IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. RSA No.4198 of 2014 (O&M)
Date of decision : 25.09.2018

Ram Dhari ...Appellant

Versus

Dalip Singh ...Respondent

2. RSA No.4203 of 2014 (O&M)
Date of decision : 25.09.2018

Dalip Singh ...Appellant

Versus

Pritam Singh and others ...Respondents

3. RSA No.4269 of 2014 (O&M)
Date of decision : 25.09.2018

Ram Dhari and another ...Appellants

Versus

Pritam Singh and another ...Respondents

4. RSA No.4272 of 2014 (O&M)
Date of decision : 25.09.2018

Dalip Singh ...Appellant

Versus

Ram Dhari and others ...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Harsh Aggarwal, Advocate
for the appellant (In RSA No.4198 of 2014)
for the appellants (In RSA No.4269 of 2014)
for respondent No.1 (In RSA No.4272 of 2014)
for respondent No.3 (In RSA No.4203 of 2014)

Mr. Rajinder Goyal, Advocate
for the appellant (In RSA No.4203 of 2014)

for the appellant (In RSA No.4272 of 2014)
for the respondent (In RSA No.4198 of 2014)

Mr. Vijay Sharma, Advocate for respondent No.1
(In RSA Nos.4272, 4269 and 4203 of 2014)

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ANIL KSHETARPAL, J. (ORAL)

By this judgment, RSA Nos.4198, 4203, 4269 and 4272, of 2014 shall stand disposed of as all the four appeals are arising from a single judgment passed by the trial Court as well as by the First Appellate Court while deciding two suits for specific performance of the agreement to sell.

Learned counsel for the parties are also agreed that these appeals can conveniently be disposed of by a common judgment.

The arguments in the appeals were heard and the order was pronounced. This Court now proceed to record the reasons.

In the considered opinion of this Court, the question which needs consideration is as under:-

1. Whether for the first time in the second appeal, defendants can be permitted to plead that the suit filed by the plaintiff was liable to be dismissed being barred under Section 12 of the Specific Relief Act, 1963 (hereinafter to be referred as “the Act of 1963”) i.e. the performance of the part of contract, in absence of any objections in the written statement/reply or any issue raised or pressed before the Courts below?

Some facts would be required to be noticed.

Civil Suit No.251 was filed by Pritam Singh-plaintiff seeking possession by way of specific performance of the agreement to sell dated

15.04.2005. The defendants in the aforesaid suit had entered into an agreement to sell their land measuring 49 bighas and 13 biswasis at the rate of ₹1,25,000/- per bigha and received a sum of ₹13,00,000/- as earnest money. It may be noted that defendant No.1-Ram Dhari is father of defendant Nos.2 and 3. Inadvertently defendant No.3 had not signed the agreement to sell. The plaintiff remained always ready and willing but the defendants did not come forward to perform their part of the agreement to sell. On the target date i.e. 15.04.2006 was holiday, therefore, he visited the office of the Sub-Registrar and got his attendance marked on 16.04.2006. The plaintiff also got served a notice to the defendants on 22.04.2006 but the defendants did not come forward to perform their part of the contract.

Defendant Nos.1 to 3 contested the suit by filing a joint written statement by pleading that there was neither any agreement to sell nor the earnest money has been received.

Second suit for specific performance of agreement to sell was filed by Dalip Singh, appellant in RSA Nos.4203 and 4272 of 2014 against defendant No.1-Ram Dhari pleading the agreement to sell dated 13.04.2005 for sale of piece of land which was part of the earlier agreement to sell and, therefore, agreement to sell be specifically enforced. In this case also, defendants denied the execution of the agreement to sell and receipt of earnest money.

Learned trial Court decreed the suit filed by Pritam Singh-respondent, plaintiff in Civil Suit No.251 to the extent of share of Ram Dhari and his son Janak Ram excluding of Sandeep Singh as he was not signatory to the agreement to sell whereas the suit filed by Dalip Singh was dismissed as premature.

Four first appeals were filed. Two by Pritam Singh, one by Dalip Singh and one by appellants-Ram Dhari as well as Janak Ram.

Learned First Appellate Court, after re-appreciating the evidence held that both the agreements to sella are proved and both the plaintiffs in different suits were ready and willing to perform their part of the contract. However, learned First Appellate Court found that the second suit filed by Dalip Singh is collusive between him and Ram Dhari with a view to defeat the rights of the plaintiff-Pritam Singh in Civil Suit No.251, therefore, the decree for possession by way of specific performance of the agreement to sell as granted by the trial Court was upheld. Whereas, in the case of Dalip Singh, he was held entitled to refund of the earnest money.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by both the Courts below.

Learned counsel representing Dalip Singh-appellant in RSA Nos.4203 and 4272 of 2014, has submitted that the learned Court has misread the acknowledgment. The First Appellate Court has erred in recording a finding that the agreement to sell with Dalip Singh is collusive because Ram Dhari has contested the suit and denied the agreement to sell. Once the First Appellate Court has reversed the finding of the trial Court that dismissal of the suit filed as premature was wrong, therefore, decree for specific performance of the agreement to sell ought to have been granted in his favour.

