

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

-.-

RSA 4458 of 2010
Date of decision: 16.03.2016

Kunti Devi

..... Appellant

Versus

Uttam Singh and another

.....Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

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Present: Mr. R K Chauhan, Advocate
for the appellant

Mr. R S Thakur, Advocate
for respondent No. 1

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

Rekha Mittal, J.

The present appeal has been directed against the judgment and decree dated 28.11.2009 passed by the Additional District Judge, Gurdaspur, affirming the judgment and decree dated 08.02.2002 passed by the Civil Judge (JD), Pathankot (for brevity, 'the trial Court') whereby the suit filed by the respondent/plaintiff-Uttam Singh for specific performance of the agreement to sell dated 17.08.1993, was decreed.

Facts relevant for disposal of the present appeal are that, as per allegations in the plaint, an agreement to sell dated 17.08.1993 in regard to

plot measuring 270 square feet along with a shop constructed thereon, detailed in para 1 of the judgment of the trial Court situated in Village Pathankot, Tehsil Pathankot was executed by the appellant through her attorney Anil Kumar Sharma. Out of total sale consideration of Rs.40,000.00, a sum of Rs.25,000.00 was paid towards earnest money at the time of agreement and sale deed was agreed to be registered on or before 16.08.1995 at the expenses of the plaintiff/respondent No.1 on payment of balance sale consideration of Rs.15,000.00. The plaintiff always remained ready and willing to perform his part of the contract but the defendants committed breach thereof. On 16.08.1995, the plaintiff remained present in the office of Sub Registrar Pathankot for execution and registration of the sale deed but the defendants did not turn up. Notice dated 09.09.1995 was served upon the defendants calling upon them to get the sale deed registered on 19.09.1995 but the defendants did not come forward to perform their part of the agreement. Hence the suit.

The appellant filed the written statement, contested claim of the plaintiff, denied execution of agreement to sell with the averments that the agreement is a false and fictitious document. She never appointed defendant No. 2 as her attorney, therefore, he (defendant No. 2) was not competent to enter into an agreement to sell in respect of the suit property of which she is a co-owner along with her two brothers and sisters as it was inherited by them from their father. The plaintiff had already received back the amount of Rs.25,000.00 from Anil Kumar Sharma-defendant No. 2, alleged to have been paid to him as a part of sale consideration at the time of execution of the alleged agreement to sell. When she came to know about the fake and

manipulated alleged power of attorney, she got the same cancelled through publication in newspaper *Punjabi Nojawan Saptaiki*. The price of the shop was Rs.3,00,000.00 and as such there was no occasion for her to enter into an agreement to sell for Rs.40,000.00. A false and frivolous notice was received from the plaintiff that didn't require any reply. All other material averments of the plaint have been denied with a prayer for dismissal of the suit.

Defendant No. 2 (respondent No. 2) did not appear in the Court to contest the proceedings and was proceeded against ex-parte.

The learned trial Court, on examination of the pleadings of the parties, issues determined for adjudication, evidence adduced and submissions made by their respective counsel, answered claim of the plaintiff/respondent No. 1 in positive and as a consequence, the suit of the plaintiff was decreed for specific performance of the agreement to sell with a direction to defendant No. 1 (appellant herein) to execute the sale deed in favour of the plaintiff on his depositing the balance sale consideration of Rs.15,000.00 within two months and the plaintiff shall bear the expense of stamp and registration as per terms of the agreement Ex.P1, failing which the plaintiff shall be at liberty to get the sale deed executed through agency of the Court on deposit of balance sale consideration of Rs.15,000.00. It was also directed that in case the plaintiff fails to deposit balance sale consideration within two months, the suit shall stand dismissed.

The matter was carried in appeal by unsuccessful defendant no. 1 but the same did not find favour with the Additional District Judge, Gurdaspur and the appellate Court concurred with the findings of the

learned trial Court on material aspects of the matter.

Still feeling dissatisfied, the present appeal has been preferred by Smt. Kunti Devi.

