
(1969) 04 RAJ CK 0005

In the Rajasthan High Court

Case No : Civil Regular First Appeal No. 54 of 1960

Suraj Bai and Others

APPELLANT

Vs

Nawab Mohammed Mukarram Ali Khan and Others

RESPONDENT

Date of Decision : 18-04-1969

Acts Referred:

Contract Act, 1872 — Section 39, 51

Citation : (1969) WLN 209

Hon'ble Judges : L.S. Mehta, J;C.M. Lodha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

C.M. Lodha, J.—The defendant respondent in this case is Nawab Mohd. Mukarram Ali Khan who owned a Haveli popularly known as Nawab Sahib's Ki Haveli situated in Tripolia Bazar, Jaipur. He agreed to sell a portion of it for a sum of Rs. 49,999/- to the plaintiffs Ram Kishore and others by an agreement dated 24th August, 1955, which has been placed on the record and marked Ex. 1. It may be stated here that the plaintiffs Ram Kishore Ganeshlal and Damodar dass died during the pendency of this appeal and are now represented by their heirs. A part of the sale price, that is Rs. 10,000/- was paid at the time of the execution of the agreement and it was stipulated that the plaintiffs purchaser would get the sale deed prepared at their expense and thereafter the defendant would present the same for registration and get the sale deed registered on payment of Rs. 39,999/- and also transfer the possession of the property in question to the vendees. It has also been provided in the agreement that the party committing breach of the contract would be liable to pay damages to the other party to the extent of 25% of the sale price. The plaintiffs case is that they had purchased stamps worth Rs. 1000/- for execution of the sale deed and also asked the defendant to execute the sale deed on the stamps. It was also alleged by them that they sent a draftman to take measurements of the property agreed to be sold to them but the defendant prevented him from taking the measurements.

The plaintiffs have charged the defendants with a fraudulent intention of illegally putting an end to the contract by having to initiated a complaint in respect of the proposed sale in the Tehsil Jaipur as a result of which the plaintiffs received a notice dated 13th September, 1955 from the Tehsil whereby they were restrained from purchasing this property. Copy of this notice is marked Ex. 3. It was also alleged in the plaint that the defendant gave a notice to the plaintiff dated 9th September, 1955, by which he wrongly repudiated the contract on the false ground that the plaintiffs had not purchased the stamps for drawing out the sale deed thereon within the stipulated period of seven days. A copy of this notice dated 9th September, 1955, has also been placed on the record is marked Ex. 2, It was stated in the notice that the defendant had forfeited Rs. 10,000/- paid to him by the plaintiffs as part of the purchase price and would bring a suit against the vendees for Rs. 2500/- as damages. The plaintiffs have further averred that in spite of the defendant's notice dated 9th September, 1955, wrongly repudiating the contract, they called upon the defendant by their notice dated 10th October 1955, that they were still prepared to purchase the property in question and if within a month, the defendant failed to execute the sale, deed, the plaintiffs would be forced to bring a suit for enforcement of their right. A copy of the notice dated 10th October, 1955, has also been placed on the record and is marked Ex. 4. The plaintiff's case is that in spite of their notice date 10th October, 1955, the defendant did not execute a sale deed in their favour. They therefore put an end to the contract by their notice dated 22nd March, 1956, and called upon the defendant to return ten thousand rupees paid to him as part of the purchase price together with a sum of Rs. 12,500/- as damages as provided in the contract. Ultimately, the plaintiffs filed the present suit in the court of the Senior Civil Judge, Jaipur, on the 5th April; 1956, and claimed a decree of Rs. 22500/- on account of the alleged breach of contract on the part of the defendant.

2. In the written statement filed by the defendant, he admitted the fact of entering into the contract in question and also payment to him a sum of Rs. 10000/- ten thousand as part of the purchase price at the time of the agreement to sell. But he pleaded that the plaintiffs had committed breach of contract and were not prepared at any time to perform their part of the contract. The defendant, therefore, contested the plaintiff's right to recover any amount from him either by refund of the part of the purchase price or by way of damages.

3. After framing the necessary issues on the pleadings of the parties, to learned trial court recorded the evidence of P.W. 1, Ram Kishore, one of the plaintiffs, and P.W. 2, Ram Prasad on 6th March 1957, the defendant cross examined these witnesses but thereafter remained absent with the result that the evidence of the third witness produced by the plaintiffs P.W. 3 Sualal, was not; subjected to any cross examination nor did the defendant produce any evidence in; the case.

