

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

RSA No.4107 of 2013 (O&M)

Date of decision : 27.10.2016

Ashwani Kumar and another

...Appellants

Versus

Pavinder Kumar

...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. Ashish Aggarwal, Sr. Advocate with
Ms. Neeti Gupta, Advocate for the appellants.

Mr. Mahavir Sandhu, Advocate for respondent.

AMIT RAWAL, J. (Oral)

The appellants-defendants are aggrieved of the concurrent findings of fact, whereby suit seeking specific performance of the agreement to sell dated 17.05.2004 in respect of land measuring 16 kanals agreed to have been sold, for a total sale consideration of Rs.7,00,000/- against the payment of earnest money of Rs.5,20,000/-, has been decreed by both the Courts below.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Ms. Neeti Gupta, learned counsel appearing on behalf of appellants-defendants submits that no doubt judgment and decree of both the Courts below particularly that of the lower Appellate Court is not sustainable in the eyes of law, for, findings arrived at by the lower Appellate Court, particularly in

paragraph No.20, by not taking into consideration the other exhibited documents, on the premise, that deposition i.e. Ex.D15 to Ex.D26, and even the statement of PW4 and PW5 cannot be looked into in view of the provision of Section 92 of the Indian Evidence Act. He further submits that finding rendered by the lower Appellate Court that agreement to sell do not require attestation is totally alien to the settled proposition of law. It has done away with the applicability of the provision of Section 68 of the Indian Evidence Act. Stand, in the written statement taken, was that blank papers have been used for converting it into agreement to sell. In this regard, he has referred to many documents such as Ex.D13, Ex.D11, DW3/12, complaint to the police Ex.D15, Panchayat compromise dated 12.11.2004, the statement of even attesting witnesses and other person who feigned ignorance about the execution of the agreement to sell, but stated it to be loan transaction. He submits that lower Appellate Court is enjoined upon obligation to formulate the point of determination and as per the provision of Order 41 Rule 31 of Code of Civil Procedure, much less, require to deal with every oral and documentary evidence. Having failed to do so, it is a fit case where matter is required to be remanded back. He reserves right to raise further arguments to rely upon the documents referred to during the course of hearing, in case this Court is not of the prima facie opinion that the matter is required to be remanded back.

Per Contra, Mr. Mahavir Sandhu, learned counsel appearing on behalf of respondent submits that once there is categoric admission particularly of the signatures, the intention of the defendants is writ large as they had intended to enter into the agreement to sell. Judgment rendered by

the lower Appellate Court is perfect, legal and justified. Subsequent events are in-consequential for the adjudication of the dispute as for the purpose of seeking the discretionary relief, two elementary principles i.e. readiness and willingness, much less, intention to sell the property, or, discharge of the obligation by the respective parties is required to be seen and rightly so, the lower Appellate Court brushed aside arguments by referring to the Ex.D15 to Ex.D26, even the statement of PW4 and PW5 and thus urges this Court for affirming the findings rendered by the lower Appellate Court.

I have heard learned counsel for the parties and appraised the paper book.

In order to appreciate the controversy with regard to the remanding of the matter, it would be apt to reproduce the findings rendered in paragraph No.20 by the lower Appellate Court, which reads thus:-

“20. In the present case, a perusal of the agreement Ex.P1 shows that it was executed by the plaintiff and the defendants and was attested by PW4 Gurnaib Singh as well as PW5 Jarnail Singh. Although the plaintiff has deposed that the said document was executed as per the terms and conditions contained therein and on the date and place mentioned in it, yet, PW4 Gurnaib Singh and PW5 Jarnail Singh, in their respective depositions, have deposed that the plaintiff had got their signatures on the said document at the home of PW4 Gurnaib Singh, when the plaintiff was sitting alone in the said house. Their such oral deposition/s, which are contrary to the contents of the said document, as per the mandate contained in Section 92 of the said Act, are not admissible in evidence as they have not alleged any fraud etc. in execution of the said document. Their deposition that the plaintiff had obtained their signatures

