

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

RSA No.2828 of 2015.
Decided on:-March 14, 2018.

Nijjar @ Nizar Mohd. and another

.....Appellants.

Versus

Mamman and another

.....Respondents.

CORAM: *HON'BLE MR. JUSTICE HARI PAL VERMA.*

Present:- Mr. Amit Jain, Advocate
 for the appellants.

HARI PAL VERMA, J.

The appellant-plaintiffs have filed the present regular second appeal against the judgment and decree dated 11.11.2014 passed by learned District Judge, Mewat, whereby their appeal against the judgment and decree dated 29.11.2013 passed by learned Additional Civil Judge (Senior Division), Ferozepur Jhirka, was dismissed.

Briefly stated, the appellant-plaintiffs had filed a suit for specific performance of an agreement to sell dated 26.03.2010 in respect of the suit land as described in the plaint. As per the plaint, respondent-defendant No.1 had entered into an agreement to sell dated 26.03.2010 for a total sale consideration of Rs.7.5 lakhs and as against the agreed sale price, the plaintiffs had paid a sum of Rs.5.5 lakhs to the defendant No.1 as earnest money. The balance sale price of Rs.2 lakhs was to be paid by the plaintiffs to

defendant No.1 at the time of execution and registration of the sale deed. The sale deed was required to be executed on or before 25.09.2010. As the defendant No.1 failed to execute the sale deed as required under the agreement to sell, despite the fact that the plaintiffs were always ready and willing to perform their part of the contract, the defendant No.1 deliberately committed breach of the agreement. When the defendant No.1 did not come forward to execute the sale deed, the plaintiffs appeared before the Sub-Registrar, Ferozepur Jhirka on 25.09.2010 with the balance sale consideration, but the defendant No.1 did not report for the execution of the sale deed. Accordingly, in order to establish their presence, the plaintiffs submitted an affidavit before the Executive Magistrate, Ferozepur Jhirka. Instead of executing the sale deed in favour of the plaintiffs, the defendant No.1 rather transferred the suit land in favour of defendant No.2 vide sale deed bearing Vasika No.1095 dated 05.01.2011 for sale consideration of Rs.12 lakhs. Defendant No.2 purchased the suit land in collusion with defendant No.1, knowing it well that the defendant No.1 had already executed an agreement to sell in favour of the plaintiffs. Even on the date of execution of the sale deed by defendant No.1 in favour of defendant No.2 on 05.01.2011, the plaintiffs had appeared before the Sub-Registrar and the factum of agreement in favour of the plaintiffs was duly brought to the notice of defendant No.2, but still he went ahead with the sale deed.

In the suit so filed, defendant No.1 did not appear despite service and, therefore, was proceeded against *ex parte*, but defendant No.2 contested the suit and had filed written statement controverting the claim of the

plaintiffs and, rather, pleaded to be a bonafide purchaser of the suit land for valuable sale consideration. Defendant No.2 pleaded that she had made a bonafide enquiry from the revenue record on the spot, before the execution and registration of the sale deed. Moreover, the plaintiffs had full knowledge and notice of the sale deed dated 05.01.2011 as they are the real brothers of defendant No.1. The agreement to sell dated 26.03.2010 was prepared by the plaintiffs and defendant No.1 in collusion with the scribe, witness and the vendor only to grab the land of defendant No.2.

On the basis of pleadings of the parties, the civil Court formulated the following issues:

1. Whether the plaintiff is entitled to the decree of possession by way of specific performance of agreement to sell dated 26.3.2010, as prayed for? OPP
2. Whether the defendant No.1 received Rs.5,50,000/- as earnest money out of total sale consideration of Rs.7,50,000/- from plaintiff? OPP
3. If issue No.1 and 2 are proved, whether plaintiff is entitled for the relief of permanent injunction, as prayed for? OPP
4. Whether the present form is not maintainable? OPD
5. Whether the plaintiff has no locus standi to file the present suit? OPD
6. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
7. Whether the plaintiff has concealed true and material facts from the Court? OPD

8. Whether the defendant No.2 is bona fide mortgagee of the suit land for valuable mortgage consideration?
OPD
9. Relief.

