IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.3620 of 2012 (O&M)
Date of decision:15.02.2016

Kesar Singh ... Appellant

Vs.

Megh Singh ... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

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

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. Kartik Gupta, Advocate
for the appellant.

Mr. J.S.Puri, Advocate
for respondent No.1.

AMIT RAWAL J. (Oral)

C.M.No.9656-C of 2012

Deficiency of the Court fees, has been made good.

C.M.stands disposed of.

C.M.No.9657-C of 2012

For the reasons stated in the application, duly supported by an affidavit, delay of 27 days in re-filing the appeal is condoned.

C.M. stands disposed of.

C.M.No.13712-C of 2015

The present application is at the instance of the applicant-appellant by invoking the provisions of Order 41 Rule 27 read with

Section 151 of the Code of Civil Procedure to place on record the documents (Annexures A-5 to A-8), by way of additional evidence.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr.Kartik Gupta, Advocate submits that respondent-plaintiff had instituted a suit against the appellant-defendant for specific performance of the agreement to sell dated 28.04.2005 (Ex.P1) and also subsequent endorsement(s) regarding the land in question measuring 20 bighas 5 biswas 10 biswansis, i.e., half share of land measuring 40 bighas 11 biswas, situated in village Jalalgarh in District Sangrur, which was allegedly agreed to be sold @ ₹1,23,000/- per bigha against receipt of ₹13,00,000/- as earnest money and possession was also delivered to the respondent-plaintiff.

He further submits that contents of the agreement, aforementioned, would reveal that respondent-plaintiff had been extending the date of registration of the sale deed by way of endorsements as there was a stay order on the suit land, in another suit filed against the appellant-defendant titled as Salinder Singh vs. Kesar Singh which was decided on 11.09.2006. In the aforementioned suit, there was an interim order of attachment of the suit land as the suit was for recovery of ₹9,90,000/- which was filed in the year 2002. The matter was compromised and whatever the due amount was paid by the applicant/appellant-defendant and in this regard, the statements of the parties in the said suit were recorded on 11.09.2006. It is the statements and order of the Court noticing the compromise sought to be placed on record by way of additional evidence.

It has been further stated that factum of pending of the aforementioned suit and its decision is evident from the respondent/plaintiff's own documents, i.e. Ex.P3 and Ex.P-7. The aforementioned documents are essential and necessary for the effective adjudication, much less, for substantial justice between the parties as it would enable this Court to pronounce the judgment in the most satisfactory manner, as well as, it would also enable the Court by accepting the documents which will also help the Court to pronounce the judgment.

In support of the aforementioned contentions, he relied upon the various judgments passed by the Hon'ble Supreme Court, Karnataka High Court, as well as, by this Court which read thus:-

i) North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (D) by LRs ***2008(3) RCR (Civil) 165****;*

ii) Surjit Singh and others vs. Gurwant Kaur and others ***2014 (4) RCR(Civil) 343;***

iii) Rajesh Kumar vs. Mangat Rai and others ***2012(2) PLR 334;***

iv) Pooja and others vs. Jagdish Singh ***2014(1) PLR 535;***

v) Germanjit @ Jermanjit Singh and others vs. Malkit Kaur and others ***2012 AIR CC 1427;***

vi) Perfect Polybags Private Ltd. vs. Canara Bank ***2014 ILR (Karnataka) 6280;*** *and*

vii) Malayalam Plantations Ltd. vs. State of Kerala and another ***2011(3) RCR (Civil) 609****.*

Reply to the application has been filed.

Mr. J.S.Puri, learned counsel appearing on behalf of the non-applicant/respondent-plaintiff submits that application is not maintainable as it tantamounts to filling up of the lacunae. In pursuance to the judgment and decree, sale deed has been executed and registered on 15.10.2014. The reasons assigned in the application do not comply with the requirement of provisions of Order 41 Rule 27 of the Code of Civil Procedure. The other suit filed by one Salinder Singh has no co-relation as incorporation of reason of stay order in another case vis-a-vis extension of time itself does not show that it was paper transaction. The case laws cited above in support of the application are distinguishable.

I have heard learned counsel for the parties and appraised the application, reply, as well as, case law cited at bar and am of the view that application deserves to be allowed for the following reasons:-

The documents sought to be placed on record has co-relation with the stand taken in the written statement, inasmuch that in Ex.P3 to Ex.7, it has been mentioned that time for execution and registration of the sale deed was extended owing to the interim order passed in the suit referred above, whereas, date of the compromise dated 11.09.2006 and the extension of time and one of the extension (Ex.P6) is also of 11.09.2006.

