

PETITIONER:
HABIBA KHATOON

Vs.

RESPONDENT:
UBAIDUL HUQ & ORS.

DATE OF JUDGMENT: 05/08/1997

BENCH:
S. B. MAJMUDAR, D. P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S. B. Majmudar, J.

The appellant on grant of special leave to appeal has brought in challenge the judgment and order rendered by the High Court of Judicature at Allahabad, Lucknow Bench dismissing the appellant's Second Appeal and in turn confirming the judgment and decree passed by the Trial Court against the appellant and as confirmed by the Court of the Additional District Judge, Lucknow, U.P. The appellant was original defendant no. 2 in the suit filed by predecessor-in-interest of respondent nos. 1 to 3 herein, one Zahirul Huq, for specific performance of an Agreement of reconveyance of suit property which is a residential house. We shall refer to predecessor-in-interest of respondent nos. 1 to 3, Zahirul Huq as plaintiff and the appellant, who was original defendant no. 2, as defendant no. 2 and predecessor-in-interest of respondent nos. 4 and 5 as defendant no. 1. A few facts for appreciating the grievance of defendant no. 2, appellant before us in these proceedings, deserve to be noted at the outset.

The plaintiff filed Regular Civil Suit No. 9 of 1963 in the Court of Civil Judge, Malihabad at Lucknow for specific performance of an Agreement of reconveyance of the suit house. The house originally belonged to Smt. Amir Jehan Begam. It was situated in Mirzaganj Kasba Malihabad in Lucknow District of State of Uttar Pradesh. Smt. Amir Jehan Begam sold the said house to defendant no. 1 Shakir Ahmad Khan who purchased the said house by as Sale Deed dated 29th January 1960 for a consideration of Rs. 7480/-. Along with the Sale Deed an Agreement of reconveyance was executed by original defendant no. 1 Shakir Ahmad Khan in favour of Smt. Amir Jehan Begam agreeing to reconvey the suit property within three years on return of the same consideration. Thereafter defendant no. 1 sold his right, title and interest in the said property on 1st March 1960 to defendant no. 2, appellant herein. It was the case of the plaintiff that the obligation to reconvey the property as per the Agreement of reconveyance executed by her vendor, defendant no. 1 was binding on defendant no. 2. In the meantime the original vendor of the property Smt. Amir Jehan Begam died.

Under the Agreement of reconveyance her son Irfan Hasan Khan became entitled to enforce the right to repurchase. Said Irfan Hasan Khan assigned his right to repurchase the suit house from defendant nos. 1 and 2 under a Sale Deed executed by him in favour of the plaintiff Zahirul Huq on 31st May 1962. The plaintiff as assignee of the said right to repurchase earlier available to Irfan Hasan Khan under the Agreement of reconveyance, after service of notices to the concerned defendants filed the aforesaid suit for getting the property reconveyed in his name by enforcing the said Agreement of repurchase. Original defendant nos. 3 to 7 who were the other heirs of original vendor Smt. Amir Jehan Begam were also impleaded but they remained proforma defendants. Besides specific performance the plaintiff also claimed pendent lite damages from defendant nos. 1 and 2 for use and occupation at the rate of Rs. 50/- per month.

The aforesaid suit was contested by original defendant nos. 1 and 2 alone. Remaining defendant nos. 3 to 7 did not appear to contest the suit. Defendant nos. 1 and 2 by filing separate but concurring written statements contended, amongst others, that the right of repurchase granted under the Agreement by defendant no. 1 in favour of original vendor Smt. Amir Jehan Begam was a personal right which could be exercised either by Smt. Amir Jehan Begam or by her son Irfan Hasan Khan but said Irfan Hasan Khan was not competent to assign the said right of repurchase in favour of a stranger like the plaintiff. They also raised other ancillary contentions with which we are not concerned at this stage. The only dispute, between defendant no. 2 on the one hand and the plaintiff's heirs on the other, which survives for consideration is as to whether the original plaintiff could be legally assigned the right to repurchase granted under the Agreement to repurchase executed by original defendant no. 1 in favour of the original vendor Smt. Amir Jehan Begam and her son Irfan Hasan Khan.

