

CASE NO.:
Appeal (civil) 5187 of 2001

PETITIONER:
Panchanan Dhara & Ors.

RESPONDENT:
Monmatha Nath Maity (Dead) Th. LRS. & Anr.

DATE OF JUDGMENT: 12/05/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

This appeal is directed against a judgment and order dated 29th January, 1998 passed by the Calcutta High Court in Second Appeal No. 887 of 1991 affirming the judgment and order dated 29th June, 1990 passed by the learned Asstt. District Judge, Ghatal, District Midnapore, West Bengal in Title Appeal No. 74 of 1989 whereby and whereunder an appeal against the judgment dated 31st August, 1989 passed by the learned Munsif, Ghatal, District Midnapore, West Bengal in Title Suit No. 133 of 1985 was dismissed.

The basic fact of the matter is not much in dispute. Respondent No. 2 herein (the company) is a company registered and incorporated under the Companies Act, 1956. The said company held and possessed the suit property situated in the District of Midnapur in the State of West Bengal. It intended to sell the said property. Respondent Nos. 1 and 2 having come to know of the said intention on the part of the company entered into an agreement for sale thereof, wherefor a sum of Rs. 6000/- was paid to the Company by way of advance. The balance amount was to be paid within a period of fourteen months. As the title of the Respondent No. 2 in respect of the said property was not clear, the Company instituted a suit against some persons who were claiming title thereover on or about 22.05.1971. The said suit was marked as Title Suit No. 110 of 1971. In the said suit a compromise petition was filed on 3.4.1979 which having been accepted by the concerned court, a consent decree was passed on the basis thereof on 3.5.1979. Respondent No. 1 thereafter issued several letters being dated 12.11.79, 11.01.80, 05.01.81 and 08.10.84 asking the Company to execute and register a sale deed in his favour. The Company in response thereto had all along been assuring the Respondent No. 1 that it would do so.

By a letter dated 16.3.1985, one of the Directors of Respondent No. 2 assured Respondent No. 1 that no apprehension should be entertained by Respondent No. 1 that the contract between him and the company would not be honoured. However, on 21.8.1985, the company refused to execute and register a deed of sale in favour of Respondent No. 1 on the plea that the same became barred by limitation.

A suit for specific performance of the said agreement for sale dated 18.04.1971 was filed in the Court of Munsif, Ghatal, District Midnapore, West Bengal which was marked as Title Suit No. 133 of 1985. It is not in dispute that not only the Appellant herein had filed a caveat in the said suit, it purchased the said property on 13.11.1985, i.e., during pendency thereof. Even in the deed of sale executed in favour of the Appellant by the Company the factum of the said suit being pending in the court had specifically been mentioned.

Before the learned Trial Judge, inter alia the following contentions were raised on behalf of the Appellant:

- (i) the agreement for sale was not enforceable as the provisions of Sections 46 and 48 of the Companies Act had not been complied with.
- (ii) It was not established that the Respondent No. 1 had all along been and ready and willing to perform his part of contract.
- (iii) The suit was barred by limitation.

As regards the contention that in executing the said agreement the provisions of Sections 46 and 48 of the Companies Act had not been complied with, the learned Trial Judge held that as all the Directors of the Company were parties to the said agreement, the said provisions are not attracted. The plea that the Respondent No. 1 was not ready and willing to perform his part of contract was also held to have been waived. The plea of limitation was also negatived.

The appeal preferred thereagainst was also dismissed by the First Appellate Court.

In the Second Appeal preferred by the Appellant herein, it does not appear that any substantial question of law was framed by the High Court as was mandatorily required under Section 100(4) of the Code of Civil Procedure. However, a learned Single Judge of the court dealt with all the contentions raised on behalf of the Appellant and dismissed the suit.

Mr. Santosh Mishra, learned counsel appearing on behalf of the Appellant, in support of this appeal submitted that the courts below committed a manifest error in arriving at the finding that the suit was not barred by limitation, purported to be relying on or on the basis of the first part of Article 54 of the Limitation Act whereas in this case the second part thereof could be attracted. It was urged that the Respondent No. 1 in terms of the agreement for sale dated 18.04.1971 was required to pay the balance sum of Rs. 8,000/- within fourteen months therefrom but even assuming that the deed of sale was to be executed and registered on perfection of title, the suit filed by the Company against third parties having been decreed on 31st August, 1979, the period of limitation in terms of Article 54 of the Limitation Act should have been reckoned from the said date. Strong reliance in this behalf has been placed on *Ramzan v. Hussaini* [(1990) 1 SCC 104], *Tarlok Singh v. Vijay Kumar Sabharwal* [(1996) 8 SCC 367], *T.L. Muddukrishana and Another v. Lalitha Ramchandra Rao (Smt.)* [(1997) 2 SCC 611] and *Venkappa Gurappa Hosur v. Kasawwa C/o Rangappa Kulgod* [(1997) 10 SCC 66].

