

(1972) 12 AHC CK 0008

Allahabad High Court

Case No: Second Appeal No. 2976 of 1964

Jagar Nath

APPELLANT

Vs

Chhedi Dhobi and Others

RESPONDENT

Date of Decision: Dec. 12, 1972

Acts Referred:

- Transfer of Property Act, 1882 - Section 10

Citation: AIR 1973 All 307

Hon'ble Judges: T.S. Misra, J

Bench: Single Bench

Advocate: S.C. Asthana, Chhote Lal, V.K.S. Chaudhary and Shambhu Prasad, for the Appellant; G.P. Bhargava and A.H. Bhargava, for the Respondent

Final Decision: Allowed

Judgement

T.S. Misra, J.

This is a plaintiff's appeal arising out of a suit for specific performance of a contract of sale and for a declaration that the "bara" situated to the south of his house was never sold by him to the defendant No. 1 and also for possession over the said "bara" in case he was found to be out of possession. It was alleged by him that Purshottam who was impleaded in the suit as defendant No. 2 and who subsequently died during the pendency of the suit was his second cousin. Four or five years prior to the filing of the suit Purshottam returned to the village with a view to settle down there. For this purpose he requested the plaintiff to find out a house for him. The plaintiff suggested that one of his houses, which is in fact the subject-matter of the suit, might be purchased by Purshottam on the condition that Purshottam and his heirs might continue in possession of the house for any length of time and in case they ever desired to sell the same, they would first offer the same for sale to the plaintiff or his heirs and on his refusal to purchase the same they could sell it to any third person. This condition was accepted by Purshottam and the house was accordingly sold to him per sale deed dated 1-5-1951 in which

the said condition was incorporated. Purshottam, however, did not abide by that condition and sold the house to Chhedi Dhobi, defendant No. 1 for a sum of Rs. 700.00 on 30-6-1955 without first offering the same to the plaintiff. Purshottam also included in the sale deed the plaintiffs Bara which had never been sold to Purshottam and of which he was not the owner. As the defendants failed to transfer the house to the plaintiff for this amount of Rs. 700.00, the latter instituted the suit which gave rise to the present appeal. The defendant No. 1 contested the suit, inter alia, on the ground that there existed no such contract between the plaintiff and Purshottam as alleged in the plaint and at any rate the alleged contract was illegal. It also pleaded that the plaintiff had refused to purchase the house, hence he purchased the same from Purshottam for a sum of Rs. 700.00. The bar of the provision of Section 41(14) of the Transfer of Property Act was also raised by him. The trial court having found that the agreement in question being uncertain and violative of the rule of perpetuity was unenforceable. It, however, found that Purshottam had sold the house to the defendant No. 1 without ever offering to the plaintiff and had wrongly included Bara land in the sale deed executed in favour of the defendant No. 1. The trial Court dismissed the suit for specific performance of contract of sale but granted the decree for possession over the Bara land. Against the said decision, the plaintiff and the defendant No. 1 filed separate appeals. Both the appeals were heard and disposed of by a common judgment by Civil and Sessions Judge. The appellate court below found that the agreement was vague and it offended against the rule of perpetuity. It also did not give any right to pre-empt. The Appellate Court below also recorded a concurrent finding of fact that Bara land was never transferred to Purshottam hence he had no right to sell the same to the defendant No. 1, On these findings both these appeals were dismissed. Aggrieved the plaintiff has come to this Court in second appeal. A cross-objection has also been filed by the defendant No. 1.

2. The learned counsel for the appellant contended that the agreement to sell as contained in the sale deed, Ex. 1, was neither vague nor did it offend against the rule of perpetuity. It is stated in the sale deed, Ex. 1, that Purshottam had after disposing of his ancestral house left the village but had later on returned and as he had no house to live in, he requested Jagar Nath. Ram to get a house for him so that he could settle down in the village. Jagar Nath was then owning two houses. He offered to sell one of those houses to Purshottam on the condition that if at any time Purshottam wanted to sell that house, he could sell the same to Jagar Nath or his heirs, as the case may be, and if Jagar Nath or his heirs did not purchase the same, then in that event, Purshottam or his heirs, as the case may be, could sell the house to any other person. This condition was agreed to by Purshottam and on this agreement Jagar Nath sold the house to Purshottam. Both the courts below have found the terms of the agreement to be vague, because they do not specify the price at which Purshottam was to sell the house to the plaintiff and the period within which the plaintiff could exercise his right. In my view the agreement in question

