

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.2455 of 2012(O&M)

Date of Decision:31.05.2018

Noor Mohd. and others

...Appellants

Versus

Asha Sharma

...Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Chetan Mittal, Sr. Advocate with
Mr.Kunal Mulwani, Advocate for the appellants.
Mr.Akshay Jain, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by both the courts below, while decreeing the suit for possession by way of specific performance of the agreement to sell with respect to land measuring 13 ½ acres of land.

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

(i) *Whether the first appellate court is required to deal with the arguments/submissions of learned counsel for the appellants?*

(ii) *Whether before granting a relief of specific performance of the agreement to sell, the Court is carefully required to look into an agreement to sell?*

The plaintiff filed a suit as noticed above, claiming specific performance of agreement to sell dated 28.12.2000 in her favour for 13½ acres of land on a total sale consideration of Rs.6,90,625/-. She claimed that Rs.4,00,000/- was paid as earnest money and the sale-deed was to be

executed and registered on 15.3.2001. She further claimed that before the target date for execution and registration of sale-deed, she served a notice on the defendants-appellants and thereafter remained present through her husband in the office of Sub Registrar on the target date for execution and registration of sale deed. It is pleaded that the plaintiff remained always ready and willing to perform her part of the contract.

The defendants contested the suit by pleading that the agreement to sell, specific performance whereof has been sought, was not an agreement entered into between the parties. The defendants pleaded that no doubt an agreement to sell was executed on 28.12.2000 but the total sale consideration was Rs.33,75,000/- out of which Rs.1,00,000/- was received by each of the defendant (Rs.4,00,000/- in total). The sale-deed was to be executed and registered on 15.3.2001. It is further averred that agreement to sell, specific performance whereof has been sought, is fabricated by the plaintiff.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

Following facts pointed out by the learned counsel for the appellants remained unexplained:-

- (i) Agreement to sell, although executed on Rs.3/- non-judicial stamp paper, is a print-out of the proforma of the agreement to sell and at material places, blank spaces left have been filled in with hand. As per agreement to sell, Ex.P1, defendants-appellants agreed to sell the property in dispute @Rs.50,000/- per acre. Total land agreed to be sold is 13.50

acres. Thus,, total sale consideration should be Rs.6,75,000/- whereas agreement to sell discloses total sale consideration of Rs.6,90,625/-

(ii) The defendants-appellants are four in number. Each of the defendant-appellant is alleged to have executed a separate receipt of Rs.1,00,000/- each. In each of the receipt, balance amount payable by the purchaser has been mentioned as Rs.2,90,625/-, which cannot be balance sale consideration even with respect to all the four defendants-appellants as entire sale consideration which remains payable as per the price of per acre mentioned in the agreement to sell comes to Rs.2,75,000/- and balance payable to each of the respondent-appellant would come to Rs.68,750/-.

(iii) On careful examination of an agreement to sell shows that three persons apart from the parties have signed or thumb marked. Sorabh Khan has signed under the space meant for witnesses. However, thumb impression of defendant No.4 is at a place left for signature or thumb impression of the witnesses. Further two persons have signed down below on page No.3 namely Surender Sharma and Jawahar Lal Sharma. Now the case set up by the plaintiff is that Jawahar Lal Sharma is scribe of the agreement to sell. As noticed earlier, agreement to sell is a computer print out of a proforma of the agreement to sell leaving the parties to fill in material contents with the pen.

(iv) Shri Sorabh Khan, the marginal witness, has appeared on behalf of the defendants-appellants and has submitted that in

fact agreement to sell was for a total sale consideration of Rs.33,75,000/- out of which Rs.4,00,000/- was received as earnest money. He has not supported the agreement to sell which has been produced in the court. It may be significant to note that although Sorabh Khan, the marginal witness, was summoned by the plaintiffs and his affidavit was also filed in lieu of evidence in examination in-chief, however, he was not produced for cross-examination by the plaintiffs.

(v) Similarly, separate receipt of Rs.1,00,000/- is witnessed by marginal witness-Sirajuddin. He has also appeared and has stated that the agreement to sell was for total sale consideration of Rs.33,75,000/-.

