

# CALCUTTA HIGH COURT

Jadu Nath Gupta

Vs

Chandra Bhusan Sur

(Graham ,J.)

04.05.1931

## JUDGMENT

### **Graham, J.**

1. This appeal arises out of a suit for specific performance the question involved being whether the plaintiff, now appellant, was entitled to the relief which he claimed.

2. The facts which led to the institution of the suit, may be briefly referred to, Some of those are common ground, while as to others there is divergence in the versions put forward on behalf of. the respective' parties. It appears that the plaintiff appellant, who is a Kabiraj practising in Calcutta, belongs to the Noakhali District where defendant 1, Rai Raj Kumar Datta Bahadur (hereafter referred to as the Rai Bahadur) also resides. In May 1924 the Rai Bahadur went to Calcutta, and it is the case of both parties that while he was there a contract was entered into between him and the plaintiff whereby in consideration of a salami of Rs. 400 he was to give to the plaintiff lakheraj right in a tank or dighi, which the plaintiff had been holding under him at an annual jama of Rs. 52. According to the Rai Bahadur the whole of Rs. 400 was to be paid on the next day while according to the plaintiff Rs. 200 was paid on 3rd May and the balance of Rs. 200 was to be paid at a later date after the Rai Bahadur had returned to Noakhali. This latter sum, or to be precise Rs. 170 was, it is not disputed, subsequently tendered by the plaintiff's brother Dwarika Nath Gupta not however within the time stipulated but towards the end of May. The Rai Bahadur had however already treated the contract as broken in consequence of the previous default, and had settled the tank with defendant 2 on receiving a salami of Rs. 800.

3. The plaintiff's case was that he had always been and still was ready to pay the balance of Rs. 200, and that he had repeatedly pressed the Rai Bahadur to execute the promised conveyance but with out success. He accordingly sued for specific performance of the contract, and in the alternative for recovery of Rs. 200 plus Rs. 500 as compensation from the Rai Bahadur.

4. The trial Court granted a decree for specific performance against defendants 1 and 2 with costs against all three defendants.

5. Against that decision there was an appeal by defendants 2 and 3, and the learned Additional Subordinate Judge in a lengthy and elaborate judgment arrived at a different conclusion holding

that in the facts and circumstances proved the plaintiff was not entitled to specific performance. He accordingly allowed the appeal, set aside the decree of the Munsif and directed that the plaintiff should recover Rs. 200 from defendant 1 with proportionate costs throughout. In other respects the suit was dismissed and defendants 2 and 3 were given costs (one (one set) on the same scale throughout.

6. The plaintiff has now preferred this second appeal and the question is whether the learned Additional Subordinate Judge was right in refusing specific performance. In my judgment the facts and circumstances, which have been proved in this case, fully justify the conclusion at which he arrived. The grounds upon which I base my opinion are mainly three. In the first place it seems to me that there was a palpable failure on the part of the plaintiff to carry out his part of the contract. Secondly, and this may be considered in conjunction with the first point, I think having regard to the particular facts and circumstances proved that it should have been held that time was of the essence of the contract. Thirdly, I agree with the view of the Subordinate Judge that in the events which had happened the granting of a decree for specific performance would involve hardship and inequity to the defendants.

7. The first two points may be considered together. The question whether time was of the essence of the contract or not, has not been very clearly dealt with in the Courts below. The Munsif was however apparently definitely of opinion that time was not an essential factor. The Additional Subordinate Judge seems to have held the same view, though it is negated by some of the findings at which he has arrived. In arriving at that conclusion moreover he has taken into consideration circumstances which subsequently developed instead of confining himself to the state of affairs which existed at the time when the contract was entered into. Time may be of the essence] of a contract by reason of an express condition, or such condition may be inferred from the circumstances and intention of the parties. Viewed from either of these standpoints it seems to me that time ought in this instance to be held to have been of the essence of the contract. It has been found by the Subordinate Judge that the Rai Bahadur was at the time of entering into the contract in urgent need of money (see p. 8 of the paperbook), and that therefore he insisted that the entire sum of Rs. 400 should be paid immediately. No doubt in cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract. But that presumption is rebuttable, and it is rebutted, as I think, in this case. The fact that the Rai Bahadur was in urgent need of the money is borne out by the favourable nature of the contract to the plaintiff who was to get for a salami of Rs. 400 a lakheraj right in lieu of a jama of Rs. 52. The friendship between the parties and the plaintiff's declared intention of dedicating the tank to public use may, have influenced the Rai Bahadur, but even allowing for those considerations it does not seem probable that he would have agreed to such terms except upon prompt payment in cash. Be that as it may there can be no doubt that he did grudgingly agree to payment of the balance of Rs. 200 within seven or eight days of his return to Noakhali. The mere fact that he waived his right to immediate payment does not however show that time was not of the essence of the contract, and the circumstance that, while agreeing to postponement, he still insisted on payment at an early date confirms the view that time was essential.

