

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

**RSA No.848 of 2013 (O&M)
Date of decision: 20.02.2015**

Daya Nand

... Appellant

Vs.

Pawan Kumar and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Harkesh Manuja, Advocate
for the appellant.

Mr. Bharat Bhushan Jain, Advocate and
Mr. Sumit Goswami, Advocate
for respondents No.1 and 2.

AMIT RAWAL J.

This regular second appeal at the instance of appellant-plaintiff is directed against the judgment and decree of the lower Appellate Court whereby the suit for specific performance of the agreement to sell dated 05.07.2002 decreed by the trial Court has been dismissed by lower Appellate Court in appeal filed by defendant.

Mr. Harkesh Manuja, learned counsel appearing on behalf of the appellant-plaintiff, in support of his grounds of appeal contends that the lower Appellate Court has committed illegality and perversity

in setting aside the well reasoned judgment and decree of the trial Court, whereby the suit for specific performance of the agreement to sell dated 05.07.2002 was decreed and defendants No.1 and 2 were directed to execute and register the sale deed of the land described in the plaint in favour of the appellant-plaintiff after receipt of the balance sale consideration amount within a period of three months from the date of passing of the decree, as the lower Appellate Court has been swayed away while allowing the appeal in not referring to the written statement of the defendants wherein no specific and categorical averment regarding the collusion between plaintiff and defendants No.1 and 2 had been made. In essence, defendants No.3 and 4 failed to aver and prove apparent collusion between plaintiff and defendants No.1 and 2.

He further submitted that circumstances which have borne in the mind of the lower Appellate Court while deciding the appeal of the defendants No.3 and 4, that no questions were ever put to the plaintiff in the cross-examination, whereas on the contrary, the appellant-plaintiff has proved the execution of the agreement to sell through the testimony of PW2 - Raghbir Singh and PW3 - Sandeep attesting witnesses of the agreement to sell. He further submitted that the legal notice dated 12.05.2005 (Ex.P6) was also sent through registered post to defendants No.1 and 2 to perform their part of contract and thereafter, when defendants No.1 and 2 failed to perform their part of contract, the suit was accordingly, filed in the

month of June, 2005, therefore, there was continuous readiness and willingness on the part of the plaintiff. He further submitted that DW6-Pawan Kumar, subsequent vendee, admitted in cross examination that he did not have any document which could have proved the agreement and receipts regarding the payment were forged, therefore, the lower Appellate Court erroneously concluded that plaintiff did not put any suggestion to the said witness qua the alleged collusion. He also submitted that rather there was a collusion between defendants No.3 and 4 on one hand and defendants No.1 and 2 on the other hand, for the reasons that defendants No.3 and 4 obtained judgment and decree after the agreement to sell in question had been entered into and the defendants No.1 and 2 did not challenge the said judgment and decree dated 28.11.2007 and thus, urged the following substantial questions of law arise for adjudication of the present appeal:-

- “i) Whether finding regarding collusion between plaintiff and defendants No.1 and 2 could have been recorded in the absence of any specific issue?*
- ii) Whether in a situation wherein the circumstances which were made basis for recording a finding regarding collusion and were ever put to the plaintiff/appellant in his cross-examination, could have been relied upon for recording finding regarding collusion?*

- iii) Whether in the absence of any specific/categoric instances in the written statement of defendants No.3 and 4, first appellate court could have recorded finding regarding collusion?*
- iv) Whether the first appellate court has misread and misinterpreted the pleadings, evidence as well as law applicable thereto?*
- v) Whether once the agreement to sell, receipts regarding payment and readiness and willingness have been proved, suit for specific performance filed by appellant could not have been dismissed unless special circumstances were shown by defendants No.3 and 4?"*

Mr. Bharat Bhushan Jain, learned counsel appearing on behalf of respondents No.1 and 2/defendants No.3 and 4, in support of his contention submitted that the judgment and decree of the lower Appellate Court do not suffer from any illegality and perversity as the lower Appellate Court had discharged the obligation by referring to the oral and documentary evidence. He further submitted that there was an apparent and clear collusion between appellant-plaintiff and defendants No.1 and 2. He further submitted that appellant-plaintiff had challenged the judgment and decree dated 28.11.2007 by filing first appeal which was dismissed. There was cutting on the date as well as on the back of the stamp paper on which the agreement was

written and prayed that the appeal be dismissed.

I have heard learned counsel for the parties and appraised the impugned judgments and decrees and trial Court record also and am of the view that appeal is liable to be allowed as the judgment and decree of the lower Appellate Court suffer from following illegality and perversity:-

The lower Appellate Court has misread the receipts dated 05.07.2002 (Ex.P3) and 6.10.2003 (Ex.P4) of Rs.2,50,000/-, Rs.50,000/- respectively, which have been executed in the presence of Sandeep, by observing that defendants No.1 and 2 never executed much less witnessed by Sandeep. I have seen the receipts. Both receipts bore the thumb impressions of defendants No.1 and 2 and witnessed by Sandeep. The statement of Sandeep has gone un-impeached in this regard.

It would not be out of place to mention here that the target date for execution and registration of the sale deed, in respect of agreement to sell dated 5.07.2002 was initially fixed as 6.10.2003 by payment of earnest money of Rs.2.5 lacs and against total sale consideration of Rs.19 lacs in respect of land measuring 41 kanals 14 marlas, thereafter, the date of execution and registration of the sale deed was extended to 06.05.2004 against the receipt of Rs.50,000/- and then to 6.05.2005 against receipt of Rs.1 lacs. As per the averments made in the plaint, defendants No.1 and 2 have received a sum of Rs.4 lacs. The said witnesses of plaintiff have

categorically stated in the cross examination that they along with Bale Singh and Umed Singh had appended his signatures on the receipt. The findings of the lower Appellate Court that receipts have been typed with the help of a single typewriter do not have any substance. Rather finding has been rendered without there being any specific evidence led by defendant Nos. 1 and 2 much less defendants No.3 and 4.