On the other hand, learned counsel representing Ram Dhari-appellant in RSA Nos.4269 and 4198 of 2014, has submitted that the total land agreed to be sold was 49 bighas and 13 biswasis, whereas the suit was filed only for 49 bighas. He submitted that as per Section 12 of the Specific Relief Act 1963, specific performance of part of the contract is not permissible unless the case falls within the provisions of Sub-Sections 2, 3 and 4 of Section 12 of the Specific Relief Act. He submitted that since in the present case, the provision of Sub-Sections 2, 3 and 4 of Section 12 of the Act of 1963 are not attracted, therefore, the suit was liable to be dismissed. He further drew attention of the Court to the effect that the details of the Scribe of the agreement to sell has not been disclosed. He further submitted that both the agreement to sells are doubtful as first agreement to sell was executed at Nabha, although, the property is situated in District Patiala. He further submitted that both the attesting witnesses are Property Dealers. He further submitted that there is no evidence that the plaintiff was having balance sale consideration with him on the target date. While arguing his appeal against Dalip Singh, has submitted that the First Appellate Court has erred in ordering the refund of the earnest money even after recording a finding that Ram Dhari and Dalip Singh have colluded.

On the other hand, learned counsel for Pritam Singh-respondent has pointed out that the collusion between Ram Dhari and Dalip Singh, is apparent because as per Ex.P4, a notice, which was sent to Ram Dhari on behalf of Dalip Singh is dated 26.07.2006. The address of Ram Dhari was of Village Alipur whereas the alleged acknowledgment which has been produced as Ex.P12 proves that the notice was served on Ram Dhari at Amargarh. He further pointed out that the notice was served on Ram Dhari on 31.07.2006 whereas Ram Dhari replied to the notice on 28.07.2006 i.e. prior to service of notice, therefore, the collusion between Dalip Singh and Ram Dhari is apparent. He further pointed out that during the pendency of the suit, Dalip Singh was called upon to produce the original acknowledgment as original acknowledgment of service of notice but Dalip Singh did not choose to produce the aforesaid acknowledgment under the pretext that it has been lost. Thereafter Pritam Singh examined Postmaster who has specifically stated that the notice as per their record was served on Ram Dhari on 31.07.2006. Hence, he submitted that there is no misreading of date of acknowledgment as contented by the learned counsel for the appellant representing Dalip Singh. He further submitted that the contest between Ram Dhari and Dalip Singh was only camouflage and in fact, both had colluded together to defeat the rights of Pritam Singh. The suit filed by Dalip Singh was even before the target date when the sale deed was to be executed as per alleged agreement to sell between them. He further pointed out that the date of the execution of the agreement to sell is not proved as the agreement to sell is not scribed by any professional Scribe which could prove that on which date the agreement to sell was entered into.

This Court has considered the submissions of the learned counsel for the parties.

As regards the argument of learned counsel for the appellant-Dalip Singh that there is misreading of acknowledgment of receipt of notice, it may be noted that the plaintiff-Dalip Singh had withheld from the Court the original acknowledgment which would have proved as to on which date, Ram Dhari was served with a notice dated 26.07.2006. The notice Ex.P4 proves that it was addressed to Ram Dhari resident of Village Alipur, Tehsil Malerkotla whereas the photocopy of the acknowledgment shows that the notice as alleged has not only been received in the town Amargarh but as if it was addressed at the address.

Learned counsel for the appellant has tried to explain that notice may have gone to the Village and, thereafter, postman would have re-directed to send it to Amargarh. In the present case, question is not whether the notice was re-directed or not. The question here is whether from the facts, it has been rightly concluded by the Courts below that Dalip Singh and Ram Dhari have colluded or not.

In the considered view of this Court, certain facts point towards the collusion. The factors are as under:-

i) Dalip Singh sents a notice on 26.07.2006 which addressed to Ram Dhari at address of Village namely Alipur. As per the argument of the learned counsel, it had gone to Village Alipur and thereafter re-directed to Amargarh. If one carefully looks at the acknowledgment in which the address as originally written is of Amargarh and not Alipur.

ii) The original acknowledgment has been withheld from the Court. The original acknowledgment has to be in possession of Dalip Singh or his counsel. The aforesaid notice was sent through Sh. Nirbhai Singh Sangha, Advocate, Malerkotla. It was the duty of Dalip Singh to produce the same. Hence, an adverse inference is to be drawn against Dalip Singh.

iii) Dalip Singh filed a suit even before the target date, allegedly agreed to, between the parties as per the agreement to sell. That itself proves that Dalip Singh and Ram Dhari had colluded and were trying to defeat the right of the plaintiff-Pritam Singh. The suit filed by Pritam Singh is dated 12.05.2006 and Ram Dhari and his one son were served and represented by the counsel on 31.05.2006 before the Court whereas Dalip filed suit on 03.08.2006

iv) The agreement to sell propounded by Dalip Singh is not scribed by professional Scribe and as such antedating of the agreement to sell is one of the possibilities.

