

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-389-2013 (O&M)

Date of decision: 03.07.2017

Jaspal Kumar and another

... Appellants

Versus

Gurdev Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Rakesh Chopra, Advocate
for the appellants.

Mr. Avnish Mittal, Advocate,
for the respondent.

AMOL RATTAN SINGH, J.

This is the second appeal of the two defendants in a suit filed by the respondent-plaintiff seeking possession of the suit land by way of specific performance of an agreement of sale dated 01.12.2004; or in the alternative seeking recovery of Rs. 15,88,500/-, with a further relief of permanent injunction restraining the defendants from alienating, mortgaging, encumbering or transferring the suit property to any other person except the plaintiff.

2. The facts, as taken from the judgments of the learned courts below, are that, as per the respondent-plaintiff (hereinafter referred to as plaintiff), agricultural land fully detailed and described in the heading of the plaint, was owned and possessed by the appellant-defendants (hereinafter referred to as the defendants) and that they entered into an agreement of sale on 01.12.2004 with the plaintiff, qua the suit land measuring 44 kanals and 10 marlas, for a sale consideration @ Rs. 3,60,000/- per acre. The

defendants herein are stated to have received Rs. 2,30,000/- as earnest money from the plaintiff, with the remaining amount agreed to be received by them at the time of execution and registration of the sale deed, for which the date fixed was 15.05.2005, i.e. 5½ months later.

On 22.12.2004, the appellants-defendants issued a notice to the plaintiff, through their counsel, stating that 09 kanals and 04 marlas of the land agreed to be sold was not owned and possessed by them but by their father. The plaintiff is stated to have replied to the said notice, stating that the defendants had mis-represented at the time of agreement with regard to the ownership of the land but that he was willing to exclude the said 09 kanals and 04 marlas from the purview of the agreement and to get the sale deed executed and registered in his favour qua the remaining land.

3. It was further contended in the plaint that the plaintiff always remained ready and willing to perform his part of the agreement and that since 14.05.2005 and 15.05.2005 were holidays, he came to the office of the Sub-Registrar, Rajpura, along with the balance consideration and other expenses, on 13.05.2005, but found that the office had closed due to the death of an ex-Minister of Punjab. He therefore went again to the office of the Sub-Registrar on 16.05.2005 but the defendants did not turn up till evening, and therefore the plaintiff executed an affidavit and got it attested, thereby marking his presence in the office of the sub-registrar.

Still further, it was contended that the plaintiff requested the defendants many a time to get the sale deed executed and registered but they having eventually refused to do so, and the plaintiff having come to know that they were negotiating for the sale of the suit land with some other persons, the suit came to be instituted on 15.06.2005.

4. Upon notice issued to them, the present appellants-defendants filed a written statement, controverting the averments in the plaint and denying that they had ever entered into any agreement qua the suit land with the plaintiff, or that had they received any earnest money from him.

It was contended by them that they had been defrauded and cheated, with one Prem Kumar, a property dealer, having manipulated everything.

As per the defendants, the aforesaid Prem Kumar, along with the plaintiff, represented to defendant no. 1 that the father of the defendants had signed an agreement with the plaintiff in respect of his entire land and that the sale agreement was in their possession. An agreement was also stated to have been shown to the first defendant, allegedly signed by his father.

As per the written statement, it was further represented to the defendants that “advance sale price” had been paid to their father, Pishori Lal, vide the said agreement of sale and that they, i.e. the defendants, were only to execute the sale agreement in favour of the plaintiff.

Yet further, as per the stand of the defendants, the aforesaid representation by the plaintiff and Prem Kumar, was made only to defendant no. 1, with defendant no. 2 not present at the time. The first defendant, believing the aforesaid version of the plaintiff and Prem Kumar, got a sale agreement scribed in respect of 44 kanals and 10 marlas of land “as desired” by them (Prem Kumar and the plaintiff).

However, it was further averred that no amount was actually paid to either the first or the second defendant, by the plaintiff, while executing the sale agreement in question.

5. It was then contended that the defendants subsequently discovered that their father had not entered into any sale agreement with the plaintiff qua the suit land, and therefore, the sale agreement in question stood vitiated and could not be enforced.

