

P. R. Deb and Associates

Vs

Sunanda Roy

Civil Appeal No. 4631 of 1993

(Faizan-uddin, Mrs. Sujata V. Manohar JJ)

01.03.1996

JUDGEMENT

Mrs. SUJATA V. MANOHAR, J.:-

1. Civil Appeal No. 4631 A of 1993 is by original defendant to the suit challenging the decree of specific performance which has been passed in appeal by the High Court of Calcutta against the appellant. The judgment and decree of the High Court in appeal is dated 28th of August, 1991. By this judgment and decree, the judgment and order of the trial Court dismissing the respondent's suit for specific performance was set aside. The High Court granted to the respondent a decree for specific performance of the contract in question and directed the appellant to execute the deed of conveyance as set out therein on the respondent paying to the appellant the amounts set out therein. The decree provided that the respondent shall make these payments with interest as specified therein within a period of three months from the date of the judgment; and the appellant was directed to execute the documents within three months thereafter. The respondent, however, did not make payment within specified period which expired on 27th of November, 1991. The respondent, however, ultimately made an application dated 3rd of February, 1992 before the High Court for extension of time for making payment under the decree by a further period of three months. The appellant opposed this application. The High Court by its order dated 26th May, 1993 has declined to grant any extension of time for payment of the said amounts holding, inter alia, that in the facts and circumstances of the case it would cause hardship, serious prejudice and injury to the opposite party if any further extension of time is given thereby reopening the decree. The application of the respondent for extension of time has been dismissed by the High Court thus resulting in the respondent's suit for specific performance standing dismissed.

2. Civil Appeal No. 4631 of 1993 filed by the respondent from the judgment and order of the High Court dated 26th of May, 1993. For the sake of convenience the appellant in Civil Appeal No. 4631 A of 1993, that is to say the original defendant, is referred to as the appellant while the respondent in Civil Appeal No. 4631A of 1993, that is to say the original plaintiff, is referred to as the respondent.

3. The appellant is the owner of certain immovable property bearing No. 30. Gariahata Road, South Calcutta. By the agreement dated 24th of October, 1977 the appellant agreed to sell to the respondent the said property for a sum of Rs. 9 lakhs on the terms and conditions set out in the agreement of sale dated 24th of October, 1977. Under the terms of this agreement a sum of Rs. 25,000/- was to be paid at the time of execution of the agreement. A further sum of Rs. 4 lakhs was to be paid within five months from the date of the agreement and the balance amount was to be paid at the time of conclusion of the purchase, timebeing of the essence of the contract. Under Clause 4

of the agreement , after the title of the appellant was accepted by the respondent, the respondent was required to send to the appellant's advocate a draft to the proposed conveyance in order to enable the appellant to apply for and obtain the income-tax clearance certificate under Section 230-A of the Income-tax Act and for permission of the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976. Under Clause 6 of the agreement the appellant was required to hand over vacant possession of the said property on completion of sale except for possession of four shop rooms in the front portion. Clauses 11,13 and 14 of the agreement are as follows :

"11. And it is further agreed if ultimately the Conveyance is to be executed in favour of a Cooperative Housing society to be initiated by the said P. R. Deb & Associates as nominee of the said Purchaser herein and a further Agreement may be entered into between the Promotor of that Housing Society and the Vendor and the said Agreement be registered at the Office of the District Registrar at Alipore, 24-Parganas and the Vendor shall have to give necessary consent letter to the Co-operative Housing Society to the effect that she has agreed to sell the land and the buildings thereon to the Cooperative Housing Society.

13. On the vendor's making out a marketable title to the said property free from all encumbrances whatsoever and on her complying with the obligations under this Agreement, if the purchaser fails to complete the purchase within the time and in the manner hereinbefore mentioned, the Vendor thereupon shall have the full power of rescinding this Agreement by giving notice in writing to the Purchaser or its said Advocate and the said earnest money of Rs. 25,000/- shall in that event stand absolutely forfeited by the Vendor as and by way of liquidated damages and the Vendor shall have further rights to sue the purchase for specific performance of this Agreement and for other reliefs.

14. It is clearly understood and agreed that further payment of Rs. 4,00,000/- will not be treated as earnest money for the operation of this clause. In case the transaction falls through the said sum of Rs. 4,00,000/- has to be refunded forthwith."

4. Under the terms of the said agreement the respondent was required to pay Rs. 4 lakhs within five months, that is to say, on or before 23rd of March, 1978. As the respondent filed and neglected to pay this amount with prescribed period, the appellant addressed to the respondent her solicitor's letter dated 12-4-1978. In this letter, the appellant pointed out that the payment of Rs. 4 lakhs had not been made by the respondent to the appellant within the prescribed period under the agreement. It was further pointed out that the respondent was aware that the appellant was residing in the said property. The appellant had agreed to give vacant possession of this property on completion of sale. The payment of Rs. 4 lakhs was required under the terms of the agreement to enable the appellant to acquire a suitable residence by utilising this sum. The letter also records that in fact the appellant had inspected a number of properties and approved two of them for purchase; but owing to the default on the part of the respondent in paying the sum of Rs. 4 lakhs the appellant was not able to proceed any further. On account of the default committed by the respondent, the appellant had the option to terminate the agreement. However, without prejudice to her rights she called upon the respondent to pay the said sum of Rs. 4 lakhs within seven days failing which the appellant would be compelled to take further steps against the respondent as he may be advised. Despite this notice, the respondent failed and neglected to pay the sum of Rs. 4 lakhs.

