

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 1796 of 2016(O&M)
Date of Decision:31.7.2018

Ramesh Singh

---Appellant

vs.

Kishan Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Suman Jain, Advocate
for the appellant

Rekha Mittal, J.

The present appeal directs challenge against the judgment and decree dated 9.10.2015 passed by the Additional District Judge, Palwal whereby appeal preferred by the respondents-plaintiffs against the judgment and decree dated 14.5.2013 passed by the Addl. Civil Judge (Senior Division), Palwal was accepted, the judgment and decree dated 14.5.2013 were set aside and suit filed by the respondents-plaintiffs seeking specific performance of agreement to sell dated 10.2.2006 was partly allowed by grant of alternative relief of recovery of Rs. 20 Lakhs paid towards earnest money with interest @ 6% per annum from the date of agreement till realization.

In brief, case of the respondents-plaintiffs is that the appellant being owner in possession of the suit property measuring 19 kanal 9 marlas entered into agreement to sell with the plaintiffs for Rs. 1,02,11,250/- and received a sum of Rs. 20,00,000/- towards earnest money at the time of execution of agreement of sale, in the presence of witnesses. It was agreed that the appellant-defendant would get the sale deed executed and registered in favour of the plaintiffs or their nominees on or before 30.4.2006 on receipt of balance sale consideration of Rs. 82,11,250/-. As per terms of the agreement, the appellant was to get the lease hold rights of the suit land surrendered before the target date and in case of his failure to do so, date for execution and registration of sale deed was to be extended. The plaintiffs got a legal notice served upon the appellant-defendant on 29.4.2006 calling upon him to get the lease hold rights surrendered so that vacant possession could be delivered to the plaintiffs. The defendant despite receiving notice did not get the lease rights surrendered nor got removed the super structure from the suit land and not even extended date for execution and registration of sale deed.

Plaintiffs have always been ready and willing to perform their part of the contract and requested the defendant number of times to execute the sale deed after receiving balance sale consideration. Since 30.4.2006 was a holiday, plaintiffs went to the office of the Sub Registrar on 1.5.2006 alongwith requisite expenses and balance sale consideration but the defendant did not turn up and plaintiffs returned after getting their presence marked. The defendant sent an evasive reply on 4.5.2006. The plaintiffs served legal notice on 22.5.2006 calling upon the

defendant to perform his part of the contract within 15 days and dated 4.4.2007 asking him to show the documents regarding cancellation of lease and removal of construction over the suit land but to no avail. Hence the suit.

The appellant-defendant filed the written statement admitting factum of agreement of sale and receipt of earnest money of Rs. 20,00,000/-. It is averred that in the reply to notice dated 29.4.2006, it was specifically mentioned that since the plaintiffs failed to perform their part of the contract and have not appeared before the Sub Registrar on 1.5.2006 alongwith balance sale consideration, transaction between the parties stood cancelled, revoked and rescinded and the earnest money paid by them stood forfeited. It was also mentioned in the reply that plaintiffs have no lien over the suit land and the defendant is at liberty to sell the same to any body else. He has admitted the receipt of notices dated 22.5.2006 and 4.4.2007 with the averments that the same were duly replied by the appellant and re-asserted that earnest money stood forfeited and the agreement stood cancelled.

The controversy between the parties led to framing of issues, reproduced in para 4 of the judgment of trial court. Having heard counsel for the parties in the light of materials on record, the trial court negated plea of the respondents/plaintiffs with regard to their readiness and willingness to perform their part of the agreement and the suit was dismissed. However, the Court in Appeal allowed alternative relief of recovery, noticed hereinbefore.

Counsel for the appellant has assailed judgment and decree passed by the Appellate court primarily on two counts. The first submission

made by counsel is that the appellant filed application dated 17.3.2006 for cancellation of patta entry and mutation Ex. DW6/2 was entered by the patwari on 3.5.2006 and verified by Kanungo on 10.5.2006. It is further argued that as per agreement between the parties, in case the appellant fails to get the entry of lease surrendered/cancelled on or before 30.4.2006, the appellant was only obliged to extend the period of agreement but the same did not give any right to the respondents/plaintiffs to seek refund of Rs. 20,00,000/-, paid towards earnest money. In addition, it is argued that in the notice dated 29.4.2006 (Ex. P2), in the concluding lines of para 2, it has been mentioned that in case the patta is not cancelled/surrendered, the respondents would be constrained to file a suit for recovery of earnest money alongwith damages etc. meaning thereby that the respondents did not remain ready and willing to perform their part of the agreement by getting the sale deed executed and registered, therefore, they have wrongly been allowed refund of earnest money alongwith interest.

Another submission made by counsel is that despite the appellant having categorically conveyed to the respondents-plaintiffs in view of reply to the first notice that the agreement stands cancelled, earnest money stands forfeited, subsequent notices dated 22.5.2006 and 4.4.2007 have no relevance in the circumstances of the present case. It is vehemently argued that once the appellants have cancelled the agreement and forfeited the earnest money, suit filed by the respondents-plaintiffs seeking specific performance of the agreement and in the alternative for recovery of earnest money and damages etc. without seeking declaration to challenge cancellation of the agreement of sale is not maintainable. For

this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court **I.S.Sikandar (Dead) by Lrs. vs. K. Subramani and others 2014(1) RCR (Civil) 236.**

I have heard counsel for the appellant, perused the paper book particularly the judgments passed by the courts and copies of various documents marked as exhibits, supplied by counsel for the appellant during the course of hearing.

