

Before T.P.S. Mann, J.

SWARAN SINGH,—Plaintiff/Appellant

versus

BAGGA SINGH AND OTHERS,—Defendant/Respondents

R.S.A. No. 246 of 1985

23rd April, 2008

Code of Civil Procedure, 1908—Agreement to sell—Suit for specific performance—Defendant's name reflecting in revenue records and claiming himself to be exclusive owner and in possession of suit land—Cannot be said that parties were not clear about identity of property—Suit property already under possession of plaintiff—A co-sharer in exclusive possession of his share in joint holding can sell/ transfer said portion—Findings of lower appellate Court setting aside judgment and decree of trial Court for specific performance of agreement cannot be sustained.

Held, that it was stated in the agreement to sell itself that defendant was exclusive owner in possession of the suit land situated in Mustil No. 11 Killa Nos. 6(4-0) and 7(4-0). It was also mentioned that even before entering into an agreement to sell, the plaintiff was in possession of the said piece of land. In such a situation, it cannot be said that the parties were not clear about the identity of the property. The defendant's name was reflected in the revenue records and also claimed by himself to be the exclusive owner and in possession of the suit land. The same very suit property was already continuing to be under the possession of the plaintiff.

(Para 15)

Further held, that both the learned lower Courts have concurrently held the power of the defendant to alienate the specific Khasra numbers in spite of the fact that he was only a co-sharer in the suit land. the impugned judgment and decree passed by learned lower appellate Court

cannot be sustained. It is also held that a co-sharer in exclusive possession of his share in the joint holding can agree to sell/transfer the said portion, subject to, of course, partition. Further that the plaintiff would get the title of the defendant and right to joint possession of the land agreed to be sold and to enforce partition in respect of the land in question. To that extent, the findings arrived at by the learned lower appellate Court while modifying that of the learned trial Court cannot be sustained.

(Paras 16 & 17)

Ashwani Chopra, Senior Advocate with Rajneesh Chauhan,
Advocate *for the appellant.*

S.C. Khungar, Advocate *for the respondents.*

T.P.S. MANN, J.

(1) Suit for specific performance of contract dated 30th December, 1980 filed by plaintiff-appellant was decreed with costs by learned Sub-Judge 1st class, Fazilka,—*vide* judgment dated 12th October, 1983. Appeal against the same was filed by respondent No. 1, which was partly accepted by learned District Judge, Ferozepur,—*vide* judgment dated 10th December, 1984. The plaintiff-appellant was held entitled to a decree for recovery of a sum of Rs. 6,000 with interest at the rate of 12% per annum from the date of the agreement till its realization. He was held entitled to the costs assessed by the trial Court. To that an extent, judgment passed by the learned trial Court was modified. However, there was no order as to costs in the appeal. Aggrieved of the same, the plaintiff filed the present appeal in this Court.

(2) The plaintiff-appellant sought possession of 8 Kanals of suit land by way of specific performance of contract dated 30th December, 1980. He pleaded that the suit land was owned by Bagga Singh-defendant, who agreed to sell the same to him on 30th December, 1980 for an amount of Rs. 8,000. He received an amount of Rs. 6,000 as earnest money. The sale-deed was to be executed on 28th December,

1981. The plaintiff was ready to perform his part of the contract and remained present before the Sub Registrar on 28th December, 1981 but defendant Bagga Singh failed to turn up and inspite of notice, he refused to execute the sale-deed.

(3) Bagga Singh-defendant opposed the suit by filing a written statement, wherein he pleaded that he did not execute any such agreement to sell dated 30th December, 1980. The value of the land was Rs. 15,000 to Rs. 16,000 per killa. In fact, he had entered into an agreement to mortgage the suit land for Rs. 8,000 after receiving an amount of Rs. 3,000 as earnest money and the remaining amount of Rs. 5,000 was to be paid at the time of execution of the mortgage deed on 8th January, 1982. On that date, he remained present before the Sub Registrar, Fazilka but the plaintiff did not turn up. He was ready and willing to perform his part of the contract but the plaintiff was not ready. Moreover, the suit property was not under his exclusive ownership nor he cultivated the same. No specific portion of killa Nos. 6 and 7 of Mustil No. 11 had been mentioned regarding which the agreement to sell pertained.

