

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Campbell.

JANGAL SINGH AND ANOTHER (DEFENDANTS)—

Appellants,

versus

GHULAM MAHOMED (PLAINTIFF) } *Respondents.*
WADHAWA SINGH (DEFENDANT) }

Civil Appeal No. 1274 of 1918.

Specific performance—Contract of sale—Delay in suing—Abandonment.

In October 1917 plaintiff brought the present suit for specific performance of a contract of sale of land, dated 28th April 1915, made by Wadhawa Singh, defendant 1, in plaintiff's favour. Out of the sale price of Rs. 7,000, Rs. 100 had been paid to defendant as earnest money and the latter undertook to get a deed of sale duly registered within one year and receive the balance of the price. The defendant also undertook, in case of breach of agreement, to pay Rs. 1,000 as damages besides refunding the earnest money and being liable for specific performance of the contract. Defendant 1 failed to execute a sale deed by 28th April 1916, and in October 1917 sold the property to defendants 2 and 3. The suit was contested by defendant 1 on the ground that it was plaintiff who had committed a breach of contract, and that after the long delay plaintiff was not entitled to bring the suit. Defendants 2 and 3 pleaded ignorance of the agreement of sale to plaintiff, and that the latter was estopped by long silence. The trial Court decreed the claim for specific performance. The defendant-vendees appealed to the High Court.

Held, that the evidence showed that plaintiff was ready to complete the purchase and had no intention of abandoning his rights. Delay may in certain cases be evidence of abandonment or acquiescence, but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and has in no way altered the position of the defendants does not disentitle the plaintiff to sue for specific performance.

Kissen Gopal Sadaney v. Kally Prosonno Sett (1), followed.

Held also, that it was not shewn that time was of the essence of the contract, and that the present case was covered by the rule laid down in *Chamarti v. Aradhi* (2).

(1) (1906) L. L. R. 83 Cal. 639.

(2) (1914) 28 Indian Cases 560.

First appeal from the decree of Diwan Som Nath, Senior Subordinate Judge, Lyallpur, dated the 25th February 1918, decreeing plaintiff's claim in part.

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SHEO NARAIN for Appellants.

MUHAMMAD IQBAL for Plaintiff, and NIAMAT RAI for Defendant—Respondents.

The judgment of the Court was delivered by—

ABDUL RAOOF J.—This is a first appeal arising out of a suit for the specific performance of a contract of sale executed on the 28th April 1915 by Wadhawa Singh, defendant No. 1, in favour of the plaintiff Ghulam Muhammad. Under the contract the defendant agreed to sell the property in dispute in lieu of Rs. 7,000, out of which Rs. 100 were paid as earnest money, and undertook to get the deed of sale duly registered within one year and receive the remaining sale price, namely, Rs. 6,900. The following condition was entered in the agreement:—

“In case of breach of the agreement I will pay Rs. 1,000 as damages besides refunding earnest-money. Moreover, I will be bound for specific performance of the contract. If the vendee breaks the agreement, he shall also be liable for payment of Rs. 1,000 as damages and the earnest-money will be forfeited. In case of breach of promise on my part the vendee shall be competent to recover the damages by means of a suit, and by compelling me for specific performance of the contract he will get compulsory registration of the deed effected.”

From the above it is clear that a sale-deed was to be executed and completed by the 28th April 1916, but no sale-deed, however, was executed in favour of the plaintiff, and on the contrary defendant No. 1, in October 1917, sold the property in dispute to defendants Nos. 2 and 3. Thereupon, the present suit was instituted on the 29th October 1917, against Wadhawa Singh and the vendees, Jangal Singh and Jiwan Singh. The plaintiff averred that the plaintiff had repeatedly requested defendant No. 1 to execute and complete the sale-deed in favour of the plaintiff, and to take the balance of the sale money, but that defendant No. 1 always put it off on the pretext that he had no time; that ultimately on the 25th April 1916 he sent a notice to the plaintiff calling upon the latter

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to get the sale effected and have the sale-deed registered; that the said notice, dated the 25th April 1916, was received by the plaintiff on the 27th April 1916; that on the 28th April 1916 the plaintiff took the purchase money to Lyallpur, but defendant No. 1 did not come; that the plaintiff remained there for three days continuously waiting for defendant No. 1, but he did not turn up; and that finally the plaintiff sent a notice to the defendant on the 1st May 1916 under a registered cover, and that in reply to the plaintiff's notice defendant No. 1 sent a second notice, dated the 23rd May 1916, by which the latter refused to perform the contract. It is also alleged in the plaint that a notice was sent by the plaintiff to defendants Nos. 2 and 3, informing them that defendant No. 1 had contracted to sell the property in dispute to the plaintiff, and that defendants Nos. 2 and 3 would be liable to be sued in Court if they purchased the property in spite of the information given. On the above allegations the plaintiff claimed the specific performance of the contract and Rs. 1,000 as damages. The suit was resisted by defendant No. 1 on the allegations that a breach of contract was committed by the plaintiff himself; that the plaintiff being heavily indebted was unable to pay the purchase money; and that the plaintiff was not entitled to the relief claimed owing to the long delay in bringing the claim.

Defendants Nos. 2 and 3 eventually pleaded ignorance of the agreement of sale between the plaintiff and defendant No. 1 and averred that the notice given by the plaintiff was received by them after the sale had been executed by Wadhawa Singh in their favour, and that the plaintiff was estopped by his long silence from claiming any relief against them.

The following issues were framed by the lower Court on the pleadings of the parties :—

- (1) Was plaintiff ready to perform his part of the contract, as incorporated in the agreement, dated 28th April 1915, and did defendant commit a breach with respect to it?
- (2) Did defendants, vendees, know about the existence of the prior contract to sell in

favour of the plaintiff and did they with this knowledge obtain the sale in their favour ?

- (3) If issues 1 and 2 are proved in plaintiff's favour, to what amount for damages, if any, is he entitled in addition to the relief for specific performance ?
- (4) Is plaintiff estopped from bringing the present claim by his long silence, if any ?
- (5) To what relief is the plaintiff entitled, and against which of the defendants ?

Upon all these issues the trial Court found in favour of the plaintiff and against the defendants, with the result that the claim for specific performance has been decreed, but the claim for damages has been disallowed.

The vendees defendants, have preferred this appeal, but defendant No. 1 vendor has remained quiet. *Pandit Sheo Narain*, counsel for the appellant, has argued the case before us very fairly and has pressed all the points that can fairly be put forward. He has fairly admitted that the notice sent by the plaintiff had been received by his clients in time, and that it was not open to them to plead that they were *bona fide* purchasers without notice, and as such protected by the *proviso* attached to section 27 of the Specific Relief Act. The main contentions put forward by the learned counsel are as follows :—

- (1) That a sale-deed has not been executed in favour of the plaintiff owing to his own fault, and that he himself has been guilty of a breach of contract ;
- 2) That there has been considerable delay on the part of the plaintiff and the evidence in the case shows that the delay was of such a nature from which it ought to be inferred, that the plaintiff had abandoned his claim under the agreement ;
- 3) That in any case having regard to the long delay in preferring his claim the Court in the exercise of its discretionary power

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under section 22 of the Specific Relief Act should refuse to grant specific performance in this case.

(After reviewing the evidence relating to the first contention the judgment continues—*Ed.*)

In our opinion, there is overwhelming evidence on the record to show that the plaintiff could pay the price of the property which Wadhawa Singh had promised to sell to him, and that it was quite easy for him to obtain funds by mortgaging a portion of his property. The evidence produced by the defendants is not sufficient to prove that the plaintiff had refused to purchase the land. On the other hand, there is a good deal of evidence for the plaintiff which goes to show that the plaintiff was ready to make the purchase.

As regards the second contention, there is no question, but that delay may, in certain cases, be evidence of abandonment or acquiescence; but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of defendants, does not disentitle the plaintiff to sue for specific performance. This view is fully supported by authorities. See for example, *Kissen Gopal Sadaney v. Kally Prosonno Sett* (1). The learned Judge, who decided the above case, made the following observation in his judgment:—

“When a right is not in fact actually abandoned, delay to enforce it may induce a reasonable belief that the right is foregone and the party who acts upon the belief so induced, and whose position is altered by this belief in his prejudice, may plead delay as an answer to a claim made against him. But in my opinion more delay is not a sufficient reason for debarring the plaintiff from relief by way of specific performance.

* * * In my opinion delay is not material so long as matters remain *in statu quo*, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted.”

(1) (1906) 1 L. R. 33 Cal. 635.

The real question, therefore, which we have to decide in this case is whether the delay on the part of the plaintiff is evidence of abandonment by him of his rights under the agreement or not. The evidence given by the defendants already referred to does not satisfy us that the plaintiff intended to abandon his rights. On the contrary, as we have already said he had made preparations to make the purchase and for that purpose had gone to Lyallpur. In the face of direct evidence we are not prepared to accept the contention of *Pandit Sheo Narain* that the delay of a year and six months in this case necessarily implied that the plaintiff had given up his intention of enforcing his rights under the agreement.

It has been feebly contended by *Pandit Sheo Narain* that time was of the essence of the contract in this case and the plaintiff having failed to have the sale completed before the date fixed, it was no more open to him to ask the defendant to execute the sale-deed in his favour. Here the learned counsel was not able to show how the time was of the essence of the contract in this case. From the circumstances of the case it is not an illegitimate conclusion to draw that the defendant *Wadhawa Singh* himself had resiled from the agreement and was himself guilty of a breach of contract. The present case is fully covered by the rule laid down in *Chamarti v. Arardhi* (1) on which the lower Court has relied.

The third contention also raised by *Pandit Sheo Narain* cannot prevail. This contention is that having regard to the long delay on the part of the plaintiff to bring the suit, we ought to refuse to grant the equitable relief claimed by him. The suit is within time, and the delay is not so great as to induce us to hold that the plaintiff has forfeited his right under the agreement.

We see no grounds to differ from the view taken by the lower Court. We accordingly dismiss the appeal with costs.

C. H. O.

Appeal dismissed.

(1) (1914) 28 Indian Cases 560.

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