IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 3164 of 1985 (O&M)
Date of decision: 12.01.2015

Sukhdev Singh (since deceased) and others
... Petitioners

versus

Charanjit Kaur and others
.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Gourav Ghopra , Advocate, for the petitioners.
Mr. Ravi Verma, Advocate, for the respondents.

K.Kannan, J.

CM No. 1725-C-1986

This is an application by the respondents in appeal to dismiss the appeal in terms of a compromise. This was filed after the arguments in appeal began and when I had treated it as part-heard by an order dated 23.07.2013. On a subsequent date, when the appeal was sought to be dismissed by a reference to the compromise through an application filed by the respondent, I directed the original compromise memorandum to be filed and adjourned the case to 09.01.2014. Till date the original has not been filed. There was a reply to the application denying that the compromise was voluntarily executed. It was stated that it was brought about by threat and coercion and that none of the recitals in the document had been acted upon. The Provisions of the Order 23 requires that any adjudication in the compromise shall be taken up immediately and even if there is an adjournment, the Court shall record its reasons in terms of the order 23 Rule 3 proviso. That was precisely the reason why I had directed the original to be filed. If there is no ground made for non-production of the original and the applicant will also not give any evidence in support of his own document, the application only deserves to be rejected, both, on the ground of the inadmissibility of the document and for want of proof of the recitals in the compromise.

CM is dismissed

RSA No. 3164 of 1985

This is an appeal preferred against the order of both the Courts below declining the relief for specific performance and providing to the plaintiff only the relief of recovery of money found under the document as supporting the consideration for agreement of sale. The defence to the agreement of sale propounded by the plaintiff was that the defendant's thumb impression had been taken when he was drunk and he had not been aware of the recitals. The plaintiff had examined himself and had also examined the scribe and the witnesses who supported the recitals of consideration found on the document. Both the trial Court and the Appellate Court found that the agreement was true and the plea by the defendant that it had been brought about by deception and that the defendant was in inebriated State, was not true. The concurrent findings of the courts below are to the effect that the agreement is true and validly executed.

The consideration for the sale agreement was recited to be ₹ 30,625/- and as per the recitals an amount of ₹ 14,625/- was paid as earnest money and the major portion of the balance had been for discharge of debts already contracted by the defendant through promissory note and the mortgages. There were three sets of mortgages (i) the documents dated 31.03.1961, 08.04.1963 and 19.06.1969 aggregating to ₹ 4,800/-; (ii) the documents dated 16.06.1969 and 08.07.1969 aggregating to ₹5,000/- and (iii) documents dated 14.09.1971 and 08.07.1974 aggregating to ₹ 5,500. The agreement directed that the discharge of these loans contracted by the defendant and the balance of ₹ 500/- was to be paid at the time of the registration of the sale deed which was to take place before 02.06.1979. There were issues framed also as regards the truth and validity of the mortgages and both the courts found that the mortgages were true. As regards the contest taken regarding a promissory note for ₹ 708/-, the original document had not been produced and the trial Court found the issue against the plaintiff and in favour of the defendant. In appeal, the trial Court, reversed the finding and held that the proof of promissory note itself was not necessary because receipt had been made for a sum of ₹ 600/- and even the execution of the promissory note dated 20.12.1977 agreeing to repay the principal with interest @ 1% per month had not been specifically denied. The Appellate Court reversed the finding of the trial Court on that issue and that further it was in evidence that a cash of Rs. 14,625/- had been paid by the plaintiff to the defendant on the date of the agreement on 12.07.1978. This was stated to be received by the defendant to send his son to Canada. This aspect of the evidence of the plaintiff had also not been cross-examined.

The reference to consideration on the findings of both the Courts below, if taken together would clearly reveal that the entire consideration as recited had been fully proved. The Appellate Court still did not grant a relief for specific performance only on the ground that the defendant had contended that it was a coparcenary property and that therefore, the defendant could not be compelled to execute a sale. This finding of the Appellate Court in affirmation of the trial Court is legally untenable. It will be wrong to assume that a father-coparcener that acts as a Karta has no power to sell the ancestral property without joining the sons. On the other hand, the power of a Karta to sell exists even without joining the son and limitations in the law as recognized by Mitakshara law and applied by Courts admit only of two factors: (i) the sale shall be for binding necessity and (ii) and /or shall have family benefit. What constitutes a binding necessity is invariably a question of fact and the preponderance of authority is that if it is for discharge of antecedent debt, it must be taken as binding on the family. The antecedent debt is a debt which is antecedent in point of time to the transaction of sale or an agreement of sale. I have extracted already the references to all the documents of mortgages and the simple money debt, all of which ranged between the year 1961 to 1976, while the agreement is dated 12.07.1978. The antecedent debts contracted by the father-manager Karta constitued a family necessity and by application of theory of pious application, the sons will be bound by the same even if they are contracted as personal loans. The only exclusion can be if the debt was for immoral or illegal purpose. If the debts are proved as a matter of fact, any contention that they are tainted with illegality and immorality must be proved only by the person that sets up such a claim. There is hardly any attempt anywhere that the debts are so tainted. As I have observed the sale of property by a manager for the discharge of antecedent debts is to be supported and it is irrelevant that the sons are not parties along with the father-manager selling the properties including the share of the sons. In para 242 Part 2 of the Mulla Hindu Law, 18th Edition, it is stated that:

> (2)The manager of a Joint Hindu Family has power to alienate for value, joint family property, so as to bind the interest of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity, or for the benefit of the estate. A coparcener to satisfy an antecedent debt of the minor's father (of grandfather) when there is no other reasonable course open to him. It is not necessary to validate the alienation that the express consent of the adult members should have been obtained.

