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

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Date of decision : 12.10.2018

Dhoop Singh and another

... Appellants

Versus

Balwant Singh (deceased) through LR's and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Senior Advocate with
Mr. Chetan Slathia, Advocate and
Mr. C.B. Goel, Advocate
for the appellants.

Mr. Ashish Aggarwal, Senior Advocate with
Mr. Kulwant Singh, Advocate
for the respondent(s).

AMIT RAWAL, J.

The appellants-defendant Nos.7 and 8 are in the present regular second appeal against the judgment and decree of the lower Appellate Court, whereby the suit claiming specific performance of the agreement to sell dated 24.12.1985 has been decreed in toto, whereas the trial Court had partly decreed the suit by confining the decree for return of earnest money of ₹20,000/- alongwith interest @ 6% from the date of the execution of the agreement till realization.

The respondents-plaintiffs, namely, Satbir, Balwant and Om Parkash sons of Nihala, instituted the suit on the premise that the defendant Nos.1 to 6 had entered into an agreement to sell dated 24.12.1985 in their

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favour alongwith defendant No.9 with regard to land measuring 24 kanals as they were owner of $1/4^{\text{th}}$ share in the land measuring 139 kanals $8\frac{3}{4}$ marlas out of land measuring 557 kanals 15 marlas. Defendant Nos.1 to 4 in the capacity of co-sharer had mortgaged the land measuring 83 kanals 9 marlas bearing Rect. No.25 Killa No.9 to 13, 19, 20, Rec.t No.32 Killa No.1, with the Bank of Baroda, Kaithal, for ₹50,000/-. Defendant Nos.1 to 5 had already mortgaged the land measuring 12 kanals, representing 240/11155 share, with defendant Nos.7 and 8 for ₹15,000/-, vide mortgage deed dated 21.05.1984 and in lieu thereof, the defendants-mortgagors were in possession of the specific numbers. Defendant No.6 had also mortgaged land measuring 19 kanals 18 marals, representing 398/11155 share, with defendant Nos.7 and 8, for a sum of ₹27,000/-, vide mortgaged deed dated 27.05.1982. In total, the mortgaged land was 115 kanals 7 marlas and after adjustment of area so mortgaged the land measuring 24 kanals $1\frac{3}{4}$ marla (not mortgaged), was agreed to be sold to the plaintiffs for a valuable sale consideration of ₹86,500/- against the receipt of earnest money of ₹20,000/-. The stipulated date for execution and registration of the sale deed was 02.06.1986. The balance sale consideration of ₹66,500/- was to be paid at the time of registration of the sale deed. The plaintiffs and defendant No.9 had always been ready and willing to perform the part of the agreement, but defendant Nos.1 to 4 colluded with defendant Nos.7 and 8 as by warding off the interest of the plaintiffs, sold the land, in dispute, vide sale deed dated 22.05.1986 (Ex.D-3). In these circumstances, the aforementioned suit was filed on 24.05.1986, as the breach had already been committed before the target date i.e. 02.06.1986.

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Defendant Nos.1 to 4 filed written statement and in para 5, it was stated that the mortgaged land had already been redeemed, but admitted the execution of the agreement to sell and receipt of earnest money etc. Defendant Nos.7 and 8 filed separate written statement and stated that plaintiffs and defendant Nos.1 to 4 were in collusion to harm in view of the fact that they had already an agreement to sell in their favour i.e. prior to the agreement to sell, in question.

The plaintiffs filed replication and objected by stating that written statement of defendant Nos.1 to 4 was evasive and viz-a-viz replication to the reply of defendant Nos.7 and 8, it was stated that there was no agreement to sell in favour of defendant Nos.7 and 8, prior to agreement to sell in favour of the plaintiffs. The agreement to sell in favour of the plaintiffs was correct, legal and enforceable.

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

1. *Whether the defendants No.1 to 4 executed an agreement to sell in favour of the plaintiff and defendant No.9 in respect of suit land and received ₹ 20,000/- as earnest money as alleged in the plaint? OPP*
2. *Whether the plaintiffs were ready and are still ready and willing to perform their part of contract? OPP*
3. *Whether the suit cannot be filed on behalf of the defendant No.9 for specific performance as alleged in P.O. No.1 taken in the written statement? OPD*
4. *Whether the suit is baseless and untenable? OPD*
5. *Whether the plaintiffs have no cause of action to bring the suit? OPD*
6. *Whether the defendants No.7 and 8 are entitled to special costs under Section 35-A CPC? OPD*

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7. Relief.

