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Nov. 18.

LALA DURGA PRASAD AND ANOTHER
v.
LALA DEEP CHAND AND OTHERS.

[B. K. MUKHERJEA, VIVIAN BOSE and BHAGWATI JJ.]

Specific performance—Agreement for sale of land—Suit by purchaser against vendor and subsequent transferee for specific performance—Form of decree—Refund of money paid by subsequent transferee—Contract—Dispute arising subsequently as to form of warranty—Whether repudiation.

A dispute arising, subsequent to a contract for sale of land, about the particular form in which the warranty of title should be inserted in the sale deed cannot affect the completeness of the contract already made, nor can it amount to a repudiation of the contract when the party who wanted a particular form to be adopted does not persist in it and expresses his readiness and willingness to perform the contract agreed to. Even if a party insists on a particular form that would not affect the contract, though it may in certain circumstances disentitle him to specific performance.

Bindeshri Prasad v. *Mahant Jairam Gir* (I.L.R. 9 All. 705) referred to.

In a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale, if the plaintiff succeeds, the proper form of the decree to be passed is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff.

Kafiladdin v. *Samiraddin* (A.I.R. 1931 Cal. 67), *Potter* v. *Sanders* (67 E.R. 1057) and *Kali Charan* v. *Janak Deo* (A.I.R. 1932 All. 694) referred to.

In such a suit it would not be right to lay down that in every case the balance of the purchase money should be paid to the subsequent transferee up to the extent of the consideration paid by him. There may be equities between the vendor and the subsequent transferee which would make that improper, and unless these are also raised and decided in the case, the normal rule should be to direct the money to be paid to the vendor.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 86 of 1950.

Appeal from the Judgment and Decree, dated the 12th May, 1949, of the High Court of Judicature at Allahabad (Seth, Agarwal and Wanchoo JJ.) in First Appeal No. 410 of 1943, arising out of the Judgment and Decree, dated the 28th April, 1943, of the Court of the first Civil Judge of Meerut in Original Suit No. 4 of 1942.

S. K. Dar (*Ram Kumar* and *B. S. Shastri*, with him) for the appellants.

G. S. Pathak (*G. C. Mathur*, with him) for respondent No. 1.

Jagdish Chandra for the Custodian of Evacuee Property.

1953. November 18. The Judgment of the court was delivered by

BOSE J.—This appeal arises out of a vendee's suit for specific performance of a contract of sale dated 7th February, 1942. The vendor is the first defendant whom we will call the Nawab as that is how he has been referred to in the courts below. He is now in Pakistan and his property has been taken over by the Custodian, U. P. The plaintiff is the vendee and the second and third defendants, who appeal, are subsequent purchasers.

The only question which we are asked to decide here, except for certain subsidiary matters, is whether the agreement of 7th February, 1942, was a concluded one. The plaintiff's case is that on that date the Nawab agreed to sell the plaint property to him for Rs. 62,000 and accepted Rs. 10,000 as earnest money the same day. Later, namely on 4th April, 1942, the Nawab sold the same property to the appellants for a sum of Rs. 72,000. The plaintiff states that the appellants had notice of his prior agreement.

The appellants' case is that the plaintiff's so called agreement of 7th February, 1942, was not a concluded one as the parties never reached finality. They raised a number of other defences such as misrepresentation and fraud, an agreement with the Nawab prior to that of the plaintiff, lack of knowledge of the plaintiff's

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agreement and so forth. But all those positions were abandoned in this court and the only point argued, aside from certain subsidiary ones with which we shall deal later, was whether the parties reached finality on 7th February, 1942.

The learned trial Judge held, among other things, that there was no concluded contract and so dismissed the suit. In the High Court the appellate Bench which heard the appeal differed. Harish Chandra J. held that the parties reached finality while Kaul J. differing from him agreed with the trial court and held they had not. The matter was accordingly referred to a Full Bench of three Judges. All three held that there was a concluded contract. In view of this, the appeal was allowed and the plaintiff's suit was decreed on condition that the plaintiff deposit Rs. 62,000 in court. This he did. Defendants Nos. 2 and 3, who are subsequent purchasers, appeal.

