IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.3496 of 2012 (O&M)
Date of decision: 02.02.2015

Avinash Chand Sharma ... Appellant

Vs.

Tilak Raj Bakshi and others ... Respondents

RSA No.3497 of 2012 (O&M)

Avinash Chand Sharma ... Appellant

Vs.

Tilak Raj Bakshi and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not? Yes
3. Whether the judgment should be reported in the Digest?

Present:- Mr. M.L.Sarin, Senior Advocate with
Mr. Nitin Sarin, Advocate
for the appellant.

Mr. Deepak Arora, Advocate
for respondent No.1.

AMIT RAWAL J.

This judgment shall dispose of two regular second appeals i.e. RSA No.3496 of 2012 and 3497 of 2012. It would be apt to refer few facts which are essential for decision of the aforementioned regular second appeals.

For the sake of convenience, the facts are being taken from RSA No.3496 of 2012.

Kirpa Ram Bakshi was the owner of house bearing No.13, Sector 19-A, Chandigarh (hereinafter to be referred as 'disputed house'). He died on 17.10.1980. Before his death, he had executed a registered Will dated 04.09.1974 (Ex.P13) in favour of his three sons namely Tilak Raj Bakshi (plaintiff), Vishu Dutt Mehta (defendant No.1) and Har Krishan Lal Mehta (defendant No.3) in equal shares. On the basis of said Will, vide letter dated 10.07.1981 issued by the Estate Office, U.T.Chandigarh, the disputed house was transferred in the name of aforementioned three persons in equal shares. All the aforementioned three sons stated to have arrived at memorandum of understanding and on 31.03.1982, all the three brothers reduced the minutes of discussion in writing (Ex.P15) Clause V of the writing which is relevant for the adjudication of the present appeal is extracted herein below:-

> *"The individual portions of New Delhi and Chandigarh and agricultural land cannot be sold without concurrence of all three in writing and if it is sold on agreement of three, first preference to be given to both other brothers. Any special renovation after expiry of joint upkeep is done by any one of us and full accounts are maintained, then in the event*

of total sale of any unit, the extra amount spent on special renovation (subject to reasonable depreciation/appreciation) by individual will be payable to the individual over and above 1/3rd share of the sale proceeds."

That in the year 1991 i.e. 16.04.1991, defendant No.1-Vishnu Dutt Mehta, brother of Tilak Raj Bakshi and Har Krishan Lal inducted appellant/defendant No.2, as tenant.

From the perusal of the Sub Clause V, it is manifest that the property in New Delhi and Chandigarh as well as agricultural land could not be sold without concurrence of all three brothers in writing and first preference would be given to other brothers. In order to exercise the option to purchase the share, Vishu Dutt Mehta-defendant No.1 through his wife Shyama Mehta wrote a letter dated 15/16-2-1996(Ex.P16) to the respondent-plaintiff intimating that Vishnu Dutt Mehta was interested in the sale of the portion/share and offered a sum of ₹ 5 lacs as final. It was also indicated in the letter since Tilak Raj Bakshi was elder one, and living on the ground floor, therefore, first offer was being made to him and in case other brother Har Krishan Lal @ Kuku did not accept offer then Vishnu Dutt Mehta would make sale of his portion to the outsider. True translation of the same is annexed as Annexure P-1. Ex.P16, for the sake of brevity, the same is reproduced herein below:-

"Dear Santosh and Tilak ji,

Namaskar

I hope you people are hale and hearty. I had received a letter with respect to Havan being got performed by Buaji. I had also got a Havan performed on First. God may give peace to the sole. The almighty may give place to her near him. She had been relived of her difficulties.

