

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA-838-2015(O&M)

Date of decision:-22.5.2019

Phool Chand (since deceased) through his LRs

...Appellants

Versus

Vijay Kumar and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Nupur Chaudhary, Advocate
for the appellants.

Mr.Munish Gupta, Advocate
for the respondents.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiffs Vijay Kumar @ Vijay Singh and his brother Deep Chand, residents of Mohalla Misharwada, Narnaul, Tehsil Narnaul, District Mahendergarh had brought a suit against defendants i.e. Phul Chand, deceased, represented through his LRs and Ram Lal, deceased, represented by his LRs seeking a decree for specific performance of contract in respect of land comprised in Khewat No.298 khatuni

no.441, 441/1,441/2 khasra no.579/1 measuring 2 biswa 10 biswansi out of total land measuring 5 biswa situated at Narnaul as per jamabandi to the extent of 1/2 share, such property being detailed in head-note of the plaint as well as in the judgment of trial Court. In the alternative the plaintiffs had sought a decree for recovery of Rs.2,26,000/-, in addition to that craving for grant of permanent injunction against the defendants restraining them from mortgaging, selling, gifting the suit land and not to interfere in the use and possession of the plaintiffs over the same. The plaintiffs had further contended that if the Court came to the conclusion that specific performance was not to be granted against defendant No.1 then a decree for specific performance qua 1/4 share of Ramlal be passed after adjusting the amount.

As per the version of the plaintiffs, the defendants being owners in possession of the suit land measuring 2 biswa 10 biswansi had entered into an oral agreement to sell with plaintiffs on 20.5.2001 receiving Rs.1,56,000/- as earnest money, whereas the remaining sale consideration amount was agreed to be paid at the time of registration of the sale deed on 21.5.2001; that the possession was delivered to the plaintiffs at that time; that all the terms and conditions were agreed to by defendant Phul Chand and Roshan Lal, GPA of defendant Ram Lal; that Vijay Singh purchased stamp of Rs.35,030/- on 21.5.2001; that the sale deed was also scribed and

entered in the register of the Deed Writer, thereafter Phul Chand left the spot on the pretext of urinating and after completion of all the formalities except the signatures of Phul Chand, signatures of all the parties, attesting witnesses were obtained; since Phul Chand did not turn up and it was 4:30 p.m., so the date of registration of the sale deed was postponed for 22.5.2001; however on 11.6.2001 the defendants refused to execute the sale deed, giving rise to a cause of action to the plaintiff to bring the suit.

On notice defendants No.1-A, 1 and 2 had appeared and filed separate sets of written statements contesting the suit.

In the written statement filed by defendant No.1-A, he challenged the locus standi of the plaintiffs to bring the suit contending that it was not maintainable and no cause of action had arisen to the plaintiffs to file the same. On merits, such defendant contended that no oral agreement to sell dated 22.5.2001 was ever entered into and his father had not informed him in that regard and further when no oral agreement to sell was entered into, the question of receiving sale consideration did not arise; furthermore father of the answering defendant was not having any share in the suit land, therefore question of executing oral agreement to sell did not crop up. Denying the remaining allegations, such defendant prayed for dismissal of the suit.

In the written statement filed on behalf of defendant

No.1, he also contested the suit on merits contending that the details of the Khasra No.579/1 had been wrongly mentioned and the answering defendant had not entered into any oral agreement to sell and furthermore once the answering defendant had no share in the suit land, there was no question of executing the oral agreement to sell. Such defendant also prayed for dismissal of the suit.

In the written statement filed on behalf of defendant No.2, it was contended that with regard to suit land he had arrived at a compromise with his brothers in the year 1970 and as per the compromise he was not owner in possession over khasra No.579/1; that he had not entered into any oral agreement to sell; that in the year 1970 his GPA was about 8-10 years, as such the compromise was not to his knowledge; that the market rate of the suit land was about Rs.24 lacs, so the question of entering into the oral agreement to sell for the sum of Rs.2,26,000/- did not arise and if the GPA of the answering defendant had executed any oral agreement to sell then the same is not binding upon him; that the possession of the suit land was never given to the plaintiff and that if some oral agreement to sell was there then the same is not binding upon him. Refuting the remaining allegations, such defendant also prayed for dismissal of the suit.

The plaintiffs had filed replication controverting the allegations in the written statements whereas reiterating the

averments in the plaint.

