

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

RSA No.3201 of 2010 (O&M)

Date of decision : 16.08.2017

Jagan Nath

...Appellant

Versus

Hari Kishan

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. A.K. Pathania, Advocate for the appellant.

Mr. B.K. Bansal, respondent in person.

ANIL KSHETARPAL, J.

The defendant-appellant has filed this Regular Second Appeal against the concurrent findings of fact arrived at by the Courts below.

The plaintiff-respondent filed a suit for specific performance of agreement to sell dated 09.04.1983 with respect to half share of House No.582, Sector-8B, Chandigarh constructed on a plot of 5 marlas and for permanent injunction restraining the defendant Jagan Nath from receiving and collecting the rent regarding the aforesaid house from Amar Nath, tenant son of the plaintiff.

The defendant filed a counter claim seeking declaration that the defendant is owner and landlord in possession through his tenant Amar Nath son of the plaintiff. The defendant further sought a relief of permanent injunction restraining the plaintiff or anyone else from interfering with

peaceful possession of the defendant through his tenant.

The plaintiff and defendant are brothers.

As per the agreement to sell dated 09.04.1983, the defendant had agreed to sold the half share of house in question for a total sale consideration of ₹1,00,000/-, received ₹80,000/- as earnest money, delivered the actual and physical possession of his share to the plaintiff in part performance of the agreement to sell and shifted to house No.1541, Sector-7C, Chandigarh. No date for execution of the sale deed was fixed in the agreement to sell.

In defence, apart from usual objections, the defendant took a stand that 5 marlas of plot underneath house No.582, Sector-8B, Chandigarh was purchased through joint funds of the parties. It was further claimed that the plaintiff had not constructed ground floor of the house from his resources in the year 1967. It was further pleaded that in the year 1969, there was a family settlement that ground floor of the house in question fell to the share of the plaintiff whereas remaining two floors fell to the share of the defendant.

The defendant has taken a stand that since accommodation was not sufficient for growing needs of the family of plaintiff and defendant, therefore, decision was taken to jointly sell the house in question. Consequently, defendant executed a General Power of Attorney on 09.04.1983 in favour of Amar Nath which was duly registered on 04.05.1983. The defendant further asserts that the plaintiff had informed the defendant that he had also executed similar power of attorney in favour of his son Satya Dev. Execution of the agreement to sell dated 09.04.1983 and

receipt of earnest money to the extent of ₹80,000/- was denied. Agreement to sell was said to be result of fraud and forgery. The transaction of exchange of ₹80,000/- so claimed was barred by the provision of Income Tax Act, 1961.

Although, the plaintiff had claimed that the property belongs exclusively to him. However, it is established from sale deed and Joint Ownership Certificate that the property originally belongs to the plaintiff and defendant jointly.

The trial Court after appreciating the evidence available on the file decreed the suit filed by the plaintiff for specific performance of the agreement to sell and defendant No.1 was directed to execute and get the sale deed registered as per the agreement to sell dated 09.04.1983 on receipt of balance sale consideration of ₹20,000/-. A counter claim filed by the defendant was accepted by declaring that he is co-owner of the disputed property to the extent of half share. The remaining relief claimed through counter claim was rejected.

The defendant filed the first appeal. The learned First Appellate Court after appreciating the evidence available on the file reiterated the findings of the trial Court and held that the judgment passed by the trial Court is correct.

Counsel for the appellant has filed a detailed synopsis. Counsel for the appellant has also filed copy of the written arguments submitted by the appellant before the First Appellate Court.

The defendant executed four documents which prove that there was agreement to sell between the parties. The agreement to sell is Ex.P3,

Special Power of Attorney is Ex.P10, General Power of Attorney is Ex.P11 and a Will executed by defendant in favour of Amar Nath is Ex.P12. All these documents have been produced and proved by the plaintiff by leading the evidence.

The appellant had also filed an application seeking review of the judgment dated 17.11.2009 delivered by the learned First Appellate Court, which was ordered to be dismissed vide order dated 26.03.2013.

