

MUKESH KUMAR AND ORS.

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v

COL. HARBANS WARAICH AND ORS.

OCTOBER 27, 1999

[S. RAJENDRA BABU AND R.C. LAHOTI, JJ.]

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*Limitation Act, 1963—S.21—Suit for specific performance of contract—Transposition of a party from the array of defendants to plaintiff—Bar of limitation—Applicability of—Held, mere change of a party from the array of defendants to that of plaintiff will not make him new plaintiff—By virtue of sub-section (2) of S.21, deeming provision under S.21(1) not applicable to a case of transposition of parties—Civil Procedure Code, 1908—Order I rule 10—Specific Relief Act, 1963.*

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*Specific Relief Act, 1963—S.22—Specific performance of a contract—Enforcement of—Held, can be enforced by any party to a contract—In case of co-contractees it is sufficient if all of them are before the Court and it is not necessary that all of them should be arrayed on the same side—However where a single indivisible contract is to convey land to several persons, some of the joint contractees cannot seek specific performance if other contractees do not want that relief.*

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*Hindu Law—Hindu Undivided Family—Joint property—Attachment for payment of income tax dues—'Karta' of Hindu Undivided Family entering into sale transaction—Legal necessity of—Held, sale was for the purpose of benefit of joint family which was binding on all the members of family—No infirmity in the findings of courts below as to legal necessity.*

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Respondents No.1 to 3 (plaintiff) entered into an agreement with respondent No. 4 (defendant) for purchase of certain property. Respondent No. 4 was a 'Karta' of Hindu Undivided Family (HUF) comprising of appellants 1 to 5. Under the agreement, respondents 1 and 2 would together purchase one half of the property while respondent No. 3 would purchase the other half. Due to non-execution of sale deed, respondents 1 and 2 filed a suit for specific performance. Initially, respondent No. 3 refused to join as plaintiff and was arrayed as defendant No. 6 but subsequently he was transposed from the array of defendants and joined as plaintiff. Trial court decreed the suit holding that

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**A** since the Hindu Undivided Family was facing heavy debts, the sale of suit property was a legal necessity which would bind all the members. On appeal, both the first appellate court and High Court affirmed the findings of trial court. Hence the present appeal.

**B** On behalf of appellants it was contended that the findings reached by courts below regarding legal necessity was not correct since all the defendants were not partners of the defendant firm which was facing debt, the transposition of respondent No.3 from the array of defendants as plaintiff was beyond the period of limitation.

**C** Dismissing the appeal, the Court

**D** HELD : 1. There is no infirmity in the findings recorded by the courts below as to legal necessity. Though all the defendants may not have been partners of the defendant firm, all male members of the joint family who were major at that time were partners thereof and, therefore, it could not be said that the business carried on by defendant firm is not a family business of the defendants. The fact that joint family properties have been attached for payment of the income tax itself was sufficient to hold that the sale of the property was for the purpose of benefit of the joint family. [145-B-C-D]

**E** 2. The transposition of respondent No.3 from the array of defendants as plaintiff is not barred by limitation. S. 21 of the Limitation Act, 1963 provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be claimed to have been instituted when he is so made a party. However, sub-section (2) of S.21 of the Act makes it very clear that provisions of S.21 would not apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of the suit or where plaintiff is made a defendant or a defendant is made a plaintiff. For sub-section (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Thus, where a suit as originally filed is properly framed with the proper parties or record, the mere change of a party from array of defendants to that of plaintiff under Order I Rule 10 of the Civil Procedure Code will not make him a new plaintiff and will not bring the case within S.21 of the Limitation Act. [147-B-C-D-E]

**H** 3. Specific performance of a contract can be enforced by any party to the contract. If there are more parties than one, specific performance of a

contract cannot be decreed in the absence of some of the parties to the contract. If some of the parties entitled to the benefit of the contract are not willing to be arrayed as plaintiffs they should be impleaded as defendants. Judgment can be given in favour of the persons interested whether they are joined as plaintiffs or as defendants. In the case of co-contractees it is not necessary that all of them should be ranged on the same side for obtaining specific performance. It is sufficient if all of them are before the court. But where a single contract is to convey a land to several persons and the contract is not indivisible, some of the joint contractees cannot seek specific performance if the other contractees do not want that relief. [146-B-C-D-E]

*Nirmala Bala Dasi v. Suddarsan Jana*, AIR (1980) Cal. 258; *Jagdeo Singh v. Bisambhar*, AIR (1937) Nag. 186, approved.

*Monghibai v. Cooverji Umersry*, AIR (1939) PC 170, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4918 of 1989.

From the Judgment and Order dated 11.3.88 of the Punjab and Haryana High Court in R.S.A. No. 1730 of 1987.

