

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

RSA No.1051 of 2012(O&M)

Date of decision: 26.2.2020

Jabbar and another

.....Appellants

VERSUS

Braham Parkash and another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Mohit Garg, Advocate for the appellants.

Mr. Saurabh Goel, Advocate for respondent No.1.

Mr. Ashish Yadav, Advocate for respondent No.2.

REKHA MITTAL, J.

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts whereby suit for specific performance in respect of agreement to sell dated 08.05.1995 purportedly executed by the appellants/defendants through their mother for sale of 2/3rd share in agricultural land detailed in para 1 of the plaint was decreed by the trial Court vide decree and judgment dated 24.02.2010 and appeal preferred by unsuccessful defendants/appellants did not find favour with the Additional District Judge, Nuh (Mewat).

The suit was earlier decreed vide judgment and decree dated 24.02.2006 but appeal preferred by the appellants/defendants who were minors at that time was allowed and the case was remitted to the trial Court for decision on all the issues after compliance of the mandatory provisions of Order 32 Rule 3 of the Code of Civil Procedure, 1908 (in short 'the

Code') governing appointment of a guardian for a minor defendant. It was further directed that trial before the Court below shall commence denovo.

During pendency of suit at the second stage, the appellant attained majority and they filed written statement in their personal capacity contesting suit of the respondent/plaintiff. It was averred that Smt. Sarifan, their mother, left village Mehraula after death of their father. She never entered into agreement with the respondent to sell the disputed land. Sarifan had adverse interest against them and she never cared to maintain them. The appellants had been residing with their uncle namely Kasam. The impugned agreement is false and fabricated, prepared with a view to grab their land. Their mother never obtained any permission to sell their land.

The trial Court framed issues reproduced in para 5 of judgment of said Court. Evidence adduced by the parties, finds reference in para 6 thereof. Having heard counsel for the parties in the light of materials on record and rival claims raised in the pleadings, the trial Court answered material issues No.1 to 3, onus whereof was placed upon the respondent in his favour whereas issues No.4 to 7, onus whereof was placed upon appellants/defendants were answered against them. Eventually, the suit was decreed allowing specific performance of agreement to sell dated 08.05.1995. The respondent was directed to deposit balance sale consideration within 3 months from the date of order. As has been noticed hereinbefore, the appeal preferred by unsuccessful defendants did not come out fruitful for them as the Appellate Court affirmed findings of the trial Court without variance.

Counsel for the appellants would argue that respondent examined Kamal Sethi PW-4, an attesting witness of agreement of sale but

his statement cannot be taken on its face value nor can be relied upon without looking for corroboration from other source as said witness was working with the respondent/plaintiff. It is further argued that though the Courts have refused to take into consideration testimony of handwriting expert examined by the appellants at the initial stage before the case was remitted to the trial Court for decision afresh, the Appellate Court has wrongly taken judicial notice of the earlier statement of Sarifan, admitting correctness of agreement of sale. It is argued with vehemence that if the Appellate Court wanted to take into consideration the earlier statement of Sarifan, there was no reason for the Court to ignore the earlier evidence adduced by the appellants by examining an expert to establish that thumb impression on the agreement in question does not tally with the standard/specimen thumb impression of Sarifan, sufficient to negate plea of the respondent with regard to execution of agreement by Sarifan and substantiate plea of the appellants that agreement is forged and fabricated document. Counsel would pray that impugned judgments may be set aside and the matter be remitted to the trial Court for decision afresh after providing an opportunity to the appellants to examine themselves and prove their contention that Sarifan had an interest adverse to the appellants, therefore, any such agreement even if it is held to be executed by Sarifan cannot bind the appellants who were minors in 1995.

Another submission made by counsel is that the Court has wrongly refused to take note of contention of the appellants controverting plea of the respondent with regard to readiness and willingness to perform his part of the agreement. It is argued that in respect of alleged agreement dated 08.05.1995, the suit was instituted on 04.05.1998, therefore, the

respondent has wrongly been allowed specific performance of agreement in exercise of discretionary jurisdiction of the Courts.

