

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.1947 of 2016 (O&M)

Date of Decision:24.04.2018

Randhir Singh

...Appellant

Versus

Daljeet Singh and others

...Respondents

RSA No.3064 of 2016 (O&M)

Shalinder Singh

...Appellant

Versus

Daljeet Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Rajesh Bansal, Advocate for the appellant in
RSA No.1947 of 2016 and for respondents No.3 and 4 in
RSA No.3064 of 2016.
Mr.Rajesh Malik, Advocate and
Mr.Manoj Kumar, Advocate for the appellant in
RSA No.3064 of 2016 and for respondent No.3 in
RSA No.1947 of 2016.
Mr.Akshay Bhan, Sr. Advocate with
Mr.Santosh Sharma, Advocate for respondents No.1 and 2.
(in both appeals)

ANIL KSHETARPAL, J.

This judgment shall dispose of above-mentioned two appeals as
both these appeals arise out of common judgment passed by the learned first
appellate court.

Defendants No.1 and 2 have filed separate appeals, challenging
the judgment passed by the learned first appellate court, granting relief of
specific performance of agreement to sell with respect to land measuring 91

kanals and 3 marlas, modifying the judgment passed by the learned trial court ordering refund of earnest money with interest.

The plaintiffs filed a suit for possession by way of specific performance of the agreement to sell dated 23.4.2002. The agreement to sell was allegedly executed by defendant No.1 in favour of the plaintiffs with respect to land measuring 155 Kanals and 11 Marlas, being undivided share of joint land. Defendant No.2 is father of defendant No.1. Defendant No.1 filed written statement, admitting the claim of the plaintiffs, whereas defendants No.2 and 3 are father and brother, who contested the suit.

The suit for specific performance was filed with alternative prayers. It was prayed that decree for specific performance be passed with respect to land measuring 131 Kanals and 3 Marlas excluding land measuring 24 Kanals and 9 Marlas already sold by defendant No.1. The plaintiffs further challenged a compromise decree passed by the court on 25.3.2004. The claim made in the suit is extracted as under:-

“Suit for specific performance of contract, directing the defendant- No.1 to perform his part of contract in terms of agreement to sell dated 23.4.2002 by way execution & Registration of sale deed in favour of plaintiff no.1 to the extent of 2/3rd share and plaintiff No.2 to the extent of 1/3rd share in respect of the agri. Land comprised in Khewat No.2 Khatoni No.2 to 60 total measuring 2774 kanls 16 marlas to the extent of 2312/55496 share corresponding to 115 kanal 12 marlas excluding already sold land measuring 24 kanal 9 marlas by the defendant set No.1 out of it i.e. 91 kanal 03 marlas or 1823/55496 share & agri.land comprised in Khewat no.3 khatoni no.50 rect.no.75 killa no.20(8-0), 21 (8-0), rect. no.81 killa no.4(8-0), 5(8-0), 6 (8-0), measuring 40 kanal total land measuring 131 kanal 03 marlas, situated in the revenue estate of village Anta Tehsil Safidon Distt. Jind vide Jamabandi of

1999-2000 and for possession of the above detailed land after receiving the balance sale consideration from the plaintiffs and consequently alleged order dated 17-12-2002 passed by the court of Sh.R.K.Dogra, HCS Addl. Civil Judge (Sr. Division) Safidon in civil suit no.137 of 20-12-2000 titled as "Sukhbir etc. Vs. Kuldeep Singh etc." and order dated 25.3.2004 passed by the court of Sh.R.K.Dogra, HCS Addl. Civil Judge (Sr.Divn.) Safidon in civil suit no.121 of 20.5.2002 titled as "Randhir Singh etc. Vs. Pardeep Singh etc." both passed in favour defendants set No.2 & against defendant set No.1 pertaining to the above detailed land & subsequent mutation No.553 & 554 dated 11.6.2004 entered & attested in favour of defendants set no.2, al are null, nonest, void abinitio & result of fraud and same are not binding on the right of the plaintiffs and consequently restraining the defendants from alienating & transferring the above land in favour of any body in any manner whatsoever."

Defendant No.1 filed a written statement, admitting the suit filed by the plaintiff. Defendants No.2 and 3 also contested the suit. During the pendency of the suit, defendant No.1 filed an application dated 25.1.2007, seeking permission to defend and decide the suit with permission to file the written statement. The facts pleaded in the application are as under:-

1. *"In fact the applicant/defendant No.1 had married a girl outside the caste of the family of the applicant and incidentally the wife of the applicant had aged and ailing parents and practically there was no person to look after the parents of the wife of the applicant. Since all the members of the family of the applicant did not approve the inter caste marriage and further retaliated and had a total hostile attitude towards the applicant. Facing with the situation the applicant under compelling circumstances had to go to Surat City in Gujarat with the parents of the wife of the*

