

In the High Court of Punjab and Haryana at Chandigarh

RSA No.4830 of 2011(O&M)

Date of Decision 27.5.2019

Faquir Chand and another

---Appellants

Vs.

Sona Devi and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Ashok Kumar Sharma Nabhewala, for the appellants

Mr. C.B.Geol, Advocate, for the respondent

Rekha Mittal, J.

Challenge in the present appeal has been directed against judgments and decrees passed by the Courts whereby suit for specific performance of agreement to sell dated 19.12.1996 filed by the respondent-plaintiff was decreed by the trial court vide judgment and decree dated 22.1.2008 that came to be affirmed in appeal filed by unsuccessful defendants-appellants.

Land measuring 2 kanal 8 marlas, detailed in head note of the plaint is the subject matter of suit on the basis of agreement dated 19.12.1996 purported to be executed by Devi Dayal-defendant No. 2 (since deceased) as an attorney of Smt. Kaushalya, daughter in law of said Devi Dayal-respondent No. 2. Challenge to the judgment and decree passed by the trial court before the first Appellate Court was laid by Faquir Chand and Prem Lal purchasers of suit land vide sale deed dated 5421 dated 4.2.1997 executed by Sh. Devi Dayal as an attorney of Smt. Kaushalya. The present appeal has also been preferred by the subsequent purchasers namely Faquir Chand and Prem Lal.

The trial court accepted plea of the respondent-plaintiff that

agreement dated 19.12.1996 was executed by Sh.Devi Dayal on behalf of Smt. Kaushalya and he has proved her readiness and willingness to perform her part of the agreement, therefore, entitle to specific performance of the agreement. The plea raised by the appellants-defendants No. 3 and 4 that they are bona fide purchasers in good faith for consideration and entitle to protection under Section 41 of the Transfer of Property Act (in short “TP Act”) in respect whereof additional issue No. 1-A was framed by the trial court, was rejected.

Counsel for the appellants would fairly concede that the appellants being subsequent purchasers cannot challenge findings of the trial court in respect of agreement of sale dated 19.12.1996, a dispute inter se the plaintiffs and defendants No. 1 and 2 and the same has attained finality as defendants No. 1 and 2 did not file an appeal before the first Appellate court. However, counsel has raised three issues namely:

- (1) since the agreement dated 19.12.1996 has not been signed by the purchaser and Sat Pal signatory on behalf of Sona Devi has admitted that he was not attorney of Sona Devi, suit for specific performance on the basis of such an agreement is not maintainable
- (2) suit for specific performance is barred under Order 2 Rule 2 of the Code of Civil Procedure (in short “the Code”) in the face of previous suit for injunction filed by Smt. Sona Devi and
- (3) findings of the courts negating plea of the appellants that they are bona fide purchasers without notice suffer from perversity and liable to be set aside.

To substantiate first contention that agreement to sell dated

19.12.1996 cannot form the basis of suit for specific performance, he has relied upon judgments of the Madras High Court **R. Chhinnadurai vs. S. Rajalakshmi AIR 2004 (Madras) 313** and **S.M.Gopal Chetty vs. Raman alias Natesan and 7 others AIR 1998 Madras 169.**

Counsel for the appellants would argue that on 3.2.1997, the respondent-plaintiff filed a suit for permanent injunction restraining defendants No. 1 and 2 from alienating the suit land on the allegations that they are intending to alienate the suit land despite agreement dated 19.12.1996 having been executed in favour of the plaintiff-respondent. It is argued that though as per agreement propounded by the respondent-plaintiff, the stipulated date for execution of the sale deed was 15.5.1997 but since defendants No. 1 and 2 were allegedly threatening to alienate the suit land, cause of action to file suit for specific performance was available to the plaintiff at the time of institution of suit for permanent injunction on 3.2.1997, therefore, suit filed by the respondent-plaintiff is liable to be dismissed being barred under Order 2 Rule 2 of the Code. In the alternative, it is argued that as the respondent-plaintiff withdrew the suit for injunction in June 1997 without seeking permission to file a suit for specific performance, the instant suit is not maintainable under order 23 Rule 1 of the Code.

To challenge findings of the courts on issue No. 1-A that sale is protected under Section 41 of the TP Act, it is argued that though the sale deed in favour of the appellants was executed on 3.2.1997 but prior thereto, there was an agreement for sale of land in October 1996 executed in favour of the appellants on the basis whereof the appellants paid a sum of Rs.

