Privy Council Appeal No. 103 *of* 1928.

Rustomji Ardeshir Cooper - - - - - *Appellant*

v.

Dhairyawan Annasaheb Narandas Thakersey Mulji and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21st JANUARY, 1930.

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The dispute in this appeal is as to the appellant's right to specific performance of an agreement for the sale of land. The facts are of an unusual character and make the determination of this question a matter of considerable difficulty.

The appellant was, in the year 1920, the owner of a plot of land with a four-storeyed building upon it situated opposite the Mulji Jetha Cloth Market in Bombay. Parts of the building were in a dilapidated condition, and in February of that year the Municipality served him with notice to pull down certain portions of three of the upper floors which appeared to be dangerous. The appellant was advised to rebuild, and had plans prepared and submitted to the municipal authorities, but they were not approved. Meanwhile, he was in negotiation with one Narandas Thakersey Mulji, who was a director of the Cloth Market Company and interested in the development of the site, which was evidently a valuable one, and on the 18th December, 1920, an agreement was come to between them under which the appellant was to sell and Narandras was to buy an undivided half share in the property which was thereafter to be let out to tenants upon the joint

adventure of the two. The terms of this agreement were reduced to writing and it is necessary to set out the more material clauses *in extenso* :—

> " 1. The vendor shall sell and the purchaser shall buy an undivided half share in the said property for the sum of Rs. one lac ninety thousand.
>
> " 2. The vendor shall forthwith carry out all the repairs and works specified in the said notice . . . from the municipality and the purchaser shall pay in addition to the said sum of Rs. one lac ninety thousand half of the expenses incurred in carrying out the requirements of the said notice.
>
> " 4. The sale shall be completed within two months from the date of this agreement if the requirements of the said notice are carried out before that period. If the requirements are not carried out within the said period then the sale shall be completed within two weeks after all the said requirements have been carried out and completed and the property is fully occupied by the tenants.
>
> " 5. The vendor shall within seven days of the date of this agreement hand over to the purchaser's attorneys all documents of title for investigation of title.
>
> " 8. After completion of the purchase the purchaser shall attend to the management of the property and shall collect the rents of the entire property and shall keep regular account thereof."

Then followed detailed provisions for the division of the net rents under which Narandas was to have a preferential 6 per cent. on his capital expenditure, any deficit being made good by the appellant and charged on his moiety of the property, for the creation of a reserve fund, for auction between the parties if either wished to sell his share, and for arbitration in case of disputes. The property was described in a schedule to the agreement as a parcel of land containing by admeasurement 101 square yards or thereabouts " with the messuage tenement or dwelling house standing thereon," situate at Champa Gully, and bounded, etc.

There is, no doubt, therefore, that the sale was to be of a small but valuable plot with an existing building upon it, and that before the appellant (the vendor) could demand completion and payment of the Rs. 1,90,000 he would have to comply with the terms of the municipal notice above referred to. Their Lordships think that having regard to the reference in Clause 2 to " repairs and works " the intention was that the appellant should not merely pull down the portions referred to in the notice, but should also make them good again.

Within a few days after the execution of this elaborate document the parties agreed to a variation, which is the cause of all the difficulty. This new agreement was, unfortunately, not put in writing, and its bearing on the other terms of the original document was not considered. The variation was in effect that instead of complying with the terms of the municipal notice the building should be pulled down and a new building erected on the site, the costs of rebuilding being shared by the parties equally. What the new building was to be, who was to be responsible for its erection, and what it was to cost were matters

apparently left over for future discussion, and it is obvious that if the question were whether either of the parties could specifically enforce the agreement as it then stood the answer must be in the negative. But this is not the question which the Board have to decide. The old building was demolished and their Lordships think it is established that this was done by Narandas; a new building was erected by the appellant according to plans approved by Narandas, and the whole cost was paid by the appellant. A conveyance was not executed, though the title deeds had been with Narandas's solicitors for its preparation since the 20th December, 1920, and no demand was made by the appellant for completion until the 26th March, 1922, when the building itself was nearly finished. From this date onward the appellant, who was anxious to leave for Europe, continued to press, as his letters show, for a conveyance and payment both of the Rs. 1,90,000 and half the building costs. It seems clear, however, that Narandas was not anxious to go on. Probably land values were depreciating and the prospects of the joint venture were fading. On the 7th July his solicitors wrote that the requirements of the municipal notice had not been complied with, and that, therefore, under Clause 4 the time for completion had not arrived. To this the appellant replied in effect that Clause 4 had no application to the new building.

