PRIVY COUNCIL.*

JAMSHED KHODARAM IRANI (PLAINTIFF), v. BURJORJI DHUNJIBHAI (DEFENDANT).

[On appeal from the High Court of Judicature at Bombay.]

P. C.*
1915.
November 11, 12, 15, 16; *December* 6.

Contract Act (IX of 1872), section 55—When time may be considered of the essence of a contract—Where intention to make time of essence of contract is not specifically expressed in unmistakeable terms—Rule of equity to disregard letter of contract, and take contract substantially as meaning completion of it within reasonable time—What takes place prior to signing of contract but nothing that takes place afterwards, to be looked at in judging of intention.

By an agreement dated 8th July 1911 the defendant (respondent) agreed to sell his interest in certain land which he held on lease from the Secretary of State for India, to the plaintiff (appellant) for Rs. 85,000 of which Rs. 4,000 was paid on execution of the agreement, and it was agreed that the title was to be made marketable, and that Rs. 80,500 should be paid on the execution of the deed of sale which was to be prepared and received within two months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered; and there was a clause to the effect that if the purchaser did not pay the amount of the purchase money within the fixed period he should forfeit his right to the earnest monies, and the vendor should be at liberty to resell the property. On 3rd October 1911 requisitions as to title were made by the appellant. The respondent did not comply with the requisitions, but on 6th October he asserted a right to put an end to the contract on the ground that time was of its essence, and claimed to be entitled to the deposit of Rs. 4,000 as the appellant had failed to complete his purchase within the time fixed. In a suit for specific performance,

Held (reversing the appellate judgment of the High Court) that time was not of the essence of the contract.

Section 55 of the Contract Act (IX of 1872) did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks, not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time.

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* *Present.*—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

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Lennon v. *Napper* (1); *Roberts* v. *Berry* (2); *Tilley* v. *Thomas* (3) and *Stickney* v. *Keeble* (4), referred to as laying down the doctrine adopted by, and embodied in, section 55 in reference to sales of land.

The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to it are to be taken as having really in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation that time is intended to be of the essence of the contract. Equity will also infer an intention that time should be of the essence of a contract from what has passed between the parties prior to the signing of the contract, the construction of which cannot, in the contemplation of equity, be affected by what takes place after it has once been entered into.

Held therefore that there was nothing in the language of the agreement or the subject matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain. The subject matter or the character of the lease sold were not such as to take the case out of the class to which the principle of equity applies. The appellant did not bind himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself their Lordships agreed with the view of the Trial Judge that there was nothing said in it sufficient to exclude the equitable canon of interpretation; and with his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence.

APPEAL 113 of 1914 from a judgment and decree (17th February 1913) of the High Court at Bombay in its Appellate Jurisdiction, which reversed a judgment and decree (30th July 1912) of the same Court in the exercise of its Original Civil Jurisdiction.

The suit in which the above decrees were passed was one for specific performance by the respondent of a contract for the sale of land to the appellant, or in the alternative for the return of the earnest money, and for damages. The defence was that the contract had become voidable under section 55 of the Indian Contract

(1) (1802) 2 Sch. & Lef. 682.

(2) (1853) 3 De. G. M. & G. 284, at p. 289.

(3) (1867) L. R. 3 Ch. 61.

(4) [1915] A. C. 386.

Act (IX of 1872) by reason of the failure of the appellant to perform his part by the time specified, and had been avoided by the respondent.

In the first Court Mr. Justice Macleod held that time was not of the essence of the contract.

On appeal Sir Basil Scott C. J. and Mr. Justice Chandavarkar reversed that decision and decided in favour of the defendant, the present respondent.

The facts of the case are fully stated in the report of the case before the appellate Court which will be found in I. L. R. 38 Bom. 77.

On this appeal :

Sir R. Finlay, K. C. and *Kenworthy Brown* for the appellant contended that time was not of the essence of the contract, nor did it become so by reason of the subsequent correspondence ; and that if it was a term of the agreement that time should be of the essence of the contract, such term had been waived. The law governing the case was to be found in section 55 of the Contract Act (IX of 1872) under which it was for the respondent to show that time was intended by the parties to be of the essence of this contract. The intention cannot be proved by evidence extrinsic to the contract, but only by the terms of the written contract itself : see section 91 of the Evidence Act (I of 1872). There was nothing to show such an intention in the contract in this case. Merely fixing a time for completing the contract did not by itself show such an intention ; nor did the clause fixing a time for payment of the balance of the purchase money with a provision that the deposit was to be forfeited on default in payment within the time so fixed show it was the intention of the parties that time should be of the essence of the contract [VISCOUNT HALDANE referred to *Stickney* v.

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Keeble[1]]. The contract in that case fixed a time for its completion, but it was held that time was not of the essence of the contract. The principle on which such a contract is interpreted is that its terms are sufficiently complied with if it is performed within a reasonable time after the date fixed. It was submitted therefore that time was not of the essence of the contract.

Leslie Scott, K. C. and *E. B. Raikes* for the respondent contended that by the agreement between the parties time was intended to be, and was, of the essence of the contract. The case of *Stickney* v. *Keeble*[1] was distinguishable: the contract in that case was in different terms from those of the agreement in the present case; and reference was made to page 416 of the report of that case per Lord Parker who said that the maxim that "in equity the time fixed for completion was not of the essence of the contract" only applied to cases where the stipulation as to time could be disregarded without injustice to the parties. Here it was submitted that if the time fixed was regarded as not of the essence of the contract it would be unjust to the respondent. [VISCOUNT HALDANE referred to *Lennon* v. *Napper*[2] which was cited in *Roberts* v. *Berry*[3] where it was decided that in contracts to sell land the stipulation as to time is differently interpreted by Courts of Law and Equity]. A Court of Equity holds that time is of the essence of the contract, (*a*) where the stipulation as to time is expressly so made, (*b*) where the property is such that the nature of the case makes time of the essence of the contract, and (*c*) where from surrounding circumstances the Court can infer that it was the intention of the parties that it should be so. In cases previous to *Stickney* v. *Keeble*[4] it has been decided that time was

(1) [1915] A. C. 386.
(2) (1802) 2 Sch. & Lef. 682.
(3) (1853) 3 De G. M. & G. 284.
(4) [1915] A. C. 386.

