

LAHORE HIGH COURT

Waryam Singh

Vs

Gopi Chand

(Tek Chand, J.)

22.04.1929

JUDGMENT

Tek Chand, J.

1. The defendants, Gopi Chand, Rattan Chand and Kishan Chand, sons of Puran Chand, were grantees of five rectangles of land in the Upper Chenab Colony. Under the terms of the grant they had to fulfil certain conditions and pay nazrana in instalments before acquisition of proprietary rights. On 23rd April 1917, when some instalments were yet to be paid, Gopi Chand and Rattan Chand executed an agreement in favour of Hira Singh, father of the plaintiffs, contracting to sell 200 kanals of land in certain specified numbers, constituting one rectangle for L 5,800. Out of the consideration, L 3,500 was paid in cash at the time of the execution of the document and the balance was to be paid from time to time for filling up an old canal and payment of instalments of nazrana into the Government Treasury. It was further stipulated that after acquiring the proprietary rights and after depositing the instalments fixed by the Government the promisors will execute a sale deed in favour of the promisee. On the execution of this agreement Hira Singh was put in possession of the land agreed to be sold, and since then he has been carrying on cultivation and paying the land revenue. From time to time the promisors received money from him for payment of the nazrana, and on 30th August 1920, the proprietary rights in the five rectangles were conferred on them and Kishan Chand. On that date the only part of consideration which remained unpaid was the small sum, of L 219. On 3rd September 1920, Hira Singh sent a notice by registered post (Ex. P-12) to Gopi Chand and Rattan Chand offering to pay L 219 and asking them to have sale deed executed and registered. No reply having been received, Hira Singh sent by money order the remaining sum of L 219 to Gopi Chand but he refused to accept it, and it was delivered back to Hira Singh on 16th February 1921. (wrongly printed as 16th March 1921 at p. 64 of the paper book), Hira Singh died some time after, and his sons, who had been in possession all along, applied for mutation being effected in their name as full owners. The Assistant Collector sanctioned the mutation on 22nd July 1923, but on appeal it was cancelled by the Collector on 9th October 1923.

2. On 6th November 1923, the plaintiffs instituted the present suit against the two promisors, Gopi Chand and Rattan Chand, and their brother Kishan Chand, praying for specific performance of the agreement above mentioned by "executing, completing and registering" a formal sale deed in their favour in respect of the 200 kanals described therein. It was further prayed that if for any reason one-third share in the land belonging to Kishan Chand defendant 3 could not be sold, the deficiency might be made good from the remaining land owned by defendants 1 and 2 in the five rectangles mentioned above. In the alternative, a prayer for a decree for L 12,000 as damages was also made.

3. The defendants resisted the suit on various grounds pleading inter alia that the suit for specific performance was barred by time under Article 113, Lim. Act that the property in question being owned by three brothers, Gopi Chand, Rattan Chand and Kishan Chand, the first two had no right to agree to sell the whole of it, and that as Kishan Chand did not consent to transfer his share, the suit for specific performance must fail in its entirety. To the alternative prayer made in the plaint, it was pleaded that it was not competent to the Court to specifically enforce the contract by granting to the plaintiffs a decree for possession of one-third of the land out of the share of defendants 1 and 2 in the remaining land. The plaintiffs' right to claim a decree for damages was also denied.

4. The trial Court found the issue as to limitation in favour of the plaintiffs, but holding that defendants 1 and 2 were not competent to transfer the share of defendant 3 in the land in suit it refused the prayer for specific performance in respect of any part of it. It, however, passed a decree for refund of L 5,581 against defendants 1 and 2. Both parties have preferred appeals to this Court, the plaintiffs praying for a decree for specific performance of the agreement by sale of the whole of the land mentioned in the agreement or in the alternative, by sale of two-thirds of it without any further compensation. The defendants, on the other hand, pray that the suit of the plaintiffs should have been dismissed in its entirety.

5. It is conceded by the learned Counsel for the plaintiffs that Kishan Chand, defendant 3, was an owner to the extent of one-third in the land in dispute and that defendants 1 and 2 could not sell his share without authority from him. He has failed to show that any such authority was given and admits that to this extent the agreement to sell was unauthorised. On this admission, Mr. Jagan Nath for the defendants sought to argue that the suit for specific performance must fail in its entirety as the defendants were members of a joint Hindu family and that none of them had a right to transfer even his own interest in it without family necessity. In their written statements the defendants did not, however, plead that they were members of a joint Hindu family, nor did they lead any evidence on the point. On the other hand, it was admitted by Gopi Chand in his statement as a witness that the three brothers were messing separately and that there was no common "hotchpot". The status of the defendants must, therefore, be taken to be that of tenants-in-common and not coparceners, and thus defendants 1 and 2 could validly transfer their two-third share in the land in dispute.

