

Santosh Devi Vs Jai Narain and another**Regular Second Appeal No. 2651 of 2009**

Court: High Court Of Punjab And Haryana At Chandigarh**Date of Decision:** July 3, 2012**Citation:** (2012) 168 PLR 426**Hon'ble Judges:** L.N. Mittal, J**Bench:** Single Bench**Advocate:** V.K. Jain, with Mr. J.L. Malhotra, for the Appellant; Shailender Sharma, for the Respondent**Final Decision:** Dismissed

Judgement

L.N. Mittal, J.

Defendant no. 2 Smt. Santosh Devi has filed this second appeal. Respondent no. 1 - plaintiff Jai Narain filed suit against

proforma respondent no. 2 Smt. Suresh as sole defendant. However, Santosh Devi appellant was impleaded as defendant no. 2 because during

pendency of the suit, she had purchased the suit land from the original defendant Smt. Suresh vide sale deed dated 1.5.2006.

2. Case of the plaintiff is that Suresh defendant no. 1 agreed to sell suit land measuring 13 kanals 141/2 marlas to the plaintiff for Rs. 3,85,000/-

and received Rs. 3 lacs as earnest money and executed agreement dated 12.11.1997. Sale deed was agreed to be executed upto 15.6.1998.

However, on 12.6.1998 with mutual consent of both the parties, date for execution of the sale deed was extended to 12.8.1998 by making

endorsement on the back of the agreement. Plaintiff remained ready and willing to perform his part of the contract but defendant no. 1 committed

breach thereof. Accordingly, the plaintiff filed suit for possession of the suit land by specific performance of the impugned agreement.

3. Defendant no. 1, who was originally sole defendant, admitted the factum of agreement dated 12.11.1997 between the parties. However,

defendant no. 1 pleaded that sale consideration was agreed to be Rs. 30,85,000/- and not Rs. 3,85,000/-. It was also pleaded that earnest money

of Rs. one lakh was only paid. It was denied that the defendant no. 1 received Rs. 3 lacs as earnest money. It was pleaded that first page of the

agreement has been changed by tampering figures therein i.e. by tampering figure of earnest money from Rs. one lac to Rs. three lacs and by

tampering figure of sale consideration from Rs. 30,85,000/- to Rs. 3,85,000/-. It was pleaded that defendant no. 1 always remained ready and

willing to perform her part of the agreement and even attended the office of Sub Registrar on 15.6.1998 to execute the sale deed in terms of the

agreement but the plaintiff himself committed breach of the agreement. Endorsement regarding extension of date of execution of sale deed was

denied. It was pleaded that on failure of the plaintiff to get sale deed executed, the agreement stood cancelled and the earnest money stood

forfeited. Various other pleas were also raised.

4. Defendant no. 2 pleaded that she has purchased the suit land from defendant no. 1 vide sale deed dated 1.5.2006 for valuable consideration

and in good faith and is bonafide purchaser thereof and has become owner in possession thereof.

5. Learned Civil Judge (Junior Division), Palwal vide judgment and decree dated 10.6.2008 dismissed the plaintiff's suit. However, first appeal

preferred by plaintiff has been allowed by learned Additional District Judge, Faridabad vide judgment and decree dated 26.5.2009 and thereby

suit filed by the plaintiff stands decreed. Feeling aggrieved, defendant no. 2 has filed this second appeal.

6. I have heard counsel for the parties at considerable length and carefully gone through the case file.

7. Learned counsel for the appellant vehemently contended that secondary evidence of the impugned agreement and receipt was allowed by the

trial court vide order dated 25.7.2002 without giving notice of the application for secondary evidence to the defendants. It was also contended that

loss of the original agreement was not pleaded in the plaint although the agreement had allegedly been lost before filing of the suit. It was also

argued that loss of the agreement is not proved nor it is shown as to how the agreement had been lost. It was submitted that the plaintiff has also

not explained as to how and why he got prepared and attested Photostat copies of the agreement and receipt. It was also pointed out that

Photostat copies of the agreement and receipt purported to have been attested on 25.9.1998 after comparison with the original whereas the

original had allegedly been lost on 27.7.1998 and Daily Diary Report (DDR) regarding the same had been lodged with the police on 28.7.1998. It

was thus contended that secondary evidence of the agreement could not be allowed. Reliance in support of these contentions has been placed on

judgments in H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam, ; Smt. J. Yashoda Vs. Smt. K. Shobha Rani, Mangat Ram v. Prabhu Dayal and

others, 2002 (4) RCR (Civil) 706; Hari Singh v. Shish Ram 2002(4) RCR (Civil) 830; M/s Parkash Chand Kapoor Chand v. Inderjit Singh and

others 2006(3) RCR (Civil) 700 and Ashok Kumar Sachdeva v. Harish Malik, 2007(4) RCR (Civil) 311.

