Tilak Raj Bakshi vs Avinash Chand Sharma(Dead) Through ... on 20 August, 2019

Equivalent citations: AIRONLINE 2019 SC 2127

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Bench: K.M Joseph, Ashok Bhushan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 1524-1525 OF 2019
(@ SLP(C)Nos.15576-15577 of 2015)

TILAK RAJ BAKSHI ... APPELLANT(S)

VERSUS

AVINASH CHAND SHARMA (DEAD)
THROUGH LRS. & OTHERS ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. These appeals arise out of special leave petitions and are directed against the impugned judgment of the High Court of Punjab & Haryana by which the second appeal filed by the second defendant in the suit has been allowed and the civil suit filed by the appellant herein has been dismissed. Parties will be referred to with reference to their position in the Trial Court.

2. The suit scheduled property located in Chandigarh was owned by one Kirpa Ram Bakshi. He had executed a registered will on 04.09.1974 in favour of the plaintiff, the first defendant and another son who was the 3rd defendant in the suit. Thereafter, the disputed house was transferred in favour of the aforesaid three persons by the Estate Officer. The plaintiff filed the present suit from which the appeal arises alleging that on 31.03.1982 there was an agreement entered into between the three brothers namely himself, the first defendant and the younger brother. Clause (5) of the agreement provides as follows:

> "The individual portions of New Delhi and Chandigarh and agricultural land cannot be sold without concurrence of all three in writing and if it is sold on agreement of three, first preference to be given to both other brothers. Any special renovation after expiry of joint upkeep is done by any one of us and full accounts are maintained, then

> in the event of total sale of any unit, the extra amount spent on special renovation (subject to reasonable depreciation/appreciation) by individual will be payable to the individual over and above 1/3rd share of the sale proceeds."

3. It was alleged that the said clause was violated by his brother, the first defendant and without getting his written concurrence for the same the first defendant sold the suit scheduled property to the second defendant. It was alleged that this will result in fragmenting the site which is prohibited and it was also alleged that the sale was void. The suit came to be filed for declaring the sale deed in favour of the second defendant void and for specific performance directing first defendant to execute sale deed in respect of one-third share to the plaintiff.

4. The second defendant contested the matter. It was inter alia contended that the family settlement was forged and fabricated. The plaintiff did not have any preferential right. The second defendant was a bonafide purchaser. The plaintiff never intended to purchase the property. The share of the first defendant was transferred to the second defendant by the Estate Officer of Chandigarh on his application.

5. The trial Court found that the family arrangement was indeed executed. It is a genuine document and not forged or fabricated. The suit filed on 03.02.1998 challenging the sale deed dated 12.11.1997 was filed within time. The second defendant was found not to be a bonafide purchaser. He was aware of giving preference by the first defendant to the appellant. It was further found that the plaintiff was never offered to purchase the share of the first defendant. The trial court found that the plaintiff was entitled to specific relief and declared the sale null and void. The plaintiff was entitled to specific performance as per the terms and conditions of the agreement dated 31.03.1982 to purchase the share of the first defendant.

6. The second defendant appealed against the judgment. The first Appellate Court found that the family arrangement was genuine. It referred to the correspondence between the plaintiff and the wife of the first defendant. He proceeded to find that the only controversy was whether the first defendant has offered to the plaintiff to purchase his one-third share or whether the plaintiff never came forward for the same. The first Appellate Court found that no document was produced to show that the first defendant himself offered. The court further goes on to find letters by the wife of the first defendant which reveals that offer was given to the plaintiff to purchase. As per clause (5) of the family arrangement, the concurrence of the plaintiff was not taken in writing before selling to the second defendant. As far as the offer is concerned the Appellate Court referred to the correspondence. Defendant no.1 was not ready to accept earnest money. The house was located at Chandigarh. The sale could be effected only at Chandigarh. Plaintiff visiting Bhilai, where first defendant lived, would not have been served any purpose. Reference is made to the telephone bills of the plaintiff to prove communication between him and the first defendant regarding sale. The sale in favour of the second defendant was effected through power of attorney. No offer was made for selling to the plaintiff by the first defendant through a power of attorney. It is found that though P19 shows that a deal was struck but because the wife of the first defendant was pressing hard for the plaintiff to come to Bhilai, it did not work. The plaintiff was found ready and willing. The first defendant has violated the family settlement. The second defendant was aware from the wife of the

first defendant that she wanted to sell to the plaintiff. The second defendant was a tenant who was aware of the family arrangement. There was no notice issued to the other sharers. The appeal of the second defendant was dismissed. That apart the Appellate Court also allowed the cross appeal filed by the plaintiff and directed the second defendant to hand over possession to the plaintiff.
PROCEEDINGS BEFORE THE HIGH COURT

7. The High Court after referring to the correspondence between the parties found that the first defendant has indeed offered to sell his share to the plaintiff. Plaintiff could have sent a draft. The precarious condition of the first defendant, having regard to his health, was known to the plaintiff.

8. The High Court found that there was no valid and binding contract between the parties. No price has been fixed nor there is any penalty clause, i.e., in case of failure, either one of the parties can enforce the agreement (obviously clause (5) which we have already quoted). In view of the omissions of the appellant to act on the offer, he has lost the preemptory right to purchase the share and it led to the sale in favour of the second defendant. The High Court proceeds to hold that clause (5) relied upon by the plaintiff is not only vague but indefinite and void. The plaintiff cannot be permitted to exercise belatedly after he has lost to encash offer reflected in the letters which we will refer to hereinafter.

9. It is also found that the second defendant being the tenant could only be evicted under the law relating to tenants.

10. The High Court noted that the fragmentation may not be possible but solution was found in Sections 2, 3 and 4 of the Partition Act and by ascertaining market value they could buy each other's share. Section 22 of the Hindu Succession Act was found to have been declared unconstitutional by this Court. Appellant had not accepted the offer. Reference was made to Section 20 of the Specific Relief Act and it was found that in the circumstances, appellant was not entitled to the discretionary relief.

11. We heard Shri Nidhesh Gupta, learned senior counsel appearing on behalf of the appellant and Shri Dhruv Mehta, learned senior counsel appearing on behalf of the first respondent (second defendant).

