

2024:PHHC:089691



105 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Decided on:-17.07.2024

1. RSA-4611-2018 (O&M)

Bal Kishan (since deceased) thr. LRs.Appellant..

vs.

Keshav Kumar and othersRespondents.

2. RSA-5092-2018 (O&M)

Bal Kishan (since deceased) thr. LRs.Appellant..

vs.

Shankar Lal and others ..Respondents.

3. RSA-4472-2018 (O&M)

Keshav KumarAppellant.

vs.

Balkishan and others ...Respondents.

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Ashish Aggarwal, Sr.Advocate with
Ms. Aashna Aggarwal, Advocate,
for the appellant (in RSA Nos.4611 & 5092-2018).

Mr. Mani Ram Verma, Advocate,
for the appellant (in RSA-4472-2018).

HARKESH MANUJA J. (Oral)

CM-1942-C-2024 in RSA-4472-2018

Prayer in this application is for bringing on record and
impleading the legal representatives of respondent No.1-Balkishan.

Having heard learned counsel for the applicant-appellant and gone through the contents of the application, prayer made herein is allowed, subject to all just exceptions and persons mentioned in para 2 of the application are ordered to be impleaded as legal representatives of respondent No.1.

Amended memo of parties is taken on record.

Main case(s)

1. This common judgment of mine shall dispose of above mentioned three appeals as they all involve common question of law and facts.

For convenience, the facts are being taken from RSA-4611-2018 (O&M).

2. By way of present appeal, challenge has been laid to the judgment and decree dated 19.01.2018 passed by the learned District Judge, Rewari, whereby, Appeal No.1, titled as ***“Keshav Kumar and another vs. Bal Kishan and others”*** assailing the judgment and decree dated 19.01.2015 passed by the Additional Civil Judge (Senior Division), Rewari in Civil Suit No.247 of 2009, stands allowed.

3. The dispute in the present case revolves around two properties i.e. Plot No.59-R, measuring 345 Sq. Yds, situated in Model Town, Rewari described as property No.A and House No.59-L, measuring 345 Sq. yds. situated in Model Town, Rewari, described as property No.B. The parties to the appeal are closely related being brothers, uncles and nephews. Respondents No.1 and 2/plaintiffs {Keshav Kumar and Inderjeet respectively} (herein referred to as “plaintiffs”) filed a suit for possession by way of specific performance based on an agreement to sell dated 11.10.2006

executed between them and present appellant/defendant No.1 {Bal Kishan} (hereinafter referred to as “defendant No.1”). It was pleaded that as per the agreement, property No.A was agreed to be sold by vendor-defendant No.1 against land measuring 345 Sq.yds @ Rs.19,000/- per sq. yrd in favour of respondent No.1-plaintiff No.1 with 20.11.2006 being the target date and a sum of Rs.15 lakhs was received by the vendor as earnest money. It was also pleaded that in case, the purchasers intended to get the sale deed executed in favour of any of his family members, the sale consideration would be @ Rs.21,250/- per sq. yds. In the suit, a prayer was also made for transfer of property No.B in favour of plaintiffs besides two others i.e. respondents No.3 and 4/defendants No.2 and 3 {Shankar Lal and Ashok Kumar respectively} (hereinafter referred to as “defendants No.2 and 3”), on the basis of a previous oral family settlement arrived at between the parties. It was further pleaded that though the purchaser being ready and willing to get the sale deed executed, the needful was not done by the vendor, hence the suit.

4. In response, two separate sets of written statement were filed on behalf of defendant No.1 as well as defendants No.2 and 3 respectively. In the written statement filed on behalf of defendant No.1, the factum of execution of agreement to sell dated 11.10.2006 qua property described as ‘A’, besides the receipt of earnest money and the target date were though admitted, however, the prayer in the suit was opposed while pleading that plaintiff No.1 was never ready and willing to perform his part of the agreement. As regards the stipulation contained in the agreement in question about any oral settlement qua property described as ‘B’, the same was categorically denied and rather, a plea of fraud was set up to this extent.

