

IN THE HIGH COURT OF PUNJAB & HARYANA AT  
CHANDIGARH

RSA No.2062 of 2005.

Decided on:-March 23, 2015.

Kartar Singh and others

.....Appellants.

Versus

Darbara Singh and others

.....Respondents.

CORAM: *HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.*

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Argued by:- Mr. S.S. Rangi, Advocate  
for the appellants.

Mr. Puneet Bali, Senior Advocate with  
Mr. H.S. Oberoi, Advocate  
for the respondents.

**Dr. Bharat Bhushan Parsoon, J.**

This regular second appeal by defendant Kirpal Singh, since deceased and now represented by his legal heirs, is directed against judgment and decree dated 29.10.1998 of the lower court, whereby suit of the respondents-plaintiffs for seeking a decree of specific performance of the agreement to sell dated 15.6.1983 in respect of the suit land, was decreed and appeal by defendant Kirpal Singh, appellant herein, preferred before the first appellate court, was dismissed on 18.12.2002.

2. Appellant-defendant Kirpal Singh was owner in possession of the suit land. This land was already mortgaged with the plaintiffs vide mortgage deed dated 9.6.1980. The defendant had not been able to redeem the mortgage. He had agreed to sell the land to the plaintiffs vide agreement to sell dated 15.6.1983 @ Rs.35,000/- per Killa and Rs.26,000/- were paid to

the defendant on the date of execution of the agreement. Sale deed was to be executed by 15.6.1984 after payment of balance sale consideration. Claiming their readiness and willingness to perform their part of the contract all through, on the appointed day when the defendant did not turn up in the office of Sub-Registrar, Samrala for execution and registration of the sale deed, whereas the plaintiffs were present with balance sale consideration as also to defray stamp, registration and miscellaneous charges, the plaintiffs, respondents herein, had issued notice on 12.12.1984 calling upon the defendant to execute the sale deed by 24.12.1984 on which day as well, the plaintiffs remained present in the office of Sub-Registrar but the defendant did not turn up even then.

3. When the appellant-defendant did not come forward to execute the sale deed in terms of agreement to sell dated 15.6.1983 and did not show his willingness and readiness, whereas the plaintiffs have been ready and willing to perform their part of the contract, on these averments, suit for specific performance of the agreement to sell, was filed by the plaintiffs.

4. The defendant did not appear before the lower court and was proceeded against ex-parte and an ex-parte decree was passed against the defendant on 13.6.1985 considering the ex-parte evidence produced by the plaintiffs. Later on, an application under Order IX Rule 13 CPC for setting aside the ex-parte judgment and decree was filed by the defendant but the same was also dismissed on 10.3.1989. However, appeal preferred by the defendant against said order was accepted on 14.5.1992 and the ex-parte decree was set aside, allowing the defendant to file his written statement. Though the suit was contested tooth and nail by the defendant, but only plea set up by him therein was that on the day of execution of the agreement to sell dated 15.6.1983, he had only taken a loan of Rs.7,500/- from plaintiff No.1 and agreement to sell dated 15.6.1983 (Ex.P1) was executed only as a

security for repayment of the loan, whereas there was no intention either of the defendant to sell the land or of plaintiff No.1 to purchase the same. Receipt of amount of Rs.26,000/- as set up by the plaintiffs was denied. Entire case of the plaintiffs that the sale deed was to be executed, was denied claiming dismissal of the suit.

5. In replication preferred by the plaintiffs, stand taken in the plaint was reiterated.

6. On the pleadings of the parties, on 20.8.1993 following issues were settled for adjudication by the lower court:

1. Whether defendant executed an agreement to sell dated 15.6.1983 and received Rs.26,000/- as earnest money?  
OPP
2. Whether plaintiffs have been ready and willing to perform their part of agreement? OPP
3. Whether suit is not maintainable in the present form?  
OPD
4. Relief.

7. After receiving oral as well as documentary evidence from the parties and considering the same while hearing arguments of their counsel, deciding all the issues in favour of the plaintiffs, their suit was decreed by the lower court vide judgment dated 29.10.1998 calling upon the defendant to execute the sale deed within a period of two months on deposit of balance sale consideration by the plaintiffs. The decree had followed.