As per the plaintiffs, in the agreement dated 26.03.2010, there was a specific recital as regards execution and registration of the sale deed on 25.09.2010. On the date of execution of the agreement, the defendant No.1 had received earnest money of Rs.5.5 lakhs in the presence of witnesses and since the defendant No.1 failed to execute the sale deed by 27.09.2010 (25.09.2010 to 26.09.2010 being holidays), the plaintiffs were entitled to seek specific performance of the agreement. But the defendant No.1 after execution of the agreement had sold the land to defendant No.2 vide sale deed bearing Vasika No.1095 dated 05.01.2011 and in this manner, the defendant No.1 has not only committed cheating, rather the sale deed dated 05.01.2011 was a sham transaction and the amount has been received by defendant No.1 to deceive them (plaintiffs).

On the other hand, defendant No.2 has raised the plea of bonafide purchaser and has contended that despite due diligence exercised by her, she had no knowledge of the agreement to sell in favour of the plaintiffs. Rather, the plaintiffs had the knowledge of the sale of land in her favour. She alleged that the plaintiffs were real brothers of defendant No.1 and in collusion with each other, they have filed the present suit to deprive the defendant No.2 of her valuable rights.

On the basis of available evidence, the civil Court dismissed the suit and held that the plaintiffs were not entitled for the specific performance

of the agreement to sell dated 26.03.2010. However, the defendant No.1 was directed to return the amount of Rs.5.5 lakhs allegedly received by him from the plaintiffs along with interest @ 18% per annum from 26.03.2010 till the date of its realization. While dismissing the suit, the civil Court has observed as under:

“30. In the present case the defendant No.2 has categorically stated that she was a bona-fide purchaser without notice for valuable consideration.

31. Even if it is presumed that averments of the plaintiff are genuine as the document has been proved in the Court then also collusion with the defendant No.1 is quite evident. Defendant No.1 has not put in appearance in the Court to contest the allegations levelled by the plaintiff. The plaintiffs and defendant No.1 are real brothers. Document Ex.D1 is a registered document which carries a presumption of genuineness. On the basis of the document revenue records were altered.

*32. In view of **Nand Kishore Vs Rameshwar Dayal and another 1989 PLJ 258 (supra)** once the defendant in the written statement had taken plea of bona-fide purchaser the onus was shifted upon the plaintiff to prove that defendant No.2 had the knowledge of the agreement to sell in favour of the plaintiff prior to sale deed in his favour. No such evidence is on record. In the entire factual matrix the fraudulent and conniving nature of defendant No.1 is evident. As the documents Ex.P1 and P2 have been proved by calling upon the attesting witnesses but a doubt is created upon their genuineness in wake of the statement of Ram Singh Namberdar PW2. As per his statement the plaintiffs did not wait for the entire day for appearance of defendant No.1 for execution and registration of the sale deed. The plaintiffs and the defendant No.1 were real brothers allegedly residing in the*

same village. They all had to come to the Tehsil campus from the same place. Appearance of plaintiffs in the Tehsil office, non appearance of defendant No.1, the plaintiffs not waiting for the entire day, the affidavit Ex.P2 not drafted in the presence of the witnesses and contradictions in the statement of plaintiff's witnesses cast a doubt on the bonafide of the plaintiffs and defendant No.1. Relief of specific performance is a discretionary relief and the discretion has to be exercised keeping in view the surrounding facts and circumstances of the case. Further there is no evidence on record to show that the plaintiffs had arrived in the Tehsil office on 5.1.2011. PW Ram Kumar if he had the knowledge of agreement dated 26.3.2010 was not under any obligation to be a witness to sale deed dated 5.1.2011. He could have straight away refused to do so. Thus the story of arrival of the plaintiffs in the Tehsil office seems false outrightly. Though the conduct of the defendant No.2 has also not been upto the mark (payment at the house of defendant No.1 on the date fixed for execution of the sale deed), the onus was upon the plaintiffs to convince the Court with their assertions."

Aggrieved against the judgment and decree dated 29.11.2013 passed by learned civil Court, the plaintiffs filed an appeal before the lower appellate Court, but the same was also dismissed by learned District Judge, Mewat vide judgment and decree dated 11.11.2014.

Still aggrieved with the judgments and decrees passed by the Courts below, the plaintiffs have filed the present regular second appeal.

Following substantial questions of law have been raised by the appellants:

- a) Whether it is required under any provision of law for the scribe to prove or remember name of typist and if word

“drafted by” is written rather typed makes agreement to sell doubtful?

- b) Whether if agreement to sell is proved which is prior in time of sale deed same requires to be enforced by process of law?
- c) Whether learned Courts below have erred in misreading, ignoring and discarding testimony of PW-2 who has duly proved that defendant No.2 was aware and had knowledge of agreement to sell?
- d) Whether learned Courts below have misread testimony of Mustaq PW-3 attesting witness observing that in his cross examination he has stated that Mamman was having registry and numbers in agreement were recorded with help of registry, whereas PW-3 has categorically deposed in his cross-examination that numbers were written from Jamabandi?
- e) Whether learned Courts below have erred in not returning any finding as to whether agreement to sell was executed or not?
- f) Whether it is mandatory for the first appellate Court to independently assess evidence of parties and consider relevant points which arise for adjudication and bearing of evidence on those points?
- g) Whether learned Courts below have illegally decreed suit on basis of conjectures and surmises?
- h) Whether grave and manifest injustice has been done to appellants?

Learned counsel for the appellant-plaintiffs has argued that a suit for specific performance was filed on the basis of an agreement to sell dated 26.03.2010 in respect of the agricultural land, as detailed in the plaint. The plaintiffs have always been ready and willing to perform their part of the contract. The plaintiffs approached defendant No.1 so many times and tendered him the balance sale consideration with a request to execute and register the sale deed, but the defendant No.1 kept on delaying it on one

pretext or the other. On 25.09.2010, the plaintiffs along with balance sale consideration had appeared before the Sub-Registrar to get the sale deed executed in their favour, but defendant No.1 did not turn up. Consequently, the plaintiffs submitted an affidavit before the Executive Magistrate, Ferozpur Jhirka for getting their presence recorded. The defendant No.1 has deliberately committed breach of agreement to sell with an ulterior motive so as to deprive the plaintiffs from their valuable right and, rather, transferred the land to defendant No.2 for ostensible sale consideration of Rs.12 lakhs vide registered sale deed bearing Vasika No.1095 dated 05.01.2011. The defendant No.2 had full knowledge and notice of the agreement dated 26.03.2010. Even on 05.01.2011, the plaintiffs came to the office of Sub-Registrar and informed the defendant No.2 not to purchase the suit land as defendant No.1 had already executed an agreement, but defendant No.2 did not pay any heed. The plaintiffs also requested the defendant No.1 not to alienate the suit land as there was already an agreement to sell in favour of the plaintiffs executed by defendant No.1. Therefore, the sale deed in favour of defendant No.2 is nothing but a collusive attempt to deprive the plaintiffs' right to get the sale deed executed in their favour, which is not binding on the rights of the plaintiffs.

He has further argued that the Courts below have erred in not considering the agreement to sell dated 26.03.2010 Ex.P1, which is duly proved to have been executed by defendant No.1 in favour of the plaintiffs. Shri Julfikar, Advocate (PW1) examined by the plaintiffs has deposed that he scribed/drafted the agreement and both the parties had put their thumb

impressions and money was given in his presence. Therefore, it was proved that the agreement to sell was written in the Court premises. He denied that the agreement is forged or ante-dated. Once the agreement to sell dated 26.03.2010 was prior in time and the necessary ingredient of readiness and willingness of the plaintiffs has also been proved by the plaintiffs, the suit of the plaintiffs ought to have been decreed. The Courts below have not considered the testimonies of Shri Julfikar, Advocate as PW1 and attesting witness, namely, Mustaq as PW3, who have stated that the agreement to sell was written in the Court premises and the number of land were duly written on the basis of Jamabandi.

I have heard learned counsel for the appellant-plaintiffs.