On the pleadings of the parties, following issues were framed:

1. Whether the defendant has agreed to alienate the property in dispute vide agreement dated 20.5.2001, as alleged in the plaint? OPP.
2. Whether the plaintiffs have paid Rs.1,56,000/- to the defendant as earnest money? OPP.
3. Whether the defendants have delivered the possession of the suit property at the time of execution of the agreement dated 20.5.2001, if so its effect? OPP.
4. Whether the plaintiffs were or are willing to perform their part of contract? OPD.
5. Whether the suit is not maintainable in the present form? OPD.
6. Whether the defendants are entitled to special costs under Section 35A CPC? OPD.
7. Relief.

Both the parties led evidence in respect of their claims.

During the course of their evidence, the plaintiffs had examined Sh.Ravi Kumar, Deed Writer as PW1, Sh.Sukhram as PW2, Sh.Mahabir Parsad, Lambardar as PW3, Sh.Vijay Kumar Soni as PW4, Sh.Surender Singh as PW5, Sh.Om Parkash as PW6, Sh.Mahender Singh as PW7, Sh.Hemchand as PW8 and Sh.Dinesh

Kumar, Registration Clerk as PW9.

On the other hand, the defendants had examined Sh.Harchand as DW1 and Sh.Daya Nand as DW2.

After hearing the learned counsel for the parties, the trial Court decided issues Nos.1 to 3 against the plaintiffs, issues Nos.4 to 6 against the defendants being not pressed. Resultantly, suit of the plaintiffs was dismissed. This was so done vide judgment and decree dated 18.3.2011.

The plaintiffs were aggrieved by the said judgment and decree and they had filed an appeal before the Court of District Judge, Narnaul, which was assigned to Additional District Judge, Narnaul, who vide judgment and decree dated 10.12.2014 accepted the appeal, set aside the judgment and decree passed by the trial Court directing the defendants to get the sale deed executed and registered in favour of the plaintiffs after receiving the balance sale consideration at the expenses of the plaintiffs within two months from the date of passing of the judgment and in case the defendants failed to do so then the plaintiffs would get the sale deed executed through Court of law.

Now it was turn of the defendants to feel dissatisfied and they have filed the present regular second appeal before this Court, notice of which was issued to the respondents/plaintiffs, who appeared through counsel.

I have heard learned counsel for the parties besides going through the record.

The trial Court had dismissed the suit of the plaintiffs mainly for the following reasons:

- (i) that it had not been mentioned by the plaintiffs in their pleadings that as to in presence of which persons an amount of Rs.1,56,000/- was given to the defendants, though at the time of leading evidence, the plaintiffs had introduced many witnesses to show that at the time of alleged oral agreement to sell dated 20.5.2001 that amount was paid as earnest money in their presence;
- (ii) that normally the Deed Writer of a document affixes his stamps and signatures only after signing of the vendor, vendees and attesting witnesses on the document but in the present case seal and signatures of the Deed Writer have been affixed even without signatures of one of the vendor i.e. Phul Chand;
- (iii) that non-payment of Rs.1,56,000/- as earnest money to the defendants gets corroborated from the statement of PW2 Sukhiram, who in his cross-examination had stated that in his presence, no amount was given by Vijay Kuamr and Deep Chand to Phul Chand and Roshan Lal. PW3 Mahabir Parsad, Lambardar, alleged witness of the sale deed in his cross-examination had stated that no transaction had taken place in

his presence. PW6 Om Parkash in his cross-examination had stated when Roshan Lal put his signatures at that time, no payment was made;

(iv)that in the alleged sale deed Ex.P1 it is mentioned that possession of the suit property was given to the plaintiffs but when plaintiff himself appeared in the witness box as PW4, in his cross-examination he showed ignorance with regard to length and width of the suit property going to the extent of saying that presently the land is lying vacant and no one is in possession thereof, meaning thereby that no possession was ever delivered to the plaintiffs. There is no document to show delivery of possession by the defendants to plaintiffs;

(v)that PW7 Mahender Singh in his cross-examination had stated that he knows Roshan Lal for the last 7-8 years. The oral agreement was statedly settled on 20.5.2001 when statement of this witness was recorded on 9.2.2011, which means that the witness did not know Roshan Lal and Phul Chand at the time of alleged oral agreement to sell dated 20.5.2001 and he is a procured witness; and