8. The judgment and decree of the lower court was taken in appeal by the defendant claiming that the true tenor and nature of document Ex.P1 was a document of security for repayment of loan of Rs.7,500/- taken by defendant Kirpal Singh from plaintiff No.1 which was not appreciated in that context. In short, it is claimed that the appellant-defendant had never

agreed to sell his land and had merely taken a loan of Rs.7,500/- as he was to pay the loan amount to the village society from where he had earlier borrowed money. Finding no merit in the grounds taken in the appeal by the appellant-defendant and affirming judgment and decree of the lower court, the appeal was dismissed on 18.12.2002.

9. In this regular second appeal, claim of the appellant is that both the courts below did not appreciate the stand of the appellant-defendant and wrongly granted the relief of specific performance of the agreement. It is claimed that neither amount of Rs.26,000/- was received by the appellant as earnest money nor document (Ex.P1) was executed for sale of his land. It is, rather, set up by the appellant that he was in need of money and had taken loan from respondent-plaintiff No.1. It is urged that taking undue advantage of the defendant being under debt, document (Ex.P1) was taken as agreement to sell. It is claimed that even if the courts below had found the case of the plaintiffs to be of merit, money decree instead of specific performance only should have been allowed.

10. Order dated 16.1.2007 of this Court reveals that this appeal was admitted for hearing for determination of the following substantial question of law:

“Whether the agreement to sell dated 15.6.1983 is proved to be executed by the defendant-appellant for sale of 2 Bighas of the land?”

11. During the pendency of this appeal, respondent No.4 Nirmal Singh died and is represented by his two LRs brought on record on 11.9.2006. Similarly, respondent No.3 Karnail Singh also died during pendency of the appeal and his five LRs were brought on record out of whom three LRs were deleted from array of respondents vide order dated 11.9.2006.

12. Learned counsel for appellant Kirpal Singh (now deceased and represented through his LRs) has urged that transaction of loan has been converted into an agreement to sell, which was neither executed nor any earnest money, was received. It is claimed that when there was no agreement to sell, there was no question of being ready and willing to perform the agreement.

13. Counsel for the respondents, on the other hand, has urged that plea of loan raised in defence by the appellant-defendant is merely concocted and afterthought to thwart the claim of the plaintiffs. Asserting validity and legality of the impugned judgment and decrees of the two courts below, prayer for dismissal of the appeal has been made.

14. Before rival claims of the parties are adjudicated with reference to the evidence and attending circumstances on record, it would be appropriate to take stock of the facts about which there is no dispute.

15. The land in suit is 2 Pukhta Bighas. Jamabandi for the year 1976-77 testifies this fact. The defendant had already mortgaged this land with possession in favour of the plaintiffs on 9.6.1980 for a mortgage money of Rs.15,000/-. Jamabanbdi for the year 1981-82 supports this fact. The land was allegedly agreed to be sold for Rs.35,000/- per Killa; total land was valuing Rs.43,750/-. After adjusting Rs.15,000/- of the mortgage money, Rs.26,000/- additionally were paid. Total amount thus paid came to be Rs.41,000/-. Only Rs.2,750/- remained to be paid after payment of which the sale deed was to be executed by 15.6.1984.

16. Readiness and willingness to perform their part of the contract is elaborately pleaded by the plaintiffs in their pleadings and absence of the same is alleged qua the defendant. If pleadings of the defendant are taken into consideration, execution of the agreement to sell dated 15.6.1983 has nowhere been denied by the defendant but the only rider imposed by him is

that he never intended to sell his land as the agreement to sell was to serve as a security for repayment of the loan of Rs.7,500/- allegedly taken by the defendant from plaintiff No.1 on 15.6.1983, the date of execution of the agreement to sell. Relevant pleadings on this count are as under:

- “1. *That the suit is not maintainable in the present form. The plaintiffs have concealed the true facts from this Hon'ble Court. In fact on 15.6.1983 the answering defendant took a loan of Rs.7,500/- from the plaintiff No.1 and the plaintiff No.1 got executed the agreement to sell dated 15.6.1983 from the answering defendant as a security for the loan only. The answering defendant had no intention to sell his land.*
2. *That the plaintiff No.1 had only given a loan of Rs.7,500/- Rs.7,500/- to the answering defendant and got executed the present agreement from the answering defendant, so the question of readiness and willingness of the plaintiffs did not arise to perform their part of the contract.”*

17. In reply to the pleadings of the plaintiffs regarding execution of the agreement to sell and of their readiness and willingness to perform their part of the contract, stand of the defendant in para No.4 of his written statement is as under:

