

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

(1)

**Regular Second Appeal No.62 of 2013 (O&M)
Date of Decision: February 10, 2016.**

Sharda

.....APPELLANT.

VERSUS

Hoorra and others

.....RESPONDENT(s).

(2)

Regular Second Appeal No.362 of 2013 (O&M)

Kamalvir

.....APPELLANT.

VERSUS

Hoorra and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Santosh Sharma, Advocate
for the appellant (s).

SURINDER GUPTA, J.

The above-mentioned two appeals have been taken up together for disposal by a common judgment as the matter in dispute in both the appeals is similar.

Brief facts in RSA-62-2013

2. Smt. Sharda-plaintiff filed suit for possession by specific performance of the agreement dated 15.01.1997 with regard to the land

measuring 36 kanals 5 marlas situated in revenue estate of village Pachgaon, Tehsil Tauru, District Mewat(Nuh) on payment of balance sale consideration. As per the plaintiff, Alaf Khan, defendant No.3 in his capacity as general power of attorney of defendants No.1 & 2, entered into an agreement to sell the suit land vide agreement dated 15.01.1997 @ ₹2 lacs per acre and received ₹7,31,250/- as earnest money. The remaining sale consideration was to be paid at the time of execution and registration of the sale deed. No specific date for the execution of the sale deed was fixed and it was agreed that defendant No.3 will execute and get the sale deed registered within one month of the decision of the pending civil suit with respect to the suit land in their favour. It was also agreed that in the event of defendants No.1 to 3 losing that suit, they will refund the earnest money. The plaintiff came to know from reliable sources that defendants No.1 to 3 won the civil suit but had not given any information to her. She had always been ready and willing to perform her part of the agreement and requested defendants No.1 to 3 to execute and get the sale deed registered, which they refused and threatened to alienate the suit land to other person. She filed suit seeking the relief of injunction against the defendants No.1 to 3 who sold the suit land to defendants No.4 to 7 on 28.08.2007, as a result of which suit filed by the plaintiff became infructuous and was withdrawn on 02.12.2006 with permission to file a fresh suit. Plaintiff served a legal notice upon the defendants No.1 to 3 calling upon them to execute the sale deed but they refused to accept the same. She filed the present suit on 19.12.2006 seeking the relief of specific performance of the agreement to sell dated 15.01.1997.

statement, wherein they contested and controverted the averments in the plaint, inter-alia pleading that they never authorised defendant No.3 to execute the agreement dated 15.01.1997 in favour of plaintiff. The agreement, if any, is false and frivolous and defendant No.3 had not paid any amount of earnest money allegedly received by him. They sold the suit property to defendants No.4 to 7 vide sale deed bearing No.1728 dated 28.08.2006.

4. In separate written statement filed by defendant No.3, he admitted execution of the agreement to sell executed by him and receipt of the earnest money, however, he denied the other contentions raised by the plaintiff.

5. Defendants No.4 to 8 in their separate written statement contested the claim of plaintiff, inter-alia, pleading that she has concealed the material facts and termed the agreement dated 15.01.1997, a result of collusion between the plaintiff and defendants No.1 to 3, in order to defeat valuable right arising in their favour from the sale deed dated 28.08.2006. Defendants No.1 and 2 apprised them at the time of sale deed and it is also incorporated therein that there was no such type of agreement in existence between the plaintiff and defendants No.1 and 2. Defendants No.4 to 7 further alienated the suit land in favour of defendant No.8 vide sale deed No.1888 of 11.09.2006. The land was purchased by them for valuable consideration after taking reasonable care to ascertain that defendants No.1 and 2 were owners and had competence to alienate the same.

6. Learned Additional Civil Judge (Senior Division), Nuh upheld the execution of agreement dated 15.01.1997 (wrongly mentioned as

01.12.1998 in issue No.2) and held that the agreement was executed by defendant No.3 in his capacity as general power of attorney of defendants No.1 and 2. It was also observed that plaintiff had always been ready and willing to perform her part of agreement but at the same time, defendants No.4 to 8 were held as bona fide purchasers of the suit land and plaintiff was held entitled to refund of the earnest money with interest.

7. Not satisfied, Smt. Sharda-plaintiff as well as defendants No.1 and 2 against whom the decree for refund of earnest money was passed, preferred separate appeals, which were decided by Additional District Judge, Nuh, vide common judgment dated 30.07.2012.

8. The first Appellate Court dismissed the appeal filed by plaintiff Smt. Sharda and allowed the appeal filed by defendants No.1 and 2. The suit filed by plaintiff Sharda was held as barred by limitation and the agreement dated 15.01.1997 was termed as ante-dated, forged and fictitious document, got executed just to defeat the rights of respondent/defendants No.1 and 2. The suit filed by plaintiff Smt. Sharda was ordered to be dismissed.

