

**In the High Court of Punjab and Haryana, at Chandigarh**

**Regular Second Appeal No. 2451 of 2017 (O&M)**

**Date of Decision: 18.02.2020**

Prem Saini

... Appellant(s)

Versus

Kuldeep and Others

... Respondent(s)

**CORAM: Hon'ble Mr. Justice Anil Kshetarpal**

Present: Mr. Rakesh Nehra, Advocate  
for the appellant.

Mr. Avnish Mittal, Advocate  
for respondent No.1.

Mr. Satish Singla, Advocate  
for respondent No.2.

**Anil Kshetarpal, J.**

The defendant/appellant has filed the present regular second appeal against the judgement passed by the learned first Appellate Court modifying the decree passed by the learned trial Court. The learned trial Court had decreed the suit for recovery of ₹ 15,50,000/- along with interest at the rate of 4% per annum from the date of execution of the document Ex.P1 dated 20.04.2005 till actual realization while declining the relief of specific performance of the agreement to sell. Whereas the learned first Appellate Court has granted decree for possession by way of specific performance of the agreement to sell.

In the considered view of this Court, the following question arises for consideration:

“Whether it is appropriate for the learned first Appellate Court to reverse the judgement of the learned trial Court without critically analysing the reasons recorded in the impugned judgement?”

The plaintiff filed a suit for possession by way of specific performance of the contract. The plaintiff claims that defendant No.1-Prem Saini had entered into an agreement to sell in favour of the plaintiff with respect to the property in dispute for a total sum of ₹ 15,50,000/- vide agreement to sell dated 20.04.2005 on receipt of total sale consideration. The plaintiff claims that he requested defendant No.1 to honour the agreement to sell, but he did not agree, therefore, the plaintiff, after issuing notice, filed a suit as he came to know that defendant No.1 has created a false prior agreement to sell dated 30.11.2004 in favour of defendant No.3-Nihal Singh.

The defendant No.1 contested the suit by pleading that the plaintiff has filed the suit only with an intention to fraudulently acquire the property of defendant No.1. He was in need of money, therefore, he previously also mortgaged his property with one Bhoop Singh son of Ganeshi Ram on 22.01.2003. As a security, an agreement to sell was executed in favour of Bhoop Singh. On return of the said amount along with interest to Bhoop Singh, the agreement to sell, which was executed as security in favour of Bhoop Singh, was cancelled on 20.04.2005 and the present agreement to sell was executed. The defendant also pleaded that he had executed a prior agreement to sell in favour of Nihal Singh as he was to pay certain amount to him. The defendant further took a stand that the

property in dispute has been allotted by the Government on license and he has been earning his livelihood from the shop in question.

The learned trial Court, on appreciation of evidence, found that the agreement to sell dated 20.04.2005 is a security document to secure repayment of the loan. It was also found that the plaintiff has made material alterations in the document Ex.P1 dated 20.04.2005. Keeping in view the aforesaid facts, the learned trial Court ordered that in place of decree for specific performance of agreement to sell, it would be appropriate to pass a decree for recovery of ₹ 15,50,000/- along with interest as noted above.

However, the learned first Appellate Court has set aside the aforesaid judgement and held that the plaintiff is entitled to decree for possession by way of specific performance. The learned first Appellate Court has recorded the following reasons to set aside the discretion exercised by the learned trial Court:

“Oral evidence produced by defendant No.1 is not sufficient to rebut the documentary evidence produced by the plaintiff and it is well settled that where oral and documentary evidence is available, the documentary evidence shall prevail”.

This Court has heard learned counsel for the parties at length and with their able assistance, gone through the judgements passed by the Courts below and the record produced by both the counsel, correctness whereof is not disputed.

Ex.D5 is an entry dated 22.10.2003 in the register of the Scribe.

This entry is signed by Prem Saini i.e. defendant No.1/appellant and Bhoop Singh. As per the aforesaid entry, defendant No.1- Prem Saini had agreed to

sell the shop No. 39 situated in New Sabzi Mandi, Jhajjar in favour of Bhoop Singh for total sale consideration of ₹ 12,00,000/-. He had received ₹6,80,000/- as earnest money. It is recited that the parties have agreed to execute and register the sale deed on 21.04.2005. An agreement to sell dated 20.04.2005 is Ex.P1. On bare look at the agreement to sell, it is apparent that the agreement to sell is on three sheets/leaves of stamp paper. On leaf No. 3, last two lines are in different handwriting and appeared to have been squeezed in. The aforesaid writing is with respect to the time when the sale deed would be executed. It has been written that the first party i.e. Kuldeep, the plaintiff can get the sale deed executed after Prem Saini, defendant No.1, has got the shop transferred in his name and given one month notice to Kuldeep. It will be noted here that the aforesaid agreement to sell is witnessed by Bhoop Singh son of Ganeshi Ram. Bhoop Singh is the person who had entered into an agreement to purchase the property in dispute vide agreement to sell dated 22.10.2003, which admittedly was cancelled. It is an admitted fact on the record that the aforesaid agreement was for securing a loan. It is further significant to note that Sultan Singh, the marginal witness of the agreement to sell dated 22.10.2003, is also a marginal witness of new agreement to sell dated 20.04.2005.

