(1911) 02 CAL CK 0037

Calcutta High Court

Case No: Suit No. 384 of 1910

Nobin Chandra Sah Pramanik		APPELLANT
	Vs	
Sm. Krishna Baroni Dassi and Another		RESPONDENT

Date of Decision: Feb. 11, 1911

Judgement

Stephen, J.

This suit was originally decreed by me ex parte on the Defendant failing to appear when the case was called on. Subsequently the Defendant proved facts that led me to suppose that I might have been misled by evidence which showed that one of the Defendants was in the High Court at the time I heard the suit, and was intentionally absenting himself from my Court; and I re-instated the case accordingly. The plaint in the case, as far as it is material, is as follows :-On the 15th December 1908, the Defendants contracted to sell and the Plaintiff to buy a half share in land in Calcutta at the rate of Rs. 650 a cottah which came to Rs. 18,581-2-4 and the Plaintiff paid Rs. 501 as earnest money: the sale to be completed within a month. On the 26th January 1909, the Defendants informed the Plaintiff that they could not fulfil their contract as they had previously sold the share in question to one Gokul Chandra Bural but the Plaintiff refused to accept this excuse. On the 5th April, the Defendants informed the Plaintiff that they could not perform their contract because they had mortgaged the half share along with other property, and the mortgagees refused to release it. This excuse also the Plaintiffs refused to accept: Gokul next brought a suit against the present Defendants and the Plaintiff in which he sought to have a decree for specific performance against the Defendants and to have them and the Plaintiff restrained from completing the contract already mentioned. This suit was abandoned, and on the 18th September the Plaintiff called on the Defendants to complete their contract, but this the Defendants refused to do.

2. Meanwhile, on the 28th April, the Local Government published a declaration under the Land Acquisition Act announcing their intention of acquiring the premises in question for a public purpose. This they eventually did, paying for them a sum of Rs. 20,394-5-5 being

at the rate of Rs. 850 a cottah. The Plaintiff now sues for Rs. 10,014-3-1, the difference between the sum he contracted to pay beyond the Rs. 501, and the sum which was paid to the Defendant by the Local Government in respect of his half share, which he alleges is the damage he has sustained by the breach of his contract by the Defendants.

3. The Defendants, apart from pleas that they have given up, plead that they have not committed any breach of contract in being unable to convey the property free from incumbrances to the Plaintiff inasmuch as the mortgagees refused to release it: they deny that the Plaintiff was always ready and willing to complete the contract, and they say that the damages claimed are excessive and too remote.

4. Issues were settled, of which I need mention only the last three, as the contest in the case concerned them only: these are :-(3) was the Plaintiff ready and willing to perform the contract mentioned in the plaint ? (3) what is the true measure of damages ? (5) Are the Defendants bound under the contract to convey the property free from incumbrances, or are they bound to convey such interest only as they have in the properly ?

5. The Plaintiff opened his case by addressing me on the fifth issue, an adverse decision on which would render further argument unnecessary. Taking the facts relating to the mortgage set out on the pleadings which have not in fact been disputed, he contended that the vendor was bound to discharge all incumbrances on the property at the date of the sale under sec. 55 (1) (g) of the Transfer of Property Act, which is of course merely an expression of previously well-settled law. The mortgagee''s interest was such an encumbrance, and did not affect the title of the Defendant so as to bring the case within the rule laid down is Flureau v. Thornhill 2 W.B. 1078 (1776). He admitted that the purchase-money for the property sold would not suffice to redeem the mortgage which included other properly and in which other mortgagors were concerned, but he contended that so long as the vendor had legal rights which if enforced would enable him to clear the property from the encumbrances of the mortgage he was bound so to clear it, whatever the cost might be, and would be liable in default on failing to do so. I consider this argument sound for the following reasons. The general law, which is only worth stating because of the exception to it, is that a man is liable for damages arising from a breach of contract. An exception to this rule was laid down in Flureau v. Thornhill 2 W.B. 1078 (1776) that upon a contract for the purchase of real estate, if the vendor without fraud is incapable of making a good title, the intending purchase is not entitled to any compensation for the loss of his bargain. This rule after being limited in various ways was re-affirmed in modern times by the House of Lords in Bain v. Fothergill 7 E. & I. App. 158 (1874). In that case Lord Chelmsford says '"" I think the rule in Flureau v. Thornhill 2 W. B. 1078 (1776). as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." This decision does not in my opinion cover the present

