(2011) 01 P&H CK 0447

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1671 of 2010

Jamail Singh and Others		APPELLANT
	Vs	
Smt. Naranjan Kaur and Others		RESPONDENT

Date of Decision: Jan. 27, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Order 32 Rule 1, Order 32 Rule 15, Order 32 Rule 3

Citation: (2011) 4 CivCC 102 : (2011) 162 PLR 408 : (2011) 2 RCR(Civil) 215

Hon'ble Judges: L.N. Mittal, J

Bench: Single Bench

Final Decision: Allowed

Judgement

L.N. Mittal, J.
Legal representatives of original Plaintiff Jaswant Singh have preferred the instant second appeal after they were successful in the trial court, but have been non-suited by the lower appellate court.

2. Jaswant Singh - Plaintiff filed suit against Dayal Singh - Defendant (since deceased and represented by Respondents as his legal heirs). In fact, one of the legal representatives of Plaintiff and Defendant each has also since died and they are represented by the remaining legal representatives.

3. Plaintiff alleged that on 02.05.1973, Defendant Dayal Singh entered into agreement to sell the suit land to the Plaintiff and received Rs. 5,000/- as earnest money. Thereafter, another agreement to sell dated 06.08.1984 was entered into between the parties for sale of the suit land by Defendant to Plaintiff for total consideration of Rs. 64,575/- in supersession of the first agreement. Earnest money of Rs. 5,000/- given under the first agreement was adjusted in the second agreement. It was stipulated in the second agreement that Plaintiff shall pay Rs. 30,000/- to the Defendant as further part sale consideration up to 15.11.1984. It was

further stipulated in the impugned second agreement that the Defendant, after getting conveyance deed in his name from the State Government, shall execute the sale deed in favour of Plaintiff up to 01.06.1985. However, sale deed of the suit land could not be executed in favour of Defendant himself up to 01.06.1985 - the date stipulated in the agreement and therefore, Defendant could not execute the sale deed of the suit land in favour of the Plaintiff. Accordingly, date for execution of the sale deed in favour of the Plaintiff was extended and it was agreed that Defendant shall execute the sale deed in favour of the Plaintiff within three months from the date conveyance deed is produced by the Defendant. Endorsement to this effect was made on the back of the impugned agreement. Defendant received Rs. 30,000/- on 10.11.1984 and further amount of Rs. 12,000/- on 16.04.1986 as further part payment of the sale consideration. Thus, in all, Plaintiff had paid Rs. 47,000/- to Defendant against total sale consideration of Rs. 64,575/-. The Plaintiff alleged that he always remained ready and willing to perform his part of the agreement, but the Defendant failed to do the needful. Conveyance deed in favour of the Defendant was issued by State Government on 7/8.06.1993. Mutation on its basis has also been sanctioned in favour of the Defendant. Accordingly, Defendant was bound to execute sale deed in favour of the Plaintiff up to 08.09.1993. However, instead of doing so, he started negotiating for sale of suit land to other person. Accordingly, Plaintiff had to file suit for permanent injunction restraining the Defendant to alienate suit land to anybody else other than the Plaintiff. Temporary injunction to this effect was granted in the said suit. However, on expiry of the stipulated date of sale deed i.e. 08.09.1993, the Defendant failed to execute the sale deed in terms of the agreement. Accordingly, suit for permanent injunction was withdrawn and instant suit for possession of the suit land by specific performance of the impugned agreement to sell dated 06.08.1984 was instituted.

4. Defendant, in his written statement, raised various objections. However, impugned agreement dated 06.08.1984 was admitted. The Defendant, however, pleaded that the amount of Rs. 30,000/- payable up to 15.11.1984, as per terms of the agreement, was not paid by the Plaintiff to the Defendant. Accordingly, the Defendant served notice dated 20.11.1984 requiring the Plaintiff to pay the said amount of Rs. 30,000/-, but the Plaintiff did not pay the said amount and rather sent reply dated 07.12.1984 alleging that the Plaintiff never agreed to pay Rs. 30,000/- up to 15.11.1984. Plaintiff had not paid any amount to the Defendant and he might have created bogus receipts dated 10.11.1984 and 16.04.1986. Other plaint allegations were broadly controverted.

5. Learned Civil Judge (Junior Division), Jagadhri, vide judgment and decree dated 25.05.006, decreed the Plaintiff''s suit. However, first appeal preferred by legal representatives of Defendant has been allowed by learned Additional District Judge, Yamuna Nagar at Jagadhri, vide judgment and decree dated 16.10.2009 and thereby, suit stands dismissed. Feeling aggrieved, legal representatives of the Plaintiff have preferred the instant second appeal.

