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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-437-2011 (O&M)
Date of decision : 17.10.2016

Usha Rani

... Appellant

Versus

Gura Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rajinder Singh Aulakh, Advocate for the appellant.

Mr. Sahil Khunger, Advocate for the respondents.

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AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the judgment and decree of the lower Appellate Court, whereby his suit seeking specific performance of the agreement to sell dated 27.06.2002 in respect of the suit property against the payment of earnest money of ₹ 2,80,000/- agreed to be sold for a total consideration of ₹ 2,99,622/- has been dismissed, in essence, the judgment and decree of the trial Court has been set aside.

Mr. Rajinder Singh Aulakh, learned counsel appearing on behalf of the appellant-plaintiff submits that the respondent(s)-defendant(s) in the cross-examination admitted his signatures on the agreement to sell and this fact is also noticed by the lower Appellate Court, but the lower Appellate Court has gone in the arena of conjectures and surmises in holding that it was a loan transaction on the premise that no explanation has come forth for keeping the matter hanging for 1½ year as 95% of the sale consideration had been parted. He submits that such finding is totally alien to the pleading of the parties to the *lis*, much less, contradictory to the observations in the previous paragraphs of the judgment. The lower Appellate Court though mentioned about the fact that the defendant(s) has not been able to belie his signatures on the agreement to sell, much less, its execution, yet declined to grant the discretionary relief. Non-appearance of the appellant-plaintiff, namely, Usha Rani, in such circumstances, would not be fatal, thus, urges this Court for setting aside the judgment and decree under challenge.

Mr. Sahil Khunger, learned counsel appearing on behalf of the respondent(s)-defendant(s) submits that the defendant(s) has been prevented to ask specific questions to the signatory of the agreement to sell, though, the same was emphatically denied and the attorney-holder was not from the near relation i.e. father, son or husband, but a different person, namely, Mukhtiar Singh and therefore, the *ratio decidendi* culled out by the Hon'ble Supreme Court in ***"Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd." 2005 (1) RCR (Civil) 240*** and as well as in ***"Man Kaur (dead) by LRs V/s Hartar Singh Sangha" 2010(4) SCC (Civil) 239***, squarely applies to the facts and circumstances of the case. The admission in the agreement to sell cannot construe or read against his client, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a force and substance in the submissions of Mr. R.S. Aulakh, for, once, the lower Appellate Court has given the following observations in paragraph 11:-

"11 Having gone through the rival contentions of the parties, I

have come to the conclusion that so far as payment of ₹ 2,80,000/- as earnest money out of the total sale consideration of ₹ 2,99,622/- is concerned, the same has been proved on the file. There is no material on the file which can be said to be sufficient enough to hold that the agreement to sell or extension thereof does not have the signatures of the appellant/defendant No.1. The only intention has to be seen now by the court as to if the appellant/defendant No.1 was having the intention to sell the suit property or not. In this regard if we go through the statement of appellant/defendant No.1 which he recorded as DW1 in his examination-in-chief he has totally denied the execution of the agreement to sell and has alleged that the same is the result of forgery and false preparation with the connivance of attesting witnesses as well as Scribe. Now coming to the cross-examination of Gura Singh, in the opening lines of his cross-examination he has admitted his signatures on Ex.P2, agreement to sell and he has further admitted to be correct that he got an agreement written in favour of plaintiff/respondent No.1 Usha Rani. Although in the subsequent lines he has stated that he did not execute the agreement for alienation of the suit property, though so far as agreement to sell is concerned, the same bears the signatures of the appellant/defendant No.1 and the same has been admitted by him on more than one occasion. If in this regard intention part of the appellant/defendant No.1 is considered, he has failed to prove if the agreement to sell was not executed by him or in such and such manner the same is the result of fraud or mis-representation. Unless and until specifically contents of the fraud or fabrication are proved allegations cannot be said to be attracted and those just appear to have been planted in order to avoid the result of document in question".

in my view, the lower Appellate Court could not have embarked upon a path to interpret whether it was a loan transaction or not?

i.e. the intention behind the execution of the documents. Assuming for an argument sake, though not admitting that agreement to sell was a loan transaction, no documentary, oral or corroborative evidence has been brought on record for repayment of the same. Once, the agreement to sell has been admitted, in my view, the respondent(s)-defendant(s) cannot take the benefit of the *ratio decidendi* culled out by the Hon'ble Supreme Court in the judgments cited supra. The position would have been different had there been a complete denial despite strenuous cross-examination. This aspect has totally not been noticed by the lower Appellate Court, thus in my view, there is a gross illegality and perversity.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in ***"Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213***", wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***"Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others" 2001(4) SCC 262***, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in ***"Pankajakshi 's case*** (supra) reads thus:-

> *"Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled." [at paras 27 - 29]"*
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> *27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in*

force."

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the foregoing reasons, judgment and decree of the lower Appellate Court is hereby set aside and that of the trial Court is restored.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

17.10.2016
Yogesh Sharma

Whether speaking/reasoned	**Yes/** ✓	**No**
Whether Reportable	**Yes/**	**No** ✓