IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.599 of 1999 (O&M)
Date of decision : 07.12.2018

Deepak Singh ...Appellant

Versus

Balbir Singh Grewal and others ...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vikas Bahl, Sr. Advocate with
Ms. Priyanka Kansal, Advocate and
Ms. Vedika Gandhi, Advocate for the appellant.

Mr. A.K. Chopra, Sr. Advocate with
Mr. Harminder Singh, Advocate for the respondents.
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ANIL KSHETARPAL, J. (ORAL)

CM No.18218-C of 2018

Prayer in the application is for permission to produce additional evidence in the form of an affidavit of the appellant.

In the affidavit, it has been pleaded that the suit property is the only residential house owned by the deponent, his wife, son, daughter and grand daughter. In the considered view of this Court, such affidavit is not relevant for the purpose of decision of the appeal. It has been found in the detailed judgment which follows that the appellant has no right, title or interest in the property.

Accordingly, the application is dismissed.

Main case

Defendant No.1-appellant is in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below decreeing the suit for possession by way of specific performance of the agreement to sell dated 09.08.1981 for sale of house No.235, Sector 9-C, Chandigarh.

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At the outset, it must be noticed that the execution of the agreement to sell and the receipt of the earnest money is not disputed. Plaintiff Nos.1 and 2 had agreed to purchase the property for a sum of ₹11,40,000/- wayback on 09.08.1981 and paid ₹1,25,000/- as earnest money on 09.08.1981 and further paid ₹40,000/- on 29.08.1981.

The defendants while filing the written statement had pleaded as under:-

> *"10. That para 10 of the plaint does not call for any reply from the answering defendant as it does not relate to him. The answering defendant did not reach before the Sub-Registrar firstly because he had already through a telegram dated 6.8.1982 addressed to plaintiffs Nos.1 and 2 extended the period of the execution of the sale deed in respect of the property in dispute and secondly because his sons, the other coparceners, the property being a joint Hindu Family property, were not consenting to the registration of the sale deed in spite of being pressed by the answering defendant."*

Still further, when defendant No.1 appeared in evidence, he in examination-in-chief stated as under:-

> *"I had to procure income tax clearance certificate before the date of sale however I could not arrange that certificate before 6.8.82 because I came to know that plaintiffs No.1 and 2 were British Nationals and that they have not sought permission of Reserve Bank of India. Both the plaintiffs are residents of London. I did not execute sale deed in favour of the plaintiffs on 6.8.82. I however sent telegram that the date was extended. I also sent registered letters."*

In cross-examination, he stated as under:-

> *"It is correct that on 6.8.82 I was not in a position to execute*

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sale deed in favour of the plaintiffs because I had not procured income tax certificate and cleared the liabilities."

After considering all the aspects of the matter, both the Courts below, as noticed above, have decreed the suit.

Learned Senior counsel appearing on behalf of the appellant has submitted that during the pendency of the litigation, plaintiff Nos.1 and 3 have assigned their rights in favour of plaintiff Nos.2 and 4. It may be noticed that plaintiff Nos.1 and 2 are the brothers whereas plaintiff Nos.3 and 4 are their wives. He further submitted that since plaintiff No.2 is a British citizen, therefore, the agreement to sell is against the public policy being in violation of the Foreign Exchange Regulation Act, 1973 (hereinafter to be referred as "the Act of 1973"). He further submitted that the discretion should not be exercised in favour of the plaintiffs as 37 years have gone by and this is the only residential house owned by defendant No.1. He further submitted that the earnest money has already been paid to the plaintiffs. He further submitted that the agreement to sell was cancelled through telegram which has not been challenged. He further submitted that the present suit is barred under Order 2 Rule 2 CPC as the previous suit for injunction was filed and in the aforesaid suit, it was pleaded that defendant No.1 has refused to honour the agreement to sell. He further submitted that the First Appellate Court has failed to decide the application under Order 41 Rule 27 CPC for permission to lead additional evidence filed by defendant No.1-appellant herein. He further submitted that the decree cannot be passed as the property was under attachment and, therefore, the decree is in violation of Section 64 of the Code of Civil Procedure.

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On the other hand, learned Senior Counsel for the respondents has submitted that plaintiff Nos.1 and 2 had entered into the agreement and the permission, if any, shall be required only when the sale deed is to be executed. He further submitted that during the pendency of the case, the Act has already been repealed on 29.12.1999. He further submitted that once plaintiff No.1 is an Indian National residing in India and there is no evidence that any foreign exchange was brought in the country without the permission if required, therefore, the agreement to sell cannot be said to be against the public policy.

He further submitted that the delay in granting the ultimate relief to the plaintiffs is solely on account of the defendant who cannot be allowed to capitalize on his own wrong action. He further submitted that the earnest money was received subject to the decision of the appeal and the Court while ordering refund had specifically ordered that money is being repaid without prejudice to the rights of the plaintiffs.