On the 12th July Narandas's solicitors gave the appellant notice that he must complete the building and get it tenanted within 15 days, failing which their client would hold him responsible for all loss caused thereby. On the 19th July they wrote again to the same effect, but extending the time for completion to the end of that month. There were difficulties as to drainage, and the appellant thought that Narandas was putting obstacles in his way. In August there was a reference to arbitration which dragged on till February, 1923, but proved abortive. The drainage difficulty was still unsolved as the municipality refused to pass the appellant's proposals. On the 28th March, 1923, Narandas's solicitors wrote :—

> "We are instructed to give you notice to complete the necessary drainage work, obtain the completion certificate and get the property tenanted within three months from the receipt hereof by you, time being the essence of the contract, and we have further to give you notice that if you fail to comply with the above requisitions within the time aforesaid our client will cancel the contract."

This seems to have brought matters to a head, and on the 5th April, 1923, the appellant started the present proceedings on the original side of the High Court. In his plaint he vouched the original agreement, stated that by a subsequent agreement the old building was pulled down and a new one built upon the site, and that it was agreed that the costs of construction of the new building should be shared between him and Narandas. The drainage difficulties were referred to, the alleged obstruction by Narandas, the arbitration proceedings and the depreciation

of the property, and the appellant prayed that Narandas should be ordered specifically to perform the original written agreement and to pay to him the Rs. 1,90,000 as the price of the half share sold, and also half the costs of the new building. Other reliefs were asked for which are not now material.

Narandas defended the suit. In his written statement he admitted the agreement of the 18th December, 1920, and the subsequent variation. He denied that he had obstructed the appellant in any way; he relied upon his solicitor's notice of the 28th March, 1923, and said that owing to the appellant's failure to complete the building within the time thereby limited he had cancelled the contract, and he accordingly denied that the appellant was entitled to any relief and claimed the dismissal of the suit.

Paragraph 6 of his written statement with reference to the variation was as follows :—

> " After the agreement (meaning the agreement of the 18th December, 1920) was entered into it was agreed between the parties that instead of complying with the terms of the municipal notice the building should be pulled down and a new building should be erected on the site. The original agreement stood varied accordingly."

No reference was made to the agreement for sharing the costs of the new building, but it was admitted before the trial Judge and has not been disputed before this Board.

In the Court of Appeal the appellant amended his prayer and asked for specific performance of the original agreement as varied. Their Lordships are somewhat embarrassed by the fact that the actual amendment made is not printed in the record, there being only a quite inaccurate reproduction of the Chief Justice's note of the application to amend.

On the 26th June, 1924, before the suit came to trial Narandas died and the respondents now represent his interests.

The principal question which has been argued in the present appeal is whether Clause 4 of the agreement of the 10th December, 1920, applied after the variation. At the time the suit was instituted it is admitted that the new building was still without drainage and was untenanted, and in fact, untenantable. The contention of the respondents was that the effect of the parol variation was merely to substitute the erection of a new building for the partial demolition, and repair of the old building, so that the new building, not having been erected within the two months allowed by the first part of Clause 4. the completion of the sale of the half share of the property would have to wait until the building was finished and fully tenanted. Much reliance was placed by the respondents' counsel upon the words in Narandas's statement above quoted (which it was said both courts had accepted) that " the original agreement stood varied accordingly," as meaning that apart from the substitution of new erection for repair all the terms of the original agreement were to stand. If this is the true effect of the agreement which

the parties made, it is clear that the suit as a suit for specific performance of the contract of sale was premature and must fail ; it being admitted by the appellant that the suit was one for specific performance only and not for damages.

The appellant, however, contended that Clause 4 had no application to the varied contract and that the effect of the agreement to erect a new building was to relieve him altogether of his obligation to do the repairs necessitated by the municipal notice, and that, therefore, the term for completion fixed under the original agreement as dependent upon the repairs must go out altogether leaving only the implication of law that the contract was to be completed within a reasonable time (Indian Contract Act, S. 46). He did not allege any specific agreement that Clause 4 should be deleted any more than the respondents alleged a specific agreement for its retention. His contention was that it ceased to be applicable and necessarily disappeared : that its disappearance was consequential upon the dropping of the repairs, and was in no way inconsistent with the statement that " the original agreement stood varied accordingly." This apparently was the effect of the appellant's amendment, and if it is the true construction, it is in their Lordships' opinion, almost equally clear that the appellant must succeed.

Elaborate and carefully argued judgments were delivered by the trial Judge and by the two Judges of the Court of Appeal, and upon this point, which, in their Lordships' view, is the pivot upon which the decision of the case must turn, they differed fundamentally. Talyarkhan J., by whom the suit was tried, sums up his conclusions as follows :—

> " For the reasons stated above I find that Clause 4 did not apply, and the contract, therefore, became one to be performed within a reasonable time, and, as already stated, all that the plaintiff had to do was to execute the conveyance on receipt of the consideration which both his evidence and his correspondence show he was always ready and willing to do."

The Chief Justice in the Court of Appeal says :—

> " In the result then I would hold that Clause 4 applied to the varied agreement, and that in the events which happened the second branch of that clause applied, and consequently, completion was not to take place until two weeks after the new building had been completed and fully occupied by tenants."

And his colleague, Crump, J., is to the same effect :—

> " If there was a contract, and admittedly there was, my conclusion is that the time fixed by Clause 4 was intended to be applicable *mutatis mutandis*, and that plaintiff was not entitled to demand a conveyance until the new building was completed and fully tenanted. The plaintiff's suit was therefore bad at the date of the institution. The plaintiff at that date had not performed his part of the contract.

Each of the three judgments discussed at length the conduct of the parties subsequent to the varied agreement. The learned trial Judge thought it important to see whether their conduct

and acts were consistent with the applicability of Clause 4, and he was satisfied that neither of them acted in this belief. The Chief Justice, though evidently doubting whether in such a case subsequent conduct was relevant, came on his own analysis of the facts, as disclosed by the voluminous correspondence, to exactly the opposite conclusion, and his learned colleague in the Court of Appeal was of the same opinion; but in their Lordships' view where, as in the present case, the question is one purely of construction, the subsequent conduct of the parties is irrelevant. There is no difficulty here as to the meaning of words, and such cases as *Attorney-General for East African Protectorate* v. *Watcham* [1919], A.C. 533. have no application. It may well be, as the correspondence suggests, that Narandas's advisers thought that Clause 4 was applicable, and that the appellant thought it was not, and that each acted upon his own belief. The fact that the appellant made no demand for completion of the sale until the new building was nearly finished was not necessarily inconsistent with his present claim. He was trying to induce Narandas to take the other half of the plot off his hands, and may have been waiting for this to eventuate. If he had demanded completion before the new building came into being he might have been met with the objection that the agreement was one and indivisible and too uncertain to enforce. In the same way the fact that Narandas himself demolished the old building and quite possibly kept the proceeds of demolition, and that he retained the title deeds of the property would be by no means conclusive of his part ownership.

Their Lordships, however, feel no doubt that the question propounded must be decided upon the terms of the written agreement and of the agreed variation construed, so far as may be, in the light of the surrounding circumstances. They feel that there is force in the respondents' argument that the subject of the agreement was essentially something capable of producing profits and that until this was brought into being, either under the original agreement by making the old building tenantable, or under the varied agreement by the erection of a new building he was under no obligation to buy. They think that this was so under the original agreement; it seems to be implicit in Clause 8; but to say that, therefore, it was of the essence of the varied agreement, comes very near to begging the question. If it were so why was not the obligation to erect the new building laid in terms upon the appellant? Yet, even as pleaded by Narandas in his written statement, no such obligation was imposed, nor was there any indication of what the new building was to be. It was contended in the Courts in India that rebuilding was covered by the terms of the original agreement, but this argument was rightly rejected in both Courts. Before the Board the contention was that as the variation merely substituted rebuilding for repair the obligation was necessarily upon the

appellant inasmuch as he had agreed to do the repairs, but this again seems to their Lordships to be rather a forced deduction.

