

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2186 of 2015 (O&M)
Date of decision: 23.08.2017

Shinder Kaur and others

... Appellants

Vs.

Gurnam Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. Ashok Bhardwaj, Advocate
for the appellants.

RAMESHWAR SINGH MALIK, J. (ORAL)

Unsuccessful plaintiffs are in regular second appeal against the concurrent findings of facts recorded by both the learned Courts below, whereby their suit for specific performance of agreement to mortgage dated 10.11.2005, was dismissed by the learned trial Court vide its impugned judgment and decree dated 18.05.2012 and their first appeal was also dismissed by the learned Additional District Judge vide impugned judgment and decree dated 20.11.2014, upholding the impugned judgment and decree of the learned trial Court.

Brief facts of the case, as noticed by the learned first appellate Court in para 2 of its impugned judgment, are that defendant was owner of the house measuring 9.55 marlas or 286.55 square feet in village Dhadrian. The defendant agreed to mortgage his house for ₹50,000/- with the plaintiff vide agreement to mortgage dated 10.11.2005 and received ₹40,000/- as earnest

money. The date for registration of mortgage deed was fixed as 15.05.2006, on payment of balance amount. The possession was delivered to the plaintiff at the time of agreement dated 10.11.2005 and plaintiff was in possession of the property in dispute. Plaintiff was always ready and willing to perform her part of agreement. On 15.05.2006, the plaintiff remained present in the office of Sub Registrar Longowal along with balance sale consideration, but defendant did not come present. Plaintiff filed suit for mandatory and permanent injunction. The defendant appeared in that suit and filed written statement. Few days before filing of suit, plaintiff again requested the defendant to execute mortgage deed as per terms of agreement but he refused. She prayed for specific performance of agreement to Mortgage dated 10.11.2005 and in the alternate, for recovery of ₹40,000/- paid as earnest money with interest and also sought injunction restraining the defendant from alienating the disputed house or dispossessing the plaintiff forcibly from the house.

Having been put to notice, defendant appeared and filed his contesting written statement, raising more than one preliminary objections. He specifically pleaded that the plaintiffs earlier filed suit for mandatory and permanent injunction bearing Civil Suit No.206 of 27.05.2006. Said suit was filed after alleged date of registration of mortgage deed i.e. 15.05.2006. Defendant took the plea that the present suit was barred under Order 2 Rule 2 of the Code of Civil Procedure (for short 'CPC'). On completion of pleadings of the parties, learned trial Court framed the following issues: -

1. Whether defendant executed an agreement to mortgage dated 10.11.2005 in favour of plaintiff for consideration? OPP.

2. Whether plaintiff is entitled to specific performance of agreement of mortgage dated 10.11.2005? OPP.
3. If issue No.2 is not proved whether plaintiff is entitled to alternative relief of recovery of Rs.40,000/- along with interest, as prayed for? OPP.
4. Whether plaintiff is entitled to permanent injunction as prayed for? OPP.
5. Whether suit is not maintainable in the present form? OPD.
6. Whether plaintiff has got no cause of action to file the present suit? OPD.
7. Whether plaintiff has not come to the Court with clean hands? OPD.
8. Relief.

In order to prove their respective stands taken in their pleadings, both the parties brought on record their documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, learned trial Court came to the conclusion that plaintiffs have miserably failed to prove their pleaded case. Accordingly, suit of the plaintiffs was dismissed by the learned trial Court vide its impugned judgment and decree dated 18.05.2012. Plaintiffs filed their first appeal, which also came to be dismissed by the learned Additional District Judge vide impugned judgment and decree dated 20.11.2014. Hence this regular second appeal, at the hands of unsuccessful plaintiffs.

Heard learned counsel for the appellants.

As noticed hereinabove, plaintiffs-appellants earlier filed suit for mandatory and permanent injunction qua this very property against this very defendant-respondent. It is a matter of record that said suit was filed by the plaintiffs after the alleged execution of agreement to mortgage between the parties. Once the plea and relief now being taken and sought by the plaintiffs was very much available to them at earlier point of time, when they filed their earlier suit for mandatory and permanent injunction, provisions of law contained in Order 2 Rule 2 CPC would be immediately attracted against the appellants. Having said that, this Court feels no hesitation to conclude that the learned Courts below were well within their jurisdiction to pass their respective impugned judgments and decrees and the same deserve to be upheld.

When confronted about the factual as well as legal aspect of the matter, learned counsel for the appellants had no answer and rightly so, it being a matter of record. Further, the learned Courts below have rightly considered true facts of the case as well as the evidence available on record in support of their cogent and concurrent findings. There was hardly any scope for the plaintiffs to avoid the mandate of law contained in Order 2 Rule 2 CPC. That is what has been held by both the learned Courts below. Under these undisputed facts and circumstances of the case, it can be safely concluded that 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.

Before arriving at his judicious conclusion, the learned Additional District Judge rightly examined, considered and appreciated true facts of the

case as well as evidence brought on record, in the correct perspective. The relevant and cogent findings recorded by learned first appellate Court in paras 11 to 13 of the impugned judgment, which deserve to be noticed here, read as under: -

“Now plaintiff has filed suit for specific performance of agreement of mortgage regarding house executed by defendant dated 10.11.2005. The defendant has denied having executed any agreement, rather pleaded that he purchased two houses i.e. disputed suit and other suit from the plaintiff on 07.11.2005 i.e. just three days before alleged agreement and there is no question of mortgaging the house with plaintiff. The plaintiff has not filed replication to rebut the version of defendant. Plaintiff in order to prove his case has examined only himself. In his cross-examination he admitted having sold two houses to defendant vide sale deed dated 07.11.2005 and that defendant had become owner in possession of the houses. He stated that agreement was scribed by Sat Pal deed writer and was got entered with the office of Sub Registrar. However, perusal of agreement shows that it was never got registered with the office of Sub Registrar nor any such affidavit has been placed on the file. He admitted that deed writer entered this agreement in his register. There is further question whereby he denied if agreement was scribed by some other person and not by Sat Pal deed writer. However it does not mean that defendant has admitted execution of agreement. Defendant has

examined Buta Singh Lambardar, who has proved sale deed dated 07.11.2005. As per agreement in question, this witness had also witnessed the agreement in question but no question has been put to him regarding the agreement in question. The counsel for the appellant would argue that plaintiff had filed criminal complaint against defendant and these witnesses Ex.P2 and therefore they could not depose in their favour. However it was incumbent upon the plaintiff to put this document to this witness in his cross-examination, when he appeared as DW1. Similarly this document has not been put to deed writer Sat Pal Sharma. The defendant in his cross-examination admitted signatures of Buta Singh on the agreement Ex.P1. He denied if he has put his thumb impression on the agreement. Plaintiff has not examined any expert witness to prove if agreement in question bears the thumb impression of defendant..From the above said evidence discussed above, the plaintiff/appellant has failed to prove due execution of agreement in question by defendant in his favour.

The defendant has also placed on the file copy of Civil Suit for mandatory injunction filed by plaintiff titled as Sheesha Singh Vs. Gurnam Singh. This suit was filed on 27.05.2006 i.e. after the due date for registration of mortgage deed and also the order dated 13.10.2006 Ex.D6, whereby suit of the plaintiff was dismissed as withdrawn. However, there is no mention if plaintiff was granted permission to file fresh suit regarding the same

subject matter. The cause of action to file suit for specific performance has already arisen when suit for mandatory injunction was filed. The counsel for the respondent has referred to 1988 (1)-Civil Court Cases 567 (P&H)-Surjit Kumar Vs. Anil Kumar, where there was agreement to sell and after due date, suit for permanent injunction was filed. Suit was got dismissed without seeking permission to file suit for specific performance or for recovery of earnest money. Second suit for recovery of earnest money and liquidated damages was held to be barred. He has also cited 1998 (1)-Civil Court Cases-645 (P&H)-Rao Narain Singh Vs. Durga Devi on the same point. He has also cited 2014 (2)-Civil Court Cases-318-(Delhi)-Sucha Singh Sodhi (Deceased) Through Lrs. Vs. Baldev Raj Walia & Anr., where plaintiff earlier filed suit for permanent injunction. Permission was sought to withdraw suit with liberty to file suit for specific performance. The court in its order allowed withdrawal of suit without granting liberty to institute suit for specific performance. It was held that suit for specific performance was barred under order 2 Rule 2 of CPC. The order rejecting the plaint was upheld.

The ratio of these authorities could not be rebutted and are fully applicable to the facts of the present case. The plaintiff had earlier filed suit for permanent injunction after accrual of cause of action to file suit for specific performance. The same was withdrawn without permission to file the suit for specific

performance. Thus the present suit is clearly barred under Order 2 Rule 2 CPC. The learned lower Court has rightly held so and has rightly dismissed the suit of plaintiff.”

During the course of hearing, learned counsel for the appellants failed to point out any patent illegality or perversity in the impugned judgments and decrees 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 the 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 **Narayanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (5) SCC 264.**

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 present regular second appeal is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No ground 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.

[RAMESHWAR SINGH MALIK]
JUDGE

23.08.2017

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No