IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2996 of 2009(O&M)
Date of Order: 30.04.2018

Surjit Singh

...Appellant

Versus

Rachhpal Singh and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sumeet Mahajan, Senior Advocate, with
Mr. Amit Kohar, Advocate,
for the appellant.

Mr. K.R.Dhawan, Advocate,
for the respondents.

ANIL KSHETARPAL, J.

In this appeal, arguments were heard at length and the appeal was allowed with the observation that the reasons would be recorded later on. Hence, this court now proceed to record reasons.

Defendant-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the courts below.

This appeal was allowed by this Court vide judgment dated 07.09.2015. However, vide order dated 06.02.2017, Hon'ble Supreme Court has remanded the case to this Court for re-decision. The order passed by the Hon'ble Supreme Court on 06.02.2017, is extracted as under:-

" *Leave granted.*

These appeals are filed against the judgment and *order dated 07th September, 2016 passed by the High Court of Punjab and Haryana at Chandigarh whereby order passed by the Addl. Civil Judge (Sr. Division) Kapurthala in Civil Suit No.83 dated 19.04.2011 was dismissed and order passed in Civil Suit No.575 dated 30.07.1999 was allowed.*

After hearing learned counsel for the parties at length it is stated at the Bar by both sides that the impugned judgment deserves to be set aside and case be remitted to the High Court for decision afresh. The impugned order is set aside. Let the appeals be heard afresh by the High Court and the judgment be rendered in accordance with law.

Appeals are allowed."

Plaintiff-respondent filed a suit for possession by way of specific performance of the agreement to sell dated 20.06.1998. As per agreement to sell, Rs.2,15,000/- was paid as earnest money out of total sale consideration of Rs. 5,30,625/-. Plaintiff had alleged that 14 kanals and 3 marlas land was agreed to be sold and sale deed was agreed to be executed on 19.06.1999.

Defendant-appellant contested the suit. Defendant although, took inconsistent stand, however, in substance, defendant pleaded that in fact the agreement to sell was a loan transaction. It was pleaded that there was one earlier agreement to sell of the suit property dated 05.07.1997 when Rs.1,40,000/- was paid to the defendant-appellant. It was further pleaded that the defendant-appellant could not re-pay the entire amount. He paid

Rs.25,000/-. Hence, a fresh agreement to sell was executed showing the advance of Rs.2,15,000/-. It was further pleaded that on 10.06.1999, another agreement to sell was executed between the parties with respect to another peace of land. All these agreements were only to secure re-payment of the loan.

Both the courts have concurrently found that the agreement to sell has been proved and plaintiff was always ready and willing to perform his part of the contract. With these findings, both the courts have decreed the suit for possession by way of specific performance of the agreement to sell.

In the considered opinion of this Court, following substantial question of law arise in the present case:-

> (i) Whether the courts below have correctly exercised their discretion under Section 20 of the Specific Relief Act?

As per Section 20 of the Specific Relief Act, the discretion exercised by the Court can be corrected by the appellate court. The discretion has to be exercised by the Court on sound and reasonable basis guided by judicial principles. Section 20 of the Specific Relief Act is extracted as under:-

> ***20.Discretion as to decreeing specific performance.*** *—*
>
> *(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of*

correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of

entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee,whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall,except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with *reference to the circumstances existing at the time of the contract.*

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

After revaluating the evidence, this court has arrived at a conclusion that in fact the agreement to sell was never intended to be acted upon and it was only to secure re-payment of the loan. The opinion formed by this court is based upon the following reasons:--

(i) In the agreement to sell dated 20.06.1998, it has been provided as under:-

> "*It is agreed that in case first party returns the total amount to second party by 19.06.1999, this agreement shall be cancelled and possession of land will be returned.*"

(ii) Plaintiff while filing the suit did not disclose a previous agreement to sell between the parties dated 05.07.1997. However, when defendant pleaded this fact in the written statement, plaintiff admitted execution of the agreement to sell dated 05.07.1997 with respect to the same land between the same parties.

(iii) Plaintiff is admittedly a money lender as admitted by

Faqir Singh while appearing in the connected suit i.e. Civil Suit No.83 of 2001, which is arising from another agreement to sell between the parties, dated 10.06.1999. Faqir Singh admits that earlier also Surjit Singh had been taking loan from the plaintiff and the plaintiff lends money to various persons.

(iv) As per the agreement to sell dated 20.06.1998, sale deed was to be executed on 19.06.1999 i.e. exactly one year after the date of agreement to sell. However, on 19.06.1999, presence of the plaintiff in the office of the Sub-Registrar for execution and registration of the sale deed is not proved. Plaintiff has tried to prove the presence by producing on record Ex.P7, which is available at page 67. In the aforesaid affidavit, there is a cutting on the date when it was attested. At two places, the original date written is 29.07.1999 but the word '2' has been converted into '1' to read it like 19.07.1999. Plaintiff has not produced any evidence to prove that it was got attested by the Executive Magistrate on 19.07.1999 or the officials of the office of Executive Magistrate had committed mistake in writing the date at two places as 29.07.1999 instead of 19.07.1999.

