IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1401 of 2010(O&M)
Date of Decision.20.10.2016

M/s Salient Crafts ....Appellant

Vs.

M/s Tetx-N Rai International and others ....Respondents

Present: Mr. Chetan Mittal, Senior Advocate with
Mr. Prateek Gupta, Advocate
for the appellant.

Mr. Puneet Bali, Senior Advocate with
Mr. Vaibhav Jain, Advocate and
Mr. Paramveer Singh, Advocate
for respondent No.1.

Mr. Gunjan Rishi, Advocate
for respondent No.3.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

The appellant-defendant No.1 is in regular second appeal against the judgment and decree of the lower Appellate Court whereby the suit seeking specific performance of the agreement to sell dated 24.01.1994 has been decreed in toto, in essence, the judgment and decree of the trial Court declining the discretionary relief but entitling the respondent-plaintiff for recovery of the amount along with interest pendente lite and future interest @18%, has been set aside.

Mr. Chetan Mittal, learned Senior Counsel assisted by Mr. Prateek Gupta, Advocate for the appellant-defendant No.1 submitted that the suit aforementioned seeking specific performance of the agreement to sell was filed on 19.06.1995 in respect of sale of industrial plot bearing No.311, Udyog Vihar, Phase-II, Dundahera, Teshil and District Gurgaon which was allegedly agreed to be sold for ₹25.50 lacs. As per the terms and conditions of the agreement to sell, a sum of ₹50,000/- was paid as earnest money and another ₹2.50 lacs was to be paid on or before 28.01.1994 and another sum of ₹2 lacs was agreed to be paid on 03.02.1994. However, the second installment of ₹2 lac was not paid on 03.02.1994 but the plaintiff produced on record the receipt dated 06.02.1994 (Ex.P4) allegedly executed by defendant No.2-Parmod Saigal, husband of appellant-defendant No.1, which was specifically denied as the husband did not have any authority or power of attorney to receive the amount on behalf of the appellant. The respondent-plaintiff had not always been ready and willing to perform his part of the contract as the entire balance consideration was to be paid within 30 days.

He further submitted that the respondent-plaintiff had not stepped into the witness box and only Vivek Arora stepped in, thus, the ratio decidendi culled out from the judgment of Hon'ble Supreme Court in ***Man Kaur (D) through LRs Vs. Hartar Singh Sangha 2010 (10) SCC 512*** would squarely be applicable to the facts and circumsances of the case as the appellant-defendant No.1 has been prevented from audience/presence of the plaintiff for ascertaining the truth/certain facts *viz-a-viz* the terms and conditions of the agreement to sell, *ibid.*

The appellant-defendant No.1 has specifically denied the receipt Ex.P4, much less, signatures of defendant No.2. The Appellate Court has gone into the arena of conjectures and surmises in not looking the report of the handwriting expert, Ex.DW1/11. Even otherwise, the Court could have invoked the provisions of Section 73 of the Indian Evidence Act for comparing the signatures of defendant No.2 *viz-a-viz* the passport and other admitted signatures. The onus to prove the execution of the document was/is always upon the plaintiff in case the signatures are denied whereas the plaintiff has failed to discharge the onus. In support of his contention, he relied upon judgment of Hon'ble Supreme Court in ***Thiruvengadam Pillai Vs. Navaneethammal and another (2008) 4 SCC 530***. The respondent-plaintiff has sent legal notices dated 2.2.1995 (Ex.P5) and 28.02.1995 (Ex.P6) whereas the reference to earlier notice dated 09.02.1994 has not seen the light of the day.

Defendant No.2 was proceeded ex parte on 29.08.1996. When the application for setting aside the ex parte order was moved, the plaintiff gave up the said defendant from the array of defendants, which fact is discernible from the order dated 31.03.1998. No explanation, much less, cogent reason has come on record as to why the payment was not made on 03.02.1994 as stipulated in the agreement to sell instead having allegedly been paid to the defendant No.2/husband of the appellant-defendant No.1 on 06.02.1994, who had no authority to receive the same. There is no mention of the preparation of the draft of ₹40,000/- and ₹4,50,000/- as stated in the plaint, much less, in the evidence. In fact, story of preparation of the drafts for the aforementioned amount had been falsely introduced to create the evidence to explain the undue delay in filing the suit, which was admittedly cancelled as per the statement of PW2, T.K. Sharma, Manager of the Karur Vysya Bank. The story of handing over of cheque of ₹2 lacs on 03.02.1994 and having not been accepted, is nothing but a cock and bull story.

