APPELLATE CIVIL

Before K. L. Gosain and A. N. Grover, J.

SOHAN LAL AND OTHERS,—*Appellants.*

versus

SETH BAL KISHAN,—*Respondent.*

Regular First Appeal No. 157 of 1952.

Transfer of Property Act (IV of 1882)—Section 55(2)—Warranty of title under—Extent of—Purchaser, when justified in declining to carry through the transaction of sale—Title defective Purchaser, whether entitled to refund of earnest money, brokerage and interest on earnest money etc.

1959

Mar., 19th

Held, that under Section 55(2) of the Transfer of Property Act the implied warranty of title on the part of the seller in favour of the buyer is irrespective of the question whether the buyer has or has not notice of the infirmity of the title of the seller. Where sellers title is doubtful and there is a reasonable probability of litigation in respect of the property agreed to be purchased, the buyer would be quite justified in declining to carry through the transaction of sale and to accept the delivery, and the Court will not, in a case like this, force a doubtful title upon the purchaser. In such circumstances the purchaser is entitled to the refund of the earnest money paid by him together with interest thereon, the brokerage paid and other expenses incurred by him in respect of the transaction.

First Appeal from the decree of the Court of Shri Ishwar Das Puri, Senior Sub-Judge, Amritsar, dated the 28th day of April, 1952, dismissing the plaintiffs suit with costs.

D. R. MANCHANDA and SHAMAIR CHAND, for Appellants.

D. K. MAHAJAN and K. L. KAPUR, for Respondent.

JUDGMENT

Gosain, J.

GOSAIN, J.—This is a plaintiff's appeal against the judgment and decree of Shri Ishwar Das, Senior

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Subordinate Judge, Amritsar, by which the plaintiff's suit for the recovery of Rs. 12,900 was dismissed with costs. On 27th February, 1947, defendant Balkishan agreed to sell to plaintiff Sohan Lal an area of 38 kanals and 14 marlas of urban land situate in village Kala Ghanupur Urban within the municipal limits of Amritsar City at the rate of Rs. 6 per square yard and further agreed to execute a sale deed in respect of the same in plaintiff's favour up to 4th April, 1947. Later on the date for execution of the sale deed was extended to the 30th April, 1947. In the agreement of sale which is Exhibit P. 7 the defendant stated as follows :—

> "I am the exclusive owner in possession of land measuring about 38 *kanals* and 14 *marlas* entered at *khata* No. 27/52 bearing *khasra* No. 8691, as shown in the *jamabandi* of 1939-40, situate in the area of Mauza Kala Ghanupur Urban within the limits of Municipal Committee, Amritsar, without partnership of anybody. * * *".

Some time before the 30th April, 1947, the plaintiff came to know that the aforesaid representation made by the defendant in the agreement of sale was entirely wrong and that the defendant was not the exclusive owner of the land in dispute. On the 28th April, 1947, the plaintiff sent a telegram to the defendant which is Exhibit P. 9 and reads as under :—

> "Reference agreement sale 27th February, 1947, your title defective return ten thousand advance and pay ten thousand damage else suit."

In reply to the aforesaid telegram the defendant sent a telegram, Exhibit P. 11, reading as under—

> "You have failed to execute performance agreement sale, dated 27th February, 1947, on extended date stop your advance rupees ten thousand stands forfeited."

On the 6th May, 1947, the plaintiff sent to the defendant another telegram, Exhibit P. 10, which reads as under—

> "My telegram dated 27th April, demanding return advance money with payment ten thousand further damages not complied land subject agreement sale 27th February, under litigation your title not free marketable no question forfeiture advance please pay rupees twenty thousand within week else suit your cost."

On the 26th November, 1949, the plaintiff brought the present suit for the recovery of a sum of Rs. 12,900 detailed as under—

		Rs.
(1) Refund of earnest money	...	10,000
(2) Interest on the above from 27th February, 1947, to the date of the suit at 6 per cent per annum.	...	1,650
(3) Brokerage paid to the brokers	...	1,200
(4) Expenses incurred on agreement, telegrams, etc.	...	50
Total	...	12,900

The plaintiff alleged that he had entered into the transaction of sale with the defendant on the express assurance given by the defendant that the land exclusively belong to the defendant without

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the partnership of anybody and the title to the said land was absolutely free and marketable. . He had, however, later found that the land was joint with others, that before the date of the agreement, i.e., on the 19th November, 1946, Labh Singh, son of Ganga Singh, Zargar, had filed an application for partition of the land measuring 136 *kanals* and 4 *marlas* including the land sold to the plaintiff, that an injunction had been issued against the defendant restraining him from constructing any building on the land in dispute pending decision of the partition application, that the injunction had actually been served on the defendant on the 3rd January, 1947, and was in operation at the time of the agreement of sale, that the defendant intentionally concealed these facts from the plaintiff and that the title of the defendant was a doubtful one. The plaintiff further alleged that the defendant was liable to refund to him the earnest money along with interst at 6 per cent per annum and was further liable to pay the amount of brokerage actually paid by the plaintiff to the brokers as also the expenses incurred by the plaintiff on agreement, etc. The defendant denied the various allegations of the plaintiff and curiously denied also that any application for partition of the land in dispute had been filed. In para 5 of the written statement he admitted that the land was a part of the *shamilat* land but urged that as a cosharer he was entitled to sell the land and that on this score he considered himself to be the sole owner and possessor of the plot of land sold by him. He averred that the plaintiff had full knowledge of all the facts and had chosen to purchase the land in spite of the defect of title now pointed out by him. The trial Court framed the following six issues—

(1) Whether the defendant failed to perform his part of the contract ?

