Subhash Chander v. M/S. Active Promoters Pvt. Ltd. , 2014 PLRonline 0107

Punjab and Haryana High Court

Paramjeet Singh, J.

Subhash Chander v. M/S. Active Promoters Pvt. Ltd.

RSA No. 256 of 2013 (O&M)

03.03.2014

CPC O. 41 R. 27 – When specific allegations have been made by the plaintiff in respect of document being fraudulent, then the burden shifts upon defendant No.1/propounder of the document to prove the same to be genuine, because it is a settled principle of law that the person, who claims some right on the basis of document, is required to positively prove the same.

Punjab Stamp Rules, 1934, as applicable to Haryana, Rule 28(xiii)

Punjab Stamp Rules, 1934, Rule 28

Mr. Arun Jain, Sr. Advocate, with Mr. Amit K. Jain, Advocate, for the appellants. Mr. Ashok Aggarwal, Sr. Advocate, with Mr. Mukul Aggarwal, Advocate, for the respondent.

Judgment

PARAMJEET SINGH, J.

CM No. 2803-C of 2014

This application has been moved by the respondent under Order 41 Rule 27 of the Code of Civil Procedure to place on record sale deed dated 08.12.2014 (Annexure A-1) and report dated 20.02.2014 (Annexure A-2) regarding handing over possession of the suit land in execution of the impugned judgments and decrees passed by the Courts below being subsequent events.

Having heard learned counsel for the parties and for the reasons stated in the application, the same is allowed and Annexures A-1 and A-2 being subsequent events, are taken on record.

This regular second appeal by LRs of defendant – Sewa Ram is directed against the judgment and decree dated 19.03.2012 passed by learned Civil Judge (Junior Division), Gurgaon, whereby the suit for specific performance of the contract and for permanent injunction filed by respondent/plaintiff was decreed as well as against the judgment and decree dated 06.12.2012 passed by learned Additional District Judge, Gurgaon, whereby

the appeal preferred by appellants has been dismissed.

For convenience sake, reference to parties is being made as per their status in the civil suit.

The detailed facts of the case are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, the facts relevant for disposal of this second appeal are to the effect that plaintiff filed a suit for specific performance of contract on the basis that defendant had entered into an agreement dated 06.07.2005 to sell the suit land measuring 82 kanals 12 marlas situated in village Naurangpur, Tehsil and District Gurgaon, fully detailed and described in para No. 2 of the plaint, at the rate of Rs. 20.00 lacs per acre, in favour of the plaintiff on whose behalf deal was struck by one Surender Sharma. It is further averred in the plaint that total sale consideration of the land in question was Rs. 2,06,50,000/- out of which Rs. 50.00 lacs were paid by plaintiff to the defendant as earnest money vide cheque No. 82905 dated 06.07.2005 drawn on Bank of India, New Delhi, which was allegedly encashed by defendant. Target date for execution of sale deed was fixed as 06.10.2005 It was also mentioned that land in question is free from any type of encumbrance and is not subject-matter of any agreement or any kind of litigation. It is further averred by the plaintiff that due to increase in prices of real estate in the area, defendant turned dishonest and wanted to resile from the transaction. On the target date, representative of plaintiff i.e Surender Sharma remained present in the Tehsil office along with remaining sale consideration of Rs. 1,56,50,000/- and stamp papers worth Rs. 12,39,000/-, which were purchased on 01.08.2005 but the defendant did not turn up on the date fixed. Hence, suit was filed.

It needs to be mentioned here that initially notice was issued to defendant but the same was received back unserved due to incomplete address, which is clear from the zimni order passed by Civil Judge (Junior Division), Gurgaon, on 19.10.2005 Thereafter notices were issued on various dates. Ultimately, after many dates notice issued to defendant was received back with the report of refusal followed by affixation. The Court deemed it sufficient service and proceeded ex parte against the defendant. The case was fixed for ex parte evidence, which is clear from the zimni order dated 19.05.2010 Thereafter an application was moved on 09.06.2010 for setting aside ex parte order, which was allowed and ex parte proceedings were set aside vide order dated 07.01.2011 and case was fixed for filing the written statement.

Thereafter defendant filed written statement and took various preliminary objections regarding cause of action, maintainability, locus standi to file the present suit, suit being false and frivolous. It was pleaded that plaintiff was estopped from filing the present suit by its own act and conduct. On merits, defendant denied the case of the plaintiff in the plaint and submitted parawise reply to the plaint. It was denied that defendant ever entered into an agreement with the plaintiff and alleged that if there is any such agreement then same is vague, fictitious, fabricated and has been procured without knowledge, notice and consent of the defendant. It was specifically mentioned that defendant was a 90 years old man, he had low eye vision and was also hard of hearing. Other averments in the plaint were denied.

Plaintiff filed replication to the written statement denying the averments in the written statement and reiterating the averments in the plaint.

