

In the High Court of Punjab and Haryana at Chandigarh

RSA-3168 of 1997 (O&M)
Date of Decision:4.9.2019

Jagir Singh and others

---Appellants

vs.

Swaran Singh and another

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. G.S.Punia, Senior Advocate with
Ms. Harleen Kaur, Advocate
for the appellants
Mr. R.S.Ghuman, Advocate
for the respondents

Rekha Mittal, J.

The present appeal directs challenge against concurrent findings recorded by the courts whereby suit for specific performance of agreement to sell dated 4.10.1988 in respect of land measuring 8 kanals being 160/915 share of land measuring 45 kanal 15 marlas comprised in khasra No. 5/1, 6/1, 7/1, 8/1, 2, 3, 4/1, 4/2,9/1 of Rect No. 20 Khasra No. 24/2, 25/1 of Rect No. 19 of khewat No. 74, khatoni No. 97, 98 and 99 was decreed by the Additional Senior Sub Judge, Nawan Shahr (hereinafter referred to as “the trial court”) vide judgment and decree dated 16.2.1994. The appeal preferred by unsuccessful defendants (appellants herein) sons of Gurdial Singh (since deceased) did not find favour with the Additional District Judge, Jalandhar as the same was dismissed vide judgment and decree dated 8.5.1997.

The facts relevant for disposal of present appeal are that as per case set up by the respondent-plaintiff, Gurdial Singh father of the defendants entered into agreement to sell the suit land for consideration of Rs. 80,000/-. The agreement was reduced into writing on 4.10.1988 and a sum of Rs. 58,000/- was paid to Gurdial Singh and was to be deducted from the remaining sale consideration. The sale deed was agreed to be executed on 13.2.1989. Gurdial Singh failed to return the amount as stipulated, to the plaintiff and after his death, defendants failed to return the said amount to the plaintiff, therefore, the plaintiff is legally entitle to seek specific performance on the basis of stipulations in agreement to sell. On the target date, plaintiff came to the office of Sub Registrar, ready with money and also to defray the stamp and registration expenses. The defendants did not come present to execute the sale deed. The plaintiff got his presence marked by way of affidavit. He always remained ready and willing to perform his part of the contract but defendants are guilty of breaching terms and conditions of the agreement. Hence the suit.

Defendants No. 2 to 5 raised preliminary objections that Smt. Balwinder Kaur etc. daughters of Gurdial Singh deceased are necessary parties to the suit; name of Davinder Singh is wrongly mentioned as Joginder Singh in the plaint. The agreement dated 4.10.1988 is not enforceable as a contract of sale of land rather it amounts to lending money in order to secure loan. On merits, defendants denied execution of agreement to sell by their deceased father in favour of the plaintiff. They further denied receipt of earnest money by deceased Gurdial Singh with the averments that Gurdial Singh had been cultivating 15 acres of land and had

sufficient income, therefore, he had no necessity to sell his land. Agreement and receipt in dispute are stated to be wrong, illegal and being the result of fraud.

The trial court framed the following issues:-

1. Whether father of the defendant executed an agreement to sell on 4.10.1988 with the plaintiff after receiving the earnest money of Rs. 58,000/- ? OPP
2. Whether the plaintiff is entitled to the decree as prayed for? OPP
3. Whether the plaintiff is and has always been ready and willing to perform his part of the contract? OPP
4. Whether the plaintiff is entitled to the alternative relief as prayed for? OPD
5. Whether the suit is bad for non joinder of necessary parties in view of the preliminary objection No. 1? OPD
- 5A Whether agreement in question was money lending and borrowing transaction between the parties as alleged? If so, its effect? OPP
6. Relief

The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial court decided issues No. 1 to 4 and 5A, taken up jointly, in favour of the plaintiff and against the defendants. Eventually, the trial court allowed specific performance of agreement dated 4.10.1988 and the plaintiff was called upon to deposit Rs. 22,000/- i.e.

balance sale consideration within 90 days. The defendants were directed to execute the sale deed in favour of the plaintiff. Failure of the plaintiff to deposit balance sale consideration would entail dismissal of the suit.

As has been noticed hereinbefore, appeal preferred by unsuccessful defendants No. 2 to 5 was dismissed by the First Appellate Court as the said court affirmed findings of the trial court without variance.

