JIGRY AUTO WORKS LTD AND M. H. PATEL (1993) S.J. 65 (H.C.)

HIGH COURT
KABAMBA, C.B.N., J.
19TH FEBRUARY, 1993
1989/HB/129

Flynote
Company Law - Acting Through its Officers.
Contract Law - Specific Performance - Damages in Lieu of Specific Performance.

Headnote
The Plaintiff Company rented a house from the defendant. Some time later, the parties agreed that the Plaintiff Company should buy the said house from the defendant. However, when the managing director of the plaintiff Company signed the Contract of Sale in his personal capacity, the defendant increased the purchase price. The Plaintiff Company sued the defendant.

Held:
(i) A Company, though a body corporate and a personality, can only do things through its officers as its organs.
(ii) A court will not grant a decree for specific performance of a contract if the party seeking the decree can obtain a sufficient remedy by a judgment for damages and such a decree will not be made when it would be impracticable to secure compliance to it.

Cases referred to:
1. Salomon, Saomon & Co. (1897) A.C. 22 HL
2. Dunlop v Selfridge (1915) A.C. S. 47)
3. BOLTON (ENGINEERING) CO. v Graham & Sons (1957) 10.B. 159, C.A
4. Mobil Oil (Z) Ltd v Loto Petroleum Distrisbutors Ltd. (1977) Z.R. 336,
5. Denny v Hancock (1870) L. R. 6 ch. App 1.

For the Plaintiff: Mr. B.K. Chishimba of Messrs Chishimba and Co.
For the Defendant: Mr. M. K. Maketo of Christopher, Russel Cook and Co.

Reserved Judgment
KABAMBA, J.:

The Plaintiff's claim is for specific performance of an agreement made between them and the Defendant for the sale of the Defendant's residential premises stand No. 1509 in Kabwe. In the alternative, they claim for damages in lieu of the said specific performance.

The Plaintiff bears the burden to prove the case on the balance of probability. Thereafter the burden shifts to the Defendant of adducing evidence. Mr. B.R. Bhana deposed on behalf of the Plaintiff Company that he was the Managing Director and shareholder of the Plaintiff Company. And in 1987, the Company occupied the house in question as tenants to the Defendant. In April, 1988 the Defendant approached them and he told them his intention to sell the house since he was staying in Britain. They accepted the offer to buy the house and on 20th April, a written memorandum of contract was made. The terms were, among others, to pay in Foreign Exchange (British sterling) with Kwacha cover. At the same meeting, the rent of the residential house was raised from K600 to K1,200. They agreed that the legal charges were to be paid by the Plaintiff Company. When the contract was drawn up the Defendant signed it and he signed it on behalf of the Company because the discussion was that the Company should buy, but when he signed as Mr. Bhana buying the premises, the Defendant asked 6,800 Pounds in U.K sterling as payment. Both parties engaged the services of Advocates.

During the same period they engaged valuers who stated that the value of the premises was 298,000. Valuation was done by S.P. Mulenga & Associates. After discussion they arrived at the price of K150,000 which was close to 6,800 pounds. On 16th November, 1988, their lawyers, wrote to defendant asking him to engage lawyers of his on choice. Again on 7th December, 1988, their lawyers wrote to defendant reminding him about the letter of 16th November. On 12th January, 1989, Defendant Lawyers wrote to them confirming that they had been instructed by the Defendant. Later the state consent was obtained by the Defendant's Lawyers. After this they were asked to pay through their Lawyers in instalments of 120,000=00 the purchase money. They in turn asked the Defendant to prepare foreign exchange documents. This was sent to them through their Lawyers on 6th June, 1989. According to Formal Contract the purchase price was K120,000=00 and the seller was Mr. M. H. Patel and the purchaser was Jigry Auto Works Limited. Mr Bhana signed the Contract on behalf of the Plaintiff Company, and sent it back to the Defendant. He made available the purchase price to the Defendant but there was no response from the Vendor's side. Later the Vendor (Defendant) repeated that he wanted the money to be remitted in foreign currency. He applied for forex but the Bank of Zambia requested for the necessary documents to be supplied. So the Company asked the Defendant to supply those documents to be supplied. So the Company asked the Defendant wrote to them that he was leaving the country but he was going to look into the matter but the Defendant did not do as he promised and the matter came to stand still hence the Plaintiff Company decided to bring the matter to court for finality.

