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IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

SAO No. 75 of 2015 (O&M)
Date of decision : October 31, 2015

Gurmeet Singh and others

..... Appellants

Versus

Ellora Hitech Infra Venture Pvt. Ltd.

..... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. Vivek Suri, Advocate
for the appellants.

Ms. Meena Sharma, Advocate and
Mr. Satyaveer Singh, Advocate
for the respondent.

****

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

Amit Rawal, J (oral).

The appellant has challenged the impugned order whereby the lower appellate court remanded the matter back to the trial court to decide the application filed under Order 7 Rule 11 CPC allowed by the trial court vide order dated 29.9.2012.

Mr. Ashish Aggarwal, learned Senior counsel assisted by Mr.Vivek Suri, Advocate submits that the Additional District Judge vide order dated 28.8.2015 has not only noticed the contentions of the parties to the *lis* but as well as case law cited while remanding the matter back without assigning any reasons and in view of the ratio decidendi culled out by the Hon'ble Supreme Court in **I. S. Sikandar (D) by L.Rs Vs. K. Subramani and others 2014**

(1) RCR (Civil) 236 submits that it is a pleaded case of the respondent-plaintiff that specific performance of the agreement to sell was erroneously and fallaciously cancelled, but while seeking relief of specific performance, injunction and damages has been claimed though cancellation of the agreement has not been pleaded. He thus, submits that there is a gross illegality and perversity in the findings rendered by the lower appellate court.

Ms. Meena Sharma, learned counsel appearing on behalf of the respondent submits that the trial court while deciding the application under Order 7 Rule 11 CPC had taken into consideration the defence raised in the written statement which is not scope while deciding application under the provisions of Order 7 Rule 11 CPC, since trial court was only enjoined upon an obligation to consider the averments in the plaint. Even certain facts have been taken into consideration. In essence, the plaint could not have been rejected in the manner and mode it has been done. There is no illegality and perversity in the order passed by the Additional District Judge remanding the matter back to the trial court to decide the application under Order 7 Rule 11 CPC afresh, thus, prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book.

Before adverting to the rival contentions of the parties to the *lis*, it would be apt to reproduce the prayer clause of the suit:-

"*It is, therefore respectfully prayed that Decree for specific performance of the agreement to sell dated 16.12.2011 entered into between the plaintiff and defendants for the execution of sale deed favour of plaintiff in respect of land situated Khewat No. 298, Khatauni no. 306, Mustil No. 84//Killa no. 24/1/2 owned by Gurmeet Singh having 1/3rd share (1K-5M), Anumeet Singh having 1/3rd share (1 K-5 M) and Raghumeet Singh having 1/3rd share (1 K-5M), Khewat No. 330 Khatauni no. 338, Mustil No. 94/1 Killa no. 8/3 owned by Gurmeet Singh having 1/3rd share (OK-13M), Anumeet Singh having 1/3rd share (OK-13M) and Raghumeet Singh having 1/3rd share (OK-13M no. 522, Khatauni no. 535, Mustil No. 83// Killa nos. 1,2 and 21/1 owned by Gurmeet Singh having 35/251 share (1K-11M) and Radhika Sodhi having 32/255 share (1K-12M), Khewat no. 523 , Khatauni no. 536, Mustil no. 83, Killa nos. 5,7/, and 15 owned by Gurmeet Singh having 25/204th share (2K-10M), Khewat no. 524, Khatauni No. 537, Mustil No. 84 Killa No. 6 owned by Gurmeet Singh having 19/160th share (0K-19M), Khewat No. 525, Khatauni no. 538, Mustil No. 83// Killa nos. 9, 11 and 20 owned by Anumeet Singh having 1/8th share (3K-OM) and Mustil No. 83// Killa no. 10 owned by Anumeet Singh having 1/8th share (1K-OM), Khewat No. 526, Khatauni no. 540, Mustil No. 94// Kila nos. 1,2,3 and 4 owned by Radhika Sodhi having 1/5th share (6K-8M), Khewat no. 533, Khatauni no. 547, Mustil no. 93//Killa nos. 5/2, 6/1 and 7/1 and Mustil no. 94// Killa no. 11 owned by Gurmeet Singh (18 K-17), Khewat No. 534, Khatauni no. 548, Mustil No. 94 Killa no. 8/4, 9,10, 12 owned by Gurmeet Singh having 1/3rd share (8K-12M), Anumeet Singh having 1/3rd share*

