

YEE CHING DICK

A

v.

CHANDRA PRAKASH BIDESI AND ANOTHER

[SUPREME COURT, 1962 (Hammett Ag. C.J.), 15th, 22nd March]

B

Civil Jurisdiction

Contract—agreement for sale and purchase—deposit—refundable if consent of local authority not given—refusal of consent—conditional consent given after action commenced—interpretation of agreement.

Interpretation—agreement for sale and purchase—subject to consent of local authority—consent refused but later given conditionally—whether deposit refundable—construction of agreement.

C

An agreement for the sale and purchase of a milk bar contained the following provision — “Entire agreement is subject to consent of the Suva City Council but in the event of such approval being obtained, the deposit shall be forfeited if the purchaser shall decline to continue with the agreement. Otherwise, deposit to be refunded forthwith”. The Suva City Council refused its consent and the purchaser demanded a refund of the deposit. After correspondence a writ was issued by the purchaser and subsequently on the application of the vendor the Suva City Council gave a conditional consent to the transaction.

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Held : 1. The meaning of the provision quoted above was that the sale was subject to the consent being given on first application and if such application was refused the deposit was refundable forthwith.

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2. The words “consent” and “approval” were used synonymously and were intended to mean “unconditional consent” or “unqualified approval”, or at least an approval or consent not qualified by conditions of a major character or which would require the expenditure of money by the purchaser.

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3. There was no evidence of any agreement by the purchaser to forego his rights.

Action in the Supreme Court for refund of deposit paid under an agreement for sale and purchase.

D. J. Whippy for the plaintiff.

A. Lateef for the defendants.

The facts sufficiently appear from the judgment.

I

HAMMETT Ag. C.J. : [22nd March, 1962]—

A On the 10th August, 1959, the Plaintiff paid the Defendants the sum of £500 by way of deposit, pursuant to an Agreement between the Plaintiff and the Defendants, for the sale and purchase of the business operated by the Defendants known as "The Popular Milk Bar". This Agreement was made subject to the consent of the Suva City Council. The Suva City Council refused to give its consent to the transfer, and the Defendants having failed to refund the said deposit, the Plaintiff issued the Writ in this action on 4th December, 1959, claiming the return of this deposit of £500.

B The Defendants contend that after the issue of the Writ in this action, on further representations being made on their behalf, the Suva City Council rescinded its previous decision refusing its consent and gave its consent to the transfer on 21st December, 1959. They therefore maintain that the Plaintiff is not entitled to the return of his deposit, and that it has now been forfeited under the terms of the Agreement.

C None of the facts in the case are disputed and all appear either on the pleadings or in the correspondence and documents admitted in evidence by consent. No other evidence was called by either side, both of whom relied upon legal arguments. The only issue in the case is what is the proper construction that should be put upon the terms of the Agreement between the parties.

D The facts are as follows :

On 10th August, 1959, the Plaintiff paid a deposit of £500 and was issued with a receipt, embodying the terms agreed, in the following form :

E "RECEIVED from Yee Ching Dick of Toorak, Grocer, the sum of FIVE HUNDRED POUNDS (£500-0-0) by way of deposit under an agreement for sale and purchase of all the goods and chattels of 'the Popular Milk Bar' (with the exception of one only 10 cubic feet 'Frigidaire') together with the tenancy or licence under tenancy agreement dated the 26th day of May, 1959, full purchase price being one thousand eight hundred pounds (£1800-0-0) payable within twenty four hours after approval to this agreement being given by the Suva City Council. Entire agreement is subject to consent of the Suva City Council but in the event of such approval being obtained, the deposit shall be forfeited if the purchaser shall decline to continue with the agreement. Otherwise, deposit to be refunded forthwith. All stock sold in the meantime to be replaced upon delivery of possession which shall be effected within twenty four hours of the said approval by the Suva City Council. All costs of and incidental to the effecting of the above agreement to be paid by the purchaser.

G DATED this 10th day of August, 1959.

(STAMP)
10/8/59

The Popular Milk Bar
(sgd.) C. P. Bidesi Jnr.

H I agree :
(sgd.) Yee Ching Dick.

”

It is agreed that about a week later this Agreement was varied by consent by substituting the sum of £2,160 in place of £1,800 as the full purchase price and the duplicate copy of the original Agreement duly amended was signed again by the Plaintiff, the 1st Defendant and also for the first time by the 2nd Defendant. It is not disputed that the first and second Defendants are partners in the business known as "The Popular Milk Bar".

A

After the signing of this Agreement the solicitor for the Plaintiff and the solicitors for the Defendants wrote to the Suva City Council asking for its consent to the transfer.

B

The Suva City Council refused to consent to the transfer and on 28th September, 1959, this decision was conveyed by a letter from the Town Clerk in the following terms to the solicitors for the Defendants, a copy of which was sent to the Plaintiff's solicitor:

"Messrs. Cromptons,
Thomson Street,
SUVA.

28th September, 1959.

