IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.4434 of 2010 (O&M)
Date of Decision-03.11.2015

Ferozepur Cantt. Agriculture Development Bank Ferozepur through its Branch Manager .. Appellant

Versus

Gurmail Singh and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. S.K. Arora, Advocate
for the appellant.

Mr. Sandeep Khunger, Advocate
for respondents No.1 to 3.

***

RAJ MOHAN SINGH, J.

{1}. Defendant No.2-appellant has filed this appeal against concurrent judgments and decrees passed by the Courts below in a suit for specific performance of agreement to sell dated 02.03.2000 executed by defendant No.1 in favour of Mehal Singh predecessor-in -interest of the plaintiffs in respect of 8 kanals of land.

{2}. Plaintiffs filed suit for possession by way of specific performance of agreement to sell dated 02.03.2000 in respect of suit land comprised in killa No.8(8-0) situated in the Revenue Estate of Village Mehal Singh Wala, Tehsil and District Ferozepur. The predecessor-in-interest of the plaintiffs agreed to purchase the land in question for a total sale consideration of Rs.1,40,000/- and agreement to sell was executed which was duly witnessed by Partap Singh and Jarnail Singh as attesting witnesses. Defendant No.1 thumb marked the same as token of correctness. An amount to the tune of Rs.1,00,000/- was paid and 25.12.2002 was fixed as target date for execution of the sale deed in favour of Mehal Singh predecessor-in-interest of the plaintiffs. Defendant undertook to execute the sale deed on the date fixed on receiving balance sale consideration. Mehal Singh predecessor-in-interest of the plaintiffs died on 16.08.2001 before the stipulated date of execution of sale deed. Plaintiffs being beneficiaries of the Will executed by Mehal Singh succeeded the estate of Mehal Singh which devolved upon them on the basis of one registered Will dated 12.07.2001. Mehal Singh left behind his widow Surjit Kaur and daughters namely Balwinder Kaur, Joginder Kaur and Manjit Kaur who were married by Mehal Singh during his lifetime. There was no dispute regarding inheritance of the estate of Mehal Singh on the basis of will. Plaintiffs further alleged that on the target date, the office of Joint Sub Registrar was closed being holiday. Gurmail Singh plaintiff attended the office of Joint Sub Registrar, Mamdot on the next date i.e. 26.12.2002 along with balance sale consideration for the purposes of getting the sale deed executed but defendant No.1 did not turn up. Gurmail Singh plaintiff after waiting sufficiently got his presence marked from Executive Magistrate, Mamdot. Mehal Singh during his lifetime as well as the plaintiffs after the death of Mehal Singh always remained ready and willing to perform their part of obligation. Plaintiffs further pleaded that they were still ready and willing to perform their part of agreement. They also offered the balance sale consideration even after stipulated date and also requested the defendant to execute the sale deed but of no avail. A notice dated 27.12.2002 was issued through registered post and even thereafter, needful was not done by the defendant. Plaintiffs also alleged that on 29.01.2003 when they obtained latest jamabandi of the land, they came to know about the collusion between defendants No.1 and 2 in obtaining loan of Rs.92,000/- from defendant No.2-Bank thereby, creating simple mortgage in favour of defendant No.2. Plaintiffs claimed that the encumbrance created by defendant No.1 was not binding upon the rights of the plaintiffs and the alienation was liable to be ignored being collusive in nature.

Defendant No.2 knew about the agreement in question and it was not a bona fide transfer. Plaintiffs also claimed that in case relief of specific performance is not to be entertained for any reason then in that eventuality, plaintiffs are entitled for recovery of Rs.1,40,000/- inclusive of principal amount as well as damages.

{3}. The suit was contested by the defendants. Defendant No.2 denied the execution of agreement to sell and also denied the receipt of any earnest amount from the plaintiffs as alleged. Defendant No.1 pleaded that he obtained Rs.14,000/- from Mehal Singh and in lieu of security, Mehal Singh obtained his thumb impressions on blank papers. Defendant was working as Siri (Domestic Help) with the plaintiffs from March 2000 to 2002 and thereafter, paid the amount to the plaintiffs and left the job. Plaintiffs insisted defendant No.1 to remain with the plaintiffs as Siri to which defendant did not agree and that was the cause of grievance. Plaintiffs converted blank stamp papers having thumb impressions of defendant No.1 into an agreement to sell.

{4}. Defendant No.2 also contested the suit thereby pleading that the suit is not maintainable as the plaintiffs have not served upon defendant a notice under Section 79 of the Co-operative Societies Act. Besides taking further grounds, it was alleged that agreement in question was false and fabricated and has been prepared in connivance with defendant No.1 and other marginal witnesses. Defendant No.2 alleged that suit land was mortgaged with defendant No.2 as defendant No.1 has secured loan of Rs.55,000/- on 31.10.2002. Defendant No.2 has the first charge over the suit land being mortgagee.

