

MANICKLAL MUKHERJEE
(KALI DURGA ESTATE), CALCUTTA

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v.

COMMISSIONER OF SANCHAITA INVESTMENTS CALCUTTA

OCTOBER 14, 1992

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[S. RANGANATHAN, V. RAMASWAMI AND
YOGESHWAR DAYAL, JJ.]

Contract Act, 1872:

*Agreement to sell—Conditions of sale—Non-performance by buyer—
Held, agreement became unenforceable and stood cancelled.*

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Attachment order deeming property as of buyer—Validity of.

The respondent was appointed by this Court as Commissioner in respect of matters of a firm. He attached the premises in dispute treating it as belonging to the said firm. The Appellants filed an objection claiming ownership of the premises. The objection petition was forwarded to the High Court.

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The appellants contended before the High Court that although under a registered agreement the appellant firm had agreed to sell the premises to the firm in respect of which the respondent was appointed as the Commissioner, yet in view of the default of the buyer firm, the agreement became void and unenforceable.

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The case of the appellants was that under the agreement the buyer was to pay the balance of the sale amount and take possession of the premises within 15 days of receipt of the notice from the vendor in this respect, and if the buyer failed to perform its part, the vendor was entitled to cancel the sale and to refund to the buyer the amount it had paid after forfeiting Rs. 1,50,000 by way of liquidated damages. The appellants by notice dated 13.11.1980 informed the buyer that the premises was ready for delivery of possession and the buyer could take possession thereof on or before 30.11.1980. The buyer failed and neglected to pay the balance amount and to take possession on or before the stipulated date and accordingly the agreement to sell became unenforceable and void and it

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A was also cancelled. The cancellation of sale was further confirmed by a settlement entered into between the parties during the pendency of suit filed by the appellants for the purpose. In pursuance of the settlement the buyer firm not only received back all the money it had paid to the vendor but the latter also paid Rs.50,000 to the former besides forfeiting its claim to Rs.1,50,000 which was agreed to be paid by the buyer to the vendor as unliquidated damages in case the buyer failed to perform its part.

B The High Court rejected the claim of the appellants and confirmed the attachment order. The appellants filed the instant appeal.

C Allowing the appeal, this Court,

D HELD: 1.1. The agreement to sell is not enforceable and had been cancelled. It has come to an end by non-performance of conditions of the sale by the purchaser. [pp. 973-H; 974-A]

E 1.2. Under the terms of agreement if the purchasers failed to take possession within the stipulated period the vendor was entitled to forfeit the security deposit and the agreement itself would stand cancelled. Admittedly the vendor issued the notice dated 13.11.1980 to the buyer that the premises was ready for delivery of possession on or before 30.11.1980. It was not shown that the buyer firm was ready and willing to perform their part and the default, if any, was that of the vendors, or that the purchaser was willing to take possession but it was not handed over.

[p. 972 E-G]

F 1.3. The agreement to sell is dated 21.6.1980; the attachment was effected on 14.4.1987 and the order was to sell the property in public auction as if it had become the property of the buyer firm without any direction to the appellant to execute a sale deed in favour of the respondent. Since the agreement had not fructified into a sale, the buyer could not become the owner of the property. [p. 973 F-G]

G 1.4. The judgment of the High Court is set aside and the attachment made by the respondent on 14.4.1987 is vacated. [p. 974 B-C]

CIVIL APPELLATE JURISDICTION : Civil Appal No. 3459 of 1991.

H From the Judgment and Order dated 7.11 1990 of the Calcutta High

Court in Matter No.6684 of 1988.

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Dr. S. Ghosh, N.C. Mullick, P.K. Mullick and Kailash Vasdev for the Appellants.

Gobind Mukhoty, H.K. Puri and Samir Ghosh for the Respondent.

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The Judgment of the Court was delivered by

V. RAMASWAMI, J. The respondent-Commissioner Sanchaita Investments in exercise of the powers vested in him under orders of this Court attached the entire first floor of premises No.158, Dharamtolla Street, Calcutta along with all appurtenants attached thereto under an order of attachment dated 14th April, 1987. The appellant who claimed to be the owner of the property in possession filed an objection against attachment on 24th April, 1987 before the respondent. The objection petition was forwarded by the respondent to the High Court for adjudication.

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The Appellant-Kali Durga Estate is a partnership firm of which Mr. Manicklal Mukherjee who is representing the same in this appeal in a partner. There is no dispute that the property in dispute belonged to this partnership firm. The case of the appellant was that though under a registered agreement dated 21st June, 1980 the appellant agreed to sell the property to Sanchaita Investments which was a partnership firm having its office at 5-6, Fancy Lane, Calcutta, the same was later on cancelled and the agreement itself has become unenforceable. The respondent- Commissioner has been appointed under the order of this Court as Commissioner in respect of all Sanchaita Investments matters by various orders of this Court and it is in exercise of those powers the Commissioner attached the property now in dispute. The objection to the attachment was heard by a Division Bench of the Calcutta High Court which by its order dated 7.11.1990, dismissed the appellant's plea for raising the attachment, holding that the claim of the appellant that their agreement had been cancelled and no right had accrued to Sanchaita Investments cannot be accepted. The learned Judges further directed the Commissioner to take steps to put up the property for sale by public auction.

