

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 5225 of 2014 (O&M)

Date of Decision: 20.04.2022

Gurmail Singh

... Appellant(s)

Versus

Sukhdev Singh

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Sanjeev Kumar, Advocate
for Mr. Jai Bhagwan, Advocate
for the appellant(s).

Mr. M.S.Cheema, Advocate
for the respondent.

Anil Kshetarpal, J.

1. While assailing the concurrent findings of fact, arrived at by both the Courts below, the plaintiff has filed the present appeal. Both the Courts below have dismissed his suit for grant of decree for specific performance of the agreement to sell.

2. In the considered opinion of the Court, the following issues require adjudication:

i) Whether the agreement to sell is required to be mandatorily attested by the two attesting witnesses mandatorily and proved in accordance with Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”) i.e. like a Will, gift deed or mortgage deed?

ii) Whether a written agreement to sell, duly signed/thumb marked by the parties, can be ignored on the ground that it is

surrounded by the suspicious circumstances for which no foundation is laid in the pleadings?

iii) Whether the insignificant inconsistency in the oral evidence is sufficient to discard the written agreement entered into between the parties, duly signed and thumb marked by them?

3. Some facts are required to be noticed. The plaintiff filed the present suit on 25.05.2007 for the specific performance of the agreement to sell dated 28.01.1992 with respect to a plot measuring 3 biswas for a sum of ₹12,000/- on receipt of the entire sale consideration on delivery of possession. The plaintiff, in the alternative, prayed for recovery of the amount along with interest and also prayed for the grant of decree of permanent injunction restraining the defendant from interfering in his peaceful possession. He further asserted that despite a notice on 08.05.2007, the defendant has not come forward to perform his part of the contract.

4. The defendant contested the suit while asserting that he never entered into any agreement to sell with the plaintiff on receipt of the amount alleged. He took a stand that the alleged agreement to sell dated 28.01.1992 is forged, fictitious, without consideration and is a result of fraud. He further took a stand that he never negotiated with regard to the alienation of the property in favour of Pandit Mohan Lal son of Sh. Shyam Lal, resident of village Bhumsi, Tehsil Malerkotla. The plaintiff filed replication and reiterated his stand in the plaint.

5. On examination of the pleadings, the trial Court culled out the following issues:-

“1. *Whether the defendant agreed for the sale of disputed*

property in favour of plaintiff vide agreement dt. 28.01.1992? OPP

2. *Whether the defendant received the sale consideration of Rs.12,000/- from the plaintiff? OPP*
3. *Whether the plaintiff remained ready and willing to perform his part of the agreement? OPP*
4. *Whether the plaintiff is entitled to specific performance of the agreement dated 28.01.1992 or the alternative remedy? OPP*
5. *Whether the defendant is threatening to alienate and dispose of the disputed property to some one else and to dispossesses the plaintiff from the same illegally and forcibly? OPP*
6. *Whether the suit is maintainable? OPPD*
7. *Whether the suit is within limitation? OPP*
8. *Whether plaintiff is estopped from filing the suit by his act and conduct? OPD*
9. *Relief”.*

6. In order to prove his case, the plaintiff examined PW.1 Surjit Singh, who is stated to be the marginal witness to the agreement to sell. He deposed that the agreement to sell was scribed in his presence by Subhash Chander Jain and Surjit Singh, after the receipt of the consideration amount, signed the agreement to sell in his presence and in the presence of the plaintiff as well as other witnesses. He further deposed that the scribe made an entry in his note-book and the same was also signed by the defendant as

scribed in the Tehsil Complex, where the Tehsildar has his office. However, the agreement was not presented before the Sub-Registrar. The agreement was signed in the presence of another marginal witness, namely, Mohinder Singh.

7. PW.2 Amrik Singh, Draftsman, proved the layout plan of the property which shows that there are four shops and a small residential area in the property. PW.3 Subhash Chander Jain, Scribe, appeared and brought his note-book. He proved an entry at serial No. 57 dated 28.01.1992, which is signed/thumb marked by the parties as well as the witnesses. PW.4-Plaintiff himself appeared in support of his pleadings.

