

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH.

155

RSA-1579-1990 (O&M).
Date of Decision: 08.04.2024.

SMT. KAMLA

... Appellant

Versus

UMED SINGH AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Kulvir Narwal, Advocate, with
Mr. Shubham Chaudhary, Advocate,
for the appellant.

Mr. B.S, Rana, Sr. Advocate, with
Mr. Nayandeep Rana, Advocate, for the respondents.

VINOD S. BHARDWAJ, J (ORAL).

Appellant-defendant has preferred the instant Regular Second Appeal against the judgment and decree dated 02.03.1989 passed in Civil Suit No.851 of 1985 whereby the suit of the respondent-plaintiff for recovery of Rs.22,500/- was decreed along with costs and with future interest @ 6% per annum and also against the judgment and decree dated 23.04.1990 whereby the Civil Appeal No.43/13 of 1989 was dismissed by the Additional District Judge, Rohtak.

2 Briefly summarized, the facts of the present case are that respondent-plaintiff filed a suit for recovery of Rs.22,500/- paid to the defendants as sale consideration and also for the amount spent towards stamp and registration charges. The respondent-plaintiff had purchased the land in dispute, as described in para no.1 of the plaint, from the appellant-defendant vide sale deed dated 10.06.1974 registered on 17.06.1974 for a total sale consideration of Rs.20,000/-. It was stated in the agreement that the land under sale is free from all encumbrances and the appellant-defendant is the sole owner having absolute right to alienate the same. It was also incorporated that in the event of any defect in the title or the land under sale flushes out from the respondent-plaintiff, appellant-defendant will compensate the respondent-plaintiff to the said extent.

3 It later transpired that the appellant-defendant had already entered into an agreement to sell the above land with one Chattru son of Het Ram. A suit for specific performance of the agreement to sell dated 27.08.1970 was filed bearing Civil Suit No.311 of 1973 by said Chattru. The said civil suit was dismissed by the Sub Judge First Class, Rohtak vide judgment and decree dated 03.11.1973. Aggrieved of the said dismissal, Chattru preferred an appeal before the District Judge, Rohtak. Vide judgment and decree dated 20.09.1982, passed by the Additional District Judge, Rohtak, the appeal was allowed and the decree dated 03.11.1973 passed by the Sub Judge First Class, Rohtak was set aside. The appellant-plaintiff therein was held entitled to a decree for specific performance of the agreement dated 27.08.1970 within a period of 03 months of the receipt of the balance sale consideration.

4 It was during the pendency of the above appeal before the Appellate Court that the sale deed was executed by the appellant-defendant in favour of the respondent-plaintiff on 17.06.1974 (Ex.P-1). It was averred that the said *lis* which was already pending between the parties before the Civil Court with regard to the said property was not disclosed at the time of execution of the sale deed. The said decree in favour of Chattru was maintained upto the High Court and that eventually a sale deed was got executed in the execution proceeding, after deposit of balance sale consideration, in favour of Chattru. It was thus claimed that the appellant-defendant intentionally and with malicious intention did not disclose about the previous agreement to sell and also about the pendency of litigation before the Civil Court. A prayer was thus made for return of the consideration money along with Rs.2,500/-, that had been incurred by the plaintiff-respondent on account of stamp and other charges. Interest @ 12% per annum was also claimed.

5 The appellant-defendant filed the written statement wherein various objections were taken with respect to the maintainability of the civil suit and also that there was no sale transaction inter se between the respondent-plaintiff and the appellant-defendant and that he was the nearest reversioner in the property. It was claimed that half share in the land held by the appellant-defendant and half share in plot No.89 measuring 607 sq. yards was given to the respondent-plaintiff free of costs and that the sale deed was executed without consideration. Hence, the same is void. It was also pleaded that Chattru was the brother of the respondent-plaintiff and that they have been residing together. There was thus no occasion for the

respondent-plaintiff not to know about the arrangement and earlier agreement with Chattru. It was also submitted that the possession of the suit land had been taken by the respondent-plaintiff and that she is entitled to receive back possession of the plot no.89 measuring 607 sq. yards. A prayer was thus made for dismissal of the suit.

6 On completion of the pleadings, the following issue were framed:-

1. Whether the plaintiff is entitled to recover an amount of Rs.22,000/- as alleged? OPP.
2. If issue No.1 is proved whether plaintiff is entitled to interest? If so at what rate and how much? OPP
3. Whether the suit is pre-mature as alleged in para no.1 of the written statement? OPD
4. Whether the plaintiff is estopped by his act and conduct from bringing the present suit? OPD
5. Whether the suit is speculative, if so, its effect? OPD
6. Whether the suit is barred by time? If so, its effect? OPD
7. Whether the defendant is entitled to receive the remaining $\frac{1}{2}$ share of plot no.89 measuring 607 sq. yards and $\frac{1}{3}^{\text{rd}}$ share of produce in the event of the suit of the plaintiff is decreed? OPD
8. Relief.

