

## RAJASTHAN HIGH COURT

Bhikkilal

Vs.

Shanti Devi

SB Civil Reg. F. A. No. 168 of 1990  
(Ashok Parihar, J.)

17.04.2008

### ORDER

**Ashok Parihar, J.**

1. The present appeal is directed against the judgment and decree dated 25-4-1990, passed by the trial Court, by which, suit for specific performance filed by the plaintiff appellants has been dismissed. The brief facts of the case are that a sale deed was executed by Thakur Ghanshyam Singh (now defendant No.2 in the present appeal) in favour of one Mathuresh Chandra (since deceased and now represented by his legal heirs) on 3- 8-1970. Another deed of re-conveyance was also executed by above Mathuresh Chandra on 4-8-1970 to the extent that in case Thakur Ghanshyam Singh or his nominees make payment of Rs. 50,400/- within five years i.e. before 3-8-1975, above Mathuresh Chandra will have no objection in re-convey of the properties in question in favour of Thakur Ghanshyam Singh or his nominees. It appears that subsequently Thakur Ghanshyam Singh executed a sale deed in regard to part of the property in question on 28-6-1975 in favour of one of the appellants Bhikkilal for a consideration of Rs. 45,000/-. Thakur Ghanshyam Singh received Rs. 15,000/- in cash and Rs. 30,000/- was to be paid to Mathuresh Chandra against Rs. 50,400/- for re-conveyance of the property. Another sale deed was also executed by Thakur Ghanshyam Singh for remaining part of the suit property on 30-6-1975 in favour of Smt. Gyarsi Bai wife of Girdharilal and Teekam Chand son of Girdharilal for a consideration of Rs. 35,000/-. Thakur Ghanshyam Singh received Rs. 14,600/- and remaining Rs. 20,400/- was to be paid to Mathuresh Chandra against remaining amount from the total of Rs. 50,400/- for re-conveyance of other part of the property in question.

2. After execution of the above two sale deeds in favor of present plaintiff-appellants a notice was given on behalf of Thakur Ghanshyam Singh to Mathuresh Chandra on 15-7-1975 in regard to sale of the above properties. Another notice was given on behalf of Bhikkilal to Mathuresh Chandra on 28-7-1975 for re-conveyance of the property in question. A telegram was also sent on 2-8-1975 on behalf of Thakur Ghanshyam Singh and Bhikkilal. A reply was sent through telegram on behalf of Mathuresh Chandra on 3-8-1975 with the assertion that Thakur Ghanshyam Singh had already relinquished his rights in the property in question, as such, there was no question of any re-conveying of the property. The suit for specific performance was filed by the plaintiff-appellants thereafter. After completion of pleadings, following issues were framed by the trial Court on 18-10-1977 :-

"1. Did the defendant No. 1 execute the agreement dated 4-8-1970, in favor of the defendant No.2 to re-convey the properties in suit to the defendant No.2 or his nominees for Rs. 50,400/- up to 3-8-1975?

2. If issue No. 1 is decided in favor of the plaintiffs was the said agreement cancelled by the defendants by mutual consent and there was no subsisting agreement between them on 28-6-1975 and 30-6-1975? If so, its effect?

3. Did the plaintiff Nos. 1 and 2, by a sale deed dated 28-6-1975 and the plaintiff Nos. 3 and 4 by a sale deed dated 30-6-1975 purchase from the defendant No. 2, his right to get the property in suit re-conveyed to him under the agreement dated 4-8-1970?

4. Whether the defendant No.2 could bifurcate the agreement dated 4-8-1970 and require the defendant No. 1 to re-convey the property in portions under two sale deeds? If not, its effect?

5. Whether the plaintiffs always were and still are ready and willing to perform their part of the contract?

6. Whether the plaintiffs are entitled to get compensation from the defendant No. 1 as alleged in para 16 of the plaint? If so, at what rate?

7. Whether the suit is undervalued and Court fee paid is insufficient?

8. To what relief, if any, are the plaintiffs entitled?"

3. The plaintiff-appellants examined Bhikkilal and Teekam Chand on their behalf, whereas, three witness namely; Gulab Chand, Munnalal and Chandmal Sharma were examined on behalf of defendant-respondents. Thakur Ghanshyam Singh was also one of the defendants. However, did not examined himself nor any witness was produced on his behalf. After considering the evidence and material on record, the trial Court decided issue Nos. 2, 3, 4 and 6 in favor of main contesting defendants as against the

plaintiffs and defendant Thakur Ghanshyam Singh and dismissed the suit accordingly vide impugned judgment and decree dated 25-4-1990.

4. Mr. S.M. Mehta, Sr. Advocate, appearing on behalf of the plaintiff- appellants, while heavily relying on Section 92 of the Evidence Act, has submitted that terms and conditions of a registered document could be changed only by registered document, however, in the present case, the alleged sale deed executed by Thakur Ghanshyam Singh on 15-6-1971, relinquishing all his rights in favor of Mathuresh Chandra was not duly registered. Mr. Mehta further submitted that both the alleged deeds executed by Thakur Ghanshyam Singh on 15-6-1971 and the endorsement made on the original re-conveyance agreement executed on 4-8-1970 were either forged or just an afterthought, which is also evident from the fact that both the documents dated 15-6-1971 as also alleged endorsement on original reconveyance deed were not mentioned by the contesting respondents either in their reply to the notice or even in the written statement. Even Thakur Ghanshyam Singh, in his separate reply, has not mentioned anything about the agreement dated 15-6-1971. In these circumstances, it has been submitted that only Thakur Ghanshyam Singh could have proved the endorsement as also the alleged agreement dated 15-6-1971 and the burden was on the contesting defendants to produce or summon Thakur Ghanshyam Singh.