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It is seen from the registered agreement to sell executed by the appellant in favour of Sanchaita Investments that the appellant agreed to sell the property for a sum of Rs.16 lacs. On the date of the agreement itself a sum of Rs. 4 lacs was paid by the Sanchaita Investments as earnest

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- A** money and it is not in dispute. Subsequently on various dates the purchaser had paid a further sum of Rs.9 lacs before 21st October, 1980 as provided in the agreement. The balance of consideration was to be paid at the time when the vendor could deliver possession of the entire first floor premises. It appears from the agreement itself that the purchaser had inspected the original documents of title and the satisfied themselves as to the title of the vendor (Appellants). As and when the vendor was in a position to deliver possession, the balance of consideration of Rs.3,00,000 was agreed to be paid and the sale completed. The agreement further provided that the buyer shall pay the balance and take possession of the entire first floor within 15 days to the receipt of the notice received from the vendor that the premises is ready for delivery of possession.

- The agreement further provided that if the buyer failed to pay within 15 days of service of the notice as stated above the sellers shall have a right to refund to the buyer all the payments recieved except a sum of Rs. 1,50,000, and cancel the agreement and forfeit the sum of Rs. 1,50,000 by way of liquidated damages and the buryer shall have no claim over the sellers or in respect of the property. By notice dated 13.11.1980 the appellants informed Sanchaita Investments that the first floor of the premises which they have agree to sell is ready for delivery of possession and that the buyer can take possession of the same on or before 30th November, 1980 on their payment of the full consideration. It is the case of the appellants that the said Sanchaita Investments failed and neglected to pay the balance amount and take possession of the same before 30th November, 1980 and accordingly the agreement to sell had become unenforceable and void and it was also cancelled. In order to avoid any cloud of title the appellants also filed on 28th April, 1981 suit No. 329 of 1981 on the file of the High Court at Calcutta for a declaration that the agreement had became void and unenforceable and also for a praying for cancellation of the same. The Appellant had also filed an application for an injuction restraining the defendent-Sanchaita Investments, their agents, servants and others from in any way dealing with the property or interfering with the rights of the plaintiff-appellants. The records do not show whether any interim order was given but do show that notice was issued in that application to the defendent. It was the further case of the appellant that while the suit was pending the parties entered into a settlement by which the appellant-plaintiff agreed to return the sum of Rs. 13,00,000 received from Sanchiata Investments towards the sale consideration and also an addition-

al sum of Rs. 50,000 and further agreed to give up their right to forfeit a sum of Rs. 1,50,000 on the default of the buyer to perform their part of the contract. In pursuance of this settlement the appellant issued an account payee crossed cheque dated 10.6.1981 for a sum of Rs. 10,00,000 drawn in favour of Sanchaita Investments on State Bank of India as part payment of the refund of earnest money received under the agreement to sell dated 21st June, 1980. Admittedly that cheque was cleared and the amount was paid to Sanchaita Investments. The appellant sent another cheque for Rs. 3,50,000 in favour of Sanchaita Investments in full settlement and payment of the advances received and the additional sum of Rs. 50,000 agreed to be paid under the settlement. The Sanchaita Investments in their letter dated 18th August, 1981 informed the appellants that the cheque for Rs. 3,50,000 drawn in their favour on State Bank of India Jorasanko Branch which was received by them had been misplaced and on that representation the plaintiff informed their bank about the loss of the cheque and not to honour the same if presented and at the request of Sanchaita Investments they paid a sum of Rs. 3,50,000 in cash and obtained acknowledgment of the same and also an undertaking that they shall not present the said cheque in case they trace it for encashment. It is in those circumstances the appellants filed a claim application before the Commissioner claiming that the property is not liable for attachment and for removal of the attachment.

The learned Judges rejected the claim on the following reasoning. There was no need for the claimants to have abdicated their right to recover or forfeit a sum of Rs. 1,50,000 if the purchaser had failed and neglected to take possession in spite of the fact that the vendor was ready and willing to deliver possession of the building in November, 1980 itself. The High Court was also of the view that there was no need for paying the additional sum of Rs. 50,000 to the purchaser which means a total financial loss of Rs. 2,00,000 to the vendors. The materials on record do not show that the vendors had any immediate buyers for purchasing the property. The information about the loss of cheque for Rs. 3,50,000 by the vendor was only on the 18th August, 1981 and even if that story is true another cheque could have been issued instead of paying cash. There was no need for the purchaser to have backed out from the agreement to purchase because the property prices were going up and the vendor would have known that on the date of settlement the property would have fetched much larger money. The endorsement of cancellation in the original agree-

A ment to sell had not been registered. The settlement had also not been recorded in the suit. The learned Judges also observed that "the absurdity in the aforesaid story becomes manifest when another factor namely, existence of a debt of Rs. 21,50,000 payable by the vendor to the Sanchaita Investments is taken into consideration".

