

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

RSA No.6067 of 2014 (O&M)

Date of decision: 15.09.2022

Girdhari Lal (since deceased) through LR Hari Narain

..... Appellant

Versus

Mittar Sain

..... Respondent

CORAM: HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present: Mr. Shailendra Sharma, Advocate
for the appellant.

Mr. Anil Bansal, Advocate
for the respondent.

TRIBHUVAN DAHIYA J.

CM-14451-C of 2014

For the reasons stated in the application, delay of 254 days in re-filing the appeal is condoned.

RSA No.6067 of 2014 (O&M)

This is the appellant-plaintiff's second appeal against the judgment of reversal.

2. The appellant-plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for specific performance of the agreement to sell, and, in the alternative, for the relief of recovery, on the pleadings that the respondent-defendant (hereinafter referred to 'the defendant) was owner of 1/5th share out of the 179/256 share (8 kanals 19 marlas), out of the land measuring 12 *kanal* 16 *marla*, as detailed and described in the head-note of the plaint, and as shown in the *Jamabandi* for the year 1998-99. The respondent-defendant was, therefore, owner of 1 *kanal* 16 *marla* share out of the said land, on the basis of sale deed No.2270

dated 08.08.1995. The defendant sold 01 *kanal* 0 *marla* of land, vide sale deed No.959 dated 07.05.2004, to the plaintiff. He also sold 0 *kanal* 5½ *marla* of land vide another sale deed No.1193 to Smt. Sheela Devi. Therefore, the defendant was left with only 0 *kanal* 10½ *marla* share in the suit property. It has further been pleaded by the plaintiff that he and defendant had jointly purchased 179/256 share out of the land measuring 12 *kanal* 16 *marla* vide sale deed No.2270 dated 08.08.1995, and out of the said land they carved out plots. Some of the land was wasted in the streets, and after deducting the said land, plaintiff was allotted 1 *kanal* 16 *marla* land. Out of the said land, after execution of all the aforesaid sale deeds, the plaintiff was left with 0 *kanal* 10½ *marla* of land. It has been averred that by writing dated 07.05.2004, defendant sold 350 sq. yards plot, located at the back side of Amarjit Dhillon's land, to the plaintiff for a sum of Rs.1,22,500/-, and received the entire sale consideration in the presence of the witnesses. The defendant himself scribed the writing and signed it, admitting that he has no concern with the said land any longer. He also agreed to execute the sale deed in favour of the plaintiff, for which he (plaintiff) was always ready and willing. On 17.04.2008, the plaintiff's counsel sent notice to the defendant to get the sale deed executed, but he refused to accept the notice. With these pleadings, the suit was filed.

3. Upon notice, the defendant appeared and stated that the alleged writing/agreement dated 07.05.2004 was illegal and void as the area, boundaries, *khasra* numbers and *khata* numbers have not been

mentioned therein. The alleged agreement to sell is on a plain paper, un-stamped, and is, therefore, inadmissible in evidence. On merits, execution of the writing/agreement dated 07.05.2004 was denied, and also receipt of the sale consideration amount.

4. The following issues were framed to settle the controversy between the parties:-

1. Whether the plaintiff entered into an agreement dated 07.05.2004 for the sale of the disputed property in favour of the plaintiff for Rs.1,22,500/-? OPP
2. Whether the plaintiff has been ready and willing to perform his part of the agreement? OPP
3. If issue No.1 and 2 are proved whether the plaintiff is entitled for the relief of specific performance of the agreement dated 07.05.2004? OPP
4. If relief of specific performance is not granted in favour of plaintiff, whether the plaintiff is entitled for the alternative relief of recovery of Rs.1,22,500/- along with interest? OPD
5. Whether no cause of action accrued in favour of the plaintiff to file the present suit? OPD
6. Relief.