The plaintiff and the appellants were prepared to compromise in this court on terms that the plaintiff should get the property and the appellants be paid Rs. 62,000 to compensate them for the Rs. 58,000 which they said they had paid to the Nawab for their subsequent purchase and for the loss of the property. (The plaintiff said the appellants paid the Nawab Rs. 72,000 and not Rs. 58,000 but there is no finding about this). As the Nawab's estate has vested in the Custodian, U. P., we thought it proper to join him in this appeal in case he should later lay claim to the plaintiff's Rs. 62,000. The fears of the parties regarding the Custodian, U. P., were justified, for he refused to compromise and claimed the Rs. 62,000 despite the fact that the Nawab had already been paid Rs. 58,000. His learned counsel stated that it was for him to decide whether anything had been paid to the Nawab and if so how much and for him to decide what should be done with the Rs. 62,000. In view of that we have been obliged to proceed with the appeal.

The differing opinions of the various learned Judges who have handled this case show that the evidence is nicely balanced. The question of burden accordingly assumes importance, as also another guide

which Judges of experience have applied through the years. When the question is one of fact and is of a simple nature it is useful to collect facts which are admitted or proved beyond doubt and then see which case fits in with those facts. They are useful as pointers to show the way.

Now the question here is one of fact. The plaintiff founds on a contract which the defendants deny. He must therefore prove it. The initial burden is on him. He relies on two facts in the plaint. The first is that he paid a sum of Rs. 10,000 to the Nawab on 7th February, 1942, by two cheques. The Nawab accepted this money and cashed the cheques and the money went into his own account in his bank. The second is that the Nawab gave the plaintiff a receipt on that date for this money. These two facts are admitted.

The receipt (Ex. 35-G) is signed by the Nawab and is in these terms:

"Received this 7th of February, 1942, a sum of Rs. 10,000 by two cheques...*as earnest money* out of Rs. 62,000 for the contract of sale [of the plaint property] through Babu Chhater Sen and executed a receipt. 7th February, 1942.

It is further declared that the sale deed would be executed within three months and that in default the *contract* would be deemed *cancelled.*"

This is the language of a completed contract and if there was nothing more the plaintiff would succeed. The burden therefore shifts because of the Nawab's unqualified admission in this document. We must accordingly turn to the defendants' pleadings and their evidence to see how this burden is discharged.

The Nawab's plea in the main is one of fraud and misrepresentation. In his written statement he says that there was a previous contract with the appellants for Rs. 58,000 and that they paid him Rs. 6,000 as earnest money on 5th February, 1942. After this, the plaintiff's broker Chattar Sen told him (the Nawab) falsely that the appellants had backed out and that in view of this it would pay the Nawab to accept the plaintiff's offer of Rs. 62,000. The Nawab believing this

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to be true entered into the contract of 7th February, 1942, with the plaintiff and accepted Rs. 10,000 as earnest money. He concludes—

"The talk, on the plaintiff's behalf, about payment of the earnest money conducted through Chattar Sen, broker, was wholly based on fraud and deception and *so* it is not binding."

Stopping there. There is implicit in this plea of fraud and misrepresentation an averment that the contract was valid and binding till set aside at the option of the Nawab who was the defrauded party.

The only other plea relevant to this matter is the following:

"All the conditions of the sale can under no circumstance be taken as fulfilled and deemed as *fait accompli* between the plaintiff and the answering defendant; and, for this reason also, the talk between them about the moabeda is not enforceable".

This is as vague as it can be and is the kind of woolly pleading which a party who is not sure of his facts and case usually makes; no particulars are furnished. But apart from that, here again the *motif* of the theme is that there was a concluded contract which fell to the ground because certain conditions, presumably conditions precedent, were not fulfilled. In any case, this does not explain the receipt, and the circumstances in which it came to be given apart from the explanation which is contained in the plea of fraud. But that, as we have said, imports the important averment that there was a concluded contract which bound both sides until it was set aside at the option of the defrauded party.

The appellants' pleas follow the same pattern. It is true that in paragraph 26 of their written statement they start by saying that "No agreement was entered into etc....." but they explain that by saying that "whatever proceedings were taken concerning the plaintiff's moabeda.....were taken by defrauding and misrepresenting etc.....and *consequently* the moabeda relied on by the plaintiff is legally invalid."

The same theme of fraud and misrepresentation is carried through to paragraphs 27 and 28. There is no clear cut plea that there was never at any time a concluded agreement and there is no attempt to explain away the receipt, Exhibit 35-G, or to show the circumstances in which it came to be made.