8. Counsel for the appellant also contended that readiness and willingness of the plaintiff to perform his part of the agreement is not proved. It has

not been shown that he had requisite money to get the sale deed executed and registered in terms of the agreement nor he has proved his capacity

to pay the earnest money of Rs. 3 lacs. Reliance in support of this contention has been placed on judgment of Hon"ble Supreme Court in Man

Kaur (dead) by LRS. Vs. Hartar Singh Sangha, . It was also argued that Dharam Raj husband and attorney of defendant no. 1 is a good and

competent witness being husband of defendant no. 1 and also being signatory to the agreement as witness. Reliance in support of this contention

has been placed on judgments in Satnam Channan v. Darshan Singh 2006 (2) RCR (Civil) 614 and Man Kaur (supra). It was also argued that

plaintiff has not signed the impugned agreement and therefore, he cannot seek specific performance thereof. In support of this contention, reference

has been made to judgment of this Court in Vipin Kumar v. Smt. Asha Lata Ahuja and others, (2009-3) 155 PLR 255.

9. Counsel for the appellant also contended that first page of the agreement has been changed so as to change the amount of sale consideration

and amount of earnest money as pleaded by defendant no. 1. It was also contended that it was wrongly recited in agreement that possession of the

suit land has been delivered to the plaintiff whereas in fact the possession was never delivered to the plaintiff. It was also contended that

endorsement regarding extension of date of execution of sale deed is not proved. Reference was also made to notice dated 29.8.1998 (Ex. D1 as

well as Ex. D11) served by plaintiff on defendant no. 1 wherein sale consideration was mentioned to be Rs. 30,85,000/-.

10. Counsel for the appellant also contended that Narinder Singh attesting witness of the agreement examined by the plaintiff wrongly stated that he

was not related to the plaintiff but had to admit his relationship with the plaintiff on further cross-examination. It was also contended that defendant

no. 1 had served notices dated 23.7.1998 and 1.8.1998 mentioning the sale consideration to be Rs. 30,85,000/- and earnest money as one lac.

11. Counsel for respondent no. 1 - plaintiff contended that there has been no tampering with the impugned agreement as is evident from the bare

perusal of photostat copy of the agreement Ex. P/1 and receipt Ex. P2. It was pointed out that the amounts have also been written in words and

there fore, question of tampering does not arise. It was also contended that in the notice dated 29.8.1998, the amount of sale consideration was

wrongly mentioned as Rs. 30,85,000/- instead of Rs. 3,85,000/- due to inadvertence. In this context, it was pointed out that almost 81/2 years

after the impugned agreement, defendant no. 1 sold the suit land to defendant no. 2 - appellant vide sale deed dated 1.5.2006 for Rs. 5 lacs only

and therefore, the impugned agreement dated 12.11.1997 could not have been for consideration of Rs. 30,85,000/-.

12. I have carefully considered the rival contentions.

13. As regards secondary evidence of the impugned agreement, it is correct that loss of the agreement was not specifically pleaded in the plaint.

However, the plaintiff had placed on record attested photostat copy of the agreement and receipt and also copy of the DDR lodged by him

regarding loss of the agreement and the same were referred to by defendant no. 1 in her written statement. Thus even before filing of written

statement, defendant no. 1 was aware that according to the plaintiff's version, the original agreement stood lost. Consequently, non mentioning of

loss of original agreement in the plaint becomes insignificant.

14. As regards sufficient ground for leading secondary evidence, existence and execution of the original agreement stands admitted by defendant

no. 1 in her written statement. Consequently, when the plaintiff pleaded and stated that the original agreement had been lost, sufficient ground is

made out for permitting the plaintiff to lead secondary evidence. Trial court order permitting the plaintiff to lead secondary evidence was passed in

presence of counsel for the defendants and after hearing counsel for the parties. Defendants' counsel did not agitate that he should be allowed to

file reply to the application or that the application should not be allowed.

