IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.1859 of 1997 (O&M)
Date of Decision:31.01.2019

Mal Singh

...Appellant(s)

Versus

Munshi Singh and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.G.C.Dhuriwala, Advocate for the appellant.
Mr.M.L.Sarin, Senior Advocate with
Ms.Hemani Sarin, Advocate for the respondents.

ANIL KSHETARPAL, J.

The defendant-appellant is in the regular second appeal against the judgments passed by the courts below, decreeing the suit for specific performance of the agreement to sell dated 30.03.1985.

Normally while deciding second appeal, the Court is not expected to re-appreciate the evidence, however, there is no bar in re-appreciation of the evidence particularly when it is established that the judgments passed by the courts below are shown to be prima facie perverse.

In the considered view of this Court, question of law which arises for consideration is as to whether readiness and willingness by the plaintiff in a suit for specific performance of the agreement to sell can be proved through a cheque drawn in favour of the plaintiff by some one else who is not party to the agreement to sell.

The execution of the agreement to sell dated 30.03.1985 for a land measuring 10½ acres for a total sum of Rs.3,36,000/-, payment of earnest money of Rs.15,000/- and further payment of Rs.35,000/- on

15.05.1985 are not in dispute. As per the agreement to sell, the sale deed was to be executed on 15.02.1986. Originally when the plaintiff filed a suit, he pleaded that he had got purchased stamp papers and got scribed a sale deed, however, defendant did not sign the sale deed and he went away by making an excuse that income tax clearance certificate would be required. The plaintiff claims that he served a notice dated 21.02.1986, calling by the defendant to come and execute the sale deed but he did not come forward, forcing the plaintiff to file the present suit on 08.05.1986.

The only issue which has been pressed by the learned counsel for the appellant is that the plaintiff was not having sufficient resources to pay the balance sale consideration. He has submitted that on 17.02.1986, the plaintiff was not possessed of balance sale consideration, i.e. Rs.2,86,000/- payable to the defendant at the time of execution and registration of the sale deed. He has submitted that both the courts have overlooked this fact which was of utmost necessary, because the plaintiff was required to prove that he was ready and willing to perform his part of the contract on the target date, i.e. 15.02.1986.

On the other hand, learned senior counsel for the respondents has submitted that the plaintiff had taken a loan from his brother amounting to Rs.2,00,000/- and Hakam Singh had issued a cheque in favour of the plaintiff which he was carrying. He has further submitted that brother-in-law of the plaintiff had brought an amount of Rs.82,000 to Rs.85,000/- which was also lying at the residence of the plaintiff. He has next submitted that since the plaintiff had entered into an agreement for sale of some land at Rajasthan, therefore, the amount received was also available. He has also submitted that the plaintiff is not required to display cash on the target date.

He has further submitted that since the time is not essence of the contract in an agreement to sell for sale of immovable property, therefore, the suit filed by the plaintiff cannot be dismissed.

It may be noted here that the plaintiff and defendant are real brothers. As noted above, the execution of the agreement to sell, payment of earnest money and additional payment of Rs.35,000/- are not in dispute. As per the agreement to sale, sale-deed was to be executed and registered on 15.02.1986. Since 15.02.1986 was a holiday and 16.02.1986 being Sunday, therefore, the parties went to the office of Sub Registrar on 17.02.1986. After purchasing the stamp papers on 17.02.1986, the sale deed is alleged to have been scribed.

However, the scribe in his evidence has stated that he informed the defendant-appellant that income tax clearance certificate would be required and, therefore, the defendant-appellant went away with a promise to bring the said certificate. It may be noted here that agreement to sell does not specify that the defendant-appellant would be required to get income tax clearance certificate. It is not the case of the plaintiff that the defendant was informed in advance or any information was given to the defendant to get the income tax clearance certificate and then only the sale deed can be executed and registered. Still further, no evidence has been brought on file to prove that the income tax clearance certificate was required before execution of the sale deed with respect to agricultural land.

Now let us examine as to whether the plaintiff was having sufficient resources to pay the balance sale consideration or not?

The plaintiff was required to pay Rs.2,86,000/- as per the agreement to sell to the defendant. Apart therefrom, he had to pay stamp duty fee, i.e. Rs.42,000/- , which according to him was paid. The plaintiff examined a bank official, who has proved that on 17.2.1986, the plaintiff had a credit balance of Rs.65,935.70/-. No doubt, on 17.02.1986, the plaintiff had withdrawn Rs.35,000/-. It is further case of the plaintiff that he had taken a loan of Rs.2,00,000/- from his brother Hakam Singh. In order to prove that fact, the plaintiff has produced on file Ex.PW10/A, a certificate issued by the Bank of India where Hakam Singh was maintaining a Saving Bank Account No.459. The aforesaid certificate shows that Hakam Singh had taken a loan against the FDRs and the amount was credited in the account of Hakam Singh for the first time on 05.03.1986. Statement of bank account of Hakam Singh proves that up to 17.02.1986, he had only a sum of Rs.9064.78/- in his account. Thus, on the target date, i.e. 15.02.1986, Hakam Singh was also not having credit balance of Rs.2,00,000/- in his saving account.