5. The respondent contends that under Clause 11 of the said agreement, the appellant was required

to enter into a further agreement with the promotor of a proposed housing society being formed by the respondent and was required to give a consent letter to the co-operative housing society as set out in Clause 11. The respondent contends that although meetings were held between the solicitors of the appellant and the respondent, the appellant did not give such consent or enter into an agreement with the proposed co-operative housing society which was then being set up by the respondent. It is the respondent's case that he could not raise the sum of Rs. 4 lakhs since the appellant did not consent to and/or execute an agreement in favour of the proposed housing society in supersession of the agreement of 24th of October, 1977. In this connection, the respondent's solicitors have addressed two letters to the appellant's solicitors. One is a letter dated 5th of June, 1978, written long after the expiry of the date for payment of Rs. 4 lakhs, in which the respondent has called upon the appellant to approve the draft agreement for sale between one M/s. Anirban Cooperative Housing Society Ltd. which was not then registered and the appellant in supersession of the existing agreement along with a cheque for Rupees 25,000/- drawn in favour of the appellant by the said proposed society. This cheque has not been encashed. The second letter from the respondent to the appellant's solicitors is dated 25th September, 1980 in which it, is inter alia, recorded that unless the agreement was executed between the proposed cooperative society and the appellant, it would not be payment of Rs. 4 lakhs. The letter also records that the appellant had, during the negotiations, taken the stand that unless the sum of Rs. 4 lakhs was paid the appellant would not execute the fresh agreement for sale. This letter also records that after the agreement between the proposed co-operative society and the appellant is completed, the respondent will within a month thereafter, make payment of Rs. 4 lakhs. But unless the agreement is completed it is impossible to collect the money from the members of the proposed co-operative society.

6. On 10-11-1980, the respondent filed a suit for specific performance against the appellant praying for specific performance of the agreement of 24th of October, 1977. The trial Court by its judgment and order dated 24-12-1985 dismissed the suit holding that the respondent was not ready and willing to perform his part of the contract. In appeal, however the High Court has granted specific performance as prayed for on terms and conditions which are set out in its judgment and decree dated 28-8-1991. Hence the present appeal has been filed by the appellant.

7. Under the agreement of sale dated 24-10-1977, the respondent was required to make part payment of Rs. 4 lakhs within five months of the agreement of sale. The agreement has clearly provided that this payment is not by way of earnest but it is part payment of the purchase price. The purpose of this payment is clearly set out in the appellant's solicitor's letter dated 12-4-1978 addressed to the respondent's solicitors. Early payment of the amount of Rs. 4 lakhs was required as the appellant had to purchase alternative residential accommodation for herself in order to carry out her obligation under the agreement of sale to deliver vacant possession of the property to the respondent except for the four shops set out in the said agreement. By her solicitor's letter of 12th April, 1978, the appellant had also made it clear that she requires payment of Rs. 4 lakhs for this purpose and gave notice to the respondent to pay this amount within a week of the said letter since the time for payment had already expired. Clearly, payment of Rs. 4 lakhs within a reasonable time was an essential term of the contract. Because a late payment of this amount may affect the appellant's right to obtain suitable alternative residential accommodation; property prices may increase, thus affecting the appellant's right to purchase a suitable residential accommodation. From the reply which has been sent by the respondent's solicitor, especially the reply dated 25-9-1980, it is quite clear that the respondent was not in a position to pay the sum of Rs. 4 lakhs either within the time specified in the agreement of sale or within a reasonable time. In fact, he has clearly set out in the said letter that unless he is able to enter into a suitable arrangement with a co-operative housing society, he will not be able to pay Rs. 4 lakhs to the appellant. He has insisted, therefore, on the

