

K. Kallaiah Vs. Ningegowda

K. Kallaiah Vs. Ningegowda

SooperKanoon Citation : sooperkanoon.com/375253

Court : Karnataka

Decided On : Apr-13-1981

Reported in : AIR1982Kant93; ILR1981KAR819; 1981(2)KarLJ11

Judge : K.S. Puttaswamy, J.

Acts : [Indian Contract Act, 1872](#) - Sections 55; [Code of Civil Procedure \(CPC\), 1908](#) - Order 8, Rule 5; [Limitation Act, 1963](#) - Schedule - Article 54

Appeal No. : Second Appeal No. 1203 of 1978

Appellant : K. Kallaiah

Respondent : Ningegowda

Advocate for Def. : B.N. Dayananda, Adv.

Advocate for Pet/Ap. : G.S. Visweswara, Adv.

Judgement :

1. This appeal is by the plaintiff and is directed against the judgment and decree dated 30-8-1978 of the Civil Judge, Hassan, in R. A. No. 3 of 1977, affirming the judgment and decree dated 10-11-1976 of the Munsiff, Channarayapatna, in O. S. No. 206 of 1971.

2. Prior, to 29-6-1960 the plaintiff was the owner of land bearing Sy. No. 70/2A of Kaggere village, Nugehally Hobli, Channarapatua Taluk, measuring 2 acres 15

gnats out of which an extent of 0-01 gnats was a 'kharab' land. On 29-6-1960 the plaintiff executed a registered sale deed in favour of the defendant purporting to convey the said land to the latter for a consideration of Rs. 200/(Exhibit P-1). On the same day, the defendant also executed an agreement to reconvey the said land (Exhibit P-2) to the plaintiff within 18 months from that day. On 10-7-1963, the defendant reconveyed an extent of 1 acre 15 guntas including the kharab out of the aforesaid land to one Sri K. Visweswaraiah, a son of the plaintiff (Exhibit P-3).

3. The plaintiff alleged that under another agreement of the same date (Exhibit P-2 (d)). the defendant agreed to reconvey the remaining extent of 1 acre also to him on his paying the balance of the loan amount taken by him on 29-6-1960 under the purported registered sale deed Exhibit P-1 with interest thereon. On these and other allegations, the plaintiff instituted O. S. No. 206 of 1971 on 6-10-1971 in the Court of the Munsiff, Channarayapatna for specific performance of the agreement dated 10-7-1963 and for a permanent injunction restraining the defendant from interfering with his alleged possession of the aforesaid 1 acre of land.

4. In resisting the plaintiffs suit, the defendant denied the execution of the alleged agreement dated 10-7-1963 (Exhibit P-2 (d)). The defendant alleged that he had sold 1 acre 15 guntas of land to Sri Visweswaraiah on humanitarian considerations at the instance of the elders of the village though the transaction was an out and out sale and was not a loan transaction and therefore the plaintiff was not entitled for specific performance of the alleged agreement. He also asserted that he was in possession of the property and that the plaintiff was, therefore, not entitled for a permanent injunction. Lastly he urged that the suit filed by the plaintiff for specific performance was barred by time.

5. On the above pleadings, the learned Munsiff framed the following four issues :

(1) Whether the plaintiff proves that the defendant has executed an agreement agreeing to reconvey the suit schedule property on 10-7-1963 ?

(2) Whether the plaintiff is entitled for the relief of specific performance and permanent injunction sought for ?

(3) Whether the defendant proves that he has become the absolute owner of the suit schedule property and the sale in his favour was an out and out sale ?

(4) To what relief are the parties entitled ?

6. From the above, it is clear that the learned Munsiff did not frame an issue on the plea of the defendant that the suit was barred by time, though he was required to frame an issue in that behalf.

