

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

**RSA No.2342 of 2014 (O&M)
Date of decision:10.01.2018**

Ram Niwas and others

... Appellants

Vs.

Raghubir Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

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

Mr. S.S.Dinarpur, Advocate
for the respondent.

AMIT RAWAL J.

The appellant-defendants are in Regular Second Appeal against the concurrent findings of facts and law, whereby, suit seeking recovery of ₹11,20,000/- alongwith pendent lite interest at the rate of interest 6% per annum from the date of filing of the suit till its final realization, has been decreed. The appeal filed against the same was partly accepted and the judgment and decree of the trial Court has been modified to the extent that the respondent-plaintiff is entitled to recover the original claimed amount of ₹10 lacs from the defendants alongwith interest 6% per annum.

Before I could advert to the arguments of learned counsel for the parties, it would be in the fitness of things to give preface of the matter for adjudication of the dispute.

Respondent-plaintiff instituted a suit for recovery of aforementioned amount which included ₹10,00,000/- as principal amount

and ₹1,20,000/- as interest at the rate of ₹1/- per hundred per month from 02.05.2008 to 02.05.2009, in reference to the agreement to sell No.100 dated 02.05.2008.

As per the case set out in the plaint, it was averred that the plaintiff being resident of village Barwas, Tehsil Loharu, District Bhiwani and the defendants being resident of same village, by presuming themselves to be owners of the land comprising in khewat no.234, khatoni No.249, kites 19, total measuring 92 kanals 03 marlas situated at village Barwas, Tehsil Loharu, District Bhiwani, on the basis of mutation no.975, had agreed to sell 800/1843 shares i.e. 40 kanals to the plaintiff on 2.5.2008 for a total sale consideration of ₹30,00,000/- against the receipt of ₹10,00,000/- as earnest money from the plaintiff in view of the agreement to sell dated 02.05.2008, *ibid*. The date for execution and registration of the sale deed was fixed as 02.05.2009.

As per the averments, the plaintiff was told by the defendants that the said land was free from all encumbrances. It was further averred that the plaintiff came to know that defendants were not owners of the property as they had acquired the title on the basis of judgment and decree dated 07.10.2007 (Ex.P39) from Jagan Nath, who had become the owner by virtue of a decree dated 28.07.2007 (Ex.P6) passed in civil suit No.155 of 2006, wherein, one Parwati was arrayed as co-sharer but she had already died in the year 2006, i.e., 26.04.2006. There was every likelihood that decree could be challenged and the plaintiff may be deprived of ownership and title in the sale deed, as per terms and conditions of the agreement to sell, *ibid*, if executed. One of the enquiry revealed that the children of

Parwati had been threatening to get the decree dated 28.07.2007 (Ex.P6) set aside. It is in this background of the matter, the only relief of recovery was sought.

The aforementioned suit was contested by the appellant-defendants by taking various preliminary objections with regard to cause of action, locus standi, maintainability, estoppel by denying that the aforementioned decree was obtained by playing fraud upon Parwati or any threat was ever extended by the children of Parwati to Jagan Nath in a suit titled as Jagan Nath vs. Suraj Mal.

Since the parties were at variance, the following issues were framed by the trial Court:-

- “1. Whether the plaintiff is entitled to recovery of ₹11,20,000/- from the defendants alongwith interest at the rate of ₹1% per month, as alleged in the head note of the plaintiff, if so to what effect? OPP*
- 2. Whether the suit is not maintainable in the present form? OPD*
- 3. Relief.”*

The trial Court on the basis of the preponderance of the evidence, decreed the suit by rejecting the objections raised by the defendants and the appeal preferred against thereof, has been dismissed.

Mr. Alok Jain, learned counsel for the appellant-defendants contented that the judgments and decrees are outcome of perversity as the defendants had marked the presence before the Sub-Registrar on 01.05.2009 (Ex.D1) and 04.05.2009 (Ex.D2). Even a legal notice Ex.D3 was also sent

but the plaintiff feigned ignorance to the same and therefore, the simpliciter suit seeking recovery of amount in the absence of relief qua specific performance, was not maintainable.

On the date of execution of the agreement to sell dated 02.05.2008, there was no defect or impediment or cloud on the title of the property as the property agreed to be sold was only 40 kanals, whereas, total land was 92 kanals 3 marlas.

Non-submission of the reply to the legal notice itself was a clincher to the non-maintainability of the suit. The Courts below lost the sight of the fact that Harish son of Banwari, who happened to be the nephew of Parwati, appeared as witness in the previous civil suit and therefore, no advantage could be drawn when neither it had been proved on record that Parwati had died on 26.04.2016 nor the Death Certificate (Ex.PW2/1) was linked to Parwati, who, suffered the decree in favour of the appellant-defendants. The name of the husband of Parwati had not come on record nor the reasons as to why Parwati live in a village. In essence, there was admission that Parwati died prior to passing of the judgment and decree dated 28.07.2007 (Ex.P6). The plaintiff before entering into agreement to sell had verified the title of the suit land, therefore, cannot be permitted to retrace the steps in only seeking the refund of amount instead of claiming relief of specific performance. It leads to an inference that readiness and willingness was apparently wanting.

