

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

**RSA No.647 of 2012 (O&M)
Date of Decision:11.09.2018**

Dharam Pal

...Appellants

Versus

Karanvir

...Respondent

RSA No.1629 of 2012 (O&M)

Dharam Pal

...Appellants

Versus

Karanvir

...Respondent

RSA No.1084 of 2017 (O&M)

Manjeet and another

...Appellants

Versus

Karanbir and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Ramesh Malik, Advocate for the appellants.
Mr.Kulvir Narwal, Advocate for the respondent

ANIL KSHETARPAL, J. (ORAL)

This judgment shall dispose of three appeals bearing RSA

Nos.647 of 2012, 1629 of 2012 and 1084 of 2017 as parties are common

and decision in one i.e. RSA No.647 of 2012 would govern the decision in remaining appeals.

The defendant-appellant is in the regular second appeal against the judgment passed by both the courts below, decreeing the suit for possession by way of specific performance of the agreement to sell dated 28.10.2003 with respect to land measuring 14K-9M which was already mortgaged with a P.A.R.D Bank, Jhajjar. As per the agreement to sell, the total sale consideration agreed between the parties was Rs.3,20,000/- out of which 1,70,000/- is stated to have been paid as earnest money and the target date for execution and registration of the sale-deed was fixed after a period of one year i.e. 27.10.2004. The plaintiff has also pleaded that on the directions of the defendant, loan of Rs.1,75,097/- was deposited in the bank and obtained clearance and the defendant had agreed to repay Rs.25,097/-.

The second appeal is arising out of a suit filed for injunction by the plaintiff against the defendant, whereas in the third suit plaintiff has challenged transfer deed executed by the defendant in favour of his two sons.

The defendants took a stand that in fact, it was a loan transaction as he was in need of money and he had taken a loan of Rs.1,40,000/- with interest @ 1% per month and the plaintiff got his thumb impressions. He further plead that his two sons are working as drivers with Amar Brick kiln Company on monthly salary of Rs.7,000/- per month and both the sons had deposited the amount with the brick kiln owner and the amount which has been deposited in the bank, is in fact amount received from the aforesaid Brick kiln and defendant being uneducated took the

plaintiff who has retired as Head Master from a School with him and plaintiff taking advantage of the aforesaid fact deposited the amount of loan while mentioning his own name as the person who is depositing the amount and now by taking benefit of his name on receipts, claims that he has deposited the amount from his own funds. The defendant further pleaded that family of the plaintiff-defendant belongs to same area and they are very well known to each other.

In evidence, both the marginal witnesses of the agreement to sell have appeared. DW-4, a marginal witness of the agreement to sell, has been examined by the defendant who has stated that it was the loan transaction, whereas Kartar Singh Numberdar has been examined as PW-6, who, in his cross-examination, has admitted that the defendant had taken loan at 1% per month rate of interest.

Both the courts mechanically decreed the suit without considering the fact that the relief of specific performance of the agreement to sell is an equitable relief and discretion vest with the court to grant or not to grant the relief of specific performance of the agreement to sell. Learned first appellate court, while dismissing the appeal, put entire onus on the defendants as if they were required to prove that agreement to sell was not a loan transaction. In fact, the defendants had already discharged their onus by examining Indraj, one of the marginal witness of the agreement to sell and in the cross-examination of Kartar Singh, Numberdar, other attesting witness of the agreement to sell, who has been examined by the plaintiff, extracting that in fact it was a loan transaction. In such circumstances, in the considered opinion of this Court, both the courts committed an error in

granting specific performance of the agreement to sell.

In fact, both the courts below have failed to exercise discretion. Hence this Court is of the considered view that the discretion should not have been exercised in favour of the plaintiff for the following reasons, i.e. (i) both the marginal witnesses of the agreement to sell admit that the transaction was in fact a loan transaction and the amount was borrowed at the rate of 1% per month; (ii) there is no reason why one year time was granted for execution and registration of the sale-deed. The date on which the alleged agreement to sell is executed is 28.10.2013, whereas the target date for execution of the sale-deed is exactly after one year i.e. 27.10.2004 and (iii) it has come in the evidence that the plaintiff lends money. Still further, the defendant was very candid when he admitted his thumb impression but took the plea that he had taken a loan of Rs.1,40,000/- due to his bad financial condition and his both sons are working in a brick klin at a monthly salary of Rs.7,000/-.

It will be noted that although the defendant has taken a plea that he had deposited Rs.1,75,097/- with the bank, however, both the courts below have not recorded finding that the aforesaid amount is proved to have been paid by the plaintiff from his own pocket. Although, learned counsel for the respondent has submitted that taking into consideration that the defendant has taken a plea that salary of the sons of the plaintiffs is lying deposited with Brick klin Company but no evidence in support thereof has been produced. However, defendant has specifically pleaded that the defendant withdrew Rs.48,000/- on 19.4.2004, Rs.40,000/- on 21.4.2014 and Rs.90,000/- on 23.4.2004. It is proved from receipts produced that the

amount of loan was deposited in three installments with bank. These are as follows:-

Rs.50,000/- dated 19.4.2004,

Rs.1,00,000/- dated 21.4.2004

Rs.25,097/- dated 23.4.2004

These receipts clearly prove that defendant had correctly taken a stand that the amount was repaid in the bank after having withdrawn receiving the same from the Brick kiln where his sons are employed. Had this amount been deposited by the plaintiffs claimed, there was no reason to deposit the amount in three installment and that also within four days.

In view of the aforesaid reasons, the appeal bearing RSA No.647 of 2012 is partly allowed. The decree for specific performance of the agreement to sell is set aside and the plaintiff is held entitled only granted relief of refund of earnest money along with interest @7.5% per annum from the date of agreement to sell till realisation.

Second appeal bearing **RSA No.1629 of 2012** is arising out of suit for injunction filed by the plaintiff. Once in the suit filed for specific performance of the agreement to sell, only refund of the amount as alternative relief has been granted, therefore, the suit for injunction would also not be maintainable and hence judgments passed by the courts below are reversed. Accordingly the present appeal is also partly allowed.

In the third appeal bearing **RSA No.1084 of 2017**, the plaintiff has challenged the relinquishment deed executed by the defendant-Dharampal in favour of his sons. Once Karanbir Singh, plaintiff, has not been held entitled specific performance of the agreement to sell, he has no

locus standi to challenge the relinquishment deed executed by Dharam Pal in favour of his sons. Consequently, the present appeal is allowed.

However, while decreeing the suit for alternative relief, i.e. recovery of amount of earnest money alongwith interest, it is ordered that the aforesaid amount shall remain charge on the property in dispute and if the defendant fails to pay the amount, the plaintiff shall be entitled to proceed with the execution for recovery, in accordance with the law.

Pending application(s), if any, shall also stand disposed of, in terms thereof.

11.09.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No