

Jarnail Singh Vs. Amrik Singh

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Court : Punjab and Haryana

Decided On : Apr-29-2003

Reported in : (2003)135PLR425

Judge : M.M. Kumar, J.

Acts : [Evidence Act,1872](#) - Sections 91 and 92

Appeal No. : Regular Second Appeal No. 1639 of 2003

Appellant : Jarnail Singh

Respondent : Amrik Singh

Advocate for Pet/Ap. : G.S. Punia, Adv.

Disposition : Appeal dismissed

Judgement :

M.M. Kumar, J.

1. This is plaintiff's appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for brevity, the Code'), challenging concurrent finding of facts recorded by both the Courts below. It has been concurrently held that the agreement to sell the property to the plaintiff-appellant was executed by the defendant-respondent on 5.5.1998 and a sum of Rs. 1,50,000/- was paid to him as earnest money. It has

further been held that the aforementioned amount of Rs. 1,50,000/- paid by the plaintiff-appellant as earnest money was returned to him by the defendant-respondent as is proved by the affidavit Ex.D4 executed by the plaintiff-appellant. Both the Courts below have also found it as a fact that the plaintiff-appellant also received interest on the earnest money of Rs. 1,50,000/- paid by the plaintiff-appellant in pursuance of the agreement to sell. Three receipts have also been proved on record Exs.D1, D2 and D-3 showing payment of interest from 7.10.1998 to 7.11.1998; 7.11.1998 to 7.12.1998 and also in respect of the period before 7.10.1998. A sum of Rs. 18,750/- and Rs. 3750/- as interest have been duly received by the plaintiff-appellant. The conclusion reached by the Courts below is that it was a money transaction and the agreement to sell dated 5.5.1998 was only to ensure repayment of loan.

2. The views of the learned Distt. Judge read as under:-

'There is no dispute between the parties with regard to execution of the agreement to sell Ex.P1, as the respondent has admitted the execution of the same. The main question to be determined -in this case is as to whether the appellant had sworn the affidavit Ex.D4 and vide the same whether agreement to sell Ex.P1 was cancelled or not. If it is proved that the appellant had received Rs. 1,50,000/- from respondent and had sworn the affidavit Ex.D4, then the suit of the appellant under all circumstances available on the record, which include the receipts Ex.D1 dated 7.11.1998 and Ex.D3 dated 7.12.1998, it appears that the amount received by way of earnest money vide agreement to sell Ex.D1 was in fact a loan taken by the respondent from the appellant. The respondent had replied notice of the appellant dated 18.6.1999 vide reply Ex.D5 and in the said reply it was specifically mentioned that the amount was received by way of loan and the interest on it was being received by the appellant from the respondent. The affidavit Ex.D4 of the appellant was attested by Shri V.K. Vashishat, Advocate, Notary Public PW2 who categorically stated that the said affidavit was attested by him on the identification of Malkhi Ram Lamberdar and the said affidavit was entered in the register of the Notary Public at Serial No. 3718. This witness had also proved reply to the notice Ex.D5. DW2 was subjected to cross examination by the appellant, but nothing could be brought on record to show that this affidavit Ex.D4 was not sworn by the

appellant or that it was not attested by DW2. Once the affidavit Ex.D-4 is proved and established, then, it also stands established that the agreement to sell Ex.P1 was cancelled vide this affidavit. It is incorporated in this affidavit by the appellant that the original agreement to sell which was Ex.P1 was not traceable at that time and that when the same was traced out, shall be returned to the respondent. Thus, it appears that for all intents and purposes the agreement to sell Ex.P1 stood cancelled on 4.3.1999 when the appellant had received back the principal amount of Rs. 1,50,000/- from the respondent and prior to that he had also received the amount of interest vide receipts Ex.D1, Ex.D2 and Ex.D3.'

3. Mr. G.S. Punia, learned counsel for the plaintiff-appellant has argued that it is not proper to accept the findings recorded by both the Courts below because no proof was furnished to prove the affidavit Ex.D4. According to the learned counsel, the plaintiff-appellant has produced the Finger Print Expert Ms. Jassy Ahluwalia, as PW-4, who has opined in her report Ex.PW-4/1 that the standard signatures of the plaintiff-appellant on comparison on the affidavit Ex.D4 were found to be of different person. Learned counsel further pointed out that no inference could be drawn by leading parole evidence under Section 91 of the Indian Evidence Act, 1872 (for brevity, the Act) to contradict the contents of the documents and then to conclude that the agreement to sell dated 5.5.1988 was, in fact, a money transaction. In support of his submission, the learned counsel has placed reliance on a judgment of the Supreme Court in the case of *Fabril Gasosa v. Labour Commissioner and Ors.*, A.I.R. 1954 Supreme Court 954. The learned counsel has further argued that the Advocate, who represented the defendant-respondent before the Court has also attested the affidavit Ex.D4 in his capacity as a Notary Public.

