

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

1. RSA No.2306 of 2008 (O&M)
Date of decision : 24.04.2018

Navneet Kaur

...Appellant

Versus

St. Soldier Properties and Industrial Ltd. and another

...Respondents

2. RSA No.4567 of 2010 (O&M)
Date of decision : 24.04.2018

St. Soldier Properties & Industrial Ltd.

...Appellant

Versus

Satvir Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Amit Jain, Advocate and
Mr. Veenu Garg, Advocate for the appellant
(In RSA No.2306 of 2008)

Mr. Tushar Sharma, Advocate for
Mr. R.S. Bajaj, Advocate for the appellant
(In RSA No.4567 of 2010) and
for respondent No.1 (In RSA No.2306 of 2008)

ANIL KSHETARPAL, J.

This judgment shall dispose of RSA No.2306 of 2008 and
RSA No.4567 of 2010 as the controversy involved in both the appeals is

similar in nature and the questions which required to be decided are also common.

The plaintiffs in both the suits are brother and sister whereas defendant No.1 in both the suits is common. It is unfortunate that two suits filed on the basis of similar facts filed by brother and sister have been decided differently and the judgments passed by both the Courts are contradictory to each other. Fortunately, these appeals have come up for hearing together. Learned counsel for the parties also agreed that both the appeals can be disposed of by a common judgment. A photocopy of the records has been produced by the learned counsel for the parties, correctness whereof is not being disputed.

In both the cases, the plaintiffs filed a suit for possession by way of specific performance of the agreement to sell. The plaintiff in RSA No.4567 of 2010 claims to have entered into an oral agreement with defendant No.1 who is a colonizer on 04.02.1998 and booked a plot No.505. It is claimed that the plaintiff agreed to purchase the plot No.505 vide oral agreement dated 04.02.1998 and paid a sum of ₹1,46,739/- in cash, under the table, and he was issued a receipt of ₹70,000/- which was paid separately. It is further pleaded that defendant No.1 agreed to execute the sale deed in six months on receipt of balance sale consideration.

The plaintiff in RSA No.2306 of 2008 claims that she booked plot No.601 at the rate of ₹25,000/- per marla and paid under the table ₹1,46,086/-, and further paid ₹50,000/- against the receipt through cheque dated 27.09.1997.

In both the suits, it has been pleaded by defendant No.1 that plot has already been sold in favour of defendant No.2. It is further pleaded that the plaintiff is relative of Sh. Joginder Singh Multani, a property dealer and the plaintiff had refused to purchase the plot and get the sale deed executed within 10 days. It is further pleaded that there was a Notification under Section 4 of the Land Acquisition Act issued by the State for intending to acquire the land on 24.11.1997 and, therefore, the plaintiffs had refused to purchase the plot.

Civil Suit dated 06.04.1999 filed by Satvir Singh (brother), subject matter of Regular Second Appeal No.4567 of 2010, has been decreed by both the Courts below whereas on the similar evidence, suit filed by the sister-Navneet Kaur dated 07.04.1999, subject matter of Regular Second Appeal No.2306 of 2008 has been dismissed by both the Courts below.

In the considered opinion of this Court, following substantial questions of law arise in the present case:-

1. Whether the Courts are justified in deciding the similar suits involving similar controversy differently and separately particularly when the controversy which need determination is same and the parties are also closely related?
2. Whether in the facts of the present case, the plaintiffs have proved that there was an agreement to sell and the plaintiffs were ready and willing to perform their part of the contract?
3. Whether before the Court draws adverse inference on account of

non-appearance of the party to the suit, the Court is required to examine sufficiency or insufficiency of the evidence available on the file?

NOW THE STAGE IS SET FOR CONSIDERING THE QUESTIONS OF LAW:-

1. Whether the Courts are justified in deciding the similar suits involving similar controversy differently and separately particularly when the controversy which need determination is same and the parties are also closely related?

It is not in the interest of justice that the similar suits between closely related parties involving similar points for adjudication should be decided separately. The present case proves that fact. In one suit, both the Courts have decreed the suit for possession by way of specific performance of the agreement to sell on similar facts whereas other suit has been dismissed declining the relief of specific performance of the agreement to sell. The Courts must devise some method to identify similar suits involving similar controversy and then assign such suits to one Court and thereafter examine the feasibility of consolidating the suit or decide the same simultaneously so that the judgments are not contradictory. Hence, question No.1 is answered accordingly.

2. Whether in the facts of the present case, the plaintiffs have proved that there was an agreement to sell and the plaintiffs were ready and willing to perform their part of the contract?