5. The plaintiff-Girdhari Lal appeared as PW-1, also examined Jiwan Kumar as PW-2, and Karam Singh as PW-3. He also tendered documents (Exhibits P-1 to P-13) to establish his case. On the other hand, the defendant appeared as DW-1 and tendered document (Exhibit D-1) before closing his evidence. The trial Court gave its findings on issue Nos.1 to 3 and 5 together, and decreed the suit by holding that the plaintiff had pleaded in detail in the plaint as to how the defendant had alienated his residual share, and was left with only 10½ marlas share out of the said land. This fact is not denied by

the defendant in the written statement. In these circumstances, when the defendant's share in the said property was joint, and the plot measuring 10½ *marla* was well known to both the plaintiff and the defendant, this was the same plot on the back side of Amarjit Singh Dhillon's land (as described in the writing/agreement) comprising of *khasra* numbers as detailed and described in the head-note of the plaint.

6. Therefore, the trial Court held that identity of the plot was clear and distinct. The defendant was well aware of the plot that he was selling, and the plaintiff very well knew the plot, which he was purchasing. Except the said plot measuring 10½ *marla*, the defendant had no other residual share in the said land. Therefore, there is no dispute regarding identity of the plot in question. It was further held that as the writing/agreement dated 07.05.2004 was not registered, it was liable to be treated as an agreement to transfer the said land by the vendor/defendant to the vendee/plaintiff. Therefore, the writing (Exhibit P-1) is liable to be treated as an agreement to sell. It was also held that suit was filed within the period of limitation, which was to be counted from the date of legal notice dated 17.04.2008 (Exhibit P-2) and served upon the defendant calling upon him to execute the sale deed in favour of the plaintiff in terms of the writing (Exhibit P-1).

7. Besides, the entire sale consideration stood paid to the defendant by the plaintiff in the presence of witnesses at the time of the execution of the writing dated 07.05.2004 (Exhibit P-1). On the finding of issue Nos.1 to 3 and 5, it was held that since the plaintiff has

been held entitled to the main relief of specific performance of the agreement to sell, he was not entitled to relief of recovery as prayed for.

8. The defendant went in appeal against the judgment of the trial Court, and the lower Appellate Court reversed the judgment by holding that the said writing/agreement was written on half page plain paper, which was unstamped, and description of the property was not mentioned therein. No proper dimensions/boundaries of the property in question were mentioned either. As such, the writing/agreement dated 07.05.2004 (Exhibit P-1) was vague, which could not be treated as an agreement to sell for specific performance, especially when no particular date has been mentioned for registration of the sale deed. There is no affidavit showing plaintiff's readiness and willingness for execution before the Sub-Registrar. Accordingly, findings on issue No.1 to 3 were set aside. It was further held, as the defendant has received full sale consideration amount of Rs.1,22,500/-, but has not executed any sale deed in favour of the plaintiff, therefore, he cannot be allowed to retain the said amount. It would amount to unjust enrichment. Accordingly, plaintiff was held entitled to recovery of the said amount, as alternative relief, from the defendant. Accordingly, finding on issue no.4 was set aside by holding the plaintiff entitled to recover a sum of Rs.1,22,500/- from the defendant with interest at the rate of 6% per annum.

9. Learned counsel for the appellant has contended that the relief of specific performance could not be denied to the plaintiff as the property in dispute was identifiable. Except the plot measuring 10½ *marla*, the defendant has no residual share in the said land, as all the remaining property had already been sold by him. On the other hand, learned counsel for the respondent has submitted that the agreement to sell is vague and cannot be executed, as it lacks in basic requirement of clearly identifying the property which was meant to be transferred by way of the writing/agreement in question. Besides, no date for execution of the sale deed was mentioned in the said agreement.

10. To appreciate the controversy between the parties, it is apposite to reproduce the writing/agreement dated 07.05.2004 (Exhibit P-1), which reads as under:

I Mittar Sain son of Shri Devi Dayal, resident of Rampura Phul has sold a plot measuring 350 sq. yards, which is situated in village Gill Kalan, behind the land of Amarjit Singh Dhillon, to Girdhari Lal son of Ram Nath Ji, at the rate of Rs.350/- per sq. yard. The total amount of the said plot comes to Rs.1,22,500/-, which I have received in cash voluntarily. Now I have no concern with the said plot. Few lines have been written so that should be remembered.

