

Pakharsingh Vs. Kishansingh

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Court : Rajasthan

Decided On : Aug-30-1973

Reported in : AIR1974Raj112; 1973()WLN630

Judge : S.N. Modi, J.

Acts : [Contract Act, 1872](#) - Sections 55; [Specific Relief Act, 1963](#) - Sections 10; [Evidence Act, 1872](#) - Sections 16 and 114

Appeal No. : First Appeal No. 68 of 1971

Appellant : Pakharsingh

Respondent : Kishansingh

Advocate for Def. : S.R. Bajawa, Adv.

Advocate for Pet/Ap. : Hastimal Parikh, Adv.

Disposition : Appeal dismissed

Judgement :

S.N. Modi, J.

1. This first appeal by the defendant Pakharsingh is directed against the judgment of the Additional District Judge, Sri Ganganagar, decreeing the plaintiff's suit for specific Performance of the contract.

The defendant-appellant Pakharsingh was the owner of the agricultural land measuring 91/2 bighas situate in village Chak No. 1-KK fully described in para, No. 1 of the plaint. By agreement dated 9-4-1966 Pakharsingh agreed to sell the said land to the plaintiff for Rs. 13,300/- On the same day, the defendant received from the plaintiff Rs. 8,000/- as earnest money. The salient terms of the agreement are as follows:--

1. That the sale will be completed and registered on or before 25-11-1966.
2. That a further sum of Rs. 1,000/- will be paid to the defendant on 25-6-1966.
3. That the registration charges shall be borne by the vendee,
4. that the remaining sale-price will be paid at the time of the registration of the sale-deed and
5. that in case of the defendant's failure to get the sale-deed registered, he shall refund Rs. 9,000/- and he will be further liable to pay Rs. 9,000/- as damages and in case the plaintiff failed to get the sale-deed registered, the earnest money of Rs. 9,000/- shall stand forfeited.

I may pause to mention here that the plaintiff Kishansingh was already in Possession of the land in dispute as tenant of Pakharsingh. The plaintiff paid Rupees 1,000/- to the defendant on 29-6-1966 in pursuance of the terms of the agreement. As the defendant could not get the land in dispute mutated in his favour by 25-11-1966 the parties entered into another agreement on 3-2-1967 by which the time for the registration of the sale-deed was extended upto 28-5-1967 by mutual consent. By the agreement dated 3-2-1967 the defendant acknowledged having agreed to sell the land on 9-4-1966 and also that he had received Rupees 8,000/- on 9-4-1966 and Rs. 1,000/- on 29-6-1966. It was also mentioned in the agreement dated 3-2-1967 that in case the defendant did not get the registration of the sale-deed done by 28-5-1967 the plaintiff shall be entitled to sue for specific performance of the contract. It was also specifically mentioned in the agreement dated 3-2-1967 that other terms of the previous contract shall continue to remain in force. It would thus appear that both the agreements Exhibit.

1' and Exhibit 2 clearly incorporated a default clause imposing a penalty upon a party failing to carry out the terms of the contract. The sale-deed was however not executed and registered on or before the due date, that is. 28-5-1967, The aforesaid facts are all admitted and there is no dispute between the parties.