In the plaint, it has been alleged that draft of ₹40,000/- and ₹4.5 lacs were prepared which the defendant Nos.1 and 2 refused to accept for HSIDC. However, in the evidence it surfaced that instead of telephonic talks, there was some meeting allegedly held with defendant No.2 in the month of September and in this backdrop of the matter, the aforementioned drafts were prepared.

The finding of the lower Appellate court is not only illegal but erroneous as there is no requirement of readiness and willingness when time is not the essence of the contract. It has to be gathered from the facts and clauses of the agreement whereas in the present case, the time is essence of the contract because specific dates have been given for execution of agreement to sell, which the plaintiff was to comply with. In support of his contention, he relied upon ratio decidendi culled out from the judgment of Hon'ble Supreme Court in ***Naarinder Kumar Malik Vs. Surinder Kumar Malik (2008) 8 SCC 743***.

The lower Appellate Court ought not to have granted the discretionary relief ignoring the fact that the agreement to sell is dated 24.01.1994 whereas the suit has been decreed much later and the prices of the property has been increased. In support of his contention, he relied upon judgment of Hon'ble Supreme Court in ***Satya Jain (dead) through LRs and others Vs. Anis Ahmed Rushdie (dead) thrugh LRs and others (2013) 8 SCC 131***, thus, urges this Court for setting aside the judgment and decree passed by the lower Appellate Court by formulating the substantial questions of law as drawn in the memorandum of appeal.

Per contra, Mr. Puneet Bali, learned Senior Counsel assisted by Mr. Vaibhav Jain, Advocate and Mr. Paramveer Singh, Advocate for respondent No.1 and Mr. Gunjan Rishi, Advocate for respondent No.3 arduously argued that the judgment and decree passed by the lower Appellate Court being last court of fact and law is perfectly in consonance with the provisions of Section 16(1)(c) of the Specific Relief Act, 1963, for, meeting of the plaintiff with defendant No.1 for handing over of the cheque on 03.02.1994 has unequivocally surfaced in the cross-examination of appellant-DW4. In fact, the respondent-plaintiff had prepared cheque of ₹2 lacs for payment on 03.02.1994 but the defendant No.1 insisted for payment in cash. In this backdrop of the matter, ₹2 lacs were paid in cash to defendant No.1 on 06.02.1994. The aforementioned receipt, Ex.P4, has been witnessed by same very witnesses i.e. Vivek Arora and Rajesh Kumar Gupta, who were witnesses of the agreemet to sell.

He further submitted that the aforementioned witnesses were consistent and coherent despite extenstive cross-examination. The alleged legal notice dated 24.03.1995, Ex.PX, allegedly sent through Registered AD leads to irresistible conclusion that the appellant-defendant No.1 admitted the execution of the agreement to sell, much less, did not deny the receipt of ₹2 lacs in cash on 06.02.1994. There is no reference in the aforementioned notice with regard to the legal notice dated 09.02.1994, Ex.DW4/1. Had it been so, there would have been specific reply with regard to the denial of the receipt. In fact, the said notice had been prepared later on as an afterthought, as an ante dated document. Such Registered AD has not been proved as no witness from the office of the concerned office has appeared.

Exs.PW2/1, PW2/2, PW2/3, PW2/4 and PW2/5 are the standing instructions to the Manager, Karur Vysya Bank Ltd. by various sister concerns of the respondent-plaintiff regarding the payment of the balance sale consideration and Ex.PW2/5 is a certificate by Karur Vysya Bank Ltd. whereby the ledger of the aforementioned Bank showed that the respondent-plaintiff had sufficient amount in their account, which has been proved on record as Ex.PW2/6 to PW2/47. Even the preparation of the draft of ₹4.50 lacs on 22.10.1994 in favour of M/s Salient Craft and ₹40,000/- on 09.09.1994 in favour of HSIDC had been proved vide Ex.PW2/48 and Ex.PW2/49 respectively.

The stand of the appellant-defendant No.1 has been falsified from the reading of cross-examination of appellant-defendant No.1 who appeared as DW4, as she admitted that Vivek Arora had come to his house within a week for payment of first and second installment. Thus, the story of the respondent-plaintiff qua approaching the appellant-defendant No.1 with cheque of ₹2 lacs on 03.02.1994 has been proved/believed. Clause 9 of the agreement to sell that in case the vendor fails to perform the part of the agreement, the plaintiff would be entitled to liquidated damages, is against the settled proposition of law laid down by the Hon'ble Supreme Court in ***P. D'Souza Vs. Shondrilo Naidu (2004) 6 SCC 649***.