5. Mr. P. Gandevia, appearing on behalf of the contesting defendants- respondents, on the other hand, submitted that endorsement made by Thakur Ghanshyam Singh on the original re-conveyance agreement dated 4-8-1970 as also agreement dated 15-6-1971 executed by Thakur Ghanshyam Singh in favour of Mathuresh Chandra relinquishing all his rights in the property in question have duly been proved by the witnesses. It has been alleged that till the property in question is re-conveyed by Thakur Ghanshyam Singh or his nominees as per re-conveyance deed dated 4-8-1970, the same could not have been sold by Thakur Ghanshyam Singh to third person, that also in parts, as such, the suit for specific performance filed by the present plaintiff-appellants was not maintainable. He further submitted that once the re-conveyance agreement was not required to be registered under the law the subsequent agreement in regard to relinquishment of rights by Thakur Ghanshyam Singh was also not necessarily required to be registered. It has also been submitted that Thakur Ghanshyam Singh had taken a contrary stand and intentionally did not come in the witness box to deny the execution of agreement dated 15-6-1971 and the endorsement made by him on the reconveyance deed dated 4-8-1970; both of which were written in his own handwriting by Thakur Ghanshyam Singh.

6. Mr. M.M. Ranjan, also appearing on behalf of contesting defendants submitted that since no money was paid to legal heirs of Mathuresh Chandra by the present plaintiffs-appellants, even otherwise, the specific performance of the agreement could not have been claimed by them as against the contesting defendants.

7. Having considered submissions of learned counsel for the parties, I have carefully gone through the entire material on record as also the judgments cited at the Bar.

8. The plaintiff-appellants have produced two witnesses who have only proved two sale deeds executed by Thakur Ghanshyam Singh, one in favour of Bhikkilal on 28-6-1975 and another on 30-5-1975 in favour of Smt. Gyarsi Bai and Teekam Chand. The contesting defendants, on the other hand, examined three witnesses. DW-1 Gulab Chand, who has been brother-in-law of Mathuresh Chandra, stated that after Thakur Ghanshyam Singh having relinquished all his rights on the property in question in favour of Mathuresh Chandra, a notice was also issued in newspaper on 19-9-1973 in this regard. Other two witnesses namely; Munnalal (DW-2) and Chandmal Sharma (DW-3) have stated that Thakur Ghanshyam Singh had made endorsement on the reconveyance agreement dated 4-8-1970 in regard to relinquishment of his rights in favour of Mathuresh Chandra and further executed a separate agreement on 15-6-1971 in this regard. Both the witnesses have stated that the endorsement and the agreement were written by Thakur Ghanshyam Singh in his own hand-writing and both the above witnesses also signed the agreement dated 15-6-1971 as witnesses. The original reconveyance deed dated 4-8-1970 on which endorsement alleged to have been made by Thakur Ghanshyam Singh and the agreement executed by Thakur Ghanshyam Singh on 15-6-1971 have duly been produced on behalf of the contesting defendants and have also been exhibited as per statements of the above witnesses. Though, counsel for the defendant-Thakur Ghanshyam Singh cross-examined the witnesses produced on behalf of the contesting defendants, however, for the reasons not know, Thakur Ghanshyam Singh did not chose to appear as a witness either on behalf of the plaintiff-appellants nor his own behalf to categorically deny the endorsement and the agreement dated 15-6-1971 written in his own hand-writing and duly signed by him. Initially, written statement was submitted by Thakur Ghanshyam Singh on 6-8-1976 in favour of plaintiff-appellants. Subsequently, amended written statement was also filed by Thakur Ghanshyam Singh on 18-8-1987 taking the plea that conditions of registered document could be changed or varied only by a registered document. In view of "evidence produced on behalf of contesting defendants as referred to above even the plaintiff- appellants could have summoned Thakur Ghanshyam Singh in

rebuttal because he was only the best witness to deny his own hand-writing and signatures on the relevant documents relied upon by the contesting defendants-respondents. In the light of above discussion, since Thakur Ghanshyam Singh had already relinquished all his rights in the property in question in favour of Mathuresh Chandra so far as re-conveyance agreement dated 4-8-1970 is concerned on 15-6-1971 itself, there was no question of re-conveying the property to the plaintiff-appellants.

9. Whether a non-testamentary document in respect of immovable properties is compulsorily registrable or not depends on the facts and circumstances and the terms of the document. No hard and fast rule can be laid down. The crucial test in each case is as to the nature of the document itself. If it does create a right, title or interest in itself, whether in present or in future, it is compulsorily registrable under Section 17(1)(b). However, if by itself it does not create any right but visualizes creation or extinction of a right by some other document, then it falls squarely within the ambit of Section 17(2)(v) and, hence, not registrable. A bare reading of the agreement dated 4-8-1970 would show that it was a simple agreement to re-convey under certain conditions mentioned therein and, thus, was not compulsorily registrable. Under the circumstances, even provisions of Section 92 (4) of the Evidence Act are not applicable in the present case.

10. Without going into the question as to whether the properties in question could be sold prior to re-convey of the properties, the relevant question is whether such properties could be bifurcated and sold in parts to different parties who could claim re-convey of their respective portion at their own sweet-will and convenience. In given cases, it may be impossible and impracticable for the party concerned to partition the property for re-convey to different parties. The agreement to re-convey dated 4-8-1970 does not visualize such eventuality. The terms and conditions are fixed and such conditions cannot be changed by way of bifurcation of the property in question without mention of such terms in the agreement itself.

11. Having considered entire facts and circumstances, since on the basis of material and evidence on record, proper discretion has been used by the trial Court in deciding all the issues accordingly I find no ground for taking any contrary view. The appeal is dismissed accordingly as having no merit.

Appeal dismissed.

