

(2010) 05 P&H CK 0263
In the Punjab And Haryana At Chandigarh

Seth Narain Dass through L.Rs.

APPELLANT

Vs

Jatindra Steel and Tubes Ltd. and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Specific Relief Act, 1963 — Section 20

Citation : (2011) 5 RCR(Civil) 913

Hon'ble Judges : Rakesh Kumar Garg, J

Bench : Single Bench

Judgement

Rakesh Kumar Garg, J.—This is plaintiff's second appeal challenging the judgement and decree of the Lower Appellate Court whereby appeal filed by respondent No. 1 was accepted and suit of the plaintiff/appellant for specific performance of the agreement in question was ordered to be dismissed with costs.

2. As per the averments made in the plaint, one Sh. Tulla, predecessor-in-interest of respondents No. 2 to 7 was the owner of the suit land. He entered into an agreement with the plaintiff-appellant on 24.12.1969 for the suit land for a consideration of Rs. 12,000/- and received a sum of Rs. 4000/- as earnest money at the time of execution of the agreement. The remaining amount of Rs. 8000/- as agreed between the parties was to be paid at the time of execution and registration of the sale deed. Tulla died somewhere in the year 1970 leaving behind defendant Nos.1 to 6 (now respondent Nos.2 to 7) as his legal representatives who were bound by the agreement. It was further the case of the appellant that during the lifetime of Sh. Tulla he was requesting him and after his death he made several requests to respondent Nos.2 to 7 to execute the sale deed in his favour after receiving balance sale consideration from him. However, they kept on postponing the completion of transaction on one pretext or the other. It was further averred that the appellant was ready and willing to perform his part of the agreement. Thus, he was entitled to get the sale deed executed by way of specific performance of the agreement in question. Moreover,

respondent Nos. 2 to 7 after ignoring the prior lien of the appellant started negotiating with respondent No. 1 for sale of the suit land. The appellant served notice dated 01.08.1972 upon respondent No. 1 informing him about the pre-existing contract binding on respondent Nos.2 to 7 and in favour of the appellant. However, defendant No. 7 i.e. (respondent No. 1) ignored the agreement in favour of the plaintiff/appellant and made an attempt on 24.07.1972 to get the sale deed executed from respondent Nos.2 to 7 in his favour and ultimately he got the sale deed executed and registered in his favour from respondent Nos.2 to 7 on 07.08.1972. The aforesaid sale deed was illegal, collusive and without consideration and was not binding on the plaintiff-appellant who was having a prior agreement in his favour which could be specifically enforced through court. Respondent No. 1 had purchased the suit land with full knowledge of the contract existing in favour of the plaintiff as defendant Nos.1 to 6 (i.e. respondent Nos.2 to 7) failed to perform their part of the contract and they executed the sale deed in favour of defendant No. 7 (i.e. respondent No. 1). Necessity arose to file the instant suit for specific performance of the agreement in question against the defendants.

3. Upon notice, defendant Nos.1 and 2 filed their joint written statement alleging therein that there was no privity of contract between the plaintiff/appellant and the defendants/respondents. Plea of limitation was also raised. However, it was admitted by defendant Nos.1 and 2 that Sh. Tulla was the owner of the land but was not in possession of the same. Agreement by Sh. Tulla in favour of the plaintiff was denied. It was further alleged by the defendants that even if there was any agreement in favour of the plaintiff, the same was not admissible in law being illegal. It was alleged by them that they were not bound by any agreement deed executed by Sh. Tulla in favour of the plaintiff. The defendants also alleged that they were not in possession of the land in dispute.

4. Respondent No. 1 (defendant No. 7) filed his separate written statement raising various legal objections. It was pleaded that the suit land was under permanent lease much before the alleged agreement in favour of the plaintiff and therefore the suit for possession did not lie. Respondent No. 1 also pleaded that he was a bona fide purchaser for consideration without notice and was protected under the law. It was denied by respondent No. 1 that there was any agreement in favour of the plaintiff executed by Sh. Tulla, deceased. He also alleged that he had no knowledge of existence of any agreement in favour of the plaintiff at the time of execution of the sale deed in his favour.

5. From the pleading of the parties following issues were framed by the trial Court:

1. Whether Tulla had executed the agreement in dispute in favour of the plaintiff, if so, what was the terms and conditions? OPP
2. Whether the plaintiffs are always ready and willing to perform his part of the contract? OPP

3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether the suit is not maintainable as alleged in preliminary objection No. 2? OPD
5. Whether the suit is time barred? OPD
6. Whether the plaintiff has got cause of action to bring the present suit? OPP
7. Whether defendant No. 7 is a bona fide purchaser without notice? OPP
8. Whether the defendants are entitled to special costs? OPD
9. Relief.

6. After hearing learned Counsel for the parties and considering the evidence on record, the trial Court decided issue Nos.1,2 & 7 in favour of the plaintiff/appellant and decreed the suit in his favour holding that Sh. Tulla had executed a valid agreement to sell the land in question in favour of the plaintiff as the plaintiff-appellant was always ready and willing to perform his part of the agreement and had sufficient means to do so. The plea of limitation raised by the defendants/respondents was negated and it was further held that respondent No. 1 was not a bona fide purchaser without notice. It was observed by the trial Court that the agreement to sell in favour of respondent No. 1 was executed on 18.08.1972 whereas appellants had served notice upon respondent No. 1 on 01.08.1972 under postal cover of the pre-existing sale agreement executed by Sh. Tulla in their favour. Remaining issues were decided against the defendants.

7. Feeling aggrieved from the aforesaid judgment and decree of the trial court, the defendants/respondents filed an appeal before the Lower Appellate Court. It may be relevant to point out here that during the course of appeal the District Judge, Gurgaon framed the following additional issues:

8(a) Whether the land in dispute was under permanent lease with another person at all material times?

8(b) If issue No. 8(a) is found in the affirmative , whether the suit is competent without impleading such lessee?

8(c) If issue No. 8(a) is found in the affirmative, whether the plaintiffs' suit for possession is maintainable?

8. On the directions of the Lower Appellate Court, the trial Court recorded evidence on these issues and returned its findings holding issue No. 8(a) against the defendants and issue Nos.8(b) & (c) in favour of the plaintiffs.

9. It is also relevant to mention that the defendants had challenged the findings of the trial court only on issue Nos.1, 2 and 7 before the Lower Appellate Court and the findings of the trial Court on remaining issues which were against the defendants/respondents were not challenged.

10. After considering the arguments raised by learned Counsel for the parties, the Lower Appellate Court reversed the findings of the trial court on issue Nos.1,2 and 7 in favour of defendants-respondents and held that Sh.Tulla did not execute the alleged agreement to sell in question and further conduct of the appellant leads to the only conclusion that he was not willing to perform his part of the contract and that defendant No. 7 was a bona fide purchaser having no notice of the agreement in question. Consequently, the appeal was accepted and judgment and decree of the trial court was set aside resulting into dismissal of the suit filed by the appellant.

11. Not satisfied with the judgement and decree of the Lower Appellate Court, plaintiff-appellant has filed the present appeal.