7. On a consideration of the evidence placed before him, the learned Munsiff answered issues Nos. 1 and 2 in the affirmative and issue No. 3 in the negative. In the course of his judgment, the learned Munsiff also found that the suit filed by the plaintiff was barred by time. On the above conclusions the learned Munsiff dismissed the plaintiff's suit, which was unsuccessfully challenged by him before the learned Civil Judge in R. A. No. 3 of 1970.

8. On 8-12-1978 Jagannatha Shetty, J. admitted this appeal to consider the following substantial question of law :

'Whether on facts and circumstances of the case, time is the essence of contract on which the plaintiff has relied upon?'

9. At the hearing of the appeal, I found that in addition to the above substantial question of law, it was necessary to frame two more substantial questions of law. Accordingly, I framed and heard the parties on all of them. Additional points Nos. 1 and 2 will be numbered as points Nos. 2 and 3 respectively and will be hereafter referred to as such Additional substantial questions of law mentioned as points Nos. 2 and 3 respectively are as follows:

(2) Whether in a contract for reconveyance in respect of immovable properties, time stipulated in the contract is or is not the essence of contract?

(3) If the time is not the essence of -the contract, whether the suit filed by the plaintiff within three years from the date of refusal of the defendant to perform the contract is or is not in time ?

10. Re: Points 1 and 2:

As these points are inter-related, I propose to deal them together.

11. Sri G. S. Visweswara, learned counsel for the appellant, has contended that in a contract of sale of immovable property, time stipulated is not the essence of contract. In support of his contention Sri Visweswara strongly relied on the rulings of the Supreme Court in *Gornathinayagain Pillai v. Pallaniswami Nadar* : [1967]1SCR227 and *Govind Prasad Chaturvedi v. Haridutt Shastri* : [1977]2SCR877 .

12. Sri B. N. Dayananda, learned counsel for the respondent supported the conclusions of the Court below.

13. In his plaint the plaintiff specifically asserted that the time stipulated in the agreement dated 10-7-1963 (Exhibit P-2 (d)) was not an essential term of the contract and had been stipulated by abundant caution only and was not intended to be acted upon. The defendant while denying the existence of the agreement did not alternatively plead that time stipulated was the essence of contract and the same was intended to be acted upon by the parties. Unfortunately, on this crucial question also neither the trial Court nor the first appellate Court framed a specific issue, examined the pleadings, the evidence in the proper perspective and recorded their finding. But considering the arguments addressed before them, both the Courts taking the view that the question was concluded by a Division Bench ruling of this Court in *Rottakai Rajamma v. Rottakal Krishna Murthy Setty*, 1960 Mys LJ 1121, have recorded a finding that time stipulated in the agreement dated 10-7-1963 (Exhibit P-2 (d)) was the essence of contract. In my view, the entire approach made by the Courts below were erroneous.

14. On the very plea of the plaintiff, that time was not the essence of the contract, the Courts below were bound to frame an issue on that question, consider the same with due regard to the law bearing on the point, the pleadings, the evidence and record a specific finding instead, of dealing in a rambling way. But, I will assume that an issue had been framed and the Courts below on a consideration of evidence have found that time was the essence of contract and examine whether the same is sustainable.

15. In *Gomathinayagam Pillai's case* : [1967]1SCR227 the Supreme Court has ruled that where a contract relates to We of immovable property it will normally be presumed that time is not the essence of contract. On a review of all the earlier rulings rendered by the English Courts and the Privy Council, Shah, I. (as he then was) speaking for the majority stated the principle in these words (at p. 870) :

'S. 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph:

'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'.

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or, before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if, having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, ILR (1916) 40 Born 289: (AIR 1915 PC 83) the Judicial Committee of the Privy Council observed that the principle underlying S. 55 of the Contract Act did not differ from those which obtained under the law of England as

regards contracts for sale of land'.

Bachawat, J. did not express dissent on that point but dissented on another point that has no bearing on points Nos. 1 and 2.

