SUPREME COURT OF INDIA

Shanker Singh

Vs.

Narinder Singh & Ors.

C.A.No.3249 of 2005

(P.Sathasivam and H.L.Gokhale,JJ.,)

15.12.2011

JUDGMENT

H.L.Gokhale,J.,

This appeal by special leave under Article 136 of the Constitution of India, seeks to challenge the judgment and order dated 8.4.2003 rendered by a learned Single Judge of the Punjab and Haryana High Court, in Civil Regular Second Appeal No. 1338/1983. The learned Single Judge has allowed the said second appeal by the respondent Nos. 1 and 2 (contesting respondents and original plaintiffs), who had filed a suit for specific performance of an agreement entered into with the appellant (original defendant No. 1). Although various questions of law are sought to be raised in this appeal, the relevant questions for our determination are mainly two viz. (a) whether the High Court has erred in applying the provisions of Sections 12, 14 and 20 of the Specific Relief Act 1963 (hereinafter referred as `the act' for short), and (b) whether the agreement in question being vague in nature was incapable of being performed? Factsleading to this present appeal are as follows:-

"2. On 12.1.1977 the appellant herein, a resident of Village Dera Saidan entered into an agreement to sell certain property with the respondent No. 1, a resident of Dera Mainda, both villages being in Tehsil Sultanpur, Distt. Kapurthala of State of Punjab. The property to be sold consisted of two parts viz. agricultural land, and a house property. The Agricultural lands were bearing Khasra nos. 25/21/1-1/11-19, 26//24/6-11, 10/8-0, 12/5-8, 19/6-13, 20/8-0, 25//5/8-0, 15/8-0, 16/8-0, 17-8-0, 18/6-14, 21/2/5/7, 22/5-14, 23/8-0, 24/8-0, 25/7-18, 26/2-0, 34//2/6-14, 25//13/3-13.

3. The relevant clause of the agreement stated as follows:-

> "Whereas the first party is the owner of = share in 65-13 and the total area of the first party is 92-K-17M and the remaining one house in the abadi Dera Saidan bounded by the custodian on the east, Kartar Singh on west, Pahar- passage on the south and the =

share belongs to the wife of the first party namely Pritam Kaur. Now I am in need of purchasing property and therefore, now I am executing this writing in my full senses and dealing to sell the = share in lands measuring 92K-17M along with motor, bore, passage, fan and water pump fitted with engine and without engine along with the place for placing garbage including shamlat and including passage and all the rights which vest in Pritam Kaur and also execute this deal for sale on behalf of Pritam, with the party of the 2nd part for a total consideration of Rs. 1,24,500/- and I have received a sum of Rs. 28,000/- in cash as advance money in front of the witnesses. The purchaser will get the registry executed on 25th day of Magh 2034 and the possession will be handed over at the time of registry."

It was also agreed that if the appellant violated the terms of the agreement, then the respondents were entitled to the recovery of Rs. 28,000/- as earnest money and Rs. 28,000/- as damages, the total coming to Rs. 56,000/. It was further agreed that if there was any addition or decrease in the area agreed to be sold belonging to appellant, the price of the same was to be adjusted accordingly.

4. It so transpired, that on the agreed date of registration the appellant did not turn up at the office of the Sub-Registrar, and hence the respondent gave a notice to the appellant to execute the sale deed. The appellant did not respond, and therefore the respondent No. 1 filed Suit No. 21/1978 in the Court of Sub Judge 1st Class, Sultanpur Lodhi for the specific performance of the agreement. The wife of Shanker Singh, Pritam Kaur was joined as defendant No.2. (She is reported to have expired in 1997). The other co-sharers of the land had sold their land in dispute in favour of one Joginder Kaur and three others who were joined as defendant Nos. 3 to 6 (Respondent Nos. 4 to 7 in the Civil Appeal).

5. The appellant raised various defences. Firstly he denied having entered into the agreement, and then he claimed of having received only Rs. 8,000/- and not Rs. 28,000/- as earnest money. Thereafter, he contended that he did not have the authority to enter into the agreement to sell = share in the house property which belonged to his wife. Lastly he contended that he alongwith his two minor sons Amrik Singh and Balbinder Singh formed a Hindu Undivided Family (HUF), and that he could not sell the coparcenery property except in the case of legal necessity and for the benefit of the family.