The issues reflect these pleadings and no issue asks in clear cut terms whether the parties had reached finality, nor is the burden anywhere laid on the Nawab and the appellants to explain away the receipt, Exhibit 35-G.

[*Their Lordships then reviewed the evidence.*]

A question was also raised about the plaintiff demanding a warranty of title and the Nawab refusing. But this had nothing to do with the bargain struck on 7th February, 1942. The question of warranty arose in this way. When the sale deed was in the course of preparation in March, 1942, Chattar Sen brought a draft containing a warranty in a form to which the Nawab's manager objected because the plaintiff was insisting on it; but there the matter ended. It is usual to insert a warranty of title in most sale deeds and when that is not done the law imports one; and in some deeds there is a covenant for quiet enjoyment as well. All that happened here was that the kind of warranty inserted by Chattar Sen in the draft was not acceptable to the other side. But nobody suggested either in the evidence or the pleadings that the plaintiff refused to accept a sale deed unless the exact form of warranty placed in the draft was given. As we have said, this question arose subsequent to the contract for sale and the plaintiff's insistence on this form of warranty at that stage could not affect the contract of 7th February, 1942. It might in a given case disentitle him to specific performance as it did in *Bindeshri Prasad* v. *Mahant Jairam Gir*(1). But that would depend upon whether his proposal regarding a form of warranty to which he was not entitled was a mere proposal regarding the form of the sale deed or was a refusal to perform without it. No question of repudiation or refusal to perform was raised in the pleadings nor is

(1) I.L.R. 9 All. 705.

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that to be found in the evidence. On the contrary, the plaintiff's letter, dated 22nd April, 1942, Ex. 25 calls upon the Nawab to complete the conveyance "as agreed to"; and the plaint is to the same effect; it says nothing about a warranty. In the circumstances, a dispute arising *subsequent* to the contract for sale about a particular clause in the deed during the negotiations about the form the deed should take cannot affect the completeness of the contract already made, nor can it amount to repudiation when it is not persisted in and the plaintiff later expresses his readiness and willingness to perform the contract "agreed to".

It was also argued that there was no concluded contract because the only parties who were competent to contract never met. On the 7th Chattar Sen met the Nawab and the defendants' learned counsel argued that Chattar Sen had no authority to contract on behalf of the plaintiff. The later meeting was between the plaintiff and the Nawab's manager and it was said that the manager had no authority to conclude the bargain.

There is nothing in this point. The plaint states quite definitely that Chattar Sen was sent by the plaintiff with Rs. 10,000 earnest money and relies on the contract effected by him. Chattar Sen's authority to contract was not questioned. We cannot allow it to be questioned here. That means that there was an effective and concluded contract on the 7th between Chattar Sen, on the plaintiff's behalf, and the Nawab direct, both of whom were competent to seal the bargain. The question whether the Nawab's manager had authority to complete the contract on the Nawab's behalf when he met the plaintiff after this does not arise, for on that date there was already a binding contract in existence.

Disagreeing with the trial court, and agreeing with the majority of the Judges in the High Court, we hold that there was a completed contract on 7th February, 1942, which the plaintiff is entitled to have specifically performed.

Now arises a question which touches the Custodian, Uttar Pradesh. The contract was for Rs. 62,000. The

plaintiff paid Rs. 10,000 as earnest money but this was later returned, so Rs. 62,000 is still due. But there is a conveyance outstanding in favour of the appellants for which they have paid, according to their case, Rs. 58,000. If the Rs. 62,000 due to the Nawab is paid to him, or to the Custodian, U. P., who represents his estate, it is evident that the Nawab, who is at fault, will be paid twice over for the same property and his estate will benefit accordingly while the appellants will be left to pursue their remedies against the Nawab or his estate. The question is whether we have power to direct that the Rs. 58,000 be paid to the appellants instead of to the Nawab and thus obviate further, and possibly fruitless, litigation. But before we decide that, we will consider another question which is bound up with it, namely, the proper form of decree in such cases.

The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a *purchaser's* suit for specific performance). According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser.

The only statutory provisions which bear on this point are section 91 of the Indian Trusts Act, 1882, section 3 of the Specific Relief Act, 1877, illustration (g), and section 27 of that Act, and section 40 of the Transfer of Property Act.

