Roomal and ors. Vs. Siri Niwas

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Court : Delhi

Decided On : Jan-14-1985

Reported in : AIR1985Delhi153; 27(1985)DLT188

Judge : A.B. Rohatgi and; U.C. Jain, JJ.

Acts : Hindu Minority and Guardianship Act, 1956 - Sections 8

Appeal No. : Regular First Appeal Nos. 30 and 52 of 1973

Appellant : Roomal and ors.

Respondent : Siri Niwas

Advocate for Pet/Ap. : I.S. Mathur and; Swantantar Kumar, Advs

Judgement :

Avadh Behari Rohatgi, J.

(1) This case is classic illustration of law's delay. The purchasers agreed to buy a parcel of land on 13-1-1961. The suit for specific performance was instituted on 18/09/1961. The trial court decreed the suit in favor of one of the purchasers on February 2,1973. The present appeals were filed in 1973. And now in 1985 we are deciding the appeals. Thus this litigation has taken a quarter of a century.

(2) The plaintiffs Siri Niwas, and the two minors Satish Kumar and Brij Narain Singh, sued Roomal and Jodha for specific performance. The suit was decreed in favor of Siri Niwas. As regards the minor plaintiffs the suit wasdismissed. From the order of the Subordinate Judge dated2-2-1973 two appeals have been brought. R.F.A. 52 of 1973is the appeal of the vendors. Roomal and Jodha. They challenge the decree of specific performance obtained by Siri Niwas against (hem. R.F.A. 80 of 1973 is the appeal of the two minor plaintiffs namely, Satish and Brij Narain Singh.They contest the view of the trial court that they cannot sue for specific performance. This judgment will govern themboth.

(3) These are the facts. On 13-1-1951, the defendantsRoomal and Jodha, agreed to sell a residential plot beating Khasra No. 208113211 measuring 'about one bigha' within the abadi of Zamrudpur, Delhi, to the plaintiffs, STi Niwas,and the two minors, Satish Kumar and Brij Narain Singh.The agreement to sell was executed. The defendant agreed to complete the sale by 28-2-1961. The defendants did not perform their part of the agreement. They did not execute the sale deed. The plaintiffs brought the suit for specific performance. As we have said, the suit was decreed '' favor of Siri Niwas. The minors' claim was declined.

(4) In the appeals three question., arise for decision. The first question is whether the minors can sue for specific performance. The trial judge held that. the agreement to sell could be specifically enforced only by Siri Niwas. plaintiffNo. 1, since he was a major and that the minor plaintiffs2 and 3 could not sue for specific performance. He held that the agreement to purchase (PX) was beyond the capacity of the guardians and did not bind the minors personally. For this view he followed the decisions in Sunder Singh v. JiwanSingh, (1970) 72 Punj. L. R 218 Mir Sarwarjanv. Fakruddia, 39 Indian Appeals 1(2) and Subrahmanyam v.Subba Rao .

(5) We cannot accept this view. This question is now concluded by a recent decision of the .Supreme Court Manik Chand v. Ramchandra, : [1980]3SCR1104 . The case settles an important point of Hindu Law on which there was much controversy. In the High Courts (here was a conflict of opinion. There were two schools of thought. One school held that the Privy Council decision in Mir

Sarwarjanv. Fakruddin (supra) held the field and thereforee a contract entered into by a natural guardian of a Hindu minor for the purchase of property was not enforceable on behalf of the minor. They held that he must fail if he such for specific.performance for the reason that it is not within the competence of a guardian of a minor to bind the minor or minor'sestate by a contract for the purchase of immovable property as there is no mutuality. This school believed in the doctrine of mutuality on which the decision of the Privy Council in Mir Sarwarjan is based. On the other hand, the other school held that Mir Sarwarjan was no longer good law after the decision of the Privy Council in Subrahmanyam v. SubbaRao (supra) and thereforee a minor's contract entered into by his guardian can be enforced if it is for the benefit of the minor or his estate, In the governing decision of Mohri Bibiv. Dhurmadas Ghose (1903) 30 I.A.114 the Privy Council held that a minor's contract is void and cannot be ratified.Nor there can be estoppel against the minor. But where the guardian of a minor enters into a contract on behalf of the minor the position is different. The powers of the natural guardian are defined in Hindu Law. He can only function within doctrine of legal necessary or benefit. (HanoomanPershad v. Mst. Babooe (1836) 6 M.I.A. 393 This school argued that the validity of the transaction of sale or purchase to be judged reference to the scope of the guardian'spower to enter into a contract on behalf of the minor.