Court of first instance, on the basis of pleadings of the parties, framed following issues:-

"1. Whether the defendant entered into agreement to sell dated 6.7.2005 in respect of the suit property as alleged? OPP

2. Whether the plaintiff has been ready and willing to perform his part of the contract? OPP

3. If issues No. 1 and 2 are proved, whether the plaintiff is entitled to specific performance of the agreement dated 6.7.2005, possession as prayed for? OPP

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD

6. Whether the plaintiff is estopped from filing the present suit by its own act, conduct? OPD

7. Whether the plaintiff has not come to the court with clean hands? OPD

8. Relief."

The Court of first instance, after affording opportunity to lead evidence to the respective parties, recorded issuewise findings. Issue Nos. 1 to 3 were decided together in favour of the plaintiff and it was held that defendant had entered into an agreement to sell dated 06.07.2005 (Ex.P5) regarding suit property. Issue Nos. 4 to 7 were taken up together and decided against the defendant and in favour of the plaintiff. Accordingly, suit of the plaintiff was decreed for specific performance. Against the judgment and decree of the Court of first instance, appeal preferred by appellants has been dismissed and the judgment and decree of the Court of first instance has been affirmed by lower appellate Court. Hence, this second appeal.

I have heard learned counsel for the parties and perused the record.

Learned senior counsel for the appellants referred to substantial questions of law formulated in the grounds of appeal, which read as under: –

"1. Whether the plaintiff/respondent having failed to led affirmative evidence to prove the due execution and validity of the agreement to sell the suit filed for specific performance by the plaintiff/respondent could be decreed?

2. Whether in the facts and circumstances of the instant case the plaintiff/respondent having withheld the best evidence and the cross examination of the witnesses examined by it having exposed the hollowness of the case of the plaintiff, the approach of the learned Courts below in decreeing the suit filed by the plaintiff is perverse?

3. Whether in view of the hardship and failure of justice to the appellants relief of specific performance could be granted to the plaintiff/respondent?

Learned senior counsel for the appellants vehemently contended that no affirmative evidence has been led to prove the due execution of the agreement. It was argued that case of the defendant is that he never entered into the agreement, it is a false and fabricated document without notice to the defendant. Defendant was 90 years old man. It was argued that stamp paper on which the agreement is written, does not bear signatures of the defendant. It is a pre-printed/typed document wherein blank spaces have been filled up in different handwritings and inks. First page of agreement Ex.P5 is in different handwriting and similarly second page of it is also in different handwriting and ink. Even the name of plaintiff is in different ink and pen. Writing in the blank spaces on the stamp paper is apparently by a different person and with different ink as letters are written with a pointed pen and on other two pages blank spaces have been filled up with a broad nib pen. It has been further argued that Clause 11 of agreement, already printed on last page of the agreement has been scored out and it bears the signatures of kharidar (purchaser) and does not bear the signatures of defendant. It is further submitted that it is apparent to the naked eye that writing at the last page of the agreement which is in the shape of note has been written by a person who has filled up the blank columns on the upper part. It is the case of the plaintiff that this writing is of the defendant, however, clear case set up by the defendant is that he only knew Urdu and has never signed or written documents in Hindi. Writing has not been proved on record. Otherwise also, this agreement has been written on pre-printed pages under the advice of some legal expert as number of obliques have been put at number of places, meaning thereby signatures are taken on already printed pages, including first page which is on a stamp paper worth Rs. 5. Learned counsel for the appellants further made reference to the backside of the stamp paper and submitted that signatures/thumb impression of the defendant is not there. It has been pointed out by learned senior counsel for the appellants that even on the agreement to sell there is no date mentioned nor the name of the person who typed it or filled in the blanks has been mentioned. Even no date is put under the signatures of any of the marginal witnesses nor names of marginal witnesses have been typed rather they are in handwriting. It was submitted that marginal witness Krishan Singh was from a different village and was not known to the defendant. Learned senior counsel for the appellants contended that stamp paper was purchased in the name of defendant allegedly on 04.07.2005 whereas date of agreement is mentioned as 06.07.2005 Actually there is no date mentioned anywhere in the agreement to sell as to when and at which place it was executed. Only date is with respect to cheque No. 082905 dated 06.07.2005 and another date mentioned is for execution of sale deed i.e 06.10.2005 No date is mentioned as to when the document was executed either in the beginning or at the end. At the end in Hindi ‘tehrir tarikh’ (date of writing) has been left blank. Learned senior counsel for the appellants further contended that both the Courts below have not properly read the evidence with regard to proof of agreement. Even it was never read over to the defendant. The affidavit Ex.PW3.A tendered by PW3 Krishan Singh does not say that it was ever read over to the defendant. It is mentioned in the affidavit that after typing of the agreement to sell the computer operator has read over and explained it to him and there is no averment that it was read over to the defendant. Merely proving the signatures of defendant on the document does not mean