It was further urged that in the event, the terms and conditions contained in the said agreement dated 18.04.1971 were found to be uncertain, the same would be void in terms of Section 29 of the Indian Contract Act.

The learned counsel would furthermore submit that having regard to the provisions of Sections 46 and 48 of the Companies Act having not been complied with, the said agreement could not have been enforced.

Mr. Mishra, as regards the plea of readiness and willingness on the part of the Respondent No. 1 to perform his part of contract, would submit that although the said plea is not available so far as the present Appellant is concerned in view of the decision of this Court in *Jugraj Singh and Another v. Labh Singh and Others* [(1995) 2 SCC 31] but it was for the court to see as to whether the plaintiff has proved his case in this behalf or not.

Mr. Gourab Banerji, learned Senior Counsel appearing on behalf of the Respondents, on the other hand, submitted that the question of limitation being a mixed question of fact and law, the contention that the first part of

Article 54 of the Limitation Act would not be attracted in this case should not be permitted to be raised having not been raised before the courts below. It was submitted that both the courts understood that having regard to the conduct of the parties, the agreement was kept alive and at all material point of time the contract was subsisting. As regards alleged non-compliance of the provisions of Sections 46 and 48 of the Companies Act, the learned counsel urged that from the findings of the fact arrived at by all the courts, it would be evident that all the Directors signed the agreement of sale on behalf of the Company and in any event they have sufficient authority to do so. Even under the Articles of Association of the Company, it was urged, one of the Directors was entitled to execute the deed of sale on behalf of the Company.

The Appellant herein is a subsequent purchaser. A finding of fact has been arrived at by all the courts that he had purchased the property with full notice of the said agreement for sale.

The Company has not preferred any appeal against the judgment and decree passed by the learned Munsif before the appellate court.

A deed of sale has already been executed in favour of the First Respondent in execution of the decree passed by the learned Trial Court. Before the High Court, as noticed hereinbefore, no substantial question of law was framed. The question as regards the applicability of the first part or the second part of Article 54 of the Limitation Act had also not been raised before the High Court. The parties adduced evidence only on that basis.

So far as the question of limitation is concerned, the learned Trial Judge held:

"The letters sent by the plaintiff or his brothers on behalf of the plaintiff (ext. 8 to 11), the letter of chairman director Purushattam Roy (ext. 7) coupled with the fact of non issuing of any notice by defendant no. 1 estate repudiating that contract proved beyond any trace of doubt that the agreement between plaintiff and defendant no. 1 estate was subsisting and was still in force and that the suit was not barred under Article 54 of Limitation Act."

We may notice that the learned First Appellate Court as regards the Appellants' contention that the suit was barred by limitation held:

"Next, it was vehemently argued before this court that the suit is barred by limitation as it was recited in ext. 3 that the transfer would be effective within 14 months after execution of the bainanama (Ext. 3). But the argument is not tenable in view of the fact that the time has been expanded by the respondent no. 2 impliedly by agreeing to transfer of the suit property as and when time comes. The respondent no. 1 and his brother despatched several letters (Ext. 8,9,10,11) to the respondent no. 2 for transfer of the suit property to them. Ultimately, by ext. 7 (a letter sent by the company to the respondent no. 1) the company has agreed to extend the time giving the respondent no. 1 assurance that just in time transfer would be made effective. Ext. 7 also suggests that the letters (ext \026 8,9,10,11) sent by the respondent no. 1 and his brothers were received by the company, respondent no. 2. Thus, it can be said safely that the time which was recited in the ext \026 3 was extended by respondent no. 2 by ext \026 7 and

moreover, ext \026 3 suggests unequivocally that time is not essence of the contract. Had the time being the essence, the words "subject to perfection" on the title of the respondent no. 2 of the suit property would not have occurred in ext \026 2. Therefore, when the ld. Munsif has discussed this point in this light this court sees nothing to interfere."

The High Court has also accepted the said reasonings of the learned lower appellate court stating:

"As regards the second point urged by Mr. Mukherjee, in my opinion, the same is also without any force. The respondent no. 1 having made specific case that the company refused to perform its part of the contract in the year 1985 and having produced letters written on behalf of the company showing that the agreement was subsisting and no person having come forward to depose on behalf of the company to convert those statements, in my opinion, the learned courts below rightly found that the suit is not barred by limitation."

