

RSA No. 1872 of 2015 (O&M)

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

**RSA No. 1872 of 2015 (O&M)
Date of Decision: 21.7.2017**

Narender

.....Appellant

Vs.

Sumitra Devi and another

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

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

RAMESHWAR SINGH MALIK J. (ORAL)

Unsuccessful defendant No.2 is in regular second appeal, against the concurrent findings of facts recorded by both the learned courts below, whereby suit of the plaintiff for possession by way of specific performance of the agreement to sell dated 29.1.2008 was partly decreed, denying the relief of specific performance and granting alternative relief of recovery of earnest money.

Brief facts of the case, as recorded by the learned first appellate court in para 3 of its impugned judgment, are that plaintiff Sumitra filed instant suit against defendants Nirmal Singh and Narender Singh seeking specific performance of the agreement to sell bearing registration No.2298 dated 29.1.2008, registered with Sub Registrar, Safidon, District Jind in respect of house area measuring 184 sq. yards, as detailed in the head note of

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the plaintiff. She averred that the defendants were owners of the suit property and had agreed to sell the same to her for total sale consideration of ₹4,99,000/- vide agreement to sell dated 29.1.2008, registered with Sub Registrar, Safidon at serial No. 2298. It was scribed by Ajit Singh deed writer and attested by Kuldeep and Om Parkash Lambardar. A sum of ₹4,90,000/- was paid to the defendants as major part of consideration of sale price in the presence of scribe and the witnesses. The defendants, in part performance of this agreement, delivered possession of the suit property to the plaintiff and sale deed was agreed to be executed on 3.11.2008 in favour of the plaintiff by the defendants after receiving balance sale price. It was agreed that in case defendants failed to execute the sale deed then the plaintiff shall have right to get the sale deed executed through the court.

She further averred that on 3.11.2008 she purchased non judicial stamps of ₹24,950/- for the purpose of execution of sale deed and got her presence marked in the office of Sub Registrar, Safidon, by moving application and affidavit. She remained there with the balance sale consideration and registration charges. The defendants did not turn up to execute the sale deed. She had always been ready and willing to perform her part of the agreement to sell. She had to pay only balance sale consideration of ₹9000/-. She further pleaded that possession of the suit property had been delivered to her yet the defendants got succeeded in getting FIR No.364 of 2008 under Sections 323, 448, 506, 147, 149 IPC with Police Station, Safidon registered against her and others. She further pleaded that the defendants were powerful persons had support of musclemen, gunda elements and local police. She requested the defendants many a times to admit her claim but of no avail, which necessitated her to file the present

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suit.

Defendants were put to notice. They appeared and filed their contesting written statement, raising more than one preliminary objections. On completion of pleadings of the parties, the learned trial court framed the following issues:-

1. Whether the plaintiff is entitled for specific performance as well as injunction, as alleged?OPP
2. Whether the suit of the plaintiffs is not maintainable in its present form?OPD.
3. Whether the suit of the plaintiff has got no cause of action and locus standi to file the present suit?OPD.
4. Whether the plaintiff is suppressing the true and material facts from the court?OPD
5. Whether the plaintiff is estopped from filing the present suit by her own act and conduct?OPD.
6. Relief.

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, the learned trial court came to the conclusion that plaintiff could not prove her readiness and willingness to perform her part of contract. Accordingly, suit of the plaintiff for possession by way of specific performance of the agreement to sell dated 29.1.2008 was partly decreed by the learned trial court on 28.2.2012, for returning earnest money along with interest.

Both the parties felt aggrieved against the judgment and decree passed by the learned trial court. Plaintiff filed her first appeal for decreeing her suit in toto, whereas the defendants filed their first appeal for setting aside the abovesaid judgment and decree of the learned trial court, whereby

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alternative relief was granted to the plaintiff. Both the appeals came to be dismissed by the learned first appellate court, vide its common impugned judgment and decree dated 8.1.2015. Hence this regular second appeal at the hands of defendant No.2

Heard learned counsel for the appellant-defendant No.2.

An agreement to sell dated 29.1.2008 was executed between the parties which was recorded at serial No. 2298 in the register of the office of Sub Registrar. This agreement to sell was proved by the plaintiff on record as Ex.P-1. Target date for execution of the sale deed was 3.11.2008. Out of total amount of sale consideration of ₹4,99,000/-, an amount of ₹4,90,000/- had been paid by the plaintiff to the defendants at the time of agreement to sell.

On the target date, i.e. 3.11.2008, plaintiff came present in the office of Sub-Registrar and she also purchased non judicial stamps worth ₹24,950/- for the purpose of getting the sale deed registered. However, sale deed could not be executed because the defendants did not come present in the office of Sub-Registrar. It was also the pleaded case on behalf of the plaintiff that since major part of the sale consideration had been paid on the date of agreement to sell, possession over suit property had been handed over to her by the defendants.

