

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

R.S.A.No.4773 of 2010

Des Raj Singh

....Appellant

Versus

Kulbir Singh and Ors.

....Respondents

Date of Order: 26.3.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sanjeev Pandit, Advocate for the appellant.

Mr. Tarundeep Kumar, Advocate for
Mr. D.S. Pheruman, Advocate for the respondent Nos 2 to 5.

AMIT RAWAL, J (ORAL)

Appellant-plaintiff is in regular second appeal against the concurrent findings of facts recorded by both the courts below whereby suit claiming specific performance of the agreement to sell has been dismissed and the appeal filed before the lower Appellate Court also met with the same fate also.

Appellant-plaintiff filed a suit for specific performance of the agreement to sell dated 12.5.2005 on the premise that the defendants Kulbir Singh and his brother Jasbir Singh had entered into agreement to sell in respect of the suit land measuring 9 kanal 2 marlas on 12.5.2005 for a total sale consideration of Rs.8,00,000/- out of which a sum of Rs.2,50,000/- was paid by the plaintiff as earnest money. The stipulated date for execution of sale deed was 10.5.2006. During the subsistence of the agreement to sell, the aforesaid vendors had sold the land to defendant Nos.2 to 5 vide two

sale deeds dated 23.1.2006 and 2.2.2006. Plaintiff marked his presence on 10.5.2006 vide Ex.P.3 with the hope that the defendant-vendor might come on the stipulated date. Since there was breach of the terms and conditions of the contract, plaintiff chose to file the suit on 17.3.2006 before the expiry of the stipulated date.

Before the suit could be filed, defendant-Jasbir Singh had died and only Kulbir Singh was arrayed as the defendant, who contested the suit. It was stated that Kulbir Singh, at the time of executing agreement to sell, was minor and therefore the suit was not maintainable. The agreement to sell was emphatically denied. It was stated that the plaintiff had no cause of action to file the present case as defendant No.1 had already sold the suit land in favour of defendant Nos.2 to 5.

The trial Court on the basis of pleadings of parties framed the following issues:

- “1. Whether the defendant No.1 and his brother entered into agreement to sell dated 12.5.2005?OPP*
- 2. Whether amount of Rs.2,50,000/- has been advanced in favour of defendant no.1 and his brother as earnest money?OPP*
- 3. Whether the suit of plaintiff is not maintainable?OPD*
- 4. Whether defendant and his brother were minors as on 12.5.2005?OPD*
- 5. Whether plaintiff has no locus standi to file the suit?OPD*
- 6. Whether plaintiff is entitled to permanent injunction as prayed for?OPP*
- 7. Whether plaintiff is entitled to relief of possession by way of specific performance of agreement to sell dated 12.5.2005?OPP*

8. Whether plaintiff is entitled to recover Rs.2,50,000/- alternatively along with interest for?OPP

9. Relief.”

Before closing evidence, the respondent-plaintiff in support of his case, examined PW1 Sukhdev Singh, attesting witness of the agreement to sell, PW3-Baljit Singh Deed Writer, who scribed the agreement in question at the instance of the parties, PW4-Gurdev Singh, Clerk office of Sub Registrar, Amritsar proved on record application moved by the plaintiff as Ex.P.2.

Defendant besides stepping himself as DW2 brought on record copy of birth certificate Ex.D1, copy of birth & death certificate of Jasbir Singh as Ex.D2 and mark D3, examined DW1 Beero, who proved on record copy of her election identity card Ex.D1, DW3 Resham Singh, Deed Writer, who drafted the sale deed dated 23.1.2006, DW4 Jasbir Singh, DW5 Jasbir Singh, and DW7 Paramjit Singh, Member Panchayat.

In rebuttal, plaintiff brought on record jamabandi for the year 2000-2001 as Ex.P.4.

The trial Court on the basis of oral as well as documentary evidence dismissed the suit of the plaintiff, observing that defendant No.1 and his brother Jasbir Singh never entered into agreement to sell dated 12.5.2005 as they were minors at that time. The findings were affirmed by the lower Appellate Court in appeal, hence the present appeal.