The precise question that falls for consideration is whether agreement to sell dated 4.10.1988 is an agreement of sale or the same is a loan transaction and agreement was executed to secure repayment of loan.

Counsel for the appellants would argue that Swaran Singh-respondent/plaintiff appeared in the witness box to prove his case. In cross examination, he had stated that prior to the agreement in question, there were two agreements earlier executed between the plaintiff and Gurdial Singh (since deceased) but those agreements were cancelled as amount of earnest money mentioned therein was returned by said Gurdial Singh. It is further argued that in respect of one previous agreement between the parties, defendants examined Vijay Kumar Ghai, Deed Writer Nawan Shahar DW2 and he has proved an entry in his register at Sr. No. 902, copy whereof is Ex. DW2/A. It is argued with vehemence that as per recitals in column No. 5 of the entry Ex. DW2/A, land measuring 8 kanals out of land measuring 45 kanal 15 marlas comprising same khasra numbers mentioned in the instant agreement of sale was agreed to be sold at Rs. 80,000/-. The amount of Rs. 28,000/- was paid towards earnest money by way of receipt and sale deed was agreed to be executed on 13.9.1988. It was also agreed that in case the seller refunds the amount of earnest money upto 13.7.1988,

agreement shall be deemed to be cancelled and there is no question of executing a sale deed. It is further argued that though a copy of the second agreement executed between the parties or a document in respect thereof has not been produced on record but the respondent in his cross examination had stated that second agreement was executed on 8.7.1988 and money taken under the said agreement was refunded by the seller about 20 days prior to execution of present agreement of sale. It is further argued that there is no document on record produced by the respondent-plaintiff that money paid under the first agreement executed in December 1987 or the second agreement executed in July 1988 under which the seller statedly received earnest money of more than Rs. 40,000/- was paid by Sh. Gurdial Singh. It is further argued that as a matter of fact, the first agreement was executed in respect of amount paid to Sh. Gurdial Singh either by way of pronotes and receipts executed between the parties and exhibited on record or under the first agreement of sale executed in December 1987 but the subsequent agreements made reference to the same money along with interest and for that reason, in the second agreement payment made to Gurdial Singh is mentioned as more than Rs. 40,000/- and in the present agreement to the tune of Rs. 58,000/-. It is argued with vehemence that in view of materials on record that there were money transactions between the parties earlier on the basis of pronotes and receipts and later three agreements of sale contain a clause for refund of earnest money by a particular date and cancellation of the agreement in case the earnest money is refunded, findings recorded by the courts that the parties executed the agreement in question with an intent to sell the land in question or rejecting

contention of the defendants that Gurdial Singh never intended to transfer the land in dispute are the result of perversity and liable to be set aside.

Counsel representing the respondent-plaintiff, on the other hand, has supported consistent findings recorded by the courts with the submission that even if the seller was given liberty to refund the amount of earnest money by a stipulated date but since he has failed to discharge his obligation nor his legal heirs offered to return the amount of Rs. 58,000/- despite receipt of notice or immediately after appearance in the suit, they cannot seek aid from the fact that Gurdial Singh was given liberty to refund the amount of earnest money before a particular date. It is further argued that in the agreement it has been mentioned with regard to refund of earnest money by the buyer and not by the seller, therefore, this recital in the agreement is of no consequence to accept contention of the appellants and intervene in concurrent findings of fact. It is argued that Jaswinder Singh DW1 one of the contesting defendants was examined but his testimony is conspicuously silent that agreement to sell was executed to secure repayment of loan taken by deceased Gurdial Singh, as such, there is no evidence adduced by the appellants to substantiate their plea of loan transaction. It is further argued that Jaswinder Singh, on the contrary, has denied that agreement to sell was executed by Sh. Gurdial Singh and the same has rightly been rejected by the courts.

Another submission made by counsel is that Rs. 58,000/- were paid in the year 1988 and period of more than 30 years has elapsed since then. It would be absolutely inequitable, if the respondent-plaintiff is allowed refund of Rs. 58,000/- with simple interest even @ 18% per annum,

in view of the fact that price of land has increased substantially during the intervening period.

Counsel for the appellants was directed to seek instructions if they are agreeable to pay an amount of Rs. 10 lakhs or execute sale deed in respect of half of the land, subject matter of agreement of sale. Counsel would state that appellants are not agreeable and the appeal may be decided on merits.

