

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.72 of 2013

Date of decision:06.12.2021

Binder Singh and another

...Appellants

Versus

Jagtar Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jhanji, Sr. Advocate, with
Ms. Eliza Gupta, Advocate,
for the appellants.

Mr. Kanwaljit Singh, Sr. Advocate, with
Mr. Ajaivir Singh, Advocate,
for respondent no.1.

ANIL KSHETARPAL, J (Oral)

1. The hearing of the case was held through video conferencing on account of restricted functioning of the Courts.
2. The appellants are defendants no.2 and 3 in a suit filed for grant of decree of possession by way of specific performance of the agreement to sell dated 28.06.2002. The appellants assail the correctness of the concurrent findings of fact arrived at by the courts below while decreeing the suit to the extent of $\frac{3}{4}$ th share in 72 kanals of land.
3. The learned counsel representing the plaintiff (respondent herein) has stated that the sale deed, with respect to the land measuring 57 kanals and 10 marlas, has already been executed in favour of the plaintiff by the Executing Court.

4. The respondent-Jagtar Singh filed the suit for possession by way of specific performance of the agreement to sell dated 28.06.2002. It is proved on file that Smt. Parkash Kaur, Sh. Binder Singh and Sh. Gusahib Singh had executed the agreement to sell with respect to land measuring 72 kanals on receipt of earnest money of Rs.1,01,000/- whereas the balance sale consideration of Rs.11,36,500/- was payable on or before 30.12.2002. The defendants did not come forward to honour the agreement and the plaintiff, after getting his presence marked in the office of the Sub-Registrar on 30.12.2002, filed the suit on 12.03.2003. The plaintiff also served a notice on the defendants before filing the suit. The defendants claim that the agreement to sell is a forged and fabricated document and no agreement was ever entered between the parties. It was also claimed that defendant no.3 is of unsound mind. Defendants no.3 and 4 were proceeded against ex-parte.

5. The trial court, on appreciation of evidence, recorded a finding of fact that the plaintiff has successfully proved his case that there was an agreement to sell executed between the parties on 28.06.2002, on receipt of the earnest money of Rs.1,01,000/- and he was always ready and willing to perform his part of the contract. The plaintiff, in order to prove his case, examined PW1-Sh. Amritpal Singh, scribe of the agreement to sell, PW3-Amar Singh, Headman of the village and PW4-Sh. Balvir Singh, residents of the village. Sh. Amar Singh and Sh. Balvir Singh are witnesses of the margin to the agreement to sell.

6. On the other hand, Smt. Parkash Kaur appeared as DW1, whereas Sh. Binder Singh appeared as DW2 but they did not come forwarded to face the cross-examination. Thus, the statement of Sh. Binder Singh has not been taken into consideration.

7. The trial court decreed the suit to the extent of 3/4th share as Smt. Paramjit Kaur, daughter of Smt. Parkash Kaur, had not signed the agreement to sell. During the pendency of the first appeal filed by the defendants, an application under Section 50 of the Mental Health Act, 1987 was filed and the Court, after getting the report from the Board constituted under the aforesaid Act, held that Sh. Gursahib Singh was not of sound mind on the date of filing of the appeal and therefore, permitted Smt. Parkash Kaur to prosecute the appeal as the next friend.

8. The First Appellate Court, on reappraisal of the evidence, has upheld the judgment and decree passed by the trial Court.

9. This Bench has heard the learned counsel for the parties at length and with their able assistance perused the paper book as well as the lower court record which was requisitioned.

10. The learned counsel representing the appellants has raised the following contentions:-

(1) Once the proceedings under the Mental Health Act, 1987 were initiated and it was found that Sh. Gursahib Singh is of not of sound mind, therefore, the Court should have remitted the matter back to the trial court in order to find out whether Sh. Gursahib Singh was of sound mind on the date of the agreement to sell or not?

