

(1934) 05 CAL CK 0024
In the Calcutta High Court

Probodh Kumar Das

APPELLANT

Vs

Gillanders Arbuthnot and Co.

RESPONDENT

Date of Decision : 17-05-1934

Acts Referred:

Contract Act, 1872 — Section 141

Citation : AIR 1934 Cal 699 : 152 Ind. Cas. 571

Hon'ble Judges : Lort-Williams, J; Lord-Williams, J; Costello, J

Bench : Full Bench

Judgement

Lort-Williams, J.—This is an appeal from a judgment of Buckland, J., arising out of a suit upon a contract of sale of a tea garden. It appears that some time in August 1931 one S.N. Roy approached Messrs. Gillanders Arbuthnot and Co. with, an offer to purchase from them the Kaiyacherra Tea Estate as per description given by them. The terms upon which he offered to purchase were contained in a letter dated 19th August 1931. He added as postscript to his letter that Mr. P.K. Das, the present appellant, was agreeable to stand as guarantor. Subsequent to that letter, there were certain discussions between the parties, and an amended offer was made, and on 30th September 1931 Messrs. Gillanders Arbuthnot and Co., wrote saying that they could not accept the amended offer immediately, and asked Roy to leave it open till 7th October.

2. On 8th October the company wrote accepting the offer contained in the letter of 19th August, subject to modification which had been arranged verbally, regarding the payment of the purchase money. The contract provided, inter alia, that the property should be sold free from all sorts of charges and encumbrances, and that the purchase price should be Rs. 85,000 of which Rs. 15,000 were to be paid on the date of delivery of possession, Rs. 10,000 before 31st January 1932, and the balance of Rs. 60,000 in three equal instalments spread over three years. A promissory note was to be given for the balance of the purchase price, for Rs. 70,000 with interest thereon, payable on demand, and upon any default in the punctual payment of any of the instalments, the

vendors were to be at liberty to enforce payment on the promissory note for the whole amount then outstanding. The amount was to be further secured by way of equitable mortgage by deposit of title deeds or by a legal mortgage. The purchase was to take effect from 10th October 1931, the date of the execution of the document, and possession was to be given on 16th October 1931, when the purchaser would make the first payment of Rs. 15,000. Then follows the condition which has become of some importance in view of what subsequently happened. Clause 4 of the agreement provides that

the tea manufactured in the garden till, then and in stock in the garden on the date of possession shall also be delivered to me at the time, except such a stock as has previously been sold amounting to as I understand about 25 maunds.

3. "Till then" obviously meant up to 16th October 1931 when possession was to be given. Clause 5 provides that Messrs. Gillanders Arbuthnot and Co. would have the property conveyed to the purchaser or his nominee, as soon after he had made payment of the first sum of Rs. 15,000 as Messrs. Gillanders' Solicitors could reasonably arrange,

and the conveyance was to contain the usual form of receipt for the whole of the purchase money, although, in fact, the purchaser would only have paid a sum of Rs. 15,000.

4. The balance of Rs. 70,000 was to carry interest, and together with the interest was to be a first mortgage on the Kaiyacherra Tea Estate, which the purchaser was to execute. The cost of stamp duty and registration fee relating to the conveyance and mortgage were to be paid by the purchaser in addition to the price of the property. The terms of Mr. Das guarantee, which was written at the foot of this contract, were as follows;

I hereby agree to stand guarantor for the due performance by Mr. S.N. Roy of the undertakings set forth above, and I agree to pay the amount outstanding on account of principal and interest immediately on being called upon by you to do so, if you do not receive payments from Mr. S.N. Roy according to the above letter, and without your first being required to take legal action for the recovery of the amount due from Mr. S.N. Roy.

5. The initial sum of Rs. 15,000 was paid by the purchaser, and possession was given on or about 16th October 1931. Default was made in payment of part of the instalment of Rs. 10,000 due on 31st January 1932. On 21st October 1931 i.e., five days after taking possession, Roy wrote to Messrs. Gillanders, inter alia, as follows:

The despatch of an invoice of 179 chests of tea was taken in hand by your late Manager. This has been taken over by myself, as excluding 24 chests herein, they were all packed subsequent to 10th October, the date of my purchase, and they all are under the terms of purchase, my property. Again 606 chests were despatched from the garden between 28th September to 7th October, and these

teas are on their way to Calcutta, and they also are, under the terms of purchase mine. I, accordingly beg to request you to hand over the chests to the Bhawanipur Banking Corporation Ltd., after duly endorsing the invoices. We also understand that 96 mds. of tea are lying unsold with Messrs. Bullock Bros. and Co. Please direct Messrs. Bullock Bros. and Co. to send the sale proceeds of the same to my bankers Messrs. Bhawanipur Banking Corporation, Ltd.

6. On 24th October Messrs. Gillanders wrote as follows:

We do not agree with your contention regarding the tea despatched by the receiver and regret therefore that we cannot comply with your requests. The terms of the purchase were that only the tea remaining unpacked at the factory on the date of sale should be delivered to you.