In the same book referring to several judgments of High Court of Patna, Madras, Bombay, Allahabad and Nagpur, the book paraphrases all the judgments as under:-

> (4) Specific performance of contract of sale entered into by Manager.
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> Where a manager enters into a contract for the sale of immovable property belonging to the joint family for a legal necessity, but subsequently refuses to complete the sale, the court may order decree specific performance of

> the contract, though some of the members of the Joint family are minors. However, not if the contract is for a purpose not binding upon the other coparceners and made without their concurrence.

The Hon'ble Supreme Court has also reiterated the same position in Cheruvu nageswaraswami Vs. Rajah Vadrevu Viswasundara Rao, 1953 AIR (SC) 370, which held that father under Mitakshara Law can alienate for discharge of antecedent debt not contracted for illegal or immoral purposes and such a father's power to alienate would also vest in receiver in an adjudication of father as insolvent.

If the property is agreed to be sold for discharge of antecedent debts and for payment of consideration to enable the defendant to send one of his sons abroad, then it should be noticed that the plaintiff had proved all the necessities in law. Counsel for the plaintiff referred to some decisions of this court that say that even an agreement of sale of co-parcenary property, cannot be defeated by the person who has executed the document by reference to the character of such property as co-parcenary. I do not feel inclined to refer to them in the light of the decisions of the Hon'ble Supreme Court and the observations and the commentary of Mullah Hindu Law in this regard.

Counsel appearing for the respondent states that Hon'ble Allahabad High Court has held that sale of ancestral property which was not supported by necessity cannot be enforced. This decision has no application in a situation where the recitals in the agreements and the documents filed in the Court clearly evidenced the existence of antecedent debts and the agreement was necessitated by discharge of such antecedent debts. The observations of the Courts below that the plaintiff had no right to purchase coparcnery property, did not appreciate correctly the effect of sale for discharge of antecedent debts. The plaintiff was seeking for enforcement of the contract which was executed by the defendant. The defendant took a plea that the property was ancestral and that he had no power to sell. The agreement itself makes reference to the antecedent debts and there was no specific need for any plea in that regard. The recitals in the document of which the plaintiff seeks for enforcement are themselves proof of what they contain. If the defendant was pleading for non-enforceability of the document, all that the plaintiff was required to show was the truth of the document. Both the courts below upheld that the mortgages were true by framing specific issues in that regard. Even the finding related to a simple money debt that was held against the plaintiff by trial Court was reversed by the Appellate Court. Consequently, it meant that all the debts were true and the sale agreement had been written for discharge of the debts.

If the agreement is true, as found by both the courts below and the recitals of consideration were also true, then the point that would required to be addressed is only whether the courts would be justified in declining the suit for specific performance and allowing only the relief for recovery of the amounts. Section 10 of the Specific Relief Act reads thus

> Cases in which specific performance of contract enforceable. Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—
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> (a)when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or
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> (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation.—Unless and until the contrary is proved, the court shall presume—
>
> (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and
>
> (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff. (emphasis supplied)

From the reading of the Section itself it is evident that is respect of immovable properties, specific enforcement is the only appropriate remedy and it cannot be denied. Two other limitations exits in law namely; that the plaintiff shall prove readiness and willingness under Section 16 (c) of the Specific Relief Act; the relief is discretionary and the Court will not exercise it only because the agreement is lawful.

There is evidence of the plaintiff that he was ready and willing to perform his part of the contract, indeed, literally the whole of the consideration had been paid except for a small balance of ₹ 500/-, which was agreed to be paid by the plaintiff at the time of registration. It is nobody's case that the plaintiff did not have the wherewithal to make the payment. If the plaintiff's financial status itself is not in dispute, then an affirmation by him that he was ready and willing to pay was sufficient proof of such an assertion.

Another fetter that could be caused shall be the examination of equities at the time when the court grants a decree of specific performance, Section 20 of the Specific Relief Act details the power of the Court as discretionary and sets out circumstances when the Court may properly exercises not to decree specific performance. Section 20 (2) (a), that makes reference to the contract of the party be such that, though not voidable, gives the plaintiff an unfair advantage over the defendant. Section 20 (2) (b) involve some hardship on the defendant which he did not foresee. Section 20 (2) (c) addresses a situation of a defendant entering into the contract that makes it inequitable to order the specific performance. None of these would come before us. These are aspects of evidence which must be brought forth and explained by the defendant to disentitle the plaintiff to secure the relief of specific performance. The denial of relief of specific performance was clearly untenable. The question of law raised are answered, as follows: 1(i) the Court will not be justified in denying specific performance in the face of Section 10 (ii) when the consideration for the agreement referred to discharge of antecedent debts, there is no fetter in the law for specific performance for sale of property, (iii) The other question raised whether the plaintiff could have been awarded return of money advanced without interest does not arise for consideration since I have held that plaintiff is entitled to relief of specific performance in the manner sought for.

The judgments of the courts below are set aside and the appeal is allowed with costs throughout. The cost in appeal is assessed at ₹ 5,000/-. The plaintiff shall also be entitled to determination of mesne profits from the date when possession was taken from the plaintiff till delivery of possession pursuant to the registration of the sale deed, the determination of which will be carried out in independent proceeding in execution. The second appeal is allowed on the above terms.

(K.KANNAN)
JUDGE

12.01.2015
Kumud