Smt. Shaharyar Bano and Another

Vs

Seth Sanwal Das

Civil Appeal No. 2003 of 1970

(A.Alagiriswami, P.K. Goswami, N. L. Untwalia JJ)

06.10.1975

JUDGMENT

ALAGIRISWAMI, J. -

1. The appellants were the defendants in a suit filed by the respondent for specific performance of an agreement entered into by them to sell a house belonging to them in Bhopal. The agreement, Ex. P-1, is dated September 17, 1959 and reads as follows :

Today, i.e. on 17-9-1959, one house in which I am living situate at Gojarpura, I agree to sell the entire house apart from the side-portion of the door which has been given to the maternal uncle according to the religious law of MOHAMMADANISM, for a consideration of Rs. 31,375 (i.e. thirty one thousand, three hundred and seventy five rupees) to Seth Sanwaldas, son of Motilal SARRAF CHOUK with the consent of my sister. The entire door is included in the said house. I have realised a sum of Rs. 2,000 (i.e. two thousand) as an earnest money. No other (person) has a right (in that house) and there is no necessity of any advice. Tomorrow morning you consult your pleader and get PACCI receipt executed and shall have no objection.

> #Finis. Sd/- Shaharyar Bano Begum ) daughter of late Sardar Sd/- Sarwar Bano ) Akbar KhanWitness :- Sd/- Ramnarayan Singh Chouk (in Hindi) Sd/- Ramprakash (in English).##

The trial Court dismissed the suit holding that though the appellants executed an agreement of sale in favour of the plaintiff by which they agreed to sell only the house in which they were residing and the gate adjoining the said house, it was not proved that the property to be sold included the open plot of the land between the gate and the other house occupied by the tenants and also did not include such other house and hence a decree for specific performance cannot be passed to the extent of all the four properties for which specific performance was prayed for. It however ordered the defendants to return the sum of Rs. 2000 received by them at the time of agreement.

2. Before the High Court it was argued that the agreement, Ex. P-1, was too vague and therefore unenforceable. The High Court took the view that the terms of the agreement were quite clear and the trial Court was wrong in refusing to pass a decree for specific performance. Another argument advanced before the High Court was that although the defendants at the time of entering into the agreement considered themselves to be the sole owners of the whole house, they later on discovered that there were other cosharers also and that they were therefore incapable of carrying out the terms of the contract. The respondent stated before the High Court that he relinquished all claims for such further performance or for any damages or compensation either for deficiency or for loss or damage

which may be sustained by him through the default of the defendants on that ground. In the result the High Court gave a decree for specific performance of the contract and for a sale-deed of the whole house, except the portion which has been shown in the sketch map attached to the plaint as having been expressly exempt from sale, regarding the right, title and interest of the defendants and that the defendants would not be liable to compensate the plaintiff for any portion of the property that may go out of his hands on account of the claim of other cosharers which may be proved in the house.

3. Before us three points were urged (1) that there was no concluded contract, (2) reservation of rights of other cosharers, and (3) a decision on what exactly was the property agreed to be conveyed. Points Nos. 1 and 2 do not really call for much comment nor are they susceptible to much argument in their support. The contract, Ex. P-1, is quite clear and definite. The fact that the vendee was asked to consult his pleader and get pacci receipt executed did not make the contract dependent upon the vendee consulting his pleader and getting the pacci receipt. The fact that he did not return thereafter to get pacci receipt does not make the contract any the less binding on the appellants. As regards the rights of the cosharers, it appears that some of them applied to be added as parties in this suit and on the plaintiff's objection their applications were dismissed. We do not see how it affects right of the plaintiff to get the decree for specific performance of the agreement with him if he is prepared to take what the defendants agreed to convey to him and took the risk of its turning out to be less than what they had agreed to sell to him. That is in effect what the High Court has provided and we see no flaw in this.

4. The most important points is what was it that was agreed to be sold. It appears that the 'premises' in question, to use that colourless term because of the confusion which the use of the word 'house' has led to in this case, seems to consist of three portions and a passage. In one of the portions the defendants were residing. That was to the right-hand side of the passage. At the end of the passage was another portion which had been leased to tenants, and to the left hand side of the passage was the portion which is specifically excepted from the agreement as having been given to the maternal uncle of the defendants. The claim of the plaintiff was for the house occupied by the defendants as well as the house which was let out to the tenants and the passage as a whole. According to the defendants only the house which they were occupying was agreed to be sold. It is because of this confusion that the trial Court refused to give a decree for specific performance on the ground that the agreement was vague. The High Court took the view that the agreement included the portion occupied by the defendants as well as the portion let out to the tenants, in other words that the defendants had agreed to sell all that they owned in these premises except the portion to the left of the passage which had been given to their maternal uncle. We have carefully gone through the evidence and are of the view that what was agreed to be sold was only the portion which was in the occupation of the defendants and the agreement did not include the portion which was let out to the tenants. It follows that the passage would be common to the portion in the occupation of the defendants as well as the portion let out to the tenants.