8. On the other hand, the defendant appeared as his own witness. As already noticed, both the Courts below have dismissed the suit. The reasons recorded by both the Courts below are as under:-

I) Surjit Singh has stated that the defendant signed the agreement to sell, whereas it is thumb marked, therefore, his presence, at the time of agreement to sell, is not proved.

II) The deposition of one attesting witness is necessary, since the presence of Surjit Singh is doubtful, therefore, the agreement to sell is not proved.

III) Surjit Singh has stated that the plaintiff had executed the agreement to sell and not the defendant, therefore, his deposition cannot be relied upon.

IV) Subhash Chander Jain, Scribe of the document, does not know the parties personally, therefore, he did not identify the parties.

V) The plaintiff admitted that the writing was for a money transaction, therefore, there was no agreement to sell.

VI) The suit suffers from delay and laches as the suit was filed after a period of 12 years.

VII) The plaintiff claims that he requested the defendant many a times in the presence of Gurbachan Singh, Sarpanch, but he has not been examined. He further stated that the agreement to sell is registered with the Tehsildar, which is factually incorrect.

VIII) The plaintiff states that the agreement to sell is computer typed, whereas it is typed on a manual typewriter.

IX) The plaintiff has, thus, failed to dispel the suspicious circumstances.

9. Heard the learned counsel representing the parties and with their able assistance, perused the judgments passed by both the Courts below as well as the record of the trial Court, which was requisitioned.

10. The learned counsel representing the parties have also filed their synopsis as well as the gist of their arguments.

11. Before proceeding further, some facts are required to be reiterated, which are as under:-

a) A bare perusal of the agreement to sell dated 28.01.1992 (Ex.P1) shows that it has been scribed on a non-judicial stamp paper of ₹3/-, which was purchased by the defendant (Surjit Singh) on 28.01.1992. The agreement to sell is a typed document, running into two pages. Both the pages are thumb marked by Surjit Singh. The endorsement of the Stamp Vendor, on account of the sale of the stamp paper, also shows that Surjit

Singh while purchasing the same had thumb marked the document. The non-judicial stamp paper has been purchased for the execution of the agreement to sell.

b) The agreement to sell is not only signed by Sukhdev Singh, the vendor, but also signed by Gurmail Singh and four other witnesses of margin including Surjit Singh and Mohinder Singh. The document is scribed by Subhash Chander Jain, who has signed the agreement to sell as Scribe while making an endorsement that the entry of the aforesaid agreement to sell at serial No. 57 in his register on 28.01.1992.

c) The agreement to sell has been proved by examining one witness on the margin i.e. Surjit Singh, who appeared as PW.1, apart from examination of PW.3 Subhash Chander Jain, Scribe and PW.4 Gurmail Singh, the plaintiff.

d) As per the agreement to sell, a plot measuring 3 bighas (plain parcel of land) was agreed to be sold for a total consideration of ₹12,000/- which was received in entirety and possession was delivered. In other words, it was a total payment of agreement to sell on delivery of possession. The parties did not specify the date for execution and registration of the sale deed.

e) The defendant, in his deposition, has admitted that there are five shops constructed in the disputed property, besides a courtyard, kitchen and a bedroom. Out of the aforesaid four shops, existing on the property, the plaintiff has leased out three

shops, whereas he himself is carrying out of his business in his fourth shop. The defendant denied that the electricity connection in the aforesaid shops and house is in the name of the plaintiff.

12. The learned counsel representing the appellant *inter alia* contends that both the Courts below have erred in examining the case in a proper perspective. He contends that Surjit Singh, the marginal witness, has deposed as PW.1 and proved the agreement to sell, which is corroborated by PW.3 Subhash Chander Jain. The defendant has admitted the possession of the plaintiff, therefore, the case set up by the plaintiff stands corroborated. He further contends that once the agreement to sell does not prescribe any time period or date for its performance, therefore, the suit could not be dismissed on delay and laches, particularly when the defendant had been paid the entire amount on the delivery of possession.