B. Sen, N.N. Goswami, S.K. Bagga, R.K. Talwar, D.M. Sinha, P.N. Puri, Arvind Minocha, G.S. Sachdev, Seeraj Bagga and Ms. Shurestha Bagga for the appearing Parties.

The Judgment of the Court was delivered by

**RAJENDRA BABU, J.** Respondents Nos. 1 and 2 entered into an oral agreement with respondent No. 4 to sell property comprising building no. 1 along with open area surrounding Cool Road, Jalandhar measuring about 3 kanals and 17.75 marlas. Pursuant to this agreement a documents was written on April 12, 1978 setting out that respondents Nos. 1 and 2 would together purchase one half of the property, while respondent No. 3 would purchase the other half. A sum of Rs. 80,000 was paid on February 23, 1978 as earnest money and Rs. 40,000 was paid on April 12, 1978. Respondent No. 3 entered into the possession thereof on that day. A suit was originally filed by respondents Nos. 1 and 2 against respondent No. 4 and appellants Nos. 1 to 4, while appellant No. 5 was impleaded subsequently. The suit filed was for specific performance to execute the sale deed in favour of the plaintiffs and to receive the balance amount of Rs. 80,000 before the Sub-Registrar, Jalandhar at the time of registration of the sale deed. In the alternative reliefs

- A** claimed for are for the return of the earnest money paid with stipulated damages and the cost incurred for the repairs of the building. The trial court on August 4, 1984 decreed the suit directing the plaintiffs to deposit the balance sale price of Rs. 80,000 along with sale and registration expenses in that court within a period of two months and further directed the respondents to execute the required sale deed in favour of the plaintiffs. However, the trial court excluded 1/25th share of Manju, appellant No. 4 herein. The first appellate court while dismissing the appeal filed by the defendants allowed the cross objections of the plaintiffs to the extent of 1/25th share of appellant No. 4. On second appeal to the High Court the findings recorded by the court below were affirmed except to the extent of 1/25th share of appellant No. 4 and the appeal filed by appellant No. 4 was allowed to the extent of her 1/25th share in the property and the decree of the first appellate court was set aside and that of the trial court restored. That decree is in appeal before us by way of special leave.
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- D** Several issues had been raised in the suit. The trial court came to the conclusion that Suresh Kumar, respondent No. 4, as Manager of Karta of the Hindu undivided family comprising defendants Nos. 1 to 5, entered into oral agreement on February 23, 1978 to sell the suit property to the plaintiffs and received a sum of Rs. 1,20,000 as earnest money. He also found that considering the extent of properties and nature of the business carried on by the joint family of the defendants, the Hindu undivided family was heavily in debt facing suits of the magnitude of Rs. 70 lakhs and more, was also in arrears of income tax of more than Rs. 3,60,000 and sale of such property which was not yielding any income was a part of good management by the Karta and the proceeds were prudently applied for the business of the Hindu undivided family and such a transaction could bind all the members of the Hindu undivided family, including Yogesh Kumar who was minor at that time. The pleading and evidence showed that the plaintiffs were always ready and willing to perform their part of the contract and they were capable of paying the balance amount of the sale price along with sale and registration charges, but the respondents committed the breach of contract and therefore, the appellants were entitled to the specific performance of the contract. The share of appellant No. 4 to the extent of 1/25th share could not come in the way of execution of the decree for specific performance of the agreement to 24/25th share of the property which was sold. These findings stood affirmed in the second appeal except to the extent indicated earlier. Therefore, in substance the findings of the trial court have been affirmed in the second appeal by the
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High Court.

The learned counsel for the appellant raised three specific contentions for our consideration. Firstly that the finding recorded by the courts below in regard to legal necessity is not correct. On this aspect the contention put forth is that the High Court had found that the firm of defendants was known as M/s. Amin Chand Bhola Nath. In the said firm all the defendants were not partners and, therefore, the High Court was wrong in having come to the conclusion that the sale of the property belonging to a joint family was for the benefit of the family when, in fact, not all the defendants were partners thereof. But it is brought to our notice that though all the defendants may not have been partners thereof, all male members of the joint family who were major at that time were partners of the firm and, therefore, it could not be said that the business carried on by M/s Amin Chand Bhola Nath is not a family business of the defendants. The fact that the joint family properties have been attached for payment of the income tax extending to over Rs. 3 lakhs itself was sufficient to hold that the sale of the property was for the purpose of benefit of the joint family. In that view of the matter, we find no infirmity in the finding recorded by the courts below as to legal necessity.

