IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3688 of 2015 (O&M)
Date of decision : 31.07.2018

Hafij Khan

...Appellant

Versus

Naveen Kumar

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vikas Kumar, Advocate for the appellant.

Mr. Rajesh Lamba, Advocate for the respondent.

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ANIL KSHETARPAL, J. (ORAL)

The defendant-appellant is in the Regular Second Appeal against the judgments passed by both the Courts below while decreeing the suit for possession by way of specific performance of the agreement to sell (registered) dated 11.02.2011 with respect to house No.41. As per agreement to sell, sale deed was to be executed and registered on 31.01.2012.

The defendant contested the suit and pleaded that agreement to sell was only a security document and there was a loan transaction between the plaintiff and the defendant. It was further pleaded that the plaintiff also extended the loan of ₹7,00,000/- on 16.03.2010 and an agreement to sell was executed in which amount was repaid and, therefore, the aforesaid agreement to sell came to an end.

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Both the Courts decreed the suit for specific performance of the agreement to sell but did not give due credence to Ex.D1. Learned trial Court held that Ex.D1 is not sufficient to prove the loan transaction, whereas learned First Appellate Court but for a casual reference to Ex.D1, does not discuss the aforesaid issue.

In these circumstances, in the considered opinion of this Court, the question of law which needs determination by this Court is as under:-

a) Whether a plaintiff, who has filed a suit for specific performance of the agreement to sell by concealing material facts, is entitled to the discretionary relief of specific performance of the agreement to sell?

Section 20 of the Specific Relief Act, 1963, clearly provides that the grant of relief of specific performance of the agreement to sell is discretionary. The discretion of the Court is not to be exercised arbitrarily but on sound and reasonable reasoning guided by judicial principles subject to correction in appeal. Unfortunately, both the Courts did not advert to this statutory requirement as provided in Section 20 of the Specific Relief Act. The Courts below mechanically ordered the specific performance of the agreement to sell which is not required. Section 20 of the Specific Relief Act, 1963 is reproduced as under:-

> *"**20. Discretion as to decreeing specific performance.**—(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.*
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> *(2) The following are cases in which the court may properly*

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exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other

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party.”

In the considered opinion of this Court, on following grounds, the plaintiff-respondent is not entitled to specific performance of the agreement to sell:-

1. The plaintiff has failed to disclose the previous agreement to sell between the parties dated 16.03.2010 through which ₹7,00,000/- was paid as earnest money. It is the case of the defendant that the aforesaid agreement to sell was also executed in the similar manner as a security document and when loan was repaid, the agreement was not taken to logical end. When the plaintiff appeared in the witness-box, he admitted his signatures, however, later on, denies the signatures on the agreement to sell as well as on receipt. The defendant, in order to prove the agreement to sell, has examined the Scribe Smt. Hem Lata Advocate as DW2 and Sh. S.S. Bainsla Advocate, Notary Public as DW3. Once the plaintiff had admitted his signatures, which of course was later on denied, evidence of the plaintiff becomes doubtful. The plaintiff should have led evidence to prove that the admission made by him was on account of slip of tongue.
2. As per the agreement to sell dated 11.02.2011, which is registered, total consideration for sale of house was fixed at ₹17,00,000/-, out of which ₹16,00,000/- is stated to have been paid as earnest money. Only ₹1,00,000/- remained payable, however still the date for execution and registration of the sale deed was fixed after a period of one year. No explanation has come as to why the target date for execution and registration of the sale deed was fixed after a period of

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one year.

3. The plaintiff has failed to give any explanation as to what happened to first agreement to sell dated 16.03.2010. The defendant when pleaded in the written statement, no replication was filed. Although, it is true that the replication is not necessary to be filed, however, the plaintiff when confronted with the previous agreement to sell dated 16.03.2010, he admitted his signatures at first instance.

In view of the aforesaid discussion, the judgments passed by the Courts below are modified. The plaintiff is held entitled to refund of ₹16,00,000/- alongwith interest at the rate of 7.5% p.a. from the date of payment till the date of recovery.

Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

31.07.2018 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**

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