

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NOS.4597-4598 OF 2014
(Arising out of SLP (C) Nos. 31491-31492 of 2012)

SHAMSHER SINGH & ORS

.....APPELLANTS

Versus

RAJINDER KUMAR & ORS

...RESPONDENTS

J U D G M E N T

V.Gopala Gowda, J.

Leave granted.

2. These appeals have been preferred by the appellants (the original defendants) against the common Judgment and final Order dated 17th September, 2012 passed by the High Court of Punjab and Haryana at Chandigarh in RSA Nos. 2871 & 1543 of 2012. By the said impugned judgment, two separate RSAs filed by the appellants against the

common judgment of First Appellate Court were dismissed by the High Court.

3. The factual matrix of the case is as follows:

The respondents (original plaintiffs) filed a suit for specific performance against the appellants herein alleging that an agreement to sell dated 3rd June, 2002 was entered between them with respect to the suit land. It was alleged that out of ₹3,00,000/- (total agreed consideration), ₹2,00,000/- had already been paid by the plaintiffs on 3rd June, 2002 and as per agreement, the balance amount were to be paid at the time of execution of sale deed, i.e. on 20th December, 2002. It was further alleged that later, the defendant-appellants became dishonest and wanted to sell the land to some other persons. Therefore, they had to file the suit.

4. The defendants filed their written statement contending in that they had never entered into any agreement to sell the suit land to the plaintiffs. It was also contended that the alleged agreement to

sell was a product of forgery and fabrication and so, it was null and void. The Trial Court having considered the contention of both the parties, partly decreed the suit of the plaintiffs on 13th May, 2009 and directed the defendants to pay ₹3,00,000/- to the plaintiffs along with simple interest @9% per annum from the date of execution of the agreement to sell till the date of payment.

5. Being aggrieved by the Judgment and Decree, the defendant-appellants filed Civil Appeal No. 74 of 2009 on the ground that the alleged agreement to sell was not valid and legal and the appellants never intended to sell the suit land. They further contended that there was no signature of any of the attesting witness on the receipt of the earnest money and the land was already under mortgage with the banks and so there was no question of any agreement to sell and urged other grounds as well.

6. The plaintiffs also filed a Special Civil Appeal No. 102 of 2009 against the judgment and decree dated 13th May, 2009 with prayer for direction of

execution of sale deed and transfer of possession of the suit land. Both the appeals were disposed of by the First Appellate Court vide common judgment and order dated 17th February, 2012. The Appellate Court while dismissing the appeal preferred by the defendant-appellants, allowed the appeal preferred by the plaintiff-respondents and directed the defendant-appellants to get the sale deed executed and registered in favour of the plaintiff-respondents.

7. Second appeals preferred by the defendant-appellants against the common judgment passed by the First Appellate Court were dismissed by impugned common judgment dated 17th September, 2012. Hence, these appeals.

8. The main issues in this case are (i) whether a decree of specific performance can be passed with respect to the purported agreement of sale between the plaintiff and the defendants and (ii) whether the defendant nos.1 to 3 could have entered into this purported agreement of sale with respect to

the fact that their land has been contended to be mortgaged with the defendant nos.4 and 5 as security for loans that they have taken. The first appellate court as well as the High Court have decreed the specific performance, ordering the defendants to enforce the agreement of sale, Ex. P-2. The Trial Court, on the other hand, did not grant decree of specific performance, but instead passed a decree ordering the defendants to return ₹3,00,000/- with interest to the plaintiffs on the ground that a balanced approach should be taken as the plaintiffs should be protected and the defendant nos. 1 to 3 should not be disproportionately penalized and that the administration of justice requires that the defendant nos. 1 to 3 should be directed to return the amount of ₹3,00,000/- to the plaintiffs along with simple interest @ 9% per annum from the date of execution of the agreement of sale till the date of payment. The Trial Court further went on to observe that if the defendants directed to execute the agreement of sale, then comparatively

greater hardship would be caused to them. The first appellate court, on the ground that the defendants have not taken a plea of hardship has reversed the judgment of the Trial Court, decreeing specific performance of the agreement of sale, directing the defendants to execute the sale deed and register it in favour of the plaintiffs on the basis of the agreement to sell, Ex. P-2. The plaintiffs were directed to deposit the balance sale consideration minus earnest amount already paid, within one month of the order. The High Court has upheld the order and judgment of the first appellate court.

9. After going through the findings and reasons recorded by the appellate courts and the impugned judgment and with reference to the questions of law raised in these appeals and grounds urged in support of the same, the following points would arise for our consideration:

- (1) Whether the concurrent finding of the second appellate court in reversing the finding of the Trial Court in its judgment

to exercise discretionary power not to grant decree of specific performance as provided under Section 20(2) (a) and (b) of the Specific Relief Act, 1963, after referring to Exs.P-2, P-8 and other relevant facts, is legal and valid?

