MITHILESH KUMAR

v.

MANOHAR LAL

OCTOBER 30, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Registration Act, 1908 :

S.17(1)(b)—Agreement entered into stipulating self-imposed conditions for use of land—No consideration—Whether compulsorily registrable—Held: Undertaking given as to exercise of right over property—Incapable of valuation—Value cannot be construed to be hundred rupees or more—Hence not a compulsorily registrable document.

Kashinath Bhaskar Datar **v.** *Bhaskar Vishweshwar,* **AIR (1952) SC 153;** *S. Noorden* **v.** *V.S. Thiru Venkita Reddiar and Ors.,* **AIR (1996) SC 1293;** *Lachhaman Dass* **v.** *Ram Lal and Anr.,* **[1989] 2 SCR 250;** *Mst. Kirpal Kaur* **v.** *Bachan Singh and Ors.,* **[1958] SCR 950;** *Sardar Singh* **v.** *Krishna Devi (Smt.) and Anr.,* **JT(1994) 3 SC 465 = [1994] 4 SCC 18 and** *Bhoop Singh* **v.** *Ram Singh Major and Ors.,* **[1995] 5 SCC 709, distinguished.**

Mohamad Hussain **v.** *Korwar Sarappa,* **AIR (1954) Hydrabad 14 and** *Gobardhan Sahi and Anr.* **v.** *Jadu Nath Rai and Anr.,* **ILR (35) Allahabad 202, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2325 of 1980.

From the Judgment and Order dated 26.10.79 of the Allahabad High Court in S.A. No. 470 of 1972.

J.P. Goyal, R.P. Goyal and Sushil K. Jain for the Appellant.

G.L. Sanghi. K.B. Rohtagi and Ms. Aparna Rohtagi for the Respondent.

The following Order of the Court was delivered :

A This appeal by special leave arises from the judgment of the learned single Judge of the Allahabad High Court made on 26.10.1979 in Civil Appeal No. 68/71.

The appellant filed the suit for perpetual injunction restraining the respondent from raising a construction except the Chabutra in the north B after leaving a 3 feet passage and from opening windows, door ventilators, parnalas towards the north, south and east of the plaintiff's property by raising any construction in the passage. The appellant relies upon the agreement dated June 26, 1964 executed by the respondent as foundation for the aforesaid rights. He also sought alternative relief on the basis thereof that if any construction is made in violation of the said agreement, there C shall be given mandatory injunction to demolish the same at the instance of the defendant and to close the doors, windows, ventilators etc. at his cost. The trial court dismissed the suit. But on appeal, the appellate Court reversed the decree of the District Munsif, Kashipur of his judgment and decree dated May 10, 1971 and decreed the suit only in respect of item Nos. 1 and 2 holding that the agreement did not require registration. The D High Court in the second appeal held that the items require registration compulsorily under Section 17(1) (b) of the Registration Act. Since the agreement was not registered, the appellant has no right to claim any right on that basis. Accordingly, it allowed the second appeal, reversed the decree of the appellate Court and confirmed that of the trial Court. Thus, this E appeal by special leave.

The admitted position is that the respondent had purchased the property of an extent of 1732.6 sq.ft. with 16' wide road on the north side and 30' wide road towards Indira Gandhi School on the west side; shops constructed be the appellants on the south side and open land on the east F side; situated at Mohalla Ganj, Kashipur, District-Nainital from the appellant and got it registered in the Registrar's Office. On the next day, namely, 26.6.1964, he had entered into an agreement with a condition envisaged as hereunder:

G "I have purchased a piece of land only and not the trees and the wall. The said trees and wall belong to Shri Mithlesh Kumar. The following are the terms and conditions in respect of the said trees and the wall:-

(1) That Lala Mithlesh Kumar will uproot the said trees and H demolish the wall within 6 months hereof.

(2) Whatever construction is raised by me in the said piece of land, I will not open any door or window or ventilator or rain-water pipe or other pipe for discharge of day-to-day water flow towards the South, North and East. I will not construct any platform or balcony or stairs or comers towards 16 ft. wide passage which Sh. Mithlesh Kumar has left in his land in front of my piece of land. A B

(3) That I will raise my boundary wall in the north after leaving a set-back of 3 ft. measured from the platform.