In fact it was contended that it is only when the counsel for the defendants issued a legal notice to the plaintiff and Prem Kumar, as also Bhagwant Singh and Nirbhay Singh (attesting witnesses), for fraudulently fabricating a sale agreement, that the suit was filed by the plaintiff.

[Note:- It needs to be stated here that the contents of the written statement have not been taken as reproduced by the learned Additional Civil Judge (Senior Division) in his judgment, there being some confusion in the narration of the contents, and therefore, the stand of the defendants has been taken from the written statement itself, available in the record of this appeal].

6. Upon the aforesaid pleadings the learned Additional Civil Judge (Sr. Divn.) framed the following issues:-

“1. Whether defendants executed an agreement to sell dated 01.12.2004 in favour of plaintiff and received earnest money as alleged? OPP.

2. Whether plaintiff remained always ready and willing and is still ready and willing to perform his part of the contract? OPP.

3. Whether plaintiff is entitled for possession by way of specific performance of agreement to sell? OPP.

4. Whether plaintiff is entitled to injunction as prayed for? OPP

5. Whether suit is not legally maintainable? OPD

6. Whether suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD

7. *Relief.”*

7. By way of evidence, the plaintiff examined the aforesaid Prem Kumar, who is also shown to be an attesting witness to the agreement, Nirbhay Singh, himself (plaintiff Gurdev Singh) and Bhagwant Singh, as PWs 1 to 4 respectively.

As per the judgment, he also tendered the following documents in evidence:-

- | | |
|---|-----------|
| “1. Original agreement to sell dated 01.12.2004 | Ex. P-1; |
| 2. Affidavit | Ex. P-2; |
| 3. Notice received by plaintiff | Ex. P-3; |
| 4. Copy of reply | Ex. P-4; |
| 5. Copy of jamabandi for the year 2003-04 | Ex. P-5; |
| 6. Copy of jamabandi for the year 1988-89 | Ex. P-6; |
| 7. Postal receipt | Ex. P-7; |
| 8. Post card | Ex. P-8; |
| 9. Copy of jamabandi for the year 2003-04 | Ex. P-9.” |

The defendants examined the first defendant, Jaspal Kumar, and their father, Pishori Lal, as DWs 1 and 2 and closed their evidence thereafter.

8. No evidence having been led in rebuttal, the learned trial Court took up issues no. 1 to 4 for consideration together.

That Court went on to record a finding that the plaintiffs had duly proved the documents led in evidence, by examining the witnesses concerned, whereas the defendants on the other hand had taken a plea of fraud and deception without challenging their signatures on the agreement, Ex. P-1. A finding was therefore recorded by reference to Sections 101 and 102 of the Indian Evidence Act, that once the signatures are accepted then

the onus to prove that the agreement was got executed by deception and

fraud, shifted onto the defendants.

The contention of the defendants that a mis-representation had been made by Prem Kumar and the plaintiff, was not accepted by the learned Civil Judge, firstly because though in the written statement it was alleged that Prem Kumar and the plaintiff had shown defendant no. 1 a written agreement already signed by his father, however, when the said defendant testified as DW-1, he deposed that no document/written agreement was shown to him by the plaintiff and Prem Kumar on that date. He had deposed that both these persons had orally told him that the plaintiff had already paid Rs. 2,30,000/- as earnest money to his father, against an agreement of sale.

Hence, with the testimony of the first defendant being contrary to the written pleadings, the stand taken by the defendants was held to be contradictory.

9. Further, in the written statement it was pleaded that the first defendants' brother, Jaswant Kumar (defendant no. 2), was not present with him at the time when the aforesaid representation was made to him; however, Jaswant Kumar was found to be one of the executants of the agreement dated 01.12.2004 (Ex. P-1), but had not stepped into the witness box to state that his signatures were not obtained on that date.

The defendants' father, Pishori Lal, while testifying as DW-2, stated during his cross-examination that he had not accompanied his sons on 01.12.2004 when the agreement, Ex. P-1, was allegedly executed by them in favour of the plaintiff. He submitted that he was away to Bathinda and returned only on 05.12.2004 and was informed on the next day, i.e. 06.12.2004, about the agreement having been entered into.