I have heard counsel for the parties, perused the paper book and records.

Before advertng to the submissions made by counsel for the parties, it is appropriate to advert to the reasons that weighed in the mind of First Appellate Court to reject plea of loan transaction and accept plea of respondents that agreement was intended to be a transaction for sale and purchase of land in question. In para 11 of the judgment, the Court has held that it is matter of common knowledge that routine recital regarding return of earnest money with damages is usually recorded in every agreement towards end of the same besides the paramount recitals containing terms and conditions of the agreement and date for execution and registration of the sale deed. The intention which can be gathered from Ex. P1, the agreement, was to sell the land in dispute. Another finding of the court is that had this agreement been executed for securing repayment of loan allegedly advanced, there would have been a clause with regard to payment of interest at a specified rate. Jaswinder Singh DW1 did not state even a single word that agreement Ex. P1 was executed just with a view to secure repayment of loan. His statement with regard to non-execution of

agreement to sell cannot be believed in the face of cogent and convincing evidence produced by the plaintiff (respondent No. 1 therein).

In para 12 of the judgment, the court has accepted that appellants proved Ex. D1 Pronote dated 20.12.1986 for Rs. 3800/-, Ex. DW4/A dated 28.1.1987 for Rs. 2000/-, Ex. DW4/C dated 13.4.1987 for Rs. 2500/-, Ex. D3 dated 1.6.1987 for Rs. 1500/-, Ex. DW3/A dated 29.2.1988 for Rs. 6000/-, Ex. DW3/C dated 17.5.1988 for Rs. 1600/- and Ex. D5 dated 18.6.1988 in the sum of Rs. 1000/- and agreement dated 18.12.1987 copy of the entry whereof is Ex. DW2/A were executed by Gurdial Singh in favour of Swaran Singh. However, the court refused to give any weightage to these pronotes and receipts found in possession of Gurdial Singh or his Lrs with observations namely (i) that after repayment of loan with interest the documents were cancelled and liability stood discharged and (ii) if the agreements were earlier executed between the parties and by mutual consent, those were cancelled by them, that does not mean that agreement to sell Ex. P1 was merely executed with a view to secure repayment of loan. Another observation of the court is that execution of pronotes aforesaid and earlier agreements were clearly independent transactions having no connection with agreement to sell Ex. P1.

The first observation made by the Court in Appeal based upon purported common knowledge suffers from perversity of the greatest degree. I have yet to come across in my 35 years experience in judicial stream that if the parties had entered into an agreement for sale of property, there would be a clause leaving the seller at liberty to refund the earnest money on or before a particular date and on payment thereof, the agreement

would stand cancelled. On the contrary, even if an agreement is got executed as a security for repayment of loan, ordinarily the proposed vendee would not permit the proposed seller to have such a clause in the agreement which has implications of creating doubt if the parties intended to sell/purchase the property. In this view of the matter, the first reason assigned by the Appellate Court clearly shows that the court grossly misdirected itself, thus, fallen into a grave factual error.

The Court in Appeal has taken note that since agreement does not contain a clause with regard to payment of interest, therefore, it cannot be a loan transaction. Man may tell lie but the circumstances do not. Indisputably, there were many transactions of loan between the respondent and deceased Gurdial Singh, evidenced by various pronotes and receipts on record. There were also loan transactions between Sohan Singh son of the respondent and Gurdial Singh, father of the appellants and documents in respect of those transactions were also exhibited on record and taken into consideration by the First Appellate Court. Though the respondent in his cross examination when recalled in rebuttal to additional evidence tried to portray a picture that Sohan Singh is independently cultivating land and has separate income but he has not succeeded in his venture to prove the said fact. Admittedly, Sohan Singh was not examined in the case to prove that money transactions on the basis of pronotes and receipts between him and Gurdial Singh had nothing to do with dealings between the respondent and Gurdial Singh. The Appellate Court has also taken into consideration document Ex. DW2/A proved by Vijay Kumar Ghai, Deed Writer, Nawan Shahar in respect of an agreement of sale between the respondent and