that document is proved and its probative value is required to be taken into consideration independently even if the document has been exhibited and is admissible in law. Learned senior counsel further contended that material witness i.e the person who entered into agreement on behalf of company and also filed suit i.e Surender Sharma has not been examined; it means that best evidence has been intentionally withheld and adverse inference is to be drawn. Learned senior counsel for the appellant contended that defendant was already having bank account and fraudulently new account was got opened and all amount was straightway deposited by plaintiffs in that account. Even deposit slip does not bear signatures of defendant and the amount has been deposited by some other person. Once defendant entered into agreement there is no question that he would not deposit the amount himself specifically when said amount is in lacs. It was argued that computer operator and Surender Sharma were the persons who were allegedly dealing as broker with plaintiff and the brokerage amount in crores has been paid to them. It is argued that authorised person PW1 has admitted that prior to agreement no written offer was given regarding selling the disputed land to the company by defendant. It is contended by learned senior counsel that evidence of PW1 is only hearsay evidence and cannot be taken into consideration as he was neither present at the time of execution of agreement nor at the time of alleged payment etc., which has been wrongly relied upon by Courts below. Stamp papers worth Rs. 12,39,000/- for execution of sale deed were purchased by Sonu Bajaj on 01.08.2005 much prior to the date fixed for execution of sale deed i.e 06.10.2005 This clearly indicates their intention that as and when they were in a position to find the old man, they would get sale deed executed. Stamp papers have not been intentionally proved on record and only certificate under Section 42 has been placed on record. No prudent man will purchase stamp papers unless the executant of agreement has agreed to execute the deed. It was vehemently argued by learned senior counsel for the appellants that statement of PW3 Krishan Singh, who is a marginal witness, also does not prove the contents of the document. It is only the deed writer or the person, who had typed it, can prove the same. No scribe has been examined and even the person who had entered into agreement on behalf of company has not been examined. As such the document has not been proved on record. Mere identification of the signatures on the same does not mean that contents of agreement to sell have been proved. It was further argued by learned senior counsel for the appellants that when the execution of agreement to sell is denied then onus is always upon the plaintiff to prove its contents otherwise its probative value is nil. Learned senior counsel for the appellants contended that application was moved before the lower appellate Court for placing on record various documents i.e sale deeds and mutations to indicate the price of the property at the relevant time. Although in the zimni order dated 06.12.2012 said application was ordered to be decided with the main case but there is no reference in the judgment of lower appellate Court, which may indicate the reason for rejecting the application. It is contended that said documents are material for just and proper adjudication of the dispute and in this appeal this Court can take note of the certified copies of registered documents i.e sale deeds for considering the value of the land in the area at that point of time. It was further contended that mutations are per se admissible being public documents and can be taken into consideration.

On the other hand, learned senior counsel for the respondent vehemently contended that there are concurrent findings of fact with regard to execution of agreement to sell dated

06.07.2005 (Ex.P5). It is also proved on record that Rs. 50.00 lacs were deposited in the account of defendant and he had withdrawn the amount from his account from time to time. It is also argued that amount was deposited in new account opened by depositing Rs. 500/- and thereafter first entry of Rs. 50.00 lacs appears. Learned senior counsel for the respondent referred to various entries mentioned in the account statement, which has been exhibited on record as Ex.P6 Learned senior counsel for the respondent referred to Ex.P8 affidavit of Surender Sharma, got attested before the Executive Magistrate on 06.10.2005, to indicate that plaintiff was always ready and willing to perform its part of contract. Learned senior counsel contended that there is no question of fraud. All the entries whereby the amount had been withdrawn have been proved. Defendant has failed to prove the fraud. Learned senior counsel for the respondent argued that this appeal has become infructuous since sale deed has already been executed and reference has been made to order dated 18.11.2013 passed by Executing Court whereby draft sale deed was ordered to be placed before the Executing Court and thereafter sale deed has been executed through Reader of the Executing Court on 08.01.2014 These documents have been placed on record through CM No. 2803-C of 2014. As such learned senior counsel for the respondent has prayed for dismissal of the appeal.

I have considered the contentions raised by learned counsel for the parties.

On consideration of arguments raised by learned counsel for the parties, I find that following substantial questions of law arise for consideration in this appeal: –

“1. Whether respondent has failed to lead evidence to prove due execution and validity of agreement to sell dated 06.07.2005 Ex.P5, agreement to sell is clouded with suspicious circumstances and whether its contents have been proved on record, if so, its probative value?

2. What is the effect of non-mentioning of reasoning for declining the application for placing and proving the documents on record which is apparently in the shape of additional evidence?

3. Whether plaintiff is entitled to refund of amount with interest which was allegedly deposited in the account of defendant?”

Before the Court of first instance Sonu Bajaj appeared as PW1, as an authorised representative of the plaintiff-company. R.B Chahal, Chief Manager of the Bank of India appeared as PW2 to prove cheque allegedly given at the time of agreement and deposited in the account of defendant and one attesting witness Krishan Singh appeared as PW3. However, Surender Sharma, authorised representative of the plaintiff-company, who had filed suit and got attested affidavit Ex.P8 before the Executive Magistrate and also had entered into alleged agreement on behalf of the company, did not appear in witness box. The examination of PW1 is only a futile exercise to prove the genuineness and execution of the agreement to sell Ex.P5 His evidence is only hear-say evidence and is not based on personal knowledge as he had neither filed suit nor participated in the execution of agreement to sell Ex.P5 nor he has stated that he had received any personal knowledge

from Surender Kumar, the person who had entered into agreement on behalf of plaintiff-company. His evidence has no bearing on the merit of the case. The Court of first instance has recorded finding on issues No. 1 to 3 collectively with regard to execution of agreement to sell, readiness and willingness and entitlement to specific performance of agreement to sell dated 06.07.2005 Findings have been recorded by taking into consideration the statement of Krishan Singh alleged attesting witness of agreement to sell and affidavit Ex.P8 of Surender Sharma regarding marking of his presence on 06.10.2005 before the Sub Registrar along with stamp papers and also the statement of PW1 authorised representative of plaintiff-company. Reference to the same has been made in para Nos. 9 and 10 of the judgment of Court of first instance and ultimately finding has been recorded in para No. 14, which reads as under: –

"In view of the above, I am of the considered opinion that the plaintiff has been able to prove that the defendant had entered into an agreement to sell dated 6.7.2005 in respect of the suit property and that the plaintiff has been ready and willing to perform his part of the contract. Therefore, the plaintiff is entitled to specific performance of the agreement dated 6.7.2005 alongwith possession of the suit property. Therefore issues No. 1 to 3 are decided in favour of the plaintiff and against the defendant."

The finding of Court of first instance has been affirmed by lower appellate Court.

Now I will discuss whether agreement to sell (Ex.P5) is duly proved on record and what is its probative value. However, before that it would be appropriate to refer to the relevant provisions in Punjab Stamp Rules, 1934, as applicable to Haryana.

Rule 28(xiii) of the said Rules reads as under: –

"(xiii) The vendor shall, with his own hand, write in indelible ink in English or at the time of sale, on the back of every non-judicial or Court-fee impressed stamp which he sells –

(a) serial number;

(b) the date of the sale;

(c)(i) the name, caste or tribe and surname (if any) and residence of the purchaser;

(ii) if the stamp is purchased by any person other than the principal, the said particulars in regard to both the agent and the principle:

(a) if the name to be written is that of an Indian man or unmarried woman, the vendor shall, in addition to the name and other particulars regarding such manor unmarried woman, write the name of his of her father;

(b) if the name is that of an Indian married woman or widow, the vendor shall, in addition to the name and other particulars regarding her, write the name of her husband; and

(c) if the stamp is purchased for any person by a pleader or an advocate as agent, the

vendor need only write name and parentage of the principal and where the parentage cannot be conveniently ascertained, brief particulars of the case together with a sufficient description of the agent;

(d) the value of the stamp in full words, and shall affix his dated signature to the endorsement.

He shall at the same time make corresponding entries in his vend register, and shall also invite the purchaser to attest them by his signature or thumb impression, or both, and in the event of the purchaser refusing so to attest the entry of sale, the vendor shall refuse to sell the stamp required and shall cancel any entries made regarding it in his register."

Perusal of first page of agreement to sell (Ex.P5) which is a stamp paper, indicates that it does not bear signatures of defendant on the backside of stamp paper, who allegedly entered into agreement and does not indicate who actually purchased it. Thus as required by aforesaid Rule the particulars of purchaser have not been indicated on the backside of stamp paper. The register of stamp vendor wherein corresponding entries would have been made and attested by the purchaser, has not been proved on record. First page of Ex.P5 is on stamp paper and rest are on ordinary papers. This fact is not disputed by learned senior counsel for the parties. On the first page, which is a pre-printed in Hindi, there are number of blank spaces and only names and khasra numbers have been filled in. Writing on this page is different from the writing on second and third pages of Ex.P5 There are blank columns on the second page which have been subsequently filled up by two different pens. Even cuttings on the last page have not been attested by the alleged seller. Document is pre-printed and only blank spaces have been filled up and signatures have been obtained on it. Firstly, if the Ex.P5 would have been written at the instance of defendant then he must have purchased the stamp paper and his signatures should have been there. Secondly, there was no occasion for filling up blank spaces specifically with regard to name of the defendant and his parentage. If the document would have been executed in the presence of the executant and witnesses then it should have been typed in a uniform continuous manner and blank spaces would not have been left out. The names of the witnesses, seller and purchaser as well as the typist who typed it would have been typed and thereafter signatures would have been put. Though in the blank columns name and father's name of defendant has been mentioned but no address and name of village etc. has been written or typed. Further even on the last page word 'baeya' (vendor) has been mentioned but no details have been mentioned along with it i.e name, father's name and address. It only bears signatures on a revenue stamp in Urdu, which has been shown as mark 'B'. Where the word 'kharidar' (purchaser) has been written no details of the 'kharidar' have been mentioned. Even no details of the witnesses i.e name, address etc. have been typed. These have been written in hand. It means, document was already in existence and subsequently witnesses have been added according to choice and blank spaces have been filled up. This is not a document which can be said to have been executed consciously by defendant or in the presence of defendant. If the agreement to sell would have been written in the presence of the seller then there was no question of leaving the blank spaces and thereafter filling with ink. This clearly indicates that Ex.P5 is clouded with suspicious circumstances. Now the question arises whether the document has been

