

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

RSA No.5251 of 2012 (O&M)

Date of Decision: February 02, 2018

Karan Singh and another

...Appellants

Versus

Smt. Rajo and others

..Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. P.K. Ganga, Advocate
for the petitioners.

Mr. V.S. Punia, Advocate
for respondent No.5 and 6..

FATEH DEEP SINGH, J.

The brief factual background leading to initiation of present regular second appeal by the unsuccessful plaintiffs Karan Singh and Prem Singh both brothers is to the effect that they filed civil suit against Smt Razia (now deceased) and another for possession by way of specific performance of an oral agreement to sell dated 20.2.2001 in respect of share of 9 marlas being 3/7 share in one kanal plot No.2305 for total sum of Rs.22,000/- which amount was paid. It is alleged that defendants undertook to get the sale deed registered in favour of plaintiffs by 3.4.2001 and the possession of plot was handed over to the plaintiffs. It is alleged that as per this agreement, the defendants refused to get executed the sale deed and, hence, the suit in question. It is worthwhile to refer here that suit against defendant No.1 Razia and defendant No.2 Bhim Singh stood dismissed on 15.9.2006 under the provisions of Order 9 Rule 2 CPC. Defendant No.3.

Dharampal, brother of defendant No.2 Bhim Singh appeared and filed written statement denying each and every contentions of the plaintiffs regarding agreement and undertaking for having transacted any money as alleged. Claiming that plaintiffs have committed fraud and misrepresentation and, therefore, no cause for specific performance of any such agreement dated 20.3.2001 was made out. Replication was filed. On 17.7.2009 the trial Court framed the following issues:-

1. Whether the plaintiffs are entitled for a decree for possession by way of specific performance of agreement to sell dated 3.4.2001? OPP
2. Whether the plaintiffs are entitled for a decreed of permanent injunction restraining the defendants from alienating the suit property except to the plaintiffs? OPP
2-A Whether the suit of the plaintiff is not maintainable in the present form? OPD
3. Whether the plaintiffs have no locus standi to file the present suit. OPD
4. Whether the plaintiffs have no cause of action to file the present suit?:? OPD

The plaintiff-Karan Singh examined himself as PW1 and tendered his affidavit Ex.PW1/A proving sale deed dated 3.4.2001 Ex.P1 (wrongly denoted as Ex.P2) as well as special power of attorney Ex.P3 and has examined Deed Writer PW2 Ram Singh through affidavit Ex.PW2/A who through register Ex.P4 proved the entries and after tendering jamabandi Ex.P4/A, the plaintiffs closed their evidence. On the other hand, defendants No.3 testified as DW1 and tendered affidavit Ex.DW1/A reiterating his stand and rebutting case of the plaintiffs and was put in cross-examination photostat copies of documents Mark A to Mark E. Consequent upon hearing of arguments, the Court of learned Civil Judge, Junior Division, Hisar through judgment dated 20.1.2010 dismissed the suit

of the plaintiffs. Aggrieved over these findings, the disgruntled plaintiffs knocked at the door of the First Appellate Court of learned Additional District Judge, Hissar, who through impugned orders dated 06.09.2012 dismissed the appeal of the appellants with no order as to costs. The same is subject matter of challenge before this Court.

Heard, learned counsel for the parties.

Learned counsel for the appellant at the very onset accepts the fact that orders dated 15.9.2006 under order IX Rule II CPC since then have attained finality as the plaintiffs have neither filed any fresh suit or any application for restoration qua these defendants so Dharampal is the lone contesting defendant. Since it is a suit which has been preferred by the plaintiffs, the onus rests heavily upon plaintiffs to prove their case to the hilt. More so, onus of principal issue No.1 was placed upon the plaintiffs. The lone contention canvassed before this Court is regarding the finding on issue No.1. The plaintiffs in their stand by way of pleadings have claimed that agreement was written on 30.4.2001, however, in subsequent part of the plaint it is pleaded that all the parties went to the office of Sub-Registrar and also went to Deed Writer to get the sale deed written and which is reproduced in the testimony of plaintiff by way of affidavit Ex.PW1/A, when in the cross-examination of DW1 it has been specifically brought about denying that any agreement was ever executed on 03.4.2001 as claimed by the plaintiffs. The material contradiction has come about as to when this agreement was got executed. As is there in the arguments put forth by the counsel for the two sides, the cross-examination of PW2 Ram Singh, Deed Writer is quite material, who has shrugged off his shoulder that

he never knew any of the parties, who all are illiterate and have thumb marked, when on the other hand, plaintiff in his cross-examination accepts that though others are illiterate but Bhim Singh was 4-5 class passed. The stand of the defendants right at the inception of their case is that under the garb of widow pension, plaintiff has procured thumb impression of Razia and got thumb impression of his son as witness to it and subsequently had tried to take undue advantage of the same. As is there in the arguments of the two sides, learned counsel for the respondents has brought it out that PW1 in his cross-examination had admitted that he procured the widow pension of Razia, who is 80 years old rather are matters of serious concern which corroborates and pushes forward the stand of the defence. On one hand as is there in the submissions, the plaintiffs claim that they are in possession of property in question but PW1 in his cross-examination accepts that possession of the plot is with the defendants. Since a material controversy over the very execution of agreement has come about but the plaintiffs have failed to seek any relief about that very document which certainly debars in terms of Section 34 of the Specific Relief Act. The Court below has rightly held it so that on account of admission by the plaintiff that the defendants were in possession the plaintiff must have sought relief for declaration with possession and mere possession by way of specific performance does not lie. The Court below has strongly observed that it is the stand of the defendants that plaintiff was in habit of filing complaint against poor *harijans* and has highlighted cross-examination of PW1 regarding suit filed against one Subhash in respect of plot, wherein, compromise has taken place and he had received money from the poor

person. The Court has examined threadbare the evidence of the plaintiffs and has concluded that PW1 happens to be plaintiff and his evidence is not of much relevance to forward the case rather name of other PW Ram Singh was nowhere there in the pleadings regarding execution of the alleged agreement and even one of the witness PW2 Ram Singh has shown agreement to have been written on 03.4.2001 in sharp contradiction to the stand of the plaintiffs. More so, most material lacuna in the case of the plaintiffs comes about by the denial of the defendants as to their thumb impressions but to the very query of the Court, learned counsel for the appellants could not show by what means thumb impressions of the defendants on the alleged document have been proved through an Expert or otherwise in evidence. In the totality of fact the onus lay heavily upon plaintiffs to prove principal issue No.1, who have miserably fail to prove the same.

Learned counsel for the two sides did not address any other point before this Court. The Courts below have rightly and materially appreciated the evidence and law and have come to a justifiable conclusion and there is no perversity or illegality in the impugned findings. Thus, the present appeal being hopelessly without any merits stands dismissed with costs.

(FATEH DEEP SINGH)
JUDGE

February 02, 2018
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Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No