8. The position therefore was that there had been an initial breach of the contract in not paying Rs. 400 on the following day. I have already referred to the finding of the Subordinate Judge on this point. That breach was however condoned, and further time was allowed for payment of the balance of Rs. 200 until the Rai Bahadur returned to Noakhali or within seven or eight days of

his return thither. There was now however a further dual breach by the plaintiff. Not only was the money not tendered until towards the end of May, but even then the amount brought was only Rs. 170 instead of Rs. 200. In dealing with this point the Munsif seems to me to have employed a very specious argument holding that, although it was true only Rs. 170 was brought if the Rai Bahadur had refused to accept it on the ground that it was short of the amount due, it would have been easy for Dwarika Babu to make up the full amount by getting a loan of Rs. 30. He then concludes that that was not the real reason for the Rai Bahadur's refusal, and that the real reason was that Dwarika Babu was late in paying the money. It seems to me that this argument is hardly fair to the Rai Bahadur. The Rai Bahadur in his evidence recorded on commission stated that he refused the money because it was short of the amount due. The learned Subordinate Judge has observed (at p. 9 of the paper book) that the Rai Bahadur does not suggest anywhere that the shortness of the amount was the ground of his refusal.

9. That statement therefore is incorrect. In any case there was every justification for refusing the money upon the other ground that it was not paid within the time agreed on. Thereafter it seems to me that the conduct of the plaintiff was very damaging to his case. In this connexion the Subordinate Judge has observed as follows:

But then comes the repudiation of the contract by the Rai Bahadur by the end of May 1924. Whether right or wrong plaintiff knew it for certain that such was the fact, and he had his brother's letter counselling him to smooth over the hitch. He does practically nothing for a whole year. Many things happened in between.

10. He then goes on to refer to certain circumstances which compelled the Rai Bahadur to raise money with the result that in the absence of any further move by the plaintiff he (the Rai Bahadur), assuming that the contract was at an end, settled the tank in December 1924 with defendant 2 at a salami of Rs. 800 in cash. In view of the quiescence of the plaintiff for a whole year it is difficult to hold that the Rai Bahadur was not justified in assuming that the contract was at an end, and that the plaintiff did not want to proceed with it. The result may be unfortunate for the plaintiff but he has only himself to blame for it. At every stage he defaulted to carry out his part of the contract, and when his conduct led to the only reasonable conclusion that he did not wish to proceed further in the matter he made a 'fancied grievance' of the fact that the tank had been settled with some one else, and dragged into Court the Rai Bahadur who had treated him with every consideration and indulgence. As the learned Subordinate Judge has said it was not what was to be expected from a friend, and I am in agreement with his conclusion that in all the circumstances disclosed it is not a case in which the Court ought to grant specific performance.

11. In dealing with the question whether time was of the essence of the contract I have assumed that this is a question of law and not of fact being a legal inference to be derived from the facts, and in that view of the matter have considered that it is open to us to come to our own conclusion upon the facts. In my judgment a party guilty of the laches of which the plaintiff has been guilty in this case ought not to be permitted to obtain a decree for specific relief. Under Section 22, Specific Relief Act the granting of such relief is discretionary, and I am of opinion that the facts and circumstances which have been proved afford ample justification for the refusal to grant relief in the exercise of that discretion.

12. The third ground mentioned above furnishes an additional reason for refusal inasmuch as the grant of the relief sought for would involve hardship and inequity to the defendants which it

would be neither just nor expedient to inflict upon them.

13. We consider that there was no justification for the retention of the Rs. 200 by the Rai Bahadur after he regarded the contract as having been rescinded, and that being so we think interest ought to have been allowed to the plaintiff upon that sum from the date when the contract was deemed to be at an end. We accordingly dismiss the appeal with this modification: that the plaintiff-appellant will receive interest at 6 per cent per annum on the said sum of Rs. 200 from 1st June 1924 until date of realization.

14. The appellants' claim for damages is without any justification, and cannot be entertained. Each party will bear his own costs throughout.

