

GOVIND PRASAD CHATURVEDI

v.

HARI DUTT SHASTRI AND ANOTHER

January 28, 1977

[A. N. RAY, C. J., M. H. BEG AND P. S. KAILASAM, JJ.]

Contract Act—contract relating to sale of immovable property —What is the normal presumption regarding stipulation of time—Whether presumption is displaceable—Whether the question of time being the essence of a contract can be raised before the High Court for the first time in appeal.

The appellants entered into an agreement with the respondents on March 24, 1964, for purchasing the suit property belonging to the latter. The terms of the agreement provided that the appellant would get the sale deed executed upto May 24, 1964, and in case of his failure to do so, the earnest money paid by him to the respondent would stand forfeited. The sale deed was not executed within the prescribed time, and the appellant filed a suit against the respondents for breach of contract. The trial court granted him the relief of specific performance of the contract. The respondents succeeded in an appeal before the High Court on the ground that time was of the essence of the contract and therefore the relief of specific performance could not be granted, and also that the appellant had not been ready to perform his part of the contract.

Allowing the appeal by certificate, the Court,

HELD : (1) Fixation of the period within which the contract has to be performed does not make the stipulation as to time, the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence may be evidenced by circumstances which are sufficiently strong to displace the normal presumption. [881 A-C]

Gomathinarayana Pillai & Ors. v. Palaniswamy Nadar [1967] 1 SCR 227, 233, applied.

(2) In the absence of specific pleadings or issues raised before the trial court, the question whether the time is of the essence of the contract or not, cannot be raised before the High Court in appeal. [882 B-C]

(3) A careful consideration of the evidence and the correspondence between the parties shows that the appellant was always ready to perform his part of the contract and that the respondents were evading their responsibilities.

[885 F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 696 of 1971.

Appeal from the Judgment and Decree dated the 20-4-1970 of the Allahabad High Court in First Appeal No. 15 of 1966.

A. K. Sen, S. T. Desai and P. P. Juneja for the Appellant.

S. V. Gupte and M. V. Goswami for Respondents.

The Judgment of the Court was delivered by

KAILASAM, J. This appeal is filed by the plaintiff against the judgment of the Allahabad High Court on a certificate dismissing the suit for specific performance of a contract of sale dated 24th March, 1964.

A The facts of the case are briefly as follows :—

The suit property was owned by one Shri Aditya Narain and the plaintiff/appellant became a tenant of the suit property under Aditya Narain in the year 1942. On 2nd January, 1961 the respondents, the two defendants in the suit purchased the suit property for Rs. 19,000 from Aditya Narain and the appellant became tenant of the respondents. Soon after the purchase of the property by the respondents they sought to evict the appellant by filing a petition under section 3 of the U.P. Rent and Eviction Act. The appellant resisted and the Rent Control and Eviction Officer rejected the petition holding that the respondents' requirement of the premises was not genuine. On the mediation of Sri Chand Doneria the parties entered into the suit agreement on 24th March, 1964. In pursuance of the agreement the appellant handed over Rs. 4,000 as earnest money to the respondents. The terms of the agreement will be set out in due course but suffice it at this stage to state that it provided that the appellant should get the sale deed executed within two months i.e. upto 24th May, 1964 and in case the appellant did not get the sale registered within two months the earnest money of Rs. 4,000 shall stand forfeited. From the 5th May, 1964 letters and telegrams were exchanged between the parties but the sale deed was not executed on or before the 24th or on the 25th May as the parties had agreed. The appellant filed a suit, Civil Suit No. 122 of 1964, in the court of Civil Judge, Agra, on 2nd September, 1964 alleging that the appellant has always been ready and willing to perform his part of the contract and he did all that he was bound to do under the agreement but the respondents failed to execute the sale deed as agreed and therefore committed breach of the contract. The plaintiff prayed for a decree of specific performance of the contract of sale dated 24th March, 1964 against the respondents and for direction to the respondents to execute the sale deed of the property and get it registered and in default the sale deed may be executed by the court according to law. The respondents filed a written statement denying the various allegations made in the plaint and pleaded that the appellant did not perform his part of the contract within the stipulated time and the contract thereafter did not subsist and therefore the suit was misconceived. On these pleadings the trial court framed five issues of which it is relevant to note only two which are issues 1 and 3. They are as under :—

G Issue No. 3. "Whether the contract did not subsist on the date the appellant performed his part of the contract as alleged in the plaint?"