Contention of Mr. Mishra as regard the applicability of the first or the second part of Article 54 of the Limitation Act will have to be judged having regard to the aforementioned findings of fact. A plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also the conduct of the parties and also as to how they understood the terms and conditions of the agreement. It is not in dispute that the suit for specific performance of contract would be governed by Article 54 of the Limitation Act, 1964. While determining the applicability of the first or the second part of the said provision, the court will firstly see as to whether any time was fixed for performance of the agreement of sale and if it was so fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years therefrom.

In this case, before the Trial Court, the parties proceeded on the basis that the Second Respondent herein refused to execute and register a deed of sale in terms of the said agreement on 21.8.1985. The courts below have also arrived at a finding of fact that the time for performance of the said agreement for sale had all along been extended and even as on 16.3.1985, a Director of the Second Respondent assured the First Respondent that it would be honored. In a suit for specific performance of contract in respect of any immovable property, time would ordinarily not be the essence of the contract. The Appellant herein also did not raise any plea to the said effect.

A bare perusal of Article 54 of the Limitation Act would show that the period of limitation begins to run from the date on which the contract was to be specifically performed. In terms of Article 54 of the Limitation Act, the period prescribed therein shall begin from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement. In this case, the First Respondent was to offer the balance amount to the Company, which would be subject to its showing that it had a perfect title over the property. We have noticed hereinbefore that the courts below arrived at a finding of fact that the period of performance of the agreement has been extended. Extension of contract is not necessarily to be inferred from written document. It could be implied also. The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived

at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused. Performance of the said contract was refused by the Company only on 21.8.1985. The suit was filed soon thereafter. The submission of Mr. Mishra that the time fixed for completion of the transaction was determinable with reference to the event of perfection of title of the Second Respondent cannot be accepted. The said plea had never been raised before the courts below. Had such a plea been raised, an appropriate issue could have been framed. The parties could have adduced evidence thereupon. Such a plea for the first time before this Court cannot be allowed to be raised. Even otherwise on a bare perusal of the agreement for sale dated 18.4.1971, it does not appear that it was intended by the parties that the limitation would begin to run from the date of perfection of title.

In Ramzan (supra), Sharma, J., (as the learned Chief Justice then was), opined that the date fixed for the parties for performance of the agreement should be ascertained on the basis of the terms of the contract. On an interpretation of the agreement in sale, which was the subject matter of the said suit, the same was held to be a contingent contract within the meaning of Section 31 of the Indian Contract Act. Therein, the property was placed under a mortgage and the defendant had agreed to execute a deed of sale on the redemption of the mortgage by her. The mortgage was redeemed in 1970. It was in the aforementioned fact situation, the doctrine of *id certum est quod certum reddi potest* (certainty need not be ascertained at the time) was applied. The said decision, therefore, is not applicable in the instant case.

In Tarlok Singh (supra), an agreement was entered into by the parties on 21.12.1984. A proceeding was pending in respect of the suit land. The time for performance was extended by an agreement dated 18.8.1984 stipulating that the Appellant therein would be required to execute the same within the 15 days of the order vacating the injunction which had been passed. In view of the said admitted fact, it was held that the date for performance of the contract was fixed. The order granting injunction having been vacated on 6.4.1986, the suit which was instituted on 25.8.1989, was held to be barred by limitation.

In T.L. Muddukrishana (supra), Tarlok Singh (supra) was followed.

In Venkappa Gurappa Hosur (supra), a finding of fact was arrived at that the agreement was refused to be executed as far back in 1959 and in that view of the matter it was held that the issuance of a notice in August, 1972 did not stop running of the period of limitation. The said decision, therefore, has no application in the present case.

Performance of a contract may be dependent upon several factors including grant of permission by the statutory authority in appropriate cases. If a certain statutory formality is required to be complied with or permission is required to be obtained, a deed of sale cannot be registered till the said requirements are complied with. In a given situation, the vendor may not be permitted to take advantage of his own wrong in not taking steps for complying the statutory provisions and then to raise a plea of limitation.

An almost identical question came up for consideration before a Division Bench of this Court in S. Brahmanand and Others v. K.R. Muthugopal (Dead) and Others [(2005) 12 SCC 764] wherein this Court laid down the law:

"Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any

further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article\005"

In R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy [(2006) 2 SCALE 156], wherein one of us was a member, it was observed:

" In terms of the said Article, a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff has notice that performance is refused. The notice dated 24.04.1984, thus, is required to be construed in the context of the agreement dated 13.10.1982 entered into by and between the parties.

