

PETITIONER:
MANZOOR AHMED MARGRAY

Vs.

RESPONDENT:
GULAM HASSAN ARAM & ORS.

DATE OF JUDGMENT: 05/10/1999

BENCH:
M.B.Shah, D.P.Wadhwa

JUDGMENT:

Shah, J.

Leave granted. These appeals are filed by Original Defendant No. 1, Mohammad Yousuf Magray, Defendant No. 3 (Manzoor Ahmed Magray, son of Mohammad Yousuf Magray) against the Judgment and Order dated 14th August, 1998 in CIA Nos. 6 & 8 of 1982 passed by the High Court of Jammu and Kashmir, Srinagar. The dispute pertains to orchard land measuring 17 kanals and 2 marlas, comprised in Khasra No. 191/45, Khewat No. 43, situated at Shankerpora, Tehsil Chadoora, District Srinagar along with trees. It is the case of the plaintiff that Mohammad Yusuf Magray had entered into an agreement dated 14th July, 1971 for sale of suit land in favour of the plaintiff; the price of the land was fixed at Rs. 4,250/- per Kanal and the advance of Rs. 2,000/- was paid by the plaintiff to defendant no. 1; the sale transaction was to be completed within one and a half months. The agreement further stated that defendant No. 1 had an authority from his younger brother, defendant No. 2 to sell the land and was also entitled to transfer the same on behalf of his minor son, defendant No. 3. It was stated that the land was purchased by him. His younger brother and son (both minor) were benamidar co-owners. Out of the agreed sale consideration of Rs. 72,500/-, sum of Rs. 60,000/- was to be paid by the plaintiff to defendant No. 1 at the time of execution of the sale deed and delivery of possession. Balance amount was to be paid by the plaintiff at the time of registration of the sale deed. It was contended by the plaintiff that as there was escalation in the prices of land, defendant No. 1 dishonestly refused to perform his part of the contract and, therefore, notice was issued for performance of the contract. As plaintiff apprehended that defendants were likely to alienate the suit land, plaintiff filed the suit for injunction in the court of IInd Additional Munsif, Srinagar. Thereafter, as the defendant refused to execute the sale deed, plaintiff had filed the present suit No. 22 of 1974 on 24th May, 1974 for specific performance of the contract before the High Court of Jammu and Kashmir.

On the day when the suit was filed, defendant No. 2(brother of defendant No. 1) was major. However, defendant No. 3 was minor and, therefore, court appointed Sh. K.K. Dhar as guardian who appeared on his behalf

during the course of trial. In the written statement filed by defendant No. 1, he has admitted the execution of the agreement dated 14th July, 1971. However, he denied that defendant nos. 2 & 3 were his benamidars. It was contended that entire land did not belong to him but defendant nos. 2 and 3 were co-owners. He submitted that he had offered to execute the sale deed in favour of the plaintiff qua his share but it could not materialise because plaintiff was unable to persuade other defendants to similarly execute the sale deed of their respective shares. Lastly, it was contended that plaintiff had no ready money and he was not ready and willing to perform his part of the contract. Additionally, it was contended that as the agreement was not executed by all the co-owners, it could not be specifically enforced. In his written statement, defendant No. 2 stated that land was purchased jointly and that all the three defendants were full fledged owners of the 1/3rd share each. Regarding the agreement to sale, he feigned ignorance. On behalf of the defendant No. 3, written submission was filed contending that defendant No. 1 had no authority to permanently transfer his share in the land.

It has to be stated that at the time of trial, defendants never stepped into witness box.. The learned Single Judge after considering the evidence on record partly decreed the suit of the plaintiff for specific performance of the contract so far it related to 1/3rd share of Mohammad Yusuf Magray (defendant No. 1) and dismissed the suit against defendant Nos. 2 & 3. Against the said judgment, Original Plaintiff Ghulam Hassan Aram preferred CIA no. 6 of 1982; defendant No. 1 preferred CIA no. 8 of 1982 which came up for hearing before the Division Bench. The Court dismissed the appeal (CIA No. 8/82) filed by defendant No. 1 with costs and partly allowed the appeal filed by the plaintiff and decreed so far as it related to 1/3rd share of Manzoor Ahmad Magray, son of defendant No. 1.

