

IN THE HIGH COURT OF PUNJAB AND HARYANA,
AT CHANDIGARH

RSA No. 3432 of 2012 (O&M)

Date of Decision: 18.10.2016

Rakesh Kumar

..... Appellant

Vs.

Balbir Kaur and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Rajinder Pal Singh Rana, Advocate,
for the appellant.

AMOL RATTAN SINGH, J.

1. This is an appeal by the plaintiff in a suit seeking possession of the suit property by way of specific performance of an agreement dated 14.03.2000, stated to have been entered into between him and respondent-defendant no.1 (Balbir Kaur).

The suit was decreed in favour of the plaintiff by the learned Additional Civil Judge (Sr. Divn.), Jalandhar, vide his judgment and decree dated 21.10.2009, but on an appeal filed by the first and second respondent herein (defendants no.1 and 7 in the suit), the learned first appellate Court reversed that judgment and decree and vide the impugned judgment dated 17.05.2012, the suit of the plaintiff was dismissed with costs.

Hence, this appeal by the plaintiff-appellant (hereinafter to be referred to as “the plaintiff”).

2. The case set up by the plaintiff was that defendant no.1, claiming to be the owner of a half share in the suit land, measuring 13 marlas and 19 sq.

ft., agreed to sell not only her share but also that of defendants no.2 to 6, i.e. her children (and alongwith her, also legal representatives of her late husband, Nirmal Singh).

The plaintiff accepted the offer and upon an assurance stated to have been given by defendant no.1 to get necessary permission from the other legal heirs also, after getting the land mutated in their name, the agreement was entered into, fixing the sale consideration at Rs.2.5 lacs. The entire amount is stated to have been paid at the time of execution of the agreement, with it being decided that the sale deed would be executed by the plaintiff with the attorney of defendant no.1, one Anil Kumar.

3. With no balance sale consideration due to be paid, it was averred that the plaintiff had always been willing and ready to perform his part of the contract and that the defendants and the aforesaid attorney were approached to get the sale deed executed. However, on 18.05.2005, i.e. more than 5 years after the agreement was executed, when the plaintiff finally approached the first defendant, seeking proof of mutation of the suit land, as the aforesaid attorney was not available, the defendants disclosed that sale deeds dated 09.05.2005 and 10.05.2005 had been registered in respect of the suit land by them, in favour of defendant no.7 (present respondent no.2).

Consequently, the plaintiff filed the suit on 20.05.2005 seeking a declaration as stated aforesaid, further seeking a declaration that the sale deeds dated 09.05.2005 and 10.05.2005 are illegal, null and void.

4. Upon notice issued to them, defendants no.1 to 6 appeared and filed their written statement raising the usual preliminary objections with regard to the maintainability of the suit etc. and denying that any such agreement had ever been entered into with the plaintiff on 14.03.2000 qua the

suit land.

On merits, it was further stated that the thumb impressions and signatures on the alleged agreement were forged and fabricated and could be got compared from an expert.

The rest of the contents of the plaint were also denied.

Defendant no.7 also filed a separate written statement again raising the same preliminary objections and further stating that defendant no.1 had executed the two sale-deeds in his favour, and that he was a bona fide purchaser for valuable consideration.

On merits, this defendant also denied the execution of the agreement dated 14.03.2000 between the plaintiff and the first defendant, further stating that even if the alleged agreement is proved to be correct, he being a bona fide purchaser, was within his rights to protect his property.

5. Upon the aforesaid pleadings, the following issues were framed by the learned Addl. Civil Judge:-

“1. Whether the plaintiff is entitled for possession of suit property by way of specific performance of agreement dated 14.03.2002?OPP

2. Whether, the plaintiff is entitled for declaration to the effect that the agreement dated 09.05.2005 and 10.05.2005 executed by defendants no.1 to 6 in favour of the defendant No.7 is null and void is prayed for?OPP

3. Whether the suit is not maintainable?OPD

4. Relief.”

6. The plaintiff examined himself as PW1 and one Gian Chand as PW2, whereas the defendants examined defendant no.1 and closed their

evidence.

At that stage defendant no.7 absented himself and was proceeded against ex parte.

