

recorded that calling of such a high number was not the right course to follow. Therefore, the petitioner in the instant case had positively to prove that the marking done by the Board was plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. But again the petitioners have miserably failed to supply any material or furnish a convincing data in support of their case. In this view of the matter, the contention of the learned counsel, as earlier observed, merits rejection.

(19) No other point arises for consideration.

(20) For the reasons recorded above, the writ petitions being without any merit, fail and are dismissed. In the circumstances of the case, we make no order as to costs.

N.K.S.

FULL BENCH

Before P. C. Jain, C.J., S. P. Goyal and S. S. Kang, JJ.

RAKESH KUMAR AND OTHERS,—Appellants.

versus

SAT PAL,—Respondent.

Regular Second Appeal No. 1203 of 1985

April 14, 1986

Specific Relief Act (XLVII of 1963)—Section 12(3)—Agreement to sell—Suit for specific performance—Specific performance—Whether could be ordered for lesser share of property than agreed upon to be sold.

Held, that sub-section (3) of section 12 of the Specific Relief Act, 1963 provides that where a party to a contract is unable to perform the whole of his part of it, he is not entitled to obtain a decree for specific performance if the part which must be left unperformed forms a considerable part of the whole, though admitting of compensation in money, or if the part which must be left unperformed does

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not admit of compensation in money. However, at the suit of the other party, the Court may direct such a party in default to perform specifically so much of his part of the contract as he can perform if the party bringing the suit, i.e., the plaintiff fulfils the conditions laid down in clauses (i) and (ii) of that sub-section. In view of this provision, it cannot be urged that a decree for specific performance cannot be ordered for lesser share of the property than agreed upon to be sold. Section 12 of the Act envisages passing of the decree for specific performance of a part of a contract in the event of the satisfying of the pre-requisites as enumerated in the respective provisions of the section. Where party agrees to sell a property in which some other persons have also a share, then with regard to such a property under section 12(3) specific performance can be directed in respect of so much of his/their part of the contract as he/they could perform. In other words, he/they could be directed to sell his/their share of the land to the plaintiff, but this could be done provided the latter relinquished all claims to further performance and also all rights to compensation for the deficiency or the loss or damage sustained through the default of the defendant. It is, therefore, held that a decree for specific performance can be ordered for lesser share of the property than agreed upon to be sold subject to the fulfilment of the conditions enumerated in section 12 of the Act.

(Paras 9 and 11)

(Case referred by Hon'ble Single Judge Mr. Justice S. P. Goyal to the larger Bench for decision of an important question of law involved in this case on 23rd May, 1985, The Division Bench consisting of Hon'ble the Chief Justice Mr. P. C. Jain and Hon'ble Mr. Justice Sukhdev Singh Kang again referred the case to a larger Bench on 13th February, 1986. The larger Bench consisting of Hon'ble the Chief Justice Mr. P. C. Jain, Hon'ble Mr. Justice S. P. Goyal and Hon'ble Mr. Justice Sukhdev Singh Kang, after answering the relevant question of law, again referred the case to the learned Single Judge for deciding the case on merits on 14th April, 1986).

JUDGMENT

Prem Chand Jain, C.J.

(1) The legal question that needs decision by us may be formulated thus :—

“Can a decree for specific performance be ordered for lesser share of the property than agreed upon to be sold?”

In order to appreciate the controversy, certain salient features of the case may be noticed.

(2) Shiv Ram was the father of Sat Pal plaintiff and defendants Nos. 1 to 3. Smt. Rattan Devi, defendant No. 4, is the widow of Shiv

Ram. Smt. Raj Kumari and Smt. Veena are the daughters of Shiv Ram. The house in dispute was owned by Shiv Ram deceased. Rakesh Kumar and others defendants represented to the plaintiffs that Smt. Raj Kumari and Smt. Veena had relinquished their rights and title in the house in dispute in favour of the parties to the suit, with the result that each one of them had 1/5th share in the house in dispute. It is further averred that the defendants entered into an agreement dated 12th July, 1980, with the plaintiff to sell their 4/5th share in the house to him. The defendants received from the plaintiff Rs. 5,400 out of the sale consideration and the remaining amount was to be paid in instalments i.e. Rs. 9,000 on 30th August, 1980, Rs. 8,000 on 30th October, 1980 and Rs. 8,000 on 30th December, 1980. It is next averred that the plaintiff paid to the defendants the sum of Rs. 9,000 on 30th August, 1980. On 30th October, 1980, he offered the amount of Rs. 8,000 out of the sale consideration against receipt, but the defendants avoided to accept that amount. A notice dated 4th November, 1980, was also issued, but the defendants did not accept that notice; rather they sent a notice to the plaintiff that he had failed to pay the instalments payable on 30th October, 1980, and that the amount paid by him to them stood forfeited. The plaintiff thereafter sent registered notices to the defendants. Consequently, the plaintiff filed a suit for specific performance of the agreement dated 12th July, 1980, in respect of 4/5th share of the defendants in the house in dispute on payment of the balance sale consideration of Rs. 16,000.