Against that judgment and decree, defendant No.1 has filed SLP nos. 18241-42/98 and defendant no. 3 has filed SLP nos. 16649-50/98. At the time of hearing of this appeal, learned Counsel, Mr. Thakur, appearing on behalf of the appellant submitted that the judgment and decree passed by the High Court is illegal and erroneous because: -

(a) The agreement itself provides a default clause to the effect that in case of non-fulfillment of the agreement, defaulting party shall pay to the other, an amount of Rs. 10,000/- as damages and shall be bound to pay the same. Therefore, in view of Section 23 of Jammu & Kashmir Specific Relief Act, decree for the specific performance is not required to be granted. (b) Plaintiff was not ready and willing to perform his part of the contract and there is the specific condition in the agreement that the sale deed is to be executed within a period of one and a half months after obtaining the copies of the site plan and extracts of the revenue entries from the patwari concerned. (c) Delay in filing the suit which also indicates that plaintiff was not ready and willing to perform his part of the contract and in such cases, it is the discretion of the Court not to grant relief of specific performance. (d) The contract is indivisible and, therefore, there was no question of granting specific performance of the contract of 1/3rd share or 2/3rd share. For this purpose, he relied upon Sections 14 & 15 of the J & K Specific Relief Act, 1963. (e) Suit

land cannot be alienated or transferred in view of the Jammu and Kashmir Agrarian Reforms Act, 1972 and the Jammu and Kashmir Prohibition on Conversion of Land and Alienation of Orchards Act, 1975.

Re: Contention (a) in the default clause providing for damage of Rs. 10,000/-, decree specifically cannot be granted.

Learned Counsel for the appellant in support of his contention referred to last part of the agreement which provides that if any party violates the terms and conditions of the agreement, he will be liable to pay Rs. 10,000/- as penalty to another party. He, therefore, submitted that at the most, plaintiff was entitled to recover damages to the tune of Rs. 10,000/- and there is no question of passing decree for specific performance. From a reading of the aforesaid clause in the agreement, it can be stated that it is strictly a penalty clause for securing the performance of the contract. It only provides that if any party violates the terms and conditions of the agreement, he would be liable to pay a penalty of Rs.10,000/-. This would not mean that contract is not to be performed. It would only mean that if there is breach of some terms and conditions of the contract, the defaulting party has to pay the penalty specified therein. The said clause, also, does not provide that in case a sale deed is not executed, damages to the tune of Rs.10,000/- are to be awarded. While dealing with a similar contention and a clause in the contract providing that in case of failure of compliance of terms of agreement, vendor will be liable to refund security deposit and to pay damages equal to the security, this Court in *M.L. Devender Singh Vs. Syed Khaji* [1973 (2) SCC 515] held that there was no mention anywhere in the contract that the party to it will have the option to either fulfil the contract to buy or sell or to pay the liquidated damages or penalty of Rs. 20,000/- stipulated for a breach as an alternative to performance of the contract to buy or sell. The Court considered the provisions of Specific Relief Act, 1963, particularly Section 23 (which is similar to Section 20 of the Act of 1877) and held that Section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the contract is to be construed. The Court observed: Where a payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property.

Thereafter the Court quoted with approval the following principles stated in Sir Edward Frys Treatise on the Specific Performance of Contract (Sixth Edition at p.65): From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes

(i) where the sum mentioned is strictly a penalty a sum named by way of securing the performance of the contract, as the penalty is a bond;

(ii) where the sum named is to be paid as liquidated damages for a breach of the contract;

(iii) where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract.

The Court also held that the fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words unless and until the contrary is proved in Section 10 of the Specific Relief Act of 1963. The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. Similar clause was interpreted by this Court in the case of Prakash Chand Vs. Angad Lal [1979 (4) SCC 393] and it was observed that a perusal of the terms of the contract indicated that stipulation for damages was made only for the purpose of securing performance of the contract and not for the purpose of giving an option of paying money in lieu of specific performance. Court observed: - Even if a sum has been named in the contract for the sale as the amount to be paid in case of a breach, the appellant is entitled in law to the enforcement of the agreement.

