

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

1) RSA No.1530 of 2012
Date of Decision: 17.11.2016

Gurcharan Singh

... Appellant

Vs.

Harjinder Singh and others

... Respondents

2) RSA No.2051 of 2012

Gurcharan Singh

... Appellant

Vs.

Harjinder Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr.Raman Goklaney, Advocate,
for the appellant.

Mr.Sandeep Khunger, Advocate,
for respondent no.1.

Amol Rattan Singh, J.

These two appeals have been filed by the 1st defendant in a suit filed by respondent no.1 herein (hereinafter to be referred to as the plaintiff), Harjinder Singh, seeking a decree of possession by way of specific performance of an agreement to sell, stated to have been entered into between the appellant and the plaintiff on 16.05.2002, in respect of land measuring 19 kanals, out of a total land holding of 114 kanals 15 marlas, fully described in the judgment of the learned Additional Civil Judge (Senior

Division), Ferozepur.

As per the suit of the plaintiff, the appellant-defendant, being a co-sharer in the said land, as per the *jamabandi* (record of rights) for the year 2000-01, agreed to sell it to the plaintiff for a total consideration of Rs.5,00,000/- and executed the aforesaid agreement on 16.05.2002, scribed by one Charanjit Singh, deed-writer, and witnessed by Ajmer Singh.

The agreement was stated to have been duly signed by the defendant after it was read over to him and at the time of the agreement, Rs.4,60,000/- was paid in cash by way of earnest money to the defendant, with 15.11.2002 stipulated to be the date for execution of the sale deed in favour of the plaintiff.

As that date was stated to be not a day for registration, with 16.11.2002 and 17.11.2002 also being a week-end, the plaintiff “attended the office” of the Joint Sub Registrar on 18.11.2002, alongwith the balance consideration and the expenses to be incurred for the purchase of stamp papers and registration etc.

2. However, it was further contended, that the defendant did not turn up, though the plaintiff kept awaiting for him through out the day. Eventually, he is stated to have got his presence marked before the Executive Magistrate by way of attestation by the said authority, on the plaintiffs' affidavit, on the same date, i.e. 18.11.2002.

Hence, it was contended that though the plaintiff was always ready and willing to perform his part of the contract but the 1st defendant had entirely disregarded the same and thereafter, even had

transferred most part of the suit land in favour of defendants no.2 to 4, i.e. the sons of the 1st defendant. (The said defendants presently being respondents no.2 to 4, all represented by their legal representatives, as is seen to be so even before the learned Additional Civil Judge (Senior Division), they, the sons of the 1st defendant obviously having died during the pendency of the suit itself).

3. It was contended that the 1st defendant had transferred 37 kanals and 3 marlas of land to defendants no.2 to 4 vide a transfer deed dated 10.10.2002, registered on the same date. It was further contended that the sons of the 1st defendant being resident with him in the same village (village Mudki), they had complete knowledge of the agreement of sell between the plaintiff and their father and as such, they were not bonafide purchasers for valuable consideration.

Hence, on the aforesaid contentions, the suit was filed by the plaintiff on 13.12.2002, further seeking a declaration that the transfer deed in favour of defendants no.2 to 4, executed by defendant no.1, was illegal, void and “without jurisdiction”.

4. Upon notice being issued in the suit, the 1st defendant appeared and filed his written statement taking preliminary objections that the agreement to sell was “vague, indefinite, void and not admissible in evidence” and therefore cannot be enforced.

It was further contended that the 1st defendant being a joint co-owner/co-sharer in the suit land, which was in exclusive possession of other co-sharers too, who had not been impleaded as parties to the suit, it was bad

for non-joinder of necessary parties.

Still further, it was contended in the preliminary objections that since defendant no.1 was not in actual physical possession of any part of the suit land, "It was not sufficient to convey title and delivery of possession to the plaintiff on the basis of the agreement to sell".

Yet further, the preliminary objections stated that the property was joint Hindu undivided family property in which defendants no.2 to 4 also had an interest and lastly, that in fact, the agreement dated 16.05.2002 was a forged and fabricated document. Further, a preliminary objection was also raised that the plaintiff was estopped by his act and conduct and had no locus standi to file the suit.

