

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.4852 of 2017 (O&M)

Date of Decision: December 10, 2018

Joginder Singh & another

...Appellants

Versus

Sohan Singh & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Bhoop Singh, Advocate,
for the appellants.

Mr. S.K.Jain, Advocate,
for the caveators.

AMIT RAWAL, J.

Notice of motion.

Mr. S.K.Jain, Advocate, who is on the caveat, accepts notice on
behalf of the respondents.

The present Regular Second Appeal is directed against the
concurrent findings of fact and law, whereby the suit of the respondent-
plaintiffs for specific performance of the agreement to sell dated 08.11.2004
by rejecting the plea of the appellants-defendants-subsequent vendees on
the basis of the previous agreement dated 15.05.2004, has been decreed.

Respondent-plaintiffs sought the specific performance of the
agreement to sell dated 08.11.2004 on the premise that Rajinder Kaur-
defendant No.1 had agreed to sell the land in dispute measuring 2 bighas 2
biswas for a total sale consideration of ₹ 14,17,500/- against the payment of
earnest money of ₹ 2,50,000/-. 10.02.2005 was kept as the stipulated date

for execution and registration of the sale deed. In Para 2 of the plaint, it was averred that the balance sale consideration on receipt of the earnest money was ₹ 9,67,500/-. The defendants did not appear before the Sub Registrar on the stipulated date, though plaintiffs had been always ready and willing to perform their part of the agreement. During the subsistence of the agreement to sell, defendant No.1 in collusion with defendant Nos.3, 4 and 5 started negotiations and in this regard suit for injunction was filed, but sale deed was executed on 04.02.2005. Without waiting for further time, present suit was filed on 08.02.2005 which was registered on 09.02.2005.

Defendant No.1-vendor opposed the suit on the ground of maintainability by denying the agreement to sell. It was alleged that defendant No.1 was 75 years old and suffering from blood pressure, sugar and other ailments. Defendant No.1 along with her son Harjit Singh had gone to the petrol pump of Avtar Singh and Kehar Singh, who were requested to get the general power of attorney executed in favour of her son Sarabjit Singh as she was unable to look after the property. Aforementioned persons assured for execution of the power of attorney and on 08.11.2004 visited the house of defendant No.1 and brought some stamp papers which were signed. The aforementioned papers had been forged and converted into agreement to sell as there was no intention to sell the suit land. Even a complaint in this regard was submitted to the Senior Superintendent of Police, Patiala, but no action was taken. It was alleged that defendant No.1 had already sold the land to Joginder Singh son of Jeet Singh through attorney Mohinder Pal son of Kharaiti Lal vide sale deed dated 01.02.2005 for a total sale consideration of ₹ 9,62,500/-.

Defendant No.2 filed a separate written statement and opposed

the suit by taking numerous preliminary objections and propounded the sale deed in question which was on account of agreement to sell dated 15.05.2004.

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

- “1. Whether plaintiff is entitled for possession by way of specific performance of the agreement to sell dated 8.11.2004? OPP*
- 2. Whether the plaintiff always remained ready and willing to perform his part of the contract and is still ready and willing to do so? OPP*
- 3. Whether the plaintiff is entitled to permanent injunction? OPP*
- 4. Whether the suit of the plaintiff is barred under Order 2 Rule 2 CPC? OPD*
- 5. Relief.”*

Plaintiffs, in support of the averments, examined PW-1 Kehar Singh attesting witness, PW-2 HC Mohinder Ram, PW-3 Ashok Kumar, Registration Clerk of the office of Sub Registrar, Dera Bassi, PW-4 Mahanvir Parshad Jain, Deed Writer and PW-5 Vivek Jain plaintiff and brought on record Ex.P2, Ex.P3 and Ex.PX, i.e., certified copy of the enquiry report dated 26.03.2005, sale deed dated 01.02.2005 and jamabandi for the year 2002-03.