4. The learned Senior Civil Judge, by his Judgment dated 25th August, 1959, decreed the plaintiff's suit for refund of Rs. 100,000/- paid by the plaintiffs to the defendant as part of the purchase price at the time of the execution of the

agreement but dismissed claim for damages. The plaintiffs have, therefore, filed an appeal to this Court with a prayer that the judgment of the trial court may be modified and they may be awarded a decree for damages also to the tune of Rs. 12,500/-. The defendant has not preferred any appeal from that part of the judgment and decree by which they have been directed to refund Rs 10,000/- as part of the purchase price paid to them. The only question we are, therefore, called upon to determine in this appeal is whether the plaintiffs appellants are entitled to get any damages.

5. In this connection, the learned Senior Civil Judge has held that the plaintiffs have failed to establish that they had purchased stamps for the sale-deed and further that they have failed to prove that they had got any draft of the sale, deed prepared or had got any arrangement for payment of the balance of the sale price. In short, the finding of the learned Senior Civil Judge is that the plaintiffs have failed to show that they were ready and willing to perform their part of the contract and consequently they were not entitled to get any damages.

6. Mr. Tikku, learned Counsel for the appellants, has urged that the defendant had committed breach of the contract in as much as, in the first instance, he had not permitted the plaintiff's to take the measurements of that portion of the Haveli which was agreed to be sold, with the result that without measurements the sale-deed could not be drafted. In the second place, it is urged that the defendant had himself repudiated the contract, though wrongly, by his notice dated the 9th September 1955, Ex. 2 and consequently, it was no more necessary thereafter for the plaintiffs to have shown that they were ready and willing to perform their part of the contract. In support of his contention, he has referred us to Section 39 of the Indian Contract Act, 1872, and also placed reliance on *Najan Ahmed Haji Ali Vs. Salemahomed Peermahomed*, and *Union of India (UOI) Vs. Bungo Steel Furniture (Pr.) Ltd.*, . On the other hand, Mr. Kasliwal, learned Counsel for the defendant respondent has submitted that the plaintiffs have failed to allege and prove that they were ready and willing to perform their part of the contract. It is urged that the plaintiffs have led no evidence to show that, they had prepared a draft of the sale-deed and had made arrangements for payment of Rs. 39,999/- the balance of the purchase money or that they had actually purchased stamps for execution of the sale deed. He has also argued that the defendant was justified in repudiating the contract by the notice dated the 9th September 1955. In support of his arguments, he has referred to Section 51 of the Contract Act and has also relied upon *Mathra Das v. Secretary of State* AIR 1920 Lah. 979 and *Imamali V. Rani Priyawati Devi* AIR 1937 B. 289.

7. We may state at once that the notice Ex. 2 dated the 9th September, 1955, by the defendant to the plaintiffs repudiating the contract on the ground that the plaintiffs had failed to purchase the stamps for drawing out the sale-deed within a week of the execution of the agreement does not seem to be justified. We have examined the terms of the agreement Ex. 1, and it is not provided there in that

the plaintiffs would get the sale deed prepared within a week from the date of the agreement. What is mentioned there, in this connection is that the defendant vendor would present the sale deed for registration within a week of the date of its preparation. No time limit has been fixed by which it was made obligatory on the part of the plaintiffs to get the sale-deed prepared and it does not appear to us that the parties ever intended to make time, an assense of the contract. Moreover, in transactions of immovable property. Time is not generally, the essence of the contract unless there is clear evidence to the effect that the parties intended to make it so. On receipt of this notice from the defendant, it was no doubt open to the plaintiffs to put an end to the contract and sue the defendant for damages. It was also open to the plaintiffs to keep the contract alive and give an opportunity to the defendant to perform the contract, and in case the defendant failed to do so, to sue for specific performance of the same, or, in the alternative, for damages. Section 39 of the Contract Act itself lays down that when a party to contract has refused to perform or disabled himself from performing his promise in its entirety, the promises may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance. It was observed in *Najan Ahmed v. Saleman Ahmed* (supra) that:

In such a case when the seller clearly shows his intention not to be bound by and to repudiate the contract, the buyer of the places, may treat the notice of intention as inoperative, & await the time when the contract is to be executed and then hold the seller responsible for all consequences of non-performance but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject to all his obligations and liabilities under, it and enables the seller not only to complete the contract, if so advised, notwithstanding his previous reputation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it, on the other hand, the buyer may, if, he thinks proper, treat the repudiation of the seller as wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damages.