on the said document on the pretext that he had some money defendants does not appear to be correct. To that very affect will be the documents Ex.D15 to Ex.D26 brought on record. Similarly, the contents of the document Ex.P1/A show that it has been executed by the plaintiff and the defendants whereas PW3 Om Parkash and one Sham Lal have attested it. At the same time, PW3 Om Parkash has deposed that he had signed the said document at his home. His such deposition, in view of the bar contained in Section 92 of the Indian Evidence Act, 1872, is also not admissible as he has not alleged any fraud etc. in execution of the said document. His deposition that the plaintiff had obtained his signatures on the said document in good faith does not appear to be correct. Similarly, the agreement Ex.P7/F was executed by the plaintiff and another as well as the defendants. At the same time, the defendant Ashwani Kumar has deposed contrary to the contents of the said document. His such deposition, therefore, is not admissible, although his stand of deceit/fraud shall be dealt with later on. To that very affect will be his deposition in respect of the receipt/writing Ex.P7/G on the back of the document Ex.P7/F. Further, the plaintiff has examined PW Ramesh Kumar Aggarwal. He has deposed that he had scribed the document Ex.P1 on 17.05.2004. He is fair enough to say that the witnesses to the said document had come later on and no receipt in respect of payment of money was prepared. He also is fair to say that the payment of money was not made in his presence. His over all deposition establishes that he scribed the document Ex.P1 on the date mentioned therein. PW2 Mani Jain has opined that the documents Ex.P1, Ex.P1/A, Ex.P7/F and Ex.P7/G contain the signatures of the defendants. The defendants also admit their respective signatures on the said documents. What

they say is that such signatures were obtained under deceit/fraud. Therefore, evidence on record establishes the due execution of the said documents, irrespective of attestation thereof. The argument that the said documents have not been proved as per law and therefore, cannot be read into evidence, hence, cannot be accepted. Rather, rigors contained in Section 68 of the Evidence Act will not be applicable in the present case. Such Section is applicable to a document which is required by law to be attested by at least two witnesses. As stated above, an agreement for sale of immovable property cannot be treated as required by law to be registered or attested by two witnesses. Rather, Sections 61, 67 and 71 of the said Act will apply to the present case.”

On going through the aforementioned findings, lower Appellate Court have been emphatic regarding non-applicability of the provisions of Section 68 of the Indian Evidence Act. It is strange that Judge having rank of Additional District Judge has given aforementioned findings and further gone to say that agreement to sell does not require any attestation of two witnesses. I would not delve the merits and demerits of the controversy, particularly by giving reference to Ex.D15 to Ex.D26, and even the statement of PW4 and PW5, as it would seriously prejudice the right of the parties, for, it would be the domain of the lower Appellate Court being the last Court of facts and law, to appreciate. Right to file an appeal against the judgment and decree of the trial Court, is a statutory one and it should not have dealt in the manner, as has been indicated above.

I am of the view that it is a fit case where matter is required to be remanded back to the lower Appellate Court by setting aside the

judgment and decree of the lower Appellate Court.

Resultantly, judgment and decree of the lower Appellate Court is hereby set aside.

Matter is remitted back to the lower Appellate Court.

Parties as well as through their counsel are directed to appear before the lower Appellate Court on 02.12.2016 and Lower Appellate Court shall decide the case as expeditiously as possible preferably within a period of six months.

I am sanguine of the fact that the lower Appellate Court shall decide the case in view of the observation, much less, principles of Section 96 of the Code of Civil Procedure.

Since, there was interim order regarding the execution of the judgment and decree which is indicated from order dated 03.03.2014, Mr. Mahavir Sandhu, Advocate submits that appellants-defendants should also be restrained from creating third party rights or alienating land.

I am of the view that request of both the counsel is genuine and justified. Accordingly, there shall be stay of further execution proceedings, till the disposal of the appeal

Accordingly, appeal stands disposed of.

Appellant-defendants are restrained from creating third party rights or alienate the land.

27.10.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No