

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.4201 of 2012
Date of Decision:02.02.2018

Ashok Kumar and others

...Appellants

Versus

Purshottam Bansal

...Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.C.B.Goel, Advocate for the appellants.
Mr.Vikram Singh, Advocate and
Mr.Abhinav Sood, Advocate for the respondent

ANIL KSHETARPAL, J. (ORAL)

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below while decreeing the suit for possession by way of specific performance of three agreements to sell (two agreements to sell dated 14.11.2006 and third one dated 15.11.2006) between the same parties.

The execution of the agreements and receipt of earnest money are not in dispute between the parties. The only issue, which was contested before the courts below was that on the extended target date, i.e. 12.6.2007, (whereas as per agreement to sell, the target date was 15.5.2007), the plaintiff had not come present to execute the sale-deeds, whereas it is the case of the plaintiff that he visited the office of the Sub Registrar, where sale-deed was to be executed and registered but the defendants did not come forward to execute and register the sale deeds. However, both the parties got their respective affidavits attested from the office of Sub Registrar on 12.6.2007, that is the extended target date to prove their respective presence

in the premises of the office of Sub Registrar.

As per the agreement to sell, the defendants-appellants were required to take two steps as per agreements to sell before execution of the sale deeds:- (i) they were required to repay the loan which was standing as a charge on the land in dispute and (ii) apply and obtain No Objection Certificate from the District Town Planner. It is not in dispute that the defendants-appellants did not take any of the steps to comply with these two requirements, which were agreed between the parties.

Before the first appellate court, the plaintiff moved an application for additional evidence under Order 41 Rule 27 of the Code of Civil Procedure ('CPC' for short), pleading that the plaintiff is a money lender. The first appellate court rejected the application on the ground that the additional evidence now sought to be produced is beyond the pleadings.

Before the first appellate court, the defendants-appellants raised only one argument that the agreement to sell was not registered, although, possession was delivered under the agreement to sell. The first appellate court, after relying upon a Division Bench judgment of this Court in the case of **Ram Kishan and another Vs. Bijender Mann alias Vijender Mann and others, 2013 (2) CCC 188**, dismissed the appeal.

I have heard the learned counsel for the parties at length and with their able assistance gone through the impugned judgments passed by the courts below as well as records.

Learned counsel for the appellants has submitted that the plaintiff has no declaration decree to the effect that the cancellation of agreement vide notice dated 2.7.2007 Ex.D3 was illegal and therefore, the suit filed by the plaintiff is not maintainable. He has relied upon a judgment

passed by the Hon'ble Supreme Court in the case of **I.S.Sikandar (D) by LRs Vs. K.Subramani and others, 2013 (15) SCC 27**. He has further submitted that the plaintiff has also prayed for possession, whereas in the agreement to sell, the possession was delivered. Therefore, he prays that the suit filed by the plaintiff is false. He has further submitted that the defendants had also attended the office of the Sub Registrar on 12.7.2007 and therefore, it must be inferred that the plaintiff was not ready and willing to perform his part of the contract. He has further submitted that there were three agreements to sell and therefore, one consolidated suit was not maintainable.

On the other hand, learned counsel for the respondent has drawn attention of the court to the fact that the defendants-appellants did not repay the amount of loan and the plaintiff made a request to the court for permission to pay the balance amount to the State Bank of India. He has drawn attention of the Court to the order dated 19.9.2007, wherein the court granted permission to the plaintiff to deposit the balance loan amount with the bank. He has further submitted that once the defendants-appellants had not paid the amount, there is no question of their being ready and willing to perform their part of the contract.

With regard to first argument of the learned counsel for the appellants, it may be noticed that the defendants did not object to the maintainability of the suit on the ground that the agreement has been cancelled and that cancellation is required to be challenged before the courts below. Neither in the pleadings nor in the evidence, such point was ever raised. A careful reading of the impugned judgments passed by the courts below also establishes that such contention was never raised. Learned

counsel for the appellants has also very fairly admitted that such contention has not been raised before the courts below. However, he has submitted that this issue is being legal and can be pressed for the first time in Regular Second Appeal.

This Court has considered the submission, however, do not find any substance therein.

