Dr. Jiwan Lal & Ors vs Brij Mohan Mehra & Anr on 14 September, 1972

Equivalent citations: 1973 AIR 559, 1973 SCR (2) 230, AIR 1973 SUPREME COURT 559, 1972 2 SCC 757, 1973 2 SCJ 594, 1973 2 SCR 230

Author: S.N. Dwivedi

Bench: S.N. Dwivedi, J.M. Shelat, D.G. Palekar

PETITIONER:
DR. JIWAN LAL & ORS.

Vs.

RESPONDENT:
BRIJ MOHAN MEHRA & ANR.

DATE OF JUDGMENT14/09/1972

BENCH:
DWIVEDI, S.N.
BENCH:
DWIVEDI, S.N.
SHELAT, J.M.
PALEKAR, D.G.

CITATION:
1973 AIR 559 1973 SCR (2) 230
1972 SCC (2) 757

ACT:
Specific Relief-Stipulation in contract for benefit of one party only-If could be waived by him-Specific performance-Delay in filing suit for-when material.

HEADNOTE:
The appellant and respondents enterd into a contract under which, from the very inception, the respondents became liable to sell their immovable property and the appellants became liable to buy it. One of the terms of the contract provided that if the property was requisitioned by the Government prior to the registration of the sale-deed the respondents should refund the earnest money paid by the appellants with interest. The premises were requisitioned before the execution of the sale-deed. The respondents

tendered a cheque for the earnest money with interest and filed an appeal against the order of requisition but the appeal was dismissed. Notwithstanding the requisition, the appellants were repeatedly asking the respondents to execute the sale-deed in accordance with the agreement. As the respondents did not do so, the appellants filed a suit for specific performance of the contract about two years after the respondent's appeal against the order of requisition was dismissed. The trial court decreed the suit but the High Court reversed the decree.

Allowing the appeal to this Court,

HELD:(1) There is nothing in the agreement to show that non-requisitioning of the property was a condition precedent to the performance of the seller's (respondent's) obligation to sell the premises or that the contract came to an end on the requisitioning of the premises. On the contrary, the non-requisitioning of the premises was a condition precedent to the performance of the buyer's (appellants) obligation to buy the premises. That is, when the premises were requisitioned, the appellants could rescind the contract if they so desired. As the clause relating to requisitioning was inserted for the exclusive benefit of the vendee and not for the benefit of the vendor as well as the vendee and it did not create any liabilities against the vendee the appellants (vendee) could waive, unilaterally, the condition precedent specified in the clause. [238D-E, H: 236A]

Dalsukh M. Pancholi v. The Guarantee Life and Employment Insurance Co. Ltd. and Others, A.I.R. 1947 P.C. 182, Hawksley v. Outram, [1892] 3 Ch. 259 and Morrell v. Studd and Millington, [1913] 2 Ch. 648, referred to.

(2)Where it would be unjust to give a remedy to a party either because he has, by his conduct, done that which might fairly be regarded as an equivalent to a waiver of it or, where by his conduct and neglect, be has, though perhaps not waiving that remedy, 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, in either of these cases, lapse of time and delay are material. [236G-H; 237A]

In the present case, the appellants never abandoned their rights under the contract. They were justified in waiting till the date of disposal of the appeal against the order of requisition in the hope that the order of

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requisition might be set aside in appeal. Thereafter, they were pressing the respondents to execute the sale deed. Therefore, they never waived the remedy of specific performance.

Further there is no allegation in the respondent's written statement that they would be prejudiced by the specific performance, nor is there any evidence to that effect.

Therefore, the delay in the institution of the Suit had not caused any disadvantage to the respondents.

Linadsay Petroleum Co. v. Hurd, L.R., 5 P.C. applied.

