

RSA No. 2054 of 2017(O&M)

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

**RSA No. 2054 of 2017(O&M)
Date of Decision: 22.5.2017**

Gurpreet Singh

.....Appellants

Vs.

Gurinder Singh and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. Varun Garg, Advocate
for the appellant.

Mr. Mandeep Singh Dhaliwal, Advocate
for the caveators-respondent Nos 1 and 2.

RAMESHWAR SINGH MALIK J. (ORAL)

Plaintiff has approached this Court by way of instant regular second appeal against the impugned judgment of reversal dated 2.1.2017 passed by the learned District Judge, whereby first appeal filed by the defendants against the judgment and decree dated 6.1.2015 of the learned trial court decreeing the suit for specific performance and declaration, was allowed and alternative relief was granted to the plaintiff-appellant for recovery of earnest money, along with reasonable rate of interest.

Brief facts of the case, as noticed by the learned first appellate court in para 2 and 3 of its impugned judgment, are that Gurpreet Singh-

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plaintiff filed suit for possession by way of specific performance of agreement to sell dated 26.08.2010 vide which defendant No.1-Bhupinder Singh agreed to sell shop measuring 45 sq. yards bearing khasra numbers with specific boundaries fully detailed in the head note "A" of the plaint, situated near MRF Agency, Ward no.2, Bus Stand, Bhawanigarh, Tehsil and District Sangrur, as per jamabandi for the year 2008-09, on payment of balance sale consideration and defendants No.2 and 3 be also directed to join defendant No.1 to execute and register the sale deed and in the alternative suit for recovery of ₹4,00,000/- i.e. ₹2,50,000/- paid as earnest money and ₹1,50,000/- as liquidated damages alongwith interest @18% per annum from the date of agreement till realization. Further suit for declaration to the effect that transfer deed No.3021 dated 14.02.2011 executed by defendant No.1 in favour of defendants No.2 and 3 was illegal and liable to be set-aside. Further suit for permanent injunction restraining defendants No. 2 and 3 from alienating, mortgaging or transferring the shop in dispute to any other person except the plaintiff and further restraining the defendants from raising any sort of construction or changing nature of the shop in dispute.

Plaintiff submitted that defendant No.1 was exclusive owner in possession of shop in dispute. The site plan was placed on the record. Defendant No.1 agreed to sell the shop in dispute to the plaintiff and executed agreement to sell dated 26.08.2010 which was got typed by him in the presence of plaintiff and Pappi Ram and Om Parkash witnesses. Vide said agreement, defendant No.1 agreed to sell the shop in dispute for a sum of ₹4,00,000/- and received ₹2,50,000/- as earnest money. The agreement to sell was signed by defendant No.1, after admitting its contests as correct, in the presence of plaintiff and witnesses who also signed the same. The

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agreement to sell was attested by Ashok Kumar Goyal, Advocate, Notary Public, Bhawanigarh who appended his stamp and signatures on the name and entered the same in his register at serial No.300 dated 26.08.2010. The agreement to sell was handed over to the plaintiff. The original agreement was placed on the record. As per the agreement, the sale deed was to be executed on or before 31.03.2011. The balance sale consideration was to be paid at that time and possession was also to be delivered. It was also agreed that if defendant No.1 failed to get the sale deed executed as per terms of agreement to sell, then plaintiff shall have the right to get the sale deed executed and registered through Court or defendant No.1 will be liable to pay double amount of earnest money to the plaintiff.

It was also agreed that if plaintiff failed to get the sale deed registered in his favour, the earnest money paid by him shall be forfeited. On 30.03.2011 plaintiff approached defendant No.1 and requested him to get the sale deed registered in his favour. Defendant No.1 promised to come present in the office of Joint Sub Registrar, Bhawanigarh on 31.03.2011 for doing the needful. Accordingly, on 31.03.2011 the plaintiff remained present in the office of Joint Sub Registrar, Bhawanigarh with balance sale consideration and other expenses to be borne for the execution and registration of sale deed but defendant no.1 did not turn up. The plaintiff got attested an affidavit from Notary Public, Bhawanigarh to show his presence in that office. The original affidavit was placed on the file. Thereafter, the plaintiff approached defendant No.1 and requested him to get the sale deed executed and registered in his favour but defendant No.1 put off the matter on one pretext or the other. The plaintiff served registered legal notice dated 20.09.2011 upon defendant No.1 through his counsel which was duly