2. Now, the plaintiff's case is that It was Sunday on 28-5-1967 and it being a holiday he on 29-5-1967 went to the Office of the Sub-Registrar and Tehsildar, Padampur, along with the amount for the purpose of the registration of the sale-deed, but since the defendant was not present there at the said office, he came back to his house after presenting an application Exhibit 6 to the Tehsildar, Padampur, which was returned to him after an endorsement by the Tehsildar. His further case is that on 2-6-1967 he by a registered notice called upon the defendant to execute the sale-deed within 15 days of the receipt of the notice and receive the remaining sale-price from him, but this notice was returned to him with the endorsement 'refused'. The plaintiff filed the present suit for specific performance of the contract on 26-10-1967 alleging that he was always ready and willing to perform his part of the contract. The suit was resisted by the defendant. He alleged that on 29-5-1967 he waited for the plaintiff at the office of the Sub-Registrar, Padampur, as per the terms of the agreement and when the plaintiff was not found there, he presented an application before the Sub-Registrar, Padampur, about his presence at the Registrar's Office on 29-5-1967. As regard the application alleged to have been presented by the plaintiff before the Tehsildar. Padampur, the defendant pleaded that such application and the endorsement thereon could be obtained at any time. The defendant denied having refused to accept the notice alleged to have been given by the plaintiff. He pleaded that time was the essence of the contract and since the plaintiff committed default in performing his Part of the contract on or before the stipulated date, the contract came to an end and it cannot now be enforced against him. It was further pleaded that the defendant was in urgent need of money on 29-5-1967 and when he failed to obtain the same from the plaintiff he had to mortgage his other land and thereby suffered a loss of Rs. 10,000/-. The learned trial Judge decreed the suit holding that as per the agreements dated 9-4-1966 and 3-2-1967 time was not the essence of the contract. He further held that there was no failure on the part of the plaintiff to perform his part of the contract Hence this appeal.

3. In this appeal, two Questions fall to be determined. The first Question is whether under the two agreements of sale, time was the essence of the contract and secondly, whether the plaintiff was not ready and willing to perform his part of the contract and he is therefore disentitled to a decree for specific performance.

4. On the first point, Mr. H. M. Parikh, the learned Advocate for the defendant-appellant, contends that, in the present case, time was the essence of the contract. He read out to me the two agreements Exhibit 1 and Exhibit 2. According to him, the stipulation fixing a particular date or time before the registration of the sale-deed was to be completed leads to the inference that the time was the essence of the contract. He further contends that in the first agreement the parties thought it necessary to specify the time and after that agreement was superseded by another agreement, they again fixed a time in the second agreement. That sufficiently indicates that both the parties intended time to be the essence of the contract. The learned counsel further contends that the fact that both the agreements contain a default clause to the effect that if the purchaser did not get the sale-deed registered within the specified period he should forfeit his rights to the earnest money and if the vendor committed default he would be liable to return the earnest money and pay a sum equivalent to earnest money as damages, clearly indicates that the time was the essence of the contract. The learned counsel also invited my attention to the application Exhibit 6 and Exhibit A/1 filed by the plaintiff and the defendant respectively on 29-5-1967 before the Sub-Registrar, Padampur. Exhibit 6 shows that the plaintiff approached the Tehsildar on 29-5-1967 for registration of the sale-deed but the defendant was not found there. Similarly, Exhibit A-/1 shows that the defendant approached Tehsildar-cum-Sub-Registrar on 29-5-1967 for registration of the sale-deed but the plaintiff was not available. It is contended that the fact that both the parties approached the Sub-Registrar on 29-5-1967 reveals that in reality their intention was to treat the time as the essence of the contract.

5. On the other hand, it is argued by Mr. S. R. Baiawa, the learned counsel for the plaintiff-respondent, that the circumstances brought out by the learned counsel for the defendant-appellant are wholly insufficient to arrive at the conclusion that the time was the essence of the contract. He in all respect supported the finding

arrived at by the lower Court on this point.

6. The relevant law on the point is contained in Section 55 of the Contract Act. The first paragraph of Section 55 which is relevant, provides that 'when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. Their Lordships of the Supreme Court had the occasion to interpret this paragraph in *Gomathinayagam Pillai v. Palaniswami Nadar*, AIR 1967 SC 868 and it was observed as follows :

'It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.'

Their Lordships then quoted with approval the following observations of the Judicial Committee of the Privy Council in *Jamshed Kodaram Irani v. Burjorji Dhunjibhai*, AIR 1915 PC 83:--

'Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties,

notwithstanding that they named a specific time within which completion was to take place, really and in substance, intended more than that it should take place within a reasonable time.'