6. The Trial Court framed the following issues:

"1) Whether the agreement in question was executed by Shanker Singh defendant in his own behalf and on behalf of defendant No. 2 for consideration?

2) Whether Shanker Singh was competent to enter into agreement on behalf of defendant No.

3) Whether the property in suit is the co-parcenary property as alleged in para No. 1 (on merits) of the written statement filed by defendants No. 1 & 2?

4) Whether the plaintiffs have been ready and willing to perform their part of the agreement?
5) Whether defendant No. 1 has committed breach of the agreement?

6) Whether the plaintiffs are entitled for specific performance of the amount claimed?
7) Relief."

7. The respondent examined himself, the writer of the agreement and one of the witnesses of the agreement to prove the document of sale. The Trial Court held on issue No. 1 that the evidence of the writer of the agreement and that of the attesting witness was reliable, and that the earnest money of Rs. 28,000/- had in fact been paid. The agreement in question was therefore proved to be a duly executed document. This finding has been left undisturbed in the first appeal as well as in the second appeal.

8. As far as the second issue with respect to the competence of the appellant to enter into the agreement on behalf of his wife is concerned, although the wife of appellant Smt. Pritam Kaur did file a separate written statement, she did not enter into the witness box. The Trial Court therefore, held that an adverse inference will have to be drawn that she had given such an authority to her husband to sell her property. It further held that when Shanker Singh had agreed to sell his entire land, there was no logic on his part to retain the house, when he alongwith his wife had decided to shift to some other place after purchasing some other property as is evidenced from the agreement.

9. As far as issue No. 3 is concerned, the appellant contended that he had purchased the land in dispute from the proceeds of the sale of his ancestral land at village Nihaluwal, which ancestral land belonged to his father Lachhman Singh. He produced documents which showed that he as well as his brother Puran Singh and his sisters had sold their lands at village Nihaluwal. However, the appellant could not prove that the land in dispute was purchased from the proceeds of the sale of the land which came to his share from his father. The learned Single Judge noted that in any case the property in dispute was not one inherited by the appellant from his father. He observed that the land in dispute for being proved to be an ancestral one, must be shown to have been held at one time by the ancestor, and that it has come to the appellant by survivorship. The learned Trial Judge therefore held that the disputed land could not be held to be a co-parcenery property wherein the minors had any share. The burden that the disputed land, was a co-parcenery property was on the appellant, and he had failed to discharge the same.

10. The Trial Judge held that the respondents were of course ready and willing to perform their part of agreement, and it is the appellant who had failed to discharge his obligation. The learned Judge therefore decreed the suit for specific performance by his judgment and order dated 20.2.1980.

11. The appellant herein challenged this judgment in Civil Appeal No. 62 of 1980 (which appears to have been numbered subsequently as Civil Appeal No. 92 of 1981). The learned Additional District Judge who heard the appeal held that as far as the agreement is concerned, the same had been duly executed, and that the appellant had received the amount of Rs. 28,000/- as earnest money. As far as the issue with respect to the interest of the minors is concerned, he held that for proving the property to be ancestral, the appellant had to show that the land in Village Nihaluwal was originally held by his father Lachhman Singh, and it was the same land which was sold by him and those proceeds had led to the purchase of the land at Dera Saidan. The learned Judge however, noted that no documentary evidence of holding of Lachhman Singh with respect to the land at Nihaluwal had been produced, nor was there any revenue entry of the name of Lachhman Singh in the disputed land at Dera Saidan. Hence the disputed land could not be held to be co-parcenery property.

