

APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

JAGGO BAI (DEFENDANT) *v.* HARIHAR PRASAD SINGH
(PLAINTIFF)*

1939
September,
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Contract, breach of—Specific performance, damages, return of consideration—Contract for sale of immovable property—Suit for specific performance or, in the alternative, for refund of price paid in part—Withdrawal of claim for specific performance—Maintainability of claim for return of consideration—Not a claim for damages—Interest—Equitable jurisdiction—Interest Act (XXXII of 1939), section 1, proviso.

The plaintiff's suit was for specific performance of a contract to sell to him the mortgagee rights in certain property, or, in the alternative, for refund of the part payment of the price which had been made by him, together with interest thereon. The evidence established that the defendants, and not the plaintiff, were in breach of the contract. During the course of the suit the plaintiff withdrew his claim for specific performance: *Held*, (1) that by withdrawing his claim for specific performance the plaintiff was not debarred from maintaining his claim for refund of the amount of the purchase price which had been paid by him; (2) that the plaintiff was entitled in equity to interest on such amount.

The court is not precluded from awarding damages in a suit for specific performance where the plaintiff during the pendency of the suit withdraws his claim for specific performance, and in a proper case and under suitable conditions the court can exercise the power to award damages. The present case was one of that kind. Further, in claiming the refund of the part price paid by him the plaintiff was not strictly claiming damages for breach of contract at all but only the equitable relief of return or restitution of what he had paid, the contract having fallen through. There can be no question that a purchaser who is not in default is entitled to recover the amount of what he has paid towards the purchase price from the defaulting seller.

The interest claimed by the plaintiff could not be regarded strictly as compensation in respect of damage resulting from

*First Appeal No. 209 of 1937, from a decree of Tufail Ahmad, Civil Judge of Banda, dated the 19th of March, 1937.

the defendant's breach of contract. The defendant, who wrongfully repudiated the contract, was bound in equity not only to return the amount, of which the defendant had had the use, but to pay a reasonable interest thereon. The proviso to section 1 of the Interest Act of 1939 applies to a case in which the Court of Equity in England exercises jurisdiction to allow interest; and the non-performance of a contract of which equity can give specific performance is such a case.

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Sir *Syed Wazir Hasan* and Mr. *Mushtaq Ahmad*, for the appellant.

Mr. *Ambika Prasad*, for the respondent.

THOM, C.J., and GANGA NATH, J.:—This is a defendant's appeal arising out of a suit in which the plaintiff prayed for the following reliefs:

“(a) That the defendants be ordered to execute a deed of assignment of their mortgagee rights under the mortgage deed dated the 18th February, 1921, executed by the late Bindeshwari Prasad in favour of the defendants, on payment by the plaintiff of a sum of Rs.23,000, the balance of the amount of sale consideration, or any other amount that the court may be pleased to fix, and a decree in favour of the plaintiff be passed for the specific performance of the contract against the defendants.

(b) That if, for any reason, in the opinion of the court a decree for specific performance of contract cannot be passed, the defendants may be ordered to refund the sum of Rs.29,000 with interest to the plaintiff, and a decree for a sum of Rs.26,000 be passed against the defendant No. 1 and for a sum of Rs.3,000 against the defendant No. 2, with interest by way of compensation, from the date of payment up to the date of realisation, and the court may grant any further relief.”

On the 16th December, 1928, the appellant, Mst. Jaggo Bai, agreed to transfer to the plaintiff her mortgagee rights under a mortgage executed by Bindeshwari Prasad on the 18th February, 1921. The sale price of the mortgagee rights was fixed at Rs.52,000.

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The material clauses of the deed executed by Mst. Jaggo Bai are as follows:

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“Accordingly negotiations for transfer of the document aforesaid together with all rights were started with Rai Bahadur B. Harihar Prasad Singh through B. Girja Shankar, wakil of Lucknow, and it has been settled that I shall transfer the amount of the mortgage deed aforesaid with interest together with all the rights and powers for a sum of Rs.52,000 and I shall see that the Rai Bahadur aforesaid acquires the entire property permanently. In case the legal advisers of the Rai Bahadur aforesaid consider that I would not be in a position to transfer the entire property mentioned in the mortgage deed free from all defects and disputes unless Seth Beni Chand is made to join the deed of transfer, I shall transfer to the Rai Bahadur aforesaid one-half of the property mentioned in the document aforesaid for a sum of Rs.26,000 without raising any plea or objection. Whenever within three years the Rai Bahadur aforesaid wants I shall execute the deed of transfer in respect of the mortgage deed, dated 18th February, 1921, and have it registered in any way and in favour of anyone proposed by him. For the present, I have already received a sum of Rs.7,000 out of the amount agreed upon by means of a cheque No. 4A 19887, dated 28th November, 1928, and I have this day received Rs.19,000 by means of cheque No. 4A 19893, dated 16th December, 1928, i.e., in all I have received a sum of Rs.26,000. At the time of compliance and completion of the deed of transfer I shall, as directed by the Rai Bahadur aforesaid, allow credit for the sum of Rs.26,000 and accept the balance of the amount settled, whatever it might be, subject to the terms noted above.”

