

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RSA No.884 of 2015 (O&M)
Date of Decision: 13.03.2015**

Harjit Singh

..... Appellant

Versus

Naib Singh and another

..... Respondents

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

Present: Mr. Ranjivan Singh, Advocate,
for the appellant.

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

RAJIV NARAIN RAINA, J.

This is a second appeal against the First Appellate Court decree dated November 19, 2014 passed by the Learned Additional District Judge, Sangrur affirming the judgment and decree of the learned Additional Civil Judge (Sr. Div.), Sangrur dated October 13, 2011 dismissing the suit. The appellant who was the plaintiff, instituted a suit for specific performance of contract based on an agreement of sale of corpus agricultural land falling in the revenue estate of village Rai Singh Wala, Tehsil and District Sangrur, entered between him and the 1st respondent Naib Singh comprising 20 Bighas O Biswa in the land described in the plaint. He sought execution of sale deed and in the alternative prayed for refund of earnest money of Rs.7 lacs said to be paid at the time of execution of the agreement along with interest @ 18% per annum till realization. Prayer (B) in the suit was for declaration to the effect that the registered transfer deed No.112 dated April 21, 2004 executed by Naib Singh in favour of Sukhwinder Singh – 2nd

respondent his minor son acting as minor's guardian conveying the corpus to his minor son be declared as illegal, null and void and not binding on the rights of the plaintiff since the transfer was without consideration and thus liable to be set aside. In his first prayer in the suit for specific performance, he did not pray for possession of corpus.

Briefly put, the facts in the plaint were that vendor Naib Singh agreed to sell corpus for Rs.55,000/- per Bigha and in furtherance of the proposed transaction executed the abovesaid agreement with the appellant after receiving earnest money of Rs.7 lacs on the day the agreement was signed. The agreement was scribed by a document writer. It was agreed that Naib Singh would have to execute the sale deed in favour of appellant up to November 17, 2004. On failure to do so it was agreed that the appellant would get the sale deed executed and registered through Court by depositing the balance amount of sale consideration. The appellant remained at all times ready and willing to perform his part of the contract. On November 17, 2004 the appellant as prospective vendee remained present and waiting in the office of the Joint Sub Registrar, Bhawanigarh to discharge his contractual obligations but Naib Singh did not turn up to discharge his. In the circumstances the appellant got his presence marked before the Joint Sub Registrar, Bhawanigarh.

Afterward, he came to know that Naib Singh had transferred the corpus land in favour of his minor son, the 2nd respondent, without informing him and keeping the matter concealed. The transfer of corpus to the 2nd respondent was to intentionally avoid execution of the sale deed and the transaction was completed to defeat the accrued rights of the appellant

under the prior agreement. The appellant pleaded that he was still ready and willing to perform his part of the contract and it was the 1st respondent who failed to perform his part of the agreement by backing out which brought the suit to court for trial.

On summons issued, the respondents appeared and contested the case by filing separate written statements of defendant father and son refuting the facts pleaded in the plaint. It was pleaded in defence that the agreement in question was without consideration. The 1st respondent denied that he had ever agreed to sell his land or received any earnest money from the appellant on April 19, 2004 as alleged. It was recounted that one Ram Singh son of Mukand Singh, cousin of the appellant runs a commission agency at village Bhadson. He and persons known to him have good relations with senior police officers and together they wanted to usurp the property of the respondent Naib Singh. Ram Singh is stated to be the brother-in-law of Tek Singh, brother of Naib Singh. On June 16, 2004 Tek Singh, brother of Naib Singh, Ram Singh, commission agent and a few other persons arrived at village Rai Singh Wala and took away by force three trolleys of wheat belonging to the respondents. Naib Singh's wife made a complaint of the incident to the police but the police did not readily act parrying it off on one pretext or the other. However, later better sense prevailed and FIR No.62 was registered on April 23, 2004 under Sections 382/323/506/148 & 149 IPC at PS, Bhawanigarh. Though FIR was registered but no investigative action was taken by the police. At the instance of the appellant and his people, respondent Naib Singh was kept in illegal police custody from April 16, 2004 to April 20, 2004 and during that