In RSA No.4567 of 2010 arising out of the suit filed by brother Satvir Singh, concurrent finding of fact has been arrived at by the Courts below that there was an agreement to sell and the plaintiff was

always ready and willing to perform his part of the contract and the case set up by the defendants is stands falsified while carefully reading the evidence produced by the defendants. Both the Courts have relied upon the statements of Sh. S.K. Kapoor, Manager of defendant No.1 and evidence of Sh. S.K. Chopra, Director of defendant No.1-company. Both the Courts have noticed that from the evidence available on the file, it is clear that the plot was booked with defendant No.1, a colonizer, pursuant to the application having been invited through advertisement and amount of ₹1,46,739/- was received underhand in cash whereas some amount was received through cheque. The Courts have further found that the plot was agreed to be sold at the rate of ₹25,000/- per square yard. However, it was agreed that the sale deed would be registered at the rate of ₹11,000/- per square yard, therefore, underhand payment was received.

Both the Courts have further found that defendant No.1-company did not produce its books of account and, therefore, adverse inference is to be drawn against defendant No.1-company. The Courts have further noticed that significant admissions have been made by the witnesses who had appeared on behalf of the defendants and, therefore, the plaintiff is proved to be ready and willing to perform his part of the contract.

In RSA No.2306 of 2008 arising from a suit filed by sister Navneet Kaur, only difference is that in the suit filed by brother Satvir Singh, oral agreement to sell was dated 04.02.1998 and receipt was of ₹70,000/-, whereas in the present case, the receipt is of ₹50,000/- and

underhand payment is ₹1,46,086/-. The Courts below in RSA No.2306 of 2008 have found that the plaintiff since did not appear in person and underhand payment is not proved, therefore, specific performance of the agreement to sell cannot be granted. In RSA No.2306 of 2008, amount of ₹50,000/- received against receipt i.e., cheque payment is admitted. Sh. Sanjiv Kumar Chopra, Director of the company through whom written statement was filed by defendant No.1 has not chosen to appear. Defendant No.1-company did not produce its books of accounts in evidence. It is established on the file that the sale deeds were being registered by defendant No.1-Colonizer at the rate of ₹11,000/- or ₹11,500/- The sale deeds have been executed in favour of defendant No.2 at the rate of ₹11,500/- which proves that in fact underhand payment were being received and the sale deeds were being registered at the Collector rate.

In both the cases, defendant No.1 has taken a defence that the plaintiffs were not ready to come and execute the sale deed within a period of 10 days. A look at the public advertisement issued by defendant No.1 inviting applications clearly stipulate that the sale deed was to be executed within six months. Defendant No.1 failed to produce any subsequent agreement proving that the sale deed was to be executed within a period of 10 days.

Defendant No.1 in both the cases have taken a defence that since there was a Notification under Section 4 of the Land Acquisition Act issued by the Government proposing to acquire the land, therefore, the plaintiffs refused to purchase the plots. It is not disputed that subsequently

while issuing Notification under Section 6 of the Land Acquisition Act, Government did not include the colony in question. The plaintiff (the sister) in RSA No.2306 of 2008 sent a notice calling upon the defendants to come and execute the sale deed. She remained present in the Office of the Sub-Registrar on 15.01.1999 and got her presence marked in order to show her readiness and willingness.

In view of the aforesaid, the finding of the Court that the plaintiff was not ready and willing to perform her part of the contract is not justified. The plaintiff (sister) in RSA No.2306 of 2008 filed the suit on 07.04.1999. She after issuance of Notification under Section 6 of the Land Acquisition Act, once being satisfied that the land is not being compulsorily acquired by the State, issued notice to defendant No.1 to come and execute the sale deed. Defendant No.1 refused to receive the notice. She was justified in waiting till threat of compulsory acquiring the land was over. In such circumstances, the findings of the Courts below are erroneous.

In view of the above, question No.2 is also answered in favour of the plaintiff i.e. appellant in RSA No.2306 of 2008. Similarly, question No.1 is also answered in favour of respondent No.1-plaintiff in RSA No.4567 of 2010.

3. Whether before the Court draws adverse inference on account of non-appearance of the party to the suit is required to examine sufficiency or insufficiency of the evidence available on the file?

In RSA No.2306 of 2008, both the Courts have drawn adverse

inference on account of non-appearance of the plaintiff in evidence. She appeared through her father Joginder Singh, Power of Attorney. In the considered opinion of this Court, the Courts were not justified in drawing adverse inference without due application of mind. The Courts are required to examine whether the evidence which has been produced by a party orally as well as documentary is insufficient to prove the case set up by the plaintiff or not. It is not necessary that the party must always appear in the evidence. In some cases, suits are required to be decided on the basis of the documents and on the basis of other evidence produced by the parties. The examination of the plaintiff through power of attorney holder in some cases is proper particularly when facts are within the knowledge of power of attorney holder, who has appeared for the party and is not liable to be ignored. It would always depend upon the facts and circumstances of each case.

