

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARHRSA-5644-2019 (O&M)
Reserved on: 29.08.2023
Date of decision: 06.09.2023

HARVINDER SINGH & ANR.

..Appellants

Versus

KRISHAN KUMAR (DECEASED) THROUGH LRS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Ajay Jain, Advocate
for the appellants.Mr. Shailender Kashyap, Advocate
for respondent.ANIL KSHETARPAL, J.

1. The correctness of the concurrent findings of fact arrived at by the Courts below while decreeing the plaintiffs suit for possession by way of specific performance of the agreement to sell has been assailed by the defendant in this second appeal.

2. In the considered opinion of the Court, the following question of law arises for adjudication in the present case:-

1. Whether the evidence is required to be incorporated in the pleadings?

3. In order to comprehend the controversy involved in the present case, the relevant facts, in brief, are required to be noticed.

4. The execution of the registered agreement to sell dated 29.01.2009 with respect to 16 kanal land and one half share in the Dhani (constructed area) and 1/6th share in the tubewell for total consideration of

dispute. As per the terms of the agreement to sell, the sale deed was to be executed on or before 15.09.2009. On 06.02.2009, another sum of Rs.6,60,000/- was paid to the defendant by the plaintiff against the endorsement on the agreement to sell. On 14.09.2009, the date for execution of the sale deed was extended by one year to 15.05.2010. The defendant claims that the aforesaid document was executed as a collateral security for the repayment of loan, which he borrowed from the plaintiff. The defendant admits that he borrowed Rs.5,00,000/- on 29.01.2009, whereas, Rs.6,60,000/- on 06.02.2009. The defendant also claims that he offered to repay the loan amount, however, the plaintiff refused to receive the same on return of the documents on receipt of the borrowed amount. On 14.06.2011, the suit was filed.

5. In the oral evidence, the plaintiff in order to prove his case, examined PW-1 Sh. Ashwani Kumar, the scribe, PW-2 Sh. Madu Ram, the marginal witness to the agreement to sell and writing dated 14.09.2009, PW-3 Sh. Krishan Kumar, plaintiff. In the documentary evidence, he produced an agreement to sell dated 29.01.2009, writing dated 14.09.2009 (Ex.PW1/B), affidavit dated 17.05.2010 (Ex.P-2), *rapat roznamcha* dated 13.09.2000 (Ex.P-3), mutation No.4443 (Ex.P-4) and copy of jamabandi for the year 2011-12 (Ex.P-5).

6. On the other hand in the oral evidence, defendant appeared in evidence as DW-2. They also examined DW-2 Sh. Nand Kishore, DW-3 Sh. Karnail Singh, DW-4 Sh. Sadhu Singh, DW-5 Sh. Gurnam Parshad, DW-6 Sh. Mahender Singh Ex-Sarpanch and present Nambardar, DW-7 Sh. Inder Lal Ex-Sarpanch and DW-8 Sh. Gujraj Singh, the marginal witness of the agreement to sell dated 29.01.2009.

7. In the documentary evidence, the defendants produced Ex.D-1

and Ex.D-2 (the extracts of the register of the scribe) in order to prove that similar agreements to sell were executed by various persons in favour of the plaintiff. Ex.DW1/C is the statement of Sh. Bhupinder recorded on 06.07.2013 in State Vs. Vikram, FIR No.177, dated 06.07.2013, under Sections 148, 149, 323, 506, 427, 325 IPC, PS Sirsa Sadar. Ex.D-3 is the agreement to sell dated 06.04.2009 executed by Sh. Karnail Singh in favour of Sh. Krishan Kumar (plaintiff) with respect to the land measuring 20 kanal situated in village Naja Dela Kalan, Sirsa, on receipt of Rs.17,50,000/- out of total sale consideration of Rs.20,00,000/-. Ex.DW3/A is the collector's rate, whereas, Ex.DW3/C is the affidavit of Sh. Krishan Kumar dated 25.11.2009, and Ex.D-4 is the agreement to sell dated 16.03.2009 executed by Sh. Nand Kishore (DW-2) in favour of Sh. Krishan (the plaintiff) in respect to the land measuring 40 kanals and 16 marlas on receipt of the earnest money of Rs.9,00,000/- out of total sale consideration of Rs.15,82,850/-.

8. The Court of first instance refused to take into consideration, the defendant's plea that the agreement to sell was executed as a collateral security on the ground that in the written statement the defendants have not pleaded that the plaintiff has executed various other agreements in similar manner and he is a money lender. The First Appellate Court after superficially examining the facts dismissed the appeal. The First Appellate Court, in fact, failed to thoroughly re-examine the evidence, which is expected of a First Appellate Court.

9. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record of the Courts below. The learned counsel representing the appellants and respondents have filed their respective

written note of the arguments.

10. On the one hand, the learned counsel representing the appellant while drawing the attention of the Court to the plaintiff's statement as PW-3, submits that the defendant has successfully proved that the plaintiff is in the business of lending money to the village/farmers and his modus operandi is to get the agreements to sell executed in his favour to secure the repayment of the loan amount. He submits that a similar agreement to sell was executed by Sh. Karnail Singh in favour of Sh. Krishan Kumar the plaintiff with respect to a parcel of land located in the same village i.e. Naja Dela Kalan. Subsequently, on refund of the amount by Sh. Karnail Singh, the aforesaid agreement to sell (Ex.D-4) was cancelled. Similarly, another agreement to sell was executed by Sh. Nand Kishore in favour of the plaintiff. The plaintiff (Sh. Krishan Kumar) filed a suit for specific performance of the agreement to sell but withdrew the same on the ground that he has been refunded the amount. He hence submits that the Courts have erred in decreeing the suit. He also relies upon the judgment passed in RSA-130-2015, titled as "Kesar Singh Vs. Harbhajan Singh", decided on 19.04.2018, to contend that the evidence is not required to be incorporated in the pleadings and therefore, the Courts have erred in refusing to consider the defendant's contention.

11. On the other hand, the learned counsel representing the respondent submits that the concurrent findings of fact have been arrived at by the Courts below, which should not be interfered with on reappraisal of evidence.

12. This Court has considered the submissions of the learned counsel representing the parties.

13. It may be noted here that the defendants in order to prove their

case has produced the copy of two entries in the register of scribe, which proves that on 16.03.2009, Sh. Nand Kishore entered into an agreement to sell in favour of Sh. Krishan Kumar (the plaintiff) with respect to 40 kanal and 16 marlas land on receipt of earnest money of Rs.9,00,000/- out of total sale consideration of Rs.15,82,850/-. Ex.P-6 is an order passed by the Court in Krishan Kumar Vs. Nand Kishore, wherein, the plaintiff Sh. Krishan Kumar withdrew the suit on the basis of settlement. When Sh. Krishan Kumar was confronted with the aforesaid documents, he admitted that he filed a suit but cancelled the agreement after the amount was refunded by Sh. Nand Kishore who had sold the property to notorious persons. Similarly, when Sh. Krishan Kumar was confronted with the agreement to sell executed by Sh. Karnail Singh in his favour, he explained that he cancelled the agreement on refund of the earnest money. It may be noted here that Sh. Parkash son of Sh. Madu Ram is the marginal witness of an agreement to sell dated 16.03.2009, executed by Sh. Nand Kishore, whereas, Sh. Madu Ram is the marginal witness of the agreements to sell executed by Sh. Karnail Singh in favour of Sh. Krishan Kumar. Sh. Madu Ram was also the marginal witness to the agreement to sell executed by the defendant in favour of the plaintiff on 29.01.2009.

14. The other two agreements to sell executed by Sh. Nand Kishore and Sh. Karnail Singh are also proved from the statement of Sh. Ashwani Kumar, who was examined by the plaintiff. The scribe of all the three agreements to sell is common. It is also significant to note that Sh. Bhupinder Singh, Advocate is also the common marginal witness of both the agreements to sell namely Ex.D-3 and Ex.D-4. After having considered the argument, this Court is of the view that both the Courts have erred in exercising their discretion in accordance with Section 20 of the unamended

Specific Relief Act, 1963, which provides that the jurisdiction to grant decree for specific performance is discretionary and the Court is not bound to grant such relief merely because the agreement to sell is proved. Though, by subsequent amendment in the year 2018, Section 20 has been substituted, however, in the present case, the unamended act would apply because not only the agreement to sell was executed prior to the amendment but even the suit was filed and decreed by the Court of first instance prior to the amendment. The amendment came into effect during the pendency of the first appeal.

15. In the considered view of this Court, the plaintiff is not entitled to the relief of specific performance on account of the following reasons:-

1. The defendant has successfully proved that Sh. Karnail Singh and Sh. Nand Kishore entered into two different agreements to sell various parcels of land in the same village or adjoining village in favour of the plaintiff-Sh. Krishan Kumar which were cancelled after receipt of money by the plaintiff. In those cases also, the plaintiff adopted a similar modus operandi of getting the agreements to sell executed in his favour to secure the repayment of the loan.

