IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No.345 of 2014 (O&M)
Date of Decision: February 27, 2018

Daya Singh

...Appellant

Versus

Swaran Lata

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Ms.Shashi Ghuman, Advocate,
for the appellant.

Mr.Arvind Kashyap, Advocate,
for the respondent.

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AMIT RAWAL, J. (Oral)

Appellant-defendant is in Regular Second Appeal against the concurrent findings of fact, whereby the suit claiming specific performance of the agreement to sell dated 6.11.2002 in respect of the suit property, alleged to have been sold for a total sale consideration of ₹4,35,000/- against the payment of earnest money of ₹2,40,000/-, has been decreed by the trial Court and upheld by the Lower Appellate Court.

Respondent-plaintiff instituted the suit on the premise that appellant-defendant Daya Singh (the vendor), had entered into an agreement to sell in respect of the suit property for sale consideration and earnest money, as indicated above. The stipulated date for execution and registration of the sale deed was fixed as 15.2.2003, which was extended upto 28.3.2003. Thereafter, the plaintiff had approached the defendant for performing his part of the agreement. Since the defendant did not accede to such request, he was compelled to claim the discretionary relief on

3.8.2005, when the aforementioned suit was filed.

The aforementioned suit was contested by the defendant by taking the objections qua maintainability, locus-standi and estoppel. On merit, it was pleaded that it was not an agreement to sell but a security for having taken loan from the husband of the plaintiff, which was ₹1,00,000/- with interest @ 3% per annum as they were running a jewellery shop at Village Sanghol. It was also pleaded that the husband of the plaintiff had taken loan of ₹36,000/- from the defendant against pronote and receipt dated 24.11.2000 along with interest @ 2% per month and again same amount vide pronote and receipt dated 2.5.2002. Various other pronotes and receipts of different denominations were executed. The matter was compromised with regard to the outstanding amount. The defendant requested for the return of the aforementioned alleged agreement executed as security, but the same was not returned on one pretext or other.

On the basis of the pleadings of the parties, the trial Court framed the following issues:-

"*1. Whether the plaintiff is entitled for possession by way of specific performance on the basis of agreement to sell dated 6.11.2002? OPP*

2. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP

3. Whether the plaintiff is remained ready and willing to perform his part of contract? OPP

4. Whether the plaintiff is entitled for recovery of Rs.4,35,000/- along with interest from the defendant? OPP

4. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP

5. Whether the suit is not maintainable in the present form? OPD

6. Whether the plaintiff is estopped by her own act and *conduct to file the present suit? OPD*

7. Whether the plaintiff has no locus standi to file the present suit? OPD

8. Whether the alleged agreement to sell only for security of the loan amount without consideration? OPD

9. Relief.

Respondent-plaintiff appeared as PW-1 and tendered into evidence certified copies of jamabandies for the year 1995-96, Ex.P4 and Ex.P5, 2000-01 Ex.P6 and photocopy of the sale deed dated 17.11.2003 Mark P7, whereas the appellant-defendant himself appeared as DW-1 and further examined Ravinder Kumar as DW-2 and Balbir Singh as DW-3. The trial Court, on the basis of the evidence, decreed the suit. The appeal preferred also met with the same fate.

Ms.Shashi Ghuman, learned counsel representing the appellant-defendant submits that both the Courts below have gone into arena of conjectures and surmises as in the written statement, there was admission of the agreement, but did not prove the contents of the agreement, which, *prima-facie*, revealed that the signatures on the document were admitted, but not its contents. It was specifically pleaded that the amount was for security. The onus was on the respondent-plaintiff to prove whether the aforementioned document was, in fact, the agreement to sell. In other words, the vendor had intended to sell the land. The plaintiff neither examined any attesting witness nor Kamaljit Puri, the Documents Writer or the Stamp Vendor proved that there was an intention to sell the land. The plaintiff had also not given any explanation of readiness and willingness to prove the compliance of Section 16(c) of the Specific Relief Act (for short "the Act"). There was an abdication and perversity.

Mr.Arvind Kashyap, learned counsel for the respondent-plaintiff submits that once the thumb impressions of Daya Singh were admitted, there was no occasion for the plaintiff to examine the attesting witnesses, much less the Documents writer and Stamp Vendor. The explanation had also been admitted while referring to the contents of Para 5 of the written statement as in corresponding paras of the plaint, there was a specific pleading to that effect. There is a specific pleading in Para 7 of the plaint regarding the compliance of provisions of Section 16(c) of the Act. The suit had been filed within three years from the date of last extension, therefore, could not have been non-suited for want of compliance of statutory provisions of the Act and, thus, urges this Court for upholding the concurrent findings as appellant-defendant has not been able to counter the specific evidence for claiming the discretionary relief.

I have heard the learned counsel for the parties, appraised the paper book, records of the Courts below with their able assistance and of the view that there is force and merit in the submissions of Ms.Ghuman, for, the respondent-plaintiff has failed to prove the contents of the document by not examining the attesting witnesses, Stamp Vendor and the Deed Writer Kamaljit Puri, for, the appellant-defendant had denied the same by saying it to be a security. The intention of the parties for entering into the alleged agreement had not been brought on record. On going through the pleadings in Para 7 of the plaint, there is a reference of readiness and willingness, but no explanation has come forth as to what effective steps the plaintiff had taken after the expiry of extended stipulated date, i.e., 28.3.2003. In other words, the pleadings are conspicuously wanting. For the sake of brevity, Para 7 of the plaint reads thus:-

> "*7. That the plaintiff has always remained ready and willing to perform her part of agreement to sell and she is still ready*

and willing to perform her part to the agreement to sell dt.6.11.2002 but the defendant failed to perform his pat of the agreement without any reason or execute although the plaintiff has tendered/offered the balance sale consideration to the effect many times."

The aforementioned contents of Para 7 were not denied in the written statement. The onus of proving the readiness and willingness was on the respondent-plaintiff. In my view, the plaintiff has miserably failed to prove the same. The readiness has to be from the date of the execution of the agreement to sell, till the filing of the suit and during the pendency of the suit. No doubt, the plaintiff has not taken specific plea, but since the onus was on the plaintiff, it is in this backdrop of the matter, I have dealt the aforementioned issue. The aforementioned view of mine is supported by the judgment rendered in **B.Vijaya Bharathi Versus P.Savitri & others, 2017 (4) SCC 291**. Having failed to examine the contents of the document, the Courts below, in my view, have misdirected in not noticing all the facts. There is, thus, illegality 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 and decision thereof could be without framing substantial question of law, so there is need to frame the substantial questions of law or not. 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]*"
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> "*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.

The appellant-defendant had admitted the receipt of the amount, but had not been able to refund the amount of ₹2,40,000/-. I modify the judgment and decree of the Court below and ₹2,40,000/- taken as security is ordered to be refunded along with interest @ 9% from the date of payment till realisation. In case the amount is not paid within a period of three months, it shall entail interest @ 12% per annum.

For the reasons stated above, the judgments and decrees of the Courts below are set-aside. The suit is dismissed and the appeal is allowed.

February 27, 2018 **(AMIT RAWAL)**
ramesh **JUDGE**

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**