The learned Additional Civil Judge found the said testimony to be not creditworthy, as the first defendant, while testifying as DW1 had deposed that the signatures of his brother, defendant no. 2 Jaswant Kumar, were obtained on the day after the agreement was written out, and had also stated that he spoke to his father the next day after the representation, with regard to the agreement that his father had made, as had been told to him by the plaintiff and Prem Kumar.

From the aforesaid testimonies, that Court drew an inference that if the version of DW-1 was assumed to be correct, then it would suggest that his father had told him on 02.12.2004 that he never entered into any agreement with the plaintiff. In that case, the brother of the second defendant, i.e. Jaswant Kumar, would not have signed on the agreement on the third day, i.e. on 03.12.2004.

10. After discussing the aforesaid evidence led by the defendants, the learned trial Court went on to examine the evidence of the plaintiff. It is recorded that one of the attesting witnesses to the agreement, Nirbhay Singh, though had deposed by way of examination-in-chief but did not subject himself to cross-examination. Yet, no adverse inference was taken against the plaintiff, on the ground that he had given up the said witness vide a statement recorded on 11.08.2008, stating that he was ill and unable to appear for cross-examination.

The learned trial Court next found that PW-2 Pishori Lal had alleged that out of the total land of 44 kanals and 10 marlas, 09 kanals and 04 marlas belonged to him and he had never agreed to sell it to the defendants. The defendants had taken a plea that Ex. P-1 was executed in respect of 44 kanals and 10 marlas on the basis of a '*Jamabandi*' for the year

1998-99 (Ex. P-6), wherein, before the Court, the entire land was shown to be incorporated in the name of the defendants on the basis of '*Tabdil*' (exchange) no. 9374, sanctioned in favour of the defendants. The plaintiff had come to know that the entries pertaining to Ex. P-6 were incorrect and therefore, had filed a suit for specific performance only qua 35 kanals and 06 marlas, thereby excluding the land owned by Pishori Lal. It was also found by that Court that the said 35 kanals and 06 marlas were proved to be standing in the name of the defendants, from Ex. P-5 (i.e. the '*Jamabandi*' for the year 2003-04).

11. Rejecting an argument on behalf of the defendants that in the absence of the plaintiff seeking enforcement of the entire land that was subject matter of the agreement (i.e. 44 kanals and 10 marlas), and that the agreement qua only 35 kanals and 06 marlas could not be enforced, it was held that the said 35 kanals and 06 marlas, bearing specific khasra numbers, could be severed from the land owned by Pishori Lal and as such, the agreement was enforceable qua the land owned by the defendants.

12. An argument also having been raised that PW-1 Prem Kumar was mentioned as the son of Khushi Ram in Ex. P-1, whereas he was examined as PW-1 as Prem Kumar son of Nathu Ram, that argument was also rejected, on the ground that in paragraph 6 of his affidavit, Ex. PW1/A, Prem Kumar had clarified that his fathers' name is Nathu Ram and grand-fathers' name is Khushi Ram and therefore in the agreement of sale it should have actually been written as Prem Kumar son of Nathu Ram son of Khushi Ram.

13. On the aforesaid reasoning, issues no. 1 to 4 were decided in favour of the plaintiff, holding that Ex. P-1 was a validly executed

agreement by the defendants in favour of the plaintiff, on which the defendants had appended their signatures after understanding the contents thereof, and that the readiness and willingness of the plaintiff to execute his part of the contract stood proved by his affidavit, Ex. P-2, showing that he was present in the office of the Sub-Registrar on 16.05.2005 to execute the sale deed.

14. The remaining two issues, of whether the suit was legally maintainable or not and whether it had been properly valued and was within jurisdiction, were also decided in favour of the plaintiff, holding that the defendants could not prove the issues against the plaintiff.

Consequently, the suit of the plaintiff was decreed in his favour, with a direction that upon him depositing the balance sale consideration within 03 months, along with expenses for registration of the sale deed etc., the defendants would get the sale deed executed thereafter within one month, failing which the plaintiff would be at liberty to get the sale deed executed through process of the Court.

15. The defendants having filed a first appeal, that was heard by the learned Additional District Judge, Patiala, who, after noticing the pleadings of the parties, the issues framed by the learned Additional Civil Judge and the evidence led by the parties, thereafter first went on to notice the argument before him, on behalf of the appellant-defendants, that the suit itself was defective.

