Sr. No.220

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.4965 of 2013(O&M)
Decided on:02.08.2017

Jaswinder Singh

..........Appellant

versus

Nirmal Kaur

..........Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr.Kuldeep V.Singh Ahluwalia, Advocate with
Ms. Jaspreet Kaur, Advocate
for the appellant.

Mr. Malkeet Singh, Advocate
for the respondent.

Rajbir Sehrawat, J.(Oral)

The present appeal has been filed by plaintiff Jaswinder Singh against the judgment and decree dated 8.04.2013 whereby the decree passed by the trial court in favour of the appellant for specific performance has been modified and the relief has been restricted to the return of earnest money paid pursuant to the agreement.

The brief facts of this case are, that the respondent Nirmal Kaur was the owner of the land measuring 2 Kanals comprised in khewat No. 54 khatauni No. 67 khasra No. 9//16/2 and khewat No. 55 khatauni No. 68 khasra No. 9//7 situated in the revenue estate of village Gopalpur, District Jalandhar. She entered into an agreement to sell this land to the appellant – plaintiff vide agreement dated 27.06.2003 for a sum of ₹ 3 lakhs out of which she received the earnest money of ₹ 2.5 lakhs on the date of execution of the agreement to sell. The date specified for execution of sale deed was agreed to be within a period of one year. Thereafter, the parties mutually agreed twice to extend the date of execution of the sale deed. Ultimately, the appellant presented himself before the Sub-Registrar on the given date for getting the sale deed executed. However, the respondent did not turn up to execute the sale deed. Therefore, the suit was filed.

Before the trial court, parties led their evidence. The appellant examined both the attesting witnesses to the sale deed as PW-2 Joginder Singh and the Deed Writer Mukhtiar Din as PW-3. Roop Lal, Clerk of Suvidha Centre, Jalandhar was examined as PW-4 to prove the fact of purchase of Stamp Paper for affidavit regarding appearance before the Sub-Registrar.

Respondent on the other hand, appeared herself as DW-1 and examined one Bhola Ram as DW-2.

After appreciating the evidence led by the parties, the trial court held that the respondent has admitted her thumb impression on the agreement to sell as well as on the writings regarding extension of the date for execution of the sale deed. However, she has failed to lead any cogent evidence regarding the fraud. Therefore, the trial court decreed suit.

In appeal, learned lower Appellate Court though recorded a finding in para 21 of its judgment that in its considered opinion the defendant has entered into an agreement to sell on 27.06.2003 and thereafter, she has even agreed to the extension of the date of execution of the sale deed. However, the lower Appellate Court has not granted relief of specific performance to the plaintiff. Rather by partly accepting the appeal of the defendant has ordered that suit of the plaintiff was decreed only for recovery of ₹ 2.5lakhs alongwith interest of 9%. The reason given by the lower appellate court for denying the relief of specific performance was that no reason has been given by the plaintiff for extension of the date twice. Still further lower appellate court has written that the plaintiff was present at Suvidha Centre, Jalandhar whereas he was required to be present in the office of Sub-Registrar, Kartarpur. Therefore, the lower appellate court draws a conclusion that agreement to sell dated 27.06.2003 was executed by the defendant, not intended for sale of her land but it was got executed by her in order to give security to the plaintiff for getting loan for her son Surinder Pal, who intended to go abroad, a venture in which he could not succeed.

While arguing the case, learned counsel for the appellant has submitted that both the Courts below have given concurrent finding that agreement to sell in question was duly executed by the defendant/respondent. The reasons for denying the relief of specific performance; as given by the learned lower appellate court; are not sufficient to deny him the relief of specific performance even if the same are taken on their face value, although these facts are result of perverse reading of the evidence by the lower appellate court.

The next contention of learned counsel for the appellant is that once the respondent admitted her thumb impression on the agreement to sell then to rebut the argument she was required to prove her plea of fraud by leading a positive evidence, which she has failed to prove. On the contrary, learned counsel for the appellant argued, the respondent has admitted that the date of execution of the sale deed was extended twice. She has further admitted in cross examination that she could not go to the office of Sub-Registrar on the date of execution of the sale deed because of her illness. She still further admitted that the appellant - plaintiff was ready and willing to get the sale deed executed. To finally rebut the argument of the defendant, the counsel for the appellant has pointed out that in cross-examination she has admitted that even her son Surinder Pal was residing separately for a long time, therefore, there is no question of respondent taking loan for his requirement to go abroad. In view of this situation, learned counsel for the appellant has argued that there are no equitable circumstances in favour of the defendant to deny the relief of specific performance to the appellant.

Learned counsel for the respondent has argued that there are suspicious circumstances surrounding the agreement and therefore, this agreement is bad in law. His further argument is that suspicious circumstances surrounding the agreement also show the agreement to be fraudulent. Elaborating his argument he submits that the agreement has been written only on one page and the thumb impressions of the parties have been put on the side of the writing instead of at the bottom. He further submits that even the writings regarding the extension of the date of execution of the sale deed has been written on one and the same date, on the back side of the paper, on which the agreement is written. He still further argued that since a substantial amount of consideration had already been paid by the plaintiff, therefore, there was no necessity for him to wait for one year to get the sale deed executed and still further to seek extension of time for execution of the sale deed.

In view of the above suspicious circumstances, as per the learned counsel for the respondent, the agreement stands proved to be fraudulent. Therefore, according to him, the decree for specific performance should not have been passed by Trial Court and the lower Appellate Court has rightly granted the relief of return of money only.

After hearing learned counsel for the parties, this Court is of the view that once the thumb impression on the agreement are admitted by the respondent then it would be her duty to prove the plea of fraud which she had taken. However, she has not led any cogent evidence to prove her plea of fraud.

Both the courts below have rightly held that agreement in question was, in fact, entered into between the parties. This finding has not even been challenged by the respondent by filing any appeal.

Otherwise also, from the admissions made by the respondent herself it is clear that she admitted the agreement in question to have been executed by her. She has admitted that thumb impressions on the agreement as well as on the writings of extension are her thumb impression.

Even if, the first thumb impression on the agreement to sell is taken to be obtained fraudulently, though not substantiated by the respondent, there would not have been any occasion for the respondent to put her thumb impression twice again over the writings regarding extension of date of execution of the sale deed. Still further, she has categorically admitted that she was to go to Sub-Registrar for executing the sale deed on the given date, but she could not go due to her illness. Still further, she has admitted in her cross-examination that the appellant herein was ready and willing to get the sale deed executed. This seals the question of agreement in favour of the appellant. Even the fact that her son was already living separate from her for the past quite some time, belies the plea of the respondent that she had entered into this agreement as security for a loan which was availed by her to help her son to go abroad. There is nothing on record to show that her son ever made attempts to go abroad or he ever went abroad.

The plea raised by the respondent that agreement is written on one page only does not prove the fraud in execution of the agreement in question. There is no requirement or presumption of law that the agreement cannot be written on a single page and that if it is written on a single page the implication would be of a fraud in the agreement. The next contention of learned counsel that all the writings regarding the extension of the date of execution of the sale deed has been written on one and the same date is also belied by the fact that it is written on different dates and seal has been put by the person writing on it. The respondent has not led any evidence to prove that these were written on a single date. No witness has been examined in this regard nor any document has been produced by her to substantiate this claim. Not even any expert of hand writing or expert to determine the age of writing has been examined by the respondent to substantiate her plea. The further argument of learned counsel for the respondent that if the substantial part of the sale consideration was already paid, then there was no necessity for the plaintiff to wait for one year to get the sale deed registered, also is totally irrelevant. For any individual reasons the parties may agree for any date or for extension of the date of execution of the sale deed. Hence, this fact itself does not convey any conclusion that agreement was fraudulently entered into.

The argument of the learned counsel for the respondent that the agreement is surrounded by suspicious circumstances and therefore, is proved to be the fraudulent and not sustainable deserves to be noticed and rejected. The concept of existence of suspicious circumstances as a ground to set aside an instrument of disposal of property is not applicable in case of an agreement to sell. This concept is applicable only qua the instrument of 'Will' where the instrument takes effect after the death of the executant. Therefore, in case of Will the Court takes assistance from the attending circumstances whether the executant could have executed the Will or not? However, in case of agreement to sell the parties enter into an agreement with open eyes knowing fully well about all the attending circumstances and then decided the terms of the agreement as per their desire. Therefore, the Court cannot delve into the suspicious nature of the circumstances to assess the validity of the agreement to sell. An agreement to sell can be questioned only on the ground of fraud, undue influence or misrepresentation, like any other agreement. In this case, there is no proof of fraud. Rather the admissions made by respondent exclude the possibility of fraud. Still further there is no allegation of undue influence or misrepresentation by the appellant. Hence the agreement stands duly proved by the appellant by duly examining the attesting witness.

As a last resort, learned counsel for the respondent submitted that the relief of return of money has rightly been granted by the First Appellate Court because it was within the discretion of the court to mold the relief in the facts of this case. However, a perusal of the judgment of the lower Appellate Court shows that it has denied the specific relief of execution of sale deed by giving the reason that the agreement itself seems to be suspicious. However, as discussed above, the reason given by the lower appellate court for this purpose are not sufficient, rather, has been discarded by admissions of the respondent herself. Therefore, no proper exercise of discretion by the lower Appellate Court is discernible in its judgment. Otherwise, also the counsel for the respondent has failed to bring up any equitable circumstances in her favour. On the contrary, the conduct of the appellant in entering into contract than making an attempt to disown the contract by taking a plea which she could not substantiat shows that balance of equities can not be in her favour. Hence, the denial of relief of execution of the sale deed in favour of the appellant plaintiff is not sustainable.

No other point was argued.

In view of the above, the present appeal is allowed. The judgment and decree passed by the lower appellate court are set aside and the judgment and decree passed by the trial court are upheld.

2nd August, 2017 **[RAJBIR SEHRAWAT]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned *Yes/No*

Whether Reportable *Yes/No*