[Directions regarding execution of the sale deed given]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : C.A. No. 1100 of 1967. Appeal by certificate from the judgment and decree dated January 25, 1966 of the Punjab High Court at Chandigarh in Civil Regular First Appeal No. 362 of 1964. C.K. Daphtary, M. C. Chagla, S. K. Mehta, K. R. Nagaraja, ill. Oamaruddin, K. S. Suri and R. K. Melita, for the appellants.

W.C. Setalvad, S. T. Desai and I. N. Shroff, for respon- dent No. 1.

The Judgment of the Court was delivered by DWIVEDI, J. This is an appeal against the judgment and decree of the High Court of Punjab and Haryana, dated January 25, 1966. The High Court reversed the judgment and decree of the Subordinate Judge, 1st Class, Amritsar, dated August 17, 1964. The Subordinate Judge had decreed the plaintiffs' suit for possession of the premises by specific performance of the agreement to sell. The High Court dismissed the suit.

Brij Mohan Mehra, one of the respondents, was the defendant, and the appellants were the plaintiffs in the suit. There was an agreement between Dr. Jiwan Lal, the first appellant, Shri Krishan Das the second appellant, and one Bal Kishan Das, the predecessor in interest of the appellants Nos. 3 to 8 and Brij Mohan Mehra. It was concluded on December 9, 1959. By that agreement Brij Mohan agreed to sell the premises in suit to Dr. Jiwan Lal, Shri Kishan Das and Bal Kishan Das. The sale consideration was Rs. 122500/-. The prospective vendees paid Rs. 10,000/- as earnest money. The balance of the sale consideration was to be paid by them at the time of the registration of the sale deed. The material terms incorporated in cls. 5, 6, 7 and 9 of the agreement are set out here

5. The sale deed shall be executed and registered by the vendor in favour of the purchasers within three months from the date when the premises are vacated by the Income-tax Authorities and intimation is given to the purchasers by the vendor per registered post.

6.In the event of the above said premises, which is the subject matter of sale not being vacated by the Income-tax Authorities or is subsequently requisitioned by the Government prior to the registration of the sale deed the vendor shall refund to the purchaser the sum of Rs. 10,000/- (Rupees ten thousand only) received by the vendor as earnest money plus interest at the rate of 6 per cent per annum.

7.If even after the vendor having satisfied the purchasers regarding, the title of the premises which are the subject matter of sale, the Purchasers do not complete the sale-deed and have it registered within the above, the earnest money so paid by the Purchasers to the Vendor shall stand forfeited for non-performance of the contract here- inbefore entered into, and the Vendor shall be at liberty to retain or resell the property.

9.From the date from which the above said premises are vacated by the Income-tax Authorities to the date of execution and registration of the sale-deed the Vendor shall affect such repairs as may be necessary with the consent of the Purchasers at the expense of the Purchasers. The purchasers shall be liable to pay after such repairs etc. are effected. all expenses and incidentals incurred in connection therewith by the vendor before the sale deed is executed and tendered for registration. The purchasers shalt also pay for and on account of the Chowkidar to look after and maintain the condition of ,the premises in good order till the execution and registration of the sale-deed.

The premises were requisitioned by the Additional District Magistrate, Amritsar on January 23, 1960. Thereafter Brij Mohan Mehra refused to execute the sale-deed in spite of the requests of the prospective vendees. So the plaintiffs instituted their suit. Their case was that the premises were requisitioned on the manipulation of Brij Mohan Mehra, that clause 6 of the agreement was intended to be for the benefit of the prospective vendees, that the prospective vendees waived the condition in cl. 6, that Brij Mohan Mehra could not put an end to the contract by relying on cl. 6, and that the plaintiffs have always been ready and willing to perform their part of the obligation under the agreement.

Brij Mohan Mehra contested their claim. His case was that the agreement was a contingent agreement, that it became void on the requisitioning of the premises, that no contract ever came to existence prior to the requisitioning of the premises, that he did not manipulate for the requisition of the premises, that the plaintiffs could not waive the condition in cl. 6, that they were not ready and willing to perform their obligation under the agreement and that they were guilty of laches and should be deemed to have abondoned their rights under the agreement.

