

(1949) 12 MAD CK 0032

In the Madras High Court

Case No : Appeal No. 518 of 1946

R. Muniswami Goundar (died) and Another

APPELLANT

Vs

B.M. Shamanna Gouda and Others

RESPONDENT

Date of Decision : 16-12-1949

Acts Referred:

Limitation Act, 1908 — Article 113

Citation : AIR 1950 Mad 820 : (1942) 55 LW 605 : (1950) 2 MLJ 163

Hon'ble Judges : Subba Rao, J;Somasundaram, J

Bench : Division Bench

Advocate : T.K. Subramania Pillai, for the Appellant; C.A. Vaidhyalingam, O. Radhakrishnan and P. Rajeswaran, for the Respondent

Final Decision : Dismissed

Judgement

Subba Rao, J.—This is an appeal against the decree and judgment of the Court of the District Judge of North Arcot in O. S. No. 7 of 1945, a suit for specific performance of a contract of sale. The facts are rather complicated, but it is necessary to give a resume for a correct appreciation of the contentious of the parties. One B. S. Muniswami Appa filed O. S. No. 125 of 1920 on the file of the District Court of C. and M. Station, Bangalore, to enforce his money claims against one China Muniswami Goundar and obtained a decree therein. The suit properties were brought to sale in execution of the decree and the decree-holder himself purchased the properties and took possession on 6th May 1924. Manioka Goundar, the son of China Muniswami Goundar preferred a claim in regard to his share in the suit properties. As the claim was allowed, Muniswami Appa filed O. S. No. 12 of 1924 on the file of the Court of the Subordinate Judge of Vellore for a declaration that he was entitled to attach and bring the plaint properties to sale in execution of his decree. To that suit Manioka Goundar and China Muniswami Goundar were made parties. The suit was decreed. Meanwhile one A. P. Varadaraja Mudaliar obtained a decree against Manioka Goundar and China Muniswami Goundar in C. S. No. 834 of 1922. In execution of that decree, the

suit properties were brought to sale in the year 1927. Defendants 1 and 2 who are the legal representatives of Muniswamiappa preferred a claim petition but that was dismissed and one Krishnamurthi Aiyar purchased the properties in court sale. They filed O. S. No. 68 of 1929 on the file of the Court of the Subordinate Judge of Vellore for setting aside the claim order. The decree-holder Varadaraja Mudaliar, the auction-purchaser Krishnamurthi Aiyar, the judgment-debtors, China Muniswami Goundar and, as Manioka Goundar died, his son Subramania Goundar were made parties. The Subordinate Judge of Vellore set aside the claim order and upheld the title of defendants 1 and 2 Exhibit P-4 is the said judgment dated 27th October 1930. The auction purchaser preferred an appeal A. S. No. 34 of 1931 on the file of the Court of the District Judge of North Arcot. The appeal was disposed of on 26th January 1933 and the decree of the Subordinate Judge was set aside. Pending the appeal, on 17th December 1931, there was a partition between defendants 1 and 2 whereunder the suit properties fell to the share of defendant 1. On 26th April 1932, i. e., pending A. S. No. 34 of 1931, defendant 1 and the plaintiff entered into an agreement dated 26th April 1932. Under that agreement, defendant 1 agreed to sell the suit properties to the plaintiff for a sum of Rs. 5500. The vendor received Rs. (sic) in the manner mentioned in that document and he agreed to take the balance of Rs. 2400 before the Sub-Registrar upon executing the sale deed on the disposal of the suit pending at that time. As the appeal was allowed, Krishnamurthi Aiyar took possession of the property on 30th November 1933 in execution of his decree after removal of the obstruction by the plaintiff. Defendants 1 and 2 preferred an appeal to the High Court against the decree in A. S. No. 34 of 1931, being S. A. No. 466 of 1933. As the title of defendant 1 to suit property was negatived, the plaintiff filed O. S. No. 40 of 1935 for recovery of the amount advanced by him under EX. P. 5. Defendant 1 contended that the suit was premature as S. A. No. 466 of 1933 was pending. The suit was dismissed on the ground that it was premature. S. A. No. 466 of 1938 was allowed on 4th April 1938 and the decree in O. S. No. 68 of 1929 was restored. The result is that the title of defendant 1 was affirmed. Defendant 1 thereupon filed a petition dated 21st October 1940 for restitution of the properties from Krishnamurthi Aiyar but that was dismissed as defendant 3, the mother of Subramania Goundar, obstructed. Defendants 1 and 2 filed E. A. No. 105 of 1941 against China Muniswami, defendant 3 and others for removal of obstruction, but it was dismissed. They filed O. S. No. 61 of 1942 on 23rd March 1942 on the file of the Court of the Sub-ordinate Judge of Vellore for setting aside that order. To that suit China Muniswami Goundar and defendant 3, i. e., the mother of Subramania Goundar were made parties. Pending the suit, China Muniswami Goundar died and defendant 4 was added as one of the legal representatives. Before the suit was disposed of, on 14th September 1943, the plaintiff applied under Order 1, Rule 10, Civil P. C., to be made a party to the suit and the main allegation made in the affidavit filed in support of the petition was that the parties to that suit were colluding to defraud his rights. Notice of that petition was served on the advocate for defendant 1 and defendant 3 on 14th September 1943. That petition was returned for complying with certain