Issue No. 3. "Whether the contract did not subsist on the date the suit was filed?"

H The trial court found that it was proved beyond a shadow of any doubt that the appellant was always ready and willing to perform his part of the contract and the respondents were not at all anxious to execute the sale deed in his favour and that the respondents were guilty of breach of contract. On issue No. 3 it found that even though the time for getting the sale deed executed expired after the 24th May, 1964 the

appellant would not be disentitled to the relief of specific performance of the contract for sale on the ground of delay as the respondents themselves were responsible for it. The respondents preferred an appeal to the Allahabad High Court and a Bench of the court on the arguments set out two points for determination in the appeal. They are : (1) whether the appellant or the respondents committed the breach of contract entered into between the parties on 24th March, 1964; and (2) whether the time was of the essence of the contract. If not, its effect. The High Court found that the respondents were always ready and willing to perform their part of the contract in terms of the agreement dated 24th March, 1964 and it was the appellant who committed the breach of the contract by not getting the sale deed executed by 25th May, 1964 in terms of the agreement dated 24th March, 1964. The High Court on the issue as to whether time was of the essence of the contract held that in the circumstances of the case and in view of the conduct of the parties of serving on each other notices, counter notices and telegrams they expressed their intention to treat time as of the essence of the contract and that once the time is held to be the essence of the contract the appellant's suit for specific performance must fail. The High Court also held that even if time is not held to be of the essence of the contract it was of the opinion that the appellant is not entitled to a decree for specific performance as he had failed to prove that he was ready to perform his part of the contract.

The appellant applied for a certificate and the High Court by its order dated 22nd February, 1971 granted the certificate under clause (a) of Article 133(1) of the Constitution.

In this appeal before us the learned counsel for the appellant submitted that the High Court was in error in holding that the time was of the essence of the contract and that the High Court's finding that the appellant was not ready and willing to perform his part of the contract while the respondents were always ready to perform their part of the contract is opposed to oral and documentary evidence and the probabilities of the case.

The first question that arises for consideration is whether time is of the essence of the contract. In order to determine this question it is necessary to set out the suit agreement which is marked as Ex. 23 at page 137 of the papers. It runs as follows :—

“Dear Pandit Govind Prasad Ji Chaturvedi,

Sir,

A litigation has been going on between you and us with respect to the Kothi of Bima Nagar, of which you are a tenant on behalf of us. The said dispute has been decided today through the mediation of Sri Shri Chand Doneriya, on the terms and conditions given below which shall be fully binding on you as well as us.

1. That you are agreeable to purchase our Kothi of which you are a tenant and a transaction between you and

A us has been finally settled today; at Rs. 24,000 (rupees twenty-four thousand), with respect to the said Kothi.

2. That you are paying us, at present, a sum of Rs. 4000 in cash, as earnest money, the receipt whereof has been acknowledged by us by affixing a revenue stamp at the foot of this letter, and that the remaining sum of Rs. 20,000 shall be paid by you to us at the time of registration.

B 3. That the expenses relating registration and cost of stamps etc. shall be borne by you and we shall be entitled to get a sum of Rs. 24,000 (rupees twenty-four thousand) net.

C 4. That you must get the sale deed executed within two months *i.e.* upto 24th May, 1964, and in case you do not get the sale-deed registered within two months then the earnest money amounting to rupees four thousand, paid by you shall stand forfeited without serving any notice. But in case we in some way evade the execution of the sale-deed, then you will be entitled to compel us to execute the sale deed legally and we shall be liable to pay the costs and damages incurred by you.

D 5. That we shall furnish you a guarantee of good title in respect of the property which is free and immune from all sorts of disputes.

E 6. That you shall be liable to pay the rent till the date you get the sale-deed registered and you shall clear off all amount due to us before registration.