13. Per contra, the learned counsel representing the respondent, while defending the judgments passed by both the Courts below, has contended that the trial Court as well as the First Appellate Court has clearly noticed that the agreement to sell is surrounded by the suspicious circumstances and there are irreconcilable and inconsistencies in the oral evidence of the witness as well as the plaintiff. He, hence, contends that the Court should not interfere in the concurrent findings of fact.

14. This Bench now proceeds to analyze the first issue as to whether the agreement to sell is required to be attested by the two attesting witnesses mandatorily and proved in accordance with Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”) i.e.

between the parties. It is provided under Section 54 of the Transfer of Property Act, 1882 that a contract for sale of the property shall take place on the terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Thus, it is evident that the agreement to sell is not required to be attested by two attesting witnesses.

15. The concept of requirement of the mandatory attestation of the document by two attesting witnesses is with respect to only a few documents. The first one of them is, a Will which is required to be attested by the two attesting witnesses as per the provision of Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as “the 1925 Act”). Secondly, a mortgage deed, where the principal money secured is ₹100/- or upward, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and signed, at least, by two witnesses. Similarly, a written gift deed under Section 123 of the 1925 Act is required to be signed by or on behalf of the donor and attested by at least two witnesses. The learned counsel representing the respondent, despite an opportunity, fails to draw the attention of the Court to any provision which requires the agreement to sell to be attested by at least two attesting witnesses. The applicability of Section 68 of the 1872 Act is dependant upon the requirement that the particular instrument is required to be attested by at least two attesting witnesses or not, failing which Section 68 and 69 of the 1872 Act lose their application. An agreement to sell shall be required to be proved like any other written instrument in accordance with the Section 72 of the 1872 Act, which does not require that the attesting witnesses to be examined.

16. Hence, the issue No. (i) is answered in favour of the appellant/plaintiff.

17. This Bench now proceeds to discuss the second issue as to whether a written agreement to sell, duly signed/thumb marked by the parties, can be ignored on the ground that it is surrounded by suspicious circumstances for which no foundation is laid in the pleadings.

18. In a case where there is a written contract between the parties, which is duly signed or thumb marked by them, the Court should hesitate in ignoring the same, unless a cogent and definite evidence has come on the record to prove that it is surrounded by the suspicious circumstances. For proving such suspicious circumstances, the parties alleging the same are required to lay a foundation in its pleadings. In the absence thereof, the Court is not justified in ignoring the written contract between the parties, which is duly signed or thumb marked by them on insignificant inconsistencies in the oral evidence. It will be too much to extract from a witness to have exact memory of the events which took place. Once a document is in writing, the Court should prefer the documentary evidence in place of oral evidence, unless there are circumstances which lead the Court to some other conclusion. Hence, issue No. (ii) is accordingly answered.

19. Now, the Bench proceeds to discuss the third issue as to whether insignificant/inconsistency in the oral evidence is sufficient to discard the written agreement entered into between the parties, duly signed and thumb marked by them. It is noted here that issue No.(iii) has already been answered while discussing issue No.(ii). However, in the facts of the present case, firstly an analysis of the reasons recorded by both the Courts

20. The first reason, assigned by both the Courts below, to dismiss the suit is with respect to the statement of Surjit Singh, wherein he stated that Sukhdev Singh had signed the agreement to sell in his presence. It would be noted here that the deposition of Surjit Singh was recorded in the year 2008, whereas the agreement to sell was executed in the year 1992. In such circumstances, in the considered opinion of this Court, both the Courts below have erred in doubting the written contract on this aspect. Surjit Singh has specifically stated that Sukhdev Singh, the defendant, first of all signed the agreement to sell in the presence of Mohinder Singh, another witness on the margin, as well as himself and the plaintiff. Despite the searching questions, the learned counsel representing the defendant has failed to impeach his credibility. He has stated that he along with Mohinder Singh son of Jagir Singh and other witnesses, was present when the agreement to sell was signed. The trial Court has erred while observing that Surjit Singh has stated that the agreement to sell was executed by the plaintiff and not by the defendant. This is a misreading of the evidence. This Court has called upon the counsel representing the respondent to draw the attention of the Court to such part of the statement, however, he failed.

