Fazle Ahmed Vs Rajendra Nath Roy Choudhuri and Others

Court: Calcutta High Court

Date of Decision: March 25, 1925

Citation: AIR 1926 Cal 339

Hon'ble Judges: Walmsley, J; Mukerji, J

Bench: Full Bench

Judgement

Mukerji, J.
The plaintiff instituted this suit for recovery of Rs. 6,250 made up of Rs. 5,501 as earnest-money in connexion with the

contract for sale of a plot of land 22 bighas in area, and Rs. 749 being the amount of damages and interest. The suit has been dismissed by the

Subordinate Judge, and hence this appeal.

2. The plaintiff"s case as laid in the plaint was that the Defendants Nos. 1, 2, 7 and 8 proposed to sell the land to him for Rs. 13,200 and a

bainapatra was executed by them in his favour on the 28th September, 1919, on receipt of Rs. 501 as earnest-money, that later on he came to

know that there were other owners who were unwilling to part with the property, and that at last he had to agree to increase the consideration to

Rs. 20,100, upon which all the defendants executed in his favour another bainapatra on the 16th July 1920 on receipt of a further amount of Rs.

5,000 as earnest-money. The plaintiff alleged that the defendants had stipulated to convey a good title to the properties and to obtain the requisite

permission of the District Judge and make over vacant possession of the property at the time of the transfer; but that the title of the defendants was

defective and the defendants had failed to produce their title-deeds in spite of requisition and were negligent in completing the transaction.

3. The case put forward on behalf of the defendants was that the first contract was made with one Sricharan Prosad Shaha, who was not the

plaintiff"s benamidar as alleged on behalf of the plaintiff, that there was no representation made by them, that there were no other owners, but, on

the other hand, Sricharan knew full well that there were other owners, that the plaintiff was very eager to purchase the property and came to a

settlement with Sricharan, paid him up and got his consent to negotiate the sale for himself that the plaintiff was satisfied with the title which the

defendants were able to show, approved of the same and thus the second bainapatra was executed; that the defendants obtained the necessary

permission from the District Judge and ejected the tenants who were on the land at considerable cost; that by this time the plaintiff had changed his

mind or was unable to complete the transaction and had failed to secure a buyer and so put the matter off repeatedly and on false and frivolous

pretexts; and that accordingly the plaintiff was not entitled to a refund of the earnest money, nor any damages or interest.

4. The plaintiff has come to Court with a story, a large portion of which cannot possibly be accepted. Whether Sricharan was a benamidar for the

plaintiff or not in the matter of the bainapatra that was first executed need not be considered for the purposes of the appeal. It appears that the

transaction was entered into at a time when there was a land boom in Calcutta and its suburbs. The plaintiff''s conduct in offering to complete the

purchase within seven days, provided all the co-sharers joined in the conveyance (Ex. A-4) and the fact that he got this offer accepted by the

defendant''s pleader on the very day that he made it (Ex. A-5) amply indicates that he was extremely eager to make the purchase. There is

evidence to show that on that very day the rent receipts produced by the defendants were examined, and statement as to the names of the owners

of the property and their respective shares therein was also inspected and the transaction was about to be completed it being understood that there

were to be two conveyances: one to be executed by the adults and the other by the guardian of the minors. Draft conveyances were made over to

the defendants'' pleader for approval and were returned to the plaintiff after approval, subject to some additions and alterations. The plaintiff then

insisted on having the permission of the District Judge with regard to the share of the minors and wanted to have vacant possession, and that is why

the completion of the transaction was deferred and the second bainapatra was executed. The plaintiff''s conduct in paying as earnest-money such

an unusually large sum of Rs. 5,000 also points to his great eagerness to purchase the property at the time, and unmistakably shews his story as to

his not having approved of the defendants'' title to be untrue. There is in the second bainapatra a clear statement that the purchaser''s pleader had

approved of the defendants'' title. The plaintiff''s case that this statement was put in without his knowledge cannot be accepted; and the positive

evidence on the record is to the contrary. The plaintiff is neither illiterate nor of immature understanding, but holds the responsible post of an

Auditor in a Government office. It is clear upon the evidence that he set about negotiating for the purchase of the property with the full knowledge

that, at least, one previous contract, namely, that with Mr. Cohen for its sale had fallen through on account of defect of title, or imperfect title.

