

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

RSA No.1505 of 1994 (O & M)
Date of Decision:26.03.2018

Kulwant Singh and another

...Appellants

Versus

Surinder Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. M.L. Sarin, Senior Advocate with
Ms. Hemani Sarin, Advocate
for the appellants.

Mr. Sarwan Singh, Senior Advocate with
Mr. N.S. Rapri, Advocate
for the respondents.

ANIL KSHETARPAL, J.

Defendants No.2 and 3-appellants are in the regular second appeal against the finding arrived at by the Courts below.

Learned trial Court while passing a decree for specific performance of the agreement to sell, refused to pass a decree for possession, although, it was prayed for. Hence, two first appeals were filed. Appeal filed by the plaintiffs-respondents was allowed, whereas appeal filed by defendants No.2 and 3 was dismissed.

Defendants-appellants have filed appeal only against the dismissal of their appeal filed before the learned First Appellate Court.

Plaintiffs filed a suit for specific performance of agreement to sell dated 18.09.1986. It was pleaded that at the time of agreement to sell

defendant No.1 and it was agreed that the sale deed would be registered on 19.12.1986. The plaintiff was always ready and willing to perform his part of the contract. Defendant No.1 committed the breach of the contract and executed a sale deed of the suit land in favour of defendants No.2 and 3, the appellants. Defendant No.1 filed written statement and denied having executed any agreement to sell and it is result of fraud.

Defendants No.2 and 3-appellants pleaded that defendant No.1 had executed a sale deed in their favour for lawful consideration and the possession of the suit land was already with the father of defendant Nos.2 and 3 namely Piara Singh as a mortgagee. They had also pleaded that an agreement to sell in their favour was prior in time to that of the plaintiffs and they are bona fide purchasers for valuable consideration and without having any notice of the right or title of the plaintiffs.

Both the Courts after appreciation of evidence held that the agreement to sell in favour of the plaintiffs is proved and defendants No.2 and 3 have failed to prove that there was any prior agreement in their favour by defendant No.1.

I have heard learned Senior counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

Learned counsel for the appellants has submitted that the appellants were not allowed to argue on the question of readiness and willingness on the ground that they are subsequent purchasers. He submitted that the aforesaid view is erroneous.

Learned counsel for the respondents does not dispute this position. In view of the aforesaid, the finding recorded by the learned First

Appellate Court declining the subsequent vendess to raise an argument with regard to lack of readiness and willingness of the plaintiffs is set aside. However, learned counsel for the parties have agreed that they would address the arguments finally in this appeal itself on the issue of readiness and willingness of the plaintiffs.

Plaintiffs in order to prove his readiness and willingness has pleaded in the plaint to this effect and has also appeared in the evidence as PW-4 and asserted that he was always ready and willing to perform his part of the contract. PW-4 was not cross-examined on this issue by the learned counsel for the defendants. No suggestion was given to the plaintiffs. Hence, the evidence of PW-4 on the assertion that the plaintiff was ready and willing to perform his part of the contract has not been challenged in cross examination.

In view of the aforesaid, the finding of the learned trial Court that the plaintiffs were always ready and willing to perform his part of the contract does not require any interference.

Still further, the agreement to sell is dated 18.09.1986. As per the agreement to sell, sale deed was to be executed on 19.12.1986 and the suit was filed on 19.12.1986 itself. Hence, the plaintiffs were ready and willing to perform his part of the contract.

Second argument of learned counsel is that agreement to sell dated 18.09.1986 has not been proved. Plaintiffs in order to prove the agreement to sell has examined scribe i.e. Darshan Singh as PW-1; Sukhwinder Singh, attesting witness as PW-2 and himself as PW-4. Hence, the agreement to sell has been proved as not only scribe even marginal

Next argument of learned counsel for the appellants is that his clients i.e. defendants No.2 and 3 are bona fide purchasers without notice and, therefore, sale deed in their favour cannot be set aside. In this regard, it may be noticed that on the one hand, defendants No.2 and 3 claimed that their father was a mortgagee and hence in possession of the property. On the other hand, they are asserting that they did not know of the agreement to sell. Plaintiffs appeared in rebuttal and had specifically stated that defendants No.2 and 3 were in knowledge of the agreement to sell and rather it was known to everybody in the village.

Still further, the conduct of defendants No.2 and 3 proves otherwise. Defendants No.2 and 3 pleaded a prior agreement to sell in their favour. Learned trial Court found that the agreement set up by them is not genuine. Before the learned First Appellate Court, learned counsel for the appellants, during the course of argument did not press this issue. It has been recorded by the learned First Appellate Court as under:

“In this case defendants propounded agreement Ex.D.1 allegedly executed by Gurbux Singh vendor prior to agreement Ex.P.1. This agreement was not pressed into service neither referred to by learned counsel for the vendees.”

In view of the aforesaid, the appellants are not proved to be bona fide purchasers.

Learned counsel for the appellants in the end argued that since father of defendants No.2 and 3 was mortgagee, therefore, specific performance of the agreement to sell can only be subject to the rights of the

Learned counsel for the respondents has not disputed this position. In view of the aforesaid discussion, while dismissing the appeal it is ordered that the decree for performance of agreement to sell shall be subject to the rights of the mortgagee.

With the aforesaid modification, regular second appeal is dismissed.

26.03.2018
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(ANIL KSHETARPAL)
JUDGE

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