21. The next reason assigned by both the Courts below is also erroneous because a professional scribe is not expected to know the parties personally, hence, he cannot identify the parties. Both the Courts below have erred in overlooking the facts that the scribe brought a note-book to prove that the agreement to sell has not only been scribed by him, but the defendant as well as the marginal witnesses have signed/thumb marked the

the Courts below have further erred while observing that the plaintiff admits that the writing was for the agreement related to payment of money. In the considered view of this Court, a small sentence cannot be read in isolation of the entire statement. Before relying upon the oral evidence, the Court has read the entire statement made by the witness. It would be noted here that it is not the case of the defendant that there was any loan transaction. The plaintiff, while appearing in his evidence as PW.4, was not given any suggestion by the learned counsel representing the defendants. He has just stated in a casual manner that the writing was for money. For that fact, both the Courts have erred in drawing a conclusion that there was no agreement to sell.

22. Similarly, the next reason assigned by the First Appellate Court that the plaintiff did not take steps for a period of 12 years, therefore, the suit suffers from its long silence and consequently, is liable to be dismissed. As per the provisions of Article 54 of the Schedule attached to the Limitation Act, 1963, the limitation period will begin to run either from the date or period specified in the agreement to sell or from the date when the intended purchaser has a notice of refusal. The defendant does not state that he informed the plaintiff about his intention to refuse performance. Moreover, the agreement to sell is a total payment agreement and the plaintiff was not required to pay any further amount. As per the agreement to sell, not only the possession was delivered, but also no date for its performance was specified. Additionally, the defendant, while appearing in evidence as DW.1, has admitted that there are four shops apart from the courtyard, kitchen and a bedroom on the plot which belong to the plaintiff. It is not his

case that he has raised the construction. As per the agreement to sell, a plain plot was agreed to be sold. The defendant also admitted that the plaintiff has leased out three shops, whereas in the fourth shop he is running his own business. In such circumstances, the Courts have erred in overlooking the aforesaid facts. Hence, the suit filed by the plaintiff cannot be held to be suffering from delay and laches.

23. Both the Courts below have also erred in drawing the adverse inference against the plaintiff on account of the non-examination of the Sarpanch. The Sarpanch of the village is neither a witness to the agreement to sell nor instrumental in the contract. The plaintiff has only stated that he requested the defendant many a times in the presence of Sarpanch. Even if the plaintiff fails to prove that fact, it is not sufficient to discard the written contract.

24. Both the Courts below have also erred in appreciating the evidence in proper perspective. The plaintiff as well as the attesting witnesses and the Scribe have stated that the agreement to sell was scribed in old Tehsil compound, where the Sub-Registrar has the office. It is nowhere stated by the plaintiff that the agreement to sell was registered by the Tehsildar. In fact, he has stated that it was not registered.

25. Both the Courts below have further erred in taking note of insignificant inconsistencies in the oral and documentary evidence like the agreement to sell was computer typed, whereas it was typed on a manual typewriter. After a period of 16 years, the plaintiff cannot be expected to exactly remember that the agreement to sell was computer typed or typed on a manual typewriter.

26. Both the Courts below have further erred in observing that the plaintiff has failed to dispel suspicious circumstances. In the considered view of this Court, there are no suspicious circumstances, particularly when the defendant, after having taken a particular plea that the agreement to sell is a result of forgery, has failed to lead any evidence to substantiate the aforesaid evidence. At the cost of repetition, only the defendant has appeared in his evidence and admitted that the building, consisting of four shops and a residential house belonging to the plaintiff, has been constructed on the plot. He does not claim that he has constructed the property.

27. Consequently, both the Courts have erred in dismissing the suit while refusing to grant the relief of specific performance of the agreement to sell. Hence, the present appeal is allowed. The judgments passed by both the Courts below are set aside. The suit filed by the plaintiff for specific performance of the agreement to sell dated 28.01.1992 shall stand decreed with costs. The plaintiff shall be entitled to get the sale deed executed by filing an application before the Executing Court. The defendant is directed to execute the sale deed within a period of two months, from the date of filing of an execution application, failing which the Executing Court shall get the sale deed executed on behalf of the defendant.

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

(Anil Kshetarpal)
Judge

April 20, 2022
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No