(8K-12M) and Raghumeet Singh having 1/3rd share (8K-12M), Khewat No. 664, Khatauni no. 684 Mustil no. 84 killa nos, 17 & 24/2 and Mustil No. 94// Killa no. 8/2 owned by Gurmeet Singh having 1/3rd share (4K-7M), Anumeet Singh having 1/3rd share (4K-7M) and Raghumeet Singh having 1/3rd share (4K-7M), Khewat No. 851, Khatauni no. 881, Mustil no. 84// Killa no. 25/1 owned by Gurmeet Singh having 1/2 share (3K-OM) total measuring: 83 Kanal 8 Marlas and for its possession may kindly be passed in favour of the plaintiff and against the defendants. And decree for permanent injunction, restraining the defendants to sell, alienate, mortgage, gift or dispose of the land in any manner to any person except the plaintiff may be passed in favour of the plaintiff and against the defendants. And in the alternative suit for recovery of Rs. 13,00,00,000/- (Rs. Thirteen Crore only) along with interest @ 18% per annum from the date of filing of the present suit till its final realization as damages from the defendants in case Specific Performance of the agreement to sell is not possible may be passed in favour of the plaintiff against the defendants. And Award the costs of the suit in favour of the plaintiff against the defendants.

Any other relief which this Hon'ble Court may deem fit in the facts and circumstances of the case may also be granted in favour of the plaintiff and against the defendants in the interest of justice."

The Hon'ble Supreme Court had an occasion to deal with such proposition by raising the question and answering the same by holding that until and unless there is a prayer/declaration for seeking cancellation of the agreement, the suit for specific performance of agreement would not be maintainable, in essence,

once the agreement according the respondent-plaintiff is not in existence the specific performance of the same cannot be granted unless its recision or cancellation is sought. It would be apt to reproduce the questions posed and answered by the Hon'ble Supreme Court **I. S. Sikandar (D) by L.Rs's case (supra).**

> *"16. After perusal of the impugned judgment of the High Court and the questions of law framed by the defendant No.5 in this appeal, the following points would arise for determination of this Court:*
>
> *1)Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?*
>
> *2) Whether the reversal of the findings of the trial court on the issue Nos. 3, 4 and 5 by the High Court and answering the same in favour of the plaintiff in the impugned judgment and granting the decree for specific performance in favour of the plaintiff in respect of the schedule property is legal and valid?*
>
> *(3) Whether the grant of decree of specific performance in favour of the plaintiff despite Clause 12 of the Agreement of Sale dated 25.12.1983 is legal and valid?*
>
> *(4) Whether the grant of the decree is in conformity with sub-sections (1) and (2) of Section 20 of the Specific Relief Act and whether the learned Judge of the High Court has exercised his discretionary power reasonably in granting the same in favour of the plaintiff?*
>
> *5) What decree or order to be passed?*

17. Answer to Point No.1 The first point is answered in favour of the defendant No. 5 by assigning the following reasons:

It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos. 1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the sale deed

executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985. The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale

is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5."

From the prayer clause, it is discernible that the respondent-plaintiff has also sought damages as 7,02,20,158/- as first installment was also forfeited.

Without adverting to the merits and de-merits of the case, it was for the trial court to arrive at a finding on the basis of evidence as to how much installments were due or not paid but the fact remains that the appellate court while accepting the appeal of the respondent-plaintiff did not assign any reasons with regard to the applicability of the ratio decidendi culled out in **I. S. Sikandar (D) by L.Rs's case (supra).** It would be apt to reproduce paragraph 25 of the judgment of lower appellate court as under:-

"25. The lower court after taking into consideration the allegations made in the plaint along with documents relied upon by the plaintiff has rightly observed that there was no cause of action in its favour. The lower court in its right perspective has rejected the plaint by making reference to the ratio of law laid down in case of T. Arivandandam Vs. T. N. Satya Pal AIR 1977 SC 2421. Before summing up his arguments, it has been prayed that appeal may be dismissed. In support of his arguments, he made reference to the ratio of law laid down in cases ***T. Arivandandam Vs. T. N. Satya Pal AIR 1977 SC 2421, Saradamani Kandappan Vs. S. Rajalakshmi 2011(4) Civil Court Cases 271 (SC) I.S.Sikander Vs. K. Subramani and others 2014 (1) RCR (Civil) 236 (SC) and Padamkumari and others Vs. Dasayyan and others 2015 (2) RCR (Civil) 972 (SC)."***

On going through the observations of the appellate court, I am of the view that there is no deliberation upon the applicability or non-applicability of the judgments cited at the behest of the appellant-defendant. Thus, in my view, there is illegality and perversity in the impugned order as the lower appellate court has not addressed a legal point.

Accordingly the order dated 28.8.2015 of the lower appellate court is set aside. The matter is remitted back to the lower appellate court to decide the appeal bearing CA No. 2304 of 2013. In essence, the aforementioned appeal is restored back to its original number. Both the parties are ad idem that the appeal may be decided by the District Judge, Panchkula.

The parties shall appear before the District Judge, Panchkula on 1.12.2015.

The parties shall be at liberty to take other pleas as well.

It is expected that the lower appellate court shall decide the appeal as expeditiously as possible, preferably within a period of one month from the date of receipt of certified copy of this order.

The appeal stands disposed of.

(AMIT RAWAL)
JUDGE

October 31 , 2015
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