THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 1368 of 2012 (O&M) with
XOBJS No. 6-C of 2015 (O&M)
Date of decision : 04.02.2015

Rajiv Garg

......Appellant

Versus

Nirmal Kant Bansal and another

...Respondents

CORAM: HON'BLE MS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of the local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Vikas Bahl, Sr. Advocate with
Ms. Vibha Tewari, Advocate and
Mr. Nitish Garg, Advocate
for the appellant.

Mr. Raj Kumar Gupta, Advocate
for respondent no.1-Cross Objector.

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ANITA CHAUDHRY, J.

The instant Regular Second Appeal is at the instance of the defendant against the judgment passed by both the Courts below in a suit for possession by way of specific performance. The Lower Court passed a decree for recovery of double the amount of earnest money in favour of the plaintiff which was affirmed by the Additional District Judge, Panchkula vide judgment dated 29.11.2011. Cross objections have also been filed by the plaintiff.

The brief facts of the case are that Rajiv Garg and Gurdial Dass owned a property measuring 14 marlas situated in Sector 16, Panckula. They entered into an agreement to sell the property to the plaintiff namely Nirmal Kant for a total consideration of ₹ 32,50,000/- vide agreement dated 29.03.2003. A sum of ₹ 3,00,000/- was paid as earnest money. The parties agreed to get the sale deed executed on 15.06.2003. Defendant No. 1 the GPA holder of defendant No. 2 undertook to obtain No Objection Certificate, No Due Certificate and permission to transfer the property from various departments including income tax clearance and hand over possession of the property at the time of execution of the sale deed. It was further averred in the plaint that he was ready and willing to perform his part of the contract. It turned out to a holiday being Sunday on the day fixed for execution of the sale deed. The plaintiff informed the defendants through telegram dated 14.06.2003 requiring his presence on 16.06.2003 being the next working day for getting the sale deed executed. The case set up by him was that he appeared before the Sub Registrar, Panchkula and got his affidavit attested and was present from morning till evening with sale consideration of ₹ 29,50,000/- but the defendant failed to appear and did not obtain the necessary certificates nor got the property vacated from the tenant. He asked defendant No. 1 to return double the earnest money which was refused.

Defendant No. 1 appeared and took more than one preliminary objections on merits. The execution of the agreement was admitted. The receipt of earnest money was also admitted. It was averred that the plaintiff was never ready and willing to perform his part of the agreement and, therefore, the earnest money stood forfeited in favour of the defendants. Defendant No. 1 took specific plea that he was aware that the last date of execution of sale deed was 15.06.2003 which was a Sunday, therefore, there was no need to send a telegram and he had made a call to the plaintiff and his wife that since it was a Sunday, the sale deed would be executed on 16.06.2003 and he remained present in the office of Sub Registrar but the plaintiff did not turn up and he was present through out and got his presence marked. It was pleaded that the plaintiff was never willing to perform his part of the agreement and had failed to sign the documents which were to be submitted to HUDA and instead a fictitious application in the name of one Anil Kumar was given in HUDA office perpetuated to play mischief as the plaintiff was not interested in executing the sale deed and the address was verified but no person was found living at the address. It was pleaded that on 12.05.2003 the plaintiff and his wife came and asked him for return of the earnest money and threatened them with dire consequences and the matter was brought to the notice of SHO at Police station, Sector 36, Chandigarh. It was pleaded that he had the right to retain the earnest money and had responded to the notice that he was still ready and willing to execute the sale deed on payment of the balance amount with interest at the rate of 18% but the plaintiff was neither ready nor willing to execute the sale deed.

