

## PRIVY COUNCIL.

P. C.\*  
1908  
November 10

AMMA BIBI AND OTHERS (PLAINTIFFS) v. UDIT NARAIN MISRA  
AND OTHERS (DEFENDANTS).

and 3 other appeals consolidated.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 97—Agreement to sell—Rescission of contract—Act No. IX of 1872, (Indian Contract Act, sections 55, 65—Suit to recover money paid as part of purchase money when consideration failed—Suit for specific performance and in alternative for refund of money paid—Accrual of cause of action.*

The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immovable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. On 10th December 1896 the plaintiff instituted a suit against the defendants for a refund of the money so paid by him, alleging that the defendants had failed to fulfil their part of the contract, which was to execute a conveyance of the property within one month. The defendants denied this, and the first Court, while finding that the period of one month had been fixed by the parties for the execution of the deed of sale, held on the evidence that time was not of the essence of the contract, and that the plaintiff could not (as he claimed) rescind the contract under section 55 of the Contract Act and recover the money he had paid; and this decision was on appeal affirmed by the High Court on 18th January 1900. On 16th April 1900 the plaintiff sued the defendants claiming specific performance of the agreement to sell, or in the alternative for a refund of the money paid by him as part of the consideration for the sale agreed upon. The first Court gave the plaintiff a decree for specific performance. On appeal by the defendants it was held by the High Court on 30th April 1903, (1) that the terms of the agreement to sell not being satisfactorily proved no decree for specific performance could be made; (2) that the plaintiff was therefore entitled to recover the money which he had paid under the agreement; and (3) that, following the case of *Bassu Kuar v. Dhun Singh* (1), the plaintiff's alternative claim for a refund on failure of consideration was governed as to limitation by article 97 of schedule II of the Limitation Act 1877, and was not barred by lapse of time, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. The plaintiff appealed from the decision of the High Court of 18th January 1900, and the defendants from that of 30th April 1903 to His Majesty in Council, and both

\*Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1888) L. L. R., 11 All., 47, L. R., 15 I. A., 211.

appeals were dismissed by their Lordships of the Judicial Committee, who upheld the decisions of the High Court.

FOUR appeals consolidated (Nos 55, 56, 57 and 58 of 1906) from decrees of the High Court at Allahabad. In Nos. 55 and 56 the decrees (18th January 1900) of the High Court affirmed decrees (4th May 1897) of the Subordinate Judge of Gorakhpur; and in Nos. 57 and 58 the decrees (30th April 1903) of the High Court reversed decrees (27th September 1900) of the same Subordinate Judge.

The original plaintiff in all the four suits out of which the appeals arose was one Muhammad Minnat Ulla who is now represented by the appellants in appeals 55 and 56, and the respondents in appeals 57 and 58. On 10th December 1896 Minnat Ulla brought two suits (275 and 276 of 1896) against two separate sets of defendants, of whom the principal was Udit Narain Misra in suit 275 and Rama Shankar Misra in suit 276, those defendants now being respectively the principal respondents in appeals 55 and 56 and the principal appellants in appeals 57 and 58. In both the suits 275 and 276 of 1896 the plaintiff alleged that the defendants had agreed to sell certain property to him on, (among others) the condition that they should execute and register the necessary sale-deeds within a month from the 15th September 1896 the date of the agreements. In accordance with these agreements the plaintiff paid a substantial portion of the consideration for the sales as earnest money in the manner agreed upon. The defendants however did not execute the sale-deeds within the stipulated time, and the plaintiff therefore sued them for a return with interest of the purchase money which had been paid by him in respect of the sales, alleging that the defendants, by omitting to execute the deeds within a month, had failed to carry out their contract. In these suits the Subordinate Judge found on the evidence that one month's time was agreed upon between the parties for the completion of the sale, and in his judgment he said :—

“ The plaintiff comes into court on the allegation that the defendants having failed to complete the sale within the specified time of one month, the contract to sell and purchase is at an end and that therefore he is entitled to recover the amount which he has paid for them together with interest thereon. Section 55 of Act IX of 1872, therefore applies to the case and the plaintiff is entitled to rescind the contract if time be found to have been

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of the essence of the contract. In order to determine this I must first refer to the terms of the contract embodied in the petition, Exhibit II. The terms as set forth in the document are as follow:—'That in lieu of the aforesaid amount (Rs 13,865-6) as well as in lieu of the amount due to Maulvi Minnat Ulla, the defendant would in the course of one month execute and have registered a sale-deed of the four villages specified below in favour of the Maulvi at the rate of Rs. 2-6 per cent. per annum according to the Government roll, and whatever may be found due to the Maulvi after the execution of the sale-deed, the condition of the former deed would hold good and according to the conditions in the old deed the same property would continue hypothecated in the balance of the purchase money and at the time of the execution of the sale-deed, the Maulvi would execute an agreement to reconvey the property sold to the defendant within one year subject to the conditions agreed upon between the parties.' In these terms I find nothing to support the contention that the time of one month is of the essence of the contract. According to the terms of the agreement, the one year for reconveyance is to be reckoned after the execution of the sale-deed, on whatever date it may be executed. It does not appear that the plaintiff had to sustain a substantial loss if the sale was not completed within one month."

