

NON-REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO. 3912 OF 2017**PATEL KANTILAL PARSHOTTAMDAS (D)
& ORS.

.....APPELLANT(S)

VERSUS

JITENDRAKUMAR NANJIBHAI MISTRY
(D) THROUGH LRS & ORS.

.....RESPONDENT(S)

J U D G M E N T**A.K. SIKRI, J.**

First, the facts and events in chronological order, as reading of these facts will facilitate proper understanding of the issues that have cropped up in the instant appeal of the dispute between the parties.

One Jeevandas was the owner of a part of property bearing plot Nos. 109 to 112, which was demarcated and known as sub-plot No.10 of the said plot. This sub-plot measures 828 square yards and is situated outside Shanpur Darwaza, Mahendi Kuva Road, Ahmedabad. Jeevandas executed a sale deed in respect of this plot (hereinafter referred to as the 'suit property') in

favour of one Kantibhai (for short 'Kanti') on 16.04.1959 for 99 years, of which yearly rent fixed was Rs.1860/-. This lease deed also provided an option to the lessee to purchase the suit property. The lessee (Kanti) executed an Agreement of Sell dated 15.07.1974 in respect of the suit property in favour of one Jitenderkumar Nanjibhai (for short 'Jitender') at a total consideration of Rs.1,85,001/-. The purchaser paid earnest money of Rs.25,000/- at the time of execution of the said Agreement to Sell. This agreement further provided that the sale deed would be executed within a period of five months from the date of execution of the agreement. Sale deed was, however, not executed within the said period and by mutual agreement this period was extended by another five months. A further sum of Rs. 20,000/- was paid by Jitender to Kanti. However, even during the extended period, no sale deed could be executed.

- 2) According to Jitender (purchaser), the period for execution of the sale deed was further extended by two years, though Kanti disputed this. Kanti gave notice dated 06.05.1981 to Jitender for cancellation of Agreement to Sell putting blame on Jitender in not performing his part of the contract. Jitender replied to the said notice taking the position that the period for execution of sale deed had been further extended.
- 3) As this led to dispute between the two, Kanti filed two suits against Jitender:

for cancellation of Agreement to Sell and for possession and mesne profits. After sometime, Jitender also filed suit against Kanti for specific performance of Agreement dated 15.07.1974. All these suits were clubbed together. The trial court decreed the suit filed by Kanti. Suit of Jitender for specific performance was dismissed barred by limitation as well. The trial court also returned the finding to the effect that Jitender could not establish that he was ready and willing to perform the contract. He, in fact, did not even enter the witness box in support of his case. The trial court, therefore, accepted the case put up by Kanti to the effect that even when Kanti was in a position to handover complete and vacant possession of the suit property, Jitender did not perform his part of the contract within stipulated period.

- 4) Jitender filed three appeals against the aforesaid judgment. During the pendency of these appeals, both Kanti and Jitender passed away and their legal heirs were brought on record. The High Court has decided these appeals by the common judgment dated 22.10.2013. The High Court has maintained the decree of dismissal of the suit filed by Jitender for specific performance. Upholding the judgment of the trial court, the High Court has held that Jitender is not entitled to the specific performance of the contract. However, insofar as decree passed in favour of Kanti in the suit filed by him is concerned, the High Court has set aside the said decree and remanded the case back to the trial court. The High Court discussed the nature of suit filed by Kanti and pointed out that his suit was for cancellation of agreement on the

ground that there was failure on the part of Jitender to show readiness and willingness to execute the sale deed, which plea was accepted by the trial court. The High Court has held that this is an erroneous approach inasmuch as under Section 31 of the Specific Relief Act, 1963, the suit can be instituted for cancellation of written agreement when such written agreement is void or voidable. Thus, Kanti was supposed to show that the agreement is void or voidable. Instead, plea taken was that the other side has not shown readiness or willingness to execute the sale deed, which could not be a ground for cancellation of the agreement.

- 5) The High Court pointed out that Kanti was given lease of the said property in question for a period of 99 years by Jeevandas and, therefore, Kanti was only a lessee. No doubt, the said lease deed gave right to Kanti to purchase the suit property from the original owner. However, such an option to purchase the suit property given to Kanti was not exercised by him during the period mentioned in the lease deed or during the life time of the original owner i.e. Jeevandas. Thus, Agreement to Sell executed by Kanti in favour of Jitender was in the nature of 'contingent contract' and, therefore, Jitender could hardly acquire any right when Kanti himself was not the owner of the property. It is further held that Kanti had yet to become the owner. As he had not acquired propriety rights over the suit property, it was not possible for him to transfer such a right to Jitender. Having held so, the matter has been remanded back under the following circumstances:

“... But the point is, what is nature of agreement – i.e. agreement to sell, executed in the present case. It is in nature of contingent contract and hence, voidable on that count. The question that what is the nature and strength of agreement to sell – can be answered satisfactorily only when plea based on the point that contract is in nature of voidable contract is raised and the same is defended by the other side. Broadly stated, status of ‘seller’ at the time of execution of agreement to sell being status of ‘lessee’ only and acquiring of proprietary rights by the purchaser depending on ‘owner’ executing the deed in favour of purchaser, places the agreement to sell in category of ‘contingent contract’. Prima facie, the agreement falls in realm of ‘contingent contract’. Upon hearing the learned advocate for the parties and in the circumstances of the present case, it appears to be just and proper to allow the present appeal and remand Civil Suit No. 4104 of 1982 for its disposal in accordance with law. It would be open to the parties to amend the pleadings accordingly and to lead the evidence – if the parties are so advised – in addition to the evidence already on record. It is clarified that it would also be open for the parties and the trial court to refer to and rely upon the evidence already on record. Since the suit is very old, it is expected that trial court would dispose of the suit as expeditiously as possible.”

