

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1846 of 2011 (O&M)
Date of Decision: 11.05.2015

Sukhwinder Singh and another

..... Appellants

Versus

Gurmej Kaur and another

..... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sandeep Khunger, Advocate,
for the appellants.

Mr. K.B. Raheja, Advocate,
for Respondent -2.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes.**

RAJIV NARAIN RAINA, J.

Plaintiffs are brothers in second appeal against the judgment of reversal by the appeal court at Ferozpur. Their lawsuit for possession by way of specific performance of a contract to buy land succeeded but so did the defendants' appeal. Hence, this appeal.

The story; Defendant 1 Gurmej Kaur agreed to sell her 60/76 share in the suit land comprising 3 kanals 16 marlas situated in Basti Nizamdin Wali within the revenue estate of Ferozepur, as per jamabandi for the year 1998-99 to the plaintiffs for a total sale consideration of Rs.4 lacs. The agreement was executed on November 03, 2004. The plaintiffs paid earnest money of Rs.1 lac in cash to Gurmej Kaur at the time of execution of the agreement and it was agreed between the parties that the sale would be executed and registered on or before May 03, 2005 on receipt of the

balance sale consideration. About two weeks before the stipulated date for execution of the sale deed, Gurmej Kaur approached the plaintiffs and requested extension of time which was mutually agreed up to July 28, 2005. The plaintiffs were duped when they discovered that on May 24, 2005 much before the mutually extended date fixed for registration of sale deed that 7 kanals of land including 3 kanals 16 marlas agreed to be sold to the plaintiffs had been sold by Gurmej Kaur to Mukhtiar Singh – defendant No.2 by a registered sale deed. Gurmej Kaur had reneged from the contract.

The plaintiffs sued for specific performance of the agreement and sought for a declaration that the sale deed dated May 24, 2005 was illegal, void, inoperative and not binding on their rights qua the land in question. Plaintiffs pleaded that they were ready and willing to perform the covenants in the agreement and are still willing to do so.

On summons issued by the trial court, Gurmej Kaur entered appearance and filed written statement contesting the case by taking the plea that the agreement had been obtained by fraud committed on doctored papers on which her thumb impressions were obtained on blank stamp papers. Mukhtiar Singh, vendee, took the defence of bona fide purchaser without notice of the agreement to sell executed by his vendor in favour of the plaintiffs.

The trial court framed issues as arise from the pleadings. Parties led their evidence in support of their respective cases. The suit was decreed by the learned Additional Civil Judge, Senior Division, Ferozepur vide judgment dated May 10, 2010 who agreed with the case of the plaintiffs.

The defence set up by Gurmej Kaur that fraud was committed upon her was

found false. The second defence taken by Gurmej Kaur was that she had entered into an agreement to sell dated July 26, 2004 in favour of Mukhtiar Singh which was earlier to the agreement to sell contracted with the plaintiffs. Since this fact was to the special and personal knowledge of Gurmej Kaur it would be taken as within the notice and knowledge of Mukhtiar Singh and, therefore, the latter could not plead protection of Section 41 of the Transfer of Property Act, 1882 and to take advantage of being a bona fide purchaser for valuable consideration without notice. The judgment and decree of the trial court was not appealed against by Gurmej Kaur and the decree is final qua her.

However, Mukhtiar Singh felt aggrieved by the decree and preferred an appeal in the court of the learned Additional District Judge, Ferozepur. The appeal has been allowed. Specific performance of the agreement has been denied. The court of first appeal has held that the plaintiffs are entitled to recover the amount of Rs.2 lacs only i.e. double the amount of earnest money paid to Gurmej Kaur – respondent 1. In order to examine what has weighed with the court of first appeal it is best to reproduce them verbatim from the judgment:-

*"11. Having gone through the rival contentions of both the parties at length I have found that the learned lower court has decreed the suit on the basis of the agreement to sell dated 3.11.2004 which has **only been proved by PW2 Ranjit Singh and that scribee has not been examined** in the court. If we go through the agreement to sell Ex.P1 which is running on three pages, on the third page thumb impression of Gurmej Kaur proposed vendor are below the recital of agreement to sell and similarly thumb impression of Gurmej Kaur on the extension is also much below the writing. **The said agreement to sell has not been scribed by a regular Deed Writer. Although it is not***

the requirement of the law that it should have been scribed by regular Deed Writer, but even then if there is contradiction between two agreements to sell i.e. one dated 3.11.2004 and the other dated 26.7.2004 which has been scribed on a stamp paper issued by the Stamp Vendor on 26.7.2004 carrying adhesive stamp over the same and it has been proved by Harbans Lal DW1, attesting witness, Balbir Singh DW2 and Mukhtiar Singh purchaser. So far as proof of Ex.D1 is concerned, the same has been proved by examining two witnesses instead of one witness which has been examined by the plaintiff in order to prove his agreement to sell Ex.P2.

