

CALCUTTA HIGH COURT

Jitendra Nath Roy

Vs.

Sm. Maheswari Bose

A.F.O.D. No. 50 of 1961

(H.K. Bose, C.J. and G.K. Mitter, J.)

06.08.1964

JUDGMENT

Mitter, J.

1. This is a purchaser's appeal from a decree refusing specific performance of an agreement for sale of immovable property dated December 15, 1954. The learned trial Judge found that the plaintiff was not ready and willing to perform his part of the agreement at all relevant times and that the agreement for sale was duly cancelled by the defendant.

2. The undisputed facts prior to the date of the suit filed on May 21, 1957 are as follows : The negotiation for the property i.e. premises Nos. 34A and 34B, Amherst Street were carried on between two solicitors namely Mr. Anil Kumar Ghose for the purchaser and Mr. Anil Kumar Dutta for the vendor commencing in the first week of December 1954, The vendor was one Maheswari Bose a Hindu widow, who wanted to sell the property for legal necessity.

(After dealing with the correspondence between the solicitors the judgment proceeded to deal with the relevant terms of the draft agreement dated 13-12-1954).

The terms of the agreement relevant for the purpose of this appeal are as follows :-

(1) The vendor agrees to sell as a Hindu widow the said two properties free from all incumbrances at Rs. 32,000/- out of which Rs. 501/- has been paid by way of earnest and in part payment.

(2) The purchase is to be subject to the approval of the vendor's title by the purchaser's attorney Mr. Anil Ghosh provided that the disapproval of the title should not be unreasonable or arbitrary. The purchaser's attorney shall intimate to the vendor's attorney in writing by January 24, 1955 his approval of the vendor's title and power to sell the said land and premises. In default the vendor will be entitled to cancel the agreement and refund only the earnest money without interest or costs.

3. The balance of the price shall be paid and. the purchase shall be completed by February 15, 1955. The vendor shall forthwith deliver the title deeds which are in the possession of the vendor to the purchasers' attorney on his accountable receipt for his inspection.

(After stating term (9) which is not material for purposes of this report, the judgment proceeded :)

The word 'purchaser' in the document shall mean and include himself, his heirs, executors and assigns and nominee or nominees.

(After dealing further with the correspondence, the judgment proceeded :)

4. In the plaint filed herein, after referring, to the agreement for sale, the purchaser complained that the defendant had in spite of demands failed and neglected to produce the relevant documents of the title before the solicitor and that, he was obliged to complete the investigation of the title by his own labour and exertion on or about December 23, 1956 and being satisfied therewith had called upon the defendant on January 29, 1957 to complete the sale but the latter had wrongfully refused to do so. There was the further usual averment that the plaintiff had been and still was ready and willing to perform his part of the agreement. There is a little inaccuracy in the plaint as regards the terms of the agreement for sale it being stated in paragraph 2(i) that the defendant would make out a marketable title to the property to the satisfaction of the plaintiff or his solicitor. The written statement was filed on July 16, 1957. In this after referring more fully to the terms of the agreement the defendant charged (1) that neither the plaintiff nor his attorney had taken any steps whatever for investigating the title or intimating to the defendant or her attorney the approval thereof or the defendant's power to sell within the time mentioned in the agreement (2) that the defendant's attorney had called upon the plaintiff through his attorney on or about June 15, 1955 to complete the purchase within seven days with, a notice that in default the agreement would be treated as cancelled. The defendant further pleaded that as no steps had been taken to complete the purchase even after the said notice the defendant cancelled the agreement on or about June 27, 1955. There was denial that the defendant had failed and neglected to produce any relevant documents of title before the plaintiff's solicitor or to establish her title to the property.

5. On August 9, 1958 one Saraswati Devi filed an application for substitution of herself in the place of the plaintiff on the basis of a deed of assignment dated December 28, 1954 between herself and Jitendra Nath Roy. This was dismissed on September 11, 1958. The deed of assignment records that in pursuance of the agreement between the parties thereto and in consideration of the sum of Rs. 5,000/- paid to Jitendra Nath Roy but to be held in deposit by his solicitor Mr. Anil Ghose till the completion of the conveyance, the assignor granted and assigned his right and interest to purchase the property from Sm. Maheswari Bose to the assignee for the price of Rs. 35,000/- and nominated the assignee as his nominee in that behalf. The deed shows that it was executed by Jitendra Nath Roy and Saraswati Devi on December 28, 1954 and that a sum of Rs. 3,000/- was paid to Jitendra Nath Roy on November 21, 1955.

