IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-736-2015 (O&M)
Date of decision : 21.01.2020

Kesar Singh (deceased) through his legal heirs

...Appellant(s)

Versus

Harwinder Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. G.S. Bhatia, Advocate for the appellant(s).

Mr. Manish Singh, Advocate for
Mr. G.N. Malik, Advocate for the respondents.

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ANIL KSHETARPAL, J.

Defendant No.1 through his legal heirs have challenged the correctness of judgments and decrees passed by the Courts below decreeing the suit for possession by way of specific performance of the agreement to sell dated 03.10.2005.

In the considered view of this Court, the following substantial questions of law arise for determination:-

a) Whether the examination of marginal witnesses to a document is necessary before a document is held to be proved, although not required in law to be compulsorily attested by the attesting witnesses, even when the executant admit the execution thereof?

b) Whether the admission of execution of a written document, after going through the contents thereof, is not sufficient to hold that the party admitting execution has the knowledge of the contents thereof?

c) Whether it is necessary for the counsel representing opposite side while cross examining a witness to read over the contents of the document to the witness particularly when he admits that he has gone through the document before putting signatures thereon, before a Court can rely upon the aforesaid document?

FACTS:-

Harwinder Singh-plaintiff had filed a suit for specific performance of the agreement to sell dated 03.10.2005 with a consequential relief of permanent injunction. The plaintiff claims that defendant No.1-Kesar Singh (since deceased) had executed an agreement to sell with respect to a shop measuring 13.4/9 square yards for a total sale consideration of ₹90,000/- on receipt of ₹15,000/- towards earnest money. The sale deed was stipulated to be executed on or before 01.10.2006. The plaintiff filed a previous suit when defendant No.1-Kesar Singh threatened to alienate the property, in which defendant No.1 appeared in person and filed his written statement whereupon the suit for injunction was withdrawn on 13.06.2006. The plaintiff had issued a notice to the defendant calling him to perform his part of the contract on 18.09.2006 and thereafter remained present in the office of the Sub-Registrar on 29.09.2006 and 03.10.2006. It is pleaded that September 30th, 1st and 2nd October were declared holidays.

The plaintiff, later on, came to know that defendant No.1 had entered into an agreement dated 26.07.2004 for mortgaging the shop in dispute for a period of two years i.e. upto 26.07.2006 with defendant No.2

for an amount of ₹36,000/- and delivered possession to defendant No.2. This fact was concealed by defendant No.1 at the time of execution of the agreement to sell.

Defendant No.1 contested the suit and pleaded that no agreement to sell was executed with regard to the suit property. He pleaded that in fact, on 03.10.2005, he had borrowed an amount of ₹15,000/- from Harwinder Singh-plaintiff, which has been repaid, against proper receipt. The plaintiff had paid him ₹15,000/- in the Court Complex, when he was under the influence of liquor and his signatures were obtained on the stamp papers. An application dated 03.03.2006 was moved by his wife to the Member Secretary, Punjab State Free Legal Aid Authority, Chandigarh complaining cheating, praying for registration of the case against the plaintiff but no action was taken. The remaining allegations were denied. Defendant No.2 did put in appearance but did not file any written statement.

The parties were permitted to lead evidence. On appreciation of evidence, both the Courts have decreed the suit for possession by way of specific performance of the agreement to sell dated 03.10.2005. The Courts have also ordered that the plaintiff shall be entitled to deduct the amount of mortgage from the balance sale consideration in order to pay to defendant No.2 for redemption of the mortgage.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the records.

Learned counsel for the appellant(s) has drawn attention of the Court to Ex.D1, the alleged receipt signed by the plaintiff. He submitted that on plain reading thereof, it is apparent that the stand of the defendant to the effect that an amount of ₹15,000/- borrowed by defendant No.1 from the plaintiff, is correct. He submitted that the plaintiff when appeared in evidence, has admitted his signatures and, therefore, the Courts below have erred in not relying thereupon. He further submitted that the relief of specific performance of the agreement to sell is discretionary, hence, the plaintiff is not entitled to discretion particularly when it is proved that the amount of earnest money was, in fact, a loan amount.

