BOMBAY HIGH COURT

Hasam Nurani Malak

Vs.

Mohansingh

A.F.O.D. Nos. 42 and 43 of 1965, Wardha in S. C. S. No. 1 of 1964.

(Chandurkar and Masodkar, JJ.)

03.09.1973

JUDGMENT

Chandurkar, J.

1. These two cross-appeals, one filed by the defendant and the other filed by the plaintiffs, arise out of a decree passed by the Civil Judge, Senior Division. Wardha decreeing the claim for specific performance of a contract of resale and directing the plaintiffs to deposit in Court Rs. 9,000/- plus Rs. 8,100/- on account of interest for payment to the defendant within six months from the date of the decree. Admittedly, the plaintiffs were the owners of field khasra No. 96. area 6.95 acres in Bhumiswami rights situated at Jawoorwada, Tahsil Arvi. District Wardha. On 7-3-1957 the plaintiff executed a sale deed for a consideration of Rs. 9,000/- in respect of this field in favor of the defendant. The field was already in possession of the defendant under a registered lease deed dated 5-6-1952 by which the right to pluck and remove the fruit from the garden of orange, musambi, lemon and guava trees in the field was transferred to the defendant for a period of five years from 1952-53 to 1956-57 for a consideration of Rs. 7,000/-. The defendant was also entitled to pluck and remove the pails from the said garden for the period 1957-58 to 1960-61 by another agreement of the same date. On the date on which the sale deed was executed by the plaintiffs, the defendant also executed an agreement of reconveyance by which the plaintiffs were entitled to obtain reconveyance of the said property on payment of the consideration of Rs. 9,000/- plus interest at 1-1/2 per cent. per month within five years from the date of the agreement. The agreement of reconveyance provided that after the expiry of five years the plaintiffs would lose their right of obtaining a reconveyance. The plaintiffs, therefore, brought a suit on 2-1-1964 for specific performance of this agreement of reconveyance. According to the plaintiffs, they had offered to execute a mortgage by conditional sale or a usufructuary mortgage as they were already indebted to the defendant and they were in need of additional funds; and though the defendant had agreed to take a mortgage by conditional sale or a usufructuary mortgage, he insisted that the transaction, though a mortgage, should be given the

shape of a sale with the condition of repurchase. According to the plaintiffs, they were entitled to get a resale after taking accounts of the income made by the defendant from the garden, but having found that the defendant dishonestly wanted to take advantage of the sale and the kararnama the plaintiffs even offered to pay the entire amount as stated in the kararnama in the first week of March 1962. They had given a notice to the defendant calling upon him to render accounts, but according to the plaintiffs, the defendant refused to abide by the real transaction or by the transaction as shown in the aforesaid sale deed and kararnama. The plaintiffs, therefore, alleged in their plaint that the defendant was guilty of breach of contract and they, therefore, claimed Rs. 6,000/- as damages for the year 1962-63 during which period the defendant was not entitled, to remove the fruit from the garden. The plaintiffs, therefore, claimed that the defendant be directed to execute a sale deed of field khasra No. 96 on receipt of the amounts stated in the Kararnama dated 7-3-1957, or such amount as may be determined by the Court and place the plaintiffs in possession thereof and further to pay the plaintiffs Rs. 6,000 on account of mesne profits as claimed.

2. In his written statement the defendant pleaded that the previous transactions between the parties were not relevant to the claim for specific performance of the contract of resale and for damages. According to him, time was of the essence of the contract of repurchase, and since the plaintiffs failed to obtain a reconveyance of the field on or before 7-3-1962, the plaintiffs were not entitled to any relief. It was denied that the plaintiffs wanted to make any payment as stipulated in the kararnama. The defendant denied that he was liable for damages for breach of contract, and according to him, he was in possession of the field as owner thereof and that he was always ready and willing to abide by the terms of the kararnama. The defendant further submitted that while supplying better particulars asked for by the defendant the plaintiffs had categorically stated that the suit was for enforcing the kararnama dated 7-3-1957 and, therefore, the suit as framed was liable to be dismissed.