6. The issues settled by the learned trial Judge were as follows :-

- (1) Was the agreement duly cancelled by the defendant as stated in paragraph 6 of the written statement ?
 - (2) Was the plaintiff ready and willing to perform, his part of the agreement at all relevant times ?
 - (3) To what relief, if any, is the plaintiff entitled ?
- (After discussing the evidence, the judgment proceeded :)

7. The learned trial Judge held against the plaintiff both on issue (1) and issue (2). It was contended before us by the appellant that the learned Judge should have found that it was the defendant who had failed initially in performing her part of the bargain and could not cancel the agreement as she had purported to do. It was urged that in compliance with the agreement the defendant should have sent the title deeds of the property to the purchaser's solicitor immediately after December 15, 1954 and until this was done no complaint could have been made about the purchaser not performing his part of the agreement. Reliance was placed on Clause (3) of the agreement for sale which according to the appellant cast an obligation on the vendor to deliver the title deeds without any request in that behalf. It was said that Clause 3 obviated any necessity for the request which would otherwise have to be made under Section 55(1)(b) of the Transfer of Property Act. Great stress was laid on the wording of the clause which provided that "the vendor shall forthwith deliver the title deeds which are in the possession of the vendor to the purchaser's attorney on his accountable receipt for his inspection". The use of the expression "shall forthwith deliver" was said to import an unconditional obligation to send the title deeds irrespective of any other consideration. Our attention was drawn to the draft agreement for sale and the provisions in Clause 3 thereof which read "the balance of the price is to be paid and purchase to be completed within three months from the date on which the title deeds shall be delivered to the purchaser's attorney for his inspection". It was contended that Section 55(1)(b) of the Transfer of Property Act would have been attracted to this clause but not to the clause in its altered form. It was said that under the clause in the original draft the sending of the title deeds was a matter left to the discretion of the vendor and his solicitor and the purchase was to be completed within three months of the receipt of the title deeds but; in the altered agreement a definite date was fixed, for the completion of the purchase and the payment of the balance price and in order to keep to that time schedule it was necessary that no time should be lost in the vendor's sending the title deeds for inspection. According to counsel Clause (3) can only mean that the title deeds were to be sent at once without any request. We, therefore, have to consider whether the use of the expression "shall forthwith deliver" militates against sending on request in terms of Section 55(1)(b) of the Transfer of Property Act. The learned trial Judge referred to a number of decisions on the meaning of the word "forthwith". Some of these may be usefully referred to. As was pointed out by Jessel M.R. in *Ex parte Lamb*, (1881) 19 Ch. D. 169 at p. 173 the word "forthwith" must be construed according to the circumstances in which it is used. Where as in *Hyde v. Watts*¹, "there is a covenant to insure a man's life, there must of necessity be some delay, for the act could not be done in a moment. But where an act which is required? to be done forthwith can be done without delay, it ought to be so done." In the same case, Lush L.J. said "that the word 'forthwith' has not a fixed and absolute meaning; it must be construed' with reference to the objects of the rule and the circumstances of the case". According to Benjamin on Sale 8th Edition page 695 - "Generally the construction of the contract may show that 'forthwith' means no more than

¹(1843) 12 M and W. 254

without delay or loss of time, it being a less strict term than immediately." In *Gulraj Shroff v.*

*Kaniram Sureka*², where there was an order made on September 9, 1937 during the long vacation extending the time to file the affidavit of documents by a week and inspection to be given forthwith the solicitor for the plaintiff contended that there was no default if inspection was not given during the vacation. Relying on the decision in *ex parte* Lamb Lort-Williams, J., held that the order contemplated giving of inspection during the period of the vacation and the delay in doing so in the circumstances of the case was unreasonable. In my opinions the word 'forthwith' according to the decided cases does not mean immediately but means "with all reasonable celerity" as observed by Tindal, C.J. in *Burgess v. Boetefeur*³, I further hold that the use of the word 'shall' in conjunction with the word 'forthwith' in regard to the obligation to deliver the title deeds does not militate against a request in regard thereto on the part of the purchaser ? solicitor and does not amount to a contract to the contrary within the meaning of Section 55(1)(b) of the Transfer of Property Act. In my view, Clause (3) in this case only meant that on a request being made for the title deeds by the purchaser's solicitor the vendor was under an obligation to end the same with all reasonable dispatch.

