

(1997) 12 P&H CK 0028

High Court Of Punjab And Haryana At Chandigarh

Case No: Letters Patent Appeal No. 397 of 1987

Sardari Lal

APPELLANT

Vs

Kartar Singh and
Others

RESPONDENT

Date of Decision: Dec. 5, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 7, 34

Citation: (1998) 3 CivCC 65 : (1998) 119 PLR 485 : (1998) 2 RCR(Civil) 49

Hon'ble Judges: R.L. Anand, J; Jawahar Lal Gupta, J

Bench: Division Bench

Advocate: R.K. Battas, for the Appellant; Hemant Kumar, for the Respondent

Judgement

R.L. Anand, J.

Unsuccessful plaintiff Sh. Sardari Lal has filed the present L.P.A. No. 397 of 1987, which has been directed against the judgment and decree dated May 20, 1987, passed by the learned Single Judge in R.F.A. No. 145 of 1978 vide which the learned Single Judge reversed the judgment and decree dated September 30, 1976 passed by the Court of Sub Judge, Ist Class, Rajpura, who granted a decree for specific performance of agreement of mortgage suit property in terms of agreement Exhibit PA against the defendants, who were ordered to execute a registered deed of mortgage with possession of the suit property in favour of the plaintiff on receipt of balance amount of Rs. 300/- on or before November 30, 1976. It was further directed by the trial Court that in case the defendants failed to comply with the aforesaid directions, it will be open for the plaintiff to deposit the balance amount of Rs. 300/- in the Court for payment to defendants No. 1 and 2 and after doing so the plaintiff could approach the court for getting the usufructuary mortgage deed in terms of Exhibit PA dated August 8, 1971, executed on and behalf of defendants No. 1 and 2 and the remaining defendants would join them in the execution of the mortgage deed.

2. The pleadings of the parties can be summarised in the following manner:-

3. Shri Sardari Lal appellant filed a suit for specific performance of agreement to mortgage dated August 8, 1971 regarding the agricultural land measuring 35 Bighas 14 Biswas, fully described in the head note of the plaint, as per Jamabandi for the year 1967-68 situated in village Ram Nagar, Tehsi Rajpura, and in the alternative for the grant of a money decree in the sum of Rs. 25,000/- i.e. Rs. 24,700/- given as advance to defendants No. 1 and 2, i.e. Kartar Singh and Hazura Singh and Rs. 300/- by way of damages. It was alleged by the plaintiff that Sarvshri Kartar Singh and Hazura Singh, defendants No. 1 and 2 executed an agreement dated August 15, 1968 (Exhibit PB) in his favour agreeing to mortgage with possession the suit land against a consideration of Rs. 16,000/-. Out of this amount, a sum of Rs. 14,700/- was paid to them by virtue of the said agreement. Subsequently, on August 8, 1971, these two defendants agreed that they would mortgage the suit land with the plaintiff for a consideration of Rs. 25,000/-. A new agreement (Exhibit PA) was executed by defendants No. 1 and 2 in favour of the plaintiff and through this agreement an additional sum of Rs. 10,000/- was paid to the said defendants. In this manner defendants No. 1 and 2 received a sum of Rs. 24,700/-. It was further agreed upon between the plaintiff and defendants No. 1 and 2 that the balance consideration of Rs. 300/- would be paid to defendants No. 1 and 2 at the time of the registration of the mortgage deed, which was agreed to be executed and registered on or before September 7, 1971. The plaintiff requested the said defendants to discharge their obligations under the agreement Exhibit PA dated August 8, 1971, but to no effect. The plaintiff even served registered notices upon defendants No. 1 and 2 calling upon them to execute and register the mortgage deed but the defendants refused to accept the notices.