He also referred to cross-examination of PW2-Raghubir Singh, who unequivocally admitted in cross-examination that appellants prior to 02.05.2009, i.e., target date fixed for execution and registration of the sale

deed, had met the defendants and never apprised that there was a defect in the agreement to sell. The factum of Parwati having the share to the extent of certain portion out of total land was also not denied, therefore, the plea taken in the suit seeking recovery is liable to be rejected by dismissing the suit.

In support of his contention, he referred to the judgment of Delhi High Court rendered in **Dr. Habibur Rehman Khan Vs. Naresh Kumar and another 2014(207) DLT 15**, wherein, in paragraph 23 of the judgment, the Delhi High Court while interpreting the contents of the agreement to sell with regard to identical facts held that the plaintiff was not even entitled to refund of amount as the amount had already been forfeited by the legal notice.

He has also referred to the judgment rendered by the Hon'ble Supreme Court in **Satish Batra vs. Sudhir Rawal 2012(4) RCR (Civil) 890** to contend that seller is entitled to forfeit the earnest money on account of failure of the purchaser for execution and registration of the sale deed and thus, urged this Court for adjudication of the present appeal by formulating substantial questions of law as raised in para 10 of the memorandum of appeal arise .

Mr. S.S.Dinarpur, learned counsel for the respondent-plaintiff submitted that suit against Parwati in the year 2006, in view of the provisions of Order 22 Rules 4 and 9 of CPC was not maintainable and in this regard, he referred to the judgment rendered by this Court in **Karam Kaur (died) vs. Dalip Singh (dead) through LRs 2001(4) RCR(Civil) 361** and on similar lines, Division Bench judgment of this Court in **Amar Kaur**

and others vs. Sadhu Singh and others 1961 AIR (Punjab) 57.

He also drew the attention of this Court to the findings in paragraph 16 of the trial Court, wherein, the Court below while examining the evidence found that in a suit bearing No.155 of 2006 titled as Jagan Nath Vs. Suraj Mal, by virtue of which Jagan Nath acquired the title as per the judgment and decree dated 28.07.2007 Ex.P6. Only one of the defendant signed the Vakalatnama on behalf of defendants No.15, 16, 17 and 18 (Ex.P-14). Even legal representatives of deceased Beghraj, who was arrayed at Sr. No.16, were not properly defined. Defendant no.16 had already died at the time of filing written statement (Ex.P4) but was not arrayed through the legal representatives.

He further submitted that judgment and decree Ex.P6 was obtained on the statement of defendant no.14 without any authority of other defendants. The decree, therefore, conferring right on Jagan Nath was collusive which was writ large as thereafter, the sons of Jagan Nath soon instituted a civil suit bearing No.290 of 2007 on 18.09.2007 where there was some reference of family settlement on account of rights as “occupancy tenancy”. It could not be believed that the property at the hands of Jagan Nath was ancestral as he himself attained the title by civil decree Ex.P7. He thus, urged this Court for dismissal of the present appeal as no substantial question of law arises for adjudication of the present appeal.

During the course of hearing, Mr. Dinarpur, handed over a copy of the judgment and decree dated 11.12.2014 rendered in Civil Suit No.306 of 2011 titled as Bahadur Aggarwal vs. Ramniwas and others, wherein, challenge to the judgment and decree dated 28.07.2007 (Ex.P6 and Ex.P7),

and judgment dated 07.10.2007, Ex.P39 had been laid and had been set aside. However, Mr. Aok Jain, raised the objection with regard to the aforementioned judgment and decree on the premise that the same have not attained finality as appeal before the Lower Appellate Court is pending adjudication.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Alok Jain. The reason is not only one but many.

I would be failing in my duty if I do not take cognizance of the aforementioned judgment and decree as this is exactly the same by the plaintiff in seeking recovery of the amount of earnest money instead of specific performance of the agreement to sell on purported apprehension. The judgment dated 11.12.2014 is not an ex parte judgment but contested one. It would be apt to refer the relevant relief clause rendered in the judgment which reads thus:-

“18. As a sequel of my findings on above issues, plaintiff partly succeeded in proving his case. Hence, the suit of the plaintiff is hereby decreed partly to the effect that the award dated 28.7.2007 passed in case titled Jagannath Versus Surajmal etc., mutation No.961 incorporated on the basis of said award, judgment and decree dated 7.10.2007 passed in case titled Ramniwas Versus Jagannath and mutation No.975 incorporated on the basis of above said judgment and decree are illegal, null and void and all the subsequent revenue entries are also illegal, null & void and same are liable to be

corrected according to position prior to passing of award dated 28.7.2007. Revenue record be corrected accordingly. Decree sheet be prepared accordingly. File be consigned to the record-room, after due compliance.”