(2) Whether the appellate courts were right in ignoring the relevant legal aspect of the case viz. whether the vendors, who had mortgaged the schedule property to the banks, had the right to enter into agreement and whether such agreement is valid and in that case, do the plaintiffs then have the right of enforcing such agreement without asking the vendor to redeem the mortgage in relation to the suit schedule property and obtaining a valid discharge?

(3) What order/decrees are the appellants entitled to?

Answer to point no.1

10. The High Court has erred in law in dismissing the Second Appeal filed by the defendants questioning the correctness of the judgment and decree of the First Appellate Court in reversing the judgment of the Trial Court wherein it has

decreed a sum of ₹3,00,000/- with 9% interest to be paid to the plaintiffs in lieu of granting the relief of specific performance in relation to the property in question in favour of the plaintiff by exercising its sound discretionary power under Section 20(2) (a) and (b) of the Act. This judgment and decree of the First Appellate Court was challenged by the defendants urging various legal grounds. The High Court should have examined the case of the defendant Nos. 1 to 3 keeping in view the discretionary power conferred upon the courts below while examining the respective claim and counter claims of the parties particularly in the light of the covenants in the agreement of sale, Ex.P-2 and also with reference to exhibit P-8, the compromise arrived at between the parties at the Police Station. The appellate courts have erred in holding that the agreement of sale was proved by the plaintiff though the defendant Nos. 1 to 3 in their statement denied the execution and pleaded that it is a mortgage and not an agreement of sale. The said finding of fact recorded by the

Trial Court was annulled by the First Appellate Court in exercise of its appellate power without examining the pleadings and substantiated evidence on record particularly the recitals of the agreement of sale and the compromise deed between the parties. Therefore, the said finding of fact recorded by the First Appellate Court in reversing the finding of the Trial Court recorded on the contentious issue is not only erroneous but also suffers from error in law. Therefore, the substantial question of law that would arise in the Second Appeal before the High Court namely, is whether the finding of the Trial Court in exercise of its discretionary power under Section 20(2) (a) and (b) of the Act must be reversed, keeping in view the Exhibit P-8, the compromise deed and awarding monetary decree of ₹3,00,000/- though the advance amount paid is ₹2,00,000/- is contrary to the legal evidence and the statutory provisions of Section 20(2) (a) and (b) and also Section 21(2) of the Specific Relief Act. We have considered this question of law while answering the point No.

1 framed in these appeals in favour of defendant Nos. 1 to 3.

11. An extremely important aspect of this case is the compromise, Ex. P-8 which had been arrived at between the parties to the suit, and has also been brought on record as evidence. The Trial Court relied on the same to show that the defendants have agreed to the agreement of sale and at the compromise arrived at by the parties at the Police Station, the condition agreed upon was that the defendant Nos. 1 to 3 would return the earnest amount. The said compromise also bears the thumb impressions of the defendants. The Trial Court held that the compromise is an important document that contradicts the version put forth by the defendants, as it has been stated in the compromise that the defendants had expressed their willingness to execute the sale deed upto 25.07.2002. The defendants cannot then do a u-turn and deny the existence of the agreement of sale. Thus, on this ground too, we have to hold that since the defendants had agreed to return the

amount as per the compromise, the judgment of the Trial Court decreeing return of an amount of ₹3,00,000/- with 9% simple interest from the date of execution of the agreement of sale till the date of payment, must be upheld and that of the appellate courts decreeing specific performance be rejected.

Therefore, the first appellate court has grossly erred in law by decreeing the suit for specific performance considering the well-reasoned order of the Trial Court. The High Court has also erroneously upheld the same. As per section 20(2) (b) of the Specific Relief Act, 1963 (in short "the Act"), the jurisdiction to grant decree of specific performance is discretionary and section 20(2) lists the cases in which the court may properly exercise discretion **not to grant decree of specific performance**. Section 20(2) (a) and (b) reads thus:

"(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff."

12. On perusal of the original records in this case, it has come to light that both the purported agreement of sale, Ex. P-2 as well as the compromise, Ex.P-8 have major discrepancies in them. Certain clauses in both the documents seem to unduly favour the plaintiffs. In Ex.P-2, the operative part of the agreement of sale which is originally in Hindi, the English translation of the same reads as under:

"...The last date for execution of sale deed is fixed as 20th December, 2002. By that date if the seller fails to get the sale deed executed in favour of the

buyer then the seller will pay the amount double of the advance money taken, and if by the due date the buyer does not get the sale deed executed then the advance money paid by him will be forfeited and instead of claiming compensation the buyer shall have the right to get the sale deed executed through court in his name or in anyone else's name without paying the balance amount and the seller will have no right of any objection. The buyer shall bear all costs of registration....."