Learned counsel for the appellant has also filed substantial questions of law alongwith the appeal. The substantial questions of law are extracted as under:-

“A) Whether a litigant, such as the respondent-plaintiff in this case, could be allowed to built up his case, during the stage of the evidence, on the basis of the documents such as Ex.P10 (SPA) dated 09.04.1983, Ex.P11 (GPA) dated 09.04.1983 and Ex.P12 (WILL) dated 09.04.1983 without mentioning a single word, muchless even by way of passing a passing reference, in his entire plaint dated 07/01/1994 or amended plaint dated 09/03/1995, in civil suit No.1 of 1994, out of which the present appeal has arisen?

B) Whether the findings and conclusions rendered in the judgments of the Learned Courts below by misreading and misdirecting the inadmissible evidence whereas the admissible evidence on record was suffice for arriving at conclusion otherwise then the perverse finding returned, are sustainable in the eyes of law?

C) That while following the ruling, in the case of Dr. O.P. Rawal V/s Mr. Justice A.L. Bahri, in para 9 of the judgment of the learned trial Court, it was held that onus to prove facts on the basis which relief was sought, such as the alleged agreement to sell dated 09/04/1983 was upon the

respondent plaintiff, even if the appellant-defendant did not lead any evidence, thus in view of the settled proposition of law, whether both the Learned Courts below acted erroneously to return findings based on the inadmissible evidence as per the mandate of Section 60 of the Registration Act and thus failed to prove his case in terms of Section 101 of the Evidence Act?

D) Notwithstanding the facts that time is not essence unless a date or future event for specific performance is mentioned in the agreement to sell, nevertheless as per the settled proposition of law by the Hon'ble Apex Court in 'Manju Nath Anadappa's' case that where a plaintiff, never asked the defendant to execute the sale deed or tendered the balance amount of consideration within a period of three years or approached the court within the reasonable time, whether the respondent plaintiff in the present case who admittedly sought the relief of specific performance to enforce agreement to sell dated 09.04.1983, after more than thirteen years through his amended plaint dated 09.03.1995 was entitled to claim such a discretionary relief being of prohibitory nature and that too hopelessly time barred?

E) That as per the mandate of sub Rule (3A) and Rule (2) of Order XVIII CPC read with the Rule III:4 of the Case Flow Management Rules, 2007, contained in Chapter I Part P Volume I of the Punjab and Haryana High Court Orders and Rules the written argument submitted by the parties form part of the record of the court case file, thus, in view of this position in law, whether the Learned Courts below were justified in ignoring the written arguments of the appellant which are duly on record and thus abdicated the judicial function as contemplated in the aforesaid Case Flow Management Rules?

F) That in para 8 and 9 of the plaint in this case, the

respondent plaintiff had specifically pleaded that he had filed “an ejectment petition No.73/15-06-1992 against Amar Nath” (his eldest son); wherein he had proved the alleged agreement to sell dated 09/04/1983 as Ex.A5, whereas the appellant was not a party in the said proceedings and further that in the present suit, the respondent plaintiff has produced in his evidence Ex.P5, written statement of Amar Nath as Ex.P6 and his replication as Ex.P7, filed in ejectment petition No.73 of 1992; thus, whether such a piece of evidence, adduced by the respondent at the back of the appellant, was admissible and could be relied upon by both the learned Courts below to return findings against the appellant in the present suit?

G) Whether while returning findings both the Learned Courts below not only relied upon inadmissible evidence as per the mandate of Section 60 of the Registration Act, including Ex.P4, the affidavit of Amar Nath parse inadmissible as per Evidence Act as well as in terms of Order XIX Rule 1 CPC and High Court Order and Rules, but both the learned Courts below chose to misread and misdirect not only Exhibit P-4 but also the mandatory provisions mentioned above, leading to erroneous findings and conclusions suffering from patent illegalities?

H) Whether on the basis of alleged agreement to sell dated 09/04/1983, the respondent could be allowed to arrogate himself to assume the role and jurisdiction of a Civil Court to make self serving declarations, interalia, to the effect that w.e.f. 09/04/1983, the respondent had become full fledged owner of the half share of the appellant in the suit property, and that the appellant had ceased to be the co-owner, which self serving declaration so pronounced by the respondent in his replication dated 19/09/1992 Ex.P7, filed in ejectment petition No.73 of 1992 and even prior

thereto in his will dated 08/06/1992 Ex.DW1/4 and Ex.P1 the General Power of Attorney dated 09/06/1992, are tenable in the eyes of law?

