

(1946) 01 CAL CK 0011
In the Calcutta High Court
Case No : Appeal No. 1429 of 1942

Ghyasuddin Ahmed

APPELLANT

Vs

Md. Ismail and another

RESPONDENT

Date of Decision : 09-01-1946

Acts Referred:

Citation : (1946) 01 CAL CK 0011

Final Decision : Allowed

Judgement

Biswas, J.—This is an appeal on behalf of the plaintiff and arises out of a suit for specific performance of a contract for sale. The contract was not in writing but is said to have been entered into verbally between the parties, who were related to each other, the plaintiff being the nephew of defendant 1. The subject-matter of the contract was a property in the town of Sylhet on which stood a house. At the date of the contract, part of the house was let out to a tenant whose lease was to expire about four years hence, namely, in June 1940. It was agreed that the consideration, which was fixed at a sum of Rs. 2000, would be paid in instalments and that the conveyance would be executed by defendant 1 in favour of the plaintiff upon the payment of the last of such instalments, but the plaintiff was to be put in possession of the property upon payment of the first instalment, except as regards the portion which was in occupation of the tenant. As regards this portion, it was expected that the tenant would vacate it on the expiry of his lease and the plaintiff was then to be given possession of the same.

2. It appears that in terms of the agreement the plaintiff was put in actual possession of the major portion of the property and he went on making part payments of the purchase money. There was stage when the plaintiff found it difficult to make further payments, and he accordingly suggested to defendant 1 that the latter might dispose of the property to some other party. Defendant 1, however, was anxious to accommodate the plaintiff in every possible way, and offered to accept payment of the balance of the purchase money in easy monthly instalments of Rs. 25. In point of fact, after this arrangement was made, the

plaintiff paid two or three instalments, but thereafter again defaulted. The last payment was made on 6th April 1940. Defendant 1 appears to have thereafter made a demand for the balance which was still due. He is said to have actually sent his son over to the place of the plaintiff for the purpose. The son, however, came back empty-handed. Thereupon, according to defendant 1's case, he felt so exasperated that he could not wait any further but decided to sell the property to defendant 2, a neighbour of the plaintiff. That sale was actually completed on 13th July 1940. That led to the present suit for specific Performance which was commenced on 22nd January 1941, after the plaintiff had made a tender of the whole of the balance of the purchase money to defendant 1 on 26th October 1940.

3. The two main questions, which were raised at the trial, were first whether it could be said that by reason of the plaintiff's conduct the contract had come to an end and was accordingly not enforceable, and secondly, whether or not defendant 2 was a bona fide purchaser for value without notice of the contract with the plaintiff, so that even if the contract was enforceable against the defendant 1 it could not be enforced against defendant 2.

4. On both the questions the learned Munsif found in favour of the plaintiff and decreed the suit. On appeal, the learned District Judge agreed with the trial Court that there was nothing in evidence to show that the contract had been put an end to, and held that defendant 1 was accordingly not entitled to sell the property to any other party. On the second point, however, the learned Judge took a different view from that of the learned Munsif. He did not disturb the finding on which the learned Munsif had relied to the effect that the plaintiff had been in possession of the property, but he held that such possession amounted merely to constructive notice of a sale of the property to the plaintiff, but not of the particular contract for sale which had been entered into with him. What the learned Judge meant to hold was that the plaintiff's possession merely gave defendant 2 notice that he was in possession as a purchaser, but that on enquiry defendant could not but have found that as a matter of fact no such transaction had been completed by or in favour of the plaintiff. In this view the learned Judge was of opinion that defendant 2 was well within his right to purchase the property for value in spite of the prior contract in favour of the plaintiff. The decree of the trial Court was accordingly modified, and the plaintiff's prayer for specific performance was rejected. There was a decree against defendant 1 only for a refund of the sum of Rs. 1325 which the plaintiff had paid to defendant 1 on account of purchase money. A sum of Rs. 50 was also awarded against defendant 1 as damages.

5. Mr. Das, on behalf of the appellant, has directed his arguments mainly against the decision of the lower appellate Court on the question of notice. That decision, in my opinion, is clearly wrong and is founded on a misconception of the true legal position. Accepting the finding that the plaintiff was in possession of the property, there can be no doubt that this was sufficient to put an intending

purchaser on notice as to the extent and right of the plaintiff's interest, and if that was so, the subsequent purchaser would undoubtedly be affected by all the equities which the person in possession was entitled to enforce against the vendor. On behalf of defendant 2, it was contended, in the first place, that the finding of possession, such as it was, was not sufficient in law to amount to constructive notice. It was pointed out that the possession was not actual khas possession but possession through tenants, and that that being so, it did not amount in law to notice of the plaintiff's title. I am unable to accept this contention. Whether the plaintiff was himself in actual occupation of the property, or was in possession through tenants, the fact remains that possession was not with the vendor, but with a person other than the vendor. That was certainly enough to put the intending purchaser on enquiry, and if such enquiry had been made by him, that was bound to disclose the real title. I do not think that the mere fact that possession was exercised through tenants would make any difference in the application of the doctrine of constructive notice in a case of this kind.

6. The learned advocate for the respondents did not seek to support the view which had been adopted by the learned Judge. That view, as already stated, is absolutely untenable. Illustration 3 to cl. (b) of S. 27, Specific Relief Act, is a sufficient answer to it. The illustration is this:

A contracts to sell land to B for Rs. 5000. B takes possession of the land. Afterwards, A sells it to C for Rs. 6000. C makes no enquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest and he may enforce specific performance of the contract against C.

7. It will be observed that B's possession is said to be sufficient to affect C with notice of B's interest, and notice of his interest would necessarily include notice of his prior contract. It seems to me to be absurd to say that though defendant 2 had notice of the plaintiff's purchase which was not a fact, he could not be said to have notice of the contract for purchase which was a fact. I must accordingly hold that the defence of a bona fide purchase for value without notice, which was set up on behalf of the respondents, fails, and the contract should be specifically enforced against him, if it was otherwise enforceable.

8. That takes us to the other point which was canvassed in this case, as to whether upon the facts the contract could be said to have come to an end. As already pointed out, both the Courts have concurrently found that there was no termination of the contract, but that finding has been assailed on behalf of the respondents as not based on evidence. I find myself unable to accept this contention. It is said that the admitted facts in the case established a breach of the contract on the part of the plaintiff. The facts on which special reliance was placed were that defendant 1 had agreed to accept payment in instalments only on condition that such payments were made regularly, and secondly, that although default in making regular payments had been waived by defendant 1 upto a certain point of time, there was no further waiver when defendant 1 sent

his son to the plaintiff for the unpaid balance of the purchase money. I do not think these facts are sufficient to support the legal inference which is sought to be drawn from them. As the Courts below pointed out, there was not a word in the evidence that defendant 1 gave notice to the plaintiff, orally or in writing, at any stage, that any further default on his part would not be waived, but would put an end to the contract. If defendant 1 was really minded to bring the contract to an end, it was quite within his power to do so by giving some such notice. That is not what he did. It is quite true that there was failure on the part of the plaintiff to make the payments at the stipulated time, but then having regard to the fact that defendant 1 had all along been very lenient in the matter of enforcing payments of the instalments, it is not possible to hold that any particular default or defaults would have the consequence of terminating the contract except; upon express notice to that effect. I think that upon the facts of the case as disclosed in the evidence, both the Courts below were right in the view they took on this question.

9. If, then, the contract was subsisting, the question that still remains is whether or not in the circumstances of the case it was one of which the Court should grant specific performance in the exercise of its discretion. This point had not been raised in the Courts below, but has been argued here on behalf of the respondents, and reliance is placed on S. 22, Specific Relief Act, which provides that the 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. This need not be disputed; but is there any reason why the Court should not exercise discretion in favour of the plaintiff here? The case cannot be brought within any of the clauses of S. 21 which lays down what contracts cannot be specifically enforced. An argument was raised on behalf of the respondents that cl. (a) applies, in so far as this was a contract for non-compliance with which compensation was an adequate relief. The learned Judge in fact made a decree for money compensation in favour of the plaintiff. It will be observed, However, that in the case of a contract for transfer of immovable property there is a presumption that such a contract cannot be adequately relieved by compensation in money (see the explanation to S. 12, Specific Relief Act). Nothing has been proved to the contrary in this case to rebut this presumption. The only ground on which it is urged that the Court should not assist the plaintiff is his default, but upon the facts it appears that such default had been consistently waived by defendant 1, and it is not open either to him or to any one claiming title through him to complain of such default now, in the absence of any evidence that any such complaint had been made at the time the default occurred.

10. Having regard to all the facts and circumstances, I see no reason for not accepting the finding of the Courts below that there was a subsisting contract which was capable of specific performance, and for not holding that the plaintiff was entitled to a decree for specific performance. The result is that the appeal is allowed, the judgment and decree of the lower appellate Court are set aside, and those of the Court of first instance restored with costs in all Courts. Leave to

appeal under cl. 15, Letters Patent is refused.