APPELLATE CIVIL

Before Chopra and Gosain JJ.

SAT PARKASH AND OTHERS,—*Defendants-Appellants*
versus
DR. BODH RAJ AND OTHERS,—*Respondents*

Civil Regular First Appeal No. 145 of 1949 with Cross-objections

1957

Sept., 19th

Contract Act (IX of 1872)—Section 46—Scope of—"Reasonable time", construction of—Contract not performed within reasonable time whether can be repudiated—Time whether the essence of the contract only if it is so provided in the contract or by notice it is made the essence of the contract.

Held, that section 46 of the Indian Contract Act lays down that where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagtment must be performed within a reasonable time. It will, of course, depend on the facts and circumstances of each case as to what time should be deemed to be "reasonable" in that case. It is not correct that the only modes in which the time can be made the essence of the contract are by express provision in the contract or by notice by one of the parties. The law engrafts on the contract a condition that reasonable time in the absence of any specific time provided in the contrtct will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the parties, the said party will be deemed to be guilty of breach of duty or breach of contract.

First Appeal from the decree of the Court of Shri Chaman Lal Puri, Sub-Judge, 1st Class, Amritsar, dated the 24th day of May, 1948, declaring that the amount due to plaintiff on the mortgage mentioned in the plaint calculated up to this 10th day of August, 1948, is the sum of Rs. 5,675 for principal and interest and the sum of Re 712 for the costs of the suit awarded to the plaintiff making in all the sum of Rs. 6,387.

2. *And it is hereby ordered and decreed as follows:—*

(i) *That the defendants 1 and 3 do pay into Court on or before the 1st day of August, 1949, or any*

later date up to which time for payment may be extended by the Court the said sum of Rs. 6,387.

(ii) That on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Civil Procedure Code, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged properties in the plaint mentioned and all such documents shall be delivered over to the defendants or to such person as they appoint and the plaintiff shall if so required reconvey or retransfer the said property free from the said mortgage and clear of and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required deliver up to the defendants quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for sale of the mortgaged property and on such application being made; one-half share of the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule II of Order XXXIV of the First Schedule to the Civil Procedure Code,

1908, and that the balance, if any, shall be paid to the defendants or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid the plaintiff shall be at liberties (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendants for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

The suit is dismissed as against Bhupindar Parkash, defendant No. 2, who is a minor. Defendant No. 3, Sh. Gita Wanti shall also be personally liable to pay the amount adjudged above.

DAULAT RAM MANCHANDA and ROOP CHAND, for Appellants.

I. D. DUA, RAM SARUP, JAGAN NATH SETH, G. C. MITTAL and PARKASH CHAND JAIN, for Respondents.

JUDGMENT

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GOSAIN J.—This is a first appeal against the preliminary decree of Shri Chaman Lal Puri, Subordinate Judge First Class, Amritsar, dated the 24th of May, 1949, for the recovery of Rs. 5,675 with costs in favour of the plaintiff and against defendants Nos. 1 and 3 and dismissing the suit against defendant No. 2.

The facts giving rise to this appeal are as under. House No. 626/11, situate in Kucha Kadan, Amritsar, was the property of Sat Parkash major and Bhupindar Parkash minor, sons of Shri Tara Chand, Khatri. Some time before partition of the country an application for the appointment of a guardian for the person and property of Bhupindar Parkash minor was made to the High Court at Lahore and the High Court appointed Sat Parkash, brother of the