suffers from no infirmity. The agreement for sale cannot be held to be void merely because no time for performance is specified. At any rate in the instant case the agreement provided that whenever Purshottam desired to sell the house he would have to offer the same first to Jagar Nath, or his heirs as the case may be. If the latter did not purchase the house within a reasonable time, Purshottam had the right to sell the same to any person he liked. The price at which the house was to be resold to Jagar Nath was also not left Indetermined inasmuch as Purshottam was given a right to sell the house at a reasonable price. While construing the terms of the agreement, we have not merely to look at the form or the language but its substance, the governing idea or purpose of the deed, the context and the surrounding circumstances. As pointed out above, Purshottam was in need of a house in the village. Jagar Nath who was cousin of Purshottam agreed to sell one of his houses to him on the agreement that if and when Purshottam wanted to sell that house, he could sell the same to Jagar Nath or his heirs, as the case may be, and in the event they failed to purchase the same, Purshottam could sell that house to any other person at a reasonable price. The terms of this agreement were, therefore, quite clear to the parties concerned and did not suffer from any infirmity on account of the alleged vagueness therein.

3. Both the courts below had also held that the said agreement offended against the rule of perpetuity. In support of this finding the learned counsel for the respondents referred me to 64 Ind Cas 1001 (Cal.), *Rash Behari Gangully v. Shabharanjan Samaddar*; [Dol Singh and Others Vs. Khub Chand and Others](#), , and AIR 1924 Oudh 125, *Teju Singh v. Moti Singh*. In my view these decisions do not help the respondents. In the case of *Rash Behari Gangully* (supra), it was held that a covenant for pre-emption which is unlimited in point of time is void on the ground that it is obnoxious to the rule against perpetuities. Subsequently a Full Bench of the Calcutta High Court in the case of [Moulvi Ali Hossain Mian and Others Vs. Rajkumar Haldar and Others](#), , however, held that covenant for pre-emption in respect of land unrestricted in point of time and binding on parties, their heirs and successors did not offend the rules against perpetuity. In the case of *Dal Singh* (supra) the agreement provided as follow:--

"I the executant promise and execute this document in proof of my promise that when I the purchaser or my heirs want to transfer the shares in two villages then I will sell them to Ganga Din or his heirs for the sum of Rs. 400/- and will not sell them to anybody else."

Thus there was a clear agreement between the parties that the executant would not sell the properties to anybody else. The terms of that contract were held to constitute a transfer of property subject to a limitation absolutely restraining the transferee from parting with or disposing of his interest in the contract inasmuch as he did not have the right to sell the properties to anybody-else except to Ganga Din or his heirs. That is not so in the present case. It was agreed between the parties

that in case Jagar Nath or his heirs did not purchase the property, Purshottam would have the right to sell the same to any other person at a reasonable price. Similarly in the case of Teju Singh (supra) the terms of the grant provided that the property could not be transferred to a stranger and such a restriction on alienation was held to be absolute. The facts of this case also, therefore, are distinguishable.

4. The rule against perpetuity is embodied in Section 14 of the Transfer of Property Act. Its object is to restrain the creation of future conditional interest in the property. It concerns rights of property only and does not affect the making of contracts which do not create rights of property. It does not, therefore, apply to personal contracts which in effect do not create interest in property. An ordinary contract for purchase entered into after the Transfer of Property Act does not by itself create any interest in land but the obligation can be enforced against a subsequent gratuitous transferee from the vendor of a transferee of value but with notice. The rule against perpetuity has no application to contracts which create no interest in land. The rule against perpetuity as quoted in Section 14 of the Transfer of Property Act begins with these words, "no transfer of property can operate etc.". The provision of Section 14 would therefore not apply to those cases in which there is no "transfer of property". The agreement in the instant case is not a transfer of property at all. Therefore, Section 14 has no applicability.

