

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

RSA No.6142 of 2017 (O&M)
Date of Decision: February 08, 2019

Jagdish

...Appellant

Versus

Baane Singh and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Rajesh Lamba, Advocate
for the appellant.

JAISHREE THAKUR, J. (Oral)

CM-16032-C-2017

1. There is delay of 02 days in filing the main appeal.
2. For the reasons mentioned in the application, the same is allowed and delay of 02 days in filing the appeal is condoned.

CM-16033-C-2017

1. There is delay of 318 days in re-filing the main appeal.
2. For the reasons given in the application, the same is allowed and delay of 318 days in re-filing the appeal is condoned.

Main case

1. This is regular second appeal filed by the appellant-plaintiff against the judgment and decree dated 31.07.2014 passed by the lower court whereby, the suit of the appellant-plaintiff has been partly allowed, as well

as the judgment and decree dated 24.05.2016 passed by the first Appellate Court, dismissing the appeal.

2. In brief, the facts of the case, as alleged, are that respondents No.1 and 2/defendants No.1 and 2 being owners in possession of the suit property (as detailed in para 1 of the plaint) agreed to sell the same in favour of the appellant-plaintiff vide agreement to sell dated 31.01.2006 for sale consideration of ₹ 1,48,750/- and received whole of the sale consideration amount in advance. It was averred that since there was ban imposed by Haryana Government in executing the sale deed of the properties, respondents No.1 and 2/defendants No.1 and 2 agreed to execute the sale deed in favour of the appellant-plaintiff or his nominee as and when demanded by the appellant-plaintiff. It was submitted that the appellant-plaintiff reached the office of Sub Registrar Faridabad on 05.09.2007 to perform his part of the contract, but respondents No.1 and 2/defendants No.1 and 2 did not appear there and failed to perform their part of the contract. In this regard, the appellant-plaintiff got his presence marked in the office of Sub Registrar, Faridabad by executing an affidavit. Thereafter, the appellant-plaintiff also issued legal notice dated 19.10.2007 to respondents No.1 and 2/defendants No.1 and 2 to execute the sale deed in his favour, but the legal notice received back undelivered. Hence, the present suit.

3. Upon notice, respondents No.1 and 2/defendants No.1 and 2 filed their joint written statement, while taking preliminary objections as to maintainability, cause of action, locus standi and mis-joinder of parties. On merits, they denied the execution of agreement to sell dated 31.01.2006 and

receiving the amount of ₹ 1,48,750/- as full and final payment of sale consideration. It was alleged that by taking the benefit of illiteracy of respondents No.1 and 2/defendants No.1 and 2, the appellant-plaintiff got their signatures on some blank papers and used it as sale agreement. It was averred that under the impression of huge amount, the appellant-plaintiff imposed the condition that they should sign said papers and as and when they would refund the received money of ₹ 1,48,750/- along with 2% interest, he would return these signed papers to them. It was claimed that respondents No.1 and 2/defendants No.1 and 2 contacted the appellant-plaintiff many times to refund the amount along with interest, however, he intentionally avoided the matter. Rest of the averments were denied.

4. In the written statement filed on behalf of respondent No.3/defendant No.3, who was impleaded as a party to the suit vide order dated 16.10.2012 alleged that the suit is not maintainable and the same has been filed in collusion between the appellant/plaintiff and respondents No.1 and 2/defendants No.1 and 2, apart from raising the issue of concealing material facts from the court and that suit is bad non-joinder and mis-joinder of necessary parties. It was claimed that respondent No.3/defendant No.3 is the owner and in the physical possession of the plot measuring 119 sq. yards vide sale deed No.1820 dated 21.04.2008 registered in the office of Sub Registrar Faridabad for a consideration of ₹ 3,57,000/- and further claimed herself to be a bona fide purchaser of the suit property. It was averred that respondents No.1 and 2/defendants No.1 and 2 along with one Girdhar have filed a false suit against respondent No.3/defendant No.3 along with predecessor of respondent No.3/defendant No.3, from whom respondent

No.3/defendant No.3 had purchased the suit, for cancellation of the sale deed executed in favour of respondent No.3/defendant No.3. Remaining averments were denied.

