Swarnam Ramachandran

v.

Aravacode Chakungal Jayapalan

(Supreme Court Of India)

ASHOK BHAN and S.H. KAPADIA,JJ.,

Civil Appeal No. 4527 Of 2000 | 25-08-2004

Kapadia, J.

1. Being aggrieved by the suit for specific performance being decreed, the defendants-vendors have filed this appeal by special leave against judgment and order passed by the Division Bench of the Bombay High Court dated 17.6.2000 in Appeal No.813 of 1994 confirming the judgment of the learned Single Judge dated 3.10.1994.

2. The facts giving rise to this civil appeal, briefly, are as follows:

By an agreement for sale dated 18.2.1981 entered into between appellants as vendors and respondent as purchaser, the appellants agreed to sell all that piece or parcel of land admeasuring 481.25 square metres bearing plot no.423-C out of the larger piece of land bearing City Survey No.1285 (Part) of Suburban Scheme-III of Chembur with bungalow bearing Municipal No.1137 (2) standing thereon. (hereinafter for the sake of brevity referred to as "the suit property") for lump sum consideration of Rs.10,00,000/-. Prior to the execution of the agreement, the respondent paid Rs.1,00,000/- as earnest money. Under clause (1) of the said agreement, a sum of Rs.1,25,000/- was to be paid by the respondent within two months from the date of the agreement i.e. by 18.4.1981 and the balance of Rs.7.75,000/- was payable by him on completion of the sale i.e. by 31.8.1981. Under clause (8) of the agreement, the sale was to be completed on or before 31.8.1981. However, there was a proviso to clause (8) under which an option was given to the appellants to extend the date of sale up to 31.12.1981.

3. On 31.3.1981, the respondent herein paid Rs.50,000/- by cheque to the appellants. By letter dated 3.9.1981, addressed by the appellants, it was alleged that Rs. 1,25,000/- was payable by the respondent on or before 18.4.1981; that the full amount was not paid; that the respondent was, therefore, called upon to make the balance payment of Rs.75,000/- within three days from the date of receipt of the said letter. However, by the said letter, time to complete the sale was extended by the appellants under clause (8) up to 31.12.1981. In reply, the respondent stated that out of Rs.1,25,000/-, a sum of Rs.50,000/- had been paid on 31.3.1981, when it was agreed by and between the parties that the balance amount of Rs.75,000/- would be paid by 30.9.1981. By letter dated 12.9.1981, the appellants denied having agreed to receive the balance amount of Rs.75,000/-, payable on or before 18.4.1981, by 30.9.1981. At the same time, by the same letter dated 12.9.1981, the appellants agreed to accept the amount of Rs.75,000/- on or before 30.9.1981 and purported to make time the essence for such payment. On 30.9.1981, the respondent's advocate forwarded two cheques to the appellants i.e. cheque dated 29.9.1981 for Rs.30,000/- and another cheque dated 15.10.1981 for Rs.45,000/- (post-dated cheque). In the said letter, it was pointed out that the cheque for Rs. 45,000/- was post-dated as the respondent would be realizing the effects of certain cheques deposited by him in his account. By letter dated 3.10.1981, the appellants alleged that time to pay balance amount of Rs.75,000/- by 30.9.1981 was made the essence of the contract; that since the respondent had failed to pay the said amount, the agreement for sale stood terminated. Consequently, the appellants forfeited the amounts paid by the respondent under the agreement. By letter dated 17.10.1981, respondent herein contended that time was not the essence of the agreement; that the agreement had been terminated with malafide intentions; that the respondent had complied with all his obligations and that he was ready and willing to perform his obligations under the said agreement.

4. In the circumstances, on 2.12.1981, the respondent herein instituted suit no.1985 of 1981 on the original side of the Bombay High Court. In the suit, the respondent alleged that sometime in the last week of March, 1981, he was informed that the appellants desired to extend the date of completion of sale till 31.12.1981, to which he agreed; that on that occasion he paid Rs.50,000/-; that it was agreed that in view of the postponement of the sale, the part payment of Rs.75,000/- be made by 30.9.1981. That, in terms of the said arrangement, on 30.9.1981, the respondent forwarded his two cheques for Rs.30,000/- and Rs.45,000/-; that cheque for Rs.45,000/- was post dated as respondent would be realizing the effects of certain cheques deposited by him by 15.10.1981. That

contrary to the said arrangement, the appellants vide notice dated 3.10.1981 illegally terminated the agreement alleging that time to pay the balance amount by 30.9.1981 was the essence of the contract as indicated by the letter dated 12.9.1981; that respondent was always ready was willing to perform his part of the contract and in the circumstances, he was entitled to the decree for specific performance.

5. In the written statement, the appellants pleaded that there was delay in payment of Rs.1,25,000/- on or before 18.4.1981; that although time was the essence of the contract and the same was communicated to the respondent, he committed default and, therefore, the appellants were entitled to terminate the agreement for sale and that the respondent was neither entitled to the specifif performance of the contract nor damages, as prayed for.