There is no dispute that the appellant-plaintiffs and respondent-defendant No.1 are real brothers and the sale deed dated 05.01.2011 Ex.D1, which is a registered document carries a presumption of genuineness. The respondent-defendant No.2 in her written statement has taken a plea of bonafide purchaser and, therefore, it was incumbent upon the plaintiffs to prove that the defendant No.2 had the knowledge of the agreement to sell dated 26.03.2010 in favour of the plaintiffs prior to the sale deed dated 05.01.2011 executed in her favour. No such evidence has been adduced by the plaintiffs to prove that the defendant No.2 had the knowledge of the agreement to sell dated 26.03.2010.

So far as execution of agreement to sell dated 26.03.2010 Ex.P1 and affidavit dated 27.09.2010 Ex.P2 are concerned, the same have been proved by the plaintiffs by calling upon the witnesses, but at the same time, a

doubt was created upon their genuineness more particularly in the light of statement of Ram Singh Namberdar as PW2. The pleaded case of the plaintiffs is that they appeared before the Sub-Registrar on 27.09.2010 and got their presence marked. But as per the statement of Ram Singh Namberdar as PW2, the plaintiffs did not wait for the entire day for appearance of the defendant No.1 for execution and registration of the sale deed. The appearance of the plaintiffs in the Tehsil office, whereas non-appearance of defendant No.1 and the plaintiffs having not waited for the entire day casts a serious doubt on the bonafide of the plaintiffs and defendant No.1.

Except a bald statement of the appellant-plaintiffs that on 05.01.2011, they had cautioned the respondent-defendant No.2 not to go ahead with respondent-defendant No.1 for execution of the sale deed, there is no other evidence on record to show that the plaintiffs were present in the Tehsil Office on 05.01.2011.

The appellant-plaintiffs and respondent-defendant No.1 are real brothers and it is easy for real brothers to bring an agreement into being just to frustrate the right of defendant No.2, who purchased the land for valuable consideration of Rs.12 lakhs and more importantly when the defendant No.2 is resident of some different village. Even the very agreement Ex.P1 entered between the plaintiffs and defendant No.1 is not free from doubts. Shri Julfikar, Advocate as PW1, who is scribe of agreement Ex.P1, gave an evasive reply and has stated that he does not remember the name of the typist from whom it was got typed. The agreement Ex.P1 reflects neither the name, who drafted it nor the name of person, who typed it. In the agreement Ex.P1,

the words “drafted by” have been written by PW1 and thereafter, he signed at the bottom of the agreement. So once in the typing process, neither the name of the typist nor the name of PW1 have been mentioned, it creates a doubt upon the version of the appellant-plaintiffs, more particularly when the alleged vendor and the prospective purchaser i.e. defendant No.1 and the plaintiffs are the real brothers.

Since the respondent-defendant No.2 was a bonafide purchaser without notice of any earlier agreement to sell for valuable consideration, it has rightly been held by learned Courts below that the appellant-plaintiffs are not entitled to the specific performance of agreement to sell dated 26.03.2010. Even otherwise, the interest of the appellant-plaintiffs has already been protected by learned civil Court vide impugned judgment and decree dated 29.11.2013, whereby respondent-defendant No.1 has been directed to return the amount of Rs.5,50,000/- allegedly received by him from the plaintiffs along with interest @ 18% per annum w.e.f. 26.03.2010 till the date of its realization.

The appeal filed by the appellant-plaintiffs against the judgment and decree dated 29.11.2013 passed by the civil Court has rightly been dismissed by learned lower appellate Court. Therefore, there is no illegality in the concurrent finding of facts recorded by the Courts below.

No other point was argued.

Since the controversy involved in the case has duly been considered by the Courts below, no substantial question of law arises in the present regular second appeal.

Thus, affirming the judgment and decree dated 29.11.2013 passed by the civil Court as well as the judgment and decree dated 11.11.2014 passed by the lower appellate Court, the instant regular second appeal, being devoid of any merit, is dismissed.

March 14, 2018

Yag Dutt

**(HARI PAL VERMA)
JUDGE**

Whether speaking/reasoned: Yes

Whether Reportable: No