**IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH**

**Regular Second Appeal No. 4303 of 2011**
**Date of decision : January 15, 2015**

Manjit Kaur and another

....Appellants

versus

Bhim Singh and another

....Respondents

**Coram: Hon'ble Mr. Justice Fateh Deep Singh**

Present : Mr. Rakesh Nagpal, Advocate, for the appellants

Mr. HPS Ghuman, Advocate, for the respondents

**Fateh Deep Singh, J. (Oral)**

In this regular second appeal, the appellants Manjit Kaur and her son Baldev Singh, both heirs of Teja Singh deceased have laid challenge to judgment and decree dated 13.9.2011 of the learned District Judge, Patiala whereby two appeals one titled, Teja Singh vs Bhim Singh and another and Bhim Singh and another vs Manjit Kaur and another stood dismissed by common judgment in which appeal the appellants have challenged the findings of the trial court by way of judgment dated 27.1.2011 decreeing the suit of plaintiff Teja Singh for specific performance

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and allowing in the alternative relief by way of decree for the recovery of Rs 4 lacs with interest.

Heard Mr. Rakesh Nagpal, Advocate, for the appellants and Mr. HPS Ghuman, Advocate, for the respondents and perused the records.

Both the courts below have upheld the fact that by virtue of an agreement to sell dated 3.3.2006 Ex. P3 the owners Bhim Singh and his brother Behal Singh now respondents have undertaken to sell their land measuring 8 kanals at the rate of Rs 11,05,000/- per acre and in pursuance of which the sellers have received earnest money of Rs 4 lacs undertaking to execute the sale deed on or before 15.6.2006. It is worth while to refer here that it was disclosed and accepted at the time of execution of agreement to sell that the land was under mortgage with Punjab Agricultural Development Bank.

From the pleadings of the parties, the trial court had framed the following issues:-

(1) Whether the defendants executed an agreement to sell dated 3.3.2006 for the sale of the suit land in favour of plaintiff for consideration of Rs 11,05,000/- per acre after receiving a sum of Rs 4 lacs as an earnest money ?OPP

(2) Whether the plaintiff was always ready and willing and is still ready and willing to perform his part of the contract ?OPP

(3) Whether the defendant is entitled to get the relief of

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specific performance of the agreement to sell dated 3.3.2006 or in the alternative recovery of Rs 8,00,000/- as damages) along with interest at the rate of 18% per annum from the date of agreement to sell till its realization from the defendants ?OPP

(4)Whether the plaintiff is entitled to permanent injunction as prayed for?OPP

(5)Whether the suit of the plaintiff is not maintainable in the present form?OPD

(6)Whether the plaintiff has no cause of action to file the present suit?OPD

(7)Whether the alleged agreement to sell is forged and fabricated document and without consideration?OPD

(8)Relief.

The plaintiff examined eight witnesses and proved documents Ex. P1 to P45 whereas the defendants examined one witness and proved three documents Ex. D1 to D3.

In the light of the contentions of the two sides, the following question of law arises for consideration:-

> "Whether in the circumstances of the case of the two sides instead of granting relief of specific performance of the agreement, the court could grant alternative relief for the return of the earnest money with interest.?"

The contentions that have sought to be raised that it is joint

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property of the owners, un-partitioned and the relevant time was under mortgage. The same being a question of law and way back in the case of **Bhartu vs Ram Sarup, 1981 PLJ 204**, Full Bench of this Court has laid down the preposition that sale of un-partitioned property is permissible and the purchaser steps into foot-steps of co-sharer as a co-sharer subject to determination of his share by way of partition. So submission of counsel for the respondents Mr. RS Ghuman that the said land cannot be sold is highly fallacious and untenable and has been correctly controverted on behalf of the appellants' side. Learned trial court has placed heavy reliance on the jamabandi record Ex. P48 and Ex. D2 to reach the conclusion that definite share of the sellers was not decipherable and since there is no partition and is only a joint khata, said relief of specific performance cannot be granted and which is highly unjustified and uncalled for. Section 20 of the Specific Relief Act, 1963 provides ample discretion to the courts to grant such a relief. In this case the conclusion drawn by the courts below is highly inequitable. The very conduct of the sellers at the very inception of the suit whereby they have initially denied having signed the agreement to sell on which score their stand was not accepted which stand based on falsehood is against the principles of equity and shows their stand to be not bonafide. Counsel for the respondents could not controvert the arguments of the counsel for the appellants the well laid preposition that while exercising discretion in such matters the court need to take into

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consideration the circumstances of the case, the conduct of the parties and their respective interests under contract and there is nothing suggestive brought to the notice of the Court that by such a contract any unfair advantage goes to the appellants.

The second contention that has been put to operation by way of thwarting stand of the appellants is that the property at the time of agreement was under mortgage. Counsel for the appellants has placed reliance on **Laxman Tatyaba Kankate & Anr. Vs Smt. Taramati Harishchandra Datrak, 2010(3) Civicil Court Cases 828 (SC)** to hammer home the point that by virtue of section 13(1)(c) of Specific Relief Act, 1963 postulates that where a person contracts to sell immovable property with an imperfect title and property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and thus obtain a valid discharge and then specifically perform the contract in his favour. It is the admitted stand of the two sides and even considered by the trial court in its judgment in para no. 18 onwards that the amount of loan is approximately Rs 5 lacs and therefore, considering the same to be much less than what is the total price of the sale agreement, the defendants now respondents cannot escape under any reasonable stand and must suffer for their own act of entering into an agreement which they need to honour by all means.

The two courts below have wrongly appreciated these two

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crucial aspects in the present controversy and which are answered in favour of the appellants-plaintiff. The impugned findings are thus modified holding that the plaintiff is entitled to specific performance of the agreement to sell dated 3.3.2006 along with possession and thus directing the defendants to execute the sale deed after the defendants pay back the mortgaged amount themselves or out of the amount to be received/already received through this agreement to sell. With this modification, the instant appeal is allowed. Suit of the plaintiff stands decreed in toto. Substantial question of law is thus answered in favour of the appellants.

**( Fateh Deep Singh )**
**Judge**

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