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In the High Court of Punjab and Haryana at Chandigarh

RSA-324 of 2016(O&M)
Date of Decision:15.10.2018

Visakhi Ram

---Appellant

vs.

Bhushan Kumar and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

***

Present: Mr. Hari Om Verma, Advocate
for the appellant

Ms. Harjot Kaur, Advocate for
Mr. N.S.Sodhi, Advocate
for respondents No. 1 and 2

Mr. Mukesh Sharma, Advocate
for respondent No. 3

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<u>Rekha Mittal, J.</u>

The present appeal directs challenge against concurrent findings recorded by the courts whereby suit for possession by way of specific performance and declaration or in the alternative for recovery was partly decreed by the trial court and the respondent-plaintiff Bhushan Kumar is held entitle to recover Rs. 3,15,000/- with interest @ 9% per annum with effect from 31.10.2000 till realization. The appeal preferred by

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unsuccessful defendant-appellant did not find favour with the Additional District Judge, Moga as the court dismissed the appeal preferred by the appellant and cross objections filed by Sh. Bhushan Kumar.

Bhushan Kumar sought specific performance of agreement to sell dated 31.10.2000 on the averments that the appellant agreed to sell the suit house for sale consideration of Rs. 3,40,000/- and received Rs. 3,15,000/- in the presence of marginal witnesses. Sale deed was agreed to be executed on 31.5.2001. It is averred that plaintiff always remained ready and willing to perform his part of the agreement. He appeared in the office of Sub Registrar, Moga on the stipulated date for execution of sale deed but defendant No. 1 failed to turn up.

The appellant/defendant No. 1 filed the written statement seriously contesting claim of the plaintiff-respondent or execution of agreement to sell and receipt of Rs. 3,15,000/-. He has pleaded that agreement to sell is a forged and fabricated document, without consideration prepared by the plaintiff in connivance with the scribe and marginal witnesses. He was not owner of suit property on the date of agreement as he had already sold the house to defendant No. 2 vide sale deed dated 26.7.1999 and mutation was sanctioned in favour of defendant No. 2 on 16.8.1999. The plaintiff has filed the suit to extract Rs. 50,000/- from defendant No. 1 as mortgage money regarding the house which has already been paid by him in instalments to the plaintiff. It is further averred that the answering defendant mortgaged his house with possession in favour of plaintiff on 30.5.1997 for Rs. 50,000/- on the basis of mortgage deed duly executed between the parties. Thereafter, he occupied the house as a tenant

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under plaintiff on monthly rent of Rs. 500/- by way of oral tenancy. He regularly paid rent and Rs. 1,000/- as part payment of mortgage money. Entries in this regard have been made in his books of account. With mediation of plaintiff, defendant No. 1 executed agreement to sell dated 25.4.1998 in favour of defendant No. 2 and ultimately sold the suit house vide sale deed dated 26.7.1999. The answering defendant is an illiterate person. Plaintiff is an educated man and is involved in bulk of litigation in Courts. Taking undue benefit and to grab suit house, he obtained signatures of defendant No. 1 on blank non-judicial papers on three occasions in May 1998, November 1999 and October 2000 on the pretext that the documents will be required as security for repayment of mortgage money with rent and interest. Signatures were also obtained in the register of petition writer against blank entry on above referred occasions. Defendant No. 1 apprehended misuse of non-judicial stamp papers by plaintiff and he served notice dated 23.10.2000 under postal certificate. All other material averments have been denied with a prayer for dismissal of the suit.

Defendant No. 2 also filed a separate written statement and contested claim of the plaintiff being purchaser of suit house vide sale deed dated 26.7.1999 executed prior to the agreement dated 31.10.2000 propounded by the plaintiff/respondent.

The controversy between the parties led to framing of issues, reproduced in para 8 of the judgment of trial court. The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the

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learned trial court accepted plea of the respondent-plaintiff that agreement Ex. P1 was executed by defendant No. 1 in favour of plaintiff against receipt of earnest money of Rs. 3,15,000/- but denied the relief of specific performance on the premise that defendant No. 1 was neither owner of suit property on the date of agreement nor he was competent to alienate it in favour of the plaintiff. Eventually, suit of the plaintiff was decreed for alternative relief of recovery alongwith interest, noticed hereinbefore.