Both the witnesses have proved the agreement to sell, much less, the receipts dated 28.01.1994 and 06.02.1994. The handwriting expert, DW1, Somnath Aggarwal is a Diploma Holder. He has not obtained any licence from the Government, rightly so, his report has been declined. Assuming for the arguments sake, though not admitted, the report could be looked into, he has admitted that he has not taken specimen signaures of defendant No.2 for comparison in receipt Ex.P2, thus, urges this Court for confirming the finding rendered by the lower Appellate Court by dismissing the appeal. In support of his contentions, he relied upon judgments of Hon'ble Supreme Court in ***Saradamani Kandappan Vs. S. Rajalakshmi and others (2011) 12 SCC 18; Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah (1998) 3 SCC 331*** and ***Ceean International Private Limited***

Vs. Ashok Surana and another passed in FA No.13 and 14 of 2000 decided on 27.08.2002.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Mittal, learned Senior Counsel, for, the cumulative reading of the facts as brought to the notice of this Court through the luminated arguments by counsel representating the respective parties, it is discernible that the agreement to sell is admitted. The main question to be decided is whether defendant No.2, husband of appellant-defendant No.1, was authorized to receive sum of ₹2 lacs. Whether it tantamounts to adherence to the terms and conditions of the agreement to sell or not, for, as the agreement to sell, according to the appellant-defendant No.1, envisage the receipt of ₹2 lacs on 03.02.1994 whereas the sum of ₹2 lacs in cash has been received by defendant No.2, which has been proved through testimony of Vivek Arora and Raj Kumar Gupta, PW1 and PW3. Raj Kumar Gupta had candidly admitted the agreement to sell, much less, receipt bearing his signatures and that of Vivek Arora. Both witnesses were extensively cross-examined but nothing contrary surfaced. The appellant-defendant No.1 in cross-examination admitted that she had not submitted any application to HSIDC seeking transfer in favour of respondent-plaintiff, much less, has not even cleared outstanding due.

It is a matter of record that earlier the plot was allotted to Mr. M.S. Dhillon, who had transferred it to defendant No.3 and defendant No.1 had got it transferred in her name by execution of the document dated 16.08.1989 for total sale consideration of ₹2,61,000/-.

The handwriting exeprt, DW1, has not taken any licence from the Government. He also admitted that he had not taken specimen signature either in the presence of the opposite party or in the presence of the court.

In my view, the appellant-defendant No.1 has failed to dispel the contents of the receipt, Ex.P4 whereby the respondent-plaintiff stated to have discharged their obligation i.e the terms and conditions of the agreement to sell.

The payment of earnest money of ₹50,000/- and another sum of ₹2,50,000/- on 28.01.1994 has not been denied by the appellant. The story concocted by the defendant was that in fact the total price was not ₹25.50 lacs but ₹34.50 lacs as the plaintiff had agreed to pay the extra cost for the construction but the fact remains that the agreement to sell contains the payment of plot and the construction raised thereon. The aforementioned story is totally alien to the terms and conditions of the agreemet to sell.

The notice Ex.DW4/1 dated 09.02.1994 has not been proved on record as no evidence from the office of the concerned office acknowledging to have sent UPC has been proved, thus, the aforementioned notice apparently appears to be an afterthought. The appellant stated to have replied the legal notice dated 02.02.1995 (Ex.P5) and 28.02.1995 (Ex.P6) vide legal notice dated 24.03.1995, Ex.PX, whereby it has been stated that no copy of agreement to sell, much less, receipts is available with her and she did not execute any such document. For the sake of brevity, the contents of the reply are reproduced as under:-

"To 24.03.1995

M/s Tets N Rai International,
C-46/5, Okhla Industrial Area, Phase-II,
New Delhi through its proprietor Mrs. Ritu Arora

Registered AD

Sub: Legal Notice

Madam,

We have been instructed by our client Smt. Manju Sehgal wife of Shri Parmod Sehgal, resident of House No.B-79, Defence Colony, New Delhi to write to you as under:-

1- That our client referred to above, acknowledge the receipt of your notice dated 28.02.1995 casued to be served by you through Shri Surinder K. Rao, Advocate, Gurgaon but repudiates vehemently the contents contained therein to be incorrect.

2- That no copy of the alleged agreement of sale dated 24.01.1994, alleged receipt in the sum of Rs.2,50,000/- dated 28.01.1994 and Rs.2,00,000/- dated 06.02.1994 said to have been executed by our above said client are available with her therefore, no proper reply can be given in the absence of these documents. Our client did not execute any such document.

