IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.2803 of 2013 (O&M)
Date of decision:05.08.2016

Vijay Kumar ... Appellant

Vs.

Ashok Kumar Laroia and others ... Respondents

RSA No.4279 of 2013 (O&M)

Ashok Kumar Laroia ... Appellant

Vs.

Vijay Kumar and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Raj Kumar Gupta, Advocate
for the appellant (in RSA No.2803 of 2013) and
for respondent No.1 (in RSA No.4279 of 2013).

Mr. Aalok Jagga, Advocate
for the appellant (in RSA No.4279 of 2013) and
for respondent No.1 (in RSA No.2803 of 2013).

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second Appeals bearing No.2803 and 4279 of 2013.

RSA No.2803 of 2013 was filed at the instance of the plaintiff and RSA No.4279 of 2013 by the defendants as the trial Court decreed the suit of the plaintiff seeking specific performance of the agreement to sell dated 18.12.2003 in respect of plot No.1361, Sector 26, Panchkula agreed to be sold for a total sale consideration of Rs.6,09,000/- + Rs.91,000/- = Rs.7,00,000/- against the payment of Rs.91,000/-, whereas, Rs.21,000/- has been paid in cash and Rs.70,000/- paid by cheque no.123576 dated

17.12.2003. However in appeal, the Lower Appellate Court reversed the finding against the plaintiff qua exercise of discretion under Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as "1963 Act") and converted the suit for refund of earnest money along with interest @ 12% from the date of filing of the suit till its realization.

Mr.R.K.Gupta, learned counsel appearing on behalf of plaintiff - Vijay Kumar submits that the stipulated date for execution and registration of the sale deed was fixed 15.02.2004. The Lower Appellate Court has gone into the arena of conjectures and surmises by holding that the agreement to sell was not signed by plaintiff - Vijay Kumar, as he has signed on behalf of Govind Mohan. The defence taken by the defendants was that they got impression that Govind Mohan was Vijay Kumar. No doubt, on the stipulated date, as per the terms and conditions of the agreement to sell, as well as the provisions of HUDA bye-laws, the vendor was required to obtain NOC/submit an application for permission to transfer the plot by depositing the transfer fees. Since he did not deposit the same by the aforementioned date but applied on 16.04.2004 by depositing a sum of Rs.5,000/-, vide Ex.P9 and the application is dated 19.04.2004. Accordingly, the parties had agreed to execute and register the sale deed on 23.08.2004, but the defendants did not appear on the date fixed before the office of Sub Registrar Panchkula despite the fact that plaintiff had prepared a demand draft dated 23.08.2004 of balance amount of Rs.6,09,000/-, preceding to the stipulated date for execution and registration of the sale deed. The legal notice dated 03.08.2004 was sent. If at all, the defendants had any grievance with regard to the identity of Vijay Kumar, they could have easily rebutted in evidence by filing a written statement. The defence taken in the written statement was an after thought.

It is now well settled law that even the oral agreement to sell is valid in the law, even if the vendee has not signed the same which is admissible in evidence and can be seen for the purpose of intention of the parties.

In support of his aforementioned contention, he has relied upon the ratio decidendi culled out in judgment rendered by Hon'ble the Supreme Court in **Alka Bose vs. Parmatma Devi and others 2009(1) RCR(Civil) 450** and the judgment of this Court rendered in **RFA No.1504 of 1977 titled as Gian Singh and others vs. Smt. Devinderjit Kaur.**

He further submits that for grant of relief of specific performance, discretion cannot be denied on the premise that price of the plot has increased during the pendency of the litigation. The alternative relief can only be granted, had the plaintiff always not been ready and willing to perform his part of contract, much less, not diligently pursuing the litigation.

The plaintiff has examined himself as PW1 and Govind Mohan as PW2. The factum of execution of the agreement to sell has not been denied but only readiness and willingness had been challenged. The Lower Appellate Court has erroneously rendered the finding that Govind Mohan was not authorised to enter into agreement to sell on behalf of Vijay Kumar. The aforementioned finding is neither here and there as there is no reference to the examination-in-chief of Govind Mohan, wherein, it has been categorically stated that he had executed an agreement to sell on behalf of the plaintiff and so is the statement of the plaintiff. Even if there is no written authorisation, once both the persons have appeared, it is sufficient requirement of law. The matter would have been different, had Govind Mohan not been appeared in the witness box and sided with the defendants and thus, urges this Court for setting aside of the judgment and decree of the Lower Appellate Court by restoring the judgment and decree of the trial Court. He, thus, prays for formulating the following substantial questions of law which read thus:-

> *"i) Whether the plaintiff had been ready and willing throughout to perform his part of contract seeking specific performance of the agreement to sell as the suit was filed on 24.09.2004 preceding to service of legal notice dated 03.08.2004 (Ex.P3), to appear before the Registrar for execution and registration of the sale deed?*
>
> *ii) Whether the impugned judgment and decree passed by the learned First Appellate Court is illegal, without jurisdiction, perverse, result of misreading of evidence and is sustainable in the eyes of law?*
>
> *iii) Whether the judgment passed by the learned First Appellate Court without recording issue-wise findings and without considering and appreciating the pleadings, evidence, can be terms as a judgment under law within the requirement of Order 41 Rule 30-31 CPC?*