(2) The Court below, even after recording that the jamabandi for the year 1997-1998 has not been exhibited, still took into consideration the same while recording the finding.

(3) An application under Order 41 Rule 25 of the Code of Civil Procedure, 1908 for framing an additional issue was

not decided by the First Appellate Court.

- (4) Once it has been found that Smt. Paramjit Kaur did not sign the agreement, then, no specific performance of the agreement to sell should have been granted in terms of Section 17 of the Specific Relief Act, 1963.
- (5) It is proved on file that this is the only agricultural land owned by the defendants, therefore, the court should not exercise its discretionary power to grant decree for specific performance.
- (6) In the absence of a specific contract with regard to the specific performance of the agreement to sell, no decree could be granted.

11. Per contra, the learned counsel representing the respondent-plaintiff, contends that Sh. Binder Singh had purchased the stamp paper for execution of the agreement to sell. He further submits that since Sh. Binder Singh did not come forward to face the cross-examination, therefore, an adverse inference should be drawn against him. He further submits that although the defendants have pleaded that the agreement to sell is forged and fabricated, however, they have led no evidence to prove that fact. He further contends that Section 17 of the Specific Relief Act, 1963 is not applicable because Smt. Parkash Kaur, Sh. Binder Singh and Sh. Gursahib Singh were owners to the extent of $\frac{3}{4}$ th of the share in the suit property. It was noticed in the agreement to sell that remaining $\frac{1}{4}$ th share is owed by Smt. Paramjit Kaur and the remaining defendants had assured that they will get her signatures on the agreement to sell. He further contends that the relief of specific performance of the agreement to sell is not dependent upon a

contract. While referring to Sections 10 of the Specific Relief Act, 1963, he contends that the specific performance of a contract is a statutory right available to a party in accordance with the provisions of Specific Relief Act, 1963, therefore, the absence of an expression to this effect is not fatal to the case. He further contends that the defendants have not pleaded hardship before the courts below and therefore, they cannot be permitted to take up this point, at this stage, for the first time in the regular second appeal.

12. After having heard the learned counsel representing the parties at length, the Bench proceeds to analyze the submissions of the respective parties.

13. The first argument of the learned counsel representing the appellants is required to be examined in the peculiar facts of the present case. Here is a case where majority of the members of the family of a mentally retarded person had entered into an agreement to sell with the plaintiff. Smt. Parkash Kaur is the mother of Sh. Gursahib Singh, whereas Sh. Binder Singh is his brother. There is no evidence to show that on the date on which the agreement to sell was executed i.e. 28.07.2002, Sh. Gursahib Singh was of unsound mind. As per the report submitted by the Board, Sh. Gursahib Singh is stated to be suffering from moderate mental retardation with 75% disability. The report is of the year 2007. The agreement to sell was entered 9 years prior thereto. No doubt, while filing the written statement, Smt. Jagtar Kaur did assert that Sh. Gursahib Singh was of unsound mind, however, no evidence was led to that effect. In fact, only defendant no.1 and 2 contested the suit and denied the execution of the agreement to sell on receipt of the earnest money. After having lost before the trial Court, the application under Section 50 of the Mental Health Act,

1987 was filed in order to create a defence. It may further be noted that as per Section 12 of the Indian Contract Act, 1872, a person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind. Hence, there is a heavy burden on the appellants to prove that at the time of agreement to sell, Sh. Gursahib Singh was not of sound mind. This matter can be examined from another perspective. Smt. Parkash Kaur is her natural guardian. Sh. Binder Singh is also his de facto guardian. All the three, namely, Smt. Parkash Kaur, Sh. Binder Singh and Sh. Gursahib Singh signed the agreement to sell on receipt of the earnest money. From a bare look at the agreement to sell, it is evident that the same is thumb marked by Sh. Gursahib Singh. At that time, Smt. Parkash Kaur or Sh. Binder Singh never disclosed that Sh. Gursahib Singh is mentally retarded.

