

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.3018 of 2016 (O&M)

Date of Decision:17.05.2018

Mohar Singh

...Appellant

Versus

Pawan Kumar

...Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.S.S.Slar, Advocate for the appellant.
Mr.Jai Kumar Chauhan, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

The plaintiff-appellant is in the regular second appeal against the judgment and decree passed by the learned first appellate court, reversing the judgment and decree passed by the learned trial court.

This Court has heard the learned counsel for the parties and gone through the photocopy of the record produced by the learned counsel for the parties, correctness whereof is not being disputed.

In the considered opinion of this Court, following substantial questions of law arise for consideration of this Court:-

- (i) Whether the intended purchaser can compel the intended vendor/seller to specifically enforce the contract in view of the provisions of Section 13 of the Specific Relief Act, 1963 ('the 1963 Act' for short) after the intended seller has obtained the perfect title or not?
- (ii) Whether a contract for sale of immovable property in violation of term of the allotment letter would be covered as

void contract within the meaning of Section 23 of the Contract Act, 1872 ('the 1872 Act' for short)?

FACTS

It would be necessary to note few facts.

The defendant-respondent was allotted Plot No.1252, Sector-28, Panchkula, vide allotment letter dated 25.5.2000. As per clause 5 of the allotment letter, no sale, transfer, gift-deed or mortgage of the plot was permitted for a period of 10 years from the date of allotment letter. The defendant entered into an agreement to sell with the plaintiff on 19.12.2002. for a sale consideration of Rs.37,000/-. Plaintiff was also made liable to pay remaining amount, whatever was due, to the allotment authority, i.e. Haryana Urban Development Authority ('HUDA' for short). Agreement to sell is signed between the parties. It was further agreed that Rs.34,000/- has been paid as earnest money and balance amount of Rs.3,000/- would be paid on the target date, i.e. 26.12.2002 and original documents would be handed over by the defendant to the plaintiff. It is the case of the plaintiff that on 26.12.2002, all the original documents like allotment letter, receipt of payment were handed over by the defendant to the plaintiff and balance amount of Rs.3,000/- was paid.

The concurrent finding of the courts below and the facts came on record are that it is the plaintiff who paid all the instalments and kept on communicating/dealing with the HUDA. The last payment was made on 15.6.2009, vide receipt Ex.P2. All the receipts including original allotment letter, agreement to sell etc. have been produced by the plaintiff.

The defendant admitted the execution of the agreement to sell.

However, he pleaded that the plot was allotted to him in the category meant

for economic weaker section and there is 10 years' restriction/embargo on the sale of the plot as per allotment under such category. The defendant further took the stand that the plaintiff did not pay the remaining balance of Rs.3000/- and it is the defendant who has paid all the installments and conveyance deed in his favour has been executed on 20.10.2009. He further asserted that possession of the plot was delivered to him and he has raised some construction thereon.

The learned trial court, after noticing all the facts, decreed the suit filed by the plaintiff for possession by way of specific performance of the agreement to sell, whereas the learned first appellate court has chosen to reverse the decree for possession by way of specific performance of the agreement to sell and ordered refund of the amount paid by the plaintiff within a period of one month along with interest @8% per annum, failing which, interest would be payable @10% per annum.

Now, the stage is set for considering the substantial questions of law, which are as under:-

Question No.1

“Whether the intended purchaser can compel the intended vendor/seller to specifically enforce the contract in view of the provisions of Section 13 of the Specific Relief Act, 1963 (‘the 1963 Act’ for short) after the intended seller has obtained the perfect title or not?”

Section 13 of the 1963 Act reads as under:-

13. Rights of purchaser or lessee against person with no title or imperfect title.—(1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:—

(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

After careful reading of the aforesaid provisions, it is clear that whenever a person contracts to sell the property having no title or only imperfect title then the purchaser has a right to compel specific performance of the contract if the vendor has subsequently acquired any interest in the

property or perfected his title. In the present case, restriction for sale of the plot was for a period of 10 years from the date of allotment. Time period of 10 years elapsed in May 2010, whereas the suit was filed on 13.12.2010. So on the day the suit was filed the defendant had acquired perfect title of the property and embargo did not exist. The conveyance deed in favour of the defendant was executed on 20.10.2009. The restriction to sell the property had come to an end before filing of the suit. In this situation, the suit filed by the plaintiff has found maintainable.

Learned counsel for the respondent has drawn attention of this Court to the judgment passed by the Hon'ble Supreme Court in ***Satish Kumar Vs. Karan Singh and another, 2016(4) SCC 352*** and has submitted that an agreement to sell entered into during the period embargo did exist on the alienation of the property, a suit for specific performance of agreement to sell would not be maintainable. This Court has carefully gone through the aforesaid judgment. The aforesaid judgment deals with a situation when the suit for specific performance had been filed during the period when restriction to sell the property was in place, whereas in the present case, the situation is entirely different. The case in hand is at the stage when restriction to sell the property had come to an end. Learned counsel for the appellant has further referred to many judgments passed by other High Courts in this regard. However, in none of the judgments, the suit was filed after the restriction to sell the property had come to an end. Similar principle can be deduced for reading of Section 43 of the Transfer of Property Act, 1882 ('the 1882 Act' for short). Section 43 of the 1882 Act provides that where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to

transfer such property for consideration, such transfer at the option of the transferee shall operate and once unauthorized person subsequently acquires interest in the property, transferee shall be entitled to enforce the same.