duly proved on record or not. This is to be seen in the light of statements of witnesses. Only Krishan Singh alleged witness to agreement Ex.P5 has been examined, who had tendered his affidavit Ex.PW3.A in examination in chief. In para No. 2 of the affidavit he has mentioned that after typing, the agreement was read over and explained to him by the computer operator, which was accepted as correct and Sewa Ram, he (Krishan Singh) and one Yaad Ram had signed it. It is not mentioned that it was read over and explained to Sewa Ram – defendant. It is the categoric case of defendant that he was 90 years old person having low eye vision and was hard of hearing. No suggestion was put to Sewa Ram, who appeared as DW3, that he was not hard of hearing and not having low eye vision. Nor PW3 in his affidavit has mentioned that defendant was hale and hearty and was having good senses and was understanding each and everything. In my opinion, evidence of PW3 does not prove the contents of document. The contents of Ex.P5 could have been proved only by examining document writer/typist/computer operator who typed it. From above, the only possible conclusion is that attesting witness to document Ex.P5 could not explain conduct of the parties and he was not even aware as to who was the person who prepared the document Ex.P5 nor he has mentioned the name of computer operator. It is clear from the document Ex.P5, when read in light of the Punjab Stamp Rules, 1934 as applicable to Haryana, that stamp paper had not been purchased by defendant – Sewa Ram. Otherwise also it was a pre-printed document and blank spaces have been filled up that too in different handwritings and inks. On the stamp paper of Rs. 5/-, blank spaces have been filled up in different hands, inks and pen. Even on the last page, the names of seller, purchaser and witnesses have not been typed at spaces where words ‘purchaser’, ‘seller’ and ‘witnesses’ have been written. It is also not mentioned as to who had drafted the document or got it typed. Language of the document clearly indicates that it has been prepared by a lawyer or deed writer or some other expert in the field. What to talk of address of the scribe/typist/computer operator or his signatures even address of the defendant has not been mentioned. Plaintiff has not examined scribe. The name of the scribe has not been disclosed either in the affidavit of PW1 authorised signatory or in the plaint. If such person would have been examined, he would have revealed the correct position with respect to document in question. Even authorised representative of the plaintiff – company, Surender Sharma, who is alive, has not been examined although his affidavit Ex.P8 got attested before the Sub Registrar-cum-Executive Magistrate, has been placed on record. This affidavit is with respect to his appearance before the Sub Registrar. Evidentiary value of affidavit is insignificant as he did not appear in Court so that he may be subjected to cross-examination and truth may come out. Another strange feature of this case is that plaintiff had already purchased the stamp papers on 01.08.2005 whereas date for execution of sale deed was 06.10.2005 It is common knowledge that stamp papers for execution of sale deed are purchased on the day when the seller and purchaser come together for execution of the document. In these circumstances evidence of the person, who saw the document being typed or signatures being affixed, was necessary.

Hon’ble Bombay High Court had occasion to deal with such a situation in Sir Mohammed Yusuf v. D, AIR 1968 BOMBAY 112, wherein the Hon’ble Bombay High Court has held as under: –

“(42) The reason on which the decision of Bhagwati J. is based is not far to seek. The

evidence of the contents contained in the document is hearsay evidence unless the writer thereof is examined before the Court. We, therefore, hold that the attempt to prove the contents of the document by proving the signature or the handwriting of the author thereof is to set at nought the well recognised rule that hearsay evidence cannot be admitted. This question has been discussed by Halsbury at paragraph 533 at p. 294 (Halsbury's Law of England, 3rd Edition, Vol. 15) under the heading 'Hearsay' Says Halsbury:

".....Statement in documents may also be hearsay. So, if A had taken counsel's opinion before acting, the contents of the opinion would be admissible for the same purpose but not to prove the truth of any statement of fact therein"

In paragraph (534) Halsbury has discussed the reasons for rejection of hearsay evidence and says:

"The reasons advanced for the rejection of hearsay are numerous among them being the irresponsibility of the original declarant the depreciation of truth in the process of repetition the opportunities for fraud which its admission would offer, and the waste of time involved in listening to idle rumour.

The two principal objections, however, appear to be the lack of an oath administered to the originator of the statement, and the absence of opportunity to cross-examine him."

The Advocate General drew our attention to a decision of House of Lords in Maria Sturla v. Filippo Freccia, (1879) 5 A.C 623. In that case, the report of a committee appointed by a public department in a foreign state was admitted in evidence as a public document. It was, however, held that it was not admissible as evidence of all the facts stated therein. In that case the facts were: The document in question, a report of certain persons called the Ginunta di Marina at Genoa, was sought to be put in evidence for the purpose of proving that person who was formerly consul for the Genoese Republic in London, and the succession to whose daughter, Mrs. Brown, was in question, was a native of Quarto near Genoa and at the time that report was made, aged about forty-five years. The document was tendered for that purpose and for that purpose only.

It was conceded that the report was an authentic public document of the Genoese Government. The statements, however, contained in the report were not based on the evidence of any of the relatives of the consul at Genoa. The information contained therein did not appear to have been received from any member of Mangini's family. One of the well-recognised exceptions under the English Law of Evidence to the reception of hearsay evidence is the evidence relating to pedigree. The only question, which their Lordships of the House of Lords were considering was, whether the contents of the report fell within the purview of the above exception and their Lordships held that it did not, because the statements contained in the report were not based on the evidence given before the dispute started by any of the members of the deceased's family. We are not concerned with that part of the decision of the House of Lords in the present case. The point to be noted is that the statements contained in the report were treated as hearsay and since they did not fall within the well-recognised exceptions, they were excluded from evidence. To conclude

this part of the discussion, we hold, in the first place, that what has been formally proved is the signature of Abreo and not the writing of the body of the document at Ex.28 and secondly, that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document was Abreo."