I am in further agreement with the case law cited on behalf of the applicant/appellant-defendant which has laid down certain criteria for accepting the additional evidence, in case, it enables the Court to pronounce the judgment, much less, also for substantial cause. By taking into consideration the aforementioned judgment, I am of the view that it would enable this Court to pronounce the judgment in the most satisfactory manner. Accordingly, the application, aforementioned, is allowed as aforementioned documents are from the record of the other civil suit proceedings which are permissible in evidence.

RSA No.3620 of 2012 (O&M)

The appellant-defendant is aggrieved of the concurrent findings of facts and law, whereby, suit for specific performance of the agreement to sell dated 28.04.2005 and writings dated 27.07.2005, 07.10.2005, 05.05.2006, 11.09.2006 and 23.09.2006, has been decreed.

It would be relevant to refer per-pleadings of the parties in order to adjudicate the dispute between the parties to the lis.

The appellant-defendant is stated to have entered into agreement to sell in respect of land measuring 20 bighas 5 biswas 10 biswasis @ ₹1,23,000/- per bigha, i.e., for a total sum of ₹24,93,825/- and a sum of ₹13 lacs as earnest money is stated to have been paid. As per the averments made in the suit, the aforementioned agreement was attested by marginal witnesses and the defendant also allegedly made endorsements regarding receipt of ₹13 lacs. Defendant allegedly requested plaintiff to extend the date of the execution of sale deed and on receipt of ₹1 lac more as earnest money, the date for execution of sale deed was extended upto 15.10.2005. However, the defendant approached the plaintiff on 07.10.2005 that there is a stay order on the suit property and suit was pending regarding the suit property and requested to extend the date of execution and registration of sale deed till the stay order is vacated and also requested for payment of ₹2 lacs more. Accordingly, a recital was also written on the backside of the second page of the agreement to sell aforementioned. By that time, a sum of ₹16 lacs had been paid. However, on 05.05.2006, defendant received another sum of ₹1,50,000/- towards earnest money and in this regard, a recital/writing was also made by the defendant in his hand under his signatures. As per the recital/writing, plaintiff is alleged to have installed a submersible motor and underground Khaal (water pipe) in the suit land at his own expenses, in essence, he had been put into possession of the suit land. However, on 11.09.2006, appellant-defendant further received a sum of ₹3,10,000/- from the respondent plaintiff and in this regard, a recital/writing was reduced into writing. Thus, a sum of ₹20,60,000/- was paid.

On 23.9.2006, defendant told the plaintiff that matter in the pending suit has been compromised and sale deed would be executed in favour of plaintiff or his nominee on or before 12.10.2006 but the appellant-defendant did not appear before the Registrar, whereas, the respondent-plaintiff was present and got attested his affidavit from the Executive Magistrate Amargarh.

The appellant-defendant on having received the notice of the suit and contested the same by filing the written statement and denied the factum of having offered to sell the land, much less, execution of the agreement to sell. It was stated that it was executed as a collateral security as he was under debt and compelling domestic circumstances. The facutm of handing over and delivering of the possession was also emphatically denied by stating that alleged agreement is an outcome of fraud and mis-representation being played by the respondent-plaintiff and attesting witness as the rate of land in dispute at that relevant time was ₹3,50,000/- per bigha instead of ₹1,23,000/- per bigha. It was further stated that in the last week of April, 2005, the defendant was in need of ₹10 lacs and he approached the plaintiff for advancement of the same as loan on interest. In these compelling circumstances, plaintiff had got written from the defendant that he was received ₹13 lacs as earnest money instead of ₹10 lacs by adding interest. As regards, writing referred in the corresponding paras of the suit, it was stated that no such amount was received through alleged extensions. No other advance money was ever received by the defendant except ₹10 lacs as stated above. The question of readiness and willingness did not arise. The defendant submitted the neither affidavits dated 11.10.2006 and

12.10.2006, nor any legal notice purported to have been sent.

Both the parties were since at variance and the trial Court framed as many as 8 issues including the issue of relief.

The trial Court decreed the suit exercising the discretion under Section 20 of the Specific Relief Act and appeal filed on behalf of the appellant also met with the same fate. In these circumstances, the present regular second appeal has been filed.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr.Kartik Gupta, Advocate appearing on behalf of the appellant-defendant submits, that alleged agreement to sell was executed as a collateral security, the repeated alleged extensions, and non-filing of the suit as per the stipulated date shows that plaintiff neither intended to purchase the suit land nor was ready and willing to do the same. The suit land is agricultural land in joint khata and one cannot get the possession without seeking the partition. The agreement to sell refers to jamabandi for the year 1999-2000 but the respondent-plaintiff has not produced and proved on record the writings to show that land in question was under debt with one Sarwan Singh son of Sohan Singh, Megha Singh son of Mohinder Singh, Megh Singh and Ad-Rahan with Amarjit Kaur in exchange with Jaspreet Kaur and Amarjit Kaur and all these were having incumbrance, therefore, the Courts below have erroneously exercised the discretion under Section 20 of the Specific Relief Act (hereinafter referred to as 'the Act') and rather the discretion under Section 22 of the Act, ought to have been granted. He submits that while referring to the additional evidence, particularly, the date of compromise dated 11.09.2006 co-relates with the extension Ex.P6. The possession of the property was never handed over to the plaintiff, in essence, the plaintiff failed to lead any evidence with regard to expenses incurred for installation of the submersible pump and other equipments. As per Annexure A-8, an application for correction of khasra girdawari was submitted on 06.06.2007, i.e., during the pendency of the suit and the prayer in the application was for correction of khasra girdawari, i.e., ½ share, in essence, there was no specific share. In support of his aforementioned contentions, he relied upon the judgment of the Hon'ble Supreme Court in **Lourdu Mari David vs. Louis Chinnaya Arogiaswamy** **1997(1) RCR (Civil) 286** to contend that the plaintiff had not come to the Court with clean hands, much less, had not been able to prove his possession and, therefore, the said fact was sufficient to dis-entitle him for specific relief. He also relied upon the judgment of this Court in **Gurnam Singh and others vs. S.Jagjit Singh and Rosha** **1976 RLR 100** to contend that if any orders for correction of the entries in khasra girdawari have been made by the authorities, that would irrelevant in the civil proceedings, in essence, would not be a final verdict about the possession as the said entry was effected at the back of the appellant-defendant. He also relied upon the judgment of this Court in **Samma Singh vs. Kapur Singh and others** **1997(2) RCR (Civil) 103,** to contend, that where during the pendency of the suit, khasra girdawari is corrected. It is the civil courts which shall determine the issue independently on the basis of the evidence adduced by the parties in connection with truthfulness or falsity of khasra girdawari entries. He further relied upon the judgment of this Court in **Suhag Wanti vs. Commissioner, Patiala Division, Patiala and others** **2013(1) CivCC 100 (DB)** to contend, that correction of khasra girdawari if made during pendency of civil suit for title and possession, the said entry is not binding upon the civil Court and any change of possession has to be proved by independent material which may be placed before the Court. He also relied upon the judgment of the Hon'ble Supreme Court in **A.C.Arulappan vs. Smt. Ahalya Naik** **2001(4) RCR (Civil) 109** to contend that perpetual extensions of time in 11th September, 2006, ex facie proved that it was loan transaction, thus, as there was no intention to sell the land in question. Thus, question of part performance of the agreement to sell does not arise for determination of the present appeal. He submits that following substantial questions of law arise for determination of the present appeal:-

> *"i) Whether the respondent/plaintiff who was lender impliedly allowed to pass the stipulated date as per his own case voluntarily several times can ask for specific performance of the agreement?*
>
> *ii) Whether the respondent/plaintiff can seek specific performance without setting at naught the encumbrance of bank loans and other debts and further without impleading aggrieved persons as per jamabandi annexed*

with the plaint?

iii) Whether the present case of agreement can succeed without pleading and proving on record jamabandi 1999/2000 basis of alleged agreement as required under Section 114 of the Evidence Act it amounts to withholding which amounts to playing fraud as held in Kundan Lal?

iv) Whether entry made in the khasra girdawari during the pendency of the suit would prove the possession of the respondent-plaintiff in the absence of any evidence led in the suit before the trial Court?

He further submits that as per Ex.D1 khasra girdawari for the year 2005, from the date of the execution of the agreement till the application submitted on 23.06.2007, Annexure A-8, it is the appellant-defendant, who, had been shown in the possession and therefore, suit for specific performance in the absence of any possession was not maintainable, thus, prays for setting aside of the aforementioned judgements and decrees of the Courts below.

