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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-4343-2015 [O&M]

Date of Decision : May 4th, 2016

Sushil Kumar

.... Appellant

Versus

Sudesh Prashar

.. Respondent

CORAM : HON'BLE MR. JUSTICE SHEKHER DHAWAN.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present Mr. Anand Chibbar, Senior Advocate, with
Mr. Lalit Thakur, Advocate,
for the appellant.

Mr. Parduman Yadav, Advocate,
for the respondent.

SHEKHER DHAWAN, J.

Present Regular Second Appeal, by the defendant, is directed against the judgment and decree passed by the Courts below in a suit for possession by way of specific performance of agreement of sale dated 15/16.07.2005. The Court of first Instance vide judgment and decree dated 15.03.2014 dismissed the suit for possession by way of specific performance of agreement of sale, but allowed alternative relief holding the plaintiff entitled to get refund of amount of earnest money. On an appeal filed by plaintiff - Sudesh Prashar, learned Additional District Judge, Ambala, vide judgment and decree dated 3.8.2015, decreed the suit of the plaintiff and passed a decree for possession by way of specific performance of agreement of sale in her favour.

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2. For the sake of convenience, parties are being referred to as per their status before the Court of first Instance.

3. Relevant facts of the case for the purpose of decision of this appeal; that the plaintiff had filed suit for possession by way of specific performance of agreement of sale dated 15/16.07.2005. As per the plaintiff, earnest money of Rs.6,00,000/- was paid to the defendant at the time of execution of agreement towards the sale consideration and subsequently, payment of Rs.1,00,000/- was received by the defendant on 12.11.2005 against receipt and another sum of Rs.3,00,000/- was received the defendant through cheque dated 14.11.2005. As such, the total payment of Rs.10,00,000/- was received by the defendant against receipt. The plaintiff was always ready and willing to execute the sale deed as per agreement of sale dated 15.7.2005. Legal notice was also got issued by the plaintiff on 19.1.2006. Stamp papers were purchased vide challan on 5.4.2006, but the defendant failed to turn up for execution of sale deed on 10.4.2006 and subsequently, registered legal notice was served upon the defendant on 18.4.2006. As per the plaintiff, there was certain outstanding amount on the suit land and the same was not cleared by the defendant. Hence, the necessity of suit.

4. Defendant contested the suit, *inter alia*, taking the plea that no agreement dated 15.7.2005 was ever executed between the parties. The alleged agreement dated 15/16.07.2005 is forged and fabricated document. The receipt of earnest money and subsequent payments to the defendant were also denied. As per the defendant, the plaintiff had advanced him a sum of Rs.3,00,000/- as friendly loan on 14.11.2005 vide cheque No. 728639 and at that time, plaintiff got signed some blank papers

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and stamp papers with a promise not to misuse the same, rather to return the same at the time of clearance of the loan amount. The defendant requested the plaintiff to return the blank papers and stamp papers on repayment of loan amount of Rs.3,00,000/- and on receipt of notice dated 19.1.2006, the defendant came to know that the plaintiff got forged an agreement of sale as well receipts. However, the defendant denied receipt of Rs.10,00,000/- and prayed that the suit be dismissed.

5. On the pleadings of the parties, the Court of first instance settled the issues. Parties led their respective evidence and after appreciating the entire oral as well as documentary evidence brought on record by the parties, the Court of first instance dismissed the suit of the plaintiff qua the relief of possession by way of specific performance of agreement of sale but allowed alternative relief and held the plaintiff entitled to get refund of the amount of total earnest money. The appeal filed before the Court of first Appeal was allowed and the suit of the plaintiff for possession by way of specific performance of the agreement of sale dated 15/16.07.2005 was decreed. As such, the present Regular Second Appeal by the defendant.

6. Learned counsel for the appellant submitted that the property was under mortgage at the time of execution of agreement. The plaintiff was not willing to perform her part of the agreement and that is why the Court of first Instance had not decreed the suit for possession by way of specific performance and the Court of first Appeal decreed the suit for possession by way of specific performance and the said judgment and decree is liable to be set-aside.

7. Learned counsel for the appellant also submitted that since the property was mortgaged, the sale deed could not be executed and as

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such, the plaintiff was entitled to the decree for possession by way of specific performance but the first Appellate Court ignored this fact while passing the judgment and decree and the same are liable to be set-aside. Reliance has been placed upon the decisions of Hon`ble Supreme Court in **A.C. Arulappan Vs. Smt. Ahalya Naik, AIR 2001 SC 2783** and **Parmannad Vs. Bajrang and others, AIR 2001 SC 3606.**

8. Learned counsel for the respondent submitted that the Court of first Appeal has already considered all these facts while accepting the appeal because it was for the appellant to take required steps for execution of sale deed and if he failed to do so, there is no reason for denial of relief of specific performance of agreement of sale. On this point, reliance has been placed on a judgment of this Court in **Tarsem Singh Vs. Gurnam Singh, (2016-1) PLR Vol. CLXXXI pg. 25.**

9. Learned counsel for the respondent also took the plea that in fact, the defendant denies the execution of sale agreement, in such like cases of specific performance of agreement, in the eventuality of their failing to prove the same, no equity accrues to him. On this point, reliance has been placed on a decision of this Court in **Harjinder Singh @ Rajinder Singh Vs. Karam Chand and another (2012-3) PLR Vol. CLXVII pg. 723 (P&H).**

10. As regards to the agreement relating to mortgaged property, learned counsel for the respondent submitted that if the vendor professing to sell unencumbered property but if the same is mortgaged, then the vendor has only a right to redeem it and the purchaser may compel him to redeem the mortgage and to obtain a valid discharge. In this context, reliance has been placed on the decision of Hon`ble Supreme Court in

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Shamsher Singh and others Vs. Rajinder Kumar and others, 2014 (2)**RCR [Civil] 865.**

11. Learned counsel for the respondent also submitted that perusal of Section 20 of the Specific Relief Act, 1963 reveals that the relief of specific performance is discretionary and such a discretion should not be exercised in favour of a party who gets an unfair advantage over the other. On this point, reliance has been placed on **Gamdoor Singh Vs. Ajaib Singh, 2013(2) RCR [Civil] 569** wherein such a view was taken.

12. Having considered the submissions made by learned counsel for the parties and appraisal of record, this Court is of the considered view that most of facts are not disputed that the plaintiff had filed a suit for possession by way of specific performance of the agreement dated 15/16-07-2005. The defendant had denied the execution of the said agreement *inter alia* taking the plea of fraud, rather set-up a plea that friendly loan of Rs.3,00,000/- was taken on 14.11.2005 on the basis of cheque No. 728639 and at that time, some signatures were obtained and the agreement Ex. P1 is the forged document. The suit property was having lien/charge of the bank. Ex. P1 was duly attested by Jagpal and Sanjiv Kumar. Both of them were examined before the Court of first instance as PW-1 and PW-3 respectively and they proved due execution of the agreement [Ex.P1]. The plaintiff also proved due execution of the agreement. She has also been able to prove that she was willing and ready to perform her part of the agreement and for that purpose legal notice was got issued on 19.1.2006. Thereafter, she remained present in the office of Sub-Registrar, Naraingarh but the defendant failed to put in appearance and affidavit Ex. P5 was got executed on 5.4.2006. On that

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date stamp papers could not be purchased because of the strike of employees of the bank and the defendant promised to get the sale deed executed on 10.4.2006, but on 10.4.2006, the defendant had not come present. That way, the plaintiff has been able to prove the due execution of the agreement and receipt of earnest money and her willingness and readiness to perform her part of agreement. More so, Sushil Kumar [DW-1] has admitted his signatures on Ex. P1 and P3. The only contention of the defendant is that suit property was mortgaged. The Court of first Appeal has rightly appreciated the controversy that present suit was filed on 16.7.2008 and the suit land stood redeemed prior to the filing of the present suit as is evident from Ex. P18 and P19 and the Court of first instance failed to appreciate the said fact. The Court of first Appeal has also rightly taken the plea that relief of specific performance cannot be denied merely because of the reason that the land was mortgaged because it was for the defendant to get the mortgaged property redeemed. Such a view as taken by Hon`ble Supreme Court in **Sukhbir Singh etc. Vs. Brij Pal Singh etc.** 1996(2) Apex Court Journal 3. In **Tarsem Singh Vs. Gurnam Singh** , (2016-1) PLR Vol. CLXXXI pg. 25, this Court observed as under:-

“ Existence of loan by the defendant to bank cannot also be a circumstance in favour of the defendant. If the plaintiff was bargaining for purchase of property subject to the mortgage, the defendant was actually securing the benefit of allowing the sale to take place without in any way being obligated to repay the amount to the bank. If the plaintiff was himself not making an issue for a direction for discharge of the mortgage by the defendant himself and was not asking for abatement of sale consideration for the outstanding due to the bank, the defendant

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must only take the transaction as beneficial to him, for he has been relieved from obligation to repay the bank”.

13. More so, as per view taken by a Coordinate Bench of this Court in **Abdul Sattar and others Vs. Pitamber Singh, 2008(3) RCR [Civil] 424**, if the agreement has been duly proved to have been executed between the parties and the plaintiff is ready and willing to perform his part of contract, the discretionary relief of grant of specific performance should be exercised in favour of the plaintiff and against the defendant. Consequently, the authorities relied upon by learned counsel for the appellant are of no assistance to him.

14. In view of the above, the the Court of first Appeal has taken the most reasonable view while accepting the appeal and rightly set-aside the judgment and decree passed by the Court of first instance and the said findings recorded by the the Court of first Appeal do not call for any interference by this Court. Resultantly, the present Regular Second Appeal stands dismissed.

(SHEKHER DHAWAN)
JUDGE

May 4th, 2016
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