

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

108

RSA No.1498 of 2010 (O&M)

Date of decision: 26.10.2018

Gurkaran Singh and another

..... Appellants

Versus

Jaspal Singh and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Pawan Kumar, Sr. Advocate with
Mr. Robit Kumar, Advocate
for the appellants.

Mr. J.S. Brar, Advocate
for respondents No.1 to 4.

ANIL KSHETARPAL, J.

Defendants No.3 and 4-appellants are in the regular second appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the trial Court.

In the considered opinion of this Court, the following substantial questions of law arise for consideration:-

1. Whether the First Appellate which intends to reverse the judgment of the trial Court is required to critically analyze the reasons given in the impugned judgment and thereafter, give its own reasons while reversing/setting aside/modifying the impugned judgment and decree passed by the trial Court?
2. Whether in the facts and circumstances of the present case, existence of agreement to sell and payment of earnest

money as also payment of additional amount stands proved or not?

At the time of admission, the following substantial questions of law were framed:-

- “i) Whether the plaintiffs have proved the alleged agreement to sell dated 20.4.1996 as required under law?*
- ii) Whether the plaintiffs have been able to discharge the onus of having paid Rs.11,80,000/- as earnest money?*
- iii) Whether the signatures can be compared from the photocopy of a document?”*

However, in the considered view of this Court, the questions of law which have been framed by this Court in the previous part of the judgment shall also cover the questions of law which were framed at the time of admission.

Plaintiffs filed a suit for possession through specific performance of the agreement to sell dated 20.04.1996. It was pleaded that as per the agreement to sell, 86 kanals 2 marlas land was agreed to be sold @ Rs.1,35,000/- per acre and the earnest money to the tune of Rs.11,50,000/- was paid and the possession of the property was delivered to the plaintiffs. Additional amount of Rs.30,000/- was paid on 27.08.1996. As per the agreement to sell, the target date for execution and registration of the sale deed was fixed as 25.10.1996. The plaintiffs claim that they were ready and willing to perform their part of the contract and they visited the office of the Sub-Registrar along with the required amount but defendant did not come forward. Thus, the suit was filed.

Defendants No.1 and 2 appeared pursuant to the notice and pleaded that the alleged agreement to sell dated 20.04.1996 is forged and fabricated document which has been manipulated in connivance with the

alleged marginal witnesses. The receipt of earnest money was also denied. During the pendency of the suit, the land was sold in favour of defendants No.3 and 4 vide sale deed dated 05.12.2001 and they were impleaded as party defendants. After framing of issues, learned trial Court permitted the parties to lead evidence.

Learned trial Court dismissed the suit filed by the plaintiffs on following grounds:-

1. The original agreement to sell has not been produced. The story of agreement to sell having been lost from the diggy of a scooter (storage space) is after thought as defendants No.1 and 2 moved an application before filing the written statement for direction to the plaintiffs to produce the original agreement to sell vide application dated 31.01.1997. Notice of the application was given. A reply was filed on 03.02.1997 taking a plea that there is no necessity to produce the original agreement to sell at that stage. On 03.02.1997 itself, the Court directed the plaintiffs to produce original agreement to sell. However, on 04.02.1997 i.e. next day, a DDR was lodged that the original agreement to sell has been lost. On the basis of the aforesaid reasons, the Court held that the existence of the original agreement to sell is not proved.

2. Still further, the Court held that payment of earnest money of Rs.11,50,000/- on the date of agreement to sell and additional amount of Rs.30,000/- on 27.08.1996 has not been proved. The plaintiffs had taken a stand that they had sold 6 acres of land and a combine (an agriculture instrument) to pay the amount of earnest money, however, neither those sale deeds were produced nor any other document was produced to prove that the earnest money was available with the plaintiffs for payment to

defendants No.1 and 2.

3. Still further, the Court held that the agreement to sell is scribed at Moga which is at a distance of more than 100 Kms from the place where both the parties reside and the land in dispute is situated. No reason has come on record as to why the parties travelled 100 Kms to execute the agreement to sell.

4. The Court further held that the agreement to sell has not been got scribed from any professional document writer (scribe) who maintains proper record in the form of a register of the documents scribed by him and it has been allegedly got typed from a typist who was not keeping any record of the documents scribed by him. With these reasons, the learned trial Court dismissed the suit.

Learned First Appellate Court unfortunately did not deal with the reasons recorded by the learned trial Court before reversing the judgment and decree passed by the learned trial Court. Learned First Appellate Court has merely stated that existence of the agreement to sell is proved as a Daily Diary Report (Ex.P-39) has been recorded with the Police and the marginal witnesses have deposed about the existence of the agreement to sell. The Court further recorded that the application for permission to lead secondary evidence has been allowed. As noticed above, the learned Court did not deal with the various other reasons recorded by the learned trial Court before reversing the judgment of the trial Court.