7. That both the parties shall withdraw their respective cases or get the same dismissed and shall bear their own costs.

F 8. That neither party shall take any fresh legal steps during this period of two months by which any hindrance may be caused in execution of our sale deed.

In confirmation of the agreement which has been made between you and me through this letter, you too have affixed your signature on this letter.

Yours,

G Signature of Hari Dutt Shastri

24-3-1964

Signature of Bhavbhooti Sharma

24-3-1964

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H The relevant clause is clause 4 which provides that the appellant must get the sale deed executed within two months *i.e.* upto 24th May, 1964, and in case the appellant did not get the sale deed registered within

two months then the earnest money amounting to Rs. 4000 paid by the appellant shall stand forfeited without serving any notice. The clause further provides that in case the respondents in some way evade the execution of the sale deed then the appellant will be entitled to compel them to execute the sale deed legally and the respondents shall be liable to pay the costs and damages incurred by the appellant. It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. (*vide Gomathinayagam Pillai & Ors. v. Palaniswami Nadar*)⁽¹⁾. It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract. In the plaint the allegation was that the appellant has always been ready and willing to perform his part of the contract and he did all that he was bound to do under the agreement while the respondents committed breach of the contract. The respondents did not set up the plea that the time was of the essence of the contract. In paragraph 32 of the Written Statement all that was stated was that the appellant did not perform his part of the contract within the stipulated time and that the contract thereafter did not subsist and the suit is consequently misconceived. The parties did not go to trial on the basis that time was of the essence of the contract for no issue was framed regarding time being the essence of the contract. Neither is there any discussion in the judgment of the trial court regarding this point. The trial court after considering the evidence came to the conclusion that appellant was always ready and willing to perform his part of the contract while the respondents were not in the circumstances therefore the High Court was in error setting as one of the points for determination whether time was of the essence of the contract. The High Court after referring to the agreement was of the view that the agreement was entered into between the parties during the course of a litigation between the appellant and the respondents and in pursuance of the agreement the parties were directed to withdraw their cases and were directed further not to take fresh legal steps during the period of two months within which the sale deed was to be executed. On taking

(1) [1967] 1 S.C. R. 227, 233.

- A into account the circumstances of the case and the conduct of the parties of serving on each other notices, counter notices and telegrams the High Court inferred an intention on the part of the parties to treat the time as of essence of the contract. We will refer to the terms of the contract and the correspondence between the parties in due course but at this stage it is sufficient to state that neither the terms of the agreement nor the correspondence would indicate that
- B the parties treated time as of essence of the contract. In fact, according to the agreement the sale deed ought to have been executed by the 24th May but it is the admitted case that both the parties consented to have the document registered on the 25th May. On the question whether the time is of the essence of the contract or not we are satisfied that the High Court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raised before the trial court and when the case of time being the essence of the contract was not put forward by the respondents in the trial court.
- C Apart from the absence of pleadings we do not find any basis for the plea of the respondents that the time was of the essence of the contract.

- D The decision on this issue would be sufficient to allow this appeal and to grant the appellant the decree for specific performance which he has prayed for but as on the question whether the appellant was always ready and willing to perform his part of the contract the courts below have given contrary finding and the High Court has recorded a finding that the appellant was not ready and willing to perform his part of the contract while the respondents were always ready and willing with which finding we are unable to agree we will discuss the evidence at some length.
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- The background to the suit agreement dated 24th March, 1964 is that there was litigation between the parties. The appellant was a tenant under the previous owner, Aditya Narain, from 1942. The respondents purchased the property in 1961 and in 1963 filed a petition to evict the appellant. That petition was resisted and the Rent Control and Eviction Officer dismissed the petition of the respondents. While the matters stood thus the compromise was entered into. The appellant having been a tenant of the premises from 1942 would have been naturally anxious to continue in possession while the respondents who had purchased the property in 1961 were anxious to get into possession. As they wanted to settle their dispute the respondents agreed to sell the property for which the appellant was willing and which they had purchased on 2-1-1961 for Rs. 19,000 to the appellant for Rs. 24,000. Of this Rs. 24,000 the tenant paid Rs. 4000 in cash as earnest money. This would indicate that the tenant was keen on purchasing the property in which he was living since 1942. The agreement provided that the appellant must get the sale deed executed within two months after 24th March, 1964 and if the appellant failed to get the sale deed registered within two months the earnest money of Rs. 4000 shall stand forfeited. Normally one would not expect the appellant to forfeit his earnest money. As the period stipulated was 24th May, 1964 the appellant started prepara-
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tions for getting the sale deed executed. According to the appellant he wrote Ex. 24 on 5th May, 1964 calling upon the respondents to come to Agra on the 18th May, 1964 for executing and making registration in pursuance of the contract and to complete the sale deed. According to the appellant no reply was received to this letter and he sent a notice through his advocate, Ex. 35, on 13th May, 1964 in which he stated that he was ready to pay the balance of the consideration of Rs. 24,000 along with the entire arrears of rent and requested the respondents to execute the sale deed by 18th May and latest by 24th May, 1964. The lawyer's notice also referred to the letter of the 5th May. Another lawyer's notice was sent, Ex. 36, on 20th May, 1964 by registered post complaining that the respondents had not replied to his letter dated 5th May, 1964 and to his lawyer's notice dated 13th May, 1964 and called upon them to get the sale deed registered by 25th May, 1964 as 24th May is Sunday. Along with the lawyer's notice a draft sale deed was endorsed. These three letters were followed by telegrams which were sent by the appellant to both the respondents on 20th May, 1964, Ex. 30. On the 22nd May the appellant attended the office of the Sub-Registrar, Agra and presented an application to the Registrar to the effect that he was at the Registrar's office between the hours 3 and 4 p.m. on that day. On 22nd May, 1964 the appellant received a reply from the respondents acknowledging the registered notices given on 13th and 20th May by the appellant's counsel. According to the reply by the advocate on behalf of the respondents the two letters of the 13th and 20th May were received by the respondents only on the 22nd May, 1964. In this reply of 22nd May, 1964 the advocate of the respondents denied the allegation in the notice dated 20th May, 1964 of the appellant that the draft sale deed has been put in the cover. It also complained that the draft sale deed has not been sent. The respondents stated that they were ready to execute the sale deed but the appellant was wanting postponement for reasons best known to him. It may be noted that the two complaints that are made in the advocate's notice on behalf of the respondents do not bear scrutiny. The notice complains that the draft sale deed has not been enclosed. It has been proved that in one of the notices sent to the son and which was opened in the court the draft sale deed was found enclosed. Further without the cooperation of the respondents it is difficult to prepare a draft sale deed as the date of sale by Aditya Narain in favour of the respondents would not have been available to the appellant. In fact Mr. Gupte the learned counsel for the respondents submitted that the letter stating that a copy of the draft sale deed was enclosed cannot be true as the appellant could not have got particulars about the earlier document of title of the respondents. The respondents' plea that the draft sale deed was not received does not show that they were willing or cooperating in the execution of the sale deed. We are unable to give any weight to the contention of the learned counsel that their plea that they sent a draft sale deed cannot be true as they could not have been in possession of particulars about the title deed of the respondents. In fact no question was asked of the appellant when he was in the box as to how they got information as to the sale deed by Aditya Narain in favour of the respondents. The letter of the

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A 5th May the receipt of which was not denied by the reply of the advocate for the respondents and the lawyer's notices on behalf of the appellant, Ex. P-35 and P-36, dated 13th May and 22nd May, 1964 would show great anxiety on the part of the appellant to complete the sale deed. There can be no doubt that they had basis for suspecting that the respondents were not willing to perform their part of the contract.

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A considerable volume of evidence has been let in on behalf of the appellant as well as the respondents regarding as to what took place in the Sub-Registrar's office on 25th May, 1964. It is sufficient to state that both the parties let in oral evidence as well as acknowledgment by the Sub-Registrar to prove their presence. Though both the parties would assert their presence it is common ground that they did not meet each other. It is difficult for us to comprehend as to how if both the parties were present at the Sub-Registrar's office they did not meet each other. It is obvious therefore that the parties were keen on creating evidence in support of the ensuing litigation. But on the facts the conclusion is irresistible that it was the appellant who was anxious to get through the sale deed, he having paid Rs. 4000 as the earnest money and living in the premises for over 25 years. It is not necessary for us to refer to the subsequent letters and telegrams exchanged between the parties as that would not alter the position in any event.