5. From the pleadings of the parties, vide order dated 15.03.2008, following issues were framed by the lower court:-

1. Whether the defendant had executed an agreement to sell dated 31.01.2006 for a sale consideration of ₹ 1,48,750/-?OPP.
2. Whether full and final payment of sale consideration was made by plaintiff to the defendant?OPP.
3. Whether the plaintiff was/is ready and willing to perform his part of the contract?OPP.
- 4A. Whether the defendant No.3 is a bona fide purchaser of the suit property?OP defendant No.3.
5. Whether present suit is not maintainable in the present form?OPD.
6. Whether the suit is bad for non-joinder and mis-joinder of necessary parties?OPD.
7. Relief.

6. In order to prove his case, appellant-plaintiff Jagdish himself examined as PW1, Tejbir as PW2, Charan Singh as PW3, S.S. Nahta as PW4 and Joginder Pal as PW5. On the other hand, respondent No.1/defendant No.1 Bane Singh himself examined as DW1, respondent No.2/defendant No.2 Jai Singh himself examined as DW2, Gajender Singh as DW3, Sukhbir Singh as DW4, Rajender Singh Arora as DW5, Rohtash Singh, retired SI as DW6 and respondent No.3/defendant No.3 Kailashi Devi herself examined as DW7.

7. After hearing both the sides, the lower court has partly decreed

the suit of the appellant-plaintiff against respondents No.1 and 2/defendant No.1 and 2 and the appellant-plaintiff has been held entitled for recovery of ₹ 2,30,000/- from respondents No.1 and 2/defendant No.1 and 2 along with interest @ 6% per annum from the date of passing of consideration till its realization. Aggrieved, the appellant-plaintiff filed the first appeal, which came to be dismissed by the District Judge, Faridabad. Now both the judgments and decrees of the courts below are under challenge in this regular second appeal.

8. Learned counsel for the appellant-plaintiff argues that both the courts below failed to appreciate the fact that the appellant-plaintiff was always ready and willing to perform his part of the contract. It is contended that it is a common practice in District Faridabad and other Districts that for a certain period of time, registries are banned and both the courts below returned a wrong finding to the effect. It is also argued that both the courts below failed to appreciate the fact that the third party interest was created in the suit property during the pendency of the suit, as such, the transaction will be hit by doctrine of *lis pendence*.

9. I have heard learned counsel for the appellant-plaintiff and have also gone through the pleadings of the case.

10. The lower court, while partly allowing the suit of the appellant-plaintiff, has observed as under:-

“19. Learned counsel for the plaintiff has argued that the alienation made by defendants No.1 and 2 were pending lis. But the said argument is totally misconceived since the first alleged fraudulent transaction pertains to 20.11.2007 i.e. prior to filing of the present suit so the law of lis

pendence would not apply. Because the defendants No.1 and 2 were not vested with the rights in the property on the date of filing of the suit. The validity of the sale deed is subject matter of a separate suit which is pending adjudication and the copy of the plaint of the same has been annexed as D-1. Without commenting on the validity of the sale deed, this court limit its observation regarding the enforcement of the agreement. The plaintiff by leading cogent evidence has proved the execution of the agreement dated 31.01.2006 and this fact is also proved that an amount of Rs.11,48,750/- had changed hands. It has been maintained by the plaintiff that the possession of the property was given to him on the same date. But a new fact transpires i.e. one year after 31.01.2006, the possession of the property was taken back from the plaintiff which has been acquiesced to by plaintiff during the course of his cross-examination. Meaning thereby that in the month of February 2007 the possession was taken back from the plaintiff. The present suit has been filed on 14.12.2007 i.e. after a lapse of 10 months from the taking of the possession. This period of 10 months has totally gone unexplained. It has been maintained in the agreement that the Government had banned the execution of the sale deeds but qua the said aspect the evidence has not been brought on record by the plaintiff.

20. Ironically the title deeds of the property have not been produced on record. The conduct of the plaintiff in remaining silent for a period of 10 months after taking of the possession and issuing notice for the first time on 19.10.2007 has totally gone unexplained. Furthermore, a perusal of the deposition of Gajender Singh shows that he has maintained that in the Panchayat on 14.01.2008 the matter was compromised between plaintiff and defendants

No.1 and 2 which has been placed on record as Mark B wherein it was agreed that a sum of Rs.2,30,000/- would be paid by the defendants No.1 and 2 to the plaintiff.”

