

ON APPEAL
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N:

CHORAMUN JHOBBOO

Appellant

- and -

ELIAS IBRAHIM COOWAR

Respondent

C A S E FOR THE RESPONDENT

Record

- 10 1. (a) This is an Appeal from a Judgment of the Court of Civil Appeal of Mauritius (M. Rault, Ag. Chief Justice and P. de Ravel, Ag. S.P.J. (as they then were)) dated 19th December 1977. p. 52 l.7 to p. 56
- 20 (b) The Court of Civil Appeal dismissed an Appeal made by the Appellant who, aggrieved and dissatisfied with a Judgment of the Supreme Court (Garrioch, S.P.J. (as he then was)) delivered on the 2nd February, 1977, appealed to the Court of Civil Appeal in order to have the said Judgment quashed, set aside, reversed, amended or otherwise dealt with for the reason that, in view of the clear, unambiguous contents of the deed governing the parties, the non-payment of the balance of the sale price by the Respondent as called upon so to do by the "Mise en Demeure", the Learned Judge was not justified in his interpretation that the Appellant and the Respondent did not intend the penal clause to be a novation extinguishing the right of the Respondent to a specific performance of the sale therein mentioned. p. 25 l. 21 to p.40 l.1 to 10
p.43 l.8 to 15
- 30 (c) The learned Judge had on 2nd February, 1977 ordered the Appellant to appear before Mr. Notary Bertrand Maigrot within one month from the date of the said Judgment to cash the balance of the sale price and to sign the authentic deed of sale of the property in suit to the Respondent. In default of the Appellant complying with the order within the time fixed, it was ordered that the Judgment should stand in lieu and stead of the authentic deed of sale and the Respondent should be entitled to have it p.37 l.19 to p.38 l.5

Record

transcribed and to deposit the balance of the sale price with the cashier of the Supreme Court, and the Judgment so transcribed should be a good and valid title to the Respondent. The Appellant was in the meantime prohibited from selling the property to any third party.

p.2 to 3

2. The facts of the case as revealed by the pleadings are as follows:-

p.4 l.1 to 10

p.4 l.11 to
p.5

p.6 l.4 to 8

p.8 l.5 to p.9
l.20

(A) On the 29th August, 1973 the Appellant (Defendant at the trial) sold to the Respondent (Plaintiff at the trial) an immoveable property in virtue of a deed under private signature dated the 29th August 1973. The Respondent was to pay the balance of the sale price on the 15th October, 1973 upon proof of clear title of the property and the transfer of ownership was to take place on the signature of the authentic deed which was to be drawn by a Notary already chosen by the parties. On the 21st December 1973 the Appellant summoned the Respondent by way of a "Mise en Demeure" to appear before the chosen Notary on the 14th January, 1974 at 11 a.m. in order to pay the balance due and to sign the authentic deed witnessing the sale. On the appointed date and time, the Respondent duly appeared before the Notary ready and willing to pay the balance due but the Appellant failed to attend. A Memorandum of non appearance was drawn up. The Respondent has always been ready and willing to sign the deed of sale. The Respondent thereupon entered the Action before the Supreme Court praying for a judgment, inter alia, prohibiting the Appellant from selling the property to any third party and ordering him to appear before the chosen Notary in order to cash the balance of the sale price and to sign the authentic deed of sale and in case of non compliance with the order of the Court decreeing that the Respondent should transcribe the Judgment of the Court and deposit the balance of the sale price with the cashier of the Court, such a Judgment to be a good and valid title to the Respondent. 10
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p. 9 l.20 to
p.10

p.10

(B) In his Statement of Defence, the above facts were not denied and the Appellant alleged that one of the conditions embodied in the deed of private signature was to the effect that should the Appellant refuse to sign the authentic deed, he would have to refund to the Respondent the sum paid on the purchase price together with a sum of Rs. 20,000 as damages.

The Appellant averred that he was ready to comply with that condition. The Appellant further averred that he did not attend the office of the Notary on the 14th January 1974 because he was bed-ridden. 50