minor, and Smt. Gita Wanti, mother of the minor, as joint guardians. On the 15th of May, 1946, Sat Parkash and Shrimati Gita Wanti executed an agreement for sale of the said house in favour of Dr. Bodh Raj, plaintiff for a sum of Rs. 27,500 At the time of the execution of the agreement, Sat Parkash and Shrimati Gita Wanti received Rs. 5,000 from the plaintiff by means of a cheque, dated the 15th of May, 1946, drawn on the Prabhat Bank, Limited, Amritsar. The terms of the aagreement of sale were that the price of the property agreed to be sold was to be Rs. 27,500 that Rs. 5,000 paid by means of a cheque was to serve as earnest-money, that defendants Nos. 1 and 3, Sat Parkash and Shrimati Gita Wanti, were to obtain sanction of the High Court at Lahore for sale of the house on behalf of the minor, and that the sale deed was to be executed as soon as the said sanction was obtained. Sat Parkash had executed the agreement both in his personal capacity and as a guardian of the minor jointly acting with Shrimati Gita Wanti who signed the agreement merely in her capacity as a joint guardian. The plaintiff alleged that, though repeatedly asked, defendants Nos. 1 and 3 did not obtain the sanction of the High Court at Lahore and that the contract of sale could not, therefore, be completed. He sued for the refund of Rs. 5,000 paid by him as earnest-money together with Rs. 675 as interest on the same calculated at 6 per cent per annum from the date of payment till the date of suit and further prayed that this amount may be held to be a charge on the property in question. The plaintiff also claimed future interest at the same rate from the date of the suit till realisation of the amount. The defendants resisted the suit on the preliminary grounds that the Court at Amritsar had no jurisdiction to try it and that the plaint was not in the prescribed form and was thus liable to be rejected. Three preliminary issues about these objections were framed by the learned trial Court on the 20th of November, 1948, and were decided

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against the defendants on the 22nd of December, 1948. There is now no dispute with regard to the points covered by the order referred to above and it is not necessary, therefore, to go into details either of the objections or of the order disposing of the same. On merits, the defendants pleaded that defendants Nos. 1 and 3 did make an application to the Lahore High Court for getting permission to sell the property as guardians for the minor, defendant No. 2, that the said application was dismossed in default on the 5th of March, 1947, that another application was thereafter made to the High Court at Lahore and that the proceedings were still pending in the High Court, and hence the plaintiff was not entitled to sue for the return of the earnest-money. Five issues were framed by the learned trial Court on merits and they are as under:—

1. Were the defendants ready and willing to perform their part of the contract as contained in Exhibit P. 2?

2. To what interest, if any, is the plaintiff entitled by way of damages?

3. If issue No. 1 be not proved, then was not the plaintiff entitled to get back Rs. 5,000 paid by him as earnest-money?

4. Is not defendant No. 2 personally liable to refund the earnest-money and to pay damages to the plaintiff?

5. Relief.

The trial Court found all the issues against the defendant and in favour of the plaintiff and ultimately passed a preliminary decree for the recovery of Rs. 5,675 with costs in favour of the plaintiff and against defendants Nos. 1 and 3 and ordered the defendants to deposit the decretal amount and costs in Court on or

before the 1st of August, 1949, and also ordered that in default the plaintiff shall be entitled to get one-half share of the immovable property in dispute as described in the plaint sold and recover the amount and costs adjudged above from the proceeds of sale. It is of importance to note that the learned trial Court after going through the entire documentary and oral evidence came to the conclusion that the following facts were proved beyond any doubt:—

"1. That defendants Nos. 1 and 3 had been appointed guardians of the property of the minor defendant No. 2 by the High Court of Judicature at Lahore before the agreement to sell contained in Exhibit P. 2 was made.

2. That the minor's share of the immoveable property could not be sold without the sanction of the said High Court and it was specially agreed in Exhibit P. 2 that the necessary sanction would be obtained before the sale deed was executed.

3. That though the agreement to sell was executed on the 15th of May, 1946, the first step taken by the defendants to obtain the sanction was in the end of 1946 or in the beginning of 1947 when they made an applicaton to the Lahore High Court for the said permission through Dewan Mehr Chand, Advocate.

4. That the above application was dismissed in default on the 5th of March, 1947, as the appplicants or their counsel or Mukhtar could not appear in Court on account of riots at that time.

5. That a fresh application was subsequently made for revival of the previous application or for treating it as a new application

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in the High Court but the fate of the same was now known to Dewan Mehr Chand Advocate or Dewan Amolak Singh. Dewan Mehr Chand could not give the date when the second application was lodged but according to Dewan Amolak Singh the said application was made in or about April, 1947, i.e. about a month after the dismissal of the previous application.

6. That the second application was fixed for some date after the 15th of August, 1947, when nobody appeared to prosecute it.