7. Upon appraising the evidence led and considering the pleadings and arguments made on behalf of the parties, the learned Addl. Civil Judge first held that in any case, defendants no.2 to 6, i.e. the sons of the first defendant, not being signatories to the agreement set up by the plaintiff, they were not bound by it in the absence of any authority given by them to their mother, to enter into such an agreement on their behalf.

However, it was found that the first defendant, upon stepping into the witness-box, even denied her signatures on the power of attorney executed by her in favour of her lawyer, as also on her written statement.

Thus, holding that she was denying even her own documents, and upon cross-examination she had admitted that even earlier, sale deeds had been executed by which property measuring 6 acres had been sold by her for Rs.32.5 lacs, the agreement was, in effect, held by that Court to have been validly executed.

The contention on behalf of the defendants that the said document had not been proved in terms of Section 68 of the Indian Evidence Act, 1872, was rejected by the learned Addl. Civil Judge, holding that since the agreement was not a document that was required by law to be attested, it did not have to be proved in the manner stipulated in Section 68 and in fact, it had been duly proved in terms of Section 72 of the Evidence Act.

Accordingly, the suit of the plaintiff was partly decreed in favour of the plaintiff, to the extent of the share of defendant no.1, and the sale deeds dated 09.05.2005 and 10.05.2005, Exs.P-2 and P-3, in favour of respondent

no.7 herein, were declared to be illegal, null and void

8. Upon the first respondent-defendant and respondent no.7 herein having filed an appeal against the said judgment and decree, the learned Additional District Judge, Jalandhar, having noticed the facts and having considered the judgment of the learned lower Court, found that on the document set up as an agreement by the plaintiff, there were material alterations, inasmuch as, the word “Ajj” (today) had been scored off and substituted with the words, “Pehlan Miti 2.8.96”, meaning “earlier dated 2.8.96”.

It was also found that there was no attestation on the alterations by any of the defendants and as such, the document itself became doubtful, which was further fortified by the fact that there was no reason for not immediately transferring the suit land in favour of the plaintiff, when the entire sale consideration was stated to have been received by him in cash.

Further noticing that neither had Anil Sharma, the alleged attorney of the first defendant, stepped into the witness-box, nor even had the power of attorney stated to have been executed in his favour been exhibited, despite the fact that the plaintiff was a property dealer and easily could have got Anil Sharma to step into the witness-box, such powers of attorney being routinely executed by proper dealers, and yet further, the suit having been filed more than 5 years after the date of the agreement set up, it was held that the plaintiff was not entitled to any relief, even to the extent that it had been decreed by the lower Court.

9. It was also noticed by the first appellate Court that the plaintiff in his testimony had not been able to give the denominations of the stamp papers on which the agreement was executed, nor whether stamp paper worth

Rs.300/- was required or not, despite being “a regular property dealer”; nor could he name the scribe who had written the document. He also deposed wrongly that the deed-writer had affixed his stamp on the agreement and had signed it, whereas there was no such stamp or signatures of the deed-writer on the document.

The plaintiff also admitted that the original power of attorney executed by Balbir Kaur, (the first respondent-defendant), had never been handed over to him despite full consideration having been allegedly paid. Hence, it was held that the inference to be taken was that no such transaction had taken place and moreover, any prudent person would have at least obtained the original power of attorney executed by the vendor, (even though execution of such documents had been disproved by the Supreme Court in **Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana**, 2009(7) SCC 363).

Yet further, it was noticed that the plaintiff in his testimony was neither able to state whether the khasra numbers of the property were mentioned in the agreement, or whether the share of the first defendant was $\frac{2}{3}$ rd or $\frac{1}{3}$ rd in the suit property.

One of the signatories/witnesses to the agreement, Pardeep Kumar, despite being the plaintiff’s “own man”, was also not examined. The second witness, Gian Chand, though had appeared for his examination-in-chief, had not turned up to face cross-examination. As such it was presumed by the first appellate Court, that he was not willing to tell the truth.

Lastly, it was found that even when the cross-examination of the plaintiff is evaluated as a whole, it was found that to every material question his standard answer had been that “I do not remember”.

