

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

Date of decision: 04.07.2018

1. RSA No.1471 of 2018 (O&M)

Vinay Gupta

..... Appellant

Versus

Ram Murti Sharma

..... Respondent

2. RSA No.1800 of 2018 (O&M)

Prem Gupta and another

..... Appellants

Versus

Ram Murti Sharma and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Harkesh Manuja, Advocate
for the appellants (in both cases).

ANIL KSHETARPAL, J. (ORAL)

Vide this judgment, I shall be disposing of two appeals bearing RSA No.1471 of 2018 and RSA No.1800 of 2018 as the dispute between the parties is inter-dependent and the parties to both the suits are common.

In RSA No.1800 of 2018, which is the main appeal, defendants-appellants are in the regular second appeal against the concurrent finding of fact arrived at by the Courts below.

Plaintiff-respondent filed a suit for specific performance of the agreement to sell dated 17.02.2004 which was a total payment agreement allegedly executed by defendants No.2 and 3-appellants.

The defendants-appellants pleaded that in fact there was an agreement to sell between the parties dated 27.11.2002 for a total sale consideration of Rs.26,00,000/-. Since the plaintiff did not perform his part of the contract, therefore, the earnest money paid thereunder was forfeited. The execution of the agreement to sell dated 17.02.2004 was denied. It was also disputed that the possession of the plot/shed in question was delivered to the plaintiff in part performance of the alleged agreement to sell dated 17.02.2004. The agreement to sell dated 17.02.2004 was claimed to be result of fraud and forgery.

Both the Courts below after appreciating the evidence available on the file have concurrently recorded a finding that in fact, there was an agreement to sell on 27.11.2002 between the parties, however, thereafter, a fresh agreement to sell was executed and the payment made under the agreement to sell dated 27.11.2002 was acknowledged. The Courts further found that the entire sale consideration as agreed between the parties have been paid and the possession has been delivered, therefore, the suit was decreed. In RSA No.1471 of 2018, the plaintiff/appellant is seeking decree for mandatory injunction directing the defendant who is plaintiff in the suit for specific performance to hand over the vacant physical possession of the property in question.

This Court has heard learned counsel for the appellants at length and with his able assistance gone through the judgments passed by the Courts below.

Learned counsel for the appellant has submitted as under:-

1. When first agreement dated 27.11.2002 was rescinded, the payment made in the first agreement stood forfeited and

therefore, the second agreement was without valid consideration.

2. First agreement to sell has not been pleaded by the plaintiff, therefore, the plaintiff has not filed the suit with clean hands.

3. Vide notice dated 22.08.2006, agreement to sell dated 27.11.2002 was cancelled and since cancellation of the agreement to sell has not been challenged, therefore, the suit could not be decreed.

4. Learned counsel has drawn attention of the Court to the statement of the plaintiff wherein he states that the plaintiff wanted to pay the amount under the agreement to sell dated 27.11.2002, however, he was having insufficient money. Hence, counsel for the appellant submits that the plaintiff was not ready and willing to perform his part of the contract.

As regards the first argument, it will be noticed that the subsequent agreement dated 17.02.2004 is in writing executed on a non-judicial stamp paper signed by the defendants-appellants. Amit-appellant admits receipt of entire sale consideration of Rs.16,85,000/-. The entire sale consideration has been paid through various cheques drawn on the bank. Once the defendants-appellants acknowledges the receipt of payment and a fresh agreement has been executed, the defendants-appellants cannot be permitted to rely upon the previous agreement. As per Section 62 of the Contract Act, in case of novation, rescission and alternation of contract, the original contract which has been substituted with a new contract need not be performed. Section 62 of the Contract Act is extracted as under:-

“62. Effect of novation, rescission and alteration of contract. -
If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

In view of the aforesaid position, this Court does not find any force in the first submission of learned counsel for the appellant.

On 17.02.2004, the defendants-appellants not only executed the agreement to sell but also sworn in an affidavit before the notary public admitting sale of the property and delivery of possession. The affidavit was got attested from the notary public on 19.02.2004. Still further, on 19.02.2004 another affidavit along with the application for transfer of the plot was signed by the defendants-appellants. Through the application for permission to transfer, the Haryana Urban Development Authority was required to grant permission to transfer the plot in question in favour of the plaintiff. It has also come in evidence that the plaintiff had deposited Rs.60,000/- as transfer fee along with the aforesaid application.

With regard to second argument of learned counsel for the appellant, it will be noted that no doubt, the relief of specific performance of the agreement to sell is discretionary, however, such discretion cannot be exercised arbitrarily. First agreement to sell has not been pleaded by the plaintiff, however, in the considered opinion of this Court, once there was a subsequent agreement to sell in writing between the parties, first agreement to sell was not required to be pleaded. In all cases, merely because an insignificant fact has not been disclosed, the suit cannot be dismissed particularly when in evidence, the plaintiff has admitted the execution of the first agreement to sell dated 27.11.2002.

With regard to third argument of learned counsel for the

appellant, it will be noted that the agreement to sell, specific performance whereof has been sought for, is dated 17.02.2004 whereas the agreement which was cancelled through notice dated 22.08.2006 is of 27.11.2002. The agreement dated 27.11.2002 had already been superseded by a fresh agreement dated 17.02.2004, therefore, the notice Ex.D-3 would not come to rescue the defendants No.2 and 3-appellants. Counsel for the appellants has submitted that since cancellation of the agreement has not been challenged, therefore, the suit is not maintainable. As already noticed, the argument is without any substance because the agreement to sell dated 17.02.2004 has not been cancelled or rescinded.

Last argument of learned counsel for the appellant is with reference to the statement of the plaintiff that he did not had sufficient money. This Court with the help of learned counsel for the appellant has read the statement of the plaintiff in entirety. No doubt, the plaintiff has stated that he was not having sufficient money to pay under the agreement to sell dated 27.11.2002, however, it is apparent from the reading of the entire statement that the parties after entering into an agreement to sell dated 27.11.2002 realized that price of the plot was much above the market value and therefore, the price was re-negotiated and a fresh agreement to sell was executed on 17.02.2004. In the fresh agreement to sell, the entire payment received by the defendants-appellants right from 27.11.2002 till 11.01.2004 was acknowledged and it was clearly recorded in the agreement to sell dated 17.02.2004 that the entire payment of Rs.16,85,000/- already received is full and final payment. The possession was also delivered to the plaintiff. Hence, learned counsel for the appellant is not correct in reading the few lines out of the context. The evidence of the witness has to be read

in entirety and some lines cannot be picked up in isolation divorced from the entire statement.

Since the appeals have been decided on merits, therefore, no order is required to be passed in the applications (CM-3825-C-2018 in RSA No.1471 of 2018 and CM-4927-C-2018 in RSA No.1800 of 2018) seeking condonation of delay.

In view of the discussion made above, this Court does not find any good ground to interfere with the concurrent finding of fact arrived at by the Courts below.

Both the appeals are dismissed.

04.07.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

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