IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No.4018 of 2008 (O&M)
Date of Decision: September 21st, 2018

Hem Raj

...Appellant

Versus

Leela Ram

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Harsh Aggarwal, Advocate
for the appellant.

Mr. Rajan Bansal, Advocate
for the respondent.

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AMIT RAWAL, J.

Present Regular Second Appeal is directed against the judgment and decree dated 22.05.2008 of the Lower Appellate Court, whereby the judgment and decree dated 16.08.2007 passed by the trial Court decreeing the suit of the appellant-plaintiff seeking recovery of ₹2,31,750/-, i.e., ₹ 2,25,000/- as principal and ₹ 6750/- as interest @ 12% per annum, has been reversed.

Appellant-plaintiff instituted the suit aforementioned on 13.06.2006 on the premise that on 24.03.2006, one plot consisting of Khata No.23/40, Khasra No.217//14/2 (0-18), situated in the area of Barnala was agreed to be sold by the respondent-defendant for a consideration of ₹1,26,000/- per biswa (452 sq. feet). A sum of ₹ 2,25,000/- was paid to the defendant. The stipulated date for execution and registration of the sale deed was fixed as 24.05.2006 and the remaining consideration was to be paid at the relevant point of time, much less possession. Plaintiff acquired the knowledge that defendant entered into an agreement dated 24.01.2006 with previous owner Rajesh Garg son of Girdhari Lal, resident of Street No.9, Ram Bagh backside Sarvhitkari School, Barnala. The agreement to sell in question was attested by Rinka son of Girdhari Lal and Jiwan Lal son of Dharam Pal, residents of Barnala. Plaintiff was ready and willing to perform his part of the agreement by remaining present in the office of Sub Registrar on the stipulated date, but the defendant did not turn up. In view of such, his presence was marked vide affidavit dated 24.05.2006.

The aforementioned suit was contested by the defendant by denying the agreement to sell dated 24.01.2006 allegedly executed with one Rajesh Kumar, but on the same very date, i.e., 24.01.2006, plaintiff had agreed to purchase the land in dispute by denying the agreement to sell dated 24.03.2006, much less stipulated date. Plaintiff was not ready and willing to perform his part of the agreement. The agreement in question envisaged that the defendant would bring the original owner Rajesh Kumar for execution and registration of the sale deed. The defendant and Rajesh Kumar were ready and willing to perform their part of the contract. Objection qua maintainability of the suit much less locus standi was also taken.

On the basis of the aforementioned pleadings, the trial Court framed the following issues:-

1) Whether the plaintiff is entitled for earnest amount of Rs.2,25,000/- along with interest as alleged in the plaint? OPP

2) Whether suit is not maintainable? OPD

3) Whether plaintiff has no locus-standi to file the suit? OPD

4) Relief.

In support of his case, plaintiff examined PW-1 Kuldeep Singh Patwari, Jiwan Lal as PW-3 and himself appeared as PW-2. Rinka son of Girdhari Lal was given up as he was won over by the defendant. On the other hand, Rinka @ Rajesh Kumar appeared as DW-1 and defendant himself appeared as DW-2 and the evidence was closed.

On the basis of the evidence on record, the trial Court by noticing the fact that the defendant was not owner of the property nor had any power of attorney from Rajesh Kumar (original owner), decreed the suit. However, in appeal laid before the Lower Appellate Court, the aforementioned judgment and decree has been set-aside.

Mr. Harsh Aggarwal, learned counsel for the appellant-plaintiff, in support of the grounds taken in the memorandum of appeal, submitted that the Lower Appellate Court has lost the sight of the fact that the readiness and willingness was duly proved on record as plaintiff remained present before the office of Sub Registrar along with balance sale consideration, whereas defendant has not appeared. Affidavit executed with regard to presence has been proved on record as Ex.P5. Even PW-3 Jiwan Lal, witness of the agreement, proved its execution. Defendant did not appear on the stipulated date, but showed his presence before the Sub Registrar on 14.06.2006 on the basis of the alleged legal notice dated 02.06.2006. Even if the defendant had examined Rajesh Kumar, the original owner as DW-1 that he was ready and willing to perform his part of the agreement, but the fact of the matter is that the plaintiff knew the consequences of not succeeding in claiming the discretionary relief under Section 20 of the Specific Relief Act, 1963 (for short" 1963 Act"), for, defendant was not owner of the property nor there was any right of "assignment", therefore the agreement was incapable of being performed by the defendant.

It was next contended that there was no specific rescission by the defendant. Lower Appellate Court has exceeded jurisdiction by going beyond the pleadings as it was never the case of the respondent that the civil suit for recovery was not maintainable, therefore, could not have thrown the plaintiff qua maintainability of the suit. Once the execution of the agreement to sell had been proved, much less payment of the earnest money and in the absence of the rescission of contract under Section 27 of 1963 Act, defendant cannot forfeit the alleged demand and in such circumstances, the suit simpliciter for recovery of earnest money would lie.

During the course of hearing, he drew the attention of this Court to the order dated 23.09.2010, whereby the appeal was admitted on the following substantial questions of law:-

1) Whether the findings given by the Lower Appellate Court are perverse to the evidence on record?
2) Whether the suit for recovery simplicitor cannot be decreed even for the admitted amount?
3) Whether a person can take benefits of its own wrong?
4) Whether it can be held that a suit simplicitor for recovery is not maintainable but the suit for recovery in alternative to the specific performance is maintainable?

Per contra, Mr. Rajan Bansal, learned counsel for the respondent-defendant submitted that original owner Rajesh Kumar was examined and his evidence was in tandem to the terms and conditions of the agreement to sell in question, whereby it was agreed that the respondent-defendant would bring the original owner on the stipulated date. No doubt, defendant did not appear on the target date, but a notice dated 02.06.2006

Ex.D1 was served upon the plaintiff, whereby he was called upon to appear before the Sub Registrar on 14.06.2006. The application for marking presence mark-A and affidavit mark-B in this regard had been brought on record. Rajesh Kumar through a specific question having been put on behalf of the plaintiff denied the execution of any agreement dated 24.01.2006. A simpliciter suit for recovery in the absence of relief of specific performance was not maintainable. Issue No.2 in this regard was framed and, therefore, the defendant had no other choice but to forfeit the earnest money.

It was further submitted that the Lower Appellate Court, being the last court of fact and law, after appreciating the evidence on record rightly set-aside the judgment and decree as, *ex-facie,* suit was not maintainable, for, agreement to sell Ex.P4 did not give any recovery rights to the plaintiff, therefore, the plaintiff cannot take the benefit of provisions of Section 23 of 1963 Act and, thus, urged this Court for upholding the judgment and decree under challenge.

In support of the aforementioned submissions, reliance was made to the following judgments:-

1) **Satish Batra Versus Sudhir Rawal, 2012(4) R.C.R. (Civil) 890= 2013 (1) SCC 345** to contend that the seller is entitled to forfeit the earnest money where the sale of an immovable property falls through by reason of the fault or failure of the purchaser. Plaintiff miserably failed to bring the balance sale consideration on 24.5.2006;

2) **I.S.Sikandar (D) by L.Rs Versus K. Subramani and others, 2013 (15) SCC 27= 2014 (1) R.C.R. (Civil) 236** to contend that the suit was not maintainable as the plaintiff did

not aver the termination of the agreement.

In rebuttal, Mr. Harsh Aggarwal relied upon the judgment of this Court in **Lokesh and others Versus Rameshwar Tyagi, 2018 (1) R.C.R. (Civil) 248** where a suit for recovery of the earnest money dismissed by the Court below has been decreed by this Court by relying upon the ratio decidendi culled out in **I.S.Sikandar;s case (supra).**

CONCLUSION:-

Arguments heard. Record perused.

On the date of execution of the agreement dated 24.03.2006, defendant was not having any title and interest in the suit property. Defendant intentionally withheld the agreement dated 24.01.2006, which was emphatically denied by Rajesh Kumar, for, it would be a clincher to form a different opinion whether there was an assignment clause or not. In the absence of any assignment clause, there was no privity of contract with the plaintiff for performance of the agreement to sell in the absence of title. In such circumstances, plaintiff had no other remedy and choice but to claim refund of earnest money, for, despite plaintiff having proved the readiness and willingness vide Ex.P5, the defendant has not come out with any evidence on record that he was present on the target date.

Issuance of a legal notice Ex.D1 dated 02.06.2006 was an afterthought, whereby plaintiff was called upon to appear before the Sub Registrar on 14.06.2006. It was an deliberate act on behalf of the defendant for which the plaintiff cannot be made to suffer. In view of such scenario, the plaintiff had no other choice but to claim the relief of earnest money. Agreement to sell would deem to have been determined.

Lower Appellate Court abdicated in reversing the judgment and decree of the trial Court by holding that no recovery rights were given to the plaintiff. Such a view purportedly was as per the plain and simple language of Section 23 of 1963 Act, which read as under:-

> *"23. Liquidation of damages not a bar to specific performance.-*
>
> *(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.*
>
> *(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."*

It is now settled law that where in a suit for specific performance even if there is no recital of taking aid of the Court for the purpose of execution and registration of the sale deed, in other words, in the absence of such terms in the agreement, the performance cannot be granted.

Lower Appellate Court remained oblivious of the fact that the plaintiff had proved the execution of the agreement to sell, much less receipt of the earnest money of ₹ 2,25,000/-, which has been admitted by the defendant. The ratio culled out in **I.S.Sikandar's case (supra),** would not help the defendant as in no circumstances, defendant had been able to prove on record that the agreement to sell had become inexecutable and had been cancelled in view of non-fulfillment of the condition specified therein. *Prima-facie*, the plaintiff had proved the readiness and willingness as defendant failed to prove his presence on the stipulated date.

I cannot remain ignorant of the fact that the suit was filed immediately on 13.06.2006. Plaintiff cannot derive any undue benefit by retaining amount of ₹ 2,25,000/- without any right and title. There is no equity in his favour.

There is no dispute to the ratio decidendi culled out in the judgment cited by Mr. Bansal, but the ratio was culled out as per the facts of the case, for, in a suit for specific performance, the conduct and intention of the parties can be only ascertained from the direct and cogent evidence.

As an upshot of the aforementioned findings, the judgment and decree of the Lower Appellate Court is held to be erroneous and perverse, much less capricious. The same are hereby set-aside. The substantial questions of law framed by this Court vide order dated 23.09.2010 are, thus, answered in favour of the appellant-plaintiff. Resultantly, the appeal stands allowed.

September 21st, 2018 **(AMIT RAWAL)**
ramesh **JUDGE**

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**