

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.5690 of 2015 (O&M)

Date of decision : 29.05.2018

Mahabir Singh and another

...Appellants

Versus

Sarwan Kumar

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Rakesh Dhiman, Advocate for the appellants.

Ms. Pratibha Yadav, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

The defendants-appellants are in the Regular Second Appeal against the decree for specific performance of the agreement to sell granted by both the Courts below.

The agreement to sell is proved and there is a concurrent finding to that effect which does not call for any interference. However, in the present case, the defendants while filing the written statement had pleaded that the agreement to sell was in fact written with a view to secure repayment of a loan of ₹40,000/-, which has already been repaid.

Learned counsel for the appellants submitted that from the careful reading of the agreement to sell, it is proved that in fact the agreement to sell was never intended to be acted upon for sale of the property, rather it was a loan transaction as the defendants-appellants were

given option to return the amount before the target date fixed for the execution and registration of the sale deed and on such event, the agreement to sell would have come to an end. He has further submitted that as per the agreement to sell, the sale deed was to be executed and registered on 01.05.1997 but the suit came to be filed only on 31.03.1999 i.e. after a period of 1 year and 11 months but there is no explanation as to why the suit was filed after such a delay.

On the other hand, learned counsel for the respondent has pointed out that in para 4 of the plaint, the plaintiff has asserted that he has been requesting the defendants to come and execute the sale deed but the defendants did not agree with the request and, therefore, the suit was filed.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by both the Courts below and the record.

In the considered opinion of this Court, in the present case, rather than granting decree for specific performance of the agreement to sell, ends of justice would be met if a decree for refund of the earnest money alongwith interest is passed. The reasons for such conclusion are as under:-

1. In the agreement to sell, there is a specific clause which if translated into english, would read as under:-

“If within the limitation, intended seller pays back the amount of the earnest money to the intended purchaser, the agreement to sell would come to an end”

From the reading of the aforesaid clause, it is apparent that the agreement to sell was never intended to be acted upon.

Although, learned counsel for the plaintiff-respondent has submitted that since the payment has not been made within the time as agreed upon, therefore, the agreement to sell is enforceable. No doubt, the agreement to sell is enforceable, however, the grant of decree for the specific performance of the agreement to sell is discretionary. Which in the considered opinion of this Court, the Courts below have failed to exercise properly. The discretion exercised by the Courts below is amenable to challenge in the appeal. Section 20 of the Specific Relief Act is extracted 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.

(2) The following are cases in which the court may properly 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 I—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 II.— 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 party.”*

2. In the present case, the sale deed was to be executed and registered on 01.05.1997 whereas the suit for specific performance of the agreement to sell was filed on 31.03.1999. In para 4 of the plaint, the plaintiff only stated that he orally called upon the defendants to perform their part of the contract, however, the defendants started demanding more amount. Hence, the suit was not filed for a period of 1 year and 11 months. In the considered opinion of this Court, such plea for filing the suit for specific performance

after a period of 1 year and 11 months particularly when the property is situated in District Gurgaon where prices increase more rapidly being in National Capital Region, the discretionary relief should not be granted in favour of the plaintiff.

3. The plaintiff, before filing a suit for specific performance for a period of 1 year and 11 months, neither issued notice nor produced any documentary evidence to prove that he had made any attempt to get the sale deed executed and registered.

4. In the present case, total sale consideration was ₹51,300/- for a small house situated in an area of 50 square yards out of which ₹46,300/- is said to have been paid as earnest money. Only ₹5,000/- was to be paid to the defendants. However, still, the date for the execution and registration of the sale deed was fixed after a period of 1 year.

In view of the aforesaid, the judgment and decree passed by the Courts below are modified. The appeal filed by the defendants is partly accepted. In place of decree for specific performance of the agreement to sell, decree for refund of the earnest money is passed alongwith interest at the rate of 9% p.a. from the date of agreement to sell till its realisation.

Regular Second Appeal is partly accepted.

29.05.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No