12. Learned senior counsel for the appellant would contend that this is a clear case of family settlement. The family settlement contained two distinct conditions. Not only preference must be given to the other sharers, the first defendant was obliged to obtain the written concurrence of the other sharers. He would submit that courts lean in favour of family settlements and uphold the same. In this case, there is no absolute prohibition against sale of his share. It is only a partial prohibition. The first defendant could sell his share to his brothers. The object behind clause (5) was highlighted to be that third party is not rendered entitled to the family property. Such a partial prohibition has been approved by both the Privy Council and also by this Court. In this regard, he drew our attention to the judgments of this Court in the case of K. Naina Mohammed (Dead) Through Lrs. v. A.M. Vasudevan Chettiar (Dead) Through Lrs.and Others 1 , Hari Shankar Singhania and Others v. Gaur Hari Singhania and Others2 and also judgement of the Privy Council

in the case of Muhammad Raza (since deceased) and others v. Abbas Bandi Bibi3. He also drew our attention to the judgment of this Court in Hari Shankar Singhania (supra) to contend that family settlement is treated differently from any other formal commercial settlement. This is what the court held:

"A family settlement is treated differently from any other formal commercial settlement as such settlement in the eye of 1 2010 (7) SCC 603 2 2006 (4) SCC 658 3 AIR 1932 PC 158 the law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well-being of a family.

Technicalities of limitation, etc. should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. ..."

13. Next, he would contend that under Rule 16 of the Chandigarh Estate Rules, 2007, no fragmentation or amalgamation of any of the site is permissible. Therefore, in regard to the sale deed in favour of the second defendant the High Court overlooked that the aforesaid rule shall be observed in its breach. Next he was at pains to demonstrate before us that the plaintiff was always willing and ready to take the share of the first defendant. The correspondence, however, revealed that the wife of the first defendant was insisting that the entire consideration must be paid at Bhilai where the first defendant resided, whereas the conveyance could be effected only at Chandigarh where the plaint schedule property is located. The plaintiff was ready to accommodate the reasonable demands of the first defendant but the property came to be conveyed to the second defendant.

14. It was argued by Shri Nidhesh Gupta, learned senior counsel for the appellant that even if preference was given to the plaintiff, he must succeed on the ground that clause (5) of the family settlement envisages written concurrence from the other sharers before a valid sale deed was made by the first defendant.

15. Per contra, Shri Dhruv Mehta, learned senior counsel, appearing on behalf of the first respondent, supports the order of the High court. He also took us to the correspondence and pointed out the plight of the first defendant whose health was in a precarious condition and he wanted money urgently. An offer was made. The offer, he would point out, was not unreasonable namely Rs.5 lakhs but the plaintiff was not prepared to act on the offer leaving no option with the first defendant except to sell the share to the second defendant. He would further point out that the second defendant was actually a bonafide purchaser of the property and the Trial Court and the first Appellate Court erroneously found that he was not a bona fide purchaser on the basis that he deposed that the wife of the first defendant told him about the offer made to the appellant. He would point out that this conversation did not establish that respondent was aware of the family arrangement and therefore, the second defendant was indeed a bonafide purchaser. He would further complain that first Appellate Court has gone one step further than the Trial Court and even ordered that second defendant to put the plaintiff in possession even though undisputedly he was a tenant who was entitled to protection of the statute against eviction except in accordance with law.

16. The following points arise for our decision:

A. Whether there was a family settlement?

B. Whether the High Court was right in, without even a plea, holding that the family settlement is vague and unenforceable and void?

C. Whether an offer was made by the first defendant to the plaintiff before the sale of the property to the second defendant?

D. Whether the High Court was right in holding that the courts could not exercise discretion under Section 20 of the Specific Relief Act, 1963 as the contract is not specifically enforceable?

E. What is the impact of absence of written concurrence by brothers for sale?

F. What is the effect of the prohibition against fragmentation of property in question under the Capital of Punjab (Development and Regulation) Act, 1952?

FINDINGS WHETHER THERE WAS A FAMILY SETTLEMENT?

17. As far as the first question is concerned, whether there was a family settlement, at paragraph 6 of the plaint, the family settlement was pleaded. The answer to the same, by the second defendant, is that the alleged family settlement dated 31.03.1982 is a forged and fabricated document. We can safely conclude that no material has been placed by the second defendant to establish that the alleged family settlement is a forged document. There is no case that it is not a family settlement. The settlement is arrived at between the plaintiff, his brother-the first defendant and another brother-third defendant. Therefore, we can proceed on the basis that there is a family settlement.

WHETHER THE FAMILY SETTLEMENT WAS VAGUE?

18. With regard to the finding by the High Court that whether the family settlement is vague, unenforceable and void, the complaint of the plaintiff is that there is no pleading that family settlement is vague and unenforceable. Section 29 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Contract Act', for short), reads as follows:

"29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void. —Agreements, the meaning of which is not certain, or capable of being made certain, are void." Illustrations

(a) A agrees to sell B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty."

(b) A agrees to sell B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void."

(c) A, who is a dealer in coconut-oil only, agrees to sell to B “one hundred tons of oil”. The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil."

(d) A agrees to sell B “all the grain in my granary at Ramnagar”. There is no uncertainty here to make the agreement void."

(e) A agrees to sell to B “one thousand maunds of rice at a price to be fixed by C”. As the price is capable of being made certain, there is no uncertainty here to make the agreement void."

(f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given.

The agreement is void."

19. Section 93 of the Indian Evidence Act, 1872, reads as follows:

> “93. Exclusion of evidence to explain or amend ambiguous document.—When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. Illustrations
>
> (a) A agrees, in writing, to sell a horse to B for “Rs. 1,000 or Rs. 1,500”.

Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.”