Counsel for respondent No.2 allowed to be impleaded as party in appeal vide order dated 13.01.2014 passed in CM No.11668-C of 2012 would argue that suit land was purchased by her from the appellants vide sale deed dated 09.01.2012. It is argued that in the revenue records i.e. jamabandis and khasra girdawaris pertaining to suit land, there is no reference to pendency of litigation much less judgments and decrees passed in favour of the respondent/plaintiff. It is argued with vehemence that as respondent No.2 is a bona fide purchaser for valuable consideration without knowledge of pendency of litigation, she is entitle to protect her ownership and possession of suit land. In support of his contention, he has relied upon Full Bench decision of this Court **Smt. Niranjana Kaur and others Vs. The Financial Commissioner, Revenue & Secretary to Government, Punjab and others, 2010(4) RCR 610.** He would also echo arguments of counsel for the appellants that the matter may be remitted to the trial Court for decision afresh with an opportunity to respondent No.2 to prove her plea of bona fide purchaser, thus, entitle to protection under Section 41 of the Transfer of Property Act, 1882 (in short 'the Act').

Counsel for respondent No.1/plaintiff, on the contrary, has supported concurrent findings recorded by the Courts. It is vehemently argued that appellants failed to adduce even an iota of evidence to establish their plea that their mother Sarifan had interest adverse to them, therefore, agreement purportedly executed by her would not be binding against them. It is further argued that even if testimony of Sarifan recorded previously before the case was decided on 24.02.2006 is ignored altogether, evidence

adduced by the respondent/plaintiff is more than sufficient to discharge onus of issues No.1 to 3 when otherwise testimony of Sarifan recorded at the second time gets demolished in view of testimony of Naresh Kataria PW-3, handwriting expert examined by the respondent on the basis of comparison of disputed thumb impression of Sarifan on the agreement with standard/sample thumb impressions available on record. It is further argued that despite the respondent/plaintiff having examined Naresh Kataria PW-3, the appellants did not examine either the earlier expert nor availed services of another expert to rebut testimony of Naresh Kataria. In addition, it is argued that counsel for the appellants has not made any submissions or point out any facts elicited in cross examination of Naresh Kataria to prove that his expert opinion does not carry weightage or his testimony is not worthy of credence and reliance.

With regard to submissions made by counsel for respondent No.2, it is argued that as respondent No.2 is a purchaser pendente lite, she cannot derive any advantage to her contention from the referred authority or under Section 41 of the Act.

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

The questions that fall for consideration are:-

1. Whether findings recorded by the Courts in respect of agreement of sale dated 08.05.1995 and readiness and willingness of the respondent/plaintiff to perform his part of the agreement, thus, entitle to specific performance of agreement suffer from perversity?

2. Whether the appellants have been able to establish their plea that Smt. Sarifan had adverse interest against the appellants who were admittedly minors in May, 1995.

Before adverting to the submissions made by counsel for the parties, it is pertinent to note that concurrent factual findings cannot be interfered unless they are vitiated by perversity or raise a question of law.

To prove agreement to sell Braham Parkash – respondent/plaintiff appeared in the witness box and examined one of the attesting witnesses namely Kamal Sethi. In addition, he examined Naresh Kataria to prove that agreement to sell has been thumb marked by Sarifan, mother of the appellants. As has been rightly argued by counsel for the respondent/plaintiff, there is no rebuttal to testimony of Naresh Kataria nor counsel for the respondents has made any submissions to challenge evidential value or veracity of Sh. Naresh Kataria. There is no denial that science of comparison of fingerprints is perfect. The respondent has adduced both direct and opinion evidence to establish that agreement to sell has been executed by Sarifan.

