

246

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.445 of 2016 (O&M)

Date of Decision : 06.10.2017

SURAT SINGH

....APPELLANT

VERSUS

RAJWANT KAUR AND OTHERS

....RESPONDENTS

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. Amit Sheoran, Advocate for
Mr. Gaurav Arora, Advocate
for the appellant.

RAMESHWAR SINGH MALIK, JUDGE (ORAL)

Unsuccessful plaintiff is in Regular Second Appeal against the concurrent findings of facts recorded by both the learned Courts below, whereby suit for possession by way of specific performance of agreement to sell was partly decreed by the learned trial Court vide impugned judgment and decree dated 27.01.2012, granting the alternative relief of recovery of earnest money along with interest and his first appeal was also dismissed by the learned Additional District Judge vide impugned judgment and decree dated 30.07.2015, upholding the judgment and decree of the learned trial Court.

Brief facts of the case, as noticed by the learned First Appellate Court in para 2 of the impugned judgment are that the facts relevant for disposal of the appeal were that plaintiff filed a suit seeking a decree for specific performance on the basis of an agreement to sell dated 3.12.2002 executed by the defendants in his favour and also sought a relief of

permanent injunction restraining the defendants from alienating the suit land in favour of any other person except the plaintiff. It was alleged by the plaintiff that defendants No.1 to 3 entered into an agreement to sell dated 3.12.2002 with the plaintiff regarding the land measuring 17 Kanals 11 Marlas as fully detailed in the plaint vide Jamabandi for the year 1998-99 for a total sale consideration of Rs.6,82,256/- and Rs.5 lacs were paid by the plaintiff to the defendants as earnest money and the balance price of Rs.1,82,256/- was to be paid at the time of execution and registration of the sale deed and the target date was fixed as 2.12.2003. The defendants were required to clear the bank loan which they had raised on this land before the execution of the sale deed. As such, in order to get clearance from the bank, the defendant extended the target date for execution of sale deed upto 2.1.2004 which was also duly signed by the defendants in the presence of the witnesses and the terms and conditions of the original agreement were continued as before. The date was further extended upto 15.5.2005 vide writing dated 1.12.2004. On 3.12.2002, another sum of Rs.65,000/- was paid by the plaintiff to the defendants and thus, a sum of Rs.1,17,256/- was to be paid at the time of execution of the sale deed. On 17.5.2005, the plaintiff came present in the office of Sub Registrar, Nilokheri alongwith the balance sale price for execution and registration of the sale deed and waited for the defendants but they did not turn up to perform their part of the contract and thereafter, he appeared before the Sub Registrar-cum-Executive Magistrate, Nigdu and got his presence marked by filing an affidavit dated 16.5.2005 executed showing that he was ready and willing to perform his part of the contract while the

defendants were not willing to execute the same. Plaintiff sent a legal notice dated 22.2.2008 through his counsel to defendants No.1 to 3 for execution of the agreement to sell which was received back undelivered.

Defendants were put to notice. They appeared and filed their contesting written statement raising more than one preliminary objections. It was specifically pleaded by the defendants that there were more than one money transactions between the parties. They took the loan from the plaintiff and thereafter returned the same. They never intended to sell their land to the plaintiff. During the course of money transactions, defendants put their signatures on some papers, which came to be misutilized by the plaintiff. Plaintiff filed his application. On completion of pleadings of the parties, the learned trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to decree for specific performance of contract on the payment of balance sale consideration, as prayed for? OPP.
2. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
3. Whether the plaintiff has got no locus-standi to file the present suit? OPD.
4. Whether the suit of the plaintiff is not legally maintainable in its present form? OPD.
5. Whether the plaintiff has no cause of action to file the present suit? OPD.
6. Whether the plaintiff has not come to the court with clean hands and has suppressed the true and material facts from the court? OPD
7. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
8. Relief.”

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record the documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, the learned trial Court came to the conclusion that plaintiff has duly proved the execution of agreement to sell between the parties. However, keeping in view the totality of the facts and circumstances of the case, plaintiff was not found entitled for the decree of specific performance. Accordingly, suit of the plaintiff was partly decreed granting him the alternative relief of refund of earnest money along with interest vide impugned judgment dated 27.01.2012, passed by the learned trial Court. Plaintiff felt aggrieved and filed his first appeal but the same was also dismissed by the learned Additional District Judge vide impugned judgment and decree dated 30.07.2015. Hence, this Regular Second Appeal at the hands of unsuccessful plaintiff.

Heard learned counsel for the appellant.

More than one money transactions between the parties have been duly established on the record. However, since the defendants could not duly prove refund of the amount of earnest money, the learned Courts below were well justified to grant alternative relief of recovery of earnest money along with interest, by passing their respective impugned judgments and decrees. Relief of specific performance, being a discretionary relief, the learned Courts below were well within their jurisdiction to exercise discretion in favour of the defendants, denying the primary relief of specific performance to the plaintiff-appellant and the impugned judgments and decrees, passed by the learned Courts below

deserve to be upheld.

Before arriving at a judicious conclusion, the learned Additional District Judge rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct perspective. Relevant and cogent findings recorded by the learned first Appellate Court in para 13 and 14 of its impugned judgment, which deserve to be noticed here, which read as under:-

“The execution of the agreement to sell dated 3.12.2002 by the respondents-defendants in favour of the plaintiff was well proved by the plaintiff by leading oral as well as documentary evidence. The plaintiff, in order to prove the execution of the agreement to sell dated 3.12.2002 examined himself as PW1, Baj Singh and Hazoor Singh, attesting witnesses of the agreement to sell as PW-2 and PW-4 respectively. On the other hand, the plea of the defendants-respondents was there were money transactions between the parties as they had raised a loan from the plaintiff which was repaid by them and the plaintiff might have obtained their thumb impressions taking advantage of their illiteracy. However, the defendants-respondents did not lead any satisfactory evidence on the file to prove this plea and to the contrary, they did not deny their signatures/thumb impressions on the agreement to sell. The defendants-respondents also did not lead any evidence on the file to prove that they returned a sum of Rs.5,65,000/- received by them as earnest money, to the plaintiff-appellant. Therefore, the learned trial court has rightly held that the execution of the agreement to sell Ex.P2 by the defendants-

respondents has been proved by the plaintiff-appellant. However, the learned lower court has held that as pleaded in the plaint and as admitted by the plaintiff while appearing in the witness box as PW-1, the defendants-respondents took a loan from the bank and the suit land was mortgaged with the bank and therefore, the right of the plaintiff-appellant was subservient to the right of the bank which granted loan to the defendants-respondents as there was nothing on the file to prove that the defendants-respondents cleared the loan amount to the bank and obtained a clearance certificate. On this ground, the learned lower court has refused to grant a decree for specific performance to the plaintiff-appellant. This court also finds itself in conformity with these findings recorded by the learned lower court and this court is also of the view that when the suit land was under mortgage with the bank which granted loan to the defendants-respondents and since, there is no evidence on the file to prove that the defendants-respondents had cleared the loan and had obtained a clearance certificate, the bank has the first right to recover the loan amount from the defendants-respondents who mortgaged the suit land as security while raising loan and the right of the plaintiff would be subservient to the right of the bank. As such, the learned lower court has rightly refused to grant a decree for specific performance to the plaintiff-appellant.

In *Parakunnan Veetill Vs. Nedumbara Kuruvila and others*, AIR 1987 S.C. 2328, it has been held by the Hon'ble Supreme Court that Section 20 of the Specific Relief Act, 1963 preserves judicial

discretion to courts as to decreeing specific performance. The court should meticulously consider all the facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of operation to have unfair advantage to the plaintiff.”

Further, it is also a matter of record that the suit land was under mortgage with the bank. In such a situation, parties to this unwarranted litigation were not competent to enter into agreement to sell, unless the defendants would obtain a clearance certificate because without any clearance certificate issued by the bank, no sale deed could have been executed. It was not even the pleaded or argued case on behalf of the plaintiff-appellant that any such clearance certificate was obtained by the defendants or was issued by the bank in their favour. Under these undisputed circumstances of the case, it can be safely concluded that the learned Courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld for this reason also.

Since the suit land was under mortgage with the bank, first charge would be that of the bank on the suit land. Plaintiff could not have forced the defendants to execute the sale deed in his favour unless the land would have been free from all encumbrances. In such a situation, plea raised on behalf of the defendants appeals to reason that there were more than one money transaction between the parties. Defendants raised a

loan from the plaintiff. During these money transactions, defendants had to put their signatures as per the dictates of the plaintiff, he being in a commanding position. In such a fact situation, no fault can be found in the concurrent findings of the facts recorded by the learned Courts below and the impugned judgments and decrees deserve to be upheld for this reason also.

So far as the judgment of the Hon'ble Supreme Court relied upon by learned counsel for the appellant in 'Laxman Tatyaba Kankate and Another versus Taramati Harishchandra Dhatrak,' 2010(7) SCC 717, is concerned, there is no dispute about the observations made and law laid down therein. However, on close perusal of the cited judgment, it has not been found to be of any help to the appellant, being distinguishable on the facts.

It is the settled principle of law that peculiar facts of each case are to be examined, considered and appreciated first, before applying any codified or judgemade law thereto. Sometimes, difference of even one circumstance or additional fact can make the world of difference, as held by the Hon'ble Supreme Court in Padmausundara Rao and another versus State of Tamil Nadu and others, 2002(3) SCC 533, Union of India versus Amrit Lal Manchanda and others, 2004 (3) SCC 75, State of Orissa versus Md. Illiyas, 2006(1) SCC 275 and State of Rajasthan versus Ganeshi Lal, 2008(2) SCC 533.

During the course of hearing, learned counsel for the appellant failed to point out any patent illegality or perversity in either of the impugned judgments passed by the learned courts below. He also

could not refer to any question of law much less substantial question of law, which is *sine qua non* for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009(2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2013 (3) SCC 179.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since no illegality has been found in either of the impugned judgments and decrees passed by the learned Courts below, the same deserve to be upheld. Present regular second appeal having been found wholly misconceived, bereft of merit and without any substance, must fail. No ground for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

(RAMESHWAR SINGH MALIK)
JUDGE

October 06, 2017
rajneesh

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