A

STANLEY CHARLES BURGESS & OTHERS

v.

RAM PRASAD

B

[SUPREME COURT, 1974 (Stuart J.), 2nd May]

Civil Jurisdiction

Land—agreement for sale and purchase—time of the essence—whether such a clause waived by vendor—whether vendor estopped from exercising his right of recission.

C

Land—agreement for sale rescinded by vendor—whether money paid under such an agreement returnable to purchaser.

Completion of the sale and purchase of a piece of land was fixed for 24th August 1969. The agreement contained a clause making time the essence of the contract and for the forfeiture of the deposit in the event of default by the purchaser.

D

The purchaser failed to complete on the due date and the vendor served notice to rescind the agreement.

Held : 1. The vendor had not on the facts, waived his right of recission, nor was he estopped from exercising this right.

E

2. Half the purchase money had, in fact, already been paid by the purchaser to the vendor, and as the vendor did not seek to enforce a forfeiture of all monies paid, the purchaser was entitled to the return of the whole of the monies already paid. In any event, it was unconscionable for such a sum to be forfeited to the vendor.

Cases referred to :

F

Rickards v. Oppenheim [1950] 1 K.B. 616 ; [1950] 1 All E.R. 420.

Howe v. Smith (1884) 27 Ch.D. 89.

Stockloser v. Johnson [1954] 1 Q.B. 476; [1954] 1 All E.R. 630.

Steedman v. Drinkle [1916] 1 A.C. 275.

Kilmer v. British Columbia Orchard Lands Ltd. [1913] A.C. 319.

G

Action in the Supreme Court for specific performance of an agreement for the sale and purchase of land.

D. S. Sharma for the plaintiffs.

K. C. Ramraka for the defendant.

STUART J. : [2nd May 1974]

H

This is an action on the part of the plaintiffs Stanley Charles Burgess, Mohammed Ali Hussain and Mohammed Aziz Khan for specific performance of an agreement for sale and purchase of a piece of freehold land situated at Waqadra, Nadi. The agreement was made on 24th July 1969 and the plaintiffs agreed to buy from Ram Prasad, who is also known as Ram Prasad Gosai,

the defendant, a piece of land containing 3 acres 3 roods 39 perches being lot 9 D.P. 1026 and the whole of the land comprised in Certificate of Title 6842. The price was $21,000 of which $10,400 was agreed to have been already paid and the balance was expressed to be payable " on registration of transfer of the said land to the purchasers and in any event not later than 24th August 1969 ". One of the printed clauses of the agreement ran as follows :

> " Time shall be of the essence of this contract; and if default is made by the Purchaser in payment when due of any of the purchase moneys or interest or in performance or observance of any of the terms and conditions of the sale the Vendor (in addition to other remedies) may rescind this sale contract (whereupon the deposit theretofore paid shall be forfeited to the Vendor as liquidated damages) and may at the Vendor's option and without tendering any assurance resell the said land by public auction or private contract subject to such conditions as the Vendor may think fit; and any deficiency in price resulting from and all expenses attending a resale or attempted resale after set-off of any payments made in reduction of the purchase price may be recovered from the Purchaser by the Vendor as liquidated damages; and any increase in price upon resale after deduction of expenses shall belong to the Vendor ".

The Vendor was to give possession on transfer of title, the purchasers were to pay all legal costs, and there was a specific covenant to the following effect :

> " The purchasers agree to grant to the vendor a drainage easement through the said land from a point at the rear boundary of C.T. 7082 to the point on the said land where a drain has been constructed linking the adjoining property of Hotel Hibiscus Limited and running across C.T. 6842 to the boundary of C.T. 7080 ".

The agreement was on a stencilled form completed by Mr Barrie Sweetman in his handwriting and he witnessed the signature of the vendor and two of the purchasers. This agreement was the final agreement of a series by which Burgess had been trying to buy this piece of land from the defendant. They started in May 1967 when Burgess offered £10,500 for the land to be paid by 15th July. On 26th May he offered the same sum payable finally by 31st January 1968 and on 27th June 1967 an agreement was entered into embodying that arrangement but in that agreement Burgess was described as acting as trustee for a company to be formed to purchase and develop the said land which is the land the subject of this action. This agreement had still not been carried out by 24th July 1969. It is not surprising, therefore, that the vendor was somewhat concerned at the delay. Unfortunately however 24th August 1969 was a Sunday, and the plaintiffs sought to escape this dilemma in two ways. First they said that on 23rd August 1969, Mr Sweetman who was acting as solicitor for both parties, met the defendant who was with some friends, at the North-West Agricultural Show at Lautoka, and there he had a conversation with the defendant after which he believed that the defendant was willing to allow matters to stand over until Mr Sweetman, who was engaged in a Sugar Commission of Inquiry, was able to attend to it. The defendant denied any such conversation. The second way of escape is indicated in the evidence of Mohammed Ali Hussain, one of the plaintiffs who said that on Monday 25th August he saw defendant at the office of the Hibiscus Hotel, Nadi and asked him to come into Mr Sweetman's office. The defendant told him he was not well and could not come but would come on the Thursday following. The defendant also denied this. On 30th August defendant