requirements. Meanwhile, the parties to the suit rushed through a compromise and a compromise decree was passed on 20th September 1943 whereunder defendants 1 and 2 after receiving a sum of Rs. 5000 gave up all their rights in the suit properties. R. Muniswami Goundar (the plaintiff) filed the present suit on 18th August 1944 for specific performance of the agreement embodied in Ex. P-5 dated 26th April 1932.

2. The defendant contended inter alia that the suit was barred by limitation, that the agreement was affected by the principle of *his pendens*, that the plaintiff having elected to file a suit for the refund of the purchase money was precluded from filing the suit for specific performance and that defendant 3 acquired a right by adverse possession. The learned District Judge held on all the aforesaid points against the plaintiff and dismissed the suit. The plaintiff prefers the above appeal.

3. The main question in the appeal is whether the suit to enforce the agreement EX. P-5 is barred by limitation. The learned counsel for the appellant as well as the respondents agreed that Article 113, Limitation Act, applied. But counsel for the appellant argued that limitation would start only from the date when he had notice that the performance was refused, i. e. the compromise decree in O. S. No. 61 of 1942 dated 20th September 1943, whereas the learned counsel for the respondent contended that limitation would start to run from the date of the agreement itself, i. e., 26th April 1932. Exhibit P-5 is the agreement entered into between the parties on 26th April 1932, The relevant portion of the agreement reads as follows: "

As regards the balance of Rs. 2,400, since a suit has been pending concerning the same property, I shall receive it before the Sub-Registrar upon executing a sale deed the moment the suit is disposed of."

The parties therefore under this document contemplated a date which may be ascertained with reference to an event certain to happen. Whether the suit means the appeal then pending i. e., A. S. No. 34 of 1931 or is comprehensive enough to include a final determination of the suit by the highest Court of appeal the dates of the disposal of the appeal and of such determination by the highest Court of appeal are ascertainable with certainty. Article 113 reads as follows:

----- "Description
Period of Time from which period of suit. limitation. begins to run. 113. For Three years The date fixed for the per- specific per- formance, or, if no such formance of date is fixed, when the a contract. plaintiff has notice that performance is refused." -----

The principle underlying this article is apparent. When the date is fixed under the first part of Col. 3, limitation begins to run forthwith as the date is certain. But where no such time is fixed and where the party against whom the limitation runs is not in a position to know of the occurrence of the contingency contemplated by the contract, time begins to run only when he has notice of the refusal of the performance. The question is, what is the meaning to be attached

to the words "date fixed"" in the first part of col. 3. Do they mean the date by calendar or are they comprehensive enough to include a date which can be ascertained with reference to an event certain to happen ? The principle applicable is the doctrine of *Id certum est quod cerium reddi potest*. This doctrine is stated in Broom's Legal Maxims, p. 423 (10th edn.),

"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. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first, when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty."

The language used in the aforesaid passage is wide enough to include a date which though at the time when the contract was made was not known but could be ascertained by an event which subsequently was certain of happening. In *Duncombe v. Brighton Club Co.*, (1875) 10 Q. B. 371: 44 L. J. Q. B. 216, the learned Judges had to construe the words "if such debt be payable by virtue of some written instrument at a certain time." u/s 28 of 3 and 4 Wm. 4, chap-42, a creditor would be entitled to interest only if the written instrument fixed a certain time for payment. Mellor J. says at p. 377:

"it does not seem to be material whether, that is done with reference to a named event on which payment is to be made, or by naming the day."

The following maxim found in Broom's Legal Maxims (5th edn., p. 623) is approved:

"Although every estate for years must have a certain beginning and a certain end, albeit there appears no certainty of years In the lease, yet, if by reference to a certainty it may be made certain, it sufficient,"

