

(1955) 09 BOM CK 0083
In the Bombay High Court
Case No : A.F.O.D. No. 423 of 1950

Dhibi Shankarji Shamalji

APPELLANT

Vs

Patel Ratilal Rambhal

RESPONDENT

Date of Decision : 09-09-1955

Acts Referred:

Bombay Planning Act, 1915 — Section 41
Transfer of Property Act, 1882 — Section 55, 55(6)

Citation : AIR 1956 Bom 443

Hon'ble Judges : Dixit, J;Chainani, J

Bench : Division Bench

Advocate : M.H. Chhatrapati and H.C. Thakore, for the Appellant; D.V. Patel, for the Respondent

Judgement

Dixit, J.—This appeal arises from a suit filed by the plaintiff to obtain specific performance of an agreement of sale and, in the alternative, for damages for its breach. The facts leading up to the suit may have to be stated in some detail.

2. One Bai Kesar, widow of Kishore Muljibhai Patel, was the owner of a land bearing s. No. 384, admeasuring 9 acres and 36 gunthas of which 3 Gunthas were Kharab. On 11-6-1931, Bai Kesar sold a portion of Survey No. 384 admeasuring 3 acres and 18 gunthas to one Jesaji Chhotaji.

On 21-1-1932 Bai Kesar sold to the defendant a portion of that survey number admeasuring 6 acres and 12 gunthas for Rs. 13,479-4-0. In 1940, Bai Kesar sold a portion of that very land admeasuring 6 gunthas to one Hargovind for Rs. 2,000/-. Then on 5-1-1946, Jesaji Chhotaji sold the land purchased by him in 1931 to one Chandulal and one Amrutlal.

3. The defendant who has become the owner of a portion of S. No. 384 admeasuring 6 acres and 12 gunthas, entered into two transactions with one Bhailal Purshottam. Thus, in 1939 the defendant sold to Bhailal Purshottam a portion of the property purchased by him.

In 1941, the defendant sold again to Bhailal Purshottam a portion of the property purchased by him and finally on 16-1-1944 the defendant entered into an agreement with Bhailal agreeing to sell to the latter 2,000 sq. yards at the front and 3,000 sq. yards at the rear. This agreement led to suit No. 127 of 1949 by Bhailal to enforce the agreement.

4. On 1-2-1943, the suit agreement took place whereby the defendant agreed to sell to the plaintiff a portion of the property purchased by him in 1932, admeasuring 1200 sq. yards at the front and 4000 sq. yards at the rear with, a passage to connect them both. The agreement is reduced to writing and is Ex. 30 in the case.

It may be convenient to set forth the material parts of this agreement. The agreement commenced by saying that the land out of S. No. 384 within the outskirts of Mouje Dariapur Kajipur village, Taluka City Mahal, sub-district and District Ahmedabad is of defendant's independent ownership, possession and enjoyment. It says that the land was situate in the area of Ellis Bridge Town planning scheme No. 3 and was shown by final plot No. 30.

The agreement further says that the land out of that had been accrued to the defendant by independent ownership. The agreement then refers to 1200 square yards shown by letters A B C D in the plan annexed to the agreement. The agreement then refers to 4000 square yards as shown by letters H I J K F G and D E P G as shown in the plan annexed to the agreement. The total area was accordingly 5200 square yards. The agreement then recites:

"We have agreed to sell to you the property of that above description absolutely for the amount of price which may be then calculated at the rate of Rs. 9/- per square yard and as earnest money thereof, we have taken from you a cheque for Rs. 7,000/- bearing No. 625511 on the Central Bank of India Ltd. Maskati Market Branch, Ahmedabad, which we have received".

The period within which the sale was to be completed was a month and a half. The agreement also recites that the area of the land was to be got settled and to be measured. The agreement finally provides :

"Having cleared up all our rights and titles in respect of the said property within the period of the Banakhat (agreement of sale) if you fail to pay to us the remaining amount of the consideration of the sale price and to get executed a Pakka Bale deed then the amount of the earnest money paid to you will be forfeited and that you shall not have anything to do with the said land thereafter". Under the agreement, the plaintiff and the defendant were to bear the expenses of stamps, registration etc. half and half. At the foot of the agreement are to be found two endorsements. The first one of these is dated 14-3-1946, whereby the plaintiff and the defendant agreed to extend the period by 15 days.