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received by defendant No.1 but he failed to perform his part of the agreement to sell. Copy of legal notice and postal receipt were placed on the record. Thereafter, plaintiff verified the revenue record and he came to know that defendant No.1 played fraud with him as he transferred the shop in dispute in favour of defendants No.2 and 3 vide transfer deed No.3021 dated 14.02.2011. The said transfer deed was illegal and sham transaction and had been created just to defeat the rights of plaintiff. The plaintiff had always been ready and willing and is still ready and willing to perform his part of the agreement and to get the sale deed executed. He requested defendant No.1 many a times to get cancelled the transfer deed and execute the sale deed in his favour as per agreement to sell dated 26.08.2010 but defendant no.1 flatly refused to do so. Rather, defendants No.2 and 3 threatened to alienate the shop in dispute to some other person.

Having been served, defendants put appearance. Defendant No.1 filed his contesting written statement, raising more than one preliminary objections. Defendants No. 2 and 3 filed their separate written statement, alleging that their father-respondent No.1 was a habitual drunkard person and was also habitual of taking loan to fulfill his lust for intoxicants and liquor. On completion of pleadings of the parties, the learned trial court framed the following issues:-

1. Whether the defendant no.1 executed an agreement to sell dated 26.08.2010 in favour of plaintiff with respect to the suit land and obtained ₹2,50,000/- as earnest money?
OPP

2. If so, whether plaintiff is entitled to the relief of possession by way of specific performance of the agreement? OPP

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3. Whether in the alternative, plaintiff is entitled to recovery of ₹4,00,000/- (₹2,50,000/- as earnest money and ₹1,50,000/- as damages) alongwith interest as prayed for? OPP

4. Whether the plaintiff is entitled to declaration as prayed for? OPP

5 Whether the plaintiff is entitled to permanent injunction, as prayed for? OPP

6. Whether the suit of the plaintiff is not maintainable in the present form? OPD

7. Whether the plaintiff has got no cause of action and locus standi to file the present suit? OPD

8. Whether the suit is bad for non joinder of necessary parties? OPD

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

10. Relief.

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, the learned trial court came to the conclusion that plaintiff has duly proved his case. Accordingly, his suit for possession by way of specific performance and also for declaration was decreed, vide judgment and decree dated 6.1.2015. Feeling aggrieved, defendants filed their first appeal, which came to be partly allowed by the learned first appellate court, denying the primary relief for specific performance, but alternative relief of recovery of earnest money along with interest @ 12 per annum was granted, vide impugned judgment and decree dated 2.1.2017. Hence this regular second appeal at the hands of plaintiff.

Heard learned counsel for the parties.

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So far as agreement to sell dated 26.8.2010 is concerned, it was proved by the plaintiff. However, defendants were also in a position to establish on record that defendant No.1 was a habitual drunkard. He was also habitual of taking loan to fulfill his lust for intoxicants and liquor. So far as suit property, i.e. commercial shop on main highway, is concerned, defendants No.2 and 3 were having no other landed or commercial property in their favour, as source of their livelihood, apart from doing some odd jobs. In view of this glaring fact situation obtaining on record, mere fact that plaintiff has proved the agreement to sell, will not entitle him for a decree of specific performance. Having said that, this Court feels no hesitation to conclude that the learned first appellate court was well within its jurisdiction to pass the impugned judgment and the same deserves to be upheld.

It is the settled proposition of law that even if an agreement to sell is proved on record by the plaintiff, it would not mean that decree of possession by way of specific performance has to follow automatically, in every given fact situation. The legislature, in its wisdom, itself has carved out some exceptions in Section 20 of the Specific Relief Act ('the Act' for short). Instant one is a fit case which would fall in more than one exceptions carved out under Section 20 of the Act. The judgment and decree passed by the learned trial court were rightly set aside by the learned District Judge, so as to avoid undue hardship to the defendants-respondents and also to do substantial justice between the parties. Under these undisputed facts and circumstances, it can be safely concluded that the learned first appellate court committed no error of law, while passing the impugned judgment and decree, granting alternative relief of recovery of earnest money along with interest @ 12 % per annum and the same deserve to be upheld, for this

reason also.