20. The question is not res integra. A Bench of three learned Judges of this Court considered the very same question in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd.4 and held as follows:

> “10. There is one more point which must be considered. It was strongly urged before us by the appellants that, in the trial court, no plea had been taken by the respondent that the agreement for the extension of time was vague and uncertain. No such plea appears to have been taken even in the grounds of appeal preferred by the respondent in the High Court at Bombay; but apparently the plea was allowed to be raised in the High Court and the appellants took no objection to it at that stage. It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal. After all, the plea raised is a plea of law based solely upon the construction of the letter which is the basis of the case for the extension of time for the performance of the contract and so it was competent to the appeal court

> to allow such a plea to be raised under Order 41 Rule 2 of the Code of Civil Procedure. If, on a fair construction, the, condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty. The provisions of Section 93 of the Indian Evidence Act are clear on this point. It is the language of the document alone that will decide the question. It would not be open to the parties or to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence. Such an attempt would really mean 4 AIR 1958 SC 512 the making of a new contract between the parties. That is why we do not think that the appellants can now effectively raise the point that the plea of vagueness should not have been entertained in the High Court." (Emphasis supplied)

21. Therefore, the mere fact that a plea is not taken, that the clause in question is vague, and hence, unenforceable and void will not stand in the way of the Appellate Court looking into the contract and, if on its terms, it finds it to be vague and unenforceable, it can be so held.

22. The question is to whether clause (5) in question is vague and unenforceable. We noticed that it provides that the property in question cannot be sold without concurrence of the three brothers in writing. If it is sold on the agreement of three brothers, the first preference is to be given to both other brothers. When it is stated that the property cannot be sold without concurrence of the three brothers in writing, there cannot be any doubt about its meaning. It means what it says which is that should a brother want to sell the property, the other two brothers must agree in writing. This clause cannot be described as vague. This is different from the aspect as to whether it is a clog on ownership or whether it is otherwise unenforceable but it cannot be described as being vague. The second contention is that when a decision is taken by the brothers permitting sale by a third brother, then, first preference is to be given to both the other brothers. What is intended is that after the written concurrence is obtained for selling in order that property is not sold to a third party/stranger, the other two brothers are given an opportunity to buy that property. This portion of the clause cannot also be described as vague as such. No doubt, it could be argued that the price at which the offer is to be made is not expressly mentioned. We have found that the clause is part of a family settlement between brothers. Courts ordinarily lean in favour of family settlement. Clause (5) itself does not contain an agreement to sell. It only contemplates a preferential offer being treated as a condition precedent to a brother affecting a sale outside of a family to a stranger. The price can only be understood as market price which would be the fair price. Therefore, we are of the view that the finding by the High Court that contract is vague cannot be sustained.

WHETHER OFFER WAS MADE BY DEFENDANT NO.1 TO PLAINTIFF

23. We will first ascertain from the correspondence admittedly entered into between the plaintiff and the wife of the first defendant, what actually transpired. Ex. P16 was written on 16.2.1996 by Shyama Mehta, wife of the first defendant, the same reads as under:

> "Dear Santosh and Tilak ji, Namaskar I hope you people are hale and hearty. I had received a letter with respect to Havan being got performed by Buaji. I had also got a

Havan performed on First. God may give peace to the sole. The almighty may give place to her near him. She had been relieved of her difficulties.

I am once again writing to you that if you or Kuku is interest in purchase of our portion, then let us finalize the deal. From our side, the deal can be closed. From our side, Rs.5,00,000/- is final and I am making last request. I am sending last request and I want that before the property goes into the hands of children, the brother should settle. The health of Mehtaji is deteriorating day by day. He is not in a position to travel. I hope you would also like that your son should remain with you. You are elder and living on the ground floor, therefore, first offer is being made to you and second offer would be made to Kuku and only thereafter, I would offer the sale of my portion to outside. What is the status of eyes of Santosh? I hope there would be improvement. Please inform as to what Mamta is doing these days. She must have completed her degree. Kindly convey my love to Mani, Lakshmita and Dhruv. Please send photographs of Dhruv and Lakshmita and Naini. These days, Dhruv must be quite talkative. Please come over to Bhilai. We could be very happy. Mehtaji also joins me in wishing you Namaskar and love to children.

Awaiting your reply, Yours Shyama"

24. On 10.03.1996 by Exhibit P17, the wife of the first defendant wrote as follows:

"Dear Tilakji and Santoshji Namaskar We are well here and I hope everyone would be hale and hearty. I heard about death of sister-in-law of Santoshji. It is very shocking. May God giver her soul peace. I had a talk with Tilakji and I am responding to the points he asked :-

1. What would be the earnest money?

2. How the payment would be made?

3. What would be the rate?

4. Where the payment would be made and when the sale deed would be executed?

5. How the house would be got vacated?

1 The earnest money can be paid Rs.1 lac or two; even the entire payment can be made and signatures can be got done. 2 Half payment would be through draft and the remaining half would be in cash. 3 As regards the rates, we have already quoted quite low rates and this is final.

I want to finalize the deal without telling Manu because it we are not able to finalize, then next offer would be to an outsider.

If the deal is finalist by 1st April, after 15th Manu would come and if he comes, then he would not let the house be sold.

4 Payment will have to be made at Bhilai on coming to Bhilai because Mr. Mehta is not in a position to travel.

5 After giving the earnest money, we would issue notice for vacating the house or adopt any other method (not readable).....We will see.

I hope you have got answer to all the points. Please reply in writing immediately or give me a phone call.

Kindly convey my love to children and regards to both of you.

Sd/-Shyama"

25. There is no response again to the letter by the plaintiff though he claimed that he responded by a letter dated 23.02.1996 and 22.03.1996. Again on 01.04.1996 P18 was addressed by the plaintiff to the first defendant and his wife which inter alia read as follows:

> "Fax No.0788-324339 Fax for Sh. V.D. Mehta, 48/6, Nehru Nagar (West) Bhilai (MP) Res.Tele-324651 13/19-A, Chandigarh 01.04.1996 Respected brother and Shyama Bhabi, Namaskar, Ref. Today morning phone talks. In response to Bhabi's letter dated 10.03.1996, replied on 22.03.1996. Main points are (1) Your reply pointwise received and discussed with family and in principal your offer is acceptable to us broadly.

Please reconsider the matter and try to visit both of your along with Many Chandigarh.

Also we are aware of brother's health but if you try can come here, we will complete the formalities in one or two working days and give Biana one lac plus agreement to sell will be done. At present, matrimonial talks of Mamta are in advanced stayed with 4/5 parties and their/our visits to each other are likely. Our top priority is Mamta's marriage and second priority is about your portion and Naini shifting to us. Your reasonable offer has come at such a time that it is hard on me to take decision. From my side, I will do my utmost best to complete the deal. Rest it is God's wish. I and Santosh both are about 60 years old and are keeping indifferent health. I am due to retire in August this year. Please try to reduce the total value if there is some scope. In case you decide not to come to Chandigarh, I will come for one or two working days to you.