(4) Learned trial Court framed the following issues :—

- “1. Whether the defendant executed an agreement dated 30th December, 1980 ? OPP
2. Whether the plaintiff has been willing and ready to get the sale deed executed ? OPP
3. Whether the plaintiff is entitled to specific performance of agreement ? OPP
4. If issue No. 3 is not proved whether the plaintiff is entitled to recover Rs. 6,000 ? OPP
5. Whether the plaintiff is in possession of the suit property ? OPP
6. Whether the plaintiff has knowingly gave the address of the defendant wrong. If so its effect ? OPD

7. Whether the defendant could not alienate the specific khasra number ? If so, its effect ? OPD
8. Relief.

(5) In support of his case, the plaintiff himself appeared as PW1, besides examining PW2 Kashmiri Lal, PW3 Mohan Singh, PW4 Assa Singh and PW5 Hans Raj, whereas defendant Bagga Singh appeared himself as DW1 and also relied on the testimonies of DW2 Kishan Singh, DW3 Ram Singh and DW4 Gurdeep Singh.

(6) Both the learned lower Courts concurrently held that Bagga Singh-defendant entered into an agreement on 30th December, 1980, whereby he agreed to sell suit land measuring 8 kanals situated in Khasra No. 11 Mustil, Killa Nos. 6(4-0) and 7(4-0). However, taking into consideration the fact that the land measuring 8 kanals covered by the agreement to sell was not specified, as only 4 kanals of area, out of each of the killa numbers, was mentioned, it was held by the learned lower appellate Court that agreement to sell could not be specifically enforced. Accordingly, suit for specific performance of the agreement, which was decreed by the learned trial Court, was granted to the extent of recovery of the earnest money along with interest by the learned lower appellate Court.

(7) Learned counsel for the appellant submitted that the learned lower appellate court was not justified in decreeing the suit for recovery of the earnest money by setting aside the judgment and decree passed by the learned trial Court for specific performance of the agreement. It is submitted that though 4 kanals of area, out of each of the two killa numbers was mentioned in the agreement to sell, yet it was clear that Bagga Singh was in possession of the said two pieces of 4 kanals each and, therefore, decree for specific performance of the agreement could be passed against him. Learned counsel has referred to the copy of Jamabandi Ex. P1, wherein Bagga Singh-defendant was shown to be in possession of the entire area of 57 Kanals 15 Marlas, including the suit land. He has also pointed out that issue No. 7 as to whether the

defendant could not alienate the specific Khasra numbers was decided by the learned trial Court in favour of the plaintiff by holding that Bagga Singh-defendant was in exclusive possession of Killa Nos. 6 and 7 and, therefore, he could justifiably enter into an agreement to alienate 4 kanals, from each of the two killas, in favour of the plaintiffs.

(8) Learned counsel for the respondents submitted that in the agreement in question, two killa Nos. 6 and 7 were mentioned out of which Bagga Singh-defendant allegedly agreed to sell 4 kanals, from each of them and as the shape of boundaries or otherwise of the portion agreed to be sold was not mentioned, therefore, the agreement could not be specifically enforced. It is also submitted that no evidence other than the agreement could be taken into consideration for determining the exact location of the land. As the agreement was vague and indefinite, therefore, the same had to be ignored and could not be specifically enforced.

(9) I have heard learned counsel for the parties and perused the evidence brought on the record.

(10) Learned counsel for the appellant had framed the following substantial questions of law for determination in the second appeal :—

1. Whether the impugned judgment and decree can be legally sustained in light of the Full Bench decision of this Hon'ble Court in **Bhartu versus Ram Sarup (1)**.
2. Whether a co-sharer in possession exclusively of his share in the joint holding can agree to sell/ transfer the said portion subject to partition ?
3. Whether a transferee gets the title of the transferor and right to joint possession of the land agreed to be sold/ sold and to enforce partition dehors the fact whether the property agreed to be sold/sold is a share or a specified portion ?

(1) 1981 PLJ 204

4. Whether the learned First Appellate Court was legally justified in modifying the decree of the learned trial Court without actually reversing the findings with regard to the sale of part of land in the khasra numbers ?
5. Whether the plaintiff/appellant is entitled to specific performance of the agreement to sell of 4 kanals of land out of Khasra No. 6 and 4 kanals of land out of Khasra No. 7, as has been rightly held by the learned trial Court?
6. Whether the impugned judgment which is based on non-reading/misreading of the pleadings/evidence on record, can be legally sustained ?

(11) It is clear from the agreement to sell dated 30th December, 1980 that Bagga Singh-defendant was owner of the suit land and agreed to sell the same in favour of Swaran Singh-plaintiff for an amount of Rs. 8,000. He clearly mentioned in the agreement to sell that he was exclusive owner and in possession of Mustil No. 11 Killa Nos. 6(4-0) and 7(4-0) total area 8 Kanals and there was no bar, whatsoever, on selling the same. He also mentioned that Swaran Singh-plaintiff was already continuing to be in possession of the suit land since before.