11. So far as question of readiness and willingness is concerned, the lower court has observed as under:-

“22. In light of the said connotation, first of all it was incumbent upon the plaintiff to prove that he was always ready and willing to perform his part of the agreement. On the contrary, the conduct of the plaintiff shows that he has failed to explain the period of silence once he had made the full and final settlement. The embargo in the execution of the sale deed has not been established which debarred the plaintiff for getting the sale deed executed in his favour once he had made the full and final payment.

23. Although the agreement has been proved but the intent of the plaintiff over the agreement and getting it specifically enforced has not been proved on record. In the absence of plaintiff proving his readiness and willingness in getting the sale deed executed, this court is not inclined in granting specific enforcement in favour of the plaintiff. Moreover, the silence of the plaintiff after possession was taken from him also goes against the plaintiff and the said silence has resulted in creation of third party interest. Although the defendants No.1 and 2 have alleged fraud and the same is not the subject matter in the present suit but evidently third party interest has been created in the property. The rights of defendant No.3 in the property shall be duly adjudicated in the pending suit wherein the validity of the sale deeds through which defendant No.3 is deriving interest has been impugned. Resultantly, it can be said that the conduct of the plaintiff does not inspire confidence in holding that he was always

ready and willing to perform his part of the contract. Onus lay very heavily upon the plaintiff to prove that there was an embargo in the execution of the sale deed. But qua the said aspect evidence has not been led by the plaintiff. Readiness and willingness is a subjective term and the plaintiff was duty bound to prove the same. In which in the opinion of the court the plaintiff has miserably failed. Another strong circumstance which goes against the plaintiff is his conduct and his unexplained silence for a period of ten months after as per his version the property was repossessed by defendants No.1 and 2 from the plaintiff. These facts leads to a doubt regarding the readiness and willingness of the plaintiff in getting the agreement enforced. The compromise at the panchayat has also not been explained by the plaintiff qua which he has acquiesced to during the course of his cross-examination. Resultantly, this court is of the opinion that plaintiff has failed in proving all the ingredients for getting the agreement specifically enforced.”

12. The lower Appellate Court, while dismissing the appeal of the appellant-plaintiff, also affirmed the findings so recorded by the lower court.

13. This court is of the considered view that both the courts below have rightly declined the relief of specific performance of agreement to sell dated 31.01.2006 to the appellant-plaintiff. In the case in hand, the appellant-plaintiff claimed himself to be in possession of the suit property, pursuant to agreement to sell dated 31.01.2006. However, there is no such recital in the agreement to sell Ex.P1 to this effect, rather, it is mentioned that respondents No.1 and 2/defendants No.1 and 2 are in possession of the

same. During his cross-examination PW1 Jagdish has deposed that he remained in possession for a period of one year after execution of the agreement to sell, meaning thereby till January 2007 whereas, the present suit has been filed on 14.12.2007 after a lapse of about 10-11 months from taking the possession from the appellant-plaintiff and this silence, in fact, has resulted in creation of third party interest. The appellant-plaintiff has also failed to substantiate that the Government had banned the execution of the sale deed, by producing on record any document in this regard. The appellant-plaintiff has also failed to explain that as to why he did not get the sale deed executed either at the time of execution of agreement to sell Ex.P1 or immediately after some time. Statement of DW3 Gajender Singh shows that a Panchayat was convened on 14.01.2008 wherein the matter between the appellant-plaintiff and respondents No.1 and 2/defendants No.1 and 2 was compromised and it was agreed that respondents No.1 and 2/defendants No.1 and 2 would pay a sum of ₹ 2,30,000/- to the appellant-plaintiff. So far as the argument raised regarding alienation of suit property during the pendency of the suit is concerned, the same is not sustainable. The suit property was alleged to be fraudulently transferred by respondents No.1 and 2/defendants No.1 and 2 in favour of Sunita Rani and Santosh Gupta on 20.11.2007 whereas the present suit was filed on 14.12.2007. Thus, doctrine of *lis pendence* is not applicable in the instant case. As far as question of validity of sale deed in favour of respondent No.3/defendant No.3 is concerned, the same is subject matter of different suit, which has been filed by the respondents No.1 and 2/defendants No.1 and 2, as such, this court would not like to comment on the same.

14. In view of the above, this court finds no illegality or perversity in the concurrent findings so recorded by both the courts below. As such, no question of law requiring determination arises in this regular second appeal filed by the appellant-plaintiff, which has no merit.

15. Dismissed.

February 08, 2019
vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No