

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR-1321-2013

Date of decision: 12.1.2015

Paramjit Singh Mann

..... Petitioner

Versus

Mahinder Pal and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH

1. *Whether Reporters of the local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

PRESENT: Mr. Parminder Singh, Advocate for the petitioner.

Mr. Saurabh Bajaj, Advocate for respondent No. 3.

Mr. Amit Singla, Advocate for respondent No. 4.

R.P. NAGRATH, J.

The petitioner has invoked revisional jurisdiction of this Court under Article 227 of the Constitution of India seeking to set aside the order dated 7.2.2013 (Annexure P-6), passed by the trial Court whereby the application filed by the plaintiff-petitioner to prove two agreements to sell dated 15.10.2003 and 5.2.2004 by way of secondary evidence was declined.

2. The petitioner filed a suit for possession by way of specific performance of two agreements to sell dated 15.10.2003 and 5.2.2004

executed by defendant-respondent No. 1 in respect of 15 kanals 5 marlas of the land being one half share of the total land measuring 30 kanals 10 marlas. This land was owned by Sh. Karam Chand, father of defendant-respondent No. 1. Sh. Karam Chand died on 8.4.2002 and his estate devolved upon respondent No. 1 and Raj Rani, his sister-in-law (wife of deceased brother of respondent No. 1) on the basis of Will dated 5.3.2002. The mutation of the estate of Sh. Karam Chand was entered on 17.9.2003 but it had not been sanctioned at the time when agreement to sell dated 15.10.2003 was executed. The agreement was executed for a consideration of ₹ 6,48,125/- and the target date for execution and registration of the sale deed was fixed for 5.2.2004 and the balance amount of sale consideration i.e ₹ 2,48,125/- was to be paid at the time of execution of the sale deed. Since the mutation was not yet sanctioned the respondent No. 1 executed another agreement to sell dated 5.2.2004 and received the balance amount of ₹ 2,48,125/- from the plaintiff-petitioner.

3. Both these agreements were scribed by Sh. Rohtash Mann, Advocate, District Courts, Karnal and attested by Leelu Ram and Sultan Singh. Possession of the land agreed to be sold was delivered to the plaintiff-petitioner at the time of execution of first agreement dated 15.10.2003. It was further stated that since the mutation could not be sanctioned, no date for execution of the sale deed was fixed in the second agreement and defendant-respondent No. 1 was bound to serve one week's notice to the plaintiff-petitioner on sanction of the mutation to get the sale deed registered.

4. It was further stated that the petitioner's possession was

threatened by defendant-respondents No. 2 to 4 and it was revealed that respondent No. 1 has executed the sale deed in respect of the same land measuring 15 kanals 5 marlas in favour of defendant-respondents No. 2 and 3 vide sale deed dated 8.9.2004 and defendant-respondent No. 2 further sold the land measuring 6 kanals 2 marlas out of the total land measuring 15 kanals 5 marlas to defendant respondent No. 4 vide sale deed dated 25.02.2005. The sale deeds were attacked as sham and bogus transactions and the result of fraud played upon the plaintiff-petitioner and thus, are not binding upon him. The mutations No. 929 and 951 on the basis of these sale deed were also sanctioned. It is pertinent to mention that the petitioner had attached photostat copies of both the agreements to sell along with the plaint in the suit instituted by him in the year 2008.

5. The facts of the case would further reveal that the plaintiff-petitioner was afforded sufficient opportunities to produce his evidence but having failed to do so, the suit was dismissed in terms of Order XVII Rule 3 of the Code of Civil Procedure (CPC) by the trial Court on 17.11.2010. The petitioner filed Civil Appeal No. 124 on 21.12.2010 against the judgment and decree dated 17.11.2010, passed by the trial Court. It was noticed by the learned Appellate Court that when the matter was fixed before the trial Court on 9.9.2010, as last opportunity for evidence, two witnesses of the plaintiff were present but it was informed that the original agreements were lost. However, another adjournment was granted by the trial Court for evidence for 17.11.2010 subject to payment of ₹ 300/- as costs. On the said date, learned trial Court closed

the evidence and dismissed the suit.