That argument was based on the same rationale, that the agreement being for 44 kanals and 10 marlas of land, but the suit having been filed in respect of only 35 kanals and 06 marlas, it was not maintainable.

That argument was further extended to contend that non-segregation of the land detailed in the agreement Ex. P-1, would also be on account of the fact that all “rights appurtenant to the land,” including the tubewell connection, water channels, passage etc, could not be segregated. The argument raised on behalf of the appellants was, therefore, in terms of Section 12 of the Specific Relief Act, 1963.

16. After considering the aforesaid argument, it was rejected by the first appellate Court, holding that the arguments raised were by way of 'technical objections', including an argument that no replication had been filed to the written statement.

As regards the non-filing of the replication, that Court referred to the judgment cited by counsel for the plaintiff-respondent, in **K. Laxmanan** vs. **Thekkayil Padmini** 2009 (1) CCC 526 (S.C)., wherein it was held that non-filing of a replication does not amount to an admission of the facts pleaded in the written statement.

17. On the non-severability of the suit land, the reasoning adopted by the learned Additional Civil Judge was also adopted by the first appellate Court, holding that once the property bears distinct and specific khasra numbers, there would be no reason as to why it cannot be separated from the remaining property (as is not to be included in the decree to be issued).

The contention on the non-severability of the land due to a tubewell connection, passage etc., was also rejected, holding that the land in question being agricultural land, as such, even when there is partition of such land, passages are carved out and joint tubewell connections are also shared etc.

18. Further in the context of the argument on Section 12 of the

Specific Relief Act and part performance of the agreement, it was held that in terms of Section 12 (3) of that Act, as interpreted by the Supreme Court in C.Varghese vs. Deveki Amma Balambika Devi 2005 (4) R.C.R (Civil) 469, the entire amount of consideration to be paid would be only qua the proportionate part of the contract which can be executed.

On the aforesaid reasoning, the first appeal was dismissed.

19. In this second appeal, learned counsel for the appellants has framed the following questions of law for consideration of this Court.

“(a) Whether the suit of the plaintiff is liable to be dismissed for not complying the mandatory provisions of Section 12 and Section 10 of the Specific Relief Act?”

(b) Whether the value of the rights in tubewell, bore, rasta, khal (water course) and all rights appurtenants connected to the agricultural land can be segregated and valued in terms of money with respect to different parcels of land sought to be transferred?”

(c) Whether any witness can be given up once he has entered the witness box by tendering his examination-in-chief by way of affidavit?”

(d) Whether adverse inference should have been drawn against the plaintiff/respondent for giving up PW-2 Nirbhai Singh after he had been examined-in-chief?”

(e) Whether the impugned decrees and judgments are perverse and arbitrary by not referring and discussing the material written arguments with respect to the fraud and circumstances touching the due execution of the agreement of sale Ex. P-1?”

As a matter of fact, the questions framed at (c) and (d) hereinabove do not really require any adjudication as substantial questions of law in a second appeal, in view of the fact that undoubtedly once PW-2

by way of his examination-in-chief (by way of his affidavit) had to be discarded, and even if an adverse inference should correctly have been drawn by the learned trial Court against the plaintiff on that score, it would not alter the fact that the other witnesses for the plaintiff, i.e. PW-1, Prem Kumar, the plaintiff himself (PW-3) and PW-4 Bhagwant Singh, all duly testified in favour of the plaintiff, essentially in terms of the averments made in the plaint.

The questions framed at clause (a) and (b) hereinabove, essentially are one question of law, to the effect as to whether in terms of Sections 10 and 12 of the Specific Relief Act, 1963, a decree qua only 35 kanals and 06 marlas could have been passed in favour of the plaintiff, with the agreement that was sought to be enforced through the suit, being for the sale of 44 kanals and 10 marlas of land.

The second question of law that would arise, as would be seen from the arguments raised by learned counsel for the appellants, would be as to whether, without seeking a decree for a declaration that the legal notice annulling the agreement, issued by the appellants-defendants (Ex.P3), be declared null and void, would the suit of the respondent-plaintiff be maintainable, in terms of the judgment of the Supreme Court in I.S. Sikandar vs. K. Subarmani 2014 (1) RCR (Civil) 236?