5. On merits, it was stated that the 1st defendant is an illiterate and rustic villager, not knowing how to read and write, only knowing how to append his signatures "in a very poor form".

The plaintiff, on the other hand, it was contended, was a commission agent and also had a shop of Kiryana goods in the village in his own name and that defendant no.1 had been selling his agricultural produce to him, as also purchasing goods from the shop. Thus, it was alleged that during the course of those transactions, the plaintiff succeeded in getting the signatures of the 1st defendant on blank stamp papers under the pretext that it was security for the amount outstanding against him.

Further, it was averred that the said defendant had cleared all dues to the plaintiff but the latter continued to claim some amount from the former, upon which some dispute arose between them, after which the

defendant stopped visiting the plaintiffs' shop. Hence, as per the 1st defendant, the agreement to sell was fabricated.

6. It was next contended in the written statement that the 1st defendant entered into an agreement to sell 38 kanals and 19 marlas of land to defendants no.2 to 4 on 19.07.2001 and had received cash of Rs.3,50,000/- from them. The sale deed was to be executed on or before 12.09.2002 but was actually executed on 10.10.2002, whereby the land was sold in equal shares to the said defendants, on the basis of a family settlement as also on the basis of the aforesaid agreement. Thereafter, defendants no.2 to 4 were stated to be owners in possession of the land.

7. Defendants no.2 to 4 also appeared and filed their written statement taking the usual preliminary objections of locus and non-maintainability etc. It was also averred that they are owners in possession of 37 kanals and 21 marlas of land, including the suit land, on the basis of a registered sale deed dated 10.10.2002, executed in pursuant to an agreement dated 19.07.2001.

The suit land being part of a joint Hindu undivided family, and co-parcenary, ancestral property of the defendants, was also pleaded as a defence by these defendants, who further contended that their father, defendant no.1, could not therefore have executed the agreement to sell the land, in favour of the plaintiff, without any legal necessity existing for the benefit of the estate.

Further, it was contended that defendants no.2 to 4 are bonafide purchasers of the suit land for valuable consideration, without notice of the

agreement to sell between the plaintiff and the defendants and as such, the sale in their favour was protected under Section 41 of the Transfer of Property Act, 1882.

It was also contended that defendants no.2 to 4, in any case, had a preferential right to the suit property on the basis of the earlier agreement dated 19.07.2001 and as such, the subsequent agreement dated 16.05.2002 in favour of the plaintiff, could not be given effect to.

The same contention as was made by defendant no.1, to the effect that the agreement dated 16.05.2002 is a forged and fabricated document, was also reiterated by defendants no.2 to 4 in their written statement.

8. The plaintiff filed two replications to the aforesaid written statements, denying the contents thereof and reiterating the contents of his plaint, upon which the following issues were framed by the Additional Civil Judge:-

- “1. Whether the plaintiff is entitled to the decree of possession by way of specific performance of agreement of sale dated 16.05.2002 executed by defendant no.1 in favour of plaintiff? OPP
2. If issue no.1 is not proved, whether the plaintiff is entitled to the alternative relief of recovery of Rs.5,00,000/-? OPP
3. Whether the agreement to sell dated 16.05.2002 is vague, indefinite and void? OPD
4. Whether the defendant no.1 was not competent to enter into an agreement to sell dated 16.05.2002? OPD
5. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD

6. Whether the plaintiff has no locus standi to file the present suit? OPD
7. Relief.”

9. The plaintiff examined himself, one Varinder Kumar and Charanjit Singh by way of oral evidence and also tendered documents, including the agreement to sell dated 16.05.2002, the transfer deed dated 10.10.2002 and a copy of the *jamabandi* for the year 2000-01, by way of documentary evidence.

The defendants only examined defendant no.1 as DW1, who testified in support of his affidavit, Ex.DW1/A, which was shown to be in support of the stand taken by him in his written statement.

