

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

RSA No. 3698 of 2016 (O&M)

Date of Decision: 29.11.2016

Gurdial Singh

.....Appellant

Vs.

Jasvir Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Amit Verma, Advocate,
for the appellant.

AMOL RATTAN SINGH, J. (ORAL)

This is the second appeal of the plaintiff after his suit seeking specific performance of an agreement of sale was dismissed by the learned Additional Civil Judge (Sr. Divn.), Mukerian, and the first appeal filed by him was allowed only to the extent of granting him his alternative prayer for recovery of the earnest money paid by him, along with interest thereupon.

2. The case of the appellant-plaintiff (hereinafter to be referred to as “the plaintiff”), was that respondent-defendant no.1, Jasvir Singh (hereinafter to be referred to as “defendant no.1”), was the joint owner of land measuring 2 kanals and 3 marlas along with other landed property situated in Village Manj Kalan, Tehsil Mukerian, District Hoshiarpur. The said defendant was stated to have entered into an agreement for sale of the aforesaid land measuring 2 kanals and 3 marlas, with the plaintiff, on 13.12.2002, for a total sale consideration of Rs.2 lacs.

The plaintiff was stated to have paid Rs.1,62,500/- as earnest money on the same date, with the remaining Rs.37,500/- to be paid by him at

the time of execution and registration of the sale deed, for which purpose the last date fixed was 15.06.2003. It was further contended that on 10.06.2003, another sum of Rs.10,000/- was paid to defendant no.1 and the date for execution of the sale deed was extended to 23.05.2005, i.e. almost two years later.

On that date, i.e. on 23.05.2005, it is contended that the plaintiff remained present in the Tehsil complex at Mukerian with the balance sale consideration, where he also got his 'presence marked' by way of an affidavit, but defendant no.1 did not come to execute the sale deed. The said defendant is stated to have given an evasive reply thereafter also and refused to execute the sale deed, leading to institution of the suit on 01.06.2005.

3. Upon notice issued, the first defendant appeared and filed his written statement, denying the execution of the agreement or receiving any earnest money. It was contended that the suit land was actually of commercial nature, situated in the middle of the "abadi" and that the market price of the land was not less than Rs.30,000/- per marla and consequently, the question of selling it at a low price of Rs.2 lacs did not arise.

In fact, it was further contended that defendant no.1 had taken a loan of Rs.1,25,000/- from one Manmohan Singh and had agreed to pay interest @ 5% for six months by way of an oral settlement. However, it was alleged that Manmohan Singh got the alleged agreement scribed by adding Rs.37,500/- as interest to the principal amount of Rs.1,62,500/-, which had not been actually received by defendant no.1. Still further, it was contended that there was no intention between the parties to sell/purchase the land and that in fact blank stamp papers were got signed by Manmohan Singh only by way of security for the loan taken, which papers were then got scribed as

described hereinabove. Yet further, Manmohan Singh is also stated to have got a cheque for a sum of Rs.1,62,000/- from defendant no.1 on 04.04.2005, and he agreed to return the “alleged agreement” the next day but did not actually do so. Hence, defendant no.1 got encashment of the cheque stopped, after which the aforesaid Manmohan Singh also filed a complaint under Section 138 of the Negotiable Instruments Act, 1881.

Lastly, it was contended that the plaintiff being a Government servant never obtained any permission from the Government prior to execution of the agreement and that Manmohan Singh in connivance with the deed writer had also got his signatures on the back of blank papers and in the register of the deed writer.

4. A replication was filed to the aforesaid written statement by the plaintiff and consequently the following issues were framed by the learned Addl Civil Judge (Sr. Divn.):-

“1. Whether the defendant entered into an agreement to sell dated 13.12.2002 and agreed to get sale deed registered after receiving the balance sale consideration on or before 15.06.2003?OPP

2. Whether defendant no.1 has failed to get the sale deed execution ?OPP

3. Whether plaintiff was always ready and willing and still ready and willing to perform his part?OPP

4. Whether plaintiff is entitled for relief of specific performance ?OPP

5. If issue no.3 is not proved, whether the plaintiff is entitled for relief of recovery of Rs.3,25,000/- for the breach of agreement to sell? OPP

6. Whether the alleged agreement to sell is the outcome of fraud and mis-representation ?OPD

7. Whether no agreement to sell was ever executed by the defendant?OPD

8. Whether the suit of plaintiff is liable to be dismissed?OPD

9. Relief.”

5. The plaintiff examined himself, deed writer Ashok Kumar, one Diwan Chand, as also the aforesaid Manmohan Singh, as witnesses. Though one Darshan Singh who was stated to be an attesting witness to the agreement was also initially examined as PW3, but with said witness not having allowed himself to be cross-examined, his examination-in-chief was discarded.

By way of documentary evidence, the plaintiff tendered the agreement dated 13.12.2002, an affidavit dated 23.05.2002, a writing on the back of the instrument (agreement), dated 10.06.2002 and the 'jamabandi' (record of rights) for the year 1999-2000, as Exs. P-1 to P-4 respectively.

The defendant examined himself as DW-1 and tendered a certified copy of an order dated 02.02.2008, passed in the complaint filed under Section 138 of the Act of 1881, by way of evidence.

6. The learned Addl. Civil Judge, having considered the pleadings, arguments and having appraised the evidence, held that the agreement itself could not be stated to have been proved; firstly for the reason that it was actually a document obviously created as security of a loan taken, as no prudent person would extend the date for execution of the sale deed for two years, with only Rs.28,000/- out of a total sale consideration of Rs.2 lacs remaining to be paid.