Apart from the other evidence, that of his own pleader Jogesh Babu and of the defendants'' pleader, Ashu Babu, clearly shows that the plaintiff

was not at all anxious to look into the defendants'' title beyond what the latter were able to make out upon the scanty materials which they had at

their disposal. There is a very important statement in the deposition of Mr. Makabul-ul-Huq, who acted as plaintiff''s pleader at one stage of the

proceedings, namely, before the second bainapatra was executed and before Jogesh Babu came upon the scene. He states that on one occasion

he came to Ashu Babu''s sherista, at the request of the plaintiff to examine what documents the defendants had produced for examination, and that

for some days there was talk going on between the plaintiff and the defendants about the examination of title-deeds. He says that he was not

satisfied about the defendant''s title and asked for the patta, but Ashu Babu gave him to understand that he was to produce the rent receipts only

for plaintiff''s examination. We find upon the evidence of Ashu Babu also that when he showed the rent receipts to the plaintiff''s pleaders he told

them distinctly that he would not be able to produce any other documents in respect of the property. The conclusion that one must come to upon

the entire evidence in the case is that when the second bainapatra was executed, the title had already been approved by the plaintiff and the

defendants were to convey the property after having obtained the permission of the District Judge in respect of the shares of the minors and after

taking such steps as were necessary for the getting rid of the tenants in order that the plaintiff might have vacant or khas possession of the land.

5. The District Judge granted the permission by an order dated the 17th December 1920 and the fact was communicated to the plaintiff by the

defendant''s pleader by a letter Ex. 3(c) dated the 23rd December 1920. On the 28th December 1920 the plaintiff''s pleader replied to the

defendants'' pleader (Ex. A) asking information about the date of the Judge''s order, and impressing upon the latter that the deed of sale should be

executed and registered within 15 days of the date of the permission, so that he might get khas possession when he would take possession at the

time of registration, and enquiring if tenants had been actually evicted and stating that, if that had not been done, it should be done within the period

mentioned in the second bainapatra. It will be seen that the period mentioned therein was 15 days from the date of the Judge''s order. The

concluding paragraph of the letter is important as it was stated that time was of the essence of the contract and that the plaintiff was not prepared

to grant an extension on any account. It is noteworthy that no objection was taken in this letter on the ground of defect of title or the imperfect

nature of the title-deeds that had been produced. This letter is somewhat curious in that it suddenly thought of treating time as of the essence of the

contract when, as a matter of fact, such a long time had elapsed since the execution of the bainapatra.... The defendants'' pleader, on the 27th

January 1921, Ex. 3(a) replied to the above letter, giving the date of the Judge''s order and stating that the defendants had obtained vacant

possession by securing istafa from all the tenants and undertaking to make over vacant possession immediately after execution and registration of

the conveyance. The defendants appear to have felt somewhat surprised at the statement that time was of the essence of the contract and

characterized it as a mere plea to avoid completion of the contract. By this letter the defendants definitely gave the plaintiff notice that if he did not

get the conveyance completed, that is to say, executed and registered, they would regard the contract cancelled and the earnest-money would be

forfeited. The plaintiff''s pleader then, on the 2nd February 1921, gave a reply (Ex. 3b) condemning the defendants'' long silence over the letter of

the 28th December 1921, insisting that time was of the essence of the contract and saying that the plaintiff was willing to forego his right to refund

of earnest money and damages if the defendants would send the draft conveyance for approval within 24 hours and execute the conveyance by the

5th. February 1921. It further stated that the plaintiff wanted to be taken to the land in order to be satisfied about the istafa executed by the

tenants. It was also stated that a certain reversioner had written to the plaintiff warning him of his rights. Lastly, and this is most important, it was

stated that the defendants were to produce the original title-deeds which they had undertaken to produce at the time of the agreement, and if they

were not produced the plaintiff would not make the purchase. To this letter there was a stern reply (Ex. I) given by the defendants'' pleader on the

7th February 1921 complaining that the plaintiff was setting up one excuse or another to avoid completion of the transaction as he was unable to

find a purchaser though he was hunting for one, explaining that the objection as to defect of title was unreasonable, frivolous and without

foundation, and insisting that the draft kabala should have been sent by that time and expressing willingness to take the plaintiff to the land at such

time as he would appoint for the purpose. The letter concluded with a threat of forfeiture and a sale to somebody else; for the consequences of

which the plaintiff would be held liable. There was no further correspondence between the parties after this letter; and the suit was instituted on the

22nd February 1921.

6. The impression left upon one''s mind by the correspondence referred to above is that the plaintiff was setting up frivolous pretexts and resorting

to new devices at every step in order to get rid of the contract. He neglected intentionally to fulfil his part of the contract and was trying his best to

wriggle out of it. A claim for damages or interest under such circumstances is entirely out of the question.