In their separate written statement, defendants No.2 and 3 disputed the factum of any family settlement between the parties as regards property No.B.

In pursuance to the aforementioned pleadings the following issues were framed by the Courts below:-

- “1. Whether the plaintiff is entitled to get possession of the suit property by way of specific performance of contract dated 11.10.2006?OPP*
- 2. Whether the plaintiff is still ready and willing to perform his part of contract?OPP*
- 3. Whether the suit of the plaintiff is not maintainable? OPD*
- 4. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 5. Whether the plaintiff has no cause of action to file this present suit?OPD*
- 6. Relief.”*

5. The Trial Court vide its judgment and decree dated 19.01.2015 though recorded a finding in favour of plaintiff No.1 as regards valid execution of the agreement to sell dated 11.10.2006, however, non-suited him and declined him the decree for possession by way of specific performance qua property described as ‘A’ for the reasons that he failed to establish his readiness and willingness to perform the agreement in question, however, went on to grant the alternate decree for refund of earnest money in his favour along with interest @9%.

As regards the family settlement qua property No.B, the trial Court recorded that the same was never proved on record. Aggrieved thereof, following three appeals were filed:-

- “1. Appeal No.1, titled as “**Keshav Kumar and another vs. Bal***

Kishan and others”

2. *Appeal No.2, titled as “Shankar Lal and another vs. Bal Kishan and others”*
3. *Appeal No.3/Cross-objections, titled as “Bal Kishan vs Keshav Kumar and others”*

6. The Appellate Court vide its judgment and decree dated 19.01.2018, partly accepted appeal No.1 titled as “***Keshav Kumar and another vs. Bal Kishan and others***”, though having declined the relief of possession by way of specific performance qua property No.A, went on to grant decree for possession qua property No.B, while upholding the previous oral family settlement between the parties. Simultaneously, Appeal No.2, titled as “***Shankar Lal and another vs. Bal Krishan and others***”, was also allowed granting decree for transfer of property No.B by defendant No.1. Further, cross-objections/appeal No.3, titled as “***Balkrishan vs. Keshav Kumar and others***”, was also allowed resulting into forfeiture of the earnest money amounting to Rs.15 lakhs as received by defendant No.1 in terms of agreement to sell dated 11.10.2006; the plaintiffs having failed to establish their readiness and willingness to perform their part of the said agreement.

7. Defendant No.1 being aggrieved of judgment and decree dated 19.01.2018 passed in appeal No.1 and appeal No.2 filed two appeals bearing RSA-4611-2018, titled as “***Bal Kishan vs. Keshav Kumar and others***” and RSA-5092-2018, titled as “***Bal Kishan vs. Shankar Lal and others***”, respectively, whereby relief regarding transfer of property No. B was granted in favour of plaintiffs as well as defendants No.2 and 3. In addition, RSA-4472-2018, titled as “***Keshav Kumar vs. Balkishan and others***” was filed by plaintiff being aggrieved of the outcome of the cross-objection/appeal No.3, whereby, the earnest money of Rs.15 lakhs

paid under the agreement to sell dated 11.10.2006, was ordered to be forfeited.

8. Impugning the judgment and decree dated 19.01.2018 passed by the first Appellate Court, learned Senior counsel raises following submissions:-

(1) No relief in favour of plaintiffs as well as defendants No.2 and 3 regarding transfer of property No. B could have been granted in a suit for possession by way of specific performance filed at the instance of plaintiffs as for the said relief, a suit for declaration was required to be filed by them. Learned Senior counsel while relying upon Section 25(1) of the Indian Contract Act, 1872 (for short, "1872 Act") submits that the agreement in question as regards the transfer of property No.B based on family settlement between the parties was not enforceable in law being without consideration and in this regard, he also places reliance upon judgment of Orissa High Court passed in "***Sarat Chandra Panda and others vs. Narsingh @ Nrushing Charan Paramguru***", 2010(109) CutLT869.