I am once again writing to you that if you or Kuku is interest in purchase of our portion, then let us finalize the deal. From our side, the deal can be closed. From our side, Rs.5,00,000/- is final and I am making last request. I am sending last request and I want that before the property goes into the hands of children, the brother should settle. The health of Mehtaji is deteriorating day by day. He is not in a position to travel. I hop you would also like that your son should remain with you. You are elder and living on the ground floor; therefore, first offer is being made to you and second offer would be made to Kuku and only thereafter, I would offer the sale of my portion to outsider. What is the status of eyes of Santosh? I hope there would be improvement. Please inform as to what Mamta is doing these days. She must have completed her degree. Kindly *convey my love to Mani, Lakshmita and Dhruv. Please send photographs of Dhruv and Lakshmita and Naini. These days, Dhruv must be quite talkative. Please come over to Bhilai. We would be very happy. Mehtaji also joins me in wishing you Namaskar and love to children.*

Awaiting your reply,

Yours Shyama"

Respondent-plaintiff did not reply to the aforementioned letter which necessitated, Defendant No.1-Vishu Dutt Mehta, through his wife, to again sent a letter dated 10.03.1996 (Ex.P17) wherein also intention to sell the property/share was indicated much less asked for the amount of earnest money, mode of payment, vacation of house etc. For the sake of brevity, letter Ex.P-17 which is annexed as Annexure P-2 is extracted herein below:-

"Dear Tilakji and Santoshiji

Namaskar

We are well here and I hope everyone would be hale and hearty. I heard about death of sister-in-law of Santoshji. It is very shocking. May God giver her soul peace. I had a talk with Tilakji and I am responding to the points he asked:-

1. *What would be the earnest money?*

> 2. *How the payment would be made?*
> 3. *What would be the rate?*
> 4. *Where the payment would be made and when the sale deed would be executed?*
> 5. *How the house would be got vacated?*

1. *The earnest money can be paid Rs.1 lac or two; even the entire payment can be made and signatures can be got done.*
2. *Half payment would be through draft and the remaining half would be in cash.*
3. *As regards the rates, we have already quoted quite low rates and this is final. I want to finalize the deal without telling Manu because it we are not able to finalize, then next offer would be to an outsider. If the deal is finalist by 1st April, after 15th Manu would come and if he comes, then he would not let the house be sold.*
4. *Payment will have to be made at Bhilai on coming to Bhilai because Mr. Mehta is not in a position to travel.*

> *5. After giving the earnest money, we would issue notice for vacating the house or adopt any other method (not readable)……………… ……We will see.*
>
> *I hope you have got answer to all the points. Please reply in writing immediately or give me a phone call.*
>
> *Kindly convey my love to children and regards to both of you.*
>
> *Sd/-Shyama"*

The plaintiff stated to have replied the letter dated 10.03.1996 vide letter dated 22.03.1996 but did not produce the said letter, however, produced on record the letter dated 01.04.1996 (Ex.P18) addressed to Vishnu Dutt Mehta. In the said letter, plaintiff requested defendants No.1 and 3 to reconsider the matter but acknowledged the critical health condition of his brother namely Vishnu Dutt Mehta and while acknowledging the aforementioned fact stated in the said letter, formalities would be completed in one or two working days and agreed to give *Biana* of one lac plus agreement to sell. However, while going through his intention to purchase, he requested Vishnu Dutt Mehta to reduce the total value, if there was some scope. For the sake of brevity, letter dated 01.04.1996 is reproduced herein below:-

> *"Fax No.0788-324339*

Fax for Sh. V.D.Mehta,

48/6, Nehru Nagar (West)

Bhilai (MP)

Res.Tele-324651

13/19-A, Chandigarh

01.04.1996

Respected brother and Shyama Bhabi,

Namaskar, Ref. Today morning phone talks. In response to Bhabi's letter dated 10.03.1996, replied on 22.03.1996. Main points are (1) Your reply point-wise received and discussed with family and in principal your offer is acceptable to us broadly. Please reconsider the matter and try to visit both of your along with Manu Chandigarh. Also we are aware of brother's health but if you try can come here, we will complete the formalities in one or two working days and give Biana one lac plus agreement to sell will be done. At present, matrimonial talks of Mamta are in advanced stayed with 4/5 parties and their/ our visits to each other are likely. Our top priority is Mamta's marriage and second priority is about your portion and Naini shifting to us. Your reasonable offer has come at such a time that it is hard on me to take decision.

