

## **Surinder Singh vs Kapoor Singh (Dead) Th. Lrs. & Ors on 3 May, 2005**

**Equivalent citations: AIRONLINE 2005 SC 470, 1995 (3) SCC 573, (2005) 2 CLR 2, (2005) 2 CUR LJ (CIV&CRI) 447, (2005) 4 SCJ 519, (2005) 100 CUT LT 198, (2005) 3 MAH LJ 747, (2005) 2 CUR CC 216, (2005) 3 UC 1548, (2005) 2 ALL WC 1685, (2005) 5 BOM CR 605, 2005 (5) SCC 142, (2005) 59 ALL LR 754, (2005) 3 CIV LJ 811, (2005) 4 ANDH LD 106, (2005) 4 SCALE 596, (2005) 2 CIVIL COURT CASE 685, (2005) 3 REC CIV R 268, (2005) 4 SUPREME 40, 2005 BLJR 2 1316, (2005) 2 CURLJ(CCR) 447, (2005) 2 CIVILCOURTC 685, (2006) 100 REVDEC 22, 2005 ALL CJ 2 1464, (2005) 2 CLR 2 (SC), (2005) 2 WLC (SC) CIVIL 116, (2005) 30 ALL IND CAS 92 (SC), (2005) 3 ALL MR 816 (SC), (2005) 2 CTC 801 (SC), (2005) 2 CTC 121 (MAD), (2005) 30 ALLINDCAS 256 (MAD), (1995) 2 CURCC 261, (1995) 2 SCJ 110, (1995) 2 SCR 513 (SC), (2005) 30 ALLINDCAS 92, (2005) 3 ALLMR 816, (2006) 3 ESC 1737, (2006) 3 UPLBEC 2535**

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**Bench: N. Santosh Hegde, D.M. Dharmadhikari, S.B. Sinha**

CASE NO.:

Appeal (civil) 401 of 1994

PETITIONER:

Surinder Singh

RESPONDENT:

Kapoor Singh (Dead) Th. Lrs. & Ors.

DATE OF JUDGMENT: 03/05/2005

BENCH:

N. Santosh Hegde, D.M. Dharmadhikari & S.B. Sinha

JUDGMENT:

**J U D G M E N T S.B. SINHA, J :**

A two-Judge Bench of this Court by an order dated 6.9.2001 referred the matter for decision by a bench of three Judges in view of the purported conflict recorded in Kartar Singh vs. Harjinder Singh and Others [(1990) 3 SCC 517] and Rachakonda Narayana vs. Ponthala Parvathamamma and Another [(2001) 8 SCC 173].

The basic fact of the matter is not in dispute.

Balwant Singh father of the Appellant herein was the owner of the suit land measuring 153 Kanals 19 Marlas. He allegedly entered into an agreement to sell the said land on a consideration of Rs.500/- per Bigha. The total consideration of Rs.16,000/- in terms of the said agreement for sale dated 22.7.1964 is said to have been paid. However, for some reason or the other no sale-deed could be executed and registered pursuant to or in furtherance thereof. It is stated that Arjan Singh had paid a further sum of Rs.14,000/- in addition to the said sum of Rs.16,000/-. The said Balwant Singh died on 11.2.1968 whereafter the Appellant herein entered into another agreement for sale on or about 17.10.1968 in relation to the suit land. The said agreement was entered into by him on his own behalf as also on behalf of his sister, for a consideration of Rs.4,700 per acre. The amount of Rs.32,000/- paid to Balwant Singh was treated to be the earnest money under the said agreement, in terms whereof, a sale-deed was to be executed and registered on or before 20.6.1969. As the Appellant herein allegedly failed and/or neglected to perform his part of contract, a suit for specific performance of the said agreement dated 17.10.1968 was filed. In the said suit, a plea was raised that the Appellant herein was not authorized to enter into the agreement for sale on behalf of his sister Tajinder Kaur. The Trial Court inter alia accepting the said plea dismissed the suit. It was further held that as two Khasras bearing Nos.39/4 and 29/3/2 were not included while describing the land in the plaint, a decree for specific performance could not be granted.