I) That as per the mandate of Section 54 of the Transfer of Property Act, which declares that contract for sale, such as alleged agreement to sell dated 09/04/1983 does not confer or bestow any right, interest or title in the immoveable property; whether in view of such a legal mandate/declaration, the learned trial Court abdicated its judicial function to adjudicate the case as per law and dispense legal justice, instead of acting as a judicial rubber stamp to endorse the self-serving declaration of the respondent while referring to the statement dated 07/09/1996 of Sh. M.L. Gupta, Advocate, of the respondent, who admitted that “defendant was owner of the ½ share of the said property prior to his execution of agreement to sell” as observed by the learned trial Court in para 56 of its judgment, which weighed with the learned trial Court and the learned First Appellate Court to non-suit the appellant qua his rest of the counter claim?

J) Whether a contract, such as agreement to sell dated 09.04.1983 (Exhibit P-3) was enforceable in view of the provisions of Section 23 of the Contract Act particularly when the agreement Exhibit P-3 was wanting in compliance of the express provisions of the Chapter 20(A) of the Income Tax Act, read with Rule 48-G made there under and statutory return in form 37-G and such tending to defeat the express provisions of law?

K) Whether the learned Courts below were justified in allowing the counter-claim of the appellant partially whereas in view of the material/evidence on record the entire counter-claim of the appellant ought to have been allowed and declaratory and injunctive relief ought to have

been granted including the alternative plea?”

Even the respondent has also filed brief synopsis.

Counsel for the appellant has argued that the judgment passed by the Courts are beyond pleadings as Special Power of Attorney, General Power of Attorney and Will dated 09.04.1983 are not the part of the pleadings. Therefore, the Court could not have relied upon the aforesaid documents. Learned counsel has further argued that the judgments passed by the Courts below are result of misreading of evidence and reading of inadmissible evidence. Learned counsel has further argued that suit filed by the plaintiff was beyond limitation. It has also been asserted that the learned First Appellate Court has wrongly ignored the written arguments filed by the appellant. The agreement to sell is stated to be not enforceable due to non-compliance of express provision of Chapter 20(A) of the Income Tax Act and Rules framed thereunder. Learned counsel has further argued that the suit is barred by the principles of Order 2 Rule 2 CPC.

I have heard learned counsel for the appellant and respondent in person.

The present suit was filed for specific performance of the agreement to sell dated 09.04.1983. The agreement to sell has been proved in accordance with law. The plaintiff in his pleadings has pleaded the agreement to sell. However, in support of his pleadings, the plaintiff had produced on file Special Power of Attorney, General Power of Attorney and a Will executed by the defendant. Such documents are not required to be pleaded. The evidence sought to be led by the parties is not required to be made part of the pleadings. Order 6 Rule 2 CPC specifically provides that

every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence.

Therefore, first argument of the learned counsel is that since documents i.e. Special Power of Attorney, General Power of Attorney and a Will have not been pleaded, therefore, could not be relied upon, is not sustainable.

Learned counsel for the appellant has further submitted that findings of the Courts are result of misreading of evidence and reading of inadmissible evidence. However, the counsel has not pointed out the specific instances where there is misreading of the evidence or reading of inadmissible evidence on the file.

I have seen the judgment passed by the Courts below. The Courts below have appreciated the documentary as well as oral evidence brought on record by the parties.

Learned counsel for the appellant has further submitted that the judgment passed by the First Appellate Court is erroneous as the learned Court has not referred and considered the written arguments filed. On pointed question as to what part of the written arguments has not been considered by the Court, the counsel for the appellant failed to point out any material submission which has not been considered. Taking into consideration that the judgments passed by the Courts below are detailed and reasoned, I do not find any reason to accept the arguments of the learned counsel for the appellant that the judgment of the First Appellate Court is liable to be set aside on this score.

Learned counsel for the appellant has further submitted that the agreement to sell was not enforceable as compliance of the express provision of Chapter 20(A) of the Income Tax Act and Rules framed thereunder, have not been made.

