IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2436 of 2011 (O&M)
Date of Decision: 13.01.2015

Sikander Singh and another ...Appellants

Versus

Gian Chand and others ...Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Sarwan Singh, Senior Advocate with Mr. N.S. Rapri, Advocate for the appellants.

Mr. Kanwaljit Singh, Senior Advocate with Mr. Amandeep Singh, Advocate for the respondents.

FATEH DEEP SINGH, J.

This is an appeal by defendants against the reversal of findings of the trial Court by the learned first Appellate Court.

Before venturing into the very merits of the case of the parties, it is very much essential to explore the background of this litigation as it would facilitate better and proper understanding and appreciation of the dispute. It is not in any manner disputed that the land measuring 3 kanals, 16 marlas detailed in the jamabandi for the years 1990-91 situated in village Mubarkpur was in the hands of Surinder Singh son of Jhandu Ram-defendant No.1, whereas, defendant No.2 Hari Chand was owner in occupation of land measuring 7 Kanals, 4 Marlas in the same very area and which two properties are very much detailed in the headnote of the plaint. Thus, these lands in all measuring 11 kanals were offered for sale and in pursuance of which through agreement to sell dated 30.3.1999 Ex.P1 defendant Nos.1 and 2 entered into an agreement with plaintiff Gian Chand and defendant No.4 present appellant-Sikander Singh. The terms and conditions of this agreement were duly incorporated and the total sale consideration came to ₹1,85,625/-. The plaintiff though claims that he and defendant No.4-Sikander Singh equally contributed this amount which is not mentioned in Ex.P1, was duly received by defendant Nos.1 and 2. Though, the plaintiff claims that he and defendant No.4 have also paid to defendants No.1 and 2 earlier another amount of ₹25,000/-. Thus, there is a claim of entire consideration having been paid leading to delivery of possession of this land to the plaintiff and defendant No.4. It is pertinent to mention here that as per the terms agreed and in pursuance of this agreement to sell, defendant Nos.1 and 2 executed a legally valid general power of attorney Ex.P2 pertaining to this land in favour of defendant No.3 Gurtej Kaur, who also happens to be the wife of defendant No.4.

It is during the course of events on 24.7.1996 the plaintiff filed a suit for permanent injunction, plaint Ex.D5 against present defendants No.1 and 2 as well as defendant No.4 restraining them from interfering in his ½ share in the said suit property. The plaintiff alleges that from the written statement filed in that suit on 31.10.1996 he came to know that the entire suit property has been sold off by defendant No.4-Sikander Singh. It was on further inquiries, the plaintiff discovered that Gurtej Kaur, defendant No.3 while acting as an attorney of defendant Nos.1 and 2 executed two sale deeds both on 18.1.1996 Ex.P3 and Ex.P4 regarding which mutations were duly sanctioned. It is consequent thereupon, defendant Nos.4 and 5 executed sale deed dated 5.2.2001 Ex.P5 in favour of defendant No.6-Sharanpreet Kaur through attorney Ramandeep Singh. Thus, claiming that both the sale deeds by defendant No.3 in the capacity of attorney of defendant Nos.1 and 2 and subsequent thereto, were contrary to law without any consideration. Thus, the plaintiff sought the relief in question for specific performance of agreement Ex.P1.

Defendant Nos.1 and 2 did not contest the suit which was contested by defendant Nos.3 to 5, who have taken a common stand that the suit was not maintainable and in fact defendant No.4 and the plaintiff were good friends and it was an outcome of mutual understanding to purchase the land and the plaintiff having no money to pay for the price undertook to pay the same subsequently and the agreement was undertaken and defendant No.4 actually paid the amount as an understanding and power of attorney was duly executed in favour of defendant No.3, who happens to be the wife of defendant No.4 and that the actual transaction and money paid was by defendant No.4-Sikander Singh and plaintiff did not contribute anything and denied that the land was purchased in equal shares by the plaintiff and defendant No.4. Taking the plea that the plaintiff being unable to pay the price backed out and that is how defendant No.4 acting through defendant No.3 being attorney of defendant No.1 and 2 transferred the land by virtue of these two sale deeds. The stand of defendant

