

Dalsukh M. Pancholi - - - - - *Appellant*

v.

The Guarantee Life and Employment Insurance
Company, Limited and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 24TH APRIL, 1947

Present at the Hearing:

LORD WRIGHT

LORD PORTER

LORD UTHWATT

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal by the plaintiff-appellant against a judgment and decree of the High Court of Judicature at Lahore, dated 29th March, 1944, which reversed a decree of the Court of the Subordinate Judge, First-Class, Lahore, dated 30th November, 1943, and dismissed the suit.

The appeal arises out of a suit for specific performance of an agreement for sale of property situate in the town of Lahore, known as the "Cinema property". The agreement was executed by Ram Jas 3rd defendant (4th respondent) for himself, and as proprietor, Pahlad Das & Bhagwan Das, in favour of the appellant through his broker Dina Nath Sodhi, and was dated 12th July, 1942. The property was to be sold for Rs.6,50,000.

The material terms of the agreement are found in the letter written by the broker to Ram Jas. The terms mentioned in that letter are as follow:—

1. That the property will be conveyed to my customer free of all encumbrances, charges, liens, attachments and all other defects of titles whatsoever.
2. This offer is subject to your immediate acceptance.
3. A cheque for rupees one lac by way of earnest money will be issued in favour of the person or persons to be named by the attaching Court at the time of its giving approval to the transaction and delivered inside the Court.
4. The balance consideration money, viz., rupees five lacs and fifty thousand will be paid before the Sub-Registrar, Lahore, at the time of registration of the sale-deed within thirty days of the approval of the offer by the Court, or as directed by the Court.
5. That possession of the property will be delivered to the purchaser immediately this sale-deed is registered.

This offer was accepted on 12th July by Ram Jas in the following terms:—

“ I accept this offer and confirm the bargain subject to Court's approval.”

The above contract was not carried out, and the property was sold in the circumstances mentioned below, to the Guarantee Life and Employment Insurance Company Ltd., 4th defendant (1st respondent) for Rs.6,70,000 on 23rd July, 1942.

The property belonged to a joint Hindu family which carried on business in the city under the name and style of Pahlad Das-Bhagwan Das. At the material time, Raja Ram, 2nd defendant (3rd respondent) Ram Jas 3rd defendant (4th respondent) Ishar Das, Parmeshri Das and their descendants formed its members. The father of the defendants was Bhagwan Das, the son of Pehla Das. Raja Ram was the *karta* of the family, but he executed on 9th August, 1939, a Power of Attorney in favour of Ram Jas, and Ishar Das not a party to the suit, authorising them jointly and severally to “ do all acts relating to money dealings, sale of property etc., and execute every kind of document ”. The suit contract was executed under this Power of Attorney.

The business carried on by the family failed, and since 1929, it had been engaged in litigation. In 1929, Raja Ram and his brothers handed over the immovable properties of the family to certain trustees for the benefit of creditors. These trustees managed the estate for about six years when, owing to litigation, by Order of the Court of the Subordinate Judge of Lahore, the properties were put into the possession of the receiver appointed by the Court.

Besides a large number of unsecured creditors, the principal secured creditors of the family were the Punjab National Bank Limited, Lahore, the Allahabad Bank Limited, and the Lakshmi Insurance Company Limited, Lahore. The total liabilities of the family to the secured and unsecured creditors in July, 1942, had mounted up to about Rs.7,09,184. Besides the decrees for sale obtained by the three mortgagees the property was under attachment in execution of money decrees obtained by the estate of Sir Moti Sagar and Dewan Anand Kumar. The execution of the mortgage decrees was pending in the Court of Mr. Fazal Haq, Lahore, and he had ordered the property to be sold by public auction on the 24th, 27th, and 29th July, 1942. The auction sale was in execution of the decree obtained by the Punjab National Bank Limited.

It was to avert the sale of the property referred to above, that the contract of sale already mentioned was entered into by Ram Jas. It will be observed from the contract of sale that the property was to be sold “ subject to Court's approval ”. On 20th July, 1942, Ram Jas made the following application to the Court of Mr. Fazal Haq, 1st Class Subordinate Judge, Lahore, under Order 21, Rule 83, C.P.C. praying that the offer made by Dina Nath may be accepted and the sale stayed.

“ Application under Order 21, Rule 83, of the Civil Procedure Code.

