RODRIGO AND OTHERS
v.
ST. ANTHONY'S HARDWARE STORES LTD.

SUPREME COURT.
AMERASINGHE, J.
DHEERARATNE, J.
P. R. P. PERERA, J.
S.C. APPEAL NO. 44/94
C.A. 113/81F
D.C. COLOMBO 3253/ZL
DECEMBER 8, 16 AND 29, 1994.

Agreement to sell – Specific performance – Agent for vendors – Section 114 illustration (f) of the Evidence Ordinance.

Where in an agreement to sell land two of the conditions were completion of the sale before a fixed date and tender of draft deed approved by the vendors at least a week before the signing of the deed of transfer and where negotiations were conducted by one brother (1st defendant) on behalf of his brother (2nd defendant) and mother (3rd defendant), all living in one house –

Held:

(1) The 1st defendant had held himself out as the agent of the other defendants and the other defendants by their own conduct held out that the 1st defendant was their sole spokesman in relation to the transaction so much as to induce Gnanam, Managing Director of the plaintiff company and the lawyers for the company that the 1st defendant was a sufficient medium through which notice could reach the other defendants. The 1st defendant did not give evidence and the court is entitled to draw the presumption that had he given evidence, such evidence would have been unfavourable to the case of the defendants – see section 114 illustration (f) of the Evidence Ordinance.

(2) The draft deed of transfer was received by 1st defendant four days prior to the date fixed for signing the transfer. There was no uncertainty in relation to the vendors and vendee, the subject matter of the sale and the consideration. There was sufficient compliance on the part of the plaintiff in regard to the stipulation of notice of the draft. Although a plaintiff who breaks an essential term of the agreement cannot claim specific performance, trivial breaches do not disentitle a party from claiming relief.

(3) Time was of the essence of the contract only in respect of the last date for signing the deed of transfer and in no other respect. On the last date for signing,

the defendants were not available and wanted a further date to sign the deed of transfer.

(4) The plaintiff was entitled to a decree for specific performance.

Cases referred to:

1. *Smith v. Hamilton* (1950) 2 All ER. 928.
2. *Roberts v. Berry* (1853) 3 Ch. 284.
3. *Dyster v. Bandall and Sons* (1926) 1 Ch. Div. 932.

APPEAL from judgment of the Court of Appeal decreeing specific performance.

H. L. de Silva, P.C. with *Gomin Dayasiri* and *J. de Costa* for defendant-appellants.

Romesh de Silva, P.C. with *Palitha Kumarasinghe* and *Geethaka Goonewardene* for plaintiff-respondent.

Cur adv vult.

February 13, 1995.

DHEERARATNE, J.

The defendants are the owners of the land called Fiscalwatta in extent 39A. 2R. 21P, the subject-matter of this action. The first and second defendants are brothers who own the said land in the proportion of 1/3 and 2/3 respectively, subject to the life interest in their mother the third defendant. At all times material to this action, the defendants were residing together in one house. By agreement No. 1483 of 3.11.78 (P4) the defendants agreed to sell Fiscalwatta to the plaintiff limited liability company for a consideration of Rs. 2,000,000 within 180 days from the date of execution of that agreement; a sum of Rs. 50,000 was accepted by the defendants as part of the consideration. By agreement No. 1527 dated 6.2.79 (P5) the defendants accepted a further sum of Rs. 150,000 as part of the consideration. As the parties were "unable to complete the transaction for the sale of the said property within the time limit specified" in P4 and P5, they entered into a fresh agreement No. 1574 dated 2.5.79 (P6). Two covenants of P6 which are material to this action read as follows:

(3) The date of completion of the sale of the said property shall be fixed by the purchaser and notified by it to the vendors provided however that it is the essence of the contract created by these presents that the sale shall be made and completed within a period of ninety days of the execution of these presents, that is 31st July 1979.