Thus, holding that in such circumstances, no reliance could be placed on the plaintiffs' deposition, to hold that the agreement in question was actually executed, or that the sale consideration had been paid to the first defendant, the first appeal was allowed and the judgment of the learned Addl. Civil Judge reversed.

10. When this appeal had come up for hearing on 20.08.2016 before this Court, learned counsel for the appellant had been directed to address arguments on how the suit for specific performance was within limitation, it having been filed more than 5 years after the agreement to sell was stated to have been entered into, with no date given in the agreement for execution of the sale deed and with possession not delivered to the plaintiff.

In response to the order dated 20.08.2016, learned counsel has relied upon a judgment of the hon'ble Supreme Court in **Madina Begum and another** vs. **Shiv Murti Prasad Pandey and others** Law Finder Doc Id # 781369, to submit that it was held by their Lordships that as per Article 54 of the Schedule to the Limitation Act, 1963, that even if a date is fixed for the performance of an agreement, non-compliance with the agreement on that date would give cause of action to file a suit for specific performance within three years, but when no such date is fixed, the limitation of three years would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement.

He, therefore, submits that in this case no date having been fixed in the agreement to sell dated 14.03.2000, and because the appellant-plaintiff had notice of non-compliance of the agreement by the respondent-defendant No. 1, only when she sold the suit property to respondent No. 7, vide sale deeds dated 09.05.2005 and 10.05.2005, the aforesaid judgment would apply

on all fours to the case in hand, as regards limitation.

11. Having considered the above, even accepting the aforesaid as regards limitation, it is seen that the learned first appellate court has gone into the details of the transaction and found that other than the plaintiffs' own averment in his testimony, that the agreement to sell dated 14.03.2000 was executed and the transfer was to be made subsequently, upon the mutation of the suit land having been made in favour of respondents no. 1 to 6, no efforts were made thereafter by the appellant-plaintiff in the five years till the filing of the suit, to even try and get the sale deed executed, or a transfer effected even by way of a mutation entry.

It had been further noticed by the learned first appellate Court, that a power of attorney was stated to have been executed in favour of one Anil Kumar, for getting the sale deed executed at the option of the appellant-plaintiff. However, even the aforesaid Anil Kumar was not examined by the appellant-plaintiff.

12. Learned counsel for the appellant however submits that with respondent No. 1 denying even her signatures on her written statement and on the power of attorney executed in favour of her counsel, it was obvious that her testimony was to be completely discarded as being unbelievable.

Even accepting that fact, the appellant keeping silent for five years after the agreement to sell, and in the meanwhile the suit land having been sold to a third person, who in the absence of any mutation in favour of the appellant cannot be stated to be not a *bona fide* purchaser, with respondent No. 1 admitting to having sold land which was beyond her own share of 03 marlas (in the 13 marlas and 19 square feet that constituted the subject matter of agreement to sell), I do not find myself able to reverse the judgment and

decree passed by the lower appellate Court.

13. Yet further, it has been noticed by the learned first appellate court that the appellant could not remember the name of the scribe to the agreement. He also deposed to the effect that the deed writer had affixed a stamp on the agreement and signed it, which was found to be factually incorrect, there being no stamp or signature of the deed writer. He also admitted that though there was a reference of a power of attorney in the agreement, the original instrument of power of attorney was not handed over by respondent No. 1 and further, PW2, Gian Chand, did not turn up to face cross-examination, though he was stated to be a marginal witness to the agreement in question.

Thereafter, as noticed already, the observation of the learned lower appellate court is to the effect that “When cross-examination of this gentleman is further evaluated, it is found that to almost every material question, his standard answer was “I do not remember”.”

In other words, the appellant also, in his own cross-examination, stated that he did not remember anything material pertaining to the suit instituted by himself.

14. Keeping in view all the above, I see no reason to reverse the judgment of the first appellate Court.

Consequently, finding no merit in the appeal, it is dismissed in *limine*, but with no order as to costs.

(AMOL RATTAN SINGH)
JUDGE

October 18, 2016
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Whether speaking/reasoned
Whether Reportable

Yes
Yes