The sole submission made by counsel for the appellant is that both the Courts below committed a gross error by holding that the appellant in the written statement has not pleaded in regard to issuance of receipt whereby Shri Anil Kumar paid an amount of Rs.25,000.00 to the plaintiff and agreement to sell was cancelled. It is further argued that the appellant in paras 2 and 3 has categorically pleaded that the plaintiff had received back an amount of Rs.25,000.00 from Shri Anil Kumar-defendant No. 2, alleged to have been paid to Shri Anil Kumar, as he was not competent to enter into an agreement to sell. Defendant No. 2 is residing separately from defendant No. 1 at Ludhiana for the last more than three year and he recently gave receipt executed by the plaintiff of Rs.25,000.00, which the plaintiff has received back from defendant No. 2. Photo copy of the receipt is attached. According to learned counsel, once the Courts have failed to take into consideration specific pleading in regard to return of amount of Rs.25,000.00 by Shri Anil Kumar to the plaintiff and photocopy of the receipt being a part of the written statement filed by her, the findings recorded by the Courts below in regard to receipt Ex.D1 cannot be allowed to sustain and suit filed by the plaintiff for any relief whatever is liable to be dismissed.

Counsel for the contesting respondent, on the contrary, has supported the judgments passed by the Courts below with the submissions that even if there was some lapse or inadvertent mistake committed by the

Courts in failing to notice the facts pointed out by counsel for the appellant, the same itself is not sufficient to set aside the findings recorded by the Courts below when otherwise the Courts have considered the evidence adduced by the appellant to prove her plea in regard to payment of Rs.25,000.00 by Shri Anil Kumar to the plaintiff and execution of receipt Ex. D1 in lieu thereof. It is further argued that the respondent filed replication and specifically denied the factum of payment of Rs.25,000.00 by Shri Anil Kumar to the plaintiff or execution of any receipt in regard thereto.

Counsel for the respondent has submitted that no such fact with regard to payment of Rs.25,000.00 by Shri Anil Kumar to the plaintiff finds mention in the reply to notice dated 06.10.1995 Ex. P9 sent by Shri Jagdish Chander Chawdhary, Advocate, Pathankot on behalf of the appellant and her son Shri Anil Kumar and the same is sufficient to falsify and belie plea of the appellant that either Shri Anil Kumar returned the amount of Rs.25,000.00 to the plaintiff or the plaintiff executed a receipt Ex.D1, acknowledging said payment. It is further argued that receipt Ex.D1 is nothing but result of forgery and fabrication and for that reason Shri Anil Kumar did not appear in the witness box to prove the factum of return of an amount of Rs.25,000.00 or execution of Receipt Ex.D1 as evidence of refund of the amount.

Another submission made by counsel is that the appellant is guilty of raising false allegations that she did not execute power of attorney dated 26.11.1991 in favour of Shri Anil Kumar or he (Anil Kumar) did not execute an agreement to sell in favour of the plaintiff on the basis of said

power of attorney. The power of attorney is a registered document, proved as Ex.P3 after necessary permission granted by the Court to prove the document by way of secondary evidence. In addition, it is submitted that the appellant is guilty of raising inconsistent and self contradictory pleas because at one hand she denied the agreement to sell but on the other, she sought to plead and prove that the agreement to sell was cancelled vide receipt dated 04.08.1995 Ex.D1.

I have heard counsel for the parties, perused the paper book and the original record of the trial Court.

The substantial question of law that arises for adjudication is:-

'Whether the judgments and decrees passed by the Courts below are rendered perverse for failure of the Courts to take note of the pleadings in the written statement qua return of an amount of Rs.25,000.00 and a receipt in regard to said refund?'

There is no dispute about the fact that the Courts below have committed a serious lapse by failing to notice the averments made in paras 2 and 3 of the written statement pointed out by counsel for the appellant but at the same time, the Courts have taken into consideration the receipt Ex.D1 and evidence adduced by the appellant qua said receipt and defence version set up by her. Nevertheless, the question for consideration is *'Whether the appellant has been able to establish that Shri Anil Kumar returned the amount of Rs.25,000.00 and the agreement in question was cancelled vide document dated 04.08.1995 Ex D1.*

The appellant has admitted the receipt of notice dated 09.09.1995 but with a plea that a false and frivolous notice was received

and it did not require any reply. In the replication, the plaintiff has stated that a reply was given to the notice through Shri Jagdish Chander Chawdhary, Advocate, Pathankot vide letter dated 06.10.1996 (1996 in place of 1995 appears to be the result of typographical error). The said reply bears an endorsement of admission by Shri Jagdish Chander Chawdhary, Advocate, counsel for the appellant before the trial Court and the same is marked as Ex.P9. Counsel for the appellant has not disputed that the appellant and Shri Anil Kumar sent reply to the notice dated 09.09.1995 (Ex.P5) vide reply dated 06.10.1995 (Ex P9). The receipt in regard to return of amount of earnest money propounded by the appellant is dated 04.08.1995. The reply dated 06.10.1995 is conspicuously silent that an amount of Rs.25,000.00 having been paid back by Shri Anil Kumar to the plaintiff, cancellation of the agreement to sell and execution of receipt dated 04.08.1995 by the plaintiff. As the appellant at the first available opportunity did not set up any such plea, it creates a serious doubt in her version raised in the written statement that Shri Anil Kumar had already paid the amount of Rs.25,000.00 received under the agreement.