Before arriving at a judicious conclusion, the learned first appellate court examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct perspective. Cogent findings recorded by the learned first appellate court in later part of para 10 of its impugned judgment, which deserve to be noticed here, read as under:-

“.....The onus was heavily on the plaintiff to prove his own case. Gurpreet Singh in the entire plaint claimed that defendant no.1 Bhupinder Singh had executed agreement to sell dated 26.08.2010 with him and at that time defendant no.1 received ₹2,50,000/- as earnest money from him in the presence of witnesses. The plaintiff further claimed that this agreement to sell dated 26.08.2010 was signed by two marginal witnesses namely Pappi ram and Om Parkash. In the entire paint plaintiff Gurpreet Singh never claimed that this agreement to sell dated 26.08.2010 was signed on his behalf by Bhagwant Nath. However, when the evidence was led in the present case, Gurpreet Singh PW-1 in his affidavit Exhibit PW1/A started claiming that the agreement to sell dated 26.08.2010 was prepared on his instructions in the presence of Bhagwant Nath. The entire version in this affidavit has been changed by the plaintiff. Similarly, Bhagwant Nath also stepped into the witness box as PW-2 and in his affidavit Exhibit PW2/A corroborated the version of Gurpreet Singh, PW-1. The

perusal of cross- examination of Gurpreet Singh, PW-1 revealed that he himself was not present at the time of execution of agreement to sell. Rather, he claimed that before the execution of agreement to sell he did not know the vendor. Gurpreet Singh expressed his ignorance if there was any money transaction between defendant mo.1 and Bhagwant Nath. In subsequent cross-examination he further stated that he does not know that the agreement to sell was scribed in lieu of security for loan amount. Gurpreet Singh, PW-1 even did not know the marginal witnesses Pappi Ram and Om Parkash. Regarding this Bhagwant Nath, PW-2 confirmed during his cross- examination that both the marginal witnesses were known to him. Ashok Kumar Goyal, Advocate, Notary Public who stepped into the witness box as PW-4 admitted in his cross- examination that both the marginal witnesses to this agreement to sell dated 26.08.2010 are property advisors. Om Parkash, marginal witness also appeared as PW-5. During cross-examination he confirmed that he had signed on the agreement to sell at the instance of Bhagwant Nath. There is nothing on record to show that Gurpreet Singh plaintiff played any role in the execution of agreement to sell dated 26.08.2010 Exhibit P1 nor he knew the vendor or the marginal witnesses. The entire transaction regarding execution of agreement to sell dated 26.08.2010 Exhibit

P1 took place at the instance of Bhagwant Nath, PW-2 and at his instance the marginal witnesses had affixed their signatures. In case, Gurpreet Singh plaintiff was interested to purchase the shop in question he would have obviously met the vendor Bhupinder Singh and would have played active role in its execution whereas in the present case Gurpreet Singh did not come into picture at the time of execution of this document. He appeared for the first time when he got his affidavit attested on 31.03.2011 which is Exhibit P2 vide which plaintiff has tried to establish his readiness and willingness to perform his part of agreement to sell. The said affidavit was attested by Ashok Kumar Goyal, Notary Public who is examined as PW-4. However, there is nothing on record to show that Gurpreet Singh himself or Bhagwant Nath ever visited the office of Sub Registrar, Bhawanigarh to get their presence marked to show their readiness and willingness to perform their part of agreement to sell dated 26.08.2010. Even the scribe of agreement to sell has not been examined.

On the other hand, Bhupinder Singh has taken specific stand that he took loan from Bhagwant Nath and his signatures were taken on blank stamp papers by way of security. In this case, Bhupinder Singh has not denied his signatures on the agreement to sell dated 26.08.2010 Exhibit P1 but he claimed that he had no intention to sell

the property as it was only a money transaction. The defendants have placed on record another agreement to sell dated 12.11.2010 Exhibit D1 which was got cancelled from Ram Singh by making payment of ₹2,95,000/- on 07.02.2011. This agreement to sell dated 12.11.2010 which was got cancelled by return of money further supports the version of appellants/ defendants that it was merely a money transaction and the document was scribed by way of security. It is matter of record that Bhupinder Singh defendant no.1 has transferred the property in question alongwith other property in favour of his sons by way of two transfer deeds dated 14.02.2011 duly registered in the office of Sub Registrar, Bhawanigarh which are Exhibit D2 and Exhibit D4 and the site plans are Exhibit D3 and Exhibit D5, respectively.....”

During the course of hearing, learned counsel for the appellants failed to point out any patent illegality or perversity in the impugned judgment rendered by the learned first court below. He also could not refer to any question of law much less substantial question of law, which is sine qua non for entertaining a 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 **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179.**

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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 present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case 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.

22.5.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

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