(6) The controversy started in 1911 when Mir Sarwarjan was decided by Lord Macnaghten. Indian Courts were bound by that decision. In 1948 when the Privy Council decided Subrahmanyam the view of Lord Macnaghten in Mir Sarwarjan began to he doubled, but as both the decisions were of the Privy Council controversy continued. In1956 the Indian Legislature passed the Hindu Minority and Guardianship Act. In Section 8 the powers of the natural guardian of a Hindu minor were codified. In 1963 the New Specific Relief Act was passed. Section 20 was enacted for the first time abolishing the doctrine of mutuality. The Law Commission had recommended the abolition of the discredited doctrine of mutuality. The legislature abrogated it. Inthe light of the new legislation the question arose whether the two deepens were still good law. The Supreme Court has now resolved this long standing controversy.

(7) The Supreme Court has categorically held that a contract entered into by a guardian on behalf of the. minor is enforceable. The court did not follow Mir Sarwajan, and overruled the view taken in that case. Under the Hindu law the natural guardian is empowered to enter into a contract on behalf of the minor and the contract would be binding and enforceable if the contract is for the benefit of the minor. The Courtsaid:

'THE position under the Hindu Law is that a guardian has legal competence to enter into a contract on behalf of the minor for necessity or for the benefit of the estate.'

(8) The court approved of the decision of the Madras HighCourt in Krishnaswami v. Sundarappayyar (1894) 18 Mad. 415 and held that :

'THE English Law that a minor cannot claim specific performance which proceeds, on the ground of want of mutuality has no application to thiscountry.'

(9) The Supreme Court followed the view of the Privy.Council expressed in Subrahmanyam v. Subba Rao. and held that a guardian of a minor is competent to enter into a contract on behalf of the minor so as to bind him it it is for the benefit of the minor. The court approved of the view of the Full Bench of Andhra High Court in Suryaprakasam v. Cangarain Air 1956 A.P.33 (FB)and agreed with the High Court that Mir Sarwarjan had been impliedly overruled by Subranmanyam. Mir Sarwarjan is thereforee no longer good law. There are two reasons why Mir Sarwarjan has lost all authority. One is that mutuality is no longer the test. Secondly in cases of transfer of property it is not the minor's contract with which the court is concerned.The court is concerned with the guardian's powers in Hindu Law when he makes the contract on behalf of the minor.If the contract is for the benefit of the minor and within the competence of the guardian the contact is valid and enforceable, whether it is for sale or purchase of property. the guardian has substantial legal capacity to act on behalf of the minor. He has full contractual powers. The restriction on his powers is that he must act for the benefit of the minor and not to his detriment.

(10) Subrahmanyam is a clear authority for proposition that mutuality does not apply to a minor's contract made by is guardian on his behalf. The importance of Subrahmanyamlies in this that it did away with mutuality and rested the decision on the guardian's capacity to enter into a contract for the benefit of the minor. The Judicial Committee held that a guardian could enter into an agreement for the sale of the property which would be binding on the minor if the agreement was for legal necessity or for the benefit of the minor and such a contract was capable of specific performance(See Pollock and Mulla Contract 9th ed. p. 115). It took37 years before the true principle of Hindu Law was authoritativelystaled. How slow and painful is the development of the law. Subrahmanyam is a landmark decision in the history of minor's incapacity. But the controversy did not end withSubrahmanyam. In fact it began with it. Some courts continued to follow Mir Sarwarjan. Some applied Subrahmanyam.This conflict was set at rest only in 1931 by the Supreme Court in Manik Chand. Thus ended the long domination of thedoctrine of mutuality in India.

(11) The Andhra High Court has held that there is no essential distinction between the contract of sale and contract of purchase. One change has certainly been made now by the statute. For sale of the minor property sanction of the court is now necessary (See Section 8. Hindu Minority and Guardianship Act).Finally the Supreme Court held:

'....AFTER the passing of Hindu Minority Act, 1956,the guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate.This provision makes it clear that the guardian is entitled to act so as to bind the minor if it is necessary or reasonable and proper for the benefit of the minor. The power thus conferred by the section is in no way more restricted than that was recognised under the Hindu Law. It is not disputed in this case that the contract entered into by the guardian is for the benefit of the minor. It appears quite strange that the respondent should plead that the transaction is not for the benefit of the minor when the minor is convinced it is in his benefit and that it is worth pursuing the litigation up to this Court. 1. is common knowledge that the prices of immovable property have been on the rise and there can he no doubt that the

transaction is for the benefit of the minor.'

