

Civil Revision No.6946 of 2013

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.6946 of 2013

Date of Decision: August 5th, 2016

Subhash & others

...Petitioners

Versus

Gurdial Singh & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Mr.Chetan Mittal, Senior Advocate with
Mr.Varun Issar, Advocate,
for the petitioners.

Mr.Munish Jolly, Advocate,
for respondent No.1.

Mr.Akshay Jain, Advocate,
for respondent Nos.2 & 3.

AMIT RAWAL, J.

Petitioner-defendants are aggrieved of the impugned order, whereby application at the instance of the respondent-plaintiff for allowing him to prove the existence and contents of agreement to sell dated 7.1.2005 and power of attorney bearing Wasika No.3539 dated 30.12.2005 by way of leading secondary evidence, has been allowed.

Mr.Chetan Mittal, learned Senior Counsel assisted by

Mr.Varun Issar, Advocate, for the petitioner-defendants submits that the

respondent-plaintiff had instituted a suit for recovery of 1,22,25,000/- as the balance sale consideration and in the alternative for cancellation of the sale deed bearing Wasika No.10172 dated 2.1.2006, executed by defendant No.4 in favour of defendant No.5 being the attorney of the plaintiff in respect of land measuring 10 bighas 5 biswas comprising in Khasra No.357 (6-0), 377 (4-0), 356 min (0-5), situated in the revenue estate of Village Peer Machhaila, Tehsil Dera Bassi, District Mohali on the basis of the aforementioned agreement dated 7.1.2005.

He further submits that there is no pleading in the suit with regard to the existence and loss of the agreement to sell. The application has been moved at a belated stage and the photocopies of the aforementioned documents, sought to be placed on record by way of secondary evidence, cannot be brought on record in view of the ratio decidendi culled out in the judgments rendered in **Mukesh Kumar alias Motta Versus State of Haryana**, 2011 (1) R.C.R. (Civil) 675, **Mangat Ram Versus Prabhu Dayal and others**, 2002 (4) R.C.R. (Civil) 706, **Tilak Raj Versus Janak Raj**, 1998 (2) R.C.R. (Civil) 348, **Joginder Pal Versus Parduman Singh**, 1998(2) R.C.R. (Civil) 633, **H.Siddiqui (D) By Lrs Versus A.Ramalingam**, 2011 (4) SC 240 and **Smt.J.Yashoda Versus Smt.K. Shobha Rani**, 2007(2) R.C.R. (Civil)

He further submits that during the pendency of the suit, the respondent-plaintiff moved an application (Annexure P-5) calling upon the petitioner-defendants to produce the original agreement to sell dated 7.1.2005. The aforementioned application was contested by filing reply stating therein that the original agreement dated 7.1.2005 was not in their possession. In fact, the respondent-plaintiff had himself torn the said agreement when the registered sale deed was executed in favour of M/s Solitair Enterprises Pvt.Ltd.-defendant No.5 by defendant No.4.

The aforementioned application was decided by the trial Court vide order dated 7.9.2011 holding therein that the agreement to sell dated 7.1.2005, if it is in possession of any of the parties to the suit, shall only be produced by the respective party with liberty of the Court and then it shall not be considered as admissible piece of evidence for want of permission of the Court. It is thereafter, the aforementioned civil suit was fixed for evidence of the plaintiff. Instead of leading evidence, the respondent-plaintiff moved an application for secondary evidence, which has been allowed. He submits that photo copy of the documents can be procured by manipulation and presented as original, which is not permissible as the suit is wanting pleadings with regard to the loss or custody of the agreement to sell, but no explanation has come that under what circumstances photo copy of the agreement to sell has been kept,

thus, urges this court for setting-aside of the impugned order and allowing the revision petition.

Per contra, Mr.Munish Jolly, learned counsel for respondent No.1 and Mr.Akshay Jain, learned counsel for respondent Nos.2 and 3 submit that in lieu of the aforementioned agreement to sell, the respondent-plaintiff had received a sum of 1,95,50,000/- against the total sale consideration of 3,10,00,000/-. They have drawn the attention of this court to Paragraph 1 of the plaint and as well as the reply thereto in the written statement to contend that the factum of the receipt of the consideration, much less the agreement has been admitted. It is only with regard to some passage, the matter is in dispute. They have also drawn the attention of this Court to the reply to application for producing original agreement to sell dated 7.1.2005 (Annexure P-7), whereby defendants had admitted execution of the agreement to sell, but came out with the plea of having been torn by the plaintiff. They submit that once the loss of the document has been admitted, it is in these circumstances, the application has been moved, thus, the ratio decidendi culled out in the judgments cited supra, would not come to their rescue and, thus, urge this Court for affirming the findings and dismissal of the revision petition.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is no force and substance in the