Please inform convenient trains from Delhi and for return journey try to make II sleeper reserve up to Delhi/Ambala. Hope brother's health is improving and all children are happy at their places and so are grand children. Please reply soon or phone or fax at my office No.0172-703603 "Attn: Tilak Raj Bakshi" With regards, your affectionately-Tilak Raj Bakshi."

26. To the same P19 letter is sent by the wife of the first defendant, the same reads as under:

> "Dear Tilak, Namaskar I am in receipt of your letter and fax. I was to consult my children, so there was some delay. Manik is not ready to give you the portion of the house. He is quite angry but I have spoken to Rajiv. He has told me that if your goodself are interested in purchasing, then you are requested to come to Bhilai with all the payment in one go and get all the papers signed. We do not wish to inform him because he is in Dubai for one month with Anju. He has got his visa extended by one month and if till then his job is fixed, then he would stay otherwise he would come back and do something here. I do not wish to now receive earnest money. Please make the final payment as the prices in Chandigarh are increasing quite rapidly and the rate settled by you is quite old. Therefore, I have given you offer because I wan in dire need of money. Now the need is yours. If the deal is finalized before Manu coming back, then it is alright because health of Mehtaji is also very delicate. In any case, I would handle the situation in any manner but it would not be possible later on. For coming to Bhilai, you can catch Chhattisgarh Express from Ambala or you can catch Mahamaya super fast which starts at 2.20 P.M from Delhi. There is another train from Nizammuddin which runs three days a week which is again good train. Please tell me on telephone whenever you wish to come. I would get the seat booked because during summer vacation, there would be heavy rush.

Convey love to children. Namaskar to both of you.

Sd/-Shyama"

27. There is no response to this letter by the plaintiff. It is thereafter that the sale was affected in favour of the second defendant on 12.11.1997. It is undoubtedly true that learned counsel for the plaintiff drew our attention to the telephone bills on record which go to show that appellant was engaged in communication defendant No. 1 or his wife in regard to their property and their interest in purchasing the property. From the correspondence, we are inclined to find as follows:

> In letter dated 16.02.1996, he wrote that if the plaintiff or Kuku is interested in purchasing the portion, then let the deal be finalized.
>
> Consideration of Rupees 5 lakhs was final and she was making the last request before the property goes into the hands of the children, the brother should settle.
>
> The health of Mehtaji (first defendant) was deteriorating day by day. He was not in a position to travel. Plaintiff being elder and living on the ground floor, offer was made to him and second offer made to Har Krishan Lal alias Kuku (the other brother of the first defendant) and only thereafter the offer would go to outside.

28. In the second letter dated 10.03.1996, she wrote to the plaintiff and his wife. It was mentioned that earnest money could be paid Rupees one lakh or two, half payment was to be through draft and

remaining half was to be in cash. It is specifically stated that as regards the rates they have already quoted low rates and it is final. It was pointed out that if the deal is not finalized by 1st April, after 15th, if Manu, apparently, the son of the first defendant came, he will not allow the property to be sold. Payment was to be made at Bhilai on going to Bhilai, as first defendant was not in a position to travel.

29. In the last letter dated 01.04.1996, it is written by the plaintiff to the first defendant and his wife. He has shown awareness of the first defendant's health. Next he pointed out matrimonial talks of Mamta's (daughter) that was in an advanced stage and 4/5 parties were in talks, the marriage was the top priority and second priority was about the portion of the first defendant. Thereafter, it is stated that a reasonable offer of the first defendant has come at such a time that it is hard for him to take a decision. He promised to do his best to complete the deal. Next, he would say that an attempt may be made to reduce the total value if there is some scope.

30. Correspondence indeed establish, therefore, that the health of the first defendant was poor and it was deteriorating and he was in urgent need for money. It is quite clear that the first defendant had made offer to the appellant for selling his share for Rupees Five Lakhs. It is also quite clear that the plaintiff himself acknowledged in the letter dated 01.04.1996 that the offer of Rupees five lakhs was reasonable. Appellant, quite clearly, has articulated his pressing priority to be to conduct the marriage of his daughter. This means that he was hard pressed for money. Otherwise there was no need for him after finding the offer to be reasonable to request the first defendant and his wife to try to reduce the value. Letter dated 15.04.1996 written by the first defendant's wife shows that she did not wish to then receive earnest money and she finally demanded that final payment be made as prices in Chandigarh were increasing quite rapidly and rate settled by the plaintiff was quite old. She emphasized that the offer was given because she was in dire need of money. Now the need is of the plaintiff. This correspondence also tends to show that the rate of five lakhs was, in fact, even acceptable to the plaintiff as the letter referred to the rate settled by the plaintiff being quite old. But nothing was happening on the ground. This leads the first defendant wife to state that she would only handle the situation in any manner but it will not be possible later on. The sale took place after more than a year. One thing is clear that an offer was made on behalf of the first defendant to the plaintiff.

31. We may also notice that in his deposition as PW4, plaintiff has stated that it is correct that three brothers had partitioned amongst themselves, the house in question, by making three portions A, B, and portion. He then says, it is wrong to suggest that each owner came into possession of its respective portion which fell to him on partition. Portion A fell to apparently the plaintiff. He does not remember to whom portion B felt. He does not remember who became owner of portion C. He claims to be in possession of the entire house after partition. The first defendant let out his share of portion 15-16 years before to the second defendant, he deposes. He deposes that it is correct that he was offered to purchase first defendant's one-third share vide Exhibit P16. The agreement could not be executed as per the offer because defendant never turned up in Chandigarh. He was ready to make the entire payment while coming at Chandigarh, since the property is in Chandigarh. An amount of Rs.5 lakh was settled as consideration amount. (It may be noted that plaintiff, in P18 letter writes "please try to reduce the total value, if there is some scope). He further says, it is correct

that he had offered in that letter-Exhibit P19 to get the payment at Bhilai and after the payment, the documents will be executed. He volunteered and stated that since the documents could not be executed at Bhilai as the property in question is at Chandigarh, he never made any final payment to the first defendant in Bhilai.

