
(1944) 08 AHC CK 0010
In the Allahabad High Court

Khuda-I-Tala through K.B. Qazi Mohammad Zafar Ahmad Khan

APPELLANT

Vs

Mt. Hamida Khatoon

RESPONDENT

Date of Decision : 16-08-1944

Acts Referred:

Citation : AIR 1945 All 70 : (1944) 14 AWR 266

Hon'ble Judges : Mulla, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mulla, J.—This is a plaintiff's appeal arising out of a suit for specific performance of an agreement to sell and in the alternative for return of the earnest money paid under the agreement. The plaintiff-appellant, Khan Bahadur Qazi Mohammad Zafar Ahmad Khan, is the mutwalli of a Muslim Waqf appertaining to the Jama Masjid Kalam in the city of Saharanpur and he has brought the suit in that capacity. The sole defendant in the suit, who is now the respondent in this appeal, is Mt. Hamida Khatoon, the only daughter of one Mohammad Ahmad Khan by one of his two wives. By his other wife Mohammad Ahmad Khan had three children, including two sons named Mahmood Ahmad Khan and Mashkoor Ahmad Khan who at the material date were minors under the guardianship of their uncle Asghar Ali Khan. The agreement sought to be enforced by the specific performance was entered into between the plaintiff-appellant and the defendant-respondent on 18th October 1937. The property to which it relates consists of a one-third share in two shops situated in very close proximity to the Jama Masjid. The agreement provides that the defendant-respondent shall be prepared to execute a sale deed in respect of the property in question for Rs. 10,000 in favour of the Jama Masjid and the waqf appertaining thereto represented by the plaintiff-appellant upon being called to do so by him at any time within a period of twelve months from the date of the agreement. It was also declared by the defendant-respondent in this agreement that she had a complete title to the

property in question being the sole owner thereof and gave the opposite party the right to repudiate the agreement if that declaration were proved to be wrong. In order to secure the performance of the agreement by the plaintiff-appellant, who was directed by the agreement to get a sale deed executed by the defendant-respondent within the period of one year prescribed in the deed, the defendant-respondent got a sum of Rs. 3000 from him. From the terms of the agreement it would appear that this amount was deposited by the plaintiff-appellant with the defendant-respondent as a guarantee for the performance of the agreement. It is referred to in a later part of the agreement as Zare bayana, which is ordinarily understood to be earnest money. If the defendant-respondent failed to carry out her part of the agreement, that is, if she failed to execute the sale deed upon being asked to do so by the plaintiff-appellant, the latter could enforce specific performance of the agreement by a suit and was also entitled to recover all costs and damages from the defendant-respondent. In the event of the plaintiff-appellant failing to carry out his part of the agreement, that is, calling upon the defendant-respondent to execute the sale deed within the period prescribed in the deed of agreement, it was clearly laid down that the money deposited by the plaintiff-appellant with the defendant-respondent shall be forfeited. The plaintiff-appellant was also given the right to repudiate the agreement and to recover damages, if any, in the event of the defendant-respondent's declaration relating to her complete title to the property in question being proved to be false.

2. This agreement was admittedly entered into by the plaintiff-appellant after he had examined the title deeds relating to the property in question. It is admitted that the plaintiff-appellant saw the sale deed relating to this property in favour of the defendant-respondent and also certain documents showing that she had been realising rents in respect of this property from certain tenants. It appears further that sometime after the death of Mohammad Ahmad Khan in the year 1936 an application was made to the District Judge, Saharanpur, on behalf of his two minor sons for the appointment of a guardian of person and property and in that proceeding it was alleged on behalf of the minor sons that they were entitled to the property with which we are concerned in the present case and which admittedly stands in the name of the defendant-respondent alone. It was claimed on behalf of the minor sons of Mohammad Ahmad Khan that the transaction in favour of the defendant-respondent was only a benami transaction and the real owner of the property was Mohammad Ahmad Khan, so that this property formed part of his assets at his death. This matter was settled for the purposes of that proceeding by the learned District Judge in favour of the defendant-respondent. It is admitted that this order of the District Judge of Saharanpur was also seen by the plaintiff-appellant before he entered into the agreement in question in the present case.

