

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RSA No.4535 of 2017 (O&M)
Date of Decision: 27.10.2017**

Baljinder Kaur and another

... Appellants

Versus

Buta Singh and others

... Respondents

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

Present: Mr. Amit Jhanji, Advocate,
for the appellants.

RAJIV NARAIN RAINA, J.

CM No.11837-C of 2017

The application is allowed as prayed for and deficiency in court fee has been made good. Office objection stands removed.

CM No.11838-C of 2017

For the reasons mentioned in the application, the same is allowed and the delay of 62 days in re-filing the appeal is condoned.

CM No.11839-C of 2017

The application is allowed as prayed for, saving just exceptions.

Main Case

This is defendants' appeal. The plaintiff suit for possession by way of specific performance has been decreed by the two Courts. The agreement of sale executed by the parties is dated August 13, 2009. The document is in Punjabi script. The defendants are said to be Non-Resident Indians settled in Canada. The target date in the agreement was fixed for appearance before the office of the Joint Sub Registrar, Nurmahal for

executing sale deed on February 20, 2010 and that date turned out to fall on a Saturday, which is not working day in the Office of the Registering Authority. The following day was Sunday. Plaintiff marked his presence in the office of the Sub Registrar on the next working day i.e. February 22, 2010. He evidenced on file that he remained present from 9 AM to 5 PM in that office with the balance sale consideration of ₹4,50,000/- with ₹3,50,000/- paid to defendants No.1 and 2 earlier as earnest money. The plaintiff had with him expenses to be incurred on execution and registration of the regular sale deed. The defendants did not turn up and failed to perform their part of the contract.

The controversy arose whether defendants No.1 and 2, the appellants herein, had power to execute the agreement of sale on behalf of defendants No.3 to 7 with the plaintiff. The property was once owned by Balbir Singh. After his death his legal heirs i.e. Dalvir Kaur wife, Baljinder Kaur (defendant No.1), Amar Kaur and Harsimar Kaur, daughters of late Balbir Singh and his sons, namely, Jogi Singh and Jassi Singh inherited the property of their father. The dispute was whether Nachhatar Kaur wife of Amarjit Singh arrayed as defendant No.2 in the suit had no right, title or interest in the suit property, it being pleaded, as she was not owner and was just an aunt of defendant No.1. Therefore, she could not be party to sale agreement not being owner. The other heirs were impleaded as respondents No.3 to 7.

Upon notice, defendants No.1 and 2 appeared and filed written statement taking preliminary objections pleading that the true facts are that defendant No.1 is an NRI and cannot read or write Punjabi being born and

brought up in England. Similarly, defendant No.2 is an old lady and also an NRI aged about 85 years. The alleged agreement is illegal, null and void and a result of fraud and misrepresentation which does not carry any weight in the eyes of law. The market value of the suit property admeasuring 8 K and 4 M described in the head note to the plaint was more than ₹20 lakh. They never entered into any agreement to sell with the plaintiff. Defendants No.3 to 7 did not participate in the alleged agreement nor have they signed thereon.

On merits, it is alleged by the defendants they never agreed to sell the land in dispute nor had they executed any agreement to sell or the one in question in favour of the plaintiff on their behalf as well as on behalf of the other family members. The other defendants did not execute power of attorney with the defendants to sell the property. They never received ₹3,50,000/- as earnest money from the plaintiff. Defendants asserted in the depositions that plaintiff did not have the capacity to make the payment of ₹3.5 lakh to the defendants as earnest money as his income is about 2.5 lakh per year. Even the deed writer's register was not produced on file and has been withheld by the plaintiff.

The trial Court weighed the evidence and perused the agreement Ex.P-1 which was scribed on stamp paper brought by Baljinder Kaur on August 12, 2009 and the agreement was executed the following day by the two defendants whose thumb impressions as well as signatures are marked on every page of the agreement Ex.P-1.

Plaintiff Buta Singh appeared as his witness and deposed in his cross-examination that he knew that defendants were NRIs residing in

Canada but he was an outsider and bore no relationship with nor knew them personally. He admitted ownership of land in dispute belonging to Balbir Singh. He testified on oath in the witness box that the agreement was executed between him and defendants No.1 and 2 and the remaining defendants talked to him on the telephone that the decision to sell the property in dispute was not agreed upon by all of them to the extent of share of Baljinder Kaur defendant No.1 who had 1/6th share (three daughters and two sons of late Balbir Singh).

