

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

RSA-6399-2016 (O&M)
Date of decision : 27.01.2020

Buta Singh

...Appellant

Versus

Rattan Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. G.S. Sirphikhi, Advocate for the appellant.

Mr. B.B.S. Randhawa, Advocate for the respondents.

ANIL KSHETARPAL, J. (ORAL)

CM-16795-C-2016

For the reasons stated in the application, delay of 16 days in
refiling the present appeal is condoned.

Application is allowed.

Main case

The defendant-appellant has filed the present Regular Second
Appeal against the concurrent findings of fact arrived at by the Courts below
while decreeing suit for specific performance of the agreement to sell dated
13.08.2004.

On 11.09.2018, notice of motion was issued after noting the
contention of learned counsel for the appellant with following order:-

*“A suit filed by the plaintiffs/respondents seeking
specific performance of an agreement to sell dated 13.08.2004
with regard to the suit property was decreed by the trial Court
vide judgment dated 27.11.2013. Civil appeal preferred by the*

defendant/Buta Singh has been dismissed by the learned Additional District Judge, Gurdaspur on 16.02.2016 and thereby affirming the judgment and decree of the trial Court.

Resultantly, the defendant/appellant is in second appeal before this Court. Counsel would submit that while returning a finding as regards readiness and willingness on the part of the vendee to perform his part of the contract, Courts have placed heavy reliance upon the deposition of Numberdar Raghbir Singh, PW2 and who was an alleged attesting witness to the agreement to sell dated 13.08.2004. Counsel during the course of hearing has adverted to the Court proceedings and which would prima facie indicate that cross examination of such witness i.e. PW2 had been deferred by order and thereby he had not appeared for cross examination. Precise argument raised is that when a witness is examined in chief and is not available for cross examination then his statement cannot be read in evidence.

Notice of motion, returnable for 07.02.2019.”

Learned counsel for the appellant has submitted that the execution of the agreement to sell has not been proved as statement of PW2, the attesting witness cannot be read in evidence who did not appear for further cross-examination. Hence, he submitted that in absence of complete opportunity to cross-examine the attesting witness PW2, his deposition is incomplete, hence, cannot be relied upon.

This Court has considered the submissions and with able assistance of learned counsel for the parties, gone through the judgments passed by the Courts below and the requisitioned records of the Courts below.

It is undisputed that the agreement to sell does not require attestation by the attesting witnesses. In such circumstances, the document is required to be proved as per Section 72 of the Evidence Act, 1872 which reads

as under:-

***“72. Proof of document not required by law to be attested –
An attested document not required by law to be attested may
be proved as if it was unattested.”***

It is important to note here that there are only few documents which are required to be attested by the attesting witnesses including Will, Gift Deed etc. Neither the sale deed nor agreement to sell is required to be attested from two attesting witnesses.

In the present case, defendant-appellant has admitted his signatures on the alleged agreement to sell. Scribe has been examined as PW1 to prove that he had scribed the agreement to sell and the defendant-appellant had signed/thumb marked the same. The plaintiffs have also appeared in evidence and deposed that the agreement to sell was got drafted and signed/thumb marked by the parties including the defendant. Still further, one of the marginal witness of the agreement to sell was examined as PW2. Of course, his evidence cannot be relied upon as he did not appear for cross-examination after further cross-examination was deferred. In these circumstances, even if the evidence of PW2 is excluded, the execution of the agreement to sell has been proved particularly when the defendant-appellant has himself admitted his signatures.

Learned counsel for the appellant drew attention of the Court to a judgment passed by Hon'ble the Supreme Court in the case of **Ishwar Dass Jain (dead) through LRs Vs. Sohan Lal (dead) through LRs, (2000) 1 SCC 434**. The Hon'ble Supreme Court in that case was dealing with a case of mortgage which is required to be compulsorily attested by the two attesting witnesses as per Section 59 of the Transfer of Property Act. In that case also,

it was held that since the executant had admitted the execution of the mortgage, therefore, as per proviso to Section 68 of the Evidence Act, the document is proved in absence of specific denial of the execution by the executant particularly when the mortgage deed is registered.

Learned counsel for the appellant has further relied upon a Division Bench Judgment in the case of **Harnam Singh and others Vs. Dalip Singh and another, 1963 PLR 1133**. This Court has also carefully gone through the aforesaid judgment. Even this judgment does not support the case of the appellant. In one sentence, it has been observed that it is necessary to call an attesting witness to prove execution of a document. It is well settled that a judgment passed by the Court is not to be read as a statute. The judgment passed by the Court is to be read in the context it has been delivered. One sentence in a judgment cannot be read in a manner to hold that it is mandatory to examine attesting witness to prove the document, even if not required in law to be attested as attesting witnesses.

In view the aforesaid discussion, there is no ground to interfere with the concurrent findings of fact arrived at by the Courts below.

Accordingly, the present Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

27.01.2020

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No