

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

RSA No.675 of 1991 (O&M)

Balkishan and Anr.
Deceased through LRs.

....Appellants

Versus

Vijay Kumar
(Deceased) through LRs.

....Respondent

Date of Order: 30.4.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Liaqat Ali, Advocate for the petitioners.
Mr. Prem Nath Aggarwal, Advocate for the respondent.

AMIT RAWAL, J (ORAL)

Appellants-plaintiffs are in second appeal against the judgment and decree dated 09.11.1990 passed by the lower Appellate Court whereby both the appeals filed by the respondent-defendant Vijay Kumar and the one filed by appellants-Bal Kishan and Others against the judgment and decree dated 28.9.1989 passed by Sub Judge, Ist Class, Batala vide which the suit of the plaintiffs qua agreement to sell dated 09.6.1986 was partly allowed while holding the plaintiff entitled with alternative relief to refund of Rs.2000/- from the defendant with proportionate costs along with interest @ 6% per annum, have been dismissed.

Plaintiffs instituted the suit on 16.1.1987 stating that the defendant-respondent Vijay Kumar executed an agreement to sell the suit land for a sale consideration of Rs.2000/- and received the whole amount of Rs.2000/- and agreed to execute the sale deed on or before 29.10.1986. On the target date i.e 29.10.1986, the plaintiffs appeared before the Sub Registrar, Batala for execution/registration of the sale deed but the defendant deliberately failed and did not appear, which necessitated the plaintiffs to file the suit.

The suit was contested by the defendants, who in written statement denied the agreement to sell.

In the replication, the plaintiffs had reiterated their own averments made in the plaint and controverted those in the written statement.

From the pleadings of parties, the trial Court framed the following issues:

- “1. Whether the defendant agreed to sell the land in dispute to the plaintiff and has received Rs.2000/- as earnest money?OPP*
- 2. Whether the plaintiff is entitled for the specific performance of agreement to sell dated 9.6.1986?OPP*
- 3. Relief.”*

In order to prove their case, the plaintiffs examined PW1 Jagir Singh, PW2 Satish Chander Draftsman, PW3 Om Parkash, Deed Writer, PW4 Amar Singh, PW5 Hansa Singh besides appearing himself as PW6.

On the other hand, defendant examined DW1 Mohinder Partap, Stamp vendor and DW2 Puran Singh besides examining himself as DW3.

The trial Court on the basis of oral as well as documentary evidence dismissed the suit of the plaintiffs. However in the alternative relief, the plaintiff were held entitled to refund of Rs.2000/- from the defendant with proportionate costs besides granting interest on Rs.2000/- at the rate of 6% per annum from the date of decree. Feeling dissatisfied, the respondent-defendant Vijay Kumar filed the appeal which has been dismissed by the lower Appellate Court observing that after the death of Milkhi Ram, the land was inherited by respondent-Vijay Kumar and five other heirs being his brothers and daughters and was jointly owned by six

co-owners for the defendant-respondent Vijay Kumar was not the sole owner.

Learned counsel for the successors in interest of the appellants submitted that once the agreement to sell had been proved and the findings remained unassailed, the Court could grant the relief of specific performance qua the share of Vijay Kumar and the plaintiffs would have become co-sharers with other owners. He submitted that the remedy for the plaintiffs was to seek partition therefore, the discretionary relief ought not have been granted. His clients are willing to compensate the defendant-respondent in terms of money for his 1-6th share qua the land measuring 15 marla, comes to about two and half marla. In support of his contentions, he relied upon two judgments of Hon'ble Supreme Court reported as **Syscon Consultant P Ltd Vs. M/s Primella Sanitary Prod. P. Ltd and Others, 2016 (4) RCR (Civil) 590** and **A. Abdul Rashid Khan (dead) Vs. P.A.K.A Shahul Hamid, 2001(4) RCR (Civil) 824**.

Per contra, Mr. P.N. Aggarwal, learned counsel for the respondent-defendant submitted that once the defendant-respondent Vijay Kumar was not the sole owner of the property, he could not enter into the agreement to sell in question. Agreement to sell is hit by Section 12 of the Specific Relief Act and thus he prayed for upholding the findings recorded of the lower Appellate Court. Both the courts below have rightly observed that all the co-sharers have not come forward to sell the land, for the defendant-respondent had no right or authority to sell the share of other co-owners, thus urged for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book. After going through the contents of the agreement to sell, it is

discerned out that the respondent-Defendant Vijay Kumar had agreed to sell his un-partitioned share to the plaintiffs. It has also come on record that the respondent-defendant Vijay Kumar was not the exclusive owner of the entire land as the same was owned by five other LRs, which was not disputed by both the learned counsel for the parties.

The question posed before this Court is whether the agreement to sell, in the light of provisions of Section 12 of Specific Relief Act was executable or whether discretionary relief could have been granted qua share of respondent-defendant Vijay Kumar. Aforesaid proposition of law came up before Hon'ble Supreme Court in **A. Abdul Rashid Khan's case (supra)** wherein it has been held as under:

“13. We have perused these decisions. None of them applies to the facts and circumstances of this case. So far the Right of Pre-emption that has not been raised in any of the courts below by any party and cannot be permitted to be raised in this appeal for the first time. In fact, there is no pleading or evidence in this regard. On the other hand, learned Counsel for the Respondent No.1 has placed reliance on Manzoor Ahmed Magray v. Ghulam Hassan Aram, 1999 (4) RCR (Civil 597 (SC): 1997(7) SCC 703. This was also a suit for specific performance of a contract of an agreement of sale of an orchard. The court held that there is no bar for passing the decree for specific performance with regard to 1/3 or 2/3 share owned by the contracting parties for which he can execute the sale deed.

