IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

RSA No.403 of 2012 (O&M)
Date of Decision: 10th March, 2015

Anil Kumar

.....Appellant

Vs.

Kanwal Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Sr. Advocate with
Mr. K.S.Sidhu, Advocate for the appellants.

Mr. Kamal Sehgal, Advocate
for contesting respondent No.1-plaintiff.

Mr. Ashok Jindal, Advocate for respondent No.4.

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AMIT RAWAL, J.

The present RSA at the instance of the appellant-defendant No.3 is directed against the judgment and decree of the lower Appellate Court dated 29.11.2011 whereby the suit for possession by way of specific performance of contract/agreement to sell dated 14.09.2005 of the plaintiff, has been decreed and the appellant has been directed to claim damages against the defendants No.1 and 2-vendor and consequentially the sale deeds bearing number 3951 (Ex.P3) and 3952 (Ex.P4) have been cancelled/set aside and the defendants No.1 and 2 have been directed to execute the sale deed in

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favour of respondent No.1-plaintiff within a period of two months on receiving the balance sale consideration, failing which plaintiff has given the liberty to get the sale deed executed through the process of the Court. Before adverting to the argument of learned counsel for the appellant it would be apt to refer few facts.

The appellant-defendants No.3 and 4 have purchased the land measuring 34 kanal from defendants No.1 and 2 vide sale deed dated 13.10.2005 executed by defendants No.1, 2 and Kiran Pal for a valuable consideration of ₹ 9,65,000/-. The case set out by respondent No.1-plaintiff was that the respondents No.1 and 2-vendor had entered into agreement to sell dated 14.09.2005 for sale of land measuring 22 kanal 11 malra for a valuable consideration of ₹17,90,000/-. At the time of execution of the agreement to sell a sum of ₹ 7,19,000/- was stated to have been paid. The target date for registration and execution of the sale deed was fixed as 08.02.2006. It has been stated in the plaint that plaintiff requested defendants No.1 and 2 prior to 8.02.2006 to perform their part of agreement but they did not perform and accordingly on the date fixed i.e. 8.02.2006 for registration and execution of the sale deed in the office of Sub Registrar, Sohna District Gurgaon the defendants No.1 and 2 did not appear and on from inquiries plaintiff acquired the knowledge that the defendants No.1 and 2 had sold the land measuring 34 kanal including the suit land to defendants No.3 and 4 vide registered sale deeds mentioned above and delivered the possession to them. It has further been stated in the plaint that the sale deed had been executed during

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the subsistence of the agreement to sell and before the date of execution and registration of the sale deed and accordingly the suit for seeking specific performance of the agreement dated 14.09.2005 was instituted on 8.05.2006.

The aforementioned suit was contested by defendants No.1 and 2-vendor who appeared and filed their written statement and controverted the pleadings of the plaintiff and denied that the defendants thumb marks the alleged sale deed in the presence of the witnesses and much less denied the receipt of earnest money of ₹ 7,90,000/- on 14.09.2005. It was further stated that the respondent No.1-plaintiff did not have the funds to pay so much amount on the date but in the same breath, it was stated that the defendants No.1 and 2 did not enter into any alleged agreement to sell. It was further stated that defendants No.1 and 2 along with their brother Kiran Pal had entered into an agreement to sell in respect of land measuring 40 kanal 8 malra to the extent of 1/18th share with one Shri Phalia son of Naubat for a consideration of ₹ 95,000/- but after scribing the said sale deed and counter copy there of, the thumb impression of the defendants were obtained on various papers and in that process the thumb impressions of the defendants were also obtained on blank papers for the purpose of preparing of special power of attorney for getting the mutation entered. Since their brother Kiran Pal did not come present to execute the sale deed in favour of Phalia, therefore, the said sale could not be completed and the plaintiff hatched a conspiracy to fabricate the alleged agreement to sell in question by

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using on the blank papers having thumb impressions have been used for the purpose of the sale of land by using the same as agreement to sell and therefore, the said agreement was illegal, void and without consideration and fabricated.