8. The whole fabric of the appellant's argument on the first issue rested on the contention that the primary obligation being one of sending the title deeds without a request the question of the approval of the vendor's title and the satisfaction on the point of her power to sell the land, did not arise so long as the documents were not sent with, the necessary corollary that the right to cancel the agreement could not accrue to the vendor. In this connection reliance was placed on Sections 52, 53, 54 and 55 of the Indian Contract Act. With, regard to the first of these sections, it was said that the order of performance of reciprocal promises was fixed by the agreement for sale the first being on the vendor to send the title deeds at once without a request and the second on the purchaser to inspect the same and approve or disapprove of the title by the date fixed. In my opinion, Section 53 hardly comes into play even if it be held that the vendor had prevented the purchaser from performing his promise in the matter of the approval of the title. To rely on Section 53 would mean avoidance of the contract with a right to claim compensation - not the position which the purchaser seeks to maintain in this case Section 54 too does not aid the purchaser. Even on the assumption that the purchaser promise of approving the title cannot be performed before delivery of the title deeds by the vendor the latter is only precluded from claiming performance with regard to the approval of the title and becomes liable to make compensation to the former for any loss which the purchaser might have sustained.

9. The contract being one for the sale of Sand, the principles laid down in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*⁴, would apply. In that case there was an agreement for sale of leasehold interest which provided that the title was to be made, marketable and the conveyance was to be prepared and received within two months from the date of the agreement with a further clause that should the purchaser not pay Rs. 81,000/- (being the balance of the purchase price) within the fixed period, he was to have no right to the deposit or earnest money of Rs. 4000/- paid on account and any claim of his was to . . . be void and the vendor, was, after that date, to be at liberty to resell. The purchaser's solicitors proceeded to investigate the title and made requisitions. One of

² AIR 1938 Cal 353

⁴43 Ind App 26

³(1844). 7 M and G 481

these was made more than two months after the date of the contract. The vendor did not comply with this and shortly thereafter asserted a right to put an end to the contract on the ground that time was of its essence and claimed to forfeit the deposit on the ground that the purchaser

had failed to complete his purchase within the date fixed. It was observed by Viscount Haldane in delivering the judgment of the Board that "if these requisitions were made in time their Lordships are of opinion that they were proper and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence." According to the Judicial Committee the law applicable to the point was contained in Section 55 of the Indian Contract Act which did not differ from the English Law on the point. Under the English Law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. * * * A Court of equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract either for completion or for the steps towards completion if it can do justice between the parties and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right." According to Viscount Haldane "the special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. * * Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject matter. But equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete within a definite time." On the facts of the case it was held that the subject-matter or the character of the lease sold were not such as to take the case out of the class to which the principle of equity applied.

10. In my view, the principles laid down by the Judicial Committee in the above case apply proprio vigore to the facts of the case before us. In my opinion, the failure to make a request for sending the title deeds or to approve the title by January 24, 1955 did not entitle the vendor to treat the contract as cancelled by a mere notice to that effect. The vendor had to call upon the purchaser to take the necessary steps and approve the title within a reasonable time failing which she could treat the contract as cancelled. On the facts of this case and in view of Clause 9 of the agreement it was not unreasonable for the vendor's solicitor to call upon the purchaser's solicitor to send the draft conveyance within three days of his letter dated June 15, 1955 for the former's approval and to pay the entire purchase price within seven days from that date. It is to be noted that in reply to the letter although the addressee complained about the delay being caused by Mr. Anil Dutt's illness he did not ask for inspection of the title deeds or point out that more time than was given was necessary for the purpose. Instead he merely called upon Mr. Dutt to arrange for production of sufficient evidence as to legal necessity for the sale. This position could only be taken if the purchaser's solicitor was satisfied about the vendor's title to the property. Whether or not the purchaser's solicitor had already had the information as to legal necessity for the sale he was given an opportunity of calling on Mr. Dutt at his residence the very next day to examine the

facts relating thereto and to satisfy himself about the existence of the legal necessity. If the purchaser was really serious about the completion of the contract his solicitor should have informed Anil Dutt that the appointment did not suit him or that he was not prepared to go to the latter's residence for the purpose. In any event, he should have made an appointment suitable to himself for production of evidence of legal necessity. He did nothing for the next 12 days before the end of which the contract was sought to be terminated by the vendor's solicitor on June 27, 1955. It is noteworthy that even in his letter of June 29, 1955 Mr. Ghose made no complaint about the failure to send the title deeds but merely called upon the vendor's solicitor to produce evidence of legal necessity. In the circumstances of the case the vendor was, in my opinion, justified in writing the letter of June 15, 1955 and to treat the contract as cancelled by letter of June 27, 1955.

