

**(2013) 09 P&H CK 0397**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Regular Second Appeal No. 2515 of 2012 (O and M)

Gurmail Singh

APPELLANT

Vs

Mukand Singh and Another

RESPONDENT

**Date of Decision:** Sept. 4, 2013

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Specific Relief Act, 1963 - Section 20

**Hon'ble Judges:** Rakesh Kumar Garg, J

**Bench:** Single Bench

**Advocate:** Malkeet Singh, for the Appellant;

**Final Decision:** Dismissed

**Judgement**

Rakesh Kumar Garg, J.

Defendant No. 1 has filed the instant appeal challenging the judgment and decree of the trial Court dated 02.06.2010, whereby suit of the plaintiff-respondent for specific performance of the agreement to sell dated 26.7.2004 has been decreed and the judgment and decree of the lower Appellate Court dated 13.12.2011, whereby appeal filed by the defendant-appellant against the aforesaid judgment and decree of the trial Court has been dismissed. As per the averments, plaintiff-respondent filed a suit for possession of suit land measuring 07 kanals as detailed in the suit, by way of specific performance of agreement to sell dated 26.7.2004 executed in his favour by the appellant, after adjusting a sum of Rs. 2,12,000/- as a part of sale consideration. As per averments, appellant executed an agreement to sell with the plaintiff-respondent agreeing therein to sell the suit land measuring 07 kanals as detailed in the plaint and executed the agreement in his favour for a total sale consideration of Rs. 2,20,000/- and received Rs. 2,12,000/- as part of the sale consideration from the plaintiff in the presence of marginal witnesses of the agreement to sell. Last date for execution and registration of the sale deed was fixed as 26.01.2005. Plaintiff-respondent was ready and willing to

perform his part of the contract and he also appeared before the Sub Registrar on the stipulated date but the appellant did not turn up. Rather he resiled from the agreement. Later on, plaintiff-respondent came to know that appellant had taken loan from respondent No. 2 by mortgaging the property in dispute. Since appellant refused to perform his part of the contract, necessity arose to file the instant suit.

2. Upon notice, appellant appeared and contested the claim submitting that on 25.12.1999, he borrowed a sum of Rs. 50,000/- from plaintiff-respondent and who as a security got executed agreement to sell adding therein the interest @ 3% per month. On failure to repay the loan amount, plaintiff got executed a fresh agreement adding interest w.e.f. 26.12.2000 to 26.12.2001. He also got executed agreement to sell dated 12.1.2002 qua land measuring 07 kanals comprised in Killa No. 40/5/2 showing an amount of Rs. 1,32,000/- as earnest money. On 26.12.2002, another agreement to sell came into existence between plaintiff and defendant No.1 showing an amount of Rs. 2,12,000/- received by him as earnest money which included Rs. 10,000/- borrowed by him from plaintiff on 24.12.2003 vide another agreement executed on that day. Defendant No. 1 failed to repay the loan upto 26.6.2004, so ultimately, a fresh agreement was executed between the parties on 26.7.2004. It is further submitted that appellant never intended to sell his property. The agreement dated 26.7.2004 was executed merely as security. All other averments made in the suit were denied and dismissal of the suit was prayed for.

3. Replication to the written statement was filed wherein all the averments made in the plaint were reiterated and those of written statement were denied. From the pleadings of the parties, following issues were framed:-

1. Whether defendant executed agreement to sell dated 26.7.2004 in favour of plaintiff? OPP
2. Whether plaintiff was already ready and is still willing to perform his part of the contract? OPP
3. Whether plaintiff is entitled to specific performance of the agreement dated 26.7.2004? OPP
4. Whether plaintiff is entitled to injunction prayed for? OPP
5. Whether agreement dated 26.7.2004 was executed as security for loan? OPD
6. Relief.

4. The trial Court took up issues No. 1 and 5 together and decided both these issues in favour of plaintiff-respondent and against appellant-defendant. Issues No. 2 and 3 were decided in favour of the plaintiff and against the appellant-defendant respondents. Whereas issue No. 4 was decided against the appellant. Consequently the suit of the plaintiff was decreed.

5. Feeling aggrieved from the aforesaid judgment and decree of the trial Court, appellant filed an appeal before the First Appellate Court which was also dismissed.

6. Still not satisfied, the appellant has filed the instant appeal submitting that the following substantial questions of law arise in this appeal are framed for consideration of this Court:-

1. Whether the agreement to sell in question could be enforced when there is evidence to effect that the transaction was only a loan transaction between the parties?

2. Whether the impugned judgments and decrees are sustainable in the given circumstances to the extent of relief of specific performance?

3. Whether the respondent/plaintiff could get only alternate relief of return of the earnest money legally?

7. In support of the appeal, learned counsel for the appellant has vehemently argued that the Courts below have arrived at absolutely wrong conclusion while holding that the appellant failed to prove the series of agreements between the parties by leading cogent and unimpeachable evidence by leading secondary evidence to establish that the agreement in question was a security of the loan amount.

8. It is the case of the appellant that the agreement to sell was executed as a security for the amount borrowed by him in the past, whereas no earnest money to the tune of Rs. 2,12,000/- was allegedly paid to him and the same is evident from the record. Moreover, out of the total consideration of Rs. 2,20,000/-, a sum of Rs. 2,12,000/- stood allegedly paid at the time of the agreement but the date of execution of the sale deed was fixed after a gap of six months, whereas, only a sum of Rs. 8,000/- was left as a balance to be paid at the time of registration. This very fact clearly shows that agreement to sell was in fact a loan transaction, otherwise there was no reason for the plaintiff-respondent for payment of paltry sum of Rs. 8,000/- only. However, the Courts below have not appreciated this aspect at all and on the contrary misread and misconstrued the evidence led by the appellant.

9. It is the further case of the appellant that the Courts below have utterly failed to consider that the relief of specific performance of the agreement to sell is discretionary in nature u/s 20 of the Specific Relief Act. In the facts and circumstances of the case, the Courts below should have refused the decree for specific performance of the agreement in favour of the plaintiff-respondent and thus, questions of law as raised, do arise and the impugned judgments and decrees are liable to be set aside.

10. Counsel for the appellant has also relied upon a judgment of this Court in the case of Prem Singh Vs. Mangu Ram, to support the aforesaid arguments.

11. I have heard learned counsel for the appellant and perused the impugned judgments and decrees of the Courts below.

12. At the outset, it may be noticed that execution of the agreement to sell in question is not in dispute. In fact, appellant has taken a specific defence that the agreement to sell in question was executed by him as a security for loan. It may further be noticed that both the Courts below on appreciation of evidence have recorded a concurrent finding to the fact that appellant has failed to prove the fact that agreement to sell in question was executed by him as a security for the loan amount taken by him in the past.

13. It is well settled that a fact is to be proved by a litigant who asserts the same. After admitting the execution of the agreement in question, it was for the appellant to prove by way of leading his evidence that the said agreement was executed as a security for loan amount and he had no intention to sell the land in question.

14. It is a matter of record that appellant has not produced any evidence to support his plea that there were a series of agreements executed by him as security for the loan amount taken by him. It is again a matter of record that he was permitted to prove the aforesaid facts by leading secondary evidence, but appellant failed to lead any evidence on this point.

15. Having failed in doing so, appellant again cannot find fault with the impugned judgments and decrees of the Courts below. In the facts and circumstances of the case, once the execution of the agreement to sell stands proved and the appellant has failed to lead his evidence, it could not be argued that discretion u/s 20 of the Specific Relief Act, 1963 has not been rightly exercised by the Courts below while granting decree for specific performance of the agreement to sell in question or is in any manner arbitrary or against the settled principles of law.

16. At this stage, it may further be noticed that appellant has relied upon the cross examination of the plaintiff-respondent, whereby, he had admitted that there were loan transactions between him and the appellant in the past and agreement to sell dated 25.12.1999 and other agreements were executed and from the aforesaid facts it is clearly made out that the agreement in question was also executed by the appellant as a security for the loan amount. Further, it may be noticed that in the cross examination itself, plaintiff-respondent has specifically denied that in the past, agreements to sell were executed as security for the loan amount. He has admitted only to the extent that on 25.12.1999 agreement to sell was executed as security to secure the loan amount and on return of the said amount, the original agreement to sell was returned to the appellant. However, he has clearly denied that the later agreements were executed as security to secure the loan amount. Thus, if we, take the cross examination of the plaintiff-respondent, as a whole, the same does not support the plea of appellant.

17. By raising the aforesaid argument, learned counsel wants this Court to take a different view than the view taken by the Courts below after reappraising the evidence which is not permissible while exercising jurisdiction u/s 100 C.P.C.

18. In view thereof, I find no merit in this appeal.

19. No substantial question of law, as raised, arises in this appeal. Dismissed.