As regards the next argument of the learned counsel that Ram Dhari had denied the agreement to sell with Dalip Singh also, the same is to be noticed and rejected as Ram Dhari no doubt denied the agreement but facts which have been noted above, clearly show that there was collusion between Ram Dhari and Dalip Singh.

Last argument of the learned counsel representing Dalip Singh is that once the agreement to sell in his favour has been proved and he was ready and willing because the agreement to sell in his favour was prior in point of time, therefore, the suit should have been decreed.

In the considered view of this Court, once the finding of the First Appellate Court with regard to the collusion between Dalip Singh and Ram Dhari is proved, the rights of Pritam Singh could not be permitted to be defeated.

As regards the argument of learned counsel representing Ram Dhari, it may be noted that total agreement to sell between Pritam Singh on the one hand and Ram Dhari and his two sons on the other hand is with respect to land measuring 49 bighas and 13 biswasis. The suit for possession by way of specific performance is no doubt with regard to 49 bighas. No suit has been filed with regard to 13 biswasis. However, 13 biswasis is a very small fraction of the entire land agreed to be sold. In 1 bigha, there are 20 biswas whereas in 1 biswa there is 20 biswasis. Still further, it is admitted by the learned counsel representing Ram Dhari that this objection was never raised by Ram Dhari either in the written statement, nor any issue was framed nor any argument was raised before the Courts below. Hence, for the first time, this Court cannot permit the appellant-Ram Dhari to raise an argument which is based on facts.

The argument of learned counsel representing appellant-Ram Dhari, is also liable to be rejected on another ground. The suit filed by the plaintiff is for land measuring 49 bighas. Admittedly, no decree has been granted with respect to the share of Sandeep Singh son of Ram Dhari. In such circumstances, suit filed by the plaintiff has been decreed with respect to entire share of Ram Dhari as well as his son Janak Ram @ Janak Raj, therefore, non inclusion of 13 biswasis of land would not defeat the suit filed by the plaintiff, as specific performance of the agreement to sell with respect to the entire share of Ram Dhari and Janak Raj, which has been granted, hence there is no specific performance of part of contract. As per Section 12, sub-Section 1 of the Act of 1963, the Court is debarred from passing a decree for specific performance of a part of the contract. Of course, Sub-Sections 2, 3 and 4 of Section 12 of the Act of 1963 do provide for certain exceptions which are not subject matter of the present controversy. In such circumstances, the decree passed by the Court is with respect to entire land belonging to sell qua Ram Dhari and Janak Ram @

Janak Raj as per agreement to sell.

As regards the argument of the learned counsel representing Ram Dhari that particulars of the Scribe of the agreement to sell in favour of Pritam Singh are not known and the agreement to sell was executed at Nabha, it may be noticed that Ram Dhari and his sons are doing their business of trading at Amargarh which is the address given in the plaint. They are running Nikhil Singla Sanitary and Hardware Store at Amargarh. It is not in dispute that Nabha is closer to Amargarh when compared with Patiala. It has also come in evidence that deal was struck at Nabha only. Still further, the correctness of the agreement to sell cannot be doubted on the ground that both the attesting witnesses of the agreement to sell are Property Dealers. There is a written agreement to sell which runs into three pages. Each page has been signed by Ram Dhari as well as his son Janak Raj @ Janak Ram. The agreement to sell is in the local dialect i.e. *gurmukhi* (Punjabi) and the signatures of both Ram Dhari and as well as his son are in *gurmukhi* only. Further, Ram Dhari and his son are not the rustic villagers. They are running the business in the city.

Next argument of the learned counsel representing appellant-Ram Dhari is that the availability of the balance sale consideration has not been proved. He submitted that only the photocopy of the banker's cheques has been produced on file whereas these have not been exhibited on the file.

On the other hand, learned counsel for the respondent pointed out that when Pritam Singh got served a notice dated 22.04.2006 on Ram Dhari and his sons, it was pointed out that Pritam Singh had got prepared the banker's cheques for the amount of balance sale consideration from the different banks, the details whereof were given in the notice. Once Ram Dhari has not led any evidence to prove that the assertions made by the plaintiff-Pritam Singh was incorrect, therefore, there is no force in the argument of the learned counsel.

Last argument of the learned counsel for the appellant representing Ram Dhari is to the effect that since there is a finding of collusion, therefore, no refund could be ordered against Dalip Singh. It may be noted that both the Courts have held that the agreement to sell is antedated and, therefore, there is collusion. However, the payment of ₹4,00,000/- as earnest money is mentioned in the agreement to sell which has been signed by Ram Dhari. In such circumstances, refund has been rightly ordered in favour of Dalip Singh.

In view of the aforesaid discussion, question framed is answered against the appellant-Ram Dhari. All the four appeals are dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

25.09.2018 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No