The defendants No.3 and 4 filed their separate written statement and took up the plea that they are *bona fide* purchaser for the valuable consideration and purchased the land vide two sale deeds bearing vasika number 3951 and 3952 dated 13.10.2005. Defendants No.3 and 4 stated that the defendants No.1 and 2 have revealed to them after filing of the present suit that some fraud was committed upon by them by Phalia as they never executed any agreement of sale deed in respect of suit land in favour of the respondent No.1-plaintiff. Defendants No.1 and 2, Phalia, plaintiff, alleged scribe and attesting witnesses of the alleged agreement to sell dated 14.09.2005 conspired together. Since the parties were at variance, the trial Court framed as many as six issues including the issue of relief.

The details of the witnesses and the documents brought on the record have already been extracted in paragraphs No.7 to 10 in the judgment of the trial Court and they need not be referred again to avoid any repetition. The trial Court on the basis of the oral and documentary evidence brought on record held that the defendants No.1 and 2 executed agreement to sell dated 14.09.2005 Ex.PW2/A in favour of the plaintiff to sell the suit land i.e. measuring 22 kanal 11 marla but from perusal of the agreement and other evidence brought on record the total sale consideration was agreed to ₹ 17,9000/- and

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the plaintiff had been found ready and willing to perform his part of agreement yet did not exercise the dissertation under Section 20 of the Specific Relief Act and held that since defendants No.3 and 4 had been handed over the possession in view of the sale deeds and they were/are *bona fide* purchaser on the premise that there was no reference of agreement to sell dated 14.09.2005 (Ex.PW2/A) in any of the revenue record much less any evidence brought on record to prove that the defendants No.3 and 4 were having any knowledge of the agreement in question and thus declined the relief of specific performance and ordered that the respondent-plaintiff would be entitled to refund of earnest money of ₹ 7,90,000/- along with the interest at the rate of 12 per cent per annum from the date of payment of ₹7,90,000/- till the passing of the decree and future interest at the rate of 6 per cent per annum.

Aggrieved against the aforementioned judgment and decree the respondent No.1-plaintiff filed an appeal. It has been brought to the notice of the Court that defendants No.1 and 2-vendors had also filed an appeal against the judgment and decree of the trial Court but the statutory Court fees was not affixed thus the appeal was not entertained and accordingly was rejected.

The lower appellate Court being the Court of fact and law discharged the obligation as enshrined under Section 96 of the Code of Civil Procedure by referring to the oral and documentary evidence on record decreed the suit for specific performance, as mentioned above and directed the defendants No.1 and 2 to execute the sale deed

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within specified period and accordingly set aside the sale deed executed by defendants No.1 and 2 and their brother Kiranpal in favour of defendants No.3 and 4.

It is in these circumstances, present regular second appeal has been filed at the instance of defendant No.3. This Court after noticing the contention of the appellant-defendant No.3 issued notice of motion and also stayed the operation of the judgment and decree of the lower Appellate Court.

Thereafter an application bearing No.2907-C of 2012 dated 3.03.2012 was filed on behalf of defendant No.3-Anil Kumar to transpose respondent No.4-Vandana-defendant No.4 as appellant. The said application has been contested by plaintiff-respondent on the ground that the application was not filed by defendant No.4 and therefore, he has no locus standi to file this application. Besides numerous other objections were also taken. Thereafter the defendant No.4-Vandana filed a C.M. No.10033-C of 2012 dated 5.08.2012 for being transposed as appellant.

Mr. Kamal Sehgal, learned counsel for respondent No.1-plaintiff has opposed the aforementioned application on the premise that the appeal qua defendant No.4 has become time barred and therefore, the defendant No.4 apparently deemed to have accepted the judgment and decree passed by the lower Appellate court whereby the suit for specific performance by way of possession has been decreed.