Dated:-7.5.2004

Sd/- Mittar Sain s/o
Devi Dayal,
Rampura Phul.

Witness

Sd/- Jiwan Kumar
s/o Parkash Chand,
Phul.

Sd/- Babu Ram
Babu Ram s/o Atma Ram,
Resident of Phul Town.

11. A reading of the aforesaid document (which is stated to be agreement to sell) evidently shows, it only states that a plot measuring 350 sq. yards, which is situated in village Gill Kalan, behind the land

of Amarjit Singh Dhillon, has been sold by the defendant to the plaintiff at the rate of Rs.350 per sq. yard. The total amount of the said plot is Rs.1,22,500/- which has been received in cash by the vendor/defendant, who has signed the document on 07.05.2004 in the presence of two witnesses. Can the basic ingredients of an agreement to sell be said to have been incorporated in the aforesaid writing/document (Exhibit P-1)? Admittedly, it is neither stamped, nor prescribes any date for execution of the sale deed. It only records that a plot in question has been sold; without identifying the plot, it's ownership or location in clear terms. The only detail divulged is, a plot measuring 350 sq. yards situated in village Gill Kalan, behind the land of Amarjit Singh Dhillon. It is also not clear as to where the land of Amarjit Singh Dhillon is situated, or, which is the land owned by Amarjit Singh Dhillon in village Gill Kalan, as no parentage, *hasra* number, *killa* number, etc., have been mentioned. A plain reading of these lines does not identify the said plot in any manner whatsoever.

12. The trial Court has held this document to be an agreement to sell by referring to pleadings of the parties which indicate that out of his joint holding the defendant was left only with the land mentioned in the document, and that is how it becomes identifiable. Therefore, it is only by a method of deduction that the identity of land could be established. The court had to try and identify the property based on evidence to make the document in question enforceable. This is not permissible, nor legally required. It is for the parties to enter into a valid enforceable contract, before seeking specific performance of

the same. There is no gainsaying that every agreement to be valid must be clear and specific in its basic ingredients, which include the particulars of the land, its ownership, measurements and its location. None of these has been mentioned in the document in question dated 07.05.2004. This is not a case where possession of land has been handed over to the plaintiff/vendee at the time of execution of the document either. Unless the subject matter of an agreement is distinctly identifiable, the contract cannot be enforced. Therefore, no valid and enforceable contract can be said to have been entered into between the parties by way of the document in question dated 07.05.2004 (Exhibit P-1).

13. The Supreme Court in *Smt. Mayawanti v. Smt. Kaushalya Devi*, (1990) 3 SCC 1 has held, where a valid enforceable contract has not been made the court will not make a contract for the parties. Para 8 of the judgment reads as under:

In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the

foundation of the obligation the order of specific performance is to enforce that obligation.

14. So far as the finding of issue No.4 is concerned, whereby the plaintiff has been held entitled to recover the amount of Rs.1,22,500/- from the defendant, it is also unassailable. Merely because the document in question cannot be termed as an agreement to sell, it cannot be stated that payment of a sum of Rs.1,22,500/-mentioned therein, cannot be believed. Or, on the contrary, if this monetary transaction is believed, the document is to be termed as an agreement to sell liable to be executed. These two aspects are different, and have been rightly so treated by the lower Appellate Court. As discussed above, in the absence of prerequisites of an agreement to sell being present in the document dated 07.05.2004 (Exhibit P-1), it cannot be treated as the one, liable to be enforced. At the same time, the monetary transaction referred to therein and established on record, cannot be ignored. Since the document in question becomes unenforceable, it is all the more reason the amount be returned to the vendee/plaintiff.

15. In view of the above analysis, the impugned judgment and decree passed by the lower Appellate Court is upheld, and the regular second appeal is dismissed.

16. All pending miscellaneous applications, if any, also stand dismissed.

(TRIBHUVAN DAHIYA)
JUDGE

15.09.2022

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Whether speaking : Yes/No

Whether reportable: Yes/No