Learned counsel for the appellant submitted that both the learned courts below have not only misdirected but rendered erroneous findings by relying upon the birth Certificates i.e (Ex.D1 and Ex.D2), which had not been proved in accordance with law. Even no official witness was examined to prove the same and mere marking of an exhibit does not

dispense with its proof. The defendant Nos.1 had taken summersault from stand by saying that ten months back, he was minor and thereafter he became major and entered into two sale deeds in favour of defendant Nos.2 to 5. Moreover, the plaintiff was always ready and willing to perform his part of contract. During the pendency of this appeal, appellant-plaintiff had also filed an application under Order 41 Rule 27 CPC seeking permission of the Court to place on record the Birth Certificate of said Kulbir Singh to show his correct date of birth to be 26.12.1986, which was not objected to by learned counsel for respondent Nos.2 to 5 and accordingly the same was allowed by this Court vide order dated 27.3.2015. If the aforesaid evidence qua date of birth is taken into consideration, said Kulbir Singh was major being 18 years, four months and 24 days old at the time of entering agreement to sell. Both the learned courts below have committed grave illegality while interpreting the document qua the entry of Deed Writer since the entry had been duly shown to be made at Sr.No.169 in the document instead of serial No.159.

There is no representation on behalf of defendant No.1-Kulbir Singh despite service as long time back, Sh. A.S. Bhatti, Advocate had put in appearance on his behalf but subsequently none appeared on his behalf.

Per contra, learned counsel for the respondent-defendants submitted that as per Ex.D1 (voter card) and Ex.D2 (School Leaving Certificate), both defendant No.1-Kulbir Singh as well as Jasbir Singh (since deceased) were minors at the time of execution of said agreement to sell and both the courts below have rightly looked into this aspect. Defendant Nos.2 to 5 are bonafide purchasers for a valuable consideration nor did they have knowledge with regard to agreement to sell dated

12.5.2005, therefore, the same cannot be relied upon & urged this court for affirming the findings under challenge.

After hearing learned counsel for the parties and appraising the paper book, I find force in the contentions of learned counsel for the appellant. Ex.D1 and Ex.D2 (birth Certificates of Kulbir Singh and Jasbir Singh) tendered in the testimony of Kulbir Singh were objected to during the cross examination of said witness, which is evident from the opening line of his cross examination dated 21.8.2008. It is settled law that mere exhibition of document does not dispense with its proof unless the same are duly proved. The reference is invited to **Sait Tarajee Khimchand and Ors Vs. Yelamarti Satyam and Ors 1971 AIR (SC) 1865**. In my view, the defendants have totally failed to place on record any other material to challenge the authenticity of the agreement to sell dated 12.5.2005. Defendants have also not been able to prove that said Kulbir Singh and Jasbir Singh were minors at the time of execution of agreement to sell in question. It can not be lost sight of the fact that few months back, defendant No.1- Kulbir Singh had sold the land to defendant Nos.2 to 5 vide sale deeds dated 23.1.2006 and 02.2.2006 for a sum of Rs.4,84,000/- whereas the vendor would have been benefited from the agreement to sell dated 12.5.2005 since the sale consideration was of higher amount i.e Rs.8 lacs.

The judgments impugned are wholly erroneous and misconceived. Vide the following order dated 27.3.2015 of this Court, it has also come on record by way of additional evidence that the date of birth of respondent No.1-Kulbir Singh is 26.12.1986:

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Learned counsel for respondents no.2 to 5 states that he has no objection to the application. Reply has not been filed by respondent no.1. Therefore, the order

dated 15.1.2015 is put in operation. Mr.Sharma, learned counsel appearing for respondents no.2 to 5 submits that if respondent no.1 can have no objection to the allowing of the application, then he cannot do so because he represents a subsequent purchaser who steps into the shoes of respondent no.1. Accordingly, the application stands allowed.

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List on 3.11.2015.”

From the perusal of the order, it is apparent that the application was not objected to by the learned counsel for the defendant-respondent, therefore, in terms of the said document brought on record, defendant No.1- Kulbir Singh was major being 18 years, four months and 24 days old. Thus, the finding of the courts below that the vendor was minor at the time of execution of agreement of sell in question is not sustainable.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five

learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra)

reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29]” “27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned, the present appeal is accepted. Judgments and decrees passed by both the courts below are set

aside and the plaintiff is directed to deposit the balance sale consideration within two months from the date of receipt of copy of this order. Defendant No.1 is also directed to execute the sale deed within one month thereafter, failing which the plaintiff shall be at liberty to seek execution in accordance with law. Since defendant Nos.2 to 5 have already paid the sale consideration in respect of the land to defendant No.1, it is ordered that the amount be refunded back to them by defendant No.1 along with interest @ 9 per annum.

March 26, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No