20. Addressing arguments for the appellants, Mr. Rakesh Chopra, Advocate, after referring to the facts of the case from the pleadings, first raised an argument on the basis of Section 12 (3) (b) (i) of the Specific Relief Act, to submit that even if the agreement is taken to be accepted as having been executed between the parties, it was in respect of 44 kanals and 10 marlas of land which was not severable, and therefore, the suit having

been instituted seeking specific performance of execution of a sale deed for only 35 kanals and 06 marlas of land, no such decree should have been issued by the courts below.

In support of his argument, learned counsel relied upon a judgment of the Supreme Court in Shankar Singh vs. Narinder Singh and others 2012 (1) RCR (Civil) 576, drawing specific attention to paragraphs 18 and 20 thereof, wherein it was observed, in the context of that case before the Supreme Court, that as, in the agreement, there was a mention of a motor, a bore, passage, fan and water pump, along with a place for dumping garbage, also including 'Shamlat' land, a question would arise as to with whom such a parcel of land, wherein the aforesaid facilities were existent, should be retained. In such a case, it was held that segregation of the land in dispute into two portions would be difficult.

21. Mr. Chopra next submitted that in fact the contract itself stood repudiated on 22.12.2004 by the appellants-defendants, vide the notice issued on their behalf by their Advocate, which was accepted by the respondent-plaintiff himself, i.e. Ex. P-3. Learned counsel therefore submitted that with the contract having been repudiated, after the appellants discovered that they had been defrauded, the question of execution of such a contract would not arise.

In this context, he referred to judgment of the Supreme Court, in *I.S. Sikandar* (supra), wherein it was held that once the seller had terminated the agreement, a suit for specific performance by the purchaser would only be maintainable if the plaintiff also sought a declaratory relief (for declaring the termination of the agreement to be bad in law).

Mr. Chopra further submitted that thus, *de hors* any fraud

played, the suit of the plaintiff was erroneously decreed in his favour by the learned Civil Judge, with that judgment also erroneously upheld by the lower appellate Court.

22. In response to the aforesaid arguments, Mr. Avnish Mittal, learned counsel appearing for the respondent-plaintiff, first of all referred to paragraph 21 (RCR citation) of the judgment in **Shanker Singhs'** case, and further referred to another judgment of the Supreme Court in **P.C. Varghese vs. Devaki Amma Balambika Devi and others** 2005 (4) RCR (Civil) 469, to submit that as regards seeking part performance of the agreement in question, a suit was very much maintainable if the suit property was severable and in fact, in terms of Section 12 (3), the plaintiff was required to pay only the proportionate amount of the consideration, relatable to that part of the agreement/suit property, as was sought to be enforced by a decree.

Mr. Mittal submitted that as has been correctly held by the courts below, the land of the appellants-defendants and their father being distinctly separate, with separate khasra numbers in a revenue estate, the question of non-severability of such land did not arise and therefore, the plaintiff having come to realize that 09 kanals and 04 marlas out of the total 44 kanals and 10 marlas as were agreed to be sold and purchased between the parties, did not belong to the appellants who were signatories to the agreement, he sought specific performance of only that part of the agreement as could have been enforced qua the signatories thereto, leaving out 09 kanals and 04 marlas as did not belong to the said signatories (appellants herein), but to their father.

Learned counsel further pointed out that even in the legal notice got issued by the appellants to the plaintiff and others (Ex. P-3), they

had referred to specific khasra numbers as were standing in the name of their father, and therefore, in any case, the suit land not being part of any joint '*Khata*', i.e. the father not being a co-sharer with the sons in 35 kanas and 06 marlas of land, there would be no question of non-severability.

(Mr. Mittal referred to the said exhibit which is annexed as Annexure A-3 with the paper-book of the appeal, as also from the photocopy of the record of the learned trial Court).

23. On the question of non-readiness of the plaintiff-vendee to perform his part of the contract, Mr. Mittal submitted that once the defendants-vendors had denied the agreement itself, the plea that the vendee was not willing to perform his part of the contract, was not a plea available to them. In any case, he submitted that the presence of the respondent-plaintiff before the Sub-Registrar, as proved by his affidavit Ex. P-2, dated 16.05.2005, was never disproved.