The Subordinate Judge held that the plaintiffs were always ready and willing to perform their obligation under the agreement. The agreement did not become void on the requisitioning of the premises and Brij Mohan Mehra had manipulated for the requisitioning of the premises. He could not rescind the contract by relying on cl. 6. The plaintiffs waived the condition in cl. 6 and insisted on buying the property. They were not guilty of laches and they did not abondon their claim under the agreement. On those findings, the Subordinate Judge decreed the plaintiffs' suit.

On appeal by Brij Mohan Mehra, the High Court reversed the decree and dismissed the suit. The High Court held that cl. 6 of the agreement imposed obligations on Brij Mohan Mehra to sell and on the prospective vendees to buy only if vacant possession could be delivered to the latter and not otherwise. As soon as the premises were requisitioned the entire contract fell through and thereafter there subsisted no enforceable obligation on either side. The prospective vendees could not waive the condition in cl. 6. On those findings and without expressing any opinion about the other findings of the Subordinate Judge, the High Court reversed his decree.

The following points arise for determination by this Court.

> (1) Was there a concluded contract? (2) Was the non-requisitioning of the premises a condition precedent to the performance of the seller's obligation to sell ?

(3) Was the non-requisitioning of the premises a condition precedent to the performance of the buyers' obligation to buy? (4) Could the buyers waive the condition and insist on the performance of the seller's obligation ?

(5) Were the buyers guilty of laches and was there abondonment of their claim ?

Re. Point No. 1.

Neither party has argued that there was no formation of the contract between the parties. The contract was not made 'subject to the non-requisitioning of the premises'. By cl. 1 of the agreement, the vendor agreed to sell and the purchasers agreed to purchase the premises. Clause 5 makes the vendor liable to execute a sale deed within a certain time. So there was a concluded contract between the parties. The seller became liable to sell and the buyer became liable to buy from the very inception of the contract.

Re. Point No. 2.

Even though the agreement was drawn on the legal advice of one Mohan Singh, a lawyer for both parties, clause 6 of the agreement does not expressly subject the seller's obligation to sell to the contingency of the non-requisitioning of the premises. Nor does it say that the contract would come to an end on the requisitioning of the premises. Brij Mohan Mehra has taken care to use clear and specific language in cls. 7 and 9 to safeguard his interests. If it were intended that his obligation to sell should come to an end on the requisitioning of the premises, there is no reason why cl. 6 should not have expressed that intention fairly clearly. Brij Mohan Mehra, the prospective vendor, is a businessman. It is difficult to conceive that he would have negotiated for the right to rescind the contract in the event of the requisitioning of the premises, for the sale price of a vacant premises is usually higher than the sale price of an occupied premises. By subjecting his obligation to sell to the non-requisitioning of the premises he would have put himself at a disadvantage. It is evident from cl. 6 that the object of the prospective vendees was to obtain vacant possession of the premises. But we are unable to discern anything in the agreement to show that it was also the object of the prospective vendor. As already indicated, he stood to gain nothing from that object. Clause 9 of the agreement provides that the vendor would make repairs between the date of vacating the premises by the Income-tax Authorities and the date of the execution of the sale deed with the consent of the vendees at their expense. The want of a provision in the agreement fixing responsibility for the repairs after the requisitioning of the premises would not suggest that the non-requisitionin of the premises was a condition precedent to the performance of the seller's obligation to sell. After the requisition, the repair expenses would be a matter to be settled between the requisitioning authority and the owner of the premises. Accordingly a provision like the one in cl. 9 could not be inserted in the agreement. According to cl. 6, the vendor becomes liable on the requisitioning of the premises to refund the earnest money of Rs. 10,000/- with interest at 6% per annum. The term for payment of interest should not present any difficulty in the calculation of interest if it is held that the seller's obligation to sell was not subject to the contingency of the non-requisitioning of the premises. We are satisfied that the interest became payable not from the date of the non- requisitioning of the premises, but from the date of the payment of the earnest money. In other words, the interest would

