

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

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**RSA No.421 of 2016 (O & M)
Date of decision:30.01.2018**

Praveen Kumar and others

...Appellants

Versus

Sarjit and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Parminder Singh Kanwar, Advocate with
Mr. Padamkant Dwivedi , Advocate
for the appellant in RSA No.421-2016.

ANIL KSHETARPAL, J.(Oral)

Plaintiffs-appellants are in the regular second appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the trial Court.

Plaintiffs had filed a suit for permanent injunction restraining the defendants from interfering in their possession. Plaintiffs had claimed that their predecessor-Sadhu Ram, who was karta of the joint hindu family had entered into an agreement to sell with predecessor-in-interest of the defendant i.e. Gulab Singh on 29.05.1972 with respect to land measuring 1 kanal and 8 marlas. Entire sale consideration was paid and possession was delivered. However, since the property was under some loan, therefore, it was agreed that the sale deed would be executed subsequently once the loan is paid. Plaintiffs further asserted that the defendants had in fact made a complaint to the Gram Panchayat which was also decided against the defendants.

In the written statement, execution of the agreement to sell dated 29.05.1972 was denied. It was further pleaded that Gulab Singh was not exclusive owner of the property hence Gulab Singh could not have executed the agreement to sell. It was pleaded that Gulab Singh, Smt. Dakha and Smt. Chandravali were the owners of the property.

Learned trial Court after appreciating the evidence available on the file, decreed the suit filed by the plaintiffs whereas learned First Appellate Court has reversed the finding of learned trial Court by giving following reasons:-

1. It was incumbent upon the plaintiffs to get the thumb impression of Gulab Singh on agreement dated 29.05.1972 and compared with some standard thumb impression of Gulab Singh.

2. Ex.P-1, the alleged agreement to sell, is part of a notebook and the aforesaid notebook has not been produced.

3. Local Commissioner has no right to report about the possession of the parties.

4. Gulab Singh was in fact not under debt whereas the other co-owners were under debt and, therefore, the writing dated 29.05.1972 became doubtful.

5. It is not proved on file that Sadhu Ram had in fact paid the amount of Rs.15,00/- out of joint funds of the Hindu undivided family.

6. The land has been identified in the agreement to sell as kothawala, whereas in the subsequent revenue

record, it was not proved that the land is being described as kothawala.

In the considered opinion of this Court, following substantial question of law arise for determination:-

1. Whether it is incumbent upon the propounder of an agreement to sell to get the thumb impression of the executant (perspective vendor) compared from the hand writing and finger print expert once other party denies the execution of the agreement to sell.

2. Whether the plaintiff, who claims to have come into possession pursuant to the agreement to sell whereunder total sale consideration has been paid is entitled to protect his possession under Section 53-A of the Transfer of Property Act-in-part performance of agreement to sell.

It is not in dispute that agreement to sell dated 29.05.1972 is in writing. The agreement to sell has been thumb marked by Gulab Singh predecessor-in-interest of the defendant. To prove agreement to sell the plaintiff has examined marginal witness Phul Singh as PW-1 and has also examined scribe Bansidhar as PW-7. Both these witnesses have stated that Gulab Singh, the owner had put his thumb impression on the agreement to sell after understanding the contents of the agreement to sell.

In the considered opinion of this Court, in the presence of direct evidence, it was not incumbent upon the propounder of an agreement to sell to get the thumb impression compared from a hand writing and finger

opinion based upon his expertise. Such opinion is not binding on the Court. Therefore, as a proposition of law it cannot be held that once the thumb impression/signatures on a particular document are denied by the executant or his legal heirs, it is obligatory for the propounder to get the signatures/thumb impression compared from hand writing and finger print expert. Thereafter onus is on the other party, who denies the signatures or thumb impression to prove that the signatures or thumb impression do not belong to them.

Still further, in the present case the defendant lodged a complaint with the Gram Panchayat after a period of 34 years i.e. in the year 2006. Gram Panchayat held proceedings and heard both the sides. Before the Gram Panchayat, the defendant admitted that his father had received the amount as mentioned in the agreement to sell. However, he refused to refund the amount along with the interest. Gram Panchayat thereafter concluded that it is the defendant, who has become dishonest. The proceedings of the Gram Panchayat are Ex.P-2 on the file. The proceedings are signed by the Sarpanch of the Gram Panchayat along with 17 respectables of the village. These proceedings have been proved by the statement of Om Parkash and Deepak.

Hence, first question of law framed is answered in favour of the appellant.

The second question is that whether the plaintiff, who claims to have come into possession pursuant to the agreement to sell whereunder total sale consideration has been paid, is entitled to protect his possession under Section 53-A of the Transfer of Property Act-in-part performance of agreement to sell.

In view of the discussion made above, it is clear that the agreement to sell dated 29.05.1972 was executed by predecessor of the defendants. As per the agreement, entire sale consideration was paid and possession was delivered. It was agreed that the sale deed would be executed once the loan is repaid and entry of loan in the revenue record is deleted. The predecessor of the plaintiffs had paid the entire sale consideration. It was for predecessor of the defendant to repay the loan and get the property unencumbered facilitating the registration of the sale deed.

In these circumstances, the plaintiffs-appellants are entitled to protect their possession in part performance of the agreement to sell in terms of Section 53-A of the Transfer of the Property Act. Such perspective purchasers is entitled to protect their possession irrespective of the fact whether suit for specific performance has been filed or not. Hence, question No.2 is also answered in favour of the appellants.

Learned First Appellate Court has held that Ex.P-1 is a page from a note book (bahi) and since bahi has not been produced, therefore, the agreement to sell is not admissible. The finding of the learned First Appellate Court is erroneous. The page or paper from the bahi is a full piece of paper. Both the parties had scribed the agreement to sell and signed the same. Once that piece of paper in original has been produced on the file, it could not be ignored by the Court on the ground that note book from where this paper was removed has not been produced. Agreement to sell is a contract between the parties, the contract has been entered into in writing and signed by the parties. Hence, the Ex.P-1 being complete document could not be ignored by the Court.

could not have reported about the possession. No doubt, Local Commissioner has no authority to decide as to which party is in possession. However, Local Commissioner who has been appointed to investigate and report to the Court can certainly inform the Court that what is the position at the spot.

Next reason filed by the learned First Appellate Court that Gulab Singh himself was not under debt but his other co-owners i.e. Smt. Dakha and Chandravali were under debt.

In the considered opinion of this Court, this would not improve the case of the defendants. Property was part of a joint khata. Other co-sharers/co-owners were under debt. In the revenue record there was entry that the property is under charge on account of debt. Hence, parties agreed that the sale deed would be executed after the repayment of the loan and removal of the entry with regard to charge on the property.

Learned First Appellate Court has further ignored the agreement to sell on the ground that no evidence has been led to prove that the payment was made by Sadhu Ram from joint funds.

In the considered opinion of this Court, this issue was not even arising between the parties. Dispute was whether there was any agreement to sell between Sadhu Ram and Gulab Singh. All the legal heirs of Sadhu Ram and his brother Badri Parshad were plaintiffs. It was their joint case that in fact the amount of Rs.15,00/- was paid out of joint funds. No issue was framed by the Court on this aspect, therefore, the finding of the learned First Appellate Court were wholly unnecessary.

Learned First Appellate Court has further disputed the identity

one kanal and 8 marlas land agreed to be sold, which was referred to as kothawala land which touches the land of Badri Parshad. As per the jamabandi for the year 1999-2000, the land which has been described in the agreement to sell as kothawala is duly identified.

Still further, the identity of the property agreed to be sold is not in dispute between the parties. No issue was framed by the Courts on this aspect of the matter. Still further when the local commissioner visited the village to demarcate the disputed land, the property was identified by the respective parties. Hence, the finding of the Court that agreement to sell is vague and clearly erroneous.

Still further, the defendant had in fact filed a counter claim with regard to the property in dispute claiming themselves to be in possession and for passing a decree for permanent injunction restraining the plaintiffs from interfering in their possession. Hence, it can be safely concluded that the identity of the property in dispute was never subject matter of dispute between the parties.

In view of the discussion made above, the judgment passed by the learned First Appellate Court is set aside and the judgment passed by the learned trial Court is restored.

Hence the regular second appeal is allowed.

30.01.2018
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(ANIL KSHETARPAL)
JUDGE

Whether Speaking/Reasoned: Yes/No
Whether Reportable : Yes/No