3. The trial Court found that time was not of the essence of the agreement of reconveyance of the suit property and that the plaintiffs' claim was tenable. It held that evidence so as to vary the terms embodied in the kararnama dated 7-3-1957 could not be admitted and the plaintiffs could not, therefore, claim that they were entitled to accounts from the defendant of the income received by him from the suit field in terms of the earlier two leases and to adjust that amount towards consideration due under the kararnama. It found that the plaintiffs were not entitled to claim any damages from the defendant. The trial Court thus passed a decree that the plaintiffs shall deposit in Court Rs. 9,000/- plus Rupees 8,100/- on account of interest upto 9-3-1962 and that on deposit of this amount of Rs. 17,100/- the defendant was to execute a sale deed of the suit field in favor of the plaintiffs and put them in possession of the same. It was also directed that if the defendant failed to do so, the plaintiff may apply to the Court for getting the sale deed executed through Court.

4. The defendant has filed First Appeal No. 42 of 1965 in which his main contention is that the

trial Court erred in law in holding that time was not of the essence of the contract of resale executed by the defendant in favor of the plaintiffs. The plaintiffs have also filed first Appeal No. 43 of 1965 in which their contention was that the trial Court should have ascertained the real consideration of Exhibit 28 which is the contract of resale and should have granted specific performance on payment of the amount so determined plus interest as stipulated in the agreement. Another ground on which the decree of the trial Court was challenged was that the defendant having committed a breach of contract, damages to the extent of Rs. 6,000/- should have been awarded to the plaintiffs.

5. While dealing with the question whether time was of the essence of the contract of reconveyance, the trial Court relied on a decision of the Privy Council in *Jamshed v. Burjorji*[1], and observed :-

> "..... it is practically the settled principle that in contract for sale of landed property, as is the case here, unless the specific intention to the contrary be proved, the time is not the essence of contract even though the agreement reduced to writing gives out a specific period for completion of the contract."

It appears that the learned Judge of the trial Court did not notice the distinction between a contract of sale of immovable property and a contract of resale or reconveyance of immovable property. An agreement to reconvey property after the vendor has transferred it by sale to the vendee is essentially in the nature of a concession and has to be exercised according to the strict requirements of the agreement of reconveyance. In Halsbury's Laws of England, third edition, volume 14, paragraph 1151, it is observed :-

> "Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms."

These observations were quoted with approval by the Supreme Court in *Simrathmull v. Nanjalingiah*[2], In that case the plaintiff had borrowed a certain amount from the defendant and to lieu thereof executed a deed of conveyance of certain land with a house thereon in favor of the defendant. On the same day, the deed of reconveyance was executed by the defendant, and by this deed the defendant agreed to re-convey the house, but the exercise of the right of demanding reconveyance by the plaintiff was subject to two conditions, namely, (1) that the right must be exercised within two years; and (2) that the rent payable by the plaintiff should not be in arrears for more than six months at any time. The plaintiff was found to have broken the second condition. The defendant refused to reconvey and the plaintiff filed a suit for specific performance praying that the Court should exercise its equitable jurisdiction to give relief against the forfeiture clause. It was held that the sale deed, the deed of reconveyance and the rent note

were parts of the same transaction and that the transaction was not one of mortgage by conditional sale. It was further held that if the original vendor, i.e. the plaintiff failed to act punctually according to the terms of the contract, the right to repurchase would be lost and could not be specifically enforced and refusal to enforce the terms specifically for failure to abide by the conditions did not amount to enforcement of a penalty and the Court had no power to afford relief against forfeiture arising as a result of the breach of such a condition. After quoting the observations from Halsbury's Laws of England reproduced above, the Supreme Court referred to the decision of the Federal Court in *Shanmugam Pillai v. Annalkhshmi Ammal*[3], and observed :

> "The Federal Court in AIR 1950 FC 38 held by a majority of three to two that where under an agreement an option to a vendor is reserved for repurchasing the property sold by him the option is in the nature of a concession or privilege and may be exercised on strict fulfillment of the conditions on the fulfillment of which it is made exercisable. If the original vendor fails to act punctually according to the terms of the contract the right to repurchase will be lost and cannot be specifically enforced. Refusal to enforce the terms specifically for failure to abide by the conditions does not amount to enforcement of a penalty and the Court has no power to afford relief against the forfeiture arising as a result of breach of such a condition."

[1] 43 Ind App 26
[2] AIR 1963 SC 1182
[3] AIR 1950 PC 38

When this decision was died before the learned Judge of the trial Court he declined to follow it on the ground that the decision did not apply to the facts of the present case.

