

In the High Court of Punjab and Haryana at Chandigarh

**RSA-6032 of 2018(O&M)
Date of Decision: 13.11.2018**

Naresh Kumar

---Appellant

versus

Mohinder Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

**Present: Mr. Ivneet Singh Pabla, Advocate
for the appellant**

Rekha Mittal, J.

The present appeal directs challenge against the judgment and decree dated 31.5.2017 passed by the Additional District Judge, Kurukshetra whereby appeal preferred by the respondents-plaintiffs against judgment and decree dated 9.3.2015 passed by the then Additional Civil Judge (Senior Division), Pehowa (hereinafter to be referred to as “the trial court”), has been allowed. The judgment and decree passed by the trial court is modified and respondents-plaintiffs have been allowed principal relief of symbolic possession by way of specific performance of agreement of sale dated 9.6.2009 in respect of land measuring 12 biswas, detailed in para 2 of the judgment passed by the trial court.

The appellant-defendant No. 2 is a purchaser of suit land vide sale deed No. 796 dated 11.6.2009 purported to be executed after agreement of sale dated 9.6.2009 was executed in favour of the respondents-

plaintiffs.

Counsel for the appellant would argue that the trial court rightly allowed alternative relief of recovery of Rs. 80,000/- i.e. double of the earnest money with interest @ 9% per annum, payable by Ram Phal, defendant No. 1 but the Appellate Court has committed an error by modifying the judgment and decree passed by the trial court thereby allowing principal relief of specific performance of agreement. To bring home his contention, he has two fold submissions to make. It is argued that though sale deed dated 11.6.2009 was executed and got registered subsequent to the date of agreement of sale propounded by the respondents-plaintiffs but as a matter of fact, the sale deed was executed in favour of the appellant in pursuance of an agreement of sale dated 29.5.2009, therefore, right of the appellant qua the suit land flow from a transaction that was entered into between the parties to that agreement prior to agreement of sale dated 9.6.2009 was allegedly executed.

Another submission made by counsel is that the appellant is a bona fide purchaser for consideration and without notice of agreement of sale dated 9.6.2009 and accordingly, his rights in the suit property on the basis of sale deed dated 11.6.2009 are protected under Section 41 of the Transfer of Property Act, 1882 (in short "the TP Act"). In addition, it is argued that the trial court has rightly ignored factum of failure of the appellant to appear in the witness box for cross examination as he was not cross examined on the day his examination in chief was recorded because of request made by counsel for the contesting party/plaintiffs.

I have heard counsel for the appellant and perused the paper book particularly the judgments passed by the courts.

So far as plea of the appellant that Ram Phal-defendant No. 1 erstwhile owner of suit land had executed agreement to sell dated 29.5.2009 (Ex. D3) qua suit land in favour of the appellant and received Rs. 60,000/- towards earnest money, no such plea or evidence adduced to prove the same can be looked into for want of necessary pleadings in the written statement. As per the settled position in law, evidence beyond pleadings can neither be examined nor accepted to decide the litigation. This apart, counsel has fairly conceded that in the sale deed dated 11.6.2009 executed in his favour, there is no reference to any such agreement of sale dated 29.5.2009. In this view of the matter, the appellant cannot derive any advantage to his contention from any such agreement of sale, sought to be produced/proved without any pleadings in this regard in the written statement.

The second submission made by counsel that the appellant is a bona fide purchaser for consideration and without notice and sale in his favour is protected under Section 41 of the TP Act, is highly misconceived and has rightly been rejected by the Appellate Court. There cannot be dispute that a person who takes the plea of bona fide purchaser has to substantiate his plea by leading sufficient and tangible evidence on record. In the instant case, Naresh Kumar appellant appeared in the witness box and his examination in chief was recorded on 24.12.2012. Subsequent thereto, he did not appear in the witness box to enable the contesting party to cross examine him. The trial court committed a grave error by taking into consideration testimony of the appellant recorded in examination in chief without an opportunity to the other side to cross examine him in view of the reasoning assigned in para 9 of the judgment. It is difficult to digest that

once cross examination of a witness has been deferred by the court on request made by the contesting party, the same can cause prejudice to right of the contesting party or enure to benefit of the party who had examined the witness by way of chief examination. The matter would have been different, had cross examination of the appellant been treated as nil and such an order passed by the trial court has attained finality between the parties. As the appellant did not appear in the witness box for his cross examination by the contesting party, his statement in examination in chief cannot be looked into for any purpose whatever. In the given scenario, the appellant cannot take benefit of his examination in chief in order to support his contention that he is a bona fide purchaser for consideration and without notice of agreement of sale dated 9.6.2009, propounded by the respondents-plaintiffs. In view of the above, I do not find an error much less perversity in the judgment and decree passed by the Court in Appeal allowing specific performance of agreement of sale dated 9.6.2009.

For the foregoing reasons, findings no merit, the appeal fails and is accordingly dismissed in limine. As the appeal has been decided on merits, applications for condonation of delay in refiling and filing the appeal are of academic relevance.

(Rekha Mittal)
Judge

13.11.2018

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes/No