No.6 was of a bonafide purchaser for a valuable consideration having no knowledge of the earlier transactions and that he had purchased the property through the original owners and denied the stand of the plaintiff. The learned trial Court framed the following issues:-

> 1.Whether the plaintiff is entitled for specific performance of the agreement dated 30.3.1993? OPP
> 2.Whether the plaintiff is entitled for declaration as prayed for?OPP
> 3.Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
> 4.Whether the suit of the plaintiff is within limitation?OPP
> 4-A.Whether defendant No.6 is bona fide purchase for valuable consideration, without any notice of pendency of the suit? OPD
> 4-B. Whether agreement to sell is forged and fabricated document? OPD
> 4-C. Whether plaintiff has not come to the court with clean hands and suppressed the material facts, if so, its effect?OPD
> 4-D. Whether defendant No.6 is entitled to compensatory costs U/S 35A CPC? OPD
> 5. Relief.

The plaintiff to prove his case examined himself as PW1, Hari Chand as PW2, Manjeet Singh as PW3 and proved documents Ex.P3 to Ex.P8. On the other hand, defendants examined DW1 Hardeep Singh, DW2 Gurtej Kaur, DW3, Sharanpreet Kaur, DW4 Harbhajan Singh, Lamberdar and proved documents Ex.D5 to Ex.D8.

The learned Court of Additional Civil Judge (Senior Division), Derabassi through judgment and decree dated 3.9.2008 dismissed the relief for specific performance and ordered the refund of ½ share of ₹1,85,625/- with simple interest @ 6% per annum from the date of agreement till realisation. The same was challenged before the learned first Appellate Court and vide impugned judgment and decree dated 7.2.2011, the first Appellate Court reversed the findings and the appeal of Gian Chand was allowed, whereby, a decree for specific performance of agreement dated 30.3.1993 was passed in favour of the plaintiff, whereas the second appeal titled as *Sikander and another vs. Gian Chand and others* stood dismissed. That is how, the parties are in this regular second appeal before this Court.

The following substantial questions of law stood framed:-

1. Whether the relief being sought in the suit out of which the present appeal arises is hit by the provisions of order 2 Rule 2 CPC?
2. Whether the suit of the plaintiff is hit by proviso to Section 34 of the Specific Relief Act, 1963?
3. Whether there has been misuse of powers given by the principal to his agent, if so, to what effect?

After hearing at length learned counsel for the parties. Since there has been non-consideration of important oral and documentary evidence coupled with substantial questions of law having been ignored impels this Court to reappreciate the evidence in exercise of its powers under Section 100 CPC.