(2) Learned Senior counsel while referring to the legal notice dated 03.10.2009 (Ex.P-10) as well as affidavit dated 20.11.2006 (Ex.P-8) regarding presence before the Sub-Registrar submits that no mention of property No.B was ever made in those very documents and thus, the suit regarding the same could not have been entertained. He also submits that even, plaintiff No.2 did not serve any notice calling upon defendant No.1 to transfer the property described as 'B' on the basis of any such alleged settlement.

(3) Learned Senior counsel also submits that though defendants No.2 and 3 were also beneficiaries of the alleged family

settlement, however, in their written statement before the Trial Court, they specifically denied any such family settlement between the parties and thus, on this ground alone, the relief qua property No.B was required to be declined. He further submits that on an earlier occasion, a suit for declaration by way of adverse possession and consequential relief of permanent injunction was filed on behalf of plaintiffs and defendants No.2 & 3 against defendant No.1 qua property No.B, wherein, no pleadings regarding settlement were ever made and the said suit was withdrawn on 11.10.2006 and thus, any such plea of family settlement being wholly misplaced, was liable to be rejected.

(4) Learned Senior counsel further points out that from the deposition made by defendant No.1 (DW-14), it was proved on record that first floor of property No.B was constructed by him out of his own funds and thus, there was no question of any oral family settlement between the parties qua the same.

9. Per contra, being aggrieved of the denial of relief of possession by way of specific possession qua property described as 'A' as well as forfeiture of earnest money amounting to Rs.15 lakhs paid under the agreement in question, the appeal bearing No. RSA-4472-2018 arising out of *cross-objection/appeal No.3*, has been preferred on behalf of the plaintiffs-respondents No.1 and 2. Agitating the same, learned counsel representing the respondents submits that the declining of relief of specific performance in favour of plaintiff No.1/vendee was illegal and in the given facts readiness and willingness on his part was not required to be established, especially, when the execution of agreement was denied by defendants No.2 and 3.

In addition, learned counsel submits that from the deposition of

plaintiff No.1 (PW-1), the aspect qua readiness was also proved on record wherein he categorically deposed that he was carrying balance sum of Rs.52 lakhs on the target date while visiting the office of Sub-Registrar. Further, learned counsel also submits that once readiness and willingness on the part of plaintiff No.1 was proved on record, the forfeiture of earnest money as directed by first Appellate Court was wholly uncalled for and totally illegal.

10. I have heard learned counsel for the parties and gone through the paper book as well as record shown by the respective counsels. I am unable to find substance in the submissions made on behalf of the appellant in the respective appeals.

11. The arguments raised by the learned Senior counsel are dealt with in the following manner:-

(11.1) Argument No.1:-As regards the maintainability of suit in the form of possession by way of specific performance qua property No.B instead of maintainability of a suit for declaration, it may be pointed out here that no such specific objection was ever raised by defendant No.1 in his written statement. Even no issue to this effect was ever pressed by him before the Courts below and thus, at this belated stage of Regular Second Appeal, defendant No.1 cannot be permitted to raise any such pure technical objection so as to non-suit the plaintiffs and defendants No.2 & 3. Particularly, had any such technical objection been raised at the instance of defendant No.1 at an appropriate stage of filing of written statement, the same would have enabled the plaintiffs to amend their prayer and relief clause accordingly.

Furthermore, the prayer clause from the plaint as regards property

No.B is extracted hereunder:-

“(b) That a preliminary decree for possession by way of specific performance pertaining to the property in dispute more particularly mentioned in para No.1 (b) of the plaint and agreement dated 11.10.2006, may kindly be passed in favour of the plaintiffs and proforma defendants and against the defendant No.1 to this effect that the plaintiffs and proforma defendants are entitled to get the execution of the sale deed pertaining to the property as mentioned in para No.1(b) of the plaint in their favour as per the terms and conditions of the agreement to sell dated 11.10.2006.”

A perusal thereof shows that in addition to the specific pleadings in the plaint as regards the family settlement between the parties qua property No. B, a specific prayer for its possession was made and thus, the objection raised on behalf of the plaintiffs, about no specific declaration qua the same having been prayed for, cannot be termed to be fatal to the cause of the plaintiffs as well as defendants No.2 and 3, as in the wake of specific pleadings regarding the family settlement, the declaration was inherent in the claim for possession specifically made in the prayer clause.

(11.2) Further, no merits can be found in the argument raised on behalf of learned Senior Counsel as regards the agreement in question being void and unenforceable qua the relief of property No. B on the basis of family settlement in terms of Section 25 of the 1872 Act, the same being without consideration. In this regard, it may be noticed here that the agreement in question containing a stipulation about the oral family settlement qua property No.B between the parties is not the fundamental source of cause of action in favour of plaintiffs as well as defendants No.2 and 3 qua property No.B as the agreement merely acknowledges the previous family settlement

arrived at between the parties qua property No.B and at best is a

corroborative piece of evidence qua the acceptance of family settlement. In such circumstances, the argument raised on behalf of defendant No.1 while placing reliance upon Section 25 of the 1972 Act, is not made out in the given facts.

(11.3) Argument No.2:- No strength can be found in the submissions made on behalf of learned Senior counsel to the effect that neither in the notice dated 03.10.2009 (Ex.P-10); nor even in the affidavit dated 20.11.2006 (Ex.P-8) presence before the Sub Registrar, no prayer or claim was ever made qua transfer of property No.B on the basis of family settlement. In this regard, it may be pointed out here that notice dated 03.10.2009 (Ex.P-10), which was served upon defendant No.1 by plaintiff No.1 and also the affidavit dated 20.11.2006 (Ex.P-8) of plaintiff No.1 before the Sub-Registrar reflecting his presence on the target date, were both indicating his readiness and willingness towards the performance of agreement to sell dated 11.10.2006, which were essentially required to be proved on record for seeking relief of possession by way of specific performance. However, the claim or the prayer made in the plaint for transfer of possession of the property described as 'B', it was purely based on family settlement, for which, no such evidence to establish readiness and willingness was required and thus, non-mentioning of claim qua property 'B' in the notice dated 03.10.2009 (Ex.P-10), affidavit dated 20.11.2006 (Ex.P-8) or even the plaintiffs not serving any such notice upon defendant No.1 regarding transfer of property 'B' were not to be termed as fatal to the cause of plaintiffs as well as defendants No.2 and 3, which was claimed merely on the basis of previous oral family settlement.

(11.4) Arguments No.3 and 4 being interlinked are dealt with jointly.

A perusal of record shows that the previous suit for declaration of ownership, filed on behalf of plaintiffs as well as defendants No.2 and 3 qua property 'B', which was based on adverse possession was withdrawn on 11.10.2006 i.e. the day when parallelly the agreement dated 11.10.2006 (Ex. P-1) was entered into and executed between the parties containing a specific stipulation regarding oral family settlement between them qua property 'B' to be transferred by defendant No.1 in favour of plaintiffs as well as defendants No.2 and 3. The sequence and chronology of the facts and circumstances clearly establish the factum of family settlement been arrived at between the parties qua property 'B' followed by withdrawal of the previous suit on 11.10.2006. Thus, the same cannot be termed to be fatal to the cause of plaintiffs as well as defendants No.2 and 3, especially, when defendant No.1 admitted his signatures over the agreement to sell dated 11.10.2006 (Ex.P-1) which contained a specific covenant regarding the family settlement arrived at between the parties qua property No.B. Though, a plea was raised in the written statement on behalf of defendant No.1 about the inclusion of terms regarding family settlement qua property No.B in the agreement in hand on account of fraud been played upon him, however, in the absence of any positive evidence been led by defendant No.1 in support of his plea of fraud, the same stood discarded by the Courts below and no material in the shape of pleadings or evidence has been brought to the notice of this Court so as to take a different view on the said issue.

