

RSA-3073-2015(O&M) 1

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

**RSA-3073-2015(O&M)
Date of decision:28.01.2020**

Rakesh

.....Appellant

Versus

Suresh Chand

.....Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.S.K.Panwar, Advocate for the appellant

Mr. Kulbhushan Sharma, Advocate for the respondent

ANIL KSHETARPAL, J.

The defendant-appellant is in Regular Second Appeal against the judgment passed by learned District Judge, reversing the judgment and decree passed by the learned Trial Court. The suit filed for grant of decree for possession by way of specific performance of the agreement to sell, dismissed by the Trial Court, has been reversed by the First Appellate Court. In the considered view of this Court following questions of law arises for consideration:-

i) Whether it is obligatory for the appellate court to critically analyze the reasons given in the impugned judgment before reversing the same.

ii) Whether in a suit for specific performance of the agreement to sell, onus to prove that the case of the plaintiff is false/incorrect, not

liable to be decreed, is on the defendant.

It may be noted here that incidentally plaintiff as well as marginal witness are having identical first name. However, the plaintiff writes Suresh Chand whereas attesting witness writes, Suresh Bhardwaj.

Facts necessary for decision of the present case are that the plaintiff-Suresh Chand son of Pandit Nanak Chand Sharma filed a suit for possession by way of specific performance of the agreement to sell with a consequential relief of permanent injunction, in alternative, for recovery of Rs. 3 lacs. The plaintiff has pleaded that the defendant-Rakesh son of Hari Ram entered into an agreement to sell on 18.10.2005 with respect to land measuring 8 kanals on payment of proposed total sale consideration of Rs. 3 lacs after receiving Rs. 1,05,000/- as the earned money. Parties had agreed to execute and get the sale deed registered on 10.11.2005. Defendant came to him on 8.11.2005 and requested him to postpone the execution and registration of the sale deed on the ground that someone in the family is seriously ill. Because of the aforesaid request, the plaintiff did not visit the office of the Sub-Registrar and thereafter since the defendant did not come forward to execute the sale deed, therefore, notice dated 25.4.2006 was issued to the defendant to come and execute the sale deed, however, the defendant did not agree, forcing the plaintiff to file the suit on 23.5.2006.

The defendant denied execution of the agreement to sell. Defendant stated that he was in financial difficulty and since, he was having financial dealings with the plaintiff, hence, took a loan of Rs.1 lac with promise to repay the borrowed amount alongwith interest once the

loan from the Bank is arranged by the plaintiff for him. The defendant also pleaded that the plaintiff took him to Tehsil compound for completing the loan papers and obtained signatures/thumb mark of the defendant on various blank papers.

The agreement to sell between the parties is Ex. P-1. This agreement to sell is scribed in Devnagri script (Hindi). The names of intended vendee and vendor as also place for signatures of two marginal witnesses has been typed and earmarked. On the agreement to sell, Suresh Bhardwaj has also signed as a marginal witness no.3, name added separately with hand.

Marginal witnesses No.1 and 2 namely Rajender Singh and Tek Chand have deposed in support of the defendant while stating that in fact there was a loan transaction. There was no intention to sell the property. Whereas Suresh Bhardwaj has appeared as PW2 on behalf of the plaintiff.

Learned Trial Court on appreciation of evidence held that the depositions of Suresh Chand PW1-plaintiff and Suresh Bhardwaj –PW2, the marginal witness are contradictory. Suresh Chand-the plaintiff does not know as to whether he himself had entered into an agreement to sell with the defendant or it was Suresh Bhardwaj, who had entered into an agreement to sell with the defendant. The Court also noticed various other contradictions/ differences in the depositions of various other witnesses. The Court also noted that name of marginal witness Suresh Bhardwaj had been added with the pen. The Court further noted that the plaintiff did not visit the office of the Sub Registrar for execution and

registration of the agreement to sell. With these findings learned Trial Court dismissed the suit.

Learned First Appellate Court has reversed the judgment and granted specific performance of the agreement to sell.

This Court has heard learned counsel for the parties at length and with their able assistance has gone through the judgments passed by the Courts below and the certified copy of the record produced by the learned counsel for the appellant, correctness whereof is not disputed by the learned counsel for the respondent. Learned counsel for the appellant submitted that the judgment passed by the learned First Appellate Court is erroneous as learned first Appellate Court has not dealt with the reasons given by the learned Trial Court while dismissing the suit. He submitted that learned First Appellate Court has also erred in noticing factually incorrect facts.

On the other hand, learned counsel for the respondent has supported the judgment passed by the learned First Appellate Court and prayed for dismissal of the appeal.

Keeping in view the facts of the case, it becomes necessary for this Court to re-appraise the evidence. Plaintiff Suresh Chand s/o Nanak Chand Sharma has appeared in evidence as PW1. In cross examination he has stated that agreement to sell was between Rakesh (defendant) and Suresh Bhardwaj (PW-2-witness). Thereafter, he goes on to depose that in the aforesaid agreement Suresh Bhardwaj was also share holder. Thereafter he states that he had entered into an agreement to sell and Suresh Bhardwaj was with him. Thereafter he deposes that

Suresh Bhardwaj did not have share with him. Thereafter the aforesaid witness has stated that agreement took place at the office of Shri Krishan Singh Bhagel, Advocate. He goes on to depose that on 10.11.2005, i.e the target date for execution and registration of the sale deed, he went to the office of the Sub Registrar but defendant did not come. He admitted that he did not get his attendance marked. He further stated that Suresh Bhardwaj was with him and he does not know what is the killa number of the land agreed to be purchased by him.