14. Keeping in view the aforesaid facts, the First Appellate Court has correctly proceeded to decide the appeal after appointing Smt. Parkash Kaur as the natural guardian of Sh. Gursahib Singh. It may be noted here that Sh. Gursahib Singh did not contest the suit but filed appeal along with his mother and brother.

15. The second argument of the learned counsel needs no detailed deliberation. There is an amendment in Order 13 Rule 4 CPC by the States of Punjab and Haryana which enables the Court to treat the document as having been properly admitted in evidence, if it is satisfied that the document was in fact admitted in evidence unless non-compliance with the rule has resulted in miscarriage of justice. In view of the aforesaid, non-marking of jamabandi for the year 1997, which is per se admissible, does not vitiate the trial of the case.

16. The next argument of the learned counsel is with regard to failure to decide application for framing an additional issue.

17. In the application, the appellants had prayed for framing of the issue on the question of Sh. Gursahib Singh suffered from unsoundness mind at the time of execution of the alleged agreement to sell. This application was filed on 16.11.2009 before the First Appellate Court. The First Appellate Court, after taking note of the relevant facts, has already dealt with the aforesaid aspect, even though the application has not been specifically decided. It is observed, again, that, evidently the remaining defendants who are mother and father of Sh. Gursahib Singh were parties to the contract and have also defended the suit. Furthermore, there is no evidence produced before the trial Court or before the First Appellate Court proving that Sh. Gursahib Singh was of unsound mind at the time of execution of agreement to sell in the year 2002. Hence, failure to decide application under Order 41 Rule 25 CPC does not advance the case of the appellants.

18. The next argument of the learned counsel is based upon Section 17 of the Specific Relief Act, 1963. In fact, the agreement was executed by Smt. Parkash Kaur, Sh. Binder Singh, Sh. Gursahib Singh on their own behalf as well as on behalf of Smt. Paramjit Kaur daughter of Smt. Parkash Kaur. Since, Smt. Paramjit Kaur did not sign the agreement to sell and the plaintiff failed to prove any delegation of power by Smt. Paramjit Kaur, then, the suit cannot be decreed qua her share of the property. Section 17 of the Specific Relief Act, 1963, provides that if the contract to sell the property has been executed by a person who has no title in the property, then such a contract is not enforceable. Section 17 is not applicable to the

facts of the present case.

19. The next argument of the learned counsel is with regard to the discretionary relief. The learned senior counsel has contended that this is the only agricultural land owned by the defendants. It may be noted here that before the trial court, the defendants neither pleaded the aforesaid fact nor led any evidence to prove the same. This Court does not consider it appropriate to entertain this issue for the first time at this stage particularly when neither any issue in this regard has been framed by the trial court nor this aspect has been examined by the First Appellate Court.

20. The last argument of the learned counsel representing the appellants does not need elaborate discussion. The unamended Section 10 of the Specific Relief Act, 1963, provides that except as otherwise provided in this chapter, the specific performance of any contract may be enforced by the Court. In other words, unless specific performance of the contract is not permitted under the provisions of Chapter-II of the Specific Relief Act, 1963, the other contracts can be specifically enforced by the Court. The present suit is with respect to immovable property. Such a contract is specifically enforceable, unless there is a provision to the contrary. The attention of this Court has not been drawn to any such condition in the contract making it determinable in nature or otherwise falling under any of the exceptions to specific performance of contract provided in the Specific Relief Act, 1963. The Supreme Court while examining similar argument in **Mann Kaur (dead) by LRs vs. Hartar Singh Sanga, (2010) 10 SCC 512**, held that the agreement to sell can be specifically enforced through the court of law even in the absence of such specific term giving such remedy. It is a special statutory remedy provided by the legislature.

21. Accordingly, finding no merit, the appeal is dismissed.

All the pending miscellaneous applications, if any, are also disposed of.

December 06, 2021
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No