{5}. On the basis of pleadings of the parties necessary issued were framed and both the parties were put to trial on the following issues:-

> *"1. Whether the defendant No.1 agreed to sell the suit land in favour of plaintiffs and executed agreement to sell dated 02.03.2000?OPP*
>
> *2. Whether plaintiffs remained ready and willing to perform their part of the contract? OPP*
>
> *3. Whether the plaintiffs are entitled to decree for possession by specific performance of agreement to sell dated 02.03.2000 or in the alternative for recovery of Rs.1,40,000/-? OPP*
>
> *4. Whether this suit is not maintainable? OPD*
>
> *5. Whether this suit is bad for non-service*

of notice under Section 79 of the Co-operative Society Act upon defendant? OPD

6. Relief.”

{6}. To prove their case, plaintiffs examined PW1 Mehal Singh, PW 2 Jarnail Singh and PW 3 Satwinder Singh. On the other hand, defendant No.1 appeared as DW 1 and also examined Phuman Singh as DW 2 and Sarabjit Singh, Field Officer of defendant No.2 as DW 3.

{7}. Trial Court took issues No.1 and 2 jointly and held that execution of agreement to sell has been proved on record and plaintiffs were always ready and willing to perform their part of contract. Suit of the plaintiffs was decreed after deciding issue No.3 in favour of plaintiffs. Suit was held maintainable under issue No.4 and it was held that suit is not bad for non-issuance of notice under Section 79 of Co-operative Societies Act under issue No.5. Resutlantly, suit was decreed and plaintiffs were held entitled for decree of possession by way of specific performance of agreement to sell dated 02.03.2000. Defendant No.1 was directed to execute the sale deed after receiving the balance sale consideration within one month of the order failing which plaintiffs were held entitled to get the sale deed executed through Court. Defendant No.2 was held entitled to recover the debt from defendant No.1 on proving his liability but not through the suit land over which plaintiffs were having prior and preferential right over and above the right of defendant No.2. Trial Court decided the suit vide judgment and decree dated 30.01.2009.

{8}. Feeling aggrieved against the judgment and decree dated 30.01.2009 passed by the trial Court, both the defendants filed separate appeals. Both the appeals were consolidated and were dismissed vide judgment and decree dated 12.08.2010.

{9}. Defendant No.2 has come forward by way of filing the present appeal. While filing the appeal in this Court the appellant has formulated following substantial questions of law in para 8 of the grounds of appeal:-

> *"1. Whether the findings recorded by both the Courts below are perverse and are based upon misreading of the oral and documentary evidence on the record and cannot be sustained in the eyes of law?*
>
> *2. Whether the impugned judgments and decrees dated 30.01.2009 and 12.08.2010 passed by the Courts below are legally sustainable in the eyes of law?*
>
> *3. Whether the bank had no notice of any prior agreement to sell dated 02.03.2000 in favour of Mehal Singh and as such bank is*

a bona fide mortgagee?

4. Whether notice as required under Section 79 of the Co-operative Societies Act was required to be served upon appellant before filing the suit, which is mandatory one?

5. Whether the appellant bank is entitled to effect the recovery of outstanding amount from the land lying mortgaged and the mortgage deed is legal and valid one?

6. Whether the plaintiffs-respondents are not entitled to decree for specific performance of alleged agreement to sell dated 02.03.2000?

{10}. I have heard learned counsel for both the parties and have gone through the records with their able assistance.

{11}. Execution of agreement to sell between Mehal Singh and defendant No.1 has been proved with reference to evidence on record. The original agreement to sell Ex.P2 has been proved by the plaintiff himself as well as the deposition made by the Jarnail Singh PW2. The Will dated 12.07.2001 in favour of plaintiffs has also been proved by PW2, attesting witness of the Will Ex.P1 as well as Satwinder Singh PW 3 who had scribed the will dated 12.07.2001 executed by Mehal Singh in favour of plaintiffs. On the other hand, defendants have examined DW1 Jagga Singh who has deposed that he was employed by Mehal Singh as his Siri in March 2000 for two years and he obtained loan of Rs.14,000/- in advance from Mehal Singh and as a security Mehal Singh obtained his thumb impressions on blank papers. Thereafter, Mehal Singh converted those blank papers into agreement to sell when he refused to work with him as Siri. DW 2 Phuman Singh also deposed in the context of Jagga Singh being employed by Mehal Singh as Siri and he obtained loan of Rs.14,000/- from him and Mehal Singh obtained signatures of Jagga Singh on blank papers as security and thereafter, converted these blank papers into agreement to sell. Sarabjit Singh, Field Officer of defendant No.2 has deposed about the loan taken by defendant No.1 from the bank. He obtained loan of Rs.55,000/- on 31.10.2002, Rs.37,000/- on 13.06.2003 and sum of Rs.1,16,335/- as principal plus interest calculated upto 31.03.2005 plus Rs.3,000/- as insurance upto 14.12.2005 was outstanding against defendant-Jagga Singh. Mortgage deed Ex.DW3/B has been proved on record beside loan ledger Ex.DW3/C. The Courts below have held that stranger cannot dispute the validity of Will. Even otherwise Will has been proved with reference to requirement in law.