- 6) It is this outcome which is unpalatable to the legal heirs of Kanti, who have filed the special leave petition which has been converted into appeal after grant of leave therein.
- 7) Before advertng to the arguments of the learned counsel for the parties, we deem it appropriate to record that insofar as suit filed by Jitender for specific performance of the contract is concerned, a plea of part performance of the contract was taken in the said suit which was predicated on the averment that on an execution of the Agreement to Sell, possession of the suit property was handed over to the purchaser. The trial court held that it was not so as the possession was not given consequent upon entering upon the said agreement

but on account of relationship between the parties. The High Court termed this finding as erroneous and held that parting with possession of the suit property was pursuant to the Agreement to Sell entered into between the parties. However, appeal of Jitender against the judgment of the trial court for specific performance has been dismissed on the ground that even if such a possession was taken, it did not absolve the purchaser for his obligation to comply with the requirement of showing his readiness and willingness to execute the sale deed and that Section 53A of the Transfer of Property Act, 1882 could be used as a shield and not as a sword. The High Court also affirmed the finding of the trial court that the suit filed by Jitender, in any case, was barred by limitation and, therefore, Jitender could not avoid the inevitable result, merely by relying on Section 53A of Transfer of Property Act, 1882.

The result is that suit for specific performance filed by Jitender stands dismissed and the judgment of the High Court has attained finality as there is no appeal by the respondents (legal heirs of Jitender).

- 8) In this hue, we now revert back to the decision of the High Court in respect of suit filed by Kanti (predecessor of appellant) which is remanded back to the trial court as noted above. We are of the opinion that the aforesaid course of action adopted by the High Court in respect of relief claimed by Kanti in a suit is not appropriate. In the suit filed by him, Kanti had pleaded that after the execution of the agreement, Jitender failed to perform his obligation contained therein as he defaulted in making the payment of balance consideration within

the time stipulated. On that basis, the prayer made in the suit was that the amount of earnest money under the agreement stood forfeited as the agreement had become non-effective, null and void and consequently possession of part of suit property held by Jitender was illegal which should be handed over to the plaintiff. Mesne profit was also claimed. Second suit filed by Kanti was specifically for mesne profit and for possession. No case was set up by Kanti that agreement was void because of the reason that he was only a lessee in the suit property which was given to him by the original owner Jeevandas for a period of 99 years and as he had not become the owner thereof, the agreement was in the nature of 'contingent contract'. Obviously, no evidence was led by any of the parties to this effect in the absence of pleadings. Therefore, High Court could not, of its own, set up a new case which was not a case pleaded by any of the parties. The liberty to amend the pleadings which is given is in the nature of allowing the appellant to come out with altogether a new case not even pleaded or argued before the High Court. Such an amendment could not have been allowed even if an application under Order VI Rule 17 CPC was filed for amending the plaint. In fact, the appellant had not even sought this remedy. The decree passed by the High Court on this ground and direction to the trial court to dispose of the case afresh after allowing amendment in the pleadings and leading further evidence on amended pleadings is, therefore, clearly erroneous in law. We, thus, set aside this direction.

9) In the suit filed by Kanti (predecessor in interest of the appellant), his main reliefs were to declare agreement to sell as void and for possession-cum-mesne profit. Insofar as the first relief is concerned, this result stands achieved on the dismissal of the suit filed by Jitender for specific performance and in view of the findings of the courts below that Jitender failed to fulfill his obligations under the said agreement and could not establish that he was ready and willing to perform his part of the contract. The only question is as to whether the relief of possession could have been decreed. The trial court had decreed the suit to this effect. Against this decree, respondents had filed the appeal. The High Court has not dealt with that aspect and instead remitted the case back for fresh consideration, which direction has been set aside by us.

Though, this issue was argued before us, however, we are of the opinion that it may not be proper for this Court to consider this aspect inasmuch as this issue had arisen in the appeal of the respondents in the High Court and respondents are not in appeal before us. It would, therefore, be more appropriate if the aforesaid issue is decided by the High Court.

10) The appeal which was filed by the respondents against the decree passed in Civil Suit No. 4104 of 1982 is accordingly allowed. While setting aside the order of remand in Civil Suit No. 4104 of 1982 passed by the High Court, the High Court shall deal with the appeal of the respondents against the decree of

the Civil Court in Civil Suit No. 4104 of 1982 on the limited question of possession which was sought by the appellant in the said suit.

No costs.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI;
APRIL 13, 2017 .



JUDGMENT