2. As per the agreement to sell, the sale deed was to be executed on or before 15.09.2009. The plaintiff paid another sum of Rs.6,60,000/- on 06.02.2009. Thus, by 06.02.2009, 90% of the payment had already been paid. However, still by a writing dated 14.09.2009, the period for execution of the sale deed was extended by another year i.e. from 15.09.2009 to 15.05.2010. Even thereafter,

the plaintiff filed the suit for specific performance on 14.06.2011 i.e. after a gap of more than one year.

3. Moreover, the plaintiff has not explained the reason for not filing the suit immediately after 15.05.2010, when the defendants did not come forward to honour their part of the agreement. The plaintiff neither sent a notice to the defendants nor took any steps to ensure the registration of the sale deed.

4. Sh. Gujraj Singh, one of the marginal witness of the agreement to sell has appeared as DW-8 on behalf of the defendant. He has categorically stated that modus operandi of the plaintiff is to get the similar agreements to sell executed from the persons to whom he lends the money. The defendant has also examined DW-6 Sh. Mahender Singh (Ex-Sarpanch) and present Nambardar, DW-7 Sh. Inder Lal (Ex-Sarpanch) to prove that Sh. Krishan Lal is a money lender and the agreement to sell was only executed as a collateral security to secure the repayment of the loan amount.

16. One of the reasons given by both the Courts below to decree the suit is to the effect that possession of one room was given to be plaintiff pursuant to the agreement to sell. It may be noted that this can be one of the factors to evaluate the intention of the parties, however, it will not help the case of the plaintiff as he had sold his entire property and therefore, he required some place to temporarily stay. That is how the possession of one room in the constructed area in the agricultural land was given to him.

However, that itself is not sufficient to decree the suit for specific

performance particularly when overwhelming evidence has been brought on record by the defendants to prove that the plaintiff is a money lender.

17. Moreover, the trial Court has also erred in observing that the defendant failed to prove that the amount was refunded. In fact, the aforesaid finding of the trial Court is erroneous as the defendants have asserted that they offered to repay the amount, however, the plaintiff did not accept the same. It is not the case of the defendants that they have already refunded the amount. Thus, the trial Court has erred in reading the plea of the defendants in a correct perspective.

18. It may be noted here that the trial Court has erred in overlooked the provisions of Order VI Rule 2 of the Code of Civil Procedure, 1908, which requires that the pleading shall contain only a statement of material facts in a concise form but not the evidence, which the parties wish to prove. The defendants while filing the written statement had pleaded that the document was a security document executed for securing the repayment of the loan. In order to prove that fact, the defendants led their evidence. The evidence was led to corroborate their plea in the written statement, hence, such evidence cannot be excluded from consideration.

19. The learned trial Court has also erred while observing that the plaintiff cannot be taken by surprise and it was the duty of the defendant to plead these facts in order to give sufficient opportunities to the plaintiff to explain documents Ex.D-1, Ex.D-2, Ex.D-3 and Ex.D-4. The aforesaid reason given by the trial Court is incorrect. The first witness examined by the plaintiff was PW-1 Sh. Ashwani Kumar, the scribe. The learned counsel representing the defendant while cross-examining him, has proved Ex.D-1 and Ex.D-2 on 15.04.2015. Thereafter, the plaintiff examined Sh. Madu Ram as witness. He admitted his signatures on Ex.D-3. He was also

questioned on the agreement to sell with Sh. Nand Kishore and signatures of Sh. Prakash (his son) on the aforesaid agreement to sell. Thereafter, the plaintiff appeared as PW-3. He was also cross-examined at length on the document Ex.D-1, Ex.D-2, Ex.D-3 and Ex.D-4. Thus, the plaintiff has been provided with sufficient opportunities to explain the aforesaid two agreements i.e. Ex.D-3 and Ex.D-4. In these circumstances, the observations made by the trial Court are not sustainable.

20. Keeping in view the aforesaid facts, the reasons assigned by the Court of first instance, are erroneous.

21. Keeping in view the aforesaid discussion, the result is inevitable. The decrees passed by both the Courts below for possession by way of specific performance of the agreement to sell are substituted by a decree for refund of Rs.11,60,000/- along with interest at the rate of 9% per annum, whereas, with respect to the amount of Rs.5,00,000/- the interest would accrue with effect from 29.01.2009 and till the payment of the amount to the plaintiff with effect from 06.02.2009 with respect to the amount of Rs.6,60,000/- till its repayment. The refund of the amount shall remain charge on the suit property.

22. With these observations, the appeal is allowed.

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

September 06th, 2023

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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned

: Yes/No

Whether reportable

: Yes/No