IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3473 of 2002 (O&M)
Date of Order: 17.09.2018

Kali Ram and others

..Appellants

Versus

Gurdip Singh and others ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. S.N.Chopra, Advocate, and
Mr. Rakesh Chopra, Advocate,
for the appellants.

Mr. Dinesh Arora, Advocate, for
Mr. S.P.Arora, Advocate,
for the respondents.

ANIL KSHETARPAL, J.

Plaintiffs-appellants are in the regular second appeal against the concurrent findings of fact arrived at by both the courts below, while dismissing their suit for possession by way of specific performance of the agreement to sell with a consequential relief of permanent injunction.

It is the case of the plaintiffs that defendants no.1 to 9, agreed to sell 42 acres 1 kanal and 16 marlas of land along with 16 living rooms, 4 kitchens, 5 varandas and four tubewells installed in the land at the rate of Rs.1,10,000/- per acre and received Rs.9,40,000/- as an earnest money.

As per agreement to sell, plaintiffs were to get the sale deed executed with regard to 25 acres of land on 15.06.1991, after adjusting earnest money of Rs.5,00,000/-, whereas registered sale deed with regard to remaining land was to be executed and registered upto 30.12.1991 adjusting remaining earnest money of Rs.4,40,000/-

Initially, plaintiffs filed a suit for permanent injunction claiming that the defendants are threatening to execute the sale deed in favour of someone else. However, vide order dated 05.06.1992, plaintiffs got amended their plaint and relief of specific performance of the agreement to sell was added.

Defendants no.1 to 7 and 9 admitted execution of the agreement to sell and receipt of the earnest money. It was pleaded that no agreement to sell was executed by defendant no.8 and his name has been got fraudulently interpolated in the agreement to sell. It was further pleaded that the defendants wanted to purchase the land in District Karnal and, therefore, they entered into further two agreement to sells and paid earnest money. Defendants further pleaded that the plaintiffs were never ready and willing to perform their part of the contract. Although, defendants visited the office of Sub-Registrar on 15.06.1991, the target date for execution and registration of the sale deed i.e. 15.06.1991 with respect to 25 acres of land but plaintiffs did not turn up. Defendants further pleaded that they again visited the office of Sub-Registrar on 17.06.1991 and got their affidavit attested in order to prove their presence. Defendants further served a notice on 18.06.1991 on the plaintiffs and requested them to come and execute the sale deed on 19.06.1991 but the plaintiffs never came forward. Defendants further pleaded that inspite of repeated requests, plaintiffs did not come forward to execute the sale deed and they even visited the office of Sub-Registrar on 30.12.1991 and moved an application showing their readiness and willingness and affidavit was also got attested.

It may be mentioned here that after the amendment of the plaint, when relief of specific performance was added, defendants moved an application on 30.04.1993 in the court requesting the court to direct the plaintiffs to deposit sale consideration and stamp duty in the court, so that the sale deed can be executed. However, plaintiffs did not reply to the said application.

Defendant no.8 filed separate written statement and contended that he has neither executed any agreement to sell in favour of the plaintiffs nor received any earnest money and his thumb impression has been forged.

Both the courts after appreciating the evidence found that the plaintiffs were not ready and willing to perform their part of the contract and, therefore, specific performance of the agreement to sell cannot be granted. Both the courts have also refused the relief of refund of the earnest money also.

Learned counsel appearing for the appellants has submitted that since defendant no.8 was claiming that the agreement to sell is forged, therefore, learned trial court should have at least ordered refund of the earnest money. While elaborating he further submitted that the plaintiffs wanted to produce the entire chunk of land and since defendant no.8 had disputed the execution of the agreement to sell, therefore, the courts erred in refusing to refund the amount. He further submitted that as per Section 230-A of the Income Tax Act, sale deed could only be executed after getting permission from the income tax authorities which was not obtained by the defendants. He further drew attention of the court to the findings of the learned appellate court wherein the court has noticed that no reply was sent by the plaintiffs, although a reply had been sent. He further drew attention of the court to the findings of the first appellate court that Sukha Singh, the person who allegedly forged the thumb impression of defendant no.8, had not been summoned whereas in fact he was summoned.

It may be significant to note here that the plaintiffs through subsequent sale deed had already purchased the property owned by defendant no.8. In the present case, it is undisputed that plaintiffs never showed their readiness and willingness to execute the sale deed either on 15.06.1991 or on 30.12.1991. Admittedly, sale deed was to be executed in two stages. Plaintiffs, in order to succeed has to prove that they were ready and willing on the target dates fixed in the agreement to sell. In the present case, plaintiffs failed to prove that fact. Still further, even during the pendency of the suit, defendants again gave an opportunity to the plaintiffs to prove their readiness when an application was filed before the court, but the plaintiffs failed to avail that opportunity. In such circumstances, no exception can be made to the findings of fact arrived at by the courts below while returning a finding that the plaintiffs were not ready and willing to perform their part of the contract.

As far as arguments of learned counsel that once defendant no.8 was alleging forgery, therefore, refund should have been ordered, does not have any substance.

Agreement to sell between the plaintiffs and defendants no.1 to 7 and 9 is not disputed. It is not the case of the plaintiffs that since defendant no.8 has not signed the agreement to sell, therefore, they do not wish to purchase share of defendants no.1 to 7 and 9. Plaintiffs were very much in the knowledge of the fact that defendant no.8 has not thumb marked the agreement to sell. It is their pleaded case that they were served with a notice by Rajwant Singh, defendant no.8 on 04.04.1991, in which he had denied execution of the agreement to sell and receipt of earnest money.

Plaintiffs at least at that stage should have abandoned their right for specific performance of the agreement to sell if they only wanted refund of the earnest money. However, plaintiffs continue to contest the suit and never pleaded that they are not interested in execution and registration of the sale deed with respect to the remaining property.

Plaintiffs have pleaded that they had arranged for the balance sale consideration by entering into an agreement to sell. However, the courts have found that land belonging to the plaintiffs near Pipli had been acquired and, therefore, the plea of plaintiffs is also factually incorrect.

As regards arguments of learned counsel that necessary permission under the Income Tax Act has not been obtained by the defendants, it may be noticed that neither such issue was ever framed nor any such argument was raised by the counsel appearing for the plaintiffs-appellants before the courts below. Learned counsel for the appellants submitted that in the grounds of appeal filed before the first appellate court, such ground was taken. Since, before both the courts below, this point has not been pressed, this court cannot permit counsel for the plaintiffs-appellants to raise a new point.

Still further it is not the case of the plaintiffs that defendants were not in a position to execute the sale deed, rather plaintiffs went to the court apprehending that the defendants are intending to sell the property to someone else. Hence, the arguments of learned counsel for the appellants is against the plea taken by the plaintiffs while filing the suit.

As regards 2 small incorrect findings/errors of learned first appellate court, one with regard to replying to the notice and second with regard to effort to summon Sukha Singh, it may be noted that such findings do not effect the merits of the case. Plaintiffs did reply to the notices issued. However, that would not itself improve the case of the appellants.

As regards effort of the plaintiffs to summon Sukha Singh that also would not improve the case because property from defendant no.8 has been purchased by the plaintiffs.

In view of the aforesaid, this court does not find any good ground to interfere with the findings of fact arrived at by the courts below.

The regular second appeal is dismissed with costs of Rs.1,00,000/-.

September 17, 2018 **(ANIL KSHETARPAL)**
nt **JUDGE**

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