1. In the execution case noted above, an order for sale of the property owned by Lala Raja Ram, Ram Jas, Ishar Das and Parmeshri Das, judgment-debtors, has been passed and the 24th, 27th and 29th of July, 1942, are fixed for auction sale and the 4th August, 1942, for report.

2. Mr. Dina Nath Sodhi, Broker, has made an offer of rupees six and a half lacs, for purchase of the entire Cinema property situate at McLeod Road, Lahore, to Lala Ram Jas, the applicant, subject to the approval of the Court. The said offer is attached.

3. If the property is put to auction, it is not expected to fetch rupees six and a half lacs.

It is, therefore, respectfully prayed that the offer made by Dina Nath Sodhi Broker may be accepted and the auction stayed.”

It was signed in the following terms:—

Application of:—

Lala RAM JAS, judgment-debtor, through Lala Durga Das Khanna
Advocate, Lahore.”

The application was opposed by the Allahabad Bank Limited, and by Dewan Anand Kumar also. The Subordinate Judge rejected the application; this was on 22nd July, 1942. On 23rd July, the property was as already mentioned sold to the 1st respondent, The Guarantee Life & Employment Insurance Company, Limited, 4th defendant.

The 1st respondent was the main contesting defendant in the suit. Amongst other things the Company contended that the property belonged in equal shares to the four brothers namely Raja Ram, Ram Jas, Isher Das and Parmeshri Das, that they did not constitute a joint Hindu family, that even if their family was joint, Ram Jas had no authority to sell the property to the appellant on behalf of his brothers, that the contract in favour of the appellant was contingent on getting the "approval of the Court" and the contingency not having happened there was no enforceable contract, that the Company was a bona fide purchaser of the property and that the purchase by it was valid. It is not necessary to refer to the pleas of the other defendants; they supported the first respondent and also contended that the Power of Attorney had been cancelled before the suit contract.

Various issues were raised in the case, but it is not necessary to refer to them as the findings recorded by the Courts below show with sufficient clearness the nature of the issues and contentions of the parties, and of the questions that their Lordships have to decide.

The Subordinate Judge found that the family of the sons of Bhagwan Das was a joint family and that at the time when the suit contract was entered into, Ram Jas was its *Karta*, by virtue of the Power of Attorney which had not been cancelled, that Ram Jas entered into the agreement with the implied consent of Raja Ram and that he was competent to sell the property to the appellant on behalf of the family. He also found that the condition in the agreement that the sale was "subject to the approval of the Court" was a formal and not an essential term of the contract, and that in any case the condition was for the benefit of the purchaser and could be waived by him. He further found that respondent No. 1 purchased the property with the knowledge of the suit agreement. In the result, he gave a decree in favour of the appellant.

In appeal, the High Court agreed with the trial Court that Raja Ram and his brothers formed a joint Hindu family, and that the Power of Attorney had not been cancelled at the relevant date; but it held that Ram Jas was not the *Karta* on the relevant date and he had no authority to enter into the contract with the appellant on behalf of the joint Hindu family; that Raja Ram did not consent to the bargain or give his approval to it, and the other brothers were never consulted about it. As regards the validity of the suit contract, it held that the term "subject to the approval of the Court" was an essential term of the contract, and that even if the contract was a concluded one it was contingent on the approval of the Court; and the approval having been refused it became void and unenforceable. It further held, agreeing with the trial Court, that the 1st respondent bought the property with the knowledge of the suit contract. In the result, the appeal was allowed and the suit was dismissed.

Accepting the two concurrent findings of the Courts below that the family of Raja Ram and his brothers constituted a joint Hindu family, and that the property was sold to the 1st respondent with the knowledge of the suit contract, only two questions arise for determination before the Board. These are:—

- (1) whether the suit contract became unenforceable because it was contingent on the "Court's approval" and the approval having been refused it became void;

(2) whether Ram Jas had authority to enter into the contract on behalf of all the owners.