got another firm of solicitors, A. D. Patel & Co. to write to the three plaintiffs rescinding the agreement and forfeiting the deposit, the amount of which was not mentioned, owing to default in payment as agreed. It was common ground that the plaintiffs did thereafter offer payment of the balance of $10,600 and the defendant refused to accept payment. Not only did the plaintiffs offer to pay the balance of $10,600 owing under the agreement but Burgess offered a further $200 and considerable argument took place on the matter of that $200, the defendant contending that it was an admission that the plaintiffs had failed in their agreement. The defendant stood fast and the plaintiffs issued a writ in November 1969. They claimed that the defendant agreed to waive the stipulation making time the essence of the contract and gave the plaintiffs further time without stipulating a date for completion. Defendant denies this allegation.

The first question to be decided is this question of waiver. Sweetman, who as I have said, acted as solicitor for both vendor and purchaser, gave evidence that he had acted for Burgess since 1967 and also for defendant. He made the 1967 agreement on instructions from Burgess, and after defendant had complained about non-payment of money, both parties came to his office and made a further agreement on 24th July 1969. It is quite clear that defendant wanted to tie Burgess down to a date for settlement but I accept that this witness probably suggested that payment should be made within a month to which both parties agreed and a date a month ahead was inserted in the agreement. This witness told the Court that he spoke to the defendant on 23rd August and that as a result of that conversation he told Burgess that defendant wanted to get the matter settled as soon as possible, and that he had the transfer ready to be signed by defendant and a mortgage to be signed by plaintiffs to the Bank of New Zealand. He also arranged for the defendant's title to be sent from his Bank at Nadi to that Bank's branch at Lautoka. He said that as a result of his conversation with defendant on 23rd August he considered time no longer of the essence of the contract and he thought that the transaction would be settled the following week. He subsequently elaborated on his discussion with the defendant and told the Court that he told the defendant that he had received instructions from the Bank for a mortgage and there would be some delay and that settlement would be effected the following week and that defendant had to sign a transfer before he could get his money. He said that defendant expressed no disagreement with a settlement the following week although he said he had been waiting a long time for his money. Mohammed Ali Hussain told the Court that on the 25th August he went to see defendant and asked him to come to Lautoka. Defendant told him that Monday was the last day. He said that he was not well and could not go on Tuesday, that he was going to Sovi Bay on Wednesday and that he would come on Thursday. Jagir Singh who was Sweetman's clerk told the Court that on Thursday 28th August the defendant rang him and enquired about his money and he told the defendant that he had no money in the office for him. Incidentally I accept Jagir Singh's evidence that the defendant rang him and regard his note as incorrectly expressing the position and I do not accept the defendant's evidence that Jagir Singh rang him. I think that the true answer is that the defendant made no promise to give the plaintiff any further time but that if settlement had indeed been made as promised in the week following the 23rd August, he would have accepted his money. The discussions with Sweetman and Mohammed Ali Hussain, and his telephone call to Jagir Singh all appear to me consistent with this view. When no money was forthcoming in that week, defendant rescinded the contract. Accepting this view of the matter I reject the evidence of the defendant and his witnesses.

The question then is, whether there is evidence of waiver or some action which will estop defendant from exercising his right of rescission. Waiver there is certainly not, because waiver promises a request by one party for the forbearance of the other, and the agreement of the other to that request. Although there may have been a request I cannot see any agreement here. The best that can be said is that there was no refusal or disagreement. Nor, it seems to me can there be said to be an estoppel, for an estoppel can only arise when one party has altered his position to his detriment on the faith of a representation, he has taken a definite course of action. I cannot see that the plaintiffs did either. On the 23rd August, when the alleged representation was made by the defendant it was already too late for the plaintiffs to complete, and their conduct during the ensuing week certainly does not give me the impression that they acted as they did because they believed defendant had extended the time. Had that been so, indeed, the interview by Mohammed Ali Hussain with the defendant on 25th August would have been unnecessary. I think that in this regard the comments of Lord Denning in *Rickards v. Oppenheim* [1950] 1 K.B. 616, are apposite. That was a case of the sale of a motor car, where the plaintiffs agreed to build a body on the chassis within seven months. After ten months plaintiff told defendant the body would be ready in two weeks and defendant thereupon gave plaintiff a notice in writing that if the body were not available in four weeks defendant would not accept delivery. The four weeks passed and the work was not completed for a further 2 months and then defendant refused delivery. It was submitted that a conversation after the giving of the four week notice constituted a waiver. Lord Denning said at p. 625—