The appeal filed by the appellant and cross objections by the respondent-plaintiff came to be decided vide common judgment and decree dated 6.10.2015 passed by the Additional District Judge, Moga whereby decree passed by the trial court with regard to alternative relief and rejecting plea of the plaintiff for specific performance of agreement were affirmed.

Counsel for the appellant would argue that as the defendant had already sold the suit house to defendant No. 1 vide sale deed dated 26.7.1999 and mutation was sanctioned in favour of defendant No. 2 on 16.8.1999, there was neither any occasion for the appellant to execute agreement of sale in favour of the plaintiff nor there was any reason for the plaintiff to agree to purchase suit house in October 2010. It is further argued that had it been true that the instant agreement of sale was executed between the parties for sale consideration of Rs. 3,40,000/- out of which a sum of Rs. 3,15,000/- had already been paid, there was no reason for the parties to fix a date of seven months for execution of the sale deed in the given circumstances that only a small amount of Rs. 25,000/- remained to be paid by the plaintiff to the appellant. In addition, it is argued that the plaintiff had denied the factum of mortgage of suit house by the appellant

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in favour of the plaintiff in the replication but in his cross examination he has admitted that the suit house was mortgaged by the appellant in favour of the plaintiff and possession thereof remained with the appellant being a tenant under the plaintiff. It is further argued that the Appellate Court in para 21 of the judgment has made out an entirely different case for the respondent-plaintiff, therefore, observations of the appellate court are altogether at variance from the one made by the trial court, as such, the impugned judgments and decrees cannot be allowed to sustain. The last submission made by counsel is that scribe of the agreement has admitted that ordinarily signatures/thumb impressions of the executant are obtained at the bottom of body writing of each page of the document but in the agreement in question, signatures and thumb impressions of the appellant are in the left side margins of all the three pages of the agreement despite there being sufficient space available at the bottom of all the three pages that creates a serious doubt in version of the plaintiff and substantiates plea of the appellant that this agreement has been prepared on his blank signatures and thumb impressions. The agreement has been attested only by one witness namely Vishal Singal whose signatures have been obtained in the left side margin only on first page and said Vishal Singal is a person conveniently available to the respondent-plaintiff as he is a witness of the plaintiff in various other transactions, so admitted by the respondent in his cross examination.

Counsel representing the respondent-plaintiff has supported the findings holding the plaintiff entitle to recover the amount of earnest money alongwith interest. It is argued that consistent findings of fact cannot be

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interfered in the second appeal unless the appeal raises a question of law for determination. It is further argued that as the appellant entered into agreement to sell despite his having alienated the suit land in favour of defendant No. 2, he is guilty of committing fraud and is not entitle to any relief.

I have heard counsel for the parties, perused the paper book and records.

The question for consideration is whether findings of the courts suffers from perversity and liable to be set aside.

Indisputably, the suit house had already been sold by appellant/defendant No. 1 in favour of defendant No. 2 vide sale deed dated 26.7.1999 and mutation on its basis was sanctioned in August 1999. There is nothing on record suggestive of the fact that the plaintiff initiated any criminal proceedings against the appellant for having entered into an agreement to sell in October 2000 despite his being no longer owner of the suit house on the basis of sale in favour of defendant No. 2.

The appellant raised a specific plea in the written statement that agreement to sell is a forged and fabricated document and the same is without consideration. The agreement has been prepared on his signatures obtained thrice on blank non-judicial papers on the pretext of creating security for repayment of mortgage amount with rent and interest. He has also averred that he mortgaged his house with possession in favour of plaintiff on 30.5.1997 for Rs. 50,000/- and mortgage deed was executed between the parties, original whereof is with the plaintiff. He was inducted as a tenant in the suit house on monthly rent of Rs. 500/-.

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The respondent-plaintiff filed replication to the written statement but denied the allegations with regard to there being mortgage of suit house or the same being rented out to the appellant.

The plaintiff appeared in the witness box and reiterated his version by way of affidavit tendered in examination in chief. In cross examination, he has admitted that vide mortgage deed dated 30.5.1997, he took the house on mortgage with possession from the defendant for a sum of Rs. 50,000/-. He would state that original mortgage deed is not available with him but its photocopy is already on judicial file as Mark 'X'. He has also admitted that after mortgage with possession, he rented out the same to defendant No. 1, but rate of rent is stated to be Rs. 2000/- per month as against Rs. 500/- per month pleaded by the appellant. The very fact that the respondent-plaintiff denied the fact of mortgage deed dated 30.5.1997 goes a long way to show that he had approached the court with unclean hands. It further appears that the respondent denied the factum of mortgage and rent so that the court may not take an adverse view that since there were dealings between the parties prior to the alleged agreement, therefore, the plaintiff had occasion/opportunity to obtain signatures/thumb impressions of the appellant on blank papers. The courts have altogether failed to take into consideration this conduct of the respondent-plaintiff while deciding the question of agreement in favour of the plaintiff and against the appellant.