(4) That if I violate any terms or condition, as aforesaid, Lala Mithlesh Kumar will have a right to enforce the same through process of law at my costs and expenses." C

The crucial question in this case is: whether this agreement is a compulsorily registrable document? Shri G.L. Sanghi, learned senior counsel for the respondent, sought to contend that though the agreement was not supported by any consideration, the document is not an agreement in the eye of law since it was not signed by the appellant and, therefore, the document will not form the foundation for the right to file the suit. We cannot permit the learned counsel to argue the contention for the reason that, as regards the agreement dated June 26, 1964, the appellate Court and the High Court found, as a fact, that it is an agreement entered into by the respondent with the appellant. Therefore, it is a finding of fact based on consideration of evidence. We cannot permit the learned counsel for the respondent to argue that it is not an agreement. As regards lack of consideration in the agreement, there is no plea. Neither there is any evidence nor was any contention raised either in the appellate court or in the High Court. Under these circumstances, we cannot permit the learned counsel to raise that plea for the first time. Then he sought permission to amend the plaint. We cannot permit him, at this distance of time, to raise the contention by amending the plaint under Order 6 Rule 17 of the CPC. D E F

The only crucial question is: whether the agreement is a compulsorily registrable document? Section 2(10) of the Indian Stamp Act defines "Conveyance". Conveyance includes a conveyance of sale and every instrument by which property, whether movable or immovable, is transferred *inter vivose* and which is not otherwise specifically provided for by Schedule I. "Instrument" has been defined under Section 2(14) which includes every document by which any right or liability is or purports G H

A to be, created, transferred, limited, extended, extinguished or recorded. The agreement is, therefore, an instrument within the meaning of Section 2(14) of the Act.

The appellate Court rested its conclusion on the ground that the reading of the agreement would indicate that the appellant sought to fasten B his easementary right on the respondent. Therefore, it is not a compulsorily registrable document. The High Court had concluded that since the document limits and extinguishes his right to enjoy the property, it is a compulsorily registrable document under Section 17(1)(b) of the Act. Since it was not registered, it cannot form foundation for filing suit seeking injunction against the true owner. As seen, in Clause (2) of the agreement, C it is stated that whatever construction is raised, he will not open any door, window or ventilator or rain-water pipes and other pipes for discharge of the rain-water flowing towards south-north and he also undertook not to construct any platform or balcony or stairs or corners towards 16 ft. wide passage which the appellate left in his land in front of the land purchased by the respondent. He also undertook under the agreement that he would D not raise any boundary wall in the north after leaving a *set-back* of 3 feet measured from the platform.

It is seen that the respondent has limited by way of clog on the exercise of his right and enjoyment of the property purchased under the E sale deed dated June 25, 1964. In this behalf, whether the document is a compulsorily registrable document has to be considered from the language used in Section 17(1)(b) of the Act. The contention of Shri Sanghi, learned counsel for the respondent, is that when the instrument is in relation to immovable property and the document seeks to limit the right in relation to that property, it is a compulsorily registrable document and, therefore, F Section 17(1)(b) clearly applies to the facts in the case. By operation of Section 50 of the Registration Act such a document cannot be looked into. Section 17(1) envisages that any document, if the property to which the document relates, is situated in a district within the jurisdiction of the Sub-Registrar and as has been executed on or after the Act has come into force and it comes within any of the enumerated instruments, it is a G compulsorily registrable document. Clause (b) provides that other non-testamentary instruments which purport or operate to create, declare assign, limit or extinguish whether in present or in future any right title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, it is a compulsorily registrable H document. If it is unregistered, Section 49 of the Registration Act prohibits

acceptance of the document as evidence of right thereunder. Section 50 envisages that every such document of the kinds mentioned in Section 17(1) or Clause (a) and (b) of Section 18, shall, if duly registered take effect as regards, the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document or not be of the same nature as the registered document. It is to be seen that the agreement is not in the nature of registered document. Admittedly, in the sale deed the appellant had conveyed to the respondent absolute right title and interest in the property and open land was sold to the respondent. Subsequently, in respect of that property, the latter had executed an agreement limiting his right to construct the house in the manner and subject to the restrictions envisaged in the agreement. The question is: whether that document is capable of valuation? It is seen that what is material for the purpose of compulsorily registration under Section 17(1) is that the document must create, declare, assign, limit or extinquish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property should these two conditions be satisfied before insisting upon instrument for compulsory registration under Section 17(1)(b) of the Act. Section 49 or Section 50 prohibit use of the terms in the document which was not registered for any purpose under law. It is seen that there is restrictive clog on the exercise of the right over his property which the respondent had undertaken for constructing the house or wall over the property purchased. Though argument is in relation to the same property, the subject matter of the sale deed dated June 25, 1964, the undertaking given by the respondent is as to the exercise of his right over the property. It is incapable of valuation. Resultantly, its value cannot be construed to be hundred rupees or more. Under those circumstances, the agreement entered into by the respondent with the appellant is not a compulsorily registrable document under Section 17(1)(b) of the Registration Act.