4. It is further alleged by the plaintiff that in order to defeat and delay the agreement Exhibits PA and PB, defendant No. 2, Hazura Singh suffered a collusive decree in favour of his wife Smt. Gurdev Kaur, defendant No. 3, with respect to a parcel of land measuring 25 bighas 4 biswas out of the suit land, while Kartar Singh, defendant No. 1 suffered a collusive decree in favour of defendants No. 4 to 7. These decrees were suffered after the issuance of the registered notices by the plaintiff, calling upon defendants No. 1 and 2 to perform their part of the contract as per agreements Exhibits PA and PB. It is further alleged by the plaintiff that defendants No. 1 and 2 also entered into a collusion with defendant No. 8 Shri Amrit Lal, who also filed a suit for specific performance of agreement of sale of the suit land in his favour. As per the case of plaintiff, all transfers are subject to agreements Exhibits PA and PB and these transferees do not get any right, title or interest over and above the rights which have been conferred upon the plaintiff, vide agreements Exhibit PA and PB. Defendants No. 1 and 2 were requested several times to execute the mortgage deed as per their undertakings on receipt of a balance amount of Rs. 300/- but to no effect. It is also averred by the plaintiff that he was always ready and willing to perform his part of the contract.

5. With the above main allegations, the plaintiff claims relief of specific performance and in the alternative a money decree.

6. Notice of the suit was given to the defendants. A joint written statement was filed by defendants No. 1, 2 and 3 and they denied the execution of the agreements. The receipt of consideration of Rs. 14,700/- and Rs. 10,000/- was also denied. These defendants further denied that any notices were issued to them. It was stated that the land belonging to Smt. Gurdev Kaur, Ajaib Singh, Surinder Singh, Gurmel Singh and Jagroop Singh, defendants No. 3 to 7, had been rightly transferred. There was no collusion between defendants No. 1 and 2 on the one hand and defendants No. 3 to 7 on the other. It was pleaded by defendants No. 1 and 2 that they had got some gold ornaments in trust with the plaintiff and when they demanded the gold ornaments, the plaintiff refused to return the same. Resultantly, Shri Kartar Singh, defendant No. 1 filed a criminal complaint against the plaintiff u/s 406 I.P.C. The agreements being relied upon by the plaintiff have been forged by him and the present suit has been filed as a counter blast in order to put pressure upon defendant No. 1 Shri Kartar Singh, so that the latter may withdraw the criminal complaint. It was further pleaded by these defendants that plaintiff Shri Sardari Lal had no locus standi to file the suit. Even Shri Amrit Lal, defendant No. 8, had forged an agreement of sale and his suit for specific performance was also ill-founded. The plea of limitation was also taken.

7. Separate written statement was filed by defendants No. 4 to 7 and they adopted the pleas which were taken by defendants No. 1 to 3.

8. Yet another written statement was filed by defendant Shri Amrit Lal, who pleaded ignorance about the agreements Exhibits PA and PB. He stated that defendants No. 1 and 2 executed an agreement of sale in his favour and on the basis of that, he filed a suit for specific performance.

9. From the above pleadings of the parties, learned trial Court framed the following issues: -

"1. Whether defendants No. 1 and 2 agreed to mortgage the suit land to the plaintiff for Rs. 25,000/- and executed agreements in dispute dated 15.8.1968 and 8.8.1971 and received Rs. 24,700.00 from the plaintiff as advance mortgage money? OPP.

2. Whether the plaintiff has always been ready and willing to perform his part of the agreements and defendants No. 1 and 2 committed breach of the agreements in dispute? OPP

3. Whether the decree(s) obtained by defendants No. 3 to 7 against defendants No. 1 and 2 is collusive as alleged in para No. 3 of the plaint and to what effect? OPP.

4. Whether the suit filed by Amrit Lal defendant No. 8 against defendants No. 1 and 2 for specific performance of the contract of sale regarding the land in suit is collusive and to what effect? OPP.

5. In case suit of Sh. Amrit Lal defendant No. 8 is decreed, is he liable to pay Rs. 25,000/- to the plaintiff out of the sale price agreed to be paid by him to defendants No. 1 and 2? OPP.

6. In the alternative is the plaintiff entitled to get a decree of Rs. 25,000/- as alleged in the plaint? OPP.

6A. Whether the suit is within time? OPP.

6B. Whether the plaintiff has locus standi to sue? OPP.

7. Relief."

The parties led oral and documentary evidence in support of their case and on the conclusion of the trial, the learned trial Court held under issue No. 1 that defendants No. 1 and voluntarily executed the agreements and received a consideration of Rs. 24,700/-. Resultantly, issue No. 1 was decided in favour of the plaintiff and against the defendants, issues No. 2, 3, 4, 5, 6A and 6B were also decided in favour of the plaintiff. The trial Court granted a decree for specific performance and in these circumstances, the alternative money decree in favour of the plaintiff could not be granted. Finally, the suit of the plaintiff was decreed in terms as stated above.

10. Aggrieved by the judgment and decree of the trial Court. Shri Kartar Singh filed regular first appeal No. 145 of 1978 in the High Court and vide judgment and decree dated May 20, 1987, the learned Single Judge reversed the judgment and decree of the trial Court and dismissed the suit of plaintiff Shri Sardari Lal and in this manner Shri Sardari Lal has filed the present L.P.A. against the judgment and decree of the learned Single Judge.

11. It may also be mentioned here that during the pendency of this appeal, Gurmel Singh and Surinder Singh respondents have expired and vide separate orders their legal representatives have been brought on the record.

12. We have heard Shri R.K. Battas, Advocate, appearing on behalf of the appellant, and Shri Hemant Kumar, Advocate, appearing on behalf of the respondents, and with their assistance have gone through the record of the case and before us the learned counsel for the parties addressed arguments on issue No. 1 only and we shall confine our discussion on this issue. Otherwise, also this is the only contentious issue, which requires adjudication.

13. The plaintiff has been non-suited by the learned Single Judge mainly on the ground that the plaintiff remained unsuccessful in proving the due execution of the agreements Exhibits PA and PB and he also failed to establish that he passed on the consideration of Rs. 24,700/- out of the agreed amount of Rs. 25,000/- and in these circumstances the suit of the plaintiff could not be decreed by the learned trial Court.

14. After hearing the learned counsel for the parties, we are of the considered opinion that the learned single Judge fell in error in reversing the judgment of the trial Court and by doing so, a miscarriage of justice has been done to the appellant Shri Sardari Lal and the error committed by the learned Single Judge has to be remedied.

15. Now it is to be seen whether plaintiff Shri Sardari Lal was successful in proving the due execution and the passing on of the consideration of the agreements Exhibits PA and PB. There are two agreements on record. The first agreement was executed on August 15, 1968 (Exhibit PB) vide which a sum of Rs. 14,700/- was given to defendants No. 1 and 2, who agreed to execute the mortgage deed. A perusal of the record would show that this agreement has been duly proved from the statements of Partap Chand, P.W.3 and Paras Dass P.W.4 besides the statements of Sukhdarshan Parshad P.W.2 scribe. The second agreement dated August 8, 1971 (Exhibit PA) is also scribed by Shri Sukhdarshan Parshad and it was attested by Shri Partap Chand P.W. 3 and Shri Jaspal Singh P.W. 6. In other words, Partap Chand is the common attesting witness of both the agreements. The scribe is also the common. Paras Dass P.W. 4 is the independent attesting witness of Exhibit PB while Jaspal Singh is yet an independent witness of agreement Exhibit PA. Learned trial Court believed the statements of the attesting witnesses and the scribe besides that of the plaintiff. It was held by the learned trial Court and, in our opinion, rightly that the scribe and the attesting witnesses of these two documents are independent persons and apparently there is no reason to disbelieve their testimony.

16. Even a bare glance at these two vital documents on the record would show that these documents have been executed in a most natural and consistent manner. The stamp paper of Rs. 5/- of the first agreement in time Exhibit PB dated August 15, 1968 was purchased by Shri Kartar Singh himself and he had apparently put his thumb impression at its back. A naked glance at the said thumb impression would show that the ridges of this thumb impression are clear. He has thumb marked on the face of this document besides there is one more thumb impression at the back of this document underneath some endorsement. On the front side of this agreement (Exhibit PB) there is an endorsement in Punjabi in the hand of Shri Hazura Singh defendant to the effect that the executant had received a sum of Rs. 14,700/- in case and had agreed to mortgage the land. So much so, Shri Hazura Singh has put the date underneath his signatures in Punjabi. It is the specific case of the plaintiff that Sarvshri Hazura Singh and Kartar Singh voluntarily executed an agreement after the receipt of Rs. 14,700/-. In these circumstances when the plaintiff had examined independent witnesses to prove the due execution of the agreements and the receipt of consideration, it was obligatory on the part of defendant Shri Hazura Singh to have appeared in the witness-box to rebut the stand of the plaintiff. Conveniently Hazura Singh thought proper to stay back. Non-appearance of Hazura Singh gives rise to a strong presumption against him u/s 114 of the Indian Evidence Act. The law of the land is well settled that when a party

does not appear in the witness box and does not deny the case of the opponent, it suffers a great risk in non-appearance. The things do not rest here. The case of defendants No. 1 and 2 in the trial Court was that they did not execute any agreement in favour of the plaintiff. In order to disprove this part of the case of the plaintiff, the defendants took the trouble and examined the handwriting expert but for the reasons best known to the expert, he did not compare those thumb impressions of Shri Kartar Singh, whose ridges are decipherable and could be easily compared with the admitted signatures of Shri Kartar Singh. The reasons are quite obvious because the defendants know in their hearts and hearts that they voluntarily executed an agreement of mortgage in favour of Shri Sardari Lal plaintiff after receiving a sum of Rs. 14,700/-.

17. So, far as the document Exhibit PA is concerned, the said document is running into two pages. Again the stamp paper was purchased by Shri Kartar Singh. There are two more thumb impressions of Kartar Singh on the two sheets of the stamp papers. Again there is an endorsement in the hand of Hazura Singh, indicating that a sum of Rs. 24,700/- had been received by the executants and they agreed to mortgage the land in dispute. Similar is the endorsement of the attesting witnesses in which they had certified regarding the passing of the consideration and its purpose. The case set up by the defendants is that Shri Sardari Lal plaintiff has forged the signatures/thumb impressions of defendants No. 1 and 2. We are not convinced with this defence keeping in view that the signatures of Hazura Singh do not only figure at one place but at four places on two documents Exhibit PA and PB and similar number of thumb impressions of Kartar Singh which is highly improbable on the part of a forger. It is not the case of defendants No. 1 and 2 that the plaintiff played any fraud with them and got their thumb impressions or signatures. Mere denial without cogent proof is not enough to disprove the case of the plaintiff.

18. It is the specific case of the plaintiff that when he came to know that the intentions of defendants No. 1 and 2 are not clean and they had tried to transfer the land either by suffering collusive decrees or by entering into an agreement of sale, the plaintiff in his normal course served registered notices upon defendants Nos. 1 and 2 (Exhibit PW 7/1 and PW 7/3). The defendants refused to accept the notices. It is not their case that the notices were sent on a wrong address. Again the presumption of law arises in favour of the plaintiff that the defendants had the knowledge that the plaintiff was calling upon them for the discharge of their duties under agreement Exhibit PA. Defendants No. 1 and 2 did not want to perform their part of the contract justifying the plaintiff to file a suit for specific performance of the agreements. The learned trial Court in its well reasoned judgment had categorically stated that the plaintiff was able to prove the due execution of the agreements and the passing of the consideration. It has also been ably discussed as to why the learned trial Judge did not want to accept the evidence of the defendants, especially that of the handwriting expert, who thought proper to examine those

disputed thumb impressions of Kartar Singh, which were smudged. The handwriting expert could not advance any valid reasons in his report as to why he had not examined those thumb impressions of Kartar Singh, the ridges of which were clearly decipherable. Why Shri Hazura Singh had not given his specific handwriting before the trial court to disprove the execution of the agreements relied upon by the plaintiff? All these aspects give a clear indication that Hazura Singh and Kartar Singh knew that they voluntarily executed the agreements after the receipt of the consideration and they did not want to perform their part of the contract. The learned Single Judge had non-suited the plaintiff primarily on the ground that the scribe of the agreements was a man of shady character, being a dismissed Patwari. We are not convinced with the reasons advanced by the learned Single Judge. A man might have remained shady in his past career, but that stigma does not work for all times to come. In these circumstances, the learned Single Judge could have looked for more corroborative evidence before acting upon the statement of the scribe. We all know that civil cases are decided on preponderance of evidence and the plaintiff is not obliged to prove a fact like a criminal charge. There are no cogent reasons advanced by the learned Single Judge as to why he should discard the testimony of independent witnesses, like Partap Chand, Paras Dass and Jaspal Singh, P.W.2, P.W.4 and P.W.6, respectively when those witnesses have deposed with one voice about the due execution of the documents and the passing of the consideration. The second major reason which was admitted by the learned Single Judge was that the plaintiff has not been able to prove the source of money, which was allegedly paid to defendants Nos. 1 and 2. This aspect of the case was also examined by the learned trial Court in depth in para No. 30 of the judgment, which we would like to reproduce as follows:-

"30. Two more contentions of the learned counsel for defendants Nos. 1 and 2 remain to be examined. Firstly, it is contended by him that the plaintiff has not been able to prove source of huge amount of Rs. 24,700/- which he paid to defendants Nos. 1 and 2. This amount was not paid in a lump sum. It was paid in two convenient instalments with a convenient gap of three years. First payment of Rs. 14,700/- was made on 15.8.1968 vide agreement Ex. PB and the second payment of Rs. 10,000.00 was made on 8.8.1971 vide agreement Ex. PA. The plaintiff has stated that he paid Rs. 14,700/- by drawing Rs. 11,000.00 from Central Bank and that the balance amount was lying at his home. He has further stated that the second payment of Rs. 10,000.00 was made by him from ready money in his house which he had collected from the produce of his land. The plaintiff is a landlord and appears to be man of considerable means. Therefore, it was not difficult for him to raise the payment of Rs. 14,700.00 at one occasion and another payment of Rs. 10,000.00 about three years after that. Besides, this there are other circumstances which show that he is a man of considerable means and enjoys good confidence of people. This is so because Kartar Singh defendant No. 1 has stated that he had entrusted 70 tolas of gold ornaments to him. At current market price the value of these gold ornaments

comes more than Rs. 45,000.00. Nobody, much less Kartar Singh defendant No. 1 would entrust such valuable property to a pauper. Such an entrustment could be made only to a wealthy well-to-do and trustworthy person. From this, it may legitimately be inferred that the plaintiff is a man of substance and that it was not difficult for him to raise the requisite money."

The learned single Judge, however, did not agree with the above reasoning and he dismissed the reasons by merely stating that the plaintiff has not been able to bring the cogent evidence showing the withdrawal of the amount from the Bank. No doubt the consideration was paid as back as in the years 1968 and 1971 when the amount of Rs. 25,000/- could be considered as a huge amount, but the learned Single Judge has failed to appreciate that the plaintiff Shri Sardari Lal was a landlord and he was a man of considerable means. The money, which was parted to defendants Nos. 1 and 2, was given on two occasions and in these circumstances it was not necessary on the part of the plaintiff to produce bank accounts etc. The defendants at no point of time had cared to lead such evidence from which it could be proved that the plaintiff had no occasion to advance the amounts of Rs. 14,700/- and Rs. 10,000/- in the years 1968 and 1971, respectively. A man of resources can save Rs. 10,000/- after the expiry of three years and can advance this amount to defendants Nos. 1 and 2. Defendants Nos. 1 and 2 are coming with a plain plea of denial without realising the risk, once this plea is not established. It was also one of the major documents for the learned Single Judge when he dismissed the suit of the plaintiff that there was no occasion for the plaintiff to enter into an agreement of mortgage, when he had already parted Rs. 24,700/- against the agreed consideration of Rs. 25,000/- on mortgage and why the plaintiff had not obtained the mortgage deed at the first instance. This reasoning may look alluring but on our deeper scrutiny we find it without force. The first amount of Rs. 14,700/- was parted in the month of August. In this month the possessions of the lands are not invariably exchanged or parted. Moreover, it has come in evidence that defendants Nos. 1 and 2 had dealings with the plaintiff. It is the case of the defendants themselves that they had parted some gold ornaments to the plaintiff. This plea raised by defendants Nos. 1 and 2 though not admitted by the plaintiff, leads to two inferences. That defendants No. 1 and 2 used to repose confidence in the plaintiff and that their relations were quite cordial during those days. It is equally possible that defendants Nos. 1 and 2 might have agreed with the plaintiff that they would execute the mortgage deed with possession in due course of time, but later on the intentions of defendants Nos. 1 and 2 became bad and they started dilly dallying the matters. In order to secure his interest the plaintiff further parted Rs. 10,000/- so as to cover the payment of his earlier amount with the hope that defendants Nos. 1 and 2 would execute a regular mortgage deed in due course of time. Learned counsel appearing on behalf of the respondents, Shri Hemant Kumar, could not demolish the contention of the plaintiff-appellant that why Shri Hazura Singh did not appear in the witness-box and why the defendants did not accept the notices of the