The learned Trial Judge framed various issues arising from the pleadings of parties. So far as the issue which survives for our consideration is concerned it was issue No. 2 which was to the effect whether the right of reconveyance was not transferable by Irfan Hasan Khan. If so, its effect. The learned Trial Judge after hearing the parties on this issue in the light of the evidence recorded before him came to the conclusion that the right of reconveyance was not personal only to Irfan Hasan Khan and could be validly assigned by him in favour of the plaintiff and as the plaintiff has filed suit within the period of three years as per the said Agreement of repurchase as an assignee of the right of Irfan Hasan Khan to get reconveyance of the property, the plaintiff was entitled to succeed and get a decree for specific performance directing both defendant nos. 1 and 2 to execute the Deed of Reconveyance as prayed for by him.

This resulted in Civil Appeal No. 147 of 1964 by defendant nos. 1 and 2 in the Court of learned Additional District Judge, Lucknow. The Appellate Court after hearing the contesting parties endorsed the view of the learned Trial Judge on Issue No. 2 and held that the right of reconveyance was validly transferred by Irfan Hasan Khan in favour of the plaintiff and consequently the plaintiff's suit was well sustained. The appeal accordingly was dismissed.

Appellant-original defendant no.2 carried the matter in second appeal before the High Court. As noted earlier the High Court also agreed with the view of the courts below and dismissed appellant's Second Appeal. That is how the

appellant is before us in these proceedings.

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to enforce reconveyance was linking up with an obligation to pay up the cost of improvements made by defendant no.1 and defendant no.2 in the suit property as that part of the obligation, which was a part and parcel of the entire package of contractual right and obligation of the beneficiary under the Agreement of reconveyance, did not get conveyed to the plaintiff, the suit was liable to fail even on that ground. Learned senior counsel Dr. Ghosh in support of his contentions placed reliance on some of the judgments of this Court to which we will make a reference hereinafter.

Learned counsel for respondent nos.1 to 3, heirs of original plaintiff, on the other hand tried to support the judgment under appeal as confirming the view of the courts below and contended that on a correct construction of the relevant terms of the Agreement of reconveyance all the three courts had rightly come to the conclusion that the right inhering in the estate of Smt. Amir Jehan Begam as inherited by her son to get the property reconveyed was not a personal right of anyone and it was not so hedged in either expressly or by necessary implication in the light of relevant recitals in the Agreement of reconveyance. Consequently the appeal is liable to fail. He also submitted that so far as the obligation of Irfan Hasan Khan to pay up the cost of improvement made by defendant nos.1 and 2 in the suit house was concerned, that had nothing to do with the right of repurchase flowing from the express terms of the Agreement between the parties. Even otherwise it was found as a matter of fact by the Trial Court on Issue No.3 in this connection that there was no evidence regarding maintenance of regular accounts regarding repairs by the vendee, nor was the procedure laid down under the Agreement found to have been followed by the vendee, and hence no claim on that score survived in their favour. That there are concurrent findings of fact of both the fact finding courts that defendant no.2 was not able to prove any cost of construction said to have been incurred by her in improving the suit house. Hence the question of obligation of Irfan Hasan Khan to pay up this amount of repairs to defendant no.2 did not survive. It was also submitted that this finding on Issue No.3 could not be effectively challenged in further appeal by defendant no.2. Learned counsel for the respondents also pressed in service decision of this Court as well as of Privy Council. We will refer to the same at an appropriate state hereafter.

In view of the aforesaid rival contention the following point arises for our consideration:

"Whether the Agreement of reconveyance dated 29th January 1960 executed by defendant no.1 original vendee in favour of Smt. Amir Jehan Begam, original vendor and her heirs as mentioned in the Agreement conferred any personal right to get the property reconveyed on persons mentioned in the said Agreement of reconveyance as the beneficiaries of the said Agreement of reconveyance or whether the right of reconveyance flowing from the Agreement in favour of these named persons could

be validly assigned in favour of a third party or a stranger to the family."