C

Dear Sirs,

*re Popular Milk Bar —
Bus Station*

D

I have to acknowledge receipt of your letter of 22nd instant concerning the application by the Licensees of this kiosk to transfer their licence to Mr. Yee Ching Dick. There was also some earlier correspondence in this connection with Mr. Ramrakha, then acting for the Licensees.

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The Council has discussed the matter at its last two monthly meetings. The decision arrived at is that, in all the circumstances of the case and having regard to the fact that only a comparatively short time has elapsed since public tenders were called in respect of the kiosk, the Council should not consent to the present Licensees transferring their licence to a person chosen by them. If the Licensees do not wish to continue their business in the kiosk, the Council is prepared to assist them by accepting a surrender of the licence at some convenient future date. This date would have to be fixed, say about two months ahead, so as to allow the Council time to advertise again calling for tenders for a new licence of the kiosk. This would, of course, also enable the Licensees in the meantime to sell off their stock and, perhaps, dispose of their equipment.

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G

If the Licensees wish to surrender their licence in this manner, you will no doubt be writing me.

Yours faithfully,
(sgd.) R. W. BALFOUR
Town Clerk."

H

On 3rd October, 1959, the Plaintiff's solicitor wrote to the 1st Defendant asking for a refund of the £500 deposit in the following terms :

"Mr. C. P. Bidesi,
Popular Kiosk,
Bus Station,
SUVA.

3rd October, 1959.

Dear Sir,

re : Yee Ching Dick

As you are aware, consent to transfer your licence in respect of the Popular Kiosk has been refused by the Suva City Council. The abovenamed has called at this office several times asking for a refund of the sum of £500 given to you as a deposit. This money is of course refundable in the circumstances and it would be appreciated if you would call at this office arrange for a refund so that I could cancel your previous receipt.

Yours faithfully,
(sgd.) K. C. Ramrakha. "

The deposit was not refunded but in reply, on 13th October, 1959, the Defendants' solicitors replied that further representations were being made to the Suva City Council to obtain their consent and asking for an extension of time to 9th November, 1959. They stated that by that time if the consent was still not forthcoming the deposit would be refunded, in the following terms :

"K. C. Ramrakha Esq.,
Solicitor,
SUVA.

13th October, 1959.

Dear Sir,

re : Yee Ching Dick & C. P. Bidesi

Your letter of the 3rd October, 1959, written on behalf of Mr. Dick and addressed to Mr. C. P. Bidesi has been handed to us with instructions to reply. As you are fully aware we have been communicating with the Suva City Council on behalf of Mr. Bidesi with a view to obtaining its consent to the transfer of Licence. We have been informed by the Suva City Council that they would not consent to such a transfer. However, we are taking this matter up further and would be grateful if you would please advise Mr. Dick to wait for his deposit, till the 9th November, 1959, by which date the matter of receiving or refusing of the consent will finally be disposed of. If the consent is refused Mr. Bidesi will then have no option but to refund the deposit paid to him by Mr. Dick.

Yours truly,
(sgd.) Cromptons. "

The Plaintiff did not reply to this letter until 25th November, 1959, by which time neither had the consent of the Suva City Council been obtained nor had the Defendants refunded the deposit of £500 as they had said would be done by their solicitors' letter dated 13th October,

1959. The Plaintiff had changed his solicitor by then and his new solicitors on that date wrote the Defendants' solicitors in the following terms :

"Messrs. Cromptons,
Solicitors,
SUVA.

25th November, 1959. A

Dear Sirs,

Yee Ching Dick and C. P. Bidesi
Your ref. AL/sr

We are now writing for Yee Ching Dick in this matter. Mr. Dick has handed to us your letter of 13th ultimo addressed to Mr. Ramrakha in which you state that this matter will be finalised on the 9th instant. B

"We are to advise that unless the sum of £500-0-0 which was paid by way of deposit to your client is paid to us by the end of this month, a writ will be issued against your client. Our client will not agree to any further extension of time. C

Yours faithfully,
MUNRO, WARREN, LEYS & KERMODE
(sgd.) D. Whippy. "

Counsel for the Plaintiff contended that the further extension of time to the end of November, 1959, granted by implication by this letter was granted for the return of the deposit and not for the purpose of further efforts to obtain the consent of the Suva City Council or for completion of the contract. This was not disputed by Counsel for the Defendants and I am quite satisfied that this is the only possible logical construction that can be placed on this letter. D

It was not until 15th December, 1959, that the Defendants' solicitors wrote to the Town Clerk of the Suva City Council, with reference to his letter dated 28th September, 1959, in which the Town Clerk had conveyed the Council's refusal to consent to the transfer, asking that the matter be re-opened for reconsideration. They then did so in the following terms : E

"The Town Clerk,
Suva City Council,
SUVA.

