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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-1334-2013 [O&M]

Date of Decision : March 2nd, 2016

Gurbachan Singh

.... Appellant

Versus

Naurati Kaur and others

.. Respondents

CORAM : HON'BLE MR. JUSTICE SHEKHER DHAWAN.

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporters or not? | |
| 3. Whether the judgment should be reported in the Digest? | Yes |

Present Mr. H.P.S.Ghuman, Advocate,
for the appellant.

Mr. S.S.Salar, Advocate,
for the respondents.

SHEKHER DHAWAN, J.

Present Regular Second Appeal is directed against the judgment and decree dated 13.12.2011 passed by Additional District Judge, Patiala whereby appeal filed by the plaintiff was accepted and the judgment and decree passed by the Court of first Instance dated 17.12.2009 whereby suit filed by the plaintiff was dismissed, was set-aside.

2. For the sake of convenience, parties are being referred to as per their status before the Court of first Instance.

3. Relevant facts of the case for the purpose of decision of this appeal; that the plaintiff filed a suit for specific performance of the

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agreement of sale dated 22.5.2002 [Ex. P1] in respect of the suit land and in the alternative, for the recovery of Rs. 1,25,000/- [Rs.20,000/- as mortgage money, Rs. 95,000/- as earnest money and Rs.10,000/- as damages] along with interest at the rate of 24% per annum. The parties to the litigation entered into an agreement of sale [Ex. P1] and payment of Rs.95,000/- was made as earnest money in the presence of attesting witnesses. The total sale consideration was settled at Rs.1,25,000/-. Rs.20,000/- was to be adjusted which was mortgage money and having been received by the defendant on the basis of registered mortgage deed dated 17.9.1997 [Ex.P6] and the balance payment of Rs.10,000/- was to be made at the time of registration of the sale deed. The target date for execution of the sale deed was fixed as 20.5.2004. On the date fixed for execution of sale deed, Jasbir Singh, the General Power of Attorney of the plaintiff, remained present in the office of Sub Registrar, Bhadson along with the balance sale consideration, but the defendant did not come present. Said Power of Attorney of the plaintiff got his affidavit [Ex.P5] attested. The possession was already with the plaintiff. As the defendant failed to perform his part of agreement and started resiling from the agreement, [Ex. P1], present suit for specific performance of agreement of sale was filed.

4. Defendant contested the suit, *inter alia*, taking the plea that he had neither executed any agreement of sale of the suit land with the plaintiff nor had he received earnest money of Rs.95,000/- on the basis of agreement, [Ex. P1]. However, the defendant admitted that the suit land was earlier mortgaged with the plaintiff for a sum of Rs.20,000/- but possession of the suit land was not delivered to the plaintiff and the same

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is with the defendant. As the defendant never executed any agreement in favour of the plaintiff, there was no question of readiness and willingness on the part of the defendant and prayed that the suit be dismissed.

5. On the pleadings of the parties, issues were framed. Parties led their respective evidence and after appreciating the entire oral as well as documentary evidence brought on record by the parties, the Court of first instance returned the findings that the plaintiff version has not been proved on the file, rather, the version of the defendant that agreement was result of fraud and mis-representation by the plaintiff was proved. The Court of first instance dismissed the suit mainly on the grounds that the plaintiff herself did not step into the witness box as her own witness and in the absence of that, the suit of the plaintiff is liable to be dismissed. More so, the case of the defendant stood proved as per statement of PW-4, Gurbachan Singh himself as he was making statement contrary to the record. As per PW-4, he was present at the time of execution of agreement of sale and execution of mortgage deed as well, but this fact was not recorded in the agreement as well as in the mortgage deed. The court of 1st instance mainly relied upon the statement of PW-4. It was admitted by the witness that Jasbir Singh and the witness took the defendant to Teshil office for extending the time of mortgage and his signatures were obtained on agreement [Ex.P1], which is the case of the defendant from the very beginning on the basis of written statement. With these findings, the Court of first instance dismissed the suit.

6. However, the Court of first Appeal reversed the said findings that the presence of plaintiff was not required to prove the case if the same can be proved by examination of other witnesses. As regards to plea of fraud,

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the Court of first Appeal returned the finding that the defendant has not been able to prove the plea of fraud, the onus of which was upon the defendant, but the Court below ignored the entire material evidence available on the file on the basis of which agreement [Ex. P1] was duly proved and while accepting the appeal directed the defendant to get the sale deed executed in favour of the plaintiff [through his L.Rs.] as per terms of the agreement and the present Regular Second Appeal is challenge to that.