(vi)that as per documents Ex.D1 to Ex.D3 placed on file to be more precise in Ex.D1 the value of Rs.2 lacs has been shown for land measuring 4 biswansi, in Ex.D2 the value of Rs.2 lacs has been shown for land measuring 7 biswansi and in Ex.D3

the value of Rs.1,75,000/- has been shown for land measuring 3 biswansi. Whereas in the present case the suit land i.e. 2 biswa 10 biswansi had been sold for a meagre amount of Rs.2,26,000/- and as per the amounts mentioned in Ex.D1 to Ex.D3, the value of the suit property comes out to be Rs.25 lacs approximately being situated in the same vicinity. Therefore the sale deed Ex.P1 and GPA Ex.P2 seems to be doubtful.

Consequently, the suit of the plaintiffs had been dismissed.

The Court of learned Additional District Judge, Narnaul while accepting the appeal and setting aside the judgment and decree passed by the trial Court and decreeing the suit of the plaintiffs for specific performance has given the reasons, which are enumerated as under:

- (i) that in view of Order 6 Rule 2 Sub Rule 1 every pleading is required to contain only a statement in a concise form and all the material facts on which the party relies upon for his claim or defence and the evidence by which facts are to be proved is not required to be stated. Therefore, non-mentioning of names of the persons in whose presence the plaintiffs had statedly paid a sum of Rs.1,56,000/- to the defendants cannot be taken adversely against the plaintiffs;

(ii)that as per the case of the plaintiffs, possession of the suit property was delivered to them on 21.5.2001 and as per the case of both the parties, the land is lying vacant since the trial Court had directed both the parties to maintain status quo regarding the possession over the suit property till final decision of the suit, vide order dated 18.2.2002, as such no inference can be drawn that no possession was given to the plaintiffs;

(iii)that the documents Ex.D1 to Ex.D3 pertained to small pieces of land, that may be having prime location on the main road and the value given therein cannot be taken to be indicative of the value of the suit property and as per the sale deed Ex.P11, Deep Chand, brother of Phul Chand and Ram Lal had sold his share in that very land i.e. 1 bigha 3 biswa for a sale consideration of Rs.1 lac on 9.7.2001;

(iv)that the suit was filed on 15.6.2001, however Ram Lal had executed and got registered a release deed dated 22.6.2001 with regard to his share in the suit land i.e. 1 biswa 5 biswansi. Phul Chand has sold away his share in the suit land on 11.6.2001, vide sale deed, Ex.P9 while stating in the sale deed that agreement was entered on 21.5.2001;

(v)that the sale deeds relied upon by the plaintiffs was also scribed on 21.5.2001, which fortifies the fact that Phul Chand was very

much present in the Sub Registrar office premises on that very day and sale for consideration of Rs.2,50,000/- was just to defeat the claim of the plaintiffs and cause loss to them;

(vi)that the defendant No.1 in the written statement filed on 17.1.2002 had not stated regarding his presence in the premises of Sub-Registrar Office, Narnaul on 21.5.2001 and nothing has been stated that a sale deed has been executed and registered in favour of Pyare Lal on 11.6.2001, showing thereby that defendant No.1 had not approached the Court with clean hands;

(vii)that it is specific case of the plaintiff that on 11.6.2001 the defendants had refused to get the sale deed executed and registered;

(viii)that it was held in an ancient decision of the Privy Counsel that an oral contract is valid and enforceable;

(ix)that the execution of the sale deed has been proved by PW1 Ravi Kumar, Deed Writer, who had identified the signatures of Satya Narayan Bhardwaj, deed Writer, who had scribed the sale deed Ex.P1 stating that Satya Narayan had died;

(x)that PW2 Sukhi Ram and PW3 Mahabir Prashad had proved the execution of sale deed as well as by attesting witness as well as special attorney. PW4 Vijay Kumar plaintiff had proved the averments of the plaint and readiness and willingness to perform their part of contract; and

(xi)that the alienations by the defendants were hit by principle of lis pendense.

