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

ESA No.20 of 2010 (O&M)
Date of Decision.14.09.2018

Kalia and another ......Appellants

Vs

M/s Bansal Petroleum Limited and others ...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rakesh Gupta, Advocate for the appellants.

Mr. Aayush Gupta, Advocate for the respondents.

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AMIT RAWAL J.

The decree-holders had preferred the Execution Second Appeal against the judgment rendered by the lower Appellate Court dated 24.12.2007 whereby the objections of the third party, M/s Bansal Petroleum Limited, have been accepted and the judgment and decree dated 23.08.2006 has been set aside.

It would be appropriate to refer in brief facts arising out of Civil Suit No.254 of 1998 preceding to the filing of objections by the third party.

Om Parkash, Jogi Ram, Rameshwar sons of Sh. Jug Lal had entered into an agreement to sell dated 24.12.1986 with appellants-plaintiffs, Kalia and Dalel. As per the averments in the civil suit, on account of failure on behalf of the vendors, appellants-plaintiffs instituted the suit aforementioned for specific performance. The trial Court vide judgment and decree dated 22.02.1992 dismissed the suit and in the appeal laid before the lower Appellate Court, the judgment and decree of the trial Court was set aside and the suit was decreed vide judgment and decree dated 08.02.1997, which had attained finality.

The plaintiffs-decree holders instituted the execution application bearing No.73 of 1997. The respondents-judgment debtors No.2 to 4 filed objections dated 12.12.1997 and came out with the plea that they entered into agreement to sell with Prem Parkash and Soran on 05.11.1984 for a sum of ₹25,000/- against the payment of ₹20,000/- as earnest money. The target date for execution and registration in respect of aforementioned agreement was 30.11.1985 but the said date was extended. Even Jogi Ram and Rameshwar had also entered into agreement to sell with Satpal on 30.11.1985 but dates of execution and registration of sale deed were extended and finally the sale deed was executed on 25.06.1988. Therefore, Prem Parkash, Soran and Satpal had pre-existing rights. The said objections were dismissed by the Executing Court vide order dated 01.06.1998. It is thereafter third party i.e. respondent No.1, Bansal Petroleum filed the objections, which have been dismissed by the trial Court but in appeal before the lower Appellate Court, the judgment and decree of the trial Court has been reversed.

Mr. Rakesh Gupta, learned counsel appearing on behalf of the appellants-plaintiffs submitted that the objections filed by the objector-respondent No.1 were identical as were raised by the judgment debtors and thus, they were barred by principles of *res judicata*. The alleged agreement to sell with Prem Parkash, Soran and Satpal was fabricated, during the pendency of the suit. If at all, there was an agreement to sell, land, which was subject matter to agreement to sell dated 05.11.1984, land could not have been mortgaged to Satpal vide

Rapat No.123 dated 19.01.1986. There is no reference of the agreement to sell dated 30.11.1985 in the mortgage deed dated 19.01.1986.

The sale deeds were executed on 25.06.1988 i.e. after filing of the present suit for specific performance on 25.03.1987, therefore, the sale deeds were hit by doctrine akin to *lis pendens*. In such circumstances, the third party objector-respondent No.1 cannot take plea of bona fide purchaser as he was aware of all the proceedings. Respondent No.1 obtained the property through a collusive decree. The lower Appellate Court had given undue weightage of mentioning dates of the alleged agreements in the sale deeds executed in the year 1988. The Court had not found any document which could establish genuity of the alleged agreements to have been executed prior to the filing of the suit for specific performance by the appellants-plaintiffs in the month of March, 1987.

Though the lower Appellate Court erred in holding that the decree holder and the judgment debtor in connivance and collusion with each other obtained the order dated 01.07.1998 as they did not disclose the factum of agreements to sell dated 05.11.1984 and 05.07.1985 and even did not implead the mortgagee but failed to notice the fact that alleged agreement to sell and sale deeds were collusive between the judgment debtor and the alleged vendees. Had those agreements to sell been in existence, they would have been reflected in the mortgage deed dated 19.01.1986, thus, urges this Court for setting aside the judgment and decree under challenge.

Per contra, Mr. Aayush Gupta, learned counsel appearing on behalf of the third party objector submitted that the finding of fact arrived at by the lower Appellate Court arising out of the third party objections, which were filed as per the provisions of Rule 103 of Order 21 CPC, were to be tried as suit. Third party objector was also in possession of the suit property but the plaintiffs did not take any objection in this regard. At the best, plaintiffs had remedy to claim damages against the vendors. The trial Court had also abdicated in not framing the issues nor the sale deed dated 25.06.1988 was hit by Section 52 of the Transfer of Property Act.

The decree holders had been seeing the construction of the bottling plant of the objector but no objection was raised. The objector had spent ₹50 lacs upon the building and the machinery of LPG bottling plant. The aforementioned factory is situated opposite to the Kaithal sugar factory on the main road going from Kaithal to Pundri. The objector is not subsequent purchaser as the suit of the decree holder was dismissed by the trial Cout.

The agreement to sell dated 5.11.1984 executed by vendors in favour of Prem and Soran was in respect of land measuring 19 kanals and 15 marlas and the agreement to sell for remaining land i.e. 39 kanals 9 marlas was executed on 5.07.1985 by Jogi Ram and Rameshwar in favour of Satpal and the sale deeds in respect of entire land were executed on 25.06.1988, therefore, doctrine of *lis pendens* as found by the trial Court would not be applicable, for, the agreement to sell propounded by the plaintiffs is post, the aforementioned agreement to sell. Even plaintiffs did not deposit the balance sale consideration within the time prescribed as the judgment and decree of the lower Appellate Court is dated 08.02.1997 and the amount was to be deposited on or before 08.04.1997 but the same was allegedly deposited on 04.11.1997.

Provisions of Section 148 CPC are also not applicable in view of the provisions of Section 28 of the Specific Relief Act. Out of 59 kanals 4 marlas of land, land measuring 35 kanals 11 marlas was sold by Randhir Singh and Dharam Pal to Sushma Gupta and Swaran Lata vide sale deed dated 30.04.1990 and further vide sale deed dated 10.09.1991, land measuring 29 kanals 16 marlas to Naresh Kumar, Rajiv Kumar and Raj Kumar. 10 kanals land was purchased by Raj Kumar son of Naranjan Lal from one Suresh Kumar vide sale deed dated 8.9.1993 and another 9 kanals was purchased by Raj Kumar from Jasminder, Phulli Devi and Bimla Devi, other co-sharers of 236 kanals 16 marlas vide sale deed dated 2.11.1993 and so on and so forth. Thus, objectors are owners in possession of land measuring 29 kanals 16 marlas plus 10 kanals and 9 kanals. The entire khewant of 236 kanals 16 marlas had not yet been partitioned, thus, urges this Court for dismissal of ESA.

In rebuttal, Mr. Rakesh Gupta relied upon judgment of Hon'ble Supreme Court in ***Har Narain (dead) by LRs Vs. Mam Chand (dead) by LRs and others AIR 2010 SC (Supp) 78*** that if the sale deeds are registered subsequent to the filing of the suit, the doctrine of *lis pendens* would apply and on similar lines various other judgments.

It was further contended that it was not incumbent upon the plaintiffs to implead the subsequent transferees under the provisions of Order 1 Rule 10 CPC as such sale was hit by Section 52 of the Transfer of Property Act. In support of the aforementioned, reliance is laid to ratio decidendi culled out in judgment of Hon'ble Supreme Court in ***Sanjay Verma Vs. Manik Roy and others AIR 2007 SC 1332***.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below, judgments cited at bar and of the view that there is no force and merit in the submission of Mr. Rakesh Gupta. The sale deeds dated 25.06.1988 would not hit by doctrine of *lis pendens*. The agreement to sell dated 5.11.1984 for land measuring 19 kanals 15 marlas in favour of Prem and Soran and agreement to sell dated 5.07.1985 for the remaining 39 kanals 9 marlas in favour of Satpal after extension of time culminated into sale deeds dated 25.06.1988. The aforementioned vendees/transferees cannot be said to be bona fide purchaser as vendors had not disclosed to the plaintiffs and as well as the transferees with regard to subsequent agreement to sell dated 24.12.1986. It is strange that property was mortgaged on 19.01.1986 and the agreement to sell is of 24.12.1986. In fact, mortgaged property could not have been agreed to be sold. The objectors are in possession of the LPG bottling plant. Another piece of property i.e. un-partitioned share of the property had exchanged hands and it will be too far fetched to put the clock back in the absence of other vendees. The target date, as per the agreement dated 24.12.1986, was 23.01.1987 whereas the suit was filed on 25.03.1987. The suit was dismissed vide judgment and decree dated 22.02.1992 but however, in appeal it was decided in favour of the plaintiffs on 08.02.1997. The lower Appellate Court remained oblivious of the aforementioned facts as none of the parties had brought on record any material by way of additional evidence.

Collusion at the instance of the vendors cannot be ruled out. As per the evidence brought on record, prima facie, objector came to know about the judgment and decree only on 28.09.1998 when the warrant of possession was issued in pursuance to the execution application. The decree was also not to the specific land except for 1/4th share whereas the mortgagees were not in possession of the suit property at the time of filing of the suit. The objector, in my view, had a pre-existing right by virtue of agreements to sell dated 05.11.1984 and 05.07.1985 whereas agreement to sell between the decree holders and the judgment debtor was dated 24.12.1986. Extension of time in pursuance to agreement to sell dated 05.11.1984 cannot be a fresh agreement to sell. The doctrine of *lis pendens* would have applied, had the agreement been post the agreement to sell in question. Therefore, the ratio decidendi culled out in the judgments (supra) would not apply, thus, argument of Mr. Rakesh Gupta on this point is hereby rejected.

The objector also cannot be branded a subsequent purchaser as he derived interest in pursuance to agreements to sell dated 05.11.1984 and 05.07.1985 and outcome of sale deed dated 25.06.1988, much less, agreement to sell dated 24.12.1986. The decree holders have been seeing the construction of the bottling plant but did not disclose this fact nor moved any application for bringing the same to the knowledge of the Court as it looked that they had an intention to take possession from a third party. No prima facie material had been placed on record to belie existence of agreement to sell dated 05.11.1984 or 05.07.1985 to show that the same were ante-dated. Sale deed dated 25.06.1988 mentions about the agreement to sell dated 05.11.1984 as well as 05.07.1985. Had the agreement to sell been ante-dated, there would not have been a reflection of the same in the sale deed. The first sale deeds are in favour of Prem Parkash, Soran and Satpal and thereafter, the subsequent vendees and the objector became the last successor and owner in possession.

The view expressed by the lower Appellate Court in allowing the objection is perfectly legal and justified but it remained oblivious of the factum of payment of earnest money of ₹1,50,000/-, which has not been denied by the vendors. The Court should have protected the interest of the decree holders-appellants for refund of the same along with reasonable interest. I deem it appropriate to modify the judgment and decree of the lower Appellate Court to the extent of refund of earnest money of ₹1,50,000/- along with interest @9% per annum to be paid to the appellants by the respondents-original defendants within a period of two months from the date of receipt of certified copy of this order, failing which the interest shall entail @12% per annum.

The appeal stands disposed of in the aforementioned terms.

(AMIT RAWAL)
JUDGE

September 14, 2018
Pankaj*

Whether Speaking/Reasoned	Yes
Whether Reportable	No