3. A few months before the date of the agreement in question, a suit No. 15 of 1937 was instituted by Zahur-un-nissa, the mother of the defendant-respondent, for possession of her share in the assets of her deceased husband by partition. In

that suit the property covered by the agreement in question was not mentioned by Zahur-un-nissa as a part of the assets of her deceased husband. The two minor sons of Mohammad Ahmad Khan were, however, impleaded as defendants and it was claimed on their behalf in a written statement filed in August 1937, that is, about two months before the date of the agreement in question, that the property covered by the agreement formed part of the assets of Mohammad Ahmad Khan and the defendant-respondent had no title to it, though it stood in her name. On 19th October 1937, that is, the very next day after the agreement in question, the plaintiff-appellant was served with a notice on behalf of the minor sons in which the same claim was put forward with regard to the property covered by the agreement and the plaintiff appellant was warned that he would purchase the property at his own risk. The plaintiff-appellant replied to this notice on 80th October 1937, and it would be useful and instructive to quote a passage from his reply. It runs as follows:

The purchase has been agreed to be made in good faith and for consideration. The contract has been made after perusal of the order of the Court of the District Judge and the sale deed executed by-Mohammad Ismail Khan in favour of Hamida Khatoon and also after enquiry about rent deeds, etc., Mt. Hamida Khatoon only is competent to complete this contract. Negotiations for this transaction had been going on for a month with different intending purchasers, but owing to nearness, the property has been agreed to be purchased in the name of the mosque. There was also a great apprehension of the fact that in case the property was purchased by a man of another religion, some damage might be caused to the mosque on account of his close neighbourhood.

4. It would thus appear that in spite of the notice which the plaintiff appellant received on 19th October 1937, he entertained no doubt at all as to the fact that the defendant-respondent had a good title to the property covered by the agreement. He remained absolutely silent and took no further steps with regard to this matter until 12th October 1938, that is, only six days before the expiry of the period fixed in the agreement within which the plaintiff-appellant was to call upon the defendant-respondent to execute a sale deed. In this notice the plaintiff-appellant sought to make out a case by reference to the notice received by him on 19th October 1937, that a grave doubt had been cast upon the title of the defendant-respondent to the property covered by the agreement and hence the plaintiff-appellant was entitled under the terms of the agreement to get the period fixed therein extended until the decision of Suit No. 15 of 1937. It also suggested that the only condition under which the plaintiff-appellant would be prepared to get a sale deed from the defendant-respondent was that the latter should furnish security to him for the return of the whole sale consideration in the event of her title to the property covered by the agreement being disproved. The defendant-respondent naturally refused to offer any security as claimed by the plaintiff appellant and asserted on the other hand in her reply to the above notice that the plaintiff-appellant was bound to have a sale deed executed by her within the period of one year provided for in the agreement and in the event of

his failing to do so the deposit of Rs. 3000 made by him shall be forfeited and she will be entitled to sell the property to any other person. On 17th October 1940, the plaintiff-appellant instituted the suit out of which the present appeal arises. It is important to note that even in this suit the plaintiff-appellant does not claim specific performance of the agreement as it stands but introduces a condition to be fulfilled by the defendant-respondent before the sale deed is executed, though the agreement itself does not afford any justification for demanding any such condition to be performed or fulfilled by the defendant-respondent. The first and the principal relief claimed in the suit is in the following terms:

The defendant may be ordered to perform the contract in respect of the property mentioned at the foot of the plaint, according to the agreement, dated 18th October 1937 and to execute and complete and get registered a sale deed of the said property in favour of the plaintiff, according to the conditions laid down in the agreement and other necessary conditions? after giving adequate security for the safeguard of the consideration, damages and costs and also to deliver possession of the property aforesaid to the plaintiff.

In the alternative it was claimed that Rs. 3000 deposited by the plaintiff-appellant with the defendant-respondent as earnest money should be returned to him. The suit was resisted principally upon the ground that the plaintiff-appellant had himself failed to carry out the terms of the agreement and had repudiated it by his own conduct, so that the forfeiture clause contained in the agreement came into operation and entitled the defendant respondent to retain the earnest money which had been deposited with her. The learned Civil Judge framed the following four issues in the case:

1. Whether the time of one year agreed upon for the execution of the sale-deed was the essence of the contract?
2. Whether the plaintiff or the defendant committed a breach of the contract?
3. Whether the plaintiff could force the defendant to execute a security bond along with the sale deed?
4. Whether the plaintiff is entitled to get back Rs. 3000 the earnest money from the defendant or is the defendant entitled to retain the same in case of a breach by the plaintiff?