The trial Court on the basis of the evidence brought on record particularly DW1 and DW2 i.e. scribe and attesting witness of the previous agreement to sell dated 24.12.1985, found that the discretionary relief could not be granted in favour of the plaintiffs and ordered for refund of earnest money of ₹20,000/- along with interest @ 6%. However, in appeal taken before the lower Appellate Court by the plaintiffs, the suit *in toto* has been decreed holding that the agreement to sell (set up) dated 24.12.1985 was an anti-dated document as defendant Nos.7 & 8 and defendant Nos.1 to 4 were closely related each other, thus, the plea of *bona fide* purchasers could not be taken. It was an intentional act on the part of the vendors/defendant Nos.1 to 4, even the sale deed dated 22.05.1986 was for ₹1,14,000/- against the total sale consideration of ₹86,500/- in respect of agreement to sell, in question.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. C.B. Goel and Mr. Chetan Slathia, learned counsel appearing on behalf of the appellants-defendant Nos.7 & 8, submitted that the lower Appellate Court abdicated in reversing the judgment and decree of the trial Court as the appellants-defendant Nos.7 & 8 have been able to prove that they were *bona fide* purchasers for a valuable consideration. The fact that the agreement dated 24.12.1985 has been proved through DW1-scribe and DW2-attesting witness, has not been taken into consideration. There was no evidence on record to establish that there was a collusion between appellants-defendant Nos.7 & 8 and defendant Nos.1 to 4. As per the agreement (Ex.P-1), defendant Nos.1 to 4 were owners of land measuring 139 kanals $8\frac{3}{4}$ marals, having $1\frac{1}{4}$ th share and the land under mortgage was

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115 kanals 7 marlas. No particular khasra number of land, agreed to be sold, was mentioned in the agreement in favour of the plaintiffs. The suit for specific performance was not maintainable as the plaintiffs had already filed a suit for mandatory injunction (Ex.PW4/3), on 09.05.1986, with a direction to the vendors i.e. defendant Nos.1 to 4 to seek permission from the Income Tax and thereafter, execute the sale deed, whereas the sale deed before filing of the present suit filed on 24.05.1986, had already been executed on 22.05.1986. The appellants-defendant Nos.7 & 8 were already in possession of part of the suit land as mortgagees, thus, urges this Court for setting aside the judgment and decree of the lower Appellate Court, under challenge.

Per contra, Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Kulwant Singh, learned counsel appearing on behalf of the respondents-plaintiffs submitted that findings of fact and law arrived at by the lower Appellate Court cannot be interfered with until and unless there is gross illegality and perversity, which has not been pointed out. It has been proved on record that the appellants-defendant Nos.7 & 8 and vendors/defendant Nos.1 to 4 were closely related each other being neighbourers. Existing agreement to sell cannot be ruled out and had attempted to execute agreement to sell of back date to thwart the right of the plaintiffs. It was an attempt to wriggle out from the agreement to sell, in question. Though no issue with regard to maintainability of the suit under Order 2 Rule 2 of the Code of Civil Procedure was framed, but the same would not apply in view of the *ratio decidendi* culled out by Hon'ble the Supreme Court in “Sucha Singh Sodhi (D) thr. LRs V/s Baldev Raj Walia and another” 2018 (6) SCC 733; 2018 (2) RCR (Civil) 782.

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It was next contended that the contents of para 8 of the plaint with regard to Rect. No.32 Killa Nos.9, 10 & 12 was denied. No right had accrued to the plaintiffs to seek specific performance as at that time sale deed had not been executed. The sale deed (Ex.D-3), thus, did not specify of previous agreement to sell dated 24.12.1985, sought to be projected in evidence. Ajmer Singh-vendee/defendant No.7 admitted that the plaintiffs and defendant No.1 are real brother of his father i.e. '*Chacha*', and therefore, it cannot be believed that he did not have the knowledge of the agreement to sell in favour of the plaintiffs, thus, urges this Court for dismissal of the present regular second appeal by upholding the findings under challenge.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that there is no force and merit in the submissions of Mr. Arun Jain, for, defendant No.7- Ajmer Singh/vendee admitted that the plaintiffs and the appellants-defendant Nos.7 and 8, were known to each other, therefore, it cannot be believed that they did not have the knowledge of the agreement to sell.