I have considered the submission, agreement to sell is between the real brothers. The execution of the agreement to sell is proved. Section 269 P (1) of the Income Tax Act, as extracted in the written arguments only provides that Registering Officer under the Registration Act shall not register any document which purports to transfer any immoveable property unless certain formalities are completed. This provision of law does not deal with agreement to sell.

Learned counsel for the appellant has further referred to Section 269AB of the Income Tax Act. It is suffice to say that Section 269 AB is dealing with the rights sought to be protected under Section 53A of the Transfer of Property Act.

Learned counsel for the appellant has further submitted that the suit was barred by Order 2 Rule 2 CPC. This submission of the learned counsel has been considered in detail by the learned First Appellate Court. No doubt, the plaintiff had filed a suit claiming ownership of the property. The defendant had filed a written statement admitting the claim. However, the aforesaid suit was withdrawn as the Court refused to pass the decree being collusive suit. The relief claimed in the present suit would not be barred under the provision of Order 2 Rule 2 CPC. The cause of action to file the present suit arose when the plaintiff denied the agreement to sell in the year 1994 whereas earlier suit i.e. suit No.43 of 1983 was filed in the

year 1983 and appellant had admitted the claim of plaintiff in that suit.

Learned counsel for the appellant has further submitted that the suit was barred by limitation as the agreement to sell is of the year 1983 whereas suit came to be filed on 10.01.1994.

As noticed, the agreement to sell did not contain any specific date for execution and registration of the sale deed. Article 54 of the Limitation Act provides that the limitation for filing the suit for specific performance is three years from the date fixed for performance in the agreement to sell and if no such date is fixed, when the plaintiff has notice that performance is refused. The plaintiff had pleaded that the cause of action accrued to him when the defendant refused to honour his commitment and execute the sale deed in the year 1994, therefore, the suit filed by the plaintiff cannot be held to be beyond limitation.

With respect to question No.B, it is suffice to say that the counsel for the appellant has not been able to bring forth any misreading of evidence. It has further been submitted that inadmissible evidence has been read. I do not find any inadmissible evidence has been taken into consideration by the Courts below while arriving at the conclusion.

As regards question No.C, no doubt the onus to prove the alleged agreement to sell is upon the plaintiff. The plaintiff has led sufficient evidence to prove the execution of the agreement to sell. Section 60 of the Registration Act is dealing with certificate of registration. The agreement to sell is not a registered document.

Question No.D is with respect to the time being essence of the contract. A reading of the agreement would show that no date for

registration of the sale deed was fixed. Out of total sale consideration of ₹1,00,000/-, ₹80,000/- was paid and possession was delivered. As per Article 54, the cause of action to file the suit for specific performance starts from the date fixed for the performance and if no such date is fixed, when the plaintiff has notice of refusal to perform. Therefore, Question No.D is answered as referred above.

Question No.E is with regard to the reference to the written arguments filed by the appellant. The Learned First Appellate Court after appreciating the evidence available on the file and after considering all aspects of the case, dismissed the appeal filed by the appellant. Merely because factum of filing of written arguments has not been noticed, would not vitiate the judgment.

Question No.F as framed is not question of law. It is a question of fact. Concurrently the Courts appreciated the evidence available on the file and arrived at a findings of fact.

Question No.G is with regard to the admissibility of affidavit Ex.P4. It is only a piece of evidence. There is other material available on the file to prove the case setup by the plaintiff. Further when Ex.P4 was exhibited in evidence, no objection was taken. Hence, the question is answered against the appellant.

Question Nos.H, I and K are not questions of law. Question No.J has already been answered in detail in the earlier part of the judgment.

Taking into consideration the facts and circumstances of the evidence available on the file, as also the judgment passed by the Courts below, I do not find any reason to interfere with the findings of the fact

arrived at by the Courts.

Taking into consideration that balance of amount of ₹20,000/- was agreed to be paid in the year 1983 and 34 years had elapsed, therefore, the judgment and decree passed by the Courts below are modified by directing the plaintiff to pay the amount of ₹20,000/- alongwith interest at the rate of 9% p.a.

For the reasons recorded above, appeal filed by the appellant is ordered to be dismissed.

16.08.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No