

RAMA ROW
v.
MARTHA
SEQUEIRA.
—
SESHAGIRI
AYYAR, J.

ask the District Judge to return a finding on the following issue :—

“ Was the latrine erected by the defendant in a reasonable manner so as not to infringe unnecessarily the rights of plaintiff ” ?

Six weeks for finding and seven days for objections.

In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted a FINDING to the effect (1) that the erection of the latrine at the particular place was not consented to either by the plaintiff or by the municipality, (2) that the first defendant's garden was an extensive one wherein a latrine could be constructed at another place without causing any nuisance to the neighbours, and (3) that the latrine was not erected by the defendant in a reasonable manner so as not to unnecessarily infringe the rights of plaintiff.

This Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by the High Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and subject to the modification indicated in our remand order the Second Appeal is dismissed. Each party to bear his own costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

SAMARAPURI CHETTIAR (SECOND DEFENDANT), APPELLANT

v.

A. SUDARSANACHARIAR AND A. SADAGOPACHARIAR
(PLAINTIFFS), RESPONDENTS. *

1919,
January,
22 and 23,
and May, 2.

Sale of land—Contract of resale—Time, essence of the contract—Doctrine applicable to contracts of sale, whether applicable to contracts of resale—Rule of English law, applicability of, to India.

The doctrine, that time may not be of the essence of the contract which arises on the construction of contracts of sale of immoveable property, is not applicable to contracts of resale of property conveyed.

If the transaction is not a mortgage, the right to repurchase being an option must be exercised according to the strict terms of the power.

* Second Appeal No. 1218 of 1918.

Rule of English law followed; *Joy v. Birch*, (1836) 7 E.R., 22; *Ranelagh v. Melton*, (1864) 62 E.R., 627; and *Dibbins v. Dibbins*, (1896) 2 Ch., 348, referred to.

SAMARAPURI
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NACHARIAR.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Appeal Suit No. 80 of 1917, preferred against the decree of A. VEKATABAMAYYA PANTULU Garu, the Temporary Subordinate Judge of Chingleput, in Original Suit No. 14 of 1916.

The plaintiff and another person sold the suit lands under a sale-deed, dated 19th August 1908, in favour of the second defendant for a consideration of Rs. 4,500. Two days after the sale, on the 21st August 1908, the second defendant executed an agreement in favour of the two plaintiffs by which the former agreed to convey the lands purchased by him on 19th August 1908. The material terms of the agreement were as follows:

"If you or any one authorized by you pay up the sale amount (Rs. 4,500) to me or my heirs at any time within five years from this day (i.e.), within 21st October 1913, myself or my heirs shall sell to you, etc. This agreement will not be valid after the stipulated period. After the expiration of the said period, you will claim no right or privilege whatever to this agreement."

The plaintiffs did not pay the price on the stipulated date. About a year and a few months after the stipulated time, the plaintiffs sent a notice to the defendants to receive the money due to them and to re-convey the property. On the refusal of the second defendant, the plaintiffs brought the present suit for redemption on the footing of a mortgage to the second defendant; the plaint was subsequently amended by asking for an alternative relief by way of specific performance of the contract to sell under the agreement of the 21st August 1908; the plaintiffs contended that time was not of the essence of the contract of resale of the suit properties to them. The trial Court framed issues both as to the case relating to redemption on the footing of a mortgage and as to the case for specific performance of the contract to sell. The trial Court held that the transaction viewed as a contract of sale, could be specifically enforced, as time was not of the essence of the contract, and passed a decree for specific performance in favour of the plaintiffs. On appeal by the second defendant, the District Judge affirmed the decision of the former Court, holding that time was not of the

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essence of the contract. The second defendant preferred a second appeal.

T. Narasimha Ayyangar and *N. Srinivasa Achariyar* for the appellants.

S. Krishama Achariyar for the respondents.

The JUDGMENT of the Court was delivered by

SADASIWA
AYYAR, J.

SADASIWA AYYAR, J.—The lower Appellate Court was in error in applying the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale to contracts for resale of property conveyed. The true doctrine is stated in *Fisher on Mortgages*, chapter 1, section 1, paragraph 18, and is that if the transaction is not a mortgage the right to repurchase being an option must be exercised according to the strict terms of the power—vide *Joy v. Birch*(1), *Lord Ranelagh v. Melton*(2) and *Dibbins v. Dibbins*(3). There is no reason why a different rule should prevail in India. We therefore reverse the decisions of the lower Courts and remit the case to the Court of First Instance for the trial of issues Nos. 1 and 4 in the light of observations of the Full Bench in *Muthuvelu Mudaliar v. Vythilinga Mudaliar*(4).

K.R.

(1) (1886) 7 E.R., 22.

(2) (1864) 62 E.R., 627.

(3) (1896) 2 Ch., 348.

(4) (1919) 38 M.L.J., 385.