On the above pleadings, the trial Court framed the following issues:-

> "*1. Whether the defendant failed to perform his part of the contract qua agreement to sell dated 29.3.2003 in respect of the house in dispute and the agreement dated 29.3.2003 is liable to be specifically performed? OPP*

2. *Whether the suit of the plaintiff is not maintainable in the present form? OPD*
3. *Relief.*

To substantiate the respective stands taken, both the parties led oral evidence and produced documents. After hearing both the sides and on perusal of record, the learned trial Court decreed the suit of the plaintiff for the alternate remedy of recovery of double the amount of the earnest money i.e. ₹ 6 lacs within a period of two months.

Feeling aggrieved both the parties filed their respective appeals before the lower Appellate Court. The plaintiff was claiming the relief of specific performance while defendant No. 1 was seeking reversal of the relief granted to the plaintiff. Learned Lower Appellate Court dismissed both the appeals confirming the findings recorded by the Lower Court. Nirmal Kant Bansal plaintiff filed RSA No. 648 of 2012 which was dismissed on 15.02.2012. The present appeal was filed by defendant No. 1 after dismissal of the RSA filed by the plaintiff. The appeal was put up for the first time on 29.05.2012 and notice of motion was issued to respondent No. 1 alone.

Cross objections were filed by respondent No. 1 with an application for condonation of delay of 360 days seeking interest on the amount on equitable grounds.

There was no request by the appellant to file reply or oppose the prayer. The delay was condoned. Possibly because it would have further delayed the disposal.

Having heard both the learned counsels at considerable length and after going through the record, I am of the considered opinion that no interference is warranted while exercising appellate jurisdiction under Section 100 of the Civil Procedure Code because no question of law much less substantive question of law is found to be involved in the case. The reasons are more than one which I would be subsequently referring to.

The execution of the agreement to sell and payment of the earnest amount has been admitted. It is not disputed that there was a default clause in the agreement. Both the parties had agreed to be present in the office of Sub Registrar on 15.06.2003 which was a Sunday. Both the parties admitted that they knew it was a Sunday and, therefore, they were to be present for performance of their respective duties on 16.06.2003. The plaintiff specifically averred and pleaded his readiness and willingness to perform the agreement and tendered two affidavits attested on different point of time on 16.06.2003 to show his presence in the office of the Sub Registrar, Panchkula. The defendant on the other hand produced an affidavit stated to have been executed on 16.06.2003 but it was found that it did not refer to the time of his presence. The lower Court noted that stamp paper was purchased on 12.06.2003. No explanation was offered as to why the stamp paper was purchased on 12.06.2003.

The plaintiff had produced enough material to show that he had the requisite funds with him. He had got a loan for a sum of ₹ 9 lacs and a sum of ₹ 25 lacs were lying in his account standing with PNB, Sector 5, Panchkula. The plaintiff had examined the Manager of the Bank who proved the statement of account and spoke about the loan sanctioned.

The plaintiff had produced the telegram Ex. P-4 given on 14.06.2003 categorically asserting that he had more than ₹ 35 lacs with him and the defendant had failed to get the NOC but he would still be present in the office of the Sub Registrar on 16.06.2003. The receipt of the telegram was not disputed.

The Lower Court rightly observed that defendant No. 1 had given an explanation which was contrary to the record. It had noted that the property had been let out to a Bank in 2001 and it had not been vacated. The plaintiff had summoned the tenant occupying the property and it was revealed from the documents that it was a lease initially for 11 months which was liable to be extended from time to time. Clause 1 of the lease deed Ex. P14 gave power to the owner to extend the period of tenancy for further period of 11 months with two extensions of similar period, if requested by the Bank. For the appellant to say that he had leased out the property since the agreement had failed was totally a false plea. No notice had been given to the Bank to get the property vacated though it is another matter that the tenant while appearing as witness for the plaintiff stated that he would have vacated the premises as and when it was required. The property had been leased out to the Bank, therefore, the assurance given by the occupant was of little value.

