

APPELLATE CIVIL.*Before Addison and Bhide JJ.***RAGHBIR DAS (PLAINTIFF) Appellant***versus***SUNDAR LAL AND ANOTHER (DEFENDANTS)****Respondents.****Civil Appeal No. 1993 of 1924.***Indian Contract Act, IX of 1872, section 55—Time—when of the essence of a contract.*

Held. that for the application of section 55 of the Contract Act, the question whether time is or is not of the essence of the contract has to be decided on the facts of each case and the mere fact that time is specified for the performance of a certain act is not, by itself, sufficient to prove that time is of the essence of the contract. The Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time.

Jamshed Khodaram v. Burjorji (1), followed.

Held further, that where time is of the essence of the contract, it is the business of the party, who has promised to pay, to see that the money reaches the other party by or before the due date. Thus, where the former, having delayed till within four days of the end of the month during which payment was agreed to be made, though it was open to him to send the money by telegraphic transfer so as to ensure payment within the stipulated time, sent drafts by registered post, he must be held responsible for the delay caused by the adoption of this method.

First appeal from the decree of Bawa Kanshi Ram, Subordinate Judge, 1st Class, Lahore, dated the 11th April, 1924, directing that the defendants do pay to the plaintiff the sum of Rs. 5,000.

MATHRA DAS and BHAGWAN DAS, for Appellant.**MEHR CHAND MAHAJAN and JIWAN LAL KAPUR, for Respondents.**

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BEHDE J.—This first appeal arises out of a suit for recovery of Rs. 40,000 as compensation on account of the breach of a contract. According to the allegations in the plaint, on the 7th July, 1919, defendant entered into a verbal agreement with the plaintiff to sell 72 *kanals*, 6 *marlas* of land at Rs. 900 per *kanal*, the money being payable as follows:—Rs. 5,000 in advance, Rs. 40,000 in the month of August and the rest in December. The advance of Rs. 5,000 was duly paid. As regards the second instalment of Rs. 40,000 which was payable in August, defendant instructed the plaintiff to remit the money to him at Bombay. Plaintiff accordingly sent him two drafts for Rs. 40,000 on the Indian Cotton Company payable at Bombay, but the defendant intentionally omitted to present them for encashment and later on sold the land to a doctor named Muhammad Sharif for Rs. 1,00,000 at a profit of Rs. 35,000. The plaintiff therefore sued the defendant for recovery of the advance of Rs. 5,000 together with Rs. 35,000 as damages.

The defendant admitted the terms of the contract as stated above but pleaded further that it was definitely stipulated that if the instalment of Rs. 40,000 was not paid in August 1919, the contract was to be at an end. He stated that he did not receive the drafts for Rs. 40,000 till the 2nd September 1919, and that even then the drafts, though payable within 24 hours after presentation were not so paid though they were duly presented for encashment through the Punjab National Bank, Ltd. The defendant then returned the drafts to the plaintiff. As the defendant had to open a shop at Bombay on a particular auspicious day (*Mahurat*) fixed for the purpose and wanted

the money by that date, he had to procure it from other sources.

The defendant admitted that the land was sold subsequently to Muhammad Sharif for Rs. 1,00,000 but alleged that Rs. 33,000 out of this sum was meant for three pre-emptors who had instituted suits and Rs. 2,000 for the share of another person (2 *kanals*, 14 *marlas* in area) which was purchased to secure exclusive possession. The defendant had received only Rs. 62,400 for the area of 72 *kanals*, 6 *marlas* which was to be sold to the plaintiff and had thus sustained a loss of Rs. 2,600.

The learned Subordinate Judge who tried the suit held as regards the payment of the sum of Rs. 40,000, that time was of the essence of the contract and that the plaintiff, having failed to pay the amount within the specified time, was guilty of a breach of the contract and was, therefore, not entitled to any damages. He, however, held that in the absence of any definite stipulation as to forfeiture, the plaintiff was entitled to receive the sum of Rs. 5,000, paid in advance. A decree for Rs. 5,000 with proportionate costs was accordingly passed in favour of the plaintiff. From this decree, plaintiff has appealed while the defendant has filed cross-objections.

The main dispute between the parties centred round the payment of Rs. 40,000 in August. According to section 55 of the Indian Contract Act, when a party to a contract promises to do a certain thing at or before a specified time, and fails to do it at or before that time, the contract becomes voidable at the option of the promisee " if the intention of the parties

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was that time should be of the essence of the contract.' The question whether time is or is not of the essence of the contract has to be decided on the facts of each case. It has been held by their Lordships of the Privy Council in *Jamshed Khodaram v. Burjorji* (1), that the mere fact that time is specified for the performance of a certain act, is not, by itself, sufficient to prove that time is of the essence of a contract. The Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time.

In the present instance, the agreement to sell was not reduced to writing but the evidence of Kartar Singh, broker, who admittedly settled the bargain and has not been shown to be interested, is valuable. This witness has deposed that the defendant wanted the whole of the consideration at once, but eventually agreed to take Rs. 5,000 forthwith, Rs. 40,000 in August and the balance in December. The defendant, however, made it perfectly clear that he was selling the land merely because he was in need of money and that he would not sell it unless he could have Rs. 40,000 in August. Kartar Singh says that he duly informed the plaintiff of this fact and the plaintiff admitted in the witness-box that the broker told him that the defendant wanted Rs. 40,000 in August. He, however, stated that he only agreed to pay that amount in October. There is no evidence, whatever, to corroborate this statement and it seems clearly unreliable in view of the fact that even in the plaint it was admitted that the sum was payable in August. The stipulation

(1) (1916) I. L. R. 40 Bom. 289 (P.C.).

that the sum of Rs. 40,000 was to be paid in August was also mentioned in the receipt for Rs. 5,000 and the plaintiff admittedly made no protest or any attempt to get it altered.

