PETITIONER:
SARDAR SINGH

Vs.

RESPONDENT:
KRISHNA DEVI

DATE OF JUDGMENT26/04/1994

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
VENKATACHALA N. (J)

CITATION:
1995 AIR 491 1994 SCC (4) 18
JT 1994 (3) 465 1994 SCALE (2)719

ACT:

HEADNOTE:

JUDGMENT:
The judgment of Court was delivered by
K. RAMASWAMY, J.- Leave granted.
2. While the appellant was in government service, Kartar Lal (first defendant in the suit), his brother had purchased on 7-4-1959 the house bearing Municipal No. 313, with land admeasuring 222 sq. yards in Karol bagh from the Ministry of Rehabilitation. On 22-1-1963 the sale certificate was issued in favour of Kartar Lal. Finding it exclusively in the name of Kartar Lal, the appellant raised a dispute which was referred to named private arbitrators for resolution. The two arbitrators by their award dated 16-10-1963 declared that:

> "We award that Shri Sardar Singh is the owner of half house bearing Municipal No. 313, Ward No. XVI situate at Gali No. 10, Faiz Road, Karol Bagh, New Delhi, from the date of purchase of the said house, i.e., from 7-4-1959 as he paid Rs 18,100 to Shri Kartar Lal in the shape of claim bonds valued at Rs 11,560.00 and Rs 6540.00 in cash towards the purchase price of the said house and Shri Kartar Lal paid half of the price of the said house in the shape of claim bond and cash. The price of the said house was contributed half and half by both of them. Though, the sale deed was taken by Shri Kartar Lal in his name benami but actually Shri Kartar Lal and Shri Sardar Singh, are the owners of the said house in equal share from the date of its purchase, i.e., from 7-4-1959 and Shri Sardar Singh, is also entitled to half the amount of rent of the said house from the date of its purchase after deducting property taxes paid by Shri Kartar Lal."

On an application made under Section 14 of the Arbitration

Act, 1940 by the appellant, the arbitrators produced the award in Suit No. 299 of 1963 in the Court of the Judge, First Class, Delhi which was made rule of the court under Section 17 thereof by decree dated 28-12-1963. The appellant laid proceedings before the Rent Controller for eviction of their tenants for personal occupation on the ground that he being a government servant was entitled to possession under special procedure prescribed under that Act and accordingly had possession. Kartar Lal entered into a contract of sale of the entire property with Joginder Nath, husband of the first respondent on 15-1-1973 for Rs 90,000 and had received part consideration. The time to execute the sale deed was extended from time to time up to 31-12-1979 by which date Joginder Nath died and the first respondent had entered into fresh contract with Kartar Lal and laid the suit in OS No. 2 of 1983 against Kartar Lal. The appellant, becoming aware of the contract of sale and pending suit,

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got himself impleaded in that suit as second defendant. The trial court by decree dated 5-5-1986 decreed the suit. On appeal the High Court of Delhi in RFA No. 206 of 1986 by judgment and decree dated 21-11-1990 confirmed the decree.

3. The courts below found that the appellant's title is founded upon the award to acquire title to or to divest the title of Kartar Lal; it is compulsorily registrable under Section 17 of the Registration Act, 1908 and being an unregistered award the same was inadmissible in evidence as source of title under Section 49 thereof. The appellant's claim as owner of the half share in the property was thus negatived. The question, therefore, is whether the award, on the facts and in the circumstances, is compulsorily registrable under Section 17 of the Registration Act which reads thus:

> "17. Documents of which registration is compulsory.- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely-
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> (a)
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> (b) 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."

4. Section 49 declares the effect of non-registration that no document required under Section 17 ... to be registered shall have an effect on any immovable property comprised therein ... or be received as evidence of any transaction affecting such property ... unless it has been registered. A conjoint reading of Section 17(1)(b) and Section 49 of the Registration Act establishes that a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish in present or future, any right, title or interest, whether vested or contingent to or in any immovable property of the value of Rs 100 and above, shall compulsorily be registered, otherwise the instrument does

not affect any immovable property comprised therein or shall not be received as evidence of any transaction affecting such immovable property. This Court in Lachhman Dass v. Ram Lall held the purpose of registration that: (SCC p. 106, paras 13 and 14 : SCR p. 259 C & D)

> "In other words, it is necessary to examine not so much what it intends to do but what it purports to do.
> The real purpose of registration is to secure that every person dealing with the property, where such document requires registration, may rely
> 1 (1989) 3 SCC 99: (1989) 2 SCR 250, 259
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> with confidence upon statements contained in the register as a full and complete account of all transactions by which title may be affected. Section 17 of the said Act being a disabling section, must be construed strictly. Therefore, unless a document is clearly brought within the provisions of the section, its non-registration would be no bar to its being admitted in evidence."

