

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

**RSA No.1171 of 2013 (O&M)
Decided on: 27.05.2016**

Jaswant Singh

....Appellant

Versus

Charanjit Kaur and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. J.S. Brar, Advocate
for the appellant.

Respondents No.1 to 7 already *ex parte*.

1. *Whether Reporters of local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters 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 06.11.2012 passed by the District Judge, Patiala only to the extent, claim of the appellant for specific performance of the agreement has been dismissed by allowing alternative relief of recovery of earnest money along with interest.

The appellant/plaintiff filed a suit for possession by way of specific performance of agreement to sell dated 28.04.2006 in respect of land measuring 09 kanals 08 marlas, detailed in headnote of the plaint. It is pleaded that Rachpal Singh (since deceased) agreed to sell the suit land for a total sale consideration of Rs.10,00,000/- and

received Rs.6,00,000/- as earnest money in the presence of witnesses. The sale deed was agreed to be executed on 15.11.2006 and possession of the suit land was agreed to be delivered at the time of execution of the sale deed. In the meantime, there was some dispute of daughter of the defendant and the defendant was in need of money. He mortgaged 07 kanals of land being 140/2698 share out of land of his ownership vide mortgage deed dated 12.05.2006 in favour of Jaswant Singh and his brother, Balwinder Singh. The possession of mortgaged land was given by the defendant to the plaintiff out of Khasra Nos.24//1 and 24//5. The defendant again received a sum of Rs.50,000/- as additional earnest money and a writing in this regard was made on the back of the agreement to sell. The plaintiff always remained ready and willing to perform his part of the agreement. On 15.11.2006, he remained present in the office of Sub-Registrar, Samana for execution of the sale deed but the respondent/defendant did not come present to perform his part of the contract. The plaintiff got his presence marked before the office of Sub-Registrar, Samana by getting an affidavit attested from the Executive Magistrate, Samana.

The defendant filed the written statement, denied execution of the agreement to sell, receipt of earnest money or his liability to execute the sale deed on receipt of balance sale consideration. He has denied his thumb-impressions on the alleged agreement to sell but raised the plea that it is just possible that at the time of execution of the mortgage deed dated 12.05.2006, the plaintiff with a *mala fide* intention obtained his thumb-impressions on certain papers which would have

been used for the alleged agreement to sell in question. All other material averments of the plaint have been denied with a prayer for dismissal of the suit.

The learned trial Court decided the question of execution of agreement of sale, receipt of additional earnest money of Rs.50,000/- vide writing dated 08.07.2006, readiness and willingness of the plaintiff to perform his part of the contract in favour of the plaintiff and negatived plea of the defendant that the agreement to sell is a forged and fabricated document and without consideration while deciding Issues No.1, 2, 4 and 9 jointly but rejected his claim for specific performance of the agreement primarily on the ground that the respondent/defendant is not proved to be owner of the suit land as per revenue records in the form of *Jamabandis* marked as exhibits. As a consequence, the learned trial Court allowed the alternative relief for recovery of Rs.6,50,000/- along with interest @ 12% per annum from the date of payment till the date of decree and @ 9% per annum from the date of decree till realization of principal amount.

Feeling dissatisfied with the judgment and decree passed by the trial Court, so far as non-suiting claim of the appellant for specific performance of the agreement, the matter was carried in appeal by Jaswant Singh – appellant/plaintiff. Another appeal was preferred by Rachpal Singh – respondent/defendant represented by his legal heirs to assail their liability to pay the decretal amount. Both the appeals were disposed of by the Appellate Court vide judgment and decree dated 06.11.2012. The appeal preferred by Jaswant Singh – appellant was

dismissed with modification in view of Para 38 of the judgment whereas the appeal preferred by Rachpal Singh was ordered to be dismissed with costs throughout.

Still feeling dissatisfied, the present appeal has been preferred by Jaswant Singh – appellant/plaintiff.

