

(2004) 02 MP CK 0063
In the Madhya Pradesh High Court
Case No : First Appeal No. 108 of 2002

Dr. Deochand Bhura

APPELLANT

Vs

Purushottam Das Tandon and Others

RESPONDENT

Date of Decision : 26-02-2004

Acts Referred:

Specific Relief Act, 1963 — Section 20

Citation : (2004) 4 MPHT 144 : (2004) 2 MPLJ 148

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; N.K. Patel, for the Respondent No. 5(2) and P.N. Patel, for the Respondent Nos. 7(2), (3) and (4), for the Respondent

Judgement

S.P. Khare, J.

This is plaintiff's appeal u/s 96, CPC against the judgment and decree by which his suit for specific performance of contract has been dismissed.

It is not in dispute that defendant No. 1 Purushottam Das Tandon was owner of plot No. 134, Manmohannagar, Cherital Ward, Jabalpur. He agreed to sell this plot to the plaintiff by Ikrarnama dated 26-10-1983 executed by deceased defendant No. 6 Radhika Prasad Verma as his agent. An amount of Rs. 10,000/- was paid by the plaintiff to the vendor on the date of execution of the agreement as advance. The sale-deed was to be executed by the vendor on receipt of the remaining amount of consideration within three months. Hubbalal was in actual possession of this plot. He filed Civil Suit No. 374-A of 1983 against the plaintiff and Radhika Prasad Verma. On 2-12-1983 it was recorded in the order- sheet of that civil suit that the plot would not be sold to the plaintiff till the time of filing the written statement. Again on 20-12-1983 it has been recorded that the plaintiff would not dispossess Hubbalal until the written statement is filed. Radhika Prasad Verma filed the written statement on 9-2-1984. A certified copy of the same is Ex. P-16. Therefore, there was now no restraint order against him

from selling the plot. Hubbilal Withdrew his civil suit on 24-4-1984 as per order-sheet (Ex. P-14). On the same date the vendor and Hubbilal executed two registered documents in favour of defendant Nos. 4 and 5 -- Mohanlal Tiwari and Ghanshyam Patel. These documents have been described as "dastbardari". These have been executed by defendant No. 2 Shanker Upadhyaya on behalf of the defendant No. 1 and also by Hubbilal. The plot has been sold in two portions to these two persons on payment of Rs. 24,000/- as consideration by each of them. Thus, the defendant Nos. 4 and 5 acquired legal title to the plot.

During the pendency of civil suit filed by Hubbilal the defendant No. 1 sent a notice through his lawyer Shri Govind Upadhyaya, Advocate on 6-1-1984 to the plaintiff asking him to pay the remaining amount of consideration of Rs. 47,600/- before 26-1-1984 and get the sale-deed registered failing which the agreement to sell would be treated as cancelled. It was made clear in this notice that time should be treated as "essence of the contract". It was also intimated to the plaintiff through this notice that the defendant No. 1 would be free to sell the plot to other persons. A copy of this notice is Ex. D-11. The plaintiff gave the reply dated 16-1-1984 (Ex. P-11) to the effect that he is prepared for the registration of the plot "if all legal requirements for the purpose on your part are completed". It is not specifically spelt out in this reply what was to be done by the vendor. It is admitted that the remaining amount was not paid by the plaintiff before 26-1-1984 or before 9-2-1984. The plaintiff got a notice published in a newspaper (Ex. P-12) on 10-3-1984 that no one should purchase this plot in view of the agreement of the vendor with the plaintiff. He sent a telegraphic notice on 13-4-1984 (Ex. P-13) to Radhika Prasad Verma and Shri Govind Upadhyaya, Advocate asking them to stop registration in favour of Mohanlal Tiwari or others. But as already stated the documents conveying the plot in two parts to the defendant Nos. 4 and 5 were executed and registered on 24-4-1984.

