

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 8921 of 2015 (O&M)

Date of Decision: 24.05.2016

Sanjoy Dutta Gupta and Another

... Petitioner(s)

Versus

Gurpreet Kaur and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

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

Present: Mr. S.K.Bharti, Advocate
for the petitioner(s).

Ms. Seema Pasricha, Advocate
for respondents No.1 & 2.

Shekher Dhawan, J.

Present petition under Section 115 CPC for setting aside order dated 21.9.2015, passed by learned Civil Judge (Junior Division), Gurgaon, whereby application, filed by the respondent/defendants, under Order 37 Rule 3(5) CPC read with Section 151 CPC for seeking unconditional leave to defend was accepted and leave to defend the suit was granted.

Learned counsel for the petitioners, while assailing the said order, submitted that admittedly respondent No.1 had received payment of ₹ 40,00,000/- as per terms & conditions of agreement of sale of property and

the property is still under litigation. The sale deed could not be executed because permission was not obtained by the respondents and there being no fault on the part of petitioners. The Court below accepted the application for permission to defend the suit under Order 37 CPC without considering the fact that there was no triable defence as payment of ₹ 40,00,000/- was admittedly received by the respondents. Hence, present petition be accepted and order dated 21.9.2015 be set aside.

Learned counsel for the respondents submitted that the Court below has rightly considered that there was triable defence available to the respondents in this case and accordingly permission for leave to defend was granted and present petition is liable to be dismissed.

Having considered the submissions made by learned counsel for the parties, this Court is of the considered view that as per the provisions of Order 37 CPC, a person can certainly seek permission to defend the suit if he has some triable defence for seeking trial in the case. For that purpose, he has to put in appearance before the Court in pursuance of notice and that has already been done in the present case. The only point to be seen is whether the Court below has rightly granted leave to defend the suit or not. Admittedly, payment of ₹ 40,00,000/- was made as earnest money on the basis of agreement of sale dated 28.2.2013 with regard to plot and the agreement was executed between the plaintiff and defendants No.1 & 2. The total sale consideration was fixed to be ₹ 2,00,00,000/-. Defendant No.1 has already applied to Haryana Urban Development Authority (hereinafter referred to as “HUDA”) for seeking permission to transfer the plot on 15.3.2013 and HUDA was reasonable in accepting the application for

permission to be obtained much before the target date. The time for execution of the sale deed was extended and as such the time for execution of the sale deed and performance of the agreement was not essence of time. In sale of immovable property, the time is never regarded as essence of contract and presumption is against time being essence of such contracts. Such a view was taken by the Hon'ble Apex Court in ***Smt. Chand Rani (dead) by LRs. v. Smt. Kamal Rani (dead) by LRs. AIR 1993 SC 1742***, ***Mrs. Saradamani Kandappan v. Mrs. S. Rajalakshmi and Others air 2011 SC 3234*** and ***Gomathinayagam Pillai and Others v. Pallaniswami Nadar AIR 1967 SC 868***.

The present petition being challenge to the order, whereby the Court of competent jurisdiction has already granted permission to the defendants to defend the suit while recording observation that defendants have a triable defence, such an order is not required to be interfered because the Court is primarily concerned to see, at the time of grant of leave to defend, that whether defence raises a real issue and not a sham defence and in the instant case, defence raised by the defendants is certainly not a plea of sham defence, which could be out-rightly rejected by the Court below and as such the Court below has rightly accepted the application for permission to grant leave to defend the suit. Such a view was taken by the Hon'ble Apex Court in ***Santosh Kumar v. Bhai Mool Singh 1958 AIR 321*** and ***Mechelec Engineers & Manufacturers v. Basic Equipment Corporation 1977 AIR 577***.

Otherwise also, if the format of the suit is taken into consideration, plaintiff has filed suit for recovery under Order 37 CPC

wherein following prayer has been made :

- “(a) Pass a decree of ₹ 60,00,000 (Rupees Sixty Lakhs only) along with interest @ 24% p.m. from the date of filing the present suit till its realization along with pendente lite and future interest @24% per annum on the decreed amount, along with other prayers sought for in the present suit;*
- (b) Pass an order awarding the cost of the suit including court fee, counsel fee and other expenses in favour of the plaintiff and against the defendants;*
- (d) Pass an order restraining defendant no.3 i.e. HUDA not to grant any further transfer permission in favour of any third party till the pendency of proceedings under this suit.*
- (e) Pass a decree/declaration in favour of the plaintiffs that they have a charge/lien over the suit property (viz. Plot no. 80, Sector 30, Gurgaon) till his claim of ₹ 60,00,000/- with interest are not given to him.*
- (f) Pass such other or further orders as this Hon'ble Court may deem fit and appropriate by this Hon'ble Court in the facts and circumstances narrated herein-above in the present case.”*

The above prayer makes it ample clear that present suit is practically not a simplicitor suit for recovery as laid down under Order 37 CPC but a suit for specific performance of agreement and relief has also

against HUDA. That way, the recovery of amount is not the only prayer and in such circumstances, the order passed by the Court below, while granting permission to leave to defend, does not require any interference. Such a view was taken by the Hon'ble Apex Court in *M/s Sunil Enterprises and Another v. SBI Commercial and International Bank Ltd. AIR 1998 SC 2317*.

Ordinarily, appeal or revision is not to be entertained against the exercise of discretion that has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily, or is based on misunderstanding of the principles that governs its exercise, then interference is called for if there has been resultant failure of justice. The only ground given for concluding that the defence is not bonafide, but the permission to grant leave to defend should ordinarily not be granted if defence is not bonafide. However, that was not the case before the Court below. It is also not disputed that stage of permission shall come only when the defendant shall put in appearance after grant of permission to leave to defend. But if the defendant satisfies the Court that he has a good defence to be claimed on merits, as in this case, the defendant is certainly entitled for unconditional leave to defend. He has certainly raised a triable issue indicating that he has a fair or bonafide or reasonable defence and as such he is entitled to leave to defend and the Court below has rightly granted the said permission vide order under challenge. The said order does not call for any interference. Resultantly, present petition is without any merit and the same stands dismissed.

(Shekher Dhawan)
Judge