B Let us consider the last of the reasonings first. Wherefrom the learned Judges got the information that a debt of Rs. 21,50,000 was payable by the appellants to Sanchaita Investments is not clear from the records available in this case. There is absolutely no evidence to show that the appellants owed any sum of money to Sanchaita Investments at the time
 C when the agreement to sell was executed or at the time when the agreement was cancelled and the settlement was entered into. But it appears from the counter affidavit filed in this Court that a Loan Case No. 184 of 1989 was pending before the Commissioner Sanchaita Investments. It appears that that loan case was disposed of by the Commissioner on 9.11.1991 during the pendency of this appeal and the appellant has also filed that
 D document with an application to receive the same. We have made this order of the Commissioner dated 9.11.1991 as part of the record. In this order the Commissioner has held that there are absolutely no records to show that any amount was due from Kali Durga Estate to Sanchaita Investments and that the said claim of loan of Rs. 21,50,000 had not been
 E proved. So the main basic ground on which the learned Judges seem to have observed as above is no longer in existence.

We are also not satisfied that any of the other reasonings mentioned by the learned Judges anyway go to show that Sanchaita Investments was
 F ready and willing to perform their part of contract and the default if any was that of the vendors. There is no dispute about the notice dated 13.11.1980 which refers to the agreement to sell and states that building was ready for delivery of possession on or before 30th November, 1980. There is nothing on record to show that the purchaser was willing to take
 G possession but it was not handed over. No written statement also appear to have been filed in Suit No. 329 of 1981. Under the terms of agreement if the purchasers failed to take possession within the period mentioned therein the vendor was entitled to forfeit the security deposit and the agreement itself shall stand cancelled. The learned Judges seem to be of the view that since the property prices were going up there was no need
 H for the buyer to have agreed for the settlement and that there is a doubt

about the settlement itself. The very reason that the property prices were increasing might have induced the vendor to condone the failure of the purchaser to comply with the terms and conditions and be willing to forgo his right to forfeit Rs. 1,50,000 and pay also an additional sum of Rs. 50,000. The purchaser got back the entire advances paid by him and in additional another sum of Rs. 50,000. There is nothing illogical in this attitude of both the vendor and the purchaser settling the matter. The learned Judges have proceeded on surmises and suspicion. The cheque for Rs. 10,00,000 issued on 10th June, 1980 refunding part of the advance of Rs. 13,00,000 received is admitted. The State Bank has given a letter that the cheque was realised by Sanchaita Investments. In fact the learned Judges have not stated that the said Rs. 10,00,000 was not received by the buyer Sanchaita Investments. That itself would go a long way to show that there should have been a settlement. The letter dated 18th August, 1981 sent by the said Sanchaita Investments also clearly acknowledges the receipt of the cheque for Rs. 3,50,000 but states that the cheque had been misplaced and it was on that representation and at the request of Sanchaita Investments that a cash payment of Rs. 3,50,000 was made and Sanchaita Investments also undertook not to present the cheque for payment in case they trace it later on. The learned Judges while confirming the attachment, ordered the sale of the property by public auction and directed that out of the sale proceeds to be realised a sum of Rs. 3,50,000 is to be paid to the objector appellants but they have not given any direction as to the amount of Rs. 10,00,000 refunded to them though there could not be any dispute about the payment and receipt of at least Rs. 10,00,000. A cheque for Rs. 10,00,000 was received by Sanchaita Investments and the amount was also credited to them. It is also not clear as to what this sum of Rs. 3,50,000 referred to in the order represents. If the case of the appellants had not been believed only a sum of Rs. 3,00,000 was remaining unpaid. It may also be mentioned that the agreement to sell is dated 21.6.1980; the attachment was effected on 14.4.1987 and the order was to sell the property in public auction as if it had become the property of Sanchaita Investments without any direction to the appellants to execute a sale deed in favour of the respondent. If the agreement had not fructified into a sale on what basis Sanchaita Investments would have become the owner of the property is not made clear in the judgment. These points, however, lose their importance in view of the fact that we are allowing the appeal on the ground that the agreement to sell is not enforceable and had been cancelled. Even the FIR

- A** under the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 was filed only on the 13th of December, 1980 but even before that date the agreement had come to an end by non-performance of conditions of sale by the purchaser as seen from the letter/notice dated 13.11.1980 which gave time for completion by the 30th of November, 1980. This Act itself came into force only on 13th December, 1980.
- B**

In the circumstances we have no doubt that the judgment under appeal is liable to be set aside and accordingly we set aside the same. The appeal is allowed. The attachment made by the Commissioner Sanchaita Investments on 14.4.1987 is vacated. However there will be no order as to costs.

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R.P.

Appeal allowed.