

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.642 of 2010 (O&M)
Date of Decision: 13.03.2015

Smt. Jeewa Bai

..... Appellant

Versus

Smt. Bhagwanti

..... Respondent

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sudhanshu Makkar, Advocate,
for the appellant.

Mr. Alok Jain, Advocate,
for the respondent.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This is a second appeal against the judgment and decree in first appeal passed by the learned Additional District Judge-III, Bhiwani dated December 18, 2009 affirming the findings on all other issues in the judgment and decree of the Civil Judge (Junior Division), Bhiwani in Civil Suit No.277 of 2004 dated February 20, 2008 except issue No.1 by modifying the finding to the extent that the appellant-plaintiff is not entitled to specific performance of contract of sale of property but is only entitled to refund of agreed sale consideration i.e. to say Rs.1,67,350/- paid as earnest money as indicated in the agreement to sell subject to handing over vacant possession to the respondent within two months from the date of the decision.

Aggrieved by the above modification and of the judgments of the

Courts *a quo* the plaintiff has approached this Court for setting aside of the orders in appeal praying for allowing of the suit.

In the present case, the agreement to sell suit property executed by the plaintiff and the defendant are admitted with respect to the corpus property. However, the proposed vendor suffered a legal disability to transfer the land to the proposed vendee since his wife had secured an order of maintenance by a competent Court against him in a petition under Section 125 Cr.P.C. and the suit property stood attached due to non-payment of arrears of maintenance. The land under sale agreement measures 7 Kanal 12 Marlas as per Jamabandi for the year 1993-94. The total sale consideration was Rs.1,67,350/- when the contract was signed on February 03, 1998 upon which the entire sale consideration had been paid and received by the vendor. Admittedly, possession of the property was handed over to the plaintiff pending execution of conveyance deed transferring right in property. There was a recital that the plaintiff would be entitled to get the sale deed executed and registered as and when required by the plaintiff. Vendor Kishori Lal died on April 07, 2001 and his LRs were brought on record against whom the appeal is pressed. The LRs entered appearance and denied the claim of the plaintiff that they should come forward to execute the sale deed. But he was not obliged by the LRs. It was pleaded in defence that the sale agreement was colourable and entered in collusion only to defeat the monetary rights of the wife of the vendor to maintenance as late Kishori Lal had devised a way to avoid his liability by trying to alienate the corpus to the disadvantage of the LRs to the appellant. To make matters tougher for Kishori Lal in his life time a restraint order had been passed

against him on April 07, 1994 by a court of law restraining alienation of corpus property which potentially could bring forth the desired maintenance amount to satisfy the order. The suit land was attached contrary to the directions and an entry was made in the "Khana Kafiat" while rapat No.126 recorded on November 28, 1988 and rapat dated December 08, 1999 and, therefore, corpus could not have been agreed to be sold to third parties by virtue of restrictions imposed by the attachment order.

I have heard the learned counsel for the parties at some length and have perused the record with respect to the issues framed by the trial Court for trial.

What transpired between the proposed vendor and the vendee leading to execution of the sale agreement is not determinative of the rights of the wife and LRs of Kishori Lal since the sale agreement was entered to defraud and defeat them of their rights to maintenance, the property being attached and restrained from alienation by courts of law prior to the agreement. It is not that every sale agreement which is admitted in its making is enforceable under the Specific Relief Act where Courts exercise discretionary jurisdiction. If the legal impediments in the way of Kishori Lal did not exist or intervene the sale agreement may have been enforceable but due to operation of orders passed by competent Courts with respect to the corpus, the sale agreement was rendered dubious with intent to deprive lawful entitlement to money and illegal deprivation of it by shifting liability with a view to obstruct payment by late Kishori Lal. It matters little whether Kishori Lal in his life time did not plead that the sale agreement was based on fraud and misrepresentation so long as the legal disability continued to

operate against him. It also matters little whether Hari Chand brother of Kishori Lal one of the attesting witnesses to the sale agreement Ex.P-1 and Ex.P-2 appeared as PW-2 to corroborate the version of the appellant by admitting the execution of agreement and receipt of money towards sale consideration, Ex.P-1 and Ex.P-2 respectively, of an amount of Rs.1,67,350/- which had been passed by the vendee plaintiff to Kishori Lal.