Further, for the purpose of present matter, Section 20 and illustration therein of Specific Relief Act, 1977(1920 A.D.) of Jammu & Kashmir which is applicable to the parties makes it explicitly clear thus:

A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Illustration

A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is not procured, A will pay B Rs. 10,000. A refuses to apply for the licence and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence.

Hence, there is no substance in aforesaid contention of the learned Counsel for the appellant.

Re: (b) & (c) Plaintiff not ready and willing to perform his part of the contract and that there was delay in filing the suit

For this contention, it is to be stated that it depends upon the evidence which is led by the parties before the Court. In the plaint, plaintiff has averred that he was ready and willing to perform his part of the contract and to abide by its terms. In the written statement filed by the defendant no, 1, it has been stated that he was always ready and willing to execute the sale deed in favour of the plaintiff to the extent of his share in the suit land but plaintiff was avoiding because he was pursuing other defendants who were not ready to execute the sale deed for their shares. Defendant No. 1 has also stated that plaintiff had no ready money with him and, therefore, also he avoided execution of the document. It is to be stated that after filing his written statement, defendant No. 1 has not stepped into the witness box. Still, however, from the written statement of the defendant No. 1, it is clear that the sale deed could not be executed only because defendants no. 2 & 3 were not prepared to execute the sale deed. Hence, it cannot be stated that there was any delay on the part of the plaintiff which would disentitle him to get the equitable relief. Further, plaintiff has deposed that he was ready and willing to perform his part of the contract. Notice dated 23rd November, 1972 was also served on Mohd Yousuf for execution of the sale deed. He has also denied the suggestion that he was not ready to purchase the suit land within stipulated time. He also deposed that he was in a position to pay the sale consideration of Rs. 70,000/-, which was not challenged in the cross-examination. There is nothing on record to suggest that defendants have shown readiness and willingness to perform their part of the contract or that they have called upon the plaintiff to get the sale deed executed in his favour or to do the needful. Therefore, it cannot be said that the High Court erred in giving finding in favour of the plaintiff that he was ready and willing to perform his part of the contract. The suit is filed within period of limitation and that there is no delay on the part of plaintiff which would disentitle him to have equitable relief. Hence, there is no substance in the aforesaid contention.

(d) Re: The contract is indivisible and hence there was no question of granting specific performance of 1/3rd or 2/3rd share. The aforesaid contention is also against the provision of Section 15 of the Specific Relief Act as applicable in Jammu & Kashmir which is as under:-

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 forms a considerable portion of the whole, or 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: provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

The illustration given under the said section further makes the position abundantly clear. Illustration (a) is thus: A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who

refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

Further, in the present case, defendant No. 1 Mohd. Yousuf Magray entered into an agreement to sell the land purchased by him in 1968-69 in three names, namely, himself, his brother (Ghulam Rasool at the relevant time minor) and his minor son (Manzoor Ahmad Magray). Clause 2 of the agreement stipulated that Mohd. Yousuf would be bound to include and join his brother Ghulam Rasool for the execution and completion of the sale deed in respect of the said land. The learned Single Judge by judgment and decree dated 16th November, 1981 granted relief for specific performance of the contract only for 1/3rd share of Mohd. Yousuf (Defendant No. 1). Against that judgment the plaintiff as well as defendant no. 1 filed appeals. The Division Bench dismissed the appeal filed by Mohd. Yousuf. It allowed the appeal of the plaintiff qua the share of minor son of defendant no.1 by holding that land was purchased by Mohd. Yousuf in the name of his son and in fact, it was owned by him. The Division Bench, however, dismissed the claim for specific performance in respect of 1/3rd share of Ghulam Rasool. Against that part of the decree, plaintiff has not preferred any appeal.

As stated above, section 15 of the J & K Act makes it abundantly clear that where a party to a contract is unable to perform the whole of his part of it, 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. Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd or 2/3rd share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of defendant No.1) admittedly, no decree is passed by the High Court. Dealing with the similar contention where agreement was for sale of property belonging to brother and sister each having half share, the Court in Kartar Singh vs. Harjinder Singh and Others [(1990) 3 SCC 517] held that when the absentee vendor, for some reason or the other refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific performance of a part of a contract. Such type of case would be the case where specific performance of the whole of the contract so far as contracting party is concerned. Further, whenever a share in the property is sold the vendee has right to apply for the partition of the property and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties.