All these issues have been decided against the plaintiff and the suit has accordingly been dismissed; hence the present appeal. The first argument put forward on behalf of the appellant in its substance is that in the circumstances of this case the plaintiff appellant was entitled to avoid the agreement because a cloud had been cast upon the title of the defendant respondent to the property covered by the agreement. This contention is obviously not entitled to any weight for two very good reasons. In the first place, the condition in the agreement was that the plaintiff-appellant could avoid performing his part of the

agreement in the event of the declaration made by the defendant-respondent as to her title to the property being proved false. All that is alleged in the present case is that a cloud was cast upon the defendant-respondent's title by the plea taken by two of the defendants in Suit No. 15 of 1937 which we have already referred to above. In the second place, this plea cannot be of any avail to the plaintiff-appellant in this case because, as already stated, he had entered into the agreement with full knowledge of the fact that there was a claim being made by two minor sons of Mohammad Ahmad Khan with regard to the property covered by the agreement. We have already pointed out by reference to a passage taken from the plaintiff-appellant's own reply to the notice served upon him on behalf of the minor sons of Mohammad Ahmad Khan that the plaintiff-appellant had carefully examined all the deeds of title relating to the property covered by the agreement and was satisfied that the defendant-respondent had a good title to the property. He had seen the sale deed in favour of the defendant-respondent and a number of rent deeds which show that she had been realising rents from the property in question and had also examined the order of the District Judge referred to in his reply which, as already stated above, was an order passed in the course of a guardianship proceeding. It is therefore clear beyond all doubt that the notice which was served upon the plaintiff-appellant could not have come to him as a surprise at all and his own reply to the notice shows that it did not affect his mind at all with regard to the defendant-respondent's title to the property covered by the agreement. In spite of that notice he was, as shown by his reply, fully satisfied that the defendant-respondent was the only person competent to transfer the property in dispute. Thereafter he took no step whatever with regard to this matter until 12th October 1938 that is, only six days before the expiry of the period of one year fixed in the deed of agreement. We are therefore satisfied that in the circumstances of this case there was no ground upon which the plaintiff-appellant could have avoided the performance of his part under the agreement. He was clearly bound to get a sale deed executed by the defendant-respondent within the period prescribed by the agreement.

5. The next question which was raised in the course of argument and which is intimately connected with the one that we have already considered was that time in this case was not of the essence of the contract at all. It may be conceded that the question whether the time mentioned in a contract or agreement is or is not of the essence of the contract or agreement is a question which depends for its decision upon the facts and circumstances of each case. The mere fact that a certain time is mentioned in an agreement for the performance of an act would not necessarily lead to the conclusion that the time so fixed was of the essence of the contract. The real intention of the parties to the agreement has to be deduced from all the surrounding circumstances of the case. The learned civil Judge has considered the circumstances of the case from that point of view and has arrived at the conclusion that in the present case the time limit of one year fixed by the agreement within which the plaintiff appellant was to call upon the

defendant-respondent to execute a sale deed was of the essence of the contract and we are inclined to agree with that finding. It is admitted in the present case that there were a number of persons intending to purchase the property in question when the agreement in question was entered into by the parties to this case. It has also been proved that the plaintiff-appellant was very anxious to secure the property in question particularly because of its close proximity to the mosque of which he is the mutwalli. It would appear from his own statement that he was anxious that this property should not go into the hands of a non-Muslim.

