

PETITIONER:
T.L.MUDDUKRISHANA & ANR.

Vs.

RESPONDENT:
SMT.LALITHA RAMCHANDRA RAO

DATE OF JUDGMENT: 06/01/1997

BENCH:
K. RAMASWAMY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

THE 6TH DAY OF JANUARY, 1997

Present:

Hon'ble Mr.Justice K.Ramaswamy
Hon'ble Mr.Justice G.T.Nanavati

G.V. Chandrasekhar, Adv. For P.P.Singh, Adv. for the appellants.

Harish Salve, Sr.Adv., S.K.Kulkarni and Ms.Sangeeta Kumar, Advs. with him for the Respondent

O R D E R

The following Order of the Court was delivered:
Leave granted.

This appeal by special leave arises from the judgment of the learned single Judge of the High Court of Karnataka, made on 29.5.1996 in CRP No.2246/93.

The admitted facts are that the appellants and the respondent entered into an agreement on March 16, 1989 for sale of plot of land bearing No.114/8 situated at Peenya Industrial Suburb II Stage, Peenya Village, Bangalore for a consideration of Rs.64 lakhs. The date for the performance of the contract was fixed as May 28, 1989. the appellants issued notice on October 2, 1989 calling upon the respondent to comply with the conditions mentioned under the agreement, namely, to obtain Income-tax clearance certificate and from the Urban Ceiling Authority permitting the respondent to alienate the property to the appellants. The respondent had issued a notice on November 6, 1989 repudiating the contract though the execution thereof was admitted. The appellants then filed a suit for mandatory injunction on April 21, 1992 directing the respondent to comply with the requirements as mentioned in the agreement. While the suit was pending, the appellants made an application on November 5, 1992 under Order VI, Rule 17 of the CPC for amending the plaint and seeking specific performance of the contract. The said application was rejected by the trial Court and the rejection was affirmed by the High Court. Thus, this appeal by special leave.

Learned counsel for the appellants has contended that time is not the essence of the contract; and, the performance, though it was fixed for May 28, 1989, the other clauses relating to payment of interest for the delayed

period of performance would indicate that the time is not essence of the contract. The application, therefore, could not have been dismissed at that stage. It is further contended that the appellants had an oral agreement with the respondent that the agreement will be performed after the respondent obtained requisite permission from the competent authority. Thus, his contention is that the relief of specific performance was not barred by limitation. It is then contended for the respondent that by operation of first clause of Article 54 of the Schedule to the Limitation Act, 1963, once the date has been fixed for the performance, limitation begins to run from that date. Whether time is the essence of the contract or not is not relevant for the purpose of deciding the question of limitation. In the agreement, time having been fixed for performance of the contract as May 28, 1989, the limitation began to run under the first clause from that date. The second clause, therefore, has no application to the facts in his case. The courts below, therefore, were correct in refusing permission for amendment of the plaint introducing specific relief of performance.

It is seen that limitation under Section 3 of the Limitation Act is one of the defences available to the defendant. Article 54 of the Schedule to the Limitation Act postulated that for specific performance of a contract the period of limitation is three years from the date fixed for the performance, or, if no such date is fixed, from the date plaintiff has notice that performance is refused. Under first part of Article 54, once date for performance of the contract has been fixed by the parties, the limitation begins to run from that date and specific performance of the contract could be had within three years from that date unless the parties by an agreement extend the fixed time. In this case, date was fixed for performance, i.e., May 28, 1989. The question whether or not the time is the essence of the contract is not of much relevance since the case falls in first part of Article 54. The decision relied on by the learned counsel for the appellant in *Smt. Chand Rani (dead) by LRs. vs. Smt. Kamal Rani (Dead) by LRs.* [(1993) 1 SCC 519] of the Constitution Bench does not help the learned counsel for the appellant. In that case, this Court has reviewed the entire case law and need for reiteration is obviated. The Court held thus:

"It is well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place really and in substance it was intended that it should be completed within a reasonable time.

An intention to make time the essence of the contract must be expressed in unequivocal language."

After considering the question in the light of the terms of the contract made by the parties extracted in paragraphs 25 and 26 of the judgment, the Constitution Bench concluded in paragraph 28 that the parties intended to make time as the essence of the contract. The contract was to be performed within a particular period and the respondent had repudiated the contract. Under those circumstances, it was held that the time was an essence of the contract. The same ratio was reiterated by this Court in *K. Raheja Construction Ltd. vs. Alliances Ministries & Ors.* [1995 Supp.(3) SCC 70] which relates to the amendment of the plaint. It was held therein that since the party had repudiated the agreement, the limitation began to run from that date. Since the application for amendment of the plaint was filed after the expiry of three years, the same could not be entertained. The controversy in regard to the limitation was also considered by this Court in *Tarlok Singh vs. Vijay Kumar Sabharwal* [(1996) 3 SCALE 558] wherein this Court has that when the time has been fixed for performance of the contract by operation of Article 54 of the Limitation Act, the time begins to run from the date fixed by the parties. The Court observed thus:

