IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3987 of 2017 (O&M)
Date of Decision: 27.10.2017

Davinder Kumar and another ... Appellants

Versus

Parminder Singh and another ...Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. K.S. Dadwal, Advocate,
for the appellants.

Mr. Kartik Gupta, Advocate,
for the caveators-respondents.

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RAJIV NARAIN RAINA, J.

1. This is a case where possession of the suit land was delivered to the plaintiffs at the time of execution of agreement to sell dated June 05, 2004 and in the suit was sought confirmation of the possession by enforcing specific performance by permanent injunction prayed for against the defendants to compel transfer of the suit property and for restraining them from interfering in the lawful or peaceful possession of the land in dispute measuring 12 Kanals 15 Marlas as detailed in the head note of the plaint. In the alternative, recovery of money was sought with 18% interest per annum on the principal ₹9,64,200/-.

2. The agreement was executed by the father of the defendants at the rate of ₹6.05 lakh per acre. Vendor late Jagdish Ram received ₹1 lakh as earnest money at the time of execution of the agreement. A further sum of

₹3 lakh was stated to have been paid by July 05, 2004 by when it was expected that power of attorney qua the land for its transfer would be executed by proposed seller late Jagdish Ram. The remaining amount was to be paid by June 05, 2005. The power of attorney did not mature. Jagdish Ram backed out of the deal and plaintiffs claimed enforcement of the agreement by mandatory injunction forcing execution of sale deed through Court orders. There was a default clause which when activated could lead to forfeiture of earnest money paid. However, the possession of the suit land was delivered to the plaintiffs by Jagdish Ram or so the story goes in the plaint.

3. In terms of the agreement, a sum of ₹3,02,500/- was paid on July 06, 2004 and endorsement was entered on the back of the original agreement. In addition, general power of attorney of proportionate value of that land was executed and registered on July 06, 2004 itself. Thereafter, ₹50,000/- was paid on November 05, 2004 to Jagdish Ram and endorsement taken at the back of the document. A further sum of ₹50,000/- was delivered on December 10, 2014 and thereafter a further sum of ₹4,61,700/- was paid on June 02, 2005. In this manner, the entire sale consideration was paid to Jagdish Ram, late father of the defendants. A registered power of attorney pertaining to the transaction was got entered on June 02, 2005 in public office.

4. As per narration of facts the plaintiffs have developed the land and laid katcha roads/passage after making huge investment. Since the suit land is in the ownership of Jagdish Ram his sons got entered mutation in their names and have refused to execute the sale deed in terms of agreement

as was executed by their father in favour of the plaintiffs.

5. Upon notice, defendants filed written statement refuting the pleadings by urging that the agreement to sell was void and unenforceable under the law as it violates various provisions of the Punjab Apartment & Property Regulation Act, 1995 ("1995 Act") and hence it is opposed to public policy; the suit land is coparcenary property with late Jagdish Ram as Karta of HUF; defendants are members of HUF; the suit land is ancestral; Jagdish Ram could not sell without legal necessity and he had none to contend with. Defendants are governed by Hindu Law in the matter of alienation and succession.

6. On merits, defendants denied execution of sale agreement. Their father had no authority to sell ancestral property. Amounts, even if received by late Jagdish Ram were not meant for the benefit of the co-parceners. They are not bound by any such transaction entered into by Jagdish Ram with third party. Besides, no agricultural land can be developed into a colony without prior permission of the authorities under the 1995 Act.

7. Replication was not filed. Jagdish Ram expired before sale deed could be executed in terms of the agreement to sell and before the target dates arrived.

8. The sole witness produced by the defendants is DW-1 Davinder Kumar (defendant No.1 son of late Jagdish Ram). He has feigned ignorance that their father agreed to sell suit land in favour of plaintiffs vide agreement to sell in dispute. He said that he did not know whether his father received the entire amount of consideration or of his share in the land in dispute. As a result, there is no denial in the evidence of defendants of execution of

agreement by late Jagdish Ram or whether he received entire sale consideration. The onus was on the plaintiffs to prove their claim to decree. They produced and examined material attesting witnesses PW-3 Jatinder Singh and PW-4 Kuldip Singh to prove the necessary endorsements on the sale agreement apart from the document itself. The trial Court held that the agreement and the endorsements have been duly proved through the oral testimony of PW-3 and PW-4. The General Power of Attorneys were Ex.P-1 and P-2 and they were registered and executed by late Jagdish Ram in favour of one Mahavir and Balwinder Singh to execute the sale deed on his behalf. The said power of attorney has been duly proved by the attesting witnesses and by the scribe PW-1 Kamaljit Kumar who proved the corresponding entry of his register. PW-2 Arjan Khanna, Draftsman produced affidavit Ex.PW-2/A to prove the site plann Ex.P-5. There is admission of defendant No.1 that Jagdish Ram remained hail and hearty and understood his welfare till his death.

9. On the legal issue raised by the defendants regarding 1995 Act a few facts may be necessary to put down.

10. The plaintiffs came into possession of suit land and started development work thereon. They did not obtain necessary permissions for making a colony by sale of smaller parcels from the suit land. PW-4 Kuldip Singh (plaintiff No.2) stepped into the witness box and deposed that necessary permission from the PUDA authorities can be initiated only on transfer of land in their favour and as yet they are proposed vendees in possession of suit property.

11. The trial Court has observed in its judgment that nothing has

come on record that plaintiffs have sold any plot from the suit land to any third party-proposed vendee. The record of the file showed that suit land is Banjar in nature and lying vacant since 2004. All that has been done by the plaintiffs is to carve out a kacha passage in the suit land. Accordingly, there is nothing on record which might earn the wrath of the 1995 Act. It is trite to say that a colony can be carved only after permissions are accorded by the authorities in PUDA/State Government and in case sales have been actually effected from out of the suit land then it would be against public policy and an attempt to defeat the provisions of the law. The argument based on public policy was rejected by the trial Court and the agreement to sell with possession passing could not be declared null and void under Section 23 of the Contract Act, 1872. I would agree that the argument is premature and contingent in nature and in case colony is carved out it will have to be with due permission and change of land use granted by the competent authorities in accordance with law. We have not reached that stage yet and are only considering the case set up for execution of sale deed which the trial Court has decreed on finding the agreement legal and valid and that possession has passed together with valuable consideration in the pockets of late Jagdish Ram. The contention based on property being co-parcenary and ancestral in nature has been found irrelevant since defendants failed to prove the suit land was ancestral co-parcenary property in the hands of late Jagdish Ram. Mere pleading is not proof and to become an accomplished fact plea must be accompanied by direct evidence which this case significantly lacks in the record. Issue No.5 was specific for answer as to whether suit property was ancestral property and the onus to prove the issue was placed on the defendants which burden they have failed to discharge.

12. The suit was decreed on March 09, 2012 by the learned Additional Civil Judge (Senior Division), Hoshiarpur and the appeal carried by the unsuccessful defendants before the learned Additional District Judge, Hoshiarpur has failed. The first issue that the plaintiffs are entitled to confirmation of possession by way of specific performance of the agreement to sell dated June 05, 2004 has been answered in the negative by upholding the judgment and decree of the trial Court.

13. First and foremost, one has to recognize that in the agreement to sell there was a condition and purpose stipulated therein which was mainly to develop a colony at the suit spot and some development work has already taken place which is no more than laying down a kacha passage across the suit land which was banjar and still remains so on ground level. No vertical construction has spring up from the property in dispute nor any kind of construction is made nor anything done on proposed project to support onward sale to customers. The imputed violation by the plaintiffs of the provisions of the 1995 Act are of little significance when no overt or covert act has been done by them in actually carving out a colony by alienating land to third parties etc. Therefore, public policy has not been transgressed till today and no proposed colonizer can make a colony without permission. But permission can only come when plaintiffs become owners holding a registered sale deed. If they then wish to start making a colony they would have to abide by the law in the 1995 Act and seek permissions. It is too premature to even think whether such permissions will be granted or not. That is in the domain of a proposal or a hope expressed in the agreement to

sell.

14. The Lower Appellate Court in its judgment dated February 14, 2017 has recorded that during the course of the arguments in appeal only two points were raised by the appellants-defendants. First was regarding the property being ancestral in nature and Jagdish Ram devoid of authority to alienate the property of other co-parceners without legal necessity. The twin arguments have been rejected, and quite appropriately, for the reason that the existence of validity of the agreement to sell in dispute has not been challenged in the appeal and, therefore, it holds good. The only two points which were agitated in appeal were that suit property was ancestral in nature and, therefore, father had no right to sell and secondly, a colony cannot be developed without permission of authorities under the 1995 Act and in this manner, the agreement to sell is in violation of the provisions of law and is thus opposed to public policy and cannot be specifically enforced.

