

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

RSA No.1303 of 2015(O&M)

Bhupinder Singh

...Appellant

Versus

Tek Singh (since deceased) through LRs.

....Respondents

Date of Order: 14.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Premjit Kalia, Advocate for the appellant and
Mr. Kewal Krishan, Advocate for the appellant.

AMIT RAWAL, J (ORAL)

CM No.3675-C of 2015

For the reasons stated in the application, which is supported by an affidavit, the same is allowed. Delay of 39 days in filing the appeal is condoned.

RSA No.1303 of 2015

Plaintiff-appellant is aggrieved of concurrent judgments and decrees passed by both the courts below whereby his suit for possession by way of specific performance of agreement to sell dated 26.5.2003 entered into by Tek Singh (since deceased) in respect of land measuring 16 kanal 04 marlas for total sale consideration of Rs.7,08,750/- has been partly decreed by not granting the discretionary relief vide judgment and decree dated 12.2.2014 passed by learned Civil Judge (Sr. Division), Tarn Taran and the findings affirmed in appeal by the lower Appellate Court vide judgment and decree dated 23.9.2014.

Plaintiff instituted the suit on the premise that vide agreement to sell dated 26.5.2003, Tek Singh (since deceased) agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.7,08,750/- out of which a sum of Rs.6,78,750/- was received by said Tek Singh as earnest money in the presence of witnesses. It was mentioned in the agreement to

sell that a civil case pertaining to the suit property was pending in the Civil Court at Tarn Taran and it would be subject to the decision of the suit. Said suit was decided by the trial Court vide judgment and decree dated 16.3.2010 vide which said Tek Singh, who was plaintiff-vendor succeeded. Tek Singh died during the pendency of the suit before filing the written statement in the present suit.

Upon notice, the defendants appeared and contested the suit by denying the execution of agreement. However, they did not deny the ownership of Tek Singh.

The plaintiff in support of his case examined Gurpal Singh Lambardar as PW1 besides appearing himself as PW2. He also tendered in evidence agreement to sell dated 26.5.2003 as Ex.P2, certified copy of power of attorney as Ex.P2 and death certificate as Ex.P3.

On the other hand, defendants examined Harjinder Singh, one of the legal heirs of deceased Tek Singh and closed the evidence.

On the basis of preponderance of evidence, the trial court partly allowed the suit recording that the parties had entered into agreement to sell but non-suited the plaintiff on the premise that he failed to prove ownership of Tek Singh, though he was held entitled for recovery of Rs.6,78,750/- from the legal heirs of defendant Tek Singh to the extent of share inherited by them in the suit property along with interest @ 12% per annum from the date of execution of agreement to sell in question till realization. Appeal filed by the plaintiff-appellant against the same has been dismissed by the lower Appellate Court.

Learned counsel for the appellant submitted that though both the courts below have recorded that the agreement to sell was executed by

Tek Singh but he did not perform his part of contract after the decision of civil suit in his favour but wrongly granted the alternative relief of refund of the earnest money instead of granting the relief of specific performance. Thus the said findings recorded by both the courts below are wholly perverse and not sustainable in the eyes of law. Along with the present appeal, an application bearing CM No.3676-C of 2015 under Order 41 Rule 27 CPC has been moved for adducing the judgment of first appellate Court dated 14.1.2014, which was delivered against the judgment and decree dated 16.3.2010 holding Tek Singh to be owner of the property. Even the appellant had stated in his examination in chief qua decision of civil suit in favour of Tek Singh but he was not cross examined in this respect, thus in the absence of his cross examination he should not have been non-suited.

This Court vide order dated 14.7.2017 issued notice of the application seeking condonation of delay and as per order dated 12.2.2018, service was complete. Accordingly, I proceed to decide the case on merits.

After hearing learned counsel for the appellant and perusing the paper book, I find force and merit in the submissions of learned counsel for the appellant, for, the judgment dated 16.3.2010 was passed in favour of Tek Singh wherein he was successful in respect of an agreement to sell entered into by the third party. Appeal preferred against the same had been dismissed by the lower Appellate Court vide judgment dated 14.1.2014.

Once, the court below had already delivered finding with regard to the agreement to sell and in the absence of denial by Tek Singh in the written statement, there was no occasion for the courts below in not believing the conduct of defendants qua readiness and willingness as substantial amount of earnest money against total sale consideration had

already been paid. Discretionary relief can only be granted when the plaintiff i.e vendee has not been able to prove the ingredients of provisions of Section 16-C of the Specific Relief Act, 1963, which is in the present case has been proved.

In these circumstances, I am of the view that both the courts below have committed fallacy and perversity.

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.

Keeping in view the aforementioned, the judgment and decrees passed by the lower Appellate Court is modified to the extent that the suit of the plaintiff is decreed in toto. The appellant would be given two months period to deposit the balance sale consideration to the defendant-respondents and thereafter the defendants within one month of receipt of payment shall execute the sale deed, failing which the plaintiff-appellant shall be able to seek execution of the judgment and decree in accordance

with law. Decree sheet be prepared accordingly.

The second appeal is allowed in the above terms.

May 14, 2018
manoj

`(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No