In *Muhiuddin Ahmad v. Majlis Rai*, 6 ALL. 231 : 1881 A. W. N. 42, there was a contingent contract of sale of property. The vendor offered to sell and the vendee to buy contingent on the vendor's title being decreed in a suit pending, As the decree in the suit having been in favour of the vendor's title, the vendee filed a suit for specific performance. Though in that case the suit was not barred, whether the first part of Article 113 or the second part was applied, the judgment indicates that the learned Judges were inclined to accept the date of the decree of the appellate Court on which the contract was contingent as the date fixed within the meaning of the first part of the third column. In *Sooraparaju v. Veerabadrudu*, 30 Mad, 486 : 17 M. L. J. 505, the facts are; three brothers S, E and K and their father made an arrangement which amounted to a division of the family properties. The father and R and K continued, however, to live together. The father died first and then R, leaving him surviving A his widow and B his daughter. A and B did not claim R's share but were content with maintenance. There was, however, no surrender by A of her rights, S and K entered into an agreement between themselves to the effect that K should enjoy R's share and maintain A and B, S being given a small piece of land at once and

that after A's death, S was to take half of R's share. B died unmarried in A's lifetime and S predeceased A who died in 1891. In a suit brought in 1901 by the son of S to recover one half share of R's property, Boodam J., held that the agreement gave only a right to claim specific performance thereof when the reversion should fall in, which right became barred as it was not enforced within the statutory period after the death of the widow. At page 492 the learned Judge says : "At the death of the widow, therefore, the plaintiff's only remedy in my opinion was to sue Krishnayya for specific performance of the contract made by Ex. A. This right became barred within three years of May 1891 when the widow died."

Though the question was not discussed, this can only be supported on the principle that in the contract the date was fixed with reference to an event, namely, the death of the widow which was certain to happen. The learned counsel for the appellant relied on Sampat Kumar Singh Vs. G.R. Peters and Others, , in support of his contention, The plaintiffs in that case made two usufructuary mortgages on 17th June 1907. Subsequently they executed another usufructuary mortgage in favour of the defendants directing them to pay a portion of the consideration towards the earlier mortgages. As the defendants had failed to redeem the two earlier mortgages, the suit was filed for damages and also for a direction to the defendants to redeem the two earlier mortgages. The second relief was construed to be one for the specific performance of the agreement to discharge the earlier mortgages. So construing, the learned Judges applied Article 113. Limitation Act. At page 411 the learned Judges held that the date fixed under Article 113 must be the date clearly mentioned in the contract, whether the said contract be oral or in writing and that the force of the word "fixed" implied that it should be fixed definitely and should not be left to be gathered from the surrounding circumstances of the case. As no date was fixed in that case they held that limitation would run only from the date of the refusal which was well within time. This decision does not help the appellant as we also agree that the date cannot be gathered from the surrounding circumstances but must be fixed in the contract itself.

4. The next decision cited is Alop Parshad v. Court of Wards, A. I. R. 1938 Lah. 28 : 181 I. C. 728. The contract in that case provided that B should finance A's litigation in respect of certain property and in return get certain share of the property after the passing of the decree. It also provided that if an appeal was preferred from the decree to the Privy Council, B would be entitled to a greater share. B brought a suit for the specific performance of the contract more than three years after the date of the decree but within three years of the refusal to perform the contract. The learned Judges held that the principle *certum est quod certum reddi potest* did not apply to the facts of that case as in their view the date could not be ascertained. At page 26 they observe :

"The plaintiffs were entitled to get their share after the decree which undoubtedly means when the decree becomes unassailable. On 10th May 1925 the decree in

favour of Saleem Mohammed Shah had not become unassailable. It was liable to be challenged in an appeal to the High Court, and on the decision of such an appeal, by an appeal to His Majesty in Council. 10th May 1925 cannot, therefore, be regarded as the date on which the plaintiff became entitled to their share."

With great respect we cannot agree with these observations. In our view it would be enough if the date fixed in the contract is ascertainable with reference to an event certain to happen. Mr. Subramania Pillai relied upon a decision of a Division Bench of this Court in *Mallikarjuna v. Parthasaradhirao*, AIR 1944 Mad. 218: I. L. R. (1944) Mad. 742. Under the terms of the contract in that case the vendor promised to execute the sale deed when both of his brothers (appellants 1 and 2) or one of them appellant 2 there was some discrepancy even on that point who were students elsewhere returned to the village for the next vacation, i. e., in May June 1933, The learned Judges held that the agreement was too indefinite to be regarded as fixing a date for the performance of the contract. It will be seen that there was no definite evidence in that case in regard to the contingency. Further, the contingency contemplated in that case was not an event certain to happen. It might be that neither of those brothers might return in May or June and, therefore, obviously the aforesaid doctrine could not be applied.

5. We, therefore, hold that if the date can be ascertained with reference to an event certain to happen it will be a date fixed within the meaning of Article 113, Limitation Act. In the present case, the appeal (A. S. No. 34 of 1931) was disposed of on 26th January 1933 and the suit was filed on 18th August 1944 and, therefore, the suit is clearly barred under Article 113, Limitation Act. In the view we have taken on the question of limitation, it is not necessary to consider the other questions raised by the learned counsel for the appellant. In the result the appeal is dismissed with costs.