IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3662 of 2006(O&M)
Date of Order:02nd April, 2019

H.L.Arora(since deceased) through LRs

...Appellant

Versus

Dr.Ashok Kumar Singhal and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. S.P.Arora, Advocate, with
Mr. Himanshu Arora, Advocate
for the appellant.

Mr. Adarsh Jain, Advocate
for the respondents.

ANIL KSHETARPAL, J.

Defendant-appellant is in the regular second appeal against the findings of fact arrived at by the courts below.

In the considered opinion of this court, following substantial questions of law arise for consideration:-

(i) Whether the judgments and decrees passed by the courts below are result of non-reading of material documentary evidence filed by the plaintiff as well as the defendant as also failure of the court to appreciate the evidence in proper perspective?

(ii) Whether the courts were correct in passing a decree for possession by way of specific performance of the agreement to sell even after plaintiff no.1, who is husband of plaintiff no.2 had made a statement that he is satisfied, if his earnest money along with additional sum of Rs.10,000/- is paid and once the defendants tenders the amount to plaintiff no.1, resiled therefrom?

Although, normally while deciding regular second appeal, High Court is not required to go into re-appreciation of evidence, however, in the present case, this court is satisfied that the findings of the courts below are result of substantive misreading and non-reading of evidence, therefore, it has become necessary to re-appreciate the evidence.

Facts:-

29.06.1995	Agreement to sell dated 29.06.1995 executed between the parties is not in dispute is for a total sale consideration of Rs.10,80,000/- with respect to House No.950, Sector 7-C, Faridabad, out of which Rs.10,000/- was paid as earnest money on the same day. Whereas Rs.1,90,000 was paid additionally on 04.07.1995, thus, making a total payment of Rs.2,00,000/- The agreement to sell is on a printed performa. As per agreement to sell, the target date for execution and registration of the sale deed was 31.08.1995 on payment of the balance sale consideration. It was provided in the agreement to sell that the defendant would obtain No Objection Certificate as also permission to transfer from Haryana Urban Development Authority which allotted the plot to the defendant.
12/07/95	Defendant applied for permission to the Haryana Urban Development Authority.
14.07.995	The permission as sought for was granted by the Haryana Urban Development Authority valid for a period of 60 days subject to payment

	of increased price as also transfer fee.
28.08.1995	Defendant wrote a letter to plaintiff no.1 requesting him to come and sign the papers for completing the formality of getting the income tax clearance as provided in Rule 269 UC of the Income Tax Act, 1961. A copy of the letter was also forwarded to the property broker.
30.08.1995	Plaintiff no.1 wrote a letter to defendant requesting him to postpone the date for execution and registration of the sale deed to 12.09.1995. It was further mentioned that the defendant should take a permission of the Income Tax Department by showing the total sale consideration of Rs.6,00,000/-. After the plaintiff no.1 had signed the communication, there is a note written which reads as under:- “agreed to the above proposal as now discussed and shall act accordingly.” This note was signed by all the three parties.
11/08/95	Plaint' no.1 wrote a letter to defendant acknowledging receipt of copy of NOC and permission of the HUDA. He calls upon the defendant to fix a date of execution of the sale deed and in the meantime pay increase price and other charges as demanded by HUDA.
12/10/95	Property broker gets issued a notice calling upon plaintiffs to come and execute the sale deed within 15 days as the plaintiffs have already defaulted on the agreed date. It was mentioned in the notice that the amount of earnest money stand forfeited, however last chance has been given to come and execute the sale deed within 15 days.
16.10.1995	Plaintiffs get issued a notice to the defendant intimating that time was not essence of the contract. Total deal was for Rs.6,00,000/- and since defendant has failed to perform, therefore, the plaintiffs are entitled to all

	costs and the defendant is liable to pay a sum of Rs.4,00,000/-.In the notice, there was no reference to failure of the defendant to take permission from the Income Tax Department and the plaintiff had signed the documents as required for getting income tax clearance.
20.10.1995	Another notice is got issued by the plaintiffs, this time intimating that the total sale price was Rs.10,80,000/- and in the previous notice Rs.6,00,000/- was a typing mistake. In this notice, it is noted that permission from the income tax authorities has not been obtained by the defendant.
06/10/95	Plaintiffs writes a letter to the defendant calling upon him to come and execute the sale deed.
09.11.1995/ 10.11.1995	Three suits were filed by the plaintiffs against defendant. First suit was Civil Suit no.859, instituted on 10.11.1995 which was withdrawn by the plaintiffs claiming that the compromise has been arrived at with the defendant. Second suit was Civil Suit No.975 dated 10.11.1995 which was also withdrawn 07.04.1996 and third suit is Civil Suit No.100 of 1996, which was also withdrawn. It may be noted that in Civil Suit No.100 of 1996, it has come in the pleadings that after expiry of initial 60 days time with respect to permission to transfer as granted vide letter dated 14.07.1995, period was got extended by the defendant upto 15.1.1995. Although, no document has come on file but it is pleading of the plaintiffs. himself.
14.11.1995	Plaintiffs visited the office of the sub-Registrar and got their presence noted by trying to prove that the defendant has not come forward to honour the agreement to sell.
02/08/96	The increase price and extension fee as demanded in the letter granting permission was reduced on the request of the defendant and only amount

	of Rs.1444/- was payable which was also deposited by the defendant later on.

Plaintiffs filed a suit for possession by way of specific performance of the agreement to sell on 16.04.1996. Subsequently, plaintiff no.1 during the pendency of the suit appeared in court on 14.11.2000 and suffered a statement which is extracted as under:-

> "*It is stated that I have compromise the matter with the defendant. As per the compromise, the defendant shall pay me Rs.2,10,000/-. If the defendant pays the amount by 30.11.2000, then I shall withdraw this suit. Payment is to be made by way of bank draft.*"

Pursuant to the aforesaid, defendant tendered a draft of Rs.2,10,000/- on 29.11.2000 but plaintiffs refused to accept the draft and thereafter case proceeded.

On appreciation of evidence, both the courts as noted above have decreed the suit.

Reasons given by the first appellate court are that the plaintiffs have led sufficient evidence to prove their financial capacity. Plaintiffs had sent a notice through his counsel Sh. Mukesh Sehgal Advocate, (however, this fact is factually incorrect as Mukesh Sehgal, Advocate had sent a notice on behalf of property broker calling upon the plaintiffs to honour the agreement to sell). Plaintiffs took no steps for performance of their part of the contract between 31.08.1995 to 24.09.1995. Plaintiffs thereafter shifted their stand and got other notice issued on 27.10.1995 when the plaintiffs claimed specific performance instead of damages as claimed in earlier notice dated 16.10.1995. It was obligatory on the part of the defendant to seek income tax clearance from income tax authorities before the date fixed for execution and registration of the sale deed. Plaintiffs came to Faridabad on 27.08.1995 shows that letter dated 28.08.1995 was merely an attempt to wriggle out of the tight spot.

Learned first appellate court has overlooked the fact that as per agreement to sell the target date for execution and registration of sale deed was 31.08.1995. As required under the agreement to sell defendant applied for permission to transfer on 12.07.1995 which was granted on 14.07.1995 with intimation to the plaintiffs, receipt whereof is admitted. Defendant wrote a letter dated 28.08.1995 to the plaintiffs to please come and sign the papers for completing the formalities of getting the income tax clearance. Receipt of this letter is also admitted by the plaintiffs. On 30.08.1995, plaintiff no.1 writes a letter to the defendant to postpone the date of execution and registration of the sale deed to 12.09.1995. The date has been mentioned as 12/24.09.1995. The word 24 is written with a different pen. Plaintiff claims that the date was extended upto 24.09.1995. Plaintiff also writes the defendant to take permission of the income tax department at Rs.6,00,000/- rather than Rs.10,80,000/- as originally agreed. Plaintiff and defendant agree thereto by signing a note reproduced above. As per Section 269 UC of the Income Tax Act, 1961, a copy of the agreement to sell in the form of a statement is to be attached, verified in a prescribed manner. At no stage, plaintiffs have even asserted that they offered to sign the papers required for getting income tax clearance. On receipt of letter dated 28.08.1995 which was written by the defendant to the plaintiffs to come and sign the papers for getting the income tax clearance certificate, plaintiffs did not respond or come forward.