(5) The said deed of transfer shall be drawn in accordance with the provisions of this agreement and in the customary form and shall contain covenants on the part of the vendors to warrant and defend title to the said property. A draft of the said deed shall be submitted to the vendors for their approval at least 7 days prior to the date of the sale fixed by the purchaser.

An extent of about six acres out of the property was acquired by the state after execution of the agreement P6 but this eventuality was provided for by covenants No. 14 and 17.

The transaction of sale failed to take place on or before 31.7.79 and the plaintiff filed action against the defendants on 13.8.79 seeking specific performance of the contract. The learned trial judge held that the plaintiff was willing and ready to purchase the said property and has informed the defendants accordingly; the lapse on the part of the plaintiff was that he did not give seven days notice of the draft deed; and that the defendants had taken advantage of the lapse on the part of the plaintiff to submit the required draft within the required time. These primary findings of fact reached by the trial judge who had the advantage of hearing the witnesses are amply supported by the evidence led at the trial and I am inclined to think that they should not be lightly disregarded. However, the learned trial judge dismissed the plaintiff's action on the basis that insofar as the defendants were entitled to seven days notice of the draft deed according to P6 and the plaintiff failed to give them that period of notice, the defendants could not have been compelled to sign the deed of transfer on 31st July 79.

The Court of Appeal reversed the judgment of the trial judge and granted the relief prayed for by the plaintiff and the defendants have now appealed to this court on certain questions of law which are formulated in the following terms;

(1) Since the last day under the agreement for the completion of the sale was 31st July 1979 and the completion of the sale by that date was declared by the agreement itself to be of the essence of the contract; and since the plaintiff fixed such last date as the day for the signing of the deed of sale, but failed to submit the draft deed within the agreed time for approval of the defendants, was the Court of Appeal in error in taking the view that the submission of draft deed for approval was not of the essence of the contract?

(2) In the circumstances set out above, was it necessary that clauses 3 and 5 be read together, in order to understand the respective duties and obligations of the parties?

(3) Was the view taken by the Court of Appeal that the 1st defendant was the agent of the other two defendants incorrect and inconsistent with the express terms of the written agreement?

(4) Has the Court of Appeal given adequate consideration to the question whether a party in default is entitled to ask for specific performance of the contract?
(questions No. 5 to 7 are repetitive and were not pursued)

First I shall consider the question whether the plaintiff has breached condition No. 5 of the agreement on the assumption that notice to the first defendant was adequate notice to other defendants as well; the question of adequacy of notice will be adverted to later in this judgment. It is submitted on behalf of the defendants that clauses 3 and 5 of the agreement should be read together; that since time is the essence of the contract in terms of clause No. 3 the same should apply to clause No. 5 and therefore the plaintiff was in breach of the contract if he did not submit the draft deed to the defendants within the time-frame stipulated. There is no doubt that the parties have expressly agreed that time should be the essence of the contract in relation to clause No. 3; the question therefore is whether we should extend the same to clause No. 5. Consideration of the factual details of the transaction becomes essential for our decision. As mentioned earlier, the defendants had been already benefited under the contract by the receipt of a sum of Rs. 200,000.

On 18.7.79 by letter P7 witness Mathew of the firm of lawyers representing the plaintiff company wrote to the 1st defendant requesting him to meet Gnanam, the managing director of the plaintiff company on 23.7.79 "for the purpose of finalizing the terms of sale etc." Gnanam testified to the fact that he met the 1st defendant on the 23rd and directed him to Mathew. According to Mathew the 1st defendant approved the draft and told him that his brother the 2nd defendant will come with their lawyer the following day and approve the same. The 2nd defendant failed to meet Mathew on the 24th. With the letter marked P9 dated 24th which actually reached the 1st defendant on the 27th, a copy of the draft deed was sent to the 1st defendant by Mathew. The letter P9 fixed the time of executing the deed of sale in accordance with the agreement P6 at 5.30 p.m. on the 31st. There is no doubt that the 1st defendant did receive the draft deed and this is confirmed by letter produced marked P21 sent by the 1st defendant dated the 27th and received by Mathew probably on the 30th evening in which he stated *inter alia,* "please note that the draft transfer deed was received by me only on the 27th of July 1979 and you have failed to send it in time as is clearly stipulated in the agreement. Therefore, please note that the lapse is on your part and you are responsible for the same". The draft deed of sale had to be drawn up in accordance with the provisions of the agreement; there was no uncertainty in relation to the vendors and vendee, the subject-matter of the sale and the consideration. The draft deed of transfer was received by the 1st defendant four days prior to the date fixed for signing the transfer. I am of the view that there was sufficient compliance on the part of the plaintiff with regard to clause No. 3.