Mr.J.S.Puri, learned counsel appearing on behalf of the respondent-plaintiff submits that agreement to sell has been proved through the testimony of attesting witnesses, namely, Harbans Singh as PW1, Sukhpal Singh as PW-2 and Bhagwant Singh Lamberdar as PW3, attesting witness of the writings dated 07.10.2005 and 05.05.2006. PW-4 Phoola Singh, who, corroborated the version of the plaintiff and deposed that on 11.09.2006, defendant received a sum of ₹3,10,000/-. He identified the signatures on the said writing and proved the same, much less, statement of Harnek Singh-plaintiff. The relief of possession is inherent in the absence of any specific prayer, possession of the property was handed over to the respondent-plaintiff at the time of execution of the agreement to sell. It was only the correction in the revenue record which was required to be made in khasra girdawari, vide order dated 02.10.2008, Ex.P13, affirmed by the Commissioner Patiala, vide order dated 26th August, 2008 (Ex.P14). All the writing extensions, ex facie, proved that appellant-defendant had been received more money with intention to execute the sale deed and thereafter, coined the story of alleged loan is not acceptable, having not proved. The pendency of suit titled as Salinder Singh vs. Kesar Singh and its decision thereof, has no connection or relation with the controversy in hand. In support of his aforementioned contentions, he relied upon para No.16 of the judgment of the Hon'ble Supreme Court in **Babu Lal vs. M/s Hazari Lal Kishori Lal and others 1982 AIR (SC) 818.** He further submits that concurrent findings of facts cannot be interfered under the provisions of Section 100 of Code of Civil Procedure until and unless there is gross illegality and perversity in the impugned judgments and decrees which entail into determination of substantial questions of law and prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below, much less, case law cited at bar by learned counsel for the parties and am of the view that appeal deserves to be allowed for the following reasons:-

The writings dated 05.05.2006 and 11.09.2006 show that respondent-plaintiff was aware of the pendency of the suit referred above titled as Salinder Singh vs. Kesar Singh, much less, of the interim stay. The writing dated 11.09.2006, Ex.P6, vide which Salinder Singh-plaintiff had been paid the money and that part of the money had been received from the respondent-plaintiff to discharge the obligation towards the loan liability of Salinder Singh. No sane person would keep on extending the execution of the agreement to sell on four occasions. These facts have totally been ignored by the Courts below and thus, have been swayed away in exercising the discretion of powers under Section 20 of the Specific Relief Act. The documents placed on record by way of additional evidence, *ex facie,* clearly shows that it was a loan transaction as compromise date of other suit is 11.09.2006. In my view, suit, *ex facie*, was not maintainable as the respondent-plaintiff has failed to prove the possession through any oral and documentary evidence. The simpliciter suit for specific performance, in the absence of possession, was not maintainable which fact is proved from the extension dated 05.05.2006 (Ex.P4) from where it is manifest that respondent-plaintiff has installed a submersible pump and also dug water channel. However, no evidence has been led in this regard, in essence, no proof of purchase of submersible pump or expenses incurred on it has been placed on record. In essence, it is irresistibly concluded that respondent-plaintiff was not put in possession at the time of execution of the agreement to sell dated 28.04.2005 and this fact has been proved from perusal of Annexure A-8 and an application submitted by the respondent-plaintiff on 26.03.2007. It would be apt to reproduce the relief clause of the suit, as well as, head note of the application which read thus:-

> *"It is therefore, prayed that a decree for specific performance of the agreement to sell dated 28.4.2005 and writings dated 27.7.2005, 07.10.2005, 05.05.2006, 11.09.2006 and 23.09.2006 by way of execution and registration of sale deed regarding the land measuring 20 bighas 5 biswas 10 biswasies i.e.1/2 share out of land measuring 40 bighas 11 biswas owned by defendant bearing khata no.1/1 khasra nos.394/11-15, 395/10-17, 396/6-10, 397/6-5, 400/5-4 situated at village Jalalgarh Sub-Tehsil Amargarh Tehsil Malerkotla according to jamabandi for the year 1999-2000 along with total electric motor 10 H.P.total bore, kotha, pipe, pakha, trees, taur, chubacha, connection, security and all other rights attached to the land for total sale consideration of Rs.24,93,825/- and on payment of Rs.4,33,825/- after excluding Rs.20,60,000/- as earnest money already paid to the defendant vide agreement to sell dated 28.4.2005 and writings dated 27.07.2005, 07.10.2005, 05.05.2006, 11.09.2006 and 23.09.2006 and at the sale and*

registration expenses to be borne by the plaintiff.