12. Learned Counsel appearing on behalf of the appellant has vehemently contended that agreement to sell in favour of the appellant has been duly proved from the testimony of marginal witnesses who have supported the execution of the agreement to sell in favour of the appellant. Not only this, from the report of the handwriting/finger print expert(Ex.P-6) thumb impression of Sh. Tulla on the sale agreement dated 24.12.1969 (Ex.P5) is duly proved. It was further argued by the learned Counsel for the appellant that respondent No. 1 had notice of prior agreement to sell in question as notice dated 01.08.1972(Ex.P-3) was served through counsel and the postal receipt Ex.P-2 is on the record. The sale deed in favour of respondent No. 1 was executed on 17.08.1972 i.e. subsequent to receiving the notice and thus it cannot be said that the sale was bona fide and that respondents had no notice and there is no evidence on record to establish that respondent No. 1 had taken any steps to verify the title of the property. In support of his case, learned Counsel for the appellant has relied upon Smt. Nathan and Another Vs. Nokhu Ram, , Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others, and Amrik Singh v. Surjit Kaur 2008 (2) RCR Civil 465 and has argued that mere denial of existence of earlier sale agreement would not discharge the onus of subsequent purchaser to make enquiries about the land and such subsequent purchaser must enquire into the real nature of the property he was going to buy. To conclude, it was submitted that respondent No. 1 had the notice of the earlier sale agreement dated 24.12.1969 executed between Sh. Tulla and the appellant before the sale deed was executed on 17.08.1972 in his favour and, moreover, in the present case, the land in question was located between the land of the appellant and the respondents and it was not possible for respondent No. 1 not to have any knowledge of the previous agreement to sell in question in favour of the appellant and in these circumstances, the appellant was entitled to the decree as prayed.

13. On the basis of the aforesaid arguments, learned Counsel for the appellant has submitted that the following substantial questions of law arise in this appeal:

1. Whether the judgment and decrees of the courts below are perverse and against the evidence on record?

2. Whether in view of the evidence on record, respondent No. 1 can be held to be bona fide purchaser without notice?

3. Whether the plaintiff-appellant can be denied specific performance of the agreement in question in the facts and circumstances of the case?

4. Whether in the facts and circumstances of the case, the Lower Appellate Court erred at law in refusing the relief for specific performance?

14. On the other hand, learned Counsel appearing on behalf of respondent No. 1 has supported the impugned judgment and decree and has submitted that the defendant-respondent is a bona fide purchaser of the land for valuable consideration without notice of the prior agreement as there was no evidence on record to the contrary. The only notice proved on record is dated 18.08.1972 which is after the sale deed in favour of the defendant/respondent and this notice does not contain any mention of the earlier notice dated 01.08.1972. Learned Counsel further argued that the execution of the alleged agreement is also doubtful as the same is not on stamp paper and is not scribed by a regular deed writer and is typed in English on a plain paper by a typist employed in the office of the plaintiff. In the agreement, no time for execution of the sale deed was specified. The agreement bears thumb impression of a lady named Ashrafi who had no concern with the land. Existence of her thumb impression is not explained. Moreover, agreement to sell dated 24.12.1969 is alleged to be executed by Sh. Tulla who died on 28.02.1970 whereas the present suit was filed on 23.12.1972 i.e. last date of limitation. For three years, the appellant did not take any steps to enforce the agreement to sell against heirs of Sh. Tulla and as per his own case he issued notice to heirs of Sh. Tulla only on 01.08.1972 (Ex.P-3) which is a carbon copy and was issued under Postal Certificate. No evidence of despatch and receipt of this notice is proved on the case and only notice proved on record was dated 18.08.1972 (Ex.P-1) which was after the sale deed in his favour and thus the appellant is not entitled to the discretionary relief of the Court u/s 20 of the Specific Relief Act and the appeal having no merit is liable to be dismissed.

15. I have heard learned Counsel for the parties and perused the impugned judgment and decrees and the record of the case.

