Privy Council Appeal No. 80 *of* 1946

B. Bishan Singh (deceased) - - - - - - - *Appellant*

v.

Mahbub Ali and Another - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1947

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD MACDERMOTT

[*Delivered by* LORD SIMONDS]

This is an appeal from the judgment of a Division Bench of the High Court of Judicature at Lahore reversing a judgment of the Single Bench of the same Court which had affirmed an Order of the Subordinate Judge at Amritsar.

The appeal presents a somewhat unusual feature in that it is necessary for their Lordships to determine an issue of fact without the advantage of a direct finding upon it by the Judge who saw and heard the witnesses.

The relevant facts appear to be as follows. In November, 1935, B. Bishan Singh, the deceased appellant, now represented by his sons the present appellants, who will be referred to as "the decree holder" agreed to sell to the respondents certain parcels of land for the sum of Rs.19,600. Under the sale deed which was dated the 10th January, 1936, there was left unpaid the sum of Rs.11,600, which was to be charged on the property and it was agreed that the whole sum with interest was to be paid off within 2½ years. It was not so paid off, and on the 28th October, 1939, there was a sum of about Rs.13,000 outstanding. On that date the decree holder commenced proceedings in the Court of the Subordinate Judge, Amritsar, asking that a declaratory decree should be passed cancelling the sale deed and for possession of the land in question.

These proceedings were compromised upon terms which it is necessary to state fully. The following statement was made by the respondents (the defendants in the suit):—"We have effected a compromise with the plaintiff" [the decree holder] "on these terms that the balance of the sale price will be paid to him by instalments up to the end of 1942. Rs.3,000 will be paid up to the 15th March, 1940. All instalments will be paid through Court. The balance will be paid every six months, namely, the end of June and end of December in each year. The amount will be paid in equal instalments. In case of default of payment of any one of the instalments the plaintiff's suit will be decreed with costs, otherwise the parties will bear their own costs." The decree holder then made the following statement: "I have heard the statement of the defendants. I agree to the compromise in accordance therewith. If I get a declaratory decree as a result of default on the part of the defendants, I will return their money amounting to Rs.7,500."

In accordance with these statements a decree was on the 31st January, 1940, passed by the Subordinate Judge by which it was ordered that the defendants should pay to the plaintiff the balance of the sale consideration in the instalments mentioned in the statements and it was further ordered " In default of any one of the instalments the plaintiff will be entitled to the declaration in suit and possession of the property in suit ". The last seven words of the passage cited were added at a later date by amendment but their Lordships do not doubt that they were originally omitted by a slip and are to be regarded as having at all material times been included in the order. It is to be observed that the order does not provide, as the respondents' statement had, that payment should be " through Court," but their Lordships will assume that this was the method of payment intended by the parties and that, if through no fault of theirs the respondents were in default in payment " through Court," they would be entitled to claim a period of grace.

The respondents duly paid the instalment due on the 15th March, 1940. The next instalment, which the parties have agreed was a sum of Rs.1,267, was due by the end of June. It was not paid by the end of June. It is agreed that the 29th and 30th June were public holidays and it has been assumed (and their Lordships will make the same assumption) that the respondents would have fulfilled their obligation if they had paid the instalment on the 1st July. They did not pay it on that day and on the 5th July the decree holder applied for execution of the decree on the ground of default. On the 22nd July, 1940, issues were framed as follows:

" (1) Did the judgment debtor present the amount of instalment to the bank on the 1st July, 1940, for payment?

" (2) If issue No. 1 be disposed of in favour of the judgment debtor, is the decree holder still entitled to sue out execution of the decree?

" (3) If issue No. 1 be disposed of against the judgment debtor, is he still entitled to pay the decretal amount by instalments? "

On 23rd August, 1940, the day fixed for the hearing, the respondents did not appear and the proceedings were ex parte. Certain evidence was given on behalf of the decree holder which in view of the subsequent course of events must be disregarded. The Subordinate Judge without any specific finding on the issues held that the instalment was not paid on the 1st July, 1940, and that default had taken place and made the order claimed by the decree holder.

On the 25th October, 1940, on the respondents' application the Court set aside the order just stated on the payment of the decree holder's costs.

On the 28th November, 1940, the decree holder renewed his application for execution of the decree. It was not until the 17th January, 1942, that this application was heard. Evidence was then led on both sides. The learned Subordinate Judge reframed the issues in the following terms:

" (1) Whether the judgment debtors have committed breach of the terms of the decree?

" (2) If so, can the delay on the part of the judgment debtors in depositing the amount be condoned? "

Upon these issues he held that the respondents had committed a breach when they failed to deposit on the 1st July, 1940, the instalment falling due on the 30th June, 1940, and that the delay could not be condoned.

It will be seen that the learned Judge did not upon the renewed application direct his mind to the question which was formulated in the first issue as originally framed. Therefore their Lordships have not the advantage of his opinion upon a matter which is of first importance, viz., whether in fact the respondents on the 1st July, 1940, presented the instalment to the bank for payment. For, as already stated, if they had done so and the bank had refused payment, or, if through no fault of theirs the machinery for payment contemplated by the parties had otherwise broken down, it might well be that their default could not be regarded as a breach of their obligation.

