

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

RSA No.1504 of 2011 (O&M)

Date of Decision: January 24, 2017

Multan Singh

..Appellant(s)

Versus

Suresh Kumar

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Ravinder Malik, Advocate
for the appellant.

Mr. Keshar Partap Singh, Advocate
for the respondent.

ANITA CHAUDHRY, J.

CM-4189-C-2011

The application is allowed, deficiency of Court fee has
already been made good.

CM-4190-C-2011

For the reasons set out in the application, same is
allowed as prayed for and delay of 203 days in refileing the present
appeal is condoned.

CM-4191-C-2011

For the reasons set out in the application, same is
allowed as prayed for and delay of 29 days in filing the appeal is
condoned.

MAIN CASE

The defendant is in regular second appeal against the judgment and decree passed by the Courts below.

In brief, the facts of the case are that the plaintiff filed a suit for specific performance alleging therein that defendant had entered into an agreement dated 03.01.2000 and agreed to sell 1 Kanal 6 Marlas out of land measuring 6 Kanal 11 Marla, situated in Darra Kalan, Thanesar, District Kurukshetra. The land was agreed to be sold for Rs.60,000/- and the defendant had received Rs.50,000/- as earnest money in the presence of the witnesses. The agreement to sell was got typed at the instance of the defendant and it was signed by the defendant. Nasib Singh, Lambardar and Mahabir Singh s/o Ram Kumar were the attesting witnesses. Thereafter, the agreement was attested by the Notary Public at Kurukshetra. The plaintiff claimed that the defendant had put his signatures after understanding the contents of the same. It was claimed that the plaintiff was ready and willing to perform his part of the agreement and the defendant had failed to perform his part of the agreement. It was also pleaded that the possession of the suit land had been handed over to the plaintiff and he was still ready to perform his part of the agreement. The plaintiff claimed that he went to the office of the Sub-Registrar on 30.11.2000 along with balance sale consideration and waited for the defendant throughout the day but the defendant did not turn up and the plaintiff got his presence marked and got an affidavit attested from the Magistrate showing his readiness and willingness. The plaintiff met the defendant in the village and tendered

the balance sale consideration and requested him to execute the sale deed but the defendant refused. The plaintiff sent a legal notice through his lawyer and asked the defendant to execute the sale deed within 15 days but the defendant refused and the registered envelop was received by him. The plaintiff again visited the defendant and asked him to execute the sale deed but he kept on postponing the matter on one pretext or the other and finally refused to admit the claim and threatened to alienate the suit land to some other person and therefore, the suit was filed. It was pleaded that the plaintiff was entitled to a decree for specific performance and if for some reason, the Court came to the conclusion that he was not entitled to the decree then in that eventuality a decree for recovery of Rs.1 lac as damages should be awarded.

The defendant took the plea that the agreement was false and fake and he had not executed any agreement to sell nor he had received any advance money. It was pleaded that the agreement to sell was fictitious and a bogus document. It was also pleaded that he had never gone to the seat of the Notary. It was pleaded that the plaintiff had forged the agreement on a paper which was got signed for an affidavit and it did not bear his signatures and it has been fabricated in collusion with the witnesses. It was pleaded that he did not know any Mahabir of village Jogna Khera. It was pleaded that he was still in possession of the property and the Girdawari was in his name and the suit should be dismissed with heavy costs.

On the pleading of the parties, following issues were framed:-

1. Whether agreement to sell dated 3.1.2000 was ever executed in between the parties, as alleged? OPP
2. Whether if issue no.1 is proved, then plaintiff is ready and willing to perform his part of contract? OPP
3. Whether present suit is not maintainable? OPC
4. Whether plaintiff has no locus standi to file the present suit? OPD
5. Whether plaintiff has not come in the court with clean hands and twisted true and material facts from the court? OPD
6. Whether plaintiff is estopped by his own act and conduct from filing the present suit? OPD
7. Whether present suit is hopelessly time barred? OPD
8. Relief.

The plaintiff examined himself, Balwan Singh and Wajir Chand. The evidence of the plaintiff was closed by Court order. An application for additional evidence was moved by the plaintiff, which was dismissed. A revision was preferred against the order and this Court granted one opportunity to the plaintiff to produce his evidence. The plaintiff examined Wajir Chand Juneja whereas Mahabir was given up as having been won over.

The defendant on the other hand examined himself and placed some documents.

An application was subsequently moved by the plaintiff for examining a Handwriting Expert when the case was at the rebuttal stage. That application was dismissed by the trial Court.

The trial Court gave a finding that the plaintiff had been able to prove the execution of the agreement and the plaintiff was successful in proving that the plaintiff was ready and willing to perform his part of the contract and a decree for specific performance was passed.

The appeal preferred by the defendant did not find favour and was dismissed.

Not satisfied, the defendant has filed this appeal seeking reversal of the judgments of both the Courts below.

I have heard the counsel of both the sides and have perused the record.

