IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2409 of 2014 (O&M)
Date of Order: 15.09.2017

Hari Chand

...Appellant

Versus

Rajinder Kumar

..Respondent

RSA No.2478 of 2014

Hari Chand

...Appellant

Versus

Ashok Kumar

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. K.S.Cheema, Advocate,
for the appellant.

Mr. Sanjeev Pandit, Advocate,
for the respondent.

ANIL KSHETARPAL, J(Oral)

By this common judgment, I shall be disposing of Regular Second Appeal Nos. 2409 and 2478 of 2014.

Hari Chand, a Non Resident Indian, filed two suits for recovery of Rs.2,28,000/- each from his nephews, namely, Ashok Kumar and Rajinder Kumar sons of Tara Chand, his brother.

The following substantial questions of law arise for determination are as under:-

(i) Whether the judgments passed by the Courts are result of misreading and non-reading of evidence?

(ii) Whether the Courts have misdirected themselves while deciding the case?

(iii) Whether after rescission/alteration of a contract, the contract which has been rescinded/altered, the original contract, is required to be performed?

Undisputed facts are that Hari Chand through his attorney Ram Parkash executed an agreement to sell dated 14.12.1996 in favour of Ashok Kumar only with respect to land measuring 48 kanals approximately @ Rs.50,000/- per acre. Rs.2,30,000/- was paid as earnest money, which is not disputed by the plaintiff. It is also not in dispute that Ram Parkash as an attorney of Hari Chand executed a sale deed in favour of 4 brothers i.e. Ashok Kumar, Rajinder Kumar, Raj Kumar, Vijay Kumar sons of Tara Chand, with respect to land measuring 33 kanals 15 marlas. This sale deed refers to the agreement to sell dated 26.09.1997. It is further not in dispute that these four brothers, namely, Ashok Kumar, Rajinder Kumar, Raj Kumar, Vijay Kumar on the basis of power of attorney executed by the plaintiff sold the land measuring 2 kanals 9 marlas and 6 sarsai to outsiders. Hari Chand had executed 4 General Power of Attorneys in favour of his 3 nephews and a sister-in-law(Ashok Kumar, Rajinder Kumar, Raj Kumar and Savitri Devi, his sister-in-law) with regard to land measuring 9 kanals 1 marla each.

Ashok Kumar and Rajinder Kumar acting as an attorney of Hari Chand has executed two sale deeds dated 01.08.2001 in favour of *inter-se* brothers. Sale consideration of the sale deed Rs. 2,30,000/- each mentioned in both the sale deeds, is subject matter of recovery in the present proceedings. It is the case of Hari Chand that the sale consideration received under the sale deeds dated 01.08.2001 executed by Ashok Kumar and Rajinder Kumar as his attorney has not been paid.

On the other hand, Ashok Kumar and Rajinder Kumar claim that pursuant to agreement to sell dated 14.12.1996, land measuring 48 kanals was agreed to be sold @ Rs. 50,000/- per acre. Therefore, the total sale consideration comes to Rs.3 lacs and Rs.2,30,000/- was paid at the time of entering into agreement to sell. In one case Rajinder Kumar has taken a plea that Rs.37,812.50 was additionally paid to Hari Chand.

The relevant document is agreement to sell dated 26.09.1997, however, the same has not been exhibited on the file, however, its photocopy is available on both the files. If one reads that document, it is clear from the document that these four brothers, namely, Ashok Kumar, Rajinder Kumar, Raj Kumar, Vijay Kumar were unable to pay remaining amount of the sale consideration and, therefore, parties had settled their dispute and entered into a fresh agreement to sell dated 26.09.1997 with respect to land measuring 36 kanals 4 marlas. It was specifically written that the earlier earnest money paid would be treated as a sale consideration i.e. Rs.2,30,000/-, with respect to land measuring 36 kanals 4 marlas.

