

In the High Court of Punjab and Haryana at Chandigarh

**R.S.A. No. 1472 of 2013
Date of Decision: February 08, 2016**

Devki Nanda

... Appellant

Versus

Madan Lal

... Respondent

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

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

Present: Mr. Naresh Prabhakar, Advocate,
for the appellant.

Paramjeet Singh Dhaliwal, J.

This regular second appeal has been preferred by the appellant-plaintiff against the judgment and decree dated 23.11.2012 passed by learned Addl. District Judge, Kapurthala, whereby appeal preferred by the respondent-defendant against the judgment and decree dated 19.12.2009 passed by learned Additional Civil Judge (Senior Division), Sultanpur Lodhi has been allowed and suit filed by the appellant for possession by way of specific performance has been dismissed.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments

of the Courts below and are not required to be reproduced. However, brief facts relevant for disposal of this second appeal are that plaintiff filed a suit for possession by way of specific performance of an agreement to sell dated 26.8.1996 on the ground that the land measuring 7 marlas, detailed in the head note of the plaint, was owned by the defendant. He agreed to sell the same to the plaintiff vide an agreement to sell dated 26.8.1996 for a total sale consideration of Rs.2,50,000/- out of which Rs. 1,00,000/- had been paid as earnest money. Property measuring 30 Marlas was to be partitioned and partition was to be completed with his co-sharers upto 25.8.1999 and within 15 days of finalization of partition, the defendant was to fix the date for execution of the sale deed and also to inform the plaintiff about the same through registered AD. In case, the defendant failed to fix the date after partition or to inform the plaintiff, then the plaintiff was within his right to fix the date for execution of the sale deed. The defendant failed to get the partition of the property upto 25.8.1999, then the date was extended from 25.8.1999 to 24.8.2002 by a subsequent agreement in writing dated 25.08.1999 and further the defendant received Rs.50,000/-. The plaintiff remained ready and willing to perform his part of the contract, but the defendant failed to perform his part of the contract. The plaintiff came to know that the partition of the property had been completed on 25.8.2002. Thereafter, the plaintiff served a notice dated 9.9.2002 through registered letter, requesting the defendant to execute the sale deed on 25.9.2002. Notice was received by the defendant, but he failed to execute the sale deed. On 25.9.2002 the plaintiff remained present in the office of Sub Registrar alongwith balance sale consideration

and other expenses, but the defendant did not turn up. Again another notice dated 30.9.2002 was served with a request to the defendant to execute the sale deed on 16.10.2002. Again he received the same. On 16.10.2002 the plaintiff remained present in the office of Sub Registrar but the defendant did not turn up and he got marked his presence there. Thereafter the plaintiff repeatedly requested the defendant to execute the sale deed, but he did not do so. Hence, suit was filed.

Upon notice, defendant appeared and filed a written statement taking preliminary objections regarding maintainability; locus standi; cause of action, suppression of material facts; estoppel, limitation etc. On merits it is averred that the defendant is owner of the property in dispute, but the description is wrong. The agreement dated 26.8.1996 and additional agreement dated 25.8.1999 are false, fictitious and fabricated documents and got prepared by Satish Kumar Chhura who is marginal witness of the alleged document and is having inimical relations with the defendant. He in connivance with the deed writer and marginal witness prepared this forged and fabricated document. The document has not been scribed by a regular deed writer though several deed writers were available in the court at a walking distance from the city. It is further alleged that even the name of the scribe has not been mentioned in the document. He never purchased any stamp paper. It is further alleged that at the time of the alleged agreement, suit property was joint amongst the defendant, Bir Chand etc and appeal was also pending before the Hon'ble High Court titled as "Bir Chand Vs. Om Parkash" so question of execution of the agreement to sell relating to any share or part of the suit property by the

defendant does not arise at all. The suit property was partitioned only in the year 2002 and writing dated 25.8.2002 was made to this effect. The total plot is 28½ Marlas at the spot (since site plan is not correct as per facts at the spot). It is further alleged that the property in dispute is having commercial value and the share of the defendant was more than Rs.10 lacs even in the year 1996, so question of selling the suit property for a smaller amount does not arise at all.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- “1. Whether the plaintiff is entitled to possession of property in dispute and specific performance of contract dated 26.8.1996? OPP.*
- 2. Whether the suit is not maintainable in its present form?OPD.*
- 3. Whether plaintiff has suppressed true and material facts from Court? If so, its effect?OPD.*
- 4. Whether plaintiff is estopped by his own act, conduct, omissions and commissions to file present suit?OPD*
- 5. Whether the suit is within limitation? OPP.*
- 5-A. Whether agreement in question is result of fraud and forgery as alleged? OPD.*
- 6. Relief.”*