Not only this, perusal of the agreement would reveal that signatures and thumb impressions of the appellant are available only in left side margin of three pages of the agreement despite sufficient space

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available at the bottom of all the three pages. The scribe of the agreement has admitted that ordinarily attestation by the executant and the marginal witnesses is obtained at the bottom of the document. No tangible explanation has been given by the plaintiff or his witnesses as to why the parties deviated from usual practice of signatures of the executant being affixed at the bottom. Further more, agreement is purported to be attested by Vishal Singal and his attestation is only on first page of the document and that too in the margin left hand side. Vishal Singal is none else but a relative of the plaintiff-respondent. In cross examination of Bhushal Kumar, he was confronted with various litigations pending in the courts for recovery of amount against different persons and in all those cases, Vishal Singal happened to be attesting witness of the document(s), subject matter of litigation. The appellate court, in a cursory and casual manner, refused to give weightage to this fact that Vishal Singal is a witness of convenience for the plaintiff, therefore, his testimony can not be relied upon lightly.

The Appellate court in para 21 of the judgment has held to the following effect:-

> "It may be possible that earnest money mentioned in the agreement in question was not paid actually, but it was adjustment of the amounts finally, which had become due against appellant-defendant against loan of Rs. 50,000/- raised by him by mortgaging this property on 30.5.1997 and admittedly, he had sold it out to defendant No. 2 prior to the agreement in question. One thing more which makes this transaction as a money transaction is that total sale

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consideration agreed is Rs. 3,40,000/-, out of which a sum of Rs. 3,15,000/- is stated to have been paid on 31.10.2000 at the time of execution of agreement Ex. P1. Sale deed was slated to be executed and registered on 31.5.2001 i.e. after a period of eight months. Why it was kept pending for paltry sum of Rs. 25,000/- is not explained especially when plaintiff-respondent is financially sound. It is thus apparent that parties never agreed to sell and purchase house in dispute, rather this document has been executed to secure payment of Rs. 3,15,000/- and learned lower court has thus rightly passed money decree instead of granting relief for specific performance of contract, because property in question was already sold to defendant No. 2 on 26.7.1999."

Perusal of the aforesaid extract shows that the Appellate court has rejected plea of the respondent that there was an agreement of sale between the parties or amount of Rs. 3,15,000/- relates to the earnest money. However, without appreciating that the respondent has denied the allegations in the written statement qua mortgage, by way of replication, the appellate court introduced a new case for the respondent and on the basis of assumptions and presumptions, proceeded to hold that the suit amount represents mortgage money with interest. The findings of the Appellate Court that the parties never agreed to sell and purchase suit house have not been challenged by the respondent-plaintiff as he has not filed cross objections. As such, findings in this regard have attained finality. In absence of plea of mortgage by the respondent coupled with clear denial of

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any such transaction between the parties, by way of replication, the story coined by the Appellate Court to uphold decree of recovery has no legs to stand, therefore, can not be upheld. In this view of the matter, judgment and decree passed by the Appellate Court suffer from perversity and legally unsustainable.

Taking a cumulative view of the facts and circumstances discussed hereinbefore, it can safely be held that judgments and decrees impugned are the result of failure to take a correct view of the entire matter in right perspective, in the light of pleadings and evidence on record. As a matter of fact, the entire case set up by the plaintiff is based on falsehood. The agreement of sale has actually been prepared on blank signatures/thumb impressions of the appellant available with the plaintiff and for that reason the agreement was prepared in October 2000 even without the plaintiff knowing that the suit house already stood sold by the appellant in favour of defendant No. 2. In this view of the matter, the judgments and decrees for recovery of Rs. 3,15,000/- along with interest cannot be allowed to sustain and accordingly set aside.

For the foregoing reasons, the appeal is allowed. The judgments and decrees passed by the courts are set aside. As a result, suit filed by the plaintiff is dismissed with costs throughout.

(Rekha Mittal)
Judge

15.10.2018
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Whether speaking/reasoned: Yes
Whether reportable : Yes/No