12. The First Appellate Court however found fault with the respondents' claim on two counts. Firstly, it noted in para 6 of its judgment that `although it has not been made clear in the agreement, it appears that Puran Singh, (the brother of the appellant) was the owner of the other = share in the house as Puran Singh and Shanker Singh had purchased their land jointly in equal shares in Village Dera Saidan.' There was no dispute that = share of the house was owned by Pritam Kaur, wife of the appellant. She had filed a written statement opposing the decree. Therefore, in the same paragraph the court subsequently observed `it has already been held that even in respect of half the share in the house, Shanker Singh, defendant No. 1 had no authority to sell the same and the plaintiffs have no right to claim a decree for the same.' The Court therefore held by its judgment and order dated 23.2.1983 that the appellant could not sell, or agree to sell the property of his wife without her written consent, and therefore the agreement was incapable of being performed in respect of the house.

13. The second count on which the First Appellate Court found the claim of the respondents to be incapable of acceptance was that though the agreement provided for the sale of 92 Kanals and 17 Marlas of land, it was actually found to be 94 Kanals and 16 Marlas (i.e. 1 Kanal and 19 Marlas in excess). After examining the evidence on record, the Court observed as follows:-

> ".....Now in the agreement Ex. P.1 the consideration of the whole property has been fixed at Rs. 1,24,500/- and the consideration for the house has not been determined separately. Again, the agreement provides for the sale of 92 Kanals 17 Marlas of land and at the end it has been added that if any land was found to be in excess or deficient, then the consideration would be increased or decreased correspondingly. Now, in actual fact it has been found that the holding of Shanker Singh is 94 Kanals 16 Marlas. However, in the agreement no separate consideration for the land has been given nor is the rate of the sale given and it is not possible to determine as to what should be the cost of the excess land of 1 Kanals 10 Marlas. Had the price of the land been mentioned separately, it could have been possible to work out the price of the excess area by mathematical calculation but as the agreement stands this is not possible....."

It was obvious that such an excess share of land could not be segregated. The court therefore, held that the whole of the agreement was incapable of specific performance. Hence it set aside the decree of specific performance. The Court found fault with the appellant also for entering into the agreement for sale of = share in the house belonging to his wife without any authority. It, therefore, directed refund of the earnest money of Rs. 28,000/-.

14. The respondents challenged the judgment of the First Appellate Court by filing a Regular Second Appeal No. 1338 of 1983 in the High Court. However, having noted the finding of the First Appellate Court that Smt. Pritam Kaur had = share in the house property, and it could not be sold by the appellant herein, and also since the land was found to be in excess by 1 Kanal and 19 Marlas, the respondents submitted in the High Court that they were ready to give up the claim for = the share of Smt. Pritam Kaur in the house, and were also ready to restrict themselves to the purchase of land of 92 Kanals and 17 Marlas as per the agreement, and nothing more. The order passed at the time of admission of the second appeal reads as follows:-

> " Dt. The 19th October, 1983.
> Present
> The Hon'ble Mr. Justice J.M. Tandon
> For the appellant :- Mr. Anand Swaroop, Sr. Advocate
> with Mr. Sanjiv Pabbi, Adv.
>
> For the respondents:- Mr. H.S. Kathuria, Adv. For Res. No. 1 and 2 Order Mr. Sanjiv Pabbi, learned counsel for the appellants, states that the appellants are prepared to pay full consideration of Rs. 1,24,000/- as stipulated in the agreement for the purchase of the land and the share of Shanker Singh respondent in the house. Says further that the appellants will not press for the transfer of half share of the house which is owned by Pritam Kaur, wife of Shanker Singh.
> Admitted.
> Sd/-
> J.M. Tandon Judge"

15. The High Court therefore, framed the substantial questions of law as follows:-

> "Whether the plaintiffs are entitled to specific performance of the agreement in respect of valid part of the agreement on payment of the entire sale consideration in terms of Section 12 of Specific Relief Act, 1963."

It was submitted on behalf of the respondents herein that they were entitled to relinquish the part of the agreement which was not enforceable, and the same was permissible under Section 12 (3) of the Act. They relied upon the dicta of this Court in Kalyanpur Lime Works Ltd. Vs. State of Bihar reported in AIR 1954 SC 165 to the effect that such an relinquishment can be made at any stage of the proceedings. This proposition of a Bench of three Judges in Kalyanpur Lime Works (supra) has been reiterated by this Court in *Rachakonda Narayana*

Vs. Ponthala Parvathamma reported in[1] The learned Judge hearing the second appeal accepted this submission, and by his impugned judgment and order allowed the second appeal, and decreed the suit filed by the respondents for specific performance for agriculture land admeasuring 92 Kanals and 17 Marlas after recording the statement of the counsel for the respondents that they were relinquishing that part of the agreement which was not capable of being performed.

