IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Regular Second Appeal No.1809 of 1984
Date of Decision: 04.02.2015

Surjit Singh & another .....Appellants

Versus

Mukhtiar Singh & others ....Respondents

CORAM: **HON'BLE MR. JUSTICE RAJIVE BHALLA**

Present: Mr. O.P. Hoshiarpuri, Advocate for the appellants.

None for the respondents.

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RAJIVE BHALLA, J (ORAL)

The appellants challenge judgments and decrees dated 23.01.1982 and 01.02.1984, passed by the Sub Judge 1st Class, Sirsa and the District Judge, Sirsa dismissing their suit and appeal respectively.

Counsel for the appellants submits that the Courts below having recorded concurrent findings of the fact that there is no dispute with respect to execution of the agreement to sell, nothing more remained for the Courts below, except to decree the suit for specific performance. The Courts below have, however, dismissed the suit and the appeal by holding that the appellants have not been able to prove the passing of consideration. Counsel for the appellants further submits that a presumption of truth attaches to a written document and, therefore, onus to prove the lack of consideration lay upon the respondents. The respondents have not adduced any evidence to prove the non-passing of consideration. The mere fact that a separate receipt was not executed or that the appellants were not able to prove the source of funds, is insufficient to raise an inference that consideration did not pass, at the time of execution of the agreement. It is further submitted that the stand by respondents No.3 to 8 that they are bonafide purchasers for valuable consideration having been rejected and no appeal having been filed by them proves the malafides of respondents No.1 and 2 who set up respondents No.3 to 8 to deprive the appellants of their just rights flowing from the agreement to sell. It is further contended that as respondents No.1 and 2 were proceeded against ex-parte an adverse inference was to be drawn against them.

Counsel for the appellants submits that the following substantial questions of law arise for adjudication:-

> *"1) Whether once execution of agreement dated 10.10.1979 is proved then the onus shifts on the respondents that no sale consideration passed?*
>
> *2) Whether adverse inference should be drawn against respondent No.1 and 2 who were proceeded exparte and did not step into the witness box?*
>
> *3) Whether decree for refusal of earnest money can be made even if no prayer is made for refund."*

No one is present on behalf of the respondents.

I have heard counsel for the appellants, perused the impugned judgments and decrees, appraised the pleadings and the evidence on record.

A perusal of the impugned judgments and decrees reveals that both the trial Court and the first appellate Court have accepted that execution of agreement, dated 10.10.1979 stands proved but have non-suited the appellants and commented adversely on the agreement to sell by recording concurrent findings of fact that the appellants have failed to prove the passing of consideration.

The first question of law namely whether once execution of agreement to sell is proved, onus shifts to the respondents to prove the absence of consideration, in my considered opinion, must, in the facts and circumstances of the present case, be answered against the appellants. The execution of an agreement and the passing of consideration are too contemporaneous facts required to are proved by the plaintiff. Even as per the issue framed by the trial Court onus to prove the passing of consideration was placed on the appellants. The mere proof of the execution of the agreement to sell did not absolve the appellants of their onus to prove the passing of consideration. The trial Court, has after due consideration and appraisal of the evidence on record, held that the appellants have failed to prove the passing of consideration. The trial Court has referred to the fact that receipt of consideration is not evidenced by any independent receipt or endorsement on the agreement to sell executed by the proposed vendor. The trial Court also noted that the scribe did not depose that consideration had passed in his presence though the appellant had deposed to that effect. The scribe in fact made a statement, Ex.D4, in another suit, that no consideration passed in his presence. The second attesting witness Lachhman Singh appeared in defence and stated that consideration was not paid in his presence. The trial Court also commented adversely on the source of money and, therefore, rightly held that the appellants were unable to prove the passing of consideration. The findings recorded by the trial Court have been affirmed by the first appellate Court by holding as follows:-