12. Over and above all there is no necessity known as to why Ex.P3 extension was enhanced on 19.4.2005 for execution of the sale deed. Apart from that when the sale deed has already been executed on 24.5.2005 Ex.D2 in favour of defendant No.2 Mukhtiar Singh, present appellant, agreement to sell dated 3.11.2004 Ex.P2 extended vide Ex.P3 pales into insignificance because of the fact that there is condition in Ex.P3 that purchaser is entitled to double the amount of earnest money in case vendor fails to execute the sale deed in favour of the purchaser. Since the proposed vendor Gurmej Kaur has already sold land vide Ex.D2 in favour of Mukhtiar Singh, filing of the suit by the plaintiff on 4.7.2005 i.e. much after the execution of the sale deed would only create complicity/multiplicity of the litigation and it would make the problem more complicating. So it would be fair if the plaintiff would recover double the amount of earnest money from Gurmej Kaur because Gurmej Kaur has already sold the suit property subject matter of Exs. P2 and P3 including other property vide Ex.D2 to defendant No.2 Mukhtiar Singh, present appellant.

13. It is not the spirit of law to create multiplicity of litigation, rather spirit of law would be to curtail litigation between the parties.

14. The learned counsel for the respondent has argued before me that since Gurmej Kaur has not appeared in the court, so she has admitted the execution of Ex.P2 and if this is the position also I agree upon the same, just for the purpose of stopping further litigation between the parties in

order to avoid any further comparative hardship as Gurmej Kaur has already sold land to Mukhtiar Singh, it would not be proper for her to get the sale deed executed through Mukhtiar Singh. I also do not want to rely much upon the averment of Gurmej Kaur which she made in the written pleadings that her thumb impressions were taken on blank papers by one Bachittar Singh on the pretext that she would be granted widow pension as she has denied the agreement to sell Ex.P2 and further extension Ex.P3 and she has supported Exs.D1 and D2. So I am of the view that Gurmej Kaur is liable to make good the compensation in terms of Ex.P2 and Ex.P3 to the plaintiffs. Over and above all I am of the view that **in order to save the parties from comparative hardship, sale deed Ex.D2 cannot be said to be null and void, rather the plaintiffs who had paid earnest money of Rs. 1,00,000/- are entitled to recover double of the same from Gurmej Kaur in the light of Exs.P2 and P3.** With this observation the appeal stands disposed of accordingly. Decree sheet be prepared, lower court record be returned and appeal file be consigned to the record room."

The plaintiffs are in second appeal praying for restoration of the trial court decree and for setting aside the judgment and decree of the court of first appeal.

In the grounds of appeal, the following substantial questions of law have been framed which read as under:-

"(i) Whether the impugned judgment & decree dated 23.2.2011 passed by the Additional District Judge, Ferozepur is perverse?

(ii) Whether the observations made by Additional District Judge, Ferozepur in Para No. 11 of the Judgment are uncalled for and the same are untenable in law?

(iii) Whether refund of earnest money and damage as specified in agreement for sale being an alternative plea, can itself be a bar to claim decree for specific performance of contract??

(iv) Whether the court of Additional District Judge could

order for refund of double the amount of earnest money inspite of the fact that no appeal was filed by Respondent No.1 with whom the agreement was executed and further that both the courts have upheld the agreement to sell dated 3.11.2004?

(v) Whether the appeal filed by Respondent No. 2 could be allowed inspite of the fact that he has been held to be not a bonafide purchaser without notice and the said finding has not been reversed by the court of Additional District Judge?

(vi) Whether the Additional District Judge being court of first appeal was duty bound to give issue-wise findings while deciding the appeal?"

To my mind, the questions at (ii), (iii) read with (iv), (v) and (vi) arise for consideration in this appeal and are dealt with in a consolidated manner since reasons would have to be interconnected while determining the legal position in the context of relief which can be granted or denied.

Heard the learned counsel for the parties at length and perused the record with their assistance.

