IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2224 of 2014 (O&M)
Decided on: 03.06.2016

Nirmal Singh ....Appellant

Versus

Jarnail Singh ....Respondent

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

<u>Present :</u> Mr. Darshan Singh Malwai, Advocate for the appellant.

Mr. K.B. Raheja, Advocate for the respondent.

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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?*

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<u>REKHA MITTAL, J.</u>

The present appeal has been directed against the judgment and decree dated 28.03.2014 passed by the Additional District Judge, Sangrur whereby the appeal preferred by the respondent/defendant has been partly allowed, relief *qua* specific performance of the agreement to sell dated 04.04.2005 was dis-allowed and alternative relief for recovery of Rs.16,00,000/- (Rs.8,00,000/- paid as earnest money + Rs.8,00,000/- towards damages) with interest has been allowed.

The substantial question of law that arises for adjudication is:-

1. ***Whether intervention in judicial discretion exercised by the trial Court allowing specific performance of the agreement to sell dated 04.04.2005, by the Court of appeal is well founded and based on settled legal***

principles?

To answer the aforesaid question, a brief reference to the facts of the case is pertinent. As per plea of the appellant/plaintiff, the respondent/defendant agreed to sell land measuring 33 bighas 01 biswa @ Rs.1,23,000/- per bigha and received Rs.8,00,000/- towards earnest money vide agreement to sell dated 04.04.2005. The sale deed was agreed to be executed on or before 15.06.2006, on receipt of balance sale consideration and after clearing the loan of the bank on the suit property. The appellant always remained ready and willing to perform his part of the contract but the respondent did not clear the loan on or before 15.06.2006. The appellant remained present in the office of Sub-Registrar on 14.06.2006 and 15.06.2006 during working hours but the respondent did not turn up. The respondent was called upon to execute the sale deed on or before 30.06.2006 and the appellant remained present in the office of Sub-Registrar but the respondent failed to execute the sale deed.

The respondent/defendant filed the written statement controverting the allegations with regard to his having created any liability under the agreement to sell dated 04.04.2005 with the averments that the same is forged, fabricated, without consideration and has been prepared in connivance of alleged witnesses. The plaintiff is a relative of defendant and he might have obtained his signatures by playing fraud. He did not receive any amount towards earnest money. The answering defendant is still owner of the land measuring 34 bighas 01 biswas being co-owner. He entered into an agreement to sell land measuring 30 bighas 10 biswasies with one Kartar Singh son of Sucha

Singh vide agreement to sell dated 22.03.2005 @ Rs.1,48,000/- per bigha and had received Rs.12,00,000/- as earnest money and has retained land measuring 04 bighas 10 biswasies with him in which he has constructed a house and the sale deed was to be executed upto 15.12.2006. He has challenged maintainability of the suit and the suit being barred under Order 2 Rule 2 of the Code of Civil Procedure (in short 'CPC').

Kartar Singh – defendant No.2 filed the written statement exactly in-line with the allegations raised in the written statement filed by the respondent/defendant No.1.

The learned trial Court, on consideration of issues framed for determination, evidence adduced on record and rival submissions made by counsel for the parties accepted claim of the appellant that the respondent/defendant agreed to sell the suit land vide agreement dated 04.04.2005 (Ex.P-2) and the appellant always remained ready and willing to perform his part of the contract. As a result, suit of the appellant was decreed and the respondent was directed to execute and register the sale deed in respect of the property fully detailed in headnote (A) of the plaint in favour of the plaintiff after clearing the loan amount and receiving the balance sale consideration within a period of two months from the date of judgment and decree failing which the plaintiff shall be entitled to get the sale deed executed in his favour on depositing balance sale consideration in the Court. It was further held that the plaintiff shall be entitled to adjust the amount spent by him for clearing the loan taken by the defendant on the said property from the bank, in case the loan amount is not cleared by the defendant.

The matter was carried in appeal by the defendant/respondent and the Appellate Court affirmed the findings in regard to there being an agreement for sale of suit land by the respondent in favour of the appellant as per the terms and conditions incorporated in the agreement (Ex.P-2) but modified the judgment and decree *qua* specific performance of the agreement and allowed alternative relief in the terms noticed hereinbefore.

Counsel for the appellant has urged that the reasons that weigh in the mind of the Court of appeal in disallowing relief of specific performance of the agreement are the result of misreading of evidence and ignoring vital materials on record. To substantiate his contention, it is argued that as the respondent/defendant has denied execution of the agreement to sell, he is not permitted to raise an issue with regard to readiness and willingness of the proposed vendee under the agreement. In support thereto, he has relied upon judgments of this Court ***"Santa Singh vs Binder Singh and others",*** **2006(4) Civil Court Cases 608**, ***"Jora Singh vs Lakhwinder Kumar and others",*** **2011(2) Civil Court Cases 113**.

The next submission made by counsel is that as per the agreement to sell dated 04.04.2005, the sale deed was to be executed on or before 15.06.2006. On the stipulated date, the appellant remained present in the office of Sub-Registrar along with balance sale consideration and expenses for registration and got marked his presence by way of an affidavit attested by the Executive Magistrate. Immediately thereafter, he served notice upon the respondent/defendant calling upon him to execute the sale deed on or before 30.06.2006 and on that day, the appellant again remained present in the office of Sub-Registrar and got his presence marked by way of an affidavit. Without any loss of time, he filed the present suit on 16.07.2006, the first day of opening of the Courts for civil work after summer vacations. After the decree was passed by the trial Court, he cleared outstanding liability *qua* loan taken by the respondent against the land in question and deposited balance sale consideration of Rs.20,61,142/- with the trial Court. It is argued with vehemence that keeping in view conduct of the appellant since the date of execution of the agreement, the respondent/defendant can neither be allowed to take advantage of his own wrong who even dared to deny execution of the agreement nor of a clerical/typographical mistake by mentioning the figure 33,000 instead of 33 lacs in the cross-examination of the appellant by counsel representing Kartar Singh who propounded an agreement dated 22.03.2005 in his favour, filed a suit on the basis thereof but withdrew the same.

Counsel for the respondent/defendant, on the contrary, has supported the judgment passed by the Court of appeal by referring to cross-examination of the appellant at the hands of counsel representing Kartar Singh – defendant No.2 wherein he has stated that when he came to get execute the sale deed in his favour he was having only around Rs.33,000/- with him. It is further argued that as the appellant came to the office of Sub-Registrar on 15.06.2006 with an amount of Rs.33,000/- against his liability approximately Rs.35,00,000/- towards balance sale consideration and expenses for purchase of stamp papers, etc., the Court has rightly negated his plea of readiness and willingness.

Further submitted that as the land was under attachment, the Court has correctly appreciated judgment of the Bombay High Court ***"Sitaram Tukaram Dandgaval and others vs Sumantilal Chindulal Burad and another",*** **1997(1) Civil Court Cases 689,** to deny the relief. It is further argued that as the agreement to sell provides for payment of damages in the eventuality of the vendor having failed to perform his part of the agreement, no fault can be found in the judgment allowing alternative relief of recovery. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court of India ***"Dadarao and another vs Ramrao and others",*** **2000(1) Civil Court Cases 199**.

I have heard counsel for the parties, perused the paperbook and the records of the Courts below.

As has been noticed hereinbefore but for the sake of repetition, consistent findings have been recorded by the Courts below that the respondent/defendant agreed to sell the suit land vide agreement dated 04.04.2005 (Ex.P-2) and received an amount of Rs.8,00,000/- towards earnest money. It is also an admitted position of the case that the respondent has not challenged the judgment passed by the First Appellate Court nor filed any cross-objections to assail the findings in regard to validity of the agreement to sell or liability of the respondent to pay an amount of Rs.16,00,000/- (Rs.8,00,000/- as earnest money + Rs.8,00,000/- as damages) along with interest @ 6% per annum from the date of filing of the suit till realization of the decretal amount.

The First Appellate Court in Paras 17 and 18 of the judgment has taken into consideration two instances for differing with the judgment of trial Court and denying the relief of specific performance. The first instance is that the plaintiff on the relevant day was having only Rs.33,000/- with him, then question of readiness and willingness to perform his part of the contract does not arise. The second factor is that as per *Jamabandi* Ex.D-3, Khasra Nos.608, 605, 609, 613, 610 and 611 are already under attachment in favour of State Bank of Patiala, Dhuri and in view of judgment in ***Sitaram Tukaram Dandgaval's case (supra)*** specific performance cannot be granted.

The question that arises for consideration is whether attachment of land in favour of State Bank of Patiala would render the agreement unenforceable specifically by relying upon judgment of the Bombay High Court in ***Sitaram Tukaram Dandgaval's case (supra)***.

Section 64 CPC deals with effect of private alienation of property after attachment. A relevant extract from Section 64 reads as follows:-

> ***"64. Private alienation of property after attachment to be void*** — *Where an attachment has been made, any private transfer or delivery of the property attached or of any interest there in and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."*

Firstly, it is not clear if the land was attached under an order of the Court much less in execution of a decree passed in favour of the State Bank of Patiala. Secondly, any sale of the attached land would be void only against all claims enforceable under the attachment. In other words, all claims enforceable under the attachment would still be enforceable even if private alienation of the attached property has been made.

In the case at hand, there is nothing on record to suggest that land attached in favour of State Bank of Patiala was ever put to auction for realization of outstanding liability against Jarnail Singh. On the contrary, counsel for the appellant has urged that the appellant has already discharged all the loans outstanding against the land in question and for this purpose, he has relied upon documents (Annexures P-1 to P-7). Counsel for the respondent/defendant has neither denied correctness of the documents nor controverted the contention of the appellant that he has already cleared all the liabilities and loans outstanding against the land in question.

In ***Sitaram Tukaram Dandgaval's case (supra),*** the Single Bench of the Bombay High Court, by taking into consideration that the plaintiff/respondent had already filed another suit viz. civil suit No.31/76 against the appellants No.2 to 4 for recovery of money and the same property was ordered to be attached by the trial Court but this fact has been suppressed by the respondent/plaintiff in the suit against the appellants/defendants and after relying upon the earlier judgments of Bombay High Court held that a decree for specific performance cannot be passed so long as the order of attachment before judgment is in force in another summary suit.

The Bombay High Court has not appreciated the provisions of Section 64 CPC. In the light of provisions of Section 64 CPC coupled with the facts and circumstances that the appellant has already discharged the liability qua State Bank of Patiala, the respondent cannot seek any aid to his contention from judgment of the Bombay High Court, to wriggle out of his liability under the agreement.

This brings the Court to the findings of the Appellate Court by referring to the amount of Rs.33,000/- mentioned in cross-examination of appellant – Nirmal Singh. Before adverting to cross-examination of Nirmal Singh, it is appropriate to note that the Appellate Court dis-regarded rather did not at all adverted to various other material and relevant facts on record. As has been rightly argued by counsel for the appellant, the respondent/defendant has denied execution of the agreement to sell. Once the defendant has denied execution of the agreement, he renders himself dis-entitle to challenge version of the appellant/plaintiff that he always remained ready and willing to perform his part of the contract. In addition, before filing the suit for specific performance of agreement, the appellant filed a suit for injunction in September, 2005 seeking restraint against alienation of the suit property by relying upon the agreement and the suit was eventually decided in favour of the appellant. It has also been proved on record that the appellant remained present in the office of Sub-Registrar on the stipulated date i.e. 15.06.2006 and executed a duly sworn affidavit in regard to his presence, readiness and willingness to perform his part of the agreement. Soon thereafter, he served a notice (Ex.P-29) dated 19.06.2006 calling upon the respondent/defendant to execute the sale deed on or before 30.06.2006. It has further been proved that on 30.06.2006, the appellant remained present in the office of Sub-Registrar and got marked his presence by way of an affidavit. On 30.06.2006, he withdrew an amount of Rs.25,00,000/- from his bank account (Ex.P6) wherein he deposited an amount of Rs.29,80,000/- on 15.06.2006. Above all, the suit for specific performance was filed exactly after one month of the date fixed for execution and registration of the sale deed. Keeping in view the aforesaid conduct of the appellant, it is difficult to affirm the findings of the Court that the appellant was either not ready or willing to perform his part of the agreement. A cumulative view of the facts proved by way of oral as well as documentary evidence supports contention of the appellant that there is an inadvertent mistake committed by an official of the Court mentioning the word *'hazar'* (thousand) in place of lac behind 33 (about 33), in cross-examination of the appellant.

It is a settled principle of interpretation of evidence that statement of a witness is to be read as a whole and picking up a sentence from here or there divorced of remaining statement may result in miscarriage of justice. The present case is a glaring example wherein the Court has taken a serious view of a single mistake without appreciating conduct of the appellant as a whole and the manner in which he had proceeded, without any loss of time, seeking specific performance of the agreement. I would hasten to add that the bank account (Ex.P6) in the name of the appellant further reveals that an amount of Rs.29,80,000/- was deposited by him on 15.06.2006 and an amount of Rs.25,00,000/- was withdrawn from the said account on 30.06.2006. The money available in the account further indicates that he had funds with him to discharge his liability under the agreement. I am well alive that mere possessing of funds would not be sufficient to prove willingness of the vendee to perform his part of the agreement.

However, keeping in view the discussion made hereinbefore, I find it difficult to doubt veracity of the appellant that he was always ready and willing to perform his part of the agreement.

Indisputably, relief of specific performance is discretionary in nature. The discretionary power is required to be exercised with more care and circumspection, to rule out possibility of an arbitrary and whimsical exercise. Ordinarily, discretion exercised by the Court below may not be interfered with in second appeal. However, if such an exercise of discretion is based upon incorrect appreciation of evidence, ignoring vital materials and misinterpretation of law more particularly in the circumstances that discretion exercised by the trial Court has been intervened by the Court of appeal, there is no reason for this Court to rectify the mistake that has resulted in miscarriage of justice. As a result, the aforesaid question is answered in favour of the appellant and against the respondent.

To be fair to the respondent, counsel has relied upon judgment of the Hon'ble Supreme Court of India to support alternative relief of recovery in terms of the agreement between the parties. First of all, the Appellate Court has not allowed alternative relief in view of interpretation of the terms and conditions of the agreement. On the contrary, alternative relief has been allowed by holding that specific performance cannot be allowed, in view of observations recorded in Paras 13 and 14 of the judgment. The judgment relied upon by counsel for the respondent ***Dadarao and another's case (supra)*** has got no bearing on the facts of the case in hand. In ***Dadarao and another's case (supra),*** the parties to the agreement had specifically agreed that even if the seller did not want to execute the sale deed, he would only be required to refund the amount to complete the sale transaction. In the case at hand, the seller has been given the option to pay an amount of Rs.16,00,000/- in case, he failed to perform his part of the agreement but at the same time, the buyer has been given the right to get the sale deed executed through process of the Court. Even otherwise, as the respondent has denied execution of the agreement, there is no occasion for him to offer payment of an amount of Rs.16,00,000/- in compliance with the terms and conditions of the agreement. Keeping in view the recitals in the agreement clearly providing for specific performance of the agreement, the respondent cannot derive any advantage to his contention from the referred authority.

For the foregoing reasons, the appeal is allowed with costs, the judgment and decree passed by the Court of appeal is modified by allowing specific performance of the agreement. Resultantly, the judgment and decree passed by the trial Court is restored.

(REKHA MITTAL)
JUDGE

03.06.2016
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