(vi) The defendants-appellants produced photocopy of the agreement to sell, which according to them was the actual agreement entered into between the parties. The same is marked as 'A'. This photocopy is again on same pattern executed on Rs.3 non-judicial stamp paper with blanks filled in with hand. According to this agreement to sell produced, total sale consideration is Rs.33,75,000/- , as is being asserted by the defendants. The agreement to sell is signed by the plaintiff as well as by the defendants and Sorabh Khan as a witness. Application for secondary evidence was not moved before the trial court and therefore, the trial court did not take into consideration this agreement to sell.

(vii) Still further on careful perusal of the agreement to sell particularly page 3 thereof, which has been propounded by the

plaintiff, it is apparent that Smt.Asha Sharma, plaintiff, has signed on two places. If one compares page No.3 of the agreement to sell, Ex.P1 and Mark 'A' produced by the defendants, it is clear that the place where the plaintiff had signed has been put within bracket and another signatures have been put up with a different pen. No explanation has come on record as to why she signed twice.

All these factors create a doubt above the genuineness of the claim made by the plaintiff. The relief of specific performance of the agreement to sell is discretionary.

Now, the stage is set for dealing with the substantial questions of law:-

Question No.1

“Whether the first appellate court is required to deal with the arguments/submissions of learned counsel for the appellants?”

On careful reading of the judgment passed by the learned first appellate court, this Court is convinced that the first appellate court has not dealt with the contentions raised by the learned counsel for the defendants-appellants before it. In para 11 of the judgment, the first appellate court has noticed as under:-

“Alongwith the appeal, an application for additional evidence by way of secondary evidence has also been filed by the appellants with the submissions that the plaintiff/respondent has played a fraud not only upon the appellants but also on the learned lower Court. The respondent/plaintiff is a cunning person and hatched a criminal conspiracy in collusion with her husband and Sh.

Surender Sharma and Sh. J.L. Sharma. In furtherance of the said criminal conspiracy, the plaintiff and the above said persons approached the appellants and proposed to purchase the land in issue for a total sale consideration of Rs.33.75 lac. The appellants being satisfied with the said proposal as the same was as per the prevalent market rate and above the circle rate accepted the proposal and subsequently, the respondent/plaintiff through her husband intimated that the written agreement to sell shall be executed. The respondent and her husband subsequently on 28.12.2000 requested the appellants to execute a written agreement to sell and the husband of the respondent took the appellants on the land in issue on the pretext that he wants to visit the spot. The said person then produced blank performa of the agreement to sell and receipts and paid an amount of Rs.4 lacs to the appellants i.e. Rs.1 lac each and asked them to thumb mark/sign the agreement in issue. The appellants being simpleton villagers had no apprehension that the respondent and her husband had any criminal intentions to play fraud upon them, agreed to do the needful. The respondent and her husband got an agreement executed i.e. Filled a blank performa of the agreement for a total sale consideration of Rs.33.75 lac and gave a copy of the same to the appellants however, in guise of the agreement for a total sale consideration of Rs.33.75 lac, the respondent and her husband got additional blank performa thumb marked/signed from the appellants and subsequently in furtherance of their common intention to cheat, filled the rate of Rs.6,90,625/- as total sale consideration. The said agreement on the basis of which the present suit of specific performance has been filed is a sham document prepared by the respondent and her husband in collusion with the witnesses, namely, Sh. Surender Sharma and Sh. J.L. Sharma. The said persons whose signatures were subsequently obtained as witnesses on the fraudulent and managed agreement were not even present at

