

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

RSA No.6267 of 2015 (O&M)

Date of decision: 10.10.2017

Gurcharan Singh

... Appellant

Vs.

Amar Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. Harkaran Singh, Advocate for
Mr. B.S. Bhalla, Advocate
for the appellant.

RAMESHWAR SINGH MALIK, J. (ORAL)

Unsuccessful defendant is in regular second appeal against the concurrent findings of facts recorded by both the learned Courts below, whereby suit for recovery filed by the plaintiff was decreed by the learned trial Court vide its impugned judgment and decree dated 27.02.2012 and first appeal of the defendant was also dismissed by the learned Additional District Judge vide impugned judgment and decree dated 03.03.2015, upholding the judgment and decree of the learned trial Court.

Brief facts of the case, as noticed by the learned Additional District Judge in para 2 of the impugned judgment, are that the defendant claiming himself to be owner in possession of land measuring 32 kanals out of land measuring 40 kanals 6 marlas, fully detailed and described in the head note of

the plaint, induced the plaintiff to purchase the said land at the rate of Rs.2,00,000/- per acre. The plaintiff believing the defendant to be owner in possession of the said land agreed to purchase the same. The plaintiff further pleaded that the defendant executed an agreement to sell dated 02.02.2005 in favour of the plaintiff for the sale of the suit land at the rate of Rs.2,00,000/- per acre. At the time of execution of the said agreement, the defendant received sum of Rs.5,00,000/- from the plaintiff as earnest money and agreed to get the sale deed executed and registered on or before 01.06.2005 on receipt of balance sale consideration. The plaintiff had always been ready to perform his part of the agreement. On the stipulated date i.e. 01.06.2005, the plaintiff approached the defendant and offered the balance sale consideration and expenses for registration of the sale deed and requested him to get the sale deed registered in favour of the plaintiff in terms of the agreement to sell dated 02.02.2005. The plaintiff further pleaded that on the said stipulated date i.e 01.06.2005, the plaintiff appeared before the Joint Sub Registrar, Talwandi Bhai along with balance sale consideration and expenses for registration of the sale deed in his favour, but the defendant did not turn up and ultimately, after waiting the defendant till evening, the plaintiff got his presence marked by submitting an application before the Joint Sub Registrar, Talwandi Bhai. Even thereafter, the plaintiff requested the defendant to get the sale deed executed and registered in his favour after receipt of balance sale consideration, but he had been putting off the matter on one pretext or the other. Thereafter, the plaintiff approached the Halqa Patwari for getting certified copy of Jamabandi qua the land agreed to be sold by the defendant and after obtaining the copy of jamabandi, the plaintiff

was shocked to know that the defendant was in fact shown to be the owner of 1/4th share in the said land. The same position existed at the time of execution of the agreement to sell, but the defendant had shown a fake jamabandi to the plaintiff at that time and committed fraud with him. The plaintiff had further pleaded that since the agreement to sell in question was the result of fraud and misrepresentation, so the same was not specifically enforceable as the consent of the plaintiff was obtained by playing fraud upon him by the defendant. Thus, the plaintiff claimed himself to be entitled to recover earnest money of Rs.5,00,000/- from the defendant along with interest at the rate of 2% per month.

Having been put to notice, defendant appeared and filed his contesting written statement, raising more than one preliminary objections. Plaintiff filed his replication. On completion of pleadings of the parties, the learned trial Court framed the following issues: -

1. Whether the defendant represented himself to be owner in possession of land measuring 32 kanals as detailed in the heading of the plaint and produced copy of jamabandi for the year 2001-02 and induced the plaintiff to purchase this land @ Rs.2 lac per acre?
OPP
2. Whether on representation of the defendant, the plaintiff agreed to purchase this land? OPP
3. Whether the defendant executed agreement to sell dated 02.02.2005 in favour of the plaintiff regarding suit land and received Rs.5 lacs as earnest money? OPP

4. Whether the plaintiff remained ready and willing to perform his part of the agreement? OPP
5. Whether the plaintiff is entitled to recover Rs.3 lacs as damages for the fraud committed by the defendant? OPP
6. Whether the plaintiff is entitled to refund of Rs.5 lacs as earnest money? OPP
7. Whether the suit is maintainable? OPP
8. Whether the plaintiff has concealed material facts from the Court? OPD
9. Whether the alleged agreement is without consideration? OPD
10. Relief.

Both the parties brought on record their documentary as well as oral evidence, so as to prove their respective stands taken in their pleadings. After going through the evidence brought on record and hearing learned counsel for the parties, learned trial Court came to the conclusion that plaintiff has duly proved his case by producing relevant and cogent evidence. Accordingly, suit for recovery of Rs.5.00 lacs along with interest @ 12% per annum was decreed by the learned trial Court vide its impugned judgment and decree dated 27.02.2012. Defendant felt aggrieved and filed his first appeal, but the same was also dismissed by the learned Additional District Judge vide impugned judgment and decree dated 03.03.2015. Hence this regular second appeal at the hands of unsuccessful defendant.

