

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

R.S.A. No.4730 OF 2016 (O&M)

Date of decision: 21.09.2016

Bhagwanti

.. Appellant

VS.

Mohinder and anr.

.. Respondents

Coram: Hon'ble Mr. Justice Amol Rattan Singh

Present:- Mr. Deepak Sharma, Advocate,
for the appellant.

Amol Rattan Singh, J.

This is the second appeal of the plaintiff who had filed a suit for specific performance of the agreement to sell dated 02.03.2004, entered into between her and respondent-defendant no.1, for the purchase-sale of a half share of the said defendant, in land measuring 56 kanals, the said defendants' share thus being 28 kanals.

As per the case set up in the plaint, now taken from the judgment of the learned Additional Civil Judge (Senior Division), Ambala, the 1st respondent herein had assured the appellant-plaintiff, that he had neither entered into any agreement earlier, to sell the suit land, nor was it encumbered in any manner.

The settled consideration, as per the agreement dated 02.03.2004, was Rs.3,00,000/- per acre (thereby amounting to Rs.10.50 lacs for 28 kanals) and an "advance sum" of Rs.3,50,000/- was paid at the time of the agreement, in the presence of witnesses. The last date for execution of the sale deed was fixed as 01.06.2004.

It was further stated in the plaint that on 11.03.2004, the 1st respondent again approached the appellant through his son, Ranjeet Kumar, and received another sum of Rs.30,000/- on behalf of his father and executed a second agreement on the same date, i.e. 11.03.2004, in continuation of the first agreement, retaining all other terms and conditions of the earlier agreement.

Thereafter, on 06.04.2004, it was contended that the appellant-plaintiff approached the 1st respondent and asked him to execute the sale deed and the appellant also purchased stamp papers valued at Rs.63,000/- in the name of the 1st defendant and “got a sale deed drafted for a sum of Rs.10,50,000/-”.

Thereafter, the appellant alongwith the 1st respondent, appeared before the Sub-Registrar but defendant no.2 herein, came and presented an order of stay from a civil Court, in a civil suit titled as Naranjan Singh vs. Mohinder (Mohinder being the 1st defendant and Naranjan Singh being the 2nd defendant). Therefore, the sale deed could not be registered but respondent no.1 convinced the appellant that he actually had not executed any agreement dated 17.05.2002 in favour of the 2nd respondent herein, i.e. Naranjan Singh, as contended by the latter.

2. After that, it was yet further contended, that the 1st respondent entered into a 3rd agreement to sell on 22.05.2004, with the appellant, in continuation of the previous agreement, after receiving another sum of Rs.20,000/-, with the total money advanced by the appellant to the 1st respondent, thereby coming to Rs.4,00,000/-. The last date for execution of the sale deed was also extended to 10.05.2005, as per the appellant-plaintiff.

Yet further, it was stated that respondent no.1 handed over

physical possession of the suit land to the appellant and received another Rs.1,00,000/-, and recorded an “extension note” dated 09.05.2005, thereby extending the last date for execution of the sale deed uptill 10.01.2006. However, as the civil suit between the respondent defendants *inter se* was not decided, the date was again extended to 31.12.2006, vide yet another agreement dated 03.01.2006. In the meanwhile, *khasra girdawaries* were also corrected in favour of the appellant but thereafter, the 1st respondent started putting off the issue of the sale deed on one pretext or the other. The appellant, however, is stated to have got her presence marked before the Sub-Registrar on 02.01.2007.

Thereafter, the civil suit filed by the 2nd respondent against the 1st respondent was decreed in favour of the former but during the pendency of the appeal filed by the 1st respondent, he got registered a sale deed dated 08.07.2008, in favour of the 2nd defendant, qua the suit land.

Consequently, it was stated in the suit filed by the appellant, that the sale deed dated 08.07.2008 was a sham transaction, only to deprive her of her legal right.

3. Upon notice issued in the suit, respondent-defendant no.1 appeared and filed a written statement, in which other than the usual preliminary objections, he submitted that the plaintiff was neither owner nor in possession of the suit land and that it was well within her knowledge that the 2nd defendant had filed a suit against the 1st defendant for possession by way of specific performance of the agreement dated 17.05.2002, in respect of which the suit was decreed in favour of the 2nd defendant on 09.04.2008. Thereafter, even warrants of possession had been issued by the court in favour of the 2nd defendant.

Still further, it was contended by the 1st defendant that the suit of the appellant-plaintiff was barred under Order 2 Rule 2 CPC, and in fact, the agreement to sell dated 02.03.2004 had been wholly forged, with no amount of money ever received by the 1st defendant from the plaintiff.

4. The 2nd defendant is stated to have filed a separate written statement on the same lines as that of the 1st defendant.