7. Subsequently, various interviews took place between Roy and Messrs. Gillanders with the object of trying to settle this dispute, and on 9th December Mr. Roy wrote a letter marked "without prejudice," referring to an interview he had with Messrs. Gillanders on 8th December, and submitting proposals for an amicable settlement of the dispute. He said, either that they should make over to him all tea of the Kaiyacherra Garden, 12,000 lbs. of which must be given free of charge, and the balance be supplied at its then price. He stated that he made this proposal without prejudice to his legal rights.

8. Subsequently, Messrs. Gillanders prepared a draft letter for the signature of Roy, and this was signed by him on the 20th January 1932. In this letter he referred to the previous letter and interview, and asked the company if they would sell him 400 mds. of Kaiyacherra tea then in Calcutta, at the price of 4 annas per pound packed in garden chests. If they were prepared to sell that quantity of tea on the terms proposed, he would give up all claims in respect of the tea purchased by him under the contract dated 8th October 1931, and would admit that Messrs. Gillanders had performed the contract in full so far as the question of the sale of manufactured tea was concerned. Messrs. Gillanders replied on the same day saying that they were prepared to sell him 400 mds. of Kaiyacherra tea at 4 annas per lb., and they confirmed that all disputes under the contract of 8th October 1931 were now settled and that Roy had no further claim against them in respect of tea alleged to have been purchased by him.

9. The reason for this dispute appears to be, that between the date when Roy first made his offer in August 1931 and the date when possession was given on 16th October 1931, Messrs. Gillanders, through their Receiver or Manager, had sold off a considerable amount of tea from the estate. Roy apparently took up the position that this tea belonged to him. Messrs. Gillanders pointed to the specific terms of the agreement to which I have already referred, which provided that the tea manufactured in the garden up to 16th October, and the stock in the garden on the date of possession was to belong to the purchaser, except such stock as had been already sold prior to the date of purchase.

10. It seems clear that Roy's contention about the 606 chests despatched

between 28th September and 7th October was not justified. On the other hand it is clear that Messrs. Gillanders' statement in their letter of 24th October, that he was only entitled to tea remaining unpacked at the factory on the date of the sale, was also incorrect and not in accordance with the terms of the contract. Roy's contention, in his letter of 21st October with regard to 179 chests, was that this was packed tea lying in the garden, but packed subsequent to 10th October. Messrs. Gillanders' letter of 24th October shows, that they were disputing his right to any packed tea lying in the garden which had been packed prior to 16th October, and were contending that he was only entitled to tea which remained unpacked up to that date. Subsequently, Messrs. Orr, Dig-nam and Co., the Solicitors of Messrs. Gil-landers, sent the drafts of the conveyance and mortgage referred to in the agreement for the approval of Roy. This they did for the first time on 23rd December 1931, which was more than two months after delivery of possession. It appears from further correspondence between the parties that the vendors and their solicitors were pressing Roy not only to pay the subsequent instalment of Rs. 10,000, but to return the drafts of the conveyance and mortgage duly approved by him and by Mr. Das. Roy then began making excuses for his failure to pay his first instalment on the due date, and explained his failure to return the draft conveyance and mortgage by saying that the mortgage was an unnecessary expense and that an equitable mortgage by deposit of title deeds would be sufficient. The result was that Messrs. Gillanders wrote to Mr. Das on 1st February 1932 informing him that Roy had paid only Rs. 2,000 out of the second instalment of Rs. 10,000 and that they called upon him as guarantor to pay the balance, and on 18th May Messrs. Orr, Dignam and Co. threatened Mr. Das with proceedings unless he paid in terms of his guarantee a sum of Rs. 68,000, being the balance of the principal due, and also a sum of Rs. 2,965 odd for interest.

11. On failure of Mr. Das to make any payment, Messrs. Gillanders instituted the present suit, in which they set out the agreement to which I have referred and claimed a sum of Rs. 71,000 odd, the defendant's guarantee. In his written statement, it was contended that the execution of the necessary conveyance, and the taking of the mortgage from the purchaser, were conditions precedent to his guarantee becoming effective; further, that tea had not been delivered to the purchaser according to the terms of the agreement to the extent of 735 maunds of the estimated value of Rs. 15,000 and that, without the consent of the defendant, the plaintiffs had varied and altered the terms and conditions of sale, and entered into fresh terms with the purchaser. The suit coming on for hearing before Buck, J., the following issues were settled:

(1) Is the surety discharged by reason of the plaintiff not having executed a conveyance and obtained a mortgage of the property? (2) Is the defendant discharged by the arrangement with Roy as to the tea in variation of the terms? (3) Did the plaintiff firm represent to the defendant that they were full owners of the property? If so, can they sue on the guarantee? and (4) Did the plaintiff fail to deliver 733 maunds of tea when possession of the property was given to the

purchaser? And if so, did such failure discharge the guarantor?