The lower Appellate Court has committed perversity in misreading the documentary evidence as there is no concept of law that the receipts should have been on different typewriters and different form and shape. The fact remains it bore the regular stamp as well as thumb impressions of vendors as well as of the witnesses.

The lower Appellate Court has also got swayed away in holding that there is collusion between appellant/plaintiff and defendants No.1 and 2, whereas, on the contrary there was a collusion between vendors and defendants No.3 and 4 as defendants No.1 and 2 had not challenged the judgment and decree obtained by subsequent vendees i.e. defendants No.3 and 4 by filing the appeal instead the aforementioned decrees have been challenged by the appellant-plaintiff by causing an amendment in the plaint. There is another factor that defendants No.1 and 2 have sold suit property to defendants No.3 and 4 for higher value than what has been agreed as total sale consideration in respect of agreement to sell dated 05.07.2002, in question.

The lower Appellate Court did not refer Ex.P20/A, copy of the statement of Balle Singh vendor who appeared as DW2 in Civil suit No.270/2005 decided on 28.11.2007 wherein to a specific question in cross examination, he admitted that he executed an agreement to sell dated 05.07.2002 with the appellant-plaintiff before executing the agreement with Pawan Kumar-defendant No.3. Appellant-plaintiff when challenged the judgment and decree dated 28.11.2007, the lower Appellate Court granted them liberty by observing as under:-

“In the considered opinion of this Court, appellant Dayanand is not bound by the impugned judgment and decree and he can also not be aggrieved by it since his rights are not prejudicially affected by it in view of the provisions of Section 52 of the Transfer of Property Act. Since, he claims to have filed the civil suit against Balle Singh prior to the filing of this suit which has given rise to this appeal, the impugned judgment and decree under challenge before this Court shall be hit by the provisions of Section 52 of the Transfer of Property Act which very clearly say that during the pendency of any suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of

the Court and on such terms as it may impose. Therefore, the execution of the sale deed in favour of respondent Pawan Kumar in compliance with the terms of the impugned decree would not snatch the rights of Dayanand in the property in question in case they are established in the suit already preferred by him against Balle Singh. In case the suit filed by Dayanand is decreed and it attains finality, the executing Court shall be within its rights to enforce the decree in view of the provisions of Section 52 of the Transfer of Property Act, the impugned decree dated 28.11.2007 notwithstanding.”

Even receipt Ex.P5 of Rs.1 lac also bear the thumb impressions of the vendor and witness Ranbir Singh. This receipt executed on 06.05.2004, vide which the date of execution and registration of the sale deed was extended upto 06.05.2005 pertains to ₹ 1 lac. On 06.05.2005, defendants No.1 and 2 did not appear before the office of Sub Registrar for execution and registration of the sale deed which necessitated the plaintiff to send a legal notice dated 12.05.2005 and thereafter, filed a suit in the month of June, 2005.

The lower Appellate Court has committed illegality in reversing the judgment and decree of the trial Court by holding that the stamp papers for the purpose of agreement to sell were

purchased in the name of vendee. There is no such rule laid anywhere that stamp papers had to be purchased in the name of vendor only.

On the contrary, appellant-plaintiff had proved the ingredients of Section 16 (c) of the Specific Relief Act by not only making averments but also proved the readiness and willingness from the date of execution of the sale deed till filing of the suit and during the pendency of the suit, the defendants No.1 and 2 have not denied the receipt of earnest money as well as subsequent money vide which the agreement to sell was extended from time to time.

The judgments and decrees in favour of defendants No.3 and 4 on the basis of the agreement to sell alleged to have been executed by defendants No.1 and 2 during subsistence of first agreement to sell executed on 05.07.2002 were nothing but an act of greed on the part of defendants No.1 and 2. Once the appellant-plaintiff has proved due execution of the agreement to sell, the subsequent agreement to sell and decree thus, are nullity in the eyes of law. The lower Appellate Court has erred in not discharging obligation under Section 96 CPC by not referring to the oral much less documentary evidence particularly opening lines of cross examination of Pawan Kumar, who, when appeared as DW6, unequivocally admitted that he did not have any document which could prove that agreement and receipt regarding payment were forged and thus, there was no occasion for the lower Appellate Court

to form an opinion that there was apparent collusion between defendants No.1 and 2 and plaintiff/appellant because plaintiff never put any question much less suggestion to said witness.

In view of what has been observed above, the aforementioned substantial questions of law are answered in favour of the appellant/plaintiff against the respondents/defendants No.3 and 4 and judgment and decree of the lower Appellate Court is hereby set aside and the suit of the appellant-plaintiff is decreed. Defendants No.1 and 2 are directed to execute the sale deed in favour of the appellant/plaintiff on receipt of the balance sale consideration within a period of three months subject to the plaintiff depositing the balance sale consideration within the aforementioned period and in case the defendants did not come forward to execute the sale deed, the appellant-plaintiff would be at liberty to seek the process of law.

Accordingly, the appeal is allowed.

Decree sheet be prepared.

(AMIT RAWAL)
JUDGE

February 20, 2015
savita