Re : (e) Suit land cannot be alienated or transferred.

It is to be stated that the appellant has neither

raised the said contention in the written statement nor during the trial. However, in the appeal, the appellant sought to raise the contention that the specific performance qua the suit land cannot be granted as the transfer or alienation of the suit property is prohibited under the provisions of the J & K Agrarian Reforms Act, 1972, the J & K Agrarian Reforms Act, 1976 and the J & K Prohibition on Conservation of Lands and Alienation of Orchards Act, 1975. The Court declined to entertain the plea on the ground that it was raised almost 24 years after the filing of the suit by the plaintiff and the same, if permitted to be raised, would prejudice the rights of the plaintiff. Even considering that the said plea is pure question of law, in our view, it is without any substance. The definition under Section 2(4) of the J & K Agrarian Reforms Act, 1972 specifically excludes land which was an orchard on the first day of September, 1971. Sub-section (5) of Section 2 defines orchard to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. In the present case, agreement to sell was executed on 14.7.1971 in respect of an orchard land. Therefore, the said Act was not applicable to the land in dispute. Similar provisions are there in the Agrarian Reforms Act, 1976 which gives the definition of the word land under Section 2(9) and definition of the word orchard under Section 2(10). From the said definition, it is apparent that orchard is excluded from the operation of the Agrarian Reforms Act.

Learned counsel for the appellant, however, further referred to Section 3 of the J & K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975 which is as under: - 3. Prohibition on conversion of land and alienation of orchards.(1) Notwithstanding anything contained in any other law for the time being in force

(a) no person shall alienate an orchard except with the previous permission of the Revenue Minister or such officer as may be authorised by him in this behalf;

[Provided that alienation of orchards to the extent of Four Kanals only in favour of one or more persons for residential purposes shall not need any permission.]

(b)

Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for the specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J & K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such

Officer as may be authorised by him in this behalf is required to be obtained. Dealing with similar contention, this Court in Bai Dosabai v. Mathuradas Govinddas and Others [(1980) 3 SCR 762] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably. Lastly, the learned counsel for the appellant submitted that defendant No.1, father had no right to transfer the share of his minor son in the suit land. In our view, the High Court has arrived at the conclusion that the land was purchased by the father from his own funds and that father was in fact the owner of the said property. The defendants have not led any evidence. Further, after obtaining majority also defendant no.3 has not stepped into the witness box or raised any contention to controvert the evidence of the plaintiff that defendant no.1 was owner of the suit land as he had purchased the suit land from his money. In the agreement to sell, it has been specifically mentioned that defendant no.1 first party has purchased one share of the said land in the name of his minor son. Hence for want of any other evidence on record the said findings cannot be said in any way illegal or erroneous, which would call for our interference in these appeals.

In the result, there is no substance in these appeals. It is pointed out by the learned counsel for the respondents that on 11.5.1982 defendant no.1 had executed the sale deed in respect of 1/3rd share of the total area of 17- kanals and 2-marlas of orchard in favour of the plaintiff on the basis of the decree passed by the trial court. However, the possession of the said land was handed over to the Receiver as ordered by the High Court. It is also pointed out that by order dated 21.5.1982 the High Court had directed the parties to maintain status-quo in respect of the possession of the suit land. Defendants were restrained from alienating the suit land till further orders of the court. In this view of the matter, Receiver is directed to hand over possession of the land for which the sale deed is executed in favour of the plaintiff. Further, if any permission for execution of the sale deed is required, as contemplated under Section 3 of the J & K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, in executing the sale deed on the basis of decree passed by the High Court then the parties would file proper application for obtaining the said permission. If defendants fail to cooperate, the Registrar of the High Court would take appropriate steps. After permission is granted then the sale deed with regard to the remaining 1/3rd share in the suit land shall be executed in favour of the plaintiff.

In the result, the appeals stand disposed of accordingly with no order as to costs.