In fact on a combined reading of Section 43 of the 1882 Act and Section 13 of the 1963 Act, it becomes clear that any person who is unauthorized or having any imperfect title or no title can be compelled to perform his part of the contract, once he acquires title.

In the present case, execution of the agreement to sell and receipt of Rs.34,000/- are admitted. It is also admitted that the original documents including allotment letter and receipts have been handed over to the plaintiff. It is the plaintiff who has paid all the installments and dues against the plot. In such circumstances, answer to question No.1 as framed above is given in favour of the appellant.

Question No.2

“Whether a contract for sale of immovable property in violation of term of the allotment letter would be covered by void contract within the meaning of Section 23 of the 1872 Act?

Learned counsel for the respondent has submitted that in view of the provisions of Section 23 of the 1872 Act, such contract is void-*ab-initio* being unlawful. Section 23 of the 1872 Act is restricted as under:-

“23. What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless-

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

On a careful reading of Section 23 of the 1872 Act, it is apparent that Section 23 of the 1872 Act operates in a field where consideration or objective of an agreement to sell is unlawful as either the contract is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy.

Learned counsel for the respondent has submitted that the contract was unlawful, because it was against the terms of allotment letter. He has further submitted that such contract is opposed to public policy, because an embargo has been put on the rights of the allottee belonging to the weaker sections not to sell the property for a period of 10 years from the date of allotment letter. He has further submitted that the contract in the present case was entered into within two years of the allotment letter and, therefore, the contract cannot be specifically performed.

Learned counsel for the respondent was unable to point out any statutory provision, providing for such embargo. Learned counsel for the respondent submitted that such embargo would be part of Resolutions framed by HUDA, the allotment authority. He submitted that such restriction would come within the definition of “forbidden by law”.

This Court has carefully considered the argument, however, do not find any substance in it. The word ‘law’ in the context it has been used

would always mean “the law enacted by the Legislature”. Reference in this regard can be made to judgment passed by the Hon'ble Supreme Court of India, *Union of India Vs.Col. L.S.N.Murthy and another*, (2012) SCC 718.

The next argument of the learned counsel for the respondent is that such agreement to sell is opposed to the public policy. He, while elaborating, has submitted that an allottee of a weaker section of society is being deprived of the property, whereas intention of the allotment authorities was to allot a plot and allow such weaker section of the society to build his own house. No doubt, the allotment of the plot to the defendant was with a good objective. However, here is a case where an allottee of weaker section has been permitted to sell the property after a period of 10 years. It has been found that the defendant in spite of restriction/embargo in the allotment letter, entered into an agreement to sell before expiry of 10 year time period and received the amount. The defendant is a literate person. He has signed the agreement to sell in English. He is a resident of Panchkula, a satellite town of Chandigarh. The public policy cannot be one sided. It has to be weighed and applied while balancing the equalities. In the present case, the plaintiff entered into an agreement to sell for a valuable consideration. He also paid all the installments towards price of plot and other dues of the HUDA over a period of 7 years from 2002 to 2009. Once all the payments due had been cleared by the plaintiff, defendant became dishonest and tried to wriggle out of the contract entered into with free volition. In such circumstances, this Court is of the view that the agreement now sought to be subsequently enforced is not against public policy particularly when period of embargo to sell the property is over before filing of the suit.

Public policy is a policy valued to meet the public good or public interest, if it is not in consonance of public conscience then court should take it as infringement of public policy otherwise it will create a sense of insecurity in the minds of people to whom it will apply. Further, public policy also involves unjust enrichment i.e. one person enriched at the expense of another. Similar is the case where defendant took benefit at the cost of the plaintiff. The courts should take initiative to restore the benefit derived by one at the expense of another otherwise it will cause great injustice to the sufferer.

Learned counsel for the respondent has further argued that the defendant has constructed some portion on the plot and therefore specific performance of the agreement to sell should not have ordered.

This Court has considered the submission.

Learned trial court has held that the defendant raised some construction only during the pending of the suit so as to defeat the rights of the plaintiff. In the considered opinion of this Court, such action of the defendant cannot be used by the defendant as a sword against the plaintiff to defeat the rights of the plaintiff.

In view of the aforesaid discussion, the answer to question No.2, as framed above, is also given in favour of the appellant.

Taking into consideration that the defendant has raised some construction over the suit property. The executing court is directed to assess the market value of the construction raised at the property in dispute and that amount shall be payable to the defendant being condition precedent for execution of the decree. The decree for possession by way of specific performance of the agreement to sell is passed in favour of the appellant.

No other argument was raised.

The present Regular Second Appeal is allowed. The impugned judgment and decree passed by the learned first appellate court is set aside.

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

17.05.2018

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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No