

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

RSA No.44 of 2012 (O&M)
Date of decision : 09.02.2016

Mahabir

...Appellant

Versus

Jaipal Singh and ors.

...Respondents

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. K.P.S. Virk, Advocate for
Mr. K.S. Dhaliwal, Advocate for the appellant.

Mr. Ajay Kansal, Advocate for the respondent No.1.

AMIT RAWAL, J. (Oral)

The appellant-defendant is aggrieved of the judgment and decree of the trial Court whereby the suit for specific performance has been partly decreed. In appeal, cross-objection of the plaintiff, has been allowed, in essence, the suit for specific performance has been decreed in toto and appeal filed by the defendant No.2, has been dismissed. It is in these circumstances, the present Regular Second Appeal has been filed.

Mr. K.P.S. Virk, learned counsel appearing on behalf of appellant submits, that Bharta the alleged owner of the land measuring 5

marla had entered into exchange agreement on 02.01.2002. The agreement has been proved through the testimony of DW1 Subey Singh. The said agreement resulted into execution and the registration of sale deed dated 15.04.2002. By noticing the aforementioned fact, the trial Court declined the discretionary relief and ordered for refund of earnest money of ₹1 lacs to be recovered from defendant No.2 whereas it is Bharta, who had exchanged the land, had allegedly received the earnest money. The lower Appellate Court without referring to the statement of DW1 Subey Singh relied upon the registered exchange deed dated 15.04.2002 and granted the discretionary relief by holding that exchange deed has been registered subsequent to the agreement. The finding of the lower Appellate Court without discussing the testimony of DW1 raises following substantial question of law for determination by this Court:-

1. Whether the lower Appellate Court has misread and mis-appreciated the oral evidence on record?
2. Whether there is illegality and perversity in the finding rendered by the lower Appellate Court?

Mr. Ajay Kansal, learned counsel appearing on behalf of respondent No.1 submits that there is no illegality and perversity in the findings rendered by the lower Appellate Court granted discretionary relief under Section 20 of the Specific Relief Act and thus appeal has rightly been dismissed. Exchange agreement has been entered on 02.01.2002 which is during the currency of the agreement dated 11.04.2002, thus, prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the

paper book and am of the view that appeal deserves to be allowed for the following reasons.

The lower Appellate Court being last Court of facts and law has not re-appreciated the testimony of DW1 Subey Singh who has unequivocally proved the execution of the exchange agreement dated 02.01.2002. Despite lengthy cross-examination, no dent has been caused in the testimony, rather has embarked upon the path that exchange deed was registered on 15.04.2002 and, therefore, readiness and willingness on the part of the plaintiff was conspicuously absent. However, such finding in my view are not sustainable as there is a complete mis-appreciation of the statement of DW1. This fact has been noticed by the trial Court. The operative part of the findings rendered by the trial Court vis-a-vis statement of Subey Singh, reads thus:-

“The defendant has successfully proved the Ex.D1, which is agreement of exchange, which was executed on 2.1.2002 and thereafter, his entry was also entered in the Ex.D1. The defendant also examined Sube Singh as well as Ramphal, it is two attesting witnesses and defendant Mahabir himself, so it is not disputed that Ex.D1 was executed before the agreement to sell Ex.P1 and exchange was also entered on 15.04.2002 and of exchange was took place on 02.01.2002. In those circumstances, Bhartha was not remained owner in of the plot khasra No.353 land measuring 5 marlas as lie had exchanged this plot with Mahabir i.e. plot khasra No.366 land measuring 5 marlas and exchange was very much in the knowledge of the plaintiff. In such circumstances, plaintiff is not entitled for the relief of specific performance as Bhartha was not the owner of the suit property at the time of executing, the

agreement to sell Ex.P1.”

There is another aspect of the matter. Even exchange deed has also admitted by the plaintiff and the lower Appellate Court ought not to have exercised the discretion.

Keeping in view the aforementioned facts, impugned judgment and decree vis-a-vis allowing of the cross-objections is set aside. However, that of the trial Court is modified. It is held that defendant No.1 is directed to refund earnest money of ₹1 lacs to the respondent-plaintiff along with interest @ 9% p.a. from the date of realization.

Accordingly, question of law as noticed above are answered in favour of appellant-defendant and against the respondent-plaintiff.

Appeal stands allowed.

09.02.2016

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**(AMIT RAWAL)
JUDGE**