24. Mr. Mittal next submitted that even the stamp paper for the agreement had been purchased by the appellants-defendants and therefore, they could not say that there was a fraud played on them.

In this context, learned counsel further submitted that if the agreement had been the result of a fraud, the appellants would not know the contents of the agreement, which they described in detail in the notice got issued by them through their lawyer on 22.12.2004 (Ex. P-3).

25. Learned counsel next submitted that in their written statements, the defendants had contended that they signed on blank papers, but in his testimony, the first defendant even deposed that it was scribed at Rajpura. Further, he submitted that no FIR or complaint was got lodged by the defendants in respect of any fraud having been played upon them.

Hence, Mr. Mittal contended, that actually the denial of the agreement was a result of greed and collusion between the appellants-defendants and their father, as they wanted to wriggle out of the agreement after having entered into it.

26. In support of his arguments, Mr. Mittal further relied upon a judgment of a co-ordinate Bench of this Court in Sant Singh vs. Amarjit Singh 2015 (2) PLR 497, on the issue that a person who denies execution of an agreement, cannot be permitted to raise the plea of non-readiness of the other party to perform his part of the contract.

On the issue of severability of a contract, he relied upon a judgment of a Full Bench of this Court in Rakesh Kumar vs Sat Pal 1989 RRR 198, wherein it was held that where a party agrees to sell a property in which some other persons also have a share, specific performance with regard to such property can still be directed in terms of Section 12 (3) of the Act of 1963, qua as much of the part of the contract as can be performed by those who entered into it.

27. In rebuttal to the aforesaid arguments, Mr. Chopra, learned counsel for the appellants, first submitted that on the principle of *caveat emptor*, it was for the plaintiff to have determined as to what land was standing in the name of the appellants and which was standing in the name of their father. They not having taken that precaution, the agreement is not sustainable in law and even if the suit land is held to be severable (without admitting it), such severability cannot be taken advantage of by the plaintiff, he himself not having exercised due diligence at the time of the agreement being entered into.

Mr. Chopra next submitted that the agreement is stated to have

been prepared in Rajpura, but with no name of the scribe/typist etc. given on it. He further submitted that no scribe was even examined, for him to testify that the agreement was actually written out by him at Rajpura and explained to the defendants.

On the issue of non-examination of the scribe, learned counsel cited a judgment of a co-ordinate Bench of this Court in **Richhpal Singh** vs. **Sandhura Singh** 2013 (3) CCC 242, wherein it was held that with only the scribe being the person who could have deposed about the contents of the agreement, he not having been examined, the courts below (in that case) were justified in drawing an adverse inference against the appellant in that case.

28. Mr. Chopra next submitted that the legal notice, Ex. P-3, was got issued by the appellants-defendants not only to the plaintiff but also to the witnesses to the agreement, stating therein that a fraud had been played upon the defendants. Hence, as per learned counsel, the moment the fraud was discovered, such discovery was communicated to all concerned and therefore, the agreement was not binding upon the appellants for that reason also.

Learned counsel next submitted that the agreement does not state that possession of the suit land would be delivered to the plaintiff after execution of the sale deed.

29. On the issue of no replication having been filed to the specific plea of fraud taken in the written statement, learned counsel cited a judgment of this Court in **Salig Ram and another** vs. **Shiv Shankar and others** AIR 1971 P&H 437, to submit that a pleading taken, not specifically refuted, has to be taken to have been accepted by the party not refuting it.

30. Mr. Chopra next submitted that the courts below have not touched upon the issue that the repudiation of the agreement, vide the legal notice Ex. P-3, had not been specifically challenged by the plaintiff by seeking a declaration to the effect that the repudiation is null and void and therefore, in any case, the suit would not be maintainable in terms of the judgment in **I.S. Sikandars'** case (supra).

Learned counsel therefore prayed that the judgments and decrees of the courts below be set aside and the suit of the respondent-plaintiff be dismissed with costs through out.