submission of Mr.Mittal, much less the argument of Mr.Mittal is not able to cut ice as on juxtaposition of the averments made in Paragraph 1 of the plaint, reply thereto in the written statement and as well as reply to the application for production of the agreement to sell, petitioner-defendant Nos.1 to 3 have admitted the existence of the agreement, much less its loss. For the sake of brevity, Paragraph 1 of the plaint, reply thereto in the written statement and reply to the application seeking production of the agreement read thus:-

Paragraph 1 of the plaint

“That the plaintiff had entered into an agreement to sell his land measuring 10 bighas bearing Khasra Nos.357 and 3 situated in the revenue estate of Village Peer Machhaila, Tehsil Dera Bassio with the defendant No.1 to 3 at the rate of Rs.1,24,00,000/- per killa (Killa of 4 bighas) on 7.1.2005 for total sale consideration of Rs.3,10,00,000/-. The plaintiff received Rs.46,50,000/- in advance as earnest money from the defendants No.1 to 3 and executed the agreement to sell in favour of the defendants No.1 to 3. It was further agreed that the sale deed shall be executed and got registered by the plaintiff in favour of the defendants No.1 to 3 or in favour of the person of their choice upto 31.12.2005 and the defendants No.1 to 3 requested the plaintiff to provide them 25 feet wide passage in addition to the suit land and the plaintiff agreed to sell that area of passage at the agreed rate. A writing to this effect was made at the back of the

agreement to sell dated 7.1.2005. It was agreed that the sale deed shall be executed in pats. First sale deed was agreed to be executed on 5.5.2005 and the sale deed to other Killa was agreed to be executed on 5.10.2005.

Paragraph 1 of the written statement on merits

“That the contents of Para No.1 of the plaint are correct, except that 25' wide passage was agreed to be sold at the agreed rate.

The factual position is that the total land measuring 10 bighas was agreed to be sold for total sale consideration of Rs.3,10,00,000/- and it was agreed by the plaintiff that he shall provide 25' wide passage, which was not agreed to be sold separately rather was part of entire deal for total sale consideration of Rs.3,10,00,000/-”.

Reply to the application

*Gurdial Singh Versus Subhash and
Ors.*

Reply to the application for directing the defendants No.1 to 3 to produce the original agreement dated 7.1.2005 on behalf of defendants No.1 to 3.

Sir,

Respectfully sheweth

- 1. That para No.1 of the application is matter of record needs no reply.*
- 2. Para No.2 of the application is correct to the extent of execution part of agreement dated 7.1.2005 but it is wrong that said agreement is in the possession of defendants No.1 to 3. In fact the said agreement was torned by the plaintiff*

himself when the registered sale deed was executed in favour of defendant No.5 by Sh.Ajaib Singh, General Power of Attorney of plaintiff.

3. *That suit of the plaintiff be dismissed as have filed on the basis of photocopy.*

4. *That the plaintiff has filed the present application on the basis of false facts.*

It is, therefore, prayed that suit of the plaintiff as well as present application be dismissed.

Dated: 17.8.10

Submitted by

Gurdial Singh & Ors.

Through Counsel.”

In view of the aforementioned facts, I am of the view that the trial Court has rightly allowed the application granting permission to the respondent-plaintiff to prove the agreement to sell as the suit is for recovery of the balance sale consideration as the sale deed has been executed, but according to the plaintiff, the remaining balance sale consideration has not been paid by the defendants. By moving application dated 24.12.2009 (Annexure P-5), the respondent-plaintiff has also complied with the provisions of Section 66 of the Indian Evidence Act. The trial Court has not granted/allowed the application in farcical manner, but had put a condition by holding that it would be subject to cross-examination of the witness producing those documents.

In my view, the petitioner-defendant Nos.1 to 3 would be at liberty to cross-examine the witness to verify the authenticity and genuinity of the documents purported to be brought on record by way of secondary evidence.

The judgments cited by Mr.Mittal do not apply in the present case as the loss of the documents has been admitted.

For the foregoing reasons, I do not find any illegality and perversity in the order under challenge. The same cannot be said to have been passed without jurisdiction. No ground for interference is made out.

Revision petition stands dismissed.

**August 5th, 2016
RAWAL)
ramesh**

**(AMIT
JUDGE**

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No