

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

RSA No.3769 of 2011

Date of Decision.27.03.2018

Yashpal and another

.....Appellants

Vs

Mehar Singh and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Jagrit Singh, Advocate
for the appellants.

Mr. Sunil Agnihotri, Advocate
for the respondents.

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AMIT RAWAL J.(ORAL)

The appellants-defendants are in regular second appeal against the concurrent finding of fact whereby the suit preferred by the respondent-plaintiff seeking specific performance of agreement to sell dated 29.8.2001 in respect of residential house containing two rooms, one kitchen, courtyard measuring 2 marlas situated in village Bhangala, Tehsil Mukerian, District Hoshiarpur had been decreed by the trial Court vide judgment and decree dated 2.8.2006 and upheld by the lower Appellate Court vide judgment and decree dated 3.5.2011.

It would be apt to give brief preface of the matter emanated from the pleadings. The plaintiff instituted the suit claiming the specific performance of agreement to sell dated 29.8.2001 and entered into agreement to sell in respect of the suit property consisting of two rooms, one kitchen, courtyard and one bath room for consideration of ₹50,000/- against the payment of ₹40,000/- as earnest money. The stipulated date for execution and registration of the sale deed was fixed as 28.8.2002. The

with the balance amount of consideration of ₹10,000/- but the defendants did not turn up for performance of their part of contract. The suit filed on 24.10.2002 was preceded with a legal notice dated 6.9.2002.

The defendants appeared and contested the suit denying the execution of the agreement to sell. It was stated that the defendants were in need of money, therefore, the plaintiff agreed to give ₹40,000/- to the defendants on interest and at the time of advancing the said amount, the plaintiff deducted ₹15,000/- as advance interest for one year and ₹25,000/- was given to the defendants. For the purpose of acquiring balance amount, he requested the defendants to execute papers of security of borrowed money, which was readily agreed by them.

Replication was filed by the plaintiff controverting the assertions made in the written statement reiterating the averments made in the plaint.

The trial court on the basis of aforementioned pleadings framed the following issues:-

- “1. Whether the defendants executed an agreement dated 29.8.2001 to sell their residential house for an amount of ₹50,000/- after receiving an amount of ₹40,000/- as earnest money? OPP*
- 2. Whether the plaintiff is entitled for possession of the disputed house by way of specific performance of agreement to sell dated 29.8.2001? OPP*
- 3. Whether the plaintiff in the alternative is entitled for recovery of ₹40,000/- with interest as prayed for? OPP*
- 4. Whether the suit of the plaintiff is not maintainable in the*

present form? OPD

5. Whether the answering defendants are entitled to special costs of ₹50,000/- under Section 35-A CPC? OPD

6. Whether the defendants borrowed an amount of ₹40000/- from the plaintiff by advancing interest of ₹15,000/- for one year? OPD

7. Whether the plaintiff in order to secure the said borrowed amount got executed papers as security? OPD

8. Whether the plaintiff in connivance with his partymen and witnesses forged and fabricated the said papers into an agreement to sell pertaining to residential house of the defendants? OPD

9. Relief.”

In order to support his case, the plaintiff examined PW1 Shiv Kumar deed writer, PW2 Rajinder Singh, PW3 Atma Singh and plaintiff himself appeared as PW4 and closed the evidence. On the other hand, defendants examined Vijay Kumar Draftsman as DW1, Madan Lal as DW2, Rattan Lal as DW3 and Jaspal as DW4 and closed the evidence.

The trial Court on the preponderance of aforementioned evidence decreed the suit and the appeal preferred against the same was also dismissed.

Mr. Jagrit Singh, learned counsel appearing on behalf of the appellants-defendants submitted that both the Courts below have abdicated and judgments and decrees of the Courts below suffer from legal infirmity, much less, misdirection, for, nature and contents of the agreement to sell had not been noticed for adjudication of the *lis*. On plain and simple

reading of the agreement to sell, it leaves no manner of doubt that the agreement to sell was drafted on blank stamp paper as the signatures were only on the second page and not on the first page. It was a clincher to form an opinion that the parties had not intended to sell or purchase the land in dispute. The admission in the cross-examination for purchasing of the stamp paper for security also leads to the fact that there was no intention to part with the property as it was a simple loan transaction and the document was signed for the purpose of security. No proper and legal advice was given for replying the legal notice dated 6.9.2002 otherwise all the points taken in the plaint had been duly replied. During the course of hearing, he also referred to the original records of the Courts below to fortify his submissions that his client has returned the money though has not been able to prove the same and willing to return the money subject to terms and conditions which this Court deem appropriate.

Per contra, Mr. Sunil Agnihtori, learned counsel appearing on behalf of the respondent-plaintiff submitted that both the attesting witnesses despite extensive cross-examination have not been able to budge enabling the court to form a different opinion as they have been consistent and coherent with regard to intention of execution of the agreement to sell and passing of the earnest money. In fact, the agreement to sell was entered as the defendants had fight with his brother and he wanted to get rid of him by selling the property. All these factors weighed in the mind of the Courts below. The concurrent finding of fact cannot be interfered with unless and until there is illegality and perversity, which is not made out in the defence, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper

book and of the view that there is force and merit in the submissions of Mr. Jagrit Singh. A plain and simple reading of Ex.P1 reveals that it started with small spacing between the lines but thereafter spacing had been increased manifold in order to bring it on the next page as the second page contained the signatures of the vendors and the attesting witnesses. The first page did not bear signature of the vendors. It is not believable that a regular deed writer would draft the agreement to sell in such a manner and mode rather he should have refused to sign the same.

Be that as it may, it is settled law that witnesses may lie but the documents do not. The tenor and mode of writing of agreement to sell revealed that the defendants had signed the blank stamp papers for the purpose of securing the amount of loan from the plaintiff. Though the defendants have not been able to prove that they had repaid the amount of ₹25,000/- as the plaintiff stated to have deducted ₹15,000/- towards the interest for one year. Yashpal-appellant No.1 in cross-examination admitted that stamp papers had been purchased on 29.8.2002 but he also clarified that the same were prepared for the security, thus, the argument of Mr. Sunil Agnihotri that the defendant No.1 had approached the plaintiff for money and in lieu thereof, entered into an agreement to sell the suit property is not tenable and hereby rejected. All the facts have not been adverted to by both the Courts below, therefore, there is gross illegality and perversity, much less, misdirection.

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.

For the reasons aforementioned, the judgments and decrees passed by the Courts below are hereby set aside. However, the suit of the respondent-plaintiff is confined to the alternative relief of refund of earnest money of ₹40,000/- with interest @10% per annum from the date of payment till realization. The regular second appeal stands allowed. The decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

March 27, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No