The Court of first instance, after perusal of the evidence led by the parties, decreed the suit vide judgment and decree dated 19.12.2009. Against that, defendant preferred an appeal, which has been allowed by the learned lower appellate Court vide judgment and decree dated 23.11.2012. Hence, this second appeal.

I have heard learned counsel for the appellant.

Learned counsel for the appellant has submitted that the following substantial questions of law formulated in para no.3 of the grounds of appeal, arise for consideration in this second appeal:-

- “a) *Whether on the facts, pleadings and evidence on record the appellant is entitled to the decree for the specific performance?*
- b) *Whether granting decree for specific performance is the rule and its refusal is an exception?*
- c) *Whether the learned First Appellate Court ignored the basis principle of law in not considering or repelling the reasoning of the learned trial Court?*
- d) *Whether the learned First Appellate has ignored the material evidence and has drawn wrong inference from the facts on file by applying the law erroneously?*
- e) *Whether the learned first appellate Court has misconstrued the oral and documentary evidence by applying wrong principle of law?”*

Learned counsel for the appellant contended that the findings recorded by the learned lower appellate Court are against law, without appreciation of facts and not sustainable in the eyes of law. Learned lower appellate Court has misconstrued the oral and documentary evidence by applying wrong principle of law. Therefore, the impugned judgment and decree are liable to be set aside.

I have considered the contentions raised by learned counsel for the appellant and perused the record.

There is categorical finding recorded by the lower appellate Court that as per agreement to sell (Ex.P3), the boundaries of the case property are mentioned, on the eastern side is road, on the western side

property of legal heirs of Walait Ram, on the northern side Street and then the property of Hira Lal Sheikhri and on the southern side, it is street and then property of Mittar Pal. The defendant denied the execution of an agreement to sell, as well as, receiving of any earnest money. Admittedly, the property in question was joint between the defendant and his co-sharers. As per agreement regarding partition (Ex.D5) and site plan (Ex.D6), street shown on the northern side was not in existence before partition, rather this street has been carved out after partition. Similar is the position regarding the street on the southern side. It shows that agreement to sell has been prepared after partition of the property. Learned lower appellate court has further recorded that stamp paper allegedly purchased by the defendant is for Amanatnama, but not for execution of agreement to sell. Furthermore, power of attorney of the plaintiff admitted that settlement regarding purchase of property in dispute has not been effected in his presence. He further stated that the entire agreement was already executed when he reached at the spot. The statement of account of the plaintiff (Ex.P7) shows that on the day of registration of sale deed i.e. 24.08.2002, the balance amount in his account was just Rs.48/-. So, it is proved that he was not having paying capacity of payment of Rs.1,00,000/- or Rs. 50,000/-. Therefore, his non appearance adversely effects the case of the plaintiff. Learned lower appellate court further recorded a finding of fact that perusal of agreement to sell (Ex.P3) shows that irregular spacing as well as irregular size of words in the lines written in the agreement. It seems that the matter of the said agreement has been adjusted later on, on the already thumb marked/signed paper and this

fact gains strength from application for purchase of stamp paper (Ex.PW2/1), according to which this stamp paper has been purchased for some 'Amanatnama'. Power of attorney of the plaintiff also admitted that a lot of deed writers were available on that very day at a walking distance, but they did not get it scribed from the regular deed writer.

Findings of fact have been recorded by the learned lower appellate Court. Learned counsel for the appellant could not show that the said findings are perverse or illegal or based on misreading, non-reading or mis-appreciation of the material evidence on record. Consequently, said findings of fact do not warrant interference in second appeal. No question of law, much-less substantial question of law, as alleged, arises for adjudication in this second appeal.

No other point has been urged.

Dismissed in limine.

February 08, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge