

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.2506 of 1993 (O&M)

Date of Order:21.02.2024

Swaran Singh (since deceased) through his LR's and others

.Appellants

Versus

Bachhitar Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Mansur Ali, Advocate and
Mr. Raj Sumer Singh, Advocate
for the appellants.

None for the respondents.

ANIL KSHETARPAL, J

1. In this appeal, none of the respondents has come forward to contest the case, despite service of notice to the legal representatives of respondents no.1, 2 and 3.

2. This is the defendants' appeal against the judgment and decree passed by the First Appellate Court in a suit for specific performance of the agreement to sell, which in turn, has reversed the judgment and decree passed by the trial court.

3. The plaintiffs, namely, Sh. Bachhitar Singh, Sh. Bikkar Singh and Sh. Nihal Singh, filed a suit for possession by way of specific performance of the agreement to sell dated 25.10.1986, while alleging that previously the suit land was mortgaged by defendants no.1 to 3, namely, Sh. Swarn Singh @ Sarwan Singh, Sh. Gurcharan Singh and Smt. Basant Kaur for a sum of Rs.25,000/- vide registered mortgage deed dated 28.05.1979.

Subsequently, on 25.10.1986, on receipt of additional amount of Rs.20,000/-

the agreement to sell was entered into. It was agreed between the parties that the sale deed would be executed on 27.05.1987, whereas the defendant nos.1 to 3 have sold the property vide registered sale deed dated 19.05.1987, in favour of defendant no.4 to 7.

4. Defendant nos. 1 to 3, namely, Sh. Swarn Singh @ Sarwan Singh, Sh. Gurcharan Singh and Smt. Basant Kaur admitted execution of the mortgage, however, claimed that the agreement to sell is forged and fabricated document. Defendant no.4 to 7, claimed that they have purchased the property through 3 different registered sale deeds and they are bonafide purchasers.

5. The trial court dismissed the suit as the Handwriting and Finger Print Expert opined that the thumb impressions of defendant nos.1 to 3 do not match with their standard thumb impressions. The plaintiffs filed the first appeal along with an application under order 41 Rule 27 CPC.

6. The learned District Judge, Faridkot, allowed the application and directed the same Handwriting and Finger Print Expert to again give his opinion on the basis of thumb impressions of the defendants on the registered mortgage deed. This time the expert opined that the thumb impressions match. Ultimately, the First Appellate Court came to a conclusion that the plaintiffs have successfully proved that defendant no.1 and 2, namely, Sh. Swarn Singh @ Sarwan Singh and Sh. Gurcharan Singh appended their signatures on the agreement to sell dated 25.10.1986, however, no evidence has been led to prove that Smt. Basant Kaur had appended her thumb impression. Thereafter, the courts decreed the suit to the extent of 2/3rd share from the suit property.

7. This appeal is pending for the last 31 years.

8. This Bench has heard the learned counsel representing the appellants at length and with his able assistance perused the paper book.

9. The learned counsel representing the appellants submits that PW2-Sh. Atma Singh, is the marginal witness of the agreement to sell dated 25.10.1986, and he has admitted during his cross examination that the defendants did not sign in his presence and no payment was made in his presence. He further submits that the typist who has allegedly typed the agreement to sell has not been examined and even Sh. Jugraj Singh, the other marginal witness of the agreement to sell, has not been examined.

10. This court has considered the submissions of the learned counsel representing the appellants.

11. There is a finding of fact on appreciation of evidence arrived at by the First Appellate Court while concluding that the agreement to sell was entered into by defendant nos.1 and 2, in favour of the plaintiffs. It would not be appropriate to interfere in the same even if two views are possible. However, in the facts and circumstances of the present case, this court is of the considered view that the plaintiffs are entitled to the alternative relief of refund of Rs.45,000/- which includes mortgage amount along with interest on the following grounds:-

- (i) The First Appellate Court has overlooked Section 12 of the Specific Relief Act, 1963 which specifically debars the court from granting relief of specific performance of the part of contract. Sub-section (2), (3) and (4) are in the nature of exceptions to sub-section(1) of Section 12. However, the facts of this case do not fall in sub-section 2,3, and 4 of Section 12.

- (ii) It is evident that the plaintiffs had given loan to defendant nos. 1 to 3 in the year 1979. Subsequently, the alleged agreement to sell was entered into. The agreement to sell is signed by defendant nos.1 and 2, whereas allegedly thumb marked by Smt. Basant Kaur, defendant no.3. Its execution in entirety becomes doubtful particularly when PW2-Atma Singh, Sarpanch, has stated that in his presence, the defendants did not sign or received payment.
- (iii) It is evident that defendant no.1 to 3 had initially borrowed some amount from the plaintiffs. In other words, the plaintiffs are lending loan. The registered mortgage deed was executed to secure re-payment. The registered mortgage deed was without delivery of possession. The mortgage remained in operation for a period of more than 7 years. Since, the defendants were unable to re-pay the amount, the alleged agreement to sell was entered into. In these circumstances, the plaintiffs are not entitled to the relief of specific performance.
- (iv) A period of nearly more than 37 years have elapsed from the date the agreement to sell was entered into. At the relevant time, an unamended Specific Relief Act, 1963 was applicable. Section 20 of the unamended Specific Relief Act, 1963, provides that the relief of specific performance is discretionary and not mandatory.
- (v) The learned counsel representing the appellants has

informed the court that with respect to 2/3rd share of the suit land, till date no sale deed in favour of the plaintiffs has been executed in accordance with the decree passed by the First Appellate Court.

12. Keeping in view the aforesaid facts and discussion, the decree passed by the First Appellate Court shall stand substituted by a decree of refund of Rs.45,000/- which includes the mortgage amount along with interest @ 12% per annum from the date of the agreement to sell till payment. With the payment of the afroesaid amount, the mortgage shall stand redeemed.

13. With these observations, the regular second appeal is disposed of.

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

February 21, 2024
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned

Whether reportable

:YES/NO

:YES/NO