Thus, in my view, the suit for recovery of earnest money was the only remedy for the plaintiff instead of seeking any specific performance of the agreement to sell. It would be apt to reproduce paragraph 23 of the judgment rendered in **Dr. Habibur Rehman Khan (supra)** which reads thus:-

23. On a conspectus of the entire evidence, I find the appellant/plaintiff to be in breach of the Agreement to Sell, for the following reasons:

(i) the Agreement to Sell in the recitals describes the respondents/defendants as owner/occupier in possession of the property agreed to be sold and does not give the particulars of the title of the respondents/defendants to the property agreed to be sold, as is normally the case;

(ii) it is not the case of the appellant/plaintiff that the respondents/defendants were not in occupation or possession of the plot or not in a position to transfer such possession to the appellant/plaintiff;

(iii) the version of the appellant/plaintiff that he had prior to the Agreement to Sell not examined the documents of title in favour of the respondents/defendants is against the preponderance of probability; the appellant/plaintiff is an

educated person being a medical practitioner and it is unbelievable that he would have paid the sum of Rs.10 lakhs without satisfying himself of the respondents/defendants having some semblance of title to the property;

(iv) it stands proved that the property is situated in an unauthorized colony under regularization; the knowledge of the appellant/plaintiff of the said fact can also safely be assumed, as a buyer of immovable property is not only expected in law but normally carries out due diligence of the property agreed to be purchased;

(v) the Agreement to Sell fixes the time upto 25th May, 2006 “for the completion of the said bargain” and Clause 4 also binds the respondents/defendants “to execute the Sale Deed/GPA in favour of the second party”; the same also shows that the Agreement was not for execution of the Sale Deed only;

(vi) the appellant/plaintiff is thus deemed to be in the know of the nature and character of the property for acquisition of which he entered into the Agreement;

(vii) that the case set up by the appellant/plaintiff in the first missive dated 25th August, 2006 sent after nearly more than three months of the date fixed for completion of the bargain, of an NOC being required, was clearly an afterthought; there is no mention in the Agreement to Sell of any such NOC being required and the date fixed for completion of the bargain was

not made dependent upon obtaining of any such NOC;

(viii) though the respondents/defendants in their written statement did not deny NOC being required and rather took a plea of the responsibility therefor being on the appellant/plaintiff but in view of it having been established that the property was situated in an unauthorized colony under regularization and no such plea having been taken in the reply dated 6th September, 2006 to the legal notice (surprisingly by the same Advocate who drafted the written statement), the said plea taken in the written statement is clearly an error on the part of the Advocate for the respondents/defendants;

(ix) that even if the version of the appellant/plaintiff of such NOC being required and signatures therefor having been obtained by the respondents/defendants was correct, in view of the clear stipulation in the Agreement to Sell for completion of the bargain by 25th May, 2006, the appellant/plaintiff would have before the said date not relied upon the oral assurances of the respondents/defendants at the risk of forfeiture, clearly stipulated in the Agreement;

(x) not only so, the appellant/plaintiff maintained the quietus for three months after the said date also and the legal notice ultimately got issued appears to have been intended to obtain refund of the amount of Rs.10 lakhs and not for specific performance of the Agreement to Sell;

(xi) that even though the respondents/defendants in the reply to

the legal notice had not said that any NOC is required but the appellant/plaintiff still did not chose to sue for specific performance and sued only for refund of the amounts; the same clearly establishes that the appellant/plaintiff, after the Agreement to Sell, did not want to proceed with the Agreement to Sell and was only interested in refund of his monies.”

In my view, the appellants had no cause of action to forfeit the amount realizing the fact that the suit was instituted during the pendency of the appeal before the Lower Appellate Court. Though the appeal was decided prior to decision rendered in the civil suit No.306 of 2011. The judgment and decree dated 28.07.2007 was passed on the basis of the statement suffered by defendant no.14 in civil suit No.155 of 2006, who had no authority to suffer a statement on behalf of other defendants. It has also been proved on record through a death certificate Ex.PW2/1 and Ex.PW2/2 which was not objected to that Parwati had died on 26.04.2006. Even Vakalatnama Ex.P14 was only signed by one of the defendants and not by other defendants. The Lower Appellate Court had also taken cognizance of the fact that legal heir of Parwati had challenged the judgment and decree which was set aside. For the sake of brevity paragraph 17 of the lower Appellate Court judgment reads as under:-