Prior to decision of suit in the year 2006, the appellants examined the handwriting expert to prove that agreement to sell does not bear thumb impression of Sarifan but when the case was remitted by Appellate Court for denovo trial, the appellants neither examined the earlier expert or other expert to rebut testimony of Naresh Kataria. Taking into consideration direct and opinion evidence adduced by the respondent/plaintiff, appellants cannot derive any advantage to their contention from the statement of Sarifan that the agreement does not bear her thumb impressions. As has been rightly held by the Court, no such

plea has been raised by the appellants that Smt. Sarifan thumb marked the document for some other purpose. In this view of the matter, testimony of Sarifan is no rebuttal to evidence adduced by the respondent/plaintiff to prove agreement dated 08.05.1995.

None of the appellants appeared in the witness box to substantiate their plea that Sarifan had adverse interest against them and for that reason, the agreement is not binding against them. On the contrary, they have sought to rely upon statement of Sarifan to contend that agreement to sell was not executed by her. The very fact that Smt. Sarifan appeared in the witness box to support cause of the appellants goes a long way to negative contention of the appellant that Sarifan had adverse interest against them. Rather the appellants are guilty of prolonging culmination of proceedings by falsely raising a plea of adverse interest before the Appellate Court, on the basis whereof, the matter was remitted for de-novo trial by the Appellate Court, vide judgment dated 14.10.2006. Not only this, despite having lost before the Courts below even at the second stage, they sold the suit land to respondent No.2 during pendency of litigation, few days before filing the instant appeal. In this view of the matter, it is difficult to accept contention of the appellants that findings of the Courts in respect of agreement to sell suffer from any factual or legal flaw much less perversity.

The Courts have adverted to the question of readiness and willingness of the respondent/plaintiff to perform his part of the agreement despite the fact that appellants denied execution of agreement of sale. As per the agreement, Sarifan was required to obtain the income tax clearance and permission of the Court to sell the property belonging to minors and thereafter send necessary intimation to the purchaser. However, she failed

to discharge her obligations created under the agreement. The target date was 30.11.1995 and on that day, the respondent appeared in the office of Sub Registrar Nuh through his Manager Kamal Sethi and got his presence marked by way of an affidavit. The instant suit was filed on 04.05.1998 i.e. 2½ years from the date of agreement. Since Smt. Sarifan did not perform her obligation under the agreement, the appellants cannot be permitted to say that the respondent/plaintiff was not ready and willing to perform his part of the agreement. Counsel for the appellants has failed to point out any materials elicited in cross examination of the respondent/plaintiff on the basis whereof his plea qua readiness and willingness to perform his part of the agreement can be doubted. This apart, there is nothing on record suggestive of the fact that in-between the target date and filing of suit, there is increase in price of the property. Analyzed from any angle, I do not find any reason to interfere in findings of the Courts regarding readiness and willingness of the respondent to perform his part of the agreement.

This brings the Court to contentions raised by counsel for respondent No.2. Respondent No.2 purchased the suit land after decision of appeal and before filing of instant appeal on 12.01.2012. The appeal was filed within the prescribed period of limitation. As per the settled position in law, appeal is continuation of suit. Since respondent No.2 purchased the suit land during pendency of litigation, plea of bona fide purchaser is not available to such a transferee pendente lite. That being so, respondent No.2 cannot derive any advantage to her contention from the decision in Smt. Niranjana Kaur and others case (supra) wherein the matter in controversy was not in respect of transferee pendente lite.

Counsel for respondent No.2 has failed to cite any provision in law or

precedent that protection of Section 41 of the Act is available to a transferee pendente lite. In this view of the matter, contention raised by respondent No.2 for setting aside the impugned judgments and decrees and remitting the matter for decision afresh are patently misconceived and accordingly rejected. In view of the discussion made hereinbefore, the aforesaid questions are answered against the appellants.

For the foregoing reasons, finding no merit, the appeal fails and is accordingly dismissed leaving the parties to bear their own costs.

FEBRUARY 26, 2020		(REKHA MITTAL)
‘D. Gulati’		JUDGE
Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no