5. In the plaint as originally filed the plaintiff had only stated that the defendants had contracted to sell to him a house. By a later amendment a map was attached to the plaint and both the portions were claimed. After the amendment of the plaint the first defendant specifically stated that the plaintiff has included in the site plan and in the boundaries described in the plaint two houses, that the portion described on the western side of the site plan is entirely a separate house and has nothing to do with the alleged agreement. She also stated that the passage was not included in the agreement. That all the witnesses as well as parties proceeded on the basis that the portion occupied by the defendants was one house and the portion let out to the tenants was another house would be

obvious from the evidence which we will presently set out.

6. Though the plaintiff in his evidence says that the questioned the first defendant about the entire house which she wanted to sell, he explained it by saying that the entire house meant the door, sahan (probably open courtyard) beyond the door and the double storey which was in the outer portion of the house in which she resides, he does not say anything about the house in the occupation of the tenants. In cross-examination he stated that two houses are not there, there is only one house containing three sahans (open courtyard), outer-double-storeyed (house) of the western side is not the separate house but it is the portion of this very house. He admits that the defendants told him that there were tenants in the outer double-storeyed portion. This is important because the agreement, Ex. P-1, mentions only the house in which the defendants were living. It does not mention the portion which was in the occupation of the tenants and it was for the plaintiff to have made sure if he wanted his agreement to include the portion in the occupation of the tenants to have it specifically mentioned. PW 2 states that when he went to the defendants in order to bargain about the purchase of the house they told him that they wanted to sell the sahan together with the double-storeyed building, meaning thereby the portion in the occupation of the tenants. But in cross-examination he speaks of the front doubt-storeyed house (meaning the portion in the occupation of the tenants) and the house towards the right (meaning the portion in the occupation of the defendants). PW 3 states that the defendants told him that they wanted to sell sahan of the inner side adjacent to the main gate, double-storeyed house behind the sahan, the house in which they were living and two sahans to its back side. But even he did not say, when Ex. P-1 was written and read over, that there should be mentioned about the portion occupied by the tenants. He also says that inside the door after passing through the sahan one has to go into the houses showing thereby that the portion in the occupation of the tenants and the portion in the occupation of the defendants were treated as two different houses. DW 1 states that besides the residential home of Shaharyar Bano (first defendant) there was a khandhar (dilapidated portion of a house) and one house also in her property and this second house was at the last end of the passage which was in front of the residential house of Shaharyar Bano. Nothing was elicited in his cross-examination to establish anything to the contrary. DW 3 who was once in occupation as a tenant of the portion now in dispute stated that he was a tenant in the separate house from the residential house of Shaharyar Bano and that for going to the house in which he was living, he was required to go through the passage from inside the main gate, and the house in which Shaharyar Bano resides and the house in which he was living as a tenant were separate. He was not even cross-examined.

7. It is therefore obvious that everybody concerned in the matter proceeded on the assumption that there were two houses, one occupied by defendants and another in the occupation of the tenants. The agreement mentions the house in which the defendants were living as the subject-matter of the agreement. The words 'entire house' cannot in any way militate against this fact. It will only be the entire house in which the defendants were living. As we stated earlier, the plaintiff was aware of the fact that there was a portion of the premises which was referred to and understood as a separate house by all those concerned and which was in the occupation of the tenants. If the agreement was to include that portion also it was his duty to have it specifically mentioned in the agreement. Not having done so he has got to fail in his claim regarding that portion of the house.

8. In the result the appeal is allowed in part and the decree of the High Court would be modified by excluding the portion in the occupation of the tenants, which is shown as B, C, D, E, as well as the two rooms shown as 'R' inside room and 'R' room in Ex. P-7. As mentioned earlier, the passage from the road through the gate at the eastern end will be common to the portions in respect of which the plaintiff will now get a decree for specific performance, as well as the portion which will be

excluded from the decree passed by the High Court, and will continue to belong to the defendants/appellants. In the circumstances there will be no order as to costs.

9. Civil Appeal No. 2194 of 1970 filed by the respondent in Civil Appeal No. 2003 is dismissed as withdrawn.

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