Mr. Aalok Jagga, learned counsel appearing on behalf of defendants submits that they have challenged the findings rendered by the

Lower Appellate Court vis-a-vis grant of alternative relief on the premise that the Lower Appellate Court has not considered while granting the relief of specific performance as it has gravely erred in not appreciating the fact that it was a benami transaction which is prohibited as per Benami Transactions (Prohibition) Act, 1988. It has already come in evidence that final payment was ready through a cheque dated 21.08.2004, Ex.P15 drawn by Sh.A Jain, from Bank of Baroda account, in essence, the amount was not belonging to the plaintiff. Even the payment of Rs.91,000/- has not been proved in accordance with law. Govind Mohan in cross examination admitted that he had no authority or 'General Power of Attorney' on behalf of Vijay Kumar. In fact, the defendants were made to believe that Govind Mohan was Vijay Kumar and on such impression submitted an application for seeking permission for transfer of the plot and realizing the aforementioned fact, the defendants did not appear before the Sub-Registrar for execution and registration of the sale deed for the aforementioned reasons. The defendants had agreed to sell the plot to Vijay Kumar. He has also relied upon the provision of Indian Evidence Act, 1872. The legal notice was never served upon the defendants and thus, urges this Court for setting aside of the judgment and decree of the Court below as alleged amount of earnest money stood forfeited.

In support of his aforementioned contentions, he has relied upon the following judgments of Hon'ble the Supreme Court and Madhya Pradesh High Court which read thus:-

1. **M.P.Mathour and others 2007 AIR (SC) 414;**

2. Manoj Beharilal Mathur and another vs. Dr.Shanti Mathur and others 1997 AIR (SC) 2153.

3. Jagdish Prasad Agarwal and another vs. Raj Kumar 2006 (3) R.C.R. (Civil) 394;

4) V.Shankaranarayana Rao (D) by LRs and others vs. Leelavathy (Dead) by LRs and others 2007(3) R.C.R.(Civil) 143.

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

The legal notice is dated 03.08.2004 (Ex.P3) and its postal receipts are Ex.P4 and Ex.P5. UPC receipt is Ex.P6. Affidavit of the plaintiff is of 23.08.2004. The certified copy of cheque of balance amount is Ex.P15. All these factors would leave no manner of doubt that the plaintiff had always been ready and willing to perform his part of contract. Govind Mohan has supported the case of the plaintiff-Vijay Kumar that he on his behalf had entered into agreement to sell which was made to understand by the defendants. It is the defendants, who have basically volte-faced from performing their agreement owing to increase in price at that relevant point of time as the prices were ascending in the year 2004 as previous act or submission of an application in HUDA for seeking permission of transfer of plot had shown that he had intention to perform his part of the contract. If at all the defendants had any grievance with regard to impersonation, nothing prevented them to cancel the agreement by registered notice and forfeit the amount, but owing to not performing such part of contract, it is irresistibly concluded that stand taken in the written statement is an after thought. Even the legal notice could have been rebutted when the defendants acquired the knowledge of alleged impersonation. The fact remains that defendants had received the earnest money of Rs.91, 000/- as noticed above which was split by way of cheque and cash and had admitted the execution of the agreement but only as benami transaction.

In my view, the defendants have failed to discharge the onus vis-a-vis the benami transaction. The defendants cannot raise the plea of money having been procured by the plaintiff from third person or by any other source as the agreement contained the clause that vendor is entitled to get the sale deed executed in anybody's name. In view of such situation, the plea of benami is neither here and there but had been taken for the sake of it. The Lower Appellate Court, in my view, has not examined the aforementioned fact, much less, the legal aspect. Even if the agreement to sell is not signed by a vendee, it is still enforceable. This view of mine is supported by the judgment rendered by the Hon'ble Supreme Court in Alka Bose's case (supra). The Hon'ble Supreme Court in Alka Bose had an occasion to examine the provisions of Sections 10 and 25 of Contract Act, 1872 and held that where an agreement to sell was signed by the vendor alone and delivered to the purchaser and accepted by the purchaser, it would be a valid contract. The same is the situation in the present case.

The judgments cited by Mr.Aalok Jagga, are vis-a-vis the benami transaction, there is no dispute with regard to aforementioned provisions. The benami transaction is an act of trust where the real owner is someone else and different name lender as already noticed not proved it. Owing to the aforementioned facts and circumstances of the present case as noticed above, I am of the view that the defendants have failed to prove on record that the agreement to sell was a benami transaction and thus, prohibited under Benami Transactions (Prohibition) Act. The Lower Appellate Court has not examined the aforementioned fact and had tried on one premise that Govind Mohan has no authorisation from Vijay Kumar to enter into agreement. In my view, he has to refer to his statement. The finding would have been justified, if Govind Mohan had not appeared. In my view, the plaintiff had been always found to be ready and willing to perform his part of contract and the discretion exercised under Section 20 of the Specific Relief Act, is fully justified.

For the foregoing reasons, the judgment and decree of the Lower Appellate Court qua refund of earnest money along with interest @ 12% is hereby set aside and that of the trial Court is restored.

Accordingly, RSA No.2803 is allowed and RSA No.4279 of 2013 is dismissed.

(AMIT RAWAL)
JUDGE

August 05, 2016
savita

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No