Privy Council Appeal No. 121 *of* 1925.

Robert Hercules Skinner - - - - - - - *Appellant*

v.

Rosy Skinner and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKINSON.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT SUMNER.]

The defendant in the suit appeals in this case from a decree of the High Court at Lahore, affirming a decree of the Subordinate Judge of Hissar, by which he was cast in damages. The suit was brought in form for specific performance of a contract to purchase six villages from the plaintiffs, but the Subordinate Judge, holding that the plaintiffs were not entitled to specific relief, gave judgment for money damages. No question was raised before their Lordships as to the technical competency of this course, which was virtually an amendment of the pleadings, and accordingly only questions of merits have to be considered.

The plaintiffs may conveniently be called the Skinner family, who, at and before the time of the contract, owned six villages in the Hissar district in the Punjab, which with other family properties were in mortgage to the Bank of Upper India, Meerut. There was no mortgage by the Skinner family as a whole, nor did all the plaintiffs execute separate mortgages, but there was a series of mortgages by Robert and Thomas Skinner, Robert and George Skinner, and Fanny Skinner, on which at the date in question

upwards of Rs. 4,23,000 were outstanding, and these have throughout been treated collectively. The mortgages need not be further particularised, the instruments themselves being Exhibits on the Record. Their Lordships were informed that, although the provisions as to interest varied slightly, the average was 7 per cent. or a little more.

The agreement in suit was dated the 30th May, 1914, and was certainly inartificially drawn. It recited that the defendant, Mr. Robert Hercules Skinner, a cousin and neighbour of the Skinner family, had agreed to buy the six villages for a sum of Rs. 4,23,000, and then contained the following provisions (clauses 1 and 2), that the vendee should pay Rs. 5,000 earnest money by cheque and one lakh to the Bank of Upper India by the 18th June, 1914. Then came the two clauses which are chiefly material :—

> " 3. That the vendee will arrange with the Manager, Bank of Upper India, to get transferred from the said vendor's accounts to the said vendee's accounts the balance of the price, being rupees three lakhs and twenty-three thousand, to which the vendors give their free consent.
>
> " 4. The said vendors having hereby made a complete and conclusive sale to the said vendee, if there should be a dispute about transfer of the balance of the price with the Manager of the said Bank the said vendee, Mr. R. H. Skinner, will be responsible as below :—
>
> (*a*) That the said vendee will be liable for all interest after the 18th June, 1914, for the balance of price.
>
> (*b*) Should there be any litigation in connection with the matter of transfer, the vendee will only be responsible for costs, etc., etc., that may be awarded in such litigation."

By clause 5 the vendors " confirm this sale finally and agree to release and free the said villages from all encumbrances, except in case of litigation as provided in clause 4," set out above, and in clause 6, which is not now material. Clause 8 stated that the vendors agreed to give possession and obtain mutation of names on payment of the lakh of rupees (which was eventually done), and proceeded " and the sale deed will be drawn up accordingly." Clause 9 provided for forfeiture of the earnest money to the vendors on failure by the vendee to pay the lakh of rupees punctually, but not otherwise.

The earnest money and the lakh of rupees were duly paid. Directly or indirectly these sums reached the Bank and were applied in reduction of the mortgages, and these sums, together with an independent advance by the defendant to the plaintiffs, which has been agreed at Rs. 1,800, left the balance of the purchase money outstanding at Rs. 3,16,200. Nothing further was arranged or paid. In and after June, 1914, Mr. Hercules Skinner had interviews with the Bank with a view to carrying out the provisions of clause 3, but, as the Courts below found, he insisted on being allowed to utilise a ten-year fixed deposit, which he had outstanding at the Bank, in making up the sum required, and also claimed credit for the same purpose for a further sum alleged to be due to him by the estate of Basil Skinner, which had nothing to do with the purchase of the six villages. Accordingly, he was

never ready and willing to arrange the transfer, which clause 3 contemplates, up to the full extent of the balance of the price. There was also credible and uncontradicted evidence from the Bank that they were willing to lend the defendant on his own account at 7 per cent. the amount of the price outstanding, and so to substitute *pro tanto* his liability for that of the plaintiffs, but that nothing came of it, as he would only agree to 5 per cent. or 6 per cent. interest. Accordingly, the Courts below were warranted on the evidence in holding that, but for the defendant's objections in these respects, the transfer provided for in clause 3 would have been arranged in the summer of 1914. Shortly after the outbreak of war the Bank discontinued active trading, but remained open to negotiate for the settlement of outstanding accounts. The defendant's arrangements, however, made no progress, and ultimately the Bank's affairs were taken charge of by a liquidator. As their Lordships gather, the principal sum, as at June, 1914, with a large amount of accruing interest, is still outstanding on the mortgages referred to in the agreement.

The respondents offered two alternative constructions of clause 3, namely, that it was either an absolute undertaking to procure at all events a novation with the Bank of the balance of the purchase money, or that it was at least an obligation requiring the defendant to be ready and willing to arrange and carry out such a novation and to use all reasonable endeavours to effect it, and that in either case there was a remedy in damages for breach.