9. Not satisfied, Smt. Sharda-plaintiff has preferred this second appeal against the judgment of the Courts below.

Brief facts in RSA-362-2013

10. A civil suit was filed by plaintiff Kamalvir son of Rao Mahabir Singh seeking similar relief of specific performance of the agreement to sell dated 15.01.1997, alleged to have been executed by Alaf Khan as attorney of defendants No.1 and 2. The sale consideration, terms of agreement, plea taken by the plaintiff and defendants were similar as taken in the civil suit filed by Smt. Sharda (discussed above), as such, are not being repeated. The

suit filed by plaintiff Kamalvir was also decreed allowing him alternative relief holding that defendants No.4 to 8 are bona fide purchasers of the suit land.

11. Appeal filed by Kamalvir against judgment and decree passed by the Courts below was dismissed while appeal filed by defendants No.1 and 2 was allowed and the suit filed by plaintiff Kamalvir was ordered to be dismissed.

Common Discussion in both the appeals:-

12. I have heard learned counsel for the appellant(s)-plaintiff(s) and have perused the paper book and record of the Courts below with his assistance.

13. Before proceeding further, it will be relevant to have a look on the pleadings of the parties and evidence on record, which are as follows:-

- (i) Plaintiffs in both the cases propounded separate agreement to sell, both dated 15.01.1997 executed by defendant No.3 Alaf Khan being general power of attorney of defendants No.1 and 2 in favour of plaintiff(s) for sale of 1/2 share of the land measuring 72 kanals 10 marlas situated in village Pachgaon, Tehsil Tauru, District Mewat(Nuh).
- (ii) Both the agreements were for sale consideration @ ₹2 lac per acre and earnest money of ₹7,31,250/- was alleged to have been paid to respondent No.3.
- (iii) The civil suit seeking the relief of specific performance of agreement was filed by Smt. Sharda and Kamalvir on 19.12.2006 i.e. after expiry of period of about nine years from the date of agreement.

- (iv) As per the terms of agreement dated 15.01.1997, no date was fixed for execution of the sale deed. Rather, it was mentioned therein that civil suit regarding the suit land is pending and in the event of vendors winning that suit, they will execute the sale deed within a period of one month from the date of decision of the suit. The vendee(s) reserved the right to get the sale deed executed through Court in case of default of vendors within a period of one month.
- (v) It was also stipulated that in the event of vendors losing the civil suit, the entire earnest money was to be returned to the vendee(s) with interest.

14. Learned counsel for the appellant(s) has fairly conceded that no evidence was produced on file regarding any litigation concerning the suit land, pending at the time of agreement to sell, prior thereto or even instituted afterwards, affecting the right of vendors to sell the suit property. For the first time after the agreement, Smt. Sharda and Kamalvir filed suit for permanent injunction on 28.08.2006 propounding their agreements and seeking to restrain defendants No.1 to 3 from alienating the suit land. The suit was ultimately withdrawn. The sale deed was executed by defendants No.1 and 2 in favour of defendants No.4 to 7 on 25.08.2006 registered on 28.08.2006. Alaf Khan, defendant No.3 was attorney of defendants No.1 and 2 and was competent to execute the agreement to sell suit land in favour of plaintiff(s). He admitted the execution of the agreement and receipt of earnest money. The agreement was duly proved. The first Appellate Court taking into account extraneous circumstances, has discarded the agreement by terming it as ante-dated, false and frivolous. Even the defendants have

not taken the plea that the agreement was ante-dated. The suit was not barred by limitation as no date was fixed in the agreement for getting the sale deed executed and registered. The delay of about nine years in filing the suit has occurred as defendant No.3 had mentioned in the agreement about pendency of some civil litigation pertaining to the suit land and plaintiff(s), who had paid the major part of the sale consideration, did not take any further steps to get the sale deed executed, waiting for the outcome of that litigation. They came to know about the decision of pending litigation in September, 2006 and immediately served a notice and then proceeded to file the civil suit. Learned Additional Civil Judge (Senior Division), Nuh committed grave error of law while recording the finding that defendants No.4 to 8 are bona fide purchasers of the suit land as the sale deed was registered in their favour on 28.08.2006 on which date, plaintiff(s) had filed the civil suits against defendants No.1 to 3 and plea that they are bona fide purchasers, was not available to defendants No.4 to 8 as the alienation was pendente lite.

15. I have given a careful thought to the submissions of learned counsel for the appellant(s) and have perused the lower Court record and judgments of the Courts below with his assistance.