A Letters Patent Appeal filed by the Plaintiffs-Respondents herein against the said judgment and decree came to be allowed by a Division Bench of the High Court by reason of the impugned judgment holding that as the property was owned by the Appellant and the said Tajinder Kaur in equal share, in view of Kartar Singh (supra), a decree for specific performance could be granted in favour of the Plaintiffs-Respondents herein in respect of the share of the Appellant subject to his right to apply for partition of the property for getting his share demarcated. As regard apportionment of the sale consideration, it was directed that the same would be reduced by 50% as the Appellant would only be entitled thereto. As regard the objection of the Appellant herein that no relief could be granted as the plaintiffs-Respondents failed to mention Khasra Nos. 39/4 and 39/3/2 in the plaint, the Division Bench held that such omission was inadvertent. It was pointed out that such an objection was raised only at the time of argument whereupon the plaintiffs filed an application for amendment of plaint. It was held :

" We are of the view that the trial court was not justified in dismissing the application on technical grounds. Decree was sought for the entire land i.e. 153 K 19M. Copies of the agreement as well as Jamabandi for the relevant year were also attached with the plaint. Agreement as well as Jamabandi clearly indicate that relief sought was with regard to the land measuring 153 K 19M which also includes Khasra Nos. 39/4 and 39/3/2. In this view of the matter, prayer of the plaintiffs for

amendment of the plaintiff is allowed. Plaint would be deemed to have included Khasra Nos. 39/4 and 39/3/2 apart from other Khasra numbers mentioned in the plaint."

The plaintiff-Respondents has filed an application for amendment of plaint wherein a prayer was made to substitute the following prayer in stead and place of the original prayers made in the suit.:

"It is, therefore, humbly prayed that this Hon'ble Court be pleased to :

Grant decree for possession by part performance of the Agreement to sell dated 17.10.1968 of the land qua the share of Surinder Singh S/o Balwant Singh, permanent resident of Village Rajoana Kalan, Tehsil Jagraon, District Ludhiana i.e. to the extent of half share out of the total land measuring 153 K 19 Marlas comprised in Khata No. 252/229 and 253/3281 Khasra Nos. Rect No. 39 Killa Nos. 1, 2, 3/1, 7/2/1, 8, 9, 10, 11/1, 12/2, 13/1, 14/1 Rect No. 28 Killa Nos. 22, 23, 24, 25, 27 Rect No.29 Killa Nos. 21, 22 Rect No. 40 Killa No. 15/1 Rect. No.69 Killa Nos. 7/34, 4/35, 7/2 Rect No.59 Killa BO. 21 Rect No.60 Killa Nos. 16, 25 Rect No. 70 Killa No.1/1 26 mentioned in the Jamabandi for the year 1967-68 situated in village Rajoana Kalan, Tehsil Jagraon, District Ludhiana in the year 1967-68 and situated in Village Rajoana Kalan, Tehsil Jagaraon, subject to the payment of the entire sale consideration in the sum of Rs.32,000/- and dismiss the present appeal."

Mr. R.K. Talwar, the learned counsel appearing on behalf of the Appellant, would contend that having regard to the fact that the plaintiffs- Respondents did not file an appropriate application conforming to the requirements of sub-section (3) of Section 12 of the Specific Relief Act, 1963 (the Act), the impugned judgment cannot be sustained. According to the learned counsel the said Respondents had also filed a cross- objection and in that view of the matter they cannot be said to have relinquished their claim as regard performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by them through the default of the defendant, as is mandatorily required under clause (ii) of sub-section (3) of Section 12 of the Act. The learned counsel would further urge that keeping in view the fact that the application for amendment of plaint has been filed only after this Court referred the matter by an order dated 6.9.2001 to a larger Bench, the same deserves to be dismissed. It was submitted that the Division Bench of the High Court could not have allowed the plaintiffs-Respondents to amend the plaint in relation to the addition of plots which they failed to mention in the schedule of the original plaint.

The learned counsel appearing on behalf of the Respondents, on the other hand, made a statement before us that the Respondents do not intend to press his cross-objection and would relinquish the claim of any damage.

Sub-section (3) of Section 12 of the Act reads as under :

"12. Specific performance of part of contract.-(1) xxx xxx xxx (2) xxx xxx xxx (3)  
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 either

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

(b) 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 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 a case falling under clause (b), pays or had paid) the consideration for the whole of the contract without any abatement; and

(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 the loss or damage sustained by him through the default of the defendant."

The said provision postulates that where a defendant is unable to perform a part of the contract, and the part left unperformed forms a considerable portion of the whole but admits of compensation in money, the party not in default is entitled to specific performance on payment on the whole consideration, reduced by the consideration for the part left unperformed.

Section 12(3) of the Act is a beneficial provision so far as the purchasers are concerned. In the instant case, in view of the findings of fact arrived at by the High Court, the decree for specific performance of contract in respect of the entire suit land could not have been granted as the Appellant herein was not authorized by his sister to enter into the agreement for sale. The relinquishment of claim as contemplated under Section 12(3)(ii) of the Act as regard performance of the remaining part of the contract and all rights to compensation need not specifically be pleaded and can be made at any stage of the litigation. Such a plea can also be raised at the appellate stage. Delay by itself, it is trite, may not stand in the way of the plaintiff from claiming the relief unless the defendant establishes prejudice.

In this case, the Division Bench of the High Court passed a decree of specific performance of contract relying on or on the basis of a decision of this Court in Kartar Singh (supra).

In Kartar Singh (supra), as in the present case, the Respondent therein and the sister had half share in the property, an agreement for sale was also entered into by the Respondent not only in respect of his own share but also in respect of share of his sister. In that case, the High Court was of the opinion that the Respondent therein could not and in fact did not agree to sell the whole of the

property by himself as neither he had any authority to do so nor did he represent that he was the owner of the whole of the property. It was, in the aforementioned factual backdrop, the High Court further held that that sub-sections (2) and (3) of Section 12 of the Act would not be applicable because the portion to be left out was not a small portion of the whole property. This Court reversed the said finding of the High Court holding :

" Secondly, the agreement of sale clearly mentions that respondent was entering into the agreement both on behalf of himself and his sister, and that he was, under the agreement, selling the whole of his share and also the whole of the share of his sister in the property. Further in the agreement itself he had stated that he was responsible to get the sale deed executed by his sister and that he would persuade her to do so. This being the case, the properties agreed to be sold were clearly distinguishable by the shares of the respective vendors. In the circumstances when the absentee vendor, for some reason or the other, refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed it and whose property is identifiable by his specific share.

5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property."

In *Rachakonda Narayana* (supra), analyzing the provisions of sub- section (3) of Section 12 of the Act, this Court opined :

" Thus, the ingredients which would attract specific performance of the part of the contract, are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

It was furthermore held that an application for amendment of the plaint relinquishing the claim in respect of that part of the contract, which cannot be performed can be filed even at the appellate stage.

Kartar Singh (*supra*) was rendered in the fact situation obtaining therein. The observations therein to the effect that the provision of Section 12 was not applicable came to be made in view of the finding that the sister of the Respondent had not entered into any contract at all. In this case, however, the Appellant herein had entered into the aforementioned agreement for sale on the premise that he had the requisite authority to do so on behalf of his sister as also on his own behalf. The sister of the Appellant denied or disputed such authority and in that view of the matter, it is beyond any pale of doubt that the agreement for sale was entered into in respect of the entire suit land and having regard to the fact that the sister of the Appellant did not authorize him to enter into the said agreement, sub-section (2) of Section 12 of the Act would clearly be attracted. Kartar Singh (*supra*) should not be held to lay down a law to the effect that even in a case where a part of the contract is held to be invalid, Section 12 will have no application.

