

RSA No. 2238-2009

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

**RSA No. 2238-2009 (O & M)
Date of Decision: 11.01.2016**

Prem Parkash

... Appellant(s)

Versus

Abhay Singh and another

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

- 1) Whether Reporters of the local papers may be allowed to see the judgment ?.
- 2) To be referred to the Reporters or not ?.
- 3) Whether the judgment should be reported in the Digest ?

Present: Mr. Mukesh Mittal, Advocate,
for the appellant.

Mr. Ajay Jain, Advocate,
for respondent No.1.

Paramjeet Singh Dhaliwal, J.

This regular second appeal by the plaintiff is directed against the judgment and decree dated 17.04.2009 passed by learned Additional District Judge, Rewari whereby appeal preferred by respondent No.1 against the judgment and decree dated 06.08.2007 passed by learned Addl. Civil Judge (Sr. Divn.), Rewari, has been allowed dismissing the suit for possession by way of specific performance filed by the plaintiff.

For convenience sake, hereinafter, reference to parties is being made as per their status in the suit.

The detailed facts are already recapitulated in the judgments of

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the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that the plaintiff filed a suit for specific performance with the averments that defendant No.1 agreed to sell the suit land, measuring 18 kanals 14 marlas i.e. $1/6^{\text{th}}$ share of the total land measuring 112 kanals 3 marlas detailed in para No.1 of plaint, situated within the revenue estate of village Bhurthal, Tehsil and District Rewari, @ ₹1,40,000/- per acre on his behalf and on behalf of his brother-defendant No.2. He received ₹1 lakh as earnest money and executed an agreement to sell on 03.05.1999. It was orally agreed that defendant No.1 would produce his brother i.e. defendant No.2 at the time of registration of sale deed on or before 15.05.2000. As per the terms and conditions of the agreement, it was agreed that in case the plaintiff failed to pay the balance sale consideration on or before the stipulated date, the earnest money paid by the plaintiff would be forfeited and in case the defendants failed to execute the sale deed, the plaintiff would be at liberty to get the sale deed registered through the court. The plaintiff was always ready and willing to perform his part of contract and he is still ready and willing to execute the sale deed. He had even issued a legal notice through his counsel on 18.04.2000 requiring defendant No.1 along with his brother to come present on the seat of Shri Prabhu Dayal Gupta, Advocate. On 15.05.2000, the plaintiff remained present at the seat of Shri Prabhu Dayal Gupta, Advocate, along with balance sale consideration, expenses

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for the stamp papers, but the defendants did not turn up. Therefore, he executed an affidavit and got it attested from the Office of Sub-Registrar, Rewari. Despite repeated requests and demands, defendant No.1 refused to get the sale deed executed along with his brother in favour of the plaintiff, therefore, suit was filed.

Upon notice, defendant No.1 resisted the suit and filed written statement taking various preliminary objections. It was averred that neither defendant No.1 nor his brother Om Parkash entered into an agreement to sell the land as mentioned in para No.1 of plaint. The answering defendant never executed the agreement to sell after receiving ₹1,00,000/- as earnest money, as alleged. In fact, the plaintiff approached defendant No.1 for purchase of share and defendant No.1 told him that he would consult his brother/defendant No.2 and only if defendant No.2 is willing to sell his share in the land, only then further talks would be resumed regarding the rate and extent of the land to be sold. The plaintiff asked defendant No.1 to sign on some papers and assured that the agreement would be executed only if defendant No.2 was willing to sell the share in his land and, therefore, further talks broke down and no further proceedings took place regarding selling of land. The agreement, if any, got prepared by the plaintiff, is without consideration and is not binding on the rights of defendant No.1. Since there was no agreement between the plaintiff and defendant No.1, therefore, question of executing the sale deed as alleged did not arise.

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No legal notice was ever received by the answering defendant. Other averments in plaint were denied and dismissal of suit was prayed for.

Defendant No.2 also filed separate written statement taking various preliminary objections. On merits, it was pleaded that he never met the plaintiff nor agreed to alienate his share in the land. He did not enter into any agreement to sell and no case is made out against him. The present suit has been filed just to grab his share. He never signed the agreement to sell nor ever authorized his brother-defendant No.1 to enter into agreement to sell on his behalf. Other averments in plaint were denied and dismissal of suit was prayed for.