In assailing the findings of the court of first appeal, Mr. Sandeep Khunger appearing for the appellants draws the attention of this court to the judgment of the trial court which he contends is a proper appreciation of the evidence on file and deserves to be affirmed, which if it is, would remove the base of the questionable reasoning adopted by the court of first appeal.

He relies on the following extract:-

"So, it is apparently proved that the agreement to sell was prepared by the defendant No.1 with the connivance of defendant No.2 just to defeat the right of the plaintiffs to get the sale deed executed from the defendant No.1 and regarding not mentioning the factum of previous agreement dated 26.7.2004 in the said date, have been admitted by the defendant No.2 Mukhtiar Singh while appearing in the witness box as DW3. So, under these circumstances, when defendant

No.2 himself concealed some material facts and produced on the file such like a document which has not seen the light of day till filing of written statement by defendant No.2. So, it is clearly proved that it is a fake and self propounded document by the defendant No.2 and therefore, the factum agreement to sell dated 3.11.2004 executed by defendant No.1 in favour of plaintiffs is well within the notice of defendant No.2 and therefore, he cannot claim the protection of section 41 Transfer of Property Act under the shadow of bona fide purchaser and thus, the ruling referred by learned counsel for the defendants (Supra) 1997(1) Recent Civil Reports (Civil) page 26; 2004(4) Recent Civil Reports (Civil), Page 142; & 2006(1), Civil Court Cases, page 329 (P&H), not applicable being the facts of these cases are not identical to the facts of the case in hands."

There appears to be merit in the submission of Mr. Khunger that the reasoning of the trial Judge is worthy of acceptance as one which is in consonance with the evidence and should be certainly be preferred to that of the first appeal court which is not only not appealing to logic but is grossly suspect in its legal reasoning.

The reasoning given by the court of first appeal in para.14 is neither supported by law nor facts on the record and qualifies as *ipse dixit*. The court *a quo* proceeded to look at the case from a wrong and illogical angle to hold that in order to avoid any further comparative hardship since Gurmej Kaur had already sold land to Mukhtiar Singh, it would not be proper for her to get the sale deed executed through Mukhtiar Singh and then to reach to this rather queer reasoning just to stop further litigation between the parties. At the same time, the court of first appeal records in its judgment that it does not want to rely on the averment of Gurmej Kaur which she made in the written pleadings that her thumb impressions were

taken on blank papers by Bachittar Singh on the pretext that she would be granted widow pension if she were to sign them. She denied the agreement to sell Ex.P-2 and further extension Ex.P-3 while supported Exs.D-1 and D-2 in favour of Mukhtiar Singh. Therefore, the court fallaciously deduced that Gurmej Kaur is liable to make good the compensation in terms of Exs.P-2 and P-3 to the plaintiffs. If the document was not reliable then the question refund of money would not arise because it would then leave a void as to why was it paid in the first instance by the plaintiff to her and for what favour to incur a civil liability. This aspect is left to the imagination by the lower appeal court. It is then concluded that the sale deed Ex.D-2 cannot be said to be null and void as it would save the parties from comparative hardship but hardship was not pleaded by Gurmej Kaur in a written statement in terms of Section 20 of the Specific Relief Act, 1963. The question was did the vendor have or have not the knowledge of plaintiff's contract. Since Gurmej Kaur depended entirely on her plea of fraud in the making of the sale agreement which has not carried a ring of truth then if hardship was not pleaded as a defence then the court of first appeal fell in grave error in adopting such reasoning to dispose of the appeal with a direction that the plaintiffs are entitled to recover double the earnest money from Gurmej Kaur. The argument becomes cyclic and going to no conclusive or definite end to make a just and fair decree even in discretionary jurisdiction. Discretion itself has to be exercised judicially by known principles by applying judiciously the doctrine of preponderance of probabilities in a civil action to find which way to lean. It is this delicate balance which has not been maintained.

In consideration of substantial question (ii) I agree with Mr. Khunger that the observations made by the Additional District Judge are uncalled for and border on the absurd.