### **Suhrawardy, J.**

15. The following pro-positions of law are deducible from the authorities on the point under consideration. The English doctrine of delay and laches showing negligence in seeking relief in a Court of equity cannot; be imported into the Indian law in view of Article 113, Limitation Act, which fixes a period of three years within which a suit for specific performance should be brought. Except in mercantile and business contracts, time is not of the essence of the contract, but it may be material for the purpose of considering whether in the circumstances of a particular case, specific performance should be granted. Though time may not be essential, delay even within the time prescribed by law will affect the remedy. Absence of proof 'of plaintiff's readiness and earnestness to perform his portion of the contract will entitle the Court to exorcise its discretion under Section 22, Specific Belief Act, and re-fuse relief to the plaintiff which otherwise he would be entitled to secure: *Mahendra Nath v. Kali Prosad*<sup>1</sup> Mere delay is not a ground for refusing relief to the plaintiff if there has been no change in the status quo since the contract, but where the conduct of the plaintiff is such that though it does not amount to abandonment but shows waiver or acquiescence especially when inaction on his part induces the defendant to change his position, the plaintiff ought not to be allowed any relief: *Kissen Gopal v. Kali Prosnno*<sup>2</sup> The law upon this point has been authoritatively laid down by Sir Barrios Peacock in the *Lindsay Petroleum Company v. Prosper Armstrong Heerd Abram Farewell and John Kemp*<sup>3</sup> where ho says: Now the doctrine of laches in Courts of equity is net an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or whom 'toy his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be .: reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases, are the length of the delay and the nature of the acts done during the interval which may affect either party to cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

16. Every case in which the discretion given by the law is to be exercised must be tested on its particular facts and surrounding circumstances, such as the relation between the parties, the nature of the subject-matter of the contract, the conduct of the parties and other material

circumstances existing at the time.

17. Now, keeping these principles in view, we have to weigh the facts as found in this case by the learned Subordinate Judge which are that the plaintiff and the defendant were intimate friends, that the contract was verbal and defendant 1 verbally agreed to let out in lakheraj right the dighi or the large tank in suit to the plaintiff who held it at a rent of Rs. 52 a year and that at the time when defendant 1 promised to let it out, there was a large arrear of rent due to the plaintiff amounting to over Rs. 400. The consideration which the defendant consented to accept was Rs. 400, the whole of which was to be paid on the following day. The amount of salami did not even represent eight years' purchase. The contract which was more in favour of the plaintiff was come to either on account of the friendship between the parties, or because the defendant was in urgent need of money. On the following day the plain-tiff produced only Rs. 200 which the defendant refused to accept. But on the plaintiff's insistence the defendant put it down in his private account book as " amanat jama for lakheraj bandobast." He however agreed to accept the balance if that would be paid over to him seven or eight days after his return home. A certain sum of money was taken by the plaintiff's brother to the defendant about 20 days alter his return to his native country and the defendant expressly re-fused to accept the amount in pursuance of the agreement. Considering the relation of the parties it may be assumed that the defendant had no idea when he agreed to grant the lease that the law would be invoked to enforce the contract. After the defendant cancelled the agreement plaintiff's brother wrote to him and asked him to settle the matter. But the plaintiff took no notice of it. One year after the parties met in Calcutta and the plaintiff asked the defendant why he did not give the lease to him and made, what the learned Subordinate Judge says, a sort of tepid remonstrance." Not hearing anything from the plaintiff for a long time and finding that the plaintiff was not in earnest as he had not carried out the promise he had made about payment of money, the defendant felt himself justified in presuming that the plaintiff was not, to quote the words in *Milward v. Earl of Thanet* <sup>4</sup>" ready, desirous, prompt and eager." He accordingly let out the tank to the other defendants on much better terms. The present suit was brought about a month before the last day of limitation. Considering all these circumstances the learned Subordinate Judge came to the conclusion that it was not a proper case in which the plaintiff should be given any relief. Though I am doubtful as to whether time can be treated as of essence of the contract, I agree with my learned brother that in the circumstances of this case we should not interfere with the discretion exercised by the Court of appeal below.

18. The plaintiff is not entitled to any damages except what we have allowed him in the shape of interest on the sum of Rs. 200 retained by defendant 1.

#### Cases Referred.

1[1903] 30 Cal.265 at pp. 276-278

2[1906] 33 Cal. 633

3[1878] 5 P.C. 221 at p. 239

4[1805] 5 Ves.790n