Still further, PW-4 Diwan Chand, who was shown to be an attesting witness to the agreement, admitted in his cross-examination that he had appeared as a witness in respect of many such documents and as such, it was held that he was not a reliable witness, and one who did not know as to “what talks” took place between the parties.

Even transaction qua any money, was held not to have been proved, by that Court.

7. Though the plaintiff and PW-5, Manmohan Singh, testified in respect of the case set up, however, it was found that the plaintiff had admitted in his cross-examination that he had not seen the suit property and he did not even know its boundaries. He further admitted that he was an income tax payee, but he had not disclosed about the transaction in his tax returns. Similarly, PW-5, though he deposed that Rs.1,62,000/- were received from defendant no.1, but “it was a different transaction”, which also it was held to have not been proved by him.

Yet further, it was found by the learned Addl. Civil Judge that though PW-2, Ashok Kumar, had testified to having scribed the agreement as also the subsequent writing on 10.06.2003, however, he had not produced his register to prove the entries with regard to the instrument. Hence, further holding that though, strictly, an agreement of sale would not be affected by the fact that the plaintiff was a Government servant, but since he had not shown any due permission taken to purchase the suit property, it would be against public policy to grant him even the alternative relief of recovery of Rs.3,25,000/- as prayed for (Rs.1,62,500/- as earnest money and an equal amount as damages).

Held as above, the suit of the present appellant-plaintiff was dismissed.

8. In the first appeal filed by the plaintiff, the learned Additional District Judge, Hoshiarpur, however, found that from the statement of the witnesses, including PW-4, Diwan Chand, and deed writer, PW-2, Ashok Kumar, the agreement stood duly proved, with no suggestion made to the

deed writer in cross-examination, that the document was actually not signed by the first defendant in the presence of the witnesses. It was also observed that in his cross-examination, even the defendant had “candidly admitted” that he had executed the agreement dated 13.12.2002 in favour of the plaintiff, and that Ashok Kumar, deed writer, had 'scribed' it.

Hence, as regards the execution of the agreement, it was held to have been duly proved, as was the writing dated 10.06.2003 by which the time for execution of the sale deed was extended. The payments of Rs.1,62,500/- and Rs.10,000/- on 13.12.2002 and 10.06.2003 by the plaintiff to defendant no.1, were also held to be proved.

9. Despite arriving at the aforesaid conclusion, thereafter, the learned lower appellate Court reiterated the findings of the learned Addl. Civil Judge, to the effect that the extension of time by two years, for execution of the sale deed, proved that the document executed was not actually for the purpose of sale/purchase of the suit property but was, in fact, a security created towards a loan advanced.

The reasoning of the trial Court was further augmented by the first appellate Court holding that though the plaintiff even contended that the possession of the suit property was with him, however, he did not even know the location of the land.

The contention that since no permission had been taken by the plaintiff, from the Government, prior to entering into an agreement to purchase the suit property, was rejected by the learned lower appellate Court, holding that such permission is required only at the time of execution of a sale deed and not at the time of the execution of an agreement.

10. As regards the issuance of a cheque of Rs.1,62,000/- by the

aforesaid Manmohan Singh in favour of defendant no.1, it was held that simply because a complaint had been filed under Section 138 of the Act of 1881, against defendant no.1, that would not have any bearing on the outcome of the civil *lis*.

11. Having recorded the findings as above, eventually again reiterating that the instrument of agreement of sale was only by way of a security towards the loan taken by defendant no.1, with no intention to actually buy or sell the property, the first appeal filed by the present appellant was dismissed by the learned lower appellate Court.

12. Before this Court, learned counsel for the appellant submits that once the agreement in question had been proved to have been executed, there was no reason for the lower appellate court to deny the relief of specific performance of that agreement and instead decree the suit only in terms of the alternative relief of refund of the earnest money along with interest.

13. Having considered the aforesaid argument, it is seen that without a doubt the agreement dated 13.12.2002 stood proved; yet, however, the learned first appellate court exercised its discretion in refusing to grant a discretionary relief, in view of the fact that despite Rs. 1,72,000/- having been paid before the agreed date for execution of the sale deed, out of a total consideration of Rs. 2,00,000/-, an extension of two years time for execution of the sale deed was agreed upon, which was found to be wholly unnatural by the court.

Hence, on the aforesaid reasoning, only the alternative relief of refund of the earnest money was granted to the appellant.

That reasoning is not found to be arbitrary or irrational in any manner by this Court and in fact, is found to be wholly sound, because it

would be unnatural for anybody who had been paid Rs. 1,72,000/- out of Rs. 2,00,000/-, without possession of the suit property having been handed over to him, to still agree, after settling the date for execution of the sale deed only 6 months from the date of agreement, to extend such time for another two years, with only an amount of Rs.27,500/- remaining to be paid.

14. Further, I wholly agree with the other reasoning of the learned Additional District Judge, that with the appellant-plaintiff not even being able to give the dimensions of the land and admitting that he did not know its location, despite having raised a contention that he had been put in possession of the land, it obviously showed that actually there was never any intention to buy or sell the land and the entire transaction was only by way of a security, to secure the loan taken by respondent-defendant no.1.

Consequently, finding no merit in the appeal, it is dismissed in *limine*, but with no order as to costs.

(AMOL RATTAN SINGH)
JUDGE

November 29, 2016
nitin

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No.