6. The learned Judge also declined to follow the decision of the Madras High Court in *Samarapuri Chettiar v. Sutharsana Chettiar*[4], and the decision of the Nagpur High Court in *Shriram v. Rambilas*[5], In Samarapuri's case a Division Bench of the Madras High Court pointed out that the doctrine that the time may not be of the essence of the contract which arises on the construction of contracts of sale of immovable property, is not applicable to contracts of resale of property conveyed and that the right to repurchase being an option must be exercised according to the strict terms of the power. In Shriram's case (cit sup.) Grille, C.J., was dealing with an agreement of reconveyance executed on the same day on which the vendors had executed a sale deed in favor of the vendee. The vendors were given an option of repurchasing the property if they paid Rs. 1400/- in the month of February in any year between 1-3-1936 and 1-3-1940 and it was specifically laid down that any plea for an extension of the period would not be entertained. The plaintiff filed a suit for possession of the property on 29-2-1940 alleging that they were redeeming the mortgage and that the suit was in fact one for accounts and redemption, though, alternatively it was claimed that if the transactions were proved to be one of sale and repurchase, specific performance of the agreement of resale should be granted. The defense was that the transaction was not a mortgage and that there had been no tender of the money at all which was necessary for the fulfillment of the agreement and time was of the essence of the contract. The lower appellate Court held that time was of the essence of the agreement and no valid tender was made within the fixed time. In appeal before the High Court it was contended that time was not

of the essence of the contract Negativing this contention it was observed :

> "In support of the contention that time was not the essence of the contract reliance is placed on the Privy Council decision in ILR 40 Bom 289 : 43 Ind App 26 . The cases however where there is an option of repurchase of immovable property once sold form an exception to this equitable rule, as has been noted in Pollock and Mulla's Indian Contract Act. Edn. 7, at page 302, and where a time limit has been laid down in the agreement of repurchase and where there is no question of mutual obligation the exceptional provision for the seller's benefit must be exercised strictly within the time prescribed. This has been laid down in ILR 42 Mad 802 and also in *Maung Wala v. Maung Shwe Gun*[6], Further in *Maung Po Yin v. Maung Shwe Kin*[7], the law on the subject and the distinction from cases where there is an option to repurchase and the decision in 43 Ind APP 26 are emphasised by the appropriate quotation from Halsbury's Laws of England. The citation from Vol. 21

[4] ILR 42 Mad 802 [6] ILR 1 Rang 472 at p. 478 : AIR 1924 Ran 57
[5] AIR 1947 Nag 208 [7] AIR 1923 Rangoon 42

> at page 72 is as follows :
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> "If, however, the intended arrangement is not a lending and borrowing transaction but an absolute sale, accompanied by a contemporaneous agreement for repurchase or a stipulation that conveyance should be void upon payment of a certain sum at a fixed time, this does not entitle the vendor to such a right to redeem as is incidental, to a mortgage, but creates a mere right of purchase to be exercised in accordance with terms of the power....."

7. In *Caltex Ltd. v. Bhagwan Devi*[8], the Supreme Court, referring to the decision of the Privy Council in 43 Ind App 26 (cit. sup.) has observed :

> "In his well considered judgment Viscount Haldane carefully refrained from saying that time was not to be regarded as of the essence in all contracts relating to land."

In that case the Supreme Court was dealing with the case of a renewal of a lease. The time within which the notice of renewal of the lease was to be given was fixed by the terms of the lease deed and it was held that time so fixed was of the essence of the bargain and the tenant lost his right unless he made the application within the stipulated time. The following observations from Halsbury's Laws of England, 3rd Edn., Vol. 3, Article 281, page 165; were quoted with approvals :

> "An option for the renewal of a lease or for the purchase or re-purchase property must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse."(Underlining is ours)

It is settled law that in the case of agreement of repurchase the condition of repurchase must be

construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as time must be treated as being of the essence of the contract in the case of an agreement of reconveyance. If the original vendor fails to act according to the terms of the contract, the right to repurchase is lost and cannot be specifically enforced. The plaintiffs were, therefore, bound to have the reconveyance made within the stipulated time as time was of the essence of the contract.

8. It must be pointed out that the learned Judge of the trial Court failed to notice the distinction between the present case and the case in *Sankalchand Kuberdas v. Jotiram Ranchod*[9], on which he relied for the proposition that time could not be of the essence of the contract Sankalchand case was not a case where the vendee from the vendor had agreed to reconvey the property to the vendor. It was a case of an agreement of sale simpliciter. The plaintiff who had sued for specific performance of the agreement of sale had sold the property and the defendant had purchased that property from the plaintiff's vendee. The defendant then entered into an agreement with the plaintiff under which the defendant agreed to sell the property to him for Rs. 2,000/- to be paid at any time within three years and interest at Rs. 0/14/6 per cent per month. In spite of the sale by the

[8](1969) 2 SCR 238

[9] AIR 1949 Bom 193

plaintiff to the defendant's vendor, the plaintiff continued in possession, and after the defendant purchased it from the plaintiffs vendee, on the date on which the agreement of sale was entered into, the plaintiff executed a rent note in the defendant's favor agreeing to pay Rs. 17/8/0 per month as rent. As the plaintiff had failed to pay rent to the defendant, he sent a notice calling upon him to pay arrears of rent and give vacant possession. The plaintiff replied to the notice saying that he had sold the property to the defendant by conditional sale for Rs. 2,000/- and that the defendant was to sell the property to him if he paid Rs. 2,000/- with interest at the rate of Rs. 17/8/0 per month, which amount the defendant was pleased to call as rent, and that he was arranging to return the amount due to him. The defendant again called upon the plaintiff to surrender possession and then filed a suit for recovery of possession against the plaintiff on the strength of the rent note and obtained a decree. Subsequently in execution of the decree he got possession in June 1940 and it was thereafter that the plaintiff filed a suit in forma pauperis for specific performance of the agreement to sell executed by the defendant. The defendant's case was that time was of the essence of the contract and as the payment was not made within three years, the plaintiff was not entitled to specific performance even in equity. This Court, after referring to the decision in Jamshed Khodaram's case, 43 Ind App 26 (cit supra), took the view that the agreement of sale and the rent note formed part of the same transaction and must be read together, and the intention of the parties whether they regarded the time as of the essence of the contract had to be ascertained by reading the two documents together. The Division Bench found that the intention of the parties appeared to be that the defendant's capital of Rs. 2,000/- was to earn interest in the form of rent and the plaintiff was to remain in possession, and "as the

defendant's amount was earning interest, time could not have been of the essence of the contract." The learned Judge of the trial Court relied on these observations and took the view that the facts in the instant case were similar to the facts in Sankalchand's case, AIR 1949 Bombay 193 and he found that since the plaintiff had agreed to pay interest at Rs. 1.50 per cent per month and the defendant had not even suggested in his evidence that the parties had agreed or at least he had intended to make the time of the essence of the contract, time was not of the essence of the contract. As already pointed out above, the learned Judge of the trial Court has treated the instant case as one of a mere agreement of sale, while it is really a case of performance of an agreement of repurchase. Though in a sense both are agreements, as pointed out by the Supreme Court in Simarathmull's case AIR 1963 Supreme Court 1182, the contract to reconvey is in reality a concession made by the vendee to the vendor and sometimes it has been described to be in the nature of a privilege. It is no doubt true that an inference that time was not of the essence of the contract was reached in Sankalchand's case AIR 1949 Bombay 193 having regard to the fact that the defendant's amount was allowed to earn interest. But it must be pointed out that there it was a case of a mere agreement of sale and the finding that the real intention of the parties appeared to be that the defendant was to be paid in the form of rent cannot be of any assistance to the plaintiff who in this case is seeking to ask for a specific performance of an agreement of reconveyance. The fact that in the instant case the amount of Rs, 9,000/- was also to carry interest does not affect the nature of the agreement of reconveyance and that agreement cannot be treated as a simple agreement of sale.