Consideration of the Point

We will, therefore, address ourselves to the consideration of this question. In order to resolve this controversy, it will be necessary to have a look at the express recitals found in the document of reconveyance executed by defendant no.1. An English translation of the said document is found at page 66A of the Paper Book. It read as under:

"In a sound state of body and mind and of my own accord and pleasure, I declare and put it in writing that if the said Amir Jahan Begam pays me the aforesaid consideration within a period of 3 (three) year, I shall give back to her the aforesaid property bounded as state below. At the time of giving back to her property) the said Amir Jahan Begam shall be liable for the costs of the Deed of Sale, God forbid, if the said Amir Jahan Begam dies within this period, then only Irfan Hasan Khan, the son of the said Amir Jahan Begum, and the children of Irfan Hasan Khan, shall be competent to get (the property) back with the said period, and the other heirs of Amir Jahan Begum shall not be competent, to get it back during the life time of Irfan Hasan Khan and his children. Of course, if during this period Irfan Hasan Khan or the heirs of Irfan Hasan Khan do not remain alive, then the other heirs of Amir Jahan Begum shall be competent to get back (the property). After the expiry of the aforesaid period no right shall subsist for any one whosoever to get (the property) back, nor shall I or my heirs be then bound by this declaration. If during the said period I have to spend any money for the repairs of the said house, then at the time of giving (the property) back I shall be entitled to get that money as well. At the time of effecting repair I shall be giving verbal intimation to Amir Jahan Begam or her son Irfan Hasan Khan and shall also be duly keeping with me the accounts in respect thereof."

A mere look at the said relevant recitals in the document shows that the vendee-defendant no.1 while taking the Sale Deed in his favour on the same day agreed to reconvey the suit house within a period of three years from the date of the Agreement to the original vendor Amir Jehan Begam by accepting the same consideration which he had paid to Amir Jehan Begam when he purchased this house by the Sale Deed of even date in his favour. It is not in dispute between the parties that Amir Jehan Begam died within the

aforesaid period of three years. She had, therefore, no occasion to enforce her right flowing from the document in here lifetime. But such a contingency was also contemplated by the Agreement and it recites that if said Amir Jehan Begam died within that period then only Irfan Hasan Khan, son of said Amir Jehan Begam, and his children would be competent to get back the property by obviously enforcing the right of repurchase granted under the document and the other heirs of Amir Jehan Begam would not be so competent. However as a last priority they were also conferred the right to enforce the claim for repurchasing the suit house in case Irfan Hasan Khan and his children did not remain alive within the period of three years. It is true that great emphasis was laid by learned senior counsel Dr Ghosh for the appellant on term 'only' employed by the document for submitting that Irfan Hasan Khan was given a personal right to get the property reconveyed if his mother-original vendor, the first beneficiary under the Agreement of repurchase died within that period. Now we may state that prima facie the said interpretation of the term 'only' as submitted by learned senior counsel Dr Ghosh for the appellant cannot be said to be not plausible. However on a closer scrutiny the said interpretation of the document cannot be sustained. The Trial Court, the Appellate Court as well as the High Court while construing his document and the aforesaid term have held that word 'only' signified a situation wherein three years of the Agreement on of her heirs, namely, Irfan Hasan Khan and his own children as contra-distinguished with other heirs of Amir Jehan Begam were given a priority right to enforce their claim to repurchase this suit house from defendant no.1 or his assignee like defendant no.2 and with a view to exclude the other heirs of Amir Jehan Begam from the scheme of priorities that the word 'only' was used in the document. That only gave a prior right to purchase this property by way of reconveyance to Irfan Hasan Khan and his own children and only on the occasion of their non-availability within the three years period that this right would get transmitted to the remaining heirs of Amir Jehan Begam. This view taken by the courts below appears to be plausible. We may now refer to the main contentions canvassed by Dr. Ghosh against the said view.

It was submitted that on a conjoint and comprehensive reading of the relevant terms of the document it can reasonably be held that the right of reconveyance was sought to be conferred only on a select body of person, namely, Amir Jehan Begam failing whom her son Irfan Hasan Khan failing whom his own children and then failing all of them on the remaining heirs of Amir Jehan Begam. That this represented a scheme of pre-emption and right of pre-emption would remain personally available to only specified persons and cannot be enjoyed by stranger. Therefore, such a right could not be transferred to a stranger like the plaintiff. Consequently accordingly to Dr. Ghosh the relevant recitals in the document impliedly prohibited the beneficiaries named in the Agreement from assigning their rights of repurchase to outsiders. Now it must at once be state that nowhere in this document there is an express prohibition restricting the right of the name beneficiaries to assign their right of repurchase to a third party stranger like the plaintiff. So far as the submission of Dr. Ghosh that there is an implied prohibition as the right is conferred only on a specified class of person with a view to retaining the suit house in the family of Amir Jehan Begam and her heirs and not to outsiders is concerned, it is difficult to appreciate how

