

PETITIONER:
BIBI JAIBUNISHA

Vs.

RESPONDENT:
JAGDISH PANDIT & ORS.

DATE OF JUDGMENT: 10/02/1997

BENCH:
K. RAMASWAMY, G.T. NANAVALI

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

This appeal by special leave arises from the judgment of the High Court Patna, made on May 23, 1996 in appeal from appellate decree No. 135 of 1982.

The admitted facts are that the appellant had sold the suit property by a registered conveyance dated 21.2.1969 with a contemporaneous agreement of reconveyance for a consideration of Rs. 4,000/-. The appellant had filed the suit on April 7, 1975 for specific performance of reconveyance of the property. The Courts below had dismissed the suit on the ground that the appellant was not ready and willing to perform his part of the contract. The trial Court as well as the High Court further dismissed on the ground that the time was the essence of the contract and the appellant had not performed the contract within the stipulated time and, therefore, the suit is barred by limitation.

The question, therefore, is : whether the view taken by the trial Court and the High Court that the time is the essence of the contract is correct in law? No doubt, the High Court has framed the point in paragraph 8 of the judgment and recorded the finding that the time was the essence of the contract. It is an admitted position that the plea was not specifically raised, though it was stated in the written statement that the appellant had not performed his terms of the contract within time. Admittedly, no issue was raised in this behalf. The question, therefore, is: whether the High Court would be justified in coming to the conclusion that the time was the essence of the contract? It is now well settled legal position that in the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulates and there are special facts and circumstances in support thereof. It must be specifically pleaded and issue raised so that the other party has a right to lead evidence. There is no express plea in the written statement nor any issue raised in that behalf. Consequently, there was no opportunity to the appellant to adduce rebuttal evidence that time was not the

essence of the contract.

This Court in Smt. Indira Kaur & Ors. vs. Sheo Lal Kapoor [(1988) 2 SCC 488] in paragraph 6 held as under.

"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 respondent in the trial court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents in the trial court. Apart from the absence of pleadings we don't find any basis for the plea of the respondents that the time was of the essence of the contract."

This Court held that the plea cannot be raised, for the first time, in the High Court when it is not a matter of pleading or issue in that behalf. We find that the same ratio applies to the facts in this case. Accordingly, the finding that the time was the essence of the contract and non-suiting the appellant on that finding is clearly in error.

The next question is : whether the appellant was ready and willing to perform his part of the contract? In that behalf, all the Courts have found that the appellants was not ready and willing to perform his part of the contract and an inference has been drawn in support of the finding from the non-production of the Bank Pass-book. It is seen that though he has not produced the passbook, it is not the plea of the respondent that she had no capacity to pay the amount. She established that she has a substantial money to pay the amount. Under these circumstances, it would be unlikely that the appellant would have failed to offer the amount before coming to the Court for the specific performance. It is seen that the last day of the limitation under the contract was February 20, 1973 and the suit was filed on April 7, 1975 within three years under Article 54 of the Schedule to the limitation Act. The courts below were wrong in coming to the conclusion that the appellant had not tendered the amount to the respondent. It is seen that in the evidence of the plaintiff (PW-1), it is stated that he was willing and, in fact, he had offered a sum of Rs. 4,500/-. On the other hand, another witness (PW-3) has stated that he has offered to pay a sum of Rs. 4,000/-. On this minor discrepancy of Rs. 500/-, the court below was not right in disbelieving the entire evidence.

The material question is: whether the appellant had capacity to pay the money as offered. On this aspect, there is no consideration by either of the courts. Under these circumstances, the courts below were in error in reaching the conclusion that the appellant was not ready and willing to perform her part of the contract. As held earlier, there is no dispute on the capacity of the appellant to pay back Rs. 4,000/- the consideration paid under the conveyance executed in favour of the respondent. When we put the question to the learned counsel for the appellant as to what amount his client is willing to pay since the property is required to be reconveyed under the agreement, the learned

counsel, in fairness, has stated the appellant is willing to pay a sum of Rs. 40,000/- in lump sum. We think that the offer is very fair. Under these circumstances, even if the learned counsel for the respondent was not willing to accept, but in our considered view, we think that the ends of justice and equity would require and be met by directing the appellant to deposit a sum of Rs. 40,000/- in the trial Court within a period of six months from today. The appellant on so depositing, the respondent is directed to produce the title deeds before the Court and reconvey the property. In case the respondent refuses to produce the document of conveyance executed in his favour dated 21.2.1969 as directed earlier, the trial Court is directed to have the deed of reconveyance executed in terms of the sale deed dated 21.2.1969. In that event, the appellant is entitled to the costs of the execution and also the cost of the stamp duty and registration fee of the sale deed.

The appeal is accordingly allowed. But, in the circumstances, without costs.