the time of the execution of the original agreement for a total sale consideration of Rs.33.75 lacs. It was further submitted that the respondent and her husband also got executed the receipts of Rs.1 lac each in favour of the appellants in which the correct balance sale consideration of Rs.29.75 lac was filled. However, in guise of the said receipts also, the respondent and her husband got thumb/marked/signed blank receipts also. The appellants produced the photocopy of the original agreement to sell for a total sale consideration of Rs.33.75 lac, however, as the original was with the respondent and her husband, the same was not exhibited. In the present case, it is well established that the respondent/plaintiff has based her claim on fraudulent document and has played fraud not only with the appellants, but also with the learned lower Court and now wants to seek assistance of the Court to validate her fraud. The appellants are simpleton persons and have no knowledge regarding the technicalities of the law and legal process. The appellants relied upon their counsel and had provided him with all the photocopies as stated above. However, for the reasons best known to the previous counsel, the said documents were not produced in evidence. The existence of the said photocopies are proof enough of the magnitude of criminal intentions and conspiracy upon which the respondent/plaintiff and her husband have acted. Had the previous counsel produced the aforesaid documents before the learned lower court, the fraud being played by the respondent/plaintiff and her husband would have been apparent and clear. However, the said documents were omitted to be produced for the reasons as stated above. The principle of natural justices enumerates the foundation that no one should go unheard and that all the documents necessary for the proper and just decision of the case should be allowed to be produced on the file. Moreover, the appellants should not be made to loose their land just for the negligence of their

counsel. The documents stated above are clear proof of the fraud being played by the respondent/plaintiff and her husband and goes to the root of the matter. In the present case, in order to meet the ends of justice, it is of utmost importance that the said documents be allowed to be produced by way of additional evidence. The agreement on the basis of which the present suit has been filed, speaks of the consideration at the rate of Rs.50,000/- per acre whereas at the time of the negotiations to sell i.e. In the month of December, 2000, the circle rate of the village and the revenue estate of the land in question was Rs.1.5 lac per acre. Thus, in no event the appellants could have agreed to sell the land in question at the rate of Rs.50,000/- per acre. The appellants hereby seek the permission of the Court to produce the certified copy of the list of circle rates as issued by the State of Haryana of the relevant period. A bare comparison of the agreement produced by the respondent/plaintiff and the photocopy of the agreement Mark A shows that both the said documents are completely identical. Both are identical blank performas. Both the said documents are filled with the same identical handwriting and even the sequence of the thumb impressions and the cuttings and additions in hand writing are in all respects identical. Thus, it is well established that the original of mark A existed and a reasonable presumption can be drawn that the original is in the control, custody and possession of the respondent/plaintiff and not with the appellants/applicants. Even though the appellants had knowledge of the existence of the aforesaid documents and even after supplying the said copies to their counsel, the said documents were not produced. The said mistake cannot be attributed to the appellants and they could not be punished for the negligence of their counsel. The appellants are illiterate persons and are simpleton villagers and thus they could not be presumed to do more than providing the documents to their counsel. The appellants cannot be

punished to the extent of taking away their landed property and not allowing to produce the relevant and necessary documents at this stage which are imperative for the proper and just decision of the present case. In the event, the Court finds merits in the application of the appellants and allow them to produce the said documents by way of additional evidence in the said eventuality, as the originals of the said documents i.e. Agreement for total sale consideration of Rs.33.75 lac and the receipts showing the balance sale consideration to be Rs.29.75 lac are with the respondent/plaintiff and her husband, the applicants be allowed to prove the copies of the same by way of secondary evidence. As the originals are in possession and control of the respondent and there is no occasion that the original could have been in possession of the applicants, therefore, the applicants are allowed to produce in evidence the aforesaid documents by way of additional evidence and also be allowed to prove the same by way of secondary evidence, in the interest of justice.

Thereafter, contentions of the learned counsel for the appellants have been noticed, in para 17, which is extracted as under:-