Learned senior counsel for the respondents has submitted that in the certificate, it has been certified that loan was sanctioned on 17.02.1986 for a sum of Rs.6,00,000/- to Hakam Singh. In the considered view of this Court, such sanction of the loan would not improve the case of the respondents, because it is proved on the file that on 04.03.1986, the plaintiff deposited the cheque in question for collection, which was dishonoured on the same day. The credit entry was made in the account of the plaintiff only on the next day after re-presenting the cheque on 05.03.1986, because both the banks were situated in the same city. Therefore, on the day, i.e. 17.02.1986 or for that matter 15.02.1986, amount of Rs.2,00,000/- was not available to the plaintiff.

With regard to remaining amount, it is the case of the plaintiff that his brother-in-law had brought a sum of Rs.82,000 to Rs.85,000/- to help the plaintiff. However, when he was cross-examined, he has admitted that the aforesaid amount was lying at his residence because of security reasons. It is not the case of the plaintiff that on that day, he was carrying either a bank draft in favour of the defendant or any banker cheque of the balance amount of Rs.2,86,000/-. These facts clearly lend credence to the fact that the plaintiff was not having sufficient balance to pay the amount. No doubt, the plaintiff is not required to display balance amount in cash, however, availability of such amount is to be proved by leading cogent evidence. The payment as per the agreement to sell was to be made at the time of registration. The sale-deed had been scribed. It was to be presented before the Sub Registrar for registration. But since the plaintiff was not carrying the sufficient amount either in the form of cash or in other form, therefore, the courts below committed an error in recording a finding that the plaintiff was having sufficient balance amount. It may be noted that at the cost of repetition that the cheque dated 17.2.1986 issued by Hakam Singh is in favour of plaintiff Munshi Singh and not in favour of Mal Singh. First plaintiff-Munshi Singh had to get the amount credited in his account only then he would have paid the amount to Mal Singh, defendant-appellant.

Learned senior counsel for the respondents has submitted that the court should not interfere in the findings of fact as payment of money is only a small component in performance of the agreement to sell. Establishment of readiness and willingness to pay the balance sale consideration is necessary before a decree for specific performance of the agreement to sell. The plaintiff is required to prove that he was ready and willing to perform his part of the contract, which in the considered view of this Court, the plaintiff has failed.

Next argument of the learned senior counsel for the respondents is to the effect that wherever two inferences are possible, the Court should not interfere. In the considered view of this Court, there are no two inferences in the present case. There is total misreading of evidence by the courts below and non application of mind to the facts of the present case. Hence no other inference possible except whatever has been concluded above.

Next argument of the learned senior counsel for the respondents, while referring to the some judgments, is that the plaintiff is only required to prove that he had capacity to pay. No doubt, capacity to pay is one of the requirement to prove readiness and willingness. However, in the present case, the plaintiff has failed to prove on the target date, i.e. 15.02.1986 and 17.02.1986 that he had even capacity to pay the amount.

Next argument of learned senior counsel for the respondents that time was not essence of the contract and, therefore, the plaintiff had got served a legal notice dated 21.2.1986 on the defendant to come and execute the sale-deed, i.e. after a period of six days, hence he submits that the defendant should have come forward and executed the sale-deed.

Once in the agreement to sell the parties agreed to a particular date for execution and registration of sale-deed, the plaintiff is required to prove that he was ready and willing to perform his part of the contract on that day. Once the plaintiff has failed to prove, the agreement to sell come to an end on account of failure of the plaintiff and, therefore, subsequent notice would not improve his case. In any case, even on 21.02.1986 as discussed above, the plaintiff has failed to show that he was possessed of balance sale consideration payable to the defendant, i.e. Rs.2,86,000/-. As per the statement of account, he did not have balance of Rs.2,86,000/- ever. The bank statement of account is up to 13.12.1986.

The learned first appellate court has further committed an error apart from overlooking the material evidence by shifting onus on the defendant to hold that the defendant should have got a notice issued to the plaintiff, calling upon him to come and pay the amount and get the sale-deed executed. It is the duty of the plaintiff to prove that he was ready and willing to perform his part of the contract. Onus to prove this issue is on the plaintiff who was required to prove such fact.

Question of law framed is answered in favour of the appellant.

In view of the above, the Regular Second Appeal is allowed. The judgments and decrees passed by the courts below are set aside. Pending application(s), if any, shall also stand disposed of, in terms thereof.

31.01.2019 **(ANIL KSHETARPAL)**
mks **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No