case. There is here no question of the mortgagor''s title. His title was perfectly good but it was subject to the claim of the mortgagee which could be got rid of by payment of the debt which the mortgagor owed, and the question of how much he would have to pay, whether less or more than the amount of the purchase-money, could not affect the rights of the Plaintiff. That this is so is shown by the case of Engell v. Fitch L.R. 4 Q.B. 659 (1869) where mortgagees with power of sale sold to the Plaintiff, but took no steps to eject the mortgagor which they could have done, and it was held that the rule in Flureau v. Thornhill 2 W. B. 1078 (1776). did not apply. The decision seems to have been based chiefly on the case of Hopkins v. Grazebrook 6 B. & C. 31 (1826). which established an exception to the rule in Flureau v. Thornhill 7 E. & I. App. 158 (1874). W. B1. 1078 (1776). which is expressly overruled in Bain v. Fothergill 7 E. & I. App. 158 (1874). But in Day v. Singleton L R. [1889] 2 Ch. 320. it was held that Engell v. Fitch L. R. 4 Q. B. 659 (1869). was not overruled by Bain v. Fothergill 7 E. & I. App. 158 (1874). and that the latter case is not an authority for the application of Flureau v. Thornhill 2 W. B. 1078 (1776). "to the case of a vendor who can make a good title but will not, or will not do what he can do and ought to do in order to obtain one," a provision which seems exactly to describe the present case. The same view seems also to have been taken in fones v. Gat diner L. R. [1902] 1 Ch. 191 at p. 195. Consequently I hold that the rule laid down in Flureau v. Thornhill 2 W. B1. 1078 (1776).and re-stated in Bain v. Fothergill 7 E. & I. App. 158 (1874). does not apply to the present case, and that the fifth issue must be answered in favour of the Plaintiff.

6. I must point out that, as has been brought to my notice, it has been held in the Bombay High Court that the ruling in Bain v. Fothergill 7 E. & I. App. 158 (1874). does not apply to India; and that there is no exception to the rule provided by sec. 73 of the Contract Act. See Ranchhod Bhawan v. Monmohandas I. L. R. 32 Bom. 165 (1907). which follows the opinion expressed in the Note to sec. 73 in Pollock and Mulla''s edition of the Contract Act, but differs from the decision in Pitamber Sundarji v. Cassibai I. L. R 11 Bom. 272 (1886). The case before me has not been argued on this point and it is unnecessary that I should decide it, but I am by no means prepared to say that I differ from the decision in the later case.

7. As regards the third issue, I hold on the correspondence that the Plaintiff was willing and ready to perform the contract mentioned in the plaint till the 18th September 1909, and this point has not really been contested before me.

8. The question then arises what is the proper measure of damages ? As to this the Defendants admit that they must repay the Rs. 501 paid as part of the purchase-money at the time of the execution of the contract. The Plaintiff contends that he is further entitled to recover Rs. 10,014-3-1 the difference between what he was bound to pay further under the contract, viz. Rs. 18,380-2-4 and Rs. 28,394-5-5, the amount which the Defendants have admittedly received in the land acquisition proceedings in respect of the half share in the properly in question. The Defendants admit their liability on my findings for the difference between Rs. 18,380-2-4 and Rs. 24,690-11-6 the amount at which their share

in the land was valued in the proceedings, apart from the 15 per cent. allowed for a compulsory sale, that is, Rs. 6,310-9-2, but deny liability for the profit they receive in respect of the compulsory sale. On this point I think they must succeed. The Plaintiff is entitled to be put as far as possible in the position he would have been in if the contract had been carried out on the day when it was broken, as on that day his rights under the contract were converted into a right for pecuniary compensation. On the pleadings and on the evidence on the record I consider that the breach occurred on the date when the contract ought to have been but was not performed. That date was the 15th January 1909. It was of course open to the Plaintiff to waive his rights and to demand performance of the contract in spite of the breach, and this he may be taken to have done up to the 5th April the date assigned in the plaint for the arising of the cause of action: but I know of no authority for saying that he had power to postpone the breach of the contract as it was argued before me that he could, so as to postpone its date till the 18th September when he demanded a conveyance for the last time. If we suppose the breach to have occurred either on the 15th January or the 5th April there can have been no question of the land having been compulsorily acquired then as the declaration in the land acquisition proceedings was not made till the 28th April, and there is nothing to show that either party contemplated a compulsory acquisition before that date. The Plaintiff has contended that the case is covered by the principles of English law laid down in Williams on Vendor and Purchaser, p. 40, r. 8, and that I must give such force as I can to the principle that from the date of the contract for sale the land in equity belongs to the purchaser, and that he is therefore entitled to the increased value given to the land by the land acquisition proceedings. But this overlooks the fact that the contract in this case has been broken, and that the question of damages is the only one for me to consider. Also I am not prepared to hold that there is room for any principle derived from equity in the application of sec. 55 of the Transfer of Property Act. The result is that I find in favour of the Plaintiff who is entitled to the sum of Rs. 501 which he has already paid to the Defendant as purchase-money, and to Rs. 6,310-9-2 as damages for the breach of the contract. He is also entitled to costs on scale No. 2.