These observations were cited with approval in *Nannier v. Payxulu Iyer and Co.* AIR 1926 Mad. 778.

8. Thus two courses were open to the plaintiffs in the present case when the defendant repudiated the contract by his notice dated 9th September, 1955. They could either treat the repudiation by the defendant as wrongfully putting an end to the contract and may have at once brought an action as on a breach of it, or they may have treated the notice as inoperative and showed their willingness to perform the contract subject to all their obligations and liabilities under it. The plaintiffs, however, chose the latter course as is clear from the averment made by them in para No. 6 of the plaint as well as their notice dated the 10 Oct 1955.

It is stated in para No. 6 of the plaint that the plaintiffs gave a reply to the defendants wholly unfounded notice dated the 9th September, 1955 that they were prepared to purchase the property according to the agreement and they gave one month's time to the defendant to execute the sale-deed, so also in the notice dated the 10th October, 1955, (Ex. 4) the plaintiffs have said that they were even then ready and willing to perform their part of the contract. Thus on reading the plaint as well as the plaintiffs' notice dated the 10th October 1955, it becomes clear that the plaintiffs did not put an end to the contract but treated it as still subsisting. In these circumstances, in order to get damages. It was necessary for the plaintiffs to prove that they were ready and willing to perform their reciprocal promise.

9. This brings us to the question whether the finding of the lower court that the plaintiffs had failed to establish that they were ready and willing to perform their part of the contract is correct? It is conceded by the learned Counsel for the appellants that the plaintiffs have led no evidence to show that any draft of the sale-deed had been got prepared by them. He had also frankly conceded, and rightly so, that the plaintiffs have made an endeavour to prove that the proceedings in the Tehsil prohibiting the proposed sale of the property in question had been got instituted at the instance or with the connivance of the defendant. He has however, contended that the plaintiffs had sent an overseer for taking measurements of the property, but the defendant did not allow him to do so.

10. We have gone through the statements of the plaintiffs witnesses P.W. 1 Ramkishore P.W. 2 Ram Prasad and P.W. 3 Suwalal in this connection. It has been stated by Ram Kishore, one of the plaintiffs, that he had sent draft-man Ram Prasad with Suwalal to the defendant's house on the 26th August, 1955, but both Ramprasad and Suwalal came back without taking measurements as the defendant's Kamdar had not allowed them to take measurements. He further states that he had met the defendant the next day and the defendant told him that he would ask his Kamdar to allow the plaintiffs to take the measurements of the departments agreed to be sold to the plaintiffs. It is however, admitted by the plaintiffs Ram Kishore that thereafter he did not send any body on his behalf to take the measurements. In these circumstances it cannot be said that the defendant prevented the plaintiffs from taking measurements of the property.

11. As regards the plaintiffs evidence that they had purchased the stamps for drawing out the sale-deed thereon, we may state that it is highly unsatisfactory. The plaintiffs Ramkishore has not been able to say when the stamps were purchased? He has not produced any documentary evidence either from his possession or from the Stamps department in support of this allegation. He also states that he had returned the stamps after some time & obtained refund but he has not produced any other oral or documentary evidence in support of this assertion except his own bald statement which does not appear to us to be convincing. We are, therefore, in agreement with the learned Senior Civil Judge

that the plaintiffs had failed to prove that they had purchased any stamps as a step towards the execution of the contract on their part. Then there is absolutely no evidence on the record that the plaintiff's had made arrangements for payment of Rs. 39, 999/- the balance of the sale-price.

12. In these circumstances, no just exception can be taken to the finding of the learned Senior Civil Judge, that the plaintiffs had failed to prove that they were ready and willing to perform their part of the contract and it cannot be said that the defendant had committed breach of the contract. All that the defendant was required to do under the terms of the agreement was to present the sale-deed for registration and accept the balance of the sale-price and deliver possession of the property to the vendees. But this part of the contract by; the defendant could be performed only when the plaintiffs had prepared a draft of the sale-deed, got it written on a stamp-paper and handed it over to the defendant for signature and presentation to the Registration Department and had also made arrangements for payment of the balance of the sale-price. However, since the plaintiffs have failed to prove that they had done all these necessary acts, they cannot take the defendant liable for non-performance of his part of the contract, Consequently, the plaintiffs are not entitled to get any damages from the defendant and their claim has rightly been dismissed by the trial court.

13. We therefore, dismiss the appeal, but in the circumstances of the case, we leave the parties to bear their own costs of this appeal.