

CASE NO.:
Appeal (civil) 857 of 1998

PETITIONER:
Shyam Singh

RESPONDENT:
Daryao Singh (dead) by Lrs. & Ors

DATE OF JUDGMENT: 19/11/2003

BENCH:
Shivaraj V. Patil & D.M. Dharmadhikari.

JUDGMENT:
J U D G M E N T

Dharmadhikari J.

The High Court of Allahabad in Second Appeal before it by impugned judgment dated 30.9.1997, concurring with the two courts below, has dismissed the suit of the plaintiff/appellant seeking specific performance of Agreement of Repurchase of property in dispute on the ground that under the terms of the agreement dated 4.2.1971, the right of repurchase was personal in favour of the original contracting parties (defendant nos. 2 to 4) and the said right was not assignable or transferable in favour of the plaintiff.

The only legal question involved is whether the terms of the agreement of repurchase dated 4.2.1971 contain any implied prohibition on the original contracting parties (particularly defendants 2 to 4) from transferring or assigning their rights in favour of third party?

The relevant facts for deciding the above legal question are as under:-

Defendants 2 to 4 were Bhumidars of the lands in dispute situate at village Nala, District Muzaffarnagar in the State of Uttar Pradesh. On 4.2.1971, the owners executed registered sale-deed in favour of defendant No.1 (contesting respondent no.1 herein) for a consideration of Rs.4900/-. On the same day defendant No.1 who had purchased the property executed an agreement for re-conveyance of the said property in favour of defendant Nos. 2 to 4. The relevant terms of the Agreement of Repurchase dated 4.2.1971, on interpretation of which the parties are at variance, in its relevant parts (rendered into English) read as under:

"Ex.4 dated 4.2.1971

ORIGINAL ON STAMP PAPER OF RS.2.25/-

Whereas we, Daryao Singh son of Hardeva the first party and Surajmal, Peetam and Babu sons of Rati ram, the second party, Jat, residents of Village Nala Pargana Kandhala, Tehsil Budhana District Muzaffarnagar. The party No.2 has executed a sale deed today in favour of the party No.1 for a sum of Rs.4900/- in respect of 2 Bigha 7 Biswas of the land of Khasra No.95, bearing a rent of rs.6.25 annually situate in Khata No.331 of village Nala, Pargana Kandhala, Tehsil

Budhna, District Muzaffarnagar, about which it was agreed between the parties that if the second party paid the entire consideration of the sale deed Rs.4900/- to the first party or to the heirs of the first party within ten years from today then in that situation the first party will reconvey the aforesaid land by sale-deed in favour of the second party without any objection. If for any reason the first party does not execute a sale deed in favour of the second party, after five years but within ten years from the date of sale deed dated 4.2.71, then the second party will have a right to deposit the entire consideration Rs.4900/- in the Civil Court and get the sale deed executed by the Court, the first party will have no objection. The present agreement will be binding upon the parties and the heirs of the parties. Therefore, these few comments by way of agreement of reconveyance of sale within ten years are being written so that this document may be used when necessary. After the limitation of ten years the second party will have no right at all to get released the aforesaid and from party No.1."

[Underlining by court to add emphasis]

Under the above terms of the agreement of repurchase defendant Nos. 2 to 4 sold their rights to obtain reconveyance of sale in favour of plaintiff (present appellant) by executing a document dated 02.6.1977, on payment of a sum of Rs.19,000/-. The said document is also registered and its execution is not in dispute.

The court of Munsif Magistrate, Kairana, Distt. Muzafarnagar dismissed the suit by holding that defendant Nos. 2 to 4 having already transferred their rights in the property in favour of defendant No.1, had no right left in the property to transfer the same in favour of the plaintiff. In the opinion of the trial court the document dated 2.6.1977 executed in favour of the plaintiff does not amount to transfer of right of repurchase in favour of the plaintiff but it was a transfer of interest in the property involved which was invalid as the defendant nos. 2 to 4 had already transferred their interest and title in the land to defendant no. 1.

At this stage, it may be mentioned that we have looked into the terms of the document dated 2.6.1977 and we find a clear stipulation therein to indicate that whatever right of repurchase that existed in favour of defendant Nos 2 to 4 has been transferred by them in favour of defendant No.1. The reasoning of the trial court, therefore, is that right of repurchase has not been assigned or transferred in the document dated 2.6.1977 is prima facie erroneous and has not been supported by any of the parties before us in this appeal.