42,000/- to Sh. Devi Dayal as an attorney of Smt. Kaushalya vide receipt dated 4.10.1996 (Ex. D1), thus, findings of the courts to reject contention of the appellants and setting aside the sale deed dated 4.2.1997 (Ex. D2) admittedly executed in favour of the appellants by Sh. Devi Dayal attorney of Kaushalya Devi cannot be allowed to sustain and liable to be set aside.

Counsel representing the respondents-plaintiff has refuted contention of the appellants with the submission that appellants being subsequent purchasers of suit land cannot be permitted to raise any contention in respect of enforceability of agreement of sale or maintainability of the suit etc. It is argued that the appellants being subsequent purchasers can, at best, raise the issue qua readiness and willingness of the plaintiff-respondent to perform her part of the agreement. He has further argued that as the stipulated date for execution of the sale deed was 15.5.1997, there was no cause of action with the respondent-plaintiff to file suit for specific performance in February 1997 when she instituted the suit for permanent injunction restraining defendants No. 1 and 2 from alienating the suit land. It is further argued that in view of reply filed by the defendants in the said suit, the respondent-plaintiff came to know that defendants No.1 and 2 have already alienated suit land vide sale deed dated 4.2.1997 in favour of the appellants, no cause of action seeking injunction against alienation survived and accordingly the suit was withdrawn by the respondent-plaintiff. It is further argued that as the relief of specific performance was not available at the time of institution of suit for injunction and the same is based upon different cause of action, contention raised by the appellants with regard to suit being barred under Order 2 Rule 2 of the

Code is not tenable. It is further argued that no plea was raised by the appellants that suit for specific performance is barred under Order 23 Rule 1 of the Code when otherwise it is not so when examined in the light of scope of suit for injunction viz-a-viz suit for specific performance of agreement of sale.

With regard to findings of the courts rejecting plea of the appellants of bona fide purchasers, it is argued that concurrent findings recorded by the courts on a disputed question of fact are not amenable to intervention in second appeal on re-appreciation of evidence even if a different view is possible. It is further argued that the courts, on a detailed consideration of materials on record, has rightly held that receipt Ex. D1 was prepared ante dated in order to cause loss to the respondent-plaintiff. It is argued that as the appellants are residents of village Akbarpur Tehsil Jagadhari, suit land is also situated in the same village and defendant No. 1 was also resident of village Akbarpur, it is difficult to accept that the appellants did not have knowledge of agreement to sell dated 19.12.1996 when they got the sale deed dated 4.2.1997 executed in their favour. In support of his contention, he has relied upon judgments of this court **Deep Singh and others vs. Amrik Singh and another 2004(2) HRR 113, Ram Dass and others vs. Shisha Singh and others (2001-3) Vol.129 PLR 544.**

Counsel for the appellants, in reply, would argue that since the relief of specific performance is a discretionary relief and a period of more than two decades had elapsed since the sale in favour of the appellants and they have got a part of suit land redeemed which was under mortgage with sons of the respondent-plaintiff, interest of justice commands that decree for

specific performance may be modified and respondent-plaintiff may be allowed refund of earnest money with interest etc., to be paid by Smt. Kaushalya.

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

Indisputably, the appellants have contested the litigation to protect sale deed dated 4.2.1997 executed in their favour by Smt. Kaushalya through her attorney Sh. Devi Dayal on the premise that they are bona fide purchasers for consideration in good faith and are protected under Section 41 of the TP Act. The appellants being subsequent purchasers cannot agitate any issue pertaining to agreement dated 19.12.1996 except to contest plea with regard to readiness and willingness to perform the agreement. In this context, reference can be made to judgments of Hon'ble the Supreme Court **M.M.S.Investments, Madurai And others vs V. Veerappan and Ors 2007 (2) RCR(Civil) 816** and **B.Vijaya Bharthi vs. P.Savitiri and others 2018 (1) RCR (Civil)4**. Still, this court would dilate on two contentions raised by counsel for the appellants with regard to non-maintainability of the suit on the basis of agreement in question or under Order 2 Rule 2 of the Code.