32. Apparently, in keeping with the family settlement, a preference was indeed shown. The price was reasonable and acceptable even to the plaintiff though he wanted a reduction. Having regard to the health of the first defendant and the dire stage at which first defendant and his wife were placed, we cannot for a moment but hold that they had made an attempt to comply with the condition in the family settlement providing for preference. WHETHER THE HIGH COURT WAS RIGHT IN HOLDING THAT THE COURTS WOULD NOT EXERCISE DISCRETION UNDER SECTION 20 OF THE SPECIFIC RELIEF ACT, 1963 AS THE CONTRACT WAS NOT SPECIFICALLY ENFORCEABLE?

33. Next question we must pose and answer is whether the High Court was right in holding that the courts would not exercise discretion under Section 20 of the Specific Relief Act, 1963 as the contract was not specifically enforceable.

34. In this regard, the question would arise in the first place as to which is the contract which is sought to be enforced. It is pleaded in the plaint that first defendant was interested in disposing of his share and the plaintiff was ready and willing to purchase the share of first defendant. It is specifically averred that the third defendant (the other brother) did not show any interest in purchasing share of the fist defendant. Finally, the relief sought is by way of decree for specific performance directing the defendant to sell by the sale of one-third share in the house to the plaintiff and handover vacant possession of the demised portion to the plaintiff. This is apart from the relief against the sale in favour of the second defendant.

35. Now, let us see the judgment of the Trial Court. The Trial Court proceeds to hold inter alia that there is a family settlement, there is correspondence and there are telephone bills. They made out the case that the plaintiff was never offered to purchase the share of the first defendant as per the terms and conditions of the family settlement. The sale in favour of the second defendant is null and void, he not being the bonafide purchaser. The plaintiff has the right of first preference to purchase. The sale consideration in favour of the second defendant is Rs.4.80 lakhs, but the first defendant is not bound to sell his share for that amount. However, he is bound to offer the plaintiff and defendant no.3 for purchase of that share before selling it to anybody else as no specific amount was mentioned as sale consideration in the family settlement. On these findings, the Trial Court decreed that the plaintiff is entitled to specific performance as per the terms and conditions of the agreement dated 31.03.1982 to purchase the share of defendant no.1. Thus, it can be seen that the family settlement has been understood as the agreement and the plaintiff is entitled to specific performance of the agreement.

36. The first Appellate Court finds that it is admitted that the house belonged to the father of the plaintiff, first defendant and third defendant. He left behind him a registered will bequeathing properties including the plaint schedule house. It was found that the only controversy was whether

offer was made to purchase the one-third share and whether the plaintiff came forward to accept the offer. It was further found that concurrence of the plaintiff in writing was not taken before transferring the property to the second defendant. The plaintiff was ready and willing but it was the first defendant who violated the terms of the family settlement. The Appellate Court goes further than the Trial Court and allowed the cross-appeal of the plaintiff and decreed that the second defendant will handover vacant possession to the plaintiff, finding that the relief of delivery was a consequential relief liable to be granted. It will be remembered that the Trial Court has decreed the suit for specific relief on the reasoning that under the family settlement, the first defendant has to give first preference to the plaintiff and it was also found that the first defendant is not bound to sell at an amount of Rs.4.80 lakhs for which first defendant has sold to the second defendant. All that he was to do was that he was bound to make an offer to the plaintiff before selling to anyone else.

37. A perusal of these judgments would reveal the following aspects:

> 1. The Appellate Court finds that the plaint schedule property was owned by the father. It is found that the three sons get equal shares.
>
> 2. The Trial Court finds that no offer was made by the first defendant to the plaintiff. It decrees specific performance by directing so on the basis that first defendant will have to make an offer to the plaintiff and the third defendant after finding that the first defendant was not bound to make an offer to sell at Rs.4.80 lakhs. The Appellate Court, on the other hand, has gone to decree specific performance by even directing possession of the property to be given to the plaintiff by the second defendant. On the basis of the terms and conditions of the agreement dated 31.03.1982, there are clearly two palpable flaws in the findings and directions. Admittedly, the second defendant was already occupying the property as a tenant. He can be evicted only in accordance with law even if everything is held in favour of the plaintiff.

In other words, even if it is found that the assignment by the first defendant in favour of the second defendant is null and void, he has the right to continue in possession unless he is evicted under the relevant law for the eviction of tenants. Therefore, the direction to deliver possession is clearly unsustainable. The second flaw which vitiated the judgment of the first Appellate Court is that it has proceeded to hold that plaintiff is entitled to specific performance as per the terms and conditions of the agreement dated 31.03.1982. The Appellate Court was in error in decreeing specific performance on the basis that the family settlement without anything more, embodied a contract for sale of immovable property. The terms of the agreement, viz., the price at which the property is to be sold and purchased, are not spelt out in the family settlement, as correctly noticed by the Trial Court. The Appellate Court has not proceeded to hold that the plaintiff is entitled to purchase the property at Rs.4.80 lakhs at which price the first defendant has sold to the second defendant. If the decree is treated as confirming the decree of the Trial Court, then, the price at which it is to be purchased would only have been ascertained on the basis of an offer which is made in pursuance of the Trial Court's judgment, and therefore, no decree for specific performance, as passed by the First Appellate Court, could certainly have been passed.

38. This brings us to yet another question. Whether the terms of the family settlement embodied a right of preemption and what is the distinction between the right of preemption and right to purchase property under an agreement to sell.

39. The decision of this Court in K. Naina Mohamed (supra) involved a will which was executed in favour of the two sisters of the testator. The will inter alia provided that after the demise of both the sisters who were to enjoy the properties during their life time, the male heirs would get the two properties in question as absolute owners. The properties were mentioned as properties 'A' and 'B'. It is, thereafter, that clause (11) provided as follows:

> "(11) As and when Savithri Ammal's male heirs get and enjoy A property and as and when Rukmani Ammal's heirs get and enjoy B property, if any one of them wants to sell their share, they have to sell to the other sharers only as per the market value then prevailing and not to strangers."