It may also be noticed here that in the cross-examination, defendant No.1 while appearing as DW-14 went on to admit that the funds out of the sale of property allotted in favour of his father having migrated from Pakistan were used for purchasing the two properties in question.

Moreover, DW-14 having admitted in his cross-examination that the relationship between the parties became sour with the service of notice dated 03.10.2009 (Ex-P-10) and filing of suit, but, neither any criminal proceedings were initiated by him against plaintiffs and defendants No.2 & 3 about alleged fraud played upon him while including the stipulation about family settlement in the agreement in question nor did he ever sought recovery of its possession from opposite side having terminated the alleged license pleaded by him.

Furthermore, once the execution of the agreement to sell dated 11.10.2006 was proved on record, that itself was a valid and substantial proof of family settlement between the parties qua property 'B', containing a specific covenant to that effect in the said agreement. Equally important, having drawn benefit of refund of earnest money under the same agreement to sell dated 11.10.2006 (Ex.P-1), defendant No.1 cannot be permitted to blow hot and cold in the same breath while denying the family settlement stipulated therein qua property 'B' especially having failed to establish any fraud.

11.5 Last but not the least, no merit can be found in the submissions made on behalf of learned Senior counsel as regards the denial of family settlement made by defendants No.2 and 3 in their written statement before the trial Court as the same was later explained by them while appearing as PW-15 and PW-16, respectively, wherein they specifically admitted and proved the factum of family settlement between the parties qua property 'B'.

12. On the contrary, in the humble opinion of this Court, no merit either can be found with the contentions raised on behalf of appellant-plaintiff No.1 (Keshav Kumar) that in case of denial of execution of

agreement in question by defendant No.1 the readiness and willingness on the part of vendee-appellant was not required to be proved on record.

Precisely, the aforesaid argument goes in contradiction with the statutory requirement of Section 16(1)(c) of the Specific Relief Act, 1963, which enjoins the vendee/purchaser coming to the Court for the purpose of seeking possession by way of specific performance based on agreement to sell so as to prove his readiness and willingness to perform his part of the contract, but in the present case, the payment of balance sale consideration available with the plaintiffs was not proved on record.

(12.1) Furthermore, in the given facts, the readiness on the part of vendee-plaintiff No.1 was not proved on record there being no substantive evidence led by him as regards balance sale consideration, he having failed to prove the same through his bank statement, income tax return or even failing to produce his relatives from whom he allegedly borrowed the cash. Regarding the aspect of willingness, again the vendee-plaintiff No.1 failed to establish the same especially in terms of the fact that the agreement in question was executed on 11.10.2006 with 20.11.2006 being the target date, whereas, the suit was filed on his behalf at the fag end of the statutory period of limitation i.e. on 30.10.2009.

No doubt, the suit was filed within the period of limitation of 03 years as prescribed in law under Article 54 of the Limitation Act, 1963, however, in the given facts and circumstances of the case in hand, the same being filed less than a month before the expiry of statutory period of limitation, the same being hit by delay and latches and as such, the Courts below rightly declined to exercise discretion in favour of plaintiff No.1 for grant of decree for specific performance.

(12.2) As regards, the passing of decree regarding forfeiture of earnest money been paid against property described as ‘A’ under the agreement to sell dated 11.10.2006, no illegality or perversity can be found therein; plaintiff No.1 having failed to establish the readiness and willingness to perform his part of the agreement and the forfeiture been specifically stipulated under the said agreement. Moreover, the earnest money being around 20% of the total sale consideration can’t be termed to be excessive and thus, doctrine of unjust enrichment can’t be invoked against defendant No.1.

13. In view of the discussion made herein above and finding no merit in the present appeal(s), there being no misreading of pleadings or the evidence available on records, the same are hereby, dismissed.

14. Pending application(s), if any, also stand(s) disposed of.

17.07.2024
sonika

Whether speaking/reasoned:
Whether reportable:

Yes/No
Yes/ No

(HARKESH MANUJA)
JUDGE