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Present : Jayewardene A.J. and Akbar A.J.

HANIFFA UMMA *v.* PARACK.

150—D. C. Colombo, 1,502.

Time—Application to set aside sale—Consent order—Applicant to be declared purchaser on payment of purchase money and costs before certain date—Delay in depositing money—Equitable relief to applicant.

Where an order of Court stated, that on failure of the appellant to bring a sum of money into Court on or before a certain day, a sale of property in favour of the respondent should stand confirmed,—

Held, that the appellant was not entitled to obtain relief against failure to observe the time condition of the order.

THE appellant sought to set aside a sale of land in favour of the respondent. The sale was held on March 31, 1925, with leave of Court, and on conditions of sale approved by Court. On July 9, 1925, when the application came on for inquiry, the following order, of consent, was passed :—

" Ahamadu Lebbe Marikar Haniffa Umma, the first respondent in the above case, to be declared the purchaser on her depositing in Court within six weeks from date hereof the full purchase amount, viz., Rs. 2,000, and costs of sale, &c. In case the said sum of Rs. 2,000 and costs of sale aforesaid are not brought into Court within the six weeks mentioned above, the sale in favour of the present purchaser, Dain Kimiss Parack (the respondent), to be confirmed . . . . "

On August 19, 1925, the proctor for the appellant filed a motion praying for an extension of two weeks' time to bring the amount referred to in July 9. On August 24, 1925, the respondent filed a motion for an order confirming the sale in his favour. On September 3, 1925, when the two motions came up for consideration, the learned District Judge held that the appellant having failed to carry out the terms of the order of July, 1925, the respondent was entitled to be confirmed as purchaser of the land.

J. S. Jayewardene, for appellant.

H. V. Perera, for respondent.

November 26, 1925. AKBAR A.J.—

The appellant, by an application dated May 4, 1925, sought to set aside a sale in favour of the respondent of a portion of land belonging to the intestate estate of one Saibo Doray Abusali.

This sale was held on March 31, 1925, with the leave of the Court and on conditions of sale approved by the Court. Prior to this application the appellant had sought to stay this sale unsuccessfully and she had appealed from this order, which appeal was pending at the time of the present application.

On July 9, 1925, when the present application came on for inquiry the parties settled their differences and of consent the following order was passed :—

> " Ahamadu Lebbe Marikar Haniffa Umma, the first respondent in the above case, to be declared the purchaser on her depositing in Court within six weeks from date hereof the full purchase amount, viz., Rs. 2,000, and costs of sale Rs. 229·75. In case the said sum of Rs. 2,000 and the costs of sale aforesaid are not brought into Court within the six weeks mentioned above, the sale in favour of the present purchaser, Dain Kimiss Parack, to be confirmed and the administratrix to be authorized to execute the necessary conveyance. Each party to bear his costs of this inquiry. The partition action No. 14,044 to be dismissed, without costs, and the appeal now pending in the above testamentary case to be withdrawn. The present purchaser will be entitled to the rents until the money is brought into Court.—Colombo, July 9, 1925."

On August 19, 1925, the proctor for the appellant filed a motion praying for an extension of two weeks' time from August 19 to bring the amount referred to in the order of July 9, 1925 ; and on August 24 the respondent filed a motion for a confirmation of the sale in his favour in terms of the order of July 9, 1925, as the appellant had failed to deposit the amount fixed by this order. The appellant fortified her position still further by depositing the full amount due by her on August 25, 1925, and by filing the Kachcheri receipt in Court on August 26. The two motions came on for argument on September 3, 1925, and the District Judge in effect held that the appellant having failed to carry out the terms of the order of July 9, 1925, the respondent was entitled to be confirmed as the purchaser of the land.

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The appeal is from this order.

Mr. Jayewardene urged two grounds in support of his appeal. His first ground was that the payment on August 25, 1925, of the sum due was made in time, and he cited from *XXVII. Volume of Halsbury's Laws of England, paragraph 868,* that a week was to be reckoned as commencing on the Saturday night following July 9, 1925. Whatever the term " week " may mean in a particular English statute, I do not think the parties to these proceedings ever intended that the expression " within six weeks from date hereof " should be interpreted in this sense. The parties are both Muslims, and that it was their intention that the six weeks should commence from July 8, the date on which the consent motion was signed, is clearly proved by the fact that the appellant on August 19 filed a motion asking for a two weeks' extension of time for the payment and by the further admission both in the appellant's affidavit of September 3, 1925, and in the petition of appeal that there has been a delay of four or five days in the payment.

Mr. Jayewardene's second point raises a more interesting question of law. He argued that in contracts for the sale of land, Courts of Equity will give relief when there has been a delay in payment. The law will be found stated in the Privy Council case of *Kilmer v. British Columbia Orchard Lands Ltd.*[1] as explained by the latter cases, *Steedman v. Drinkle and another* [2] and *Brickles v. Snell.*[3]

Where time is of the essence of contract and there has been delay, the Courts of Equity will not decree specific performance, and the only relief which will be given is relief from forfeiture in the nature of a penalty. What I have to determine in this case is whether time was essential in the agreement of the parties of July 8, 1925, and confirmed by the Court on July 9, 1925. The test is " that it must be clearly and expressly stipulated and must also have been wholly contemplated and intended by the parties that it shall be so ; it is not enough that a time is merely mentioned during which or before which something shall be done." (See *Fry on Specific Performances, p. 503, VI. Edition.*) Even when there is no express stipulation, the inference that time was of the essence of the agreement can be implied from the nature of the surrounding circumstances ; and when such an inference can be drawn, the English Courts of Equity will give effect to it as if it were an express stipulation. (See cases cited in *Brett's Leading Cases, V. Edition, p 216.*)

[1] *(1913) A. C. 319.*

[2] *(1916) 1 A. C. 275.*

[3] *(1916) 2 A. C. 599.*

Here is this order of the Court in which a time is expressly mentioned within which certain things were to be done, and on the expiration of which certain rights were declared to have come into being. Time must be an essence in an order of this nature, for otherwise it will mean that the matter will be left indefinitely open for all time with the proceedings cumbering the records of the Court. In the case of *Punchi Nona v. Peries*[1] the Supreme Court cited with approval the remarks of West J. in an exactly parallel Indian case reported in a footnote in the report of the case of *Shirekuli Tima' Pa' Hegda' v. Maha' Blya'*.[2] It is true that Jayewardene J. referred to a latter Indian case, *Krisnabai v. Hari Govind*,[3] in which it was held that this rule as enunciated by West J. was " not to apply to cases where a party is seeking to enforce *by regular action a right to forfeiture* contained in a consent decree in terms of a compromise entered into under section 375 of the Indian Civil Procedure Code (section 40 of our Code), and that in such cases the Court in the exercise of its equitable jurisdiction is not precluded from granting such relief against forfeiture as it might have granted had the agreement arisen from contract or custom.

I do not think this *dictum* applies to this case for a double reason. This is not a case in which a party is seeking to enforce her rights by regular action. Nor can I see that this is an application for the enforcement of a right to forfeiture.

The order of July 9, 1925, clearly stated that on the failure of the appellant to bring the money into Court on or before a certain day the sale in favour of the respondent was to be confirmed, or in other words, his title to the property which he had already purchased was to stand unchallenged and the sale was to be implemented by the Court authorizing the administratrix to issue a conveyance in the respondent's favour.

The appellant had no right at all to the property ; she was only to get a transfer if she paid the purchase amount and other charges by a certain day. It is true that by the terms of the order the appellant agreed to withdraw partition case No. 14,044 then pending and also to withdraw her appeal also then pending. But these were merely terms in the consideration which induced the purchaser respondent to sign the terms of the agreement which ultimately culminated in the order of Court. The appellant had already withdrawn her appeal, and I fail to see what the penalty is which she has incurred and from which she claims relief. She

[1] *(1924) 26 N. L. R. 411.*

[2] *(1866) 10 Bom. 435.*

[3] *(1906) 31 Bom. 15.*

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is in exactly the same position as she was in before the order, except for the withdrawal of the appeal. The appellant is not asking us for leave to reinstate her appeal; what she is in effect asking for is the specific performance of a Court order in which time is essential and where she has been guilty of delay in complying with the time condition of this order.

The appeal should be dismissed, with costs.

JAYEWARDENE A.J.—I agree.

Appeal dismissed.