In the present case, it is admitted case of the parties that Joginder Singh father of both the plaintiffs in separate suits, was in the business of property dealing and he had got booked two plots, one in favour of his son and second in favour of his daughter. It was the case of defendant No.1-Colonizer that father of the plaintiffs had booked the plots and paid the amount. The daughter-Navneet Kaur did not appear in person but she appeared through her father Joginder Singh. In such circumstances, before drawing adverse inference, the Court was required to examine whether on account of non-appearance of the plaintiff, some prejudice has been caused to the defendants or not. The Courts are further required to

examine before drawing adverse inference that whether the power of attorney holder, who has appeared on behalf of party was able to answer all the questions put to him in cross-examination or not. In the present case, the Courts have not found that Joginder Singh who appeared on behalf of plaintiff was not able to answer all the questions or there was some information which was exclusively in the knowledge of the plaintiff herself. Normally, party is required to appear in support of their case, however, there may be cases where the evidence of the party would not be necessary and there is other sufficient evidence available on the file enabling the Court to decide the case effectively.

The rule of drawing adverse inference for non-appearance of the party in evidence, is based upon Section 114 of the Evidence Act. Illustrations given under Section 114 provide that if a party does not produce the evidence in its possession or refuses to answer the questions, the Courts are justified in drawing adverse inference that the documents, if produced, would be unfavourable to the person who withholds it. Illustrations (g) and (h) as given under Section 114 of the Evidence Act, deal with the aforesaid situation. Section 114 of the Evidence Act, is extracted as under:-

“114. Court may presume existence of certain facts - The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can accounts for his possession.

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration.

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced, be unfavorable to the person withholds it.

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavorable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

As to illustration (a) –A shop- keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to illustration (b)–A person of the highest

character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, person of equally goods character, who also took part in the took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

As to illustration (b)-A person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery B, person of equality goods character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

As to illustration (b)-A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

As to illustration (c) – A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was young and ignorant person, completely under A's influence;

As to illustration (d) – It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.

As to illustration (e) – A judicial Act, the regularity of which is in question, was performed under exceptional circumstances;

As to illustration (f) – The question is, whether a letter was received, it is shown to have been posted, but the usual course of the post was interrupted by disturbances;

As to illustration (g) - A man refuses to produce a document which would bear on a contract of small

importance on which he is sued, but which might also injure the feeling and reputation of his family;

As to illustration (h) – A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

As to illustration (i) – A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.”

This Court has examined various judgments passed by Hon'ble the Supreme Court on this aspect including (1981) 4 SCC 569 titled as Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (dead) by LRs and others, AIR 2005 SC 439 titled as Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd., (1999) 3 SCC 573 titled as Vidhyadhar Vs. Manikrao, and (2002) 7 SCC 441, titled as Rattan Dev Vs. Pasam Devi and (2010) 10 SCC 512, Man Kaur (dead) by LRs Vs. Hartar Singh Sangha.

The principles which can be culled out from the reading of the aforesaid judgments are that the Courts before drawing adverse inference must look at:-

- i) Whether other evidence available on the record is sufficient to establish the case set up by the party?
- ii) Whether some facts were in knowledge of the party exclusively and his/her non-appearance has resulted in withholding the aforesaid personal information from the Court?
- iii) Whether the General Power of Attorney or any representatives who has appeared for the party was in a position to answer all the

questions put up by the opposite party and facts required to be proved were in his knowledge?

- iv) Whether any prejudice has been caused to the other party on account of non-appearance of the party in evidence?

The Courts below while deciding suit subject matter of RSA No.2306 of 2008, have committed two errors, firstly by drawing adverse inference against the plaintiff, although sufficient evidence was available and secondly refusing to draw adverse inference against the defendants on two following counts:-

- a) Non-appearance of the Director of the company i.e. Sh. Sanjiv Kumar Chopra in the suit filed by sister, who has appeared in evidence and made significant admissions in the connected suit filed by brother Satvir Singh.
- b) Failure of defendant No.1 to produce its books of accounts.

On reading of the statement given by Sh. S.K. Kapoor, Manager of defendant No.1-company, it is apparent that on material points, Sh. S.K. Kapoor feigned ignorance and stated that these fact would be in the knowledge of Sh. Sanjiv Kumar Chopra, who has not appeared in the Court.

Hence, question No.3 is also decided in favour of the appellant.

In view of the discussions made above, Regular Second Appeal No.2306 of 2008 is decided in favour of the plaintiff-appellant and the judgments and decree passed by both the Courts below are set aside

whereas Regular Second Appeal No.4567 of 2010 is dismissed upholding the judgment and decree passed by the Courts below.

A decree for possession by way of specific performance of the agreement to sell is passed in favour of the plaintiff on payment of balance sale consideration of ₹74,444/- alongwith interest at the rate of 9% p.a. from the date of institution of the suit till the date of deposit within a period of two months from the date of receipt of certified copy of the judgment.

Defendant No.1 is directed to execute the sale deed on such deposit, failing of which the plaintiff would be entitled to get the sale deed executed and registered through the Court. It may be significant to note that in both the cases, defendant No.2, subsequent purchaser have not chosen to contest either of the cases.

Learned counsel for the plaintiff has stated that except boundary wall, plots in question are lying vacant.

Since, the sale deeds had already been executed in favour of defendant No.2 in both the cases, therefore, defendant No.2 is directed to join defendant No.1 in execution of the sale deed in both the appeals.

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

24.04.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No