(2) If issue No. 1 is proved, is not the plaintiff entitled to the refund of the earnest money of Rs. 10,000 ?

(3) Is the plaintiff entitled to get any interest, if so, at what rate ?

(4) Is the plaintiff entitled to get Rs. 1,200 paid by him as brokerage from the defendant ?

(5) Is the plaintiff entitled to get Rs. 50 spent by him on execution of the agreement deed, etc. ?

(6) To what relief was the plaintiff entitled?

Finding on all the six issues were recorded by the trial Court against the plaintiff and his suit was dismissed on the 28th April, 1952, Feeling aggrieved against the decree passed by the trial Court, the plaintiff has come up to this Court in first appeal.

Mr. Daulat Ram Manchanda, learned counsel for the appellant, has drawn our attention to the warranty of title as contained in the agreement of sale, Exhibit P. 7, a relevant portion of which has already been quoted above. There can be no doubt that in this agreement the defendant describes himself to be the exclusive owner in possession of the land in suit and further states that it is owned by him without the partnership of anybody. In the written statement filed by him he admits that the land was a part of the *shamilat* area and belonged to several cosharers including the defendant. Exhibit P. 1 is a copy of an application for partition of the land in question which had been

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filed by one of the cosharers on the 19th November, 1946. Balkishan was impleaded as a respondent in the said application and his name appears at No. 75 in the list of respondents. The land in dispute also is shown to be a part of the land which was the subject-matter of the application for partition. Exhibit P. 2 is an application made by Labh Singh, petitioner in that case wherein it was prayed that an injunction may be issued to Balkishan and Krishna Devi restraining them from constructing buildings on the spot pending decision of the application for partition and from transferring the said land to any one else. Exhibit P. 3 is the order of the Court, dated the 18th December, 1946, in which it is stated as under—

> "The applicant has filed an application and an affidavit stating that Balkishan and Mst. Krishna Devi, respondents, are about to construct a building on the land sought to be partitioned and praying for issue of an injunction to them restraining them from constructing a building pending decision of the application for partition. Hence as prayed by the applicant, an injunction restraining Mst. Krishna Devi and Balkrishan, from constructing a building on the land sought to be partitioned till further orders, be served on them through a notice."

Exhibit P. 5 is a copy of the injunction order, and Exhibit P. 4 is the report of service of the same on Balkishan on the 3rd January, 1947. As has been pointed out above also, it is rather strange that in spite of all these documents Balkishan has chosen to deny that there were any partition proceedings

filed before any revenue officer. Even in his statement as D. W. 8 he has chosen to state—

> "There was no dispute to my knowledge by any other cosharer about this land when I made the sale agreement. I never thought it necessary to get any writing from Pandit Amar Nath about his satisfying himself about my title in this land. It is from the statement of my witness, the Patwari of this *halqa,* that I came to know that there has been some partition in the revenue court of the land in dispute. I do not know if "major portion of this land in dispute has been given over to some other persons in those proceedings. No part of the land in dispute, however, has been taken over from as me yet* * * * I have recently, however, made an application to the Tehsildar, Amritsar, for setting aside the partition proceedings of the *shamilat.* I do not remmeber, however, who were impleaded as the respondents in that application."

Mr. Manchanda has further brought to our notice the evidence of D.W. 4 Hans Raj, Patwari Halqa, and D.W. 6 Guru Das, Retired Officer Qanungo, Amritsar, from which it appears that the defendant was only one of the cosharers in the land in dispute and that the total land which had fallen to the share of the defendant as a result of the partition aforesaid was 10 *kanals* and 1 *marla* only. Mr. Manchanda contends that the above evidence fully proves that the title of the defendant was defective and that the plaintiff was fully justified in repudiating the contract and claiming back the earnest money paid by him along with interest at 6 per cent per annum.

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Mr. Daya Krishan Mahajan, learned counsel for the defendant-respondent, urges that his client had become owner by adverse possession, and he could, therefore, pass a valid title to the plaintiff. No such clear plea on this point was taken in the written-statement and no issue was ever claimed on the point. There is nothing on the record to show that the defendant had become owner of the land in dispute by adverse possession and that the warranty of title contained in Exhibit P. 7 was based on a title obtained in the above manner. If such a title had been obtained, the question of title based on the same would have been raised in the partition proceedings as envisaged by section 117 of the Punjab Land Revenue Act and the land would never have been partitioned unless the said question had been determined by a Civil Court or by the revenue officer constituting himself as a Civil Court. It is admitted that the partition proceedings ended without any such question of title ever having been raised and that an area of 10 *kanals* and 1 *marla* was allowed to the defendant in lieu of his share in the *shamilat* land.

