IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1077 of 2000 (O&M)
Date of Order:03.12.2018

Balbir Singh

..Appellant

Versus

Ishar Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: None for the appellant.

Mr. Munish Gupta, Advocate,
for respondent nos.1 to 3.

ANIL KSHETARPAL, J(Oral)

Although, learned counsel for the appellant has not chosen to appear, however, this court has heard learned counsel for the respondents-defendants at length and with his able assistance gone through the judgments passed by the courts below as well as the record.

Plaintiff-appellant filed a suit for declaration that he is owner in possession of the suit land. He in the alternative sought decree for possession by way of specific performance of the agreement to sell dated 13.06.1988. It is positive case of the plaintiff that predecessor-in-interest of the defendants Deep Singh agreed to sell land measuring 18 bighas 8 biswas vide agreement to sell dated 16.04.1988 for a total sum of Rs.2,48,400/-, out of which Rs.70,000/- was paid as earnest money. It is further pleaded that there is a subsequent agreement to sell dated 13.06.1988, through which another amount of Rs.1,38,400/- was paid and Rs.40,000/- was kept towards re-payment of the mortgage amount. It was pleaded that on that day itself, Deep Singh has also executed a General Power of Attorney in favour of the plaintiff which included power to sell apart from executing a registered Will in his favour. Sh. Deep Singh died on 10.01.1989. Although, defendants who are successors-in-interest of Deep Singh were repeatedly requested, however, after delaying the matter, they finally refused to honour the agreement to sell.

Defendants contested the suit and denied any agreement to sell or receipt of earnest money.

Learned trial court after appreciating the evidence in detail, decreed the suit. The learned trial court found that execution of both the agreement to sell i.e. 16.04.1988 and subsequent agreement to sell dated 13.06.1988 which does not provide for any date or time for performance, have been proved. The court further found that out of total sale consideration, payment of Rs.70,000/- on 16.04.1988 and Rs.1,38,400/- on 13.06.1988 have been proved. The court further found that redemption of the mortgage is also proved by the plaintiff on payment of Rs.40,000/- as agreed. Execution of the General Power of Attorney, which is a registered document has also been proved.

However, learned first appellate court reversed the finding of the trial court while giving three reasons:-

(i) Plaintiff was not ready and willing to perform his part of the contract.

(ii) It is strange that the plaintiff did not get possession of the land even after paying the entire amount.

(iii) The suit is barred by limitation as the suit was filed on 09.01.1992. Whereas stipulated date for execution and registration of the sale deed as per the agreement to sell dated 16.3.1988 was 15.6.1988.

In the considered view of this court following substantial questions of law arise for determination:-

(i) Whether the question of readiness and willingness is to be examined by the court as per the facts and circumstances of the case?

(ii) Whether in view of a subsequent agreement to sell which alters/changes the original terms and conditions, can the limitation be calculated from the date fixed in original agreement to sell which stood superseded?

Now let's deal with the reasons given by the first appellate court in detail.

In the present case, first appellate court has not reversed the finding of the trial court that entire sale consideration has been paid to late Sh. Deep Singh, predecessor-in-interest of the defendants and Rs.40,000 towards re-payment of mortgage at the time of redemption. It is also not disputed that previous agreement to sell dated 16.4.1988 was superseded by a subsequent agreement to sell dated 13.6.1988, in which no date for execution and registration of the sale deed was fixed/provided for. In such circumstances, plaintiff was not required to make any further payment or prove his readiness and willingness. In such circumstances, particularly when not only both the agreement to sells have been proved but execution and registration of a General Power of Attorney, which is Ex.P3 on the record, through which late Sh. Deep Singh had even given power to the plaintiff to even sell the property clearly lead this court to arrive at a conclusion that in fact but for execution and registration of the sale deed, the deal/contract between the parties was complete. It was for this reason that subsequent agreement to sell dated 13.6.1988 did not provide the date for execution and registration of the sale deed.

As regards the reason given by the first appellate court that plaintiff did not get possession, it would again depend upon the facts and circumstances of the particular case. Merely because the entire payment has been made, it is not mandatory that in each case the intended purchaser must get hold of the possession.

It has been provided in Section 62 of the Contract Act that if the parties to a contract agreed to substitute a new contract for a previous one or alter the previous agreement, the original contract need not be performed. In such circumstances, the first appellate court committed an error in calculating the limitation from 15.6.1988. Even if the limitation is calculated from the date of death of late Sh. Deep Singh, still the suit filed is within limitation. It has been well settled by the Hon'ble Supreme Court in the case of ***Smt. Chand Rani (Dead) By Lrs. vs Smt. Kamal Rani (Dead) By Lrs. (1993) 1 SCC, 519***, that in an agreement to sell for sale of the immovable property, normally the time is not essence of the contract. In the present case in view of entire payment having been made and the subsequent agreement to sell since did not specify any date for specific performance of the agreement to sell, second part of Article 54 of the Schedule to Limitation Act 1953 would apply, wherein it is provided that limitation would begin to run from the date the plaintiff has notice of refusal by the party opposite. Learned first appellate court has clearly overlooked the aforesaid provision.

Learned counsel for the respondents has submitted that the discretion should not be exercised in favour of the plaintiff as the suit was filed after a delay of 3½ years from the original target date. He further submitted that once the plaintiff himself has pleaded that he was intending to sell the property and looking for a buyer, therefore, specific performance should not been granted.

This court has considered the submission. The discretion has to be exercised as per the facts and circumstances of the case. Herein as noticed above, deal was complete qua the defendants on 13.6.1988 when entire payment payable to the predecessor in interest of the defendants stood paid. Plaintiff had also paid the remaining amount while getting the land redeemed. In such circumstances, defendants or their predecessor-in-interest were not to receive any further payment.

In such circumstances, the discretion which has been exercise by the trial court has been wrongly interfered by the first appellate court. All the three reasons given by the first appellate court have been found to be suffering from error.

As regards second argument of learned counsel for the respondents that the plaintiff himself has pleaded that he intended to sell the property but could not find a buyer, is also to be examined as per the facts and circumstances of the present case which need not be repeated. The plaintiff is held entitled to decree for possession by way of specific performance of the agreement to sell dated 13.6.1988.

Learned counsel for the respondent further submitted that the initial stay granted by this court was vacated on 20.07.2000 and substantial time has elapsed.

The order passed by this court on 20.07.2000 is extracted as under:-

> "*After hearing the learned counsel for the appellant and the learned counsel for respondent No.3 and going through C.M.No.1821-C of 2000, the same is disposed of by declining the stay order and by observing that any alienation made during the pendency of the RSA shall be subject to the final outcome of the RSA which already stands admitted for hearing.*
>
> *Civil miscellaneous is disposed of accordingly.*"

It is apparent that while vacating the stay, which was initially granted this court had already specified that any alienation made during the pendency of the appeal shall be subject to final outcome of the appeal. In any case, no document has been produced to prove that the property has been alienated. Still further any alienation made is governed by rule of lis pendence.

In view of the aforesaid, the questions of law framed above are answered in favour of the plaintiff-appellant. The judgment and decree passed by the first appellate court is reversed and that of the trial court is restored.

The regular second appeal is allowed.

December, 03, 2018 **(ANIL KSHETARPAL)**
nt **JUDGE**

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