There is a second endorsement, which is dated 31-3-1946, and according to that

endorsement the plaintiff and the defendant further extended the period by 15 days. While, therefore the sale-deed was to be completed on or before the 15th March 1946, according to the time extended with the consent of parties, the sale deed was to be completed before 15-4-1946.

5. It appears that on 27-3-1946, the plaintiff issued a public notice inviting objections, if any, in connection with the property. The notice was published in the issue of a paper called "Sandesh" dated 28-3-1946. Upon the publication of the public notice, objections were received by the plaintiff.

The objectors were (1) Bhailal Purshottam. (2) Chandulal Maganlal and Amrutlal Vrindavanlal and (3) Hathising. On 4-4-1946, the plaintiff sent a notice to the defendant with copies of the three notices received by him containing the objections asking the defendant to clarify the objections.

On 3-5-1946, the defendant sent the plaintiff a reply, saying that the plaintiff had seen all the papers, notices, replies and maps and had convinced himself about the title before the Banakhat, that is, an agreement of sale. There was further correspondence between the plaintiff and the defendant. To that correspondence I will refer in a moment. On 4-4-1949, the plaintiff filed this suit against the defendant asking for specific performance of the agreement and, in the alternative, for damages for its breach.

The basis of the plaintiff's claim was that the defendant had not cleared up the title and had committed the breach of the agreement. The plaintiff, therefore, sued to recover Rs. 7,000/- paid under the agreement, another sum of Rs. 3,000/- said to have been paid on behalf of the plaintiff and a sum of Rs. 1870/- as and by way of interest.

6. The defendant resisted the plaintiff's suit, raising various contentions. In substance, his contention was that the defendant was ready to pass the sale deed to the plaintiff, but the plaintiff had not taken the sale-deed from the defendant within the specified time and so the defendant had a right to forfeit the amount of the earnest money. He also contended that he had not received Rs. 3,000/- from Hiraji as alleged by the plaintiff.

7. The learned trial Judge did not allow specific performance, but gave the plaintiff a decree for Rs. 11,870/- with proportionate costs and future interest at 6% p. a. from the date of suit to the date of realisation. He directed that this amount was to be a charge upon the property in suit ordering the defendant to pay to the plaintiff half the costs of the suit and dismissed the rest of the plaintiff's claim.

From the decree, the defendant has come up in appeal. Pending the appeal, the defendant died and he is now represented upon the record by his heirs and legal representatives.

8. Upon this appeal Mr. M. H. Chhatrapati contends that the defendant did not commit the breach of the agreement and that the Court below was wrong in

directing the amount of the earnest money to be paid to the plaintiff.

In order to appreciate this contention, certain material facts will have to be stated over again S. No. 384 of which Bai Kesar was the owner was sold by her to three different parties, of whom the defendant was one. The land admeasured 9 acres and 36 gunthas, but the defendant's purchase was in respect of 6 acres and 12 gunthas.

In 1940, there was a Town Planning Scheme in Ahmedabad and this Scheme was sanctioned by Government in March 1945. The Scheme is known as Town Planning Scheme, Ahmedabad, No. III (Ellis Bridge). Under that scheme there is what is called "redistribution & valuation statement Form A". Column 2 of that statement refers to "name and owner".

Column 3(a) refers to "City Survey Number" Column 7 refers to "Number" and col. 8 refers to "Area in acres and gunthas". At page 14 of the Town Planning Scheme is to be found serial No. 16 and against that serial number Bhailal Parshottamdas, Shankar Shamalji, Jesaji Chhotaji and Bai Kesar w/o Kishor Mulji are shown as owners.