The first appellate court upheld dismissal of the suit by the trial court not only on the ground that no right of repurchase had been transferred in favour of the plaintiff but also on additional ground that the right of repurchase, if any, available to defendants 2 to 4 was a right personal to them and was not assignable or transferable. The High Court by the impugned judgment passed in Second Appeal re-examined the terms of the document in question dated 4.2.1971 (Ex.4) to arrive at a conclusion that the right of repurchase was available personally to the contracting parties defendant nos. 2 to 4 and to their heirs. It held that as under the terms of the said document there is no clear stipulation permitting respondents 2 to 4 to transfer the right of purchase to anybody else, the said right was not assignable. The relevant finding of the High Court reads thus:

"It is true that there is no negative clause that the said right of repurchase cannot be transferred to a stranger but the deed dated 4.2.1971 (Ex.4) is

specific that it is binding upon the parties and their heirs. The said clause does not permit respondents 2 to 4 to transfer the right of repurchase to anybody else including the appellant."

We have heard the learned counsel appearing on either side and looked carefully and minutely into the terms of the disputed document comparing it with the vernacular copy. We have extracted above the relevant recitals of the said document. As has been noted by the High Court and the courts below, it contains no express prohibition on transfer or assignment of right by the original contracting parties to third party. The only question is whether such prohibition against assignment or transfer can be read into the document by implication.

In our considered opinion, reading the document as a whole and particularly keeping in view the fact that a long period of ten years was fixed for obtaining reconveyance, no implied prohibition of transfer or assignment can be inferred in the document particularly in view of the clear provisions of Section 15(b) of the Specific Relief Act 1963 which read as under:

"15. Who may obtain specific performance \026 Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-

- (a) any party thereto;
- (b) the representative in interest or the principal, of any party thereto;

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party."

[Emphasis added]

As is to be seen from the provisions of Section 15(b) of the Specific Relief Act, 1963, specific performance of the contract may be obtained by 'any party thereto' or 'their representative in interest'. This expression clearly includes the transferees and assignees from the contracting party in whose favour the right exists. Such right of seeking specific performance would, however, be not available in terms of proviso below clause (b) where "the contract provides that the 'interest shall not be assigned'".

Clearly in this case under the terms of the document dated 4.2.1971 Ex.4, there is no express prohibition against assignment or transfer of the right of repurchase by the original party in favour of the third party. Learned counsel appearing for the contesting respondent (defendant No.1) very strenuously urged that in the recitals of the document at the appropriate place there is mention of the parties and their heirs but there is no mention of the transferees or assignees of the contracting parties. This omission is a clear indication of implied prohibition against transfer or assignment of any right by the original contracting party.

We find it difficult to accept this proposition. True, it is that there is no clear stipulation permitting assignment or transfer of right of the purchaser by original party in favour of the third party but both

contracting parties would be presumed to have been alive to the legal provisions contained in Section 15(b) of the Specific Relief Act. The two documents \026 one of sale and the other of repurchase \026 were executed on the same day. As the sale and agreement of repurchase are contained in two separate documents, although contemporaneously executed, the transaction cannot be treated to be a 'mortgage' as defined in Section 58(c) read with proviso thereunder of the Transfer of Property Act but it seems to be a transaction akin to a 'mortgage' \026 if not 'mortgage proper'. From the tenor and contents of the two documents contemporaneously executed, it seems that the defendant nos. 2 to 4 to raise money, sold the property but with a right of repurchase on return of the money. A long period of ten years for obtaining re-conveyance was agreed between the original contracting parties to indicate the nature of transaction to be one to satisfy the monetary need of the transferer. Initial period of five years was stipulated for obtaining re-conveyance mutually, failing which after expiry of the period of five years, re-conveyance could be obtained through court within an outer limit of ten years from the original date of the execution of the document. It seems unjust to construe the terms of the document to mean that though the original transferers of the property are unable to raise requisite money within the initial period of five years and thereafter continue to be incapable financially to approach court for seeking re-conveyance, they would have no right to assign or transfer their right on value to others. This would result in deprivation of the property or competitive value altogether to the original owners.

In our considered opinion, in the absence of any words or expressions in the documents indicating prohibition on assignment or transfer of right of repurchase and in the face of clear provisions of Section 15(b) of the Specific Relief Act, 1963, an implied prohibition cannot be read into the terms of the documents. Merely because in the documents, there is mention of 'heirs' of the contracting parties but not their 'assignees' or 'transferees', the legal right of assignment available to the benefit of original contracting party under Section 15(b) of the Act cannot be denied to it.

We are fortified in our view by two direct decisions of this Court rendered in somewhat similar circumstances with documents contemporaneously executed for sale and repurchase with comparable stipulations. See T.M. Balakrishna Mudaliar vs. M. Satyanarayana Rao & Ors. [1993 (2) SCC 740] and Habiba Khatoon vs. Ubaidul Huq [1997 (7) SCC 452].