12. The third issue about representation was not proceeded with. With regard to the issue about the conveyance, the learned Judge came to the conclusion that there was no express stipulation in the contract, that the execution of the conveyance and mortgage should be a condition precedent to the defendant's guarantee becoming effective. With regard to the mortgage, the learned Judge, quite properly, held that Section 141, Contract Act, provides that a surety is entitled only to the benefit of any security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into. Therefore, this mortgage was not a security which came within the provisions of Section 141, and the defendant was not entitled to raise this matter in defence. With regard to the question about non-delivery of tea, the learned Judge said that at first he was disposed to think that there had been a variation, and that it was clear that if there had been a variation the defendant was discharged from his guarantee. But in the end he came to the conclusion that there was nothing to show that the tea which the parties were disputing about at the end of the year 1931, was tea within the terms of the contract, and that as the evidence stood, it was consistent with the view that the parties were disputing about tea which was altogether outside the contract, which Roy claimed as being within the terms, but which Messrs. Gillanders contended, formed no part of the subject-matter of the contract. That being the position, the learned Judge held that the onus was upon the defendant to establish that the parties, were disputing about tea which formed the subject-matter of the contract, and in the absence of any such evidence, he decided that issue against the defendant.

13. During the hearing of this appeal, it was contended on behalf of the defendant that Messrs. Gillanders were no longer in a possession to convey the property, because they had entered into a contract to sell the property to another party and had received payment of the purchase price of Rs. 25,000. In order to clear up this point, affidavits were put in by both sides, and it appears that such is the fact. It was contended on behalf of Messrs. Gillanders that they are still in a position to convey the property to Roy or the defendant, because they have not yet executed any registered document conveying this property to the proposed purchaser. On the issue raised about the conveyance, it was contended on their behalf that because u/s 55, T. P. Act, it is the duty of the buyer to tender to the seller a proper draft conveyance and because Roy failed to do this, therefore Messrs. Gillanders were absolved from any responsibility in the matter either towards Roy or the defendant. Section 55 provides that the conditions therein mentioned shall apply in the absence of a contract to the contrary. In my opinion, the present contract did not come within the provisions of that section. Messrs. Gillanders specifically agreed by Clause 5 of the contract to convey the property to Roy or his nominee, as soon after he had made payment of the first sum of Rs. 15,000 as their Solicitors could reasonably arrange.

14. The defendant contended, and I think rightly, that the plaintiffs have failed to

perform this term, of the contract, and that until they do so, they cannot be heard to contend that he is liable to them upon his guarantee. This was not an insignificant term of the contract, but probably the most important condition which the contract contained, and it was the very basis of the contract. Messrs. Gillanders say that they have done all that they can in the matter and therefore must not be prejudiced because of their failure to convey. In my opinion, this contention is not correct. It may be that they have been unfortunate owing to the way things have turned out. But the answer to the contention is that they ought to have foreseen that the purchaser might not only fail to perform the contract by payment, but might delay matters by purposely omitting to tender a draft conveyance. For such matters they should have provided specifically in the contract. Moreover, in face of the difficulty which they found themselves in, there was nothing to prevent them conveying this property to Roy without waiting for any tender by him of a draft conveyance. If they had done so, it would have prevented the defendant from raising the contention that they had failed to perform the most important part of their contract. This being the position, probably the delay of two months in tendering the draft conveyance to Roy becomes of less importance, though it is questionable whether delay for so long was a proper performance of the contract contained in Clause 5.

15. Further, it is clear that the plaintiff company have complicated matters considerably. They have entered into a contract of sale of this very property to another party and have accepted payment therefor. It might be possible by arrangement with this party and by executing various other legal documents, to place both the purchaser and the guarantor in the same position as they would have been, if these transactions, had not taken place. Whether that be so or not, such a position was never contemplated by the parties when they entered into the present contract. In my[opinion it is not permissible for the plaintiffs to call upon the guarantor to pay any sum under his guarantee in face of the fact that they have failed up to this very moment to carry out the most important term of their contract, namely to convey the property to the purchaser within the provisions of Clause 5.

16. On the second point about variation, it is clear that in the letter of 21st October 1931 Roy was claiming 179 chests of tea to which I have already referred, and that in their letter of 24th October 1931, Messrs. Gillanders were contending that he had no right to this tea under the contract because it was packed tea, whereas he was only entitled to tea which was unpacked at the time of delivery of possession. Therefore this tea was part of the subject matter of the dispute which was subsequently settled in the way which I have already described, that is to say, instead of the tea which Roy claimed in his letter of 21st October 1931 he got something altogether different, namely the tea mentioned in the subsequent letters of 27th January 1932. Therefore there has been a variation of the terms of the contract of which the defendant guaranteed due performance by Roy. For both these reasons the plaintiff company must fail in their suit with the result that the decree must be set aside and this appeal must

be allowed with costs here and below.

Costello, J.

17. I agree.