4. After hearing the learned counsel and perusing the judgment of the Courts below, I do not feel persuaded to take a view different than the, one taken by both the Courts below, because there are categorical findings of recorded by the Courts below showing that although the agreement to sell was executed between the parties on 5.5.1998, but it was cancelled as the aforesaid amount of earnest money was returned by the defendant-respondent and an affidavit dated 04.03.1999 in token of receipt of earnest money of Rs. 1,50,000/- was sworn in by

the plaintiff-appellant. Moreover, receipts Ex.D1 to D3 have also been proved showing the amount of interest paid on a sum of Rs. 1,50,000/-. The argument that the affidavit Ex.D4 has not been signed by the plaintiff-appellant as raised by the learned counsel, cannot be accepted in view of the fact that the standard signatures lifted by the expert were from the Vakalatnama executed on 3.2.2000 and not from the plaint or the Vakalatnama executed on 1.7.1999 or from the agreement to sell itself which was admitted by both the parties. Moreover, the defendant-respondent has examined his own expert Sh. S.K. Vashishat, as DW2, who had proved the execution of the affidavit Ex.D4. The aforementioned witness deposed that the affidavit was attested by him on the identification of Milkhi Ram, Lamberdar and contents of the affidavit were read over to the plaintiff-appellant before he signed it. The expert evidence produced by the plaintiff-appellant has been rejected by the Courts below and the view of the learned Civil Judge in this regard reads as under:-

'For the purposes of proving that the sum of Rs. 1,50,000/- was given to the plaintiff, defendant has produced affidavit dated 4.3.99 executed by Jarnail Singh Ex.D4 in this case. In order to show that the signatures on the said affidavit are not that of Jarnail Singh plaintiff, the plaintiff has examined Jassy Ahluwalia handwriting and finger print expert as PW4 in this case who has submitted his report Ex.PW4/I. Perusal of the said report reveals that for the purposes of comparison, the said expert took the disputed signatures from the affidavit dated 4.3.99 and took the standard signatures from replication dated 20.8.1999 from plaint dated 1.7.99 and from wakalatnama dated 3.2.2k. The very interesting feature of this case is that the expert did not take the standard signatures from the wakalatnama initially filed by the plaintiff in favour of Surjit Singh, Advocate on 1.7.99 whereas the Ld. Handwriting and finger print expert opted to take the standard signatures from the wakalatnama dated 3.2.2k in favour of Sh. Karam Singh Dhaliwal, Advocate only. The standard signature taken by the expert for the purpose of comparison than can very well be disguised especially in the light of the fact that the plaintiff Jarnail Singh was given reply to the notice dated 18.6.99 incorporating the fact of execution of affidavit dated 4.9.99 by him. Even otherwise when the defendant had admitted the execution of the agreement to sell dated 5.5.98 then the admitted signatures could well be taken by the expert as standard

signatures for the purposes of comparison but the expert did not choose to do so neither she was assisted to do so by the plaintiff who was at least in the knowledge of his admitted signatures on the agreement. Hence for the foregoing reasons when the expert did not choose to take the admitted signatures as standard signatures for the purposes of comparison and also she did not choose to take the signatures of the plaintiff on the wakalatnama in favour of Sh. Surjit Singh dated 1.7.1999 i.e. the first wakalatnama executed in favour of Surjit Singh, Advocate by plaintiff, then the report of expert is not believable. Moreover the science of handwriting is not a perfect science and there can occur minor variations in the signatures of a person on different occasion or even at the same time such variations can be caused whereas in this case, since the standard signatures by the expert have been taken from the documents of the plaintiff alone, therefore, the report of the expert is rejected.'

5. A perusal of the above findings recorded by the learned Civil Judge as affirmed by the learned District Judge, do not leave any doubt that the evidence of expert produced by the plaintiff-appellant was unreliable and, therefore, argument of the learned counsel that the findings are not well based, cannot be accepted.

6. The other argument raised by the learned counsel that no parole evidence under Section 91 of the Act could be produced, has also not impressed me because on the perusal of Ex.D4 the affidavit and Exs. D1 to D3 the receipts, the Courts below have reached the conclusion that it was merely a loan transaction between the parties and they did not intend to act upon the agreement to sell dated 5.5.1998. The inference of loan transaction has been raised on account of the fact that the interest in respect of the earnest money of Rs. 1,50,000/- has been paid. The judgment of the Supreme Court in the case of M/s Fabril Gasosa (supra) relied upon by the learned counsel for the plaintiff-appellant would not be attracted to the facts of the present case. It is no doubt well settled principle of law as enshrined in Sections 91 and 92 of the Act that when the contents of a contract are reduced to writing, then no extrinsic evidence is generally admissible to vary, to add or contradict such a written agreement. The statement of this principle was made by Justice P.O. Lawrence in the case of *Jacov v. Batavia and General Plantation Trust*, (1924-1) Ch. 287, in the following words:-

'It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that parol evidence will not be admitted to prove that some particular term which has been verbally agreed upon had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties'.