On the basis of pleadings of the parties, the Court of first instance framed following issues:

- “1. *Whether plaintiff was and is ready and willing to perform his part of contract?OPP*
2. *Whether the plaintiff is entitled to possession of the suit land by way of specific performance of the agreement dated 03.05.1999?OPP*
3. *Whether the defendants entered into an agreement to sell the suit land with the plaintiff on 03.05.1999 for a consideration of Rs.1,40,000/- per acre and received a sum of Rs.1 lakh as earnest money at the time of agreement?OPP*
4. *Whether the plaintiff has no cause of action and locus standi to file the present suit?OPD*
5. *Whether there is no privity of contract between the parties?OPD*

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6. *Whether plaintiff is estopped by his own act and conduct?OPD*

7. *Relief.”*

After appreciating the evidence, the Court of first instance decreed the suit vide judgment and decree dated 06.08.2007. Feeling aggrieved, defendant No.1 preferred an appeal which has been allowed by the lower Appellate Court vide impugned judgment and decree dated 17.04.2009. Hence, this regular second appeal.

Learned counsel for the appellant has referred to following substantial questions of law, formulated in the grounds of appeal ,for consideration by this Court:

(a) *Whether the agreement to sell dated 03.05.1999 between the plaintiff and defendants is a validly executed document?*

(b) *Whether the agreement to sell dated 03.05.2009 creates any right, title or interest of the plaintiff in the suit land?*

(c) *Whether the plaintiff is entitled to relief of possession by way of specific performance on the basis of agreement to sell dated 03.05.1999?*

(d) *Whether the evidence brought on record by the plaintiff showing his readiness and willingness to perform his part of the contract is legal and valid?*

(e) *Whether the oral evidence of the respondent as against the documentary evidence produced by the plaintiff is admissible as per the Indian Evidence Act?*

(f) *Whether the First Appellate Court has acted*

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illegally while appreciating the facts and the evidence on record in the peculiar facts and circumstances of the present case?

I have heard learned counsel for the parties and perused the record.

Learned counsel for the appellant-plaintiff has vehemently contended that even if, part of share of brother of defendant No.1 is not taken into consideration, the contract could be enforced to the extent of share of defendant No.1. Defendant No.1 admitted his signatures on the agreement to sell dated 03.05.1999 which has been proved on record as Ex.PW 1/1. There is no averment in respect of forgery or fraud in the written statement filed by defendant No.1. Once defendant No.1 has admitted his signatures on the agreement Ex.PW 1/1, he was duty bound to prove as to what type of fraud was played upon him by procuring his signatures. The burden to rebut the execution of agreement was upon defendant No.1, but he has failed to discharge the same. Rather, the case of defendant No.1 is only that the land was already sold and defendant No.1 had never agreed to sell the share of his brother.

Per contra, learned counsel for respondent No.1 has vehemently opposed the contentions of learned counsel for the appellant and contended that the agreement is result of fraud and the lower Appellate Court has rightly appreciated the evidence and recorded the finding. Admittedly, the agreement to sell Ex.PW 1/1 does not bear the signatures or thumb impressions of the brother of defendant No.1. No

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notice was given to the brother of defendant No.1 for execution of the sale deed. He further contended that defendant No.1 along with his brother has already sold out 18 kanals 14 marlas of land vide registered sale deed dated 16.07.1999 i.e. much prior to the filing of suit and likewise, mother and sister of the defendant No.1 have also sold out 18 kanals 14 marlas of land vide registered sale deed dated 14.09.1999. Defendant No.1 was not owner of 28 kanals of land at the time of passing of decree by the trial Court.

I have considered the rival contentions of learned counsel for the parties.

On perusal of record and arguments advanced by learned counsel for the parties, this Court finds that following substantial questions of law arises for consideration in this appeal:

- “(i) Whether there is misreading and non-reading of alleged agreement to sell Ex.PW 1/1 by the lower Appellate Court?*
- “(ii) Whether decree qua the share of defendant No.1 can be passed for specific performance or alternative relief can be granted?*

Both the above substantial questions are being taken up together.