6. The learned Appellate Court observed that when the plaintiff-petitioner had informed the trial Court about loss of the documents instead of taking drastic step of closing evidence, a suggestion could be made to the plaintiff-petitioner to lead secondary evidence in the ends of justice. Consequently, the judgment and decree of the trial Court was set aside and the matter was remitted to the trial Court for affording one effective opportunity to the plaintiff-petitioner to conclude his evidence, at responsibility. The learned Appellate Court directed the parties to appear before the trial Court on 10.10.2011, with liberty to the the plaintiff-petitioner to move an application for leading secondary evidence to prove agreements to sell.

7. The petitioner moved an application dated 10.10.2011 (Annexure P-4) before the trial Court. It was stated that original agreements dated 15.10.2003 and 5.2.2004 have been lost/misplaced and these could not be traced out despite due diligence. Therefore, prayer was made to prove these agreement by photostat copies thereof by examining witnesses to these agreements. The application was opposed by the defendants by filing reply Annexure P-5.

8. Learned trial Court observed that the agreements to sell were not registered documents and there is no evidence whatsoever to prove that original of these documents were in fact in existence. It was further observed that there is even no mention in the application as to the place where and the manner in which the original agreements to sell were lost/misplaced nor there was any assertion in the application that any

report/DDR with regard to loss of agreements was lodged with the police. It was, thus, held by the learned trial Court that the plaintiff-petitioner has failed to make out a case for existence as well as loss of the alleged original agreements to sell in question and the prayer to lead secondary evidence was declined.

9. I have heard learned counsel for the parties and carefully perused the impugned order as well as the paper-book.

10. I am of the view that observations of the learned trial Court that agreements for specific performance under which possession of the property was also delivered, being un-registered cannot be looked into, is not sustainable. Reference to the Division Bench of this Court in RSA-4946-2011, relating to the conflict between two Single Bench judgments titled **Gurbachan Singh Vs. Raghubir Singh, 2010 (2) Punjab Law Reporter 511** and **Birham Pal and others Vs. Niranjana Singh and another, 2011 (2) Law Herald (Punjab and Haryana) 1136**, on the question was answered on 12.10.2010. It was held as under:-

- (a) a suit for specific performance, based upon an unregistered contract/agreement to sell that contains a clause recording part performance of the contract by delivery of possession or has been executed with a person, who is already in possession shall not be dismissed for want of registration of the contract/agreement;
- (b) the proviso to Section 49 of the Registration, Act legitimises such a contract to the extent that,

even though unregistered, it can form the basis of a suit for specific performance and be led into evidence as proof of the agreement or part performance of a contract.

11. Learned counsel for the petitioner referred to the written statement filed by defendant-respondent No.1 Annexure P-2, wherein he admitted execution of the agreements in question. It was stated that defendant-respondent No. 1 was in dire need of money and approached the petitioner to advance him a sum of ₹ 6,50,000/-. Defendant-respondent No. 1 borrowed a sum of ₹ 6,48,125/- from the plaintiff-petitioner and he (petitioner) got executed the agreement in question from the defendant-respondent No. 1 as security towards the loan amount and on the mutual understanding, possession of the suit land was delivered to the plaintiff-petitioner. It is submitted that in view of this admission, the prayer for leading secondary evidence should have been allowed.

12. Learned petitioner's counsel relied upon judgment of this Court dated 11.11.2013 in ***CR-6-2012, (Jawahar Lal Vs. Surinder Singh and others)***, in support of his contention. The following principles were laid down by this Court:-

- “a) Photostat copy of a document can be allowed to be produced only in absence of original document.*
- b) When a party seeks to produce Photostat copy it has to lay the foundational facts by proving that original document existed and is lost or is in*

possession of opposite party who failed to produce it. Mere assertion of the party is not sufficient to prove these foundational facts.

- c) The objections as to non existence of such circumstances or non existence of foundational facts must be taken at earliest by the opposite party after the photostat copy is tendered in evidence.*
- d) When the opposite party raises objection as to authenticity of the Photostat copy its authenticity has to be determined as every copy made from a mechanical process may not be accurate. Both the requirements of clause (2) of section 63 are to be satisfied.*
- e) Allowing production of Photostat copy in evidence does not amount to its proof. Its probative value has to be proved and assessed independently. It has to be shown that it was made from original at particular place and time.*
- f) In cases where the Photostat copy is itself suspicious it should not be relied upon. Unless the court is satisfied that the Photostat copy is genuine and accurate it should not be read in evidence.*

g) *The accuracy of photostat copy shall be established on oath to the satisfaction of court by the person who prepared such copy or who can speak of its accuracy.”*

13. The question now would be whether a case for leading secondary evidence has been made out. The agreements in question are not scribed by a regular deed writer. There is no whisper in the application as to when and where the agreements in question were lost or whether the original agreements were in existence at the time the suit was instituted. No effort was made by the plaintiff-petitioner to bring on record the factum of loss of agreements, till such time the petitioner was granted last opportunity to lead evidence in support of his case.