5. With a replication filed to the written statements of the respondents-defendants, the learned Additional Civil Judge framed the following issues:-

- “1. Whether plaintiff is entitled to a decree for specific performance of the suit property detailed in the head-note of the plaint in terms of agreement to sell dated 2.3.2004 and their subsequent agreements with consequential relief of permanent injunction, as alleged? OPP
2. Whether suit of the plaintiff is not maintainable in the present form? OPD
3. Whether the plaintiff has not come to the court with clean hands, if so its effect? OPD
4. Whether suit of the plaintiff is barred under Order 2 Rule 2 CPC, if so its effect? OPD
5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct, if so its effect? OPD
6. Whether the suit is liable to be stayed under Order 10 CPC, if so its effect? OPD
7. Relief.”

6. The plaintiff examined the Reader to the Naib Tehsildar, Saha, as PW1; Vineet Kumar, Deed Writer, as PW2; Satpal as PW3 and Om Parkash, General Power of Attorney holder of the plaintiff, as PW4. She herself also stepped into the witness box as PW5 and also tendered some documents by way of evidence.

On the other hand, defendant no.1 examined himself and also tendered some documents in support of his stand.

7. Upon appraising the evidence and the pleadings, the learned Additional Civil Judge found that the plaintiff, while testifying as PW5, had failed to produce any documentary evidence regarding the payment of Rs.5,00,000/- to defendant no.1 in installments on different occasions. Further, the learned Court also found a material contradiction between the plaintiff as PW5 and her attorney (PW4), as regards the source of money paid by the plaintiff as part of the sale consideration. It was stated in the plaint that a sum of Rs.3,50,000/- had been paid on 02.03.2004, however, in cross-examination, the appellant-plaintiff stated that the 1st defendant had been paid Rs.4,00,000/- on that date, which had been brought by her father-in-law. PW4, on the other hand, who, other than being the attorney of the plaintiff, is also her husband, had stated in his cross-examination that he had withdrawn Rs.3,50,000/- from his GPF account, a month earlier. However, no copy of the GPF account had been placed on record.

As regards the remaining amounts paid in installments, PW4 had testified that he was in possession of the amounts, again without specifying from where he obtained the money.

8. It was further found by the learned Additional Civil Judge that the 1st defendant, though in his written statement had denied the entire case of the plaintiff, however, somersaulted in his cross-examination and admitted the entire case of the plaintiff, including the agreements and receipt of the sale consideration in parts.

However, it was also found by that Court that the agreement executed by the 1st defendant in favour of the 2nd defendant, qua sale of the

suit land was prior in time, it having been executed on 17.05.2002, whereas the 1st agreement with the appellant-plaintiff, was executed on 02.03.2004.

The contention of the appellant-plaintiff, that the sale deed dated 08.07.2008 executed by the 1st defendant in favour of the 2nd defendant, was actually not in pursuance of any agreement dated 17.05.2002, as the terms and conditions of the two documents were different, was rejected by the Additional Civil Judge, on the ground that the plaintiff had failed to produce a copy of the agreement dated 17.05.2002 executed between the 1st and 2nd defendant. Further, since the 1st defendant had admitted in his cross-examination that he executed the agreements with the plaintiff, subsequent to the agreement dated 17.05.2002, in favour of the 2nd defendant, it was held that the plaintiff would be entitled to recover double the amount of the sale consideration paid by her to the 1st defendant, in terms of the agreements entered into between them, i.e. Exs.P1 to P4.

Yet, as regards the decree of specific performance, which could only have been decreed in favour of the plaintiff after declaring the sale deed dated 08.07.2008 to be null and void, the Court held that the appellant was not entitled to a such decree.

9. As regards the stand of both the defendants that the suit of the appellant-plaintiff was barred under Order 2 Rule 2 CPC, it was held that since no copy of the plaint titled as Bhagwanti v. Naranjan etc. was produced, as relied upon by the defendants in respect of the aforesaid plea, that issue was decided in favour of the plaintiff.

10. However, not finding her entitled to a decree of specific performance in view of the fact that the agreement between the 1st and the 2nd defendant, *inter se*, was prior in time to the agreements between the 1st

defendant and the plaintiff, she was held entitled to only a decree for recovery of Rs.10,00,000/-, that being double the amount of the sale consideration of Rs.5,00,000/- paid by her to the 1st defendant.

11. The plaintiff having appealed against the aforesaid judgment and decree before the learned first appellate Court, that Court, after noticing the evidence led, the pleadings and the judgment of the Additional Civil Judge, also found that on the basis of the agreement dated 17.05.2002, the 2nd defendant had instituted a civil suit against the 1st defendant on 13.01.2003, which was duly contested by the 1st defendant, but the appellant-plaintiff, despite knowledge of the suit, did not get herself impleaded therein, 'nor contested it even on behalf of the 1st defendant'.