It could not be disputed that when Kishori Lal died in 2001 mutation No.428 of his inheritance was sanctioned in favour of the respondents being LRs (widow) with respect to 152/1064th share of Kishori Lal in joint property, meaning thereby, the impleaded respondent LRs had become owners in possession of land measuring 7 Kanals 12 Marlas, which is the land in dispute. The Court below has held as follows:-

"23. Since the agreement has been admitted impliedly by the respondent, though, argued it based on fraud and misrepresentation and the respondent has failed to prove any fraud and misrepresentation and in the case in hand, it is not a mere delay. It is a total inaction on the part of the plaintiff for a long period. However, as held by the Hon'ble Supreme Court that it should be within a reasonable time when no date is fixed for registration of the sale deed. Moreover, the appellant has failed to prove his readiness and willingness from the date of accident till today for execution and registration of sale deed and in totality of the facts and circumstances of the case, decree for specific performance cannot be granted to the appellant. However, the amount of Rs.1,67,350/- which is the sale consideration paid as indicated in the agreement to sell may be returned to the appellant to meet the interest of justice. Furthermore, the appellant is also may be directed to hand over the vacant possession to the respondent."

Though there is lack of clarity in what the lower appellate court

has reasoned in his judgment but the substance of the same and the conclusions reached are fully justified on the evidence on record. The Court has mostly gone on delay and laches in filing the suit on April 02, 2008 to enforce after much delay and laches an agreement of sale entered on February 03, 1998 leaving the right but taking away the remedy of specific relief.

Mr. Makkar appearing for the appellant submits that Section 54 of the Limitation Act, 1963 read with Section 16 of the Specific Relief Act, 1963 assures that when no date is fixed in the agreement of sale for its performance then time would not be an essence of the contract. He relies on the decision of the Supreme Court in **Rathnavathi and another vs. Kavita Ganashamdas**, 2014(4) RCR (Civil) 904 to submit that in the present case, time was not the essence of the contract when there was a recital in the contract that the plaintiff alone would be entitled to execute the sale deed by calling upon the vendor to transfer the property in his name even after 14 years in a case where the entire sale consideration had allegedly been paid. The Supreme Court held that the suit is not barred by limitation. However, he fails to appreciate that the corpus was seriously encumbered and under distraint by Court directives where the corpus was attached which situation was not experienced in this case and thus his case is distinguishable on facts. In the same strain he relies on the decision of the Supreme Court in **Gunwantbhai Mulchand Shah & Ors. vs. Anton Elis Farel & Ors.**, 2006 (2) SCC 634 and in **T. Mohan vs. Kannammal and another**, (2002) 10 SCC 82, the decision of the learned Single Judge of the Karnataka High Court in **Mallappa vs. Srinivasa Rao (Dead) by L.Rs.**, 2003(3) Civ.C.C.

602 and lastly on the decision of the learned Single Judge of the Bombay High Court in **Trimbak Shankar Tidke vs. Nivratti Shankar Tidke**, AIR 1985 Bombay 128. There can be no dispute with the proposition of law laid down by any of those judgments since they arise out of normal circumstances. In none of those cases were there operating restraint orders of competent courts with respect to the land which was agreed to be sold by a person under legal disability and the charge upon the land existing till his death. If an act is born to defeat the law and the property is clouded by Court orders and the disability persists till the date of death of the agreeable vendor who does not deny or challenge the sale agreement during his life time then the date of refusal under Section 54 of the Limitation Act deserves to be read *inter vivos* and, therefore, the judgments cited by Mr. Makkar, learned counsel for the appellant are distinguishable on facts. The Courts below have taken a view on facts and law which is plausible and when their approach is judicious to the evaluation of evidence then the scope of interference under Section 100 CPC in Second Appeal is not to be used to correct an error of fact or an error of law as explained in **Santosh Hazari vs. Purushottam Tiwari (Dead) by Lrs.**, 2001(3) RCR (Civil) 243: AIR 2001 Supreme Court 965 observing that *"We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable*

before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

The jurisdiction in second appeal being limited only on a substantial question of law in order to balance out the equities, the Court in first appeal has rightly modified the decree of the trial Court and ordered refund of amount of consideration agreed between the appellant and late Kishori Lal to free the LRs of an unexpected adverse visitation of rights violation.

For the foregoing reasons, I find no substance in this appeal and would dismiss it finding no substantial question of law arising in the case warranting interference in Second Appeal.

(RAJIV NARAIN RAINA)
JUDGE

13.03.2015
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