IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.287 of 1986 (O&M)
Date of decision : 01.02.2019

Ranjit Singh ...Appellant

Versus

M/s Babu Ram Ashok Kumar ...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Naresh Parbhakar, Advocate for the appellant.

Mr. Vijay Sharma, Advocate for the respondent.
****

ANIL KSHETARPAL, J. (ORAL)

CM No.6316-C of 2008

Application is for bringing on record legal heirs of appellant-Ranjit Singh. The applicants are claiming the property on the basis of a Will dated 04.08.1992. This application is contested by learned counsel for the respondent by contending that even as per the Will, applicants do not get right in the property.

Since, the matter has been adjudicated upon on merits and counsel has been permitted to argue, therefore, this application is disposed of keeping the aforesaid issue pending.

Main case

Defendant-appellant is in the Regular Second Appeal against the judgment passed by the learned First Appellate Court reversing the judgment of the trial Court and granting a decree for specific performance of the agreements to sell dated 07.07.1976, 01.09.1976 and 23.05.1977.

Although, a coordinate Bench had allowed the appeal vide order dated 28.11.2013, however, a review application was filed and the same Hon'ble Judge had issued notice. Thereafter, review application was dismissed for non-prosecution. Application for restoration was also dismissed. Appeal was filed before Hon'ble the Supreme Court and vide order dated 29.06.2016, High Court was directed to hear the review application on merits. Thereafter, review application was heard and vide order dated 23.01.2019, it was decided that the appeal is required to be re-heard on merits because there was patent factual error in the judgment that's how this appeal has come up for final disposal.

In the considered view of this Court, the questions of law which need consideration are as under:-

1) Whether an intended purchaser before execution and registration of the sale deed is entitled to redeem the property which is subject matter of agreement to sell from third party?

2) Whether endorsement/extension of time for execution and registration of the sale deed amounts to novation of the contract and, therefore, original agreement is not required to be performed?

Some facts would be required to be noticed.

Total area which was subject matter of agreement to sell is 183 square yards-house No.413/4 situated at Nabha Gate, Patiala. A part of the property was mortgaged with Sh. Ishar Singh through three separate mortgage deeds dated 05.10.1971, 13.12.1971 and 16.12.1974 against total mortgage money of ₹12,500/-. Thereafter, defendant-appellant agreed to sell entire area i.e. 183 square yards in favour of the plaintiff-respondent vide agreement to sell dated 07.07.1976, for total sale consideration of ₹40,000/-

on receiving earnest money i.e. ₹8,000/- through bank draft. The target date for execution and registration of the sale deed was fixed with the agreement of the parties as 01.06.1977. It was agreed that the possession would be delivered at the time of registration of sale deed. On 01.09.1976, another agreement was executed and the plaintiff had paid another sum of ₹12,000/- to the defendant. It was noted that he has already received ₹8,000/- vide demand draft dated 07.07.1976 and he has received further payment of ₹12,000/-. Thus, making total payment of ₹20,000/-. The date for registration of the sale deed was fixed as 01.06.1977. The defendant shall deliver the possession to the plaintiff on 03.09.1976 i.e. after two days of agreement to sell dated 01.09.1976.

There is another agreement between the parties on 23.05.1977 wherein receipt of previous payment of ₹20,000/- was acknowledged while referring to the previous agreement, however, a new date for execution and registration of the sale deed was fixed i.e. 23.11.1977. Thereafter, plaintiff purchased mortgagee rights from Ishar Singh (mortgagee of the property) by paying the mortgagee on 28.09.1977 and took possession of the property which was in possession of the mortgagee. The payment has been proved as per receipt Ex.P6. Defendant after having acquired knowledge of the redemption of the mortgage and delivery of possession in favour of the plaintiff with respect to the property which was subject matter of mortgage, filed a suit for injunction restraining Babu Ram, a partner in the plaintiff's firm from entering into the possession. On 20.11.1977, plaintiff got served a notice calling upon the defendant to come present before the Office of Sub-Registrar and execute the sale deed on receipt of balance sale consideration of ₹7500/- after adjusting the earnest money paid i.e. ₹20,000/- + mortgage amount i.e. ₹12,500/-. On 23.11.1977 i.e. the target date for execution and registration of the sale deed as per the agreement to sell dated 23.05.1977, both the parties reached the Office of the Sub-Registrar. Plaintiff reached the Office of Sub-Registrar at 9:00 AM and moved an application before the Sub-Registrar pointing out that the defendant has not come present. He was asked to wait. Plaintiff had specifically stated in his application that he has brought the balance sale consideration. Defendant came present in the office of Sub-Registrar at 04:00 PM when the endorsement was made by the official in the office of Sub-Registrar that both the parties are present but there is no sale deed. Thereafter, plaintiff also filed a suit for permanent injunction restraining the defendant from interfering in his possession qua the property which was under mortgage. Thus, two suits were pending when the parties entered into a settlement on 18.09.1978 signed by both of them in which it was recorded that there was a previous agreement to sell. Defendant records that he could not deliver the possession and he would deliver the possession 22 days after execution of the writing on which date the sale deed would also be executed and registered, however, defendant did not come forward forcing the plaintiff to file the present suit for specific performance of the agreement to sell.