Learned counsel for the respondent has vehemently argued that the courts below have exercised their discretion and this court while exercising jurisdiction under Section 100 of the Code of Civil Procedure, is not entitled to interfere with the discretion exercised. He has further submitted that the defendant-appellant has been taking inconsistent plea. He has further submitted that Gurmukh Singh in whose presence Rs.25,000/- was said to have been re-paid has not been examined. He has further submitted that although the defendant-appellant sought permission of the court to examine a Handwriting and Finger Print Expert but did not examine.

This court has considered the submissions. No doubt, the defendant-appellant has taken inconsistent stand, however, the defendant has pleaded that there was an earlier agreement to sell dated 05.07.1997 between the same parties with regard to the same land, which was on payment of Rs.1,40,000/- but it was mentioned in the agreement to sell that Rs.1,90,500/- has been paid as earnest money.

It was further pleaded by the defendant that on 20.06.998, he was only able to re-pay Rs.25,000/- as part of the interest and therefore, another agreement to sell was executed. He submitted that in fact partial interest was paid and after adding the remaining interest, Rs.2,15,000/- was mentioned as earnest money paid. It was further pleaded that another agreement to sell has been executed between the parties on 10.06.1999, which is subject matter of RSA No.2798 of 2014.

Learned trial court has drawn adverse inference against the defendant on the ground that Gurmukh Singh in whose presence Rs.25,000/- is alleged to have been paid has not been examined and the defendant has also failed to examine Handwriting and Finger Print Expert. In the considered opinion of this court, non-examination of Gurmukh Singh and Handwriting and Finger Print Expert would not absolve the plaintiff to prove his case. At the most, defendant who had asserted payment of

Rs.25,000/- as part of the interest is not proved on file.

Still further, in fact there are three agreement to sell executed between the parties, one on 05.07.1997, second on 20.06.1998 and third on 10.06.1999 (which is subject matter of RSA No.2798 of 2014). It is apparent that even before the sale deed with regard to agreement to sell dated 20.06.1998 has been executed, another agreement to sell was entered into. Still further in the agreement to sell dated 20.06.1998 itself, it is stipulated that the defendant can get rid of the agreement to sell by re-paying the amount of earnest money i.e. Rs.2,15,000/- upto 19.06.1999 as extracted above. If the parties were interested in sale and purchase of the land, such condition would not have been incorporated.

Taking into consideration the over all facts of the case, this court is of the considered opinion that the discretion exercised by the courts below is erroneous. In fact the courts below have not examined this aspect in proper perspective. After recording a finding that the execution of the agreement to sell has been proved and the plaintiff was always ready and willing to perform his part of the contract, courts have chosen to decree the suit.

Before the first appellate court, counsel for the defendant-appellant had specifically submitted that it was a loan transaction and therefore, decree for possession by way of specific performance of the agreement to sell could not be granted. However, the learned court held that since the agreement to sell stipulated that the alleged earnest money is not refunded upto 19.06.1999 the defendant shall be bound to execute the sale deed. Since, the defendant-appellant failed to comply with the aforesaid condition, therefore, the decree has been granted.

As per Section 20 of the Specific Relief Act, courts while decreeing the suit for possession by way of specific performance of the agreement to sell, or while refusing to grant specific performance or the refund, must examine whether the agreement to sell was in fact for sale of the property or for securing the amount of loan extended particularly when one party has pleaded that it was in fact the loan transaction. The court is also required to examine the terms of the agreement to sell carefully before arriving at a conclusion. The decree for specific performance of the agreement to sell should not be passed by the courts merely after recording that the agreement to sell is proved and the intended purchaser was always ready and willing. Section 20 of the Specific Relief Act, the courts have been given discretion and that discretion has to be exercised by the courts guided by sound judicial principles and not in an arbitrary manner.

In view of the discussion made above, the question of law framed earlier is answered in favour of the appellant.

It may be noticed that the defendant-appellant in order to show his bonafide offered to refund a sum of Rs.20,00,000/-, when the appeal was pending in this Court on 18.11.2013. Learned counsel for the appellant has submitted that the aforesaid amount of Rs.20,00,000/- has been deposited before the Executing Court by the defendant-appellant. Respondent-plaintiff who was present in court today was offered the amount in full and final settlement of the entire dispute. However, respondent-plaintiff has refused to accept the offer.

In view of the aforesaid, the judgments passed by the courts below granting decree for possession by way of specific performance of the agreement to sell are set aside and the suit filed by the plaintiff shall stand decreed for recovery of the earnest money along with interest @ 12% per annum from the date of agreement to sell i.e. Dated 20.8.1998 till payment. The Executing Court would pay the amount to the respondent-plaintiff as directed out of the amount of Rs.20,00,000/- deposited by the defendant-appellant and the remaining amount shall be refunded to the defendant-appellant.

The Regular Second appeal is allowed.

April 30, 2018 **(ANIL KSHETARPAL)**
nt **JUDGE**

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