Indisputably, the parties entered into an agreement to sell dated 10.2.2006 (Ex. P1) whereby the appellant agreed to sell land measuring 19 kanal 9 marlas being 1/4th share out of land measuring 77 kanal 16 marlas for a sale consideration of Rs. 1,02,11,250/- @ Rs. 42,00,000/- per acre and an amount of Rs. 20,00,000/- was paid towards earnest money and the sale deed was agreed to be executed and registered on 30.4.2006 on payment of balance sale consideration. Though it has been recited in the agreement that in the revenue records, land is recorded to be under patta but the same is otherwise free from encumbrances. On page 2 of the agreement (Ex. P1), the appellant agreed to surrender the patta prior to the stipulated dated i.e. 30.4.2006 and in case he failed to do so, he would extend the date for execution and registration of the sale deed. It is not plea of the appellant-defendant that agreement between the parties with regard to surrender of patta was not material or non-performance thereof cannot be taken advantage of by the respondents-plaintiffs. It appears that the parties agreed for getting the patta surrendered before execution of sale deed so that dispute may not be raised by the lessee to claim right of pre-emption against the sale of suit land by the appellant. Though the appellant has tried to raise

a plea that patta was already surrendered prior to the stipulated date i.e. 30.4.2006, in view of entry in mutation Ex. DW6/2 but as has been rightly noticed by the Court in Appeal, the first entry for surrendering the patta was made by patwari on 3.5.2006 which was verified by the Kanungo on 10.5.2006 but mutation was sanctioned later by the Assistant Collector IInd Grade in view of endorsement on the document Ex. DW6/2 but the said endorsement does not bear any date. In this view of the matter, plea taken by the appellant that patta was surrendered prior to the stipulated date is patently false and gets belied from document Ex. DW6/2, brought on record by the appellant-defendant.

The plaintiffs-respondents issued notice dated 29.4.2006 calling upon the appellant to get the patta cancelled/surrendered and get the sale deed executed and registered within a period of 15 days from receipt of notice. It was also mentioned in the notice that in case the appellant does not get the patta cancelled/surrendered, it would be understood that he has not complied with the terms and conditions of agreement and the respondents-plaintiffs would then file the suit for recovery of earnest money and damages etc. Counsel has tried to highlight the last four lines of the notice Ex. P2 but by skipping the previous three lines of the concluding para (sub para of para No. 2). First plea in the para is that the patta should be got cancelled/surrendered and thereafter the sale deed be executed within 15 days from the date of cancellation of patta, by receiving balance sale consideration. The plaintiffs expressed that in case the appellant does not get the patta cancelled/surrendered, it would be deemed that the appellant does not want to perform his part of the agreement and in that case,

respondents would be constrained to file suit for recovery. On plain and careful reading of last para of notice Ex. P2, it is difficult to accept contention of the appellant that the respondents were not ready and willing to perform their part of the agreement or they only expressed their desire to seek recovery of earnest money.

The appellant, despite knowing fully well that the patta has not been surrendered on or before 30.4.2006, in place of filing a response that he is ready to extend the period of agreement on account of failure to get the patta surrendered before the stipulated date in terms of agreement between the parties, started accusing the respondents-plaintiffs and had gone to the extent of saying that the agreement stands cancelled and the earnest money stands forfeited. The reply to the notice clearly indicates that the appellant backed out of the bargain, therefore, neither can he be allowed to contend that the respondents were not ready and willing to perform their part of the agreement nor to forfeit the earnest money, by taking advantage of his own wrong.

Indisputably, the respondents-plaintiffs issued two more notices calling upon the appellant to execute the sale deed after getting the patta cancelled. There is nothing on record suggestive of the fact that appellant ever informed the respondents with regard to mutation bearing No. 2083 qua cancellation of patta being sanctioned when otherwise, it remains a mystery till date as to the date on which the mutation was sanctioned by the Assistant Collector IInd Grade. The conduct of the respondents-plaintiffs in issuing subsequent notices coupled with that they filed the suit for specific performance of agreement with alternative relief

of recovery, it is difficult to accept contention of the appellant that either the plaintiffs were not ready and willing to perform their part of the agreement much less they being guilty of committing breach of the agreement of sale giving a right to the appellant to forfeit the earnest money.

The Court in Appeal has noticed that the respondents-plaintiffs have led evidence to prove that they had sufficient funds with them in their bank accounts to discharge their obligation qua payment of balance sale consideration and expense of registration etc. In view of the above, I find it difficult to accept contention of the appellant that the Court in Appeal has faulted much less findings recorded by the first appellate court suffer from perversity allowing alternative relief of recovery.

The plea of the appellant that suit filed by the respondents-plaintiffs is not maintainable for want of challenge to cancellation of agreement, by way of reply dated 4.5.2006 to the notice dated 29.4.2006. Perusal of pleadings of the parties would show that neither any such plea was raised in the written statement nor any such issue was otherwise raised before the trial court or Court in Appeal. Had the appellant raised the issue with regard to non-maintainability of the suit without challenging cancellation of agreement of sale, the respondents/plaintiffs might have amended their suit for seeking necessary declaration. The appellant cannot be allowed to raise such an issue of non-maintainability for the first time, in regular second appeal. This apart, the Court has only allowed refund of earnest money of Rs. 20,00,000/-. In view of discussion made hereinbefore, the appellant cannot be allowed to enrich himself for his own fault when the case is examined on equitable considerations. Analyzed from any angle,

judgment and decree passed by the Court in Appeal rectifying the error committed by the trial court do not warrant intervention.

For the foregoing reasons, the appeal fails and is accordingly dismissed in limine.

(Rekha Mittal)
Judge

31.7.2018
paramjit

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