Mr. Arun Jain, learned Senior counsel appearing on behalf

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of appellant and Mr. Ashok Jindal, learned counsel for the applicant-Vandana-defendant No.4 in support of their application seeking transposition of defendant No.4-respondent No.4-appellant No.2 cited following case law ***Iqbal Singh and another Vs. Joginder Pal Jain and others*** 2001 (4) RCR (Civil) 47, ***Mauji Ram and another Vs. Ram Kali and others*** 2009 (3) RCR (Civil) 593 and ***R.S. Maddanappa (deceased) Vs. Chandramma and another*** 1965 S.C 1812, to contend that the transposition of the defendant as co-plaintiff is permissible in law and it can be made to complete justice between the parties and to avoid the multiplicity of litigation particularly when the appellant No.1 and respondent No.4 had a common interest with each other. They further submitted that even the Court *suo motu* under Order 1 Rule 10 or by exercising its inherent jurisdiction can order transposition of a party. I am in agreement with the contention made by learned counsel for the appellant and Mr. Ashok Jindal, Advocate and deem it appropriate that there is no clash of interest between respondent No.4 and appellant. Moreover, they are the co-owner and acquired the interest of the suit property by virtue of sale deed and since by filing appeal the entire Court fees has been paid and the question of limitation would not come in the way of respondent No.4, accordingly order that respondent No.4-defendant No.4 be ordered to be transposed as appellant No.2. In view of court what has been observed above that application is allowed and respondent No.4 is allowed to be transposed as appellant No.2.

Mr. Arun Jain, Sr. Advocate counsel appearing on behalf of

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appellants-defendants No.3 and 4 in support of his ground of appeal raised the following submission.

(1) that the agreement to sell dated 14.09.2005 was an ante dated document and had been actually executed after the execution of the sale deed, ibid executed by defendants No.1 and 2 and by their brother Kiran Pal in favour of defendants No.3 and 4 and this fact has been corroborated through various oral and documentary evidence.

(2) There was collusion between the defendant No1 and 2 and plaintiff.

(3) The appellants are the *bona fide* purchaser in view of the provisions of Section 41 of the Transfer of Property Act as they made reasonable inquiry before purchasing the property, measuring 34 kanal, from defendants No.1 and 2 and their brother Kiran Pal as there was no reflection of agreement to sell in any of the revenue record, much less, disclosed by defendants No.1 and 2-vendors.

(4) He also referred to register of the stamp vender Ex.PW1/A to show that the stamp paper bearing serial No.49556 worth of ₹4, alleged to have been sold by the stamp vendor at Gurgaon in favour of the vendor for the purpose of execution of the agreement to sell. In order to establish his submission qua ante dating he further submitted that the stamp vendor instead of putting a curve of 3 has put a numerical word 4 for the reasons that already, the, blank thumb impression of defendants No.1 and 2 been obtained by Phalia for the purpose of general power of attorney in respect of the proposed sale deed to be entered into with regard to some other land but the said

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deed had fallen through and same stamp paper had been used as an agreement to sell.

In order to lend support to the submission No.(1) he referred to the testimonies of the various witnesses as well as the documents to contend that the agreement to sell was an ante dated.

(a) The first document which he referred are as under:-

Ex.P1 Jamabandi issued on 15.12.2005

As per column No.5 the mutation of the property has been reflected in the name of appellant i.e. mutation Nos. 1987 and 1988 has been entered in favour of the appellant.

According to learned counsel for the appellant, the plaintiff admitted that he did not obtain any of the fard/jamabandi except Ex.P1 and therefore, the agreement to sell dated 14.09.2005 was thus an ante dated documents.

