IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No.3206 of 2013 (O&M)
Date of Decision: October 24th, 2016

Manjit Singh

...Appellant

Versus

Baldev Singh & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Mr.Sunil Chadha, Senior Advocate with
Ms.Swati Verma, Advocate,
for the appellant.

Mr.K.S.Boparai, Advocate,
for respondent No.1.

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AMIT RAWAL, J.

CM No.8568-C of 2013

Prayer in the application is for making good the deficiency in the Court fees.

Allowed subject to just exceptions.

CM No.8569-C of 2013

For the reasons mentioned in the application, which is supported by an affidavit, delay of 439 days in re-filing the appeal is condoned.

CM stands disposed of.

RSA No.3206 of 2013

Appellant-defendant No.20 is aggrieved of the judgment and decree rendered by the Lower Appellate Court, whereby the suit of the respondent-plaintiff seeking specific performance of the agreement to sell dated 3.5.1995, had been decreed in toto, though the trial Court had granted the alternative relief of refund of earnest money.

Mr.Sunil Chadha, learned Senior Counsel assisted by Ms.Swati Verma, representing appellant-defendant No.20 submits that the Lower Appellate Court has committed illegality and perversity in decreeing the suit inasmuch as that execution of the agreement to sell was emphatically denied. It was specifically stated that the blank stamp papers bearing the signatures of the appellant-defendant had been used. In fact, the respondent-plaintiff had demolished his own case, for, the recital in the agreement to sell reveals that defendant No.1 had agreed to sell land measuring 16 kanals for a total sale consideration ₹5,00,000/- against the payment of earnest money of ₹1,45,000/- and another sum of ₹1,05,000/- paid on the extended date. The original target date was 29.10.1996, but on extension, it was extended to 2.5.1999 and on the date of extension, a sum of ₹1,05,000/- is stated to have been paid. Defendant No.1-vendor had sold the land to defendant No.20 vide sale deed dated 20.5.1997. Keeping in view this fact, the trial Court had granted the alternative relief, but the Lower Appellate Court committed illegality and perversity.

He further submits that the attesting witnesses to the agreement to sell have not been examined, thus, there is no compliance of the provisions of Section 68 of the Indian Evidence Act. PW-2 Avtar Singh is alleged to be a witness to the endorsement of extension. In fact, the respondent-plaintiff through the testimony of PW-1 Vijay Kumar, witness from the UCO Bank has demolished his own case as the specific stand of the defendant was that it was a loan transaction. The agreement to sell contained the recital of receipt of the entire earnest money and subsequent payment in cash, whereas on the same date, i.e., on the alleged date of execution of agreement to sell dated 3.5.1995, a sum of ₹75,000/- was paid by the respondent-plaintiff to defendant No.1 through cheque. No sane person after receiving ₹2,50,000/- would keep the agreement alive for a period of four years and such a long time leads to an irresistible conclusion that it was a loan transaction, though defendant No.20 is none else but the son of defendant No.1 and had categorically stated that it was a loan transaction, for, can take up all the pleas which a vendor can take and, thus, urges this Court for setting-aside the impugned judgment and decree and the same suffers from illegality and perversity.

Per-contra, Mr.K.S.Boparai, learned counsel for respondent No.1 submits that both the attesting witnesses had gone abroad as per the report given on the summons. The endorsement has been proved through the testimony of PW-2 Avtar Singh. The appellant-defendant No.20 in cross-examination stated that he came to know of the loan transaction from third person, who has not been examined. The original vendor, namely, Pal Singh died on 24.5.2003. He had appeared through his counsel and moved an application under Order 7 Rule 11 CPC for rejection of the plaint and thereafter was proceeded ex-parte. No steps have been taken by the defendants to bring on record his L.Rs. The discretion exercised by the Court is perfect, legal and justified. In support of his contention, has relied upon the judgment rendered by the Hon'ble Supreme Court in **Sushil K.Chakravarty (D) thr.LRs Versus M/s. Tej Properties Pvt.Ltd., 2013 (3) R.C.R. (Civil) 161** to contend that where the defendant entered appearance and filed the written statement and thereafter stopped appearing and did not contest the suit, then as per the provisions of Order 22 Rule 4 (4) CPC, it is upon the Court to proceed with ex-parte without substituting the legal heirs of deceased and exempt the plaintiff from undergoing the necessity of substituting the legal representatives. Once the signatures on the document are admitted, burden shifts upon the person alleging the execution, nugatory. In support of his contention, relied upon the judgment rendered by the Kerala High Court in **B.M.Ahamed and another Versus K.Gangadharan, 1990 Civil Court Cases 791.**

In rebuttal, Mr.Chadha has relied upon the judgment rendered in **Mathew Versus Kuruvilla, 1987 AIR (SC) 2328** to contend that the discretion under Section 20 of the Specific Relief Act should not be granted because it is lawful to do so. Motive behind litigation should also be considered.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is merit and substance in the submission of Mr.Chadha, for, no sane person would keep the agreement alive for a period of four years after granting extension in the year 1996 upto 2.5.1999 by shelling out almost half of the total sale consideration. In my view, the respondent-plaintiff has demolished his own case by examination of PW-1 Vijay Kumar, witness from UCO Bank, who had proved that defendant No.1 Pal Singh, the original vendor, had received a sum of ₹75,000/- through cheque, whereas as per the recital of the agreement to sell, the entire payment of ₹1,45,000/- and another sum of ₹1,05,000/- was paid in cash. It is in this backdrop of the matter, the trial Court granted the alternative relief.

I am in agreement with the submission of Mr.Boparai that the suit cannot be thrown out on account of non-impleadment of the legal heirs in view of the ratio decidendi culled out in **Sushil K.Chakravarty's case (supra).** I am, *prima-facie*, of the view that the agreement to sell was issued on a blank signed paper, which was for security purpose owing to the fact that he had taken a loan. Even the agreement to sell did not envisage the payment of ₹1,05,000/- on a particular date, which is alleged to be an extension/endorsement for extending the date of execution and registration of the sale deed and that too for a period of three years from the target date. In my view, the intention of the parties behind the aforementioned execution of the document was not to sell the land, but to obtain the loan. The respondent-plaintiff has miserably failed to prove the execution of the agreement to sell in the absence of the statement of marginal witnesses. If at all the report had come that they had gone abroad, he should have taken their address of abroad and summoned them at his expense. He has also not proved or shown any document that he was always ready and willing to execute the sale deed or marked his presence before the office of the Sub Registrar. On the contrary the sale deed dated 20.5.1997 in favour of appellant-defendant No.20 has been proved by DW-2, whereas on the other hand, the Lower Appellate Court, being the last Court of fact and law, has not noticed the aforementioned fact and in my view has erroneously decreed the suit by taking into consideration the price/consideration in the sale deed in favour of the appellant-defendant. Vis-a-vis the total sale consideration of the agreement to sell, it should not the basis or constituent in exercising the discretion under Section 20 of the Act.

The statement of PW-2 Avtar Singh would be meaningless as he is a witness to the endorsement only. It does not specify that a sum of ₹1,05,000/- was paid in lieu of the agreement as it could have been for extension of further loan. Payment of cheque was not pleaded in the plaint. It is for the first time, the defendant had been put to surprise when PW-1 had been examined.

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 allowing the appeal, aforementioned. Accordingly, the judgment and decree of the Lower Appellate Court is set-aside and that of the trial Court is restored.

Appeal stands allowed.

October 24th, 2016 **(AMIT RAWAL)**
ramesh **JUDGE**

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