The first contention raised by the appellants is misconceived and liable to be rejected in view of judgment of Hon'ble the Supreme Court **Alka Bose vs. Parmatma Devi and others 2009(1) Civil Court Cases 412**. In para 7 of the judgment, Hon'ble the Supreme Court has not agreed with either of the two divergent views expressed by a Single Judge of Madras

High Court in **S.M.Gopal Chetty's case (supra)** and by the Guwahati High Court in **Md. Mohar Ali vs. Md. Mamud Ali AIR 1998 Guwahat 92**. A relevant extract from para 7 of the judgment, reads as follows:-

“All agreements of sale are bilateral contracts as promises are made by both - the vendor agreeing to sell and the purchaser agreeing to purchase. On the other hand, the observation in S.M. Gopal Chetty (supra) that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it. [Section 10](#) of the Act provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the [Contract Act](#). The proviso to [section 10](#) of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In any agreement of sale, the

terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.”

In view enunciation laid down in **Alka Bose’s case (supra)**, the appellants can not derive advantage to their contention from judgments rendered by the Madras High Court in **R. Chhinnadurai’s case (supra)** and **S.M.Gopal Chetty’s case (supra)**. The judgment in **S.M.Gopal Chetty’s case (supra)** relied upon by the appellants has been held to be not laying down correct position in law in **Alka Bose’s case (supra)**. In this view of the matter, contention raised by the appellants to challenge maintainability of the suit on the basis of agreement for want of signatures of the vendee or Sat Pal being not an attorney of the vendee is patently misconceived and accordingly rejected.

The plea of the appellants that suit for specific performance is barred under Order 2 Rule 2 of the Code is also devoid of merit and accordingly rejected. Indisputably, as per agreement of sale dated 19.12.1996, the sale deed was agreed to be executed on 15.5.1997. The suit for injunction was filed by the respondent-plaintiff apprehending threat that the vendor wanted to sell the suit land to a third party. The matter would have been different had the vendor already executed a sale deed before

institution of the suit and the same was to the knowledge of the vendee at the time of institution of suit for injunction because in that eventuality, cause of action to seek specific performance of agreement to sell would be construed to have arisen and failure to seek that relief might have attracted bar under Order 2 Rule 2 of the Code. As in the instant case, the stipulated date for execution of sale deed was yet to arrive and suit for injunction was filed in order to stall further alienation of the suit land, it is difficult to accept contention of the appellants that findings recorded by the courts rejecting plea of Order 2 Rule 2 of the Code either suffer from an error much less perversity.

This brings the court to the third issue with regard to protection under Section 41 of the TP Act. There are two aspects with regard to plea of bona fide purchasers for consideration without notice. The appellants have contended that prior to agreement dated 19.12.1996 set up by the respondent-plaintiff, the vendor through her attorney agreed to sell the suit land and received earnest money of Rs. 42,000/- evidenced by receipt dated 4.10.1996 Ex. D1. Both the courts have refused to rely upon this receipt with the findings that the same is prepared in a previous date in order to overreach the agreement propounded by the respondent-plaintiff. The factum of payment of Rs. 42,000/- vide receipt finds mention in the sale deed dated 4.2.1997 but date of receipt is not mentioned that shows that date of receipt was not disclosed at the first available opportunity.

The receipt is prepared on a plain paper and not on a stamp or non-judicial paper. Identity of the person who typed the receipt has not been established much less examined as a witness. One of the attesting

witnesses of the receipt is Sahib Singh Lambardar DW2. Sahib Singh Lambardar is the person who faced criminal proceedings with regard to forging a Will purported to be executed by Jagir Singh (husband of Sona Devi plaintiff) in favour of his nephews and he remained in jail for one month. In the given circumstances, Sahib Singh Lambardar had a strong motive to become an attesting witness of the receipt and depose against the respondent-plaintiff. Not only this, Sahib Singh Lambardar is closely related to the appellants as Prem Lal appellant is his nephew (Bhatija) and Faquir Chand is his Bhanja (nephew). In view of the above, the courts have rightly refused to rely upon testimony of Sahib Singh Lambardar in respect of the receipt in question. The very fact that Sahib Singh Lambardar had hostility against the respondent-plaintiff and his family and is closely related to the appellants creates a serious doubt regarding genuineness/correctness of receipt Ex. D1 propounded by the appellants and further gives a jolt to their plea of bona fide purchasers as the word 'bona fide' connotes free from doubt etc.

