

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

RSA No.1578 of 1993 (O & M)
Date of Decision:03.08.2018

Santosh Chauhan

...Appellant

Versus

Rajinderdeep Kaur and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Puneet Bali, Senior Advocate with
Ms. Rubal J. Singh, Advocate and
Ms. Monika Thakur, Advocate
for the appellant.

Mr. M.L. Sarin, Senior Advocate with
Ms. Alka Sarin, Advocate
for the respondents.

ANIL KSHETARPAL, J.

Plaintiff-appellant is in the regular second appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the learned trial Court.

Plaintiff initially filed a suit for permanent injunction, which was later on amended and relief of specific performance of the agreement to sell was added. Plaintiff claims that there was an agreement to sell between the parties dated 20.12.1980, which is not being honoured by the defendants and, therefore, decree for specific performance of the agreement to sell be passed. When plaintiff originally filed a suit for injunction, he prayed that the defendants be restrained from alienating, leasing out or transferring or parting

with possession in any manner with respect to half portion of Kothi No.7 known as Happy Nest (Right side). Suit was instituted on 05.09.1981. Defendants contested the suit and pleaded that agreement to sell was not executed for ultimate execution of the sale deed and the defendants were having good relations with the plaintiff and her husband and the plaintiff wanted to raise a loan for which agreement to sell was executed and for that reason only agreement to sell was kept vague.

Learned trial Court decreed the suit whereas learned First Appellate Court after finding that issues No.1 and 4 have not been answered by the learned trial Court asked for a report from the learned trial Court vide order dated 16.02.1989. Report was submitted on 11.03.1989. Finding of issues No.1 and 4 was returned against the plaintiff. Relevant extracts of the report are as under:-

“ (i) The Court is of the considered view that if the defendant had already executed any agreement on 10.10.1980 in favour of the plaintiff then defendant would not have refused to sign such an agreement on stamp paper as has been stated by the plaintiff in her evidence. There is even no mention in the agreement mark-A, which side of the building was to be sold. Moreover, plaintiff has not even examined her husband or the alleged property dealer for finalizing the sale agreement, as she had asserted that sale was entered into through a property dealer. Moreover, there is no mention of Mark-A in the subsequent agreement Ex.P1 and even the plaintiff has mentioned the names of two owners in her loan application dated 14.10.1980 (Ex.P3) although the document Mark-A was only by

defendant No.2. Document Mark-A cannot be exhibited at this stage by deposit of any penalty, because at the time of evidence there is not any note that this fact will be decided at the time of final arguments.

In view of the above discussion, the Court is of the considered view that the plaintiff has failed to prove that the defendants had agreed to sell ½ portion of the house in dispute for Rs.1,25,000/- through agreement dated 10.10.1980, rather the said alleged agreement as discussed above is proved to be a fabricated document. This issue is accordingly decided against the plaintiff in favour of the defendants.”

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Even with respect to issue No.4, learned Court recorded following finding:-

“The submissions of the both sides have been considered. In the present case plaintiff has claimed 843 sq. yards out of the main building on the basis of agreement dated 20.12.1980. By preparing site plan Ex.DW5/A of the entire building portion ABCD has been marked out it on right side and DW-5, Vidya Sagar who is a retired architectural assistant having experience of 50 years have given eleven notes on the site plan in support of his point that the building is not separable or partable and all the notes given on the site plan in support of his contention has been fully justified by marking portion ABCD out of the entire site plan for an area of 843 Sq.

Yards and has stated in the notes that if the porch is divided in two parts it will become useless and there will be no entrance to the main building. Stair case will also become useless because in the lower portion it falls in the left portion and in the upper portion it falls to the right side. The stairs leading to upper portion and inter-floor will become useless. Door of the study room will have to be closed and there will be no approach to it and corridor will go to the right side. The glazed varandah which is having one door, and the said one door will fall to the right side and no door will be on left portion for approach to the rear lawn, because 1/3 varandah will be on left side and 2/3 will go to right side and it will make the Varandah useless and will also spoil the beauty of glazed Varandah. No bed room will remain in the left portion and no drawing dinning will be in the right portion. Moreover, plaintiff during her cross-examination on 31.05.2003 has admitted that delivery of actual possession of the disputed portion is not possible unless a partition wall is constructed and has also admitted that if existing stairs are partitioned by a wall its utility will be reduced and has further admitted that there is no direct passage to the right half portion but passage to left half portion is there, and also admitted that door of varandah will fall in the right portion and there will be no approach to its left portion and has even admitted that no door is affixed to garage although in earlier part of her statement she tried to assert that passage to right portion

will be seem right side, although she voluntarily during her statement had stated that for actual partition some alterations have to be made but failed to specify what alteration are to be made. Plaintiff has not examined any person to rebut the statement of DW-5, who is an architectural assistant (retired) and has more than 50 years experience in preparing site plans and estimates of various buildings. The contention of the learned counsel for the plaintiff that defendants having equal share in the entire building and they had intention to partition the property by metes and bounds, and the same principle be applied in the case of the plaintiff is devoid of any force, because defendants had equal share in the entire property including two annexes, and the defendants in between could have devised any mode including annexes how the property was to be divided by metes and bounds, and one party could keep the ground floor or the other could keep the upper floor and some portion of the annexes and there is no such evidence on the file that if the defendants had to actually partition the property, some alteration had to be made by making demolition as the plaintiff claimed during her statement that some alteration has to be made and only then physical partition is possible. If it could be said that plaintiff could re-construct the house in their portion by demolishing the existing construction on the right side that can not be the intention of the parties, because at present it is to be seen whether out of the whole building 843 sq.