5. The award made by a private arbitrator is a non-testamentary instrument under Section 17(1)(b), though the counsel for the appellant contended contra and we need not dilate on this aspect. In Satish Kumar v. Surinder Kumar2 an arbitrator was appointed by the parties without reference to the court to partition their immovable properties. An award in that behalf was made and on an application under Section 14 of the Arbitration Act, the award was made a rule of the court. The question arose whether such award was admissible in evidence as affecting partition of the immovable property. This Court held that the award required registration under Section 17(1)(b). Therefore, the award is a non-testamentary instrument.

6. The question, therefore, is whether the award in favour of the appellant creates any right, title and interest in half share of the house in his favour or extinguishes the right, title and interest therein of Kartar La]. It is, therefore, necessary to examine the award not so much to find what the award intended to do, but what it purports to do and the consequences that would flow therefrom. In this behalf we cannot accept the contention of Shri M.C. Bhandare, learned Senior Counsel, that award does not require registration as it merged in the decree of the civil court making it a rule of the court. As seen in Satish Kumar case2 this Court found that in case the award, if it creates for the first time a right in the immovable property of the value of Rs 100 or above, in the absence of its registration, the awardee would not get title on the award and the title would remain with the party against whom the award was made. The same view was reiterated in Ratan Lal Sharma v. Purshottam Harit3 and in Lachhman Dass case'. In all these cases this Court found that the title was founded on the award.

7. But as said earlier, the crucial question is what the award purports to do? As seen, the arbitrators in the award dated 19-10-1963 declared that Kartar Lal is benamidar, the appellant had contributed half the consideration of the sale price and is the owner of half the house with effect from the date of the purchase, namely 4-4-1959 and both the brothers, each as owner, are entitled to half the rent.

8. The contention of the counsel for the respondents that the award creates therein right, title and interest in

favour of the appellant and extinguishes that of Kartar Lal who had sale certificate in accordance with the law; his title gets divested only when the award was registered; its nonregistration renders it inadmissible as evidence of title; since the foundation of title, therefore, of the appellant, is based on the award, it cannot be looked

2 (1969) 2 SCR 244: AIR 1970 SC 833

3 (1974) 1 SCC 671 :(1974) 3 SCR 109

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into, nor can it be considered, are devoid of force. In Uttam Singh Duggal v. Union of India 4 the facts therein were that pending civil suit the Union of India called upon the arbitrator to adjudicate the dispute between the appellant and the Union. The award was made after deciding the dispute. It was contended for the appellant that since the award was earlier made and became final, but was not registered, there cannot be a second reference on the same dispute. The High Court held that the first award did not create any bar against the competence of the second reference. On appeal, relying on Sections 33 and 17 of the Arbitration Act this Court held that "all claims which are the subject-matter of the reference to arbitration merged in the award which is pronounced in the proceeding before the Arbitrator and that after the award has been pronounced the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award", and thereafter no action can be started on the original claim which had been the subject-matter of the reference. An award between the parties is entitled to that respect which is due to the judgment of a court of law to serve. Therefore, it was held that the second reference was incompetent. In Kashinathsa Yamosa Kabadi v. Narsingsa Bhaskarsa Kabadi5 on a question whether an award made in arbitration out of court and accepted by the parties, in the absence of registration, could be pleaded in defence as a binding decision between the parties, this Court held thus: (SCR p. 806)

> "It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent actings of the parties are binding. By setting up a defence in the present case that there has been a division of the property and the parties have entered into possession of the properties allotted, defendant 1 is not seeking to obtain a decision upon the existence, effect or validity of an award. He is merely seeking to set up a plea that the property was divided by consent of parties. Such a plea is in our judgment not precluded by anything contained in the Arbitration Act."

It is, therefore, clear that though the award was not registered, it could be relied on as a defence to show that parties had agreed to refer the dispute to private arbitration, the award made thereon was accepted by the parties and acted upon it.

9. In Champalal v. Samarath Bai6 this Court held that:

(SCR p. 816)

> "The filing of an unregistered award under Section 49 of the
> Registration Act is not prohibited; what is prohibited is that it cannot be
> 4 C.A. No. 162 of 1962,decided on 11- 10- 1962
> 5 (1961) 3 SCR 792: AIR 1961 SC 1077
> 6 (1960) 2 SCR 810: AIR 1960 SC 629
> 25
> taken into evidence so as to affect immovable property falling under Section 17 of that Act."

10. In Addanki Narayanappa v. Bhaskara Krishtappa7 (SCR at pp. 410 and 41 1) this Court held that a document of dissolution only records the fact that the partnership had come to an end. It cannot be said to convey any immovable property by a partner to another expressly or by necessary implication, nor is there any implication. It was held that such a deed was not compulsorily registrable under Section 17(1)(b) of the Registration Act. In CIT v. Juggilal Kamalapat8 (SCR at p. 790) the deed of relinquishment was accepted by one partner in favour of the other partners in the partnership firm including immovable property. This Court held that the deed of relinquishment was in respect of individual interest of a partner in the assets of the partnership firm including immovable property was valid without registration. All the assets of the partnership firm vested in the new partners of the firm. This Court approved the Full Bench judgment of the Lahore High Court in Ajudhia Pershad Ram Pershad v. Sham Sunder9 wherein the Full Bench held that assignment of the interest of partnership of a partner is to be regarded as movable property, notwithstanding the fact that at that time when it was charged or sold, the partnership assets included immovable property. In Lachhman Dass case' this Court noted the distinction between the declaration of an existing right as a full owner of the property in question and creation of a right in immovable property in praesenti. In that case since a new right was created under the award in favour of the respondent, it was held that the award required registration and non-registration rendered the award inadmissible in evidence under Section 49.

11. In Kale v. Dy. Director of Consolidation10 this Court held that a family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. Family arrangements are governed by principles which are not applicable to dealings between the strangers. The court when deciding the rights of partners under family arrangements, consider what is the broadest view of the matter, having regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. If the terms of the family arrangement made under the document as a mere memorandum, itself does not create or extinguish any right in immovable property and, therefore, does not fall within the mischief of Section 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable.

7 (1966) 3 SCR 400: AIR 1966 SC 1300
8 (1967) 1 SCR 784: AIR 1967 SC 401
9 ILR 28 Lah 417
10 (1976) 3 SCC 119, 126: (1976) 3 SCR 202

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12. It is, thus, well-settled law that the unregistered award per se is not inadmissible in evidence. It is a valid award and not a mere waste paper. It creates rights and obligations between the parties thereto and is conclusive between the parties. It can be set up as a defence as evidence of resolving the disputes and acceptance of it by the parties. If it is a foundation, creating right, title and interest in praesenti or future or extinguishes the right, title or interest in immovable property of the value of Rs 100 or above it is compulsorily registrable and non-registration renders it inadmissible in evidence. If it contains a mere declaration of a pre-existing right, it is not creating a right, title and interest in praesenti, in which event it is not a compulsorily registrable instrument. It can be looked into as evidence of the conduct of the parties of accepting the award, acting upon it that they have pre-existing right, title or interest in the immovable property.

13. In the light of the above conclusion and of the contents of the award referred to hereinbefore, the necessary conclusion is that the award did not create any right, title or interest in the appellant for the first time, but it declared the pre-existing factum, namely the appellant and Kartar Lal purchased the property jointly and that Kartar Lal was the benamidar and that both of the brothers had half share in the house with a right to enjoyment of the property in equal moiety. Thus the award is not compulsorily registrable. The contention of the counsel for the respondent is that if the unregistered award is accepted as a foundation and received in evidence effecting interest in immovable property, there is possibility of avoiding registration and by indirect process get title conferred, defeating the mandate of Section 17 and Section 49 of the Registration Act. Each case must be considered from its own facts and circumstances; the pre-existing relationship of the parties; the rights inter vivos and the interest or rights they claimed and decided in the award and the legal consequences. On the facts of this case we hold that the appellant and Kartar Lal being tenants in common, migrants from Pakistan after partition, the appellant being government servant, obviously, his brother Kartar Lal purchased the property for their benefit as coparceners or co-owners. In that view it must be held that the award does not have the effect of creating any right in praesenti, nor is it an attempt to avoid law. The award was made rule of the court a decade earlier to the date of the initial agreement of sale.