The question which deserves consideration now is as to whether the application for amendment of plaint filed by the plaintiffs-Respondents should be allowed. Sub-section (3) of Section 12 does not lay down any limitation for filing such an application. Such an application can be filed at any stage of the proceedings and in that view of the matter an application even before this Court would be maintainable.

In *Kalyanpur Lime Works Ltd. vs. State of Bihar and Anr.* [AIR 1954 SC 165], this Court has held :

" The last portion of the application, however, leaves no doubt whatever that all claims to further performance were relinquished and compensation prior to 1.4.1948 was also given up. The plaintiff's learned counsel has asked for that relief in the course of his arguments and he has made it clear that he insists on no further performance, nor does he claim any compensation for any period prior to the execution of the leases. Relinquishment of the claim to further performance can be made at any stage of the litigation "

A Division Bench of the Patna High Court in *Girdhar Das Anandji and Another vs. Jivaraj Madhavji Patel and Others* [1971 PLJR 66] in an identical situation, referring to the decision of this Court in *Kalyanpur Lime Works Ltd. (supra)*, held :

"I have already stated that learned Advocate General while opening the case of his client specifically stated that he was giving up the cross-objection and that he was relinquishing claim for further performance and for compensation etc. as required under Section 15 of the Specific Relief Act, 1877. The relinquishment as required by law, having been made in this Court the plaintiff-respondent could not be non-suited on this ground."

In view of the legal position and also in view of the statement made across the Bar including the application for amendment of plaint filed on behalf of the plaintiffs-Respondents in this Court, there cannot be any doubt that this Court can uphold the decree passed by the Division Bench of the High court relying on or on the basis of such statement as also upon allowing the application for amendment of plaint. It may be true that in the application for amendment, there is no specific averment as contained in clause (ii) of sub-section (2) of Section 12 of the Act but the entire application, in our opinion, has to be read as a whole. The plaintiff- Respondents has referred to the prayers made in the plaint and has sought to substitute the same by a prayer as noticed hereinbefore and, thus, by necessary implication, the relief for obtaining compensation must be held to have been given up. In any event, such a statement was made at the bar and we accept the same.

We have noticed hereinbefore that in *Rachakonda Narayana (supra)*, this Court has clearly held that an application may be filed even at the appellate stage. To the same effect is the decision of this Court in *Surjit Kaur vs. Naurata Singh and Another* [(2000) 7 SCC 379].

Mr. Talwar, however, would submit that keeping in view the fact that the plaintiffs-Respondents are in possession of the suit premises as tenants for a long time and they have not paid any rent therefor, this Court should not exercise its discretionary jurisdiction in their favour.

Discretionary jurisdiction, as is well-known, must be exercised reasonably and having regard to the fact situation obtaining in each case. The Appellant's father entered into an agreement for sale. The consideration amount was paid but keeping in view the lapse of time wherefor plaintiffs-Respondents were not to be blamed, a sale-deed could not be executed and registered but despite the same admittedly a further sum of Rs.14,000/- was paid by the Respondents herein. After the death of Balwant Singh, father of the Appellant, admittedly another agreement was entered into in terms whereof the amount of consideration was raised.

The Appellant furthermore misled the plaintiffs-Respondents by representing that he had the requisite authority to enter into an agreement for sale on behalf of his sister, which was found to be incorrect. In this situation, we are of the view that the equity lies in favour of grant of decree for specific performance of the contract in respect of the share of the Appellant rather than refusing the same. In any event if the Appellant and/or his sister have claim as regard the arrears of rent, the same can be adjudicated upon by the appropriate court in an appropriate proceeding. We are, therefore, unable to accept the said contention of Mr. Talwar.

For the reasons aforementioned, we are of the opinion that there is no merit in this appeal which is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.