IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2229 of 2015 (O&M)
Date of Decision: October 31, 2018

Satbir & others

...Appellants

Versus

M/s Vikram Electric Equipment Pvt. Ltd.

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Alok Jain, Advocate,
for the appellants.

Mr. Chetan Mittal, Senior Advocate with
Mr. Mayank Aggarwal, Advocate,
for the respondent.

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AMIT RAWAL, J.

Appellant-defendants have not been successful in defending the suit decreed for recovery of ₹ 60.00 lacs along with pendent-lite and future interest @ 6% per annum from the date of institution of the suit till realization.

The necessity for the plaintiff to seek only recovery of the amount as culled out in the plaint arose that on 29.07.2006, an agreement to sell was entered into between the plaintiff and appellant-defendants. Price of the land agreed to be sold was ₹ 2,60,00,000/- per acre and a sum of ₹60,00,000/- as earnest money towards the sale consideration had been paid vide three different cheques dated 01.08.2009 and 02.08.2009. The defendants assured that they were full-fledged owner and in possession of the land, but thereafter conveyed that No Objection Certificate (for short

"NOC") was required to be obtained from the Department of Town and Country Planning. On repeated requests, the defendants did not come forward for performing their part and had been putting off the matter on one pretext or the other. In fact, defendants tried their level best to avoid the aforementioned contract and, thus, was constrained to send a legal notice dated 02.02.2007. Defendants sent reply to the legal notice and denied the presence in the office of Sub Registrar, Gurgaon on 29.08.2006. It was specifically averred that the contract could not be performed as the defendants did not perform the agreement and in such circumstances, the amount aforementioned was sought to be recovered instead of discretionary relief.

Defendants opposed the suit by raising the plea of maintainability, locus standi. On merits, the factum of execution of the agreement to sell was admitted, but it was explained that one Dharampal Singh and Suresh Sharma got signed and obtained the thumb impressions of the defendants on the agreement to sell, whereby the column of the purchaser was left as blank. Receipt of amount of ₹ 20.00 lacs each, in total ₹60.00 lacs, much less the target date, i.e., 29.08.2006 was not denied. Plaintiff failed to perform the contract on account of his own default, but attribution of the fault to the defendants was emphatically denied.

In replication, the plaintiff asserted that Dharampal Singh was agent of the consolidator of the plaintiff and the agreement to sell in question was entered by the plaintiff and cheques were also issued on behalf of the plaintiff. It was also alleged that the defendants were under obligation to obtain NOC under Section 7A of the Haryana Development and Regulation of Urban Areas Act, 1975 (for short, "1975 Act").

Plaintiff examined as many as six witnesses, namely, PW-1 Arvind Singh, PW-2 Jagdish, PW-3 Jai Parkash Kaur, PW-4 Dharampal Singh, PW-5 Jasmer Singh and PW-6 Anupam Goyal. On the other hand, defendant No.1 appeared himself as DW-1 and closed the evidence.

The trial court, on the preponderance of the evidence, held that the defendants failed to procure the NOC from the competent authority, therefore, it was not legally possible for the plaintiff to execute the sale deed, thus, the suit for recovery of the amount of ₹ 60.00 lacs paid in the manner and mode as indicated above, was decreed. The appeal laid before the Lower Appellate Court was also dismissed.

Mr. Alok Jain, learned counsel representing the appellant-defendants, in support of the memorandum of appeal, has raised the following submissions:-

1) A simpliciter suit for recovery in the absence of relief of specific performance was not maintainable;

2) Arvind Singh PW-1, in cross-examination, admitted that the alleged agreement to sell, which formed the basis of filing of the suit, was not produced on record and in this regard, the attention of this court was drawn to the admission in the cross-examination, where PW-1 admitted that no document is original;

3) There was no privity of contract between the plaintiff and the defendants, but with one Dharampal Singh and Suresh Sharma;

4) Account statements Ex.P4 and Ex.P5 have not been proved in accordance with law and in order to lend support,

reliance was laid to the cross-examination of PW-2 Jai Parkash Kaur, General Manager Accounts, for, they were photocopies;

5) Provisions of Section 7A of 1975 Act were not attracted;

6) The courts below have given undue weightage to the affidavit dated 19.12.2007 (Ex.D3), which was preceded by reply and notice dated 12.02.2007, whereby it was amplified that there was no privity of contract between the plaintiff and defendants;