In the pleadings, only Rajinder Kumar had pleaded that Rs.37,812.50/- was paid additionally to Hari Chand, however, pleadings to that effect are absent in the written statement of Ashok Kumar. Defendants had led evidence to assert that the additional amount of Rs.70,000/- was paid as per the agreement to sell dated 14.12.1996 and since 48 kanals of land was agreed to be sold and, therefore, the entire amount has been paid and hence the defendants are not liable to pay any further amount.

No doubt, agreement to sell dated 26.09.1997 has not been exhibited on the file. However, existence of the agreement to sell dated 26.09.1997 cannot be doubted because the sale deed dated 16.04.2011, which is an admitted document between the parties, refers to the agreement to sell dated 26.09.1997. At the cost of repetition, the agreement to sell dated

26.09.1997 is a fresh agreement to sell, which supersedes the earlier agreement to sell dated 14.12.1996. Therefore, the defendants cannot be permitted to rely upon the agreement to sell dated 14.12.1996.

Once now it is established that there was a fresh agreement, although, not exhibited, Hari Chand was not required to perform original contract/agreement to sell dated 14.12.1996. As per Section 62 of the Contract Act, 1872, if the parties to a contract agree to substitute a new contract for earlier one, the original contract need not be performed. Section 62 of the Contract Act is extracted as under:-

> ***62. Effect of novation, rescission, and alteration of contract***
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> *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.*
>
> *Illustrations*
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> *(a) A owes money to B under a contract. It is agreed between A, B and C, that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.*
>
> *(b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.*
>
> *(c) A owes B 1,000 rupees under a contract, B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the agreement. B still owes C 1, 000 rupees, and no new contract has been entered into.*

It is now established that there was a subsequent agreement dated 26.09.1997. Although, the document has not been exhibited on the file, however, the courts were required at least to look into the sale deed dated 01.08.2001, which is an admitted document between the parties before deciding the case. Both the Courts have overlooked the sale deed dated 01.08.2001, which is an admitted document between the parties wherein reference is to agreement to sell dated 26.09.1997. Ram Parkash has appeared in the witness box on behalf of the appellant. Ram Parkash is a person who executed the agreement to sell dated 14.12.1996 as well as the sale deed dated 16.04.2011. He has specifically stated that there was an agreement to sell dated 26.09.1997. In view of the overwhelming evidence available on the file, it is proved on record that there was a subsequent agreement dated 26.09.1997.

In the aforesaid agreement, total land agreed to be sold for the amount already received is, 36 kanals 4 marlas. It is not in dispute that 33 kanals 15 marlas was transferred in favour of Ashok Kumar, Rajinder Kumar, Raj Kumar, Vijay Kumar, vide sale deed dated 16.04.2011, whereas remaining land measuring 2 kanals 9 marlas 6 sarsai was sold by them in favour of outsiders. Therefore, the findings of the Courts that sale deeds (two sale deeds) dated 01.08.2001 are relatable to agreement to sell dated 14.12.1996, are clearly erroneous. The Court have not appreciated the facts in the proper perspective. The agreement to sell dated 14.12.1996 came to an end once subsequent agreement to sell dated 26.09.1997 was executed.

Further payment of Rs.70,000/- as held by the Courts below is clearly beyond pleadings. It is not the case of either Rajinder Kumar or Ashok Kumar, defendants in both the suits that Rs.70,000/- was paid to Hari Chand or Ram Parkash. As noticed earlier Rajinder Kumar had pleaded that Rs.37,812.50/- was paid (as pleaded in para 8 of the written statement), whereas Ashok Kumar did not even assert this fact. Oral statement of Ashok Kumar that Rs.70,000/- was paid at the time when Ram Parkash was executed an agreement to sell cannot be accepted particularly when there is overwhelming evidence available on the record that agreement to sell dated 14.12.1996 had been superseded by a subsequent agreement dated 26.12.1997.

In view of the discussion made hereinabove, the questions of law are answered in favour of the appellant. Both the appeals are accepted and judgments and decrees passed by the Courts below are set aside.

September 15, 2017 **(ANIL KSHETARPAL)**
nt **JUDGE**

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