{12}. Defendant No.1 has admitted his thumb impressions on agreement to sell alleging that the father of the plaintiffs got his thumb impressions on blank papers in lieu of security of loan obtained by him from Mehal Singh. Once the thumb impressions were admitted on the agreement to sell onus shifted upon defendant to prove the circumstances in which the same was obtained by the plaintiffs. Defendant No.1 has not led any evidence to prove that the thumb impressions were obtained on blank papers as security of loan by Mehal Singh. DW2 Phuman Singh has not deposed that the thumb impressions of Jagga Singh DW1 were obtained before him.

{13}. The recital of agreement to sell carries the simple agreement for sale. The plaintiffs have led lawful evidence and presence marked before the Executive Magistrate shows readiness and willingness on the part of plaintiffs to perform their part of obligation. Defendant No.1 has admitted in his cross-examination that he never lodged proceedings for obtaining his thumb impressions on blank papers by Mehal Singh and never cancelled the agreement to sell. No notice was ever given to Mehal Singh. Agreement to sell Ex.P1 has been proved by the attesting witnesses. They were always ready and willing with balance sale consideration. Defendant No.1 has miserably failed to prove that the document was a paper transaction and was in lieu of security of loan and no agreement to sell was ever executed.

{14}. The possession of land in question with the plaintiffs is an admitted fact which shows that the agreement to sell was duly acted upon between the parties. Since execution of agreement has been proved on record, therefore mortgage deed being subsequently executed has to make way for agreement to sell dated 02.03.2000, the date on which the rights and liabilities of the parties were crystallized. The admission on the part of defendant No.1 regarding possession of the plaintiffs over the suit land corroborates that the agreement to sell was actually acted upon between the parties on receipt of earnest money. Since, no claim was made against defendant No.2, therefore, suit cannot be held to be bad for want of issuance of notice under Section 79 of the Punjab Co-operative Societies Act 1961.

{15}. The substantial questions of law No.1 and 2 cannot be answered to hold that the findings recorded by the Courts below are perverse or based on misreading of evidence in any manner. Findings recorded by the Courts below are based on evidence and judgments and decrees cannot be held to be unsustainable in the eyes of law or by any stretch of imagination. Since no relief was claimed against defendant No.2, issuance of notice under Section 79 of aforesaid Act was not *sine qua non* for decretal of the suit in favour of the plaintiffs because agreement to sell was prior in point of time and plaintiffs have claimed relief against defendant No.2. In the event of finding due execution of agreement to sell, the rights of the plaintiffs will prevail over the mortgage deed and mortgage deed cannot be held to be binding upon the rights of the plaintiffs, therefore, the service of notice was only to apprise the defendant No.2 about the cause of action.

{16}. Significantly, the written statement was filed by defendant No.2 on 27.05.2003, in which recital in terms of para No.2 on merits was made that the suit land was mortgaged with the bank by defendant No.1 on 31.10.2002 and an amount of Rs.55,000/- was obtained from the bank. Even after filing the written statement on 27.05.2003, the defendant No.2 kept on advancing loan amount of Rs.37,000/- on 13.06.2003 which shows that defendant No.2 even despite acquiring knowledge about the suit, kept on advancing loan at random and no justifiable reasons have come forth on record. Therefore, question No.3 as formulated cannot be appreciated and the bank-defendant No.2 cannot be held to be bona fide mortgagee.

{17}. In the light of aforesaid observations, issue No.4 has to be answered against the appellant and defendant No.2 cannot be held entitled to recover the amount in question from the suit land, therefore, question No.5 has to be answered against the appellant-defendant No.2. Cumulative effect of facts and evidence led by the parties proved that defendant No.2 is not entitled to take benefit of non-issuance of notice under Section 79 of Punjab Co-operative Societies Act, 1961 and in the event of finding due execution of agreement to sell, plaintiffs are entitled to a decree for specific performance. Therefore, question No.6 as framed does not arise at all.

{18}. Having taken entire stock of facts and evidence on record, this court is of the opinion that no law point worth consideration is involved in this appeal and the appeal is totally devoid of merits. Consequently, the same is accordingly dismissed.

(RAJ MOHAN SINGH
JUDGE

November 03, 2015
Prince