IN THE ALTERNATIVE

Suit for recovery of Rs.25,00,000/- detailed as under:- Rs.20,60,000/- as earnest money; Rs.4,40,000/- as damages; Together with interest as damages at the rate of 2% P.M from the date of filing of the suit till realization of the decreetal amount; AND suit for permanent prohibitory injunction restraining the defendant from alienating by way of sale, mortgage, gift, exchange or in any other manner the suit property fully described in the heading A of the plaint to any other person except to the plaintiff and defendant be further restrained from causing any interference in peaceful possession of the plaintiff over the suit land or any other relief may kindly be passed with the costs of the suit in favour of plaintiff and against the defendant. Any other additional, alternative, ancillary or consequential relief to which this Hon'ble Court thinks fit on the facts and circumstances of the case be also awarded in favour of the plaintiff and against the defendant."

Application dated 26.03.2007 Annexure A-8

"Application for correction of khasra girdawari of theland measuring 20 bighas 5 biswas 10 biwasi i.e. ½ share of 40 bighas 11 biswas, comprising khewat No.1, khatoni No.1, khasra Nos.394/11-15, 395/10-17, 396/6-10, 397/6-

5, 400/5-4 as per jamabandi for the year 2002 situated in village Jalalgarh, Sub-Tehsil Amargarh, Tehsil Malerkota, District Sangrur of hari-crop 2005-2006."

The ratio decidendi culled out in Lourdu Mari David's case (supra) prescribes that where the respondent-plaintiff has not been able to prove his possession and rather alleged possession and the same is found contrary/converse and the discretion relief should not be granted. The application, Annexure A-8, was allowed on 02.10.2008 (Ex.P3), and affirmed by the Commissioner Patiala on 26.08.2008, in essence, it was only paper transaction. No evidence has been led to show the actual/conscious possession. Had there been any truth in handing over the possession, nothing prevented the plaintiff to produce the witnesses in support of the same, much less, expenses incurred vis-a-vis installation of submersible pump by producing the bills and receipts etc. Thus, I am duly supported by the case law referred to above that khasra girdawari made during the pendency of the suit, would be highly irrelevant as the Courts are required to assess the evidence vis-a-vis possession independently. Ex.D1 shows the khasra girdawari for the period 2005 and the possession of Kesar Singh for the period 28.09.2006, 08.03.2006, 13.10.2006, 13.07.2007 leave no manner of doubt that respondent-plaintiff was not put into possession at the time of execution of the agreement to sell. Thus, in the absence of any relief of possession, suit was not maintainable, in essence, ratio decidendi culled out by the Hon'ble Supreme Court in Babu Lal's case (supra) that relief of possession is inherent in a suit for relief of specific performance is not applicable to the facts and circumstances of the present case, in view of aforementioned findings. It would be fatal to the decree while exercising the discretion in the absence of the relief of possession. Even otherwise, the possession could not be handed over as it was ½ share and having joint khata, until and unless there was a partition, the respondent-plaintiff could not have been put into possession of specific area. There was no mention of having delivered portion of specific area. The statement of Kesar Singh in a suit titled as Salinder Singh vs. Kesar Singh that he had paid the entire money to Salinder Singh is also of 11th September, 2006 and the same reads thus:-

> *"Statement of Kesar Singh aged 65 years son of Lal Singh, Agriculturist, resident of Jalalgarh, defendant, on S.A.*
>
> *Stated that I have paid the entire amount to the plaintiff as prayed for in the suit. The plaintiff has received the amount. The file be consigned to the record room. My property in dispute which was attached vide order dated 8.4.2003, the same be ordered to be released.*
>
> *RO&AC   Sd/- ACJ(SD)*
> *Sd/-Kesar Singh   Malerkotla*
> *11.09.2006"*

All these factors show that transaction was not to sell and purchase the land but was a loan transaction. The Courts below ought not to have exercised the discretion under Section 20 of the Act.

The respondent-plaintiff has not proved the payment of the amounts as reflected in the extensions except ₹10 lacs that appellant-defendant is entitled to discretionary relief, i.e., refund of ₹10 lacs along with interest @ 9% per annum which accrued till the date of realization.

Keeping in view the aforementioned observations, the substantial questions of law, noticed above, are answered in favour of the appellant-defendant and against the respondent-plaintiff. The judgments and decrees are set aside, in essence, the suit is dismissed.

Accordingly, the appeal is allowed.

(AMIT RAWAL)
JUDGE

February 15, 2016
savita