Learned counsel for the appellant has drawn attention of the Court to the statement of Sultan Singh, who has appeared on behalf of the plaintiff and stated that he is a marginal witness of the agreement to sell. He admitted that previously, Prem Saini had entered into an agreement to sell with Bhoop Singh and on return of the amount, aforesaid agreement to sell was cancelled. He further stated that he cannot tell whether there was any

exchange of amount between Prem Saini and Bhoop Singh.

In the present case, Kuldeep Singh, plaintiff, has appeared as PW.3. His deposition makes an interesting reading. He admitted that Bhoop Singh is his father-in-law. He also admitted that he knew Sultan Singh son of Dharam Singh who is an attesting witness. Initially, he stated that he did not know that whether Bhoop Singh had given a loan of ₹ 6,80,000/- on interest to Pritam Saini and, thereafter, taken back the same or not. In the next sentence also, he again stated that he does not know whether Prem had taken ₹ 6,80,000/- from Bhoop Singh, but when he was confronted with the agreement to sell dated 20.04.2005 he admitted that Sultan Singh has signed the aforesaid agreement and recognized his signatures. He further went on to state that Ex.P1, the agreement to sell in his favour, is signed by Bhoop Singh and Sultan Singh as witnesses. In the subsequent part, he admitted that Prem Saini had told him about the execution of agreement to sell with Bhoop Singh which was cancelled. Thereafter, he stated that he knew about the agreement which was cancelled. Similarly, when Shyam Lal Saini, Scribe, appeared as PW.4, he admitted that after cancelling the first agreement, a new agreement was executed in favour of Kuldeep. He stated that the first one was cancelled and after one or two hours, a new agreement to sell was executed. He admitted that the parties as well as the witnesses had come to him together. Similarly, Sultan Singh, the marginal witness, has been examined as PW.2. He pretended that he does not know that whether Kuldeep Singh is married in the family of Bhoop Singh or not. However, he admitted that Prem had entered into an agreement to sell with Bhoop Singh and the payment received under the aforesaid agreement to sell

was returned while cancelling the agreement to sell dated 22.10.2003.

Thus, it is apparent that statement of Kuldeep, plaintiff as well as Sultan Singh are totally unreliable because they have tried to mislead the Court.

Still further, on careful examination of Ex.D5, the entry in the register of the Scribe, with respect to an entry of agreement to sell dated 22.10.2003 proves that Om Parkash son of Daya Ram was the marginal witness. Whereas, the agreement to sell dated 20.04.2005 is also attested by same marginal witness, namely Om Parkash son of Daya Ram. In other words, after a period of one and a half years, the same marginal witness has attested the subsequent agreement to sell.

Keeping in view the aforesaid facts, the learned trial Court had rightly concluded that agreement to sell was in fact a loan transaction and therefore, the plaintiff is only entitled to decree for recovery of the amount of earnest money along with interest. The learned first Appellate Court has committed an error in placing undue reliance on the weakness of defence of the defendant. In a suit for specific performance of the agreement to sell, the plaintiff has to stand on his own legs and required to prove his case. The plaintiff is required to aver and prove that he was always ready and willing to perform his part of the contract. In the present case, the agreement to sell is dated 20.04.2005, whereas the suit was filed on 25.01.2010. The alleged agreement to sell is a full payment agreement. Once the entire payment has been made, there was no reason as to why the plaintiff, in the facts of the case, would wait for four years and nine months.

The learned first Appellate Court has overlooked that Kuldeep,

plaintiff, is son-in-law of Bhoop Singh. The learned first Appellate Court has also overlooked that the evidence of Kuldeep, Sultan Singh and the scribe Shyam Lal Saini proves that previously also there was an alleged agreement to sell in favour of Bhoop Singh, father-in-law of Kuldeep, admitted to be only to secure loan. Further, the learned first Appellate Court has also overlooked the fact that the last two lines on page 3 of the agreement to sell appear to be manipulated subsequently.

Appeals in this Court are regulated by Section 41 of the Punjab Courts Act, 1918. Section 41 of the Act reads as under:

***“41. Second appeals—(1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely :***

- (a) the decision being contrary to law or to some custom or usage having the force of law.*
- (b) the decision having failed to determine some material issue of law or custom or usage having the force of law.*
- (c) a substantial error or defect in the procedure provided by the Code of Civil Procedure 1908 (V of 1908), or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.*

*Explanation—A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section.*

- (2) An appeal may lie under this section from an appellate*

*decree passed ex parte”.*

On careful reading of Section 41 of the Act, it is apparent that this Court can interfere if substantive non-reading or misreading of evidences found in the judgment of the learned first Appellate Court.

In view of the aforesaid discussions, it becomes clear that the learned first Appellate Court has not only overlooked the material evidence, but has also failed to critically analyzed the reasons given by the learned trial Court before reversing the judgment.

Keeping in view the aforesaid facts, the judgment passed by the first Appellate Court is liable to be set aside. Hence, the present appeal is allowed and the judgment passed by the learned first Appellate Court is set aside. The judgment & decree passed by the trial Court is restored. No costs.

The miscellaneous application(s), if any, shall also stand disposed of.

**(Anil Kshetarpal)**  
**Judge**

**February 18, 2020**  
**“DK”**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No