

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.5943 of 2014 (O&M)
Date of Decision:23.01.2019

Noor Mohd

...Appellant(s)

Versus

Shashi and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Sachin Mittal, Advocate for the appellant.
Mr.Kunal Mulwani, Advocate for the respondents.

ANIL KSHETARPAL, J.

The defendant-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the courts below, while decreeing the suit for specific performance of the agreement to sell dated 10.5.2006.

Substantial question which requires determination is “whether oral evidence is permitted to prove that the written agreement is sham and intended to be something different than what is written therein or oral evidence is barred to examine under Section 92 of the Evidence Act”?

The plaintiff-Ram Niwas filed the present suit on 14.05.2010 by asserting that the defendant-appellant Noor Mohd. had entered into an agreement to sell with him to sell the land measuring 15 kanals and 16 marlas @Rs.1,62,500/- per acre and received earnest money of Rs.2,70,000/-. Sale deed was agreed to be executed and registered on

15.05.2007. The plaintiff has pleaded that on 15.05.2007, he was ready and willing to perform his part of the contract but the defendant did not come forward and he also visited the office of Sub Registrar, Ferozepur Jhirka to get the sale-deed executed. Hence, in token of his attendance, he got an affidavit attested from the Sub Registrar on 15.05.2007. The plaintiff is alleged to have sent a notice through counsel on 19.03.2010 by registered post and thereafter filed the present suit.

The defendant contested the suit and pleaded that the plaintiff, who runs a jewellery shop, is also in the business of money lending and the defendant used to borrow the amount from him from time to time and every time whenever the amount was taken as a loan he would get agreement to sell signed as a security document. It is further asserted by the defendant that after settling the account, plaintiff with his own hand prepared an account statement dated 06.04.2007 in which the total outstanding amount was worked out at Rs.2,57,774/- and finally accounts were settled for Rs.2,50,000/-. The aforesaid amount was paid but the plaintiff did not return the papers which were got signed and only issued a receipt of Rs.25,000/- in place of Rs.2,50,000/-.

It would be noted that Ram Niwas-plaintiff died on 10.11.2012. He did not appear in evidence although, issues were framed on 23.8.2011 and the case was adjourned for the evidence of the plaintiff to 25.11.2011 and 21.3.2012.

The learned trial court, after recording a finding that execution of the agreement to sell has been proved and the plaintiff was ready and willing, decreed the suit. The learned trial court further found that

calculation, which is alleged to be in writing of the plaintiff Ram Niwas and receipt of Rs.25,000/- have not been proved.

The appeal was preferred by the defendant and the learned first appellate court has dismissed the appeal by recording following reasons:-

- (i) In the agreement to sell, it has not been written that the agreement is only for the purpose of security of loan and, therefore, the contention of the defendant runs counter to the averments of the agreement and by virtue of Section 92 of the Evidence Act, no oral evidence can be admitted.
- (ii) The plea of loan transaction has been taken just to frustrate the fruits of the agreement to sell.
- (iii) No prudent person would not take back the signed documents on payment of the amount.
- (iv) The specific performance of the agreement to sell cannot be denied only on the ground that the suit was filed on the last day of limitation.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

It would be noted that the defendant has pleaded that he and his co-villagers used to borrow the amount from the plaintiff Late Sh. Ram Niwas and he would get such agreements executed to secure the repayment of the amount. As noted above, Ram Niwas has not appeared in evidence. However, his son Mohit has appeared in the evidence, although, he has denied that his father was in the business of money lending and he used to

get such agreements to sell executed to secure repayment of the amount, however, in cross-examination, he has admitted that the suit, on the basis of agreements, have been filed against Maksood. He has further admitted that one case against a person whose name is not clear from the statement, son of Sumer, is pending which is also with respect to land in the same village. He has further admitted that one similar suit is pending against Zakir. When he was confronted with the fact that three agreements were got signed from father of Sumer and in the aforesaid suit, they have lost, he explained that the aforesaid suit is pending. Thus, it is admitted on the file that four such suits have been filed by late Shri Ram Niwas for specific performance of the agreement to sell. He admitted that they do not own any property in the village. Still further, a reading of the statement of Mohit, it is apparent that he is not telling the truth. Therefore, he is not a reliable witness. In the initial part of the cross-examination, he denies that his father used to get such agreements signed or his father was into the business of money lending but he went on to admit pendency of four such suits.

The plaintiff has also examined Scribe of the agreement to sell as PW-2. A reading of the statement of this witness, it is apparent that this witness is also not trustworthy. When he was given suggestion that the residence of Ram Niwas-plaintiff and his office is at a distance of 100 yard, he feigned ignorance. When he was asked question whether he had executed many agreements on behalf of Ram Niwas, he again feigned ignorance. He was further asked question whether he has appeared as witness in various suits for specific performance filed by Ram Niwas, he again feigned ignorance by stating that he does not remember. Thus, such

witness cannot be relied upon to decree the suit for specific performance when the witness makes an effort to conceal more information than disclosing it.