6. On examination of the evidence on record, both documentary and oral, the High Court found that on the plain reading of the agreement, the same did not provide for time to be the essence; that circumstances did not exist enabling the appellants herein to make time the essence of the contract. That there was no ground, whatsoever, made out in the correspondence on in the written statement to suggest that the behaviour of the respondent was such as to prompt the appellants to make time the essence of the contract. That if causing delay was the grievance, how could the appellants justify their behaviour of extending the time for completion of the sale till 31.12.1981 vide clause (8) of the agreement. That the very letter dated 12.9.1981, which made time the essence for payment of Rs.75,000/- by 30.9.1981, extended time for completion to 31.12.1981. That the appellants had failed to prove that the respondent was guilty of such grave defaults entitling the appellants to make time of the essence. That although several suggestions were made to the respondent, during his cross-examination, as to the oral agreement between the parties, about time being made the essence of the contract, no evidence was led by the appellants. The appellants failed to rebut the assertion of the respondent of the circumstances under which Rs.50,000/- was paid and the oral arrangement to extend the time for payment of Rs.75,000/- up to 30.9.1981. In the circumstances, it was held that time was not made the essence of the contract; that the appellants were not justified in making time of the essence in the matter of payment of Rs.75,000/-.

7. Before the learned Single Judge, it was argued that the respondent has failed to prove, though he has so pleaded, that he was ready and willing to perform his part of the contract. In this connection, it was urged that the respondent had sent a post dated cheque for Rs.45,000/- dated 15.10.1981 which indicated that he had no funds on the due date i.e. on 30.9.1981 and, therefore, he had failed to prove that he was ready and willing to perform his part of the contract. This plea of the appellants was rejected as the High Court found on evidence that time to pay Rs.1,25,000/- was extended to 30.9.1981; that it cannot be argued that there was non-compliance on the part of the respondent when the appellants themselves extended the completion date to 31.12.1981. The learned Single judge found that taking into account the overall conduct of the respondent, it can be said that the respondent was ready and willing to perform his part of the contract; that the agreement was wrongly terminated on 31.10.1981 and the present suit was filed on 2.12.1981, which indicates that the respondent was eager to complete the transaction. In the above circumstances, the suit was decreed.

8. Aggrieved, the appellants herein instituted LPA No.813 of 1994, which was dismissed by the impugned judgment. Hence, this civil appeal.

9. Mr. T.L. Viswanatha Iyer, learned counsel for the appellants contended that parties intended to make time the essence of the contract, since the agreement stipulated specific dates for the payment of the purchase price. That the appellants had validly made time the essence of the contract on 12.9.1981 and since part of the purchase price was not paid on or before 30.9.1981, the appellants were justified in terminating the agreement dated 18.2.1981. That the property in question consisted of a house is in urban area whose price rose continuously, which fact was relevant and which has not been taken into account by the High Court. It was urged that in the aforestated circumstances, any delay on the part of the respondent disentitled him from the relief of specific performance. In this connection, reliance was placed on the judgment of this Court in the case of K.S. Vidyanadam and others vs. Vairavan reported in [(1997) 3 SCC 1]. It was urged that the appellants had made time essence of the payment of Rs. 75,000/- on or before 30.9.1981 of which the respondent was made aware and, therefore, on failure to pay the said amount on due date, the respondent herein had committed breach for which the appellants were entitled to terminate the agreement. Learned counel further submitted that the respondent, on his own evidence, was aware that he had to pay Rs.75,000/- on

or before 30.9.1981 and yet on that day, the respondent forwards two cheques for Rs.30,000/- dated 29.9.1981 and the other for Rs.45,000/- dated 15.10.1981 which showed that respondent agreed to the term of payment of Rs.75,000/- on or before 30.9.1981 and at the same time, he was not ready and willing to perform his obligation. It was further urged that in his evidence, the respondent herein had conceded that he had did not have funds to pay Rs. 75,000/- on 30.9.1981 which indicated that he was not continuous ready and willing to fulfil his obligations. It was further urged that under the agreement, an amount of Rs.1,25,000/- had to be paid by 18.4.1981; that the said amount was not paid and that this lapse was sufficient ground for the appellants to make the time the essence of the contract. In the circumstances, it was urged that the High Court had erred in decreeing the suit for specific performance.

10. The key issue which is to be decided in this civil appeal is: whether time was the essence for payment of Rs.75,000/- on or before 30.9.1981 and whether the said term was breached. This question does not depend only upon express stipulation made by the parties, but it also depends upon the intention of the parties. Notwithstanding that a specific date was mentioned in the agreement, one had not only to look at the letter but also at the substance of the contract. Whether time is of essence is a question of fact and the real test is intention of the parties. It depends upon facts and circumstances of each case.

11. According to Pollock & Mulla's Indian Contract & Specific Relief Acts - [(2001) 12th Edition page 1086], the intention can be ascertained from:

i) the express words used in the contract;

ii) the nature of the property which forms the subject matter of the contract;

iii) the nature of the contract; and

iv) the surrounding circumstances.

