IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.602 of 2010 (O&M)
Date of decision:10.11.2016

Rajinder Kumar and others ... Appellants

Vs.

Rajesh Kumar and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Dr. Surya Parkash, Advocate
for the appellants.

Mr. B.R.Gupta, Advocate
for the respondents.

AMIT RAWAL J.

The appellants/defendants No.1 and 3 to 6 are in Regular Second Appeal against the judgment and decree dated 19.01.2010 rendered by the Lower Appellate Court, whereby, suit of the respondent-plaintiff seeking specific performance of the agreement to sell dated 12.12.2006 against the vendor/defendant No.1, namely Rajinder Kumar, qua his share on receipt of balance sale consideration, has been decreed and the sale deed bearing No.1271/1 dated 13.02.2007 registered with the office of Sub Registrar, Ballah and mutation, have been declared illegal, null and void, invalid, ineffective, inoperative, with a further direction to the defendants not to change the nature of the suit land by way of sale, mortgage, charge, lien, gift or in any other manner.

Dr. Surya Parkash, learned counsel appearing on behalf of the appellant-defendants No.1 and 3 to 6 submits that the respondent-plaintiff had instituted a suit aforementioned, on the premise that defendant No.1 was recorded to be owner of land measuring 23 kanals 14 marlas being 474/3043 share out of total land measuring 152 kanals 3 marlas comprised in khewat No.544 – Min/524, Khatoni No.642, Rect. No.3, Killa No.12/2(3-12), 13(5-9), 18(8-0), 19(7-16), 20/1(0-19), 20/2/1(4-12), 13(5-9), 18(8-0), 19(7-16), 20/1(0-19), 20/2/1(4-12), 21/1(0-15), 21/2(4-4), 22(7-7), 23(7-7) khasra no.548 (0-9), kittas 11, khatoni no.643, rect. no.285, killa no.1(7-7), 9(8-0), 11(8-0), 12(6-4), 20(96-0), Rect. No.286, killa no.16/2(6-9), 25 Min (5-0), kittas 8, khatoni no.644, rect.no.285, killa no.2(7-70), 3(7-7), 4(7-7), 5(7-1), 6(2-16), 7(7-2), 13(2-13), 21(2-0), Rect. No.286, killa no.25 min (3-0), kittas 9, total kittas 28, situated at village Munak, Sub Tehsil Ballah, Tehsil Assandh, District Karnal, vide jamabandi for the year 2003-04.

He submits that defendant No.1 agreed to sell land measuring 23 kanals, i.e., 460/3043 share out of total land measuring 152 kanals 3 marlas as described above, vide aforementioned agreement to sell in favour of the plaintiff and defendant No.2 in equal shares @ ₹ 9.00 lacs per acre by receiving a sum of ₹ 8.00 lacs as earnest money and rest of the amount was to be paid by the plaintiff and defendant No.2 in equal share to the vendor/defendant No.1 at the time of execution and registration of the sale deed. The total sale consideration of the aforementioned property was fixed as ₹25,87,500/- The stipulated date for execution and registration of the sale deed was fixed as 14.02.2007. As per the agreement to sell, it was also agreed between the parties that plaintiff and defendant No.2 would be entitled to get the requisite sale deed either in their name or in the name of nominee.

As per the pleadings culled out in paragraph 4 of the plaint, the agreement to sell was scribed by the deed writer – Mahabir Gupta at Tehsil premises Gharaunda at the instance of appellant/defendant No.1 and plaintiff and defendant No.2/co-vendor had put his thumb impression on the said agreement to sell in the presence of the witnesses and the entry to this effect was also made in the register of deed writer and defendant No.1 also put his thumb impression in the register of the deed writer. The original agreement to sell was stated to be in possession of defendant No.2 – Sheela Devi.

The respondent-plaintiff further averred that between 12.12.2006 to 14.02.2007, the plaintiff had been approaching defendant No.1 for the purpose of performing his part of contract and ultimately, a registered notice dated 05.02.2007 was sent through counsel to defendant No.1 calling upon him to come present in the office of Sub Registrar, Ballah on 14.02.2007 for getting the sale deed executed and registered in favour of the plaintiff to the extent of his share.