The next contention advanced on behalf of the appellants is that the agreement was signed by Suresh Kumar as *Karta* on behalf of the Hindu undivided family and also as Power of Attorney holder of other defendants. The finding recorded by the trial court in this regard is that Suresh Kumar was karta of the Hindu Undivided Family comprising defendants Nos. 1 to 4. The execution of the sale deed by Suresh Kumar was not only as a Power of Attorney holder but also as Karta of the Hindu undivided family. In the circumstances, we hardly find any significance of the Power of Attorney when the agreement was signed by Suresh Kumar as Karta on behalf of the members of the Hindu undivided family. In fact the concurrent finding recorded by the courts below is that the agreement to sell the properties was for an on behalf of the joint family and for its benefit. The question raised is pure question of fact and we do not propose to reappraise the evidence to reach a contrary conclusion. Hence this contention also fails.

The third and last contention raised is as to limitation, that the suit agreement falls into two parts: one half of the property is proposed to be purchased by the original plaintiffs, while the other half is sought to be purchased by the third plaintiff transposed from the array of defendants; that his transposition as plaintiff was far beyond the period of limitation for

A enforcing the agreement in relation to sale of his half share in the property in question.

B Specific performance of a contract can be enforced by any party to the contract. If there are more parties than one specific performance of a contract cannot be decreed in the absence of some of the parties to the contract. If some of the parties entitled to the benefit of the contract are not willing to be arrayed as plaintiffs they should be impleaded as defendants. Section 23 (a) of the Specific Relief Act (now Section 22) covers such a case. In *Nirmala Bala Dasi v. Suddarsan Jana*, AIR (1980) Cal. 258, it is held that one of the co-promisees may sue for specific performance making the other co-promisees as defendants. Judgment can be given in favour of the persons interested whether they are joined as plaintiffs or as defendants. See: *Monghibai v. Cooverji Umersry*, AIR (1939) PC 170. In a case where property was agreed to be transferred to three co-promises and all the three filed a suit for specific performance of the contract but only one of them came to witness box in support of the claim, it has been held that the other two co-promisees would also be entitled to a decree of specific performance. In the case of co-contractees it is not necessary that all of them should be ranged on the same side for obtaining specific performance. It is sufficient if all of them are before the court. (See: *Jagdeo Singh v. Bisambhar*, AIR (1937) Nag. 186). But where a single contract is to convey a land to several persons and the contract is not indivisible some of the joint contractees cannot seek specific performance if the other contractees do not want that relief.

In the present case, in paragraph 6 of the plaint filed before the trial court, it is stated as follows:-

F “Shri Ashwani Kumar Sharma, Advocate, defendant No. 6 has similar right of getting specific performance of the agreement of sale in question but he has not joined the plaintiff in this suit. Therefore, he has been impleaded as defendant No. 6”

G A decree for specific performance sought for is in respect of entire property and it is valued at Rs. 2 lakhs as entire consideration and the court fee was paid on that basis. That is, in the event a decree is passed in favour of the plaintiffs as originally set forth in the plaint, it is possible for Ashwani Kumar to seek for appropriate relief from them and their *inter se* dispute, if any, could have been settled separately. That circumstance will not disentitle the plaintiffs from seeking appropriate relief. If that suit was maintainable with H Ashwani Kumar as one of the defendants, we find it difficult to see as to how

it is not possible for them to transpose him as plaintiff in terms of Order 1 Rule 10 C.P.C. A

Section 21 of the Limitation Act provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he is so made a party. However, if court is satisfied that omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Sub section (2) thereof makes it very clear that these provisions would not apply to a case where a party is added or substituted owing to assignment or devaluation of any interest during the pendency of the suit or where plaintiff is made a defendant or a defendant is made a plaintiff. Section 21 has no application to cases of transposition of parties. Since transposition also involves addition of a plaintiff or a defendant, as the case may be into the suit as originally filed, sub-section (2) of Section 21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained on the plaint as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. For sub-section (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Where a suit as originally filed is properly framed with the proper parties on record the mere change of a party from array of defendants to that of plaintiffs under Order 1 Rule 10 of the Civil Procedure Code will not make him a new plaintiff and will not bring the case within this Section and in such a case sub-section (2) will not apply. For instance, where one of the plaintiffs refusing to join as plaintiff was first made a defendant and thereafter transposed as a plaintiff, he is not a new plaintiff. Therefore, the argument advanced on behalf of the appellants that the suit is barred by limitation in so far as Ashwani Kumar is concerned inasmuch as he is transposed as a plaintiff after the period of limitation does not stand to reason. B  
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None of the grounds raised by the appellants survive for consideration. Therefore, the appeal will have to be dismissed. It is ordered accordingly. No order as to costs. G

S.V.K.

Appeal dismissed.