That suit having been decreed on 09.04.2008 in favour of the 2nd defendant (the judgment in that case being Ex.D1), granting him a decree of possession by way of specific performance, it was held that the appellant-plaintiff could have no right over the suit land.

It was further found that the appellant-plaintiff had earlier instituted a suit for recovery of Rs.10,00,000/- on 18.08.2008, which was later withdrawn by her on 13.01.2009 and thereafter she had instituted the suit for specific performance (in the present *lis*), on the basis of the agreements dated 02.03.2004, 11.03.2004, 22.05.2004 and 03.01.2006, despite knowledge that the decree on the basis of agreement to sell dated 07.05.2002 had already been executed in favour of the 2nd defendant.

12. Consequently, holding that the agreement dated 17.05.2002 was already in existence at the time when the appellant-plaintiff entered into an agreement on 02.03.2004 with the respondent-defendant no.1, and that in any case, the said agreements were also hit by *lis pendens*, the first appeal of the

appellant was also dismissed.

13. Before this Court, learned counsel for the appellant submits that the appellant is protected by Section 53-A of the Transfer of Property Act, 1882, in view of the fact that she could prove (as contended) that possession of the suit property was handed over to her upon payment of amount of 50% of the sale consideration in the year 2005. Upon query of the Court, as to when she had earlier filed a suit simply seeking recovery of the amount paid by her to respondent no.1, how would, subsequently, a suit for specific performance lie, learned counsel submits that since the appellant came to know that a sale deed had been executed by respondent no.1 in favour of respondent no.2, after the first respondent withdrew his appeal before the lower appellate Court, the appellant thereafter withdrew the earlier suit for recovery and filed a suit for specific performance of her contract, on the ground that a fraud had been played upon her.

14. Having heard learned counsel for the appellant, I find no ground to entertain this appeal for the reasons stated hereinafter.

Simply because possession was handed over to the appellant when admittedly litigation was pending between respondents no.1 and 2 *inter se*, it would not make the appellant a bonafide purchaser of the property, despite the fact that at the time of the agreement entered into by her on 2.3.2004, she is stated to have no knowledge of the previous agreement between respondents no.1 and 2. Though the learned 1st appellate Court has not specified as to how the appellant had knowledge of the pending litigation between the 1st and 2nd respondent, it is obvious from the judgment of the learned Civil Judge, that at least on 06.04.2004 she came to know of the pending litigation, with the 2nd respondent having served a copy of the order

of stay of the civil Court, upon both, her and the 1st respondent. In fact, that was the appellant-plaintiffs' own case also. It is also equally obvious, in fact, that that was the reason why she initially filed a suit only for recovery of the earnest money and part consideration paid by her to the 1st respondent.

Thus, once having come to know of the fact that there was pendency of litigation qua the suit property, in respect of an agreement earlier entered into between respondents no.1 and 2, the appellant not having filed a suit for specific performance of the contract, and instead having instituted a suit for recovery of the amount, obviously her initial desire was only to recover the money paid by her to respondent no.1 as part of the sale consideration.

Thereafter, even if respondent no.2 had withdrawn the appeal against respondent no.1 and thereafter a sale deed was executed in pursuance of the decree passed in favour of respondent no.1, the appellant-plaintiff having accepted the fact that a suit had already been decreed in favour of the 2nd respondent qua the same suit property, that would not change the priority of the right created by the earlier agreement in favour of the 2nd respondent, even in terms of Section 48 of the Transfer of Property Act, 1882. The said provision reads as under:-

“48. Priority of rights created by transfer.- Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.”

15. The protection of Section 53-A of the Act of 1882, as is sought to

be contended by learned counsel for the appellant, now, is also not available to the appellant, in view of the fact that, admittedly, she took possession of the suit property only on 10.05.2005, whereas even as per the appellants' own case, she had already been served with a copy of the stay order in favour of the 2nd respondent in the suit filed by him against the 1st respondent, well prior to that date, at the time when the appellant and 1st respondent had appeared before the Sub-Registrar for registration of the sale deed. Thus, she having subsequently taken possession of the suit property, after paying another sum of Rs.1 lakh, having come to know of the litigation based on a prior agreement (to hers), qua the suit land, the transfer would not be protected by Section 53-A, but in fact be hit by the bar created under Section 52 of the Act of 1882.

16. The appellant may possibly have been entitled to special damages from respondent no.1 herein, on account of the fact that he withdrew the appeal against respondent no.2 despite having knowledge that he had entered into a contract with the appellant, however, no prayer for special damages having been made in any case, other than payment of double the amount of money paid by her to the 1st respondent, that alternative prayer was granted by the learned Courts below.

Hence, I find no ground to entertain this appeal. Consequently, it is dismissed *in limine*, but with no order as to costs.

September 21, 2016
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(Amol Rattan Singh)
Judge

Whether speaking/reasoned	Yes/No
Whether Reportable:	Yes/No