There is evidence on the record to show that the defendant wanted money to start business in Bombay in partnership with other persons and had to contribute Rs. 51,000 for the purpose in the month of August. The defendant asked the plaintiff for the payment of Rs. 40,000 early in August, but plaintiff was unable to pay it before defendant left for Bombay. Eventually the plaintiff sent two drafts for Rs. 40,000 from Murree on the 28th August, but these did not reach the defendant till the 2nd of September. The opening of the shop at Bombay was at first fixed for the 28th of August but it was postponed to 1st September owing to non-receipt of the sum of Rs. 40,000. Eventually the defendant had to borrow money from other persons to pay his contribution. The evidence of the defendant on this point stands practically un-rebutted.

In view of all the facts stated above, I feel no hesitation in holding that time was of the essence of the contract to pay Rs. 40,000 in August and that the plaintiff was fully aware of this. The next point for decision is whether the plaintiff failed to perform this part of the contract as held by the Court below. Admittedly it was not till the 28th August 1919 that the plaintiff was able to send the two drafts, for Rs. 40,000. These drafts were despatched on the 28th August from Murree by registered post and reached Bombay on the 2nd of September, *i.e.*, after the expiry of the stipulated time. The learned counsel for the plaintiff-appellant urged that there were two holidays

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and this may have been responsible for the delay in delivery. But it was the business of the plaintiff to see that the money reached the defendant before the due date. It appears from the evidence of Kartar Singh, broker (which I see no reason to disbelieve), that the defendant had left instructions that the money should be paid through the Punjab National Bank at Lahore or sent through the branch of that Bank to Bombay, but neither of these courses was adopted. It was open to the plaintiff to send the money by telegraphic transfer so as to insure payment within the stipulated time, but he preferred to send drafts by registered post and must be held responsible for the delay caused by the adoption of this method. In this aspect of the question it is scarcely necessary to discuss the matter further, but I may say that the contention of the learned counsel for the appellant, that the defendant was anxious to get out of the contract owing to rise in the price of the land and intentionally returned the drafts without getting them cashed seems to me to be untenable in view of all the circumstances. The agreement of sale was entered into only in July 1919 and there is no evidence on the record to show that there had been any rise in the price of the land during July or August 1919. It is true that the land was resold at a profit but that was long afterwards. If the defendant (who was himself a practising lawyer) had been anxious to avoid the contract, I do not think he would have cared to put the plaintiff on guard by pressing for the payment of Rs. 40,000 early in August as he did. Further, it is significant that even on receipt of the drafts after the expiry of the stipulated period, he did not return the drafts forthwith as he could have done but made efforts

to secure payment through the Punjab National Bank and returned the drafts only on the 5th September, when no payment was made till that date. Admittedly a *chaprasi* was sent to the office of the Indian Cotton Company, the drawees, to inquire about the payment of the drafts. The Manager of the Punjab National Bank has supported the defendant's statement that an effort was made to cash the drafts through the Bank but the drawees offered no payment. The learned counsel for the appellant laid stress on the fact that the drafts were not endorsed in favour of the Bank but the defendant has explained in his letter exhibit P. 8 that the proceeds were not actually to be realized by the Bank but by himself, and that he wanted to present the drafts through the Bank, merely because the drawees did not know him.

It is significant that the plaintiff did not care to sue for specific performance at once and this suit for damages was instituted some $2\frac{1}{2}$ years after the alleged breach of the contract. It seems to me that the plaintiff was conscious of the weakness of his case and was tempted to launch a speculative suit, only when he found that the land had been resold at a considerable profit.

I agree with the lower Court's finding that plaintiff himself was responsible for the breach of the contract and is, therefore, not entitled to claim any damages.

As regards the cross-objections, the only point for decision is whether the sum of Rs. 5,000 was a part of the purchase money or was earnest money and as such liable to forfeiture. This sum has been loosely described in some places as 'earnest money' but here again we have to ascertain the real intention of the

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parties. I have already referred to the fact that the defendant wanted to have the whole of the consideration, but was eventually persuaded to take it in instalments. The sum is described merely as an "advance" in the receipt exhibit P. 1 and this seems to represent the real intention of the parties. In these circumstances, there is no good reason why the plaintiff should not be allowed to claim a refund of this sum.

I would accordingly dismiss the appeal as well as the cross-objections with costs.

ADDISON J.

ADDISON J.—I concur.
 N. F. E.

Appeal dismissed.

CIVIL REFERENCE.

Before Addison and Bhide JJ.

SECRETARY OF STATE—Petitioner
versus

AMAR SINGH AND OTHERS—Respondents.

Civil Reference No. 2^o of 1927.

Punjab Alienation of Land Act, XIII of 1900, section 21-A—Reference to High Court—whether abates on failure to implead legal representatives of deceased respondent—Civil Procedure Code, Act V of 1908, Order XXII, Rule 11—Findings of fact of trial Court—whether binding on High Court.

Held, that the provisions of Order XXII of the Civil Procedure Code, apply only to suits and appeals; and not to a reference under section 21-A of the Punjab Alienation of Land Act. Moreover, in such a reference the Court is bound to decide whether the decree or order complained of is or is not in accordance with the provisions of that Act; and no appearance by or on behalf of the Deputy Commissioner is necessary.

Consequently, no question of abatement can arise from the failure to implead the legal representatives of a deceased respondent.

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May 14.