It may be noted that in respect of S. No. 384 four persons are shown as owners. With reference to serial No. 16 two plots are mentioned which are 24 and 30 and there are final plots Nos. 24 and 30. As against the final plot No. 24, the area is 1 acre and 23.3 gunthas. While against the final plot No. 30 the area is 5 acres 31.7 gunthas, the total area being 7 acres 16 gunthas. This area may be compared with the original area of S. No. 384 which was 9 acres and 36 gunthas.

It is obvious that under the Town Planning Scheme the area of S. No. 384 was less than the area which it originally had. Now, under the sale deed of 21-1-1932, the defendant had purchased from Bai Kesar land admeasuring 6 acres 12 gunthas. With the coming into force of the Town planning Scheme the parties, who are purchasers from Bai Kesar would be governed by the Plots as constituted under the Town Planning scheme. That is the effect of Section 41, Bombay Planning Act, 1915.

9. Now, I will turn to the agreement in suit. According to the agreement, the defendant agreed to convey to the plaintiff 2 plots of land admeasuring 1200 sq. yards and 4000 sq. yards. The agreement recites, as already stated, that, the plots were of the independent ownership, possession and enjoyment of the defendant and the agreement recites that the land out of final plot No. 30 had been accrued to the defendant by independent ownership.

The agreement contemplated that the defendant was to clear up all rights and titles in respect of the property and so the plaintiff gave the public notice dated 27-3-1946. In response to this public notice objections were taken by three parties referred to already.

Hence the plaintiff sent a letter to the defendant on 4-4-1946 with copies of the objections received by him. The first of these is one of Bhailal and in the notice

given by him, which is dated 28-3-1946, he stated that he was replying to the plaintiff's public notice of 27-3-1946.

That notice referred first to the agreement of sale of 16-1-1944 entered into by the defendant with Bhailal and having referred to this agreement the notice concludes by saying that if the defendant had executed any Banakhat or agreement in favour of the plaintiff, the same was not binding upon Bhailal and he stated that if in spite of this notice, the plaintiff got any sale deed executed in his favour, the same would not be binding upon Bhailal.

The next objection is contained in the reply of 30-3-1946, raised by Amritlal and Chandulal. In the reply it was stated that Jasraj Chhotaji had purchased the land admeasuring 3 acres and 18 gunthas from land bearing S. No. 384 from the original owners and that the defendant had no interest in the land bearing S. No. 384/1. It concluded by saying that Amritlal and Chandulal had purchased all the rights in the final plots of the said Jasraj Chhotaji and that they had there fore rights in the said plots according to the award of the arbitrator and stated that Amritlal and Chandulal had rights in the property and the purchase, if any, by the plaintiff would be subject to their rights.

The last objection is lay Hathising and is raised in the reply dated 3-4-1946. The reply first referred to the public notice of 27-3-1946, had inspected all the papers, documents, notices, replies, plans etc. in respect of the property under the agreement of sale and that the plaintiff had got satisfied himself and having been satisfied had entered into the agreement with the defendant.

It may be noted that in this reply is not to be found a word as regards the objections raised by Bhailal, Amritlal and Chandulal and Hathising. The plaintiff next sent another notice on 10-6-1947 in which it was stated that the defendant's reply of 3-5-1946 was not true and again called upon the defendant to clear up the title and pass the sale-deed upto 20-6-1947.

To this notice, the defendant sent a further reply which stated that the plaintiff had known about the true facts regarding Bhailal's agreement and asked the plaintiff to take the sale-deed, otherwise the plaintiff would lose the earnest money. It is significant that the defendant did not say a word again with respect to the claims put forward by those three other persons. It is not necessary to refer to the further correspondence which took place between the parties.

The sum and substance of the correspondence was that the plaintiff called upon the defendant to clear up the title, but each time the defendant did not choose to clear up his title and then the plaintiff filed this suit. Now, in the plaint the plaintiff stated in para 5 that the defendant was bound to clear up the title of the land which was agreed to be sold and that the defendant had not acted according to the terms of the agreement.

The defendant in para 16 of his written statement pointed out that he had cleared up all the title in respect of the suit land and had assured the plaintiff

about his title adding that every objection of the plaintiff was cleared. This statement remains unsupported by the various replies which were riot sent by the defendant to the plaintiff's notice.