Hon'ble Supreme Court in Joseph Johan Peter Sandy v. Veronica Thomas Rajkumar, 2013 (3) Civil Court Cases 270 has taken a similar view that if the scribe is not examined then the document is clouded with suspicious circumstances.

Similar view has been taken by Single Bench of this Court in Richhpal Singh v. Sandhura Singh, 2013 (3) Civil Court Cases 242 wherein this Court held as under: –

"As regards the stand of the appellant that the respondent had agreed to sell the suit property to him at the rate of Rs. 5,00,000/- per acre and after receiving Rs. 20,00,000/- from him had executed an agreement to sell, it may be noticed that the appellant did not care to produce the scribe of the agreement to sell Ex.P1 Only the scribe could have deposed about the contents of the agreement having been read over and explained to the executant. As the appellant withheld best evidence despite it being available, the Courts below were justified in drawing the adverse influence against him. Even otherwise, the agreement in question had not been written by a regular scribe. Had it been so, such a scribe would have made an endorsement in this regard in his register and the same would have ruled out the possibility of agreement in question being ante-dated. The agreement is also not written on regular stamp paper. On the other hand, special adhesive stamps were affixed on a plain paper which were purchased by the appellant and not by the respondent. The appellant also failed to explain as to how he had arranged a huge amount of Rs. 20,00,000/-, said to have been paid as earnest money. Explanation of the appellant that he had not withdrawn the money from the bank or taken the same from the commission agent but it was lying at his house as his father had 12 acres of land, cannot be accepted. Further, the suit land was situated within the jurisdiction of Sub Tehsil Jakhal and the Sub Registrar used to sit at Jakhal, the document is shown to have been executed at Tohana."

Hon'ble Supreme Court in Smt. Chandrakantaben v. Vedilal Bapalal Modi, 1989 HAP 420 has held that no presumption can be raised that attesting witness must be assumed to be aware of its contents.

In the light of law laid down by Hon'ble Supreme Court, this Court and other High Courts, I have no option but to conclude that the only person who could prove contents of Ex.P5 and truthfulness of the document was scribe, who has not been examined. Surender Sharma, who acted on behalf of the plaintiff and signatory to Ex.P5, has not stepped into witness box. He was the best person to explain about the transaction in question. There is no averment that if Surender Sharma is examined as witness he will not speak the truth. In such circumstances, adverse inference has to be drawn against the plaintiff for withholding him from the Court and it casts a serious doubt about the execution of agreement.

Hon'ble Supreme Court in State of Bihar v. Radha Krishna Singh, AIR 1983 SC 684 has held

as under: –

"Admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil.... Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however, ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

In the present case neither particulars of purchaser have been mentioned on the backside of the stamp paper nor the register of the stamp vendor containing corresponding entry duly attested by the purchaser by putting signatures or thumb mark, has been brought on record. As per Rule 28 of the Rules the stamp vendor is required to make corresponding entry in his vend register and ask the purchaser to attest the same by putting signatures or thumb mark and if purchaser refuses to do so the stamp vendor has to refuse sale of the stamp to that purchaser and also cancel the entry in his register. Since the vend register has not been proved on record nor the stamp paper contains the particulars of the purchaser on its backside the alleged agreement to sell becomes doubtful. Situation being so, the document Ex.P5 is essentially surrounded by suspicious circumstances. Reference in this regard may be made to judgment of Hon'ble Supreme Court in Garre Mallikharajuna Rao (D) by LRs v. Nalabothu Punniah, 2013 (2) R.C.R (Civil) 529 and Thiruvengada Pillai v. Navaneethammal, 2008 (2) R.C.R (Civil) 262. When the entire facts and circumstances of the case are considered the only conclusion that follows is that the alleged agreement (Ex.P5) is a forged and fabricated document.

In the light of above facts, there is a specific averment by defendant that he had not entered into the agreement, if, at all, such an agreement is there same is the result of fraud, misrepresentation and without notice and knowledge of the defendant. Normally, the burden is on defendant to prove such fraud, misrepresentation etc. but when specific allegations are there then burden is on the plaintiff to prove that document is genuine and is to the knowledge of defendant. Otherwise also, it is settled principle of law that the person, who claims some right on the basis of document, is required to positively prove the same.

Hon'ble Supreme Court in Thiruvengada Pillai v. Navaneethammal (supra), has held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendant, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The Courts below proceeded on the basis that it is for the party, who asserts something, to prove that thing; and as the defendant alleged that the agreement was forged, it was for him to prove it. But the Courts below lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the

plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

Hon'ble Supreme Court in K. Laxmanan v. Thekkayil Padmini, AIR 2009 SC 951, has held that when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the state of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator.