(12) The court rejected the argument that a contract to purchase property on behalf of the minor amounted to imposing personal covenant on the minor. The court concluded:

'WE are unable to accept this contention for it cannot be said that the guardian by the contract was binding the minor by his personal covenant. Asit is within the competence of guardian, the contract is entered into effectively on behalf of the minor and the liability to pay the money is the liability of the minor under the Transfer of PropertyAct. We are unable to accept the plea that in a contract for purchase of property, the guardian would be binding the minor by his personal covenant In the result, we find that the contract entered into by the guardian on behalf of the minor is enforceable.'

(13) The following passage from Pollck and Mulla's India contract. and Specific Relief Acts, 7th ed. p. 70 sums up the legal position :

'ITis, however, different with regard to contracts entered into on behalf of a minor by his guardian or bya manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Privy Council that the contract can be specially enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so asto bind him by it, and, further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all.'

(14) This passage was quoted with approval by the Privy Council in Subrahmanyam and by the Supreme Court In Manik Chand.

(15) The legal petition is this. The minor 'transferor' and a 'transferee'. Of course subject to the restrictons enacted in the Hindu Minority and Guardianship Act on the powers of the Guardian of a Hindu minor A contract entered into by a guardian of a Hindu minor for purchase or sale of immovable property is specification enforceable by or against the minor, the substantial case law which grew around

the doctrine of mutuality since 1877 when old specific Relief Act was passed may now safely be consigned to the legal wastepaper basket.

(16) The trial judge followed the Punjab decision of Pandit J. in Sunder Singh v. Jiwan Singh (1970) 72 Plr 21 S. in our opinion that case was not correctly decided A minor purchaser of land was the plaintiff. He agreed to purchase land from one Jai Singh. The vendor did not execute conveyance.The. minor sued of specific performance. Following Mir Sarwarjan Pandit J. held that before holding that the minor plaintiff can enforce the contract the court must find (1) whether the contract was within the competence of the guardian,and (2) whether it is for the benefit of the minor. He remitted the case to the trial court to give a finding on these two points in the light of the provisions section 9(1) of the Hindu Minority & Guardianship Act.

(17) With respect what the learned judge missed is that the authority and competence of the guardian he was the father before Pandit J.) can be challenged only by the minor or someone en his behalf, say maternal uncle or mother. It cannot be challenged by the vendor. He is not the minor's keeper.Nor parens patriae. Nor patria potestas The vendor JaiChand knew that the purchaser was a minor and on his behalf his father had made the contract to purchase land. It will be unjust if the vendor, after making the contract, can Question the competence of the guardian and require the court to find whether the contract is for the benefit of the minor. A contract breaker, a wrong doer, will then he taking advantage of his own wrong. On his own breach he will gloat with satisfaction. He will rejoice in his wrong doing. The law will become an instrument of fraud No one will buy in the name of the minor. This is introducing the doctrine of mutuality in disguise. And mutuality doctrine the legislatures has abolished.ft has disappeared from the legal vocabulary of the Specific Relief Act Mr. Sarwajan is based on the leading English case of Flight v. Bolland (1828) 38 PR. 817 This was referred to in arguments before the Privy Council. (See P.2 of39 I.A. 1).

(18) Flight v. Bolland is an illustration of the rule that where mutuality is lacking the court will not order specific performance. The minor was held unable to obtain specific performance on the basis that .specific performance, would notbe decreed

against him. But after the abolition of the doctrine of mutuality by section 20(4) Flight v. Bolland has no application in India. Though mutuality the legislature buried in 1963still it continued to govern us from the grave till the Supreme Court decided Manik Chand in 1981. Mutuality is no longer the test. The true test is the authority and competence of the guardian to enter into the contract for the benefit of the minor or his estate. (Bhupal v. Mamchand. : AIR1973 All543). But competence can bs challenged by some one on behalf of the minor who is interested in his welfare and not by the vendor. It is only the minor who can raise the objection based on section 8(1) of the Hindu Minority & GuardianshipAct, 1956 and not a third party. (Linga Reddy v. Ramchandrappa Air 1971 Mys 194 It is strange as the Supreme Court said, that the vendor car. plead that the transaction is not for the benefit of the minor when the miner is convinced that it is for his benefit.