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of the essence of the contract in circumstances similar to those in the present case: see *Inglis* v. *Buttery* [1]. Where specific performance of a contract for sale of land is asked for by a purchaser in a Court of Equity the presumption is that time is not of the essence of the contract, and evidence, it was submitted, is admissible to rebut that presumption; it is not considered to be evidence varying or inconsistent with the contract. Reference was made to *Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* [2]. The Court can look at the surrounding circumstances for the purpose of deciding what was the intention of the parties: see Taylor on Evidence (10th edn.), Vol. II, section 1227; *Trimmer* v. *Bayne* [3]; *Seton* v. *Slade* [4]; and *Roberts* v. *Berry* [5]. Section 92 of the Evidence Act (I of 1872) in effect codifies the Common Law rule that evidence is not admissible to vary or contradict the terms of a written contract. But in the present case it was the intention of the parties that time was to be of the essence of the contract, and section 92 was therefore not applicable: reference was made to *Nokes* v. *Kilmorey* [6]; and *Tilley* v. *Thomas* [7]. The correspondence in the present case showed, it was submitted, that time was intended to be of the essence of the contract. A clause similar to that in the contract in the present case was held to show that the intention of the parties was that time was of the essence of the contract; and that if the time was extended by consent, the extension of time should be substituted for the period originally fixed without it being considered a waiver of the original condition as to

(1) (1878) 3 App. Cas. 552 at p. 577.
(2) [1914] A. C. 25.
(3) (1802) 7 Ves. 508.
(4) (1802) 7 Ves. 265.
(5) (1853) 3 De G. M. & G. 284.
(6) (1847) 1 De G. & Sm. 444 at p. 457.
(7) (1867) L. R. 3 Ch. 61 at pp. 62, 69, 70.

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time: see *Gedye* v. *The Duke of Montrose* (1); *Hudson* v. *Temple* (2); and *Barclay* v. *Messenger* (3). The clause should be similarly interpreted in the contract in the present case. It is said that *Seton* v. *Slade* (4) is adverse to this contention: see White and Tudor's L. C. (6th ed.), Vol. II, 478, where the cases on the point are discussed. But the present case is governed by section 54 of the Transfer of Property Act (IV of 1882) which gets rid of the whole of Lord Eldon's decision in *Seton* v. *Slade* (4). In India there is no distinction between legal and equitable estates: see *Webb* v. *Macpherson* (5). Whether the contract is voidable depended upon section 55 of the Contract Act (IX of 1872), and it would be voidable if a time was fixed by the contract, and if the intention was that time should be of the essence of the contract. [Mr. AMEER ALI :—That section should be read with the Evidence Act, section 91. When a contract is reduced to writing, can you prove the intention of the parties from anything outside the contract?] If the contract stipulates that a thing should be done on a certain date, and if it is not done by that date the contract shall be at an end, as by Indian Law time would be of the essence of the contract: see Specific Relief Act (I of 1877), section 12 and section 26, Illus. (*b*). [LORD WRENBURY :—Where a date is fixed by the contract, the Court interprets it to mean "or a reasonable time afterwards." Can you cite a case to show that under those circumstances it has been held to mean that time is of the essence of the contract?] *Hudson* v. *Bartram* (6) and section 108 of the Transfer of Property Act were referred to.

(1) (1858) 26 Beav. 45.
(2) (1860) 29 Beav. 536.
(3) (1874) 43 L. J. Ch. 449.
(4) (1802) 7 Ves. 265.
(5) (1903) 31 Cal. 57 at p. 72 : L. R. 30 I.A. 238 at p. 245.
(6) (1818) 3 Madd. 440.

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The appellant was not called on to reply.

1915, December 6th :—The judgment of their Lordships was delivered by

VISCOUNT HALDANE :—The question in this appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod J. decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition or provision of the lease, the lessor had the right to re-enter and determine the lease. The lease was transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911 the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by clauses 1 and 2, that the title was to be made marketable ; that the conveyance was to be prepared and received within two months from

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the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th clause provided that on payment of the Rs. 81,000, as provided by clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were

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legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in section 55 of the Indian Contract Act, 1872, which provides that—

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper*(1) which was adopted by Knight Bruce L. J. in *Roberts* v. *Berry* (2). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* (3) and by the House of Lords in the recent case of *Stickney* v. *Keeble* (4). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute

(1) (1802) 2 Sch. & Lef. 682.

(2) (1853) 3 De G. M. & G. 284 at p. 289.

(3) (1867) L. R. 3 Ch. 61.

(4) [1915] A. C. 386.

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adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas* (1) :—

"The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry*(2)), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds...mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of

(1) (1867) L. R. 3 Ch. 61.
(2) (1853) 3 De G. M. & G. 284.

Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley* v. *Thomas*,[1] where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff

[1] (1867) L. R. 3 Ch. 61,

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bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod J. in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and that the judgment of Macleod J. restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

Solicitors for the appellant : Messrs. *Latteys & Hart.*

Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

Appeal allowed.

J. V. W.