On the best consideration which their Lordships can give to a question of much uncertainty they think that this argument cannot prevail. The subject matter of the varied agreement—a new building of unknown character and extent, of unknown cost, and to be erected by one or other of the parties, or possibly by both together—was such an entirely different proposition from the execution of certain definite repairs to an existing building to be done by the owner under the requisition of a public authority, that it is, in their Lordships' opinion, impossible either to deduce from the facts or to assume that conditions which were to apply to the latter case would be equally applicable to the former. Their Lordships find themselves unable to draw this conclusion either from the terms of the variation as pleaded by Narandas or from the silence of the parties as to the details of the new scheme. The surrounding circumstances to which it is legitimate to resort throw no light upon the question. It is true that prior to the original agreement the appellant had had plans for a new building prepared, but they had been rejected by the municipal authorities, and it is not suggested that Narandas had agreed to them or that the varied agreement had any relation to them. All that the parties had agreed to was that there should be a new building, the character and cost and the responsibility for the erection of which were left indefinite.

In particular with regard to Clause 4 of the original agreement their Lordships are unable to hold that it was, or must have been, intended to remain applicable to the new development. The appellant may well have been content to wait for his purchase money—for that is all that completion meant to him—until he had done the comparatively small repairs which the old building required; they were quite definite, and apparently could be done without difficulty in the two months; but it can hardly be assumed that he would be equally content to defer his right to payment as indefinitely as the varied contract with Clause 4 applying *mutatis mutandis* would necessitate. Had this been in any sense the intention of the parties their Lordships think that there must have been a much more definite specification of the new building and much more definite provisions as to its erection. That the original agreement was to "stand varied accordingly," if this is to be taken as part of the actual agreement come to and not merely as Narandas's understanding of what was implied, meant no more, in their Lordships' opinion, than that such terms as were applicable to the new scheme should stand, and such as were inapplicable, should go out, leaving it, in the event, for the Courts to decide which were and which were not so applicable.

The result is, as their Lordships hold, that no time was fixed for completion of the sale under the varied contract, and that it must be implied that it was to be completed in a reasonable time, which had clearly elapsed by the date of the institution of the suit.

It was argued by the respondents that even assuming this to be the case the appellant had lost his right to specific performance by his delay. This is in one sense a curious argument: the main defence with which their Lordships have dealt in detail was that the suit was premature; this alternative contention would make it too late. But it is not suggested that the position of the purchaser had been so prejudiced by appellant's delay in seeking specific performance that it would be inequitable to enforce it, and apart from this the Indian Limitation Act allows him three years to sue. Their Lordships also doubt whether all the delay, such as it was, can be ascribed to the laches of the appellant, who was left to finance the rebuilding without any assistance from his would-be partner, and it is obvious that he was faced with considerable difficulties. It is also clear from Narandas's notice of the 28th March, 1923, that he was professing willingness to complete only a few days before the present proceedings were commenced. Their Lordships think, therefore, that there is no substance in this alternative plea.

The Trial Court and the Court of Appeal differed, as they did on most points, on the question whether the three months limited by this notice was reasonable, but, on the view which their Lordships take of the construction of the contract this question is immaterial.

In the result their Lordships hold that the appellant is entitled to specific performance of the contract of sale and to payment of a half share of the costs of rebuilding.

Their Lordships will humbly advise His Majesty that the decree of the High Court dated the 5th December 1927 should be varied by reinstating the decree of the Court of first instance dated the 21st January 1927, the reference therein to the agreement of the 18th December 1920 being qualified by the addition of the words "subject to the variation referred to in the 6th paragraph of the plaint as amended" but maintaining the High Court's dismissal of the appellant's appeal to them, Appeal No. 14 of 1927. The case will be remitted to the High Court to apportion the costs incurred in the two Appeals Nos. 14 and 22 of 1927, and the appellant will pay to the respondents the costs properly attributable to Appeal No. 14 and will receive from the respondents the costs of Appeal No. 22 together with three-quarters of his costs before this Board. He will pay to the respondents such costs as they may have incurred on this petition for the admission of further evidence.

In the Privy Council.

RUSTOMJI ARDESHIR COOPER

v.

DHAIRYAWAN ANNASAHEB NARANDAS
THAKERSEY MULJI AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

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