101

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA-4660-2011 (O&M)
Date of decision : 03.10.2016**

Paramjit Singh Gill

... Appellant

Versus

Haryana Financial Corporation and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Sharma, Advocate
for the appellant.

Mr. Kamal Sehgal, Advocate
for the respondents.

****

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the dismissal of the suit seeking declaration, mandatory injunction and permanent injunction i.e. letters dated 09.01.2001 & 03.03.2001 issued by defendant No.1 and letters dated 16.04.2001 & 20.03.2001 issued by defendant No.2 i.e. Branch Manager, Haryana Financial Corporation (for short 'HFC') being illegal and beyond the provisions of the law, has been dismissed by the lower Appellate Court, in essence, the judgment and decree of the trial Court decreeing the suit has been set aside.

Mr. Arun Sharma, learned counsel appearing on behalf of the appellant-plaintiff submits that the land, building, machinery and raw material as on 17.03.1998 lying in the premises of M/s Tamal Chemicals was inspected by the plaintiff in the presence of the officials of the defendant(s) as the aforementioned building was put to auction by way of an advertisement caused in Daily News paper dated 21.02.1998 as M/s Tamal Chemicals granted loan of ₹ 60 Lacs by HFC defaulted in making the payment and the possession thereof was taken on 02.07.1996. In the month of April 1998, when the Unit was in possession of the HFC, a theft took place and in this regard, an FIR bearing No.106 dated 12.04.1998 was lodged on the basis of the statement of the security guard. On 25.06.1998, an agreement to sell was executed between HFC and the appellant-plaintiff. The factum of the theft was brought to the notice of the officials of the respondents as the loss according to the appellant-plaintiff was running into lacs of rupees and payment made upto September 1998 i.e. ₹ 9.50 Lacs to credit the same towards the sole price of the property. The appellant-plaintiff constituted a company under the name and style of M/s Panchkula Chemicals on 14.07.1998 and continued to make the payment through installments till 2000, including the alleged benefit of ₹ 62,000/-. Against the loss of ₹ 9.50 Lacs, a sum of ₹ 12,38,646.00 approximately had been paid. The defendant(s) remained silent over the matter and kept on lingering the matter for one reason or the other. The defendant(s) without taking into consideration the factum of adjustment and disbursement, issued a letter on 09.01.2001 calling upon the plaintiff to pay a sum of ₹ 8.26 Lacs and subsequently a sum of ₹ 12.17 Lacs towards the balance payment and failing which, threatened to take the possession of the unit vide letter dated 02.03.2001 and 20.03.2001. The defendant(s) illegally had taken the possession of the Unit, though, the appellant-plaintiff had paid the payment of major portion and did not reimburse the sum of ₹ 2.50 Lacs for raw material ₹ 9.50 of the value of the stolen machinery and it is, in this background of the matter, the suit aforementioned was filed.

He further submits that there was an interim injunction dated 11.12.2001 restraining the respondent(s) from further selling, alienating, mortgaging or giving the vacant possession, but yet allotted to some third person. The Corporation could not have invoked the power under Section 29 of the State Financial Corporation Act, 1951 (for short 'the 1951 Act') as the said provisions do not apply to the auction purchaser, much less, applies to the industrial concern which stood mortgaged. Clause 4 (x) of the agreement to sell is void as qua the right of the appellant, it could not have been enforced. The calculations of the defendant(s) to the tune of ₹ 62,000/- towards the loss of raw material and machinery was not in accordance with law viz-a-viz the actual theft. The appellant-plaintiff was liable to be granted permanent injunction as valuable right had accrued in his favour on the basis of the acceptance of the auction bid and any transfer made by the respondent(s) during the course of the proceedings to be declared null and void, much less, illegal as the said auction was/is against the *doctrine akin* to *'Lis Pendens'*. The trial Court decreed the suit by declaring the letters to be null and void and beyond the provisions of the law and the defendant(s) were directed to restore the physical possession of the unit on deposit of the due amount till the date without any penal interest, further restrained the defendant(s) from selling, mortgaging and giving the vacant possession to any person except the plaintiff, but the lower Appellate court has committed illegality and perversity in setting aside the well-reasoned judgment and decree holding that the suit for declaration, mandatory and as well as the permanent injunction was not maintainable, thus, urges this Court for setting aside the findings under challenge.