In the grounds of appeal preferred by the appellants following question of law were formulated:

- i) Whether in view of the facts and circumstances of the present case, the plaintiffs/respondents have proved the existence of a valid and binding oral agreement to sell dated 20.05.2001 between the parties or not?
- ii) Whether Ld. First Appellate Court has committed a grave error of law while admitting the oral evidence of PW Nos.5, 6, 7 and 8 thereby adding to the terms of document Ex.P-1 being in contravention of Section 91 and 92 of The Indian Evidence Act, 1872 or not?
- iii) Whether Ld. First Appellate Court has wrongly applied the principle of lispendens under Section 52 of the Transfer of Property Act to the registered sale deed dated 11.06.2001 Ex.P9 executed by original defendant No.1-Phool Chand regarding his 1/2 share (1 Biswa 5 Biswansi) being prior in time to the filing of present civil suit or not?
- iv) Whether testimony of PW9-Dinesh Kumar is liable to be ignored in view of the fact that he was not produced to

face the cross examination and consequently the GPA Ex.P-9/A shall be deemed to be not proved as per law or not?

v) Whether Ld. First Appellate Court has committed a grave error of law while admitting the evidence on behalf of the plaintiffs/respondents which was beyond their pleadings or not?

vi) Whether Ld. First Appellate Court has committed a grave error of law while reversing the finding on issue No.1 despite the fact that there is no recital of oral agreement to sell dated 20.05.2001 in the document Ex.P-1 and thereby wrongly admitted the evidence in contravention of the Section 93 of The Indian Evidence Act, 1872 or not?

vii) Whether in view of the facts and circumstances of the case, the Ld. First Appellate Court has committed a grave error of law while reversing the judgment and decree passed by Ld. Trial Court in view of the settled preposition of law in a suit for specific performance by the Hon'ble Supreme Court of India or not?

viii) Whether impugned judgment and decree dated 10.12.2014 passed by Ld. First Appellate Court thereby reversing the findings of Ld. trial Court on issue No.1, 2

and 3 are perverse or not?

After carefully applying my mind to the rival contentions in light of the legal and factual position I find that the judgments passed by the Courts below do suffer from several infirmities. From the evidence adduced by the plaintiffs passing of an amount of Rs.1,56,000/- from the plaintiffs to defendants No.2 Ram Lal on 20.5.2001 stand proved, though the defendants have tried to deny receipt of this amount. However, the plaintiffs have been unable to establish by leading enough cogent and convincing evidence on record that they have been ready and willing to perform their part of the contract and to get the sale deed executed in their favour. The draft sale deed does not contain signatures of Phul Chand. Though according to the plaintiffs he had gone away on the pretext of urinating and did not come back on 21.5.2001, the date of registration was postponed for 22.5.2001 but no notice is shown to have been served by the plaintiffs to Phul Chand in that regard. According to the version of the plaintiffs, the defendants had refused to get the sale deed executed on 11.6.2001. As per case of the plaintiffs, Roshan Lal had signed the draft sale deed as attorney of Ram Lal. PW9 Dinesh Clerk, Registration Clerk had brought the summoned record with regard to the general power of attorney in question registered in the office of Sub-Registrar, Narnaul. He proved the certified copy of the power of attorney as Ex.PW9/A,

though his cross-examination had been deferred. But then the execution of this document is not disputed by LRs of defendant No.2 and their counsel had made a statement in the Court in that regard on 2.8.2005. The draft sale deed bears signatures of Roshan Lal, attorney of Ram Lal and not of Phul Chand. Therefore, Phul Chand could not possibly be bound by any agreement to sell and be asked to execute the sale deed in favour of the plaintiffs.

The First Appellate Court without going into depth of the matter to determine as to whether the plaintiffs have been ready and willing to perform their part of agreement i.e. they were having financial capacity to pay the remaining consideration amount and desire to get the sale transaction completed and without touching evidence in that regard has granted specific performance of agreement setting aside the sale deeds executed by the defendants. In my considered view the plaintiffs are entitled to alternative relief of refund of earnest money instead of specific performance of agreement to sell.

Therefore, the judgment and decree passed by learned Additional District Judge, Narnaul are hereby modified inasmuch in place of decree for specific performance a decree of recovery of Rs.1,56,000/- with interest @ 6% per annum from the date of payment i.e. 20.5.2001 till actual realization besides costs throughout is passed in favour of plaintiff – LRs of deceased Ram Lal since the

document was signed by Roshan Lal attorney of Ram Lal in which receipt of Rs.1,56,000/- is admitted.

With the abovesaid modification, the appeal is allowed partly.

22.5.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No