- 10 (C) In his reply, the Respondent denied the averments of the Appellant and maintained that the sale had become perfect and valid to all intents and purposes and further that as the Appellant had himself summoned the Respondent to appear before the Notary to sign the authentic deed, he was estopped from invoking his own turpitude and asking for the cancellation of the sale upon payment of Rs.20,000. No rejoinder was served and the case was fixed for trial. p.11
3. (A) At the trial, parties agreed that the facts set out in the Statement of Claim were not contested and that the facts which were not admitted were not relevant to the point of law in issue. p.20 l. 20 to 24
p.21 l.1 to 7
p.15 l.21 to p.20 l.20
- (B) No evidence was adduced and the deed under private signature dated 20th August 1973 as well as a Memorandum of the failure of the Appellant to attend the office of the chosen Notary were produced. p.8 l.5 to p.9
- 20 The Notice "Mise en Demeure" of the 23rd December 1973 emanating from the Appellant had been reproduced in the Statement of Claim and had been admitted. p.4 l.12 to p.5
4. The Trial Judge accepted those uncontested facts and on an analysis of the facts and of the documents produced held that:-
- (i) the Court had to find what was the true intention of the parties to the deed produced; p.36 l.8 to 10
- 30 (ii) it was for the Trial Judge to determine the true nature of the covenant, immaterial to the designation given to it by the parties;
- (iii) the agreement was a bilateral promise to sell and purchase; p.37 l.13 to 15
- (iv) the Respondent had the right to have the sale executed except if debarred by some restrictive clause; p.37 l.13 to 15
- (v) the clause invoked by the Appellant in his Statement of Defence was a "penal clause";
- 40 (vi) even if such clause could be construed as a "Stipulation de dedit" entitling the Appellant to chose between effecting the sale or backing out of the sale, the Appellant had manifested his unequivocal intention to proceed with the sale and sign the authentic deed when he summoned the Respondent so to do on the 14th January, 1974, so p.36 l.19 to 23
p.36 l.19 to p.37 l.5

Record

that when the Respondent complied with that summons, the reciprocal promise to sell and purchase had crystallised and neither party could withdraw therefrom;

p.37 1.14 to 16 (vii) the parties were irrevocably bound and the Respondent was entitled to sue for the regularisation of the sale under reference.

The Trial Judge accordingly made an order to that effect as set out at paragraph 1(c) above.

p.42 and 43 5. The above Judgment was appealed against and the only ground of appeal was the following: In view of the clear, unambiguous contents of the deed governing the parties, the non-payment of the balance of the sale price by the Respondent as called upon so to do by the "Mise en Demeure", the Learned Judge was not justified in his interpretation that the Appellant and the Respondent did not intend the penal clause to be a novation extinguishing the right of the Respondent to a specific performance of the sale therein mentioned. 10

p.55 1.6 to 16 6. The Appeal was heard and the Court of Civil Appeal dismissed the Appeal holding that, even if the Appellant had had a choice between perfecting the sale and paying damages, he had by his own conduct deprived himself of that faculty of choice, as he had manifested an unequivocal intention to proceed with the sale and waived his right to liberate himself by paying damages when he summoned the Respondent to appear before the Notary to pay the balance of the purchase price and the Respondent did attend the Notary to pay the balance of the purchase price. 20

p.56 1.14 to 15 The Learned Judges on Appeal remarked that the conduct of the Appellant if permitted, would be in contradiction to the fundamental rule that bilateral contracts must be executed in good faith. 30

7. The present Appeal is directed against the Judgment of the Court of Civil Appeal.

8. It is urged on behalf of the Respondent that the Court of Civil Appeal could not consider and entertain any argument or reason of appeal beyond the one invoked by the Appellant and that as a consequence the present Appeal also cannot travel outside the said ground of Appeal. Any ground of Appeal, or reason for appeal which the Appellant wishes now to put forward and which is not covered by the ground of Appeal before the Court of Civil Appeal of Mauritius cannot and should not be entertained by your Lordships. 40

9. The Respondent respectfully submits that even if, for the sake of argument, the Appellant had originally an

option between perfecting the sale and withdrawing from it, he had by his own conduct elected to perfect the sale and he could no longer retract from that. The Respondent respectfully submits that the Court of Civil Appeal was correct in its decision.

10. Furthermore, the Respondent respectfully submits that the Learned Trial Judge made the right and proper analysis of the situation and that the conclusions reached by him were correct in all respects.

10 11. On the whole, the Respondent respectfully submits that the Judgment of the Court of Civil Appeal of Mauritius was right and should be confirmed and that this Appeal should be dismissed with costs, for the following:-

R E A S O N S

1. BECAUSE the clause invoked by the Respondent in his Statement of Defence was a penal clause and not a "Stipulation de dedit".
- 20 2. BECAUSE there has never been any novation extinguishing the right of the Respondent to specific performance of the sale;
3. BECAUSE in any event, even if the Appellant had a choice between perfecting the sale and withdrawing from it he elected to perfect the sale and cannot now be heard to withdraw from it;
4. BECAUSE to allow the Appellant to withdraw from the sale in the circumstances of the present case should be tantamount to putting a premium on bad faith.

HAMID MOOLLAN

SULLEMAN BHAYAT

No. 44 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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