As regards the three objections, it may be pointed out that the learned Judge has come to the conclusion that the plaintiff was aware of the agreement which the defendant had entered into with Bhailal and he concluded that it could be said that the defendant had failed to clear up the title so far as Bhailal's agreement was concerned. There is no reason to differ from this conclusion of the learned Judge.

But there is a more serious objection as regards the two other claims and we must hold that so far as these two objections are concerned, the plaintiff is technically right, it is to be noted that whereas S. No. 384 originally admeasured 9 acres and 36 gunthas, the area of the final plots Nos. 24 and 30 was 7 acres and 13 gunthas.

Again in respect of these two final plots Nos. 24 and 30, four persons were shown as owners including the defendant and under the agreement the defendant had agreed to convey to the plaintiff exclusive title of his. The question, therefore is whether the defendant had cleared up the title which he had undertaken to do under the agreement.

Whatever the position was prior to 1945, there is no question that in March 1945, the two plots were reconstituted and in respect of these two reconstituted plots, four persons were shown to be the owners. Chandulal and Hathising in their objections had asserted that the plaintiff's Bale, if any, would be subject to their rights.

It is to be noted that although four persons were shown to be the owners in respect of final plots Nos. 24 and 30, the portions falling to the share of each were not separated at any subsequent time. The learned Judge points out that these four persons were, therefore, joint owners of final plots Nos. 24 and 30.

No doubt the defendant was in possession of the property, which he intended to convey. But possession is one thing and title is quite another. It is again to be noted that at any time, prior to the agreement, which the defendant had entered Into with the plaintiff, he himself had not got the land out of final plot No. 30 separated so as to give exclusive title to the plaintiff.

Under the agreement the defendant had agreed to convey to the plaintiff his exclusive title in regard to 5200 sq. yards. u/s 55, Transfer of Property Act, the title, which the vendor has to give to the purchaser is a title free from reasonable doubt. He has to give what is called a marketable title. And in face of the objections raised both by Chandulal and Hathi-ing, it is impossible to say that the defendant was giving the plaintiff a title free from reasonable doubt.

On the contrary, Hathising's objection stated that Hathising had a share in the land, which the plaintiff had agreed to purchase. Chandulal had asserted that the

purchase in favour of the plaintiff would be subject to his rights. Under these circumstances we are of the opinion that the learned Judge was right in holding that the defendant had not cleared up the title, which he had agreed to do under the agreement. There was, therefore, a breach of the agreement on the part of the defendant.

10. This takes me to the other points made by Mr. Chhatrapati on behalf of the appellant. If the defendant has committed the breach, the defendant is not entitled to retain the sum of Rs. 7,000/- paid by the plaintiff to the defendant on 1-2-1946 and on the footing that the defendant had committed the breach of the agreement, Mr. Chhatrapati could not urge "and did not urge that the plaintiff was not entitled to have the sum of Rs. 7000/- returned to him.

But he contended that the Court below was wrong in giving the plaintiff a decree for the sum of Rs. 3000/-. The history in connection with the sum of Rs. 3000/- is this. Under the agreement, the plaintiff and the defendant were each to pay half of the expenses of stamp and registration. The plaintiff's evidence is that the defendant asked for a sum of Rs. 3000/- and the plaintiff asked one Hiraji to pay to the defendant the sum of Rs. 3000/-.

On behalf of the plaintiff, therefore, the evidence is of the plaintiff and of Hiraji and Hiraji's books of account. If the evidence of Hiraji is believed that he paid Rs. 3000/- to the defendant, supported as it is by his books of account, there is no difficulty in holding that Rs. 3000/- were paid by Hiraji to the defendant on behalf of the plaintiff. But there are certain circumstances, which have got to be explained in this connection.

It is to be noted that there is no receipt passed by the defendant in favour of Hiraji as having received the sum of Rs. 3000/-. If the sum was paid by Hiraji on behalf of the plaintiff to the defendant, one would expect Hiraji to insist upon the defendant passing a receipt in his favour, but Hiraji's explanation is that Hiraji and the defendant trusted each other. Both of them were of the same caste and Hiraji had business connection with the defendant.