The mortgage deed of the 18th February, 1921, was executed for a sum of Rs.60,000 in favour of defendant No. 1, Mst. Jaggo Bai, and defendant No. 2, her son Seth Beni Chand.

The plaintiff avers that the defendants refused to implement the agreement of the 16th December, 1928. He accordingly claimed a decree for specific performance or, in the alternative, a decree for refund of Rs.29,000 plus interest thereon. After the evidence had been completed and during the course of arguments in the trial court the plaintiff withdrew his claim for a decree for specific performance. This was done by means of a statement

made by the plaintiff's pleader, which is in the following terms: "Babu Mukat Behari Lal, pleader for the plaintiff, stated that regard being had to the facts of the case, he does not want to press the point *re* specific performance prayed for in relief (a)."

The plaintiff's claim was contested by both the defendants upon various grounds. In the trial court, as is apparent from the judgment of the court, the main issue was as to whether defendant No. 1, Mst. Jaggo Bai, had validly executed the agreement of the 16th December, 1928. In her written statement she averred that she had no knowledge of the contents of the document which she signed. She is a pardanashin lady, and the onus was therefore upon the plaintiff to prove that she had fully understood the import of the document which she signed. The learned Judge in the trial court held that the plaintiff has discharged that onus. He has accepted the evidence of Mr. Rahim Bux, a leading mukhtar of Banda, who advised Mst. Jaggo Bai in connection with the execution of the aforesaid agreement. This finding of the learned Civil Judge was not challenged before us in appeal. The decision of the learned Civil Judge was challenged upon two grounds. It was maintained in the first place that the evidence established that the defendants were not in breach of their contract, but that the plaintiff had failed to implement his obligations in connection with the contract. In the second place it was contended that, assuming that the defendants were in breach of the contract, inasmuch as the plaintiff had withdrawn his claim for a decree for specific performance he was debarred from insisting upon his alternative claim for refund of the amount of the purchase price paid by him to defendants Nos. 1 and 2.

The learned Civil Judge granted a decree in terms of the alternative claim, that is, he granted a decree against defendant No. 1 for Rs.26,000 and interest thereon, and against defendant No. 2 for Rs.3,000 and interest thereon. Defendant No. 2 filed an appeal against the decision

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of the learned Judge, but that appeal has been dismissed for default.

In regard to the appellant's first contention that she is not in breach of her contract, it is necessary only to refer to the documents on the record. [The judgment then proceeded to consider the evidence on this question, and arrived at the following conclusion.] In these circumstances, in our judgment, it is clear that the defendants, and not the plaintiff, are in breach of the contract.

The appellant's second contention now falls to be considered. As before mentioned, it was maintained on her behalf that in view of the withdrawal of the claim for the relief for specific performance the plaintiff had debarred himself from claiming damages. This contention was based by learned counsel for the appellant upon the decision of the Privy Council in *Ardeshir H. Mama v. Flora Sassoon* (1). In that case it was decided that "In a case of breach of contract by one party, the other party may elect to put an end to the contract and to sue for damages, or he may keep the contract open and sue for specific performance. In the latter case he must, if required, prove a continuous readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. If during the progress of the suit and before the hearing, he abandons his claim to specific performance or disentitles himself to that relief by some act on his part, he cannot claim or be awarded by the court damages in lieu of specific performance of the contract. Jurisdiction to award damages in substitution of the relief for specific performance remains so long as the plaintiff does no act on his part to disentitle himself to a decree for specific performance. A court may allow a plaint for specific performance to be amended into a plaint for claim of damages, pure and simple, but discretion to allow such an amendment should be exercised with great care and caution." It is to be observed that this decision is no authority for

(1) (1928) 26 A.L.J. 1220; I.L.R. 52 Bom. 597(625-26).

the proposition that the court is precluded from awarding damages in a suit for specific performance where the plaintiff during the pendency of the suit withdraws his claim for specific performance. After an exhaustive review of the law upon the question the Board observed :

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“ In other words, that the court should have the power of granting such an amendment in a proper case is salutary and indeed necessary. The possibility that the power will be exercised may, in certain cases, be the only effective check upon a defendant to a specific performance suit, who by delay, expensive appeals and other devices, sets himself to starve a relatively impecunious plaintiff into submission by making continued performance of the contract on his part, beyond his power. And such a power is possessed by the Court in England, and in a proper case and under suitable conditions it may be used, see *Nicholson v. Brown* (1). But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff out of his rights, the plaintiff must not by its ill-considered exercise, be permitted to turn his suit into a gamble for himself at the defendant's expense. Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent, and the amendment will be allowed or refused with a due appreciation of the position.”

