

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.1791 of 2002 (O&M)

Date of decision: 28.03.2019

Balwan and others

..... Appellants

Versus

Rameshwar and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Harkesh Manuja, Advocate
for the appellants.

Mr. Anupam Gupta, Sr. Advocate (Amicus Curiae), with
Mr. Ashok Kumar, Advocate.

Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Sharma, Advocate
for the respondents.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the judgment and decree passed by the First Appellate Court reversing the judgment and decree passed by the trial Court.

In the considered view of this Court, the following substantial question of law requires adjudication:-

“Whether a deed of settlement arrived at between the parties on the intervention of the respectables out of the Court which does not fall within the scope of Order 23 Rule 3 of Civil Procedure Code can be ordered to be enforced by passing a decree for specific performance by moulding the relief?”

At the time of admission, the following substantial questions of law as proposed by counsel were framed:-

“1) Whether a registered sale deed can be set aside on the basis of oral evidence about allegations of want of consideration, legal necessity and drunkardness of the vendor even if it had been proved that the entire sale consideration has been paid by the vendee to the vendor in the presence of the Sub-Registrar at the time of the registration of the sale deed?

2) Whether any oral evidence can be admitted to contravene a fact based upon documentary evidence in view of Section 90 of the Indian Evidence Act?

3) Whether the alleged compromise dated 13.02.1990 (Ex.P-6) is hit by the provisions of Order 23 Rule 3 of Civil Procedure Code and the same could not be made basis for challenging the registered sale deed dated 20.12.1988 (Ex.P-2)?”

Some facts are required to be noticed.

Sh. Manphool, father of the plaintiffs was owner in possession of land measuring 21 kanals and 1 marla. He had purchased the property by a registered sale deed. Manphool is alleged to have sold the property through registered sale deed dated 20.12.1988 in favour of defendants-appellants for a sum of Rs.95,000/-. The plaintiffs claim that such sale deed is result of fraud as Manphool is not traceable from the date he allegedly executed the sale deed. Counter allegations have been made by both the parties. There has been long drawn litigation between the parties since the date of the alleged sale deed. On the day the sale deed was executed, a FIR was got registered by the plaintiffs who are sons of Manphool. After the FIR, present suit was filed on 20.01.1989. Initially, the suit was for declaration claiming that the sale is result of fraud. It was further pleaded that the property was joint Hindu family ancestral co-parcenary property having been purchased from the income of joint family and therefore, the sale being without legal necessity is void.

During the pendency of the appeal, it is alleged that with the

intervention of respectables of surrounding villages, a meeting of 'Khap Panchayat' of 126 villages took place on 28.01.1990 wherein after hearing both the sides, a decision was arrived at, which was later reduced into writing and signed by all the parties to the litigation apart from some of the respectables. The terms of the aforesaid settlement have been translated by the learned First Appellate Court correctness whereof is not disputed. The aforesaid terms of settlement was extracted as under:-

“(a) That the suit land shall remain under possession of Gram Panchayat Rakhi Shahpur for a period of seven years from 20.12.1988 to 20.12.1995 and it will maintain the full account and the profit shall be deposited in the bank.

(b) That if Manphool, who is missing, is traced within seven years i.e. before 20.12.1995 then in that eventuality the possession of the suit land shall be delivered to the vendees/defendants and they will cultivate the same as owners. The income out of the suit land upto that date shall also be paid to them and the plaintiffs would have no concern whatsoever in respect of the suit land.

(c) That if the whereabouts of Manphool is not known even after expiry of seven years i.e. upto 20.12.1995 then in that eventuality he would have deemed to have died thereby presuming his civil death and in that eventuality the sale deed dated 20.12.1988 shall be deemed to have been cancelled and the plaintiffs shall be recorded as owners in possession in the revenue record. The income upto that date shall also be handed over to the plaintiffs.

(d) That if within a period of seven years i.e. upto 20.12.1995 the Gram Panchayat is convinced that Manphool is alive but he was intentionally concealed by either of the parties then in that eventuality the right of such party shall be extinguished in the suit land.

(e) That if Manphool comes alive after 20.12.1995 then in that eventuality the defendants shall be entitled to get back the

suit land from Rameshwar etc.

(f) Neither any of the parties nor their legal heirs shall be entitled to sell the suit land without the consent of the Gram Panchayat.

(g) During the period of seven years the suit land shall remain in possession of the Gram Panchayat and it will be entitled to give the same for cultivation by way of auction etc. but neither of the party shall be entitled to join the auction.