31. Having considered the arguments of both learned counsel as also the judgments of the learned courts below, as regards the first issue of whether the land was severable or not, I agree with the contention of learned counsel for the respondent-plaintiff that 09 kanals and 04 marlas of agricultural land being in the name of father of the appellants, i.e. Pishori Lal, and 35 kanals and 06 marlas being in the name of the appellants-defendants themselves, each having separate khasra numbers, severability of the land would not be an issue. If it was held to be non-severable, it would amount to say that separate owners of land, just because they belong to the same family, cannot alienate in any manner, the land distinctly owned by particular individuals and that too not held as joint property.

In fact, even if co-sharers in any particular tract of land decide to sell their own shares, there can be no bar to such sale, unless they are estopped from doing so for other reasons such as conditions of a gift/will, a Court decree etc.

Hence, for the appellants-defendants to raise that plea on the basis of Section 12 of the Specific Relief Act, was a wholly misplaced

argument, obviously made only to try and wriggle out of the agreement.

32. Sections 10 and 12 of the Specific Relief Act are reproduced hereinunder:-

“10. 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-*

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(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.”

xxxx xxxx xxxx xxxx

“12. Specific performance of part of contract.- (1)*Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.*

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so

much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), [pays or has paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.-For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.”

33. Thus, a perusal of Section 12 (3) shows that where a party to a contract is unable to perform the whole of his part of it, that would not preclude the Court from directing the other party to perform so much of the contract as can be performed.

In fact that is what has been held by the Supreme Court in Sardara Singh vs. Krishna Devi AIR 1995 SC 491 and the same principle was also laid down in P.C. Vargheses' case (supra), wherein their Lordships went on to hold that even as regards the consideration amount, it is to be paid only proportionate to the consideration as would remain to be paid qua the part of the contract which can be, and is directed to be, performed.

I also agree with the learned counsel for the respondent-plaintiff that even in Shankar Singhs' case (supra) cited by learned counsel for the appellants, nothing to the contrary was held, except that in the circumstances of that case, it was held that with the motor, a bore, a passage, a fan and a water pump etc. all being part of the suit property, it would be difficult to segregate it. In the present case, even though that is a contention raised by learned counsel for the appellants, firstly, it is not possible to hold that in a chunk of land measuring 44 kanals and 10 marlas, a part of which is definitely and separately held by another owner, appurtenances to the land cannot be segregated, even by way of proportionate payment for the usage of such appurtenances, if necessary.

Second, the details of where the tubewell, bore etc. are located, not having been proved by way of evidence by the appellants, it is not considered necessary to specifically go into that issue, except to hold that if such appurtenances are commonly used and lie or are affixed in the 35

kanals and 06 marlas of land as stand in the name of the appellants, obviously, if a partition were to take place with their father, who owns 09 kanals and 04 marlas, he would be given proportionate compensation in terms of money, so as to enable him to set up a separate source of irrigation etc.

34. Thus, as regards the first question of law, it is held that 35 kanals and 06 marlas as were sought by the respondent-plaintiff to be transferred to him by issuance of a decree of specific performance in his favour to that effect, were perfectly severable from the remaining 09 kanals and 04 marlas of land owned by the appellants' father, even in terms of Section 12 (3) and (4) of the Specific Relief Act.

35. Coming then to the second question of law as has been argued by learned counsel for the appellant, i.e. as to whether the suit was maintainable *de hors* any declaration sought from the Court by the respondent-plaintiff, to declare the annulment of the agreement (Ex.P-1), to be null and void, such annulment having been made by the appellants, vide the notice, Ex. P-3.

36. However, before going on to answering that question, it needs to be first stated that as regards the factual aspect, of the agreement Ex. P-1 having been entered into by the appellant with their eyes open, I see no reason to upset the finding of fact recorded by the learned Courts below, to the effect that there was no fraud played upon them (the appellants).

This is for the reason that it is not possible to believe that simply on a statement made by a property dealer and a prospective buyer, that the father of the first appellant-defendant had agreed to sell the land to the respondent-plaintiff, the said appellant-defendant signed an agreement,

and on the next day even got it signed from his brother, without even consulting his father. Very obviously, the annulment of the contract, vide the notice Ex. P-3, was an afterthought, three weeks after the contract had been entered into, possibly because of a better price offered, or otherwise. Hence, with the appellants never having even disputed their signatures on the agreement, and in fact having stated that the agreement was scribed at Rajpura, the contention of learned counsel for the appellants that the scribe was not examined, loses all meaning. Quite obviously, the appellants entered into the contract with open eyes, but later, taking advantage of the fact that their father was not a signatory to it, they repudiated it taking two pleas; firstly, that the agreement was obtained by fraud and secondly, that in any case as 09 kanals and 04 marlas of the land did not belong to the signatories to the agreement, i.e. the appellants, but to their father DW-2 Pishori Lal, the agreement could not be executed.