period, the appellant, Ram Singh and Tek Singh obtained the signature of the respondent-Naib Singh on certain papers. These persons also compelled Naib Singh to withdraw the amount of Rs.1,60,000/- from his saving bank account. Appellant Harjit Singh and company sold the wheat of the 2nd respondent and denied payment for the produce. They even obtained the signatures of respondent – Naib Singh on promissory notes and receipts and later on they prepared these documents in favour of one Ranjit Singh son of Jawala Singh as holder of promissory notes. On the basis of these pronotes, a suit for recovery was filed in the Court at Amloh against the respondents. It was then averred in the written statement that the price of corpus property was not less than Rs.90,000/- per Bigha at the relevant time. When the agreement dated April 19, 2004 was obtained against the free will and consent of the 1st respondent and the alleged amount of Rs.7 lacs was not received by him then the question of execution and registration of sale deed in favour of the appellant did not arise at all. In this way, the agreement was without consideration. The appellant controverted the averments in the written statements by tendering replications thereto.

As the suit was registered and pleadings exchanged, the parties went on trial on the following issues:-

- "1. Whether defendant No.1 executed any agreement to sell in respect of land described in the head note of plaint on 19.4.2004 in favour of plaintiff and received Rs. 7 lacs as earnest money from the plaintiff? OPP*
- 2. Whether plaintiff had always and is still ready and willing to perform his part of contract? OPP*
- 3. Whether transfer of property by partnership deed No.112 dated 21.4.2004 by defendant No.1 in favour of defendant No.2 is illegal, null and void and not binding on the rights of plaintiff and without consideration and is liable to be set aside? OPP*
- 4. Whether plaintiff is entitled to specific performance of agreement dated*

19.4.2004? OPP

5. If the plaintiff is not entitled to specific performance of agreement dated 19.4.2004, the plaintiff is entitled to alternative relief of money decree for refund of earnest money of Rs. 7 lacs from defendant No.1 alongwith interest, if so as to what rate? OPP

6. Whether plaintiff has not come to the Court with clean hands? OPD

7. Whether plaintiff has no cause of action to file the present suit? OPD

8. Whether suit is not maintainable in the present form? OPD

9. Whether agreement was got executed by plaintiff without free consent and will of defendant No. 1 and without consideration? OPD-1

10. Relief."

Both the parties led their respective oral and documentary evidence pro and contra in support of their respective cases and closed it.

On issue No.1 the appellant himself stepped into the witness box as PW-4 and reiterated his entire case through his duly sworn affidavit by way of his examination in chief on the lines as narrated above. Since the execution of agreement was denied as it was said to have been obtained on blank papers with signatures of Naib Singh, the appellant while leading his evidence examined both the attesting witnesses of the sale agreement namely PW-2 Jaspal Singh and PW-3 Gurvinder Singh and the scribe of the agreement PW-5 Balbir Singh. These witnesses have supported the case of the appellant and have deposed that the agreement to sell was executed in their presence by Naib Singh – respondent after taking earnest money of Rs.7 lacs. On their part the respondents traversed their pleas in the written statement in their oral evidence. Naib Singh produced DW-2 Kulwant Singh who supported defendants case and deposed that the appellant and other persons had threatened and pressurized Naib Singh to sell his wheat crop to them, upon which, a criminal case was registered by the police. The 1st respondent examined Ranjit Singh, Halqa Patwari in order to show that the

land which is alleged to have been sold by him has no 'Rasta'. If there is no passage to the land then the question of selling the corpus would not arise as none would buy land without any ingress and egress. His wife Jasbir Kaur appeared as DW-5 and affirmed that corpus land comprised in Khasra Nos.87, 88 and 89 and has no *rasta*.

The appellant argues that the present is a case where Naib Singh – respondent has not specifically denied his signatures on the agreement to sell and has failed to show under what circumstances he signed the document. It is contended that the FIR stands cancelled and a cancellation report has been submitted by the police which belies the case of the respondents. Appellant pointed out that Naib Singh appearing as DW-1 has denied his signatures on the written statement as well as on the affidavit tendered by him in his examination-in-chief meaning thereby that he has no defence in this case. This amounts to an admission on the part of the 1st respondent and the execution of agreement to sell is duly proved. On the other hand, the counsel for the 1st respondent had argued before the trial Court that mere admission of signatures on the document does not prove its execution. The attesting witnesses had deposed in favour of the appellant that they are related to him. Appellant witness Gurvinder Singh and Ram Singh are partners in the commission agents business. Ram Singh is also related to the appellant. So all these persons have connived with each other and prepared a false and fabricated document in order to grab the land of the respondents. A mere pleading of the appellant that he paid Rs. 7 lacs to the 1st respondent is of no consequence because the alleged payment was not established by way of evidence. The appellant's statement that he had