10. PW2 Varinder Kumar also tendered his affidavit, Ex.PW2/A, stating that he knew the parties and an agreement had been entered into by defendant no.1 with the plaintiff on 16.05.2002, in respect of 19 kanals of land, the said defendant being a co-sharer to that extent in the land holding. This witness further deposed that the agreement was executed at Talwandi Bhai, scribed by PW2 Charanjit Singh at the instance of defendant no.1. He himself, i.e. PW2, stated that he was an attesting witness to the agreement, upon which he identified his signatures. The payment of earnest money to the extent of Rs.4,60,000/- in cash, by the plaintiff to defendant no.1, in the presence of this witness, was also testified to by him, as was the date was fixed for registration and execution of the sale deed, 15.11.2002. As per PW2, the earnest money was paid in his own presence as also in the presence of one Ajmer Singh.

The document writer, Charanjit Singh, also deposed similarly in

favour of the plaintiff, as PW3, further stating that he had entered the agreement in his register at Sr.No.472 on 16.05.2002, further proving such entry as Ex.P4.

11. In his testimony, defendant no.1 (present appellant) while testifying in support of his written statement, further stated that he is owner in possession of the suit land and that his sons, defendants no.2 to 4 had died.

However, he stated that he had not appended his signatures even on his written statement, and that he did not recognize the signatures of his sons.

He admitted knowing the plaintiff, stating that he (the plaintiff) had obtained his signatures “on ledgers”, though he had never given any signatures on blank stamp papers.

The appellant further deposed that he did not know when the agreement was executed by him in favour of his sons, nor did he remember the witness to the said agreement. He also did not know that he had sold the land to his sons, nor whether any consideration amount had been received by him from them.

Yet further, he even denied his signatures on the transfer deed, Ex.P2.

12. Having appraised the aforesaid evidence, as also the pleadings and the arguments, the learned Additional Civil Judge came to the conclusion that defendant no.1 was bent upon denying his signatures on each and every document, including his own written statement and the transfer deed executed by him in favour of his sons.

Further, though in the written statement, he had stated that his signatures were obtained on blank papers during the course of transactions between him and the plaintiff, the latter being his Commission Agent, in his testimony, he completely denied his signatures on any document (other than the ledgers).

Yet further, in his cross-examination, it was found that he had stated that he did not go to the Tehsil Complex even to execute the transfer deed, nor to give any land to his sons.

13. In view of the above, it was held by that Court that his testimony could not be taken into consideration to rebut the documentary evidence led by the plaintiff, who had proved his case by oral as well as documentary evidence.

It was further found that the agreement to sell, Ex.P1, clearly showed the signatures of defendant no.1 which were “appended at proper places and there is no signatures on the connected stamp papers”.

Obviously, what the learned Additional Civil Judge was holding in his judgment was that no inference could be drawn from the manner in which the signatures were placed on the agreement, that such signatures had been obtained on blank papers and the agreement was subsequently scribed on them.

14. On the other hand, a finding was recorded by that Court that the plaintiffs' witnesses were all cross-examined at length, without anything coming out in such cross-examination that would lead to the testimonies of these witnesses being unbelievable.

Consequently, the agreement dated 16.05.2002 was held to be a genuine document.

15. Having come to the aforesaid conclusion, it was however held that the 1st defendant being a co-owner of the suit land alongwith the other persons, a decree of specific performance could not be granted to the plaintiff and as such, the alternative relief prayed for, seeking a refund of the earnest money, could be decreed in his favour, alongwith interest thereupon, especially as the receipt, Ex.D2, was proved even in the cross-examination of the defence witness, alongwith the pro-note.

Consequently, the suit of the plaintiff was decreed to the extent of the alternative relief of the refund of the earnest money of Rs.4,60,000/-, alongwith interest thereupon, to be paid by the appellant-defendant no.1 @ 6% per annum, running from the date of the execution of the agreement till the actual realization of the amount.

16. Against the aforesaid judgment and decree of the learned Additional Civil Judge, dated 26.05.2009, the 1st defendant (the present appellant herein), as also the plaintiff, filed appeals under Section 96 CPC, before the Additional District Judge, Ferozepur.