accrue from December 9, 1959, the date on which the agreement was executed. That it is so, is also evident from the conduct of Brij Mohan Mehra. When the premises were requisitioned he sent a letter on February 11, 1960 along with a cheque for Rs. 10,103.28 to the prospective vendees. In the letter he has expressly stated that the interest has been calculated from December 9, 1959 to, February 11, 1960. The accrual of interest after the date of the requisitioning of the premises could be prevented by tendering the amount of the earnest money to the prospective vendees. The term for interest in cl. 6 would not therefore indicate that the seller's obligation to sell was subject to the condition of the non-requisitioning of the premises. In our view there is nothing in the agreement in general and in cl. 6 in particular to show that the, non-requisitioning of the premises was a condition precedent to the performance of the seller's obligation to sell the premises, or that the contract came to an end on the requisitioning of the premises.

Mohan Singh is a lawyer. The agreement was drawn with his legal advice. He has appeared as a witness for Brij Mohan Mehra. He has stated that the prospective vendees wanted to purchase the premises for setting up a hotel. Naturally, they would be keen on getting vacant possession of the premises. Accordingly they would negotiate for the right to rescind the contract in the event of the requisitioning of the premises. Clause 6 expressly imposes an obligation on the vendor to refund the earnest money with interest. There is impliedly created thereby a. corresponding right in the buyers to demand back the earnest money with interest. The right to demand back the earnest money necessarily implies the right to rescind the contract. The refund could not be claimed as long as the contract remained in force. We think that the non-requisitioning of the premises was a condition precedent to the performance of. the buyers' obligation to buy the premises. When the premises were requisitioned the buyers could rescind the contract, if they so desired.

As already discussed, cl. 6 was inserted in the agreement for the, exclusive benefit of the vendees and not for the benefit of the vender as well as the vendees. So the vendees could waive the condition precedent specified in el. 6. In Dalsukh M. Pancholi v. The Guarantee Life and Employment Insurance Co., Ltd. and others(1), there was an agreement for sale of immovable property. The property was under attachment by an order of the Court and was about to be sold by public auction. A certain amount was paid by the prospective vendee as earnest money. Clause 4 of the agreement provided that, the balance of the sale consideration would be paid before the Sub-Registrar at the time of the registration of the sale deed within 30 days of the approval of the Court to the agreement. The Court did not Approve the offer. Thereupon the vendor asserted that the contract has come to an end, while the vendee counter-claimed that as he has waived the condition in cl. 4, the contract subsisted. The, Privy Council held that as the condition in cl. 4 "was not exclusively for the benefit of the purchaser" it could not be waived by him and that the entire contract fell through. It would follow that where a stipulation is for the exclusive benefit of one contracting party and does not create liabilities against him he can waive it unilaterally. (See also Hawksley v. Outram(2) and Morrell v. Studd and Millington (3) The agreement was made on December 9, 1959. The premises were requisitioned by an order dated January 23, 1960. Brij Mohan Mehra filed an appeal against the order of requisition. It was dismissed on August 1, 1960. The suit was instituted on November 5, 1962. As the appeal was pending, the plaintiffs could reasonably wait until August 1, 1960 in the hope that the order of requisition might be set aside in 'appeal. So no legitimate objection can be taken on the score of delay until August 1, 1960. The suit was instituted

within two years, three months and four days of the dismissal of appeal on August 1, 1960. It is now to be seen whether this delay is such as would disentitle the plaintiffs to the relief of specific performance of the contract. In Iindsay Petroleum Co. v. Hurd(4), Lord Selborne said :