Question No. 1:—To answer this question correctly, three other connected questions have to be considered, these being (a) was the term "subject to the Court's approval" an essential term of the agreement? (b) if it was essential, by whose default did it fail? This involves the consideration of the question, was application made to the proper Court? and (c) was it open to the appellant to get rid of the necessity for the Court's approval by his waiver? Their Lordships have already drawn attention to the terms of the offer contained in the letter of Dina Nadh, the broker. Under Clause 1 of the letter the property was to be sold free of "attachments . . . and other defects" of title. Under Clause 3 a cheque for the earnest money Rs.—1 lac. was to be issued in favour of the person, or persons, to be named by "the attaching Court" at the time of giving its approval. Under Clause 4 the balance of consideration was to be paid . . . within 30 days of the "approval" of the Court, or as directed by the Court. The offer was accepted by Ram Jas subject to the "Court's approval". It is clear from the terms of the offer and acceptance that the parties contemplated that, to make the contract effective the "approval of the attaching Court" must be obtained. The Subordinate Judge held that the term subject to the approval of the Court was not an essential one, but in the High Court it was conceded that it was an essential term. The facts of the case show that there was good reason for insisting on this condition for at that time it was well known to the parties that the property was under attachment by various Courts. In July 1942, it had been attached (a) by the Court of Sardar Gurdial Singh, First-Class Subordinate Judge, Lahore, in execution of a decree obtained by the receiver of the estate of Sir Moti Sagar and execution proceedings were pending in that Court; (b) it had also been attached by the Court of Kwaja Gulam Mohammad in execution of a decree obtained by Dewan Anand Kumar, but this decree had been transferred for execution to the Court of Sardar Gurdial Singh and on the 17th July, 1942, it had been transferred again from that Court to the Court of Mr. Fazal Haq, First-Class Subordinate Judge of Lahore; (c) as already stated, decrees had been obtained by the Punjab National Bank Limited, the Allahabad Bank Limited and the Lakshmi Insurance Company, on their mortgages which comprise the property in suit and in execution of these decrees the property had been ordered to be sold on the 24th, 27th and 29th July, 1942.

The evidence of Dina Nadh shows that he made investigation for five or six days regarding these various attachments, and that the appellant also knew about the "attachments" mentioned in para. 1 of the letter. No wonder that the approval of the "attaching Court" was insisted on as a necessary condition for effecting the sale, for without it the title to the property was not at all safe. In their Lordships' opinion there can be no doubt that the condition was an essential one. It was essential not for one party alone, but for both parties. From the point of view of the purchaser it is unnecessary to observe that he would get a clear title to the property only if the creditors, through the Court, consented to take Rs.6,50,000 in full satisfaction of their decrees against the vendor's family. The purchaser was not willing to risk even the payment of the earnest money without the knowledge of the attaching Court for it was to be paid only to the nominee of the Court named at the time of giving the approval to the transaction (see cl. 3 of the letter). The condition was not exclusively for the benefit of the purchaser; it was equally important from the standpoint of the vendors also. Ram Jas would accept the offer only with the proviso "subject to the approval of the Court". The family was heavily indebted. It was important for Ram Jas that he should get effective discharge of all the liabilities of the family by the payment of Rs.6,50,000; thus, it was necessary from his

standpoint also, that the sale should be subject to the approval of the attaching Court. That this was the assumption on which the parties negotiated the transaction is clear, not only from the terms of the letter and the acceptance but also from the evidence given by the parties, the condition being to the advantage of both the parties.