40. The learned counsel for the appellant had contended essentially that the first defendant must honour his obligations under the settlement and what is involved here must be treated as a right of preemption. This is for the reason that in the decision which we have referred to this court, has taken the view that clause (11) was in the nature of right of preemption which can be enforced by the male heir of either sister in the event of sale of property by the male heir of the other sister. The words "other sharers" were understood to mean, "the male heirs of the other sister". We must, before we pronounce on this aspect, consider the content of the right of preemption.

41. In Bishan Singh v. Khazan Singh 5 , this Court has articulated the matter with clarity and we, hence, set out the following statement of the law:

"7. Before attempting to give a satisfactory answer to the question raised, it would be convenient at the outset to notice and define the material incidents of the right of pre-emption. A concise but lucid statement of the law is given by Plowden, J. in 136 P.R. 1894, at page 511, thus:

> "A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is jus ad rem alienum acquirendum and not a jus in re aliena.... A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without the proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale, made in disregard of his preferential right." The aforesaid passage indicates that a pre-emptor has two rights: (1) inherent or primary right i.e. a right for the offer of a thing about to be sold and (2) secondary or remedial right to follow the thing sold."

42. We also think that it would be appropriate to refer to paragraph 11:

> "11. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right. To summarize: (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place." (Emphasis supplied)

43. Right to preemption is ordinarily born out of custom or in terms of a statutory provision. We are not, in this case, concerned with the statutory right of preemption or custom. We would necessarily have to fall back on first principles relating to preemption, which we feel, have been explained in Bishan Singh (supra) which we have set out. We will proceed on the basis that a family settlement/contract can give rise to a right of preemption. But is this a case which calls for the application of right of preemption? The relief which is sought by the appellant in his plaint, reads as follows:

> "14. That the suit for the purposes of court fee and jurisdiction for relief of declaration is Rs.19-50 paise declaration and accordingly court fee i.e. Rs.19-50 paise is affixed on the plaint. The value of the suit for the jurisdiction of court fee for specific performance is Rs.4,80,000/- and accordingly court i.e. Rs..... Is affixed on the plaint.
>
> It is therefore, respectfully prayed that the decree of the declaration be passed in favour of the plaintiff and against the defendant no.1 and 2 declaring sale deed dated 12.11.1997 null and void ab initio and for setting aside the same and decree the specific performance be also passed directing the defendant. No to sell by the sale deed of 1/3rd share of property bearing House No.13, Sector 19-A, Chandigarh (shown red in site plan) to the plaintiff and to handover vacant possession of demised portion to plaintiff. Any other relief which the plaintiff under the law is held entitled to also granted to him. The suit be decreed with costs."

44. We would notice that there is no case expressly set up in the plaint that what appellant is seeking to enforce is a right of preemption. If the suit involved a right of preemption, and proceeding on the basis that the appellant was pursuing his secondary right to follow the property sold, then, the relief would have been to substitute himself in place of the buyer/second defendant. As held by this Court, the right of preemption is not right of re-purchase. Even proceeding on the basis of it being a case of preemption, as held by the High Court and by us, first preference was given to the plaintiff. As far as decision in K. Naina Mohamed (supra)is concerned, clause (11) of the will in the said case tabooed alienation in favour of strangers. In this case, the clause, we are concerned with, certainly does not place an absolute restriction on alienation in favour of a stranger. All that it contemplates is an offer being made to the brothers, once the first step of concurrence in writing by the brothers for the sale is obtained. We do not, therefore, think that the appellant would be justified in invoking the principle underlying the right of preemption in this case.

IMPACT OF ABSENCE OF WRITTEN CONCURRENCE BY BROTHERS FOR SALE

45. The controversial clause, according to the appellant, falls in two parts. Firstly, there must be a written concurrence from the two brothers, if the third brother wishes to sell his share. The second part is that the offer must be made to the other brothers before transfer is effected to a stranger. The contention is that the family settlement was arrived at so that the stranger is not inducted into the property.

46. To answer these questions, which have been posed, it may be also necessary to look at the case law in relation to the family settlements and restrictions which are put on property rights under such settlements. In Muhammad Raza (supra), which is relied upon by the appellant, under a compromise between the two Shia Mahomedans, the defendant agreed to marry the plaintiff. Certain rights were conferred upon the plaintiff upon her marriage with the defendant. The defendant was already married. Under the compromise, it was provided inter alia that the plaintiff would become owner of one-half of the property along with the first wife of the defendant. However, it was provided that the plaintiff, as also the first wife, shall not have the power to transfer the property to a stranger. Ownership was to devolve on the legal heirs of the two wives, generation to generation. Dispute arose upon the first plaintiff in earlier case/second wife, selling/mortgaging her share before her death. One of the contentions raised by the transferees from the wife, who was the plaintiff in the earlier suit which resulted in the compromise, was about the validity of the restriction against sale of the property to strangers. Dealing with the said aspect, the Privy Council had this to say:

> “Their Lordships feel the weight of these contentions, and they might have some difficulty in holding that Sughra Bibi took nothing more than a life estate. But assuming in the appellants' favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to “a stranger.” Their Lordships have no doubt that “stranger” means anyone who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless, therefore, this restriction can for some reason be disregarded, they have no title to the properties which can prevail against

the respondent.

> On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that Raghunath Prasad Singh's case29 is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is, in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them."

47. It will be noted that Privy Council took note of the fact that plaintiff in the earlier suit got title under the compromise, which contained the restriction against sale to strangers. It was not a deed of gift or conveyance but in the nature of the contract. It was upon compromise of their conflicting claims that she agreed to certain conditions one of which was the prohibition against alienation to strangers. The court also dealt with the matter on the basis that a partial restriction would not, in case of the transfer inter vivos, be bad, after the passing of the Transfer of Property Act, 1882 (hereinafter referred to as 'the TP Act').