From my side, I will do my utmost best to complete the deal. Rest it is God's wish. I and Santosh both are about 60 years old and are keeping indifferent health. I am due to retire in August this year. Please try to reduce the total value if there is some scope. In case you decide not to come to Chandigarh, I will come for one or two working days to you. Please inform convenient trains from Delhi and for return journey try to make II sleeper reserve up to Delhi/Ambala. Hope brother's health is improving and all children are happy at their places and so are grand children. Please reply soon or phone or fax at my office No.0172-703603 "Attn: Tilak Raj Bakshi"

With regards, your affectionately -Tilak Raj Bakshi."

The said letter was replied by Shyama Mehta wife of defendant No.1-Vishnu Dutt Mehta vide letter dated 15.04.1996 (Ex.P19) wherein it was stated that in case plaintiff was interested in purchasing the property, he was requested to come in Bhilai and get all papers signed as prices in Chandigarh were increasing rapidly and the rate settled was on old price. For the sake of brevity, the contents of the letter dated 15.4.1996 which has been annexed with regular second appeal as Annexure P-4, (Ex.P-19) is reproduced herein below:-

"Dear Tilak,

Namaskar

I am in receipt of your letter and fax. I was to consult my children, so there was some delay.

Manik is not ready to give you the portion of the house. He is quire angry but I have spoken to Rajiv. He has told me that if your goodself are interested in purchasing, then you are requested to come to Bhilai with all the payment in one go and get all the papers signed. We do not wish to inform him because he is in Dubai for one month with Anju. He has got his visa extended by one month and if till then his job is fixed, then he would stay otherwise he would come back and do something here. I do not wish to now receive earnest money. Please make the final payment as the prices in Chandigarh are increasing quite rapidly and the rate settled by you is quite old. Therefore, I have given you offer because I wan in dire need of money. Now the need is yours. If the deal is finalized before Manu coming back, then it is alright because health of Mehtaji is also very delicate. In any case, I would handle the situation in any manner but it would not be possible later on.

For coming to Bhilai, you can catch Chhattisgarh

Express from Ambala or you can catch Mahamaya super fast which starts at 2.20 P.M from Delhi. There is another train from Nizammuddin which runs three days a week which is again good train. Please tell me on telephone whenever you wish to come. I would get the seat booked because during summer vacation, there would be heavy rush.

Convey love to children. Namaskar to both of you.

Sd/-Shyama"

Since the plaintiff-respondent No.1 did not accept the offer of defendant No.1-Vishnu Dutt Mehta, Defendant No.1 vide sale deed dated 12.11.1997 (Ex.DW1/A), sold 1/3rd share to the appellant who was a sitting tenant on 3.2.1998, i.e. after a gap of three months, Tilak Raj Bakshi-plaintiff/respondent filed a suit for declaration challenging the sale deed dated 12.11.1997 ibid being illegal, null and void and also sought relief of specific performance of minutes of understanding reduced in writing on 31.03.1982 (Ex.P15), for an appropriate direction to Vishnu Dutt Mehta, defendant no.1 to get the sale deed executed in respect of 1/3rd share in his favour. However, later on the suit was amended and relief of possession was incorporated. Defendant No.1-Vishnu Dutt Mehta after filing the written statement was proceeded against ex parte, where as, the suit was contested by the appellant/defendant No.2.