the persons mentioned in the document of reconveyance as beneficiaries of the Agreement of repurchase are impliedly prohibited from assigning their right to repurchase once it accrued in the scheme of priorities to anyone else. The reason is obvious. So far as Irfan Hasan Khan is concerned he had admittedly a right to get reconveyance of the suit house from defendant no. 1 or his successor-in-interest defendant no.2 within the period of three years. If he himself got this right enforced against the defendant nothing prevented him as the full owner of the reconveyed house from almost simultaneously selling it to the plaintiff. Even that apart, assuming that Irfan Hasan Khan did not enforce his right of reconveyance enuring to him on the death of Amir Jehan Begam within the period of three years, and if he unfortunately died within that period his children could enforce that right within the same period and so far as they are concerned nothing is indicated in the document, either expressly or by necessary implication, that they could not assign the said right once it accrued to them in favour of any outsider. Consequently on a conjoint reading of the entire document it cannot be said that the word 'only' which was earlier found to have been employed while contra-distinguishing the prior right of Irfan Hasan Khan and his children as heirs of Amir Jehan Begam, standing in a scheme of priorities from that of other heirs of Amir Jehan Begam made the said right inhering in the named persons to be purely a personal right which was inalienable and could not have been assigned to anyone else like the plaintiff. Reliance placed by Dr. Ghosh on the decision of this Court in the case of Hazari & Ors. v. Neki & Ors. (1968) 2 SCR 833 cannot be of any avail to the appellant for the simple reason that in the said decision this Court took the view that statutory right of pre-emption thought not amounting to an interest in the land was a right which attached to the land and such a right statutorily recognised by Section 15(1)(a) of the Punjab Act of 1913 was a personal right in the sense that the claim of pre-emptor depended upon the nature of his relationship with the vendor. In that case the plaintiff who admittedly having a statutory right of pre-emption has got the suit filed for enforcing the said right and that suit had succeeded and a decree for pre-emption was passed in favour of the plaintiff. The said decree got confirmed in appeal. However during the pendency of second appeal filed by the defendants the respondent-plaintiff died and the question was whether his heirs could be brought on record under O.22 R.1, Code of Civil Procedure. This Court took the view that as the heirs were also entitled to right of pre-emption and represented the estate of the deceased plaintiff they could be brought on record. So far as the facts of the present case are concerned, as noted earlier, the fate of this case hinges on a correct construction of the relevant recitals in the Deed of reconveyance. Such a question was never on the anvil of scrutiny before this Court in this aforesaid decision. On the same lines are two latter decisions of this Court relied upon by Dr. Ghosh. They are - Zila Singh & Ors. v. Hazari & Ors. (1979) 3 SCC 265 and Bhoop Alleged son of Sheo v. Matadin Bhardwaj (Dead) by LRs. (1991) 2 SCC 128. As they deal with the right of pre-emption and fall in line with the aforesaid decision of this Court in the case of Hazari v. Neki (supra) we do not dilate on the same. We may also mention that this is not a case of any right of statutory pre-emption but is reflects a scheme of priorities for getting the property reconveyed as per the contract entered into between defendant no. 1 on the one hand and original

vendor Amir Jehan Begam on the other. It also enured for the benefit of the named beneficiaries of the said Agreement of reconveyance. It is a contractual scheme of priorities conferred on specified types of persons mentioned therein and their right to get the property reconveyed will have to be adjudicated upon within the forecorners of the said Agreement and not dehors it. In this connection we may refer to two decisions on which strong reliance was placed by learned counsel for the respondents, heirs of original plaintiff.