The submission on behalf of the appellant is that the initial onus to prove that the agreement was executed was upon the plaintiff and both the Courts below failed to notice that the attesting witness to the agreement had not been examined and there is no evidence that any sale consideration had paid and the defendant had denied his signatures and no attempt was made by the plaintiff to prove that the signatures on the agreement were of the defendant. It was urged that the statement of the witnesses have not been gone into by the first Court or by the appellate Court. It was urged that the plaintiff had claimed that one of the attesting witness had died but that fact had not been proved. It was urged that the plaintiff had examined Balwan Singh who is said to have scribed the agreement but his signatures are not there on the agreement to sell nor any entry had been made in his register. It was urged that the

Notary Public who is said to have attested the agreement had stated that no consideration had paid in his presence and there was no entry in his record that he had attested the agreement. It was urged that the manner in which the signatures of Multan Singh have been shown at two places shows that the signatures were taken for preparation of an affidavit and the agreement does not contain the signatures of the plaintiff and it is the defendant who is recorded to be in possession. It was urged that to prove the execution it was necessary to call an attesting witness if he was alive and capable of giving evidence and the document is not registered and since the plaintiff had not produced the relevant witnesses an adverse interference should have been drawn against him. Reliance was placed upon *Smt. Dilboo by Lrs. Vs. Smt. Dhanraji* 2000 AIR (SC) 3146, *Ishwar Dass Jain through Lrs Vs. Sohan Lal through Lrs* 1999(2) RCR (Rent) 714, *Hakan Singh Vs. Gurdev Singh* 199(4) RCR (Civil) 210, *Shiv Charan Vs. Siri Ram and another* 2008(3) RCR (Civil) 454 and *Ram Ratan Misra and another Vs. Smt. Bittan Kaur* 1980 AIR (Allahabad) 395.

The submission on the other hand is that one of the attesting witnesses had died and they wanted to examine Mahabir who was present in the Court when the case was fixed for plaintiff's evidence but talks of compromise were going on and the witnesses could not be examined and the evidence of the plaintiff was closed and thereafter an application was moved and the High Court in revision had given them one opportunity but Mahabir could not be present on that

day. It was urged that the defendant had admitted that Nasib had died. The counsel sought to refer to the statement made by the defendant but was unable to show any admission. Continuing with the submission, it was urged that there are two signatures on the agreement as the Notary Public had asked him to sign the document again in his presence and that is why the second signatures were put by the defendant. It was urged that the initial onus was on the plaintiff which had been discharged and the onus had shifted to the defendant. It is also submitted that the agreement to sell can be oral and the defendant had not pleaded his readiness and willingness nor had appeared before the Sub-Registrar and the relief was rightly granted to the plaintiff. Reliance was placed upon *Anil Rishi Vs. Gurbaksh Singh 2006(3) CCC 243 (SC) and Panchanan Dhara & Ors. Monmatha Nath Maity through LRs. 2006(3) CCC 358 (SC)*.

The plaintiff had set up an agreement to sell Ex. P-1, which is alleged to have been signed by the defendant Multan Singh. The date of execution is stated to be 03.01.2000. The agreement was said to have been attested by Nasib Singh, Lamberdar of Alampur and Mahabir Singh r/o village Jogna Khera. The burden of proof was on the plaintiff to prove the execution. The plaintiff failed to examine any of the attesting witnesses instead the plaintiff examined supposedly the scribe whose signatures or initials are not on Ex.P-1. It could be understood that the document could have been typed and therefore, the signatures were not necessary but the so called scribe did not make any entry in

his register. There is no explanation why the entry was not made in the register by Balwan Singh PW2. Balwan Singh was categorical that no amount had been paid in his presence. He had admitted that he knew only Suresh and not the defendant. He has admitted that the document Ex.P1 has been signed at two places by Multan Singh, which are usually done when an affidavit is prepared. Balwan Singh is a typist when the parties were in the Tehsil. He is not a regular scribe and there is no explanation why the agreement was got typed from a typist. The agreement is said to have been got typed by Multan Singh and Balwan Singh had stated that he did not know Multan. The plaintiff had failed to prove that the agreement had been typed by Balwan Singh and this piece of evidence has to be rejected.

It is well settled that the plaintiff has to stand on his own legs and had to prove his case by leading cogent and convincing evidence to succeed in his claim and he could not take the benefit of the deficiency of the defendant. The defendant had categorically pleaded in the written statement that he had not signed the agreement and he had stated on oath that it did not bear his signatures. The burden of proof was on the plaintiff to prove the agreement. The plaintiff failed to examine any attesting witnesses. He even failed to examine the Handwriting Expert. The plaintiff in his affidavit had stated that one of the attesting witnesses namely Nasib Singh had died but the death certificate was not produced nor his children were summoned to depose that he was no more. As regards the other attesting witness, he was not

examined and was given up as being won over by the defendant. There is a presumption that had they been examined, they would not have supported the party who was required to produce them and an adverse inference under Section 114 of the Evidence Act can be drawn. Both the Courts below had ignored the fact that the attesting witness to the agreement had not been examined. They failed to notice that there was no scribe of this document and the Notary Public who had attested the document did not make entry regarding this agreement in his register and he also failed to explain why it was not entered in his record. The reason is clear. The attestation could have been got done much later and therefore, the Notary could not make an entry in his register on that day. His evidence has also to be rejected.

The plaintiff had averred that he was in possession of the property, however, the revenue record shows the possession of the defendant. The agreement is shrouded with mystery and the agreement is suspicious. It is held that the plaintiff who was bound to produce the best evidence had failed to produce the witnesses. The execution of the agreement had not been proved and an adverse inference had to be drawn against the party who had not produced the best evidence. In the present case, the onus to prove issue no.1 was on the plaintiff. He was supposed to prove the due execution of the agreement. The agreement was not scribed by a regular scribe, even the conduct of the plaintiff does not inspire confidence. The vendee had not been able to prove that any consideration had been paid and I am constrained to interfere

in the concurrent finding recorded by the Courts below in favour of the plaintiff. The finding recorded by both the Courts below are set aside. The appeal is allowed and the suit filed by the plaintiff is dismissed with costs.

(ANITA CHAUDHRY)
JUDGE

January 24, 2017
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No