Firstly, the defendants-appellant cannot be permitted to raise this contention for the first time in the regular second appeal without there being pleadings to that effect or the plaintiff-respondent being apprised of the defence being taken. Had the defendants taken this objection at the first instance, while filing the written statement, the plaintiff could get an opportunity to amend the plaint and challenge the cancellation also.

Secondly, the facts in the case of **I.S.Sikandar** (supra) are entirely different. In that case, within the stipulated period, the plaintiff did not come forward to execute the sale deed, despite this fact, the defendants got issued a notice, calling upon the plaintiff to come and execute the sale-deed but the plaintiff did not come forward. Plaintiff in reply admitted his fault in performing his part of the contract and sought extension. The defendants once again sent a notice to the plaintiff, extending time and asking him to pay the sale consideration amount and get the sale-deed executed and on failure to comply with the same, the agreement to sell would stand terminated/cancelled. The plaintiff did not even come forward to perform his part within the extended time. Under these circumstances, the Hon'ble Supreme Court has held that the plaintiff was required to seek a declaration that the cancellation/termination of the agreement to sell was illegal while filing a suit for specific performance of the agreement to sell.

In this case, facts are otherwise. As per the original agreement to sell, the target date for execution and registration of the sale-deed was 15.5.2007. Since the defendants neither repaid the loan amount nor applied for No Objection Certificate, therefore, the date for execution of sale-deed was extended to 12.6.2007. On 12.6.2007, the plaintiff attended the office of the Sub Registrar and got his affidavit attested. The plaintiff immediately after seven days got issued a notice to the defendants-appellants, calling upon them to come and execute the sale-deed, as per agreement to sell. It is in response thereto, the defendants sent a reply and asserted that they were ready and willing to perform their part of the contract, however, plaintiff did not turn up for execution of the sale-deed. On the basis thereof, it was further pleaded that since the plaintiff has failed to perform his part of the contract, therefore, the agreement to sell stood cancelled.

Both the courts below have concurrently affirmed that it is not the plaintiff but the defendants, who have failed to perform their part of the contract. In the wake of this finding, in the considered opinion of this Court, the judgment passed by Hon'ble Supreme Court in **I.S.Sikandar** 's case (supra) would have no application.

Next argument of the learned counsel is that the plaintiff has also prayed for possession, although under the agreement to sell, possession was delivered. No doubt, in the agreement to sell, it has been mentioned that possession has been delivered. However, it is further recorded that possessory title shall be delivered at the time of execution of the sale-deed. This being the position, the prayer made by the plaintiff cannot be said to be contradictory. Further, the plaintiff in para 5 has submitted that physical possession of the property was given to him at the time of agreement to sell

but the defendants have taken over possession of the property forcibly. Under these circumstances, this Court does not find any substance in the argument of the learned counsel for the appellants.

Next argument of the learned counsel for the appellants is that the defendants had also attended the office of the Sub Registrar and got attested their affidavits. This argument is to be noticed and rejected. It is not in dispute that as per the agreement to sell, the defendants-appellants were required to repay the loan of State Bank of India and apply for No Objection Certificate from the District Town Planner. However, defendants-appellants did not lead any evidence to prove that they took any step in that direction. The loan was repaid during the pendency of the suit by the plaintiff. Hence the attendance got marked by the defendants was only to create evidence.

The last argument of the learned counsel for the appellant is that there were three agreements to sell but the suit filed by the plaintiff was only one. In this respect, it is earlier noticed that this objection was never taken by the defendants-appellants before the courts below. Still further, more than one agreements to sell has been executed between the same parties and cause of action to file the suit for specific performance is same, then the plaintiff would be entitled to file a single suit for possession by way of specific performance of the agreement to sell. It is not in dispute that two agreements to sell were executed on 14.11.2006, whereas third one agreement to sell was executed on 15.11.2006. In all the agreements, the sale-deed was originally to be executed on 15.5.2007 and in all the agreements, the date for execution and registration of sale deeds was extended to 12.6.2007.

In view of what has been discussed above, this Court does not

find any good ground to interfere with the concurrent findings of fact arrived at by the courts below. The present regular second appeal is dismissed. Pending application, if any, shall also stand disposed of.

02.02.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No