(b) He referred to the statement of V.K.Mangla scribe PW-2 who stated in his cross-examination that the proposed sale deed to be executed between the defendants No.1 and 2-vendor, their brother with Phalia was drafted by them and there was a practice of getting the thumb impressions of the vendor on the blank papers for the purpose of execution of general power of attorney and entry of mutation. The stamp vendor did not appear in the witness box and only his Clerk had put in appearance and it is not the case of the respondent-plaintiff that the stamp vendor had died or was mentally unstable. He submitted that as per the statement, surfaced during the cross-examination of the Clerk of the stamp vendor, the stamp vendor

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on the date when the Clerk appeared before the Court to depose, had come to the Court complex.

(c) Only one witness to the agreement to sell namely S.K.Sharma has been examined, the other witness Avtar Singh has not been examined though it has come in the statement of other witness namely Satish Kumar Sharma that when the statement was recorded Avtar Singh was sitting in the Court room and thus Avtar Singh has intentionally been withheld by respondent-plaintiff.

(d) The plaintiff admitted in the cross-examination that he was income tax assessee and had been filing return for ₹ 2,00,000/- therefore, he could not have a cash to perform his part of agreement much less pay the earnest money of ₹ 7,90,000/-. He further submitted that the lower Appellate Court has ignored the aforementioned oral and documentary evidence and thus has committed illegality and perversity and therefore, the present appeal involves the following substantial questions of law.

(1) Whether in the facts and circumstances of the instant case the plaintiff/respondent having withheld the best evidence, the findings recorded by the learned Courts below in upholding the validity of the agreement to sell dated 14.09.2005 are not perverse?

(2) Whether in the facts and circumstances of the instant case the evidence led by the plaintiff/respondent to prove the alleged agreement to sell and his readiness and willingness being self contradictory and discrepant, the

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findings recorded by the learned Courts below are not perverse?

(3) Whether in the facts and circumstances of the instant case the appellant, who are *bona fide* purchasers for consideration and without notice of the alleged agreement to sell, the suit for specific performance could be decreed by the learned First Appellate Court by reversing the finding recorded by the Trial Court on issue No.5?

Mr. Kamal Sehgal, learned counsel appearing on behalf of respondent No.1-plaintiff in support of his contention raised the following submission:-

(1) That there was no apparent collusion between the plaintiff and defendants No.1 and 2 rather the defendants No.1 and 2 has breached the trust reposed by selling the land including the suit property to the appellant-defendants No.3 and 4.

(2) He further submitted though agreement to sell had not been entered into the revenue record but the defendants No.3 and 4 were aware of the agreement to sell.

(3) He further submitted that the respondent-plaintiff has been proved on record not only its execution much less the payment of earnest money and as well as readiness and willingness, in the essence complied with the provisions Section 16 (c) of the Specific Relief Act.

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(4) There is no illegality or perversity in the judgment rendered by the lower appellate Court much less no substantial question of law arises in the present appeal to be adjudicated by this Court. In support of his contention relied upon following judgment ***Zarina Siddique Vs. A. Ramalinga,*** SC 2014 (6) CTC 319, ***Prakash Chandra Vs. Angadlal and others,*** SC AIR 1979 SC 1241, ***Gulzar Kaur Vs. Bara Singh*** P&H High Court 2000 (3) RCR Civil 458 and ***Ram Dass Vs. Ram Lubhaya,*** P&H High Court 1998 (2) RCR Civil 642 to contend that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute and adequate relief.

(5) He further submitted that the relief of specific performance being a discretionary relief is granted in equity.

Mr. Arun Jain, learned Senior counsel in rebuttal submitted that the lower Appellate Court has given a very vague and illogical reason in decreeing the suit of the respondent and in support of his submission referred to the findings recorded in paragraph 13 of judgment and the various entries in the register of stamp vendor which he showed many blank, and referred to page numbers (177, 181, 235 and 323) of stamp register Ex.PW1/A. He further submitted that the defendant No.3 has submitted an application dated 13.12.2005 to the revenue authorities for demarcation of the land and the demarcation was conducted on 17.12.2005. After demarcation the appellant surrounded the area by