(h) The auction proceedings shall be conducted in open by the Gram Panchayat and advanced information shall be given to both the parties.”

It will be noted here that apart from the First Information Report, proceedings under Sections 145-146 of the Criminal Procedure Code were also initiated which ultimately came to be decided by the Hon'ble Supreme Court. Apart therefrom proceedings under Section 107/151, Cr.P.C. were also initiated.

The defendants-appellants who are four brothers have defended the suit and pleaded that they are bona fide purchasers and they do not know where Manphool has vanished after the execution and registration of the sale deed. Allegations have been made against the plaintiffs. The defendants have also taken a stand that they are purchasers for consideration. The correctness of alleged settlement arrived at on 28.01.1990 reduced into writing on 13.02.1990 is disputed and denied.

Learned trial Court on appreciation of evidence dismissed the suit filed by the plaintiffs whereas learned First Appellate Court has decreed the suit. This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

In this appeal, this Court had requested Sh. Anupam Gupta, Sr.

Advocate to assist this Court. This Court places on record its gratitude for able assistance.

Learned counsel appearing for the appellants has submitted that the findings of the First Appellate Court to the effect that the property was joint Hindu family ancestral co-parcenary property is perverse. He drew attention of the Court to the admitted fact that the property was purchased by Manphool during his life time. It will be noted that the plaintiffs have asserted that in fact property was purchased from joint Hindu family funds by their grandfather but in the name of Manphool as their grandfather late Sh. Heera had fallen ill. It has further been pleaded that since Manphool was not doing anything except agriculture work, therefore, the property was purchased on sale of ancestral silver coins and hence, the property is joint Hindu family co-parcenary property. Submission of learned counsel for the appellants is that the findings of the learned First Appellate Court to the effect that the property is purchased from joint Hindu family funds and therefore, co-parcenary, is wrong.

There is substance in the argument of learned counsel for the appellants. It is undisputed that plaintiffs have failed to prove that the property is either joint Hindu family co-parcenary property or ancestral property because it has been purchased by Manphool. Now let us examine as to whether it is proved that the property was purchased from joint Hindu family funds. The copy of the sale deed is Ex.P-7. It has come on record that the property which was subject matter of purchase was already mortgaged for Rs.4500/- which was kept by Manphool, the vendee and Rs.5,000/- has been received as earnest money. Out of total sale consideration of Rs.16,000/- after adjusting Rs.4500/- + Rs.5,000/- paid as

earnest money, Rs.6500/- was paid. In order to prove that the amount of sale consideration was paid out of joint Hindu family funds, it was pleaded that the sale consideration was paid after selling ancestral silver coins. However, evidence of the plaintiff who was barely 4-5 year old child cannot be relied upon to prove that fact. The shop keeper to whom the alleged silver coins were sold have not been examined, therefore, the finding of First Appellate Court that the property is joint Hindu family ancestral co-parcenary property is erroneous.

Next argument of learned counsel for the appellants also has substance that the findings of the First Appellate Court on legal necessity is perfunctory. However, once it has been found that the property is not joint Hindu family ancestral co-parcenary property, therefore, it would not be necessary to further deliberate on the aforesaid aspect.

Learned counsel appearing for the appellants has further submitted that the deed of settlement which is based upon a decision of the respectables of the Khap Panchayat since results in setting aside/cancelling a registered sale deed, therefore, such document is not admissible being unregistered. While elaborating he submitted that there is a registered sale deed in favour of the defendants-appellants and the same can be cancelled/set aside/superseded by a registered document only. He further submitted that the immovable property worth more than Rs.100/- could not be validly transferred in favour of the plaintiffs-respondents without a registered document. Since deed of settlement is unregistered, hence, inadmissible in evidence and does not result in transferring title in favour of the plaintiffs from defendants.

On analysis of the arguments, this Court finds substance in the

argument of learned counsel for the appellants. The transfer of title through sale deed dated 20.12.1988 took place in favour of the defendants-appellants. Such title cannot revert back in favour of the plaintiffs or Manphool whose whereabouts are not known, without a registered instrument/transfer deed. Therefore, the findings of the Court that as per deed of settlement, the title of the immovable property stands transferred in favour of the plaintiffs is also found erroneous and therefore, set aside. It may be noted here that although, the plaintiffs had alleged fraud, however, both the Courts did not find enough evidence to prove the fraud. In view of the concurrent finding of fact, this Court finds no material to differ with the aforesaid finding.