7 Upon consideration of the evidence led by the respective parties, Additional Senior Sub Judge, Rohtak, recorded a finding that the sale deed had been executed by the appellant-defendant in favour of the

respondent-plaintiff. It was also held that there was a specific averment in the said sale deed that if any part or portion of the land under sale flushes out from the respondent-plaintiff, the appellant-defendant would compensate the vendee to that extent. The filing of the civil suit by Chattru for specific performance of the contract was also established. It was observed that merely because the respondent-plaintiff was living with Chattru would not mean that he would be having knowledge of the earlier transaction between Chattru and the defendant. It was also noticed that from a perusal of the documents including the ration card, Voter I.D. card etc., there was nothing to suggest that Shish Ram and Chattru were residing together at the relevant time. Knowledge of the respondent-plaintiff about any transaction with Chattru was thus dispelled. The respondent-plaintiff was thus held entitled to recover the amount of Rs.22,500/- from the appellant-defendant. Further, in so far as the relief of recovery of an amount along with interest @ 12% per annum is concerned, the interest was awarded @ 6% per annum only. The issues No.3, 4, 5 and 6 the onus of which lay upon the appellant-defendant, the same were not pressed. Qua issue no.7, relating to the appellant-defendant being entitled to receive the remaining $\frac{1}{2}$ share of plot no.89 measuring 607 sq. yards and $\frac{1}{3}^{\text{rd}}$ share of produce in the event of the suit of the plaintiff being decreed is concerned, it was recorded by the Court that it was the case of the appellant-defendant that she is entitled to receive the said share in the name of her husband in civil suit titled as Shish Ram Vs.Dharma, decided on 23.01.1976 as his share was given to the respondent-plaintiff along with the land. It was observed that in order to prove her case, the appellant-defendant relied on

the statement of PW.5 Wazir Chand who was a retired Girdawar and was appointed as Local Commission in the said case. The witness had stated that vide report EX.PW5/A, that possession of plot no.89 had been given to Bhiman through Richhpal and that the said Bhiman happened to be the husband of the appellant-defendant. It was later stated that the possession of the plot No.89 was given to Balwan instead of plaintiff through Richhpal. In cross-examination, however, he could not tell as to how many persons he had given the possession of plot no.89. Thus, the testimony of Wazir Chand was found to be of no help to the case of the appellant-defendant and finding that there was nothing on record to show that plot no.89 measuring 607 yards was given to the respondent-plaintiff, the claim of the appellant-defendant to the said extent was dismissed. It was also recorded that by way of suit for recovery in question, the appellant-defendant could not claim possession of any such plot as there was no counter-claim in the suit and that in the event the appellant-defendant had any right in plot no.89, she could have filed a separate suit for seeking such possession.

8 Aggrieved thereof, the appellant-defendant preferred an appeal before the District Judge. Vide its judgment and decree dated 23.04.1990, the lower Appellate Court dismissed the appeal filed by the appellant-defendant. It was held that the respondent-plaintiff was successful in establishing his claim about the execution of the sale deed in favour of the appellant-defendant and it was also recorded that in the event of any defect in the title, the liability was undertaken by the appellant-defendant to indemnify the vendee for the loss suffered by him. Besides, it was also noticed that the appellant-defendant never raised any challenge to the

findings recorded against her by the Additional Senior Sub Judge, Rohtak, on issues No.2, 3, 4, 6 and 7. The appeal was eventually dismissed.

9 Aggrieved thereof, the present regular second appeal has been filed.

10 Learned counsel for the appellant-defendant has raised the following arguments:-

- (i) Both the Courts committed an error in awarding interest @ 6% to the respondent-plaintiff and that such award of interest was bad since possession of the land had actually been delivered to the respondent-plaintiff. Since he has been in actual cultivating possession, occupation and enjoyment of the said land, interest ought not to have been awarded by the Courts.
- (ii) He contends that the respondent-plaintiff was in possession of the land till 1986 when the same was handed over to Chattru under order of the Court and not on account of any lapse of the appellant-defendant.
- (iii) It is also argued by the learned counsel that the sale deed executed by defendant in favour of the respondent-plaintiff also included all her rights in the shamlat and further that there was no transfer of any right, title or interest in the shamlat in favour of Chattru. A specific correction in this regard was also ordered by the executing Court in Execution No.154 of 1993 vide order

dated 11.02.1985. Hence, she is entitled to her easementary and proprietary rights in the shamlat.