borrowed the money from his sister is also not supported by evidence. Therefore, the agreement alleged is not supported by consideration which all facts made the execution of agreement to sell a doubtful document as to its contents and authenticity. Both sides relied on a large number of decisions in support of the cases. The learned trial Court lifted the veil on the transaction by looking into other circumstances which have cast a doubt regarding the execution of the agreement. The learned trial Judge has disbelieved the statement of deed writer PW-5 Balbir Singh that even though there is an entry in his record regarding scribing of the agreement in question but from his cross-examination, it is borne out that he did not maintain his record properly and due course. The entries are not in sequence. An observation has come from the trial Judge that the record produced by Balbir Singh does not seem to be genuine and this tilts the balance in favour of Naib Singh, who took the plea that he never executed the agreement to sell. On the issue of passing of consideration to quarters concerned, the trial Judge has noted that the appellant had failed to lead any cogent evidence to convince the Court that he had paid Rs.7 lacs to Naib Singh in part performance. There is no receipt to prove this fact nor is there receipt on the back of the agreement to sell which is generally done in these types of cases. Furthermore, appellant has not produced an iota of evidence to show his source of money for making payment of such a large amount. His story that he borrowed money from his sister is only an oral statement without any supporting or corroborative evidence. His sister was not examined or produced by the appellant in the witness box and on the other hand, he has stated that his sister had already died. To make matters more

difficult for the appellant, it has come in evidence that his sister paid him the money for buying land after selling her land. If this were true then nothing stopped the appellant from producing the sale deed on record of sale of land by her but no such effort was made. When receipt of earnest money was stoutly denied then the trial Judge rightly held that heavy onus lay on the appellant to discharge his burden by proving to the hilt that he made the payment of earnest money and therefore was entitled to a declaratory decree.

The learned trial Judge has rightly observed that there is nothing in law to discard the evidence of the witness who was known to the appellant, but then it also becomes incumbent on the Court to scrutinize carefully and weigh self-serving statements of witnesses in order to find whether witness is deposing in favour of the appellant dispassionately, objectively, truthfully and not merely because he is related to him. This is how the evidence of Ram Singh and Gurvinder Singh has been rather fairly dealt with. For these reasons as well, the execution of agreement to sell has been found to be a little doubtful.

Another point noted by the trial Judge is that the appellant got a criminal case registered against Naib Singh for cheating under Section 420 IPC in which Naib Singh was acquitted by the learned Sub Divisional Judicial Magistrate, Nabha by judgment dated August 04, 2011 (Ex. PX). Although the judgment passed by the criminal court is not binding on the civil court as correctly observed by the trial Judge, but on reading of the judgment in the criminal case, it appears that the learned trial Judge got an impression from it and on a totality of facts and circumstances as largely

probable the facts pleaded by respondent No.1 – Naib Singh showing that he never executed an agreement to sell and, therefore, no cheating was committed.

It may be noticed that the litigation on the basis of the promissory note executed by Naib Singh was decreed by judgment dated April 22, 2010 (Ex.P-12). But the learned trial Judge has rightly distanced itself from the decree since it does not per se prove due execution of the agreement to sell. This approach of the trial Judge is appreciable in search of the underlying truth in the defence of the suit for specific performance which remedy in any event is discretionary in the matter of grant of relief.

On the question of denial by Naib Singh of his signatures on the written statement as well as on the affidavit tendered by him in his examination-in-chief has been relegated to the evidentiary principle that it is upon appellant to plead and prove his case and not to derive any strength from the weaknesses of the case of the defendants. The burden and onus of issue No.1 have to be discharged by the appellant and the trial Judge remained convinced that the burden was not carried out properly entitling the appellant to a decree of specific performance. Issue No.1 was decided against the appellant and in favour of the defendant. If issue No.1 is not proved, the question of the appellant being ready and willing to perform his part of the contract no longer survives, a conclusion rightly reached by the trial judge. However, not to leave matters in doubt, the learned trial Judge read the affidavit on record as Ex.P-2 which was produced to prove the presence of the appellant in the office of Joint Sub Registrar, Bhawanigarh that its contents did not reveal that he was accompanied with balance sale