The plaintiff had asserted and had adduced evidence to show that defendant No. 1 had entered into an agreement earlier with one Anil Kmar and this fact came to light when he visited HUDA office on 04.06.2013. Ex. PW5/C was produced by the HUDA official to show receipt of application dated 29.05.2003 where Anil Kumar had referred to an agreement to sell entered by Rajiv Garg with respect its property on 22.03.2003. HUDA took notice of this and wrote a letter Ex. PW5/D. The stand taken by the defendant was that it was a fake address and no person was found. Except for the oral assertions, the defendant did not take any steps to show that it was invalid address and no such person lived at that address.

The lower Court had examined each issue and had dealt with each aspect minutely and had rightly concluded that it was the defendants who had failed to perform their part of the agreement and no steps had been taken to get the property vacated.

The plaintiff had sent a notice asking the defendant to refund double the amount paid as earnest money and had referred to the defaults on defendant No. 1's side. Defendant No. 1 sent a reply and also showed his readiness and willingness to perform his part of the agreement but it is noticeable that he was asking for 18% interest on the agreed amount and for further negotiations if the plaintiff was interested in execution of the sale deed. The defendant had taken a plea that it was a plaintiff who had backed out the agreement since prices have fallen in 2003 but to the contrary when plaintiff stepped into witness box, a suggestion had been put from the side of the defendants that prices of the property had risen to ₹ 1 crore. This is the reason why the defendant while responding to the notice asserted that the price will have to be renegotiated. If the prices had fallen there was no reason for him to mention it.

The property subsequently had been sold by the defendant to a third party vide Ex. PW 5/E. Considering all the circumstances, though referring to the rule of lis pendens, the trial Court in its discretion refused the first relief and ordered the refund of double the earnest money which had been affirmed by the Lower Appellate Court. The Regular Second Appeal filed by the plaintiff was dismissed at the initial stages. It had been amply proved by the plaintiff that he was ready and willing to perform his part of contract. The learned Courts below have recorded a concurrent finding of fact, thus, there is no scope for interference at the hands of this Court because no question of law much less substantial question of law thereof has been found to be involved. It is settled that while exercising the appellate jurisdiction, this Court will not entertain into the domain of re-appreciation of evidence for the purpose of reaching at its conclusion than the one recorded by the Courts below unless there is patent illegality apparent from the record of the case. In the present case, it can not be said that findings recorded by the Courts below are based on no evidence or they were perverse in any manner. Learned counsel for the appellant had referred to ***Kehar Singh vs. Amrik Singh, 2010(4) PLR 75, Satish Batra vs. Sudhir Rawal, 2012(4) RCR(Civil) 890, Ram Mehar vs. Murari Lal and others, 2011 (183) DLT 769*** to seek support.

I have gone through the authorities which are based on its own facts and do not help the appellant.

So far as the cross objections are concerned, they were not maintainable as the Regular Second Appeal filed by the plaintiff had been dismissed. After the dismissal of their appeal, they could not claim interest. His rights had been given a quietus when the regular second appeal had been dismissed. The plea now raised could have been taken in the appeal filed by him. I find that no prayer for interest had been made there. The cross objector may rest contend.

Reverting back to the appeal and respectfully following the law laid down by the Hon'ble Apex Court in ***Hari Shankar Rastogi vs. Sham Manohar and others, (2005) 3 Supreme Court Cases 761,*** this Court is not inclined to disturb the concurrent finding of facts recorded by learned trial Court and affirmed by the first Appellate Court. I also see no contradiction in the conclusion drawn by the Appellate Court. The concluding paragraph of judgment of Appellate Court clearly spells out the view taken by it. The lower Court had awarded double the amount of earnest money and rightly so as the substantial period has passed and money had been retained by the defendant when he was at fault and was in no mood to execute the sale deed. No case for interference is made out. The appeal and the cross objections are bereft of merit. Consequently, the impugned judgment and decree passed by the Courts below are upheld.

The appeal and cross objections are dismissed.

04.02.2015 **(ANITA CHAUDHRY)**
reena **JUDGE**