The first and foremost argument revolves around the provisions of Order 2 Rule 2 CPC. It has been stressed on behalf of the appellants by their counsel Mr. Sarwan Singh that since the plaintiff had initially filed a suit for permanent injunction fully aware of the fact that he was only entitled to ask for a relief of specific performance, if any, and therefore, having filed a suit for permanent injunction debars him to file a second suit on the same cause of action and has placed reliance on ***Veena Goyal and another vs. Raj Kumar Mittal 2008(3) Civil Court Cases 200 (P&H); Gajanan R. Salvi vs. Satish Shankar Gupta and others 2005(2) Civil Court Cases 204 (Bombay)*** and ***Rao Narain Singh vs. Durga Devi 1998(1) Civil Court Cases 645 (P&H)*** and which argument has sought to be refuted by the counsel for the respondents Sh. Kanwaljit Singh, submitting that suit for permanent injunction had given a cause of action independent to the cause of action for the subsequent suit and to illuminate his arguments has cited ***Jagat Singh vs. Jeet Singh and another 2007(3) RCR (Civil) 519***. Appreciating these submissions the provisions of Order 2 Rule 2 CPC enlist that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of cause of action. The same is based on the principle that the other party should not be vexed for one of the same cause of action. It dehors the evil of splitting up claims as well as remedies and, thus, ensures that where a party fails to initiate action in respect of a cause of action for his suit is barred from subsequently raking it up in the subsequently instituted suit. Though, it does not places a bar on a second suit based on distinct and separate cause of action. Reverting back to the instant case, in the first suit filed by the plaintiff-Gian Chand the plaint proved as Ex.D5 reflects that he has instituted earlier suit on 24.7.1996 against the original owners as well as defendant No.4-Sikarder Singh, who are also parties to the present suit and in that plaint the cause of action claims to have accrued on 21.7.1996. In the present suit as per the pleadings of the plaintiff Gian Chand in his plaint he has given the cause of action as on 18.1.1996. Upon amendment of his plaint he has delegated this cause of action as 18.1.1996 and subsequently on 31.10.1996 when it is alleged that written statement was filed in the previous suit. From this, it ensues, if in the prior instituted suit a cause of action has arisen on 21.7.1996 how in a subsequent suit filed on 31.3.1998 the cause of action has arisen on 18.1.1996 prior to the first suit and, therefore, illustrates that all was not well with the case of the plaintiff having tried to take up false stand based on falsehood, when the actual sale on the own admission of the plaintiff took place in favour of defendants No.4 and 5 on 18.1.1996 and was incorporated in jamabandi for the year 1990-91 Ex.P7 relied by the plaintiff and, thus, initial cause of action in the first suit that took place on 21.7.1996 was in fact subsisting by this mutation entered on 28.3.1996 in the revenue record immediately in consequence of the sale on 18.1.1996 in favour of defendants No.4 and 5. It is the own stand of the plaintiff that on 31.10.1996 written statement was filed in the first suit, how this led to afresh cause of action when the earlier was already there and the property already stood disposed off shows that subsequently there has been an improvement in the pleadings to overcome this hiccup. The same is with an oblique motive to enable the plaintiff from splitting up claims and remedies. To the very query of the Court, learned counsel for the respondents could not convince, how the claim in the subsequent suit is founded on a cause of action distinct from the one on which the previous suit was filed. To the mind of this Court, in fact, the causes of action in both the suits are the same in substance and are identical to each other.

Since the cause of action in both these suits appears to be the same one, differently worded and apparently being a refusal which was well known to the plaintiff and could have easily enabled the plaintiff to initially file a suit for specific performance instead of suit for permanent injunction when this cause of action was subsisting certainly undermines his case. Therefore, the plaintiff is prevented from invoking the jurisdiction of the Court in the subsequent suit. No doubt, a subsequent suit for specific performance as has been detailed in ***Veena Goyal and another vs. Raj Kumar Mittal 2008(3) Civil Court Cases 200 (P&H)*** cited on behalf of the appellant does not bars the subsequent suit for permanent injunction but where the cause of action is the same certainly the provisions of Order 2 Rule 2 CPC come into play and, therefore, bars the plaintiff to seek a relief by way of second suit.

It is settled law that agreement to sell of immovable property does not itself creates any interest in or charge on such a property and determines the terms of the contract that of a right to sale of such property shall take place by execution of another document popularly called a sale deed. Thus, by such a document a prospective buyer does not becomes the owner. Till then the ownership remains with the seller. In the present case agreement to sell Ex.P1 is strictly a commercial contract and nowhere depicts as per the evidence and arguments of the parties, who out of the plaintiff and defendant No.4 has paid what amount nor determines the extent of their share therein. Thus, by that analogy anyone of them could deal with this property as owner and the condition prescribed therein exhaustively and clearly lays down that the owners would give irrevocable power of attorney to anyone at the asking of these buyers to which the owners would not object and also unbridled powers were given to the buyers by virtue of this power of attorney to alienate the same in anybody's favour to which original owners can have no say. Thus, leaves no scope to doubt that it was by this arrangement the agent has sold off this property and there is no element of fraud, deceit or violation of the terms of the contract.