14. The next question is whether the courts below were justified in decreeing the suit for specific performance. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.

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15. Section 12 provides for specific performance of part of contract. Subsection (1) thereof postulates that except as

otherwise hereinafter provided in the section, the court shall not direct the specific performance of a part of a contract. Sub-section (4) thereto envisages that when a part of the contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part. Section 10(b) provides that:

> "Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-
> (a) * *
> *
> (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief."

It is contended for the appellant that the first respondent prayed for refund of the earnest money; since the agreement was in respect of the entire property including the half share of the appellant, the courts below, instead of decreeing specific performance of the contract, ought to have awarded refund of the earnest money. The decree for specific performance in the circumstances is illegal. Spry in his Equitable Remedies, 4th Edn., 1990 stated at p. 59 that:

> "In the absence of special circumstances rendering equitable relief appropriate the courts will not grant specific performance, if damages would leave the plaintiff in as favourable a position in all material respects, it is now necessary to reassess earlier decisions in which damages have been held to be an adequate remedy."
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> At p. 60 it is stated that:
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> "A special difficulty arises where even if the agreement in question is performed in specie, the right that the purchaser will obtain will probably not amount to more than a right to receive payments of money, such as when the land in question will probably be compulsorily acquired pursuant to statutory authority, but the better view is that damages are not an adequate remedy even in cases of this kind."
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> At p. 106 it was further stated that:
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> "Although it was said in a number of early cases that courts of equity will not order specific performance of part only of a contract, this limitation has no basis in principle, and it is now accepted that in a number of diverse circumstances partial enforcement in specie is appropriate."
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> At p. 135 it is stated that:
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> "It is well established that generally a plaintiff will not succeed in obtaining an order of specific performance unless he is able to show sufficiently and clearly the existence of a contract that is valid and enforceable at law at the time when the order is sought."
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> At p. 158 it is stated that:
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> "Whenever there is an active misrepresentation, whether it is innocent or fraudulent, or a non-disclosure in

> circumstances where there is a duty of disclosure, and according to the appropriate legal and equitable rules, the defendant against whom proceedings for specific performance are brought has a right to rescind, it follows as a matter of course that specific enforcement will not be ordered against him."
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> At p. 199 it is stated that the court may take account of the fact that there are-
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> " third persons so connected with the defendant that, by reason of some legal or moral duty which he owes them, it would be highly unreasonable for the court actively to prevent the defendant from discharging his duty."
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> At p. 312 it is stated that:
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> "It has been held by courts of equity that specific performance will not be granted to a vendor if, although he has established a good title on the balance of probabilities, that title is sufficiently uncertain to be regarded as a doubtful title in the sense in which that term is understood in the material authorities; for otherwise it might appear in subsequent proceedings that a title that the purchaser has obtained a deficient, and there might be no way in which he could be properly compensated."

16. The contention of the respondent that the appellant and Kartar Lal colluded to bring the award into existence to defeat the rights of the first respondent is devoid of substance. The award was made the rule of the court 10 years prior to the contract of sale. Kartar Lal even in this Court stood by his contract in favour of the respondent which would belie the plea of collusion.

17. In view of the finding that the appellant had half share in the property contracted to be sold by Kartar Lal, his brother, the agreement of sale does not bind the appellant. The decree for specific performance as against Kartar Lal became final. Admittedly the respondent and her husband are neighbours. The appellant and his brother being coparceners or coowners and the appellant after getting the tenant ejected both the brothers started living in the house. As a prudent purchaser Joginder Nath ought to have made enquiries whether Kartar Lal had exclusive title to the property. Evidence of mutation of names in the Municipal Register establishes that the property was mutated in the joint names of the appellant and Kartar Lal and was in joint possession and enjoyment. The courts below, therefore, have committed manifest error of law in exercising their discretion directing specific performance of the contract for the entire property. The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice. Accordingly we hold that Joginder Nath having contracted to purchase the property, it must be referable only in respect of half the right,