(12) Learned trial Court had framed issue No. 7 as to whether the defendant could not alienate the specific Khasra number. While dealing with it, learned trial Court referred to Jamabandi Ex. P.1 which showed that Bagga Singh-defendant was one of the co-sharers and being a co-sharer, he had the right to alienate his share. At the most the transferee would get the area sold subject to the right of the other co-sharers at the time of partition. Khasra-girdawari Ex. P. 6 also reflected Bagga Singh-defendant being in exclusive possession of killa Nos. 6 and 7 and accordingly, it was held that the defendant could alienate the specific killa numbers. Finding on issue No. 7 as arrived at by the learned trial Court was not reversed by the learned lower appellate Court. Only because of the fact that the shape of boundaries or otherwise

of the specific portion out of two killas had not been mentioned, the relief of specific performance of agreement was denied and, instead, relief of recovery of the earnest money was granted.

(13) In **Bhartu versus Ram Sarup (supra)**, a Full Bench of this Court held that right of pre-emption could not be denied simply by describing the land purchased in terms of specific Khasra-girdawari numbers instead of fractional share. Further that sale of share of joint land would include in its ambit any sale out of the joint holding by co-sharer irrespective of the fact whether the land sold was fractional share or specified portion comprised of particular khasra numbers.

(14) In **Surjit Singh versus Mohinder Singh and another (2)**, It was held that co-sharer in the joint land had a right to sell his share without getting the land partitioned. He could deliver possession of the portion of the joint land to his vendor if he was in exclusive possession of the same.

(15) Learned counsel for the respondents referred to **Bhagwan Singh (deceased) Rep. By LRs. versus Nawab Mohammad Iffikhar Ali Khan and others (3)**, and **Surjit Singh and another versus Mahohar Lal and others (4)**, to contend that when the agreement was vague and in-definite, it could not be enforced under Specific Relief Act and contract of sale must be definite and precise in a suit for specific performance. No oral evidence was admissible to add to terms of contract of agreement. When agreement to sell land contained neither exact area of land nor boundaries nor gave length and breadth nor also pinpointed place from which it was to be measured, specific performance of such a contract could not be enforced, being vague and indefinite. However, in the present case, it was stated in the agreement to sell itself that Bagga Singh-defendant was exclusive owner in possession of the suit land situated in Mustil No. 11, Killa Nos. 6(4-0) and 7(4-0). It was also mentioned that even before entering into an agreement to sell,

(2) 2007(4) PLR 99

(3) 1982 PLJ 386

(4) 2004(3) PLR 684

Swaran Singh-plaintiff was in possession of the said piece of land. In such a situation, it cannot be said that the parties were not clear about the identity of the property. The defendant's name was reflected in the revenue records and also claimed by himself to be the exclusive owner and in possession of the suit land. The same very suit property was already continuing to be under the possession of the plaintiff.

(16) Moreover, both the learned lower Courts have concurrently held the power of Bagga Singh-defendant to alienate the specific Khasra numbers inspite of the fact that he was only a co-sharer in the suit land. Under these circumstances, the aforementioned judgments are distinguishable facts and, therefore, not applicable.

(17) In view of the above and in light of the Full Bench decision in **Bhartu's case** (*supra*), it is held that the impugned judgment and decree passed by learned lower appellate Court cannot be sustained. It is also held that a co-sharer in exclusive possession of his share in the joint holding can agree to sell/transfer the said portion, subject to of course, partition. Further that the plaintiff would get the title of the defendant and right to joint possession of the land agreed to be sold and to enforce partition in respect of the land in question. To that extent, the findings arrived at by the learned lower appellate Court, while modifying that of the learned trial Court cannot be sustained.

(18) Resultantly, the appeal is partly accepted. Judgment and decree passed by learned appellate Court to the extent of denying specific performance of the agreement is set aside. Suit for specific performance is decreed with costs against Bagga Singh-defendant with a direction to him to execute the sale deed in favour of the plaintiff on receipt of the remaining amount of consideration within four months from today. In case he fails to execute the sale deed within the stipulated period, Swaran Singh-plaintiff would be at liberty to get the sale deed executed through Court. However, the suit for possession is declined. The appellant may resort of any other remedy, which may be available to him under the law so as to seek possession of the suit land.