7. Learned counsel for the appellant mainly submitted that the Court of first instance had rightly dismissed the suit of the plaintiff on the ground that the plaintiff has not been able to prove his case as he himself failed to step into the witness box despite being hale and hearty and the defendant came with the plea of fraud having been played upon him by the plaintiff as he was taken to the Sub Registrar office with a plea that the tenure of mortgage deed was to be extended, but fraudulently, the agreement, Ex. P1 was got executed and the said findings were returned on the basis of statement of most material witnesses having been examined by the plaintiff, who is PW-4, before the Court of first instance and the the Court of first Appeal reversed the said findings without any reasoning. In support of his arguments, learned counsel for the appellant placed reliance on the judgment of Hon`ble Supreme Court in **Man Kaur [Dead] By Lrs Vs. Hartar Singh Sangha, 2010 (10) JT 565[SC]**.

8. While arguing the point, learned counsel for the respondent submitted that in the present case, examination of the plaintiff himself was not material as the case of the plaintiff was proved on the basis of statement of attesting witness and scribe of the document. In support of

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his argument, reliance has been placed on the judgment of Hon`ble Supreme Court in **Rattan Dev Vs. Pasam Devi 2002(4) RCR [Civil] 510.**

9. Learned counsel for the respondent also submitted that the mortgage was for unlimited period and thus, there was no question of extending the tenure of mortgage and the plea of the defendant is not tenable that on the ground of extension of time of mortgage, the defendant was taken to the office of Sub Registrar and he was a victim of fraud. More so, the defendant admits the signatures on the agreement. The sale deed has already been executed and the present appeal deserves dismissal.

10. Having considered the submissions made by learned counsel for the parties and after going through the records, this Court is of the considered view that most of the facts are not disputed that defendant – Gurbachan Singh was the owner of the suit property. Registered Mortgage Deed [Ex.P6] was executed on 17.9.1997. That mortgage deed was for unlimited period and possession was given to the plaintiff. The next and most crucial point is whether agreement Ex. P1 was duly executed and proved before the Court. Defendant having admitted his signature on Ex. P1, onus lawfully shifted upon defendant to prove that he was a victim of fraud and misrepresentation. Though, such a plea was taken in the written statement, but the same has not been proved on the file. The Court of first instance merely referred to certain part of statement of Gurbachan Singh [PW-4] and returned the finding that defendant was a victim of fraud. At the same time, the Court of first instance completely ignored the fact that the plaintiff had examined PW-1, Bhupinder Singh as attesting witness, who proved the case of the plaintiff. His version was duly supported by testimony of PW-2 Balbir Singh, Deed Writer and PW-5, Manjit Kaur,

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Registration Clerk to prove Ex. P4 and P5. This fact assumes more significance because if the defendant was in fact, a victim of fraud, the matter should have been reported to the Police, but the same was not done at all. The Court of first appeal rightly observed that the allegation of fraud are required to be proved as charge in criminal case. More so, as the mortgage deed was for unlimited period, there was no question of going to the office of Sub Registrar with the plea that term of mortgage deed was to be extended. The defendant of his own has not been able to prove the plea of fraud, through alleged fraud. It is settled law that it is very easy to allege fraud but the Court requires that fraud must be proved strictly, which has not been done if the entire evidence of defendant is taken into consideration. More so, the defendant himself admitted that he has not filed any suit for redemption of the mortgage. The defendant himself has admitted that the plaintiff is in possession of the suit property and revenue record is being maintained accordingly. The Court of first instance ignored the testimony of PW-1 and PW-3 without any reason.

11. As regards to non-examination of the plaintiff, no doubt the plaintiff is required to step into the witness box so as to provide an opportunity to the other party to cross-examine and examination of the plaintiff is most vital part, but at the same time, this fact is to be kept in view that if by leading positive evidence by the plaintiff, he has been able to discharge his onus lawfully placed upon him, and, subject to the Court forming that opinion, a mere abstention of plaintiff himself from the witness box may pale into insignificance. Such a view as taken by Hon`ble Apex Court in **Rattan Dev's case [supra]**. The Hon`ble Supreme Court had also taken the similar view in **Man Kaur's case [supra]** that examination

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of plaintiff shall be relevant and essential but if the attorney holder is in a position to make the statement, even non-examination of the plaintiff himself cannot be fatal for version of the plaintiff. As in this case, the witnesses of the plaintiff were knowing all the facts and they have already deposed before the Court as PW-1, PW-3 and PW-4, the plea of fraud is legally not tenable. As mortgage was for unlimited period and possession of the suit land was with the plaintiff on the basis of registered mortgage deed, there was no question of going to the office of Sub Registrar with the plea of extension of time. More so, the sale deed has already been executed. All these facts have already been taken into consideration by the Court of first Appeal. As such, the present appeal filed by the appellants fails and the judgment and decree passed by the Court of first Appeal dated 13.12.2011 is maintained. More so, there is no substantial question of law involved in the present appeal and hence, the same is not maintainable under Section 100 of the Code of Civil Procedure.

12. In view of the above, the present Regular Second Appeal stands dismissed.

(SHEKHER DHAWAN)
JUDGE

March 2nd, 2016
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