16. In Govind Prasad Chaturvedi's case : [1977]2SCR877 , the Supreme Court had occasion to examine more or less a similar case. In that case, the contract of We had stipulated that the sale transaction should be completed within a period of two months failing which the defendant was entitled to forfeit the earnest money paid by the former. As in this case, the plaintiff did not get the sale deed executed within the stipulated time and then instituted a suit for specific performance, of the contract. But the defendant, as in the present case, did not plead that time was the essence of the contract, On an examination of that question and other questions the trial Court decreed the suit, which was reversed by the High Court in an appeal filed by the defendant. On an appeal filed by the plaintiff, the Supreme Court reversed the judgment of the High Court and restored the judgment of the trial Court. Kaitasam, J. who spoke for the Bench, following the earlier ruling in Gomathinayagam Pillai's case : [1967]1SCR227 , stated the principle in these words (at pp. 1007, 1008):

'The relevant clause is Clause 4 which provides that the appellant must get the sale deed executed within two months, i.e. up to 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. 4,000/- 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 v. Palaniswami Nadar : [1967]1SCR227). 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 already 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 para 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 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 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 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. 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'.

From the above cases, two principles clearly emerge. Firstly, where a contract relates to sale of immovable property, the normal presumption would be that time stipulated in the contract will not be treated as the essence of the contract. Secondly, when a plaintiff pleads that time is not the essence of the contract and the defendant does not deny the same, a Court is bound to accept the plea of the plaintiff. The second principle is obviously based on the law of pleadings incorporated in Rr. 3, 4 and 5 of O. 8 of the Civil P. C., though there is no reference to the same.

17. As noticed earlier, no issue had been framed on the question and the parties had not diverted their attention to place necessary evidence on that issue. Apart from this, the evidence had not been appreciated in the light of the principles enunciated by the Supreme Court. However, in this case, the defendant had not denied the assertion of the plaintiff that time was not the essence of the contract. The Courts below were bound to hold that time was not the essence of the contract and in holding to the contrary have committed a substantial error of law.

18. Let me now examine whether the principles stated by this Court in Rottakal Rajamma's case (1960 Mys LJ 1121) support the conclusions drawn by the Courts below.

19. In Rottakal Rajamma's case the contract that arose for consideration, was a contract for collection of rents or an agency agreement and was not a contract for

sale of immovable property. On an examination of

that agreement, this Court expressly found that it was not an agreement relating to immovable property but was an agreement relating to movable property and on those facts, the Court examined and stated the principles. Firstly, the principles stated in Rottakal Rajamma's case relating to the movable property or an agency agreement can hardly apply to a contract of sale of immovable property. Secondly, the principles stated in Rottakal Rajamma's case, which I apprehend are not also contrary to the enunciation made by the Supreme Court, but assuming that it is so, having regard to Art. 141 of the Constitution, is not binding on this Court or any subordinate Court to be followed.

20. On the above analysis, it follows that time stipulated in Exhibit P-2 (d) was not the essence of the contract and that points Nos. 1 and 2 have to be answered in favour of the plaintiff and against the defendant and I answer them accordingly.

Re: Point No. 3.

21. Sri Visweswara has contended that the suit filed by the plaintiff, computing the period of limitation from the date the defendant refused to reconvey the, property was in time and the Courts below in holding to the contrary have committed an error of law. In support of his contention Sri Visweswara strongly relied on a Division Bench ruling of the Madras High Court in Lakshminarayana. Reddiar v. Singharavelu Naicker : AIR1963 Mad24 .

22. Sri Dayananda while supporting the judgments and decrees of the Courts below urged that the ratio in Lakshminarayana Reddiar's case had no application and if held applicable was not sound. In support of his contention Sri Dayananda strongly relied on a large number of rulings of the Privy Council, Supreme Court and other High Courts and this Court.