Hon'ble Suprerme Court in Krishna Mohan Kul @ Nani Charan Kul v. Pratima MaityAIR 2003 SC 4351, has held that when fraud, mis-representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party which is in a position of active confidence.

In view of the discussion above, I am of the considered view that although existence of document has been proved on record but there is no proof of contents of the document as scribe has not been examined. Surender Sharma who acted on behalf of the plaintiff has not been examined, the only marginal witness Krishan Singh does not state that it was read over to the executant. As such document is clouded with suspicious circumstances. Such a document cannot be a ground for grant of discretionary relief of specific performance. Both the Courts below have not considered the material evidence i.e Ex.P5 and statement of PW3 Krishan Singh in true perspective rather have treated the execution of document proved merely on the ground that Krishan Singh had said that defendant had signed it. As such, first question is answered in favour of the appellants.

Now second question is what is the effect of non-mentioning of reason for declining the application for placing and proving the documents on record which is apparently in the shape of additional evidence.

Admittedly, defendant had moved an application dated 10.10.2012 for placing and proving documents on record, which are sale deeds and mutations etc., to indicate the price of property at the relevant time and apparent fraud with respect to consideration for the land allegedly sought to be purchased by plaintiff. Vide zimni order dated 07.11.2012 learned Additional District Judge had granted time for filing reply to the said application.

Order dated 07.11.2012 passed by learned Additional District Judge, Gurgaon, reads as under: –

"An application for impleading L.Rs of deceased appellant has been moved by learned counsel for appellants alongwith fresh Power of Attorney. No objection of the same has been appended by opposite counsel. Heard. Keeping in view the facts mentioned in the application as well as 'no objection' marked by opposite counsel, the application in hand, is hereby, allowed. Amended title placed on file.

To come up on 15.11.2012 for reply and consideration on the application dated 10.10.2012 and for arguments."

Thereafter, vide order dated 06.12.2012 said application is stated to have been dismissed along with appeal but there is no discussion in the judgment for disposing of the application nor any separate order is available on record.

I have gone through the application dated 10.10.2012 and reply to it. Documents sought to be placed on record are certified copies of sale deeds pertaining to adjoining lands in same village. Sale deed dated 07.06.2012 is regarding land measuring 6 kanals 5.3 marlas, sale consideration of which is Rs. 2,74,18,126/-, sale deed dated 07.06.2012 is regarding land measuring 4 kanals 19 marlas, sale consideration of which is Rs. 2,16,56,250/-, sale deed dated 06.06.2012 is regarding land measuring 33 kanals 9.5 marlas, sale consideration of which is Rs. 14,64,53,126/-, sale deed dated 07.06.2012 is regarding land measuring 14 kanals 2.125 marlas, sale consideration of which is Rs. 6,17,15,938/-, sale deed dated 06.06.2012 is regarding land measuring 4 kanals, sale consideration of which is Rs. 1,75,00,000/- and sale deed dated 07.06.2012 is regarding land measuring 4 kanals 12.75 marlas, sale consideration of which is Rs. 2,02,89,063/-. Mutation annexed with application indicates price of the land to be much higher i.e 1.50 crores per acre on 18.07.2006 whereas in the present case land measuring 82 kanals 12 marlas has been purchased only for Rs. 2,06,50,000/- at the rate of Rs. 50.00 lacs per acre only. Apparently, fraud has been played with the defendant. No prudent man will sell the land at such a low price. It has come in the evidence of Hemant Kumar DW4 that he had typed the document, that he was one time broker of the plaintiff-company and had earned huge money in the real estate business. It has been noticed by lower appellate Court (at page 44 of the paper-book) that plaintiff-company is still indebted to Surender Sharma to the tune of Rs. 10.00 crores. It means that plaintiff has intentionally withheld the evidence of Surender Sharma as he was the best person to depose about the agreement as to in what circumstances it was executed. In above circumstances, this Court is taking note of the sale deeds and mutation sought to be placed on record by defendant. Although the application has been dismissed by lower appellate Court but no reasons have been recorded, however, this Court cannot ignore these documents being public documents and necessary for just decision of the case specifically relief of specific performance being a discretionary relief. Keeping in view above sale deeds, average price of the land in question will be more than Rs. 13.00 crores which is being sought to be usurped by plaintiff in connivance with Surender Sharma etc. at a meager price of less than Rs. 2,06,50,000/- i.e only for about 2.00 crores from an old man of 90 years. There is no specific and speaking order by the lower appellate Court on file

regarding application of additional evidence. In these circumstances, application dated 10.10.2012 is allowed and the documents are taken on record as Ex.C1 to C7. This has been done in peculiar circumstances of the case and also due to the fact that litigation is pending since 2008, already eight years have elapsed. The second question is decided accordingly.

Next question arises whether plaintiff is entitled to refund of amount with interest which was allegedly deposited in the account of defendant?