16. The first and most vital fact which weigh against appellant(s) is a term incorporated in the agreement to cover up the delay in filing the suit seeking the relief of specific performance of the agreement to sell dated 15.01.1997 appears to be a created one. It was mentioned in the agreement that the sale deed will be got executed after the pending litigation decided in favour of vendors. In the notice sent in September, 2006, plaintiff(s) have

mentioned that they came to know about the litigation decided in favour of vendors but they have not intimated the vendees within the stipulated period of one month. It, however, remained a mystery as to which litigation regarding the suit land was pending.

17. Learned counsel for the appellant(s) has fairly conceded that no such document has been produced on record to show that any litigation regarding the suit land was pending. A reference of this litigation, was also made in the affidavit filed by plaintiff(s) while appearing as witness. It was incumbent on the plaintiff(s) to produce on record documentary evidence to prove that some litigation pending regarding the suit land had prevented them to seek the relief of specific performance of the agreement to sell. The non-production of any such evidence shows that in fact no litigation was pending and this ground mentioned in the agreement is just a creation of some active/legal mind to cover up the delay of nine years in filing the suit for specific performance. There are several other factors which find mentioned in para 19 of the judgment of the first Appellate Court, which discuss in detail the circumstances supporting the observation of the first Appellate Court that the agreement dated 15.01.1997 was created just to defeat rights of defendants No.4 to 8. Those detailed reasons, as given in para 19 of the first Appellate Court judgment, read as follows:-

“19. After hearing the rival contentions of the learned counsel for the parties and after perusing the case file very carefully and meticulously, I am of the considered opinion that in the present case the impugned agreement to sell Ex.P1 is ante dated and the same has been executed just to defeat the rights of respondents and therefore, the same is

hereby declared null and void on the following grounds:-

- (a) I have perused the agreement to sell Ex.P1 and from the perusal of the same, it reveals that respondents No.1 and 2 who were the owners of the suit land are the residents of village Pachgaon. The land in dispute is situated at village Pachgaon. The appellant is the resident of Gurgaon. Alaf Khan General Power of Attorney is the resident of village Kherla Tehsil Taoru. Liakat Ali one of the attesting witness of the agreement to sell is the resident of village Ahmadbas and Abdul Rehman another attesting witness of the agreement to sell is the resident of village Nasirbas. The deed writer is the resident of Ferozpur Jhirka. When the land is situated within the territorial jurisdiction of Taoru and the owners of the land are also residents of Tehsil Taoru then what was the occasion to get the agreement to sell Ex.P1 executed from Ferozpur Jhirka despite the fact that neither the general power of attorney nor the vendors nor the vendees are the residents of Tehsil Ferozpur Jhirka. This fact has not been explained by the appellant or the witnesses examined by the appellant. To my mind, this fact creates a doubt over the case of the appellant. Reliance can be placed on case law titled ***Malkiat Singh Vs. Charan Kaur 2007(4) Civil Court Cases 234 (P&H)***.
- (b) PW5 appellant Kamalvir has deposed in his cross examination that both the owners of the land i.e. respondents No.1 and 2 were present at the time of execution of agreement to sell. PW6 Rashid Khan one of the attesting witnesses of the agreement to sell has also deposed that the owners of the suit land were also present at the time of execution of agreement to sell. Meaning thereby, the agreement to sell was executed in the presence of respondents No.1 and 2. **When both the owners of the suit land were present at the time of execution of agreement to sell then why they did not sign the agreement to sell and why the agreement to they did not sign the agreement to sell and why the agreement to sell was not executed directly by them.** These witnesses have also deposed that the payment was made to Alaf Khan (since deceased). When both the real owners of the disputed property were present at the time of execution of agreement to sell then why the payment was not made to them. This fact also

creates a doubt over the version of the appellant.