applicant. The applicant was so disturbed and distressed that it resulted in ill health of the applicant and on medical examination in the year 2000, the applicant was diagnosed a case of cancer, described in the following words “BOTH THE ILEUM AND THE MESENTERIC NODE SHOW HODGKIN'S DISEASE MIXED”. The applicant was operated upon and got regular treatment from Tata Memorial Hospital Mumbai and also from Jaslok Hospital & Research Centre Mumbai and is under continuous treatment and observation of the doctors. Under the circumstances the applicant was in great need of financial help and one of the family members was ready to cooperate the applicant and instead of help of the applicant civil cases were filed against him. Distressed, disturbed and mentally upset the applicant had no other alternative but to lease out the suit property to the plaintiffs by signing papers of lease agreement dt.23.04.2002 but here also the applicant could not receive the payment of lease from the plaintiffs/Lessee due to non-implementation of the lease agreement. Having something else in mind with the malafide intentions the plaintiffs filed the above titled false suit on false and fabricated grounds for blackmailing the applicant. Now the applicant has come to know that the plaintiffs have prepared a false agreement to sell nor there was any occasion to execute the same. The applicant executed a lease agreement only on 23-4-02. Plaintiffs who are very clever persons are after my properties and their evil designed activities have made the applicant mentally upset and insecure. On perusal of the alleged agreement to sale it becomes clear that there is no mention of any lease in favour of the plaintiffs and further more from perusal of the agreement of the lease there is no mention of any agreement to sell which means that the alleged document of agreement to sell has been prepared with a malafide intention by the plaintiffs. Furthermore the lease agreement does not find the signature

of the deed writer. Further the parties, the alleged witnesses are shown to be the same on both set of the documents and none of the aforesaid witnesses belong to the district of the applicant.

2. That now the applicant has come to know that a written statement has been shown to be filed on behalf of the applicant and the original written statement does not bear the signature of the applicant. In other words there is no written statement on the file putting up the defence of the applicant to the suit. Otherwise also the signatures on the alleged agreement of sale and on the lease agreement do not tally with the signatures on the written statement.”

On the aforesaid application, which was contested by the plaintiff, the learned trial court permitted the parties to lead the evidence. Statement of counsel representing defendant No.1 was also recorded. Thereafter vide order dated 9.5.2009, defendant No.1 withdrew his application.

The learned trial court, after noticing that conduct of defendant No.1 is not normal and the contents of the agreement to sell are dubious, ordered refund of the earnest money along with interest @9% per annum.

The plaintiffs filed the first appeal. The learned first appellate court has chosen to modify the judgment passed by the learned trial court and ordered specific performance of the agreement to sell with respect to land measuring 91 Kanals and 3 Marlas. (Although agreement to sell was with respect to land measuring 155 kanals and 11 marlas).

It will be significant to note here that on 7.9.2015, the plaintiffs made a statement in the court, abandoning their claim qua 40 kanals of land.

The statement suffered by the plaintiffs is extracted as under:

“Stated that we abandon our claim qua 40 kanals of

land comprised in Rect. No.75 killas No.20(8-0), 21(8-0) Rect No.81 Killa No.4 (8-0), 5(8-0), 6(8-0) and against defendant/respondent No.3 Sukhbir Singh. We restrict our claim to the share of Shailender defendant/respondent No.1 and 2 qua 91 kanal 3 marla in the land of khewat No.2 as per jamabandi for the year 1999-2000 against defendant No.1 and 2.”

So while filing the suit, plaintiff did not choose to pray for specific performance of entire agreement to sell as claim qua 24 kanals and 9 marlas was given up and during the pendency of the first appeal claim qua 40 kanals was abandoned.

A careful reading of the judgment passed by the learned first appellate court establishes that the learned counsel for the defendants submitted before the learned first appellate court that the suit cannot be decreed in view of the provisions of Section 12 of the Specific Relief Act, 1963 ('the Act' for short) It was submitted before the court that part performance of the agreement to sell is not permissible. The learned first appellate court after noticing the argument/submission of learned counsel for the respondents did not advert to the same and did not decide whether the suit filed by the plaintiff can be decreed for part performance of the agreement to sell or not.

As per Section 12 of the Specific Relief Act, 1963 part performance of the agreement to sell is not permissible except under certain eventualities envisaged by sub sections, 2, 3 and 4 of Section 12 of the Specific Relief Act, 1963. Section 12 of the Specific Relief Act, 1963 is extracted as under:-

“Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole

of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money,

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or has paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing

at the date of the contract has ceased to exist at the time of its performance.”

Still further, the learned trial court did not frame issue on Section 12 of the Act. In fact, it appears that before the learned trial court, counsels representing the party did not even notice that the specific performance is being sought for part of the land agreed to be sold.

From the reading of the judgment passed by the courts below, it appears that no evidence was led as on which date 24 kanals land out of the land agreed to be sold, i.e. 155 kanals and 11 marlas, was sold by defendant No.1. Further, the courts below have not noticed the effect of statements suffered by the appellants abandoning their claim with respect to land measuring 40 kanals.

In these circumstances, this Court is of the considered opinion that both these cases be remitted back to the learned trial court for re-examining the entire case including the effect of Section 12 of the Act. The learned trial court would frame a issue on Section 12 of the Act and grant opportunities to the parties to lead evidence if prayed for and thereafter re-decide the matter, in accordance with law.

Hence, both these appeals are allowed, accordingly. The judgments and decrees passed by the courts below are set aside. The matter is remanded back to the learned trial court to re-decide the entire case after re-examining the evidence available on the file, in accordance with law.

24.04.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No