The next question is: Did the condition precedent fail because of the default of Ram Jas (as contended by the appellant), in other words, did Ram Jas make the application to the proper Court? To answer this question their Lordships have to consider which was the Court that was meant by the parties when they made the approval by the "attaching Court" a condition of the contract? The attaching Court in the case of Dewan Anand Kumar's decree was the Court of Kwaja Gulam Mohammad though its execution had been transferred from that Court. The "attaching Court" in the case of the decree of Sir Moti Sagar's estate was the Court of Sardar Gurdial Singh, while the property had been ordered to be sold by the Court of Mr. Fazal Haq. As already stated, the application was made by Ram Jas to the Court of Mr. Fazal Haq. It was argued strenuously by Mr. Pritt, the learned Counsel, that this was not the proper Court and that the surrounding circumstances and the evidence of the appellant show that his agent, and he, understood that the proper Court to which the application should have been made was the Court of Gurdial Singh. This was the point that was pressed in the High Court also in this connection. If the question is to be technically considered, Sir Thomas Strangman urged that to put the transaction through, three different applications had to be made to three different Courts, and the learned Counsel called their Lordships' attention to Sections 39, 42, 64, and Order 21, rule 26, C.P.C. The learned Counsel, of course, was not suggesting that this was the real intention of the parties. The term "attaching Court" was no doubt loosely used by the parties, but which Court it was, that was meant by them that they should approach, is quite clear from the circumstances. The Court which had actually ordered the sale of the property was the Court of Mr. Fazal Haq, and unless that Court was persuaded to stay the auction sale, the private sale proposed to the appellant would certainly be infructuous. That it was Mr. Fazal Haq's Court that was intended by the parties appears from the evidence also. Though he stated at the beginning of his evidence that his agent told him that Ram Jas would make the application in the Court of Gurdial Singh, in his cross-examination the appellant said: "I never made any application for seeking the approval of the attaching Court for this transaction. I know that Lala Ram Jas did make such an application. I do not know what was the result of the application". Dina Nadh, in his evidence stated: "I knew that Lala Ram Jas made such an application in the Court of Mr. Fazal Haq" though he prefaced his statement by saying that Ram Jas told him that he would make the application for approval in the Court of Gurdial Singh. The application for accepting the offer of Dina Nadh, and for staying the sale, was made by Ram Jas under Order 21, rule 83, on 20th July. Mr. Fazal Haq dismissed it as incompetent on the 22nd July. On the same day another application seems to have been made "for the stay of the sale and for permission being granted to effect a private sale". In the same Order that was passed rejecting the application under Order 21, rule 83, the Subordinate Judge included the Order rejecting the application made for staying the sale, stating: "Another application has been made on behalf of the same judgment-debtor to-day for the stay of the sale and for permission being granted to effect a private sale. The question of private sale has already been determined. As to the stay of sale the application purports to contain the consent of the Punjab National Bank, decree-holder, to the stay, but that is on the condition that the judgment-debtor is given permission to sell the property privately and also that the other decree-holders agree. Counsel for Allahabad Bank Limited does not agree to the stay of sale and I see no grounds for this stay. The application is rejected".

This application was opposed also by Diwan Anand Kumar whose application for execution of his decree had been transferred to the Court of Mr. Fazal Haq. Whichever Court was the attaching Court at the relevant date, it is abundantly clear that without an Order from the Court of Mr. Fazal Haq, whose Court had ordered the sale of the property, the proposed sale could not have been carried through. Their Lordships are satisfied by the evidence, and the conduct of the parties, that it was the Court that had the control of the mortgage decree proceedings that was meant by the parties when they used the term "attaching Court" in connection with the contract of sale. That Court, at the time, was the Court of Mr. Fazal Haq, the First-Class Subordinate Judge of Lahore. The view that Ram Jas went to a wrong Court with the intention of defeating the sale is not borne out by the evidence or the conduct of the parties. In their Lordships' view, Ram Jas went to the proper Court and presented the application within a reasonable time. The breach of the condition was not due to his default, and as "subject to the approval of the Court" was a vital condition of the agreement, it became impossible to fulfil it as contemplated by the parties.

The question next to be considered is whether the appellant could waive the benefit of the condition and call upon the vendor to perform the contract in spite of the failure of the condition? Their Lordships have already pointed out that the term in question was an essential one intended not exclusively for the benefit of the purchaser, and that it was for the benefit of the vendors also. It follows therefore that the purchaser cannot get rid of the necessity for the approval of the Court by his waiver.

The conclusion that their Lordships have arrived at on question No. 1 may be thus summarised:—The person to apply to the "attaching Court" for securing the approval of the Court was the vendor; on the construction of the contract, the provision for approval by the Court was not exclusively for the benefit of the purchaser, and therefore the purchaser cannot by his waiver get rid of the necessity for the Court's approval; the Court contemplated, was the Court having charge of the mortgage proceedings, as that Court alone could get rid of the Order for public sale; application was made by the vendor to the proper Court and was refused; the contract then fell to the ground and had worked itself out. In their Lordships' opinion, the contract was a contingent contract and, as the contingency failed, there was no contract which could be made the basis for a decree for specific performance and the appellant's suit has to be dismissed. In this view it is unnecessary to consider the second question, or any other point in the case.

For the reasons given above, Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 435

1962

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In the Privy Council

DALSUKH M. PANCHOLI

v.

THE GUARANTEE LIFE AND
EMPLOYMENT INSURANCE COMPANY,
LIMITED AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

Printed by His Majesty's STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1947