7. That on the 13th of December, 1947, the plaintiff served a notice upon the defendants complaining of the great delay and asking them to perform their part of the contract and to obtain he necessary permission at an early date

8. That on the 14th of January, 1948, Dewan Amolak Singh started correspondence with Shri Azim Ullah, Advocate, Lahore, in the matter and in reply to a letter from Shri Azim Ullah, dated the 19th of January, 1948, sent him a draft for his fee in April, 1948.

9. That on the 16th of March, 1948, the plaintiff served a notice upon the defendants saying that they had committed the default and that they should return the earnest-money and interest thereon.

10. That on the 19th of July, 1948, a fresh application was made to the Lahore High Court through Shri Azim Ullah for getting the necessary permission.

11. That no permission has yet been obtained by the defendants from the Lahore High

Court or from any Court of competent jurisdiction authorising the proposed sale.

12. That though the defendants in their letter, dated the 29th of March, 1948, suggested that they would obtain he necessary permission from a local Court but they did not do so.

13. That the defendants as stated in their letter, dated the 29th of March, 1948, explained that the cause of delay was due to their impression that the plaintiff no longer felt interested in the bargain.

14. That the prices of immoveable property in the town of Amritsar have fallen considerably after the riots broke here before the partition.

15. That it was not easy for a non-Muslim to go to Lahore after the 15th of August, 1947."

The decree of the trial Court was mainly based on the findings regarding the aforesaid facts. The defendant appellants have now come up to this Court in first appeal. The plaintiff-respondent has also filed cross-objections as regards future interest.

The learned counsel for the appellants, Mr. Daulat Ram Manchanda, contended that there was no unreasonable delay on the part of the defendants in the matter of performance of the contract and that they had been diligently prosecuting their applications for obtaining necessary permission of the High Court at Lahore for effecting sale of the house in question. He further contended that the mere delay on the part of the defendants could not legally entitle the plaintiff to

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repudiate the contract and to ask for refund of the earnest-money. His main contention was that if the defendants were guilty of unreasonable delay in the performance of contract, it was incumbent on the plaintiff to have served them with a notice making time of the essence of the contract, and that he could not repudiate the contract without such a notice.

With regard to the first point there can be little doubt that the defendants were guilty of unreasonable delay. The agreement of sale was executed on the 15th of May, 1946, and in the same the defendants had undertaken to make an application to the High Court at Lahore for obtaining permission of the High Court for effecting sale of the property in question. Even according to their own case they did not make any such application till about the end of 1946, i.e., for about seven months after the agreement. Their case is that they made the very first application some time in the end of 1946 or in the beginning of 1947. No copy of the said application has been produced and the only evidence of the same brought on the record is the oral statements of some of the witnesses. Even assuming that an application was made towards the end of 1946 or in the beginning of 1947, the said application cannot be held to have been made within a reasonable time. One fails to understand why the defendants should have slept over the matter for about seven months and thought of making an application after that time. It is alleged by the defendants that the said application was fixed for hearing before the High Court at Lahore on the 5th of March, 1947, but that it was dismissed in default on the said date, because the defendants could not attend the Court on account of riots in Lahore. The defendants allege that a second application was made

by them some time in the month of April, 1947. They cannot give any definite date when they made the second application nor have they produced any copy of the same. According to them, this application was fixed for hearing on some date after the 15th of August, 1947, but they are unable to say what happened to this application. It appears that some time in 1948 another application was made to the Lahore High Court, but no one is able to say what happened to the same. We expressly asked the learned counsel for the appellants to tell us whether the sanction requisite for making the sale had been obtained even till the time of the arguments in this Court, but the counsel was wholly unable to reply. It appears that the subsequent applications, one made in April, 1947 and the other some time in 1948, were also dismissed in default and that no proper steps were taken by the defendants to make any further application to obtain sanction of the High Court. These facts clearly show that the defendant-appellants were guilty of unreasonable delay on their part in the matter of obtaining sanction of the High Court which was a condition requisite for the sale to be effected.

On the second point Mr. Manchanda drew our attention to various rulings, *Mahadeo Prosad* v. *Narain Chandra* (1), *Karsandas* v. *Chhotalal* (2), *Raghavaiah* v. *Venkatasubrahmanya* (3), *Subayya* v. *Garikapati* (4), and *Dhirajlal Amratlal* v. *Bai Ullasmati* (5), etc., etc. There is no doubt that the aforesaid rulings and several others do lay down a proposition of law that where one party to a contract has been guilty of unreasonable delay and time is not of the essence of the contract

(1) A.I.R. 1920 Cal. 651.
(2) A.I.R. 1924 Bom. 119.
(3) A.I.R. 1955 N.U.C. 5827.
(4) A.I.R. 1957 Andh. 307.
(5) A.I.R. 1952 Saurashtra 88

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the other party to the contract can serve a notice on the defaulting party and make time the essence of the contract provided the notice gives reasonable time. They also lay down the proposition that if the contract is not performed within the time specified in such a notice the defaulting party will not thereafter be entitled to sue for specific performance of the contract and the defaulting party will be deemed guilty of the breach of contract. This however, does not mean that the only way in which time can be made of the essence of the contract will be either by an express provision to this effect in the contract itself or by a notice given by one party to the contract to the other party who is supposed to be guilty of undue delay. Section 46 of the Indian Contract Act lays down that where, by the contract, a promiser is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. It will, of course, depend on the facts and circumstances of each case as to what time should be deemed to be "reasonable" in that case. The "reasonable time" will all the same be of the essence of the contract and if one of the parties does not perform the contract in reasonable time, the other party will be within its right to put an end to the contract or to treat the contract as having been repudiated. In Corbin on Contracts (Volume 3) at page 806 it is said as under:—

> "This is not to say that tender of payment or conveyance can be delayed for ever. Performance within some time, limited by what is reasonable under the circumstances, will always be of the essence."

In Volume at page 18, of the same book, it is again said—

> "This 'reasonable time' may be long or short, according to circumstances; but whatever it is, tender of performance within this reasonable time is of the essence. If both parties alike fail to make tender within this time, the contract obligation is discharged. In some such cases, it has seemed to be the court's idea that there is no discharge until one of the parties has notified the other to that effect; but it is believed that this is incorrect."

In *Stickney* v. *Keeble and another* (1), the proposition aforesaid was discussed at great length. At page 404 Lord Atkinson summed up the whole matter as under:—

> "I feel, myself, quite unable to assent to the two propositions following, which, as I understood, were laid down by Mr. Hughes:—
>
> (1) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale purchase of land—though, indeed, it be measured by years—a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone.

(1) (1915) A.C. 386.

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(2) That where no time for completion is fixed in the contract and the law imports into it a provision that it is to be completed within a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him I apologize."

In *Jamshed Khodaran* v. *Burjorji Dhunjibhai* (1), their Lordships of the Privy Council had an occasion to consider the point and the following remarks of their Lordships at page 297 are very pertinent:—

"Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, not withstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within reasonable time."

(1) I.L.R. 40 Bom. 289.

The same view is expressed by a Division Bench of the Bombay High Court in *Dinkerrai* v. *Sukhdayal* (1), where Chagla C. J. at page 296 has remarked as under:—

> "It is true that in that particular case the time for delivery was fixed; but I see no reason in principle to distinguish between a contract where the time for delivery is fixed and a contract where the time for delivery is not fixed. If the time for the performance of a contract or the time for delivery is fixed, it cannot be extended by the unilateral act of a party. Equally so time cannot be extended in the case of a contract where the law implies a reasonable time for the performance of the contract. in the first case, when the fixed time has expired there would be a breach; in the latter case, when the reasonable time implied by the law has expired, equally so there would be a breach unless either in the one or in the other case there is an agreement between the parties to extend "the time for the performance of the contract".

The same view of law has been taken in Binda *Prasad* v. *Kishori Saran* (2), and *Pearl Mill Co.* v. *Ivy Tanney Co,,* (3).

As a result of the above discussion, I am definitely of the opinion that time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives

(1) A.I.R. 1947 Bom. 293.
(2) A.I.R. 1929 P.C. 195.
(3) (1919) I.K.B. 78.

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a reasonable notice to the other party making time as of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract. I am not prepared to agree that the only modes in which the time can be made of the essence of the contract are by express provision in the contract or by notice by one of the parties. In my opinion, the law engrafts on the contract a condition that reasonable time in the absence of any specific time provided in the contract will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the parties, the said party will be deemed to be guilty of breach of duty or breach of contract.

