

Shivji

Vs

Raghunath (Dead) and Others

Civil Appeal No. 539 of 1986

(S. Saghir Ahmed, K. Ramaswamy JJ)

20.02.1997

ORDER

1. Substitution allowed. This appeal by special leave arises from the judgment of the Single Judge of the High Court of M. P., passed on 28-8-1985 dismissing the second appeal.
2. The appellant is a subsequent purchaser from Smt. Reshambai, wife of Ramaji Gujar. The admitted facts are that the deceased respondent and Reshambai had purchased jointly, an extent of 9 acres 2 decimals of land under sale deed dated 26-8-1966. There was a contemporaneous agreement of sale executed by Reshambai in favour of the appellant agreeing to convey her share in the property under the sale deed in terms of the agreement to the respondent. Pursuant to the sale, it is not in dispute, there was an oral arrangement under which the parties came to be in respective possession of the land comprised in the sale deed. When Reshambai attempted to sell the land to the appellant, notice was issued by the respondent on 20-1-1969 calling upon her to execute the sale deed in terms of the agreement of sale. In her reply dated 24-1-1969, she denied having agreed to sell the land to him and refused to execute the sale. Reshambai also denied her liability to execute the sale deed. As a consequence, the respondent had filed the suit for specific performance. The defence taken in the suit was that the agreement of sale was a fraudulent document brought into existence to defeat her right and that she was not liable to execute the sale deed. The other defence taken was that the document was void by operation of rule against perpetuity. Further contention raised was that since the agreement put an embargo on her right to alienate the property, it was void. All the courts below have negated her right and decreed the suit. Thus this appeal by special leave.
3. The question is whether the document, viz., agreement to sell was executed by playing fraud on her ? The finding of fact recorded by all the courts is in the affirmative. Therefore, it need not be considered by this Court. Further the defence that the suit also puts perpetual restriction on her right of alienation and is, therefore, void, also has no force for the reason that once Reshambai was found to have executed the agreement for sale and the same was found to be a valid deed, the covenant became a contract between the parties. As a consequence, it is not a prohibition on her right to alienate the property to anybody except the respondent. On the other hand, it is a fetter on her right to deal with her share in the property and a liability burdened with the land. When the respondent purchased the property, being a subsequent purchaser, he purchased it with notice of the said agreement for sale. So he could not get any valid title unless it was proved that the agreement was unenforceable. So the agreement is valid and binds the appellant and Reshambai.
4. The only other question is whether it is violative of the rule against perpetuity. This controversy is no longer res integra. This Court in Ram Baran Prasad v. Ram Mohit Hazra ((1967) 1 SCR 293 : AIR 1967 SC 744) has considered the effect of Sections 14, 40 and 54 of the Transfer of Property

Act and held thus :

"Reading Section 14 along with Section 54 of the Transfer of Property Act it is manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of Section 40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under Section 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land.

We are accordingly of the opinion that the covenant for pre-emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law."

5. In the light of the above law, when a contract has been executed in which no interest in praesenti has been created, the rule of perpetuity has no application. As a result, the agreement is in the nature of a pre-emptive right created in favour of the co-owner. Therefore, it is enforceable as and when an attempt is made by the co-owner to alienate the land to third parties. Therefore, the rule against perpetuity has no application to the facts in this case.

6. The appeal is accordingly dismissed. But in the circumstances without costs.