4. *That para No.4 of the plaint is wrong and hence denied. When the present agreement to sell was got executed from the answering defendant as security for the loan, so the question of readiness and willingness of the plaintiffs did not arise. The plaintiffs did not remain ready and willing.*

18. Receipt of notice sent by the plaintiffs, however, is denied by the defendant.

19. Controverting the allegations of the defendant in replication, entire story put forward by the defendant was denied while asserting the claim as was set up in the plaint. Relevant pleadings in replication preferred

by the plaintiffs are as under:

1. *Para No.1 of the preliminary objection is wrong. It is wrong to state that the suit is not maintainable in the present form. It is also wrong to state that the plaintiffs have concealed the true facts from this Hon'ble court. It is further wrong to state in fact on 15.6.1983 the answering defendant took a loan of Rs.7,500/- from the plaintiff No.1 and the plaintiff No.1 got executed the agreement to sell dated 15.6.1983 from the answering defendant as a security for the loan only. It is also wrong to state that the answering defendant had no intention to sell his land.*
2. *Para No.2 of the preliminary objection is wrong. The allegations to the effect that the plaintiff No.1 had only given a loan of Rs.7,500/- to the answering defendant and got executed the present agreement from the answering defendant, so the question of readiness and willingness of the plaintiff did not arise to perform their part of the contract are wrong and denied.*
3. *Para No.3 to 11 and 13 of the written statement are wrong and denied. The allegation to the effect that the answering defendant did not receive any earnest money and that present agreement to sell was got executed from defendant as security and that the plaintiff did not remain ready and willing to perform his part of contract are wrong and denied. The plaintiffs have always been and still ready and willing to perform their part of contract according to the terms and conditions of said agreement to sell."*

20. It was much later in the day that plea of execution of agreement to sell by concealment of facts was traded by the defendant, which plea being out of pleadings is not worthy of consideration. Rather, the only issue needing determination by this Court is with regard to validity and legality as also genuineness of the agreement to sell.

21. Girdhari Lal (PW1) is scribe of agreement to sell (Ex.P1). He has specifically stated that he had scribed the said document at the instance of the defendant in favour of the plaintiffs and after scribing the same, it was

read over to the defendant, who after admitting the same to be correct had thumb marked the same. Scribe Mangat Rai (PW2) had brought even his register where at serial No.335 of 15.6.1983, there is entry of this agreement to sell (Ex.P1). Said entry has been proved as Ex.P2.

22. Incidentally, Girdhari Lal (PW1) is also scribe of the mortgage deed (Ex.P5). This document is also entered at serial No.1294 in register of scribe. Gurdial Singh (PW3) is the attesting witness. Corroborating the version of scribe Girdhari Lal (PW1), he had supported the case of the plaintiffs.

23. Not only Girdhari Lal (PW1) scribe but even attesting witness Gurdial Singh (PW3) have clearly spoken about the contents of agreement Ex.P1 with specific version that Rs.26,000/- were paid by plaintiff Darbara Singh as earnest money. He has also entered the witness box as PW5 wherein proving his case as pleaded in the plaint and replication has claimed that the plaintiffs have always been ready and willing to perform their part of the contract whereas the defendant has set up a false claim of taking of loan and has not come forward to honour the agreement to sell. Lack of readiness and willingness on his part has been prominently pleaded and proved by the plaintiff.

24. Ground of fraud taken by the defendant being out of pleadings is not acceptable and as such, the authority cited by counsel for the appellant titled ***Subhash Chander and others Versus M/s Active Promoters Pvt. Ltd. 2015(1) RCR (Civil) 62 (P&H)*** does not sustain and strengthen the case of the defendant.

25. It is very relevant to mention here that in terms of recitals of the agreement to sell, plaintiff Darbara Singh being ready and willing to perform his part of the contract had gone to the office of Sub-Registrar, Samrala

alongwith balance sale consideration as also money to defray the expenses of stamp and registration charges as also miscellaneous expenses. To sustain and support his claim, there is document in evidence in the nature of affidavit Ex.P4 of 15.6.1984 which proves his presence on the said date in the office of Sub-Registrar, Samrala.

26. Affidavit (Ex.P6) has been proved by document writer Mangat Rai (PW2) stating that it was scribed by him at the instance of plaintiff Darbara Singh and that the same is registered in his register at serial No.478 dated 15.6.1984. That entry has also been proved by him. When the defendant did not turn up, the plaintiffs had also issued legal notice to the defendant on 12.12.1984 calling upon the defendant to execute the sale deed on 24.12.1984. Notice (Ex.P8) has been proved by plaintiff Darbara Singh (PW5).