In *Mohamad Hussain* v. *Korwar Earappa,* AIR (1954) Hyderabad 14, a Bench of the Hyderabad High Court, in analogous situation, had to consider this question. Thereunder, an agreement was to erect the common wall not in existence at the time of the agreement with certain conditions attached to the agreement. It was sought to be enforced by filing a suit for injunction. It was contended that the agreement limits right to enjoy the property and, therefore, the agreement being not a registered one, it cannot be enforced. The Division Bench had held that thus:

"The question is whether an agreement to erect a common

A wall with certain conditions attached to it and the liberty to the appellant to build a wall with certain limitations is tantamount to creation or limitations of an interest in future to or in immovable property." It was held that it is not a limitation on the exercise of the right and that, therefore, it is not a compulsory registreable document."

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The question of valuation in that case did not arise; even though we have held that it is conveyance or restrictive convenient or clog on the right to enjoy the property and may limit the enjoyment of the property; but being not capable of valuation of hundred rupees or more, the prohibition of C Section 17 (10)(b) is inapplicable to the facts in this case. Shri Sanghi has relied on *Kashinath Bhaskar Datar* v. *Bhaskar Vishweshwar,* AIR (1952) SC 153. Therein, after the mortgage deed was executed, on consideration of rendering service, the appellant thereunder had agreed to waive the interest. The question arise whether such a limitation D is a compulsorily registrable document. It was held in paragraph 7 that since the right to receive rate of interest mentioned in the mortgage deed is enforceable and subsequent agreement which limits or extinguishes the right to receive interest at a particular rate being a convenient limiting the right, it is compulsorily registrable document under Section E 17(1)(b) of the Act. Therein, the valuation of limiting the interest is capable of being valued. Therefore, it was held that it is a compulsorily registrable document.

In *Gobardhan Sahi and Anr.* v. *Jadu Nath Rai and Anr.,* ILR 35 F Allahabad 202, similar question had arisen. In that case also, after the mortgage was executed, the agreement was entered into to reduce the rate of interest. The Division Bench had held that since the mortgage agreed to forego interest covered by the mortgage deed, it extinguishes the right to receive interest. Therefore, it is a compulsorily registrable document. It was also held that the document could not be relied upon.

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The case of *S. Noordee* v. *V.S. Thiru Venkita Reddiar and Ors.,* AIR (1996) SC 1293, has no application to the facts in this case. Therein, the compromise decree was entered into under which the rights were created under the document not for the first time but pre-existing right. Therefore, this Court had held that it was not a compulsorily registrable H document.

In the case of *Lachhaman Dass* v. *Ram Lal and Anr.*, [1989] 2 SCR 250 at 259, this Court had held that the object of Section 17(1) (b) is to declare a right in present or in future in respect of immovable property of the value of Rs. 100 or upwards and it is to the benefit of not only of the purchaser but also notice for everyone. There is no dispute on the propostion of the law. In that case, since the award is of value of Rs. 100 and more it was held that it is a compulsorily registrable document. The same was the view taken in the case of *Mst. Kirpal Kaur* v. *Bachan Sing and Ors.*, [1958] SCR 950. The case of *Sardar Singh* v. *Krishna Devi (Smt.) and Anr.*, JT (1994) 3 SC 465=[1994] 4 SCC 18, also does not help the appellant. Similarly, this Court in *Bhoop Singh* v. *Ram Singh Major and Ors.*, [1995] 5 SCC 709 at 713, in paragraph 12 had held that though it was an immovable property, it was acquired for the first time under the compromise decree and having not been registered under Section 17(1)(b), the exceptions engrafted in sub-section (2) thereof have no application to the property though it relates to the enjoyment of the property in relation thereto.

Thus, we hold that all the decisions do not render any assistance to the respondent. It is then contended by Shri Sanghi that the appellant is not gaining any advantage by limiting the right to use the property of the respondent and the appellant may be compensated by adequate consideration. When we put it to the learned counsel for the appellant, Mr. J.P. Goyal, learned senior counsel for the appellant, has stated that his property is adjacent to the property in question and he is fighting the case throughout; therefore, the question of compensating the appellant does not arise. Since it is not acceptable to the counsel for the appellant, we cannot give any acceptance to the contention of the learned counsel for the respondent.

Thus, considered, we are of the view that the High Court was clearly in error in reversing the decree of the appellate Court and the cross-objections in the second appeal, though for the different reasons.

The appeal is accordingly allowed and the judgment of the High Court stands set aside and that of the appellate Court stands confirmed and cross objections in second appeal allowed. In the result, the suit stands decreed. But in the circumstances, the parties are directed to bear their own costs.

G.N. Appeal allowed.