15. Contention of counsel for the appellant that photostat copy of the agreement was compared with original and attested on 25.9.1998 i.e. after

alleged loss of the original agreement on 27.7.1998 is also unacceptable because the digit of month in the date of attestation of the said copy is not

legible. The said digit is certainly not digit 9 as becomes crystal clear on comparison with digit 9 occurring in the year 98 in the said date. On the

other hand, case of the plaintiff is that the said copy was got attested on 25.7.1998 i.e. before the loss of the original agreement on 27.7.1998.

16. In view of the aforesaid circumstances, judgments cited by counsel for the appellant are not attracted to the facts of the instant case and the

plaintiff has been rightly permitted to lead secondary evidence of the agreement.

17. Plea of defendant no. 1 that first page of the agreement has been changed by tampering cannot be accepted. It is not the version of defendant

no. 1 that first page of the agreement has been replaced altogether. On the contrary, the plea of defendant no. 1 is that first page of the agreement

has been tampered to change figures of earnest money and sale consideration as noticed hereinbefore. However, perusal of Photostat copy of the

agreement reveals that there is no question of any tampering. There is clear type written (computer written) agreement mentioning the amounts in

figures as well as in words without any cutting, overwriting or tampering whatsoever. On the contrary, defendant no. 1 has admitted execution of

the agreement. The dispute is regarding the sale consideration and earnest money. Version of defendant no. 1 that the agreed sale consideration

was Rs. 30,85,000/- is palpably false because after 8 1/2 years of the agreement, when the prices had escalated tremendously in the interregnum,

defendant no. 1 sold the suit land to defendant no. 2 for consideration of Rs. 5 lacs only as against Rs. 3,85,000/- mentioned in the agreement. It

would clearly depict that the agreed sale consideration was Rs. 3,85,000/- and not Rs. 30,85,000/-. So alleged change in or tampering with the

agreement is ruled out.

18. As regards source of earnest money of Rs. 3 lacs and readiness and willingness of plaintiff with remaining sale consideration and expenses of

sale deed, defendant no. 1 did not even plead that plaintiff did not have financial capacity for the same. On the contrary, according to version of

defendant no. 1, she had agreed to sell the suit land to plaintiff for Rs. 30,85,000/-. It would show that defendant no. 1 was well aware that

plaintiff was very sound financially. If defendant no. 1 could allegedly agree to sell the suit land to plaintiff for Rs. 30,85,000/-, it cannot be said that

the plaintiff did not have the capacity to pay earnest money of Rs. 3 lacs only and to pay the balance sale consideration of Rs. 85,000/- along with

expenses of the sale deed.

19. As regards recital of the delivery of possession of the suit land to the plaintiff, same has been made at page 2 of the agreement. It is not even

the case of defendant no. 1 that there was any tampering with contents of page 2 of the agreement. Consequently, relief of specific performance

cannot be declined on the basis of aforesaid contention.

20. The agreement has been duly proved by the plaintiff by examining Mr. SC Sharma, Advocate who drafted the agreement and also signed it

and attested it and also by examining Narinder Singh witness of the agreement. Similarly endorsement of extension of date of execution of sale

deed has been duly proved by the plaintiff. The plaintiff himself has also stepped into witness box. In these circumstances, testimony of Narinder

Singh cannot be discarded in toto merely on the ground that initially he denied his relationship with plaintiff. On the contrary, testimony of Narinder

Singh is corroborated by testimony of Mr. SC Sharma, Advocate (an independent witness) who also made entry of the agreement in his register

and also by testimony of the plaintiff himself.

21. As regards readiness and willingness of the plaintiff, the very fact that he had filed suit on 6.10.1998 without any delay would depict that he has

always been ready and willing to perform his part of the contract. He had also served notice dated 29.8.1998 on defendant no. 1 before filing the

suit. Consequently, readiness and willingness of the plaintiff to perform his part of the contract is fully established.

22. Contention of counsel for the appellant that Dharam Raj husband and attorney of defendant no. 1 was competent witness has to be accepted.

He was signatory to the agreement and is also husband and attorney of defendant no. 1 and had personal knowledge of the facts to be deposed.

Consequently, his testimony cannot be discarded merely because defendant no. 1 herself has not appeared in the witness box.

23. Relief of specific performance cannot be declined to the plaintiff merely because he has himself not signed the agreement because execution of

agreement between the parties stands admitted even by defendant no. 1. For the reasons aforesaid, I find no merit in this second appeal. No

question of law much less substantial question of law arises for adjudication in this second appeal. The suit of the plaintiff has been rightly decreed

by the learned lower appellate court. The instant appeal is, therefore, dismissed.