“The learned counsel for the appellants submitted that the alleged agreement is dated 28.12.2000 and the total sale consideration was Rs.6,90,625/- and an amount of Rs.4 lacs was allegedly paid vide receipts and the date for execution of the sale deed was agreed as 15.03.2001. The version for the plaintiff was that the defendants did not come for execution and registration of the sale deed. The appellants have agreed to enter into an agreement with the respondent in its written statement but submitted that the rates as alleged were not there rather the total sale consideration for the land was agreed as Rs.33.75 lac. The land is 110 Kanals 10 Marlas and the suit has been filed on the basis of false agreement. The learned lower court has decreed the suit on the part admission of the

defendants/appellants. In the agreement Ex.P1, the amount mentioned is Rs.6,90,625/-. Mark A the application for additional evidence finds mentioning the amount as Rs.33.75 lac. He submitted that there is no cutting in Ex.P1 as well as Mark A. the witnesses are same and except the dispute of amount, all the sequenced of putting the thumb impressions, performas, typing is the same. The document Ex.P1 i.e. Agreement is itself suspicious from the evidence of the plaintiff. See the oral testimony of Sh. J.L. Sharma PW. He has stated that he knew Noor Mohd. For the last 15/20 days prior to the agreement. Therefore, an inference is to be drawn is that the talk of agreement is going on. PW2 is an advocate who has simply given the legal notice and PW3 is the witness on the agreement. See para No.2 of his affidavit. The witnesses are saying that the agreement was written in Tehsil. The question arises why it was not got recorded from the Deed Writer. The answer is clear that there was an intention to cheat. The performas are the computerized performas. All the three witnesses of the plaintiff say different version. Her agreement was prepared by the Document Writer. He cannot say that Sh. J.L. Sharma had written it. PW4 is Sh. Dharambir, Reader. PW5 is Smt. Asha Sharma, plaintiff. See page No.6 of her affidavit. The attendance marked in the Tehsil was of her husband. It means that Smt. Asha Sharma was not there in Tehsil Nuh on that day. Had she been there then why her husband's presence has been marked hand why not of her. It means that she was not there. She was not ready and willing to perform her part of contract. She appears to have stated tutored statement as is clear from her cross-examination. She says in her cross-examination that on that day, they had got their presence marked but actually there is no presence marked of Smt. Asha Sharma. The testimony of Sh. J.L. Sharma and Sh. P.K. Sharma also does not tally. The respondent alleged the performance of whole act in one day. Sh. P.K. Sharma has seen

the land on 28.12.20000 and then he goes to the Patwari and finds the owners. He has come with the amount of Rs. 4 lac and then he brings his wife. This story of the plaintiff appears to be improbable and is not believable. Sh. P.K. Sharma says that on 15.03.2001, he had come alongwith his wife whereas his wife the plaintiff says that her husband had gone alone. The question arise why there is no presence of Smt. Asha Sharma. DW2 witness on the agreement says the appellants' version that the agreement was for S. 33.75 lac. He submitted that there is never a direct evidence of the fraud rather it is always establishes from the circumstances. Even the agreement of an amount of Rs.6,90,625/- is not proved. His prayer for additional evidence is very material as he wants to produce the agreement as well as legal notice. The original of the agreement had been taken by the purchaser and the photocopy was given to the purchaser and the photocopy was given to the appellant. It is vital document which is Mark A and which tallies Ex.P1. Even the handwriting also tallies. See page 2 of the written statement. In notice, the actual amount has been mentioned as Rs.33.75 lac. This document is very material for the just decision of the case. The version of the appellants is from the very beginning that he has been defrauded. The agreement of the plaintiff/respondent is suspicious. Therefore, an opportunity be given to the appellant so that the could produce the witness. He submitted that the finding of the learned trial Court that the appellants have not given the particulars of the fraud, is not correct. The appellants are saying from the very beginning that there is a dispute of the amount mentioned in the agreement that what more else the particulars had to be given. The appellants have moved an application for secondary evidence and on seeing Ex.P1 as well as Mark A, it appears that these are not same as there is a difference of the amount. The husband of the respondent Smt. Asha Sharma says that they both husband and wife had gone in

the Tehsil whereas his wife says that her husband alone had gone. The respondent/plaintiff alleges to prove her readiness and willingness from the document Ex. P4, it is not proved from the document x P4. Therefore, the appellants be given an opportunity to produce the additional evidence and the decision of the learned lower Court be set aside.

However, learned first appellate court has not analyzed submissions/arguments of learned counsel for the appellants, while concluding the judgment. The first appellate court is required to discuss/analyze the submissions made by the learned counsel for the appellants. The learned first appellate court has dealt with the contentions in the following manner:-

“Regarding the contentions of the learned counsel for the appellants, in the considered opinion of the Court, since the evidence on the file clearly proves the due execution of the agreement to sell Ex.P1 and advance receipts Ex.P2 amounting to Rs.1 lac, Ex. P3 amounting to Rs.1 lac, Ex.P4 amounting to Rs.1 lac are clearly proved, therefor, there is no force in the contentions of the learned counsel for the appellants.”

After reproducing in short as what each witnesses has stated, the learned first appellate court has chosen to dismiss the appeal. First appellate court is last court of fact and law. First appellate court while deciding the first appeal rehears the suit itself. First appeal should be decided by the court while dealing with the submissions made by the learned counsel for the parties. First appeal should not be decided by the court without analyzing the submissions made by the learned counsel for the parties as well as the reasons assigned by the learned trial court. The judgment under appeal fails to fulfill the requirements which are expected of from a first appellate court.

Hence, question No.1 is answered in favour of the appellants.

Question No.2

(ii) Whether before granting a relief of specific performance of the agreement to sell, the Court is carefully required to look into agreement to sell?

As per Section 20 of the Specific Relief Act, it is duty of the Court to examine whether relief of specific performance of the agreement to sell would be an equitable relief in the facts and circumstances of the case. The relief of specific performance of the agreement to sell is discretionary. Of course, the discretion has to be exercised by the court on sound judicial principles. In the present case, in view of the reasons which have been recorded in the earlier part of the judgment, there is some doubt about the genuineness of the agreement to sell, specific performance whereof has been sought for.

In view of the aforesaid discussion, question No.2 is answered accordingly.

As noticed before the learned first appellate court, prayer was made for permission to lead secondary evidence. Separate application for additional evidence by way of secondary evidence was also filed. The aforesaid application was dismissed only on the ground that the grounds as pleaded in the application does not fall within the ambit of Order 41 Rule 27 of the Code of Civil Procedure ('CPC' for short). Order 41 Rule 27 CPC also provides that if the court considers the additional evidence sought to be produced or any witness sought to be examined would enable it to pronounce judgment with more clarity or for any other substantial cause, the first appellate court would allow the application. The first appellate courts are expected to be more considerate towards the cause of justice. There are

cases where additional evidence is required by the court, to do substantial justice between the parties and that is why the Order 41 Rule 27 (1) (b) CPC enables the court to permit additional evidence for any other substantial cause.

Learned counsel for the respondent has submitted that while exercising jurisdiction under Section 100 of the Code of Civil Procedure, High Court should not enter into factual aspect. He further submitted that the discrepancy as are being pointed out by the learned senior counsel for the appellants are beyond pleadings and therefore, cannot be considered by this Court. He further submitted that execution of the agreement to sell and receipt of the amount as alleged has been admitted by the defendants. He next submitted that attention of the plaintiff was not drawn to the aforesaid discrepancy when she appeared in the evidence and therefore, the contentions as raised cannot be expected by this Court.

It has been held by the Hon'ble Constitution Bench of the Supreme Court in **Pankajakshi v. Chandrika 2016 (6) SCC 157** that the appeals in this Court are governed by the provisions of Section 41 of The Punjab Court Act, 1918. Therefore, this Court is not a Court, which considers only questions of law.

Still further, learned counsel for the respondent is incorrect in submitting that the execution of the agreement to sell and the receipts are admitted by the defendants-appellants. The defendants while filing the written statement have specifically pleaded that the actual agreement to sell was for total sale consideration of Rs.33,75,000/- and the agreement to sell which has been propounded by the plaintiff in the suit, was never entered into.

Still further, the evidence is not required to be pleaded. As per Order 6 Rule 2 CPC, only facts are required to be pleaded. While deciding the case, the court is entitled to examine documentary evidence filed by the parties and analyse the same to form an opinion about its genuineness.

The Regular Second Appeal is allowed. Pending applications, if any, shall also stand disposed of.

31.05.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No