On the other hand, the defendants examined DW-1 Joginder Singh-defendant No.2, DW-2 Ramesh Kumar, DW-3 Anand Babu Ex-Sarpanch, DW-4 Mohinder Pal and brought on record original agreement to sell dated 15.05.2004 Ex.DW1/B and receipt dated 02.10.2004 Ex.DW1/C.

The trial Court, while discarding the plea of the defendants to be holder of previous agreement to sell, decreed the suit by setting-aside the

sale deed. Appeal taken before the Lower Appellate court was dismissed.

Mr. Bhoop Singh, learned counsel for the appellant-defendants submitted that both the courts below have committed illegality and perversity, particularly the Lower Appellate Court being the last court of fact and law in not noticing the categorical admission of the witness of the defendants, who had acknowledged the agreement to sell dated 15.05.2004 executed by defendant No.1 Rajinder Kaur in favour of the appellant-defendant No.2. Mahavir Parshad Jain PW-3 was none else but father of vendee Vivek Jain, one of the plaintiffs, who, in examination-in-chief admitted that the stamp vendors were purchased from Vinod Jain Stamp Vendor, who was his daughter, but register of the Stamp Vendor has not been produced, much less the daughter. If at all, the plaintiffs actually entered into an agreement, they would have known the balance amount which would have been ₹ 12,17,500/- and not ₹ 9,67,500/- as per pleadings in Paragraph 2 of the plaint.

It was next argued that in view of admission of PW-1 Kehar Singh, appellant-defendants being subsequent vendees, are bonafide purchasers for a valuable consideration. If at all, the whereabouts of Rajinder Kaur were not known or she had gone abroad, the plaintiffs should have summoned the register from the office of the Deputy Commissioner, but no effort was made to do so. It is not necessary that the agreement to sell dated 15.05.2004 (Ex.DW1/B) was required to be drafted on a regular stamp paper.

Per contra, Mr. S.K.Jain, learned counsel appearing on behalf of the respondent-plaintiffs submitted that the concurrent findings of fact and law cannot be interfered with as the appellant-defendants cannot be

permitted to take the plea of readiness and willingness. The cross-examination of PW-1 Kehar Singh has not been read in the tenor and mode with the previous cross-examination conducted by the counsel for defendant No.1. The sale deed was during the subsistence of the agreement to sell. Readiness and willingness from the date of filing of the suit had been writ large. There was compliance of the provisions of Section 16(c) of the Specific Relief Act. The receipt of earnest money of ₹ 2,50,000/- has been proved through the testimony of PW-1 Kehar Singh. Testimonies of DW-3 Anand Babu Ex-Sarpanch and DW-4 Mohinder Pal are of no help to the defendants but to the case of the plaintiffs as the agreement to sell dated 15.05.2004 (Ex.DW1/B) was executed by defendant No.1 Rajinder Kaur in connivance with defendant No.2 simply for the purpose of frustrating the claim of the plaintiffs. The written statement is conspicuously wanting with regard to the agreement dated 15.05.2004. Contents of the agreement revealed manipulation as it was not scribed on a stamp paper. The receipt reflects payment of entire consideration. No explanation has come forth as to why the sale deed was executed on 01.02.2005 and, thus, urged this court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of the learned counsel for the appellant-defendants.

PW-1 Kehar Singh, on 24.01.2008, was cross-examined by counsel for defendant No.1, namely, Shri Kuldeep Singh and his cross-examination was deferred, whereas further cross-examination on behalf of the appellant-defendant No.2 was on a later point of time, where in opening line, he admitted as under:-

“I know Joginder Singh son of Jit Singh. It is correct that Rajinder Kaur had already entered into an agreement regarding the land in dispute (Yeh theek hai Rajinder Kaur ne Jhagrhe Wali jagah da pahilan hi ikrarnama kita hoye See).”

The aforementioned statement, which was read out in the court, had not been controverted by the learned counsel for the plaintiffs, but an attempt was made to explain that it was not in the context of agreement dated 15.05.2004 propounded by defendant No.2, but in fact the agreement in question. I am afraid, the aforementioned argument is meritless in view of the language extracted above.