On the other hand, learned counsel appearing on behalf of the respondents has submitted that the defendant-appellant has been taking contradictory and inconsistent stand. He further submitted that the receipt Ex.D1, has not been proved by the defendant and, therefore, the Courts have rightly decreed the suit.

This Court has analyzed the arguments of learned counsel for the parties and have gone through the judgments passed by the Courts below alongwith the requisitioned record. It may be noted here that Ex.D1, has been translated by learned counsel for the appellant(s), correctness whereof is not disputed by the learned counsel for the respondents. Ex.D1 reads as under:-

> *"Ex.D-1*
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> *I, Kesar Singh son of Amar Singh. That I have taken Rs.15,000/- (Rupees Fifteen thousand only) for house hold need from Harvinder Singh s/o Labh Singh and have taken on 3.10.2005 upto 3.10.2006. That I will return the amount by 3.10.06 then Kesar Singh will be owner of the shop. There will be no agreement to sell (Biana).*
>
> *Witness:-*

Sd/- Mohd. Rafiq

Sd/- Kesar Singh

Sd/- Harvinder Singh
(On revenue Stamp)"

Still further, the plaintiff while appearing in evidence has admitted his signatures on Ex.D1 (the receipt). Learned counsel for the appellant(s) has also produced the translation of the relevant part of the cross-examination, which is extracted as under:-

> *"I have seen the receipt which contain my signature across the revenue stamp which is Ex.D1. This receipt was executed by defendant himself. I had signed the receipt going through its contents. It is correct that in the receipt the date 3.10.2006 has been mentioned which is stipulated date of execution of sale deed, it is wrong to suggest that the receipt was executed by defendant Kesar with assurance that he will returned the amount or thereafter the agreement shall be treated as cancelled. It is correct that witness of receipt is the same person who has signed the agreement as marginal witness."*

On careful perusal of the aforesaid receipt and the statement of the plaintiff, it is apparent that the plaintiff does not dispute his signatures on the aforesaid receipt. Thus, it is safe to conclude that Kesar Singh-defendant No.1 had taken a loan of ₹15,000/- from Harwinder Singh.

Keeping in view the aforesaid facts, this Court is of the view that the learned Courts below have erred in granting a decree for possession by way of specific performance of the agreement to sell for following reasons:-

i) Once it is proved on file that real transaction between the plaintiff and defendant No.1 was loan only, the Courts should not have exercised their discretion while granting a decree for specific performance. It may be noted here that the plaintiff has neither pleaded nor proved that two transactions i.e. one loan and second agreement to sell, were separate and independent.

ii) On careful examination of the evidence, it is apparent that defendant No.1 was in financial difficulty and had been borrowing the amount. It is the case of the plaintiff itself that defendant No.1 had initially borrowed a sum of ₹36,000/- by mortgaging the shop in question in favour of defendant No.2. Thereafter, he borrowed an amount of ₹15,000/- from the plaintiff. In these circumstances, the Courts should have been considerate and taken a compassionate view of the matter. From the reading of the statement of the plaintiff, it is apparent that he is already running a medical store in his own shop. Depriving defendant of his shop would be harsh in the facts and circumstances of the present case.

Now the stage is set to examine the correctness of the reasons given by the learned First Appellate Court.

First reason assigned by the learned First Appellate Court is that the defendant while filing the written statement, in response to the suit for injunction, previously filed by the plaintiff, has not taken this stand in the written statement. It may be noted here that the defendant had filed the written statement in person in response to the suit for injunction filed by the plaintiff and the aforesaid suit was dismissed as withdrawn. In these circumstances, merely because defendant No.1 has not pleaded the factum of having borrowed a sum of ₹15,000/- in the previous written statement, would not adversely affect the case of defendant No.1.