The law is thus well settled that simply because a specific date is mentioned in the agreement for completion of the contract and a party to that contract commits default to perform the contract on the stipulated date it does not give option to the other party to avoid the contract. Similarly, the existence of a default clause in the agreement imposing penalty does not by itself evidence an Intention to make time of the essence. Default in performing the contract within the specified time would disentitle the Party in default to a decree for specific performance of the contract only if it was intended by the parties that time was the essence of the contract. Intention to make the time to be of essence may be gathered if expressed in writing by the language of the agreement. The language of the agreement must show in unmistakable terms that the intention of the parties was to make their rights dependant upon the observation of the time-limit. Intention may also be inferred from the nature of the property to be sold and conduct of the parties and the surrounding circumstances at or before the contract. Where the property to be sold is immovable property, it would normally be presumed that the time was not essence of the contract. The conduct of the parties and the surrounding circumstances would depend upon the facts and circumstances of each case. Intention from the conduct of the parties and surrounding circumstances of the parties must appear at or before the contract and not what takes place after it has been entered into.

Applying these principles to the case in hand, I am of opinion that time was not the essence of the contract in the present case. The agreements dated 9-4-1967 and 3-2-1967, the material terms of which have already been set out above, do not express in unmistakable language that time was to be the essence of the contract. It is true that there was definite stipulation fixing dates for performance of the contract but the fact that the time was extended shows that the parties did not stick to the time and regard the same as the essence of the contract. Similarly, the existence of a default clause in the two agreements also does not necessarily lead to the inference that time was the essence of the contract. The subsequent

conduct of the parties in approaching the Sub-Registrar on 29-5-1967, in my opinion, is wholly immaterial and cannot bear upon the interpretation of the arguments. Even assuming that such conduct was relevant, in my opinion, it does not indicate that the time was the essence of the contract. The property sold in the present case is the landed property and in contracts of sale of immovable property the presumption is that time is not of essence of the contract. The language of the two agreements, the conduct of the parties and surrounding circumstances at or before the agreements do not displace that presumption. I, therefore, hold in agreement with the trial Judge that there is no material for arriving at the conclusion that time was of the essence of the contract.

7. I now take up the second point. The plaintiff-respondent pleaded in the plaint that he was always ready and willing to perform his part of the contract. The defendant denied that allegation in his written statement. In a suit for specific performance the plaintiff is required not only to allege but also to prove his readiness and willingness continuously from the date of the contract till the hearing of the suit and if he fails in that, his suit is liable to be dismissed. The plaintiff-respondent in his statement as PW1 has deposed that he is and was always ready and willing to pay the balance of the sale-price and get the sale-deed registered. There is no denying the fact that the defendant-appellant received substantial amount of Rs. 8,000/- against the sale-price on the date of the agreement and he further received Rs. 1,000/- on 29-7-1966 as per terms of the agreement. It is further evident from the statements of P. W. 1, P. W. 2 and P. W. 5 that the plaintiff had obtained a sum of Rs. 5,500/- from Messrs. Milkhasingh Prakatsingh on 29-5-1967 for the purpose of making payment to the defendant of the remaining amount of the sale-price and to purchase stamps and defray the registration charges. P. W. 8 Ramprakash who is an advocate has deposed that he on behalf of the plaintiff gave a registered notice Exhibit 7 on 2-6-1967 calling upon the defendant to execute the sale-deed and get it registered and receive payment of the balance of the sale-price. He has proved the notice Exhibit 7 and its postal receipt Exhibit 8. He has further deposed that this notice came back to him with the endorsement 'refused'. There is no dispute that the notice was despatched at the correct address of the defendant P. W. 6 Mohansingh who was the postman of the locality during the relevant period has deposed that he went to the house of Pakharsingh