It was further pleaded case of the plaintiff that defendants being powerful persons, sought to dispossess her with police help and they also illegally got registered FIR No. 364 of 2008 against the plaintiff under Section 323/448/506/148/149 IPC, which would show that defendants were proceeding on their common malafide approach right from day one. After properly appreciating the quality of evidence as well as pleadings of the

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parties, learned trial court came to the conclusion that so far as the main relief of specific performance was concerned, plaintiff was not entitled for the same. Under these circumstances, learned trial court was well justified in granting alternative relief for returning the earnest money along with interest. Having said that, this Court feels no hesitation to conclude that the learned trial court was well within its jurisdiction to pass the impugned judgment and decree and the same deserve to be upheld.

Similarly, learned first appellate court committed no error of law, while dismissing both the appeals filed by the plaintiff as well as defendants, upholding the abovesaid judgment and decree dated 28.2.2012 of the learned trial court. It is so said, because the learned Additional District Judge rightly examined, considered and appreciated true facts as well as evidence in the correct perspective, before arriving at his judicious conclusion.

Even the witness of the defendant-appellant, who appeared as DW-1 namely Naresh admitted, in his cross-examination that target date for registration of sale deed was fixed as 3.11.2008. The main plank of the defendants was that there was another agreement to sell and they had returned the amount of Rs. 5,50,000/- to the plaintiff before the target date. However, this stand taken by the defendants has been found wholly misplaced for the reason that neither they have placed on record said second agreement to sell in their evidence, nor any receipt of payment of ₹5,50,000/- was brought on record.

It does not appeal to reason that defendant-appellant would pay an amount of Rs. 5,50,000/- without insisting for the receipt thereof. Once the defendants-appellant could not prove the payment of either ₹5,50,000/-

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pertaining to the alleged second agreement to sell or payment of ₹4,90,000/- pertaining to the agreement to sell in question (Ex.P1), the learned courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld, for this reason also.

While deposing before the court, DW1, Naresh, could not give any reasonable explanation about the alleged payment of either ₹5,50,000/- or ₹4,90,000/-, because there was no receipt of either of these amounts. In fact, this witness expressed his inability to tell anything about the receipt of payment allegedly made by defendant-appellant to the plaintiff-respondent. In this view of the undisputed fact situation, it can be safely concluded that the impugned judgments and decrees are well justified on facts as well as in law and the same deserve to be upheld, for this reason also.

Before arriving at a judicious conclusion, learned Additional District Judge rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct perspective. Relevant and cogent findings recorded by the learned first appellate court in para 15 and 16, which deserve to be noticed here, read as under:-

“ The evidence led by the plaintiff would indicate that she has proved due execution of the agreement to sell by way of examining scribe/deed writer Ajit Singh PW1 and also attesting witness Kuldeep PW2. The deposition of PW2 Kuldeep, attesting witness to Ex.P1, cannot be doubted merely on account of his being real brother of the plaintiff. If the defendants wanted to create any doubt regarding due execution of the agreement to sell

Ex.P1 then they could have examined another attesting witness Om Parkash Lambardar in their defence. The version of the defendants that agreement to sell was executed as collateral security could not be substantiated by them in any manner. There is nothing on record that plaintiff and her brother had opened any jewellery shop or that defendants had also joined therein. The pleadings are totally silent as to when jewelery shop was opened, where, name and style and when said business was closed. During cross examination DW2 Narender admitted that in Ex.P1 there was mention regarding house and due date of registry was fixed as 3.11.2008. He has given evasive reply that he was not aware if plaintiff had given them Rs. 4,90,000/- as consideration. He also showed ignorance that Ex.P1 was drafted by Ajit Singh deed writer. Furthermore, there is nothing to indicate that Ex.P1 was drafted as security. The defendants cannot take any benefit from receipt-cum-agreement Mark DA as original thereof was not produced. Furthermore, in absence of any record that there was some joint jewellery business between the parties, mark DA also loses its significance. Furthermore, defendant himself has not come with clean hands as to whether there were two agreements or one agreement or if agreement got signed by them was returned to them or not. In view of the evidence led by

the plaintiff which could not be rebutted by the defendants coupled with the fact that agreement to sell in question is registered document and the title deed i.e. original gift deed, Ex.P3, indicating ownership of the defendants was produced by the defendants. The pleadings of the defendants are totally silent if they had also given their original gift deed, Ex.P3, to the plaintiff or not and if they had not given the same to the plaintiff then how the plaintiff came to possess the same and has produced the same on record.

An effort was made to dent the case of the plaintiff that plaintiff failed to prove delivery of amount of Rs.4,90,000/- as witnesses are discrepant on that aspect and there is no reference in the endorsement of Sub Registrar on the agreement to sell that any sale consideration was paid. Since the agreement to sell is registered and the defendants have failed to rebut the evidence adduced by the plaintiff coupled with the fact that it is mentioned in the agreement to sell Ex.P1 itself that defendants have already received Rs.4,90,000/- and further that in the endorsement of Sub Registrar it is also mentioned that parties had agreed regarding payment and receipt of the amount as mentioned in the agreement, it is observed that due payment of the consideration mentioned in the agreement to sell has also been proved.”

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During the course of hearing, learned counsel for the appellant failed to point out any patent illegality or perversity in either of the impugned judgments passed by the learned courts below. He also could not refer to any question of law much less substantial question of law, which is sine qua non for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179**.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

21.7.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No