IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

101

RSA No.765 of 1990 (O & M)
Date of Decision:08.02.2018

Mohinder Singh @ Minder Singh and others
...Appellants

Versus

Jit Singh and others
...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. A.K. Chopra, Senior Advocate with
Mr. Ankit Midha, Advocate
for the appellants.

Mr. P.N. Aggarwal, Advocate
for the respondents.

***

ANIL KSHETARPAL, J.(Oral)

Defendant No.2-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the Courts below.

Plaintiffs had filed a suit for specific performance of the agreement to sell dated 03.02.1984. The target date for execution and registeration of the sale deed was 31.05.1984. Defendant No.1, who was the owner, had received earnest money of Rs.7,000/-. Plaintiff on the target date visited the office of the Sub Registrar and got his presence recorded by moving an application before the Sub Registrar and getting an affidavit attested.

Plaintiffs also came to know that defendant No.1-Kewal Kishan has in fact sold the property vide sale deed dated 27.03.1984 Ex.D-2 for a sum of Rs.49,000/-, whereas the agreement to sell with the plaintiff was for

Rs.75,218.75/-.

Defendant No.1, the owner, initially filed a written statement denying execution of the agreement to sell, however, thereafter defendant No.1 did not appear in the witness-box, although his counsel kept on appearing till the decision of the date.

Both the Courts after appreciating the evidence available on the file, decreed the suit filed by the plaintiff and set aside the sale deed executed by defendant No.1 dated 27.03.1984.

Appellant while filing an application has placed on record proposed substantial questions of law, which are extracted as under:

> *" 1. Whether the Appellants being a bonafide purchaser for consideration and without notice of the earlier alleged agreement can be held to be bound by the previous agreement between the vendor and the previous prospective vendee?*
>
> *2. Whether the onus to prove that the Appellants had the knowledge of the earlier agreement to sell was on the previous vendee/plaintiff, in light of the Appellants claiming to be bonafide purchaser for valuable consideration and without notice of the earlier agreement to sell?*
>
> *3. Whether in light of Ex.D1 having been duly proved not only by its attesting witness but also by its executant in his written statement, the Ld. Courts below were legally justified in ignoring and brushing aside?*
>
> *4. Whether the Ld. Courts below erred in law and fact while overlooking the fact that the Plaintiff/Respondent failed to prove the signature of the executant on the alleged agreement, Ex.P/1 and get the same examined by an expert?*
>
> *5. Whether the Judgment and decree of the Courts*

below, which is the result of non-reading/misreading of the pleadings, evidence and/or the material placed on record, is an error of law and, as such, unsustainable in the eyes of law and is liable to be set aside?

6. Whether the Impugned Judgment and decree is liable to be set aside in light of the ground incorporated in the Memorandum of Appeal?"

During the course of arguments, learned counsel for the appellant has pointed out that the learned First Appellate Court has not given any finding on issue No.2 i.e. issue of readiness and willingness. He submits that hence the decree passed by the learned First Appellate Court is liable to be reversed. It may be noted here that under issue No.2, learned First Appellate Court has not discussed the issue of readiness and willingness with regard to the validity of agreement. In any case, learned trial Court has already recorded a finding that the plaintiff was always ready and willing to perform his part of the contract. Brother of the plaintiff has appeared in the witness-box. He has stated that the plaintiff visited the Office of the Sub Registerar on the target date along with the money and got his presence marked by moving an application before the Sub Registrar and got an affidavit attested. The learned trial Court has further found that the suit was filed within a period of one month and fifteen days after the target date. Hence, the Court has found that the plaintiff was ready and willing to perform his part of the contract.

Even otherwise, the plaintiff has filed a suit asserted that he was always ready and willing to perform his part of the contract. When the plaintiff has appeared through his attorney (brother) he also made a statement that he was always ready and willing to perform his part of the contract. Hence, this Court does not find that the finding of the learned trial Court on this issue is erroneous.

Still further, learned counsel for the appellant has argued that the plaintiff did not appear in the witness-box and, therefore, adverse influence must be drawn against him.

This Court has considered the submission. No doubt, the plaintiff has not stepped into the witness-box but brother of the plaintiff has appeared as an attorney. Brother of the plaintiff has answered all the questions. Brother of the plaintiff also submits that he visited the Office of the Sub Registrar alongwith the plaintiff on the target date i.e. on 31.05.1984. He has also stated that the plaintiff has withdrawn the money from the Bank and was carrying the money with him on the target date. Such being the position, learned counsel for the appellant could not point out any prejudice caused on account of non-appearance of the plaintiff. Agreement to sell between the parties is in writing, which is attested by two marginal witnesses. Both have been examined as PW-1 and PW-4.

In view of the overwhelming evidence, this Court cannot throw out a meritorious case only on the ground that the plaintiff has not appeared in the witness-box.

Adverse inference against the party for non-appearance can be drawn only if the other party is able to satisfy the Court that on account of non-appearance, their rights have been prejudiced. In the present case, appellants have failed to show any prejudice caused to them.

Next argument of learned counsel is that Gurkeerat Singh, attesting witness has stated that the executant had signed the agreement in Punjabi, whereas executant had put his thumb impression and signatures in English. He submits that the presence of Gurkeerat Singh is doubtful at the time of agreement. This Court has considered the submission. However, Gurkeerat Singh has been examined in the Court after substantial time. A witness is not expected to remember minute details. Witness has stated that he was present at the time when the agreement to sell was signed and he had signed as a marginal witness.

Next argument of learned counsel is that agreement to sell is not scribed by its regular scribe. The argument is to be noticed and rejected.

The proposed questions of law framed by the counsel for the appellant extracted above are all questions of fact which have been decided by the Courts after examining the evidence thoroughly. Appellant had set up an agreement to sell dated 17.01.1984 to claim a superior right. Both the Courts have found that such agreement to sell is anti-dated and doubtful.

Learned First Appellate Court has discussed this aspect in detail and after appreciating the evidence available on the file has recorded as under:-

> *" (ii) Ex.D1 is written on a stamp paper but the stamp paper is not shown to have been purchased from any authorized stamp vendor. On the reverse of Ex.D1 there is some noting purporting to have been made by the Stamp vendor but neither the signatures of the stamp vendor are decipherable nor there is any place mentioned where the sale of the stamp paper took place. This circumstance by itself may not be very material but when it is viewed in conjunction with other circumstances it assumes significance. Stamp papers, as is the common experience, are sold by stamp vendors. The stamp vendors are required to maintain registers about the sale of stamp and each transaction of sale has to be entered in that register. A stamp vendor is also*

> *required to make endorsement on the reverse side of the stamp paper incorporating therein the name of the purchaser with all his personal particulars, the purpose for which the stamp paper is required and the place where the stamp paper had been sold. The thumb impression or signatures of the purchasers are also required to be obtained under that endorsement. In the instant case the endorsement is there but thumb impression or signatures of the purchaser are missing. The signatures purporting to be that of stamp vendor are totally undecipherable. No place under-neath the signatures of stamp vendor has been mentioned. All this appears to be the result of designed effort. The name of the stamp vendor appears to have been supressed to fore-stall the move of the opposite side to summon him along with his register for the sale of stamp with a view to find out if really the stamp papers had been sold by him or not."*

Learned counsel for the appellant could not point out any error in the appreciation of evidence on this aspect of the matter.

In view of the aforesaid discussion, there is no ground to interfere with the concurrent findings of fact arrived at by the Courts below.

Hence, this regular second appeal is dismissed.

08.02.2018 **(ANIL KSHETARPAL)**
sheetal **JUDGE**

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