In the case of Sakalaguna Nayudu and another v. Chinna Munuswami Nayakar AIR 1928 PC 174 the question posed before the Privy Council was whether the counterpart document agreeing to reconvey a village earlier conveyed to the vendee, in favour of one 'A' who was mentioned in the counterpart document would enable A's heir 'B' to enforce the terms of the said counterpart document by selling the said right to the plaintiff of that case. It was held by the Privy Council on the terms of the counterpart document that it was a completed contract and it must be deemed to have been executed in favour of both of them, 'A' and his son 'B' and the benefit of the contract could be assigned by 'B' in favour of the plaintiff. Dr Ghosh tried to distinguish the aforesaid decision by submitting that in that case originally the village was conveyed by 'A' on his behalf as well as on behalf of his family members to one 'C' for a consideration of Rs. 10,000/- and on the same day 'C' had executed a counterpart document by which it was agreed by 'C' that he would reconvey the said village to 'A' after a period of thirty years from that date. Thus the original vendor being 'A' and his family the beneficiaries of the Agreement of reconveyance of the even date would naturally be 'A' and his family members including his son 'B'. Dr Ghosh was right when he submitted that on the question whether the benefit of the contract could be assigned to the plaintiff or not was not gone into by the Privy Council as the beneficiaries themselves had not contested the right of the plaintiff to get the assignment of the said right. The contest was between the receiver appointed on the insolvency of the original beneficiary 'B' and the plaintiff. Even leaving aside this question, however, it must be held that the Privy Council did uphold the assignment of the right of reconveyance which enured in 'B' in favour of the plaintiff who was an outsider. It has to be kept in view that in the document which fell for consideration of the Privy Council also there was no express prohibition against 'A' or 'B' restraining them from assigning their right of reconveyance to a third party like the plaintiff. On the terms of the document no implied prohibition was also discerned by the Privy Council. In this connection we have also to keep in view Section 23(b) of the Specific Relief Act, 1877 which is analogous to Section 15(b) of the Specific Relief Act, 1963. It lays down that except as otherwise provided the specific performance of a contract may be obtained by the representative-in-interest or the principal, of any party thereto. Thus normally any interest in a contract could be assigned to any representative-in-interest who also can enforce the specific performance of the contract against the contracting party. However if the term of the contract, expressly or by necessary implication, prohibited the beneficiary from transferring his contractual interest to third parties, then only such an assignee cannot sue for specific performance. We may in this connection also usefully refer to a decision of this Court in the case of T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao & Ors.

(1993) 2 SCC 740. 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 paragraph 10 of the Report the statement of law flowing from the decision of Sakalaguna Nayudu (supra) as well as the decision of Beaumont, C.J., speaking for the Bombay High Court in the case of Vishweshwar Narsabhatta Gaddada v. Durgappa Irappa Bhatkar AIR 1940 Bombay 339. The statement of law which got imprimatur of this Court in para 9 of the Report runs as follows:

"The Privy Council in Sakalaguna Nayudu v. Chinna Munuswami Naykar AIR 1928 PC 174 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 v. Durgappa Irappa Bhatkar AIR 1940 Bom 339 held that both under the common law as well as under Section 23(b) of the Specific Relief Act, 1877, and 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. Karuppaswami Gounder AIR 1965 Mad 506 it was held:

'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'. (AIR p.508, para 5)"

As noted earlier on a conjoint reading of the relevant terms of the Agreement of repurchase we cannot persuade ourselves to hold that the persons mentioned in the said document as beneficiaries of the right of repurchase flowing from the said document were, either expressly or by necessary implication, prohibited from assigning their right of repurchase once it accrued, to any one of their choice even though he might be outside the earmarked, listed category of persons specified in the document. In other words it must be held that Irfan Hasan Khan could validly assign his right to repurchase the suit house to the plaintiff as rightly held by courts below.

So far as the next contention of learned senior counsel for the appellant Dr Ghosh is concerned it must at once be

stated that right to repurchase flowing from the document was independent of the obligation of the said beneficiary enforcing the contract of repurchase to defray the cost of repair of the house, if at all any carried out by the purchaser-executant of the document. That is a independent obligation which would get attached to the property and consequently whoever is the purchaser of the property on the basis of the enforcement of the right of repurchase will have to bear that burden. On the fact found in the present case, however, as observed earlier, defendant no.1 and/or 2 could not prove any such actual expenditure incurred by them nor had they followed the procedure laid down in the document for enforcing such a claim against the beneficiaries under the contract of reconveyance. This alternative contention of Dr Ghosh also, therefore, fails.

In the result this appeal fails and is accordingly dismissed. However in the facts and circumstances of the case there will be no order as to costs.