IN THE HIGH COURT OF PUNJAB AND HARYANAAT CHANDIGARH

RSA-3971-2010 (O&M)
Date of Decision : 11.10.2017

Kartari Devi ...Appellant

versus

Mahender Singh and Ors. ....Respondents

CORAM : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr.Kulbhushan Sharma, Advocate
for the appellant.

Mr. Amit Jain, Advocate
for respondent No.1

RAJBIR SEHRAWAT, JUDGE (ORAL)

The present appeal has been filed by the plaintiff against the judgment of reversal, whereby the judgment and decree passed by the trial Court granting him the specific performance of agreement was reversed and the decree was restricted to the relief of returned of earnest money.

The brief facts of this case are that the plaintiff claimed that defendant No.1-Tarif Singh (respondent No.2 in the present appeal) entered into an agreement to sell dated 04.03.1999 for a sale consideration of Rs.1,50,000/- in resect of a plot having area of 60 sq. yard. forming part of Khasra No. 190 (1-5), 19 (0-17) total measuring 2 kanals 2 marlas situated within abadi (La Dora) of village Sihi, Tehsil Ballabgarh, Distt. Faridabad. The further pleading of the plaintiff is that defendant No.1 had received Rs.40,800/- as part payment of the sale consideration. It was further pleaded that the target date fixed for the execution of the sale deed was agreed to be one year from the date of the agreement. However, when the plaintiff contacted defendant No.1 in the month of February, 2000 to execute the sale deed in her favour on payment of balance sale consideration; then defendant No.1 refused to execute the sale deed by putting excuses. Therefore, the suit was filed. However, it was further pleaded in the plaint that the plaintiff had come to know that defendant No.1 along with his brother, sister and widowed mother had sold the suit property to defendant No.2-Raju vide sale deed dated 20.04.1999 during the subsistence of agreement to sell. Defendant No.2 further sold the suit property to defendant No.3-Satbir Singh vide sale deed dated 05.10.2000. Therefore, both the sale deeds in favour of defendant No.2 and defendant No.3 were also challenged to be null and void and therefore sought to be declared as such.

Notice of the suit was given to the defendants. Defendant No.1 appeared and filed written statement taking preliminary objections. On merits it was claimed that he had obtained some loan worth Rs.30,000/- from the plaintiff as she is his real Bua. In view of that temporary loan the plaintiff got signed two plain papers in presence of witness Virender Singh. It was claimed by him that he had returned the whole loan along with interest. Therefore, in effect, he denied the execution of the agreement and claimed the said agreement to be a fraudulent document. Defendants No.2 and 3 also filed written statement taking preliminary objections as usual. However, it was pleaded on merit by them that defendant No.1 has rightly sold out the suit property to them and the sale deed dated 20.04.1999 is binding upon defendant No.1 as well as the plaintiff.

As per the pleadings of the party, the issues were framed by the Court. One issue was framed regarding the validity of the agreement as claimed in the plaint. The other main issue was regarding the validity of the sale deed in favour of defendants No.2 and 3. The onus of both these issues was fixed upon the plaintiff.

Parties led their evidences.

After hearing the parties and appreciating the evidence; the trial Court came to the conclusion that the execution of the agreement has been proved by the plaintiff. It was further held that the plaintiff has always been ready and willing to perform her part of the contract. Therefore, the suit was decreed by the trial Court. However, the other aspect of the matter is that the impugned sale deed in favour of defendants No.2 and 3 was declared null and void by the trial Court without writing a single line as to how the sale deeds were void. Presumably the trial Court declared the sale deeds to be null and void only on the ground that the subsisting agreement to sell has been found to be proved in favour of the plaintiff at the time when these sale deeds were executed.

An another aspect which needs to be noted in this case is that during the pendency of the suit, Mahender Singh who is respondent No.1 in the present appeal had purchased the suit property. Therefore, after the suit was decreed by the trial Court, although, the original defendants did not challenge the judgment and decree passed by the trial Court, however, Mahender Singh; the purchaser from them; availed the remedy of appeal against the judgment and decree passed by the trial Court. He claimed to have stepped into the shoes of the original defendants No.2 and 3 in the suit.