12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract was on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.

13. Applying the above principles to the facts of the present case, we find that there was no justification in claiming, in the circumstances, to treat time as of the essence. At the outset, referring to the original agreement dated 18.2.1981, there is nothing in the express stipulation between the parties to show that the intention was to make the rights of the parties dependant upon the observance of the time limits, Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties. [See: Jamshed Khodaram Irani vs. Burjorji Dhunjibhai reported in [AIR 1915 PC 83].

14. In the present case, it was submitted on behalf of the appellants that time to pay Rs.75,000/- on or before 30.9.1981 was made the essence of the contract by notice dated 12.9.1981 as the respondent was a chronic defaulter. We do not find any merit in this argument. In his evidence, the respondent asserted that when he paid Rs.50,000/- on 31.3.1981, the appellants orally agreed to extend the time for payment of Rs.75,000/- from 18.4.1981 to 30.9.1981; that at that time there was no agreement to make time the essence of the contract. This assertion has not been rebutted by the appellants. No evidence in rebuttal has been led by the appellants. Further, as rightly held by the Courts below, the conduct of the respondent was not a gross conduct so as to justify giving of notice making time of the essence of the contract. That on the contrary, time was extended by the appellants in furtherance of clause (8) of the agreement up to 31.12.1981. In the circumstances, we are in agreement with the conclusion that time was not of the essence.

15. Mr. Iyer, learned counsel for the appellants placed reliance on the judgment of this Court in V. Pechimuthu vs. Gowrammal reported in [(2001) 7 SCC 617] in support of his above contention that time was the essence of the contract. We do not find merit in this argument. Firstly, as stated above, whether time is the essence of the contract would depend upon facts and circumstances of each case. It would depend on intention of the parties. Secondly, the facts of the above judgment show that the matter dealt with an agreement for reconveyance, which as stated above, presumes that time is of essence. We have referred to Contract Law by Mulla hereinabove, which states that in cases of reconveyance or renewal of lease, time is of essence as a matter of presumption which is rebutable. Lastly, in the case of V. Pechimuthu (supra), it has been held that rise in price of land agreed to be conveyed may be a relevant factor in denying relief of specific performance when Court is considering whether to grant decree for the first time. That it is not a relevant factor, however, before the Supreme Court of India at SLP stage where all the Courts below have granted decree. It was, therefore, held that judgment of this Court in K.S. Vidyanadam (supra) was inapplicable. In the present case, the appellants, in any event, have not stepped into the witness box nor have they led evidence on any of their allegations. In the circumstances, we do not wish to burden this judgment by citing various authorities.

16. Mr. Iyer, learned counsel for the appellants next contended that the respondent has failed to prove that he was always and that he continued to be ready and willing to fulfil his obligations under the agreement as required by section 16 of the Specific Relief Act. It was urged that on 30.9.1981, the respondent herein offered two cheques to the appellants for Rs.30,000/- dated 29.9.1981 and a post dated cheque for Rs.45,000/- dated 15.10.1981. That in his evidence, the responder had conceded that he had no funds on 30.9.1981. That under section 16, the burden is on the respondent to show that he was always ready and willing to comply with his obligations. Hence, it was urged that the Courts below erred in granting specific performance to the respondent.

17. We do not find any merit in the above arguments. The Courts below have examined the evidence on record and have recorded a finding of fact that the respondent was in a position to raise the wherewithal for implementing the contract. However, on facts, it is clear that time to complete the sale was

extended up to 31.12.1981. That notice terminating the contract was given by the appellants on 3.10.1981 and the respondent had instituted the suit on 2.12.1981 which indicates that respondent was eager to fulfil his part of the contract. That it is nobody's case that post dated cheque had bounced. That there was no unreasonable delay in payment of consideration and, therefore, it cannot be said that the respondent was not ready and willing to perform his part of the contract.

18. In the case of Nannapaneni Subayya Chowdary & another vs. Garikapati Veeraya & another reported in [AIR 1957 AP 307] it has been held, after examining various authorities, that in the suit for specific performance, all that is necessary for the purchaser to show is that he was ready and willing to fulfil the terms of the agreement; that he had not abandoned the contract; that he had kept the contract subsisting. Applying the above tests to the facts of the present case, we are of the view that the Courts below were right in their conclusion; that the respondent was always ready and willing to comply with his obligations under the contract. In the circumstances, the Courts below were right in decreeing the suit for specific performance.

19. Before concluding, it may be pointed out that under the impugned judgment, the respondent was ordered to deposit Rs.75,000/- payable under the second installment within eight weeks from 17.6.2000. If the aforestated amount has been so deposited, the appellants herein would be entitled to withdraw the same with interest; if any.

20. For the aforesaid reasons, we do not find any merit in this civil appeal, which is, accordingly, dismissed, with no order as to costs.