11. Counsel for the appellant relied on the case of *Edridge v. R.D. Sethna*⁵, in support of his contention that a wrongful repudiation of a contract by the defendant did not put an end to his obligation to sell the property and that notwithstanding such repudiation the plaintiff could claim specific performance by proving the performance of his part of the bargain. It is not necessary to examine the facts of that case in the view taken by me that there was no wrongful repudiation by the vendor before us.

12. In view of the above finding it is not necessary to consider in detail the contention of the respondent that unless the purchaser's solicitor approved the title within the time fixed, a condition of the contract was broken by the purchaser disentitling him to claim specific performance. Reference was made to paragraphs 2 and 5 of the plaint and to clause 2 of the agreement for sale, It was claimed that under Clause 2 it was for the purchaser's attorney to approve of the title and inform the vendor's attorney in writing by January 24, 1955 of such approval whereas in paragraph 2 of the plaint a case was sought to be made out that satisfaction of the plaintiff as to title would be enough and that the assertion that the plaintiff had satisfied himself as to the title by his own investigation in regard thereto as pleaded in paragraph 5 enabled him to call for specific performance of the agreement. Our attention was drawn to the case of *P.V. Sastry v. R.C. Yella Reddy*⁶, in which there is an observation in paragraph 26 that the expression "subject to the approval of the title by the purchaser's solicitor is not a mere surplusage or means no more than what the law implies, but is really a term of the contract which must first be assented to by the vendor and secondly the fulfillment of which is necessary for the enforcement of the contract." In my opinion, this observation cannot "be called in aid by the respondent for although no doubt the contract provided for satisfaction of the plaintiff's solicitor as to title it did not preclude him from saying that he was satisfied as to the title and did not want any investigation. After all the term as to marketable title being made out to the satisfaction of his solicitor was one for the benefit of the purchaser and he could waive it if he liked. If for instance in this case there was a dispute between the purchaser and his

⁵60 Ind App 368

⁶AIR 1959 And Prad 256

solicitor immediately after the contract was entered into with the result that the purchaser did not want his solicitor Mr. Ghosri to act for him there is nothing in law which would prevent him from saying that he did not want any investigation of title or that he was satisfied that the defendant had a marketable title to the property". The observations in the Andhra Pradesh judgment were not directed to this point but on the question whether there was a concluded contract unless the title was approved. Here there is no dispute that there was a valid agreement for sale the point at

issue being whether the plaintiff could call upon the defendant to perform the agreement specifically although his solicitor had not intimated the approval of the title within the time fixed. Of course there may be a case where the agreement is to be void if the purchaser's lawyer shall be of opinion that a marketable title cannot be made by the time fixed for completion as in the case of *Williams v. Edwards*⁷ which was cited at the bar or where by a contract definitely concluded any land is sold subject to the express condition that the title shall be approved by the purchaser's solicitor when a valid contract may become void on non-fulfilment of the condition. See *Williams on Vendor and Purchaser*; 4th Edition, (1936) Vol. 2 pages 974 and 975. But the present case does, not fall within the ambit of the cases cited in *Williams*. Here Clause (2) specifically provides that unless the title is approved by the purchaser's solicitor the vendor will be at liberty to cancel the agreement for sale and refund only the earnest money. The failure on the part of the purchaser's solicitor to approve the title within the time limit allows the vendor to avoid the contract and does not make the contract automatically void.

13. Once it is held that the contract was rightly terminated by the vendor the further question as to whether the purchaser was ready and willing to perform the agreement need hardly be considered. Circumstances which justify termination of contract by one party cannot be compatible with readiness and willingness on the part of the other to perform it. It was pointed out by the Judicial Committee of the Privy Council in *Mama v. Sassoon*⁸, that "in a suit for specific performance" the plaintiff

"treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

In my opinion, this means that the plaintiff must allege and prove that he had taken all the essential steps which he was required to take under the agreement for sale when he filed his suit. "Readiness and willingness" has also to be considered from another point of view namely whether the plaintiff if a purchaser was in a position to pay the money and take the conveyance in terms of the contract. This however does not mean that the purchaser has got to put the money by and be able to show that he had. command of the necessary finance throughout the life of the contract. It was held by the Judicial Committee in *Bank of India Ltd. v. Jamsetji A.H. Chinoy*⁹ that

"to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded Scheme for financing the transaction. The

⁷ 1827) 2 Sim 78 977 Ind App 76 at p. 91 : (AIR 1950 PC 90 at p. 96)

⁸ 55 Ind App 360 at p. 373 : (AIR 1928 PC 208 at p. 216)

question is one of fact."