16. As per the pleadings, the defendants have denied the execution of the agreement to sell in question by Tulla in favour of the appellant. However, in order to prove the execution of agreement to sell in question the appellant examined Krishan Dutt Bakshi PW4 who proved the fact that agreement deed was executed in his presence by Sh. Tulla in favour of the appellant which was attested by him as an attesting witness. He further deposed that Rs. 4000/- were paid to Sh. Tulla by the defendants as earnest money. He also submitted that the agreement in question was read over to him and after having understood the same, Sh. Tulla had thumb-marked the agreement Ex.P-5. Besides this, thumb impression of Sh. Tulla was got compared by the appellant with the sample

thumb impressions of Sh. Tulla through R.P. Singh, Handwriting and Finger Print Expert PW6, who opined that the disputed thumb mark was identical with the standard thumb mark and both were made by the same person. The plaintiff also got the thumb impression of Sh. Tulla on registered deed Pattanama(Ex.P-10) compared with the thumb impression of agreement deed Ex.P-5. Not only this, thumb impression appearing on mark A of Ex.P-5 of one lady Smt. Ashrafi also stood explained from the testimony of PW5. Moreover, thumb impression of a person who was not connected with deal would not make the agreement void at all. The respondents have denied the execution of the agreement in question but there is no evidence to rebut the evidence produced on record by the plaintiff-appellant. Thus, in my considered view the evidence brought on record of the case to prove the execution of the agreement in question was sufficient and it stood proved beyond doubt that the agreement deed was executed by Sh.Tulla in the presence of attesting witnesses and he received a sum of Rs. 4000/- as earnest money.

17. In the light of the aforesaid discussion, the findings of the Lower Appellate Court on issue No. 1 are liable to be reversed which are based on surmises and conjectures only and by ignoring the evidence on record.

18. Turning to the findings of the Lower Appellate Court on issue No. 2, it would be suffice to notice that though the agreement to sell in question was executed on 24.12.1969 but the appellant kept quiet and filed the suit only on 23.12.1972 i.e.last date of limitation, no fault can be found with the findings of the Lower Appellate Court on issue No. 2 to the effect that appellant was not willing to perform his part of the contract. Not only this, the appellant issued notice to heirs of Sh.Tulla as per his own case only on 01.08.1972 but there was no sufficient evidence to prove the aforesaid fact on the record as the only notice issued by the appellant which is proved on record is dated 18.08.1972(Ex.P-1). It is the case of the appellant that he served notice dated 01.08.1972 upon respondent No. 1. However, there is no evidence on record to prove the despatch and receipt of the aforesaid notice by respondent No. 1. The only notice proved on record of the case is Ex.P-1 which is dated 18.08.1972 whereas the sale deed in favour of respondent No. 1 was executed on 07.08.1972.

19. The Hon"ble Supreme Court in the case of Zorawar Singh and Another Vs. Sarwan Singh (Dead) by Lrs. and Another, held that burden of proving the fact that one is a bona fide purchaser for value without notice would lie on person who asserts the same but at the same time, if plaintiff makes a positive assertion that he gave notice regarding prior agreement for sale he must establish his case.

20. Keeping in view the aforesaid judgements and the fact that there is no sufficient evidence to prove the fact that respondent No. 1 had the notice of agreement in question, it cannot be held that the findings of the Lower Appellate Court on issue No. 7 are perverse.

21. It is also relevant to mention at this stage that the Hon"ble Supreme Court of

India in the case of Madamsetty Satyanarayana Vs. G. Yelloji Rao and Others, , held that the jurisdiction to grant a decree for specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so. Further in the case of P. D'Souza Vs. Shondrilo Naidu, , it was held that mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of Section 20(2) of the Specific Relief Act.

22. Thus, keeping in view the delay and laxity shown by the appellant to file the case on the last date of limitation and the conduct of the appellant and the facts that defendant No. 7 was not having any knowledge of the agreement to sell in question though the agreement to sell in question stands proved in favour of the appellant specific performance of agreement in question cannot be passed in favour of the appellant and the interest of justice would be sub-served by directing the defendants to pay a sum of Rs. 50,000/-to the plaintiff-appellant which would include the amount of advance paid by him. Thus, all the questions raised by the appellant are answered against him and in favour of the respondents.

23. Thus, in the above said manner, this appeal is partly accepted and is disposed of accordingly in the facts and circumstances of the case. However, there is no order as to costs.