The appellant examined both the attesting witnesses of the receipt namely Joginder Pal Verma (DW1) and Pritam Chand (DW2). To be fair to the appellant, there is no discrepancy much less a serious one in their statements despite the fact that they were subject to lengthy cross examination at the hands of counsel for the plaintiff. Admittedly, Anil Kumar did not contest the proceedings, therefore, he neither by way of written statement nor during course of evidence raised any such plea that he had returned the amount of Rs.25,000.00 received as an earnest money from

the plaintiff or receipt Ex.D1 was executed by the plaintiff in token thereof. Joginder Pal Verma and Pritam Chand, witnesses have deposed in their cross examination that Smt. Kunti Devi was present at the time of return of the money and execution of the receipt. The statement of the appellant is conspicuously silent in respect of her plea in the written statement with regard to return of the amount, execution of receipt or cancellation of the agreement to sell. The appellant raised a false plea that she never executed a general power of attorney in favour of her son Shri Anil Kumar. She admitted the receipt of notice dated 09.09.1995 Ex P5 in the written statement but denied the said fact during her cross examination by stating that "it is incorrect that Uttam Singh got served a notice dated 09.09.1995 Ex.P5 to me and my son". She further denied that "she and Anil Kumar jointly got a reply sent against the aforesaid notice to the plaintiff vide reply Exp9 through Shri Jagdish Chander Chawdhari, Advocate, her present counsel." On the contrary, Shri Jagdish Chander Chawdhary, Advocate admitted the reply Ex.P9. In the written statement, she raised a plea that she got the power of attorney in favour of Anil Kumar cancelled by way of publication in newspaper *Punjabi Nojawan Saptaiki*. In her cross examination, she has feigned her ignorance if she got this fact recorded in the written statement. Keeping in view the fact that plea of the appellant that she never executed a power of attorney in favour of her son was clearly falsified and belied on the basis of documentary evidence adduced on record coupled with the fact that Shri Anil Kumar neither contested the proceedings nor appeared in the witness box to prove factum of payment and execution of receipt Ex.D1 along with the fact that the appellant did not

raise such a plea qua payment or receipt at the first available opportunity by way of reply dated 09.10.1995, suffice to conclude that plea of the appellant raised in the written statement and her testimony on oath is not worthy of credence and reliance. Under these circumstances, the mere fact that the appellant examined the alleged attesting witnesses of receipt Ex.D1 and their having supported cause of the appellant is not sufficient to rely upon the receipt Ex.D1 either to negate plea of the plaintiff or reverse the findings recorded by the Courts below.

I would hasten to add that the respondent/plaintiff has adduced cogent and convincing evidence on record to establish that on the target date i.e. 16.08.1995, he remained present in the office of Sub Registrar, Pathankot and got his presence marked by way of affidavit Ex.P4. He again remained present in the office of Sub Registrar on 19.09.1995 in view of notice dated 09.09.1995 issued to the defendants and admittedly received by defendant No. 1 and said fact has been proved from affidavit Ex.P6. It is difficult to accept to reason that had the plaintiff received the amount of Rs.25,000.00 paid towards earnest money and executed a receipt in lieu thereof on 04.08.1995, he would have still appeared in the office of Sub Registrar on 16.08.1995 and thereafter served a notice upon defendants dated 09.09.1995 calling upon them to perform their part of the agreement. The conduct of the plaintiff also goes a long way to controvert the allegations of the written statement in regard to refund of amount of earnest money and execution of receipt Ex D1. It further appears that the receipt Ex.D1 was not executed by the plaintiff and for that reason Shri Anil Kumar son of the appellant did not appear in the witness box to prove the receipt

Ex.D1. Analyzed from any angle, I do not find any merit in the contentions of the appellant that the agreement to sell stood cancelled on return of an amount of Rs.25,000.00 and execution of receipt Ex.D1. Accordingly, the aforesaid question is answered against the appellant and in favour of respondent No. 1.

In view of the foregoing discussion, the appeal fails and is accordingly dismissed with costs.

16.03.2016
mohan bimbra

(Rekha Mittal)
Judge