7. The question then remains as to whether the plaintiff is entitled to a refund of the earnest-money. In the second bainapatra there is a stipulation

which runs in these words: ""We shall execute and register in your favour or in favour of your nominee within 15 days of the receipt of permission of

selling the share of the said minor on receiving Rs. 14,599, the balance of the consideration from you, and shall give you khas possession of the

land by evicting the tenants from it. If in spite of receipt of permission from the District Judge we fail to execute a kabala within the said date, on

taking the balance of the consideration, then you shall take khas possession of the said property by depositing the balance of the consideration in

Court. If, on the other hand, you fail to get a kabala executed by us on paying the balance of the consideration within the same time, then we shall

forfeit your earnest money."" The permission of the Judge was obtained on the 17th December 1920, and by the letter of the 23rd December 1920,

Ex. 3(c), the defendants called upon the plaintiff to complete the sale deed within a fortnight. In his reply of the 29th December 1920 (Ex. A) the

plaintiff stated that time was of the essence of the contract. The defendant''s letter of the 27th January 1921, Ex. 3(a) clearly give notice to the

plaintiff that if he did not get the deed of sale completed (i.e., executed and registered) within 10 days from the date thereof, the defendants would

regard the contract as cancelled and the earnest-money would be forfeited. The plaintiff replied (Ex. A-1) on the 2nd February 1921 noting that

time was of the essence of the contract and raising certain objections and asked for a draft conveyance to be sent for approval which, in the

absence of a stipulation to the contrary, it is the duty of the purchaser to tender. The defendants'' letter (Ex. I) of the 7th February gave the plaintiff

a further chance which he did not avail of The position then is this: a date was fixed in the bainapatra for the completion of the purchase, but in the

absence of an express stipulation to that effect, and in the absence of circumstances implying such an intention, the date cannot be regarded as of

the essence of the contract. Although, however, time is not originally the essence of a contract in this respect, it may be made so by either party

giving proper notice to the other to complete within a reasonable time provided that at the time of the notice there has been some default or

unreasonable delay by that other. There is an implied repudiation if the purchaser fails to complete on the day on which he is bound to complete.

This is the day, if any, fixed by the contract for completion, if time, in this respect, is of the essence of the contract; otherwise if the purchaser is in

default the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening

forfeiture of the deposit on non completion on that date. These conditions were fulfilled on the date on which the 10 days mentioned in the letter

Ex. 3(a) of the 27th January 1921 expired, and on such expiry the right of forfeiture of the deposit arose.

8. It has been urged that the learned Subordinate Judge was wrong in holding that the plaintiff had no money with which he could buy. That is

perhaps so. It is also true that the conduct of the defendants was not altogether free from blame. It would appear that the two istafas, Ex. H and

Ex. H-1 were executed on the 18th January 1921, and the three tenants, Krishna Chandra Mandal, Kartik Chandra Ghose and Pashupati Ghoso,

gave evidence to the effect that they did not vacate the land till March or April, that is to say about a month and a half after the institution of the

suit. The eviction of the tenants, however, was not a condition precedent to the completion of the transaction; it was only stipulated in the

bainapatra that the kabala will be executed and registered and khas possession would be given by evicting the tenants. The purchaser''s right to

take possession, in a case like this, arises coincidentally with the right to the execution of a conveyance by the vendor. In this case, there was no

attempt made by the plaintiff to get the conveyance--no tender of consideration money, no tender of draft conveyance, and in fact all the

circumstances indicate that he was trying to back out of the contract. There is nothing to show that if the conveyance had been completed the

defendants would have been unable to make over vacant possession.

9. The conduct of the defendants also in connexion with this transaction does not appear to be altogether fair; they too seem to be speculators

though perhaps in a lesser degree; they entered into a contract with Mr. Cohen while the contract with Sricharan was yet in force; their title to this

property was found defective and not accepted as satisfactory. It, therefore, seems rather unreasonable that they should be allowed to stick to the

whole amount obtained by them as earnest-money. They have, no doubt, spent some money in getting the permission of the Judge and in getting

the tenants to vacate; but the figure at which they put down their expenses seems exorbitant. For these reasons, I feel no sympathy for them; but at

the same time I am unable to hold that any considerations of equity can arise in this case. A deposit paid under a contract of sale serves two

purposes; if the sale is carried out it goes against the purchase-money, but primarily it is a security for the performance of the contract. Even if there

was no express provision the vendors would be entitled by virtue of the purpose of the deposit, to retain it as forfeited, when the contract went off,

as I hold it did, by the default of the purchaser. The question of defect of the vendor''s title is not material; for if the purchaser has, by his default in

completion after he has accepted the title, given the vendor, the right to rescind the contrast and retain the deposit as forfeited and such right has

been exercised the forfeiture is final. A subsequent discovery of any defect in the vendor''s title does not confer on the purchaser the right to

recover the deposit.

10. The appeal accordingly must be dismissed, but under the circumstances, without costs.

Walmsley, J.

11. I agree.