Suresh Bhardwaj (the marginal witness) has appeared as PW2. In cross examination he has stated that Rakesh and his elder brother Kallu had entered into an agreement to sell with Suresh Chand (plaintiff). He stated that he is neither the purchaser nor the co-agreement holder. He further goes on to state that the agreement took place between the parties at his village and not at village Ghasita. He admitted that he is working as a property broker in Badshahpur. He states that brother of defendant Kallu had also signed the agreement to sell.

Krishan Singh Bhagel, Advocate has been examined as DW3. He has stated that agreement to sell was scribed by him from Jagdish, Typist but in his presence no payment was made. Rajender Singh-marginal witness of the agreement to sell has appeared as DW1 and stated that he had signed Ex.P-1 and P-2 , the agreement to sell and the receipt as marginal witness but in fact the transaction was for loan. Similar is the statement of Tek Chand-second marginal witness of the agreement to sell. He has stated that the signatures were taken on the

blank papers. Defendant has appeared as DW3 and has reiterated his stand in the written statement.

It is apparent from the careful reading of the statement of the plaintiff that he is not even certain as to whether the agreement to sell was entered into between Suresh Bhardwaj-the marginal witness and Rakesh (defendant) or he himself had agreed to purchase the land. In one sentence states that agreement to sell is between Rakesh and Suresh Bhardwaj. In a subsequent sentence, plaintiff states that Suresh Bhardwaj was also part of the aforesaid agreement to purchase. However, thereafter deposes that Suresh Bhardwaj was not part of the deal. Still further plaintiff has deposed against his own pleadings, that he visited the office of the Sub Registrar on 10.11.2005, particularly, when in the plaint he has stated that he did not visit the office of the Sub Registrar because the defendant had requested him for postponing the date of registration of the sale deed.

Still further, there are apparent contradictions between the statements of Suresh Chand (the plaintiff) and Suresh Bhardwaj (the witness), which cannot be reconciled. Suresh Bhardwaj has stated that agreement to sell was executed by Rakesh-defendant and his brother Kallu. He states that the deal was concluded at his village and not at village Ghasita. It is admitted position that agreement to sell is not signed by Kallu brother of the defendant. The name of Kallu does not appear to be one of the proposed vendors in the agreement to sell. Suresh Bhardwaj when appeared in evidence has stated that he does not remember, the other persons present at the time when agreement to sell

was executed. He has stated that Kallu was also present. The plaintiff-Suresh Chand also could not disclose the names of marginal witnesses no.1 and 2 i.e Rajender Singh and Tek Chand. Suresh Bhardwaj(witness no.3) could not disclose the name of marginal witness-Tek Chand although they all are stated to be present there.

Still further on careful examination of the agreement to sell, it is apparent that name of Suresh Bhardwaj as marginal witness No.3 has been added subsequently as noted above. He has signed with a different pen and the words 'witness No.3' has been added with hand whereas the remaining part of the agreement to sell is typed.

Keeping in view the aforesaid facts, this Court is of the considered view that the First Appellate Court has erred in granting decree for possession by way of specific performance of agreement to sell. The relief of specific performance of agreement to sell is discretionary and the Court is required to analyze all the facts before passing a decree of specific performance of agreement to sell.

Now let us examine the reasons given by the learned First Appellate Court while reversing the judgment and decree passed by the Trial Court. From the reading of the judgment, it is apparent that the learned First Appellate Court shifted the entire onus on the defendant to prove that the agreement to sell was false, forged and not enforceable. This is not the requirement of law. The plaintiff has to prove his case. It is the plaintiff who has to stand on his own legs. Still further, as noted above before granting the relief of specific performance of the agreement to sell, the Court has to cautiously apply its mind to the facts of the case

and thereafter arrive at a conclusion. Learned First Appellate Court has picked holes in the evidence of various witnesses produced by the defendants to record a finding that the signatures of the defendant on the agreement to sell does not appear to be on the blank papers. Still further learned First Appellate Court has factually erred in recording a finding that plaintiff had visited the office of Sub Registrar on 10.11.2005, although, it was against his pleaded case.

Learned First Appellate Court has also failed to discuss the reasons given by the learned Trial Court in its judgment to dismiss the suit. The manner in which the first appeal was disposed of is not appropriate. The first Appellate Court is expected to critically analyze the reasons given in the judgment and record a finding supported by reasons, as to how the reasons recorded in the impugned judgment are wrong or not appropriate in the facts of the case. It is mandatory for the Court to critically examine the reasons given in the impugned judgment before reversing. No doubt the First Appellate Court is expected to re-appreciate the evidence carefully, however, at the same time it has to keep in mind the reasons recorded in judgment of the Trial Court. A proper balance has to be maintained by the First Appellate Court.

Now at this stage, this Court is to consider what relief should be granted to the plaintiff-respondent. The defendant does not dispute that he has borrowed a sum of Rs.1,00,000/-. He does not allege that the aforesaid amount has been repaid. In these circumstances, the decree for possession by way of specific performance of agreement to sell is substituted with a decree for refund of the amount of earnest money i.e

Rs.1,05,000/- alongwith interest at the rate of 9% per annum from the date of agreement to sell i.e 18.10.2005 till its realization. Appeal to this extent, is allowed.

28 .01.2020	(ANIL KSHETARPAL)
rekha	JUDGE
Whether speaking/reasoned	Yes / No
Whether Reportable	Yes / No