6. The evidence in the case, limited though it is, is sufficient to prove a great anxiety on the part of the plaintiff-appellant to acquire the property in question and also the fact that some influence was brought to bear upon the mind of the defendant-respondent that in selling this property to the mosque in preference to other intending purchasers she would be doing a meritorious act. In these circumstances the defendant-respondent wanted to be certain that the agreement would be adhered to and performed by the plaintiff-appellant and she, therefore, demanded a deposit of Rs. 3000 as a guarantee for the performance of the agreement. It is admitted by the plaintiff-appellant himself that the whole sale consideration was demanded immediately but as he did not have the necessary money with him he asked for a period during which the payment could be made and it was consequently agreed between the parties that the plaintiff-appellant would call upon the defendant-respondent to execute a sale deed at any time within one year from the date of the agreement. It is evident that the defendant-respondent could not possibly have agreed to keep the agreement in force for an indefinite period of time, though her hands were tied up and she could not dispose of the property or sell it to any other purchaser while the agreement remained in force. It was not merely reasonable time that had been allowed to the plaintiff-appellant for the performance of his part of the agreement but indeed a very long period had been given to him for his special convenience, because he had no money with him at the time to pay the whole sale consideration. In these circumstances we think that it is legitimate to infer that the parties intended that the period of one year provided for in the deed should be treated as a matter forming the essence of the contract. It would obviously be unreasonable to put any other" interpretation upon the agreement, for it would amount to holding that the plaintiff-appellant could at any time subsequent to the agreement have asked the defendant-respondent to execute a sale deed even though he had come several years after the date of the agreement. The time being of the essence of the contract, there cannot be any doubt upon the admitted and proved facts of the case that the plaintiff-appellant failed to perform his part of the agreement and thus committed a breach which brought the forfeiture clause into operation.

7. We, have already referred to the fact that he remained absolutely silent up till 12th October 1938, that is, only about six days before the expiry of the period fixed in the agreement. Even then he wanted the defendant-respondent to fulfil a new condition which had not been provided for in the agreement, namely, to give

him security for the realization of the whole sale consideration in the event of her title to the property being disproved in any case. This demand on his part was in our opinion wholly unjust because, as we have already shown, the plaintiff-appellant entered into the agreement with a full knowledge of the fact that some claim was being asserted in respect of the property covered by the agreement on behalf of the minor sons of Mohammad Ahmad Khan. The plaintiff-appellant allowed the whole period fixed in the agreement to elapse and even thereafter he did not ask the defendant-respondent to execute a sale deed in accordance with the terms of the agreement. Two years later, he filed the present suit and even in that suit he did not claim specific performance of the agreement, as it stood between the parties, but of an agreement, plus a condition the fulfilment of which he had no right to demand from the defendant-respondent.

8. The only question which remains for consideration is whether in these circumstances the defendant-respondent was or was not entitled to retain the amount of Rs. 3000 which was deposited with her by the plaintiff-appellant as a guarantee for the performance of the agreement? This amount has been described as earnest money even in the plaint of the suit and it has not been argued before us that it was anything else but earnest money. The terms of the agreement are also in our judgment clear on the point, for, it is clearly stated there that the amount was being taken as a guarantee for the performance of the agreement. The learned Counsel for the plaintiff-appellant contended that he was at least entitled to relief u/s 74, Contract Act, so that the Court could reduce the amount by directing the defendant-respondent to return a part of it instead of the whole to the plaintiff-appellant. In support of this contention reliance was placed upon the case of AIR 1933 223 (Nagpur) . That appears to have been a case which came up before the learned Judicial Commissioner in revision against a decree of a Small Cause Court Judge. It related to the sale of a money decree. The plaintiff had agreed to purchase the decree for Rs. 720 and had paid Rs. 530 to the defendant towards the price but this amount was stated to be earnest money and the plaintiff agreed that it should be forfeited if the contract was not carried out. The contract having been repudiated by the plaintiff, he sought to recover the amount which he had paid to the defendant. It was held by the learned Judicial Commissioner that the stipulation that the sum of Rs. 530 should be forfeited on default was of the nature of a penalty and the vendor was entitled only to reasonable compensation. Another case to which reference was made on behalf of the plaintiff-appellant is that in *Raghubir Das v. Sundar Lal* ("31) 18 AIR 1931 Lah. 205. This latter case only lays down a general principle that the mere fact that time is specified for the performance of a certain act, is not by itself, sufficient to prove that time is the essence of a contract and the Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time. This principle we have already conceded but it appears that it was further held in the case that where there is a breach of a contract of sale the party paying part of the purchase money, which