The first appellate Court, after noticing the facts and pleadings and considering the judgment of the learned Additional Civil Judge, as also the arguments addressed, came to the same conclusion as the lower court, as regards the genuineness of the agreement dated 16.05.2002, coming to that conclusion also on the same reasoning, including the fact that the 1st defendant was bent upon denying his signatures on each and every

document, with a pre-determined mind.

17. Having upheld that finding of the learned Additional Civil Judge, the willingness of the plaintiff to honour his part of the contract was also found to be proved.

The lower appellate Court also recorded a finding that though in his affidavit, Ex.DW1/A, defendant no.1 had admitted that he had executed a transfer deed on 10.10.2002 in favour of his three sons in equal shares, in cross-examination, he denied his signatures on the deed (Ex.D2).

It was further recorded that the transfer deed was only entered into to frustrate the agreement entered into between the plaintiff and the 1st defendant and as such, with the agreement and payment of earnest money having been duly proved, with the plaintiff also having proved (with his presence before the Sub-Registrar), that he was ready and willing to execute the contract, there was no reason to deny him the relief of specific performance.

18. Consequently, the judgment and decree of the lower Court was modified to the extent of decreeing the suit of the plaintiff in toto, thereby accepting his appeal, while dismissing the appeal filed by the 1st defendant, i.e. the present appellant.

The plaintiff was directed to deposit the balance sale consideration within two months, after which the appellant-defendant no.1 was directed to execute the sale deed in favour of the plaintiff within one month, failing which the plaintiff would be at liberty to get it executed through a Local Commissioner to be appointed by the Court on any

application for execution of the decree filed.

19. Consequently, these appeals have been filed by defendant no.1, challenging the two decrees issued by the first appellate Court, one allowing the appeal of the respondent-plaintiff and the other dismissing the appeal filed by the appellant.

20. Before this Court, Mr. Raman Goklaney, learned counsel appearing for the appellant, first referred to, from the record, the testimonies of PW1 and PW2, i.e. the plaintiff and the witness to the agreement, Varinder Kumar, to submit that the said witness was actually an Accountant, and had admitted to being a part time Accountant with the said firm during the period in question, from 2001 to 2003. He also admitted to receiving a salary of Rs.50,000/- to Rs.60,000/- per year from the said firm, at the time of his testimony.

This witness also admitted to the fact that the pronote, a photocopy of which was exhibited as Ex.D2, accompanied by a receipt, was the same, on the basis of which he had filed a suit, Ex.D3. The witness also admitted to having remained a member of the Gram Panchayat of village Mudki, for five years.

Yet further, he admitted that he had not shown the earnest money paid by the plaintiff, in the account books of the firm, though the plaintiff was an income tax assessee, being the proprietor of the firm.

The witness also denied knowing the source of the earnest money paid by the plaintiff, though he admitted that he had paid it in his

presence and Ajmer Singhs' presence (as already noticed).

This witness also admitted that the 1st defendant (present appellant), had last sold his paddy crop to the firm in the year 2002, further referring to dates mentioned in the receipts, Marks A and B, as 15.04.2002 and 10.10.2002 (though they were obviously not duly exhibited documents).

Mr. Goklaney further submitted that, in fact, the appellant is an extremely simple person and had actually signed pro-notes, agreement etc. in favour of the 1st respondent-plaintiff, simply as an agriculturist, i.e. in favour of his Commission Agent, to secure the advances/loans taken by him as an agriculturist, during the course of the year.

As per learned counsel, his simplicity could be seen from the fact that he had even denied his signatures on the written statement, the power of attorney in favour of his lawyer and even on the transfer deed in favour of his late sons.

21. The contention of learned counsel is to the effect that an agriculturist being under undue influence of his Commission Agent, on account of the fact that he had been taking loans from him, any contract even if entered into, in such circumstances cannot be given effect to.

In support of his arguments, learned counsel cited a judgment of a co-ordinate Bench of this Court in **Dalbir Singh @ Vir Singh v. Dalbir Singh** 2001 (2) RCR (Civil) 307, wherein it was held that there being a fiduciary relationship between an agriculturist and his Commission Agent, a higher degree of proof as regards an agreement to sell the land is required,

other than the one accepted by the Courts below (in that case). Having held as above, the suit of the plaintiff, in that *lis*, seeking a decree of specific performance of a contract, was dismissed by this Court.