The learned trial Court considered the three essential ingredients where relief of specific performance could be granted. There must be a validly executed agreement accompanied by passing of consideration and readiness and willingness of the vendee to perform his part of the contract. The trial Court considered the evidence on the triple tests and held that plaintiff was entitled to decree of specific performance with respect to the share of defendants No.1 and 2 i.e. "1/7th" of the entire property inherited from late Balbir Singh. The alternative prayer made by the plaintiff for refund of earnest money etc. and in addition ₹3.5 lakh as damages was rendered redundant in view of grant of main relief. The suit was held to be maintainable. The plaintiff was directed to deposit the remaining sale consideration in the Court within two months from the date of the judgment and decree i.e. February 11, 2015 with a direction to the defendants No.1 and 2 to get the sale deed executed with regard to their share i.e. 1/7th each out of the property in dispute.

Aggrieved by the judgment and decree of the learned
Additional Civil Judge (Senior Division), Phillaur in Civil Suit No.55 of

2010 the unsuccessful defendants carried an appeal to the Court of the learned Additional District Judge, Jalandhar.

An important facet of the case may be noticed as supervening event which came into existence in the stage of first appeal that the decree of the trial Court stood executed and the possession of suit property as per the decree was delivered to the plaintiff Buta Singh.

The appeal was contested, as recorded by the learned Lower Appellate Court, merely on the ground of failure of the trial Court to properly appreciate the evidence and the materials on file. The Court read the evidence of defendant No.1 appearing as DW-1 and the cross-examination but nothing much came out from it to dislodge the veracity of agreement of sale Ex.P-1 to call it a forged or fabricated document. The attesting witness of the agreement Ex.P-1 duly corroborated the case of the plaintiff and during his cross-examination nothing substantial was extracted or was forthcoming so as to create a reasonable doubt on the due execution of the agreement. If the defendants No.3 to 7 did not participate or consent to the agreement to sell then the trial Court had correctly decreed the suit as per share of the defendants No.1 and 2 and had not encroached upon the rights of the remaining defendants.

The most devastating fact came out during the cross-examination of defendant No.1 (defendant No.2 never appeared as witness) when she deposed that she never purchased the stamp paper but at the same time she refused to get her thumb impression Mark 'A' on the agreement in dispute compared with her sample thumb impression. If the stand was that the agreement was a product of forgery or fabrication and the same was

never executed by her or on behalf of the other defendants then refusal to pass muster of this scientific test goes against the defendants No.1 and 2. Defendant No.1 had an opportunity to demonstrate the truth by producing a finger print expert but she did not avail her right. When she was confronted by the plaintiff's witness of receiving earnest money she deposed that she and her mother had bank accounts at Nakodar and Jandiala but she cannot produce those bank accounts in Court. She was not in possession of the pass book. When the making of the agreement was denied it should have been supported by unimpeachable direct evidence to constitute fraud or fabrication of a document. I expect that being British born she would not take the risk of deposing falsely to create for herself commission of a criminal offence of making false deposition in Court.

The learned Additional District Judge concluded that on the evidence the agreement of sale stands duly proved. Defendants No.1 and 2 were the defaulting parties. They led no evidence of part sale consideration not having changed hands by way of payment of earnest money in a substantial amount of ₹3.5 lakh. The appeal was dismissed on January 07, 2017 and the judgment and decree dated February 11, 2015 was upheld to the extent of 1/7th share.

I have no reason to embark upon understanding the status of Nachhatar Kaur defendant No.2 in the transaction or whether she was owner of the suit property or not. This argument appears to have been raised for the first time in the grounds of the present appeal. No issue was framed for trial in this regard and, therefore, there is no discussion on the status of defendant No. 2-Nachhatar Kaur and it will be taken that she was joint owner of the

property with defendant No. 1.