Plaintiffs were neither ready nor willing on 31.08.1995 not on extended date i.e.12.09.1995. Even if assuming that 24.09.1995 was agreed to, still there is no evidence that on 24.0.1995 plaintiffs were ready and willing to perform their part of the contract. Thus the findings of the courts that the plaintiffs were ready and willing to perform their part of the contract are clearly erroneous.

Now let us analyse with the reasons given by the first appellate court noted above.

As regards first reason, mere financial capacity of the plaintiffs is not sufficient to prove their readiness and willingness. Plaintiffs are required to prove that they were always ready and willing to perform their part of the contract. Most important readiness and willingness is on the target date fixed for execution and registration of the sale deed which the plaintiffs have failed to prove and both the courts have not found that the plaintiffs were ready on that day. Second reason as noted above is factually incorrect as the notice was sent by Sh Mukesh Sehgal, Advocate on behalf of Sandeep Estate Agency (property dealer) to the plaintiffs. It was not vice-versa.

As regards findings noted at item no.3, the same is in favour of the defendant-appellant. The court found that plaintiffs took no step for performance of their part of the agreement between 31.08.1995 to 24.09.995 but still choose to uphold the decree for specific performance.

As regards 4^{th} reason, the court even noted that plaintiffs have shifted their stand. As in the notice dated 16.10.1995 plaintiffs had only claimed that they are entitled to Rs.4,00,000 as per the agreement to sell i.e. double of the payment made. In this notice, total sale consideration was mentioned as Rs.6,00,000/-. However, in the notice dated 27.10.1995, plaintiffs took a stand that earlier notice was due to typing error and total sale consideration is Rs.10,80,000/- and in this notice plaintiffs claim that they are entitled to enforcement of the agreement to sell by getting the sale deed registered.

Next reason assigned by the first appellate court is clearly erroneous. Section 269 UC of the income Tax Act, 1961 requires a particular form to be filled. Sub-section 2 of Section 269 UC requires that the agreement referred to in sub-section 1, shall be reduced to writing in the form of a statement by each of the parties to such transfer. Sub-section 3 provides that every statement referred to in sub-section 2 shall be in the prescribed form set forth, such particulars as may be prescribed and be verified in the prescribed manner. There is no evidence that plaintiffs ever came forward and offered to complete the formalities required inspite of a specific request having been sent by the defendant to the plaintiffs.

The last reason assigned by the first appellate court is also totally wrong as in the letter dated 30.08.1995, the plaintiffs have stated that they have come to Faridabad. However, there is no communication by the plaintiffs to the defendant offering to complete the formalities required for getting the income tax clearance.

In view of the aforesaid, it is apparent that the courts below have committed material irregularity, near to perversity, while decreeing the suit filed by the plaintiffs. Both the courts have further over looked the fact that plaintiff no.1 had suffered a statement as extracted above on 14.11.2000 and when the defendant complied with the condition imposed, plaintiff no.1 resiled therefrom. Plaintiff no.1 and 2 are husband and wife and they were represented by one counsel. Once a statement had been made in the court, correctness whereof is not disputed, the courts should not have granted the decree for possession by way of specific performance of the agreement to sell. It is no doubt true that the plaintiff has later on tried to explain that he was suffering from diabetes but that is not an excuse to wriggle out of the statement made.

In view of the above, the questions of law framed are answered in favour of the defendant-appellant. Although, it has been found that the plaintiffs were never ready and willing to perform their part of the contract, however, since defendant had offered to pay Rs 2,10,000/- and had in fact tendered the draft, therefore, plaintiffs are held entitled to refund of the amount paid along with interest @ 9% p.a.

Accordingly the judgments and decrees passed by the courts below are modified and in place of decree for possession by way of specific performance of the agreement to sell, it is substituted with a decree for refund of the payment received by the defendant i.e. Rs.2,00,000/- along with interest @9% p.a. from the date of institution of the suit till payment.

The regular second appeal is disposed of accordingly.

02nd April, 2019 **(ANIL KSHETARPAL)**
nt **JUDGE**

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