23. The execution of the agreement dated 29-6-1960 (Exhibit P-2) is not disputed by the defendant. But, the further agreement on the back of the same document (Exhibit P-2 (d)) to reconvey the remaining extent of 1 acre to the plaintiff is disputed by the defendant. He even alleged that his signature had been forged

and it was a fabricated one. On a consideration of the evidence placed, the learned Munsiff found that that agreement pleaded by the plaintiff (Exhibit P-2 (d)) was true and genuine, which finding has also been concurred by the learned Civil Judge. The said finding being on a question of fact, is binding on this Court. Sri Dayananda did not also rightly dispute the correctness of the same.

24. The agreement dated 10-7-1963 (Exhibit P-2(d)) on which the plaintiff's suit is founded reads thus :

X X X X

(The matter being in Kannada language and we having no facilities for printing Kannada we regret that it is to be omitted here.-Ed.)

Under the said agreement, the plaintiff has obliged himself to repay the balance of the sale price within one year from that date with an obligation on the defendant to reconvey the remaining extent of 1 acre within that period to the plaintiff. On the terms of the said agreement, the defendant has obliged himself to reconvey the land to the plaintiff on or before 10-7-1964 for the enforcement of which he has filed his suit on 6-10-1971. Except for the aforesaid agreement, the plaintiff has not alleged any further agreement much less has he proved the same. Without disputing these facts, the plaintiff has alleged that in respect of a contract for specific performance of immovable property, time was not the essence of the contract and, there, fore, the refusal of the defendant to perform his part of the contract when called upon to do so by him, should be reckoned as the starting point of limitation and if so computed his suit should be held to be in time.

25. Before examining the true scope of the relevant article that is applicable, it is relevant to bear the true principles that should govern the interpretation of the Limitation Act of 1963 (hereinafter referred to as the Act).

26. Justice Story in his Conflict of Laws 8th Edn., p. 794 has propounded the object of the Lim. Acts in a civilised society in these words that have become classical:

'Statutes of limitation are statutes of repose, to quiet title, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished or ought to be held extinguished whenever they are not litigated within the prescribed period. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse of time become inexplicable. It has been said by John Voet that controversies are limited to a fixed period of time, lest they should be immortal, while men are mortal'.

The Judicial Committee of the Privy Council in *Lucbmee v. Ranjeet*, (1873) 20 Suth WR 375 : 13 Beng LR 177, dealing with the earlier Limitation Act in the country stated the object 'of that Act in these words:

'The object of the Limitation Act is to quiet long possession and to extinguish stale demands'.

In *Nagendra Nath Dey v. Suresh Chandra Dey* , the Judicial Committee of the Privy Council stated the rule of construction to be followed in interpreting articles of the Act in these words:

'The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But, in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships, think, the only safe guide.'

In more than one case our Supreme Court has restated the same principles.

27. Bearing the above well settled principles, it is necessary to examine the true scope and ambit of Art. 54 of the Act, corresponding to Art. 113 of the earlier Act that governs the suit and its application to the facts of the case. Article 54 of the Act reads thus :

'54. For specific Three performance years of a contract the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that

performance is refused '

The article stipulates a period of three years for specific performance of a contract, where a date is fixed for the performance of the contract. Where a date is not so fixed, then the same has to be filed within three years from the day the plaintiff has notice of refusal. When a date is fixed for the performance of a contract, the period of limitation has to be reckoned from the date fixed for the performance of the contract. Where no date is fixed for the performance of the contract, the period of 3 years has to be reckoned from the day the plaintiff has notice of refusal. When a date is fixed for performance of contract, as in this case, the suit is necessarily regulated by the former part of the article and not by the latter part of the article. In a given case both the situations may intermix or be present. But, that is not really decisive in ascertaining the true scope and ambit of Art. 54 of the Act. What is decisive is the date stipulated for the performance of the contract. In *Chekkal Venkata Suryanarayana Murthy v. Appana Veerraju* : AIR 1980 AP32 the High Court of Andhra Pradesh and in *Sambhunatha Chakravarty v. Smt. Sushama Sinha* : AIR1980 Cal5 the High Court of Calcutta have also taken a similar view. I am in respectful agreement with the views expressed in those cases.