16. Mr. Venkataramani, learned senior counsel appearing for the appellant assailed the impugned judgment on various grounds, as against which Mr. Vishwanathan, learned senior counsel appearing for the respondents defended the judgment as a proper one in the facts of the case. Amongst other submissions, it was contented on behalf of the appellant that minors' share could not have been sold without the permission of the Court in view of the provision of Section 8 (2) of the Hindu Minority and Guardianship Act, 1956. However in view of the concurrent findings as recorded all throughout in the present case, one cannot say that the minor sons of the appellant had any share in the concerned property which required the permission of the Court for its sale. It is, therefore, not possible to accept this submission.
17. It was then submitted that the agreement was incapable of being implemented as rightly held by the Additional District Judge, and that the High Court had erred in its application of the provisions of Section 12, 14 and 20 of the act. Firstly, this was on the ground that there was no specific reference to the price of the land per Kanal or per Marla as held by the Additional District Judge. Secondly, it was submitted that the relinquishment was not unambiguous. The respondents had offered to give up their claim for such excess land, but it was not possible to state that the claim was being given up with respect to a particular parcel of land bearing a specific Khasra number. The agreement was vague in nature and since the proposed relinquishment was also ambiguous, the agreement was incapable of being performed.

Consideration of the rival submissions

18. In this connection, we may refer to the relevant provisions of the Act. Section 12(3) of the Act permits a party to an agreement to relinquish a part of the agreement which is not enforceable. However, it should be possible to identify and demarcate that part of the agreement which is not to be enforced. We must also keep in mind the provision of Section 14 of the Act which deals with contracts which are not specifically enforceable, and Sub-Section 1 (b) thereof includes therein a contract which runs into minute and numerous details, as is seen in the present case. In this connection, we must as well refer to Section 20 (1) of the Act which reads as follows:-

> "Section 20. Discretion as to decreeing specific performance - (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal."

19. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is considered to be a substantial remedy, whereas the latter is of course a specific remedy. It is true that explanation (i) to Section 10 of the Act provides that unless and until the contrary is proved, the Court shall presume that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. However, this presumption is not an irrebuttable one. That apart, for a specific performance of a contract of sale of immovable property, there must be certainty with respect to the property to be sold. As held by this Court in para 18 of *Mayawanti Vs. Kaushalya Devi reported in*[2]:-

> "18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all....."

20. Mr. Vishwanathan, learned senior counsel for the respondents submitted that the relinquishment of a part of the agreement was permissible. As far as the propositions of law concerning relinquishment as canvassed by the respondents are concerned, there is no difficulty in accepting the same. However, the relinquishment has to be unambiguous. As held by this Court in Surjit Kaur Vs. Naurata Singh reported in 2000 (7) SCC 379, the party seeking part performance must unambiguously relinquish all claims to performance of remaining part of the contract. In the present case the offer of relinquishment by the respondents cannot be said to be an unambiguous one, and it will be difficult to decide as to which portion of the land is to be segregated to be retained with the appellant, and which portion is to be sold. Firstly, this is because as rightly noted by the Additional District Judge, the agreement does not specifically mention the price of the land, and in the proposed relinquishment, the respondents have not stated as to which portion of land (admeasuring 1 Kanal and 19 Marlas) they were agreeable to retain with the appellant. Secondly, in the agreement there is also a mention of `a motor, bore, passage, fan and water pump fitted with engine and without engine along with the place for placing garbage including shamlat' amongst the properties which were being sold. It is not on record as to which parcel of land is having all these features. A question will therefore arise as to with whom such a parcel of land is to be retained. Obviously, a segregation of the land in dispute into two portions will be difficult.