There cannot be any doubt whatsoever that in respect of a contract for sale of immovable property, time is not of the essence of the contract, but the question as regard the conduct of the Appellant must be considered in the backdrop of the events noticed hereinbefore."

The said decision has again been noticed in Gunwantbhai Mulchand Shah & Ors. v. Anton Elis Farel & Ors. [(2006) 3 SCALE 82] wherein it has been held:

"We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy 2006 (2) Scale 156. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so,

the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence, on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial."

In view of the aforementioned pronouncements of this Court, we are of the opinion that the plea raised by the learned counsel for the Appellant that the suit was barred by limitation cannot be accepted as all the courts have arrived at a finding of fact that the period for execution of the deed of sale had been extended.

Similarly, the applicability of the provisions of Section 29 of the Indian Contract Act having not been raised, the same cannot be permitted to be raised for the first time before this Court. Even otherwise we do not see, on a plain reading of the said agreement of sale dated 18.04.1971, that the terms thereof were uncertain or vague so as to attract the provisions of Section 29 of the Indian Contract Act.

Sections 46 and 48 of the Companies Act, read as under:

"46. Form of contracts. \027(1) Contracts on behalf of a company may be made as follows: \027

(a) a contract which, if made between private persons, would by law be required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(b) a contract which, if made between private persons, would by law be valid although made by parole only and not reduced into writing, may be made by parole on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) A contract made according to this section shall bind the company.

48. Execution of deeds. \027(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in or outside India.

(2) A deed signed by such an attorney on behalf of the company and under his seal where sealing is required, shall bind the company and have the same effect as if it were under its common seal."

Section 46 merely lays down the mode of signing contract on behalf of the company. Once a deed is executed on behalf of the company, it is

company and not the persons signing can sue or be sued on the contract if the evidence is clear that the signature was only that of the company.

An oral agreement for sale is permissible in law. There is furthermore no dispute that the agreement for sale was entered into by three directors of the company. The subsequent letters written on behalf of the Company clearly demonstrate that all the directors were aware of the said agreement. The company before the Trial Court never chose to file any written statement or dispute the contentions raised in the plaint. The Company, thus, never denied or disputed the correctness or otherwise of the contents of the said agreement. The Company never denied or disputed the terms of the agreement nor raised any plea that the agreement was not binding on the company or the same was illegal. In fact in the deeds executed in favour of the agreement, it had clearly been stated that the suit for specific performance of contract filed by Respondent No. 1 was pending.

In *Chairman, Life Insurance Corpn. and Others v. Rajiv Kumar Bhasker* [(2005) 6 SCC 188], this Court held:

"Agency as is well settled, is a legal concept which is employed by the Court when it becomes necessary to explain and resolve the problems created by certain fact situations. In other words, when the existence of an agency relationship would help to decide an individual problem, and the facts permits a court to conclude that such a relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the Court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question. [See *Establishing Agency* by GHL Fridman \027 1968 (84) Law Quarterly Review 224 at p. 231.]"

It is not in dispute that the contract was executed in the name of the company. It has furthermore not disputed that all the five directors executed the agreement. The company was a private limited company. The Trial Court held:

"\005As all the directors of the company took part in execution of ext. \026 3 there was not necessity of giving any special authorization either u/s 46 or u/s 48 of the Companies Act for entering into or for execution of the contract. It is true that at the time of execution of the documents in favour of the party defendants (ext. A series) there was a resolution of the company. The copy of the said resolution was marked (ext. \026 1). On plain reading of Ext. \026 1 it is found that as 4 directors out of the 5 directors of the company were empowered to execute those documents said resolution was necessary u/s. 48 of the Companies Act."

Before the courts below, execution of the agreement was not denied. Thus, even in the absence of resolution the contract could not have been held to be invalid or illegal.

So far as the question of putting up of the seal of the Company is concerned, it is a relic of the days when mediaeval barons, who could not read or write, used their rings to make a characteristic impress. Even in absence of a seal, the Company may still be held to be liable having regard to the nature of transaction and the authority of those who had executed it. If the act of the Directors is not ultra vires or no public policy is involved,

the parties acting thereupon cannot be left at large. [See Proboodh Chandra v. Roadloils (India) Ltd., AIR 1930 Cal 782 and OTV Birwel Co. Ltd. v. Technical and General Guarantee Co. Ltd., (2002) 4 All ER 668].

For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly. No costs.

JUDIS