> " Counsel for the plaintiffs said that even accepting the notice of June 29 a notice making time of the essence, nevertheless even that notice was afterwards waived by the defendant. On July 10 1948, there was a discussion between the defendants on the one hand and the plaintiff's representatives on the other as to what was to be done about the car. They said that the defendant authorised the plaintiffs to go ahead with the work, and promised to take delivery of the car after he came back from his holiday and then to decide whether they should sell it for him ; whereas the defendant said that he only offered to do what he could to help them, and that he suggested their best course was to go on and complete it and sell it on their own account, not on his behalf, but in order to save any loss. The Judge took the view that the defendants' memory about it was probably the more accurate, and I see no reason for taking a different view. This interview was followed on July 16, by a letter from the plaintiffs to the defendant in these terms : In view of your comments during our conversation on this subject last week, we assume that you are prepared to leave the order with Messrs. Jones Bros. Ltd. until your return " from holiday, by which time the car should be ready for delivery. Every effort will be made on our part to expedite delivery, and we feel sure you appreciate our desire to settle this matter amicably. ' The defendant did not reply to that letter, and Mr Sachs says that the proper inference was that he assented to it. Upon this point I would say that in order to constitute a waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the parties. If that cannot properly be inferred, there is no waiver : "

Moreover, the older cases suggest that a waiver if there is any, must be evidenced by writing, otherwise there is a mere forbearance, not affecting the

contract. In none of these cases was the question of estoppel raised. I take the
A view that here there is neither waiver nor estoppel.

That being the case, the defendant's notice of rescission of 30th August, is an effective notice, and the plaintiffs' action therefore fails. It remains to consider whether the plaintiffs can get their money back. There is in my mind no doubt that the sum of $10,400 mentioned in the agreement of 24th July 1969 is in no proper sense a deposit, although it is therein expressed to be such. The
B defendant's case is that this sum of $10,400 had been paid under the previous agreements and the agreement of 24th July was really only a fresh agreement to provide for giving the plaintiffs a final chance to pay. It is thus not what Fry J. in *Howe v. Smith* (1884) 27 Ch.D. 89 referred to as an earnest to bind the bargain, but is a substantial part payment. The earnest to bind the bargain is referred to in the agreement made by Burgess with the defendant on 27th June 1967 as £500 or $1000. The plaintiffs have not in so many words asked
C for repayment of their deposit. What they ask for is a lien on the land for repayment of their money. Morever, the sum of $10,400 was tendered to the plaintiffs as repayment of moneys paid out although it was then refused, I take it that the defendant is still prepared to repay this money. Mr Ramrakha in his final address, indeed said as much, although he suggested that the whole amount should not be repaid. I am, however, entitled to bear in mind that the present value of the land was agreed at $60,000 so the defendant has lost nothing
D through this sale going off.

Indeed he will have made a substantial gain. It is perhaps desirable to mention also that plaintiffs have never been in possession of the property. My attention was directed principally to *Stockloser v. Johnson* [1954] 1 Q.B. 476 : 1 A.E.R. 630. There Somervell L. J. says that it has to be shown that the retention of the instalments would be unconscionable in all the circumstances.
E Here although in the agreement of 24th July 1969 the sum of $10,400 is referred to as deposit, it is in fact instalments, being several payments paid over a period between June 1967 and July 1969. Bearing in mind that the amount already paid by the plaintiffs is $10,400 almost one half of the total purchase price of $21,000 it appears to me quite unconscionable that such a sum should be able to be forfeited to the vendor or retained by him. As Denning L. J. says
F in the same case two things are necessary, first the forfeiture clause must be of a penal nature in the sense that the sum forfeited must be out of all proportion to the damage and secondly it must be unconscionable for the seller to retain the money. *Steedman v. Drinkle* [1916], A.C. 275 was a case from Sasketchawan where the Privy Council thought that the stipulation for forfeiture was a penalty, and relief should be given and the purchaser was left to apply for it. *Kilmer v. British Columbia Orchard Lands Limited* [1913] A.C.
G 319 was a case where the purchaser was given a further opportunity of completing his contract. I do not think that is a proper course to follow here, although the purchasers were ready and willing to complete, owing to the fact that Burgess had so many chances prior to rescission and that the value of the property has so appreciably increased. However, I am of the view that the purchaser is entitled to relief from forfeiture, and I emphasise once again, that as I understand the matter the defendant does not really seek to enforce a
H forfeiture of all the moneys paid. On the plaintiff's claim therefore their applications for specific performance and for an injunction are dismissed but they are entitled to judgment for £10,400 being the return of moneys paid by them. On the defendant's counterclaim there will be a declaration that the agreement dated 24th July 1969 is rescinded, and a declaration that the plaintiffs do not

enjoy any drainage or other casement over the land comprised in Certificate of Title 6842. No evidence was given as to whether any drain was made upon the land and in any event paragraph (d) of the counterclaim is unintelligible and no application was made for amendment. A

I think that the defendant has succeeded substantially and that the matter of return of the deposit was not strongly contested. The defendant will therefore have his costs on the claim, but since the addition of the counterclaim did not in my view increase the costs at all, there will be no costs on the counterclaim. B

Plaintiff's action dismissed; order for return to defendant by plaintiff of all moneys paid.