Mr. Jhanji for the defendants-appellants cites three judgments, two of the Supreme Court and one of this Court. He presses the provisions of Section 12 (3) and 16 (c) of the Specific Relief Act, 1963 (“1963 Act”) and Sections 11 and 55 of the Transfer of Property Act, 1882. The cases are Hanumappa Channappa Hullur (D) by LRs. v. Shivamaruthappa Parappa Kalli and others, 2015 (4) RCR (Civil) 203, Rachakonda Narayana v. Ponthala Parvathamma and another, (2001) 8 SCC 173 & Shiv Charan v. Siri Ram and another, 2008 (3) RCR (Civil) 454. The 3rd case is distinguishable on facts. It may be true that if a party to contract denies signatures on the agreement of sale, the plaintiff cannot be granted specific performance unless he proves the signatures of that party on the agreement. In this case, the burden was on the defendant to prove the thumb impressions because they denied the very existence of that document. The onus was on the defendants to discharge in view of the pleaded stand in the written statement that the document was forged and fabricated.

In *Rachakonda Narayana* the question was whether relief under Section 12 (3) of the 1963 Act is required to be pleaded in the plaint when the suit is laid or it can also be taken at the appellate stage. The Supreme Court agreed with the view taken by the High Court that readiness and willingness to perform the terms of the contract by the plaintiff based on the latter part of Sub-section (3) of Section 12 must be pleaded in the plaint itself when the suit is laid and in its absence the relief being discretionary, cannot be granted by amendment of the plaint at the appellate stage. It is open to the plaintiff to relinquish part of the performance of the contract

after paying the entire consideration of the contracted amount at the appellate stage of the proceedings, if the defaulting parties are not capable of performing the whole of the contract (see paras.9 and 10 of the report). This Court is at a loss to understand how the case applies to the present one by applying the ratio to the facts of this case. Reliance is misplaced.

There is a clear assertion in para.4 of the plaint produced on the file of this case at Annex A-1 at running page 64 where plaintiff has specifically pleaded that he is still ready to perform his part of the contract, but, breach has been committed by the defendants. In paragraph 5 he asserts that on February 22, 2010 he was present in the office of the Joint Sub Registrar, Nurmahal for execution of the sale deed in his favour from the defendants and remained throughout during working hours of the day with the remaining sale consideration of ₹4.5 lakh and other expenses to be incurred on the execution and registration of the sale deed but the defendants failed to turn up. Readiness and willingness to perform contract has been taken in the plaint even though not in an express words but in substance. When the agreement of sale is denied altogether then the question of readiness and willingness recedes to the background and it will be presumed that the ingredient is satisfied. Besides, it is not the defence in the written statement that plaintiff was not ready and willing to perform his part of the contract in view of the denial of document itself as a forged and fabricated one and as a result of fraud or misrepresentation.

Similarly, I fail to see how the decision in Hanumappa Channappa Hullur applies. The Supreme Court affirmed the principle in general law that a Court cannot specifically perform the contract in

piecemeal, it must be performed in its entirety if performed at all as per Section 12 of the 1963 Act. The contention before the Supreme Court in this case was that the plaintiff did not exercise option under Section 12 (3) of the 1963 Act for claiming lesser share viz. 1/3rd of share of vendor- father at the available opportunity and in view of non-compliance of such provision even partial relief of specific performance would not be granted. The property in that case was joint belonging to father and two sons. Father sold the property. There was no mention of the father executing the agreement himself and on behalf of defendants No.2 and 3, who are his minor sons. There is no averment in the agreement that the suit property is a joint family property and it is being sold for the benefit of a joint family. In these circumstances, the Court said that the property being joint, father could sell only 1/3 of his share and accordingly neither the agreement nor the sale would bind the sons being co-owners of the property being divisible right to inheritance, a decree for specific performance to the extent of his share can be enforced on the doctrine of partial performance. This case to my mind goes against the appellant. The Courts have not encroached upon the rights of defendants No.3 to 7 in the judgment and the decree has rightly been passed confined only as per share of defendants No.1 and 2 in the suit property.

Accordingly, I find no substance in this appeal worth consideration on the second appeal side and more so in the face of findings of fact recorded by the Courts below which are not open to interference when the first court of appeal has applied its mind and returned findings after reading the pleadings, analyzing the relevant facts and appreciating the

evidence available on record to decree the suit and, therefore, I would dismiss the appeal. No question of law, much less substantial arises in this appeal for admission to regular hearing either under Section 100 of the CPC or Section 41 of the Punjab Courts Act, 1918.

(RAJIV NARAIN RAINA)
JUDGE

27.10.2017
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<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether reportable</i>	<i>No</i>