> *"9. Seemingly the arguments advanced by the learned counsel for the appellants may be somewhat impressive but they have no real substance when the evidence on record is clearly scrutinised. The self-serving statement of Mithu Singh cannot be given any weight. Other witness of the agreement is Mukhtiar Singh PW 4. the statement given by this witness is that a sum of Rs.56,000/- was paid to Mukhtiar Singh general attorney of Khullu Ram. This witness is categoric that the amount was paid in the presence of the petitioner-writer. It is interesting to note that when Karanjit petition-writer appeared as PW1 he is totally silent on this point. The plaintiffs did not dare to ask anything with respect to the consideration from this witness. This would mean that there is no corroboration of the statement of Mithu Singh defendant and Mukhtiar Singh with respect to the consideration passed. Then there are certain other facts which shake my belief in the genuineness of the statement of Mukhtiar*

Singh PW4. On his own showing this witness had no work at all and had specifically come with Mithu Singh for the attestation of the agreement. It may also be added here that this witness appeared from the police custody as he was an accused in a murder case. This itself show that this witness is of a shady character, which fact further diminishes the evidentiary value of his statement.

As against this evidence, on behalf of defendants Lachhman Singh attesting witness of the agreement has appeared as DW2. This witness has made a clear statement that no payment was made at the time of execution of the agreement that Mithu Singh had promised to pay the amount in the Mandi and they were asked to sit in Janta Bhawan. Mithu Singh returned after some time and said that the money was not available, then he promised to make the payment at his Dhani and even at that place be expressed his inability to make the payment and torn off some stamp papers telling that the agreement stood cancelled. This witness has been subjected to the rough cross-examination but nothing fruitful could be brought on record to show that he was making false statement. No hostility of this witness has been shown against the plaintiff. He is also not shown to be in any way interested in the defendants. No material whatsoever has been brought on record to show that he was in any way a party to any conspiracy with the defendants. There is, thus, no reason to brush aside the straight forward statement of this witness who has proved himself to be an independent witness.

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11. The above discussion would reveal that the oral evidence led by the plaintiffs-appellants to prove consideration is highly unsatisfactory and, therefore, not worthy of belief. Then this plea also stands belied by other circumstances on record. Admittedly, the transaction is for Rs.95,000/-. A huge amount of Rs.56,000/- is said to have been *paid as earnest money. In this situation the source from where the plaintiff-appellants acquired this money is important. As per evidence on record, the amount appears to be in cash available with Mithu Singh because it is not his case that the amount was withdrawn from any bank or borrowed from any person. It does not appeal to logic that a person would be keeping in his house such a huge amount. Mithu Singh came with the version that he had sold house for a sum of Rs.60,000/-. Except his bald assertion, there is no documentary or oral evidence to support this version. During cross-examination this witness admitted that he had taken Rs.10,000/- from Lachhman Singh. It is interesting to note that Lachhman Singh when came in the witness box was not put any question about this fact. So this appears to be a made up story. It is a matter of common experience that the agriculturists keep amounts with their Commission Agents. They take advance from them. As per statement of Lachhman DW, Mithu Singh had also promised to get the payment made from his Commission Agents at Sirsa. It appears that he failed to arrange the money from him. There is no suggestion to Lachhman Singh that Mithu Singh had no commission agent at Sirsa. So it is a case where the amount involved in the transaction was not available from the Commission Agent otherwise the commission agent could be the best witness to support the claim of the plaintiff-appellants. The absence of this evidence also goes a long way in discrediting the plea put forth by the appellants."*

A presumption that may arise from the proof of execution of an agreement does not extend to the proof of passing of consideration. The onus, therefore, to prove the passing of consideration, as the initial onus lay upon the appellants. The appellants having failed to discharge this onus, the first question is accordingly answered against the appellants.

The second question is whether an adverse inference should have been drawn against respondents No.1 and 2 as they were proceeded against ex-parte and did not step into the witness box. The question must be answered by holding that though an adverse inference should have been drawn against respondents No.1 and 2 but the fact that the appellants were unable to prove the passing of consideration, the adverse inference does not entitle the appellants to assert that the passing of consideration stands proved.

The third question is whether a decree for refund of earnest money can be passed even in the absence of any prayer? As a general rule, parties are confined to the prayers made in their plaint, but a Court is not powerless to mould relief and if a relief arises from the pleadings, a Court is duty bound to grant such relief. The question, however, does not arise for consideration as the appellants have not been able to prove the passing of consideration.

In view of the substantial questions of law having been answered against the appellants, the appeal is dismissed, but with no order as to costs.

04.02.2015 **[RAJIVE BHALLA]**
Vinay **JUDGE**