“17. If this evidence on record is appreciated in the light of allegations made by plaintiff in para no.4 of the plaint that at about 3-4 months back before filing the present suit, children of Parwati daughter of Ramji Lal and wife of Tara Chand came to him and threatened that their mother Smt. Parwati was

joint owners in possession of the suit land, who had died on 26.04.2006 and the defendants in collusion with their father Jagannath succeeded in getting decree on 28.07.2007 in civil suit No.155 of 2006, then the allegations of the plaintiff appears to be true. It does not affect the case of plaintiff as to whether Parwati was having a very factional share in the joint land but they title pertaining to Partwati, which was already transferred in favour of the father of the defendants, vide decree dated 28.07.2007 had become disputed. It is worthwhile to mention here that the legal heirs of Parwati have challenged the judgment and decree dated 28.07.2007 and that matter is still pending before the civil Court has argued before this Court. Therefore, respondent-plaintiff has rightly concluded before the execution and resisted lopsided based on agreement Ex.P1 that there was cloud on the title of vendors and before the appointed date, he rightly opted to seek a decree for recovery pertaining to earnest money. After passing of decree Ex.P6 on 28.07.2007 in favour of Jagannath in civil suit no.125 of 2006, immediately thereafter, the present defendants being the sons of Jagannath, filed civil suit no.290 on 18.09.2007 against their father Jagannath pertaining tot he suit land on the basis of family settlement as per certified copy of plaint Ex.P40. Jagannath, father of the defendants filed written statement Ex.P41 and got recorded his statement on 29.09.2007 Ex.P38 admitting the entire claim of his 3 sons

(present defendants) and ultimately, judgment and decree Ex.P39 was passed on 07.10.2006 in favour of the present defendants. Earlier decree Ex.P6 was passed in favour of Jagannath on 28.07.2007 and thereafter, civil suit NO.290 was filed on 18.09.2007 and ultimately decree Ex.P39 was passed in favour of defendants on 07.10.2006 on the basis of admissions made by Jagannath. No doubt, the Court cannot set aside the judgment and decrees. Ex.P6 and Ex.P-39 in the present case and only the person adversely affected by these judgments and decrees can challenge the same by filing a separate suit and on this point, reliance was rightly placed by ld. Counsel for the appellant's-defendants on judgment Gopalakrishnan's case (supra). But keeping in view the manner of accruing title in favour of the present defendants in a hurried manner and immediately after judgment Ex.P39, the defendants executed agreement to sell in favour of plaintiff, whereas civil suit no.155 of 2006 was filed by the father of defendants against some dead person's and when this fact came to the knowledge of plaintiff, he was right in his apprehension in his mind that the title of vendors has become disputed and the same is subjected to further litigation and in order to avoid this litigation, he was competent even to file the present suit before the date of execution and registration of the sale deed fixed for 02.05.2009. The present suit was filed on 22.04.2009 and hence there was no malafide on the part of plaintiff. Death

certificate Ex.PW2/1 has been proved by the statement of PW1 Promila from the record and this certificate has rightly been connected with the death of Parwati and in view of these findings, it is not mere production of death certificate of Parwati but it is definite evidence that Parwati was died before filing civil suit no.155 of 2006 and the judgments Smt. Raj Raji's case (supra) and Sarwan Singh's case (supra) referred on behalf of the appellant's have no bearing on the facts of the present case and even these judgments are distinguishable on facts.”

The judgment and decree dated 07.10.2007 was passed on the statement suffered by Jagan Nath. It was a collusive decree conferring the title on the vendors/appellant-defendants. Thus, in my view, there was no question for the plaintiff to back track from the agreement to sell owing to increase in the price of the property. As per the jamabandis Ex.P19 to Ex.P23 pertaining to 1975-76 to 2000-01, in the column of cultivation, Jagan Nath son of Norang was recorded as Gair Marusi and Parwati along with other co-owners were recorded in the column of ownership.

There is no dispute to the ratio decidendi culled out in the judgment relied upon by Mr. Dinarpur that a decree against the dead person is nullity. It is not a case of the appellant-defendants that Parwati had died during the pendency of the civil suit bearing No.155 of 2006. The date of death is much before, i.e., 26.04.2006. The execution of the agreement and payment of earnest money of ₹10 lacs is not in controversy. Even if this Court had to pass a decree of specific performance in favour of the

respondent-plaintiff, the same could not be executed as the vendors had been divested of the ownership/title in view of the judgment and decree dated 11.12.2014 of the Lower Appellate Court.

As an upshot of my findings, I do not find any illegality and perversity in the judgments and decrees of the Courts below particularly of the Lower Appellate Court which had reduced the amount from ₹11,20,000/- to ₹10 lacs alongwith interest @ 6% per annum much less, no substantial question of law arises for adjudication of the present appeal for giving the different opinion than the one already given.

Resultantly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

January 10, 2018
savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No