6. Before deciding whether on this finding a decree for specific performance for the whole or a part of the contract should be passed in favour of the plaintiffs, it is necessary to determine whether the suit is within time. It is common ground between the parties that the case is governed by Article 113, Lim. Act. which provides a period of three years for suits of this nature from (a) the date fixed for the performance of the contract, or (b) if no such date is fixed when the plaintiff has notice that performance is refused. It was admitted on behalf of the defendants that no definite date had been fixed in so many words in agreement. But it was contended that it was capable of ascertainment by application of the maxim *certum est quod certum reddi potest* and that this date was 30th August 1920 when the proprietary rights were acquired by the defendants. It was accordingly urged that the suit which was brought more than three years after this date was time barred. In my judgment this maxim cannot be invoked in reference to a loosely worded document like the agreement in question in which the promisor undertook to execute the sale deed not on the happening of a particular event but after payment of the last installment in the Government Treasury and after the acquisition of proprietary rights--events which, under the conditions of the grant, could not possibly have happened simultaneously. The case does not, therefore, fall within first part of Col. 3, Article 113.

7. In order to bring it within the second part of the aforesaid article, it is necessary to establish not only that the defendants refused to perform the contract but that the plaintiff had knowledge of such refusal more than three years prior to the suit. After carefully examining the record and giving due weight to Mr. Jagan Nath's arguments I am unable to say that such knowledge has been proved. I am, therefore, of opinion that the plea of limitation fails and that the suit for specific performance was instituted within time.

8. In the trial Court it was urged by the plaintiffs that the defendants 1 and 2 having agreed to sell 200 kanals of specified land, but now having been proved to be the owners of two-third of it only, they must be required to make good the deficiency from the other land belonging to them in this village. This prayer was not pressed before us by the plaintiffs' Counsel, and it is not necessary to decide whether it could be made in a suit for specific performance.

9. Before us the principal contention on behalf of the plaintiffs has been that this is a fit case in which, under Section 15, Specific Relief Act, the Court should direct defendants 1 and 2 who are the party in default, to execute a sale deed in respect of their two-third share in the land in dispute, as the plaintiffs have already expressed their willingness to relinquish all claim to further performance, and all right to compensation either for the deficiency or for any loss-or damage sustained by them through the default of the aforesaid defendants. In reply Mr. Jagan Nath contended that the plaintiffs cannot have the benefit of this provision of the law as they did not make this prayer in the plaint or during the trial in the Court below. It appears, however, that an application to this effect was presented by the plaintiffs on 25th February 1926, before the trial Judge at the time of the arguments, in which it was specifically stated that in the event of

defendants 1 and 2 being held incompetent to sell the whole of the land in suit:

the plaintiffs would be content if a decree for specific performance is passed in their favour for two-thirds and that in that case they would be prepared to give up all claim for further performance or to compensation for the deficiency. This prayer was also repeated in the memorandum of appeal presented in this Court. I cannot find anything in Section 15, Specific Relief Act, or any other provision of the law limiting action under Section 15 to any particular state of the proceedings. It seems to me that it is open to the plaintiff to relinquish his claim to any part of the property in suit on the conditions specified in Section 15, at any time before the suit is finally decided by the Court of appeal. In the present case the prayer appears to me to be perfectly just and reasonable and I can see no valid reason to refuse to accede to it. The plaintiffs have actually performed the contract in the main and have expressed their readiness and willingness to perform what still remains to be done by them. They have paid the bulk of the consideration to the defendants, and it was with the money supplied by them that defendants 1 and 2 were able to acquire the proprietary rights in the rectangles and to fill up the old canal. The only part of the consideration which remained unpaid was L 219 and this they sent by money order to defendants 1 and 2 who refused to accept it without any apparent reason. The plaintiffs were put in possession of the property in 1917 and have been cultivating it since and paying the land revenue. In these circumstances there are no equities in favor of the defendants which would justify the refusal of equitable relief under Section 15 to them.

10. I would, therefore, accept both Appeals Nos. 1733 of 1926 and 1828 of 1926, set aside the decree of the Court below and in lieu thereof pass a decree for specific performance of the agreement dated 23rd April 1917, in favor of the plaintiffs against defendants 1 and 2 in respect of two-thirds of the land described therein, on condition of the plaintiffs' paying L 219 to the defendants within three months from this date. It will be noted in the decree that the plaintiffs have relinquished all rights for further performance or compensation etc. to which they might have been entitled under the agreement against defendants 1 and 2. The suit is dismissed against defendant 3. Having regard to all the circumstances of the case I would leave the parties to bear their own costs throughout.

Agha Haidar, J.

11. I agree.