Still further, on reading of the plaint, it is apparent that no explanation has been given as to why filing of the suit was delayed for a period of three years. In para 3 of the plaint, plaintiff has stated that he went on to the office of Sub Registrar on 15.05.2007 and got his affidavit attested. In para 4, the plaintiff has stated that he was always ready and willing to perform his part of the contract. He has stated that he approached the defendant so many times and requested him to execute the sale-deed in terms of the agreement but he postponed the matter. The plaintiff has further alleged that he got issued a notice dated 19.3.2010 to the defendant. It is, thus, apparent that there is complete silence on behalf of the plaintiff for a period of 2 years and 10 months. Had there been any agreement between the parties for purchase of the property, there was no reason why the plaintiff would wait till the end of limitation period to file the suit.

Now let us deal with the reasons given by the learned first appellate court to non suit the defendant-appellant.

The learned first appellate court has referred to Section 92 of the Evidence Act to record a finding that since agreement to sell does not record that the document is a security transaction, therefore, no oral evidence in this regard can be led. In the considered view of this Court, Section 92 of the Evidence Act has no application in the facts of the present case. Section 92 provides that when the terms of any such contract is in writing, no evidence of oral agreement shall be admitted for contradicting,

varying adding to, or subtracting from its terms. Section 92 of the Evidence Act contains as many as six provisos. Section 92 does not absolutely bar leading of oral evidence. The bar to lead oral evidence is only if the evidence led falls within the prohibition/restriction provided in Section 92 of the Evidence Act. It is permissible for a party to the written contract to lead oral evidence to prove that it is a sham agreement and intended to be something different than what is written therein. When character and real nature of contract is questioned, oral evidence is permitted to prove real contract/agreement. It is further permissible for a party to prove by oral evidence that the written contract was never intended to be acted upon or character of the document is different than what is recorded/projected therein.

The next reason assigned by the learned first appellate court that the plea of loan transaction has been taken just to frustrate the fruits of the agreement is clearly erroneous. The defendant, while defending a suit for specific performance, is entitled to take a plea that the agreement to sell was never intended to be a sale transaction but was only security document to secure the loan amount.

The next reason assigned by the learned first appellate court that no prudent man would leave the documents with other person if the amount has been re-paid is also erroneous, keeping in view the status of the parties. On one side, there is a resourceful person (gold smith), running a shop dealing in the jewellery, whereas on the other side, there is a rustic villager who has pleaded that in fact this was a loan transaction and he had been taking loan from time to time. Once a person is in desperate need of

money, the prudence does not come into play or cannot be expected. Once there is big difference between the status of the parties and financially weak party is in desperate need of the finances, he would sign on the dotted lines. Therefore, the courts have erred in not considering the evidence of the defendant.

The next reason assigned by the court that merely because the suit was filed on the last day of limitation would not be a sufficient ground to deny the relief of specific performance. In this regard, it may be noted that the relief of specific performance of the agreement to sell is in discretionary relief and the courts are required to evaluate the evidence and thereafter arrive at a conclusion whether the agreement to sell was really intended to be a sale transaction or it was for some other oblique purpose.

Keeping in view the evidence, which has been led and in particular, admission of son of the plaintiff Mohit with respect to pendency of four such litigations of similar nature, it is apparent that the plea of defendant was correct to the effect that the agreement to sell was only a security document to secure the repayment of the amount. Further no reason/plausible explanation has been furnished by the plaintiff to justify the delay of three years in filing the suit from the target date fixed as per agreement, although no doubt, the suit is within limitation. However, keeping in view that the relief is discretionary, the plaintiff has to prove that he was always ready and willing to perform his part of the contract. A word of caution, this Court is not recording that in all the cases wherever there is a delay of approximately three years or close to it, the decree for specific performance should not be granted. It always depends on the facts and

evidence available on the file. The plaintiff has only pleaded that he requested the defendant but he kept on postponing. No normal person is expected to wait for three years.

Accordingly, question as framed is answered in favour of defendant-appellant.

Keeping in view the aforesaid facts, the Regular Second Appeal is allowed. The decree for specific performance is substituted with a decree for recovery of the amount of earnest money, i.e. Rs.2,70,000/-. The plaintiff shall be entitled to recover amount of Rs.2,70,000/- along with interest @9% from the date of agreement to sell till repayment.

Pending application(s), if any, shall also stand disposed of, in terms thereof.

23.01.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No