It is not necessary to decide which of these two constructions of clause 3 is preferable, for on the facts above stated the appellant is on either view liable for the failure to arrange the novation contemplated. Their Lordships think that the damages were rightly measured in the Courts below, for if the obligation of clause 3 had been performed by the defendant, the plaintiffs would, to the extent of the sum adjudged, have been relieved long ago of the mortgage indebtedness, which as matters stand can be enforced against their property whenever the Bank may think fit to do so.

The alternative construction is vested in the supposed scheme of the transaction in the minds of the parties to it. It is said that in effect the respondents sold their equity of redemption for one lakh and the earnest money; that the respondent thereafter took all the risk of the Bank's enforcing the mortgage in regard to the sum of Rs. 3,16,200; and that in that event the appellant would be liable to have the six villages sold to realise that sum. Meantime he would find no more cash and would have the benefit of letting the mortgage interest run on instead of having to raise fresh funds, possibly at higher rates. So long as the Bank did nothing, the vendors would be relieved, and when the Bank took action, the appellant would have to take steps to ensure that the burden would fall on himself. The legal argument in support of this may be thus stated. Nothing is expressly said in the agreement about any payment after and beyond the one lakh, and, if the vendee should not succeed in arranging the transfer, and if

the Bank should enforce the mortgages, then his six villages would be a security not only for that balance, but for the residue of the mortgage indebtedness as well. The sums realised must then, as between the vendors and the vendee, be apportioned, and the properties respectively mortgaged must be marshalled. The liability for mortgage interest on the balance of the purchase money in the meantime is, by clause 4, expressly placed on the vendee as between himself and the vendors, as is also the liability for costs in case litigation with the Bank should ensue, and this is an express, and ought to be the exclusive, measure of the liability falling on him for failing to satisfy clause 3.

Their Lordships cannot accept this construction, which, indeed, is more than construction and amounts to rectification of the written bargain. It leaves the respondents to bear the risk that, when the Bank's enforcement proceedings took place, the outstanding sums might not be realisable without recourse to the family's credit and to the properties, which were mortgaged but were not included in the sale. The contract is expressed in terms, which do not contemplate such a postponement. The price having been fixed, the vendee is *ipso facto* liable to pay it to the vendors, unless he is expressly relieved or is enabled to satisfy it otherwise than by payment. Clause 3 provides such a mode of alternative satisfaction, but, when that fails, there is nothing to enable the vendee to defer action until the vendors are made liable to the Bank or to escape from payment to them altogether. The express obligation as to interest and costs is additional to and not in substitution for the implied obligation as to the price. No doubt, if and when the appellant has performed his obligations under this contract, the provision for a conveyance free of encumbrances would be enforceable and would lay the vendors open to be decreed to satisfy the sums outstanding on the Bank's mortgages, so as to clear the six villages of any encumbrance in respect of the excess of the purchase price, but the time for this has not yet come. Their Lordships neither wish to say anything that would disentitle the appellant to his rights in this regard, nor to prejudge in any way the extent of the burden, which would in that event be borne by the vendors. As matters stand, the appellant's construction must be rejected and the appeal fails.

As to the decree of the Subordinate Judge, it is in form a declaration that the defendant is liable to pay to the Bank the sum adjudged, namely, Rs. 3,16,200, with interest at Rs. 9 per cent. on the said sum from 18th June, 1914, till the date of realisation, the interest to the date of the decree amounting to Rs. 1,15,413, and the costs, in which he is cast, being recoverable by the plaintiffs themselves. This was affirmed in the High Court, with a further order as to costs of the appeal, with which their Lordships are not concerned.

The decree was no doubt framed in this way in the interest of the appellant, to protect him from the possibility that, when he had paid to the plaintiffs the damages awarded in the action, his villages might still be sold to satisfy the mortgages, no part of the

damages having been applied to their reduction. It may be surmised that the decree was made with the assent, if not the consent. of both parties, but of this there is no record, nor was the appellant's counsel in a position to give consent at their Lordships' bar on the appellant's behalf. The decree cannot then be left in the form in which it stands, and, as it is the subject of the appeal, it may be rectified, although the appellant has not asked for any relief, except for its complete reversal. In its present form it does not appear that it could be enforced, and, even if it could, the Bank of Upper India, who are not before the Court, are not compellable in this suit to apply the money in the way in which, no doubt, it was intended that it should be applied. Their Lordships think that the matter should be put right as follows.

The decree as it stands should be set aside and for it there should be substituted a decree to the effect that the defendant in the suit do pay to the plaintiffs in the suit a sum by way of damages, made up of Rs. 3,16,200, with interest at 7 per cent. from the 18th June, 1914, until the date of payment, together with the taxed costs of the suit in both Courts below and of this appeal. Except as to payment of the said costs, execution to be stayed for six calendar months, and, if within that time, without prejudice to any right that he may have to specific relief under clause 5 of the contract after so doing, the appellant shall pay to the Bank of Upper India or their assigns the said sums, to be credited by them rateably in reduction of the principal and interest due on the several mortgages, or shall otherwise procure the said Bank to reduce the said mortgages to the like extent and in the same manner, then the stay to be made perpetual, but otherwise execution to issue.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs and that for the decree pronounced in the suit by the Subordinate Judge a decree to the effect above stated should be substituted.

In the Privy Council.

ROBERT HERCULES SKINNER

v.

ROSY SKINNER AND OTHERS.

DELIVERED BY VISCOUNT SUMNER.

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