Manoj Kumar
2018.06.20 16:26
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IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.487 of 2013 (O&M)

Balwan Singh

...Appellant

Versus

Salinder Singh

....Respondent

Date of Order: 30.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Atul Gaur, Advocate for the appellant.

Mr. Puneet Jain, Advocate for
Mr. Rakesh Gupta, Advocate for the respondent.

AMIT RAWAL, J (ORAL)

Appellant-plaintiff by way of filing this second appeal is challenging the concurrent judgments of both the courts below whereby suit of possession claiming specific performance of agreement to sell dated 29.8.2002 has been dismissed vide judgment and decree dated 12.12.2009 and affirmed by the lower Appellate Court vide judgment and decree dated 25.8.2012.

The facts of the case are that the appellant-plaintiff instituted the suit on 04.5.2005 seeking possession by way of specific performance of agreement to sell dated 29.8.2002 in respect of suit land agreed to be sold at the rate of Rs.5,35,000/- per acre out of which a sum of Rs.3,30,000/- was received by the defendant as earnest money. The stipulated date as per the terms and conditions was 26.10.2000. It was averred that the defendant did not come forward for execution and registration of the sale deed on the stipulated date and had been lingering the matter on one pretext or the other resulting into filing of the suit.

Upon notice, the defendant-respondent contested the suit raising numerous preliminary objections with regard to locus standi, cause of action, non-payment of proper court fees and concealment of true and material facts etc. It was averred that the plaintiff along with one Parlahad son of Om Parkash, Man Singh son of Molu property dealer manipulated the agreement dated 27.7.2001 and receipt dated 29.8.2002 along with another agreement in question dated 10.8.2002 and receipt dated 10.9.2001 out of their greed by causing wrongful loss to the defendant. Plaintiff did not perform his part of the contract despite efforts of the defendant. The market price of the suit land was Rs.25 lacs per acre as the same was adjoining the main road and within the municipal limits of Kaithal city. Receipt of earnest money was denied. It was averred that it was manipulated transaction and the result of mis-representation and a clever design.

From the pleadings of the parties, the trial Court framed the following issues:

> *"1. Whether the defendant had agreed to sell the suit land as detailed in para no.1 of plaint to the plaintiff on 29.8.2002 for sale consideration of Rs.5,35,000?OPP*
>
> *2. Whether the defendant had executed an agreement to sell dated 29.8.2002?OPP*
>
> *3. Whether the defendant had received the earnest money to the tune of Rs.3,30,000/- from plaintiff on 29.8.2002 and had executed the receipt in lieu thereof?OPP*
>
> *4. Whether the defendant had not performed his part of contract, if so, its effect?OPP*
>
> *5. Whether the plaintiff is still ready and willing to perform his part of contract?OPP*
>
> *6.Whether the plaintiff has no locus standi and cause of action to file the present suit?OPD*

> *7. Whether the plaintiff had come to the court with clean hands, if so its effect?OPD*
> *8. Whether the suit is bad for want of ad valorem court fees?OPD*
> *9. Relief."*

In order to prove its case, plaintiff examined Vipin Taneja-Scribe as PW1, Man Singh-attesting witness as PW2, PW4 Shamsher Singh, Hand Writing and Finger Prints Expert besides appearing himself as PW3 Balwan Singh and brought on record documents Ex.P.1 agreement to sell in question dated 29.8.2002, Ex.P.2 receipt and Ex.PW4/A report of Expert.

On the other hand, defendant examined DW1 Chander Dutt, DW2 Savitri Devi and DW3-Salinder Singh besides tendering in evidence documents Ex.D.1 to Ex.D.14. including Ex.D.3 an application for marking the presence before the office of Sub Registrar.

On the preponderance of evidence, the trial Court while dismissing the suit observed that the plaintiff had failed to prove the agreement to sell much less handing over actual physical possession of suit property as in a suit filed by a third party against the vendor-defendant, there was interim stay but permission was granted. Appeal filed by the plaintiff against the judgment of the trial Court met with the same fate.

Learned counsel for the appellants submitted that the findings recorded by both the courts below in dismissing the suit are patently illegal and the same are liable to be set aside. The learned courts below have proceeded on wholly misconceived and perverse approach, while passing the impugned judgments, for, the plaintiff had always been ready and willing to perform his part of contract and it was the defendant who lingered on the matter. Moreover, the execution of the agreement to sell has been proved through the testimony of Vipin Taneja-Scribe and Mann Singh, attesting witness much less receipt qua payment of sale consideration of Rs.5,35,000/-, which is also evident from the contents of letter (Ex.D.3) submitted by the defendant before the office of Sub Registrar acknowledging the previous agreement to sell and receipt of additional earnest money. The suit could not be filed within reasonable time since there was interim stay in the proceedings initiated at the instance of third party against the vendor and the permission was ultimately granted only on 18.10.2002.

Per contra, learned counsel for the defendant-respondent submitted that no error could be found with the judgment and decrees passed by both the courts below, for, the plaintiff manipulated the agreement to sell dated 27.7.2001 along with receipt dated 29.8.2002. Permission had been granted by the court below on 18.10.2002 but no explanation has come forward for not filing the suit immediately. The property in dispute had exchanged number of times and now it would be too late to put the clock back, thus, prayed for dismissal of the present appeal.

After hearing learned counsel for the parties and appraising the paper book, I am of the view that it is a case where the plaintiff is entitled to the alternative relief viz-a-viz refund of the earnest money, for, during the interregnum, the property had changed hands several times as discussed above. No evidence has been brought on record to establish that the plaintiff had not been ready and willing from October 2002 when the Court had granted permission to sell the land whereas the suit was filed on 04.5.2005.

Coming to the execution of the agreement to sell, I find that the findings arrived at by both the courts below are not sustainable in the eyes of law, for, the contents of letter (Ex.D.3) read out in the open court during the course of hearing, revealed that the defendant had acknowledged the receipt of the additional earnest money in lieu of earlier agreement to sell dated 27.7.2001 (Ex.D1) brought on record by way of secondary evidence but failed to lead any evidence to show that the earlier receipt issued in the previous agreement was converted into agreement to sell in question, for, the signatures on the agreement to sell in question had been proved through the testimony of PW4-Expert. The statement of the plaintiff remained un-shattered throughout despite cross-examination viz-a-viz passing of the earnest money of Rs.3,30,000/-. Both the courts below have failed to notice the aforesaid facts especially the lower Appellate Court being the last court of law and facts which was under obligation to examine all the evidence and pleadings afresh by deciding the appeal filed under Section 96 CPC.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

> *"Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled." [at paras 27 - 29]" "27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force."*

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned, the judgment and decrees passed by both the courts below are set aside and the appellant-plaintiff is held entitled to the amount qua refund of earnest money i.e Rs.3,30,000/- along with interest @ 6% per annum from the date of execution of agreement to sell.

The second appeal is allowed in the above terms.

May 30, 2018 **`(AMIT RAWAL)**
manoj **JUDGE**

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No