(19) Though Lord Macnagthen's opinion in Mir Sarwarjan is entitled to the greatest respect due to that. great master of The Law, we may be forgiven for saying that Homer sometimes nods.Mir Sarwarjan is mutuality run riot, as Viswanatha Sastri J.said in. Ramalingam v. Bavanambal Ammal, : AIR1951 Mad431 . He held that in Subrahmanyam the doctrine of mutuality was discarded by the very tribunal which was responsible for its introduction' in India, and that we need no longer feel oppressed by the doctrine of mutuality as it was pot only unjust but also illogical. His view was accepted by the Full Bench of Andhra in Suryprakasam v. Gangaraju. Air 1956A.P. 33The Supreme Court approved of the Andhra Full Bench as a correct exposition of the law.

(20) The truth is that Mir Sarwarjan was decided purely on English law. It did not take note of the personal law of theHindus. That the question is essentially of Hindu Law was emphasised by Lord Morton in Subrahmanyam. In Imambandiv. Mutsaddi (1918) 45 LA. 73 Sir Ameer Ali in Privy Council decided the question on the rules of Muslim law.

(21) We have, thereforee, come to the conclusion that the contract was not void on account of minority of plaintiffs 2 and3 and that it was enforceable at 'the instance of all the threeplaintiffs. The learned judge was in error in dismiss the claim of the

minor plaintiffs 2 and 3.

(22) The second defense raised by the vendors was that the purchasers were not prepared to pay the price of one bigha i.e. 1008 sq. yards and were thereforee not willing to perform their part of the agreement. In this connection counsel for the vendors, referred us to the statement of Siri Niwas wherein unambiguous terms the said : 'We were not prepared to pay price of one bigha land to the defendants because this question does not arise.' Was this stand justified In other words, the question is whether the purchasers were bound to pay the price of one bigha or less.

(23) By contract dated 13-1-1961 the vendors agreed to sell 'approximately' one bigha of land. The agreement to sell Bays 'about I bigha'. What then is the meaning of the word'about'? This is partly a matter of fact and partly a matter of law. The! expressions 'approximately' and 'about' mean much the same as the phrase 'more or less'. Approximately means very nearly but not absolutely. Near in quantity. With relation to quantity, the term suggests only an estimate of probable quantity. Its import is that the actual quantity is a near approximation to that mentioned, and it has the effect of providing against accidental variations. The term is of relativesignificance, varying with circumstances. When the vendor uses such a phrase as 'say about' his purpose is to guard himself against being supposed to have made any absolute promise asto quantity (Benjamin on Sale 8th ed. p. 707).

(24) These words or similar expression as ''be the same more or less' are used in contracts for the sale of land and conveyances to cover any slight inaccuracy in the area as stated. The description would run, 'containing ten acres be the same more or less'. They would cover only a very slight deficiency in the area. What precisely they cover has never been accurately laiddown: and for any considerable deficiency the purchaser would be entitled to an abatement of the agreed price (Cross v. Eglen(1831) 109 E.R.1083. The more general form now is 'ten acres of thereabouts.' The effect of the words 'about' or 'approximately' has never been yet absolutely fixed by decision.

(25) In the present context the expression 'about bigha' left the quantity of land altogether uncertain. The precise quantity was not mentioned in the agreement. The parties contemplated some other criterion of the quantity of land that was agreed to be sold. The area was precisely described in the Plan incorporated in the agreement. The agreement refers to the plan and says: 'The map of the land is with this' agreement.The plan is the criterion. What was left uncertain the agreement was defined with precision in the plan. The. exact quantity of land comprised in the boundaries of the plan, was agreed to beconveyed.

(26) Even in the conveyances of skilful conveyances such expression as 'more or less' or 'about so much' are frequentlyused. The ambiguity in the instrument is explained in the plan.The expression 'about one bigha' are words of estimate andexpectation. The words of incorporation of the plan inthe instrument are 'words of contract'. The vendor is saying to the purchaser: 'You are buying the enclosed land as shown in the diagram.' The word 'about' or 'nearly' is the direct opposite of 'extactly or 'precisely'.

(27) Now what are the facts found by the trial judge Onthe question of actual area of the plot he found that at the time of the execution of the agreement the land was notmeasured. An architect was produced in evidence who had measured the plot and prepared a plan (Ex. P-5). He stated that the area of the plot was about 817.9 sq. yards excluding the gali. If the gali is included the area comes to 857.9 sq. yards. In the plaint the plaintiffs had given the area on a rough estimate as887 sq. yards approximately. The only question is. whethergal should be included in or excluded from the land, agreed: to besold.