Heard learned counsel for the appellant.

Agreement to sell dated 02.02.2005 was an admitted fact between

the parties. It was the defendant-appellant who executed this agreement to sell in favour of the plaintiff. Receipt of the amount of Rs.5.00 lacs as earnest money has also been duly established on record by the plaintiff by leading cogent and convincing evidence. Agreement to sell was duly proved on record as Ex.P1. Since the defendant-appellant was unable to execute the sale deed of entire suit land in favour of the plaintiff, because the defendant was only a co-sharer to the extent of his share, defendant was bound to pay the amount of earnest money to the plaintiff. In fact, defendant-appellant should not have executed the agreement to sell as he was not the owner of entire land. Under these undisputed circumstances of the case, 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.

Before arriving at his 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 the correct perspective. The relevant and cogent findings recorded by the learned first appellate Court in paras 12 and 13 of the impugned judgment, which deserve to be noticed here, read as under: -

“There is no denying the fact that execution of the agreement to sell dated 2.2.2005 is admitted by the defendant with the plea that the said document was executed in favour of the plaintiff/respondent as security. For this purpose appellant/defendant was bound to lead sufficient and substantive evidence on his behalf so as to substantiate his plea, but due to

paucity of evidence on behalf of the defendant, the claim of the defendant is not sustainable challenging the verdict given by the learned lower Court to recover the amount from him by the plaintiff. In support of his averment, the defendant/appellant was bound to lead cogent and convincing evidence. His mere plea that the agreement to sell in dispute was executed, but it was for the purpose of security only, does not find support from the evidence on record, rather execution of the said document in favour of the plaintiff/respondent is admitted. There is no reference of pronote and receipt Exs.D2 and D3 in the alleged agreement to sell Ex.P1. So, the said pronote and receipt Exs.D2 and D3 are having no concern with the said agreement to sell Ex.P1. The learned lower Court has observed that in terms of the agreement to sell in dispute executed by the defendant in favour of the plaintiff, the defendant was not in a position to execute the sale deed of entire suit land in favour of the plaintiff as the said defendant Gurcharan Singh has been shown to be co-sharer of the khasra numbers which are in dispute and he is not exclusive owner thereof. So, under these circumstances the learned lower Court held that the plaintiff is entitled to get the amount of earnest money recovered.

Appellant/defendant Gurcharan Singh himself not appeared in the witness box and he issued power of attorney in favour of DW1 Sukhwant Singh to pursue his case and while appearing said Sukhwant Singh admitted that defendant Gurcharan Singh is still

alive and is having sound disposing mind. So, on what account the said defendant abstained himself from appearing in the witness box, has not been justified on behalf of the defendant. Regarding compromise Ex.D5 having been allegedly executed between the plaintiff and defendant, the learned lower Court observed that said Gurcharan Singh defendant had not signed the said document. So, in this way the said document is not having binding effect upon the defendant/appellant. If any compromise was arrived at between the plaintiff and the defendant then why the defendant failed to put his signatures, has not been explained, Even DW1 Sukhwant Singh was not able to dispel the suspicious circumstances surrounding the document Ex.D5 and the learned lower Court observed that said Sukhwant Singh deposed that on 7.1.2009 i.e the date of execution of the compromise deed Ex.D5 between the plaintiff and defendant, said defendant Gurcharan Singh was not in India. So, under these circumstances, the plaintiff through his cogent and convincing evidence, was able to substantiate his claim for the recovery of the impugned amount from the defendant on account of alleged transaction of the agreement to sell in dispute, but the said deal could not have been finalized as the defendant had not exclusive ownership of the property as specified in the agreement to sell in dispute, as held by the learned lower Court, thus the plaintiff is entitled to recover the impugned amount of Rs.5,00,000/- from the defendant along with interest accrued

thereon as no one can be unduly enriched himself and in this way, the findings given by the learned lower Court call for no interference by this Court, rather the same are based upon sound foundation.”

Defendant-appellant did not appear in the witness box. Sukhwant Singh DW1, power of attorney holder of the defendant appeared. DW1 admitted that defendant was still alive and was having sound disposing mind. Non-appearance of the defendant-appellant in the Court remained a mystery. There was no justification available on record on behalf of the defendant-appellant as to why he could not put appearance in the Court and why he did not get himself examined as his own witness. In such a situation, DW1 Sukhwant Singh was unable to make an effective and meaningful statement before the Court in favour of the defendant and rightly so, because he was not well conversant with the facts of the case. Having said that, this Court feels no hesitation to conclude 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.

During the course of hearing, learned counsel for the appellant could not point out any patent illegality or perversity in the impugned judgments and decrees passed by the learned Courts below. He also failed to raise any question of law, much less substantial question of law, 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 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 since no illegality has been found in either of the impugned judgments and decrees passed by the learned Courts below, the same deserve to be upheld. Present regular second appeal having been found wholly misconceived, bereft of merit and without any substance, 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

10.10.2017
vishnu

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