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On a consideration of the letters and telegrams that passed between the parties the trial court held that it was proved beyond a shadow of doubt that the appellant was always ready and willing to perform his part of the contract and that the respondents were not anxious to execute the sale deed. The trial court accepted the evidence on behalf of the appellant that the appellant was possessed of sufficient funds and in fact he withdrew a sum of Rs. 20,500 from the Central Bank of India Ltd. As the appellant had paid the respondents Rs. 4000 he had to pay them only Rs. 20,000 towards the balance of sale consideration. The arrears of Rs. 956 due towards rent and a sum of Rs. 2000 was to be spent on getting the sale deed executed. In all a sum of Rs. 22,956 was required. He had withdrawn Rs. 20,500 from the Central Bank of India Ltd. The trial court accepted the evidence adduced by the appellant. The trial court also accepted the evidence that the appellant had Rs. 5,000 with him at home and about Rs. 30,000 in deposit with a firm. This part of the testimony on behalf of the appellant was proved by the evidence of Kailash Nath, P.W.2, Munim of M/s. Chhitar Mal Ram Dayal and the trial court accepted the evidence and found that the appellant had sufficient funds for getting the sale deed executed.

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This conclusion which we consider is irresistible was not accepted by the High Court. The High Court while accepting the evidence that the appellant had a sum of Rs. 4,500 in deposit in the bank upto 20th May, 1964 and subsequently on 21st May, 1964 he deposited a sum of Rs. 14,000 and again a sum of Rs. 2,500 on 22nd May,

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1964 and that thus the appellant had Rs 21,000 in bank on 22nd May, 1964 found the case of the appellant unworthy of credit. The High Court further observed that after the appellant had raised his deposit in the bank to Rs. 21,000 he did not deposit any further amount and therefore the amount fell short of the needed amount by Rs. 2,000. Conscious of the weakness in his story, the appellant asserted in his statement that he had Rs. 7,000 or 8,000 with him at his house. We are at a loss to follow the reasoning of the High Court. The appellant stated that he deposited the money which was with him in the house in the bank on advice for the purpose of proving that he had money with him. The Court does not suspect that he did not have Rs. 20,500. The shortage at the most is of Rs 2,000 and it cannot be said that the evidence of the appellant that he had necessary money for expenses of registration is unacceptable. Further the appellant examined Kailash Nath, P.W.2, of M/s. Chhitar Mal Ram Dayal who stated that a sum of Rs. 30,000 belonging to the appellant was lying in deposit with them. We are unable to accept the conclusion of the High Court that the appellant did not have enough funds for getting the sale deed executed the High Court while not disbelieving the fact that various letters and telegrams were sent by the appellant has remarked that the appellant did not take the course of personally going to the respondents and asking for the sale deed. In our view, the parties were suspecting each other and nothing would have been achieved by the appellant by going in person and requesting the respondents to execute the sale deed. In fact the respondents set up a story that the appellant approached the respondents and stated that he was not able to perform his part of the contract within the stipulated time. This evidence cannot be accepted taking into account the relationship between the parties. We have carefully considered the evidence and the correspondence between the parties and we have no hesitation in accepting the conclusion reached by the trial Judge that the appellant was always ready and willing to perform his part of the contract and that the respondents were evading their responsibility. The finding on this issue by the High Court is not supported by evidence or on the probabilities of the case.

In the result we allow the appeal on the ground that the respondents have failed to establish that the time is of the essence of the contract and that the appellant has succeeded in establishing that he was always ready and willing to perform his part of the contract and the respondents evaded their responsibility. The judgment of the High Court is set aside and that of the trial court is restored. The appeal is allowed with costs. The appellant will deposit Rs. 20,000/- and the sale documents in the court of the Civil Judge, Agra within six weeks from today and the parties will take further direction in the matter from the Civil Judge, Agra.