Defendant No.1 has admitted his signatures on the agreement to sell Ex.PW 1/1, however, claimed that they were obtained on blank papers, but he failed to prove that the same was the result of fraud. No averments regarding fraud, allegedly played upon him, have

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been mentioned in the written statement. Without pleadings, the plea of fraud and fabrication cannot be taken into consideration. Once defendant No.1 has admitted his signatures on the agreement Ex.PW 1/1 which has been duly proved by the plaintiff by examining concerned witnesses, it was for defendant No.1 to rebut the same, however, he has failed to discharge his duty. It is admitted in the agreement that defendant No.1 has received the earnest money of ₹1,00,000/-. If the version of defendant No.1 is to be believed that he never agreed to bring his brother for execution of sale deed, the entire evidence of plaintiff to the extent of share of defendant No.1 cannot be ignored.

As a result of above discussion, this Court has come to the conclusion that the agreement to sell Ex.PW 1/1 has been duly proved by the plaintiff and the same can be enforced to the extent of share of defendant No.1. The substantial questions are answered accordingly.

During the pendency of this regular second appeal, learned counsel for defendant No.1 offered to return the amount which he had received as earnest money along with interest. The order dated 06.05.2014 passed by a Coordinate Bench of this Court reads as under:

“The plaintiff is in appeal against the judgment and decree of the appellate Court. As per the case of the plaintiff, defendant No.1 entered into an agreement to sell the land measuring 18 kanal 14 marlas on 3.5.1999 @ ₹1,40,000/- and the date of execution and registration of the sale deed was fixed as 15.5.2000. On 18.4.2000, plaintiff served legal notice to the defendant No.1 for the purpose of execution and registration of the

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sale deed. Since, he did not come forward to execute the sale deed, the suit has been filed on 15.6.2000. The trial Court decreed the suit of the plaintiff. The appellate Court dismissed the suit and also recorded in para No.11 of its judgment that defendant No.1 come forward with an application that they had already sold the land in dispute vide sale deed dated 16.7.1999 much prior to the filing of the suit, therefore, the suit by itself was not maintainable for the purpose of specific performance.

Learned counsel for the appellant has submitted that he was not aware of this fact that the land has already been sold.

On the other hand, learned counsel for respondent No.1 has offered to return the amount which he had received as earnest money along with interest.

Learned counsel for the appellant prays for time to seek instructions.

On his request, adjourned to 25.7.2014.”

During the course of arguments in view of the offer made by respondent No.1 to return the amount which he had received as earnest money along with interest, learned counsel for the appellant has submitted that in order to avoid further litigation, he is ready to accept alternative relief, if reasonable interest is granted to him.

In ***Hemanta Mondal and others vs. Sri Ganesh Chandra Naskar*** AIR 2015 SC 3757, the Hon'ble Supreme Court has held as under:

“16. In the present case, it appears that possession was not given to the plaintiff at the time of execution of the agreement, nor the area of land agreed to be sold was clear, as such, it cannot be

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said that the plaintiff has done substantial acts or suffered losses due to expenditure in constructions etc., in consequence of a contract capable of specific performance. The direction given by High Court in the impugned order shows that the measurements of land actually agreed to be sold, are not final.

17. In the above facts and circumstances of the case, we are of the view that instead of affirming the decree of specific performance as modified by High Court, it will be equitable, just and proper to direct the appellants to pay back amount of Rs.60,000/- accepted by the original defendant with interest @ 18% per annum to the plaintiff/respondent from 04.02.1992 till date, within a period of three months from today, failing which this appeal shall stand dismissed. We order accordingly. The amount of Rs.73,125/- deposited by the plaintiff may also be withdrawn by him after appellants pay or deposit the sum in favour of plaintiff as directed above.”

Keeping in view the fact that the agreement to sell was executed on 03.05.1999 and suit was filed on 15.06.2000 i.e. almost 15 years have lapsed till date and in view of law laid down in ***Hemanta Mondal's case (supra)***, this Court deems it fit and appropriate that it will be equitable, just and proper to direct respondent No.1 to pay back amount of ₹1,00,000/-, accepted by him as earnest money, with interest @ 18% per annum to the plaintiff from the date of filing the suit till its realization. Ordered accordingly. The impugned judgment and decree

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dated 17.04.2009 is set aside and suit of plaintiff is partly decreed for the alternative relief as aforementioned. Decree-sheet be prepared accordingly.

If any amount has been deposited by the plaintiff in pursuance of the decree, he will be at liberty to withdraw the same.

Disposed of in the aforementioned terms.

11.01.2016
parveen kumar

(Paramjeet Singh Dhaliwal)
Judge