In cross-examination he said that the Parties were those who appended signatures to the agreement, but there was nowhere in the agreement where it is written "Jigry Auto Works Limited". That he did not indicate that he was signing on behalf of the Company. He conceded that looking at the document the Plaintiff Company was not a party but he and the Defendant. That according to the agreement they were supposed to pay Defendant 6,800 Pounds. That the contract was not exchanged as the contract of sale was returned to Vendor. But in re-examination he said that when the agreement document was drawn it was clearly said that the Company was buying the property.

The learned defence Counsel Mr. M. K Maketo did not call any witness to give paroi evidence but he relied on the documents. I think the documents the defence Counsel is relying on are those contained in the Defendant's Bundle of Documents, and the amended defence and the counter-claim appended to the amended defence. I will also consider his submissions in relation to the aforesaid documents and amended defence.

The learned Counsel for the Defendant Mr. Maketo in his submissions, at the outset poses pertinent questions as to whether there was a binding contract between the Plaintiff and Defendant in respect of the subject property, and if such exists whether it has been breach and above all whether it can be specifically performed. In support of his case he submitted that the Plaintiff's credibility as to his claim was highly suspect because even a cursory look at the alleged agreement does not mention the Plaintiff at all. The agreement was between Mr. M.H. Patel (Defendant) and Mr B. R. Bhana (PW 1) he said.. He said that the Plaintiff is a Limited liability Company with a distinct corporate personality. In this respect he cited the leading case of *Salomon v Salomon & Co.* (1897) A.C. 22 HL.(1) He also referred the court to S. 34 of the Companies Act Cap. 686 as to Company being a personality distinct from the subscribers and its officers. From those authorities he stressed and it was a cardinal principle of common law that no person can sue or be sued on contract unless he is a party to it. (Per Lord Haldone in *Dunlop v Selfridge* (1915) A.C s. 47). (2) According the Plaintiff was a stranger to the agreement of 26th April, 1988 and can not sue upon it.

On this issue Mr. Chishimba for the Plaintiff submits that all the documents especially Nos. 6 and 7 of the Plaintiff's bundle of documents referred to the parties to the sale as Defendant to Plaintiff. If there was any doubt as to the Parties the Defendants advocates would not/have applied for state consent to sell by the Defendant to the Plaintiff. And clearly Document No. 7 betrayed the Defendant's argument, he contended.

Now on perusal of the bundle of documents of the Defendant it seems clear that the agreement does not mention that the purchaser was the Plaintiff Company but it was between Mr. Patel ad the landlord and Mr. Bhana as the purchaser. However, the subsequent documents from both sides refer to the Plaintiff Company as the Purchaser. Document 8 in Defendant's bundle which was an application for state consent from the Defendant's Lawyers referred to the Defendant as Vendor and Plaintiff as purchaser. Documents 9, 11,12,18,19 and 20 all from the Defendant's Lawyers and purportedly signed by the Defendant confirm the fact that the Defendant was dealing directly with the Plaintiff Company. And indeed these support the parol evidence of PW 1 that from the outset it was the intention of the parties that the purchaser of the Defendant's property was the Plaintiff Company, and that indeed Mr. Bhana as the Managing Director was acting as an agent of the Company. It is a well known factor that a Company though a body corporate and a personality can only do things through

its officers as its organs. The organic theory is a well known theory to any Company law student and Lawyer. In the case of *Bolton (Engineering) Co. v Graham & Sons* (1957) 10.B 159, C.A (3) where the question was whether a Company could be said to intend to occupy certain premises for its own business, lord Haldane said and I quote relevant portion:

> "……. Some of the people in the Company are mere servants and agents who are nothing more than hands to do the work and can not be said to represent the directing mind and will of the Company and control what it does. The state of mind of these Managers is the state of mind of the Company and treated as such…"

Thus although a Company is separate personality it acts through its Directors and Managers. And in the present case PW 1 was its Managing Director and had authority to negotiate on behalf of the Company as it is manifested from the correspondence from both parties and hence the Defendant is estopped from denying that he was dealing directly with the Plaintiff Company. And the Court is quite satisfied on this issue, and I totally agree with the submissions advanced by the Learned Counsel for the Plaintiff Mr. Chishimba. In contrast the case of *Salomon* and S. 34 of Cap. 686 are totally inapplicable here.