6. I have heard learned Counsel for the parties and perused the case file.

7. Learned Counsel for the Appellants reiterated the contentions noticed in motion order dated 29.04.2010.

8. On the contrary, learned Counsel for the Respondents, relying on judgment of this Court in the case of Harjinder Singh v. Nachhattar Kaur 1 1991 P. L. J. 565 and judgment of Hon''ble Supreme Court in the case of Raj Kumar Vs. Rameshchand and Others, , contended that no order was passed for appointment of next friend of original Plaintiff Jaswant Singh, who was stated to be of unsound mind and therefore, suit itself was not maintainable. It was next contended that the suit is barred by Order 2 Rule 2 of the CPC (in short - Code of Civil Procedure) because the Plaintiff earlier filed suit for permanent injunction and thereby abandoned the relief of specific performance and consequently, the instant subsequent suit is barred by Order 2 Rule 2 Code of Civil Procedure. Reliance in support of this contention has been placed on a judgment of this Court in the case of Veena Goyal v. Raj Kumar Mittal s 3 2009 (1) R. C. R. (Civil) 587.

9. Learned Counsel for the Respondents also contended that the Advocate, who had issued notice Ex.D-5 on behalf of the Defendant to the Plaintiff, had since died and therefore, could not be examined as witness to prove the said notice. It was also pointed out that Respondent No. 8 - Mohinderpal Singh (son of original Defendant) has not admitted the signatures of the Defendant on receipt Ex.P-4 because after initially admitting the same, he again stated that the said signatures appeared to be not of his father. It was also submitted that handwriting expert was examined to prove that the said signatures did not match with standard/admitted signatures of the Defendant. Learned Counsel for the Respondents also contended that extension Ex.P-5 dated 01.06.1985 was not executed by the Defendant.

10. I have carefully considered the rival contentions. In so far as appointment of next friend of minor Plaintiff or Plaintiff of unsound mind is concerned, Order 32 Rule 1 CPC does not envisage any order of the Court for this purpose. On the contrary, Order 32 Rule 1 CPC lays down that every suit by a minor shall be instituted in his name by a person, who in such suit shall be called the next friend of the minor. Same provision applies to Plaintiff of unsound mind by virtue of Order 32 Rule 15 Code of Civil Procedure. Consequently, appointment of next friend of minor Plaintiff or of Plaintiff of unsound mind is not to be made by the Court under Order 32 Rules 1 and 15 Code of Civil Procedure. On the other hand, Order 32 Rule 3 CPC provides for appointment of guardian of a minor Defendant by the Court and the same provision shall apply to Defendant of unsound mind. Thus, where a Plaintiff is minor or of unsound mind, suit in his name can be filed by next friend without any order from the Court regarding appointment of next friend, but where Defendant is minor or of unsound mind, then appointment of guardian of such Defendant is required to be made by the Court. In the instant case, the Plaintiff was alleged to be of unsound mind and therefore, no order for appointment of next friend of the

Plaintiff was required to be made by the Court. judgment of this Court in the case of Harjinder Singh (supra) pertains to Defendant and not to Plaintiff. judgment in the case of Raj Kumar (supra) of course pertains to landlord-Petitioner, who filed eviction petition, but in that ease, already there was order by the Rent Control Authority regarding appointment of guardian and therefore, it cannot be said on the basis of this judgment that even appointment of next friend of a Plaintiff, who is minor or of unsound mind, is required to be made by the Court. There is distinction between a Plaintiff, who is minor or of unsound mind, and a Defendant, who is minor or of unsound mind. In the case of such Plaintiff, no order of the Court is required for appointment of next friend, whereas in the case of such Defendant, order of appointment of guardian ad litem is required to be made by the Court. Since in the instant case, it was Plaintiff, who was of unsound mind, no formal order for appointment of his next friend for institution of the suit, was required to be made. Consequently, judgment of the lower appellate court, non-suiting the Plaintiff on the ground that next friend of Plaintiff was not appointed by the Court, cannot be sustained.

11. Learned lower appellate court relied on notice Ex.D-5 allegedly sent by the Defendant to the Plaintiff and reply Ex.D-6 to the said notice allegedly sent on behalf of the Plaintiff to the Defendant, to hold that in spite of said notice, the Plaintiff did not pay the amount of Rs. 30,000/-. However, learned Counsel for the Appellant rightly contended that the said notice and its reply have not been proved at all. Even if the Advocate, who had sent notice Ex.D-5 on behalf of the Defendant, had died, even then there were other modes of proof to prove the said notice, but admittedly, the said notice has not been proved by leading any admissible evidence. Moreover, there is no explanation why even reply Ex.D-6 has not been proved by examining the Advocate, who allegedly sent the same on behalf of the Plaintiff. Admittedly, there is no admissible evidence to prove the said reply Ex.D-6 as well. Thus, neither notice Ex.D-5 nor reply Ex.D-6 has been proved, and therefore, relying on the said documents, the Plaintiff could not be nonsuited. It may also be added that even postal receipt, to depict that notice Ex.D-5 had actually been sent to the Plaintiff, has not been produced oh record. So, the aforesaid approach of the lower appellate court in nonsuiting the Plaintiff, cannot be accepted being patently perverse and illegal.