Per contra, Mr. Kamal Sehgal, learned counsel appearing on behalf of the respondent(s)-defendant(s) submits that the appellant-plaintiff despite having taking the possession and started the unit, did not deposit the auction amount of ₹ 18 Lacs instead of only deposited ₹ 11,18,245/- upto march 2001 and accordingly, HFC-defendant issued notices to take back the physical possession of the unit. On 20.03.2001, the physical possession of the unit was taken back from the plaintiff and was handed over to the security agency. No doubt, on 25.03.2001 the theft took place and at that relevant time, it in possession was of the security agency. An FIR was also lodged and thereafter, the Corporation recovered sum of ₹ 1,21,500/- from the security agency. The stay granted during the pendency of the suit, was not defied, but the fact remains that the contempt proceeding initiated was disposed of by taking into consideration the reply of the defendant-Corporation that the speaking order would be passed after affording the opportunity of hearing to the appellant-plaintiff. Accordingly, the appellant-plaintiff vide registered letters dated 26.02.2002 and 19.03.2002 was called for discussion and personal hearing, but did not come present, but appeared on 22.03.2002. Proper hearing was given and vide order 27.03.2002, representation was rejected. On 03.11.2003 after passing of the speaking order, the property was further sold to one Mahesh Arora for a sum of ₹ 9.15 Lacs. The appellant-plaintiff filed another suit on 12.01.2004, bearing No.45 of 2004 against the Corporation claiming damages to the tune of ₹ 2,82,16,017/- for loss of machinery and raw material. The suit was dismissed in default by the trial Court on 01.10.2011 On 18.05.2007, the sale deed had been executed in favour of the subsequent purchaser. The lower Appellate Court has rightly set aside the judgment and decree of the trial Court holding that the suit was not maintainable, 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 no force and merit in the submission of Mr. Arun Sharma, as the letter dated 09.01.2001 (Ex.P-7) clearly indicated that in case, the plaintiff did not clear the balance amount, the Corporation would be constrained to take action under Section 29 of the 1951 Act. However, vide letter dated 02.03.2001 (Ex.P-7/A), the amount deposited by the plaintiff was forfeited and it was decided to take over the possession. In my view, the appellant-plaintiff ought not to have insisted for adjustment of the amount according to his own calculations, rather should have shown *bona fide* in depositing the balance amount without prejudice to right to claim the set off after settling with HFC regarding of the alleged loss of machinery and articles in manner, breached Clause (iv) of the Agreement to Sell which rather reads such as under:-

> *"In the event of purchaser failing to make the balance payment of ₹ 13,50,000/- and the interest as mentioned above to the seller within the said stipulated period, the agreement shall cease to have effect and the purchaser shall be liable to deliver back the possession of the property to the corporation and will not be entitled to refund of any part of money paid by him which shall stand forfeited."*

The appellant-plaintiff was aware of this fact. He should not have so stubborn insisting the Corporation for calculating the loss as per his own calculations, the matter could have been settled separately and the payment of rest amount should not have been connected. The most important fact in this case is that the first theft had taken place on 12.04.1998, whereas the agreement to sell was entered into on 25.06.1998, if it was so, the plaintiff ought not to have entered into same, rather insisted for return of the amount, which though he asked, but after entering into agreement, in my view, acquiesced the aforementioned opportunity. The terms and conditions of the agreement to sell are sacrosanct. It is not the case that the appellant-plaintiff is illiterate and did not know consequential effect of non-compliance of the terms and conditions and after one month, started the unit. He was called upon to pay the balance amount as late as in the year 2001, but having failed, as noticed above, the possession was taken in the month of March 2001. All these facts reveal that there was clear cut breach of the terms and conditions of the agreement to sell. Selling of the property to a third party during the pendency of the suit, would not be hit by *'Lis Pendens'* as there was clear-cut direction by the trial Court i.e. in contempt proceeding initiated, for alleged violation of the interim order, to pass a speaking order, after giving opportunity of hearing. The speaking order was passed on 27.03.2002. The suit was filed in the year 2001. Nothing prevented the appellant-plaintiff to seek amendment of the suit and challenge the same. In fact, in my view, the suit of such nature was not maintainable. He should have sought specific performance of the agreement to sell as certain conditions according to the plaintiff appeared to have not been performed by the defendant(s). The *bond fide* of the plaintiff is lacking, rightly so, the lower Appellate Court has reversed the judgment and decree being the last Court of fact and law after appreciating the oral and documentary evidence.

For the foregoing reasons, I do not intend to differ with the findings rendered by the lower Appellate Court and in my view, are perfect, legal and in consonance with the settled proposition of law.

No ground is made for interference, much less, no substantial question of law arises for determination.

Accordingly, the appeal is dismissed.

(AMIT RAWAL)
JUDGE

03.10.2016
Yogesh Sharma

Whether speaking/reasoned **Yes/ No** ✓ (Yes)

Whether Reportable **Yes/ No** ✓ (No)