11. The other circumstance in favour of the defendant is that the plaintiff sent a letter to Hiraji asking Hiraji to pay the defendant a sum of Rs. 3000/-. It is to be noted that this letter is not forthcoming. There is another circumstance in favour of the defendant. The sale was to be completed on 15-3-1946 and time was extended in order to have it completed before 31-3-1946.

It is arguable that there would be no question of the purchase of the stamp when the parties were negotiating for the transaction, And the further fact in favour of the defendant is that it is improbable that the defendant would purchase a stamp himself when the agreement was that the plaintiff and the defendant were to bear half the expenses of stamp and registration.

There is an additional circumstance, which has also to be taken into consideration and that is that although the plaintiff kept books of account, the

plaintiff has not produced his own books of account to show that he had given credit to Hiraji for a sum of Rs. 3000/-. In fairness, however, it must be pointed out that the plaintiff was not asked any question in that connection. In considering the question of the receipt of Rs. 3000/- it would be necessary to refer to the defendant's case.

The defendant's evidence is that he purchased a stamp for a sum of Rs. 2285/- and relied upon an entry in his books of account dated 26-3-1946. The defendant's story is that he purchased the stamp from his own funds and not from the amount of Rs. 3000/-, which is alleged to have been paid by Hiraji to the defendant on behalf of the plaintiff.

Whatever infirmity there may be in the defendant's case upon this point, we must be satisfied that the plaintiff has proved that Hiraji paid the defendant a sum of Rs. 3000/- on plaintiff's behalf, and in this connection there is the testimony of the plaintiff, supported as it is by the testimony of Hiraji, whose testimony is supported by an entry in his books of account.

As against these circumstances, there are two other circumstances, which we might as well mention. The defendant's story was that he paid Rs. 2100/- to the plaintiff on 16-3-1946 and a sum of Rs. 750/- to one Thakorelal on behalf of the plaintiff on the same date, that is, 16-3-1948. In this connection the defendant relies upon the entries made by him in his books of account.

With regard to the sum of Rs. 2100/-, the plaintiff's explanation is that the plaintiff had given the defendant a post-dated cheque and bearing date 16-3-1946. This cheque was not collected by the defendant, but according to the defendant Rs. 2100/- were, given by him to the plaintiff as a loan. If the sum of Rs. 2100/- were given to the plaintiff by the defendant as a loan and the defendant were in possession of the cheque for Rs. 2100/-, it is not possible to say that the defendant would not collect the amount of the cheque, which he had in his possession.

The learned Judge, after a consideration of the evidence in the case, came to the conclusion that he was not satisfied with the payment of Rs. 2,100/- by the defendant to the plaintiff. We think, the learned Judge is right. With regard to the sum of Rs. 750/- the defendant's story was that he paid Rs. 750/- to Thakorelal on 16-3-1946.

Now, there is a letter written by the plaintiff, which shows that a sum of Rs. 751/- was to be given to one Thakorelal, who was a broker, after the completion of the sale-deed. The defendant's evidence is that he gave the sum of Rs. 750/- to Thakorelal on behalf of the plaintiff. This story too has not been accepted by the learned Judge.

The letter, Ex. 96 clearly shows that the amount was to be paid to Thakorelal after the completion of the transaction on 16-3-1943. The parties were negotiating for the deal only two days before the time had been extended both

by the plaintiff and the defendant on 31-3-1946. It is impossible that on 16-3-1946, the plaintiff would ask the defendant to pay Thakorelal a sum of Rs. 750/--

Now the significance of not accepting the story of the defendant is that the account books of the defendant are not reliable. Entries have been made by the defendant with respect to two items of Rs. 2,100/- and Rs. 750/-, and if the entries are not reliable, it would be difficult to accept the entry made by the defendant with respect to the purchase of the stamp paper in relation to the sum of Rs. 2,285/- on 26-3-1946.