As regards the cancellation, learned counsel for the respondents has submitted that this point has never been pressed before the Courts below and, therefore, for the first time, this argument cannot be permitted to be raised. He further submitted that the suit for injunction was filed on 17.06.1982 i.e. before the target date fixed in the agreement to sell i.e. 06.08.1982 and, therefore, Order 2 Rule 2 CPC would not apply. Still further, he has submitted that the pleadings of the previous suit for injunction have not been filed and, therefore, Order 2 Rule 2 CPC cannot be examined.

As regards the argument of the learned counsel for the

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appellant that the property was under attachment, he has submitted that Section 64 of the Code of Civil Procedure makes such a contract void as against all the claims enforceable under attachment. Therefore, he has submitted that Section 64 would only makes a decree for specific performance subject to clearance of the dues of the bank on account of attachment. He further submitted that in fact the appellant before this Court is claiming the property on the basis of the Will, however, in fact, he is not related and the decree which has been passed in favour of the bank has been got assigned in favour of the company namely Atma Tubes Products Private Limited and the Managing Director of the aforesaid company is Harbhajan Singh who is father of Deepak Singh appellant herein. In fact it is a sale transaction.

This Court has considered the submissions of the learned counsel for the parties and with their able assistance gone through the judgments passed by the Courts below and the record.

As regards the first argument of the learned counsel for the appellant, it may be noticed that Sections 31 and 47 of the Act of 1973 are extracted as under:-

> *"**Section 31 - Restriction on acquisition, holding, etc., of immovable property in India** (1) No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India:*
>
> *Provided that nothing in this sub-section shall apply*

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to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.

(2) Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.

(3) On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for:

Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter:

Provided further that if before the expiry of a period of ninety days from the date on which the application was received by the Reserve Bank, the Reserve Bank does not communicate to the applicant that the permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission.

Explanation. -In computing the period of ninety days for the purposes of the second proviso, the period, if any, taken by the Reserve Bank for giving an opportunity to the applicant for making a representation under the first proviso shall be excluded.

(4) Every person and company referred to in sub-section (1) holding at the commencement of this Act any immovable property situate in India shall, before the expiry of a period of ninety days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in such form as may be specified by the Reserve

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Bank regarding the immovable property or properties held by such person or company.

Section 47 - Contracts in evasion of the Act *(1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.*

(2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission is granted.

(3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but-

> *(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;*
>
> *(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to*

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which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition.

(4) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881) neither the provisions of this Act or of any rule, direction or order made thereunder, nor any condition, whether expressed or to be implied, having regard to those provisions that any payment shall not be made without permission under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note "

Section 31 of the Act of 1973 only provides for acquisition holding or transfer or disposal of the property either by sale, mortgage, lease, gift, settlement or otherwise. Section 31 does not deal with the agreement to sell which does not create a right in the immovable property as provided in Section 54 of the Transfer of Property Act.

On careful perusal of Section 47(2) of the Act of 1973, it is apparent that even if a step has been taken without seeking permission of the Central Government or Reserve Bank, it would not render any agreement invalid and the agreement would be read in a manner that such permission is implied term of the contract. Still further, Section 50 of the

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Act of 1973 provides that if anyone contravenes any provision of this Act, he shall be liable to be penalized. However, none of the provisions of the Act declare that such agreement to sell would be invalid and not enforceable. To be fair to learned counsel for the appellant, learned counsel has relied upon a judgment passed by the Division Bench of Madras High Court in the case of ***Shoba Viswanatha Vs. D.P. Kingsley, 1996(2) MLJ 96***.

This Court has carefully gone through the judgment. The aforesaid judgment notices a contrary view taken by the Delhi High Court in the case of ***Ajit Parashad Jain Vs. N.K. Widhani and others, AIR 1990 Delhi 42***, but differed with it.

However, the aforesaid Division Bench, with due respect, does not consider the effect of Section 47(2) of the Act of 1973 which clearly stipulate and answer the question in case there is any contravention. Still further, the judgment of the Division Bench is with respect to a case where the defendant was a foreign national and foreign currency was to go outside the country whereas in the present case, the foreign currency is coming to India and, therefore, it cannot be against the public policy.

Still further, plaintiff No.1 who is also party to the agreement is a Indian National holding Indian Passport. The prohibition is not applicable to a Indian National. Still further, the agreement to sell itself prescribes that they can get the sale deed executed in their name or in favour of any of their nominee. Still further, the permission, if required had to be taken on the day the sale deed was to be executed and that stage has not arrived.

As regards the second argument of the learned counsel, it may be noted that the suit was filed on 14.08.1982 whereas as per the agreement

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to sell, the target date was 06.08.1982. Thus, the suit was filed within 8 days from the date fixed for execution and registration of the sale deed. As per the agreement to sell, it is the defendant who has delayed the suit. Learned trial Court decreed the suit and it is the defendant who has filed first and second appeal. Hence, defendant No.1 cannot be permitted to capitalized on his own action which resulted into delay.

As regards the argument of the learned counsel that this is only the residential house, it may be noted that the present appeal has been filed by Deepak Singh who claims to be the beneficiary under the Will executed by defendant No.1. As rightly pointed out by the learned counsel for the respondents that in fact Deepak Singh is an indirect purchaser of the property as his father is a Managing Director in the company who has got assigned decree for recovery of the amount of approximately ₹8,24,000/-.

Next argument of the learned counsel is with regard to the cancellation of the agreement to sell while relying upon a judgment passed by Hon'ble the Supreme Court in the case ***I.S. Sikandar (D) by LRs Vs. K. Subramani and others, 2013 (15) SCC 27***. It may be noted that this point was never pressed before the Courts below and the appellant at this stage cannot be permitted to defeat the right by raising hyper-technical objection. Even on equity, the appellant does not deserve any relief. Had the objection with regard to, the failure of the plaintiffs to challenge the cancellation of the agreement to sell, been taken in the written statement, the plaintiffs would have got an opportunity to amend the plaint and incorporate the challenge. Now at this stage, the defendant-appellant cannot be permitted to raise this point for the first time in the second appeal.

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As regards the argument of the learned counsel with regard to the applicability of the suit being barred under Order 2 Rule 2 CPC, the same is liable to be rejected for three following reasons:-

a) Pleadings of the previous suit for injunction have not been filed.

b) Before the Courts below, no issue on Order 2 Rule 2 CPC got framed.

c) The previous suit for injunction was filed before the target date i.e. 06.08.1982. On that day, the cause of action to file the suit for specific performance had not arisen.

Next argument of the learned counsel is with respect to the agreement to sell being void on account of attachment by the Bank under Section 64 of the Code of Civil Procedure. Learned Senior Counsel appearing for the respondents has correctly pointed out that Section 64 makes a contract void only to the extent that it does not effect the claim enforceable under attachment. The Court is entitled to enforce the contract subject to the aforesaid attachment. This would also cover the next argument of the learned counsel that the application under Order 41 Rule 27 CPC, has not been decided. Even if the application is allowed and the decree passed by the Bank is taken on record, still, that does not improve the case of the appellant because the decree is only for the recovery of amount which is as noticed above. The decree for recovery of money has now been assigned to Atma Tubes Products Private Limited, Managing Director whereof is father of Deepak Singh-appellant. The amount under the decree shall be first charge on the remaining amount payable to defendant No.1-appellant.

As regards the argument of the learned counsel that the earnest

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money has been received back by the plaintiffs and, therefore, there is no equity in favour of plaintiffs-respondents. It may be noticed that when the first appeal was pending, application for vacation of stay was filed and in that context the order was passed by the Court on 15.10.1986, which reads as under:-

> *"Shri Bhandari has tendered in Court three Account Payee cheques No.(1)23550 dated 11.10.1986 for Rs.70,000/-, (2) 023552 dated 11.10.1986 for Rs.80,000/- and (3) 023554 dated 12.10.1986 for Rs.15,000/- drawn on the Union Bank of India, Sector 17, Chandigarh, for a total sum of Rs.1,65,000/- in the name of Balbir Singh Grewal (respondent) as an interim measure subject to the appeal. The three banker's cheques have been handed over to Shri S.C. Sibal, Advocate who appears for Shri Balbir Singh Grewal, respondent without prejudice to his right in this appeal.*
>
> *No case for modification of order dated 5.8.1985 is made out. Consequently, the order dated 22.9.1986 is hereby vacated, particularly in view of the reply filed by the appellant to the effect that in case the respondents succeed in appeal, they would not claim compensation in lieu of the additions and alternations made in the building. This application stands disposed of with the aforesaid observation.*
>
> *October 15, 1986 Sd/- Gokal Chand Mittal, Judge"*

It is clear from the reading of the aforesaid order that such order was made only as an interim measure subject to the decision of the appeal and without prejudice to the rights of the plaintiffs-respondent herein. In such circumstances, defendant No.1-appellant cannot take the benefit of the refund of the earnest money under an interim order of the Court.

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On consideration of the entire facts, this Court is left with an impression that even educated persons do not abide by the agreements which they voluntarily enter into. Defendant No.1 is a retired Colonel and is also retired I.A.S. Officer. After having entered into the agreement to sell and received earnest money, he had made all possible attempts to defeat the rights and wriggle out of the promise made by him in writing.

In view of the above, the present Regular Second Appeal is dismissed with costs of ₹1,00,000/-. However, the decree passed by the Court is required to be modified. The plaintiffs shall be required to pay the entire amount of the agreement to sell as they have already received back earnest money under the orders of the Court alongwith interest at the rate of 9% p.a. from the date of institution of the suit till the amount is deposited.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

07.12.2018 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No

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