28. The principle that time stipulated in a contract for sale of immovable property is not the essence of contract has nothing to do with the period of limitation within which a suit for specific performance of contract has to be filed. One touches on the right to enforce the contract and the other touches on the period within which that right has to be enforced. By ignoring the period stipulated in the contract or by holding that the time stipulated in a contract for sale of immovable property is not the essence of the contract in a given case, as in the present case itself the period of limitation stipulated in the Act carry neither be ignored nor extended by Courts.

29. In *Turnerchand Hukumchand v. Hulturichand Mathurdas* : AIR 1965 MP177 a Division Bench of the Madhya Pradesh High Court examining a similar question, has taken a similar view in these words

(at p. 178):

'The question whether time is the essence of the contract is, in my opinion, not at all relevant for determining whether the first or the second part of Column 3 in Art. 113 applies to a particular case. Where time for performance of the contract is fixed, limitation forthwith begins to run as from that time, irrespective of the question of notice or refusal to perform. Authorities are uniform on the point that where a time is fixed for performance, the second part of Column 3 in Art. 113 can have no application'.

I am in respectful agreement with the above enunciation.

30. In Lakshminarayana Reddiar's case : AIR1963 Mad24 on which strong reliance was placed by Sri Visweswara, the facts in brief were these: The properties in dispute belonged to respondents 1 and 2 before the High Court who were members of an undivided Hindu family. Respondent No. 1 executed a mortgage over the said property in 1923 in favour of one Manjini Gounder for Rs. 2,500/-. The mortgagee obtained a decree on the said mortgage and brought the properties to sale and assigned that decree to one Muthuvenkatapathi Reddi, who in turn brought the properties to sale which was sold to several auction purchasers. During the pendency of the protracted litigation with reference to that sale, the respondents agreed to sell the suit properties to one Lakshminarayana Reddiar, the plaintiff before the trial Court and the appellant before the High Court, under an agreement dated 3-8-1946 in which a period of three months was stipulated within which that sale should be got executed. On the failure of the respondents to execute a sale deed a suit was filed on 4-1-1954 which was resisted by the respondents inter alia on the ground that the said suit was barred by time. Accepting the plea of limitation urged by the defendants, the trial Court had dismissed the plaintiff's suit. On appeal, the High Court of Madras reversed the judgment of the trial Court and held that the suit was in time in these words (at p. 28):

'For all the reasons given above we are satisfied that in this case, though the contract mentioned a period for performance of contract that was not the starting point for the running of time having regard to the circumstances mentioned by us, and time began to run only from 8-1-1953 and consequently were reverse the

finding of the learned District Judge and hold that the suit for specific performance was filed in time.'

31. In my opinion, the principles on which the Madras High Court has reached the above conclusion is opposed to the plain language of Art. 113 of the Lim. Act of 1908 that corresponds to Art. 54 of the new Act and the well settled principles noticed by me earlier, the soundness of which has never been departed. With respect, I find it difficult to subscribe to the view expressed by the Madras High Court in Lakshminarayana Reddiar's case : AIR1963 Mad24 and 1, therefore decline to follow the same.

32. Under the agreement dated 10-7-1963, (Exhibit P-2(d)) the last date for performance of the contract was 10-7-1964 and the plaintiff has filed the suit on 6-10-1971 and the same was clearly barred by time and the decrees of the Courts below upholding the same are, therefore, correct. For these reasons, I answer point No. 3 against the plaintiff and in favour of the defendant

33. As the plaintiff's suit is liable to be dismissed as barred by time and the same has been rightly dismissed on that ground, the judgments and decrees of the Courts below do not fall for my interference though he succeeds on points Nos. 1 and 2. But, for the bar of limitation, I would have decreed the plaintiff's suit for specific performance, which I cannot do. With a heavy heart, regret and pain, I dismiss this second appeal, remembering that a hard case cannot make a bad law. But, in the circumstances of the case, I direct the parties to bear their own costs in all the Courts.

34. Appeal dismissed.