Questions (iii) and (iv) combined together are answered in the negative. An alternative plea taken in a suit for specific performance for refund of earnest money or payment of damages as specified in the agreement cannot act as a bar to claim the main relief of specific performance. Such a term in the agreement was meant only to compel due performance of the contract and such a term will not be read as depriving plaintiff of his rights in land created by the defendant 1 by mutual consent viewed in the same way on the same thing. This alternate prayer is for the reason that the plaintiffs are free to take all pleas in a single suit depending on the prophesized success or failure of the case as perceived by them in the plaint of which they are the masters. This also avoids multiplicity of litigation. The twin answer to question (iv) is connected with (iii) and I hold that when Gurmej Kaur did not file an appeal and question the decree of refund she could not be directed to refund double the amount of earnest money especially when both the courts below have upheld the agreement to sell dated November 03, 2004. This direction of the Additional District Judge, Ferozepur is in breach of rudimentary principles of natural justice and fair hearing. The direction has been issued behind the back of Gurmej Kaur and has increased her liability without notice.

So far as question (iv) is concerned, Mr. Khunger says the answer lies amongst many judgments and in one of which is a decision of this court delivered in **Roshan and others vs. Smt. Mamo and others**, 1987 PLJ 385

where it is held that if the subsequent transferees rely on some earlier agreement to sell and the earlier agreement to sell is found to be a fabricated document it cannot be held that the subsequent transferees are bona fide purchasers.

The learned Additional District Judge, Ferozepur has put the imprimatur of the court on the sale deed even though it was born of deceit practiced upon the plaintiffs. The sketchy and cursory judgment of the learned Additional District Judge, Ferozepur is not sustainable when the trial Judge held Mukhtiar Singh not to be a bona fide purchaser but that finding of the learned trial Judge has not been reversed in first appeal and still stands. This is a major flaw in the lower court judgment in first appeal. In answer to question (vi) it goes without saying the court of first appeal is a last court of fact and the last court of law. It is bound to return issue-wise findings which has not been done and was not a proper thing to do where there were multiple issues being nine in number and more than one of which are significant ones with respect to the relief the first appeal court ought to have returned findings issue-wise, though I would not readily agree or consider remanding the appeal for following the format in all cases irrespective of their nature and the demands on this court to identify the central theme or idea upon which a case can happily rest and if that core is easily locatable, then court may proceed to decide the appeal on merits within the limits of Section 100 of the Code of Civil Procedure and not to treat the deficiency alone as a substantial question of law, though in most cases it might be so conceived and hold good. In this regard, the duty of the first appeal court while considering the work of the trial Judge in civil suits

has been explained *inter alia* in the judgment of the Supreme Court in **H. Siddiqui (Dead) by LR vs. A.Ramalingam**, (2011) 4 SCC 240, where it is observed that: "Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions"

Mr. K.B. Raheja appearing for respondent 2 relies on the cross-examination of PW-1 Sukhwinder Singh plaintiff at page 119 of the lower court record from where he contends that there is an admission by the plaintiff of knowledge of the prior agreement-to-sell between Gurmej Kaur and Mukhtiar Singh. He relies on the following words while witness was being cross-examined by Mr SP Kambhoj, counsel for Mukhtiar Singh defendant 2: "It is correct that Mukhtiar Singh defendant no 2 got executed the sale deed in his favour from Gurmej Kaur for consideration for Rs.5, 25,000/- as per term and spirit of agreement dated 26.7.04." From this Mr Raheja infers the admission. But on a mere reading of this part of the cross-examination in its full text and context it is found not to be a correct inference or interpretation on the language of the cross-examination of the part relied upon. Elsewhere the witness deposed that: "I did not know whether Gurmej Kaur had executed a sale deed in favour of Mukhtiar Singh defendant no.2 on 24.5.05. It is wrong that I was having knowledge

regarding the same. I do not know as to whether Gurmej Kaur entered into an agreement to sell with defendant no 2 on 26.7.04." Then there was no admission of knowledge of prior agreement which could be imputed on the plaintiffs. Sale he knew had taken place therefore Mukhtiar Singh was impleaded as a defendant.

In the totality of the facts and circumstances of the case I am unable to sustain the judgment and decree of the learned Additional District Judge, Ferozepur dated February 23, 2011. It is accordingly set aside and the judgment and decree of the trial court is restored by allowing the appeal. The sale deed dated May 24, 2005 executed between defendant No.1 and defendant No.2 deserves to be ignored as not binding on the rights of the plaintiffs. The rest of it is left to execution proceedings. It may be noted that respondent 1 – Gurmej Kaur was proceeded ex parte vide order dated August 09, 2011 passed by this Court and has remained unrepresented.

Appeal allowed.

(RAJIV NARAIN RAINA)
JUDGE

11.05.2015

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