Subhadrabai Vs Mahomedbhai I.M. Rowji

Suit No. 2405 of 1923

Court: Bombay High Court

Date of Decision: July 17, 1923

Citation: AIR 1924 Bom 187 : (1923) 25 BOMLR 931

Hon'ble Judges: Mulla, J

Bench: Single Bench

Judgement

Mulla, J.

This is an originating summons taken out by that plaintiff and the second defendant (purchasers) for the determination of the

question whether the first defendant (vendor) is entitled to interest on the balance of the purchase money from February 18, 1923, as claimed by

him.

2. On January 18, 1923, the plaintiff and the second defendant purchased certain Immovable property at an auction sale held by the first defendant

as mortgagee of the property for Rs. 1,19,500 subject to certain conditions of which a print is Exh. A herein. On the same day the purchasers paid

Rs. 30,000 as earnest. The sale was to be completed on February 18, 1923.

3. After the date of the agreement for sale, the purchasers'' attorneys took search of the register of assurances when they discovered that the

property was subject to a mortgage dated August 11, 1873, but there was no reconveyance. The amount of the mortgage was Rs. 2,000; the

parties to the mortgage Were Hindoos; and, having regard to the rule of damdupat, the mortgagee would not be entitled to more than Rs. 2,000

for interest.

4. The above facts were brought to the notice of the vendor''s attorneys, on February 17, 1923. On February 27, the vendor''s attorneys wrote to

the purchasers complaining that the purchasers had not completed the purchase and that the vendor would claim interest as provided by condition

No. 6. To this the purchasers'' attorneys replied on March 1, stating that as the said mortgage was still subsisting, the title was not marketable, and

they enquired what the vendor proposed to do to make the title marketable. To this there was no reply.

5. The purchasers then took out an originating summons for the determination of the question whether they were entitled to retain Rs. 4000 to meet

the mortgagee''s claim. The summons was argued before me on April 13, and I delivered judgment on April 17, declaring that the vendor was

bound to complete the sale on payment of the balance of the purchase money less Rs. 4000 for principal and interest and Rs. 150 for the costs of

the reconveyance, and I directed the purchasers to deposit Rs. 4150 in Court to meet the mortgagee''s claim. No arguments were addressed to

me on the question of the costs of the summons, and, believing that the costs of the sale were to be equally divided between the parties, I directed

that the costs of the summons should be costs in the Bale. This order was made under a misapprehension, for under condition 18 all costs of the

sale were to be borne by the purchasers, The matter was mentioned to me on June 11, and on June 14, I modified the order and directed in effect

that each party should bear his own costs of the summons.

6. In the meanwhile, on April 17, the purchasers'' attorneys wrote to the vendor''s attorneys that the order for costs was made under a

misapprehension. The vendor''s attorneys replied on April 18, stating that the order was a usual order made on summonses of this kind, and they

required the purchasers to complete the matter. To this letter the purchasers'' attorneys replied on the same day reiterating that the order as to

costs was made under a misapprehension and they claimed to retain Rs. 1000 with them until the question of costs was finally determined by me.

The vendor''s attorneys replied on April 25, denying the purchasers right to retain Rs. 1000 or any other sum. The vendor also claimed interest

from February 18, being the date fixed for completing the sale. Further correspondence passed between the parties, and on May 2, the vendor''s

attorneys made what I think was a very fair proposal to the purchasers'' attorneys, namely, that the purchasers should pay the balance of the

purchase money and complete the purchase without prejudice to the contentions of the parties on the question of interest. As to costs they wrote

that they would retain Rs. 1000 with them and not part with the money until the question of costs was determined by the Court. The purchasers did

not accept the offer and by their letter of May 2, they insisted on retaining RS. 1000 with their attorneys. On May 4, the vendor''s attorneys wrote

to the purchasers'' attorneys as follows:

With reference to the 2nd para of your letter, in view of your attitude regarding the sum of Rs. 1000, we are instructed to state that our client insists

upon interest also being paid or the amount thereof being deposited either with your firm or with our firm before completion. Of course your clients

must take steps as regards the question of costs and also as regards the question of interest on or before June 15 next, failing which the amount of

interest will become payable to our client.

7. The purchasers did not reply to the above letter. On June 11, the purchasers" attorneys applied to me to reconsider the question of costs, and

on the same day they wrote to the vendor"s attorneys enquiring whether he was prepared to complete without claiming any interest. They knew full

well that the vendor insisted upon his claim for interest, and I do not see any reason why they made the above inquiry, Then on June 14, I made the

order directing each party to bear his own costs of the summons.

8. The present summons was taken out by the purchasers on June 22, 1923. The question to be determined on the summons depends on the true

construction of condition No. 6. That condition is as follows:

The purchaser of the property shall pay the balance of his purchase money to the said mortgagee within one calendar month from the day of Bale

and if the same from any cause whatever be not so paid the purchaser shall pay interest on his unpaid purchase money at the rate of 10Ã¯Â¿Â½ per

cent. per annum from the end of one calendar month from the date of sale to the day on which the same is actually paid. The purchaser shall not

however be entitled to claim any rents or income that might be earned out of the said property before payment of the entire balance of the

purchase money. This stipulation is without prejudice to the rights reserved to the mortgagee under other conditions.

9. It was contended for the purchasers that the delay in the completion of the purchase was caused by the wilful default of the vendor in refusing to

complete unless the whole balance of the price was paid, though the mortgage of 1873 was still subsisting, and that the purchasers were not liable

to pay any interest On the other hand, it was argued for the vendor that the refusal did not amount to wilful default, and that the purchasers were

bound to pay interest at the rate of 10Ã¯Â¿Â½ per cent, per annum from February 18, 1923, being the date fixed for completion until the sale was

completed.