yards could be conveniently separated for giving it to the plaintiff and that is not possible without effecting material alteration, by demolishing some property and rendering useless some portion of the main building which is evident from notes given on site plan Ex.DW-5/A. Moreover, the defendants witnesses has not been cross-examined by the plaintiff in the point that building is not partable or separable. DW-5 during his cross-examination has categorically asserted that even after alterations and new construction the division cannot be made.”

After receipt of the report, learned First Appellate Court accepted the appeal and reversed the judgment passed by the learned trial Court.

This Court has heard learned senior counsel for the parties and with their able assistance gone through the record and the judgments passed by the Courts below.

Learned counsel for the appellant has submitted that learned First Appellate Court has failed to consider Ex.P-2, which is a letter sent by Mrs. D. Baldev Singh, defendant No.1, seeking permission from the Land Acquisition Collector, Patiala to sell the house in favour of the plaintiff and her husband.

Learned counsel for the appellant submitted that once this application was submitted, the agreement to sell is proved on the file and, therefore, there is no doubt about the genuineness of agreement to sell. On careful perusal of Ex.P-2, it is apparent that this letter is with respect to area measuring 2078 square yards.

It is not the case of the plaintiff that at any time 2078 square yards was agreed to be sold or there was any concluded contract to that effect. It may

sell is mark 'A' dated 10.10.1980, which is with respect to 790 square yards, part of the house, which represents half portion of the main building. Total sale consideration mentioned in the agreement to sell is Rs.1,25,000/-. This agreement to sell is that which is only signed by Mrs. D. Baldev Singh i.e. defendant No.1, one of the co-owner. Thereafter, there is another agreement to sell, which is not signed by any of the owner dated 11.12.1980. In this agreement, area to be sold mentioned is 2078 square yards but this has not been signed by any of the vendors. It is only signed by a witness, who is stated to be the husband of defendant No.2. Even the purchasers have not signed the agreement, therefore, this agreement is not an agreement in the eyes of law. However, it is mentioned in the agreement that total sale consideration of Rs.3,75,000/- out of which Rs.25,000/- have been paid. The words "by Cheque Number" has been scored of.

Present suit filed is with respect to agreement to sell dated 20.12.1980 Ex.P-1 on the file. The aforesaid agreement to sell is in the form of a receipt wherein Rs.25,000/- is acknowledged to have been received as earnest money. Plaintiff claims that such agreement to sell is the final agreement to sell and, therefore, specific performance thereof should be ordered, whereas it is the case of the defendant that aforesaid agreement to sell is result of alteration.

Signatures of both the vendors are not in dispute, however, there are certain circumstances, which support the case as set up by the defendants. It is the case of the defendants that the agreement to sell was never intended to be acted upon and the agreement to sell was entered into only enabling the plaintiff to obtain a loan from the Department, where she was working. Factors which support the facts pleaded by the defendants are as under:-

(i) On 14.10.1980 i.e two months and eight days before the

agreement to sell dated 20.12.1980 is executed, plaintiff applies for a loan specifically mentioning that area agreed to be sold is 843 square yards. As noticed earlier, first agreement dated 10.10.1980 was only with respect to 790 square yards.

(ii) It is case of the plaintiff in the plaint that earnest money of Rs.25,000/- was paid through cheque dated 11.12.1980. However, no evidence has been led to prove that the aforesaid cheque was ever encashed. Defendants had taken a plea that aforesaid cheque was never encashed as the agreement to sell was not intended to be acted upon. The aforesaid cheque has been produced on the Court file as Ex.DW-4/A. Hence, Ex.P-2 does not help the case of the plaintiff.

(iii) Learned senior counsel has further argued that the judgment passed by the learned First Appellate Court is perverse. This Court does not find that the judgment passed by the learned First Appellate Court is perverse. No doubt, learned First Appellate Court has devoted substantial discussion on the agreement to sell dated 10.10.1980 and 11.12.1980. However, such discussion would not make the judgment perverse while decreeing a suit for specific performance. Court has to examine all the facts, which have come on record.

(iv) Learned counsel for the appellant has further submitted that the Appellate Court has wrongly recorded a part of the property, could not be sold. This Court finds that when the report was called for, which has been extracted above. In fact on examination of evidence, the Court had found that the property which is sought to be sold renders the remaining portion useless. Such finding of the learned trial Court in the report has been affirmed by the learned First Appellate Court. Hence, there is no perversity in the finding of the

Courts below.

In view of the aforesaid discussion, this Court does not find any good ground to interfere with the findings of fact arrived at by the learned trial Court in the report dated 11.03.1989 and the judgment passed by the learned First Appellate Court.

Hence, appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the above said judgment.

03.08.2018

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(ANIL KSHETARPAL)
JUDGE

Whether Speaking/Reasoned: Yes/No
Whether Reportable : Yes/No