IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.3896 of 2010 (O&M)
Date of Decision:14.12.2018

Kishan Singh and another

...Appellant(s)

Versus

Kuldip Singh

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Ashish Aggarwal, Senior Advocate with
Mr.Nandan Jindal, Advocate for the appellants.
Mr.C.M.Munjal, Advocate for the respondent.

ANIL KSHETARPAL, J.

The defendant-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below, while decreeing the suit for conformation of possession by way of specific performance of the agreement to sell.

The plaintiff had filed a suit on the basis of an agreement to sell dated 17.11.2000 through which 25 kanal and 7 marla land was agreed to be sold at the rate of Rs.2,00,000/- per acre for a total sale consideration of Rs.6,33,750/-, out of which Rs.4,13,000/- was stated to have been paid as earnest money. The target date for execution and registration of sale-deed was fixed as 16.5.2001. It is further pleaded case that on 16.5.2001, there was an extension of time for execution and registration of the sale-deed on further payment of Rs.75,000/- and the date was extended to 16.11.2001. The plaintiff had further pleaded that since there was a holiday on 16.11.2001, therefore, he issued a telegram, calling upon the defendants to appear before the Sub Registrar on 19.11.2001 and on which date, he visited the office of Sub-Registrar but defendant did not come forward. Thereafter, he filed a suit on 28.1.2002.

The defendants filed a written statement, claiming that Sandeep Singh, son of defendant No.2, wanted to go abroad and therefore, money was required and hence a loan of Rs.3,50,000/- was taken with interest @ 3% per month. It was further pleaded that since defendants were unable to repay the amount, therefore, after adding and calculating the interest amount and showing the amount so calculated to have been paid additionally, further endorsement dated 16.5.2001 was executed. It has further been pleaded that defendant No.3 had repaid a sum of Rs.1,60,000/- to the plaintiff vide receipt dated 23.4.2002.

It may be noticed that as per agreement to sell, possession has been delivered, whereas it is the case of the defendants that no possession has been delivered.

This Court has heard the learned counsel for the parties and with their able assistance gone through the judgments and the record.

This Court does not intend to go into the issue whether there was any agreement to sell or not because execution of the agreement to sell and payment of the amount has been proved. However, this Court is of the view that discretion, which has been exercised by the court, while granting a decree for specific performance of the agreement to sell, is erroneous. As per Section 20 of the Specific Relief Act, 1963, grant of a decree for specific performance of the agreement to sell is discretionary. Such discretion is to be exercised after keeping in view the facts and circumstances of each case.

At the time of admission of the appeal, following substantial questions were framed:-

(i) Whether Exhibit P-1 was merely executed as security for loan transaction and there was no intention to sell the disputed land?

(ii)Whether, if the appellants entered into the contract under circumstances, which though not rendering the contract voidable but make it inequitable, then it was necessary to grant only the alternative relief for recovery of money as prayed for, instead of enforcing specific performance?

(iii)Whether, when the performance of the contract would involve great hardship to the appellants and its non-performance would involve no hardships to the plaintiff, then will it not be in the interest of justice to grant alternative relief for recovery of money?

(iv)Whether the courts below have ignored the material evidence Exhibit D-1 and statement of respondent/plaintiff PW-5 that in fact, it was a loan transaction and not a agreement to sell?

(v)Whether mere establishment of fact that agreement for sale entered into would be sufficient to grant decree for specific performance, if circumstances indicate, as in the present case that, in fact, it was a loan transaction and part of the amount has already been returned, as clear from Exhibit D-1?

It may be noticed that both the courts have not adverted to the factum that grant of decree of specific performance is discretionary. It is the bounden duty of the court to examine whether the decree is to be granted or not in the facts and circumstances of each case.

The grounds, on which this Court has formed an opinion that relief of specific performance should not have been granted, are as under:-

(i) Date of institution of the suit is dated 28.1.2002, whereas there is an admitted compromise (agreement) between the parties on 23.4.2002 when an amount of Rs.1,60,000/- has been returned by defendant No.3 whereupon the plaintiff admitted his signatures. No doubt, in the compromise deed, it has been written that this amount of Rs.1,60,000/- has been paid on return of tractor and other agricultural implements, however, it may be noticed that the plaintiff in his evidence had taken a stand that he had purchased a tractor and other agricultural implements from defendant No.3 for a sum of Rs.1,60,000/-. But since remaining defendants had raised an issue, therefore, he agreed to return the tractor and other implements on return of the amount. It may be noticed that this compromise-deed is dated 23.4.2002, i.e., 3 months after the date when the suit has been instituted. When the plaintiff appeared in evidence, he admitted that there was no dealing with the defendants except purchase of the land. Of course, he later on tried to explain that amount was paid to him on account of cancellation of the sale of tractor and other implements. Once the parties were in litigation, probability of transaction of sale of the tractor and other implements is very remote. Still further, Sarpanch Suram Singh had appeared in evidence as DW-1. He had specifically stated that there was a transaction of loan between the parties and there was no transaction of sale of the land.

(ii) Secondly, learned counsel for the appellant has rightly pointed out that an amount of Rs.3,50,000/- was paid on 12.7.2000 to the defendants, which was transmitted to the travel agent on the next date i.e. 13.7.2000. He submitted that if one calculates interest @ 3% per month from 12.7.2000 to 17.11.2000 i.e. the date of agreement, the amount would come to Rs.63,800/-. That is how, the figure of earnest money has been arrived at. He further submitted that up to the target date, fixed in the agreement to sell, which was after a period of six months, since the defendants could not repay the amount, therefore, amount of interest was further added and the date for performance of the agreement was extended. Learned counsel for the parties have read over the endorsement. It is not clear from the endorsement on whose request the target date was extended by a period of another six months.

(iii) Still further, it is an admitted position on record that the plaintiff is not in possession. However, in the agreement to sell, it has been noted that the possession of the land has been delivered. The defendants in the written statement took a stand that possession was never delivered. When plaintiff appeared in evidence, he admitted that possession was not delivered to him at the time of agreement to sell but he never felt annoyed and thought that the possession would be delivered at the time of execution of the sale-deed. However, the plaintiff has not disclosed these facts in the plaint.

(iv) Still further, the present suit has been filed only for conformation of possession. The relief of possession has not been sought for. The decree has only been sought for specific performance of the agreement to sell. Admittedly, the plaintiff is not in possession of the property. The suit filed by the plaintiff is barred as per proviso to Section 34 of the Specific Relief Act, 1963. Once the plaintiff, who was entitled to further relief, has omitted to do so, his suit was not maintainable.

Keeping in view the aforesaid facts and circumstances of the present case, questions of law, which have been framed and extracted above, are answered in favour of the appellants.

The regular second appeal is allowed. The decree for specific performance of the agreement to sell is substituted with a decree for refund of earnest money, i.e. Rs.4,88,000(Rs.4,13,000/- + Rs.75,000/-) along with interest @ 12% per annum from the date of agreement to sell, i.e. 17.11.2000 till repayment. The amount payable shall remain charge on the property in dispute.

Pending application(s), if any, shall also stand disposed of, in terms thereof.

14.12.2018 **(ANIL KSHETARPAL)**
mks **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No