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

RSA No.3260 of 2003 (O&M)
Date of decision:08.08.2018

Nihal Singh ... Appellant

Vs.

Vinod Kumar and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Abhinav Sood, Advocate for
Mr. Vikram Singh, Advocate
for the appellant.

Mr. A.K.Singal, Advocate
for respondent No.1 to 4.

AMIT RAWAL J. (Oral)

The present Regular Second Appeal has been preferred at the instance of the appellant-plaintiff against the judgment and decree of the Lower Appellate Court, whereby, judgment and decree dated 27.7.1999 of the trial Court decreeing the suit of specific performance of the agreement to sell dated 1.3.1995, has been set aside, in essence, suit has been dismissed.

The facts which emanate from the pleadings of the parties are that plaintiff instituted the suit for possession by way of specific performance of the agreement to sell dated 01.03.1995 in respect of 03 bighas of land (hereinafter called as “suit land”) with a consequential relief of permanent injunction on the premise that defendant No.1-Daya Ram had agreed to sell the aforementioned land for a total sale consideration of

₹ 1,20,000/-. A sum of ₹75,000/- was paid as earnest money. The agreement was scribed by a regular deed writer and entered in register at serial no.58 and witnessed by the witnesses. The target date for execution and registration of the sale deed was 21.04.1995 and the balance sale consideration of ₹45,000/- was to be paid on that day. It was agreed that defendants would get the suit land redeemed from the mortgagees before the execution and registration of the sale deed. It was averred that plaintiff had always been ready and willing to perform part of the agreement and appeared before the office of Sub-Registrar on 20.04.1995 with a bank draft dated 21.4.1995 for a sum of ₹45,000/- issued by the Punjab National Bank, G.T.Road, Panipat but the defendants did not put in appearance. Even a legal notice dated 25.5.1995 was also served upon the defendants to appear before the office of Sub-Registrar, Panipat by giving another chance on 05.06.1995.

The suit aforementioned was filed on 15.06.1995. Despite the order of trial Court dated 23.08.1995 vide which defendant No.1 was restrained from alienating the suit land to any other person till the decision of the suit, defendant No.1 during the pendency of the suit has sold 2 bighas of land out of khasra no.453 to defendants No.2 and 3 vide sale deed dated 29.9.1995 for a consideration of ₹60,000/-. Thereafter, again sold 2 bigha 11 biswas of land vide sale deed dated 18.10.1995 for a consideration of ₹55,000/, thus, sought the possession of the suit land in the nature of specific performance of the agreement to sell.

Defendant No.1 filed written statement by raising numerous preliminary objections. On merit, denied the execution of the agreement to sell. It was averred that plaintiff had approached the defendant that in case, 6 bighas of land for a sum of ₹84,000/- was leased, the plaintiff would get the land redeemed from Parmal Singh and others. The defendant being an illiterate person fell into trap and in this process, the plaintiff obtained the thumb impressions endorsed on some papers regarding writing of lease for a period of 10 years for a sum of ₹84,000/- .

Defendants No.2 to 5/subsequent vendees taken the plea of bonafide purchaser. It was averred that they had deposited the mortgage amount of ₹84,000/- in respect of 11 marlas of land out of khasra no.455 and the amount of ₹75,000/- was adjusted in this regard.

Since the parties were at variance, the trial Court framed the following issues:-

> *"1. Whether the plaintiff is entitled for possession of the suit property by way of specific performance of agreement to sell dated 01.03.1995?OPP*
>
> *1.A Whether the defendants No.2 to 5 are effected by this suit?OPD*
>
> *2. Whether the present suit is not maintainable in its form nor the plaintiff has locus-standi to file the same?OPD*
>
> *3. Whether the present suit is liable to be stayed u/s 10 of CPC?OPD*

4. Relief."

Defendant No.1 during the pendency of the suit was proceeded against ex parte. The plaintiff examined as many as four witnesses. The plaintiff himself appeared as PW1, Hazari Lal as PW2, Inder Singh as PW3 and Vijay Kumar Luthra, Head Cashier, Punjab National Bank as PW4. On the other hand, defendant No.3 appeared himself as DW1, defendant No.1 as DW2, Jasbir Singh as DW3, Krishan Kumar as DW4, Inder Singh as DW5, Ram Phal as DW6, Lakhmi as DW7 and Balbir as DW8.