Counsel for the appellant has submitted that the First Appellate Court reversed the findings of the trial Court that the defendant was not owner of the suit land, therefore, specific performance of the agreement is not possible. The Court affirmed the findings of the trial Court with regard to the agreement to sell, payment of additional sum of Rs.50,000/- towards earnest money vide writing dated 08.07.2006 and readiness and willingness of the appellant to perform his part of the agreement in view of its findings recorded upto Para 21 of the judgment. However, in view of discussion in Para 23 onwards, claim of the appellant for specific performance of the contract has been disallowed. It is vehemently argued that the Court of appeal has recorded contradictory finding by holding that the agreement in question was executed in lieu of money borrowed by the respondent/defendant. According to counsel, the Court is not competent to introduce a new story/hypothesis for either of the parties. In absence of any plea by the respondent that the agreement in question was executed by him as a security for a loan taken by him, there was no reason for the Appellate Court to arrive at such a finding more particularly in the circumstances that the Court in the earlier part of the judgment has affirmed findings of the trial Court with regard to the

respondent having entered into agreement to sell and received Rs.6,00,000/- towards earnest money and another amount of Rs.50,000/- vide writing dated 08.07.2006 and the appellant being ready and willing to perform his part of the agreement. It is further argued that Rachpal Singh did not appear in the witness-box to controvert case of the appellant or to substantiate his plea that his thumb-impressions were obtained at the time when he executed a mortgage deed in favour of the appellant and his brother on 12.05.2006. Sh. Rachpal Singh died during pendency of the suit and his son Kuldeep Singh appeared in the witness-box and testimony of Kuldeep Singh is no evidence to counter case of the appellant on any score whatever.

The respondents failed to put in appearance despite service, therefore, there is no contest to the present appeal.

I have heard counsel for the appellant, perused the paperbook and records of the Courts below.

The substantial questions of law that arise for adjudication are :-

- 1. Whether the Appellate Court was justified to deny the relief of specific performance albeit that the Court accepted execution of agreement of sale Ex.P-1, writing Ex.P-3 and the appellant being ready and willing to perform his part of the contract?***
- 2. Whether the Appellate Court could introduce a new story with regard to agreement in question***

having been executed by the respondent/defendant by way of security, in absence of any such plea taken in the written statement or otherwise?

Before adverting to the submissions made by counsel for the appellant, it is pertinent to recapitulate the provisions of Section 20 of the Specific Relief Act, 1963 (in short 'the Act').

Sub-Section (2) of Section 20 provides for cases in which the Court may exercise discretion not to decree specific performance. The said Sub-Section being relevant in the present context, reads as follows:-

“20. Discretion as to decreeing specific performance.—

1. XXXX XXXX XXXX XXXX

2. The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the

contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

	XXXX	XXXX	XXXX	XXXX
3.	XXXX	XXXX	XXXX	XXXX
4.	XXXX	XXXX	XXXX	XXXX”

It appears that the Appellate Court has tried to bring the present case under Clause (c) as Para 23 of the judgment, starts with the observations that the principle of equity, good conscious and fairness is the foundation for grant of relief of specific performance and reference to Section 20 of the Act has also been made. The Court has taken a serious view of an earlier agreement between the parties, executed on 09.06.2004 regarding sale of land @ Rs.4,00,000/- per acre and payment of Rs.2,50,000/- as earnest money, scribed by Surinder Kumar Mittal, Deed Writer, who scribed the agreement in question. The Court has also commented upon conduct of Sh. Surinder Kumar Mittal examined as a witness by the appellant/plaintiff. Further the Court has also taken adverse view that in the agreement Ex.P-1 there is a recital with regard to delivery of possession but the appellant/plaintiff has taken the plea that possession was agreed to be delivered at the time of execution and registration of the sale deed. After taking note of certain facts discussed in Paras 25 to 31, the Court held in Para 37, a relevant extract wherefrom reads as follows:-

“On the independent appraisal of the evidence on the record, this Court is of the considered opinion that above mentioned circumstances will certainly cause a

hardship to the defendant and it will not be equitable to grant the relief of specific performance. As such, the plaintiff is not entitled to the relief of specific performance. It has come into evidence that the defendant has received Rs.6 lacs vide Ex.P1, Rs.1 lac vide Ex.P2 and Rs.50,000/- vide Ex.P3. Thus he has received total Rs.7,50,000/-.”