27. In repudiation of this overwhelming evidence of the plaintiffs proving the execution of agreement to sell Ex.P1 as also their readiness and willingness to perform their part of the contract, there are highly sweeping and general statements of Bhagwan Singh (DW1), Ranjit Singh (DW2) and Kulwant Singh (DW3). It is pertinent to mention here that defendant Kirpal Singh had not entered the witness box and for no reasons. Absence of apperance of the defendant in the witness box is a circumstance which raises an inference against the defendant. Appearance of Kirpal Singh (DW3) as attorney of defendant is of no avail. Merely because the defendant was under debt and his land had already been mortgaged with the plaintiffs and he had taken loan even from the 'village society', are not the circumstances whereby a presumption can be raised in favour of the defendant that the plaintiffs were taking undue advantage of his being under debt.

28. Counsel for the appellant has further cited ***Parakunnan Veetill Joseph's Son Mathew Versus Nedumbara Kuruvila's son and others AIR***

**1987 Supreme Court 2328** urging that the court is duty bound to see that the litigation is not used as an instrument of oppression to have an unfair advantage to the plaintiff. In this context, support has also been sought from **Shamsher Singh and others Versus Rajinder Kumar and others 2014(2) RCR(Civil) 865 (Supreme Court)** and **A.C. Arulappan Versus Smt. Ahalya Naik 2001(4) RCR (Civil) 109 (Supreme Court)**.

29. There are clear pleadings of the defendant wherein execution of the agreement to sell (Ex.P1) is not denied but it is merely averred that it was executed as collateral security. But in the interface of no proof of any transaction of loan as propounded by the defendant, the entire stand of the execution of the agreement as collateral security, falls flat.

30. The evidence produced by the defendant is not sufficient to dislodge the proven case of the plaintiffs. Neither the version of the defendant that he had taken loan of Rs.7,500/- from plaintiff Darbara Singh is established nor it could be sustained that the agreement to sell Ex.P1 had been executed as a collateral security securing repayment of such non-existent loan.

31. Counsel for the appellant has urged that relief of specific performance is discretionary and if the court comes to the conclusion that under the terms of the contract, the plaintiffs got an unfair advantage over the defendant, such relief should not be granted as it would put the defendant to undue hardship. Support in this regard has been sought from **Gamdoor Singh Versus Ajaib Singh 2013(2) RCR (Civil) 569 (P&H)**.

32. In this very authority, it has been specifically held that merely because the land was encumbered is no ground to leave the specific performance because the encumbrance attached to the land could be removed by the defendant before effecting the sale. In the present case,

unlike in this authority, where the land was mortgaged with Punjab & Sind Bank, the land was under mortgage with plaintiff Darbara Singh only. When in case of mortgagee Punjab and Sind Bank, this court had given a finding that the defendant could clear the encumbrance before effecting the same, in the present case, the plaintiffs had adjusted the mortgaged amount and in addition had paid Rs.26,000/-, thus, making payment of large portion of the amount of sale i.e. Rs.41,000/-, whereas the total sale consideration was Rs.43,750/-. Thus, this authority on facts of this case, does not help his case and rather goes against the appellant.

33. Keeping in view the totality of facts and circumstances mentioned earlier, merely because the land was under mortgage and the owner-defendant was under debt itself does not make out a case of hardship. It is very important to notice that no case of hardship has specifically been pleaded and much less is proved by evidence to show that it will be inequitable to order specific performance of the agreement. In ***Narinderjit Singh Versus North Star Estate Promoters Limited 2012(3) RCR (Civil) 168 (Supreme Court)***, it was held that when there were neither pleadings nor evidence to support such pleadings that it will be inequitable to order specific performance of the agreement, this plea is not available to the owner-defendant.

34. Sequelly, findings of both the courts below regarding execution of the agreement to sell by the defendant and the plaintiffs having remained always ready and willing to perform their part of the contract are upheld. The agreement to sell Ex.P1 has been established in its execution. No case of hardship had either been pleaded or is proved on record. As such, the substantial question of law is answered in favour of the plaintiffs, respondents herein, and against the defendant, appellant herein.

35. As a consequence, affirming the impugned judgments and

decrees passed by both the courts below, this regular second appeal is dismissed. Decree sheet be drawn accordingly.

**March 23, 2015**  
'Yag Dutt'

**(Dr. Bharat Bhushan Parsoon)**  
**Judge**

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