

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

Regular Second Appeal No. 4878 of 2018(O&M)

Date of Decision: March 25 , 2019.

Karnail Singh

..... APPELLANT (s)

Versus

Bhag Singh

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. A.P.Kaushal, Advocate
for the appellant.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

Appellant-plaintiff is aggrieved of judgment and decree dated 18.05.2018 passed by learned District Judge, Rupnagar whereby judgment and decree dated 28.02.2018 passed by the learned Civil Judge (Junior Division), Sri Anandpur Sahib has been set-aside consequently, dismissing the suit filed by the appellant-plaintiff.

Brief facts necessary for adjudication of this case are that, suit for possession by way of specific performance of agreement to sell dated 09.08.2011 executed by the defendant, in respect to the property as detailed in the plaint, was prayed for. It is pleaded that defendant-respondent, Bhag Singh, was owner of the

suit property and he agreed to sell the same in favour of the plaintiff-appellant for sum of ₹1,00,000/-, out of which ₹75,000/- was received by defendant-respondent as earnest money and balance was to be paid on or before on 09.07.2012 i.e., the date when sale-deed was agreed to be executed by the defendant. Agreement to sell dated 09.08.2011 was alleged to be duly executed. However before the stipulated date, it was pleaded that the defendant threatened to alienate the suit property in favour of some other person. Hence suit for permanent injunction was filed which is still pending. It is further pleaded that the plaintiff was always ready and willing to perform his part of the agreement, but it is the defendant who did not come forward. Hence, the suit was filed.

Defendant-respondent resisted the suit. Various preliminary objections were taken in the written statement and averments on merits were controverted, though it is admitted that he is the owner in possession of the suit property. It is stated that the agreement to sell dated 09.08.2011 is a forged and fabricated document prepared by the plaintiff, who is none other but real nephew of the defendant. Defendant stated that he is an old, illiterate person and a patient of tuberculosis and other chronic diseases. Defendant had reposed faith in his nephew, the plaintiff, who is an active worker of the ruling party in the State. Plaintiff assured the defendant that he would help the defendant to prepare a BPL (Below Poverty Line) Card. Plaintiff purchased stamp papers on the pretext that an affidavit was to be executed and furnished for obtaining a BPL Card. It is the said stamp papers which have been misused while taking undue benefit of illiteracy of the defendant. When the defendant came to know about the fraud perpetuated by the plaintiff, he even approached the police authorities. The

agreement, it is stated, was prepared in connivance with the others. Dismissal of the suit was prayed for.

Replication was filed. On the basis of the pleadings of the parties, following issues were framed:-

1. Whether the plaintiff is entitled for specific performance of agreement to sell dated 08.08.2011, as prayed for? OPP
2. Whether the plaintiff is entitled for consequential relief of permanent injunction, as prayed for? OPP
3. Whether the suit of the plaintiff is not maintainable? OPD
4. Relief.

Both the parties led evidence to substantiate their respective claims/stands. One of the two attesting witnesses, namely, Gopal Singh was examined as PW1 by the plaintiff and the other attesting witness appeared on behalf of the defendant as DW3, namely, Phuman Singh, who completely denied the execution of the agreement to sell.

Learned Trial court on considering the evidence on record, facts and circumstances of the case concluded that the plaintiff successfully proved execution of the agreement to sell dated 09.08.2011 by the defendant in favour of the plaintiff. Readiness and willingness on the part of the plaintiff was also held to be proved, therefore, the suit was decreed in favour of the plaintiff-appellant.

Appeal preferred by the defendant-respondent was, however, allowed by the learned District Judge, Rupnagar vide impugned judgment and decree dated 18.05.2018 while categorically holding that the plaintiff had taken undue advantage and benefit of the relationship between the parties and trust reposed by the defendant in the plaintiff. Agreement to sell, it was observed, was

not proved on record. Therefore, the suit filed by the plaintiff was dismissed.

Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellant vehemently argues that execution of the agreement dated 09.08.2011 is duly proved on record. Merely because DW3 Phumman Singh one of the attesting witness has not supported the appellant/plaintiff's case, does not detract from the plaintiff's case. Furthermore, it is proved on record that earnest money was duly handed over by the plaintiff to the respondent, therefore, it is contended that the learned District Judge, Rupnagar has grossly erred in reversing the well reasoned and logical judgment, passed by the learned trial court on 28.02.2018. It is thus prayed that impugned judgment and decree dated 18.05.2018, passed by the learned District Judge, Rupnagar, be set aside. Consequently, suit filed by the plaintiff/appellant be decreed throughout.

