

(1940) 12 CAL CK 0017

Calcutta High Court

Case No: Appeal from Appellate Decree No. 48 of 1939

Rustomali and Others

APPELLANT

Vs

Sheikh Ahider Rahaman Mia

RESPONDENT

Date of Decision: Dec. 16, 1940

Judgement

Sen, J.

This appeal arises out of a suit for specific performance. The suit has been decreed by both the Courts and the Defendants Nos. 2 to 7 are the Appellants. The Plaintiff's case briefly is as follows:-- On the 11th of July, 1937, the Defendant No. 1 contracted to sell to the Plaintiff a piece of land for the sum of Rs. 85. The Plaintiff paid Rs. 60 in advance and it was agreed that he would pay the balance of Rs. 25 within four months and on this balance being paid the Defendant No. 1 would execute and register a conveyance in his favour. Before the expiry of four months, that is to say, on the 27th October, 1937, the Defendant No. 1 sold the property to the Defendant No. 2 in the name of his sons, the Defendants Nos. 3 to 7. On these grounds the Plaintiff claims a decree for specific performance. The Defendant No. 1 asserted that he had agreed to sell the property to the Plaintiff not for Rs. 85 but for Rs. 130. He says further that the Plaintiff paid him not Rs. 60 but Rs. 56 as earnest money. The balance according to him was to be paid within one month. He stated that after the expiry of that time he asked the Plaintiff to pay the balance, but the Plaintiff said that he was not then in a position to do so. Thereafter, the Defendant No. 2 came to him and told him that he would induce the Plaintiff to take back the advance money which he had paid and to give up his rights under the contract and asked the Defendant No. 1 to sell the property to him. Believing the Defendant No. 2, who Undertook to get the consent of the Plaintiff, the Defendant No. 1 sold the property to him.

2. The case of the Defendant Nos. 2 to 7 is that the property was purchased by them without any notice of the contract made between the Plaintiff and the Defendant No. 1. Both the Courts have found that the property was purchased by the Defendant No. 2 in the name of the sons, Defendants Nos. 3 to 7 and that the

Defendant No. 2 was fully aware that the Defendant No. 1 was under contract to sell the property to the Plaintiff. Both the Courts have found further that the Defendant No. 1 is a truthful person and the contract between the Defendant No. 1 and the Plaintiff was that the Plaintiff would purchase the property not for Rs. 85 but for Rs. 130 and that the Plaintiff had paid not Rs. 60 but Rs. 56 as advance money. The Lower Appellate Court has also found that there was no time fixed by the contract within which the Plaintiff was to pay the balance. On these findings he has given the Plaintiff a decree for specific performance. The Defendants Nos. 2 to 7 now appeal.

3. None of the findings of fact are challenged in this Court. The contention on behalf of the Appellants is that the Plaintiff has not succeeded in showing that he was ready and willing to perform the contract as it was, up to the date of the suit and it is contended that the Plaintiff's claim for specific performance must accordingly fail. On behalf of the Respondents it is contended that there is nothing to show that the Plaintiff was not ready and willing to perform the contract. Their learned Advocate points out that as time was not the essence of the contract, the inability of the Plaintiff to pay the balance on the date, on which the first demand was made by the Defendant No. 1, does not amount to a refusal on his part to perform the contract. He says that there is no evidence given of any final refusal on the part of the Plaintiff to perform the contract.

4. The learned Advocate for the Appellants contends, however, that the findings of the Court below and the claim made by the Plaintiff, if compared, conclusively show that the Plaintiff has not been able to prove that he was ready and willing to perform the contract as he really was.

5. In my opinion, this contention on behalf of the Appellants is sound. The Plaintiff's case is that he agreed to purchase the property for Rs. 85 and that he was ready and willing to pay this price. The Court has found that the purchase price fixed by the contract was not Rs. 85 but Rs. 130. Now in a suit for specific performance it is incumbent on the Plaintiff to prove that he was ready and willing to perform the contract as it actually was and not as he alleges it was. This is the principle which has been laid down in the case of *Babu Bindeswari Parshad v. Mahant Jairam Gir* L.R. 14 IndAp 173; ILR 9 All. 705 (1887). In this connection I would refer also to the case of *Ardeshir Mama v. Flora Sassoon* L.R. 55 I.A. 360 : S.C 32 C.W.N. 953 (1928).. If the pleadings mean anything, it is clear that the Plaintiff was alleging that he was ready and willing to purchase the property for Rs. 85. The Courts having found that the contract was that he had agreed to purchase for Rs. 130, I must take it that the Plaintiff has failed to prove his readiness and willingness to perform the contract as it really was. In these circumstances, the claim for specific performance must fail.

6. It is admitted that the Defendant No. 1 has received Rs. 56 as advance money. This sum the Plaintiff is entitled to get back. I accordingly set aside the decree for specific performance and direct that the Defendant No. 1 shall refund to the Plaintiff the sum of Rs. 56. In these circumstances of this case I consider that the parties

should bear their own costs throughout.