(28) The learned judge accepted the testimony of the 'architect and held that the area of the gali cannot be included in the area of the plot. He found as a fact that the area of the land which was agreed to be conveyed by the vendors was 817.9 sq.yards. For this area the purchaser Siri Niwas'was directed to deposit the balance price of Rs. 12,084.00 at the agreed rate ofRs. 16.00 per sq. yard.

(29) In our opinion the findings of the learned judge cannot be faulted. From the evidence one thing is clear. The area of the plot was not measured at the time the agreement to self wasexecuted. The area sold was described as 'about bigha'.

This is why the rate was fixed as Rs. 16/.- per square yard. It was nota lump sum price. The purchasers were to pay at the rate ofRs. 16.00 per square yard for the land found on measurement and delineated in the plan (A-1 incorporated in the agreement to sell.

(30) Now it is a settled principle of law that where there is a dispute regarding the area of the property sold but boundaries of the property are not disputed, the boundaries .shall prevail over the measurements. (See Subbayya v. M. Muthra Goundan AIR 1924 Mad. 493 Raghunandan v.Kishundeo, : AIR1926 Pat257 Province of Bengal v. Mohd. Yusuf : AIR1943 Cal122 ; and Sheodhyan Singh v. Sanichura Kuer, : [1962]2SCR753 . Here the plan is not just annexed to the agreement. It is incorporated in the agreement. The delineation of the parcel of land in the plan is the controllingfactor. The agreement states the land approximately. The plan fines it with certainty. The land described in general terms inthe agreement is sufficiently described in the plan by the particular description of the boundaries enclosing the land on all the four sides.

(31) There is another good reason why we should exclude the gali from the land agreed to be sold. The agreement dated13-1-61 says : 'Before the registration of the land, the land will have to be got vacated.' This means that the vendors agreed to give vacant possession of the land to the purchasers. of the gali vacant possession cannot be delivered. We thereforee agree with the trial judge that the land agreed to be sold is 817.9 sq.yards and the purchasers are to pay for this only at the agreed rate of Rs. 161- per sq. yard.

(32) We were referred to Tata Industrial Bank v. Rustomjee Bramjee Jeegebhoy (1920) 57 Ic 957 and section 12 of the Specific Relief Act to persuade us that in this case we should refuse specific performance because the land agreed to be sold was 1008 .sq. yards and on measurement it was found to be only 817.9 .sq. yards and the difference between the two areas does not bear 'a small proportion to the whole', in the words of See. 12. We have no hesitation in rejection this argument. We have held on the interpretation of the contract that the vendors agreed to sell and the purchasers agreed to buy only that area of the land which was depicted in the diagram.We have held that the plan is an integral part of the

description of the lard Neither Section 12 nor the Bombay ruling in Tata Industrial Bank has any relevance. We have not ordered the Vendors to pay compensation because the area is found to He smaller than that which they agreed to sell. That is just the type of case contemplated in Section 12(2). What we have found is 'that the area agreed to be sold was in reality and substance817.9 sq. yards. There is no difference in quantity. There is no question of award of compensation under Section 12, Specific Relief Act.

(33) We do not sec why we should not order specific performance against the vendors when we find that the purchasers'conduct is blameless and there are no disqualifying circumstances disentitling them to the discretionary remedy of specific performance. The rule is that 'the Court will grant specific performance if it can be done without injustice or unfairness to thedefendant.' (Price v. Strange (1978) Ch. 337 per Goff LJ.).

(34) The third defense raised by the vendors was that the purchasers were not ready and willing to perform their part of the agreement. On this issue the learned judge accepted the evidence of the purchasers. He came to the conclusion that the purchasers had the balance consideration of Rs. 16,500.00 ready with them on 28-2-61, the date fixed for the completion of the sale. He held that as the vendors admittedly did not attend thesub-Registrar's office on 28-2-1961 and did not complete the sale they had failed to perform their part of the agreement.On the evidence adduced by the purchasers in the case we have no hesitation in endorsing these findings. There is no evidence to the contrary to displace the finding of the learned judge.

(35) For these reasons we dismiss the vendors' appeal (RFA52 of 1973: Roomal and Jodha v. Siri Niwas and others,) withcosts.

(36) The purchasers' appeal Rfa 80 of 1973 : Satish Kumar and ors. v. Roomal and others) we allow with costs. We have been informed that the purchasers have deposited the balance sales price i.e. Rs. 12,0841- in Court. The vendors are ordered to execute the sale deed within one month from today failing which the trial court will execute the conveyance at the cost of the vendors.

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