Second reason assigned by the learned First Appellate Court is that defendant No.1 has been taking a different stand. It may be noted here that when defendant No.1 had filed previous written statement in response to the suit for injunction, he had admitted the agreement, whereas now in the written statement, he has denied the execution of the agreement to sell. It may be noted here that even if the defendant has inconsistent stand, that does not entitle the plaintiff to a decree for possession by way of specific performance of the agreement to sell automatically. The conduct of the defendant can at the most be deprecated. However, before granting a decree for specific performance of the agreement to sell, the Court is required to exercise its discretion in accordance with law.

Learned First Appellate Court has held that since marginal witnesses of the receipt have not been examined by the defendants, therefore, such receipt cannot be held to have been proved. The reason given by the learned First Appellate Court is erroneous. A receipt was not required to be attested by the attesting witnesses as per settled law. Still further, as is clear from the statement of the plaintiff, he has admitted his signatures after going through the contents thereof. In such circumstances, the admission of a signature and knowledge of the contents is the best piece of evidence in favour of the defendants. Hence, the Courts have erred that the execution of the receipt has not been proved.

Next reason assigned by the learned First Appellate Court is that the contents of Ex.D1 were not read over to the plaintiff by learned counsel for defendant at the time when he appeared to depose in the Court and, therefore, Ex.D1 cannot be said to be in the knowledge of the plaintiff. It may be noted here that this finding of the learned First Appellate Court is also erroneous particularly when the plaintiff himself admits in the cross-examination that he had gone through the contents thereof. Once, the plaintiff had himself gone through the contents before signing the document, then the Courts erred while holding that he did not have the knowledge of the contents. Still further, when the witness in the cross-examination has been confronted with the document and he admits the execution thereof, it cannot be held that the witness does not know the contents thereof.

Next reason assigned by the learned First Appellate Court to the effect that the date on which Ex.D1 was scribed and executed, has not been disclosed. In the considered view of this Court, such date, on which the receipt was scribed or executed, although is not forthcoming, is insignificant. It is apparent from the reading of the aforesaid document that the aforesaid receipt was executed on 03.10.2005, the day the agreement to sell was executed because both the marginal witnesses of the agreement to sell and receipt are same. The second last sentence of the receipt also gives indication that Kesar Singh had agreed to return the amount of loan by 03.10.2006.

Learned First Appellate Court has also factually erred in recording a finding that the aforesaid receipt Ex.D1 is not signed by Kesar Singh. On careful perusal of the receipt, it is apparent that Kesar Singh has signed the receipt.

Learned First Appellate Court has further erred in recording a finding that first four lines of the receipt are with different pen whereas remaining appears to be added later on. It may be noted that this finding is beyond the pleadings particularly when the plaintiff was confronted with the aforesaid document marked Ex.D1 but he never made a statement to this effect. In such circumstances, the finding of the Court that some lines have been added later on, is not only beyond pleadings but also beyond evidence.

Learned First Appellate Court has further erred in recording a finding that the reason as to why the receipt was executed has not been explained. The defendant has already taken a stand that he had borrowed a sum of ₹15,000/-, for which receipt was executed.

Keeping in view the aforesaid facts, now this Court proceeds to answer the questions of law which are framed above.

It is held that the documents which are not required to be attested by marginal witnesses can be held to be proved if the executant admits its execution.

Similarly, it is held that once the execution of a written document, after going through its contents, is admitted by the executant, the Court would hold that the contents of the documents were in the knowledge of the executant.

As regards last question, it is held that if a counsel during cross-examination confronts a witness with a document and he admit its execution and signatures thereon, in absence of any explanation that he does not know the contents thereof, it would not be appropriate for the Court to assume that he does not have knowledge of its contents.

Keeping in view the aforesaid facts, the judgments passed by the learned Courts below are modified. The decree for possession by way of specific performance of agreement to sell is substituted with the decree for recovery of ₹15,000/- alongwith interest at the rate of 12% per annum from the date of agreement to sell i.e. 03.10.2005 till payment thereof. The aforesaid amount alongwith interest shall be first charge on the suit property.

Accordingly, the present appeal is partly allowed.

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

21.01.2020 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**