15th December, 1959. F

Dear Sir,

re : Popular Milk Bar

We refer to previous correspondence in this matter and particularly our letter of the 22nd September, 1959 and your reply dated the 28th September, 1959. We have been instructed by Mr. C. P. Bidesi to ask you to re-open this matter for discussion in your next Council Meeting. The reasons given for reconsideration may briefly be summarized as follows : G

(HERE FOLLOW 5 REASONS IN DETAIL)

On the strength of the information supplied in this letter we trust that the Council will agree to the transfer of the Popular Milk Bar licence in the name of Yee Ching Dick. We would be grateful to receive your early reply to this letter. H

Yours truly,
(sgd.) Cromptons. "

A On 21st December, 1959, the Suva City Council conditionally approved the transfer from the Defendants to the Plaintiff as appears from a certified copy of the Council Minute admitted in evidence as Exhibit C :

"POPULAR MILK BAR KIOSK

B *File 25/27 :* Letter dated 15th December, 1959, received from Messrs. Cromptons, on behalf of the proprietors of the Popular Milk Bar at the Suva Bus Station, requesting Council to reconsider its decision in regard to the transfer of the Licence to Mr. Yee Ching Dick.

RECOMMENDED that approval be given to the transfer of the Licence subject, however, to the new licensee being able to meet Council's requirements.

(sgd.) C. A. Stinson
CHAIRMAN OF THE COMMITTEE

C (sgd.) C. A. Stinson
MAYOR. "

D It is the contention of the Defendants that since no time was specifically agreed upon by the parties within which the consent of the Suva City Council was to be obtained, nor was it agreed that a first refusal should be accepted as final, nor were the number of times that application for approval specified, the Plaintiff is not, in these circumstances, now entitled to the refund of his deposit under the terms of his Agreement with the Defendants merely because at first the Suva City Council refused its consent to the transfer.

E I find it difficult to accept this contention. In support of it a large number of authorities have been cited which appear to me to be more concerned with the issue of whether one party or another is entitled to rescind an agreement which is made subject to the consent of a third party than with the real issue in this case. It must not be forgotten that the only claim in this case is for the return of the deposit paid. The Agreement between the parties did, albeit in somewhat brief terms, lay down the circumstances in which the deposit should either be forfeited or refunded, and the result of this action depends solely upon the construction of this Agreement. It appears to me
F that the words used are quite clear and they were as follows :

"Entire agreement is subject to consent of the Suva City Council but in the event of such approval being obtained, the deposit shall be forfeited if the purchaser shall decline to continue with the agreement. Otherwise, deposit to be refunded forthwith."

G It is the duty of the Court to determine from these words what was the intention of the parties. The only reasonable and logical construction which I consider it possible to place on these words is this :

H "The parties agreed that the sale and purchase was to be subject to the consent of the Suva City Council being given upon the first application being made for it. If such consent was obtained upon it first being applied for and the purchaser should then decline to pay the balance of the purchase price within 24 hours of the notification to him that it had been given, the deposit

would be forfeited. If however the approval of the Suva City Council was refused upon the first application being made for it, the deposit was to be refunded forthwith on demand."

I would add that the terms "consent" and "approval" used by the parties in this Agreement were used synonymously and, in my view, intended to mean "unconditional consent" or "unqualified approval", or at least an approval or consent not qualified by conditions of a major character or ones which would require the expenditure of money by the Plaintiff. I do not think it was ever intended that "approval" or "consent" meant a conditional approval, unless of course the conditions were of such a minor or formal nature that it would have been unreasonable for the Plaintiff to have refused to comply with them. A
B

In these circumstances I am of the opinion that, under the terms of this Agreement, immediately the Suva City Council notified the Plaintiff and the Defendants of its refusal to give its consent or approval to the transfer by its letter dated 28th September, 1959, the Plaintiff was entitled to the refund of the deposit of £500 on demand. He did so demand it by his solicitor's letter dated 3rd October, 1959. In my view there is no evidence of any agreement by the Plaintiff to forgo his rights in this respect. C

At the date of the issue of this Writ, on 4th December, 1959, the position was that the Suva City Council had refused to give its consent to the transfer, that the Plaintiff had demanded the refund of his deposit and the Defendants had failed to comply with that demand. By then nearly 4 months had passed since the Agreement had been entered into and the Defendants had not in fact yet written to the Suva City Council asking for its decision to be reconsidered. This was not done until 15th December, 1959. D

Even now at the date of the trial of this action no unqualified approval of the transfer has been given. The decision of the Suva City Council dated 21st December, 1959, to approve the transfer is only a conditional approval. It is made conditional upon the Plaintiff being able to meet certain unspecified requirements of the Council. No one appears to know what these requirements are and the Defendants do not appear to have made any effort to find out what they are. The Defendants have not made any attempt to show that these requirements are of such a nature as not to require the expenditure of money by the Plaintiff or that it would have been unreasonable for the Plaintiff to have refused to comply with them. E
F

In my view the Suva City Council has not given its consent to this Agreement that it was the intention of the parties to this Agreement should be obtained as a condition precedent. G

For these reasons I am of the opinion that under the terms of this Agreement the Plaintiff is entitled to the refund of the deposit of £500 and was so entitled at the date of issue of the Writ in this action.

There will therefore be judgment for the Plaintiff for £500 and costs to be taxed on the higher scale. H

Judgment for the plaintiff.