The Board approved of the view taken by Chagla, A.C.J. that it was not necessary for the

plaintiff to work out actual figures and satisfy the Court what specific amount a bank could have advanced on the mortgage of his property and the pledge of shares. In my opinion, if the plaintiff can show that he was in a position to raise the money required at or about the time when the contract was to be performed he discharges the obligation of proving readiness and willingness so far as the financial aspect is concerned. As was pointed out by Subba Rao, C.J. as he then was, in *Subeyya Chowdary v. Veeraya*⁹, at p. 313

"where the question is whether he (the plaintiff) was in a position to pay as in the present case, the enquiry should be whether he could, if he wanted, raise the money he required."

On the facts of that case his Lordship felt no doubt that the first plaintiff who was a man of property and a business man with dealings with third parties and oil mills could have raised the sum of Rs. 4,000/- if he urgently required it and on the evidence his Lordship was satisfied that the first plaintiff was substantial enough to make ready the necessary amount if the occasion arose and held that he was ready and willing to perform his part of the agreement. (After discussing the evidence the judgment proceeded :)

14. In my opinion, the plaintiff never took the necessary steps to put the transaction through. Not only did he fail to call for the documents of title for inspection on the Solicitor's accountable receipt he did not even think it necessary to call for the same on receipt of the notice dated June 15, 1955. As already noted he neglected to arrange for inspection or scrutiny of the evidence relating to legal necessity as suggested by letter of Anil Dutt of June 17, 1955. It was only in the letter of August 22, 1956 that his solicitor made a complaint about the failure "to produce the documents of title in spite of requests". This assertion seems to be baseless. It is also to be noted that there was no denial of the charge made in Anil Butt's letter of July 1, 1955 that the purchaser had no fund to complete the sale. The learned trial Judge came to the conclusion that the financial position of the plaintiff was never sufficient to allow him to raise the necessary fund for completing the transaction at any time. He was a solicitor's clerk getting only Rs. 100/- per month with a fairly large family to maintain and little, if any, property to call his own. It was impossible for a man of his position to be able to secure Rs. 32,000/- on his own at any time.

15. The question then arises as to whether the necessary fund could have been produced by the assignee of the plaintiff whereby the purchase could have been completed. There is no dispute that the benefit of a contract of the type before us could be transferred and the agreement for sale in this case expressly provided that the word "purchaser" would include his assignee or nominee. If therefore it is shown that the assignment of the contract had been entered into on December 28, 1954 and the assignee was a person who could have put up Rs. 32,000/- when called upon the term as to readiness and willingness

⁹ AIR 1957 And Pra 307

so far as it imports the means to pay the consideration would be fulfilled. On the evidence as discussed above there can be no doubt that the plaintiff Jitendra Roy never had the means to complete the purchase. (After discussing the evidence the judgment proceeded :)

16. My own conclusion on the evidence is that the document of assignment was not in existence before the institution of the suit. The salient features of the case namely the inactivity of the plaintiff and his solicitor after the date of the agreement for sale, the absence of any entry in Anil

Ghose' s day book regarding the payment of Rs. 5000/- and Rs. 3000/-, the filing of the plaint without mentioning the assignment in Saraswati Devi's favour and the application for substitution long after the institution of the suit only fit in with the assignment being posterior to the date of the suit. In this view of the matter, the issue as to readiness and willingness on the part of the plaintiff to enable him to claim specific performance of the contract must be answered against him.

17. In my opinion, the delay in the institution of the suit by itself does not justify the dismissal of claim for specific performance. This question was considered at length in *Kissen Gopal Sadaney v. Kally Prosonno Sett*¹⁰, where Woodroffe, J. held that delay was not material so long as matters remained in status quo and did not mislead the defendant or amount to acquiescence. To quote the words of the learned Judge

"to operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct of 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. When such is not the case, any lapse of time short of the period allowed under the Limitation Act should, not disentitle the claimant to relief, to which he is otherwise entitled."

Here the defendant has not changed her position in any way after the contract was entered into and the facts are not such as to lead to the conclusion of waiver of the plaintiff's right by acquiescence. If the facts otherwise justified the plaintiff's claim it was not liable to be thrown out on the ground of delay in the institution of the suit.

18. In the result, the appeal fails and must be dismissed with costs.

Bose, C. J.

19. I agree.

Appeal dismissed.

¹⁰ ILR 33 Cal 633