14. It would be quite appropriate to refer to the judgment of this Court in **Banarsi Dass Vs. Om Parkash and others, 2005 (2) RCR (Civil) 72**. That was suit filed on 3.1.2002 for specific performance of agreement to sell dated 13.10.1998. In the said case, plaintiff had filed an application dated 12.6.2002, i.e. just after five months of the institution of the suit, under Section 65 of the Indian Evidence Act, 1872 for leading secondary evidence to prove the agreement to sell on the ground that original agreement to sell was not traceable as the same has been misplaced during the marriage of his daughter which had taken place on 8.5.2002 and on that occasion white-washing of the house had taken place in which the original agreement to sell was misplaced. The application was opposed by the defendants. This Court noticed the

provisions of Order VII Rule 14 CPC whereunder a duty is enjoined on the plaintiff to file the original documents along with the plaint on which it placed reliance. Rule 14 of Order VII CPC is reproduced as under:-

“14. *Production of document on which plaintiffs sues or relies.*- (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiffs witnesses, or handed over to a witness merely to refresh his memory.]”

It was observed that the suit itself was for specific performance of

agreement to sell dated 13.10.1998, therefore, under the aforesaid provision the same should have been filed with the plaint when the suit was filed on 3.1.2002. No explanation was tendered by the plaintiff-petitioner for not filing the original agreement. The application for leading secondary evidence was found to be an after-thought as in the written statement, the defendants have denied the very existence of the agreement and thereafter the plea of loss has been set up and photocopy is sought to be proved on record.

15. In **Hira and antoher Vs. Smt. Gurbachan Kaur, 1988 (2) PLR 173**, there was no allegation at the time of filing of the suit that agreement to sell had been lost or destroyed or was not otherwise available. It was only after allowing 2/3 opportunities to produce evidence that the last opportunity was allowed to the plaintiffs to produce evidence that the plaintiffs came forward with such an application without mentioning therein as to when and under what circumstances the original agreements to sell were lost. It was held that when the plea was vague, as stated above, which was not supported by any affidavit, it was not required of the trial Court to afford any opportunity of leading evidence on this point.

16. In **Smt. J. Yashoda Vs. Smt. K. Shobha Rani, 2007 (2) RCR (Civil) 840**, Hon'ble Supreme Court held as under:-

“The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior

evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.....”

17. The present is a case where the plaintiff-petitioner had relied upon two agreements of sell and both of these documents are stated to have been misplaced with quite vague allegations contained in the application, especially, when sufficient opportunities were earlier granted to the plaintiff-petitioner to lead evidence in support of his case.

18. The fact that defendant No. 1 admitted the execution of agreement to sell may be pressed upon by the plaintiff-petitioner to seek

an alternative relief of recovery of amount paid to him. Since, defendant-respondents No. 2 to 4 are not parties to the agreements to sell, they can possibly contend that defendant-respondent No. 1 was handed back the original agreements by the petitioner-plaintiff before the sale deeds were executed in favour of defendant Nos. 2 and 3. Defendant No. 1 rather pleaded in his written statement that defendants No. 2 and 3 are very clever, shrewd and mischievous persons and approached defendant-respondent No. 1 for getting the mutation sanctioned and they brought respondent No. 1 in the Tehsil Office at Karnal for getting the mutation sanctioned and now respondent No. 1 came to know that these respondents have obtained the sale deed dated 8.9.2004 by playing fraud upon defendant No. 1. It was not a version of defendant-respondent No. 1 that so far he has filed any suit to challenge the sale deeds in question despite a lapse of more than 10 years.

19. Thus, it would be for the plaintiff-petitioner to lead whatever evidence he wants to produce in support of his case only in one opportunity as was granted by the Appellate Court but there was no scope of making a specific prayer seeking permission to lead secondary evidence as proof of the documents in accordance with law has to be determined at the final stage. In view of the above the order passed by the learned Court cannot be faulted with.

20. With the aforesaid observations, the instant petition is dismissed.

January 12, 2015
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(R.P. NAGRATH)
JUDGE