Gurdial Singh in respect whereof entry at Sr. No. 902 dated 18.12.1987 has been proved by the Deed Writer. The Appellate Court has failed to consider that besides the first agreement to which entry Ex. DW2/A pertains and the agreement in dispute, there was another agreement of sale in between which was stated to be executed on 8.7.1988. With regard to that agreement, a relevant extract from cross examination of Swaran Singh, reads as follows:-

“.....Earlier to this, I also entered into agreement to purchase of the same land from deceased Gurdial Singh. However, I do not remember the date of earlier agreement. The second bargain regarding selling of suit land took place on 7.8.1988. Again said, 8.7.88. The agreement in question is the third agreement of seelling (sick) the sale properties which took place on 4.10.88. When a bargain regarding selling of land dated 8.7.88 took place at that time Rs. 41,000/- were paid by me to Gurdial Singh as earnest money regarding the same land in question. When the bargain of selling the land dated 8.7.88 took place and I made payment of Rs. 41000/- as earnest money to Gurdial Singh at that time Dalbir Singh, Sarpanch and Darshan Singh, Ex. Sarpanch were present there. I paid Rs. 41000/- in the presence of said witnesses. An agreement was entered with regard to the said transaction in the presence of Dalbir Singh and Darshan Singh Ex Sarpanch. A receipt with regard to the earnest money of Rs. 48000/- was written and Darshan Singh and Dalbir Singh Sarpanch signed that receipt. An agreement of that payment was scribed along with receipt

and it was attested by Dalbir Singh and Darshan Singh Ex Sarpanch. I do not remember the name of the scribe of that agreement. As he returned the amount taken by him on the basis of earlier agreement, so the agreement was cancelled. Voluntarily stated. No receipt of the return amount was executed by me. That amount was returned to me not in the presence of any witness. I cannot tell the date of the return of amount of earlier agreement. However, the said amount was returned to me about 20 days earlier to the present agreement Ex. P1. The first agreement was cancelled because a wrong khasra number was given in that agreement which was not his exclusive ownership. I cannot tell the exact amount given on the basis of first agreement as many years i.e. 2 or 2 ½ years. I cannot tell the names of the witnesses who attested the first agreement. No notice was given regarding the mentioning of wrong khasra number in the agreement by me to Gurdial Singh.”

Perusal of document Ex. DW2/A pertaining to first agreement of December 1987 and facts elicited in cross examination of Swaran Singh with regard to second agreement leaves no manner of doubt that even in the previous agreements there was no stipulation with regard to payment of interest on the amount mentioned as earnest money. It also becomes undisputed position of the case that when the seller allegedly paid back the alleged earnest money, the agreements were cancelled. However, any such payment made by the seller is not evidenced by any receipt. The original

agreements have not been produced by the appellants. There is nothing on record suggestive of the fact that original agreements were in possession of Sh. Gurdial Singh. As Sh. Gurdial Singh had passed away, no clear picture can possibly emerge with regard to availability of those agreements. Taking into consideration that in the first agreement executed in December 1987 earnest money was Rs. 28,000/- in respect of the same land measuring 8 kanals and Rs. 41,000/- in the second agreement stated to be executed on 8.7.1988 just five days before 13.7.1988, the date by which the seller could repay the earnest money coupled with that earnest money in the third agreement is Rs. 58,000/- along with the fact that on the back of pronotes executed by Gurdial Singh in favour of Swaran Singh, admittedly, there are some accounts prepared in the handwriting of Swaran Singh, it certainly leads to an impression that repeated agreements were executed between the parties for securing repayment of money and interest was also calculated while mentioning different amounts of earnest money in three agreements executed between the respondent and Gurdial Singh. In the given circumstances, non-mentioning of interest or its rate is of no consequence. In this view of the matter, it can safely be held that non-mention of interest in the agreement in question cannot be taken as a circumstance to doubt plea of loan transaction or accept contention of the respondent that parties actually intended to sell the suit land by way of agreement Ex. P1.

All the previous transactions in respect of pronotes/receipts and agreements were executed between the respondent and Gurdial Singh. Gurdial Singh left behind five sons arrayed as defendants in the case. It is difficult to accept to reason that Gurdial Singh had actually been consulting

his sons or all his sons while taking money from Swaran Singh. No doubt, the appellants raised the plea of transaction being a loan transaction but they possibly could not adduce any evidence in addition to the documents of loan. In the given circumstance, the mere fact that Jaswinder Singh DW1 has not mentioned about loan would not carry much weight.