10. The words used in condition No. 6 are ""from any cause whatever"", but it has long since been settled that the generality of these words do not

allow a vendor to claim interest where delay occurs by his ""wilful default."" The Courts have so construed those words as to prevent a vendor

from taking advantage of his own wrong: see Williams v. Glenton (1866) L.R. 1 Ch. App. 200 and In re Woods and Lewis" Contract [1898] 2

Ch. 211 In Williams v. Glenton the vendor contracted to sell a moiety of an estate to Glenton, the purchase to be completed on June 24, 1854,

and if ""from any cause whatever, Ã¯Â¿Â½the purchase should not be completed on that day, the purchaser was to pay interest. After the agreement for

sale the other part-owner set up a claim to the entirety, and refused to produce the deeds. The vendor filed a bill for partition and a decree for

partition was made in July 1862. The purchaser applied at distant intervals to know whether the vendor would complete, and never expressed a

wish to rescind. After the decree was obtained, the purchaser insisted that he was entitled to complete without paying interest on the purchase

money. It was held by the Court of Appeal that the circumstances were not such as to exempt the purchaser from payment of interest according to

the contract. In the course of his judgment Sir J.L. Knight-Bruce L, J, said (p. 206):

The vendor may be, in a sense, wrong in not having his title ready at the time specified ; but I repeat it has notoriously been long settled that the

mere existence of difficulties as to the title justifying the purchaser in refusing to complete until they are removed, does not exempt him from that

clause relating to interest...There must be something more than that kind of default which I have mentioned : there must be, I might almost say,

some serious misconduct on the part of the vendor to exempt the purchaser from liability to interest. Here there is nothing of the sort. The

purchaser might possibly have exempted himself from interest by investing the purchase-money; he might, and possibly with success, have refused

to be bound by the contract; but he did neither.

11. The above case is an authority for the proposition that lapse of time occasioned merely by the defect of the vendor''s title not known to him at

the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect as was done in In re Woode and Lewis''

Contract [1898] 1 Ch. 433, [1898] 2 Ch. 211 does not exempt the purchaser from paying interest.

12. In In re Young and HarstonsÃ¯Â¿Â½s Contract (1885) 31 Ch. D. 168, the clause as to interest contained the words, ""if from any cause whatever

other than wilful default on the part of the purchaser"". In dealing with the expression ""wilful default"", Bowen L.J. said (p.174):

The term ''wilful default''...is not a term of art...Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not

doing what is reasonable under the circumstancesÃ¯Â¿Â½nut doing something which you ought to do, having regard to the relations which you occupy

towards the other persona interested in the transaction. The other word which it is sought to define is ''wilful''. That is a word of familiar use in

every branch of law, and although in some branches of the law, it may have a special meaning, it generally, as used in courts of law, implies nothing

blam-able, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from

the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a

free agent.

13. The observations of Bowen L J. were cited with approval in In re Hetling and Merton''s Contract [1893] 3 Ch. 269, in In re Mayor of London

and Tubbs Contract [1894] 2 Ch. 524 and in Bennett v. Stone.[1903] 1 Ch. 509.

14. I now pass to consider whether the delay in the present case was occasioned by the wilful default of the vendor. Applying the above

observations to the facts of the present case, I think that the delay was caused by, what I may call in the words of Knight-Bruce L.J., ""serious

misconduct on the part of the vendor Ã¯Â¿Â½Immediately the purchasers'' attorneys discovered the defect in the title, they brought it to the notice of the

vendor by their letter of February 17. The mortgage of 1873 (being still subsisting, the vendor was not entitled to payment'' of the whole of the

purchase money as if the mortgage did not exist. He insisted, however, on payment of the whole of the purchase money, which obviously he was

not entitled to do. The purchasers had no alternative but to take out an originating summons which they did on March 28, 1923. In the language of

Bowen L.J., he did not do what he ought to have done. He ought, I think, to have accepted the price less the amount of the mortgage claim, but he

refused to do so. The refusal was unreasonable : it was arbitrary and unjustifiable. What, then, is the period for which the purchasers should be

exempted from payment of interest? The mortgage was discovered by their attorneys on or about February 17. But the originating summons was

not taken out until March 28, 1923, and this delay has not been explained. Further, the purchasers were wrong in insisting upon retaining Rs. 1000

for costs. I think they would have been well advised if they had accepted the offer made by the vendor''s attorneys by their letter of May 2. Had

the offer been accepted, the purchase could have been completed by May 8, If no such offer had been made, I should have held that both parties

were in the wrong, the vendor in refusing to complete unless interest was paid for the full period of the delay, and the purchasers in refusing to

complete unless they were allowed to retain Rs. 1000 for costs. Both parties being in the wrong, it could not be said that the delay was caused

exclusively by default on the part of the vendor, which alone entitles the purchaser to exemption from liability to interest under the interest clause :

see In re Mayor of London and Tubbs'' Contract [1894] 2 Ch. 524. Again, there was no reason why the question of interest should not have been

raised by the first summons. The vendor had set up that claim by his attorneys'' letter of February 27. Having regard to all the facts of the case and

the conduct of the parties, I think that the purchasers should pay interest from February 19, 1923, up to July 9, 1923, being the date on which the

purchase was completed, except from March 28, 1923, the date of the first originating summons (No, 1208 of 1923) to May 8 when the sale

ought to have been completed, to which ought to be added a further period of ten days, being the period necessary for preparing papers for the

originating summons after the date of the discovery of the mortgage. The total period of exclusion will thus be fifty-two days. Each party to bear his

own costs of the summons. First defendant to be at liberty to add his costs to his mortgage claim. Counsel certified.