From the judgment of the Subordinate Judge the respondents appealed to the High Court of Judicature at Lahore. The appeal was heard by the late Mr. Justice Monroe who on the 15th December, 1942, dismissed the appeal. That learned Judge dealt with the case in words which, though the evidence must be further examined, their Lordships think it desirable to quote:—" The judgment debtors attempted to show that it was not possible for them to make the deposit on the 1st of July: and produced evidence to show that they went to the bank on that day and that owing to a rush of work they were unable to make the deposit before closing hours. It is clear that they did go to the bank and that they presented the warrant for the deposit to the Chief Cashier who initialled it: but I find nothing to support and I do not believe that the amount of the deposit was tendered during the banking hours. Two of the bank officials stated that when the Chief Cashier had initialled the warrant the money could not be refused. The learned Judge was right, in my opinion, in holding that there was a default." It is clear from this passage that Mr. Justice Monroe directed his mind to the material question of fact, and decided it against the respondents. Upon the second issue the learned Judge said that no ground for not enforcing the clause had been shown.

From this decision the respondents appealed to the Division Bench of the High Court, urging among other grounds of appeal that it should have been held that the amount of the instalment was tendered to the bank on the 1st July and that tender of the amount was tantamount to a deposit and a compliance with the terms of the decree.

On the 23rd June, 1944, the Division Bench allowed the appeal, setting aside the decision of the learned Single Judge and of the Subordinate Judge and dismissing the application for execution. Mr. Justice Din Mohammad delivering a judgment, in which the Chief Justice concurred, said: " All that was possible for the judgment debtors to do was done by them " and upon the basis of this statement, which he proceeded to elaborate, held that they were not responsible for any default.

Their Lordships thus have before them no finding of fact upon the material issue by the learned Judge who heard the evidence and directly opposite findings by the Appellate Courts which did not.

In the consideration of the evidence it is important to bear in mind where the burden lies. The obligation was on the respondents to pay on the 1st July. They did not pay, and it is for them to prove that the fault was not theirs. Let it be assumed that the obligation was to pay " through Court " and that this meant that they must pay into the Imperial Bank at Amritsar having first obtained a proper voucher from the Court; yet it is still for them to prove that they took all proper and reasonable steps to make such payment but nevertheless failed to do so. Applying this test, their Lordships are of opinion that the judgment of Mr. Justice Monroe is to be preferred to that of the Division Bench. The payment of a sum into the bank upon a given day was not a difficult operation. It may well have been that on that day there was a considerable press of business and there was some evidence by another customer that he could not present a deposit voucher though he tried to do so. It may be regarded too as in favour of the respondents that as early as the 28th June they had obtained the necessary voucher from the Court to enable them to make the deposit. Nor is there evidence lacking that on the 1st July they attended at the bank at about 1.30 p.m. and that Abdhul Ghani, one of the judgment debtors, had an interview there with Babu Ghulam Rasul, a clerk in charge of the Correspondence Department, and with Lala Brij Lal, the Head Cashier, who appears to have put his signature to the deposit voucher to enable payment to be made. But it is just at this point where it might be expected that proof of attempted payment would be given, that the evidence breaks down. It was Abdhul Ghani who was said to have had the money and to have been unable to pay it in. That he was in Court when the case was heard is certain. Yet he did not go into the witness box, but left it to the other respondent Mahbub

Ali to give evidence, a task the latter willingly performed. But though he stated categorically " He (i.e. Babu Ghulam Rasul) sent us to the Head Cashier, who affixed his signature. But the bank's business with the Government was closed after that and the amount could not be deposited," it appears from his cross examination that he did not go to the Head Cashier personally, but stayed outside the bank. His evidence is therefore worthless and from Abdhul Ghani, who alone could speak to what happened after the Head Cashier had initialled the voucher, there is no evidence at all. In these circumstances their Lordships cannot agree with the Division Bench that the respondents proved that they did all that it was possible for them to do. It is unnecessary to speculate why they did not do so.

The remaining question is whether the respondents, having made default in the performance of their obligation under the compromise decree and having failed to prove that it was through no fault of theirs, are yet entitled to relief. This is the question which is no doubt intended by the issue which asks whether the delay in depositing the instalment can be " condoned." Upon this question their Lordships have not the advantage of the opinion of the Division Bench. But they see no reason for dissenting from that expressed by Mr. Justice Monroe. It does not appear to them that this is a case in which any equitable doctrine in regard to relief from forfeiture or penalty comes into play. They agree in thinking that the position was accurately summarised by the learned Subordinate Judge when he said that in the event of default in payment " the parties were to be relegated to the status quo, i.e., the plaintiff was to get back his land and the defendants to get back the money paid by them to the plaintiff."

For the reasons above appearing their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the Division Bench of the High Court of the 23rd June, 1944, set aside and that of the Single Bench of the 15th December, 1942, dismissing the appeal from the decree of the Subordinate Judge, Amritsar, of the 30th January, 1942, restored. The respondents must pay the costs of this appeal and of the appeal from the Single Bench to the Division Bench of the High Court.

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In the Privy Council

B. BISHAN SINGH (deceased)

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MAHBUB ALI AND ANOTHER

DELIVERED BY LORD SIMONDS

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