> "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy put the other party in a situation in which it would not be reasonable to place him if the (1) A.I.B,. 1947 P.C. 182.
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> (3) [1913] 2 Ch. 648 at page 660. (2) [1892] 3 Ch. 359 at page 376 (4) Law Reports 5 P.C. 221 (at page 239) remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

In his written statement Brij Mohan Mehra pleaded only waiver and not also that he would be prejudiced by specific performance. There was considerable correspondence between the parties between February 1 1, and April 27, 1960. In their letters the prospective vendees repeatedly asked Brij Mohan Mehra to execute a sale deed in accordance with the agreement. They also said that they were ready and willing to pay the sale consideration stipulated in the agreement. But Brij Mohan Mehra persisted in his refusal to execute the sale deed. Eventually on April 17, 1960 one Sardari Lal Sachdev, Advocate, gave notice on behalf of the prospective vendees to Shri Hans Raj Mittal, Advocate, for Brij Mohan Mehra. It is said in that notice that the prospective vendees would attend the office of the Sub-Registrar, Amritsar on April 30, 1960 between 10 A.M. and 12 noon and that Brij Mohan Mehra should reach there to get the sale deed registered. As April 30, 1960 was a holiday, the prospective vendees later sent a telegram to Brij Mohan Mehra to appear before the Sub-Registrar and produced before him a sum of Rs. 1,12,500/-. The money was counted by the clerk of the Sub-Registrar. Brij Mohan Mehra did not appear before the Sub-Registrar on that date. The Sub-Registrar has supported this version of the plaintiffs. Dr. Jiwan Lal, one of the plaintiffs, has deposed that even after April 29, 1960, he had been asking Brij Mohan Mehra to execute a registered sale deed but he had been evading. One Mr. Ranbir Mehta went along with him to Brij Mohan Mehra for the same purpose. But Brij Mohan Mehra told him that as the premises had been attached by the Rani of Kashmir he should wait for some time. Dr. Jiwan Lal then added : "Thereafter I went and asked him to complete the same but he continued to evade." There appears to be no cross-examination on this part of his statement on behalf of Brij Mohan Mehra. Dr. Jiwan Lal denied in his cross-examination that the plaintiffs had abondoned their claim. It is not possible to believe that the plaintiffs, who were so insistent on the execution of the sale deed in their favour and who had actually appeared before the Sub-Registtar with the requisite amount of money for payment to the vendor, would abandon their claim after April 29 or August 1, 1960. There is no reason to disbelieve Dr. Jiwan Lal's statement that even after April 29, 1960, he had been pressing upon Brij Mohan Mehra to execute a registered sale deed. In our opinion the plaintiffs did not abandon their rights under the agreement. The institution of the suit after two years does not appear to have caused any disadvantage to Brij Mohan Mehra. As already stated earlier, there is no such allegation in his written statement nor is there any evidence to that effect. Brij Mohan Mehra has

admitted in his cross- examination that the prices of properties started depreciating in or about October 1962 when there was Chinese aggression on India. The suit was instituted after the Chinese aggression. So it cannot be said that the specific performance, of the agreement was likely to cause any prejudice to Brij Mohan Mehra on the date of the institution of the suit. The suit cannot accordingly be, dismissed on account of delay.

In view of our earlier findings, it is not necessary to decide whether the requisitioning of the premises was a manoeuvre of Brij Mohan Mehra to slide back from the agreement.

We set aside the judgment and decree of the High Court. The suit of the plaintiffs is decreed. Brij Mohan Mehra is directed to execute a sale deed in favour of the plaintiffs in terms of the agreement, dated December 9, 1959, on the plaintiffs tendering to him a sum of Rs. 112500/- and necessary expenses for execution and registration of the sale deed within two months from today. If Brij Mohan Mehra fails to execute the sale deed, the plaintiffs should deposit the requisite amount in the trial court within three months from today and apply for the execution of the decree for execution of the sale deed. The plaintiffs shall get their costs throughout from Brij Mohan Mehra.

V.P.S Appeal allowed.