In the case of Habiba Khatoon (supra), taking stock of earlier decisions of this Court, the Privy Council and the High Court of Bombay, the law on the present contested issue was explained to uphold the right of repurchase of the original contracting party thus:-

"We may in this connection also usefully refer to a decision of this Court in the case of T.M. Balakrishna Mudaliar vs. M. Satyanarayana Rao & Ors. Considering the provisions of section 15(b) of the Specific Relief Act, 1963, a Bench of two learned Judges of this Court speaking through Kasliwal, J., endorsed (in para 10 of the SCC) the statement of law flowing from the decision of Sakalaguna Nayadu as well as the decision of Beaumont, C.J., speaking for the Bombay High Court in the case of Vishweshwar Narsabhatta Gaddada vs. Durgappa Irappa Bhatkar. The statement of law which got imprimatur of this Court in para 9 of the Report runs as follows : (SCC p.745).

The Privy Council in Sakalaguna Nayudu vs. Chinna Munnuswami nayakar has held that the

benefit of a contract of repurchase which did not show that it was intended only for the benefit of the parties contracting, could be assigned and such contract is enforceable. Beaumont, C.J. in Vishweshwar Narsabhatta Gaddada vs. Durgappa Irappa Bhatkar held that both under the common law as well as under Section 23(b) of the Specific Relief Act, 1877, an option given to repurchase the property sold would prima facie be assignable, though it might also be so worded as to show that it was to be personal to the grantee and not assignable. On the particular facts of that case, it was held that the contract was assignable. In Sinnakaruppa Gounder v. M.Karuppuswami Gounder it was held (AIR p.508, para 5)

'In our view, generally speaking, the benefits of a contract of repurchase must be assignable, unless the terms of the contract are such as to show that the right of repurchase is personal to the vendor. In the latter case it will be for the person who pleads that the contract is not enforceable, to show that the intention of the parties thereto was that it was to be enforced only by the persons named therein and not by the assignee.' "

From the statement of law as has been approved and followed by this Court in two the decisions in Habiba Khatoon and TM Balakrishna Mudaliar (supra) unless the contents of the document in question and evidence in relation thereto are so clear to infer a prohibition against assignment or transfer, the right of repurchase has to be held to be assignable or transferable and cannot be treated as personal to the contracting parties.

On a very unsubstantial ground that the document in question makes a mention only of 'parties' and their 'heirs' and not 'assignees' or 'transferees', it cannot be held that the right of repurchase was not assignable. In our considered opinion, therefore, the courts below were in error in construing the document in question in a manner to infer an implied prohibition against assignment and transfer.

In this appeal, the respondent filed an application (not numbered) dated 25.8.2001 seeking permission to raise additional grounds and file additional documents. In the additional grounds, it is urged on behalf of the contesting respondent that suit land recorded as Holding No. 306 area 0.8693 hectares, as a result of consolidation proceedings under the provisions of UP Consolidation of Holdings Act, 1953 [hereinafter referred to as 'the Act of 1953'] has been converted into a new holding called 'Chuk' comprising several other plots with area 0.7724 hectares. Learned counsel appearing for the respondent in support of the additional grounds argues that the property agreed to be sold as a result of consolidation proceedings having lost its identity, the suit for specific performance of contract for the original Holding No. 306, has been rendered infructuous. Heavy reliance is placed on the decision of this Court in the case of Piarey Lal vs. Hori Lal [1977 (2) SCR 915].

On the other side, learned counsel appearing for the appellant seriously disputed the fact that as a result of consolidation proceedings, identity of the suit land had been lost and specific performance of agreement of sale cannot be granted. It is contended

that as a result of consolidation proceedings, 'there is merely substitution of one property for the other' and the suit for specific performance cannot be said to have been rendered incompetent or infructuous. Reliance is placed on the decision of this Court reported in *Rajeshwar vs. Board of Revenue* [1995 Allahabad Law Journal 144].

The additional grounds urged in this appeal as a result of subsequent legal developments of consolidation of holdings under the Act of 1953 raise issues both of fact and law. We consider it just and proper to remand the case to the trial court for deciding these additional issues arising on facts and law.

As a result of discussion aforesaid, this appeal partly succeeds and is allowed. The concurrent findings of the courts below that the right of repurchase under the agreement was personal to the original contracting party and their heirs, are hereby set aside. It is held that the plaintiff as 'assignee' or 'transferee' from the original contracting party is entitled to seek specific performance of the contract from contesting respondent no. 1.

The case is remanded to the trial court for deciding the limited issues arising between the parties on facts and law on the applicability and effect of the provisions of the Act of 1953.

The trial court shall grant opportunity to the parties to amend their pleadings. It shall then frame issues on those amended pleadings and after granting them opportunity to lead evidence decide the suit in accordance with law. The suit was filed in the year 1981. The trial court shall make every endeavour to complete the trial on the additional issues and decide the suit as expeditiously as possible. To facilitate early disposal of the suit, the parties are directed to appear before the trial court on 15th December, 2003. In the circumstances, we make no order as to costs in this appeal.