(3) The suit was contested by the defendants. Preliminary objections were taken to the effect that the suit for specific performance of the agreement to sell the house was not maintainable, that the suit was bad for non-joinder of necessary parties and that the agreement to sell was not legally enforceable. On merits, the execution of the agreement of sale dated 12th July, 1980, was not disputed, nor was it denied that the defendants had received the sum of Rs. 5,400 as earnest money and the first instalment of Rs. 8,000 was paid on 30th August, 1980. However, it was denied that the plaintiff ever approached the defendants to receive the amount of the instalment of Rs. 8,000 on 30th October, 1980, out of the sale consideration. It is in this manner that the defendants have controverted the claim of the plaintiff for the specific performance of the agreement dated 12th July, 1980.

(4) On the pleadings of the parties, various issues were framed by the trial Court. On consideration of the entire matter, the

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learned Subordinate Judge 1st Class,—*vide* his judgment and decree dated 18th May, 1984, did not grant the decree for specific performance and instead granted a decree for the recovery of Rs. 14,000 and interest at the rate of 6 per cent per annum from the date of the decree till realisation in favour of the plaintiff and against the defendants with proportionate costs. Feeling aggrieved from the judgment and decree of the trial Court, the plaintiff preferred an appeal. The learned Additional District Judge accepted the appeal and granted a decree for specific performance of 4/7th share in the house in dispute against Rakesh Kumar and others defendants on payment of a sum of Rs. 30,400 to them by the plaintiff minus Rs. 14,400 already paid as earnest money. The cross-objections filed by the defendants were dismissed.

(5) Dissatisfied from the judgment and decree of the learned Additional District Judge, Rakesh Kumar and others defendants preferred the present appeal, which came up for hearing before a learned Single Judge of this Court. On consideration of the entire matter in the light of the legal issue raised, my learned brother S. P. Goyal, J.,—*vide* his order dated 23rd May, 1985, which reads as under, referred the case for decision by a larger Bench:—

“Relying on *Harjinder Singh v. Kartar Singh and others*, (1) a D. B. decision of this Court, the learned counsel contends that the decree for specific performance could not be ordered for lesser share of the house than agreed upon to be sold. This decision runs counter to the rule laid down by the Supreme Court in *Balmukand v. Kamla Wati and others*². The decision of the Supreme Court was not noticed, by the Bench. Still, it would not be proper for me to take a contrary view sitting singly. This appeal is consequently admitted and ordered to be placed³ before my Lord, the Chief Justice for constituting a larger Bench to settle the question noted above.”

On reference, the matter was placed before a Division Bench of this Court, which agreed with the view of S. P. Goyal, J. and finding that the view taken in *Harjinder Singh v. Kartar Singh and others*³, deserved to be reconsidered, referred the matter to be

(1) 1975 Rev. L. Reporter 377.

(2) A.I.R. 1964 S.C. 1385.

(3) 1975 R.L.R. 377.

decided by still a larger Bench, That is how we are seized of the matter.

(6) As has come in the opening part of the judgment, the only point and the question of law that needs determination is whether a decree for specific performance could not be ordered for lesser share of the house than agreed upon to be sold.

(7) After hearing the learned counsel for the parties, we are of the view that the answer to the aforesaid question has to be in the affirmative.

(8) Section 12 of the Specific Relief Act makes a provision for the specific performance of part of contract and the relevant provision with which we are concerned, is in the following terms :—

“12. *SPECIFIC PERFORMANCE OF PART OF CONTRACT*

- (1) * * * * *
- (2) * * * * *

(3) Where a party to a contract is unable to perform the whole of his part of it, and part which must be left unperformed either :—

(a) forms a considerable part or the whole, though admitting of compensation in money; or

(b) does not admit 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 if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in case falling under clause (b), pays, or has paid the consideration for the whole of the contract without any abatement; and

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(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for loss or damage sustained by him through the default of the defendant.