is described as "advance," is entitled to refund of the sum, it not being liable to forfeiture as earnest money. We find, however, that in that case there was no definite stipulation of forfeiture and further that the amount was definitely held not to be earnest money. We do not think that this case can be of any real assistance to the plaintiff-appellant. The other case referred to by us no doubt apparently supports his contention. On the other hand we have a number of authorities of our own Court which lay down quite clearly that where there is a stipulation that earnest money shall be forfeited and there is a breach of contract by the party who claims the return of the earnest money, his claim is not entertainable because the opposite party has the right under the contract between the parties to retain the amount of earnest money if the breach is committed by the party claiming the return of the amount. The first case of this Court which may be referred to in this connexion is reported in *Bishan Chand v. Radha Kishan Das* ("97) 19 ALL. 489. It was held in that case that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been made by him to the vendor in pursuance of the contract. This judgment was based on some English authorities which we need not cite here. The principle laid down in this case was approved and followed in two other cases of this Court, one reported in *Roshan Lal v. Delhi Cloth and General Mills Co., Ltd. Delhi* ("11) 33 ALL. 166 and the other in *Mohammad Habib-Ul-Lah Vs. Mohammad Shafi*, . In the former case special stress was laid upon the pronouncement of Sir W. M. James L. J., in *Ex parte Barrell*; *In re Parnell* (1885) 10 ch A. 512 which runs as follows:

The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, give me back the deposit. There is no ground for such a claim.

In the latter case it was held that where a plaintiff has advanced money to the defendant by way of earnest money and a guarantee for the fulfilment of the contract in respect of which he is suing he cannot recover the earnest money where it is found that the breach of the contract is due to his own default. The matter appears to be concluded by a pronouncement of their Lordships of the Privy Council in *Chiranjit Singh v. Har Swarup* ("26) 13 AIR 1926 P.C. 1. The principle laid down by their Lordships in that case was:

Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault or failure of the vendee.

This pronouncement of their Lordships was referred to in the Nagpur case relied upon by the plaintiff-appellant, but the learned Judicial Commissioner, seemed to be of the opinion that the pronouncement was to be considered only in the light of the particular facts of that case and it was pointed out that the earnest money in that case was only 5 per cent, of the sale price agreed upon between the parties. We do not think that their Lordships ever intended that the application of the principle laid down by them should depend merely upon the proportion of the

earnest money deposited by the vendee with the vendor to the total sale price. It may of course be contended in some cases that the money deposited by the vendee with the vendor and stated to be earnest money is either wholly or in part not really earnest money but something more, but that is a question that would depend upon the evidence in each particular case. Where, as in the present case, there is no contest that a certain amount deposited by the vendee with the vendor was earnest money, the principle laid down by their Lordships of the Privy Council applies with full force and if it is found that the vendee committed a breach of the contract and repudiated it, he must be held to be not entitled to claim the return of the earnest money deposited by him with the vendor. The same view has also been taken by the majority of Judges of the Madras High Court in the Full Bench case in *Natesa Aiyar v. Appavu Padayachi* ("15)2 AIR 1915 Mad. 896. Having regard to the uniform current of authority in this Court, the plaintiff-appellant's contention that he is entitled to the return of either the whole of the sum of Rs. 3000 paid by him to the defendant-respondent or of any part of it must be repelled. Indeed, the plaintiff-appellant's contention that Section 74, Contract Act, can be applied to a case like the present is itself open to some doubt. We need not, however, enter into a discussion of that question in the present case because, as we have already pointed out, there is a uniform" current of authority in this Court which negatives the plaintiff-appellant's contention. We are satisfied upon the facts and the evidence in the present case that the plaintiff-appellant failed to perform his part of the agreement in question and also repudiated it by his subsequent conduct, inasmuch as when he asked the defendant-respondent to execute a sale deed in accordance with the terms of the agreement, he added a new condition, which had no place in the agreement, that the defendant-respondent should at the same time execute a security bond. It is, therefore, clear upon the authorities to which we have referred that the plaintiff-appellant is not entitled to the return of Rs. 3000 deposited by him with the defendant-respondent as a guarantee for carrying out the terms of the agreement. The result, therefore, is that this appeal fails and is dismissed with costs.