In the present case, certain facts prove that the alleged agreement to sell never existed. This Court is not repeating the reasons which have been given by the learned trial Court as all the reasons are

found to be correct. Apart from this, it has come in evidence in the statement of the officials from the office of the Sub-Registrar that on the day, the plaintiffs visited the office of the Sub-Registrar, they were not in possession of the agreement to sell. No doubt, while marking presence, the agreement to sell is not required to be attached, however, when the plaintiffs are coming to execute the sale deed in pursuant to an agreement to sell, they were expected to at least carry the agreement to sell. Still further, in the plaint which was filed on 16.11.1996, it is nowhere pleaded that the agreement to sell has been lost. The loss of agreement to sell is for the first time reported only after directions have been issued to the plaintiffs to produce the original agreement to sell vide order dated 03.02.1997 and on 04.02.1997 (next day), a report is lodged with the Police. Still further, on 03.02.1997, when the plaintiffs filed reply to the application for direction to produce the original agreement to sell, the plaintiffs took a stand that there is no requirement to produce the original agreement to sell. On careful examination of the photocopy of the agreement to sell, it is apparent that stamp paper for execution of the agreement to sell was purchased on 15.04.1996 from Moga. It is alleged to have been purchased by defendants No.1 and 2, the owners. Their signatures are not visible on the aforesaid endorsement at the time of purchase of stamp paper for execution of the agreement to sell. Further, the register of the stamp vendor where entry with regard to sale of the stamp paper is entered, has also not been produced. The son of the stamp vendor has come in evidence who has stated that he recognizes the signatures of his father but has said that he is not in possession of the register containing entries of the sale of stamp papers as required to be maintained as original stamp vendor has died.

Further, the receipt of additional payment of Rs.30,000/- on 27.08.1996 has also not been produced.

Learned counsel for the respondents has tried to defend the judgment passed by the learned First Appellate Court on the ground that the appellants before this Court are the subsequent purchasers whose sale is hit by rule of lis pendence and therefore, he cannot be permitted to argue on the validity and correctness of the agreement to sell. In the considered view of this Court, the argument is without any substance because the subsequent purchaser is entitled to defend the suit on the plea which has already been taken in the pleadings by the original owners.

Next argument of learned counsel for the plaintiffs is that the reason for execution of the agreement to sell at Moga has been explained by the attesting witnesses Bhag Singh and Sukhdev Singh who are closely related to defendants No.1 and 2 were residing at Moga. He submitted that both the attesting witnesses have consistently deposed about the execution of the agreement to sell on 20.04.1996 and payment of the earnest money. In absence of original agreement to sell, particularly when defendants No.1 and 2 had taken a plea in the written statement that the agreement to sell is forged and fabricated and conduct of the plaintiffs before the trial Court, this Court is not convinced that there was any agreement to sell between the parties. Merely on the oral evidence of two alleged witnesses, execution of the agreement to sell and payment of earnest money cannot be said to have been proved particularly in view of the reasons which have been recorded by the learned trial Court as well as by this Court.

Next argument of learned counsel for the respondents is to the effect that the typist, who has given licence, is not required to maintain the

register. No doubt, a typist is not required to maintain the register, but however, once a typist is scribing documents, then such typist is performing the duties/functions of a professional scribe and hence, the typist ought to have maintained a register which a licensed professional scribe is required to maintain. This Court is not returning a finding that such documents scribed by typist should be ignored, however, taking into consideration that the cumulative effect of various reasons noted above, this Court is of the view that in the present case, execution of the alleged agreement to sell from a typist creates a strong doubt about correctness of the photocopy of the agreement produced.

Next argument of learned counsel for the respondents that the mother of defendants No.1 and 2 had sold 3 acres of land in favour of plaintiffs in the year 1995, is also to be noticed and rejected because the aforesaid transaction has nothing to do with the present alleged transaction.

Last argument of learned counsel is to the effect that the subsequent purchasers in their written statement have not taken a plea of the agreement being forged and fabricated, therefore, they cannot be permitted to seek reversal of the judgment on the points not pleaded by them. It will be noted that the subsequent purchasers have stepped into the shoes of the original owners i.e. defendants No.1 and 2, therefore, once the original owners have taken a stand that the agreement to sell is forged and fabricated, the subsequent purchasers having stepped into their shoes are entitled to defend the suit by making submissions. Learned counsel for the respondent has further brought to the notice of the Court that during the pendency of the appeal, pursuant to the execution of the decree, the sale deed has been executed by defendants No.1 and 2. Any execution of the

sale deed by defendants No.1 and 2 shows that defendants No.1 and 2 after having sold the property have shifted their loyalties. For the same reasoning, the argument of learned counsel for the respondent that defendants No.1 and 2 have not appeared in evidence, is to be rejected because once defendants No.1 and 2 have sold a major portion of the property involved in the agreement to sell, they have obviously shifted their loyalties in favour of the plaintiffs.

In view of the aforesaid, the questions of law framed in the previous part of the judgment, are answered in favour of the defendants-appellants.

Hence, the judgment passed by the learned First Appellate Court cannot be sustained and therefore, the same is set aside and that of the trial Court is restored.

The pending miscellaneous application, if any, shall stand disposed of accordingly.

Regular Second Appeal is allowed.

26.10.2018

Dinesh Bansal

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No