IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.4736 of 2002 (O&M)
Date of Decision : December 20, 2017

The State of Punjab and another

...... Appellants

Versus

Vijay Kumar Kakkar

...... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

***

Present : Mr. Sahil Sharma, DAG, Punjab
for the appellants-State.

Mr. Dharam Pal, Advocate
for the respondent.

***

RAJ SHEKHAR ATTRI, J. (Oral)

The appellants-defendants have come up in this appeal by assailing the concurrent findings of the courts below vide which suit filed by plaintiff (respondent herein) was decreed on 02.11.2001 with a direction to deliver him the possession of the land measuring 8 kanals, comprised in Khasra No.58//4 situated in the area of Ropar or in case the possession of the aforesaid khasra cannot be delivered, then to allot him some other plot of equal value; and the first appeal of the appellants-defendants was dismissed on 27.03.2012.

The plot measuring 8 kanal bearing khasra No.58//4 in the area of Ropar was earlier part of evacuee property and it was put to open auction on 16.02.1981. The plaintiff was the highest bidder and bid was accepted at the spot but this auction was not approved by the Settlement Commissioner and was cancelled vide order dated 23.09.1981.

Thereafter, the aforessaid plot was again auctioned on 15.03.1983. This time also, the respondent-plaintiff was the highest bidder. His auction was accepted and affirmed by the Sales Commissioner, Ropar vide order dated 09.06.1983. The respondent-plaintiff deposited the entire sale consideration and the Tehsildar (Sales) issued warrants of possession. In compliance thereof, the Field Kanoongo alongwith Halqa Patwari reached at the spot for the purpose of delivery of possession to the respondent-plaintiff but they returned the warrants of possession with the report that no land of the State is available at the spot rather the State had already sold the land beyond its share. Thereafter, the respondent-plaintiff served a legal notice upon the appellants-defendants and also submitted numerous written representations seeking delivery of possession and the issuance of the sale certificate but the appellants-defendants neither paid any heed nor the sale in his favour was ever cancelled rather the matter stands still since then. Through the instant suit, the plaintiff sought the possession as well as issuance of sale certificate with regard to the suit land.

The suit has been contested, inter alia, on the grounds that the same is filed beyond the period of limitation and that no notice under Section 80 CPC has been served upon the appellants-defendants. Upon merits, it is admitted that the land was put to auction on 16.02.1981 but the said auction was not approved by the competent authority. As such, the said plot was again auctioned on 15.03.1983 and the bid of the respondent-plaintiff, being the highest, was accepted and the sale was confirmed on 09.06.1983 by the Sales Commissioner, Ropar. It is the case of appellants-defendants that the warrants of possession could not be executed as there was no land available at the spot and infact the State had 1/31 share of the total holding and it had already sold its entire land and mutations No.2678, 2679 and 3837 had already been sanctioned in the names of the previous purchasers.

On the pleadings of the parties, following issues were framed:-

1. *Whether the plaintiff is entitled for the mandatory injunction prayed for ? OPP*
2. *Whether the suit is not maintainable ? OPD*
3. *Whether the suit is time barred ? OPD*
4. *Whether no notice served under Section 80 CPC ? If so, its effect ? OPD*
5. *Relief.*

The learned trial Court has afforded adequate opportunities to the the parties to adduce their evidence. On appreciation of evidence, the suit was decreed on 02.11.2001. The appellants-defendants preferred first appeal, which was dismissed by the learned District Judge, vide judgment dated 27.03.2002. As such, the appellants-defendants are in this regular second appeal.

I have heard learned counsel for the appellants as well as learned counsel for the respondent.

Learned State counsel has vehemently contended that it was a mistake of fact as both the parties did not know if any land out of Khasra No.58//4 is available in the share of the appellants because the entire land was sold out earlier, therefore, it is impossible for them to deliver the possession. He also submitted that the contract be treated as void in terms of Section 20 of the Contract Act, 1872 and in this view of the matter, the respondent-plaintiff is not entitled to seek possession. However, he contended that the State is ready and willing to refund the entire sale amount to the respondent-plaintiff. In support of his contention, the learned State counsel has placed reliance upon the judgment of Hon'ble Supreme Court in ***Tarsem Singh vs. Sukhminder Singh 1998 (3) Supreme Court Cases 471***.

On the other hand, learned counsel for the respondent-plaintiff submitted that the concurrent findings of the courts below cannot be interfered with by this court; that the respondent-plaintiff participated in the open bid and being highest bidder, his bid was accepted; the entire sale consideration has been deposited; the sale has been confirmed by the Settlement Commissioner, but without conducting proper enquiry the Halqa 'kanoongo' and the patwari have made a wrong report that no land is available and the claim of the respondent-plaintiff has been thwarted without any cogent reason. He further submitted that it was not a mistake of fact but a fraudulent act of the appellants; that khasra No.58//4 was in the exclusive possession of the appellants that is why the same was put to auction; that now the appellants are wrongly alleging that there is no such land available in the said khewat under the ownership of the State; that in case there is no land in share of appellants then State can allot alternative land of equal value in the revenue estate of Ropar. He endorsed the findings of learned court below on all issues and strongly urged for dismissal of this appeal. To support his contentions, he has placed reliance on the precedents as reported in ***Dagadabai (Dead) by L.Rs vs. Abbas @ Gulab Rustum Pinjari 2017 (3) Civil Court Cases 311 (S.C.); Jotsna alias Jyoti and another vs. Lakhpat Rai 2017 (1) Civil Court Cases 467 (Delhi) and Meena Sharma vs. Rama Sharma and others 2008 (2) Civil Court Cases 405 (P&H).***

I have given my thoughtful consideration to rival contentions and carefully scanned evidence on the record.

In this case, the following questions of law have arisen for determination by this Court:-

(i) Whether the State was the owner of the land in question on the day of auction of the property in question ?

(ii) Whether the auction is valid if the State is not the owner ?

(iii) Whether the plaintiff is entitled to seek allotment of equally valuable land in the area of Distt. Ropar ?

(iv) If it is found that the auction is void, whether the plaintiff is entitled to compensation/damages alongwith refund of money ?

First of all coming to the ownership of the State, the Field Kanoongo has submitted the report on the warrants of possession (Ex.D1) to the effect that State has only 1/31 share which comes to 4 kanal but it had already sold 23 kanal 17 marla land and mutation Nos.2678, 2679 and 3837 have already been sanctioned in this regard. Therefore, no land was left with the appellants on the day of auction. In these circumstances, the Field Kanoongo recommended for cancellation of the auction. However, no formal order has been passed till date in this respect.

The transaction between the parties appear to be mistake of fact under the provisions of Section 20 of the Contract Act, 1872. A bare perusal of the abovesaid provisions of Section 20 makes it clear that when both the parties to an agreement are under mistake as to a matter of fact essential to the agreement, the agreement is void. The following are the four main types of operative mutual mistakes which make the agreement void:-

(i) mistake regarding the existence of the subject-matter of the contract;

(ii) mistake as to the title;

(iii) mistake as to the substance of the thing contracted for; and

(iv) mistake as to any false and fundamental assumption going to the root of the contract.

If we consider the entire facts and circumstances of the case, it become abundantly clear that neither the auctioning authority nor the bidders were aware of the fact that the State had already sold out its share out of the total land. Thus, the mistake regarding the title of the State amounts to a mistake of fact and this fact is essential to the contract. Even the subject matter of the contract was not in existence. The following facts further substantiate this proposition of law:-

(i) The suit property is part of evacuee property. Total land comes to 248 kanal 9 marla, out of which State has 1/31 share.

(ii) The land in question was finally put to auction on 15.03.1983. The respondent-plaintiff was the highest bidder. His bid was accepted and was confirmed by the

Settlement Commissioner. Therefore, Tehsildar (Sale) Hoshiarpur directed the plaintiff to deposit the balance amount of Rs.5920/- (Ex.P5).

(iii)Tehsildar (Sale) issued warrants of possession Ex.P6 stating therein that plaintiff Vijay Kumar had deposited entire sale consideration of Rs.7400/-, therefore, the possession be delivered to him of the land bearing No.58//(4) (8 kanal).

(iv)The 'halqa kanoongo' has submitted the report Ex.D1 dated 29.10.1986 to the effect that out of total area 124 kanal 13 marla, the State had 1/31 share which comes to 4 kanal and infact State had sold the land measuring 23 kanal 7 marla which is beyond the share of the State. Therefore, nothing left in residuum. He recommended that the auction in-question be cancelled and also that the sale effected beyond share be also reviewed.

A bare perusal of the copy of jamabandi placed on the record transpires that Government was a co-sharer in total land measuring 248 kanal 9 marla. However, in the jamabandi placed on the record, share of Government is not clear, albeit, in the report of Field Kanoongo (Ex.D1), it is very much clear that the Government has 1/31 share. The total land, as per jamabandi of the year 1981-82 (*in khewat No.589 khatoni Nos.729, 730 and 731*) is 248 kanal 9 marla out of which, about 8 kanal comes in the share of Government. Because, the Government has already sold 23 kanal 17 marla, thus, no land was left on the day of acution in the ownership of the Government as per jamabandi.

In this view of the matter, the State has no title or ownership over the property auctioned by it. But both the appellants as well as the respondent-plaintiff were ignorant of this fact and this fact came to the knowledge only at the time of demarcating the land for the purpose of delivering the possession vide report (Ex.D1).

It is very much clear from the facts and circumstances of the case that the appellants and also the respondent-plaintiff, both proceeded with the transaction believing that, by virtue of the auction by Tahsildar (sales) in favour of the plaintiff in respect of the suit land, the defendant-Tehsildar (Sales) had an authority to sell away the said plot and the respondent-plaintiff could safely purchase the same. Thus, it is clear that both the parties to the agreement of sale proceeded with the said belief which was, in fact and in law, incorrect.

Learned State counsel while, placing his reliance on the decision of the Hon'ble Apex Court in the case of **Tarsem Singh v. Sukhminder Singh, AIR 1998 Supreme Court 1400 :** submitted that since both the parties to the suit were under a mistake as to the matter of fact essential to the agreement, the said agreement of sale entered into between the parties in respect of the suit property was itself void. In that case, the defendant therein intended to sell the land in "kanals", the plaintiff intended to purchase it in terms of 'bighas'. "Bigha" and "kanal" are different units of measurements. In the northern part of the country, the land is measured in some States either in terms of "bighas" or in terms of "kanals". Both convey different-impressions regarding area of the land. The dispute was not with regard to the unit of measurement only. Since these units relate to area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement of sale, or, to put it differently, how much area of the land was agreed to be sold was in dispute between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. Thus, the mistake with which the parties were suffering related to a matter essential to the agreement. While observing so as to the facts, the Hon'ble Supreme Court held in para Nos.21 and 22 as under:-

> "*21. This Section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this section.*
>
> *22. the other requirement is that the mistake, apart from being mutual, should be in respect of a matter which is essential to the agreement."*

If the facts of the present case are examined in the light of the above observations of the Hon'ble Supreme Court, in the said case, it is clear that the defendant, under the belief that by virtue of the auction itself the State had authority to sell away the said property. The respondent-plaintiff claims that he believed that the appellants-defendants had authority to sell away the said property in his favour and therefore, under that belief he agreed to purchase the same. Therefore, it is clear that both the respondent-plaintiff and the defendant-Tehsildar proceeded with the transaction under a mistake as to the fact that the State had authority to sell the property and therefore, the respondent-plaintiff agreed to participate in the bid. Thus, the said mistake of fact was mutual between both the parties besides being essential for the said agreement. This being so, in my considered view, by virtue of provisions of Section 20 of the Contract Act, 1872, the said agreement of sale became void and unenforceable in law.

This Court has already discussed a similar matter in ***Dalip Singh and others versus Bachan Singh (Dead) through LRs. 2001(1) RCR (Civil) 391***. In that case, Bachan Singh was an ex-serviceman, who was allotted land as an award for his meritorious services. He agreed to sell the land to the other party aserting therein that the land has been allotted to him by the State but infact the land was allotted as a lessee for a period of 10 years only, therefore, agreement found to be void under Section 20 of the Contract Act on both the parties under a mistake of fact.

Now question arises whether the respondent-plaintiff is entitled to allotment of alternative land ? The trial Court as well as the first appellate court have given a specific finding that in case the State cannot deliver the possession of Khasra No.58//4 to the respondent-plaintiff then it must deliver the psosession of equally good land of equal value to the respondent-plaintiff in the same revenue estate and issue sale certificate accordingly. Surprisingly, no prayer has been made by the respondent-plaintiff in the plaint or in the replication in this regard. Both the courts below have exceeded their jurisdiction while granting such a relief. Apart from it, the property covered by Khewat No.589 in jamabandi of the year 1981-82 was initially the evacuee property. No record is produced that if the State has other evacuee property in the same locality. The State cannot be compelled to allot another land of the equal value and of same quality situated in the same revenue estate. The courts below took eroneous view that the respondent-plaintiff is entitled to alternative land of equal value and equal quality. The findings of the courts below are contrary to facts and law. Thus, the same are not sustainable and are hereby set aside.

Now question arises whether the respondent-plaintiff is entitled to compensation. Under the provisions of Section 65 of the Contract Act, it has been provided that if agreement found to be void the aggrieved party is entitled to the amount paid. This Section reads as under:-

> *"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."*

Section 65 of the Contract Act, also contemplates two varieties of cases (i) where the agreement is void from the inception and is discovered as such subsequently before it matured into a contract; and (ii) when the contract which is not void ab initio becomes void on account of supervening circumstances.

Thus, the contract between the parties found to be void ab initio and the same is not enforceable. However, the respondent-plaintiff has deposited Rs.7400/-, as mentioned in report (Ex.D1). He is entitled to refund of the sale money alongwith interest. The respondent-Plaintiff was not at fault. However, it was a mistake of fact. It was the State which published the auction scheme and the respondent-plaintiff had participated in the same. However, at the later stage, the contract was found to be void *ab initio* as the subject matter was not in existance because the State had already sold out the land much beyond its share. Therefore, the respondent-plaintiff is entitled to compensation in the shape of interest. This Court is of the opinion that keeping in view of the totality of the circumstances of the case, 18% compound interest with half yearly rests shall be appropriate.

As a result, this appeal is accepted and the judgments and decrees of the courts below are set aside and suit filed by the respondent-plaintiff stands dismissed. However, it is ordered that the respondent-plaintiff is entitled to refund of Rs.7400/- alongwith compound interest @ 18% with half yearly rests from the date of deposit of amount till its realization.

December 20, 2017 **(RAJ SHEKHAR ATTRI)**
mamta-M **JUDGE**

Whether speaking/reasoned Yes/No

Whether Reportable : Yes/No