It is to be noted that the sum of Rs. 3,000/- was paid by Hiraji to the defendant on 23-3-1946 and the defendant has admitted in his evidence that the plaintiff while going to Bombay asked Hiraji to pay the sum to the defendant and the defendant admitted that the plaintiff had gone to Bombay at about that time. The interval between the date of payment of Rs. 3,000/- and the date of the purchase of the stamp, which is 26-3-1946, is an interval of 3 days and looking to the evidence of the defendant the story of the plaintiff appears to us to be more reliable.

In view of the fact that we are not prepared to rely upon the entries in relation to the sum of Rs. 2,100/- and Rs. 750/-, there is no difficulty in saying that we are not prepared to rely upon the entry of the purchase of the stamp on 26-3-1945 as having been made by the defendant from his own funds. We therefore, agree with the learned Judge in holding that the sum of Rs. 3,000/- was paid by Hiraji to the defendant on behalf of the plaintiff.

12. This leaves a short question about interest. In the plaint, the plaintiff has asked for a sum of Rs. 1,870/- as interest on his claim. It is significant that in the plaint consisting of 10 paragraphs not a word is said as to how the sum of Rs. 1,870/- is arrived at.

But Mr. D. V. Patel argues in support of his claim that the plaintiff would be entitled to interest at the rate of 6 per cent per annum on the sum of Rs. 700/- from 1-2-1946 to the date of suit, which is 4-4-1949. He also says that he would likewise be entitled to interest at the rate of 6 per cent p.a, on the sum of Rs. 3,000/- from 23-3-1946 to the date of the suit, that is, 4-4-1949.

In this connection, he relies upon Section 56(6)(b), Transfer of Property Act. It allows interest to be paid on the amount of the purchase money properly paid by the buyer in anticipation of the delivery. He also relies upon Section 18(d), Specific Relief Act, which provides for payment of interest upon a deposit made by the purchaser with the vendor when the vendor's suit for specific performance is dismissed on the ground of his imperfect title.

Section 18(d) will not, in terms apply because it contemplates a case where the question is of payment of interest on a deposit, in a suit filed by the vendor whose suit has been dismissed. Section 55(6)(b), Transfer of Property Act may

support Mr. Patel's contention. But it is to be observed that Clause (b) makes a distinction as regards the payment of interest.

Clause (b) of Section 55(6) consists of two parts. The first deals for the return of the purchase money properly paid by the buyer together with interest on such amount. Therefore, interest is to be paid upon the amount of the purchase money. The other part consists of the return of the earnest and it provides that the earnest should be returned to the purchaser together with costs, but makes no mention of the payment of interest.

This shows that whereas interest may be paid upon the purchase price, interest is not to be paid upon the amount of the earnest. In a sense, the earnest is part of the purchase price and it is arguable that interest may as well be paid upon the amount of earnest.

But since Clause (b) makes a distinction between the purchase price and the earnest, it seems to us that interest is not to be allowed upon the amount of the earnest money. This view would seem to be in accordance with the Pull Bench decision of this Court in -- "Ibrahimhai v. Elctcher" 21 Bom 827 (A).

Mr. Patel has not suggested that he made any demand for the return of the amount "prior to the-date of the suit and had claimed interest. Interest can be claimed only under an agreement or under the Interest Act. There is no agreement in this case and it is not suggested that the Interest Act would apply. The plaintiff will, therefore, be entitled to interest only from the date of the suit, and not prior to the date of the suit. It follows-that the plaintiff is not entitled to the sum of Rs. 1,870/- claimed by him.

13. The result of the aforesaid discussion is that the plaintiff is entitled to the sum of Rs. 7,000/- and also to the sum of Rs. 3,000/- in all Rs. 10,000/-.

14. The appeal will, therefore, be partially allowed and the decree of the lower Court will be modified. It is directed that the defendant will pay the plaintiff the sum of Rs. 10,000/- with interest at 4 per cent p.a. from the date of the suit to the date of payment. The order as regards- costs made by the lower Court will be maintained as also the order regarding the charge on the property. As regards the costs of this appeal, the defendant has substantially failed. He will, therefore, pay the plaintiff costs of this appeal.

15. Appeal partly allowed.