(4) * * * * *

Before the enactment of Act of 1963, the relevant provisions of the 1877 Act, corresponding to section 12(3) was section 15, which reads as under :—

“SPECIFIC PERFORMANCE OF PART OF CONTRACT WHERE PART UNPERFORMED IS LARGE.

15. 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.”

(9) Sub-section (3) of section 12 of the Specific Relief Act, 1963, provides that where a party to a contract is unable to perform the whole of his part of it, he is not entitled to obtain a decree for specific performance if the part which must be left unperformed forms a considerable part of the whole, though admitting of compensation in money, or if the part which must be left unperformed does not admit of compensation in money. However, at the suit of the other party, the Court may direct such a party in default to perform specifically so much of his part of the contract as he can perform if the party bringing the suit i.e. the plaintiff fulfils the conditions laid down in clauses (i) and (ii) of that sub-section. These conditions are : firstly, that in the case in which the part which must be left unperformed forms a considerable part of the whole and admits of compensation in money, the plaintiff must pay the

agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed, while in the case in which the unperformed part does not admit of compensation in money, the plaintiff must pay consideration for the whole of the contract without any abatement. The second condition is that in either of the above two cases the plaintiff must relinquish all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. As earlier observed, similar was the situation under Section 15 of the old Act. In view of this provision, it can hardly be urged that a decree for specific performance cannot be ordered for lesser share of the property than agreed upon to be sold. Section 12 of the Act envisages passing of the decree for specific performance of a part of a contract in the event of the satisfying of the pre-requisites as enumerated in the respective provisions of the section. Where a party agrees to sell a property in which some other persons have also a share, then with regard to such a property under section 12(3) specific performance can be directed in respect of so much of his/their part of the contract as he/they could perform. In other words, he/they could be directed to sell his/their share of the land to the plaintiff, but this could be done provided the latter relinquished all claims to further performance and also all right to compensation for the deficiency or the loss or damage sustained through the default of the defendant. The point is not *res-integra* as in *Balmukand v. Kamla Wati* and others⁴, it has been observed by their Lordships that the plaintiff would have been entitled to the benefit of section 15 of the Specific Relief Act and that a decree for a part could always be granted; but the same was declined as the plaintiff in that case was not willing to pay the entire consideration for obtaining a decree.

(10) Coming to the judgment of this Court in *Harinder Singh's case* (supra), which necessitated the reference, I find that the said judgment cannot be read to mean that no decree for specific performance could be granted under section 12 of the Act of 1963 for the share of the defendant who had agreed to sell the whole of the property. In that case, while dealing with the facts, the learned Judges came to the conclusion that the case was not covered by any of the exceptions provided under Section 12 of the Act. It appears

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that before the learned Judges in that case no plea was taken that a decree for 1/2 share of the defendant be passed as the plaintiff was ready to relinquish all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. It is correct that the learned Judges did refuse to grant a decree for 1/2 share, but, as earlier observed, the plea having not been put forth by the plaintiff who claimed decree for 1/2 share only, the learned Judges in my view were justified in just awarding the amount of damages and in ordering the refund of the amount of Rs. 2,000 which had been paid as earnest money. To emphasise, the learned Single Judge in that case had granted a decree of the share of the defendant on payment of Rs. 10,000 when the property had been agreed to be sold for an amount of Rs. 20,000. If the plaintiff in that case had wished to take benefit of the provisions of section 12(3) of the Act, then he was bound to pay the entire amount with a further undertaking that he was not to claim any interest in the remaining part of the contract and also not to claim compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. In this view of the matter, I find that the decision in *Harinder Singh's case* (supra) is distinguishable and the same has rightly been decided on the facts of that case.

(11) As a result of the aforesaid discussion, I hold that a decree for specific performance can be ordered for lesser share of the property than agreed upon to be sold subject to the fulfilment of the conditions enumerated in Section 12. I further order that the appeal shall now go back for decision on other points on merits, before the learned Single Judge.

N. K. S.

Before S. P. Goyal and G. C. Mital, JJ.

RAM NARAIN PALIWAL,—Applicant.

versus

COMMISSIONER OF INCOME-TAX,—Respondent.

Income Tax Reference No. 27 of 1977

October 18, 1985.

Income Tax Act (XLII of 1961)—Section 171—Hindu Undivided Family consisting of a Karta, his widowed mother and his minor