"The question is: as to when the limitation began to run? In view of the admitted position that the contract was to be performed within 15 days after the injunction was vacated, the limitation began to run on April 6, 1986. In view of the position that the suit for perpetual injunction was converted into one for specific performance by order dated August 25, 1989, the suit was clearly barred by limitation. We find force in the stand of the appellants. We think that parties had, by agreement, determined the date for performance of the contract. Thereby limitation began to run. Induction laid on December 23, 1987 would not be of any avail nor the limitation began to run from that date. Suit for perpetual induction is different from suit for specific performance. The suit for specific performance in fact was claimed by way of amendment application filed under order VI, Rule 17, CPC on September 12, 1979. It will operate only on the application being ordered. Since the amendment was ordered on August 25, 1989, the crucial date would be the date on which the amendment was ordered by which date, admittedly, the suit is barred by limitation. The courts below, therefore, were not right in decreeing the suit."

In *Ramzan vs. Hussaini* [(1990) 1 SCC 104] this Court held in paragraph 6, thus:

"The relevant provisions in the

alleged agreement of sale as quoted in the judgment of the trial Court reads as follows:

"This house is under mortgage with Jethamal Bastimal for Rs.1000. When you will get this house, the description of which get this house, the description on which is given below, redeemed from M/s Jethamal Bastimal and take the papers of the registry in your possession on that day I will have the sale deed of the said house, written, executed and registered in your favour".

The question in whether a date was fixed for the performance of the agreement and in our view the answer is in the affirmative. It is true that a particular date from the calendar was not mentioned in the document and the date was not ascertainable originally, but as soon as the plaintiff redeemed the mortgage, it became an ascertained date. If the plaintiff had, immediately after the redemption, field the suit, could it be thrown out on the ground that she was not entitled to the specific performance asked for? We do not think so. she would have been within her right to assert that she had performed her part of the contract and was entitled to insist that her brother should complete his that her brother should complete his part. the agreement is a typical illustration on a contingent contract within the meaning of Section 31 of the Indian Contract Act, 1872 and become enforceable as soon as the even of redemption) by the plaintiff herself) happened, We agree with the view of the Madras High Court in R. Muniswami Goundar vs. B.M. Shamanna Gauda expressed in slightly different circumstances. The doctrine of *id certum est quod certum reddj potest* is clearly applicable to the case before us which in the language of Herbert Broom (in his book dealing with legal maxims) is that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. A similar question had arisen in *Duncombe Vs. Brighton Club and Norfolk Hotel Company*, relied upon in the Madras case. Under an agreement, the plaintiff had supplied some furniture to the

defendant for which payment was made but after some delay. He claimed interest. The rule at common law did not allow interest in such a case, and the plaintiff in support of his claim relied upon a statutory provision which could come to his aid only if the price was payable at a certain time. Blackburn, J. observed that the defendant did not have the slightest hesitation in saying that the agreement contemplated a particular day, which, when the goods were delivered would be ascertained; and then the money would be payable at a certain time; but rejected the plaintiff's demand on the ground that the price did not become payable by the written instrument at a certain time. The other learned Judges did not agree with him, and held that the statute did not require that the document should specify the time of payment by mentioning the event upon which the payment was to be made, and if the time of event was capable of being ascertained the requirements of the action were satisfied. The same is the position in the case before us. The requirement of Article 54 is not that the actual day should necessarily be ascertained upon the face of the deed, but that the basis of the calculation which was to make it certain should be found therein. We accordingly, hold that under the agreement the date for the defendant to execute the sale deed was fixed, although not by mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of the mortgage; and, immediately after the redemption by the plaintiff, the defendant became liable to execute the sale deed which the plaintiff was entitled to enforce. The period of limitation thus started running on that date. The case is therefore, covered by the first part of Article 54 (third column) and not the second part."

Under these circumstances, it must be held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit required to be filed within three years from the date fixed by the parties under the contract. Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly in changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance

was sought for by way of an amendment. The cause of action is required to be stated initially in the plaint but it was not pleaded. It was sought to be amended, along with an application for specific performance which, as stated earlier, was rejected. Under these circumstances, even by the date of filing of the application, namely, November 5, 1992, the suit was barred by limitation. The High Court, therefore, was right in refusing to permit the amendment of the plaint.

It is then contended that the appellants have already paid the substantial amount and, therefore, they will be deprived of the remedy of recover thereof. Shri Harish Salve, learned counsel for the respondent, in fairness, has stated that his client would refund by depositing in the trial Court the entire amount with interest as stipulated in the contract within a period of six months from today.

The appeal is accordingly dismissed subject to the above undertaking given by the respondent. No costs.