14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute,

the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court which requires no interference.

15. So far the other part of the High Court's order by which it decreed the alternative relief of Respondent No.1 for partition of the suit property in six equal share by metes and bounds and delivering separate possession over these such shares, on the face of it is erroneous and cannot be sustained, in a suit for specific performance. The vendee on the date of filing this suit has yet not become the owner of this property, as he merely seeks right in the said property though the decree of specific performance. When the sale deed itself has yet to be executed, his right in the property has yet not matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposit the balance consideration and the sale deed is actually executed. This apart how could there be any partition in the property, without other co-sharer joining, who are not part of the disputed agreement. No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing this alternative prayer of partition in this suit.

17. For the aforesaid reasons the appeal is partly allowed, to the extent the High Court's order for the partition of the suit property and delivery of possession to the plaintiff is set aside but the other part of the High

court's order decreeing the suit for the specific performance for the execution of the sale deed as against by the Appellants, to the extent of their 5/6th share is upheld. We make it clear that setting aside of the High Court's order to the extent of partitioning of the specified share is only on account of such claim being made pre-mature. This in no way would prejudice the right of Respondent No.1 (plaintiff) in future, if he becomes co-sharer of this property.”

It has further been observed by Hon'ble Supreme Court in **Syscon Consultant's case (supra)**, para 50,57,58,59,60 of which reads as under:

“ 50. It is clear that Defendants 1 to 6 failed or neglected to complete the sale even after clear title was made out when the obstacle of the mortgage was removed. Clause 9 specifically states that if after the title is made out, the vendor fails and neglects to complete the sale, and/or to carry out any of the obligations on his part as contained in the Agreement, the purchaser shall be at liberty to enforce specific performance of the Agreement or recover the earnest money with interest at 21 per cent per annum at their option. Having clearly opted throughout to enforce specific performance, we are of the view that justice of the case requires that Clause 9 must be applied in favour of the Plaintiff. After inducing the plaintiff as per PW- 1/F letter to pay Rs.17 lakhs to the cooperative bank to clear the dues on the clear understanding that the defendants 1 to 8 would thereafter execute the sale deed, they cannot go back. The clear title stood made out at that stage and the agreement was enforceable thereafter.

57. The vehement contention, advanced by learned Senior Counsel Shri Dhruv Mehta, based on Article 2177 of the Portuguese Civil Code, 1867 that there was an absolute bar for transfer of any portion of the estate or a specific item of the estate, need not detain us both on account of factual matrix and on law. As we have already noted hereinabove,

Defendants 1-8 had already given up on their right in the suit property by not taking steps to avoid the distress sale at the instance of the Bank. Though, there are different translated versions of the provision, we may extract Article 2188 as provided by Defendants 7 and 8 in their Appeal:

“It is not lawful to a co-owner, however, to dispose a specific part of the thing held indivisibly, without the same being allotted to him in partition; and a transfer of the right, which he has to the share belonging to him, may be restricted in accordance with the law.”

Suffice it to say, [Article 2177](#) does not prohibit alienation of undivided interest, which is in tune with the principle underlying [Section 44](#) of the Transfer of Property Act, 1882.

58. The conduct of the Defendants 7 and 8 also needs to be specifically commented on. Despite specifically getting reserved a liberty to proceed further after the redemption of the property by the Plaintiff, nothing was done by them. They also did not exercise their right of preemption available under the Portuguese Law. Conspicuously, none of the defendants entered the witness box despite the voluminous and clinching evidence tendered by the Plaintiff, obviously to avoid inconvenient questions, particularly, based on PW-1/F extracted hereinabove. In that view of the matter, it is also not necessary to deal with the various other contentions advanced by learned Senior Counsel on both sides since they have no bearing on the ultimate conclusion.

*59. In our view, no substantial or grave injustice is caused to the Defendants: on the contrary, the justice of the case, on facts, is in favour of the Plaintiff, and therefore, no interference under [Article 136](#) of the Constitution of India is required. Once, it is found that justice of the case on facts does not require interference, this Court, even at the appellate stage, is well within its discretion to stay its hands off, as held in *Taherakhatoon (D) by Lrs. v. Salambin Mohammad* 1999(2) RCR (Civil) 206.*

60. Thus, viewed from any angle, justice was done to the Plaintiff as per the decree granted to them by the High Court and no injustice is caused to the Defendants, in particular, Defendant No. 9, who, with open eyes, purchased litigation. As we have decided not to interfere with the judgment of the High Court in favour of the Plaintiff, we also dismiss the Plaintiff's appeal against the impugned judgment seeking the entire property.

I am afraid that the aforesaid provisions of law had not been taken into consideration by both the courts below in deciding the controversy in dispute.

Learned counsel for the appellants submitted that his client is willing to get the specific share falling in respect of the respondent-defendant Vijay Kumar i.e un-partitioned share subject to partition and suitable compensated, in case this court deems it appropriate.

In view of abovesaid facts, it is sufficient to observe that the property is not having much value in the area or its location. Rs.1 lac would be appropriate compensation over and above the amount of Rs.2000/-. In case, the said sum of Rs.1 lac (one lac) is offered by the plaintiffs-appellants to the LR's of respondent-defendant Vijay Kumar within two months from the date of receipt of certified copy of this order, the LR's of respondent-defendant Vijay Kumar shall execute the sale deed qua undivided share in favour of successors in interest i.e LR's of the plaintiffs.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in Pankajakshi (dead) through LR's and others Vs. Chandrika and others AIR 2016 SC 1213, wherein the proposition arose as to whether in

view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LR's and others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29]” “27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law

for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned, the judgment and decree passed by the lower Appellate Court is set aside.

The second appeal is allowed in the above terms. Decree sheet be prepared.

April 30, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No