- (c) In the agreement to sell Ex.P1, it is mentioned that civil litigation was pending regarding the suit land and the sale deed was to be executed and registered after the decision of the civil litigation. First of all the title of the suit is nowhere mentioned in the agreement to sell and it is also nowhere mentioned what type of civil litigation was pending before the civil court. From the perusal of the agreement to sell Ex.P1, it is also revealed that total sale consideration was settled at Rs.9,06,250/- but an amount of Rs.7,31,250/- was paid by the appellant to Alaf Khan (since deceased) as earnest money. Meaning thereby more than 80% payment was made by the appellant to general power of attorney of vendors, despite the fact that the title of the suit land was in dispute. In normal course, no one would pay such a huge amount at the time of execution of agreement to sell and that too when the title of the suit land was in dispute. Moreover, no possession was delivered by the general power of attorney to the appellant. When the appellant had made more than 80% sale consideration to the general power of attorney on account of earnest money then why the possession of the suit land was not obtained by the appellant. This fact also creates a doubt over the execution of agreement to sell Ex.P1.
- (d) The alleged agreement to sell Ex.P1 was executed on 15.01.1997. Legal notice was issued by the appellant for the first time on 19.02.2006 after the expiry of 9 years. During this period the appellant kept mum. No action was taken by the appellant to find out the status of the alleged civil litigation or to find out the fact why the sale deed was not executed in favour of the appellant. If the possession of the suit land had been delivered to the appellant in that case, the position would have been different. But in the present case the possession of the suit land was not delivered to the appellant and despite this fact the appellant kept mum for such a long time and that too without any reasonable excuse. This fact also creates a doubt over the sanctity of agreement to sell Ex.P1.
- (e) In the present case, no documentary evidence whatsoever has been produced by the appellant to prove the fact that the sale deed could not be executed and registered in favour of the appellant

because the civil litigation was pending regarding the suit land. None of the witness examined by the appellant has deposed about the aforesaid civil litigation. The title of the suit is nowhere mentioned either in the agreement to sell Ex.P1 or in any other document. All this shows that no civil litigation was pending in between the vendors of the suit land and others. This fact has been mentioned in agreement to sell Ex.P1 just to use this fact in future. The present suit has been filed by the appellant in the year 2006 after the expiry of three years. The suit filed by the appellant is hopelessly time barred. Reliance can be placed on case law titled ***Mohan Ram Vs. Balram Ram 2005(3) RCR (Civil) 134***. This fact also creates a doubt over the sanctity of agreement to sell Ex.P1.

- (f) I have perused the statement of PW4 Vinod Kumar deed writer. From the perusal of the entire statement of this witness, it reveals that he was not maintaining the register properly and to as per law. He did not produce the entire record which was summoned from him. His register was not properly verified by the prescribed authority. He also deposed that no payment was made in his presence at the time of execution of agreement to sell. All this shows that agreement to sell Ex.P1 was not scribed by him on 15.01.1997. Rather the same was scribed by him later on. In the case law titled ***Balwinder Kaur Vs. Bawa Singh (2002-3) PLR 117***, our Hon'ble High Court has held that:

"Register of deed writer does not appear to have been maintained regularly. It is not page marked. It was not attested by any Sub Registrar, neither when he commenced making entries in this register nor when he stopped making entries in this register. This register does not appear to have been bound close knit. The pages can be taken out and inserted in this register. It has no evidentiary value."

- (g) In the present case, the stamp vendor was not produced by the appellant to prove the date of purchase of stamp. Agreement to sell Ex.P1 is surrounded by suspicious circumstances. In these circumstances, it was the duty of the appellant to produce the stamp vendor but he was not produced by the appellant and this fact also creates a doubt over the sanctity of the agreement to sell Ex.P1.

Reliance can be placed on case law titled ***Nirmal Singh Vs. Mangal Singh (2002-2) PLR 46***. In this case law, our Hon'ble High Court has held that agreement to sell was not scribed by professional scribe rather it was typed by some typist. No stamp vendor was produced who could state about the date when this stamp was sold. Onus was not discharged.”

18. During the course of arguments, learned counsel for the appellant(s) could not refute the above reasons given by the first Appellate Court while reaching the conclusion that the agreement is ante-dated and was created just to defeat the rights of defendants No.4 to 8. The defendants have denied the execution of the agreement and termed it as false and fabricated document. Though the word 'ante-dated' has not been specifically used in the written statement but the pleas taken by defendants No.1 and 2 and 4 to 8 reflect that the agreements were fabricated at later stage in order to counter their right that accrued to them vide sale deed dated 25.08.2006 registered on 28.08.2006.

19. It is, otherwise, quite strange that the land is situated in Tehsil Tauru (Mewat). The agreement (Ex.P1) was got executed in another Tehsil Ferozepur Jhirka. Marginal witnesses of the agreement were also of different villages of Tehsil Ferozepur Jhirka. It is evident on perusal of the sale deeds in favour of defendants No.4 to 8 that there is office of Sub Registrar in Tehsil Tauru, District Mewat(Nuh). All this shows the desperate attempt of plaintiff(s) to create the agreement in their favour.

20. Agreeing with the detailed reasons given by the first Appellate Court and in view of my discussion above, I find no factual or legal infirmity in the judgment of the first Appellate Court, calling for any interference.

21. No substantial question of law requiring determination arises in both these appeals, which have no merits.

22. Dismissed.

February 10, 2016.
Sachin M.

(SURINDER GUPTA)
JUDGE