consideration required for registration of the sale deed. Still further, the appellant brought nothing on record to show his income to support such a large amount of earnest money and whether he had sufficient means with him to pay the balance sale consideration still less is there substantial proof of his being ready and willing throughout and especially on the alleged date fixed in the agreement to sell to appear before the Registrar for execution of sale deed. When findings on issues No.1 and 2 are recorded against the appellant then the transfer deed from father to son is unexceptionable and I would only add that those were normal reactions of a father in protection of property so that his son is not deprived of corpus given the multiplicity of litigations between the parties which must have led to bad blood. The transfer deed in favour of his son to my mind is an act in self-preservation.

This Court even without looking into the judgment and decree of the appeal court both on law and facts would conclude that the matter at the level of the trial Judge served the ends of justice. However, a few words on the appellate judgment affirming the judgment and decree of the trial Court would be in order. In addition to what the trial Judge has found from the record, the learned Lower Appellate Court was faced with a case in which the technical motions of drawing up of an agreement to sell were mechanically present as were followed and witnesses supporting the case of the appellant with respect to presence of marginal witnesses at the time of drawing up the agreement, and scribed etc. but two of the appellant's witnesses have stated that the appellant owned 100 bighas of land to support that he had sufficient means to pay earnest money, while appellant has given a different version that he borrowed money from his sister to conclude the

deal. This was not the case set up in the plaint. These statements are therefore beyond pleadings and cannot be read in evidence. The Court *a quo* reasoned that the payment of earnest money in these circumstances also cannot be said to be duly proved. On the sale agreement itself the Court *a quo* in first appeal re-affirmed that the appellant and his witnesses are closely related and also related to the defendants. The appellant had tried to show that he was not on good terms with Ram Singh but his partner is witness to the sale agreement. PW-2 stated that the stamp papers were purchased in his presence, but those were purchased on April 16, 2004 that is three days before the alleged agreement not to speak of the criminal case registered against Ram Singh and Teja Singh etc. for offences mentioned supra. The Court *a quo* appreciated the evidence of Kulwant Singh, Sarpanch deposing for the defendant. He was Sarpanch of village Rai Singh Wala and categorically stated that the defendant Naib Singh was taken away forcibly by 8-9 persons, which is as much to say that he was abducted and work was got done in the Police Station and under threat of police action to deprive Naib Singh of his property. I have no reason to disbelieve the statement of the Sarpanch and its consequences to discredit the sale agreement supported by payment of earnest money are writ large on the agreement to sell. In any case, specific performance is discretionary relief and not an absolute right. The Lower Appellate Court has held as follows:-

"The counsel for the defendant/respondent on the other hand has referred to 1999(1)-Latest Judicial Reports-400(S.C)-Ganesh Shet Vs. Dr. C.S.G.K.Setty, where it has been held that suit for specific performance, evidence and proof of the agreement must be absolutely clear and certain. He has also referred to 1999(3)-Civil Court Cases-547-(P&H)-Hakam

Singh Vs. Gurdev Singh, where it has been held that if execution of agreement is disputed, onus is upon the plaintiff to prove its due execution. In that case stamp paper was purchased in suspicious circumstances. No effort was made by the plaintiff to show from where this huge amount was arranged and where this amount was utilized by the executant. The agreement was held to be written in the circumstances shrouded with mystery."

In **Santosh Hazari vs. Purushottam Tiwari (Dead) by Lrs.**, 2001(3) RCR (Civil) 243: AIR 2001 Supreme Court 965 while explaining the scope of second appeal to the High Court held that it lies only when there is a substantial question of law:-

"We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

In conclusion, both the Courts below have held on facts that appellant has failed to prove due execution of agreement to sell and passing of valuable consideration to the defendants. The view taken by the lower courts after appreciating the evidence on record is a possible and plausible one which requires no substitution of opinion by this court to form what may appear a better view. When there is serious doubt cast on the transaction as one which may be sullied it is best to decline discretionary

relief of specific performance and leave suit property in the hands of its rightful owners.

In the circumstances and for the foregoing reasons, there is no merit found in this appeal worthy of admission. No question in law, much less a substantial one arises for consideration within the scope of Section 100 CPC.

(RAJIV NARAIN RAINA)
JUDGE

13.03.2015
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