plaintiff.

19. Faced with this difficulty, the counsel for the respondents submitted that the first agreement was executed on August 15, 1968, as per the case of the plaintiff, and when the defendants Nos. 1 and 2 were not ready and willing to perform their part of the contract, why the plaintiff waited for three years, when the second agreement (Exhibit PA) was executed on August 8, 1971. According to the counsel, the plaintiff ought to have taken certain steps in due course in the year 1968 itself for the due execution of the agreement (Exhibit PB). The argument of the learned counsel for the respondents is misconceived and has no legs to stand. The execution of the other agreement (Exhibit PA) itself suggests that the plaintiff was behind defendants Nos. 1 and 2 who were not ready and willing to discharge their obligations. For this reason the plaintiff had to part with Rs. 10,000A more, not only to secure the earlier consideration of Rs. 14,700/- but also Rs. 10,000/- which were paid to defendants No. 1 and 2 vide agreement (Exhibit PA). Bait was supposed to be given to defendants No. 1 and 2 and they accepted the amount and entered into a valid agreement. Subsequently, their intentions became bad and this time the plaintiff could not afford to wait much and he served legal notices upon the defendants, who suffered collusive decrees in order to defeat and delay the claim of the plaintiff. This conduct on the part of defendants Nos. 1 and 2 Speaks Volumes of their mala fides; so much so, they entered into an agreement of sale to deprive the rights and interests of the plaintiff. In this view of the matter, we are of the considered opinion that the learned single Judge in the impugned judgment committed a patent illegality which has to be rectified by us. When there is a wrong appreciation of evidence, this Court in L.P.A. has to rectify that mistake.

20. Resultantly, we reverse the findings of the learned Single Judge and decide issue No. 1 in favour of plaintiff-appellant and against the respondents.

21. Now the point which survives for determination is whether we should grant a decree for specific performance as prayed for by the plaintiff or grant an alternative relief emerging from the facts of the case. The case of the plaintiff-appellant is that he parted with a sum of Rs. 24,700/- as he wanted to get a usufructuary mortgage by virtue of document (exhibit FA) dated August 8, 1971. He could not become the owner. The mortgagor has always the right to redeem the property within limitation. In these circumstances, we would not like to give directions to the respondents to execute a usufructuary mortgage in favour of the plaintiff and that too after a lapse of more than 25 years. It is established on the record that the plaintiff parted with a sum of Rs. 24,700/- to defendants Nos. 1 and 2. The other defendants are either the legal representatives or the assignees of defendants Nos. 1 and 2. They have derived the benefit either under the decree or by way of succession. All the defendants are bound to return the benefits which they had received under the contracts dated August 15, 1968 (Exhibit PB) and August 8, 1971 (Exhibit PA). Under Order 7 Rule 7, Code of Civil Procedure, Civil Court can always

grant a relief, though not prayed for, after it emerges out from the facts and circumstances of the case. The defendants had retained the money. They have enjoyed the fruits of the aforesaid amount. Section 34 of the CPC lays down that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the court deems fit. We are not inclined to grant a decree for specific performance to the plaintiff, but grant a money decree for a sum of Rs. 24,700/- against the defendants-respondents. The plaintiff shall also be entitled to interest at the rate of 6 per cent per annum with effect from September 26, 1973, when the suit was instituted in the trial Court, till the realisation of the entire amount. The defendants shall further pay the costs of litigation to the plaintiff throughout. The office shall prepare a decree sheet in the above terms. The counsel fee is assessed at Rs. 1,000/-