In the plaint, respondent-plaintiff referred to all the aforementioned letters stated to have been received by him and responded to defendant No.1. Even when the plaintiff appeared in the witness box as PW4 to a specific question, in the cross examination, admitted that Vishnu Dutt Mehta rented out his portion which was in possession of appellant-defendant No.2 in the year 1990 as tenant and defendant No.1 had given an offer to sell 1/3rd share but he did not know the date, month and year. He further admitted that defendant No.1 gave his offer vide Ex.P16 extracted above. However, no agreement to sell was executed. He further admitted the amount of ₹ 5 lacs was settled amount but defendant No.1-Vishu Dutt Mehta did not come to Chandgiarh, therefore, the agreement was not executed nor any earnest money was paid. He also admitted the offer given vide letter Ex.P19 to sell the 1/3rd share of defendant No.1. The relevant portion of the admission which surfaced in the cross examination is extracted herein below:-

> *"Defendant No.1 has given its offer to sell his 1/3rd share to me but I do not remember the date, month and year. It is correct that defendant No.1 gave his offer to me vide letter Ex.P16 written by the wife of defendant No.1. It is correct that I was offered to purchase defendant No.1, 1/3rd share vide Ex.P16. No agreement to sell was executed as per offer given in Ex.P16. An amount of Rs.5 lac was settled as consideration amount. Since he did not turn up*

> *to Chd. so no agreement was executed and no earnest money was paid. It is correct that I was also offered vide letter Ex.P19 to purchase 1/3rd share of defendant No.1."*

Appellant/defendant No.2 appeared as DW4 and stated in cross examination that Mrs. Shyama Mehta had told him that she wanted to sell her share to Tilak Raj Bakshi and other brother Har Krishan Lal, which she had talked/spoken number of times but they did not show any interest and in this regard many letters were written to them. Accordingly, defendant No.1 had sold his 1/3rd share to the appellant/defendant No.2.

The trial Court in paragraph No.27 of the judgment while noticing the copies of the letters of correspondence exchanged between Shyama Mehta and plaintiff found that no such offer was ever received by the plaintiff particularly from defendant No.1 except letters from his wife. The trial Court also noticed that plaintiff admitted that offer was made to him by defendant No.1 from Bhilai but he did not turn up to Chandigarh. By giving such observations, as well as the fact that no notice was issued to the co-owners while transferring share of defendant No.1 to defendant No.2, decreed the suit of the respondent-plaintiff by holding that plaintiff has a preferential right as Ex.P15 to purchase the share of defendant No.1.Since the appellant/defendant No.2 purchased the share of defendant no.1 for a sale consideration of ₹ 4.80 lacs, therefore, directed that defendant

No.1 was bound to offer plaintiff and defendant No.3 for purchase of that share before selling that to anybody else, as no specific amount had been mentioned in Ex.P15 and granted the relief of specific performance as per the terms and conditions of the minutes of understanding dated 31.03.1982 to purchase the share of defendant no.1 and also held that sale deed dated 12.11.1997 to be null and void.

The aforementioned judgment and decree was assailed by the appellant/defendant No.2 as well as by the plaintiff by filing two appeals. The lower Appellate Court dismissed the appeal of the appellant-defendant No.2, but while accepting the appeal of plaintiff modified the decree of the trial Court by directing the appellant/defendant No.2 to hand over the vacant possession to the plaintiff-respondent.

Against the judgment and decree of the lower Appellate Court, the aforementioned two regular second appeals have been preferred by the appellant-defendant No.2.

Mr. M.L.Sarin, learned Senior Advocate assisted by Mr. Nitin Sarin, Advocate appearing on behalf of the appellant in support of his case, has raised following submissions:-

> i) That the agreement Ex.P15 in view of provisions of Section 14 of the Specific Relief Act was not enforceable and in support of his submission, referred to the provisions of Section 14 of the Specific Relief Act. In order to fortify the

argument by relying upon the provisions of Section 14. He further supplemented his submissions that the agreement to sell did not contain the following condition:-

a) There is no penalty clause, no price has been determined or fixed. Minutes of understanding is vague and thus not enforceable.