He, therefore, submitted that as a matter of fact, all accounts of the plaintiff with the appellant-defendant having actually been cleared, not only the judgment and decree of the first appellate Court, but also that of the learned Additional Civil Judge, deserve to be set aside, and the suit of the plaintiff dismissed in toto.

22. Refuting the contentions of learned counsel for the appellant, Mr.Sandeep Khunger, learned counsel for the 1st respondent-plaintiff, submitted that the agreement dated 16.05.2002 having been duly proved before both the Courts below, especially with the appellant denying his signatures on every single document, his own malafide intention in avoiding the execution of a sale deed was very obvious, seen with the fact that in his examination-in-chief, he admitted to executing a transfer deed in favour of his sons. Thus, learned counsel contended, that the very fact that after the agreement dated 16.05.2002 had been entered into, the appellant transferred 37 kanals of land, including the suit land, in favour of his sons, further proved his malafidie intention in denying the right accruing to the plaintiff.

As regards the learned Additional Civil Judge only granting the alternative relief of the refund of the earnest money, alongwith interest, on the ground that the suit property was jointly held, without the other co-owners being impleaded as necessary parties, learned counsel relied upon a

judgment of the Supreme Court in A. Abdul Rashid Khan (dead) v. P.A.K.A. Shahul Hamid 2001(4) RCR (Civil) 824, wherein it was held that even where any property is held jointly and an agreement has been entered into by a co-sharer, without the other co-sharers participating in the agreement, the co-sharer as had entered into the agreement, was bound to execute the sale deed, though it could not be decreed qua any specified part of the property, if it had not been partitioned and possession not given.

To the same effect, learned counsel for the 1st respondent also cited a judgment of a co-ordinate Bench of this Court, in Amrik Singh vs. Jagjit Singh Sayal and others 2009 (3) RCR (Civil) 553.

23. In rebuttal, Mr. Goklaney again pointed to the testimony of PW2 as also the pro-note and receipt, Ex.D1, and the replication filed by the respondent-plaintiff to the written statement of defendants no.2 to 4, wherein in paragraph 3 thereof, the factum of a loan having been obtained by defendant no.1 from the plaintiff has been admitted.

24. Having heard learned counsel for the parties and having considered the judgments of the Courts below, the first thing which needed to be clarified was the reference made by the learned Additional Civil Judge, in para 16 of his judgment, to Ex.D2 and to a defence witness, DW2. This was so as there is neither any such exhibit in the record of that Court, (which has been summoned by this Court), nor is there seen to be any DW2, the only defence witness being DW1 Gurcharan Singh, i.e. the appellant-defendant no.1 himself.

Similarly, the only document other than the affidavit of the said witness (Ex.DW1/A), exhibited by the defendants was Ex.D1, the top part of which is a pronote (photocopy) executed by one Darbara Singh son of Gurdial Singh, in favour of Varinder Kumar (who testified as PW2). The said pronote dated 24.05.2002 is to the effect that the aforesaid Darbara Singh had taken a loan of Rs.1,00,000/- from Varinder Kumar, upon which he would pay 2.5% interest per mensem.

The lower half of the said document, Ex.D1, is seen to be a receipt also issued by Darbara Singh, on the same date (24.05.2002), in respect of having received Rs.1,00,000/- from Varinder Kumar.

Hence, a query was specifically put to both learned counsel for the appellant and respondents in respect of the pronote, as also the reference to Ex.D2 and to DW2 in the judgment of the learned Additional Civil Judge. Both counsel had stated that it is obviously a typographical error and the reference is actually to Ex.D1 as regards the document, and the reference to DW2 would actually be a reference to PW2, who admitted to having loaned Rs.1,00,000/- to the aforesaid Darbara Singh on 24.05.2002, also admitting to the execution of the pronote and issuance of the receipt.

25. Learned counsel for the appellant further submitted that as a matter of fact, the said pronote and receipt were exhibited by the appellant and his co-defendants, to prove that the respondent-plaintiff and his accountant (PW2-Varinder Kumar), were regularly lending money to people and even the transaction in question with the appellant, was only a loan

transaction, sought to be secured by way of an agreement to sell the suit land.

Mr. Khunger, learned counsel for the respondent no.1-plaintiff, on the other hand, submitted that simply because one pronote and receipt had been led by way of evidence by the defendant, would not either show that the plaintiff was a money lender and neither would the said document and the admission of its execution by PW2, prove that the transaction in question was only a loan transaction.

26. Having considered the aforesaid arguments also, it is further to be seen that PW2, i.e. Varinder Kumar, Accountant of the respondent-plaintiff, further admitted in his cross-examination, to having filed a suit against the aforesaid Darbara Singh, seeking recovery of Rs.1,00,000/-. He further admitted to not having shown the money paid on the date of the agreement, i.e. Rs.4,60,000/-, to the 1st defendant, in the income tax returns of the firm of which the respondent-plaintiff was the proprietor, though he also admitted that he did not know whether or not the plaintiff filed separate returns in his individual capacity.

27. Thus, though it cannot be held simply on the basis of Ex.D1 and the testimony of PW2 in reference to the said document, that the agreement between the appellant and the respondent-plaintiff was only a loan transaction secured in the form of an agreement to sell land, however, considering the admitted relationship between the two parties as that of an agriculturist selling his produce to a commission agent, I am in agreement with the learned counsel for the appellant, that a far higher degree of

evidence to the effect that the agreement was not simply a loan transaction, was required to have been led, especially as one of the witnesses to the agreement, was the accountant of the firm.

No doubt, the scribe to the agreement was also examined and as such, the agreement itself having been executed cannot be doubted and the fact that the respondent-plaintiff actually tried to back out of the agreement, by transferring the land to his sons, (which otherwise would be held against him), yet to repeat, seeing the fiduciary relationship between the two parties and keeping in view the entire circumstances, it cannot be said with certainty that the agreement was not actually a collateral security in respect of advances/loans taken by the appellant from the respondent-plaintiff. In the opinion of this Court also, it was actually by way of a collateral security.

Further seen with the fact that, as submitted by learned counsel, the appellant has lost all three sons, in the opinion of this Court, it is not a case where discretion should be exercised under the Special Relief Act in favour of the respondent-plaintiff, by decreeing his suit in toto, by directing the appellant to execute a sale deed in the first respondents' favour.

However, the payment of the amount of Rs.4,60,000/- by the respondent-plaintiff by the appellant, virtually having been admitted by the defendants, also by showing that such like loans were given regularly by the said respondent to people, as in the case of Ex.D1, in the opinion of this Court, the decree passed by the learned Additional Civil Judge deserves to be reinstated.

28. Consequently, RSA No.1530 of 2012 filed by the appellant-defendant no.1, against the dismissal by the lower appellate Court, of Civil Appeal No.114 of 2009 filed by him, is dismissed. However, RSA No.2051 of 2012 filed by him, against the judgment and decree passed by that Court in favour of the respondent-plaintiff, thereby allowing Civil Appeal No.185 of 2009 filed by the plaintiff, is partly allowed. The judgment and decree of the learned Additional District Judge, Ferozepur, dated 22.12.2011, passed in Civil Appeal No.185 is set aside and for the reasons given by the learned Additional Civil Judge, Ferozepur, in his judgment dated 26.05.2009, that judgment and decree directing payment of Rs.4,60,000/- alongwith interest @ 6% per annum, running from 16.05.2002, till realisation of the amount, is reinstated.

Thus, the decree passed by the lower appellate Court in Civil Appeal No.114 of 2009 dismissing the appeal of the appellant (defendant no.1), is upheld, whereas that passed in Civil Appeal no.185 of 2009/18.05.2011 is set aside.

No order as to costs.

Decree sheets be drawn up accordingly.

(AMOL RATTAN SINGH)
JUDGE

November 17, 2016
dinesh

Whether speaking/reasoned
Whether Reportable

Yes/No
Yes/No.