I have heard learned counsel for the appellant and have gone through the file with his able assistance.

Relationship between the parties is not in dispute. The plaintiff, in order to prove execution of the agreement to sell and passing of earnest money of ₹75,000/- to the defendant, has stepped in the witness box and examined himself as PW2. Gopal Singh, one of the attesting witnesses has been examined as PW1. It is noticed that in the examination-in-chief both, the plaintiff as well as PW1 Gopal Singh, deposed that the defendant received an amount of ₹75,000/- from the plaintiff in the presence of both the attesting witnesses. Earnest money as per the agreement to sell was handed over by the plaintiff to the defendant at the time of the execution of the agreement. It is a matter of record that both the plaintiff as

well as PW1 Gopal Singh in their cross-examination completely changed their stand about the time, manner and place of making payment of the earnest money to the defendant. PW1 Gopal Singh deposed that this money was paid by the plaintiff to the defendant in the presence of DW1 Phuman Singh only, in the house of the defendant. PW1 Gopal Singh further stated that no payment was made to the defendant at the seat of scribe. Plaintiff also deposed that the money in question was paid in the presence of DW1 Phuman Singh only.

It is pertinent to note, at this stage, that DW1 Phuman Singh specifically stated that no earnest money was ever paid by the plaintiff to the defendant in his presence. DW1 Phuman Singh has denied the execution of any such agreement to sell dated 09.08.2011 by the defendant in favour of the plaintiff in his presence. Passing of the earnest money has also been denied. DW1 Phuman Singh has, in fact, even denied his thumb impression on the agreement to sell. It is rightly held by the learned District Judge, Rupnagar that there is no reason, whatsoever, to discredit the testimony of DW1 Phuman Singh as it is admitted by plaintiff-Karnail Singh that there is no enmity between the plaintiff and DW1 Phuman Singh and there is no reason as to why said Phuman Singh would have deposed in this manner, if it was not as per reality. Furthermore, the plaintiff has not taken any steps for comparison of the thumb impression of the attesting witness, Phuman Singh, in case it was felt that Phuman Singh was deposing falsely.

It is relevant to note that plaintiff has admitted in his cross-examination that the defendant is his paternal uncle. However, it is a matter of record that the relationship between the parties is not mentioned in the plaint by

the plaintiff-appellant. It is further admitted that the defendant was earlier residing with the plaintiff at his house, but the defendant started living separately after filing of the present suit by the plaintiff. Defendant's house, it is stated, is adjacent to the plaintiff's. Plaintiff further admitted that he had been cultivating the land of the defendant from the beginning.

It is further a matter of record that plaintiff/appellant has not specifically denied that the defendant is a patient of tuberculosis, but has chosen to feign ignorance thereof. In the factual matrix of the case, credence has to be placed on the version of the defendant, who is proved to be an old and illiterate person of 70 years suffering from tuberculosis. There is truth in the defence set up by the defendant that the plaintiff taking undue advantage of his weakness and illiteracy, obtained his thumb impressions for obtaining a BPL card and misused the papers. Plaintiff in his cross-examination has not denied that the defendant moved a complaint before the SHO, Police Station Nurpur Bedi that the agreement in question is false and fabricated.

Furthermore, 3/4th of the sale-consideration was allegedly given at the time of the execution of agreement to sell, but still dimensions of the land in question could not be given by the plaintiff. Plaintiff is proved to be in a dominant position and able to exert and derive undue benefit of the trust reposed in him by the defendant. In the factual matrix of the case, learned District Judge, Rupnagar has rightly observed that evidence of fraud and misrepresentation can be gathered from the evidence on record. Therefore, the suit filed by the plaintiff has been rightly dismissed by the learned first appellate court and correct findings of fact have been rendered on the basis of proper appreciation of the evidence on

record which do not call for any interference by this Court.

No other argument has been raised.

Learned counsel for the appellant/plaintiff is unable to point out any question of law, much less substantial question of law, which may be involved for consideration in this Regular Second Appeal.

Keeping in view the facts and circumstances as discussed above, I do not find any infirmity, illegality or perversity in the impugned judgment and decree dated 18.05.2018 passed by learned District Judge, Rupnagar whereby judgment and decree dated 28.02.2018 passed by the learned Civil Judge (Junior Division), Sri Anandpur Sahib has been set-aside consequently, dismissing the suit filed by the appellant-plaintiff, which warrants any interference by this Court.

Present appeal is, consequently, dismissed with no order as to costs.

March 25 , 2019.
'om'

(LISA GILL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No