The circumstances in the present case are not such, in our judgment, that the court should refuse to allow the plaintiff to withdraw his claim for specific performance and insist on the alternative claim for refund of part of the purchase price which was paid by him to the defendants. The defendants have not in any way suffered by the suit which has been maintained against them by the plaintiff so far as their rights under the mortgage are concerned. Indeed, they have instituted a suit against the

(1) [1897] W.N. 52 (Note 13).

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mortgagors on the basis of the mortgage and that suit is still pending. In claiming the refund the plaintiff is not strictly claiming damages at all. He is seeking *restitutio in integrum*, the contract having fallen through.

In the present suit, further, there is no question of remodelling the plaint. The plaintiff does not, in fact, sue for damages for breach of contract. He claims the equitable relief that the contract between him and the defendants having fallen through, he is entitled to what he has paid to the defendants in respect of the purchase price of the mortgagee rights which under the contract were to be transferred to him. That the plaintiff is in equity entitled to claim the refund of the portion of the purchase price paid by him we have no doubt; and in this connection we would refer to the decision of the Privy Council in *Kunwar Chiranjit Singh v. Har Swarup* (1). The facts in that case were that under a document of sale of immovable property the purchaser was bound to pay Rs.20,000 as earnest money, and the remaining sale consideration in two instalments. The purchaser, however, could not pay the earnest money as agreed, and later paid in a large sum which the vendor acknowledged as having received "towards the sale price" out of the agreed consideration. The purchaser subsequently repudiated the contract and sued to recover the money paid by him. It was held that in those circumstances there was no supersession of the original contract; and there was nothing to show that the vendor agreed to sacrifice the stipulated earnest. The purchaser, therefore, it was held, must lose his earnest money, but was entitled to recover the balance of his payment to account. Now, if a defaulting purchaser is entitled to recover the balance of his payment to account, there can be no question that a purchaser who is not in default is entitled to recover the balance of what he has paid towards the purchase price from the defaulting seller. We hold, therefore, that the

plaintiff in the present suit is entitled to insist upon his claim for refund of the sum of Rs.26,000 from Mst. Jaggo Bai. The learned Civil Judge in the court below has granted a decree to the plaintiff against Mst. Jaggo Bai for the sum of Rs.26,000 plus interest on the said sum from the date of payment of the said sum.

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It was contended for the appellant that in the circumstances the plaintiff was not entitled to interest. It was urged that since the plaintiff maintained up to the 20th February, 1937, his plea for specific performance, he was certainly not entitled to interest prior to that date. It was contended that interest upon the sum of Rs.26,000 was in the nature of damages suffered by the plaintiff as a result of the breach of contract. We do not agree that the interest upon the sum of Rs.26,000, which the plaintiff claims, can be regarded strictly as compensation in respect of damage resulting from the appellant's breach of contract. It appears to us that the appellant having obtained this sum without any willingness on her part to perform her obligations under the agreement of the 16th December, 1928, she is bound in equity not only to return the sum of Rs.26,000, but to pay a reasonable interest thereon. She has had the use of this sum, which she should have returned to the plaintiff when she decided to repudiate the contract. In this connection we refer to the decision of the Privy Council in *Bengal Nagpur Railway v. Rutanji Ramji* (1). It was held in that case that the proviso to section 1 of the Interest Act applies to a case in which the Court of Equity exercises jurisdiction to allow interest, but that in order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction. In the course of the judgment the observation of Lord TOMLIN in *Maine and New Brunswick Electrical Power Co. v. Hart* (2) was quoted with approval, viz., "In order to invoke a rule of equity it is necessary in the first instance to establish the

(1) [1938] I.L.R. 2 Cal. 72.

(2) [1929] A.C. 631(640).

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existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance.”

In our judgment it would be highly inequitable in the present case to refuse the plaintiff his claim for interest upon the sum of Rs.26,000 which the appellant had no right to retain in view of her refusal to implement her obligations under the deed of the 16th December, 1928. We hold, therefore, that in equity the plaintiff is entitled to interest. Taking all the facts and circumstances into consideration we fix interest at the rate of 4 per cent. per annum. The interest will run from the 16th December, 1928, to the date of payment.

In the result the appeal is allowed in part and the decree of the court below is modified. The plaintiff is granted a decree against the appellant for the sum of Rs.26,000 plus interest thereon at the rate of 4 per cent. per annum from the 16th December, 1928, down to the date of payment. As the appellant has substantially failed, the respondent is entitled to his costs in this appeal.

FULL BENCH

Before Mr. Justice Iqbal Ahmad, Mr. Justice Rachhpal Singh and Mr. Justice Hunter

IN THE MATTER OF AN ADVOCATE*

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Professional misconduct—Advocate advancing loans on interest—Whether moneylending business—“Engaging in trade or business”—Bar Councils Act (XXXVIII of 1926), section 15, Rules—Bar Tribunal’s findings—Acceptance by the High Court.

What does or does not constitute moneylending business must depend on the facts and circumstances of each case and is not capable of an exact definition. Investments of his savings by an advocate do not necessarily amount to engagement

*Miscellaneous Case No. 167 of 1939.