5. The provisions of Section 10 of the Transfer of Property Act also do not apply to the facts and circumstances of the instant case. In the case of [Debi Dayal Vs. Ghasita and Others](#), where the facts were similar to the present case, it was held that the agreement could not be deemed to be void on account of admiralty or on account of its offending against rule of perpetuity and that the subsequent purchaser having purchased the house with notice of the agreement, the contract could be enforced against him as well. It was also held that it was not a suit for pre-emption governed by Pre-emption Act but for the enforcement of a special contract between the parties. In the present case as well the parties had entered into a special personal contract which was binding on them and their heirs and could be enforced against a transferee with notice. It was not argued and could not be argued that the defendant No. 1 did not have the notice of the agreement. In fact the agreement was contained in the sale deed which was executed in favour of Purshottam and the defendant No. 1 must be deemed to have been aware of the terms contained in the sale deed executed in favour of his predecessor-in-interest. No absolute restraint was imposed by the terms of the agreement in question. The courts below were, therefore, not justified in holding that the contract suffered from infirmity of vagueness and that it offended against the rule of perpetuity. There is, however, concurrent finding of fact that Purshottam sold away the house to Chhedi Dhobi without ever offering it to the plaintiff. The plaintiff was, therefore, entitled to have the agreement specifically performed by having the sale-deed executed in his favour on payment of a sum of Rs. 700.00 which was the price at which Purshottam had sold the house to the defendant No. 1.

6. The learned counsel for the respondents has also placed reliance on the two rulings of this Court viz. [Asghari Began, and Others Vs. Maula Baksh](#), and [Gayasi Ram and Others Vs. Shahabuddin and Others](#), . In both these cases it was laid down that where a deed of transfer provides that the Vendee should not transfer the property to any one excepting the vendor or his heirs, the clause is contrary to Section 10 of the Transfer of Property Act and is void. In the instant case, however, the agreement in question does not provide that the vendee shall not transfer the property except to the vendor or his heirs. In fact the stipulation in the deed is to the effect that if and when the vendee intended to dispose of the house, he would first offer the same for sale to the Vendor or his heirs as the case may be and if they declined to purchase the same the vendee would be entitled to sell the property to any third person at a reasonable price. This condition, therefore, would not amount to an absolute restriction on the right of transfer. In the case of [Gayasi Ram and Others Vs. Shahabuddin and Others](#), , Sulaiman, C. J., observed:--

"As laid down by then: Lordships of the Privy Council in 1932 P. C. 158 (2), the prohibition contained in Section 10 is operative against an absolute restraint on alienation only and not against partial restraints. But in order to see whether there is absolute restraint or not, one has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited".

7. In my view the effect of the condition referred to above is not to prohibit alienation altogether excepting to the vendor and his heirs. In the present case, therefore there was only partial restraint and not absolute restraint on alienation. Hence the provisions of Section 10 of the Transfer of Property Act were not applicable.

8. The appeal filed by the plaintiff must therefore succeed. The defendant No. 1, Chhedi Dhobi has filed cross-objection. Both the courts below have held that the Bara in question was not sold by Jagar Nath to Purshottam. That being so Purshottam had no right to sell that Bara land to the defendant No. 1. The finding of the courts below is based on the appreciation of the evidence on record and I find no reason to interfere with the same in second appeal. The cross-objection must, therefore, fail.

9. No other point was pressed in the appeal or cross-objection.

10. In the result the appeal filed by the plaintiff is allowed with costs. The cross-objection filed by Chhedi Dhobi. the defendant No. 1. is dismissed. The decree passed in the Civil Appeal No. 20 of 1962, Jagar Nath v. Chhedi Dhobi is set aside and the suit is decreed. The plaintiff shall deposit a sum of Rs. 700.00 in the trial court within three months from the date hereof. The defendants Nos. 1 to 4 shall within two months of the date of deposit of the said sum, execute a sale deed in favour of the plaintiff in respect of the house in question. The stamp and registration charges pertaining to the sale deed shall be borne by the plaintiff. If the defendants Nos. 1 to

4 fail to execute the sale deed within the said period the trial court shall execute the sale deed in favour of the plaintiff in accordance with law. The plaintiff shall be entitled to his costs here and in the courts below.