It would be in the fitness of things to reproduce para Nos.5 and 8 of the plaint and corresponding paragraphs of the written statement, which read thus:-

"Para Nos.5 and 8 of the Plaint

5. *That defendant No.6 has separately mortgaged the land measuring 19 kls. 18 mls. representing 398/11155 shares of land measuring 557 kls. 15 mls. defendants No.7 and 8 for ₹27,000/- vide a mortgage deed dated 27.5.1982. The defendants/mortgagees are in possession of specific numbers in lieu thereof.*

8. *That land measuring 24 kls. bearing Rect. No.32 Killa Nos.9, 10 & 12 is the land which is not under mortgage and is*

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bounded by the land of Khiyali on its north, by the land of Molu on its east and sought and by the land of owner including the passage on its west. The remaining land 1 $\frac{3}{4}$ mls. is not adjacent to this land.

Para Nos.5 and 8 of the Written statement

5. Para No.5 of the plaint is irrelevant. However, the same has already been redeemed.

8. Para No.8 of the plaint as stated is not admitted. There is till today no partition of land with co-sharers.

Order 8 Rule 5 of the Code of Civil Procedure envisages that pleadings in the plaint have to be specifically denied, but cannot be vague or evasive. The stand in the written statement falls in aforesaid category. Defendant Nos.7 and 8 in the written statement did not take up the plea of *bona fide* purchasers or raised the objection qua maintainability of the suit except that in para 9 of the written statement, stated that the defendant Nos.1 to 4 had agreed to sell the land detailed in para 8 of the plaint to the answering defendants, vide agreement to sell dated 24.12.1985. For the sake of brevity, para No.9 of the written statement of the defendant Nos.7 and 8 reads thus:-

"9. Para No.9 of the plaint is wrong & denied. Further defts. no.1 to 4 agreed to sell the land detailed in para No.8 of the plaint to the answering defts. vide agreement dt. 24.11.85. However, the agreement is void against defts. no. 7 & 8."

In such circumstances, the objections qua filing of the present suit in view of the fact that the previous suit for mandatory injunction was withdrawn, the appellants cannot be permitted to raise such plea. In the sale deed Ex.D3, there is no reference to the agreement to sell dated 24.12.1985 to establish that the parties had already entered into an agreement to sell and

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exchanged the certain amounts as earnest money of ₹22,000/- and the balance, at the time of the registration and execution of the sale deed.

It is a matter of fact that the vendors has not come forward to contest the suit though represented through counsel at one point of time. Before the Courts below, the suit was contested through their counsel. Be that as it may, no explanation has come forward what circumstances impelled defendant No.1 to deviate from the terms and conditions agreement to sell dated 24.12.1985, which has candidly been admitted in the written statement. The answer is, that it had been sold for a higher price i.e. ₹1,14,000/- viz-a-viz ₹86,500/-/. In such circumstances, the defendants cannot take the plea of *bona fide* purchasers in the absence of any pleadings to that effect. DW2-Teka deposed that the appellants-defendant Nos.7 & 8 are the sons of 'Chacha' of the plaintiffs and their residential house was also adjoining. In such circumstances, even assuming for an argument sake, that they had not taken the plea of *bona fide*, cannot be branded as *bona fide* purchasers. The deed writer, who scribed the agreement (Ex.D1) did not produce his register of deed writing, on the plea that it was destroyed. It was a material document to be brought on record. Other witness i.e. Lambardar has not been examined for the reasons best known. All these factors have been examined by the lower Appellate Court being the last court of fact and law and I am of the view that there is no illegality and perversity in decreeing the suit by granting discretionary relief under Section 20 of the Specific Relief Act, 1963.

Keeping in view the aforementioned facts and circumstances, I do not find any illegality and perversity in the judgment and decree of the lower Appellate Court which is based upon the appreciation of oral and

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documentary evidence, much less, no substantial question of law arises for determination. The present regular second appeal is, accordingly, dismissed.

12.10.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No