15. The learned First Appellate Court went in a detail on two issues in para.16 of the judgment. Matters which the trial Court had overlooked were examined by the Lower Appellate Court. The first appeal Court formed its opinion that property in the hands of Jagdish Ram was not ancestral in nature and to conclude thus, assigned valid reasons which are sound in law and fact having regard to the pleadings and the evidence adduced by the parties.

16. Significantly, as per jamabandi relied upon by the defendants i.e. Ex.D-1, D-1/A, DW-2 and DW-2/A of the year 1960-61 and mutation No.1756 Ex.D-2 reveals that khasra numbers of the disputed land are totally different from the khasra number mentioned in the jamabandi and mutation

relied upon by the appellants-defendants. This was a very vital input, thought the learned Additional District Judge had escaped the notice of the trail court, and I would agree to the view when defendants failed to discharge their burden to prove the property in dispute was ancestral in nature despite opportunity given to prove the issue.

17. To make the defendants case even weaker, the appeal Judge read the cross-examination of Davinder Kumar DW-1 (sole witness produced by the defendants) admitting in his testimony that their father Jagdish Ram executed a Will in favour of two of his sons to the exclusion of his daughters and *a priori* a testamentary Will cannot be executed of ancestral property not partitioned. Davinder Kumar stated during cross-examination that he can produce documents to show that the suit land was ancestral property but did not come forward to produce those documents. There was another telling admission in the cross-examination of Davinder Kumar when he had to admit that the suit land as between late Jagdish Ram and Kapil Chand his brother was partitioned during their lifetime. The plaintiffs have even purchased the share of Kapil Chand without generating litigation. The testamentary Will spoken of has not been produced on record of the trial Court from which circumstance an adverse inference is also liable to be drawn against them. Defendant admitted that possession of the suit property was with the plaintiffs. The Judge drew legal inference going by the admission of the defendants that the Will of late Jagdish Ram *ex facie* discredited the theory of the suit property being ancestral in nature and character. The Judge is correct in observing that to prove property as ancestral it was incumbent to prove that it came through four male lineal

descendants and the same had never been partitioned. These facts are missing on file to the critical disadvantage of the defendants.

18. The appeal Judge did not leave matters to chance and delved into the evidence and found in the cross-examination of Davinder Kumar son of late Jagdish Ram that the latter had taken a loans from banks and if this was so, then even the argument founded on legal necessity had to be discarded, without the same commanding any legal force especially when in appeal the agreement to sell was neither challenged in the grounds of appeal nor pressed at the hearing as there was sufficient preponderance of evidence that it was a valid document on which a suit for compelling executing a sale deed could be based to secure a decree of specific performance. It may be noticed that Jagdish Ram died in the year 2006 due to brain haemorrhage. Defendant No.1 (son) admitted that Jagdish Ram had taken an agricultural loan from the Kashitriya Gramin Bank and raised ₹4 lakh by mortgaging the land in dispute. He also obtained loan from Allahabad Bank, Sabji Mandi Branch, Hoshiarpur. He feigned ignorance about the purpose of the loan. He could not tell whether his father took the loan for domestic need. What could be greater indicator in favour of the plaintiffs and against the defendants than the fact that the entire sale consideration had passed to Jagdish Ram and possession handed over by him to the proposed vendees. Then only the technical formality of registration of sale deed and payment of stamp duty and registration charges was left to be performed by the defendants to fulfill their part of the contract while stepping into the shoes of their father-Jagdish Ram. In a sale by Karta it is not necessary to recite in the agreement that the contract is on behalf of co-parceners of Joint Hindu

Family. The Judge relied on case law of the Supreme Court and the High Court noticed in the judgment which is not necessary to elaborate on to fortify the legal proposition as the proposition is only too well settled in law.

19. There is nothing on record calling for or warranting interference of this Court in the findings approved by the two Courts which are based on sound reasoning recorded after appreciation of pleadings and evidence on the file. I would, therefore, dismiss the appeal.

(RAJIV NARAIN RAINA)
JUDGE

27.10.2017
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Whether speaking/reasoned *Yes*

Whether reportable *No*