He filed an application for permission to file appeal along with the application for condonation of delay. Allowing his application, the permission to file the appeal was granted by the lower Appellate Court and the delay was condoned. However, these orders were challenged by the present appellant/plaintiff by way of revision before this Court. This Court disposed of the revision petition by upholding the permission granted to Mahender Singh to file the appeal. However, a rider was placed upon him that he shall only step into the shoes of his predecessor and he shall not be entitled to take any new plea. Therefore, the appeal before the lower Appellate Court was filed only by the above-said Mahender Singh and not by the original defendants in the suit.

While considering the appeal; the lower Appellate Court recorded findings that the claim of the plaintiff to show the title of her vendor was based upon Jamabandi Ex.P-6. According to this Jamabandi Sant Singh; father of Tarif Singh, the vendor of the plaintiff, had only 51.33 sq. yard as his share out of 2 kanals 2 marlas of the land. Still further, it was recorded that Sant Singh had left eight legal heirs including the said Tarif Singh. Therefore, it was held by the lower Appellate Court that the vendor of the plaintiff would get only $1/8^{th}$ share out of the property of Sant Singh, which works out to be over 6.14 sq. yard. It was further recorded by the lower Appellate Court that the evidence produced by the plaintiff herself shows that the agreement Ex.P-1 no where stated that Tarif Singh had become owner of he entire land by any family settlement or by any other instrument of transfer or title. It was further recorded; that the fact that the other legal heirs of Sant Singh also had share in the suit property is also reflected by the fact that subsequently the said Tarif Singh along with other heirs of Sant Singh had executed the sale deed dated 20.04.1999, Ex.P-3 in favour of Raju to sell the entire suit property. It was further held that in case Tarif Singh had been the absolute owner then he would not have joined the other legal heirs in selling the property to Raju. The lower Appellate Court further held that it is the settled principles of law that a person cannot claim to get a title better than what his vendor had. Since the vendor of the plaintiff had only $1/8^{th}$ share in the suit property, therefore, the agreement to sell the entire property would have been in contravention of the right of the other co-sharers and, therefore, was not valid to that extent. Resultantly, the lower Appellate Court held that since the property itself is a small piece of land measuring about 60 sq. yard, and out of that the share of Tarif Singh, qua which the agreement can be specifically enforced, turns out to be a very small piece of about 8 sq. yard. Therefore, it would not be appropriate to grant him the decree of specific performance. Resultantly, the lower Appellate Court granted him the alternate relief of the returned of the earnest money.

Assailing the judgment and decree passed by the lower Appellate Court, the present appeal has been filed.

The counsel for the appellant has argued that there is no evidence led by the defendants that the vendor of the plaintiff had no title qua the whole suit land. Learned counsel for the appellant has further argued that the lower Appellate Court has tried to make out a new case in favour of respondent No.1; because there was neither any pleading nor any evidence on file that the vendor of the plaintiff; namely; Tarif Singh did not have the title over the entire suit property. It is his next contention that in a suit for specific performance it is not within the scope of the suit to go into the title of the vendor. Still further; it is the argument of the learned counsel for the appellant that there is no issue framed regarding lack of title of her vendor. Still further it is argued by the learned counsel for the appellant that even if the suit property is joint then also the title of the co-sharers is to be seen at the time of partition if and when they raise this plea by filing a suit for partition. In support of his argument that the title of the vendor cannot be gone into a suit for specific performance, the counsel has relied upon two judgment rendered in ***1985 PLJ, 241 title as Megh Singh and Ors. Vs. Hoshiar Singh and Ors***. and rendered in ***2008 (2) RCR (Civil) 757 titled as***

Asa Nand Dhingra Vs. Smt. Rajni Gupta Rasal. Lastly, the counsel relied upon the judgment of the Supreme Court rendered in 2***008 (3) RCR (Civil) 294 Arjan Singh Vs. Punit Ahluwalia and Ors.*** to argue that the suit for specific performance cannot be converted into a suit for title. Hence, the counsel for the appellant has argued that the lower Appellate Court has wrongly reversed the decree passed by the trial court by recording perverse finding.

On the other hand, learned counsel for respondent No.1 argued that plaintiff and her vendor are close relatives. In fact, the plaintiff is real 'Bua' of the vendor-Tarif Singh. This is a collusive and ante-dated transaction just to defeat the subsequent sales. It is his argument that the claimed agreement is dated 04.03.1999. Thereafter, the property was sold to Raju on 24.04.1999. However, the plaintiff remained silent at that point of time; despite being a family member. Still further when property was further sold to Satbir Singh by Raju on 05.10.2000 then also she did not raise any question. After the property had been sold twice, she filed a suit for specific performance at the fag end of the expiry of limitation. Therefore, this shows that the original plea taken by the vendor-Tarif Singh that the alleged agreement was a fraudulent document and the transaction was intended to be a loan transaction only, was correct and the suit has been filed only to stifle the subsequent sale and to create hurdles in the way of the bona fide Purchasers. He also argued that this also shows that the plaintiff was not ready and willing to get the sale deed executed. To rebut the other argument of the learned counsel for the appellant; that title cannot be gone into a suit for specific performance, the counsel for respondent No.1 has relied upon the judgment of Hon'ble Supreme Court rendered in ***2015 (4) RCR (Civil), 203 Hanumappa Channappa Hullur (D) by LRs. Vs. Shivamaruthappa***

Parappa Kalli and Ors. to contend that if the property is shown record to be a joint property and one of the co-sharer tries to sell it by claiming to be the absolute owner, then he cannot be permitted to sell the same and pursuant to the agreement entered into by such a co-sharer the suit for specific performance cannot be decreed. To the same effect he also relies upon another judgment of Hon'ble Supreme Court rendered in 1***995 (3) RRR, 190 titled as N.P. Thirugnanam (Dead) by LRs. vs. Dr. R. Jagan Mohan Rao***. He further relies upon Section 23 of the Contract Act to plead that if the consideration or object of an agreement is illegal or is to the prejudice of any other person or defeats the legal right or causes an injuries to the other person then such an agreement is void and cannot be enforced. Therefore, such an agreement would not be enforceable. He has drawn the analogy to say that in the present case since Tarif Singh had agreed to sell the share which belong to the other vendor of Raju, therefore, the agreement was in violation of rights of other co-sharers. Hence, the agreement was not enforceable.

Having heard the learned counsel for the parties, and perusal of the record; with the able assistance of the parties, this Court is of the view that the judgment and decree passed by the lower Appellate Court deserved to be sustained and has been rightly passed. The argument of the learned counsel for the appellant that the suit for specific performance cannot be converted into a suit for title, is liable to be rejected for the simple reason that he himself chose to challenge the sale deed in favour of defendants No.2 and 3 claiming them to be illegal. Defendants filed written statement and said that the sale deeds in their favour were legal and valid. A specific issues was framed regarding the validity of sale deeds and the onus to prove the invalidity of the sale deed was placed upon the plaintiff. However, she has not led any evidence whatsoever to show the sale deeds to be void and illegal. Therefore, the sale deeds in favour of defendants No.2 and 3 could not have been set aside. By bringing into question the title of defendants No.2 and 3 in the suit, the plaintiff herself invited the question of title of her vendor, because the vendors of defendants No.2 and 3 were not the vendor of plaintiff alone. Rather the vendors of defendants No.2 and 3 were seven other persons also, of course along with vendor of the plaintiff. In an attempt to deny the validity of the sale deeds in favour of defendants No.2 and 3, the plaintiff herself placed on record the Jamabandi Ex.P-6. That shows the title of all these persons in the suit property. Therefore, by virtue of the pleading and evidence led by the plaintiff herself the title became the subject matter of the proceedings in the present case. The determination of the title also became relevant to the case for the reason that the plaintiff did not choose to file the suit within a reasonable time and she waited for two other sales to happen in the meantime. This also shows; that she being a family member of the vendor also knew about the fact that the title with the vendor was not absolute.

Still further, although it has come on record that the property is the joint property of vendor of the plaintiff and seven other co-sharers, however, no evidence has been led by the plaintiff to show that there is any other property also in which all the persons are co-sharers and therefore, the property sought to be sold by one co-sharer would have been set-off against some other property. Still further, the plaintiff never claimed that her vendor had acquired exclusive right over the property by any other mean of disposal of the property. Hence, in view of the facts from the pleading and the record itself the title was shown to be lacking beyond $1/8^{th}$ share in the suit property. In view of this, the title of the vendor became very relevant and it has to be considered by the Court to decide upon the competence of the vendor of the plaintiff to sell the property and also to decide upon the validity of the sale deeds in favour of defendants No.2 and 3, which the plaintiff herself challenged to be illegal. Hence, the lower Appellate Court has rightly involved the question of title in the present proceedings. So far as the judgment cited by the lower Appellate Court are concerned; those are distinguishable on the facts of this case. In none of the judgments cited by the counsel for the appellant the vendee had questioned the validity of the sale deed, *per se,* in favour of any other person. Therefore, the question of title, *per se*, was not involved in those cases. There is no dispute with the proposition that in ordinary course; the title cannot gone into in a suit for specific performance. But once the pleadings and the evidence led by the plaintiff herself shows that some other person is also having title qua the suit property, which only one person is trying to sell to her, then the Court cannot become a mute spectator for a totally illegal transaction getting the sanctions of the decree of the Court. In that situation; it is the duty of the Court to see whether the seller has a saleable title in his favour which vendee can enforce through the decree of the Court. It is not the policy of the law and it is not the philosophy of the law to become party for perpetuation of an illegality which all the parties to the proceedings are fully aware of.

This argument of the learned counsel for the appellant also finds a suitable answer in the judgements cited by the learned counsel for the respondent, where one of the co-sharer had entered into an agreement to sell the entire property claiming to be absolute owner, although, he was not the absolute owner. The Hon'ble Supreme Court held that in such a situation the suit for specific performance cannot be decreed, beyond the share of the vendor. Hence, there is no illegality or perversity in the findings recorded by the lower Appellate Court that the vendor of the plaintiff did not have the title beyond 1/8th share, which is a meagre piece of land, and therefore, the decree for the total property cannot be passed in favour of the plaintiff.

However, the argument of the learned counsel for the respondent that the plaintiff was not ready and willing to execute the sale deed cannot be accepted because he is not be the competent person to take this plea. His vendors have not taken this plea nor could they have taken this plea because they had disputed the execution of the agreement itself. Therefore, this plea of the respondent has to be rejected.

Having come to this stage, the counsel for the appellant submits that since the agreement is of the year 1999 and she has been fighting for the property before the Court of law, therefore, if her suit is not to be decreed on the ground that her vendor did not have the title, then she may be suitably compensated; apart from the relief granted by the lower Appellate Court. For that purpose the present appellant relies upon the provision of Section 21 Sub-Section 3 and explanation added to this section. It is his further prayer that the appellant has already prayed for a compensation in his plaint in case the specific performance was not to be granted. Therefore, she may be granted suitable compensation, if she is to be denied the relief of specific performance.

The submission of the learned counsel for the appellant appears to be totally justified and in accordance with the law. Admittedly, she has succeeded in proving the agreement to sell. In ordinary course, she would be entitled to specific performance qua 1/8th share of the total property. However, she is being denied specific performance only on the ground that the1/8th share comes to such a negligible quantity of land that it would not be proper to grant specific performance, therefore, the appellant has to be compensated for denying her the relief and also for facing the litigation for such a long time. In her plaint she has prayed for Rs.1.5 lac as compensation, in case, she is denied the relief of specific performance. Accordingly this prayer of the appellant is allowed. The appellant is held entitled to a compensation of Rs.1.5 lacs, over and above the relief of return of money and interest thereon; granted by the lower Appellate Court.

No other argument was raised.

In view of the above, the judgment and decree passed by the lower Appellate Court are modified to the extent above. The appeal is partly accepted in the above terms.

11th October, 2017 **(RAJBIR SEHRAWAT)**
Manju **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No