9. It was then contended on behalf of the plaintiff that they have been throughout ready and willing to perform their part of the contract but that it was the defendant who was evading to re-transfer the property in favor of the plaintiffs. It is urged that the plaintiffs had sent a notice to the defendant on 9-3-1962 and had gone to the house of the defendant about a fortnight after this notice, but the defendant did not accept the offer made by plaintiff No. 1 Mohansingh and declined to reconvey the property. Having read the evidence of plaintiff No. 1 Mohansingh and his witness Gulabrao who, according to the plaintiff No. 1, was going to lend a sum of Rs. 10,000/- to him, we are satisfied that there is no substance in this contention. As pointed out by the Privy Council in *Ardeshir v. Flora Sassoon*[10], in a case where the plaintiff claims specific performance of a contract of sale he must allege, and if the fact was traversed, he is 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 and the failure to make good that averment brings with it the inevitable dismissal of the suit. The readiness and willingness to perform the contract must be with reference to the true nature of the contract found between the parties and not readiness and willingness to perform the contract as the plaintiff understood it to be. In the instant case, the plaintiffs case throughout has been that the defendant is not entitled to the amount of the purchase price mentioned in the contract of sale but that in substance the transaction was one of mortgage and that the defendant was liable to account for the income of the land which was in his possession and that they would pay only whatever is found due after making accounts. This is clear from the terms of the notice (Exhibit 30) served by the plaintiffs on the defendant. Even in

the plaint the plaintiffs' case was that the plaintiffs were entitled to get the resale after making accounts of the income made by the defendant from the trees in the land standing in the field in question, and that the defendant had refused to abide by the real transaction or by the transaction as shown in the sale deed and the kararnama. It is obvious that the plaintiffs were not entitled to contend that the transaction between the parties was in the nature of a mortgage. Such a contention is not open to them in view of the provisions of Section 58(c) of the Transfer of Property Act. The very object of the amending Act of 1929 which added the proviso to Section 58(c) was to shut out an inquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document, as observed by Patanjali Sastri J. in *Venkata Subbarao v. Veeraswami*[11], As pointed out by the Supreme Court in *Chunchum Jha v. Ebadat Ali*[12], under the proviso to Section 58(c) of the Transfer of Property Act. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not and that the legislature has made a clearcut classification and excluded transactions embodied in more than one document from the category of mortgages. The averments in the and willing to perform their part of the contract of resale which consisted in their payment of the amount of Rs. 9,000/- with interest within the period stipulated in the document of resale. The statement of the plaintiff No. 1 Mohansingh in the witness box that he tried to see the defendant about a fortnight after sending the notice to him is it clear afterthought, because the plaint does not make any reference to this. According to him, one Gulabrao was ready to advance him Rs. 10,000/- and he had himself taken Rs. 2,000/- with him and he told the defendant that he had come with cash ready for payment. Now, the defendant was entitled to receive under the terms of the contract of resale Rs. 17,100/- as found by the trial Court. Even

[10] AIR 1928 PC 208 [12] AIR 1954 SC 345

[11] AIR 1948 Mad 450

assuming that the plaintiff No. 1's evidence is accepted, it would only mean that he had gone to the defendant only with Rs. 12,000/- which the defendant was not bound to accept as he was entitled to receive Rs. 17,100/-. It is not possible for us to accept this statement that Gulabrao had accompanied him with an amount of Rs. 10,000 because of the discrepancy between the evidence of Gulabrao and the evidence of the plaintiff No. 1. According to Gulabrao (P.W. 2), he had agreed to advance plaintiff No. 1 Mohansingh an amount of Rs. 10,000/- provided the plaintiff No. 1 would sell to him the fruits in his garden for a period of three years. Mohansingh himself does not make any reference to such an arrangement except that he states that Gulabrao had agreed to advance him Rupees 10,000/- and had taken the amount with him. As already pointed out this case is made out for the first time at the stage of evidence and it is not even alleged in the plaint that the plaintiffs had ever offered any amount to the defendant at his residence. The trial Court, in our view, was not right in accepting this case of the plaintiffs which was made out for the first time at the stage of evidence. We must therefore, hold that the plaintiffs have failed to prove that they were ready and willing to perform their part of the contract which was a contract of resale and not a mortgage and that they were not entitled to any accounts from the defendant. Since time was of the essence of the contract of resale, the plaintiffs had failed to perform their part of the contract within the time stipulated under the contract of

resale and they were, therefore, not entitled to any decree for specific performance. The defendant's appeal is allowed and the plaintiffs' appeal is dismissed. The judgement and decree of the trial Court decreeing the plaintiffs' claim for specific performance of the contract of resale are, therefore, set aside and the plaintiff's suit is dismissed with costs throughout. Leave to file appeal to Supreme Court under Article 133(i)(c) prayed for by Shri Zinzarde for the plaintiff is rejected.

Order accordingly.