In support of his submission, cited the following judgments:-

1. **Bhagwan Singh (deceased) represented by Ranjit Singh and others vs. Nawab Mohammad Iftikhar Ali Khan, Nawab Malerkotla and others Vol.LXXXIV-1982;**
2. **Mayawanti vs. Kaushalya Devi (1990) 3 Supreme Court Cases 1;**
3. **Krishan Singh Rana vs. Haryana State Industrial development JT 2000 (Suppl.2) SC 444; and**
4. **Harbir vs. Rajpal Vol.CXXX-(2002-1).**

and urged that the present appeal involves the following substantial questions of law to be adjudicated by this Court:-

i) Whether in the absence of pleading and evidence in terms of Section 19(b) of the Specific Relief Act, 1963, suit for specific performance of agreement to sell is maintainable against a bonafide purchaser for consideration?

ii) Whether a vendor-co-owner having right to first purchase other's share, is estopped from claiming right of first purchase, having availed the repeated offers in writing of a co-owner and failing to finalise the deal?

iii) Whether clause V of the Minutes of discussion Ex.P15 is a clog on the ownership right of a co-owner and thus not enforceable?

iv) Whether the judgments and decrees passed by the Courts below are result of mis-reading and non-reading of material evidence available on the file?

v) Whether appellant-defendant No.2 is a bonafide purchaser for consideration and hence saved by Section 41 of the Transfer of Property Act read with Section 19(b) of the Specific Relief Act, 1963?

vi) Whether the sale deed dated 12.11.1997 (Ex.DW1/A) could be declared to be null and void, ab initio, when the minutes of discussion (Ex.P15) are silent about the consequences of breach of clause V?

vii) Whether the sale deed dated 12.11.1997 (Ex.DW1/A) could be declared null and void, ab initio, when admittedly the vendor was a co-sharer and he never challenged the sale?

viii)Whether the Courts below, after dismissing the prayer of the plaintiff-respondent for purchasing the share of Vishnu Dutt Mehta for Rs.4.80 lacs, could hold the sale deed to be null and void?

ix)Whether the lower Appellate Court could pass a decree for possession in favour of the plaintiff-respondent when admittedly, he is owner in possession of 1/3rd share of the house and when admittedly the appellant was a tenant prior to the sale deed dated 12.11.1997?

x) Whether the alleged family settlement dated 31.03.1982 could be specifically enforced when the same is without consideration, vague and does not satisfy the consideration for which the 1/3rd portion of the house was to be transferred by Vishnu Dutt Mehta in favour of the other two signatories?

xi)Whether the judgments and decrees of the Courts below are perverse and liable to be set aside by this Hon'ble Court?

xii) Whether findings of the Courts below are against the admitted case of the plaintiff?"

Mr. Deepak Arora, Advocate appearing on behalf of respondent No.1, in support of his case, raised following submissions that:

i) Defendant No.1 did not come to Chandigarh as the *property is situated in Chandigarh and sale deed, if any, was to be executed at Chandigarh.*

ii) All the letters were not written by defendant No.1 but were written by his wife. Thus, there was no offer on behalf of defendant No.1 to sell his share.

iii) No substantial question of law arises.

I have heard learned counsel for the parties and perused the impugned judgments and decrees of the Courts below and record of the trial Court and is of the view that the present appeal is liable to be allowed.

From the perusal of the terms and conditions of the minutes of understanding, it is evident that there was no valid and binding contract between the parties much less no price had been fixed nor there is any penalty clause i.e. in case of failure either party one of the party can enforce the agreement (Ex.P15). The plaintiff/respondent No.1 not only gave the reference of the letters Ex.P16, Ex.P17, Ex.P18 and Ex.P19 in the plaint but also unequivocally, admitted that defendant No.1 had offered to sell his 1/3rd share in the property in dispute but he did not remember the date, month much less year. The relevant portion of the cross-examination has already been extracted above. The admission of the plaintiff/respondent No.1 leaves no manner of doubt that defendant No.1 Vishnu Dutt Mehta had offered to sell his 1/3rd share in the property in dispute and amount of ₹ 5 lacs was settled as consideration amount. The plaintiff also knew the pre-carious/critical condition of Vishnu Dutt Mehta, yet he did not take any effort to ask his well-being and also send earnest money by way of cheque or draft or visited Bhilai in this regard. The plaintiff-respondent No.1 could have sent a draft of ₹ 1 lac along with agreement to sell by requesting to defendant No.1 to append his signatures and return back the same.

Since the aforementioned acts has not been done by the plaintiff-respondent No.1, the plaintiff-respondent No.1 lost his pre-emptory right to purchase the share and accordingly, it led to defendant No.1 to sell his 1/3rd share vide sale deed dated 12.11.1997 (Ex.DW1/A) to the appellant-Avinash Chand Sharma. Once the appellant has stepped into the shoes of Vishnu Dutt Mehta, he has become the co-owner along with other siblings i.e. Tilak Raj Mehta and Har Kishan Lal and remedy, if any, for the parties to the lis, was to seek partition. As per Chandigarh by-laws, fragmentation of property is not admissible, remedy for the parties thus was to determine the market value of the property by buying each other's share as per the provisions of Sections 2, 3 and 4 of the Partition Act, 1893.

As per the provisions of Section 29 of the Indian Contract Act,1872, the agreements which are vague, indefinite much less void cannot be enforced under the Specific Relief Act, 1963. Judgment of this Court in Bhagwan Singh's case (supra) is directly applicable to the facts and circumstances of the present case, for, as already observed, the clause V of the minutes of understanding reduced in writing is not only vague but indefinite and void. The plaintiff/respondent No.1 cannot be permitted to exercise his offer belatedly after he has lost to encash the offer reflected in the letters referred above. Once the plaintiff-respondent No.1 lost his right, he cannot now be permitted to take the aid of provisions of Section 22 of Hindu Succession Act, 1956, as Section 22 had already been held unconstitutional by Hon'ble the Supreme Court in **Ram Awadh (dead) by LRs vs. Achhaibar Dubey 2000 AIR (SC) 860**. The lower Appellate Court has also committed illegality and perversity in modifying the judgment and decree of the trial Court by directing the appellant to hand over the vacant possession of the portion which was in his occupation.

Assuming for the sake of argument, there was no offer by defendant No.1 to sell his share even then the status of the appellant would have been as tenant and once the tenant would always be a tenant and he can only be evicted by resorting to the provisions of the East Punjab Urban Rent Restriction Act, 1949 which is applicable to the Union Territory, Chandigarh. The aforementioned ratio descendi has been applied by Hon'ble the Supreme Court in case of Krishan Singh Rana's case (supra).

However, in this case, since the plaintiff-respondent No.1 had not accepted the offer given by Vishnu Dutt Mehta, therefore, the suit ex facie for specific performance was not maintainable and minutes of understanding cannot be permitted to be read as agreement to sell as there was no condition of seeking the specific performance through the competent Court of law, therefore, the Courts below erroneously exercised the jurisdiction under Section 20 of the Specific Relief Act, 1963. For the sake of brevity, Section 14 of the Specific Relief Act is reproduced herein below:-

> 14. Contracts not specifically enforceable.—
>
> (1) The following contracts cannot be specifically enforced, namely:—
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief;
>
> (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
>
> (c) a contract which is in its nature determinable;
>
> (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.
>
> (2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has

refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lendor is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in persuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

Persons for or against whom contracts may be specifically enforced."

From the perusal of the aforementioned, provisions and the condition contained in the minutes of understanding reduced in writing, the Courts below could not have exercised discretion under Section 20 of the Specific Relief Act, 1963 and as contract cannot be specifically enforced. In view of my observations rendered above, the substantial questions of law are answered in favour of the "appellant-defendant" and against the "respondent-plaintiff".

In view of what has been observed above, the appeal is allowed and impugned judgments and and decrees of the trial Court and lower Appellate Court are set aside and the suit of the plaintiff-respondent is accordingly dismissed.

There shall be no order as to costs.

(AMIT RAWAL)
JUDGE

February 02, 2015
savita