It is the case of plaintiff – company that earnest money worth Rs. 50.00 lacs stands deposited by way of cheque in the account of defendant. The alleged amount has been deposited in a newly opened account by one Sumit Sethi, which was got opened on 10.07.2005 Thereafter withdrawals have been made in the name of defendant. This clearly indicates that amount was deposited in the account of defendant either fraudulently or otherwise and same stands withdrawn by defendant from time to time. As such in the circumstances of the case, to keep balance and in the interest of equity and justice, this Court deems it fit to hold that alleged earnest money should be refunded by the appellants to plaintiff with interest @ 6% per annum from the date of deposit in the account till payment.

In view of above discussion, I have reached to the following conclusions: –

(1) Surender Sharma, the authorised person of the plaintiff, who allegedly entered into alleged agreement with the defendant and is also signatory to the agreement, has not been examined; as such adverse inference is to be drawn against the plaintiff. He was the only person who could have deposed with regard to execution of agreement, its terms and conditions and also could have explained the circumstances in which it was written and blank spaces were filled up. He could have also told who had typed the agreement to sell Ex.P5

(2) It is evident from the language of agreement Ex.P5 that it has been prepared either by a lawyer or a deed writer or some trained person.

(3) The agreement does not bear the signature or the name and address of the scribe. The plaintiff has not examined the scribe nor it has been disclosed who such person was. This could have been revealed by Surender Sharma, who acted on behalf of plaintiff.

(4) From the bare look at the agreement Ex.P5 it is clear that on the stamp paper worth Rs. 5/- there are no signatures of the purchaser of the stamp paper i.e defendant as required by Rules referred to hereinbefore nor the register of stamp vendor containing corresponding entry mandatorily required to be signed by the purchaser or stamp paper in attestation thereof has been proved on record. The entire agreement is pre-printed/typed document wherein blank spaces were left and thereafter filled up. The same have been filled up in different handwritings, ink and pens. Even the address and village of the defendant, who is entering into agreement, is not mentioned.

(5) The agreement to sell Ex.P5 does not bear the date and place of execution.

(6) PW3 Krishan Singh is the sole marginal witness examined. In his cross-examination he does not say that the document was read over and explained to the defendant – executant of the said document. Rather his categorical evidence is that it was read over and explained to him.

(7) Admittedly, defendant was a 90 years old and it was his categorical case that he was hard of hearing and having low vision. This has not been proved by plaintiff that defendant was in a sound state of mind.

(8) Document is in the shape of pre-printed document wherein blank spaces have been left. Even the names of seller, purchaser and witnesses have not been typed they are handwritten.

(9) Since the scribe has not been examined, contents of the document have not been proved.

(10) Even Clause No. 11 of the agreement has been scored out. It does not bear the signatures of alleged seller.

(11) Considering the fact that there is apparent fraud as the price of the land at the spot is much more which is clear from the mutation Ex.C7, which was led as additional evidence along with sale deeds, the agreement can definitely be held to be unconscionable.

(12) Defendant was already having a bank account, therefore, there was no necessity to open another account with Rs. 500/- in another bank. Even the amount has not been deposited by defendant himself but by someone else in the newly opened account.

In view of above, judgments and decrees of Courts below are set aside being perverse and illegal and based on complete misreading of evidence on record and the relief is modified for refund of amount deposited in the account of defendant with interest @ 6% per annum from the date of deposit till payment.

Contention of the learned counsel for the respondent that this appeal has become infructuous since sale deed has been executed and possession has been delivered in favour of the respondent, is not sustainable in the eyes of law.

Hon’ble Supreme Court in Ram Kumar Agarwal v. Thawar Das (dead) through LRs, AIR 1999 SC 3248, in identical case of specific performance, has held as under: –

“During the course of hearing, the learned counsel for Thawar Das vehemently resisted the appeals by submitting that the decree under appeal as passed by the High court has been put to execution and sale deed in terms of the decree has been executed and therefore the appeals do not deserve to be allowed. We find no merit in this plea. The judgment of the High Court was pronounced on 21.9.1983 The sale deed in compliance with the judgment of the High Court appears to have been executed on 21.4.1984 through intervention of the court, that is, by taking out execution of the decree. Petition seeking special leave to appeal along with prayer for interim relief was filed in the Supreme Court on 2.1.1984 On

30.9.85 leave to appeal was granted and while directing notices to be issued to the respondents, this Court had also directed execution of the judgment and decree of the High Court to remain stayed if not already executed. Merely because the decree under appeal has been executed for want of stay order from the superior court the right of the judgment debtor to prosecute the appeal is not lost without there being something to show that the judgment debtor had waived or consciously given up his right of prosecuting the appeal."

This second appeal was filed in the year 2013 along with an application for staying operation of the impugned judgments and decrees. In view of the law laid down by Hon'ble Supreme Court in Ram Kumar Agarwal (supra), during the pendency of appeal and non-granting of stay, if any decree is executed then appellant/judgment-debtor does not lose the right to prosecute the appeal unless there is something to show that judgment-debtor has waived or consciously given up his right of prosecuting the appeal. Here is a case where appellants are pursuing the appeal vigorously. Even if the sale deed is executed and possession is taken, second appeal does not become infructuous. Since the judgments and decrees of Courts below have been modified, appellants will be at liberty to move an application for restitution of possession on deposit of amount as ordered by this Court.

This second appeal stands disposed of in above terms.

No costs.