Hence, as regards the finding of the Courts below that no fraud had been played upon the present appellants and that the agreement itself was therefore valid, I see no error in that finding, which is upheld.

37. As regards the contention of learned counsel for the appellant that a replication not having been filed, the contents of the written statement are deemed to have been accepted, in view of what has been held in *K. Laxmanans'* case (supra), to the effect that even in terms of Order 6 Rule 1 of the CPC, non-filing of a replication would not amount to admission of the facts pleaded in the written statement, nothing further need be observed by this Court.

38. Coming to the 2nd question of law pertaining to what is contained in the ratio of the judgment of the Supreme Court in

I.S.Sikandars' case (supra). Undoubtedly it has been held therein that in a suit seeking specific performance of an agreement, if the said agreement itself has been repudiated by one of the parties, then the party seeking specific performance of that agreement must first seek in that very suit a declaratory decree to the effect that the repudiation of the agreement is null and void.

In this context, the following part of the judgment in I.S. Sikandars' case needs to be reproduced:-

“16. After perusal of the impugned judgment of the High Court and the questions of law framed by the defendant No.5 in this appeal, the following points would arise for determination of this Court:

1) Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?”

xxxx xxxx xxxx xxxx xxxx

17. Answer to Point No.1

The first point is answered in favour of the defendant No. 5 by assigning the following reasons:

xxxx xxxx xxxx xxxx xxxx

As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on

the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5.”

The relevant part of the legal notice dated 22.12.2004, Ex.P3, issued by the appellants to the respondent herein, as also to the witnesses of the agreement, needs to be looked at and is therefore reproduced as below:-

“Therefore by the service of this notice you please explain as to why the matter should not be brought to the CIA Staff for the commission of act of forgery and fabrication of false and frivolous documents with my clients and treat the alleged agreements of sale dated 01.12.2004 allegedly executed by Jaspal Kumar and Jaswant Kumar and Smt. Kanjo Devi to be not existing one and do not try to take the undue advantage of the false and fabricated documents. Your reply must reach to my office with a week from the receipt of this notice failing which it shall presumed that you have nothing to say but to face the music of criminal as well as civil action against you making all responsible for the costs, and litigation expenses incurred by me clients.”

Thus, vide the aforesaid notice, there was no repudiation of the contract, but a reply was sought by the appellants from the respondent-plaintiff, as to why the alleged agreement of sale be not treated to be non-existent.

The plaintiff having admittedly given a reply to the said notice,

to the effect that the defendant had misrepresented at the time of the

agreement of sale regarding ownership of the land measuring 9 kanals 4 marlas, and that he (the plaintiff) was still ready to exclude the said land and to get the sale deed executed and registered in his favour qua the remaining land, very obviously there was no admission by the plaintiff of the agreement of sale either being a forged or fabricated one, or to the effect that he was not willing to purchase the land as was in the ownership of the appellants herein, i.e. the prospective vendors.

No notice thereafter having been issued by the appellants-defendants, actually repudiating the agreement, in the opinion of this Court it cannot be held that simply vide the notice dated 22.12.2004, the agreement stood repudiated or cancelled. Even though the contention therein is that the agreement was not actually executed by the appellants-defendants, but still, the notice having put a query to the respondent-plaintiff as to why it should not be treated as non-existent, it cannot be termed to be an actual repudiation of the agreement.

39. Consequently, the question of law raised in argument by learned counsel for the appellants, on the ratio of I.S.Sikandars' case, is also answered to the effect that what has been held therein, would not be applicable to the case in the present *lis*, no repudiation of the agreement actually having been made by the appellants herein.

40. In view of the entire discussion hereinabove, I see no reason to allow this appeal, which is consequently dismissed, but with the parties still left to bear their own costs.

July 03, 2017
nitin

(AMOL RATTAN SINGH)
JUDGE