The trial Court on the preponderance of evidence aforementioned found that plaintiff had complied with the provisions of Section 16(c) of Specific Relief Act, 1963 and exercised the discretion by decreeing the suit. The appeal laid before the Lower Appellate Court as noticed above, has been allowed and judgment and decree of the trial Court, has been set aside.

Mr. Abhinav Sood, learned counsel appearing on behalf of the appellant submitted that the Lower Appellate Court has committed illegality and perversity in reversing the finding by not noticing the fact that defendant No.1 had not been able to belie the signatures or receipt of earnest money on agreement to sell. The appeal was preferred by only subsequent vendees. The sale deed was *doctrine akin to lis pendens, i.e.* as per the provisions of Section 52 of Transfer of Property Act, 1882 (for short "1882 Act"). The mortgage deed has not been proved in accordance with law as it is marked document but despite the Lower Appellate Court heavily placed reliance upon the same. All these factors, if looked into correct perspective, there was no occasion for the Lower Appellate Court to reverse the well reasoned judgment and decree of the trial Court. The Lower Appellate Court though noticed the fact that agreement to sell had been proved but the reasons assigned are totally alien to the pleadings of the parties. The mortgage deed, *ibid* is post execution of the agreement to sell.

Per contra, Mr.A.K.Singal, learned counsel appearing on behalf of subsequent vendees/defendants No.2 to 5/respondents No.1 to 4 submitted that findings of facts and law arrived at by the Lower Appellate Court do not call for any interference as jurisdiction vested in it has rightly been exercised. The amount of ₹75,000/-as earnest money was adjusted, for, mortgagee was none-else but son of the plaintiff and mortgagor was son of defendant No.1-Daya Ram. A sum of ₹84,000/- was paid by the respondents for redemption of mortgage deed and therefore, the agreement to sell dated 01.03.1995 has evaporated and sale deeds, aforementioned cannot be said to be hit by *doctrine akin to lis pendens*. The mortgage deed is a registered document, even if not proved, carries a presumption of truth and thus, urged this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of the Courts below and of the view that there is force and merit in the submissions of Mr. Sood, for, the Lower Appellate Court though rendered the finding of proving the agreement to sell in favour of the plaintiff but reasons assigned for reversing the finding, in my view, are totally fallacious and arbitrary. The mortgage deed had not been proved on record, for, Narinder Singh has not been examined. It has not been proved whether the mortgage amount was adjusted vis-a-vis amount of earnest money being part of the agreement to sell. In my view, the agreement to sell and mortgage amount were two separate transactions of two parcels of land. The Lower Appellate Court did not notice the particulars of the land as there is no reference of revenue numbers, thus, there is perversity.

DW2 in cross-examination admitted the execution of the agreement to sell. He stated that he had sold 03 bighas of land to Sh. Nihal Singh for a total consideration of ₹1,20,000/- and also endorsed the thumb-impressions on the document witnessed by Hazari Lal and Shamsher Singh. The deed writer has also proved the aforementioned fact but I am afraid the Lower Appellate Court did not refer to such admission of DW2.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in ***Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213,*** wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in

<u>Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262</u> on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

> *"Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of* ***Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]*** *cannot be sustained and is thus overruled." [at paras 27 - 29]"*

> *"27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India*

came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force."

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

Keeping in view the aforementioned facts and circumstances, I am of the view that it is a case where the defendants have acquired the right and title in the suit land during the pendency of the suit, therefore, sale deeds were hit by *doctrine akin to lis pendens* as per the provisions of Section 52 of 1882 Act. The sale deeds, aforementioned are set aside. However, to defray the agony of pendency of the appeal, I deem it appropriate to direct the appellant-plaintiff to pay lumpsum of ₹2 lakhs (two lakhs) to defendants No.2 to 5/respondents No.1 to 4 as compensation.

The plaintiff shall deposit the balance amount of sale consideration alongwith a sum of ₹2 lakhs (two lakhs) as compensation to respondents No.1 to 4 within a period of two months from the date of receipt of certified copy of this order. Thereafter, LRs of defendant No.1 shall come forward to the office of Sub-Registrar for execution and registration of the sale deed and in their absence, appellant-plaintiff shall be at liberty to seek execution of decree, in accordance with law.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

August 08, 2018
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No