He further submitted that the trial Court, on the basis of the oral and documentary evidence, dismissed the suit but the Lower Appellate Court has committed illegality and perversity in decreeing the suit as the alleged witnesses were Sukhpal Singh and Rajinder Kumar and the Scribe was Mahavir Gupta.

The Lower Appellate Court erred in allowing the suit as the same was not maintainable in view of Section 12 of the Specific Relief Act, 1963 (hereinafter referred to as "1963 Act") as the prayer made in the suit is with regard to part performance of the agreement to sell Ex.P1 which is regarding 23 kanals of land, whereas, the decree has been sought for only 11 kanals 10 marlas of land.

The Lower Appellate Court has exceeded its jurisdiction in declaring the sale deed for the land measuring 23 kanals 14 marlas as null and void. The pleading qua readiness and willingness to pay complete sale consideration was lacking as the plaintiff assessed the value of the suit land being half share of the total amount of the sale consideration, i.e., ₹12,93,750/-, whereas, a categoric stand of defendant No.1 had been that the suit was not maintainable. Even the original agreement to sell was in the possession of appellant-defendant No.1.

He further submitted that in fact, the earnest money was not passed on, thus, in this background of the matter, original agreement to sell remained in the custody of appellant/defendant No.1, otherwise, original agreement is always with the vendee. The deal was cancelled as the earnest money was never paid by the plaintiff or defendant No.2. On behalf of defendants No.3 to 6, he submitted that they are the *bonafide* purchasers of the suit property for a valuable sale consideration and had made a reasonable enquiry before entering into sale deed bearing No.1271/1 dated

13.02.2007. PW3 – Sukhpal Singh is none-else but real uncle of the plaintiff and marginal witness, who, in cross-examination, admitted that Sheela Devi (second vendor/defendant No2) was not present at the time of execution of the agreement to sell.

He further submitted that on perusal of the cross examination of PW2 - Rajesh Kumar- plaintiff, it transpired that agreement to sell was entered into between the parties on 10.12.2006, i.e., prior to the writing of the agreement at the shop of Jai Bhagwan, where he paid ₹4,00,000/- and the remaining ₹4,00,000/- was paid by Sheela Devi and she was not present at that time. The respondent-plaintiff had earlier filed a suit for permanent injunction, though the same was got dismissed as withdrawn, vide order dated 20.02.2007, Ex.P11. Thus, the present suit for specific performance was not maintainable.

In support of aforementioned contention, relied upon the ratio decidendi culled out by the Hon'ble Full Bench of this Court rendered in ***Rakesh Kumar vs. Sat Pal 1986 PLJ 515*** and as well as by the Hon'ble Supreme Court in ***Shanker Singh vs. Narinder Singh and others 2014(16) Supreme Court Cases 662*** to contend that where the land is incapable of segregation in two parts, in essence, not being ascertainable as to which portion is/was to be retained and in those circumstances, the specific performance of that part cannot be performed and urged this Court for setting aside the judgment and decree rendered by the Lower Appellate Court.

Per contra, Mr. B.R.Gupta, learned counsel appearing on behalf of the respondent-vendor submits that the provisions of Section 12 (1) of 1963 Act, emphatically and vehemently relied upon, would not apply to the facts and circumstances of the case as the respondent-plaintiff only sought specific performance of his share which is permissible, in view of the ratio decidendi culled out by the Hon'ble Supreme Court in ***Sardar Singh vs. Krishna Devi 1994 (2) RRC 391,*** in essence, the discretion granted is not arbitrary but based upon sound and reasonable grounds guided by judicial principles as culled out in Section 20 of 1963 Act, in essence, his submission was that part of the contract taken by itself can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed. The Court has ample power to direct the specific performance of the former part as per the provisions of Section 12(4) of 1963 Act.

The Lower Appellate Court, being the last Court of fact and law, exercised obligation in appreciating and examination of each and every document placed on record after noticing the aforementioned fact, rightly decreed the suit. It has been proved on record that appellant/defendant No.1/vendor did not appear before the office of Sub- Registrar for execution and registration of the sale deed, rather a day before, had executed the sale deed in favour of defendants No.3 to 6.

He further submitted that the statements of the attesting witnesses had been coherent and consistent. Even if Sheela Devi did not come forward for execution and registration of the sale deed, much less not appended the signatures on the agreement to sell, as per the prayer in the suit was for seeking specific performance of ½ of the property and not of the full, i.e., by taking into consideration the land measuring, 11 kanals 10 marlas and not of 23 marlas and thus, urges this Court for affirming the findings under challenge.

I have heard learned counsel for the parties and appraised the judgments and decrees of the Courts below.

Dr. Surya Parkash, during the course of arguments, has relied upon the provisions of Section 12 of 1963 Act. It would be apt to reproduce the same which read thus:-

> *"12. Specific performance of part of contract.—*
>
> *(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.*
>
> *(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.*
>
> *(3) Where a party to a contract is unable to perform the whole*

of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), 1[pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance."

He specifically emphasized upon the provisions of Section 12(2 and 3) of 1963 Act to contend that when a party to a contract is unable to perform the whole of his part, but the part which is left unperformed by only a small proportion to the whole in value and admits of compensation, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency but where a party to contract is unable to perform the whole or part of his contract, and the part which must be left unperformed either forms a considerable part of the whole, though admitting of compensation does not admit of compensation in money, not entitled to obtain a decree for specific performance and the Court has two options to direct the party in default, either to pay the agreed consideration for the whole of the contract reduced by the consideration for the party which must be left unperformed or had been paid or in the alternative, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

The crux falling out from the arguments of Dr. Surya Parkash is that since Sheela Devi did not come forward to seek specific performance of the remaining part of her share being a co-vendee, the agreement to sell remained unperformed and the only remedy was to pay the amount of compensation. In my view, the same is totally misplaced, for, the respondent-plaintiff had been able to prove the execution of the agreement to sell through the testimony of attesting witness – Sukhpal Singh, much less the payment of earnest money. Appellant-defendant No.1/vendor had not been able to belie his signatures on the agreement to sell. In fact, as per the stand taken in the written statement, agreement to sell has been admitted.

The only question which has now to be taken into consideration is whether the Lower Appellate Court had rightly granted the discretionary relief under Section 20 of 1963 Act or not. The answer is in "Positive", for, the appellants have not been able to lead any evidence regarding non-payment of earnest money. Had it been so, the defendants were served with legal notice which remained un-replied. The readiness and willingness stood proved through the affidavit, Ex.P4, whereby, the respondent-plaintiff had shown willingness to get the sale deed executed. This fact has not been considered by the trial Court. The selling of the land to the subsequent vendees, i.e., defendants No.3 to 6 is nothing but a *mala fide* on behalf of the vendor. Once he had already parted with the ownership of land owing to the sale deed dated 13.02.2007, had not appeared before the office of Sub Registrar for execution and registration of the sale deed on the stipulated date leads to irresistible conclusion that vendor had already committed a breach. The payment of the earnest money stood proved by ocular, as well as documentary evidence led by the respondent-plaintiff. The production of the original agreement from the custody of the vendor is immaterial. Had it been so, nothing prevented the appellants to reply the legal notice indicating all the facts as stated for the first time in the written statement.

The ratio decidendi culled out in the judgments cited supra by Dr. Parkash would not apply as the property is identifiable. The Court below has only directed for sale of the land qua plaintiff's share, i.e., half from the total one, i.e., 11 kanals 10 marlas out of 23 kanals, though the agreement to sell is of 23 kanals.

I am of the view that the respondent-plaintiff has rightly been granted discretionary relief under Section 20 of 1963 Act but the fact remains that Lower Appellate Court ought not to have set aside the entire sale deed.

Since the respondent-plaintiff had sought the specific performance of the agreement to sell to the extent of land measuring 11 kanals 10 marlas, I am of the view that the judgment and decree of the Lower Appellate Court setting aside the sale deed of the entire land measuring 23 kanals is not sustainable. The decree is, thus, liable to be set aside only in respect of sale deed dated 13.02.2007 and upheld in respect of the land measuring 11 kanals 10 marlas. Accordingly, aforementioned modification is made in the judgment and decree of the Lower Appellate Court and rest of the findings being based upon the appreciation of oral and documentary evidence are upheld.

For the foregoing reasons, I do not intend to differ with the findings rendered by the Lower Appellate Court which are based upon the appreciation of oral and documentary evidence, much less, no substantial question of law arises for adjudication of the present appeal.

Accordingly, the Regular Second Appeal, in the aforementioned terms stands disposed of.

(AMIT RAWAL)
JUDGE

November 10, 2016
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No