48. In K. Naina Mohamed (supra), the owner of the property, by a registered will, created life interest in favour of her two sisters. The will stipulated that after the death of the sisters, their male heirs would acquire absolute rights in the properties with the limitation that they shall not sell the properties to strangers. The sisters divided the properties amongst themselves. The property which stood allotted to one of the sisters came to be sold by the sister and her son in favour of the appellant. The sale was challenged as being violative of the condition in the will. In the course of its judgment, this Court observed as follows:

> "38. Reverting to the case in hand, we find that by executing the will dated 22-9-1951, Smt Ramakkal Ammal created life interest in favour of her two sisters with a stipulation that after their death, their male heirs will acquire absolute right in A and B properties respectively subject to the condition that if either of them want to sell the property then they shall have to sell it to the other sharers only as per the prevailing market value and not to strangers. The restriction contained in Clause 11

was not absolute inasmuch as alienation was permitted among male heirs of the two sisters. The object of incorporating this restriction was to ensure that the property does not go out of the families of the two sisters. The male heirs of Savithri Ammal and Rukmani Ammal did not question the conditional conferment upon them of title of the properties. Therefore, the appellant who purchased B property in violation of the aforesaid condition cannot be heard to say that the restriction contained in Clause 11 of the will should be treated as void because it violates the rule against perpetuity."

49. The court also, while dealing with the question of preemption, held as follows:

> "44. In the light of the above, we shall now consider whether Clause 11 of the will executed by Smt Ramakkal Ammal is violative of the rule against perpetuity. If that clause is read in conjunction with Clauses 4 and 10 of the will, it becomes clear that the two sisters of the testator, namely, Savithri Ammal and Rukmani Ammal were to enjoy house properties jointly during their lifetime without creating any encumbrance and after their death, their male heirs were to get the absolute rights in A and B properties. The male heirs of the two sisters could alienate their respective shares to other sharers on prevailing market value. It can thus be said that Smt Ramakkal Ammal had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by the male heir of either sister in the event of sale of property by the male heir of the other sister. If the term "other sharers" used in Clause 11 is interpreted keeping in view the context in which it was used in the will, there can be no manner of doubt that it referred to the male heirs of the other sister. The only restriction contained in Clause 11 was on alienation of property to strangers." (Emphasis supplied)

50. In the case decided by the Privy Council, in Muhammad Raza (supra), during the pendency of the disputes in a suit, a compromise was arrived at, which among other things, put an end to the dispute between the parties and recognized the right with the plaintiff over the property, however, subject to the condition that there will be no right to sell to strangers. In this case, as already noted, the title to the share in the property of the first defendant is traceable to the will executed by the father. The plaint reveals that the legatees, viz., the brothers applied to the Estate Office and the property was transferred in favour of the brothers on the terms and conditions in Memo dated 10.07.1981. One of the conditions was that there will be no fragmentation of the site. It is thereafter that the controversial agreement was entered into between the brothers. Thus, the family arrangement was entered into by the brothers when their rights as owners had crystallized. It was not subject to any condition as was the case in Muhammad Raza (supra) where the compromise in the suit created the right but subject to the condition against alienation to stranger. No doubt, being brothers, they could to promote harmony and avoid future disputes, enter into a family settlement.

51. The first defendant has sold his share to the second defendant. Under the clause, can the first defendant sell to a stranger? He can sell provided there was a written concurrence by the other brothers for a sale and the offer is made to the other brothers and it does not fructify into a sale for

reasons which are not attributable to the brother who wishes to sell. We find that there was an offer to the appellant by the first defendant. He has failed to act upon it. The other brother has no case about offer not being made and he has not raised any dispute over the sale to the second defendant. The perusal of the plaint reveals that the following case has been set up by the plaintiff:

"7. that the defendant no.1 was interested in disposing his share in House no.19-A, Chandigarh and the plaintiff was already and willing to purchase the portion of the defendant no.1 and the plaintiff has been expressing his readiness willingness to purchase the share of the defendant no.1 through number of Regd. Letters, telephone and even on FAX.

8. That the defendant no.1 as well as his wife and son has been corresponding and discussing on behalf of the defendant no.1 promising to sell the property to the plaintiff as defendant no.3 did not show any interest to purchase the share of defendant no.1 nor he was interested at all to purchase the 1/3rd share of the defendant no.1 in the property.

9. that the plaintiff was shocked and surprised to learn that the defendant no.1 has sold his 1/3rd share of the property to defendant no.2 a tenant who was already occupying the said portion in a totally secret manner without informing the plaintiff and against the terms and conditions of agreement of family partition and minutes dated 31.3.1982 arrived between plaintiff, defendant no.1 and defendant no.3. the site plan showing the portion sold by the defendant no.1 to defendant no.2 (in red) is attached with this plaint." (Emphasis supplied)

52. Thus, what is sought is specific performance. The appellant proceeded in the suit on the basis that there is a contract. A contract presupposes an offer which is accepted which means that there was an offer from the defendant. The correspondence, which we have referred to, fortifies us in holding that there was an effective offer and it did not materialize on account of any default on the part of the plaintiff.

53. Now, if the clause is broken down, it involves the following steps. A brother announces his desire to sell his share. He seeks written concurrence of the other brothers. A written concurrence is given. Then, the next step is reached. The selling brother offers to sell it to the other brothers. If they take the offer and the price is agreeable to the parties, sale follows. If the brothers do not wish to buy, the sale to the strangers is permitted. In the above process, in the facts of this case, it is clear that the appellant and the first defendant, without insisting on the written concurrence, went to the stage of offer to brothers. The appellant has led the first defendant to assume, even without a written concurrence, that the sale is permitted. The first defendant has acted clearly on the basis that the requirement of the first stage was not being insisted upon. Otherwise, he could have certainly obtained the concurrence. Having thus acted in the matter, and the second stage having been reached, when for reasons where the fault cannot be attributed to the first defendant, the offer, which the appellant himself describes as reasonable, was not seized upon by the appellant, the third stage emerged. This meant that it became open to the first defendant to sell to a stranger and which is what he did by it selling it to the second defendant. Even proceeding to enforce the clause, we find that the appellant is clearly estopped from setting up the plea of absence of written consent of the brothers. It would be inequitable, particularly when we are considering the matter in an appeal

sourced under Article 136 of the Constitution of India.

EFFECT OF PROHIBITION AGAINST FRAGMENTATION OF PROPERTY IN QUESTION UNDER THE CAPITAL OF PUNJAB (DEVELOPMENT AND REGULATION) ACT, 1952

54. The further obstacle remains posed, however, that the sale will result in contravening the law prohibiting fragmentation. The Capital of Punjab (Development and Regulation) Act, 1952 (hereinafter referred to as 'the 1952 Act' for short) defines "site" in Section 2(f) as meaning "any land which is transferred by the Central Government under Section 3".