Provisions of Section 41 of the Transfer of Property Act embolden the transferees to allege bonafide purchase. Section 41 reads thus:-

“41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

Nothing contrary surfaced despite extensive cross-examination of DW-2 Ramesh Kumar. The tenor and mode of the cross-examination of DW-4 Mohinder Pal reflects that respondent-plaintiffs had the knowledge of the agreement to sell dated 15.05.2004. To a specific question, he admitted that agreement to sell dated 15.05.2004 was written at his house. From perusal of the judgments and decrees of both the courts below, it reveals that there is no reference and advertence to the cross-examination of the attesting witness of the agreement dated 08.11.2004. Reference of amount

of ₹ 9,67,500/- in Paragraph 2 of the plaint, according to Mr.Jain, was due to inadvertence and attention of this court was drawn to the prayer clause reflecting the balance sale consideration.

Inadvertence cannot be permitted to be rebutted which is evident from the contents of Para 3 of the affidavit of Kehar Singh submitted in examination-in-chief. Relevant portion of the same reads thus:-

“That at the time of execution of above said agreement to sell dated 08.11.2004, above said vendees had paid Rs.2,50,000/- as earnest money to Smt.Rajinder Kaur (vendor) and vendor Rajinder Kaur had agreed to get the sale deed executed and registered in favour of plaintiff upto 10.02.2005, on receiving the balance sale consideration amounting to Rs.9,67,500/-.”

PW-4 Mahavir Parshad Jain, Deed Writer in Paras 3 and 4 of his affidavit stated as under:-

“3. That today I have seen the stamp paper worth Rs.300/- purchased by Smt.Rajinder Kaur wife of Labh Singh resident of Chandigarh for the purposes of agreement to sell having three stamps of Rs.100/- each and these stamp papers were purchased by Smt.Rajinder Kaur from my said daughter on 5.11.2004. In this regard endorsement has been made on the back of all the three stamp papers which also bears the serial No.2381 over which the entry in respect of the said stamp papers were made by my daughter in her stamp vending register. I identify signatures/initials of my daughter as well as her writing and stamp at the back of said three stamp papers as she used to work with me.

4. That my daughter Vinod Jain is married and is not working as stamp vendor and is residing in her in laws house. Moreover, her stamp vending register is also lying deposited with the office of Deputy Commissioner Ajitgarh.”

It was argued that the daughter had gone abroad. Be that as it

may, no steps were taken to summon the stamp vendor register which was deposited in the office of the Deputy Commissioner. Perhaps the plaintiffs were afraid of ascertainment of truth. Availability of expression “adverse inference” cannot be ruled out. Even PW-5 Vivek Jain plaintiff in Para 3 of the affidavit submitted in chief referred to the balance amount as ₹9,67,500/-. The same reads thus:-

“That the defendant No.1, had agreed to execute and register the sale deed in favour of we plaintiffs on 10.2.2005 on receipt of balance amount of sale consideration amounting to Rs.9,67,500/-.”

It is not discernible that a person who had actually entered into an agreement and parted with earnest money of ₹ 2,50,000/- would not know the balance sale consideration. It cannot also lost sight of the fact that the agreement to sell dated 15.05.2004 was with regard to ₹ 9,62,500/-, thus, by 02.10.2004, defendant No.1 did not have any title and interest. Cumulative reading of the aforementioned reasoning leads to an irresistible conclusion that the judgments and decrees of the courts below are result of 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 i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. 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]”

“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.

For the reasons mentioned above, the judgments and decrees of the courts below are hereby set-aside. Suit of the respondent-plaintiffs is dismissed. Appeal stands allowed.

December 10, 2018
ramesh

(AMIT RAWAL)
JUDGE

**Whether speaking/reasoned
Whether Reportable:**

Yes/No
Yes/No