to the respondent to execute the sale deed in her favour is allowed. In the circumstances of the case, there is no order as to costs.

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