The appellants examined another witness Joginder Lal DW3, an attesting witness of the receipt. He has admitted in his cross examination that he was present at the time of execution of agreement to sell in favour of Ranbir and at that time Sat Pal was also present. Perusal of cross examination of the witnesses examined in the case particularly the witnesses examined by the respondent-plaintiff would reveal that it was sought to be proved by defendants No. 1 and 2 that agreement in question was prepared at the time of execution of agreement to sell dated 19.12.1996 in favour of Ranbir and Sat Pal signatory of the agreement in dispute was also present

there at that time. The agreement dated 19.12.1996 propounded by the respondent-plaintiff has been proved and findings of the courts in this regard have attained finality, noticed hereinbefore. Had it been true that receipt dated 4.10.1996 was actually executed on that date and was attested by Joginder Lal on that day, there was no reason for Joginder Lal not to disclose the factum of sale of land by Kaushalya when agreement in favour of Ranbir and Sona Devi plaintiff was executed by Devi Dayal on 19.12.1996. This fact alone is sufficient to create a doubt in testimony of Joginder Lal that receipt with regard to payment of Rs. 42,000/- was actually executed on 4.10.1996. In this view of the matter, it can be held that findings of the courts that receipt Ex. D1 has been ante dated are based upon correct appreciation of materials on record and do not call for interference.

The other aspect of the matter is that appellants did not have knowledge of agreement dated 19.12.1996 when sale deed dated 4.2.1997 was executed in their favour.

Sona Devi, respondent-plaintiff appeared in the witness box and tendered into evidence her duly sworn affidavit Ex. PW2/A. In para 7 of the affidavit in Hindi but translated in English, she has stated to the following effect:-

“That Faquir Chand and Prem Lal knew fully well about agreement dated 19.12.1996 from the beginning.”

The witness was cross examined at length but her statement to the aforesaid effect has not been touched/challenged in cross examination and as such amounts to admission on the part of appellants. She gets

corroboration, in this regard, from testimony of Devi Dayal defendant No. 2 (DW1) and attorney of the vendor who stated in his cross examination, reads thus:-

“I have sold the land. The persons in whose name the registry was made were told that there was dispute of agreement with Sat Pal. He had not given the money.”

An inference can be safely raised, in view of aforesaid extract from testimony of Devi Dayal that receipt Ex. D1 is ante dated because had Devi Dayal agreed to sell the suit land in favour of the appellants in October 1996 where was the occasion for him to disclose to the vendees/appellants that there was dispute regarding agreement with Sat Pal and he had not paid money.

A cumulative view of discussion aforesaid leads to an irresistible conclusion that receipt Ex. D1 has been ante dated; the appellants had knowledge of agreement at the time of sale deed, therefore, their plea of bona fide purchasers has rightly been rejected by the courts below.

Counsel for the respondent-plaintiff has relied upon judgments of this court **Deep Singh and others’ case (supra)** and **Ram Dass and others’ case (supra)** for imputing knowledge of agreement to the appellants as they are residents of the same village where disputed land is situated. However, counsel for the respondent has failed to point out certain vital facts brought forth in cross examination of appellant Prem Lal that necessarily leads to an inference qua knowledge of agreement.

Prem Lal in his cross examination has stated to the following

effect:-

“I had seen the land before entering into transaction(sauda).

This is close to our land. I do not know who was cultivating the land on the date I entered into transaction. The boundary/dol of land of my ownership abuts the land in question.”

Admittedly, a part of disputed land was under mortgage with sons of the respondent-plaintiff. The disputed land is adjoining to land owned by the appellants. It is difficult to accept that owners of adjoining land in a village would not be aware of agreement of sale in favour of one of the family members of the mortgagees. In view of the above, it can safely be held that the appellants were aware of the agreement of sale but still agreed to purchase the land, may be, because the same adjoins their land. They did not bother to make enquiries with regard to part of land being under mortgage and this fact creates a serious dent in their plea of bona fide purchasers. Analyzed from any angle, I do not find any reason to differ with findings of the courts negating plea of bona fide purchasers raised by the appellants. That being so, findings of the courts on issue No. 1-A are liable to be affirmed and ordered accordingly.

No other point has been raised.

In view of what has been discussed hereinbefore, finding no merit, the appeal fails and is accordingly dismissed with costs.

Rekha Mittal
Judge

27.5.2019

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Whether speaking/reasoned : Yes

Whether reportable : Yes/No