In the present case, however, a notice was also given by the plaintiff on the 13th of December, 1947, which is printed at page 39 of the paper-book, and in the said notice the plaintiff called upon the defendants to obtain sanction of the High Court and further said—

> "In the circumstances, I will request you to abide by the terms of the agreement to sell and produce the written permission of the High Court at an early date as it is already very late and oblige. I hope that you will treat it as very urgent and expedite the matter."

It is true that this notice does not specify any particular time within which the defendants were called upon to complete the contract. I feel, however, that this is not very material inasmuch as the defendants had already delayed the completion of the contract by more than a

year and a half and the plaintiff who was getting impatient asked the defendants by this notice to complete the sale "at an early date" which evidently means within a reasonable time which should in the circumstances be taken to be a month or so. The defendants did not attach much importance to this notice and the plaintiff ultimately gave tne defendants another notice, Exhibit D. 2, saying—

> "What to say of complying with my Registered A.D. letter, dated the 16th of March, 1948, up till this day you have not cared even to acknowledge that. It can safely be concluded that either you have failed to obtain the necessary permission or you do not intend to abide by the terms of the agreement to sell. In the circumstances, I would request you to return the sum of Rs. 5,000 (rupees five thousand only) received by you from me along with the interest at the rate of 6 per cent per annum from the date of its receipt to the date of payment at an early date and oblige."

The date in this notice seems to have been wrongly stated as the 16th of March, 1948, instead of the 13th of December, 1947, and this fact is clear from the date of the present letter which is itself the 16th of March, 1948. It appears that the date is either given wrongly in the original notice or in the printed paper-book. I have, however, no doubt that the plaintiff meant to tell the defendants that in spite of his registered A.D. letter, dated the 13th of December, 1947, the defendants had taken no action to complete the sale and that the

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plaintiff, in these circumstances, was entitled to get back his earnest-money and he called upon the defendants to pay the same.

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There is yet another aspect of the case. In the agreement of sale itself it had been expressly provided—

> "An application for the allowing of sale shall be filed in the High Court. If the High Court allows sale, the bargain shall be *puka*, otherwise the bargain shall be considered as cancelled and the sum of five thousand rupees shall be returned."

This leaves no doubt in my mind that the agreement of sale was only a provisional one depending upon the fact that the defendants were able to obtain sanction of the High Court. If such a sanction were obtained, the agreement was to be deemed to be effective and if the same was not obtained the agreement itself was to fall through and was to be deemed to have never been made, the parties used the word "pucka" in contradistinction to the word "provisional".

I cannot shut my eyes to the fact that after the partition in 1947 the values of the property at Amritsar must have deteriorated on account of the fact that Amritsar become a border city and lost much of its trade which it previously used to have with the West Punjab and with the North Western Frontier Province. It is highly unreasonable to expect that the plaintiff under the circumstances should have kept waiting for an indefinite time to see if the defendants would even complete the contract. In my opinion, he waited enough and was perfectly justified in asking the

defendants on the 13th of December, 1947, to complete the contract "at an early date" and if the defendants still could not complete the sale for another three months the plaintiff was perfectly justified in repudiating the contract and in asking the defendants to return the earnest-money received by them. I have no doubt that if the defendants had on the 16th of March, 1948, or at any time thereafter filed a suit for specific performance of the contract against the plaintiff, the said suit would not have met with any success. The suit would have been thrown out on the ground of unreasonable delay more especially when on account of fluctuations in the market the delay had caused serious prejudice to the opposite party.

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Mr. Manchanda lastly argued that his clients should not have been burdened with interest. I am of the opinion that the defendants were liable to pay the interest in view of the fact that they had wrongfully withheld the sum of Rs. 5,000 for a considerable time without making any serious attempt at all to complete the sale. I am of the opinion that this appeal must fail and I accordingly dismiss the same with costs.

In cross-objections the plaintiff claims interest at 6 per cent per annum on the amount of Rs. 5,000 from the date of the suit till realisation of the amount. I am of the opinion that the plaintiff is entitled to the same. His money has been wrongfully withheld by the defendants who presumably must have earned interest on the same. I would therefore, allow the cross-subjections but make no order as to costs in respect of the same.

CHOPRA J.—I agree.

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B. R. T.