- (iv) It has been argued by the learned counsel that the specific case set up by the appellant-defendant was that she was in possession of the property and that the same had been handed over to the respondent-plaintiff and that no replication controverting the said fact had been filed by the respondent-plaintiff. Hence, the factual assertion remained uncontroverted. Since actual physical possession of the property has been enjoyed by the respondent-plaintiff, the appellant-defendant cannot be burdened with the liability of interest for the period from execution of the sale deed till January 1986 when possession was delivered to Chattru after taking possession from the respondent-plaintiff.

11 Controverting the above, learned counsel for the respondent-plaintiff contends that the arguments are mis-conceived. He contends that the execution of the sale deed is not being disputed and the sale consideration had been received by the respondent-plaintiff. Both the Courts have concurrently recorded finding of fact in favour of the respondent-plaintiff to the said effect and accordingly, the suit for recovery of the sale consideration along with the expenses incurred by the respondent-plaintiff was decreed. It is further argued that interest was rightly awarded since the respondent-plaintiff had parted with the sale

consideration against a title which was defective and which defect was fully known to the appellant-defendant. A stipulation was made specifically in the sale deed that in the event of the land being flushed on account of defect of title, the vendee is to be compensated. The respondent-plaintiff is hence entitled to interest @ 6% per annum against the sale consideration paid by the appellant-defendant which such sale consideration she has enjoyed for the period since 1974.

12 Adverting the issue as regards the entitlement of the appellant-defendant to claim the apportionment share in the shamlat which was recorded in the sale deed to be transferred in favour of the respondent-plaintiff, it is contended that in the case of the appellant-defendant qua issue Nos.2, 3, 4, 6 and 7 was declined and that there was no challenge to the said issues before the appellate Court. Hence, the appellant-defendant cannot raise any dispute about it in the second appeal.

13 While adverting to the issue of limitation, counsel for the appellant-defendant contends that a specific finding had been recorded by the Courts that there was no evidence to suggest that the respondent-plaintiff had knowledge of the earlier agreement to sell executed by the appellant-defendant with Chattru and that the burden to establish the same lay on the appellant-defendant. The said finding having already become final, there could be no presumption of knowledge in favour of the respondent-plaintiff. Besides, there was no satisfactory explanation as to why the appellant-defendant chose to make a recital in the sale deed which was known to the appellant-defendant to be factually incorrect, if she acted bona fide.

14 No other argument has been raised.

15 I have heard learned counsel appearing for the respective parties and have also gone through the record.

16 While advertng to the issue of the respondent-plaintiff about the amount having been awarded in favour of the respondent-plaintiff along with interest @ 6% per annum, I find myself to be partially in agreement with the counsel for the appellant-defendant. A specific plea had been taken by the appellant-defendant that possession of the land had been handed over to the respondent-plaintiff and that he had been in possession of the said property till being divested of the possession over the property pursuant to the warrant issued by the executing Court. Despite specific plea taken in the written statement, there was no denial to the said plea of fact. The law is well settled that where a factual assertion is not denied specifically, the same would be deemed to be an admission. A specific recital about delivery of possession of the property in favour of the respondent-plaintiff was also incorporated in the sale deed. The respondent-plaintiff having not disputed his being in actual physical possession of the property, cannot claim that he is entitled to be compensated for compensatory interest on the consideration money for the period of nearly 12 years for which such period, he was in actual physical possession and enjoyment of the property and also for the period subsequently thereafter.

17 It is needless to mention that the interest awarded @ 6% per annum was compensatory in nature and since the actual physical possession remained with the respondent-plaintiff. The award of interest along with directing refund of the money would amount to giving dual benefit to the

respondent-plaintiff who had remained in actual enjoyment of the said property having divested the appellant-defendant from actual physical possession thereof.

18 Thus, the period during which the respondent-plaintiff in actual physical possession after execution of sale deed in his favour and till such time that possession was taken over from him deserves to be excluded from the period for which interest @ 6% per annum has been awarded. Thus, the respondent-plaintiff is held not entitled to interest on the consideration amount for the period from 18.06.1974 to January 1986.

19 Further, the appellant-defendant has also argued that the respondent-plaintiff is not entitled to claim any proportionate share in the shamlat which was also alienated in favour of the respondent-plaintiff vide sale deed Ex.P1.

20 Response of the respondent-plaintiff is, however, only to the extent that the findings on the said issues no.2, 3, 4, 6 and 7 are not challenged as such, the respondent-plaintiff would continue to stake title and interest on the proportionate share in the shamlat.

21 I, however, fail to find myself in agreement with the respondent-plaintiff. By virtue of sale deed Ex.P-1, the appellant-defendant had transferred the property mentioned therein along with appurtenant rights in the shamlat. The proportionate rights in the shamlat were consequent and ancillary to the transfer of the substantive right in the property. It would be a travesty of justice to hold that even though the sale deed is held to be non-binding on respective rights of the respondent-plaintiff and the appellant-defendant has been held liable to refund the

entire sale consideration along with all the expenses and statutory charges incurred by the respondent-plaintiff, however, the appellant-defendant would nonetheless still be divested of her right, title or interest over her shamlat property.