12. Finding of the lower appellate court that amount of Rs. 30,000/- was not paid by the Plaintiff to the Defendant also, therefore, cannot be sustained because one of the main grounds for recording the said finding was notice Ex.D-5 and reply Ex.D-6, which have, however, not been proved. On the contrary, the Plaintiff has led evidence to prove the said receipt Ex.P-4 and also receipt Ex.P-1 regarding further payment of Rs. 12,000/-, which mentions the balance sale consideration after adjusting the amount of Rs. 30,000/- paid vide receipt Ex.P-4. Moreover, Respondent No. 8 (son of original Defendant), while appearing in the witness-box, initially admitted the signatures of the Defendant on receipt Ex.P-4. It is correct that the said

witness again stated that the said signatures did not appear to be of his father i.e. the Defendant. Initial admission by Respondent No. 8 regarding signatures of his father/Defendant on the receipt corroborates the Plaintiff''s version. Even the subsequent denial is not categorical and is rather very vague and ambiguous. Even later on, Respondent No. 8 simply stated that the said signatures did not appear to be of his father. However, he did not categorically state that the said signatures were not of his father. Moreover, in further cross-examination, Respondent No. 8 even denied the signatures of his father/Defendant on the written statement. However, he again changed his statement in this regard and stated that the written statement had been signed by the Defendant. Thus, testimony of such a person cannot be relied on to hold that receipt Ex.P-4 had not been signed by the Defendant. Opinion of handwriting expert in this regard is very weak type of evidence. Firstly, science of comparison of handwriting or signatures is not a perfect science. Secondly, it is not uncommon that handwriting expert engaged by a party ordinarily gives opinion in favour of said party. Consequently, opinion of handwriting expert is not sufficient to rebut the Plaintiff''s evidence, particularly in view of the wavering statement by Respondent No. 8 himself.

13. Further extension of time for execution of the agreement vide endorsement dated 01.06.1985 on the back of the impugned agreement further corroborates the Plaintiff''s case.

14. The instant suit cannot be said to be barred by Order 2 Rule 2 CPC because admittedly, conveyance deed of the suit land in favour of the Defendant was issued on 7/8.06.1993. Sale deed in favour of the Plaintiff was to be executed within three months thereof i.e. up to 07.09.1993. However, Plaintiff filed injunction suit against the Defendant on 28.06.1993 and till then, Plaintiff did not have cause of action to seek the relief of specific performance of the impugned agreement. Consequently, he had to file suit for injunction only. However, when the date stipulated for execution of the sale deed expired on 07.09.1993, the Plaintiff immediately withdrew the injunction suit on 10.09.1993 and filed the instant suit for specific performance of the impugned agreement on 13.09.1993. Consequently, the instant suit cannot be said to be barred by Order 2 Rule 2 CPC because relief of specific performance of the agreement was not available to the Plaintiff when injunction suit was filed by him. judgment in the case of Veena Goyal (supra), relied on by counsel for the Respondents, is not applicable because in that case, prospective vendee filed suit for permanent injunction after right had accrued to seek relief of specific performance. In the instant case, however, when injunction suit was filed by the Plaintiff, right to seek specific performance of the impugned agreement had not accrued. It is thus apparent that the suit is not barred by Order 2 Rule 2 CPC and therefore, approach of the lower appellate court in non-suiting the Plaintiff on this ground as well, is also perverse and unsustainable.

15. For the reasons recorded herein above, I find that following substantial question of law arises for determination in the instant second appeal:

Whether non-suiting of the Plaintiff by the lower appellate court by reversing the finding of the trial court, on various grounds, is perverse and illegal and therefore, not sustainable in law ?

16. In view of the discussion, already made in this judgment, the aforesaid substantial question of law is answered in favour of the Appellants. As a necessary upshot thereof, the instant second appeal is allowed. judgment and decree of the lower appellate court are set aside and judgment and decree of the trial court decreeing the suit of the Plaintiff are restored. Time of one month granted by the trial court for tendering of balance sale consideration by the Plaintiff to the Defendant shall commence from today.