Sections 91 and 92 of the Act, which also incorporates aforementioned principle read as under:-

91 - Evidence of terms of contracts, grant and other dispositions of property reduced to form of document:- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Exception 1.- When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.- Wills admitted to probate in India may be proved by the probate.

Explanation 1.- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.- Where there are more originals than one, one-original only need be proved.

Explanation 3.- The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

ILLUSTRATIONS.

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms.

The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

92. Exclusion of evidence of oral agreement.-

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or of their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto: such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).- The existence of any distinct subsequent oral agreement to rescind or modify any, such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, express terms of the contract.

Proviso (6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts.

7. A perusal of Section 91 of the Act would show that term of a contract which is required by law to be reduced to the form of a document or which have been reduced to , the form of a document, no evidence except the document itself could be adduced to prove the terms of such a contract subject to rule of a secondary evidence. Section 92, however, excludes any oral evidence for the purposes of contradicting, varying, adding to or subtracting from the written terms of such a contract. In other words, oral evidence is admissible if it does not fall within the mischief of prohibition imposed by Section 92 of the Act. The aforementioned provisions came up for consideration of the Supreme Court in the case of Bai Hira Devi v. Official Assignee of Bombay, A.I.R. 1958 S.C. 448. Discussing the scope of Sections 91 and 92, their Lordships observed as under:-

'The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original, Section 91 is based on what is sometimes described as the 'best evidence rule.' The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. In a sense, the rule enunciated by Section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. (5) Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx the production of the relevant documents themselves under Section 91; in other words, it is after the document has been produced to prove its terms under Section 91 that the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that Sections 91 and 92 in effect supplement each other, Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. Since Section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under Section 91, it may be said that it makes the proof of the document conclusive of its contents. Like Section 91 Section 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92 on the other hand, applies only between the parties,

to the instrument or their representatives in interest. There is no doubt that Section 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by Section 92 about the exclusion of oral agreement can be invoked. This position is Section 99, itself. Section 99 provides that 'persons who are not parties to a document or their representatives in interest, may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document'. Though it is only variation which is specifically mentioned in Section 99, there can be no doubt that the third party's right to lead evidence which is recognized by Section 99 would include a right to lead evidence not to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of Section 92 in regard to the appellant's right to lead oral evidence, it would be necessary to examine whether Section 92 applies at all to the present proceedings between the official assignee who is the respondent and the donees from the insolvent who are the appellants before us.'

8. When the principles enunciated by the Supreme Court are applied to the facts of the instant case, it becomes evident that the agreement Ex.P-1 dated 5.5.1998 stands admitted between the parties. The affidavit Ex.D-4 filed by the defendant/respondent executed by the plaintiff-appellant has also been adequately proved and there is no oral evidence produced to prove the contents of that document. The opinion of the expert Ms. Jassy Ahluwalia, has been discarded by the Courts below for good and sufficient reasons. No oral evidence to vary the term and contents of the agreement Ex.P-1 have been permitted by the Courts below, which may become subject matter of controversy involving the principles laid down in Sections 91 and 92 as interpreted by the Supreme Court in Bai Hira Devi's Case (supra). It is always open to the parties to prove the variation or addition in terms of a written contract by any other written document. The affidavit Ex.D-4 produced and proved by the defendant-respondent cannot be considered to be an oral evidence. Therefore, I have no hesitation in rejecting the arguments

raised by the learned counsel for the plaintiff-appellant.

9. The last argument that the Advocate, who acted as a Notary Public by verifying the affidavit executed by the plaintiff-appellant Ex.D4 has also represented the defendant-respondent, does not require any detailed consideration because there is no principle prohibiting such an Advocate from appearing in the proceedings for that party. On the repeated queries by the Court, the learned counsel has not been able to point out any precedent that a Notary Public, who attested the document, is not competent to appear for that very party. It appears to me that such a Notary Public while attesting a document, does not in any manner act to the prejudice of the other party while representing one of the them in the proceedings before the Court. Moreover, such an argument of unethical practices by an Advocate could be raised only before the proper forum like the Bar Council, according to the view taken by the Supreme Court in the case of Supreme Court Bar Association v. Union of India, 1998(4) S.C.C. 409. Therefore, I do not find any substance in the submission of the learned counsel. The appeal is without any merit and is, thus, liable to be dismissed.

10. For the reasons recorded above, this appeal fails and is dismissed