In *Smith v. Hamilton* [1] an agreement for the sale of a land, contained a condition which provided that "in respect of objections, requisitions and replies, time shall be the essence of contract", Harman J, held that the inference is that in no other respect time shall be the essence of the contract. (See also *Roberts v. Berry*)[2] . On the same analogy it seems to me that time was made essence of the contract by express agreement of the parties in relation to clause No. 3 only and in no other respect.

The 1st defendant, as observed earlier is the elder brother of the 2nd, both of them being children of the 3rd; they lived in one and the same house. It is the evidence of Gnanam that at all times it was the 1st defendant who acted on behalf of the other vendors. All correspondence by the lawyers of the plaintiff was with the 1st defendant. The evidence of the 2nd defendant reveals that he was aware of letter P7 written by Mathew to the 1st defendant on 18.7.79; he knew that the 1st defendant met Gnanam on the 23rd and finalized the terms of the sale. The 2nd defendant further stated that the 1st defendant showed him the draft deed sent along with the letter P9 and further that the telegram P10 sent to the plaintiff's lawyers on 27.7.79 that no postponement was required for signing of the deed was sent after the 1st defendant discussed the matter with him. It is clear that it was after the defendants made themselves unavailable to sign the deed of transfer on the 31st, that the 2nd and 3rd defendants attempted to show by their letters P16 and P17, both dated 2nd August 1979, that they had "nothing to do" with the 1st defendant. There was sufficient evidence led at the trial to conclude that during the times material to the transaction not only did the 1st defendant hold himself out as the agent of the other defendants but the other defendants by their own conduct held out that the 1st defendant was their sole spokesman in relation to the transaction so much as to induce belief in Gnanam and the lawyers of his company that the 1st defendant was a sufficient medium through which notice could reach the other defendants. The 1st defendant's failure to give evidence in these circumstances is quite significant and court is entitled to draw the presumption that, had the 1st defendant given evidence on this matter, such evidence would have been unfavourable to the case of the defendants. (See section 114 illustration [f] of the Evidence Ordinance). It is also noteworthy that Mathew in his evidence stated that on 31.7.79 defendant's lawyer, Gunasekera, told him that his clients had gone to Anuradhapura and that they wanted a further date to sign a deed of transfer; although Gunasekera was present in court when this evidence was given (it is so recorded) he was not called by the defence to contradict Mathew.

It is submitted on behalf of the defendants that the plaintiff company is not entitled to a discretionary remedy in the nature of specific performance because of the breach of condition No. 5 of the

agreement. I have already held that there was sufficient compliance by the plaintiff company in regard to that condition on consideration of all attendant circumstances. Wessels – The Law of Contract in South Africa 2nd Edition Vol. 11 para 3135 states:

> "the court will not decree specific performance where the plaintiff has himself broken the contract or made a **material** default in the performance of his part." (Lawson sec. 472 P522)

Weeramantry on Contracts Vol. 11 page 969 states "Although a plaintiff who breaks an essential term of the agreement cannot claim specific performance, **trivial** breaches do not disentitle a party from claiming such relief." (See also *Dyster v. Randall and Sons*)[3]. For the above reasons, the judgment of the Court of Appeal is affirmed and the appeal is dismissed with costs.

AMERASINGHE, J. – I agree.

P. R. P. PERERA, J. – I agree.

Appeal dismissed.