It is, therefore, earnestly requested that copies of the above said alleged agreement dated 24.01.1994, alleged receipts of Rs.2,50,000/- dated 28.01.1994 and Rs.2,00,000/- dated 06.02.1994 may please be supplied so as to enable our client to give proper reply to the said notice. This letter is being written without prejudice to the rights of our client referred to above in any manner and she reserves her right to give proper reply on the receipt of above said copies.

Thanking you,

Yours faithfully,
sd-
(Krishan Lal Dang)
Manmohan Krishan Dang
Jagmohan Krishan Dang
Advocates"

DW-4, Manju Saigal has been candid enough to say in the cross-examination that she had not moved any application to HSIDC to clear the outstanding dues, which itself, in my view, is sufficient to form an opinion that time was the essence of the contract of sale. The respondent-plaintiff, on the other hand, has proved preparation of draft of ₹40,000/- and

₹4,50,000/- in favour of defendant No.1, copies of which have been proved on record. It has also come on evidence that YRV International and other sister concerns of the respondent-plaintiff had given standing instructions to their Bank with regard to honour of cheques in the month of March, 1993. The said instructions are still in force. Even ledger account has been proved on record as Ex.PW2/6 to PW2/47. In my view, the respondent-plaintiff has been able to prove that they were always ready and willing to perform their part of agreement to sell.

The trial Court had assigned no reasons to decline the discretionary relief and the finding rendered, in my view, was/is erroneous and perverse, rightly so, the lower Appellate Court reversed the same.

As per the ratio decidendi culled out from the judgment of Hon'ble Supreme Court in ***Man Kaur's case*** (supra), it has been held that where husband appeared in place of wife who had knowledge of the contract can always depose with regard to the terms and conditions of the agreement to sell. In the present case, PW-1, Vivek Arora has put in appearance who was in knowledge of the aforementioned facts as he was witness to the agreement to sell and therefore, the argument of Mr. Mittal, learned Senior Counsel that the appellant-defendant No.1 had been deprived of cross-examination of the plaintiff-respondent is totally misplaced.

In my view, the ratio decidendi culled out in the judgment referred to above by Mr. Mittal is not applicable to the facts and circumstances of the present case whereas the cumulative reading of the aforementioned documentary evdience leads to irresistible conclusion that the respondent-plaintiff had always been ready and willing to perform their part of the contract, rightly so, the discretionary relief under Section 20 of the Specific Relief Act, 1963 has been granted.

There is also no force in the argument of Mr. Mittal regarding giving up defendant No.2 from the array of defendants. If at all, the defendant No.2 had not executed the receipt Ex.P4, he would have been audacious enough to appear in the witness as defendant's witness. He was afraid that truth may not be surfaced if he was subjected to cross-examination. Rightly so, the adverse inference was/is liable to be drawn against the appellant-defendant.

However, there is some force in the submission of Mr. Mittal as per judgment of Hon'ble Supreme Court in ***Satya Jain's case*** (supra) that much time has elapsed as in the year 1994, the parties had set their hands together to sell/purchase the plot measuring 1000 sq. mtrs. for a sum of ₹25.50 lacs. I am of the view that once the respondent-plaintiff has been made entitled to discretionary relief of specific performance, the appellant-defendant No.1 is also entitled to be compensated in terms of money owing to the prolonged litigation and therefore, over and above the amount already received and over and above the amount already agreed upon, I will direct the respondent-plaintiff to pay a sum of ₹25 lacs to be paid as compensation to the appellant-defendant No.1.

Accordingly, the judgment and decree of the lower Appellate Court is upheld with the aforementioned additional compensation which is orderd to be made a part of the decree, in essence, the suit of the respondent-plaintiff is decreed with the aforementioned modification. The respondent-plaintiff are directed to deposit the entire balance sale consideration plus ₹25 lacs as directed above within a period of four months from the date of receipt of certified copy of this judgment and they shall be entitled to seek execution and registration of the sale deed of the aforementioned plot. If the appellant-defendant is not ready to perform their part of contract, the respondent-plaintiff shall be entitled to seek the execution in accordance with law by taking the aid of the Court in accordance with terms and conditions of the agreement to sell, in essence, shall complete and sign all applications, statements, affidavits etc. required for the purpose of transfer of said industrial plot/building in favour of respondent-plaintiff-vendee or its nominees.

For the foregoing reasons, the judgment and decree of the lower Appellate Court is upheld but with the above modification. Resultantly, the second appeal is dismissed.

(AMIT RAWAL)
JUDGE

October20, 2016
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	No