And after referring to the cases of *Ram Gopal Mookerjee v. Masseyk* (1), *Brojo Soonduree Debia v. Collins* (2), *Svooltan Chand v. Schiller* (3), *Dadabhoy Dajibhoy Baria v. Pestonji Marwanji Barwaha* (4) and *Buldeo Doss v. Howe* (5), which last case was distinguished from the present, the Subordinate Judge concluded:—

"For the reasons and with regard to the rulings cited above I am of opinion that the time of one month was not of the essence of the contract, and that therefore the plaintiff is incompetent to rescind it."

He dismissed both suits on that ground; and on appeal the High Court (SIR ARTHUR STRACHEY, C. J., and BANERJI, J.) on 18th January 1900 said in affirming that decision—

"We agree with the Court below that there is no reason for the view that time was of the essence of the contract. Upon that view the decision of the Court below is correct and the appeal must be dismissed with costs."

The plaintiffs obtained leave to appeal to His Majesty in Council.

The suits which led to appeals 57 and 58 were on dismissal of the suits 275 and 276 of 1896 instituted in the Court of the same Subordinate Judge on 16th April 1900 being numbered 83 and 84 of that year. The facts with regard to them will be found

(1) (1860) 8 Moo. I. A., 289.

(3) (1878) I. L. R., 4 Calc., 252.

(2) (1870) 13 W. R., 359.

(4) (1893) I. L. R., 17 Bom., 457 (464).

(5) (1880) I. L. R., 6 Calc., 64.

fully stated in the report of the hearing of them on appeal before the High Court (SIR JOHN STANLEY, C.J. and BURKITT, J.) in I. L. R., 25 All., 618. The suits were for specific performance of the contract, or in the alternative for return of the earnest money paid by the plaintiff. The Subordinate Judge gave the plaintiff decrees for specific performance. On appeal the High Court stated that in view of the conflict of testimony they were not satisfied as to what the contract really was, and could not therefore give a decree for specific performance; but holding that the suits were not barred by limitation as was contended by the defendants, the High Court made a decree in each suit for the recovery of the sum paid by the plaintiff with interest. From that decision the defendants appealed to His Majesty in Council.

In these appeals

Ross for the appellants in appeals 55 and 56, and for the respondents in appeals 57 and 58 contended in appeals 55 and 56 that the courts below were in error in holding that time was not of the essence of the contract. The Subordinate Judge found on the evidence that the period of one month was agreed upon by the parties for the completion of the sale, and if so, it must have been intended to be a binding condition. It was submitted that time *was* of the essence of the contract, and that the plaintiff was entitled on failure of the defendants to complete the sale within the time stipulated to rescind the contract under section 55 of the Contract Act (IX of 1872) and that the decision of the Courts in India to the contrary should be set aside.

With respect to appeals 57 and 58 it was contended for the respondents that the suits out of which they arose had been rightly held barred either by the Civil Procedure Code (Act XIV of 1882) or by the Limitation Act (XV of 1877). As it had been found that the contract was not enforceable and a decree for specific performance could not therefore be granted, it was clear that the plaintiffs, on their alternative plea, were entitled for the reasons given by the High Court to a return of the money paid by them in consideration of the sale. The decision in these appeals should be upheld.

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*De Gruyther, K. C.*, for the respondents in appeals 55 and 56, and the appellants in appeals 57 and 58, contended that the lower Courts had rightly held that time was not of the essence of the contract, even if the period of a month had been fixed for completion, and that the contract could not therefore be rescinded under section 55 of the Contract Act.

For the appellants in appeals 57 and 58 it was contended that the suits were barred by the law of limitation; article 113 of Schedule II of the Limitation Act prescribing a period of three years from the date fixed for performance of the contract, so that the cause of action arose on the expiry of the month which it had been found was so fixed, and these suits were brought more than three years after that time. With regard to the plaintiffs' right to a return of the money paid, that also was barred by the three years period of limitation, the cause of action arising from the same date. It was also submitted that that question was *res judicata* in the former suit, and the present suits for it were therefore barred by section 13 of the Code of Civil Procedure, and also by section 43 of that Code. Reference was also made to section 65 of the Contract Act, articles 97 and 120 of the second schedule of the Limitation Act, and section 12 of the Civil Procedure Code.

1908, *November 10th.*—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

Their Lordships are of opinion that the judgment of the High Court is quite right. They will therefore humbly advise His Majesty that the appeals and the cross-appeals ought all to be dismissed. The parties will bear their own costs of their respective appeals.

*Appeals dismissed.*

Solicitors for appellants in appeals 55 and 56, and for respondents in appeals 57 and 58:—*Barrow, Rogers and Nevill.*

Solicitors for respondents in appeals 55 and 56, and for appellants in appeals 57 and 58:—*Ranken, Ford, Ford and Chester.*

J. V. W.