appellant first entering into an agreement with a proposed housing society which admittedly, never came into existence. There is nothing in Clause 11 of the agreement of sale which requires the appellant to enter into an agreement of sale which requires the appellant to enter into an agreement with a proposed co-operative housing society as a condition precedent to receiving part payment of the sum of Rs. 4 lakhs. Clause 11 is independent of the right of the appellant to receive a sum of Rs. 4 lakhs. The agreement specifies the time within which the sum of Rs. 4 lakhs was to be paid and the correspondence makes it quite clear that the respondent was not in a position to pay this amount within any reasonable time thereafter because he had in turn, to collect this amount from the expected members of the proposed co-operative housing society. There is no evidence in this case to show whether there were any members of this proposed co-operative housing society and whether the respondent was in a position to collect this amount of Rs. 4 lakhs. In fact the evidence is to the contrary. The proposed co-operative housing society was never registered and there is nothing to show that there were any members of this proposed co-operative housing society. Although the respondent and his solicitor have given evidence in the case, they have not stated that the respondent had the sum of Rs. 4 lakhs at the material time or that the respondent was in a position to pay this amount within a reasonable time. There is nothing in the agreement requiring the appellant to enter into an agreement with the proposed co-operative housing society before the sum of Rs. 4 lakhs is released to her. The trial Court, therefore, had rightly come to the conclusion that the respondent-plaintiff was not in a position to carry out the terms of agreement of sale. The plaintiff, in a suit for specific performance must be ready and willing to carry out his part of the agreement at all material times. Such is not the case here. In fact, even after the decree of specific performance, the respondent was not able to deposit the amounts specified by the High Court within the time prescribed. Ultimately he applied for extension of time for deposit of amount which application was rejected.

8. In the case of Chand Rani (Smt.)(Dead) by Lrs. v. Karnal Rani (Smt.)(Dead) by Lrs.(1993 (1)SC 519): (AIR 1993 SC 1742), a Bench of Five judges of this Court considered a similar situation, where the contract stipulated that a sum of Rs. 98,000/- would be paid by the purchaser to the vendor within a period of ten days only. Despite notices of the vendor, the vendee was not willing to pay the said amount unless vacant possession of a part of the property was given by the vendor to the vendee. The court said that in view of the express terms of the contract coupled with the conduct of the vendee, it was clear that the time was of the essence of the contract and the vendee was not ready and willing to perform the contract. In these circumstances, this Court upheld the refusal of the High Court to grant specific performance. This Court has observed that although in the case of a sale of immovable property time is not of the essence of the contract, it has to be ascertained whether under the terms of the contract, when the parties named a specific time within which completion was to take place really and in substance it was intended that it should be completed within a reasonable time. It observed that the specific performance of a contract will ordinarily be granted notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that the time was not of the essence of the contract. But even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions of the contract so warrant. These can be inferred. (1) from the express terms of the contract; (2) from the nature of the property and; (3) from the surrounding circumstances. For example, the object of making the contract may make it clear that the agreement requires to be performed within a reasonable time. The Court said that the stipulation in the contract regarding payment of Rs. 98,000/- within a period of ten days only showed that the failure to pay

the amount within the stipulated period would constitute a breach of contract.

9. The present case is similar. The clause relating to payment of various amounts under the contract including the sum of Rs. 4 lakhs states that the time is of the essence, Moreover, by his letter of 12th April, 1978, also the appellant has made payment of Rs. 4 lakhs within a period of seven days from the date of notice, of the essence of the contract pointing out the circumstances which require payment of Rs. 4 lakhs within a reasonable time. As the respondent did not comply and was unwilling and/or unable to comply with this term of the agreement, he cannot be considered as ready and willing to perform his part of the contract.

10. In the case of Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son, (1987 (Supp)SCC 340) : (AIR 1987 SC 2328), this Court has observed that the Court should meticulously consider all facts and circumstances before granting specific performance. The Court take care to see that it is not used as an instrument of oppression to have an unfair advantage.

11. In the present case, the right of the appellant to purchase suitable residential accommodation is seriously affected by non-payment of Rs. 4 lakhs within a reasonable time. The respondent had failed to comply with the term of the agreement relating to payment of this amount. In these circumstances, in any case, a decree for specific performance cannot be granted as it would be unfair and unreasonable to do so. The High Court, therefore, was not right in setting aside the judgment and order of the trial Court.

12. We therefore, allow Civil appeal No. 4631 A of 1993 and restore the judgment and order of the trial Court while setting aside the judgment and decree of the High Court.

13. In view of Civil Appeal No. 4631-A of 1993 being allowed as above, nothing now survives in Civil Appeal No. 4631 of 1993 which is against the refusal of the High Court to extend time for making payment of the amounts under the decree of the High Court which has now been set aside. The High Court passed a conditional decree whereby the High Court has ordered inter alia, that in the event of the respondent herein committing default in making the payment to the appellant within the time as specified in the decree, the suit for specific performance of the contract "shall and do stand dismissed." The respondent contends that the High Court has the power to extend time for making payment despite this provision in the decree. While the appellant contends the Court having become functus officio on passing of the above conditional decree, it cannot further extend time. The High Court has declined to extend time in the facts and circumstances of the case. We need not, however, examine the detailed contentions raised by both the parties in this connection since this dispute has now become redundant, the decree for specific performance having been set aside. Civil Appeal No. 4631 of 1993 is, therefore, dismissed. The respondent shall pay to the appellant costs of the appeals.

14. The respondent will be at liberty to withdraw the amount deposited pursuant to the orders of the Court with accrued interest, is any.

Appeal allowed.