

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

R. S.A. No. 1931 of 2015 (O&M)

Date of Decision:- 27.03.2017

Gurdeep Singh

....Appellant

VS.

Sarwan Singh

....Respondent

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Vipin Mahajan, Advocate,
for the appellant.

DAYA CHAUDHARY, J.

The present regular second appeal has been filed to challenge judgments and decrees dated 16.12.2009 passed by the trial Court as well as dated 10.07.2014 passed by the Lower Appellate Court.

Briefly the facts of the case are that plaintiff-respondent filed a suit for possession by way of specific performance against defendant-appellant pertaining to land measuring 8 Kanals comprised in Khewat No.51 Khatauni No. 104, Khasra No. 45, Killa No. 23/1 (1-14), 23/2 (6-16) situated in the revenue estate of Village Chopra, Tehsil and Distt. Gurdaspur in pursuance of agreement to sell dated 1.12.2003 with alternative relief of recovery of the amount of ₹ 1,60,000/- as damages and compensation. Said suit was decreed in favour of the plaintiff with costs and defendant was directed to execute the sale deed in favour

of the plaintiff within a period of one month from the date of passing of judgment, failing which, the plaintiff was also held entitled to get the sale deed executed through the competent Court of law vide judgment and decree dated 16.12.2009.

Feeling aggrieved, the appellant-defendant approached the Lower Appellate Court by way of filing appeal which was also dismissed vide judgment and decree dated 10.7.2014.

After losing before both the Courts below, the present appeal has been filed by the appellant-defendant-Gurdeep Singh.

Applications bearing C.M. No.5128-C of 2015 and C.M. No. 5127-C of 2015 for condonation of delay of 15 days in filing and 85 days in refiling of the appeal duly supported by affidavits of the appellant have been moved.

For the reasons recorded in the applications, delay of 15 days in filing and 85 days in re-filing of the appeal is condoned.

Learned counsel for the appellant submits that both the Courts below have not properly appreciated the evidence adduced by the appellant. He further submits that issue No. 1 was not properly decided by the trial Court as the statement of respondent-plaintiff PW-1 as well as cross-examination has not been taken into consideration wherein the respondent-plaintiff himself admitted that he asked the appellant-defendant to refund the principal amount only. Learned counsel further submits that the trial Court has not taken into consideration the statements of the witnesses examined by the plaintiff-respondent himself whereby in his cross-examination he has stated that he did not take possession from the

appellant which was given to him on lease basis and he was ready to get the sale deed executed after adjustment of the lease amount. Learned counsel also submits that no averment was made in the agreement to sell and no lease deed was produced by the respondent in the Court. The statement of the plaintiff clearly shows that respondent was not ready and willing to perform his part of contract as per the terms and conditions of the agreement to sell in question. Accordingly, the respondent-plaintiff was not entitled for decree of specific performance. It is also the argument of learned counsel for the appellant that it was admitted by the respondent himself and other witnesses that they were in process of effecting compromise for repayment of loan amount but the trial Court has not considered this aspect. Instead of passing money decree, the decree for specific performance of agreement to sell the land was passed. Learned counsel also submits that PW-2, who was an attesting witness of the agreement to sell, has stated in his cross examination that a compromise was arrived at between the parties and the appellant was asked to pay the principal amount only. The statement of PW-2 itself shows that the intention of the parties to execute the agreement was not to sell/purchase any land as it was only a loan transaction.

Heard arguments of learned counsel for the appellant and have also perused the judgments of both the Courts below as well as evidence available on the record.

Facts relating to filing of suit by respondent-plaintiff and decree passed in his favour and thereafter filing of appeal by the present appellant and dismissal thereof are not disputed.

The trial Court framed the following issues:-

- “1. Whether the defendant entered into an agreement to sell for sale of the suit property to the plaintiff ? OPP
2. If issue no. 1 is proved, whether the Plaintiff is entitled to relief of possession by way of specific performance of the agreement to sell dated 01.12.2003 ? OPP
3. If issue No. 2 is proved, whether the Plaintiff is entitled to the relief of recovery of Rs. 1,60,000/- as claimed ? OPP
4. Whether the defendant had executed the document in favour of Plaintiff in token of his being surety for repayment of loan amount of Rs. 30,000/- advanced by Plaintiff ? OPD
5. Relief.”

While allowing the suit of the plaintiff, the following findings have been recorded:-

“I have heard the submissions of the learned counsel for both the parties and also gone through the entire material on record and I have found that Plaintiff has surely proved his case by examining Plaintiff witnesses who have duly proved on record that Gurdeep Singh had entered into an agreement dated 01.12.2003 in favour of Plaintiff Sarwan Singh for total Sale consideration of Rs. 1,25,000/- and he received Rs.