After the plot was purchased by the defendant Nos. 4 and 5 the plaintiff sent the letter dated 10-6-1984 (Ex. D-2) to the defendant No. 1 claiming the refund of the advance of Rs. 10,000/- and also the damages of Rs. 24,000/-. The plaintiff requested the defendant No. 1 to "settle the matter and refund my advance money". The plaintiff again wrote the letter dated 16-7-1984 (Ex. D-5) stating therein: "I am entitled to receive back my advance; the expenses incurred by me and the damages caused to me due to this deal". The same thing was repeated in the letter dated 12-10-1984 (Ex. D-6) and other subsequent letters. The plaintiff at that stage did not express that he still wants specific performance of contract from the vendor and his transferees. He was all along claiming refund of the advance and payment of compensation. The defendant No. 1 sent the cheque dated 12-3-1984 (Ex. D-16) to the plaintiff but he did not encash it. Thereafter, the defendant No. 2 acting on behalf of the defendant No. 1 sent a photo-copy of the bank draft dated 16-7-1985 for Rs. 10,000/- with his letter dated 3-8-1985 (Ex. D-17) to the plaintiff requesting him to collect the original bank draft from him. But the plaintiff did not take this draft or encash it. He filed the suit out of which this appeal has arisen as late as 16-9-1986.

The plaintiff's case is that he was always ready and willing to perform his part of the contract and the time was not the essence of the contract. The defendant Nos. 4 and 5 purchased the plot with the notice of the sale-agreement in favour of the plaintiff and therefore, they are not bona fide purchasers and the suit for specific performance should be decreed against them also.

The case of the defendant No. 1 is that the time was essence of the contract. By notice dated 6-1-1984 (Ex. D-11) it was specifically made clear to the plaintiff that he must get the sale-deed executed within stipulated time on payment of remaining amount of consideration. But the plaintiff did not abide by the essential term of the contract and did not pay the balance amount within three months of the date of the agreement or even thereafter within a reasonable time. After the execution of the conveyance deeds in favour of the defendant Nos. 4 and 5, the plaintiff claimed the refund of advance and damages and he did not insist specific performance of contract and therefore, he must be deemed to have abandoned that claim. The defendant No. 2 has adopted the written statement of the, defendant No. 1. The case of the defendant Nos. 4 and 5 is that they had no, knowledge of the sale-agreement with the plaintiff. The defendant No. 4 has pleaded that he was in possession of the portion of plot in dispute for the last fifteen years and his house was standing thereon. According to the defendant No. 5 he has built a new house on the portion of plot purchased by him after taking permission of the Municipal Corporation. He has claimed to have invested an amount of Rs. 75,000/- in the construction of his house. At that time the plaintiff did not claim specific performance of contract.

The Trial Court has held that the time was not the essence of the contract but the plaintiff was not ready and willing to perform his part of the contract. It has also been held that the specific performance of contract can not be decreed against transferees on the facts and circumstances of this case.

The points for determination are (a) whether in this case the time was essence of the contract, (b) whether the plaintiff was, ready and willing to perform his part of the contract and (c) whether the defendant Nos. 4 and 5 are bona fide purchasers for value without notice of the agreement in favour of the plaintiff and therefore, the suit for specific performance of contract can not be decreed against them.

Points (a) and (b):

In the agreement dated 26-10-1983 (Ex. P-4) it has been specifically stated that the remaining amount of consideration was to be paid by the plaintiff within three months to get the sale-deed executed and registered. It is also admitted that in the notice dated 6-1-1984 (Ex. D-11) it has been specifically mentioned that the plaintiff must pay remaining amount of Rs. 47,600/- before 26-1-1984 failing which the contract would be treated as cancelled. It has also been stated in this notice that in that event the vendor would be free to sell the property to any other person. On receipt of this notice the plaintiff wrote the letter dated

16-1-1984 (Ex. P-11) to the defendant No. 1. In this letter the plaintiff has stated that the defendant No. 1 should complete the "legal requirement". It is not known as to what is that requirement that was to be completed by the defendant No. 1. He could move further in the direction of the execution of the sale deed only on payment of remaining amount of consideration by the plaintiff. This letters shows that the plaintiff did not take the notice of the defendant No. 1 sent through his lawyer seriously. By this notice it was made clear that the time is the essence of the contract. The plaintiff was writing letters and giving notices but he was not paying the balance amount so that registered sale deed could be executed by the vendor or his agent in favour of the plaintiff. It is true that in the case of contracts for sale of land, time is not, as a rule, of the essence of the contract, the presumption in such contracts being that the parties intended that performance should take place within a reasonable time even though a time-was mentioned in the agreement. The presumption is, however, rebuttable, and the seller is entitled to make the time the essence of the contract by specifically giving a notice to the purchaser. It was observed by the Privy Council in *Jamshed v. Burjorji*, AIR 1915 PC 83 : "Equity will not assist where there has been undue delay on the part of one, party to the contract, the other party has given him reasonable notice that he must complete within a definite time". In *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, , it has been held that if time is not of essence originally, it could be made of essence even subsequently by serving notice on the other party. Relying upon the decision of the Supreme Court, Delhi High Court in *Raj Rani Bhasin and Others Vs. S. Kartar Singh Mehta*, , has held : "No doubt the presumption is that in a contract for sale of immovable property time is not the essence of the contract and the mere stipulation of a date before which the sale deed was to be executed and the stipulation that the earnest money would be forfeited if the date was not adhered to would not necessarily make the time the essence of the contract but the seller is entitled to make the time the essence of the contract by specifically giving a notice to the purchaser if the purchaser was found to be delaying performance of the contract".

In the present case the Counsel for the defendant No. 1 by sending the notice dated 6-1-1984 (Ex. D-11) to the plaintiff made the time the essence of the contract. Therefore, it was necessary for the plaintiff to take this notice seriously and make the payment of the balance amount of consideration within stipulated time period of three months. The plaintiff did not make the payment even after expiry of period of three months from the date of the agreement and, therefore, he did not fulfil his part of the contract even within reasonable time. As already mentioned he was writing letters and giving notices. But he never came forward with the money to make the payment to the defendant No. 1, so that the sale-deed could be executed in his favour. The reason for the plaintiff's failure to do so is not far to seek. The plaintiff was hesitating to purchase the plot because of the civil suit filed by Hubbilal and the plaintiff did not want to pay the balance money in face of the litigation at the instance of Hubbilal. Therefore, disagreeing

with the Trial Court it is held by this Court that the time was essence of the contract. This Court agrees with the finding of the Trial Court that the plaintiff was not really ready and willing to perform his part of the contract until the deeds were executed by the vendor in favour of the defendant Nos. 4 and 5.

Point (c):

The case of the defendant Nos. 4 and 5 is that they have purchased the plot for consideration in good faith and without notice of the agreement between the plaintiff and the defendant No. 1. The plaintiff has no doubt published a notice in the newspaper on 10-3-1994 (Ex. P-12). From this public notice alone it can not be held that the defendant Nos. 4 and 5 were aware of the agreement between the plaintiff and the defendant No. 1. There is no direct or circumstantial evidence to establish that the transferees had prior notice of this agreement. As mentioned above, after execution of the conveyance-deeds in favour of the defendant Nos. 4 and 5, the plaintiff wrote several letters to the defendant No. 1 claiming refund of the amount of Rs. 10,000/- and damages. He did not claim specific performance of contract at that stage or within reasonable time thereafter. This factor also disentitles the plaintiff to come forward and claim specific performance after a long time. The plaintiff is guilty of laches in this respect. He ought to have claimed equitable relief at the earliest stage. The plaintiff must be held to have waived and abandoned his right to claim specific performance. It is well settled that jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles. If performance of a contract involves some hardship on the defendants which they did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance. This principle has been recognized in Section 20 of the Specific Relief Act, 1963. Specific performance can be declined where it would be inequitable to enforce it. (V. Muthusami by Lrs. Vs. Angammal and Others,). In this case the Supreme Court gave direction, for refund of advance with interest.

The plaintiff had paid an amount of Rs. 10,000/- as advance to the defendant No. 1. It is clear from the narration of the facts given above that the defendant No. 1 initially refunded the amount of Rs. 10,000/- through a cheque and subsequently he sent a photo-copy of the bank draft to the plaintiff. The original bank draft remained with the defendant No. 1 or his agent and he must have encashed it. As the defendant No. 1 was ready to refund the amount of Rs. 10,000/-, there is no legal impediment in directing the defendant No. 1 to refund the amount of Rs. 10,000/- to the plaintiff with interest at the rate of 6% per annum from the date of agreement, i.e., 26-10-1983 to the date of payment. This interest is being allowed as a reasonable compensation for the retention of amount of Rs. 10,000/- by the defendant No. 1 even after execution of the conveyance-deeds in favour of the defendant Nos. 4 and 5.

In the result, this appeal is partly allowed. The suit of the plaintiff for specific performance of contract has been rightly dismissed by the Trial Court. The respondent No. 1 will, however, refund the amount of Rs. 10,000/- to the plaintiff and pay interest at the rate of 6% per annum on this amount from 26-10-1983 to the date of payment. The parties will bear their own costs in suit and appeal.