Mr. Mahajan then contends that the plaintiff was aware of the defect of title entered into the contract of sale with open eyes. Now, it is a well established rule of law that under section 55(2) of the Transfer of Property Act the implied waranty of title on the part of the seller in favour of the buyer is irrespective of the question whether the buyer has or has not notice of the infirmity of the title of the seller,—*vide Lachhman Das and another* v. *Jowahar Singh* (1), *Adikesavan Naidu and two others* v. *M. V. Gurunatha Chetti and three others* (2), *Mt. Saraswatibai* v. *Madhukar* (3),

(1) 70 I.C. 250 (Lahore)
(2) I.L.R. 40 Mad. 338
(3) A.I.R. 1950 Nag. 229

Sheokumar Tewary and another v. *Central Co-operative Bank, Dinapur, and others* (1), and *Shahu Avadesh Kumar and others* v. *S. Zakaul Hussanian and others* (2). In the instant case the defendant had given express waranty of title which is contained in Exhibit P. 7, where he had stated that the land exclusively belonged to him without the partnership of anybody. The position taken by the defendant in the said agreemnt was obviously false and untenable and he was later forced to admit that he was only one of the cosharers in the *shamilat* area of which the land in dispute formed a part. Apart from the above, there is no proper evidence on this recorde to prove that the plaintiff had knowledge of the defect of title at the time he entered into the agreement of sale. It appears that he acquired knowledge of the defect of title some time later and then took steps to claim back his earnest money by means of telegrams and letters commencing with the 28th April, 1947. It is obvious that where a seller's title would be doubtful and where there is a reasonable probability of litigation in respect of the property agreed to be purchased, the buyer would be quite justified in declining to carry thriugh the transaction of sale and to accept the delivery, and the Court will not, in a case like this, force a doubtful title upon the purchaser.

In *Tulsi-Das Ramchand and another* v. *Pritbai* (3), it was held that where at the time fixed for completion of the contract the vendors are not able to give to the vendee a title free from reasonable doubt, the vendee properly declines to complete the transaction. The fact that after judicial investigation the title of the vendor is ultimately found

(1) A.I.R. 1947 Pat. 477
(2) A.I.R. 1944 All. 243
(3) A.I.R. 1943 Sind 92

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to be clear does not disentitle the vendee to claim the return of the earnest money. Weston, J., who delivered the main judgment in that case quoted with approval a passage in Fry on Specific Performances, Edition 6, at page 416, where it is stated—

> "The Court would, it is conceived, consider the title doubtful in the following cases—
>
> (1) where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or, as it was put by Alderson B. [(1840), 4 Y. and C. 228] where there is 'a reasonable decent probability of litigation.' The Court, to use a favourite expression, will not compel the purchaser to buy a law suit. . ."

In the present case the matter did not merely stand at a threat of litigation but had gone to the extent that the litigation with respect to the property was actually pending on the date when the contract to sell was made and an injunction restraining the defendant from constructing any building on the site in question was actually in operation. The plaintiff was perfectly justified in the circumstances of the case not to accept a defective title of the nature which the defendant wished to give him. There can be no doubt that the plaintiff is in these circumstances entitled to the refund of the earnest money paid by him.

Mr. Mahajan, then contends that the plaintiff is not entitled to recover Rs. 1,200 as the brokerage paid by him. According to the contract of sale, this amount was payable by the plaintiff to the brokers and there was no escape from the same. The plaintiff was bound to pay the amount and

rightly paid it. He must, therefore, be held to be entitled to recover the amount from the defendant.

We are clearly of opinion that the plaintiff is entitled to interest on the amount of the earnest money from the 27th February, 1947, to the date of the suit. This amount was wrongfully and illegally withheld by the defendant, and there can be no reason why the plaintiff should be deprived of its interest. In the ordinary course we might have allowed even future interest from the date of the suit to the date of realization, but the plaintiff has filed no appeal with regard to the same.

Rupees 50 were claimed by the plaintiff as expenses incurred on agreement, telegrams, etc. It is obvious that this amount must have been spent by the plaintiff on the agreement and other incidental charges. The defendant did not seriously contended that this amount did not come up to Rs. 50.

In the result, we allow the appeal, set aside the decree of the trial Court and pass a decree in favour of the plaintiff for Rs. 12,900 with costs throughout.

GROVER, J.—I agree.

B.R.T.

APPELLATE CRIMINAL

Before G. D. Khosla and Tek Chand, JJ.

BALBIR SINGH,—*Appellant*

versus

THE STATE,—*Respondent*

Criminal Appeal No. 539 of 1958

1959

Mar., 20th

Indian Penal Code (Act XLV of 1860)—Section 100—Right of private defence—Nature, scope and extent of—Taking of life of another in the right of self-defence—When