IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2145 of 2013(O&M)
DATE OF DECISION: September 23,2016

Darshan Singh

…Appellant

versus

Balbir Singh and another

…Respondents

RSA No.4554 of 2015 (O&M)
DATE OF DECISION: September 23,2016

Rachhpal Kaur and another

…Appellants

versus

Darshan Singh and others

…Respondents

CORAM:- HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr.Sumeet Mahajan, Senior Advocate with Mr.Amit Kohar, Advocate for the appellant (in RSA No.2145 of 2013) and for the respondent No.1. (in RSA No.4554 of 2015).
Mr.K.S.Boparai, Advocate for the appellant No.1 (in RSA No.4554 of 2015) and for the respondents (in RSA No.2145 of 2013).

AMIT RAWAL, J.

Common questions of law and fact are involved in these two appeals and they are being disposed of by this common judgment. The facts are extracted from RSA No.2145 of 2013.

The plaintiff is aggrieved of the non grant of discretion under Section 20 of the Specific Relief Act, rather has been held entitled to recover the earnest money along with interest.

Mr.Sumeet Mahajan, learned senior counsel assisted by Mr.Amit Kohar, Advocate appearing for the appellant submits that the parties had entered into an agreement to sell dated 2.2.1999 in respect of the suit land measuring 47 kanals 1 marla against the total sale consideration of Rs.3 lacs per acre. The earnest money of Rs.5,70,000/- was paid and the target date was 5.4.1999 which by way of endorsement was extended to 5.5.1999. The appellant-plaintiff appeared in the office of Sub Registrar to mark his presence but the defendants did not appear, yet filed suit.

In order to prove the execution of agreement, much less the passing of the earnest money, he examined Surender Pal Sood, the scribe and Bharat Bhushan, the marginal witness. The defendants had, in the written statement, tried to change the terms and conditions of the agreement by terming it to be for the purpose of security in respect of the land given for Dhaliwal Traders against which the plaintiff had filed a suit for recovery on the basis of Bahi entries in January 1999. Both the

Courts below declined to grant the discretionary relief and granted the alternative relief for Rs.5,70,000/- along with interest. He submits that under the provisions of sections 91 and 92 of the Evidence Act, 1872 in case the agreement to sell is a written agreement, then the parties are bound to follow the terms and conditions of that agreement. Reliance has been placed on the para 7 of the judgment rendered in Tamil Nadu Electricity Board and another v. N. Raju Reddiar and another (1996) 4 Supreme Court Cases 551 which reads as under:

> *"At the outset it must be borne in mind that the agreement between the parties was a written agreement and therefore the parties are bound by the terms and conditions of the agreement. Once a contract is reduced to writing, by operation of Section 91 of the Evidence Act, 1872 it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. Under Section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the contract. It is only when the written*

contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove the other conditions which also must not be inconsistent with the written contract. The case in hand has to be adjudged bearing in mind the aforesaid principles and the plaintiffs being conscious of this position along with the tender appended a letter and in that letter inserted certain terms by writing in ink to establish the case that the acceptance of the plaintiffs' tender would tantamount to the acceptance to the terms contained in the letter in which there was insertion in writing to the effect that it was on multi-slab basis. It is in this context the question whether such handwritten portion was originally there or was subsequently inserted assumes great significance. We are unable to accept the stand taken by the learned counsel for the respondents that there was no such issue on this question inasmuch as this question was considered by the learned trial Judge while discussing Issue 1 on the basis of evidence laid and the trial Judge had given a finding in favour of the plaintiffs. The said finding, however, on the face of it appears to us to be wholly unsustainable. As has *been stated earlier there was no signature either by the persons submitting the tender or by the persons receiving the same on the handwritten portion of the letter. The learned trial Judge had noticed that the certified copy which was issued by the Board on 11-7-1978 of the aforesaid letter clearly contains the handwritten portion and therefore he came to the conclusion that the handwritten portion was there at the time of submission of the tender. The tender itself was submitted on 12-7-1978 and we fail to understand how the Board could grant a certified copy of the letter on 11-7-1978 when the plaintiffs' case itself is that along with the tender he had appended the letter in question. On this ground alone it can be safely held that handwritten portion in Exhibit P-1 was not there at the time of submission of the tender but was subsequently inserted obviously with the connivance of the officers of the Board. The Board in its rejoinder-affidavit filed in this Court has stated that the attested copy was actually received on 28-12-1978, much later than the finalisation of the tenders and agreement and in order to build up a case the aforesaid interpolation has been made. In the facts and circumstances of the present case the* *aforesaid stand of the Board appears to us to be wholly justified and at any rate we have no hesitation to come to the conclusion that the handwritten portion in Exhibit P-l was not there initially and has been inserted subsequently. The main basis of the plaintiffs' case on which a multi-slab rate was claimed therefore fails. The written agreement between the parties nowhere indicates that the rate to be paid to the plaintiffs was on multi-slab basis and the terms and conditions of the written contract is not susceptible of such a construction*."

He submits that the contents of the agreement to sell cannot remotely be said that the parties had intended to enter into an agreement for the purpose of security, rather all the ingredients of the sale are present.

On the contrary, Mr.K.S.Boparai, learned counsel appearing on behalf of the defendant-respondents submits that vis-à-vis the grant of alternative relief, the Regular Second Appeal No.4554 of 2015 has been filed, though it is accompanied by applications for seeking of condonation of delay 633 days in filing the appeal and 155 days in refiling the appeal, the delay was not intentional and rather bonafide. He submits that the defendants had not executed any agreement to sell dated 2.2.1999 in respect of the suit land measuring 47 kanals

1 marla, rather the plaintiff advanced Rs.7 lacs to Dhaliwal Traders as loan and explained the intention of giving a security of the property in respect of the loan. There was no intention for the selling of the land. One of the witnesses of the agreement to sell showed ignorance with regard to passing of the earnest money.

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 Vs. 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 Vs. 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.

I have heard the learned counsel for the parties and am of the view that the terms and conditions of the agreement to sell dated 2.2.1999 cannot be changed, unless and until, the terms are unambiguous only then the oral evidence can be read. Both the witnesses, i.e., scribe and the attesting witness, have extensively been cross-examined and their evidence was/is found consistent. Once the agreement to sell was admitted by the parties, much less the advancement of the earnest money.

Now the question is whether the plaintiff was/is ready and willing to perform his part of contract.

The facts noticed above, after the expiry of the date of contract, within passing of the little days after the one month, the suit was filed, thus, in my view, the appellant-plaintiff has been always ready and willing to perform his part of contract in view of the law laid down in Sita Ram and others v. Radhey Shyam 2007(4) RCR (Civil) 533. All these factors have not been taken into consideration. In view of the provisions of Sections 91 and 92 of the Evidence Act, the judgments below are not liable to be sustained.

However, the agreement to sell is dated 2.2.1999, much less the price of the property at that time was too low, therefore, I think it appropriate that the defendants should have be compensated in terms of money over and above the price agreed by the parties. Accordingly, the judgments and decree of the Courts below to the extent of non grant of discretionary relief are set aside. The suit of the plaintiff is decreed in toto. The defendants are directed to execute the sale deed in favour of the plaintiff after receiving the balance sale consideration along with an amount of Rs.10 lacs as compensation within two months from the date of receipt of a certified copy of this order, failing which, the plaintiff-appellant is entitled to get execute the decree of possession through the Court. The decree sheet be drawn.

In view of the aforesaid discussion, the RSA No.2145 of 2013 is allowed, whereas, the RSA No.4554 of 2015 is dismissed. Since the main appeal bearing RSA No.4554 of 2015 is dismissed, I find no reason to condone the delay in filing and refiling the appeal and accordingly it is dismissed.

September 23,2016 (AMIT RAWAL)
KD JUDGE