Learned trial Court dismissed the suit on the ground that the plaintiff had only brought ₹13,000/- for payment on 23.11.1977 whereas remaining balance amount payable was ₹20,000/-. However, learned First Appellate Court after noticing that the plaintiff had bought the mortgagee rights, held that only ₹7500/- was payable and accordingly plaintiff was having the money on the date fixed in the agreement to sell and he was ready and willing to perform his part of the contract.

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.

Learned counsel appearing for the appellant has submitted that the agreement to sell dated 18.09.1978 is not pleaded. The date of the first previous agreement have also not been mentioned in the agreement dated 18.09.1978. Subsequent agreement dated 18.09.1978 amounts to novation and, therefore, previous agreements to sell (contracts) are not required to be performed in terms of Section 62 of the Indian Contract Act, 1872. The plaintiff was not ready and willing to perform his part of the contract. He referred to the statement of Gurkesar Singh, Registry Clerk and Scribe-Gurjeet Singh who has appeared in evidence. He in the ends submitted that the plaintiff had no right to redeem the mortgage before execution and registration of the sale deed and, therefore, relief of specific performance of the agreement to sell should not be granted.

On the other hand, learned counsel for the respondent has submitted that the judgment passed by the First Appellate Court is on appreciation of evidence and there is no error in the impugned judgment.

The facts in detail have been noticed in the previous part of the judgment and, therefore, need no repetition.

As regards the submission of the learned counsel that the agreement dated 18.09.1978 has not been pleaded, it may be noted that the agreement dated 18.09.1978 is not an independent agreement it is rather in continuation of series of agreements which have been noticed while noticing the facts, therefore, non-disclosure of the agreement dated 18.09.1978 in the pleadings would not, in the considered view of this Court, improve the case of the defendant. Agreement dated 18.09.1978 is only an endorsement which refers to previous agreement and the defendant had sought time to deliver the possession because it was part of his residence. No new terms were settled. In such circumstances, such agreement cannot fall in the definition of Section 62 of the Indian Contract Act. In this case, four agreements which have been executed are in the continuation of original contract and as such, all the four agreements are not only in continuation of each other but also part of same transaction. Therefore, neither there was any requirement of pleadings nor it amounts to substitution or alteration of the previous agreement.

As regards argument of the learned counsel that the plaintiff was not ready and willing on 23.11.1977, it may be noted that the defendant was to deliver possession. There is no offer on part of the defendant that he is ready to deliver possession. Further, plaintiff was carrying ₹13,000/- on that day, whereas balance payment payable was ₹7500/-. Once there is a further agreement dated 18.09.1978, 23.11.1977 date do not remain relevant. In any case, once it is proved that the defendant came to the office of Sub-Registrar at the time when office time was going to be over, it clearly shows that the defendant never intended to execute the sale deed and deliver possession. Hence, argument of learned counsel that plaintiff firm was not ready and willing, is found without substance.

Next argument of learned counsel, although appears to be attractive on first blush but on deeper consideration does not have any substance. The plaintiff firm had purchased the mortgagee rights. Firm stepped into the shoes of mortgagee. Once the plaintiff firm became mortgagee, it was entitled to adjust the payment under the mortgage and retained the same with themselves. In such circumstances, the First Appellate Court has correctly held that only amount of ₹7500/- was due and payable to the defendant which was tendered on 23.11.1977. Elaborate arguments have been made with reference to Section 55(5)(b) of the Transfer of Property Act, 1882 and Section 13(1)(c) of the Specific Relief Act, 1963. The aforesaid provisions entitle the intended purchaser to compel the vendor to get the land/property unencumbered before execution of the sale deed or purchaser is entitled to retain the amount for which the property is unencumbered. Thus, both the options are available with the intended purchaser. Defendant cannot object to the same on the ground that he would get the property unencumbered after execution of the sale deed. It is not the case of the defendant that he had also got it redeemed.

In view thereof, there is no ground to interfere.

Regular Second Appeal is dismissed.

Questions of law as framed earlier are answered in favour of respondent and against the appellant.

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

01.02.2019 **(ANIL KSHETARPAL)**
Pawan **JUDGE**

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