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putting wire on 28.12.2005. In support of the submissions appellants being *bona fide* purchasers cited the following case law ***Zorawar Singh Vs. Sarwan Singh (dead) by LRs*** 2002 (2) RCR (Civil) 540, ***Makhan Singh and others Vs. Harmeet Singh and others*** 1998 HRR 532 and ***Phullan Mian and others Vs. Jogendra Ram and another*** AIR 2006 Patna 183 to contend that since agreement was not registered nor there was no entry in the revenue record, it was not possible for the defendants-appellant to have prior knowledge about the agreement qua the land purchased by them and rather it was the duty of the plaintiff to prove this fact by bringing the necessary evidence.

I have heard learned counsel for the parties and appraised the impugned judgment and decree, case law and the record of the trial Court with their able assistance and am of the view that appeal is liable to be dismissed on the following points.

The consistent stand of the appellant-defendants had been that the agreement to sell dated 14.09.2005 was an ante dated by using blank stamp papers which were thumb marked by the vendor/defendants No.1 and 2 and their brother in respect of sale deed alleged to be entered into by them with one Phalia, however his third brother Kiran Pal since did not come for the sale deed and therefore, the said deal had fallen through and it is those blank papers which have been used for entering into an agreement to sell by ante dating the date, but in support of such submission no evidence, both oral and documentary, has come on record to prove the alleged connection/link

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of Phalia with the plaintiff Kanwal or with stamp vendor except that the proposed sale deed 24.01.2006 has come on record and exhibited as DX. In the absence of any evidence alleged connection or grievance on record the entire thrust qua ante dating of agreement to sell is repelled. The reference to the various pages of register maintained by the stamp vendor which as per the appellants had the blank entries against the respective serial numbers do not prove the case of the appellant, that the agreement to sell, had been ante dated. The fact remains on a page where an entry dated 14.09.05 had been made there is no variations in the spacing of the entries to show that the entries against serial number 49556 had been entered later on. The argument that while putting an entry of stamp vendor instead of 3 as 4 would indicate that the entry had been inserted, later on, do not have any substance as there is no dark impression against the entry qua the valuation of the stamp paper. The purchase of stamp paper from Gurgaon in respect of land situated at Sohna also loses its significance as there is no bar or any law/rule that the stamp paper should be purchased from stamp vendor belonging to that particular area where the land is situated. It is the pleaded case of the parties that both that the appellants and the respondent-plaintiff are resident of Tehsil and District Gurgaon. Though the respondent-plaintiff is a resident of village Gwal Pahari, Tehsil Sohna, District Gurgaon.

That there is no hard and fast rule before buying a property in every case there has to be an agreement to sell as a person can always purchase land directly through a sale deed in one

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day but the circumstances which have come on record, would lead to an irresistible conclusion, that defendants No.1 and 2 clandestinely entered into a deal with defendants No.3 and 4 for a paltry amount of ₹10,65,000/- against the total sale consideration of ₹17,90,000/- in respect of land measuring 34 Kanal only of 22 kanal 11 marla. The aforementioned acts of defendants No.1 and 2 and defendants No.3 and 4 cannot be ignored to form an opinion that the appellant No.3 and 4 are not *bona fide* purchaser for a valuable consideration, rather it is proved on record that the appellant had been the knowledge of a subsisting agreement to sell dated 14.09.2005. *Bona fide* purchaser-appellant has also not led any evidence to disapprove the thumb impression of defendants No.1 and 2 on the agreement to sell though the contents of the agreement though have been typed and written on the thumb impressions, in other words the matter has been typed on already available thumb impressions but in order to prove aforementioned contention no effort has been made to examine any expert in this regard. On the contrary the respondent-plaintiff through the testimony of S.K.Sharma proved the execution of agreement to sell. Even the scribe Mr. V.K.Mangla who though, also scribed proposed sale deed Ex.DX, has also deposed on lines of attesting witness that the agreement to sell was executed in his presence, despite it has come on record that he did not type the agreement to sell but got it typed from typist on his dictation. There is no cardinal rule that agreement to sell has to be specifically been typed by scribe but scribe can also give dictation to a regular typist.

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As regards the plea that respondent-plaintiff had been filed a return of ₹ 2,00,000/- and therefore he did not have a sufficient money and cash to perform his part of agreement of part with substantial amount, in this context this Court cannot be oblivious to the fact that the plaintiff to a specific question, put to him in cross examination, admitted that at his house sometimes a sum of ₹ 50,000/- or sometimes ₹10,00,000/- is always kept.

As regards the statement of plaintiff with regarding to obtaining of the fard which surfaced during the cross-examination the said witness to a specific question had admitted that before the execution of the agreement he had seen the '*fard* and *intkal*' but by referring to such cross-examination the appellants made an attempt to build a case that the respondent-plaintiff had the knowledge of the sale deed and the agreement had been ante dated but the fact remains in the remarks column number 12 only two entries are mentioned as 1987 and 1988 but there is nothing mentioned that a mutation has been effected in favour of appellants-defendants No.3 and 4 the said entries can be mis-read as year that of as they are synonymous to reference of a year. Had there been a mention of defendants, in column No.4, of the aforementioned mutation numbers there would have been an substance/force in the submission of learned counsel for the appellant. Be that as it may. Since there is no mention of the name of the appellants it cannot lead to an illogical conclusion that respondent-plaintiff had the knowledge of mutation effected in favour of defendants No.3 and 4. The fact remains that the '*fard*' has been

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obtained on 5.12.2005 and the suit has been filed on 8.05.2006. Non-appearance of the stamp vendor is also not fatal to the case of respondent-plaintiff as it has come, in the record in the testimony of Clerk, he had met with an accident and a rod had been inserted in his leg, this fact has also been noticed by the lower Appellate Court in paragraph 19 of the judgment.

On the contrary the respondent-plaintiff has proved the readiness and willingness by filing the suit with promptitude from the expiry of the target date. There is no dispute to the *ratio decidendi* culled out in the judgment cited in respect of the plea that the appellant defendants No.3 and 4 are *bona fide* purchaser, but in view of the observation given hereinabove, it has amply been proved on record that the appellants had the knowledge of the execution of the agreement to sell dated 14.09.2005 Ex.PW2/A as they had purchased the land measuring 34 kanal for a paltry amount of ₹10,00,000/- against the sale consideration of ₹ 17,90,000/- therefore, the *ratio decidendi* culled out in the aforementioned judgment do not apply in view to the facts and circumstances of the present case.

In view of what has been observed above the lower Appellate Court has rightly exercised the discretion, as enshrined under Section 20 of the Specific relief Act while granting relief of specific performance and the judgment cited, on behalf of learned counsel for the respondent-plaintiff to contend that specific performance as an ordinary rule should be granted and can only be denied in case of inequitable consideration fully applies to the facts and

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circumstances of the present case. It has nowhere come in the evidence that after the purchase of the land measuring 34 kanal the appellants-defendants No.3 and 4 have raised any construction or made any improvement. Had this evidence been brought on record there would have not been occasion for the lower Appellate Court as well as this Court to ponder, on the exercise of discretion as enshrined under Section 20 of the Specific Relief Act.

In view of what has been observed above, there is no substance in the appeal much less as substantial question of law arisen for adjudication by this Court. There is no illegality and perversity in the finding rendered by the lower Appellate Court while decreeing the suit of the plaintiff for specific performance of agreement to sell in toto i.e. by setting aside the sale deeds executed by defendants No.1 & 2 and their brother in favour of defendants No.3 and 4-appellant. No other argument has been raised.

Accordingly the appeal is dismissed. There shall be no order as to cost.

10.03.2015 **(AMIT RAWAL)**
Manoj Bhutani **JUDGE**

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