

Privy Council Appeal No. 113 of 1914.

Jamshed Khodaram Irani - - - *Appellant.*

v.

Burjorji Dhunjibhai Contractor - - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 6TH DECEMBER 1915.

Present at the Hearing:

VISCOUNT HALDANE.

SIR JOHN EDGE.

LORD PARMOOR.

MR. AMEER ALI.

LORD WRENBURY.

[*Delivered by* VISCOUNT HALDANE.]

The question in this Appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod, J. decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to

the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition, or provision of the lease the lessor had the right to re-enter and determine the lease. The lease was transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911 the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by Clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th Clause provided that on payment of the Rs. 81,000, as provided by Clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another

of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in Section 55 of the Indian Contract Act, 1872, which provides that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to

sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon v. Napper* (2 Sch. and Lef. 682) which was adopted by Knight-Bruce, L.J., in *Roberts v. Berry* (3 D. M. and G. at p. 289). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley v. Thomas* (3 Ch. Ap. 61) and by the House of Lords in the recent case of *Stickney v. Keeble* (1915, A. C. 386). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* :—

“ The construction is and must be in equity, the same
 “ as in a Court of Law. A Court of Equity will indeed
 “ relieve against and enforce specific performance, notwith-
 “ standing a failure to keep the dates assigned by the
 “ contract; either for completion or for the steps towards
 “ completion, if it can do justice between the parties, and if
 “ (as Lord Justice Turner said in *Roberts v. Berry*), there is
 “ nothing in the ‘express stipulations between the parties,
 “ the nature of the property, or the surrounding circum-
 “ stances,’ which would make it inequitable to interfere
 “ with and modify the legal right. That is what is meant,
 “ and all that is meant, when it is said that in equity, time
 “ is not of the essence of the contract. Of the three
 “ grounds mentioned by Lord Justice Turner ‘express
 “ stipulations’ requires no comment. The ‘nature of the
 “ property’ is illustrated by the case of reversions, trusts,
 “ or trades. The ‘surrounding circumstances’ must depend
 “ on the facts of each particular case.”

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to

the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Primâ facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley v. Thomas (supra)*, where specific performance was refused, illustrates

this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod J. in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High

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Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and the judgment of Macleod J. restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

In the Privy Council.

JAMSHED KHODARAM IRANI

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BURJORJI DHUNJIBHAI CONTRACTOR.

DELIVERED BY VISCOUNT HALDANE.

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