21. In the present case there is one more difficulty viz. with respect to the relinquishment concerning the house. The First Appellate Court had categorically observed in para 6 of its judgment as quoted above, that the brother of the appellant, Puran Singh appeared to be the owner of the other = share of the house, and the remaining = share was in the name of Pritam Kaur, and that Shanker Singh did not have any authority to sell it. The judgment of the High Court does not show that this finding had been challenged in the Second Appeal. Nor was

any submission made in this behalf before this Court. What the respondents offered was to give up the claim for the share of Pritam Kaur, and also the claim for the excess land of 1 Kanal and 19 Marlas which was accepted by the High Court in its impugned judgment. The respondents, however, claimed to retain the alleged = share of Shanker Singh, as can be seen from the order dated 19.10.1983 which is passed at the time of admission.

22. Thus, the respondents made a statement at the admission stage that they were ready to pay the full consideration for the land as stipulated in the agreement, and for the share of Shanker Singh in the house. This order dated 19.10.1983 records that the respondents were ready to give up their claim for = the share of the house owned by Pritam Kaur, but maintained the claim for the share of Shanker Singh in the house. As against that it appears from the judgment of the First Appellate Court, that Shanker Singh did not have any such share in the house. His wife had = share, and his brother Puran Singh had = share. In the teeth of this finding of the First Appellate Court, which is neither challenged nor reversed by the High Court, the proposed relinquishment cannot be said to be a correct and unambiguous one. It does not alter the scenario and the agreement continues to remain incapable of performance. In any case it is not clear as to how such an agreement could be acted upon.

23. Therefore, for the reasons stated above, we have to hold in the peculiar facts and circumstances of this case that inspite of the offer of relinquishment made by the respondents herein, the specific performance of the agreement cannot be granted, solely on the ground that it is incapable of being performed. We have also to hold that the High Court erred in applying the provisions of Sections 12, 14 and 20 of the Act to the facts of the present case and in exercising its discretion, since this was not a case for specific performance. We have therefore to allow this appeal and set-aside the order passed by the High Court in Regular Second Appeal No. 1338 of 1983. The suit filed by the respondents will have to be dismissed.

24. We have however to note that the respondents had paid the earnest money of Rs. 28,000/- at the time of entering into the agreement way back on 12.1.1977 i.e. nearly 35 years ago. The respondents will therefore have to be compensated adequately. On the question of the appropriate compensation, it was submitted by Mr. Venktaramani, the learned senior counsel for the appellant that the agreement was made at a difficult time in the social life of Punjab for a throw away price. However, no evidence is placed on record to that effect. He then pointed out that the appellant had contended in the lower courts that respondents were influential people. Even so, it cannot be ignored that inspite of the agreement, the land has remained with the appellant all through out in view of the orders passed by the courts from time to time, due to which he has benefited. The specific performance of the agreement is being denied basically because of the finding that the agreement was incapable of being performed inspite of the offer of relinquishment. It is an adage that money doubles itself in ten years, and on that basis the amount of Rs. 28,000/- with an appropriate interest will come to atleast Rs. 3,50,000/-. If the land was with the respondents, they would have earned much more. Having seen this position, Mr. Venktaramani has fairly left it to the Court to decide an adequate amount to be paid to the respondents by way of compensation and in lieu of specific performance of the concerned agreement. Accordingly, having considered all the

relevant aspects, we are of the view that to meet the ends of justice, the appellant should be directed to pay the respondents an amount of Rs. 5,00,000/- which will be inclusive of the earnest money with due return thereon, and compensation.

25. We, therefore, allow this appeal and set-aside the judgment and order dated 8.4.2003 passed by the High Court in Civil Regular Second Appeal No.1338/1983, as well as the one dated 20.2.1980 rendered by the Sub Judge at Sultanpur Lodhi in Suit No.21/1978. The suit shall stand dismissed. There will be no order as to costs. However, the appellant is hereby directed to pay an amount of Rs. 5,00,000/- to the respondents which amount shall be paid in any case by the end of March, 2012.

[1]*AIR 1954 SC 1651*
[2]*(1990) 3 SCC 0001*