7) The suit was filed on 01.08.2009 and there was deficiency of court fee of ₹ 2,44,370/- for which time was granted and the deficiency was furnished on 14.09.2009. The court fee stamps are dated 12.12.2008 and, therefore, the suit was barred by law of limitation;

I am afraid, the aforementioned arguments are not sustainable, for, there is a specific admission with regard to receipt of money of ₹ 60.00 lacs by the appellant-defendants. The plea of privity of contract is neither here nor there, for, the cheques have been issued from the account of the respondent-plaintiff and had been deposited in the bank account of the defendants, much less have been encashed. The payment was not made in the personal capacity by Dharampal Singh and Suresh Sharma. The agreement to sell was not witnessed only by PW-3 but Dharampal Singh, who is a broker.

The plea of non-execution of the agreement to sell is neither here nor there as the contents of the affidavit Ex.D3, revealed the candid admission. Section 7A of 1975 Act relied upon by the courts below puts an obligation upon the seller to seek NOC from the concerned department. In the absence of the NOC, the plaintiff had no other choice but to seek the recovery as specific performance was incapable of.

In the reply Ex.D2 to the legal notice, appellant-defendants called upon the plaintiff to appear in the office of Sub Registrar on 19.02.2007. The plaintiff appeared but the defendants did not appear. Ex.P7 affidavit is the testimony of the same.

I cannot remain unmindful of the fact that at one stage, while noticing the contention of the counsel for the appellant, this court on 02.08.2018 passed the following order:-

> *"Learned counsel for the appellants specifically points to Ex. D-1 which is seen to be an affidavit executed by the appellants, referred to in paragraph 14 of the judgment of the learned first appellate Court (erroneously referred to as Ex. D-2), to point out that it is a wholly perverse finding to the effect that in the said affidavit the appellants had referred to the respondent-plaintiff, the inference drawn by that Court, therefore being that the appellants were aware that the original contractee, i.e. Dharampal, has transferred his interest to the respondent-plaintiff.*
>
> *He also points to the legal notice Ex. D-2 which is a reply to a legal notice, to the same effect.*
>
> *When this Court was in the process of issuing notice of motion, Mr. Mayank Aggarwal, Advocate, has appeared for Mr. Harsh Bunger, Advocate, on behalf of the respondent and despite the fact that he was sitting from the time that Mr. Jain was arguing the appeal, he has now pointed to the order dated 18.08.2017, in which it was recorded as follows:-*

> *"Learned counsel seeks time to get instructions from appellants with regard to settling the dispute amicably by returning the amount of Rs. 60 lacs.*
>
> *Learned counsel further submits that the judgment of the Lower Appellate Court was of 02.11.2014 and no execution has been filed till date.*
>
> *Learned counsel has also filed the power of attorney in favour of Mr. Harsh Bunger, Advocate, in Court today, which is taken on record.*
>
> *Learned counsel for the appellant would take instructions, according.*
>
> *Adjourned to 17.09.2018.*
>
> *To be taken up at 03:30 p.m."*

But, yet the arguments on merits of the case have been advanced.

There is a candid admission on behalf of the appellant-defendants for refund of the amount, but now volte-faced by contesting the appeal on merits.

Learned counsel for the appellants relied upon the judgment rendered by Hon'ble the Supreme Court in **Padmakumari and others Versus Dasayyan and others, (2015) 8 Supreme Court Cases 695,** to contend that failure on the part of the plaintiff to perform the contract is fatal irrespective of the fact that he had not completed his part.

The argument with regard to non-production of the document is neither here nor there in view of the candid admission with regard to the agreement, thus, non-production of the original agreement cannot be fatal to the case. There is no dispute to the ratio decidendi culled out in the judgment cited supra, but the facts of each case have to be seen.

There is a specific recital in the agreement to sell of obtaining the NOC. It would attract a penal action in case sale deed had been registered without NOC. No sane person would take risk for purchasing the property agreed to be sold for hefty amount.

For the reasons mentioned above, no ground for interference in the concurrent findings is made out, much less involvement of any substantial question of law. Resultantly, the appeal is dismissed.

October 31, 2018 **(AMIT RAWAL)**
ramesh **JUDGE**

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