22 Needless to mention here that even the right in the shamlat are in the nature of properties which have intrinsic value and in the absence of any sale consideration having been handed over to the appellant-defendant, it cannot be held that the same is still valid and binding against the rights of the appellant-defendant, over the shamlat, even if the entire sale consideration may have been ordered to be refunded to the respondent-plaintiff.

23 The sale consideration agreed between the parties included these rights as well even though physical possession of only a specific portion was being executed. Hence, when annulment of sale deed has already taken place and refund ordered, there can be no subsisting claim over any other tangible or intangible property. On decreeing refund, there would be complete absence of an element of sale consideration.

24 It is a settled position that a contract without sale consideration is *void ab initio*. Once the entire sale consideration has been directed to be refunded to the respondent-plaintiff, the respondent-plaintiff cannot stake claim on the appurtenant proprietary rights of the appellant-defendant over the shamlat by relying on the impugned sale deed. To the said extent as well, the appeal in hand deserves to be allowed and the judgment deserves to be modified.

25 So far as the plea of limitation raised by the appellant-defendant that the challenge to the sale deed has been raised after a lapse of nearly 12 years since the sale deed was executed in the year 1974 and the suit was instituted in the year 1986 is concerned, the said objection is unsustainable and is liable to be rejected. The cause of action in favour of the respondent-plaintiff accrued only after the warrants of possession were executed and the respondent-plaintiff was directed to hand over the actual physical possession of the land in favour of Chattru in compliance of the judgment and decree issued in favour of the said Chattru. It is also recorded by the Court that there can be no presumption of knowledge in favour of the respondent-plaintiff about execution of the earlier agreement to sell and/or pendency of the civil proceedings against Chattru and the appellant-defendant. I do not find any cogent reasons on the basis whereof such finding recorded by the Additional Senior Sub Judge and as affirmed by the Additional District Judge, Rohtak, can be held to be bad or non est.

26 Another argument has been advanced by the counsel for the respondent-plaintiff that the refunded amount has not been released in his favour, however, counsel for the appellant-defendant contends that a lien was created for the decreed amount against the sale consideration required to be deposited by Chattru and that there was no amount to be paid by the appellant-defendant.

27 Counsel for the respondent-plaintiff contends that since the decreed amount has not been released in his favour, the respondent-plaintiff is entitled to interest after being divested of possession and till the time actual amount is released in his favour.

28 Counsel for the appellant-defendant contends that as lien against the sale consideration had been ordered by the executing Court, hence, the appellant-defendant cannot be held liable to pay any interest on the above said amount till its actual release in favour of the respondent-plaintiff.

29 However, there is no evidence, order or document on record on the basis whereof it can currently be ascertained whether a lien was attached to the sale consideration deposited by Chattru for release in favour of the respondent-plaintiff.

30 It is thus ordered that in the event balance sale consideration has not been released in favour of the appellant-defendant on execution of the sale deed in favour of Chattru in compliance of the judgment and decree dated 23.04.1990 passed in Civil Appeal No.43/13 of 1989, the respondent-plaintiff shall be entitled to interest @ 6% from the date of being dispossessed of the property till the payment of the amount of Rs.22,500/- as decreed by the Courts, however, in case the sale consideration had been attached to the extent of decree passed in favour of the respondent-plaintiff, the liability of interest would not enure in favour of the respondent-plaintiff for the amount which lay deposited with the executing Court. The said deposited amount along with interest, if any, that may have accrued thereupon alone can be claimed by the respondent. In case interest accrued is higher than 6% per annum, the same shall be released entirely in favour of respondent-plaintiff. However, if the amount deposited by Chattru was less than the refundable amount, the respondent-plaintiff shall be entitled to interest @ 6% per annum with effect from handing over possession to

Chattru, in execution, until payment of balance consideration. The above clarification is contingent to deposit of amount with Court and the same having remained in Court with lien marked to respondent-plaintiff. In case the amount had been deposited or attached by the Court to secure the interest of the respondent-plaintiff, no burden of any interest can be fastened on the appellant-defendant who cannot be said to be in lapse and of having used, enjoyed or drawn benefit out of the said amount. An act of Court should not prejudice any of the parties. If no undue benefit was drawn by the appellant-defendant, he cannot nonetheless be held liable for defraying interest on the said amount which they had deposited under an order of attachment by the Court.

31 The appeal is accordingly partly allowed in terms as aforesaid.

32 Pending, misc. application(s), if any shall also stand(s) disposed of accordingly.

April 08, 2024.

raj arora

(VINOD S. BHARDWAJ

JUDGE

Whether speaking/reasoned : *Yes/No*

Whether reportable : *Yes/No*