As per entry Ex. DW2/A, there was an agreement between the respondent and Gurdial Singh for sale of land measuring 8 kanals out of total land measuring 45 kanal 15 marlas. The present agreement also pertains to sale of 8 kanals out of land measuring 45 kanal 15 marlas. With regard to the second agreement, there is no documentary evidence on record but as per statement of respondent, the said agreement was executed on 8.7.88 just five days before the date mentioned in entry Ex. DW2/A by which the seller was allowed to repay the earnest money and the agreement would stand cancelled. The second agreement was statedly cancelled 20 days prior to the agreement in question. Though the respondent tried to explain that first agreement was cancelled because wrong khasra number was given but he has failed to tell about that khasra number nor any submissions were made by counsel, in this regard. Counsel for the respondent has failed to point out if khasra numbers mentioned in document Ex. DW2/A pertaining to the first agreement do not tally with khasra numbers, subject matter of the agreement in dispute. The repeated agreements between the parties and that too at a short interval of few months and cancellation of the previous two agreements coupled with that amount of earnest money in the first agreement, second agreement and agreement in question kept on increasing lead to an irresistible conclusion

that the agreements were prepared just to secure repayment of outstanding liability of Gurdial Singh and for that reason the documents contained a clause leaving the seller at liberty to refund earnest money by a particular date and then agreement would be cancelled. Unfortunately, Sh. Gurdial Singh passed away before 13.1.1989, the date stipulated in the present agreement for refund of earnest money, as is clear from the notice issued by the respondent. This agreement could not be cancelled as Gurdial Singh died before the stipulated date. No doubt, the agreement in question contains a recital that in case the seller fails to refund the earnest money on 13.1.1989, he would be liable to execute the sale deed in favour of the respondent but in view of discussion made hereinbefore, it can be safely concluded that the agreement in dispute does not reflect intention of the parties to sell the land in dispute, therefore, the courts have committed a gross error rather perversity by exercising their discretion to allow specific performance of agreement in question. In this view of the matter, I find merit in contention of the appellants that judgments and decrees passed by the courts allowing specific performance of agreement cannot be allowed to sustain and are accordingly set aside.

The transaction in question is a loan transaction and Gurdial Singh had liability to refund the amount of Rs. 58000/-. The appellants are liable to repay the amount of Rs. 58000/- along with interest.

Now the question for consideration is, what should be the rate of interest. The appellants never offered to repay the amount of Rs. 58,000/- either in response to the notice issued by the respondent before institution of the suit nor during pendency of proceedings before the courts.

This court cannot overlook that prices of real estate have gone tremendously high in the last three decades. At the same time, value of Indian rupee has decreased substantially. Counsel for the appellants did not give any positive response to the proposal with regard to refund of money or registration of sale deed in respect of 4 kanals of land as against 8 kanals mentioned in Ex. P1.

In order to balance equities and satisfy ends of justice, in my considered opinion, appellants are liable to pay compound interest @ 9% per annum with yearly rests. That being so, the amount of Rs. 58,000/- shall carry interest @ 9% per annum with yearly rests, from the date of agreement till decision of the second appeal. However, future interest on the principal amount of Rs. 58,000/- shall be @ 6% per annum from the date of decision till realization. The liability to refund the amount along with interest is that of Gurdial Singh. The outstanding amount can be recovered from the estate left behind by Gurdial Singh. In order to secure recovery of the decretal amount, the same would be charge over land measuring 8 kanals, subject matter of agreement of sale. The revenue authorities are directed to make a red entry in the relevant jamabandi in respect of charge created and the appellants would be entitle to get that entry deleted after satisfying the decree.

In view of what has been discussed hereinbefore, the appeal is partly allowed in the aforesaid terms. The judgments and decrees passed by the courts are modified accordingly. The suit filed by the respondent-plaintiff for specific performance of agreement to sell dated 4.10.1988 is dismissed. The respondent-plaintiff is allowed alternative relief of recovery

of Rs. 58,000/- with compound interest @ 9% per annum with yearly rests from the date of agreement till decision by this court and simple interest @ 6% per annum on Rs. 58,000/- with effect from the date of decision till realization. In the peculiar facts and circumstances, parties are left to bear their own costs.

(Rekha Mittal)
Judge

4.9.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes