IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.870 of 2016 (O&M)
Date of Decision.10.01.2017

Manjit Krishan Malhotra ....Appellant

Vs

Kartar Krishan and another ....Respondents

Present: Mr. Rahul Sharma-I, Advocate for the appellant.

Mr. Sandeep Khunger, Advocate for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

The appellant-plaintiff is in regular second appeal against the concurrent finding of fact whereby the suit seeking specific performance of agreement dated 8.6.2004 in respect of land measuring 81 kanals 4 marlas as described in the plaint, against payment of ₹14 lacs as earnest money, agreed to be sold for a total consideration of ₹29,16,000/- with consequential relief of permanent injunction restraining the defendants from alienating the land aforementioned, has been dismissed by the both the Courts below.

Mr. Rahul Sharma-I, learned counsel appearing for the appellants submitted that the stipulated date in respect of the aforementioned agreement to sell was earlier 30.04.2006, which on the request of the respondent-defendant, was extended upto 30.12.2016 and thereafter upto 31.05.2007 and writing to that effect was also made on the original agreement under the hands of the defendants and signatures of the appellant-plaintiff. The plaintiff approached the office of Sub Registrar, Abohar on 31.05.2007 along with balance amount of the sale deed and expenses but the respondents-defendants did not put in appearance and thereafter, sent a notice dated 12.09.2007, though the same was replied and in this process, filed the suit on 09.04.2008, hence readiness and willingness had been throughout.

He further submitted that the ratio decidendi culled out in the judgment of Hon'ble Supreme Court in ***I.S. Sikander (dead) by LRs Vs. K. Subramani and others (2013) 15 SCC 27*** would not apply at all, as the time was not the essence of the agreement to sell, owing to the perpetual extensions.

Both the Courts below have gravely erred in disallowing the application for additional evidence though the documents sought to be produced were documents which went to the root of the matter, more particularly, the notice issued by the Income Tax Authorities. Had the same been taken on record/noticed, it would have helped the lower Appellate Court for proper adjudication of the *lis*. The agreement to sell stipulated that the vendors would arrange for the jamabandi and would hand over the same to the vendee prior to the registration of the sale deed. The factum of having not approached the Patwari has been admitted by DW4, Jagmohan Krishan Malhotra. In fact, the respondents-defendants were avoiding the execution of the sale deed and registration thereafter, as the prices of the land, over a period of time, increased manifold. The judgments and decrees of the Courts below are based upon misconstrual and misreading of the oral and as well as documentary evidence, thus, there is gross illegality and perversity.

The affidavit of the defendants was attested around 10.30 AM on 31.05.2007. The Courts below have also not appreciated the fact that the appellant-plaintiff was also the power of attorney holder of the defendants which included the power to sell, which had not been cancelled till the filing of the suit. In support of his contention, he relied upon the following judgments, to submit that the ratio decidendi culled out in ***I.S. Sikander (dead) by LRs*** (supra) has been differed keeping in view the peculiar facts and circumstances which are identical to the present case, thus, urges this Court for setting aside of the judgments and decrees under challenge:-

> "***1. Bal Vir Sehgal Vs. Sanjay Bansal*** passed in RSA No.2311 of 2015 on 11.01.2016.
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> 2. ***Mandhir Singh Vs. Gurjant Singh 2014(3) RCR (Civil) 728.***
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> 3. ***Rajinder Singh @ Harjinder Singh Vs. Paramjit Singh 2015 (4) PLR 826.***
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> 4. ***Sanjay Dhamija Vs. Ram Kishan (deceased) through his LRS*** passed in RSA No.2790 of 2015 on 03.12.2015.
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> 5. ***Beant Singh Vs. Karnail Singh*** passed in RSA No.2572 of 2011 decided on 12.02.2016.
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> 6. ***M/s Kailash Nath Associates Vs. Delhi Development Authority and another 2015(2) RCR (Civil) 206.***
>
> 7. ***Satish Batra Vs. Sudhir Rawal 2012(4) RCR (Civil) 890.***

He further submitted that both the Courts below have misconstrued the account statement for the period from 01.11.2009 to 12.11.2009, Ex.P28 and 11.12.2009 to 18.12.2009, Ex.P29, thus, the findings of the Courts below qua readiness and willingness are totally alien to the facts of the case and liable to be set aside.

On the contrary, Mr. Sandeep Khunger, learned counsel appearing for the respondents-defendants submitted that the agreement to sell had become null and void, much less, non existent as the appellant-plaintiff failed to perform his part of the contract. The appellant-plaintiff did not have the balance sale consideration, which itself is one of the essential ingredients for granting the discretionary relief. The actual date for getting the sale deed registered as per the agreement was after two years of the agreement. On the contrary, on 30.04.2006, the defendants had appeared themselves at Abohar but the plaintiff insisted to get the time extended. The defendants being elder brothers of plaintiff, purely out of love and affection, consented for extension and the date was extended upto 31.12.2006 but it was made clear that in case the plaintiff did not come forward, the agreement shall be treated as null and void. Even during their meeting, the plaintiff admitted to the defendants in the presence of Raj Kumar son of Faqir Chand resident of Ferozepur that at that time he had no money to get the sale deed registered i.e. on 31.05.2007. The presence of the defendants has been proved on record through the affidavit dated 31.05.2007 bearing No.5362 before the office of Sub Registrar-cum-Executive Magistrate, Abohar. Legal notice dated 12.09.2007 clearly indicated the cancellation of the agreement. In fact, there is no challenge to the same and therefore, in the absence of the same, the suit for specific performance in view of the ratio decidendi culled out in ***I.S. Sikander (dead) by LRs*** (supra) was/is not maintainable, thus, urges this Court for upholding the concurrent finding of fact rendered by both the Courts below, as no substantial question of law arises for consideration, much less, there is no gross illegality and perversity.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Sharma for the following reasons:-

(i) The statement of account produced on record on 31.05.2007 showed an amount of ₹3000/- and odd amount in the account of appellant-plaintiff, thus, having sufficient fund for making the payment of balance sale consideration, is one of the essential ingredients to prove readiness and willingness, which is conspicuously missing.

(ii) The notice dated 12.09.2007, Ex.P17, has not been denied. There is specific averment, therein, for cancellation of the agreement and forfeiture of earnest money. Para 4 of the same reads as under:-

> *"4. That due to your failure to arrange the balance sale consideration on 31.05.2007 you have failed to perform your part of the said agreement of sale dated 8.6.2004 and thus the said agreement of sale stood rescinded and the earnest money stood forfeited. Thus you have no right or authority to seek any relief on the basis of said agreement of sale dated 8.6.2004 against my clients."*

(iii) The ratio decidendi culled out in ***I.S. Sikander (dead) by LRs*** (supra) would apply to the present case, wherein in para 28, the Hon'ble Supreme Court has held that in the absence of challenge to the cancellation of agreement, simpliciter suit for specific performance is not maintainable. The judgments relied upon by Mr. Sharma are based upon facts and circumstances of each case. The pith and substance had been that there was no occasion arose for challenging the cancellation of agreement to sell. It is not a case that the cancellation was done after filing of the suit. It is of September 2007 whereas the suit was filed on 09.04.2008.

(iv) The explanation of the plaintiff for arranging loan from firm M/s Tirath Ram Badri Nath to which Rajiv Khanna being one of the partners has not been proved, as Rajiv Khanna, PW-4 did not bring on record any statement of account of having advanced the money or a friendly loan to the appellant-plaintiff rather in cross-examination admitted that the firm M/s Tirath Ram Badri Nath is a *kutcha* firm and he being partner of the firm had withdrawn ₹11,50,000/- from the account in his own name to hand over the same to the plaintiff but as noticed above did not produce any account book of the firm regarding the withdrawal of the aforementioned amount. Ex.P30 is just a document created by the plaintiff being an afterthought to show that he had sufficient balance with him on 31.05.2007.

(v) While appearing as PW3, the plaintiff himself admitted that he had taken the amount from PW4, Rajiv Khanna vide cheque but did not disclose about the remaining balance of ₹6 lacs.

All these factors have been taken care of by both the Courts while examining the witnesses of the appellant-plaintiff, and noticed that the appellant-plaintiff was not ready and willing to perform his part of the agreement. I am in agreement with the aforementioned findings and do not intend to differ with the same. The judgments and decrees passed by both the Courts below are upheld and the regular second appeal is resultantly dismissed.

(AMIT RAWAL)
JUDGE

January 10, 2017
Pankaj*

Whether speaking/reasoned Yes

Whether reportable No