and offered him registered letter Exhibit 7, but Pakharsingh refused to accept the same. He has further deposed that the endorsement of refusal on the letter Exhibit 7 was made by Charansingh at his instance. Taking Into consideration the manner in which the post office deals with the registered letters, the endorsement, namely 'refused' on the cover containing the notice raises a presumption under Section 114(e) and (f) and Section 16 of the Indian Evidence Act that an attempt was made to deliver the notice to the addressee. The presumption is no doubt rebuttable but no reliable evidence has been produced on behalf of the defendant to rebut that presumption. The only evidence in this connection is that of the defendant himself who has deposed that he has not received the notice. The defendant's bare denial, in my opinion, is wholly insufficient, to rebut the presumption. The defendant therefore cannot be allowed to plead ignorance of the contents of the notice Ex. 7 when he intentionally abstained from receiving it and acquainting himself with the contents thereof. A person refusing to receive a registered letter sent by post must be deemed to have constructive notice of its contents. When nothing was heard from the defendant after the notice, the plaintiff instituted the present suit on 26-10-1967 and deposited the balance of the sale-price in accordance with the directions contained in the decree passed in his favour by the lower Court. The above facts clearly go to show that the plaintiff was ready and willing to perform his part of the contract throughout the relevant period.

8. Learned counsel for the defendant contends that under the agreements Exhibit 1 and Exhibit 2 the plaintiff undertook to meet the expenses of sale and therefore it was the duty of the plaintiff to purchase necessary stamps and to have a draft sole-deed prepared and to submit the same to the defendant on or before the stipulated date. Learned counsel further contends that even if it be believed that the plaintiff had gone to the office of the Sub-Registrar on 29-5-1967, it was of no consequence as there is nothing to show that on 29-5-1967 the plaintiff possessed with him the necessary stamps and draft, conveyance of the property. It is contended that unless the plaintiff tendered stamps and draft conveyance to the defendant the latter was not bound to execute the sale-deed and, in the circumstances, it cannot be said that the plaintiff was ready and willing to perform his part of the contract. Learned counsel in this connection invited my attention to Section 55(1)(d) of the Transfer of Property Act and a number of cases including

AIR 1919 PC 124: AIR 1928 PC 208: AIR 1923 Nag 37 and 55 Ind Cas 791 = (AIR 1919 PC 124). The argument that it was the plaintiffs duty to purchase stamps and to have a draft sale-deed prepared and to submit the same to the vendor is no doubt correct but as it has been held that time was not the essence of the contract, it was not essential that the purchase of the stamps and preparation of the draft sale-deed should have been done before the stipulated dates, namely. 25-11-1966 or 29-5-1967. The fact that the plaintiff went to the office of the Sub-Registrar on 29-5-1967 with sufficient money and then served a notice on 2-6-1967 calling upon the defendant to execute the sale-deed and receive the balance of the sale-price sufficiently indicated his readiness and willingness to perform his part of the Contract. There is no denying the fact that the plaintiff had not purchased the stamps and also failed to prepare the draft sale-deed on and before the stipulated dates but these facts do not justify an inference that the plaintiff was not ready and willing to perform his part of the contract. No reason is apparent why the plaintiff should change his mind and be not ready and willing to perform his part of the contract so as to lose substantial amount of sale-price which he had already paid to the defendant. If he really wanted the matter to be dropped, why did he send a registered notice soon after the stipulated date calling upon the defendant to execute the sale-deed within 15 days from the receipt of the notice and then subsequently why he brought the suit. As already pointed out above, in a suit for specific performance of the contract for sale, the onus of proving readiness and willingness to perform his part of the contract lies on the plaintiff, but, as pointed out in *Abdullah Bey Chedid v. Tenenbaum*, AIR 1934 PC 91 that onus, in the absence of any evidence to the contrary, may be easily discharged. In the present case, general considerations are in favour of the plaintiff's willingness and readiness. I therefore find that it cannot be said that the plaintiff was not ready and willing to perform his part of the contract during the relevant period. In the circumstances, the decree passed by the trial Court in favour of the plaintiff is correct.

9. The appeal falls and it is dismissed with costs.