Section 91 of the Trusts Act, does not make the subsequent purchaser with notice a trustee properly so called but saddles him with an obligation in the nature of a trust (because of section 80) and directs that he must hold the property for the benefit of the prior "contractor", if we may so describe the plaintiff, "to the extent necessary to give effect to the contract."

Section 3 illustration (g) of the Specific Relief Act makes him a trustee for the plaintiff but only for the

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purposes of that Act. Section 40 of the Transfer of Property Act enacts that this obligation can be enforced against a subsequent transferee with notice but not against one who holds for consideration and without notice. Section 27 of the Specific Relief Act does not carry the matter any further. All it says is that specific performance may be enforced against

"(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract".

None of this helps because none of these provisions directly relate to the form of the decree. It will therefore be necessary to analyse each form in the light of other provisions of law.

First, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by re-conveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C. J. adopted the other course in *Kali Charan* v. *Janak Deo*(1). He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

(1) A.I.R. 1932 All. 694.

We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin* v. *Samiraddin*(1), and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, paragraph 207; also *Potter* v. *Sanders*(2). We direct accordingly.

That brings us to the question of the Rs. 62,000. We do not think it would be right to lay down that in every case the balance of the purchase money should be paid to the subsequent transferee up to the extent of the consideration paid by him. There may be equities between the vendor and the subsequent transferee which would make that improper, so, unless they fight the question out as between themselves and it is decided as an issue in the case, the normal rule should be to require that the money be paid to the vendor. But the circumstances here are peculiar. The parties before us were prepared to compromise, and had the Nawab been here it is more than probable that he would have been glad to agree so as to avoid further litigation. But he is in Pakistan and is

(1) A.I.R. 1931 Cal. 67. (2) 67 E.R. 1057.

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beyond the jurisdiction of the Indian courts. We think it would be inequitable to leave the appellants to pursue what in all probability is only a will-o'-the-wisp and for us to augment the Nawab's estate by what would appear to be an unjust enrichment. This is an equitable relief and we have a wide discretion. We joined the Custodian, U. P., to afford him the opportunity of showing why we should not take what appears to be the just and equitable course. We have afforded him an opportunity of showing how the Nawab could have defended a suit by the appellants for refund of the consideration. As he has not been able to show us anything in the contract between the Nawab and the appellants, or in the covenants of their deed, which would disentitle the appellants from claiming Rs. 58,000 from the Nawab, we consider it right that Rs. 58,000 should be paid to them and Rs. 4,000 to the Custodian, U. P. All that the Custodian, U. P., was able to urge was that the whole amount had vested in him and so was his. But that is not so. The plaintiff was directed to pay a sum of Rs. 62,000 into court as a condition precedent to the execution of a sale deed in his favour. Curiously enough, the decrce does not say what is to be done with the money when it is paid into court. But so long as it is in court under those conditions it lies there subject to such decree as may ultimately be passed in appeal. We therefore have full power to direct payment of Rs. 58,000 to the appellants instead of to the Nawab, especially as there is this lacuna in the decree.

The High Court's decree will now be modified as follows:—

(1) The Nawab will be directed to execute a sale deed in the plaintiff's favour in accordance with the terms of the contract entered into between them.

(2) The appellants will be directed to join in the conveyance to the extent indicated above.

(3) After the conveyance has been executed, the appellants will be paid Rs. 58,000 out of the Rs. 62,000 now lying in deposit in court as compensation for the loss they had suffered, without prejudice to any

further rights they may have against the Nawab or his estate.

(4) After this has been done, the Custodian, U. P., will be at liberty to withdraw the balance of the Rs. 62,000.

Except for these modifications, the decree stands and the rest of the appeal is dismissed.

The modifications we have made here do not affect the plaintiff's rights under the decree except to his advantage. As against him, the appellants have failed. We accordingly direct that the appellants pay the plaintiff the costs of this appeal.

There is an application for amendment of the High Court's decree. This will be disposed of by the High Court.

Decree of High Court modified.

Agent for the appellant: *B. P. Maheshwari.*

Agent for respondent No. 1: *N. C. Jain.*

Agent for the Custodian of Evacuee Property, U.P.: *C. P. Lal.*

Appeal dismissed.