80,000/- as earnest money in the presence of Jagir Singh and Balwinder Singh who are the attesting witnesses of the agreement to Sell Ex. P-1 dated 01.12.2003. Moreover, Plaintiff has also proved on record copy of legal notice which was served by him upon the defendant Ex. P-4 vide which he had asked the defendant to get sale deed executed on 30.11.2004 and in pursuance of that the Plaintiff remained in the office of Executive Magistrate again on 21.12.2004. Moreover, in suit for specific performance of agreement to Sell it is also the requirement of law that besides the other essential ingredients of agreement as per Indian Contract Act, it is also to be proved that Plaintiff was ready and willing to perform his part of contract. The document Ex. P-3 and Ex. P-6 has proved on record that Plaintiff was present before the Executive Magistrate on 30.11.2004 and 21.12.2004. As the witnesses examined by the Plaintiff have duly proved the execution of the agreement to sell. It has been proved on file that the defendant entered into the said agreement with the Plaintiff on 01.12.2003. Moreover, defendant has not challenged his signatures on the agreement to Sell Ex. P-1. It was upon the defendant to prove that the Plaintiff has forged or fabricated said document Ex. P-1, however, defendant has not examined any witness to falsify the document Ex.

P-1. Hence, document Ex. P-1 has been proved on record as lawful agreement by the Plaintiff and the other witnesses examined by the Plaintiff. Hence, once lawful agreement proved on record equity demands that it should be enforced. Accordingly, issues Nos. 1 and 2 are decided in favour of Plaintiff and against the defendant.

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16. Onus to prove this issue was placed upon the defendant but to discharge the onus under this issue, the defendant has not brought forward any evidence. However, during the course of arguments counsel for defendant submitted that plaintiff had given Rs. 30,000/- as loan to one Muslim Rafique but the said loanee has also not been brought forward by the defendant to prove his averments. Therefore, there is nothing on record brought by the defendant to prove that defendant had executed document in favour of Plaintiff in token being surety of repayment of loan amount. Hence, defendant has failed to prove this issue, accordingly, this issue is decided against the defendant and in favour of Plaintiff.”

Similarly the findings recorded by the Lower Appellate Court are as under:-

“15. Perusal of record of learned Lower Court to

my mind leaves no scope with this Court to interfere in the impugned Judgment and decree except to the extent to clarify the operative part thereof where clause regarding payment of balance sale price remained to be included. The suit filed was for possession of suit property by way of specific performance of an agreement to sell dated 01.12.2003. Plaintiff PW1 and attesting witness PW-2 proved this document as Ex. P1 on the file. PW-3 is its scribe. They have testified on these lines. In written statement appellant/defendant has half heartedly admitted having executed this document in favour of respondent/plaintiff. He was well aware of the fact that it was an agreement to sell when he claimed that the parties had no intention to actually sell/purchase involved property. It is not in his pleadings that he had no knowledge regarding contents of this agreement Ex.P1. His lame excuse is that actually it was document executed by him as a surety regarding alleged loan of Rs. 30,000/- raised by one Rafique from respondent/plaintiff. Said Rafique is not a DW here. His whereabouts are not disclosed in the written statement. Even his parentage is not included there. There is no document worth the name on file showing if ever he had raised a loan of Rs. 30,000/- much less from the plaintiff. Learned Lower Court

rightly did not accept such pleadings which eventually remained unproved. The version in cross-examination of PW1 that he had approached defendant to even return the earnest money cannot give any benefit to the defendant when this piece of deposition does not infer that plaintiff had given up his relief of specific performance or that he had conceded that agreement Ex.P1 only was a document as surety of loan. Similar is my view regarding his deposition in cross-examination that he had given involved property back to appellant/defendant on lease, especially when it is neither in the pleadings of parties nor there is any document in this regard. Over and above all, title of plaint and particulars show that plaintiff is yet to have possession of property in dispute.

16. Learned counsel for appellant has then referred to a Judgment **1995 (2) Civil Court Cases 001 (S.C.) reported in S. Rangaraju Naidu vs. S. Thiruvarakkarasu,** vide which our Hon'ble Apex Court had held that in a suit for specific performance, where plaintiffs are money lenders, dominant object is to recover the dues, the court is not bound to grant decree for specific performance and hence alternative relief of refund of money was granted with simple interest at the rate of 12% per annum. In the

case in hand there is no plea of plaintiff being a money lender. No benefit can be drawn from this Judgment by defendant. Furthermore, he has failed to prove on file that any person with name Rafique had raised a loan of Rs. 30,000/- from appellant ever or that document Ex. P1 was executed by him only as a surety to such loan transaction or that there was no intention for sale/purchase of involved property.”

On perusal of findings recorded by both the Courts below, it transpires that admittedly suit was filed for possession of the suit property by way of specific performance of agreement to sell dated 01.12.2003. Plaintiff while appearing as PW-1 and attesting witness while appearing as PW-2 proved the execution of document Exhibit P1 which has further been corroborated by PW3 who is the scribe of the document.

The stand of defendant that agreement Exhibit P-1 was a document executed by him as a surety regarding loan of ₹ 30,000/- raised by one Rafique from respondent-plaintiff but said Rafique was not the defendant what to talk of his parentage, s even his whereabouts were not mentioned in the written statement. It was not proved on record that loan of ₹ 30,000/- was ever raised from plaintiff. The plaintiff proved on record the execution of agreement to sell dated 1.12.2003 while appearing as PW1 and by producing attesting witness as PW2.

From perusal of findings recorded by both the Courts, it transpires that the plaintiff-respondent has proved the agreement to sell and specific findings have been recorded by both the Courts below.

Accordingly, there is no force in the arguments raised by learned counsel for the appellant and the appeal being devoid of any merit is hereby dismissed.

March 27, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes