

**HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT
CHANDIGARH**

**RSA No.5861 of 2016
Date of decision:3.8.2017**

Darshan Singh

...Appellant

Versus

Avtar Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr.Narinder S. Lucky, Advocate for the appellant.

RAMESHWAR SINGH MALIK, J. (Oral)

Unsuccessful defendant is in the regular second appeal against the concurrent findings of facts recorded by both the learned courts below, whereby the learned trial court decreed suit of the plaintiff for declaration and mandatory injunction, vide its impugned judgment and decree dated 10.3.2014 and the learned Additional District Judge dismissed the first appeal of defendant No.2, vide his judgment and decree dated 17.8.2015, upholding the judgment and decree of the learned trial court.

Brief facts of the case, as noticed by the learned trial Court in paras 2 and 3 of the impugned judgment, are that defendant No.2 was owner of land measuring 11 kanal 6 marlas i.e. fully detailed in the head not of the plaint, situated at village Ramidi, Tehsil & District Kapurthala. The defendant vide agreement dated 28.09.2001 agreed to sell the suit land measuring 11 kanals 6 marlas alongwith its all incidental rights to the plaintiff @ Rs.3,00,000/- per killa and the defendant received a sum of

Rs.1,77,000/- as earnest money. Vide endorsement dated 28.09.2001 executed at the back of the agreement, the defendant received a further sum of Rs.1,72,500/- and the earnest money paid to the defendant amounted to Rs.3,49,500/-. Vide another endorsement dated 26.03.2002, the date for the execution of the sale deed was extended upto 27.09.2002. Land measuring 11 kanals 6 marlas was to be sold in lieu of Rs.4,23,750/- and the defendant had received Rs.3,49,500/- as earnest money from the plaintiff uptill 27.09.2002. Defendant No.2 failed to perform his part of the contract, so the plaintiff filed a suit for specific performance bearing suit No.61 of 11.03.2005, which was decreed by the Court of Addl. Civil Judge, Sr. Division, Kapurthala, vide its decree and judgment dated 28.01.2006. The plaintiff in execution of the decree and judgment dated 28.01.2006 got sale deed dated 17.01.2007 executed in his favour in terms of the agreement of sale dated 28.09.2001. The plaintiff on 19.03.2007 obtained the copy of the jamabandi of the suit land and was shocked to see an entry of mortgage of the land purchased by the plaintiff in favour of defendant No.1 by defendant No.2 in the sum of Rs.3,00,000/-. On inquiry, it was revealed that defendant No.1 during the pendency of the suit for specific performance filed by the plaintiff against him, has mortgage the suit land in favour of defendant No.1 in lieu of Rs.3,00,000/-. The transaction of mortgaged entered in between the defendants was hit by the principles of *lis pendence* and did not confer any right upon defendant No.1 nor it effected the ownership rights of the plaintiff over the suit land. The entry of mortgage in the revenue record in favour of defendant No.1 was creating a cloud on the rights of the plaintiff.

The plaintiff approached defendant No.1 and requested him to get the said entry deleted, but defendant No.1 was lingering the matter on one pretext or the other. The plaintiff got a legal notice dated 21.09.2007 served upon defendant No.1 calling him to get the entry of mortgage deleted from the revenue record within 15 days of the receipt of the notice. Defendant No. 1 vide reply dated 06.11.2007 was wrongly asserting that the land stands mortgaged in his favour and the entry of mortgage could only be deleted after the clearance of the entire loan amount, so the plaintiff had no other option, but to file the present suit for declaration and mandatory injunction. The cause of action arose to the plaintiff on 19.03.2007 when he obtained the fard jamabandi of the suit land and got the knowledge of the mortgage effected by defendant No.2 in favour of defendant No.1. Lastly, the plaintiff got the cause of action to file the present suit from the reply dated 06.11.2007 given by defendant No.1 wherein he was wrongly asserted that the mortgage in his favour was correct.

Having been put to notice, defendant No.1 did not appear despite service and was proceeded against ex parte, vide order dated 7.4.2008 passed by the learned trial court. However, defendant No.2 appeared and filed his contesting written statement, raising more than one preliminary objections. Plaintiff filed his replication. On completion of pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the plaintiff is entitled to decree for declaration as prayed for ?OPP
2. Whether the suit is not maintainable in the present form?OPD
3. Whether the plaintiff has no cause of action to file the

present suit?OPD

4. Whether the plaintiff has not come to the Court with clean hands? OPD

5. Relief.

With a view to prove his pleaded case, plaintiff brought on record documentary as well as oral evidence. Contesting defendant No.2 only examined himself as DW-1 and thereafter closed his evidence. After hearing the learned counsel for the parties and going through the evidence brought on record, the learned trial Court came to the conclusion that the plaintiff has duly proved his case, by leading cogent and convincing evidence. Accordingly, suit for declaration and mandatory injunction filed by the plaintiff was decreed by the learned trial court, vide its impugned judgment and decree dated 10.3.2014.

It was held by the learned trial court that the plaintiff was owner of the land measuring 11 kanals and 6 marlas and mortgage of said land by defendant No.2 in favour of defendant No.1, vide mortgage deed dated 14.11.2005, would not effect the rights of the plaintiff on the suit land nor it confers any right upon defendant No.1 in the suit land. Feeling aggrieved, defendant No.2 filed his first appeal, which also came to be dismissed by the learned first appellate court by passing the impugned judgment and decree dated 17.8.2015. Hence this regular second appeal, at the hands of unsuccessful defendant No.2.

Heard learned counsel for the appellant.

So far as defendant No.1 was concerned, suit of the plaintiff went completely uncontroverted, as no written statement was filed on behalf of defendant No.1. Ownership of the plaintiff over the suit property had

been duly established on record. Respondent-Bank did not exercise due diligence at the time when the suit land was mortgaged with it by defendant No.2. Further, the mortgage was sought to be created after plaintiff had filed a suit for specific performance, thus, rule of *lis pendence* would be attracted.

It is also a matter of record that the said suit for specific performance was decreed in favour of present plaintiff Avtar Singh by way of decree dated 28.1.2006. Said judgment and decree dated 28.1.2006 became final in favour of the plaintiff and against defendant No.2. Once that is so, it can be safely concluded 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.

It seems that appellant-defendant No.2 was trying to play smart. Defendant-appellant, vide agreement to sell dated 28.9.2001, agreed to sell the land measuring 11K-6M along with its incidental rights in favour of the plaintiff. Defendant-appellant also received a sum of Rs.1,72,500/- as earnest money. However, when the defendant-appellant was not found interested in honouring the agreement to sell dated 28.9.2001, plaintiff filed his suit for possession by way of specific possession of above-said agreement to sell. Said suit, as noticed hereinabove, came to be decreed in favour of the plaintiff and against defendant No.2-appellant.

Defendant No.2-appellant, while proceeding on a malafide intention with a view to defeat the genuine claim of the plaintiff, mortgaged the suit property with defendant No.1-bank during the pendency of suit for possession by way of specific performance. In this manner, doctrine of *lis*

pendence having been attracted, the judgment and decree dated 28.1.2006 Ex.P4 would certainly prove to be a clincher against defendant No.2-appellant and in favour of plaintiff-respondent. Having said that, this Court feels no hesitation to conclude that both the learned courts below were well within their jurisdiction to pass their respective impugned judgments and decrees and the same deserve to be upheld, for this reason also.

The view that has been taken by this Court also finds support from the following judgments of the Hon'ble Supreme Court as well as this Court in **Vinod Seth Vs. Devinder Bajaj and another, 2010 (8) SCC 1, Yogeshwar Education Trust Vs. Gurmeet Kaur and others, 2009(2) CivCC 345 (P&H) and RSA No.292 of 2015 (Amarjit Kaur and others Vs. Manjit Singh and others) decided on 17.3.2017.**

Before arriving at its judicious conclusion, the learned first appellate court rightly examined, considered and appreciated true facts of case as well as the evidence available on record, in correct perspective. The relevant and cogent findings recorded by the learned first appellate court in para 3 of its impugned judgment, which deserve to be noticed here, read as under:-

“To prove his case, the plaintiff examined Sukhdev Singh patwari as P.W 1 Mohinder Singh PW2 Balwant Rai PW3 and his own statement and the plaintiff closed his evidence. On the other hand, defendant No.2 i.e. bank examined himself as D.W. 1 and the evidence was closed. Issue No.1 is the material issue on which the lower court has given a detailed finding. The facts which need not any repetition as stated in the plaint and are proved that the ownership of Avtar Singh is on the basis of a judgment and decree passed by the court in a suit for specific

*performance. Thus, the authenticity of the agreement, the maintainability of the agreement, passing of the consideration and the entitlement of the plaintiff to get the ownership of the property in question is passed through the rigour of the scrutiny by the court and the suit stands decreed. Needless to say, this decree has not been challenged by the appellant before any forum even after coming to know of the passing of the same by way of the present suit. The main plank of the defendant bank was that it is a connivance between the plaintiff and the defendant, but it is devoid of any merits. In order to prove the fact of the fraud or to take plea of the fraud it has to be specifically taken in the suit and has to be proved by cogent and convincing evidence that there is a collusion or connivance between the parties to deprive the bank of its right. The perusal of the documents would show that the sale deed was executed through the agency of the court as reader Dev Raj Verma of the court signed on behalf of the court in execution of the judgment and decree. Thus, the ownership of the plaintiff Avtar Singh stood established and have got the stamp of approval from a competent court of jurisdiction. The bank who advanced the loan after mortgaging the land should have been vigilant enough before granting loan to the loanee. Secondly, the mortgage was created after the plaintiff has filed the suit for specific performance and during the pendency of the suit a change over the property was created and was thus rightly held by the lower court it is hit by the principles of lis-pandis. The lower court has relied upon the judgment **2010 (3)- C.C.C.- 740 DB-S.C. "Vinod Seth vs Devinder Bajaj & Anr."** Wherein it has been held that:-*

“Transfer of property Act 1882, S.52-Lis-Pendens-Doctrine of lis-pendens does not annul the conveyance but only renders it subservient to the rights of the other

parties to the litigation. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest during the pendency of the suit will be subject to decision in the suit.”

“Similarly, the principle of lis-pendens clearly envisages that pendency of the suit or proceedings must be deemed to have commenced from the date of presentation of the plaint. Thus, any charge created by the bank was subjected to the decision of the suit and if any mortgage has been created by appellant in favour of the bank, then it was subject to the decision of the suit for specific performance and needless to say that the suit was decreed in favour of plaintiff Avtar Singh and the sale deed was executed through the agency of the court and as such the right was absolute and any charge created by the appellant does not effect the rights of the plaintiff/defendant Avtar Singh. The issue No.1 has been rightly decided in favour of the plaintiff and calls for no interference.”

During the course of arguments, learned counsel for the appellant could not point out any patent illegality or perversity in either of the impugned judgments passed by both the learned courts below. He also could not refer to any question of law much less substantial question of law nor any such question of law has been found involved in the present appeal, which is *sine qua non* for entertaining any 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 view of the matter, no interference is warranted in the present appeal. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan**

Rajendran Vs. Sarojini Lakshmy, 2009 (2) RCR (Civil) 286 and Santosh Hazari Versus 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 instant appeal is bereft of merit and without any substance, thus, it must fail. No case for interference has been made out. Consequently, both the impugned judgments and decrees passed by the learned courts below are upheld.

Resultantly, with the above-said observations made, the present regular second appeal stands dismissed, however, with no order as to costs.

3.8.2017
mks

(RAMESHWAR SINGH MALIK)
JUDGE

Whether Speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No