In the light of the arguments of the two sides and the own stand of the plaintiff as has been highlighted in the arguments of the parties, it was with the written consent by virtue of Ex.P1 of the plaintiff as well as of defendant No.4 the vendors defendant Nos.1 and 2 have given power of attorney to defendant No.3, who happens to be the wife of defendant No.4. Agreement to sell Ex.P1 illustrates that it was in the presence and under the very signatures of the second party to this agreement consisting of plaintiff-Gian Chand and defendant No.4-Sikarder Singh the vendors have given power of attorney in favour of defendant No.3 and further corroborates that it was with the express consent of the plaintiff the principal has given attorney to their agent to act on their behalf as per the wishes of the second party and this power of attorney dated 30.3.1993 Ex.P2 is a registered document executed on the same day in the presence of all these parties including the plaintiff. The same has been highlighted in the statement of plaintiff that have been put to the plaintiff in his cross-examination as PW1 and he has even relied upon this in his examination-in-chief and further admits that agreement Ex.P1 does not elicits any shares of the parties and admits that it was with his consent and in his presence a general power of attorney was given in favour of defendant No.3, who happens to be the wife of defendant No.4 are matters which certainly have a bearing on the outcome of this case. Plaintiff, when confronted with this power of attorney Ex.P2 admits that by virtue of this attorney she was competent to alienate the property in favour of any person and further accepts that this power of attorney has been given by the original owners on their asking and, thus, being mentioned in this agreement to sell Ex.P1 leaves no scope to doubt that there was a legal and legitimate authority given to defendant No.3 on behalf of defendant No.4 as well as plaintiff to deal with the property being agent of defendant No.1 and 2. Usually it is seen and is a matter of common knowledge that people dabbling in real estate usually resort to such a machination to keep themselves away from the actual transaction as well as to escape the rigor of taxation. Similar is the testimony of vendor Hari Chand, examined by plaintiff as PW2, who supports that it was on the asking of plaintiff and defendant No.3 they had given power of attorney to defendant No.4 and, thus, nothing can be said about the commission of fraud or illegitimacy on behalf of the original owners defendants No.1 and 2 and even who do not deny having given power of attorney Ex.P2 and by virtue of which defendant No.3 was entitled to sell off these properties. Even PW3 Manjeet Singh has shown concurrence to this stand of the other witness PW2 and rather asserts that only Sikander Singh was known to him and he was not having any closeness with Gian Chand-plaintiff. The backside of the stamp papers used for Ex.P1 and Ex.P2 clearly reflects that these were purchased from the same stamp vendor Suresh Kumar, apparently further undermines the case of the plaintiff on all those counts.

Thus by this own act of the plaintiff to which he has duly consented and acquiescenced to by delegation of an authority to defendant No.3 a right has crystallised in her favour to act as an agent of both the plaintiff and defendant No.3 and clearly bars by the Equitable Principle of Estoppel by acquiescence to challenge such an act of their agent. Even otherwise, the plaintiff has clearly relinquished his rights to the sale of the property in his favour by consenting to this arrangement by indirectly appointing his agent through defendants No.1 and 2.

Since it was subsequent thereto on 5.2.2001 through a registered sale deed defendant No.6 has purchased the same very property sold to defendants No.4 and 5 from defendants No.4 and 5 and, thus, an admission that the attorney has acted legitimately in transferring the property by virtue of this authority, therefore, defendant No.6 by all means is a bona fide purchaser as there is nothing suggestive by virtue of agreement to sell Ex.P1 there was any bar for the attorney not to alienate property by any means. It is the own stand of the plaintiff that there is nothing depicting even his share in property in agreement Ex.P1 and, therefore, ratios laid down in ***Bal Singh and others vs. Ravinder Singh and others 2005(3) RCR (Civil) 677; Smt. Ram Peary and others vs. Gauri and others 1978 AIR (Allahabad) 318; Sanjay Verma vs. Manik Roy and others 2007(1) RCR Civil 408; R.K. Parvatharaj Gupta vs. K.C. Jayadeva Reddy 2006(1) RCR (Civil) 779*** and ***Gunwantbhai Mulchand Shah and others vs. Anton Elis Farel and others 2006(2) RCR (Civil) 251*** do not come to the aid of the respondents. The arguments raised by the respondents that the sales are hit by the principle of *Lis Pendens* enshrined under Section 52 of Transfer of Property Act are well answered by the appellant side. The suit admittedly was dismissed in default on 01.12.1998 and restoration application was filed by the plaintiff on 4.3.1999 and which was allowed and suit was restored on 25.7.2001 whereas, sale took place on 05.2.2001 clearly when no suit was pending.

Admittedly, a suit for specific performance ought to be filed within a period of three years in terms of Article 54 of the Limitation Act from the date of refusal and the present suit having been filed on 31.3.1998 after five years of the agreement and there being entire payment of the consideration amount creates a suspicious circumstance, why instead of getting the sale deed executed the plaintiff kept mum and made no efforts at getting the sale deed executed or showed any element of readiness and willingness and rather actively participated in conferring a power of attorney on a third party a stranger to their agreement shows that all was not well with the transaction, apparently during the days of hectic real estate and escalating real estate prices this was a common device of a middle man for ensuring transaction from the owners to any buyers by fleecing as a middle man and, thus, making hefty gain at the back of the authorities and, thus, absolving themselves of any taxation liability.

Since learned counsel for the respondents could not highlight how there has been any breach of contract *inter se* between the plaintiff and defendant No.4 or defendant No.1 and 2 and plaintiff as well as defendant No.3 which could ensues compensation in terms of Section 73 of the Indian Contract Act, 1872 or that was there any bar to employ an agent which was on the specific asking of the plaintiff as well as defendant No.3 and which agent or attorney to act on behalf of the principal was very well expressed by virtue of registered power of attorney, who had expressed authority to act on their behalf qua this land and was competent enough to alienate it and, therefore, there was a legitimate relationship between principal and the duly appointed agent to act in this business of agency. The agent has acted as ostensible owner by virtue of Ex.P1 and there being no proven case of any violation of provisions of Section 41 of the Transfer of Property Act, 1882 and in terms of Section 20 of the Specific Relief Act, 1963 which embodies discretion as to decreeing a specific performance of a contract. The trial Court has rightly exercised its powers under these provisions and had declined the relief for specific performance to the plaintiff and which certainly what the balance of equity demands in the present set of circumstances. It is unlikely that a buyer while making payment of such a huge amount in a land deal would shift all his rights and titles to a 3rd person that too in writing by a registered document so executed with his consent and active connivance and, thus, learned counsel for the respondents could not show how it has resulted in an advantage over the plaintiff which could instil confidence of the Court in him and to grant him relief which is purely discretionary based on sound principles of law.

The evidence of the defendants by way of DW1 Hardeep Singh, DW2 Gurtej Kaur clearly depicts that there is a valuable consideration that has parted in this alienation *inter se* between the defendants and thus, the ultimate buyer comes within the ambit of bonafide purchaser.

Learned trial Court has rightly concluded that the studied silence of the plaintiff after making alleged payment rather does not depicts that there was any element of getting the sale deed executed and was a mere transaction of further alienation which was apparent from the own conduct of the plaintiff and, thus, the conclusion that this power of attorney by the plaintiff and defendant No.4 was apparently to facilitate the execution of sale deed in favour of desired future customers. The plaintiff was not even entitled to return/refund of the alleged earnest money as his share of contribution at the time of execution of Ex.P1 is not even depicted or proved and, thus, was not even entitled to refund as ordered by the trial Court.

Learned first Appellate Court had taken a pure lackadaisical approach into the matter by misinterpreting the evidence, especially, the jamabandi Ex.P7 which depicted this transaction and the plaintiff was fully aware of the same and the mere fact that in the cross-examination this jamabandi Ex.P7 was never confronted to the plaintiff does not suffice the purpose in helping the case of the plaintiff. Since there is no element of any fraud brought about and the attorney having exercised her powers commensurate with the authority so assigned to her by virtue of the agreement and, therefore, there being no bar of alienation by the principal through attorney in favour of any person and merely because transaction by defendant No.3 in favour of her relations cannot *Ipso facto* be termed as a fraudulent one. Thus, from this all, it is apparent that learned first Appellate Court has exceeded its jurisdiction and has failed to accordingly appreciate the relative stands of the two sides and it was not pure simplicitor refusal by the vendor to execute the sale deed in favour of vendee but was a complexity, whereby, the plaintiff had intended to make profits out of such a transaction and which he failed in his endeavour and, therefore, debars him from seeking such a equitable discretionary relief. The substantial questions of law are answered accordingly.

The findings of the learned first Appellate Court certainly are perverse and uncalled for. In the light of these discussions, the judgment and decree under assail of the learned first Appellate Court is set aside. The appeal is accordingly allowed, thereby, dismissing the suit of the plaintiff in toto.

No order as to costs.

(FATEH DEEP SINGH)
JUDGE

January 13, 2015
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