So far as the agreement dated 09.06.2004 earlier executed between the parties, the appellant/plaintiff in his cross-examination has admitted the said agreement. He has deposed that he has purchased about 30-32 kanals of land from Rachpal Singh on 3-4 occasions in between the period 1994-95 to 2004-05. Every time he used to purchase land from Rachpal Singh, there was an agreement to sell in relation to that. Earlier to the transaction in dispute, he purchased 16 kanals of land from Rachpal Singh. He did not remember the date, month and year of execution of sale deed for 16 kanals of land. He denied the suggestion that he did not purchase any land from Rachpal Singh in 2004-05.

Kuldeep Singh son of Rachpal Singh was the only witness examined on behalf of the respondent/defendant. His testimony is conspicuously silent that the appellant/plaintiff either never purchased any land from his father or he did not purchase land measuring 30-32 kanals on 3-4 occasions in between the period 1994-95 to 2004-05. In absence of any rebuttal or counter to the facts elicited during cross-examination of Jaswant Singh PW1 with regard to earlier purchase of 30-32 kanals on 3-4 occasions, the factum of an earlier agreement between the parties executed on 09.06.2004, in the circumstances

cannot be commented adversely to make out a new case for the respondent/defendant that the present agreement relates to a money transaction and was got executed by way of security. I would hasten to add that if the respondent really intended to take a loan from the appellant and create a security for repayment thereof, there was no reason for him not to execute another mortgage deed in favour of the appellant as was done on 12.05.2006 for securing a loan amount of Rs.1,00,000/-. Under these circumstances, the Appellate Court has committed a serious error by placing reliance upon agreement dated 09.06.2004 to conclude that the agreement in question was executed as a security for repayment of loan.

The agreement contains recital with regard to delivery of possession of land agreed to be sold. Admittedly, possession of the said land was not actually delivered to the appellant/plaintiff. In many cases, it is a practice that in the agreement itself, the factum of delivery of possession is mentioned though the possession continues to be with the proposed vendor. The mere fact that recital in the agreement with regard to delivery of possession is contrary to the plea raised by the appellant/plaintiff is not at all sufficient to record a finding that either specific performance of the agreement would result in hardship or is inequitable. Analyzed from any angle, the reasoning adopted by the First Appellate Court to deny relief of specific performance, in the circumstances, is not well founded, thus, cannot stand the test of judicial scrutiny. Even otherwise, in absence of any plea by the predecessor-in-interest of the respondents that he obtained any loan or

in lieu thereof, either his signatures were obtained on blank papers or agreement to sell was executed as a security for loan taken by him, there was no occasion for the Appellate Court to make out an entirely different case in favour of the respondent (represented by his LRs) to deny the relief of specific performance more particularly in the circumstance that few days after the agreement, there was a transaction of loan between the parties and land was mortgaged by the respondent in favour of the appellant as a security for repayment of loan. In view of the above, the aforesaid questions are answered in favour of the appellant. As a result, the judgments passed by the Courts below denying the relief of specific performance of the agreement cannot be allowed to sustain and liable to be set-aside.

For the foregoing reasons, the appeal is allowed, the judgments and decrees are modified, the appellant is allowed the relief of specific performance of agreement to sell dated 28.04.2006 Ex.P1 and the findings recorded by the Courts below allowing alternative relief of recovery along with interest are set-aside. The respondent represented by his legal representatives is directed to execute the sale deed within a period of two months on payment of balance sale consideration failing which the appellant would be entitled to take recourse to process of the Court for execution and registration of the sale deed.

27.05.2016
yakub

(REKHA MITTAL)
JUDGE