As to the alleged vagueness, I do not agree with Mr. Maketo that the agreement was vague and could not be enforced. The fact that the price was not stated in the original agreement does not *per se* make it vague and consequently unenforceable. It is abundantly clear that in the latter correspondence the price was ascertained and the price money of the equivalent of 6,800 Pounds had to be paid in foreign currency i.e in British pounds sterling. There was correspondence to that effect that the Plaintiff even applied to his bank for forex who requested the Plaintiff to get some information from the Defendant which information Defendant failed to give (see Document No. 14 of Plaintiff's Bundle). Nonetheless at a later stage Mr. Maketo concedes that from documents 6-14 of Plaintiff's bundle of documents and in that of Defendant, there was clear evidence that the Defendant intended to sell the subject property to the Plaintiff although he said that these were preliminary negotiations and that matters made in anticipation of a contract later to be drawn up and executed by the parties at a later stage can not bind the parties. That when the contract was drawn up they did not sign it to signify his intention to be bound. Therefore the draft agreement is not binding on the Defendant it was just an agreement to agree and have no legal force. In this regard he quotes Cheshire and Fifoot 6th Edition at page 33 which I have noted.

In the present case it is evident that the parties had gone beyond mere negotiations. There is evidence that after the written memorandum of 26/4/88, the matter was referred to the parties respective lawyers who dealt with it at length and the Defendant's Lawyers even obtained the state consent which was granted. The formal contract of sale was drawn up and signed by the Plaintiff but Defendant failed to sign it hence the subsequent failure to exchange the contract. The Defendant failed also to supply the information to plaintiff to externalise the purchase price in forex. These failures were unexplained by the Defendant.

No reasons were given by the Defendant, why he failed to perform his part but at the last minute he simply terminated the arrangement. In fact that has been the gist of the cause of this equitable but discretionary relief of the specific performance.

Consequently I turn to consider whether this relief is attainable in this present case. I wish to consider a few cases here.

In *Mobil Oil (Z) Ltd v Loto Petroleum Distributors Ltd* (1977) Z.R. 336 (4) It was held among other things that a Court will not grant a decree for specific performance of a Contract if the party seeking the decree can obtain a sufficient remedy by a Judgment for damages and such a decree will not be made when it would be unpracticable to secure compliance to it."

There are numerous cases concerning the principles according to which specific performance is granted or refused. I have decided to look at most relevant two old cases from the case Book on contract by J. C.S and J.A.C.T: In *Tamplin v James* (1880) 15 CH.D. 215 (at p. 5. Of the book) . The property was put on the sale giving description of the extent of the premises. But the Defendant believed that certain adjoining portions were part of the premises and refused to sign the contract. The Vendors brought an action for specific performance. The court gave Judgment for the Plaintiff, the Vendors said there was no fraud; ambiguity or misrepresentation. Baggallay L.J. made the following observation (relevant portion only) "…. If that were to be allowed a person might always escape from completing a contrast by swearing that he was mistaken as to what he bought and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by MANSER B. BACK (6 Hara 443) and the other cases in which the

Defendant has escaped from performance."

A foot note by the author of this book is more interesting. The remedy for breach of contract provided by common law is an award of monetary compensation (damages) for the loss which the Plaintiff has suffered as a result of the breach. Where, however, damages are not an adequate remedy equity will go further and will compel the Defendant actually to perform his contract by a decree of specific performance, such orders are most commonly made in the case of contracts for the sale of land…. and courts of equity therefore consider that damages are not an adequate remedy for failure to convey the land agreed upon".

The same or similar observation is made by CHESHIRE and FIFOOT on law of Contract (see 7th Edition P. 565 -566). I accept this observation and should be the position in the present matter regard having been had to the suspicious conduct of the Defendant.

In *Denny v Hancook* (1870) L.R. 6 ch. App 1. (5) on a sale of a small residential property, the Defendant went with the plan in his hand, inspected the property and then bid for the property. As in the other case he discovered that three trees and the iron fence stood on the adjoining property. It was admitted that the existence of these trees was a material declined to element in the value of the property as a residence. The Defendant declined to complete and Malins V. C made a decree of specific performance against him. In this case my main interest is the completion of the contract which in our case is made a shield that because by refusing to sign formal contract which failure caused the contact not to be exchanged there was no contract. In a society that is getting sophisticated and where there is acute shortage of accommodation if this defence is allowed, this would mean that the courts will unwittingly be encouraging fraud as we have seen in the case of Tamplins above as to his lordship's observations.

On the totality of evidence I have come to one and only one conclusion that this is the proper case in which to grant equitable remedy of specific performance. And I decree that the Defendant do perform his part by completing the contract to its logical conclusion. Accordingly I enter Judgment in favour of the Plaintiff for specific performance with costs to the Plaintiff.

In the matter of the counter-claim, apart from stating it in the amended defence, it has not been prosecuted by the defence. There is no mention of it in cross -examination or PW 1. Neither was it advanced in the submissions of the learned defence counsel. Therefore it is dismissed with costs to the Plaintiff.

Judgment for plaintiff

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