However, this is not the end of the matter. Learned First Appellate Court has found that on the intervention of the respectables who were members of the Sheoran Khap Panchyat (a Panchayat of respectables of 126 villages belonging to caste Sheoran to which the parties belong) had taken place on 28.01.1990 which was attended by the plaintiffs as well as defendants and a settlement-cum-decision of the Panchayat was arrived at which was reduced into writing signed by all the plaintiffs and defendants counter signed by one of the respectables on 13.02.1990. It will be noted here that the deed of settlement was arrived at during the pendency of the suit. The plaintiffs had amended their suit and had sought declaration on the basis of the aforesaid deed of settlement dated 13.02.1990. Learned First Appellate Court has found that the aforesaid deed of settlement has been successfully proved by the plaintiffs-respondents on examination of two witnesses who were signatories to the aforesaid deed of settlement namely, Sheoram, PW-9 and Hoshier Singh, PW-10 apart from the scribe,

PW-5/Sham Sunder Kaushik. It will be noted here that defendants-appellants have not denied their signatures/thumb impressions on Ex.D-6, a deed of settlement dated 13.02.1990. However, it has been pleaded that two residents of the village namely, Rai Singh and Lehri had taken their signatures on blank papers under the pretext that they would get the compromise done. It will be noted that both the aforesaid persons namely, Rai Singh and Lehri (Kesari) are signatories to the deed of settlement but the defendants have not examined any of them. Rai Singh is a Panch of the village. The deed of settlement is signed along with his seal by Sh. Baljit Singh, Sarpanch of Gram Panchayat, Rakhi Shahpur i.e. the village from where the parties reside. The deed of settlement is signed by 18 respectables. No doubt, signatures of Hoshiar Singh on page-5 are down below, however, in the facts of the present case, the signatures of Hoshiar Singh cannot be said to be doubtful. It has come in evidence that three copies of the aforesaid deed of settlement were scribed by Sh. Sham Sunder Kaushik, typist doing his work privately in the Court premises at Hansi and after signatures on all the three copies, one copy was handed over to the plaintiffs-respondents whereas two copies were handed over to the defendants-appellants.

The defendants-appellants in order to dispute the correctness of the aforesaid deed of settlement have only examined Rampal, one of the brother amongst four defendants. He is no doubt uneducated but had thumb marked the aforesaid deed of settlement. It is admitted fact that out of four defendants-appellants, two brothers namely, Rambir and Ramkesh are educated, however, none of them has come forward and faced cross-examination. Still further, defendants as noticed above admitted their

thumb impressions/signatures on the deed of settlement, although, it is being claimed that these were obtained when papers were blank. However, defendants have failed to lead convincing evidence to prove that fact.

Now the question before this Court is whether on the basis of unregistered document, a declaration can be granted to the plaintiffs that they are owners in possession of the property. In the considered view of this Court, the answer to the aforesaid question has to be in negative.

However, keeping in view the facts which have come on record particularly when whereabouts of Manphool are not known from the day the alleged sale deed was executed and registered alleged to be on payment of Rs.95,000/- in cash and he is presumed to be dead as per the decision of the Panchayat as also in accordance with the law, this Court considers it appropriate to mould the relief.

Section 10 of the Specific Relief Act, 1963 enables the Court to order specific performance of contract. Section 14 of the Act enlist the contracts which cannot be specifically enforceable. The contracts which are specifically enforceable include contracts to transfer immovable property. Through Section 10 not only entitles the Court to order specific performance of the agreement to sell but other contracts are also enforceable through Court. In the present case as already found by the First Appellate Court and affirmed by this Court that there was a contract in the form of a deed of settlement, terms whereof has been extracted above. In view of the aforesaid contract, on passage of 7 years from the date of sale deed, the property was to come back to the plaintiffs if Manphool who was missing is not traced. The whereabouts of Manphool are not still known, although, more than 30 years elapsed, therefore, Manphool is presumed to

have died. In that eventuality, as per Clause 'C' of the salient features of the contract extracted above, the plaintiffs are entitled to become owner of the property and the sale deed dated 20.12.1988 shall be deemed to have been cancelled. The relief has been moulded in order to do substantial justice between the parties.