55. Section 3 of the Act reads as follows:

> "3. Power of Central Government in respect of transfer of land and building in Chandigarh. – (1) Subject to the provisions of this section, the Central Government may sell, lease or otherwise transfer, whether by auction, allotment or otherwise, any land or building belonging to the Government in Chandigarh on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose.
>
> (2) The consideration money for any transfer under sub-section (1) shall be paid to the Central Government in such manner and in such instalments and at such rate of interest as may be prescribed.
>
> (3) Notwithstanding anything contained in any other law for the time being in force, until the entire consideration money together with interest or any other amount, if any, due to the Central Government on account of the transfer of any site or building, or both, under sub-section (1) is paid, such site or building, or both, as the case may be, shall continue to belong to the Central Government."

56. Section 4 of the 1952 Act confers power upon the Central Government and the Chief Administrator to issue directions in respect of any site or building in regard to the matters which are mentioned therein. The word "transferee" is defined in Section 2(k) of the Act, which reads as follows:

> "2(k)"transferee" means a person (including a firm or. other body of individuals, whether incorporated or not) to whom a site or building is transferred in any manner whatsoever, under this Act and includes his successors and assigns;"

57. Section 4(2) of the 1952 Act reads as follows:

> "4(2) Every transferee shall comply with the directions issued under sub-section(1) and shall as expeditiously as possible, erect any building or take such other steps as may be necessary, to comply with such directions."

58. Section 5 of the 1952 Act forbids erection or occupation of any building at Chandigarh in contravention of Building Rules made under sub-Section (2). The word “building” is defined in Section 2(c), which reads as follows:

> “2(c)"building" means any construction or part of a construction which is transferred by the '[Central Government] under section 3 and which is intended to be used for residential, commercial, industrial or other purposes, whether in actual use or not, and includes any out-house, stable, cattle shed and garage and also includes any building erected on any land transferred by the Central Government under section 3;”

59. From a perusal of the aforesaid provisions, it becomes clear that the word “site” means any land which is transferred under Section 3 of the 1952 Act. When it comes to the terms of Section 3, it contemplates power with the Central Government to transfer by auction, allotment or otherwise any land or building belonging to the Government in Chandigarh on such terms and conditions as may subject to any Rules that can be made under the Act, the Government thinks fit to impose. Thus, though it is open to the Central Government to transfer either land or building belonging to the Government in Chandigarh under Section 3 of the 1952 Act, the word “site” is confined to only the land which is transferred by the Central Government under Section 3. In fact, the word “building”, as defined in the Act, points to any construction or part of construction which his transferred under Section 3. It includes outhouse, stable, cattle shed and garage and also includes any building erected on any land transferred by the Central Government. The construction must be intended to be used for residential, commercial, industrial or any other purposes. A clear distinction is maintained between “site” and “building”. The Chandigarh (Sale of Sites and Building) Rules, 1960 came to be made. Section 22 of the 1952 Act confers power upon the Central Government to make the Rules for various purposes, which are mentioned in sub-Section (2). It includes Sections 2(a), 2(d), 2(e) and 2(h) of the 1952 Act, which reads as follows:

> “2(a) the terms and conditions on which any land or building may be transferred by the Central Government under this Act;
>
> xxx xxx xxx 2(d) the terms and conditions under which the transfer of any right in any sit or building may be permitted;
>
> xxx xxx xxx 2(e) erection of any building or the use of any site;
>
> xxx xxx xxx 2(h) the conditions with regard to the buildings to be erected on sites transferred under this Act;”

60. Rule 14 of the Chandigarh Sale of Sites and Building Rules, 1960 provides that no fragmentation of any site is permitted. Subsequently, in exercise of powers under Sections 3 and 22 of the Act, Chandigarh Estate Rules, 2007 came to be made. Rule 16 deals with fragmentation/amalgamation, which reads as follows:

> "16. Fragmentation/Amalgamation. No fragmentation or amalgamation of any site or building shall be permitted. Provided that amalgamation of two or more adjoining sites shall be permissible only in the case of commercial or industrial sites subject to the condition that the revised plans are approved by the competent authority, prior thereto. Provided further that fragmentation of any site shall be allowed if such fragmentation is permitted under any scheme notified by the Administration." (Emphasis supplied)

61. It is on the strength of the provisions contained in Rule 14 of the 1960 Rules and Rule 16 of the 2007 Rules that the appellant would argue that the assignment of the share of the first defendant occasioned a breach of the law. The second defendant, on the other hand would point out that there was no issue of fragmentation ever raised before the courts and the same was not decided in the courts.

62. It is contended by the second defendant that the sale deed in favour of the respondent no.1 specifically says that the sale is in respect of one-third share in the residential house no.13 of Sector 19A, Chandigarh. After the sale deed, it is contended, one-third share of the party was duly transferred and mutated in the name of respondent no.1/second defendant by the Chandigarh Administration. The High Court, in fact, tides over this objection by the appellant by pointing out that once the second defendant steps into the shoes of the first defendant, he became a co-owner and his remedy is to sue for partition and while fragmentation of property, is not 'admissible', the market value of the property can be determined, and buying each other's share, as per the provisions of Sections 2, 3 and 4 of the Partition Act, 1893.

63. While it may not be true that the issue of fragmentation was not raised in the courts, we would think that the appellant is not able to persuade us to hold that the assignment in favour of the second defendant is vulnerable on the basis that it involves fragmentation. We have noticed the deposition of the plaintiff about partition of the house into three portions. We have noted the fact that one-third share has been duly transferred and mutated in the name of the first respondent/second defendant by the Chandigarh Administration.

64. The second defendant has produced the communication dated 19.12.1997 which indicates the transfer of rights of site in Sector 19A held by Vishnu Dutt Mehta (first defendant) is noted in favour of the second defendant subject to certain conditions. This is obviously before the 2007 Rules came into force.

65. In the light of the aforesaid facts, we cannot permit the appellant to impugn the transaction on the said ground.

66. The upshot of the above discussion is that the contentions of the appellant are liable to be rejected. We do so. The appeals will stand dismissed. The parties will bear their own costs.

.....J. (ASHOK BHUSHAN) .....J. (K.M JOSEPH)
NEW DELHI;

AUGUST 20, 2019.