This does not seem equitable and it seems unlikely that a seller would agree to such a clause. This seems to be a clear case of terms of a contract resulting in an unfair advantage for the plaintiffs over the defendants. Since the defendants are disputing the agreement of sale and claiming that the document on which they put their thumb impressions was in fact a mortgage deed in lieu of the loan of ₹85,000/- that they had asked from the plaintiffs for their household expenses, it puts the plaintiffs in a position of 'unfair advantage' over the defendants, thus bringing the case for not granting decree of specific

performance within Section 20(2)(a) of the Act. Further, the Trial Court has clearly explained the reasons for not granting a decree of specific performance and instead granted a decree for recovery of the money from the defendants and this falls squarely within the conditions set out in Section 20(2) (a) and (b) of the Act. This position of the law has been carefully enunciated by this Court in the case of **A.C. Arulappan v. Ahalya Naik**¹, wherein it was held that:-

"If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff....If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff."

It is clear that it will be inequitable to grant a decree of specific performance in this case where it is clear that the plaintiffs have an unfair advantage over the defendants and the Trial Court

¹ (2001) 6 SCC 600

has rightly exercised its discretion not to grant specific performance.

Further we find it necessary to refer to para 3 of the pleadings wherein it is stated as under:-

"3. That the defendants no.1 to 3 entered into an agreement to sell the suit land as detailed and described in the head note of the plaint with plaintiffs for a sum of ₹3,00,000/- (Rs. Three Lacs) and they executed agreement to sell dated 3.6.2002 and received earnest money of ₹ 2,00,000/- (Rs. Two Lacs) and executed a valid receipt on the foot of the agreement to sell dated 3.6.2002 in the presence of witnesses."

This receipt has been executed on the same day, i.e. on 3-6-2002 as the agreement of sale, and the terms of the receipt are in direct contradiction with the terms of the agreement, as the receipt says that ₹2,00,000/- has been received by the defendant Nos.1 to 3 whereas the agreement of sale speaks only of ₹1,00,000/- that has changed hands and the plaintiff will pay the defendant Nos.1 to 3 the remaining ₹2,00,000/- at the time of

registration. Further, in the written statement, the defendants have pleaded that they only took a loan of ₹85,000 and mortgaged their land as security and were tricked into putting their thumb impressions on the purported agreement of sale.

It is clear from all this that the discrepancies make it difficult for us to accept that the defendant Nos.1 to 3 have intended for this to be an agreement of sale and it is extremely likely that the plaintiff has tried to take unfair advantage of them. It is prudent on our part, therefore, to uphold the Trial Court's judgment not to decree specific performance of the purported agreement of sale. We will modify the Trial Court's decree insofar as the amount is concerned and order the defendant Nos.1 to 3 to return ₹2,00,000/- with interest and not an amount of ₹3,00,000/- as directed by the Trial Court.

Answer to point no.2

13. Another important aspect of this case that has slipped the eyes of the courts below is the question of the mortgage of the suit property, as pleaded by the defendant Nos. 4 and 5. They placed the confirmation of mutation in favour of the Bank, Ex. D-1 and the Mortgage deed, Ex. D-2 as evidence. The plaintiffs have referred to the same in para 2 of their pleadings and the defendants, in reply have admitted this in para 2 of their written statement wherein they have stated that it is a matter of record that they have mortgaged their portion of the land in favour of defendant Nos. 4 and 5. More importantly, the plaintiffs have admitted the same in para 2 of their plaint, therefore it was in their knowledge that the land in question was already mortgaged with defendant Nos. 4 and 5. There has been no finding recorded on the same by either the appellate courts or the Trial Court and as per Section 13(c) of the Act, when the vendor (the defendants herein) professes to sell unencumbered property but the same is mortgaged, then the vendor has only a right to

redeem it and the purchaser may compel him to redeem the mortgage and to obtain a valid discharge. This aspect of the matter, too, has not been dealt with by the Trial Court or the appellate courts.

Answer to point no.3

14. Thus, the judgment and order of the Trial Court must be modified and the judgments and orders of the appellate courts must be reversed. There are many discrepancies on the face of this case and the Trial Court would have done well to examine all the evidence with care and diligence, which has not been done in the present case. In spite of the same, it would be prudent to uphold the judgment and decree of the Trial Court by modifying it instead of the judgments and orders of the appellate courts which have decreed the original suit for specific performance of the agreement to sell the suit schedule property.

15. For the foregoing reasons, these appeals are allowed, the impugned judgment and order passed by the High Court is set aside and the judgment and decree passed by the Trial Court in Civil Suit no.755 of 2003 is modified in the aforesaid terms. We thereby, order and direct the defendant Nos.1 to 3 to repay the plaintiff an amount of ₹2,00,000/- with interest @6% per annum within six weeks from the date of receipt of the certified copy of this judgment.

.....J.
[SUDHANSU JYOTI MUKHOPADHAYA]

JUDGMENT

.....J.
[V. GOPALA GOWDA]

New Delhi,
April 16, 2014