It will be noted that lengthy arguments were addressed by learned counsel for the Amicus Curiae and counsel for the parties with regard to the fact that the aforesaid deed of settlement does or does not falls within the scope of Order 23 Rule 3 of the Code of Civil Procedure, 1908. After hearing detail arguments, this Court is of the considered view that the aforesaid deed of settlement does not fall within the scope of Order 23 Rule 3, CPC, however, nonetheless the aforesaid deed of settlement is a contract. Learned Amicus has drawn attention of the Court to the provision which existed before 1976 amendment in the Code of Civil Procedure whereby substantive amendments were made in Order 23 Rule 3, CPC and in fact one can safely say that Order 23 Rule 3, CPC was re-written. Learned Amicus has also drawn attention of the Court to a judgment passed by the Hon'ble Supreme Court in the case of Pushpa Devi Bhagat Vs. Rajinder Singh, 2006(5) SCC 566. In the aforesaid judgment, Hon'ble Supreme Court dealt with and discussed provisions of Order 23 Rule 3, CPC. It was found that Order 23 Rule 3, CPC is in two parts. First part provides for a situation where an agreement or compromise is entered into writing and signed by the parties and thereafter, the agreement/compromise is placed before the Court and the Court on being satisfied that the suit has been adjusted either wholly or in part by such agreement/compromise in writing signed by the parties and it is lawful, a decree follows in terms of what is

settled between the parties. The Court further held that second part provides that where defendants have satisfied the plaintiffs about the claim. In Para 19, the Hon'ble Supreme Court has distinguished between first part and second part, however, with regard to second part, the Hon'ble Supreme Court has held that in that eventuality, the word used is satisfies and nothing further remains to be done or enforced and there is no question of any enforcement or execution of the decree to be passed in terms of it.

If we examine the facts of this case, this case does not fall either in first part or second part of Order 23 Rule 3, CPC. First part which provide for a written compromise/agreement signed by the parties, however, no judgment thereon has been passed and the trial Court in the present case was not satisfied that the suit has been adjusted either wholly or in part and therefore, no decree was passed in terms of the deed of settlement. Even both the parties never requested the trial Court to pass a decree in terms of settlement. The present case also does not fall in second part because in the present case, as per clause 'C', the sale had to be treated as cancelled after a period of 7 years. In other words, sale was to be annulled after 7 years from the date of the sale deed i.e. 20.12.1988 whereas the deed of settlement is dated 13.02.1990.

Learned counsel appearing for the appellants in the end has submitted that even if a settlement deed is a contract, still, it is based upon reciprocal promise and since the plaintiffs-respondents have failed to perform their reciprocal promise i.e. failed to surrender the possession to the Panchayat, and therefore, the defendants-appellants cannot be forced to perform their part of the contract. He referred to Section 51 and 52 of the Indian Contract Act, 1872. In this regard, it will be noticed and as also

noticed by the First Appellate Court that the plaintiffs were not in a position to deliver the possession. As noted above, the proceedings under Section 145 of the Criminal Procedure Code were initiated on 05.06.1989 and the order handing over possession to the receiver was passed on 08.06.1992. Thereafter, the possession remained with the receiver till the proceedings were quashed by the High Court on 07.02.1992 and thereafter, vide order dated 27.02.1992, the concerned Sub-Divisional Magistrate passed an order for return of the possession to the plaintiffs. Still further, the defendants have never acknowledged or admitted the contract. Hence, the defendants cannot now avoid performance thereof on the ground that the plaintiffs have failed to perform reciprocal promise.

It will be noted here that on 13.02.1990, deed of settlement was written. On that day, lawyers in the Civil Court were on strike, therefore, on 13.02.1990, the deed of settlement could not be produced in evidence because as per the witnesses, the Court had already adjourned the case to 14.06.1990. On 14.06.1990, once again the case was adjourned. It appears that in the meantime, the defendants resiled from the settlement.

Now let us answer the questions of law.

In view of the discussion made above, question framed by this Court at the time of final hearing is answered in favour of the plaintiffs-respondents and against the defendants-appellants.

As regards, questions which has been proposed by learned counsel for the appellants, question No.1 has already been answered in favour of the appellants. As regards question No.2, counsel for the appellants did not raise arguments. As regards question No.3, the alleged compromise dated 13.02.1990 is not covered by the provisions of Order 23

Rule 23 of Code of Civil Procedure, however, the same can be made basis to get specific performance of the settlement dated 13.02.1990.

In view of the discussion made above, the appeal is dismissed. There shall be a decree of specific performance of contract/deed of settlement dated 13.02.1990. The plaintiffs shall be entitled to file execution to get the sale deed registered in their favour and the defendants-appellants are directed to execute the sale deed in favour of the plaintiffs-respondents, failing which, the Executing Court would be entitled to get the sale deed registered through Court Officer.

The pending miscellaneous application, if any, shall stand disposed of in view of the above-said judgment.

28.03.2019
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned	Yes / No
Whether Reportable	Yes / No