

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.1046 of 2016 (O&M)

Date of Decision 02.04.2019

Sunder Singh

...Appellant(s)

Versus

Harwati

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Arun Jain, Senior Advocate with
Mr.Keshav Pratap Singh, Advocate for the appellant.

Mr.Ashish Aggarwal, Senior Advocate with
Mr.Kunal Dawar, Advocate and
Mr.Parunjeet Singh, Advocate for the respondent.

ANIL KSHETARPAL, J.

Defendant-appellant is in the regular second appeal against the concurrent findings of fact arrived at by the courts below, while decreeing the suit for possession by way of specific performance of the agreement to sell.

Basically two contentions have been raised by the learned counsel for the appellant:-

(i) The present suit is barred under Order 2 Rule 2 of the Code of Civil Procedure (for short 'CPC') as injunction suit was filed and at that time cause of action to file the suit for possession by way of specific performance of the agreement to sell had already arisen.

(ii) Payment of the earnest money is not proved and, therefore the agreement to sell is suspicious.

In the present case, agreement to sell is dated 15.12.2009, whereby the appellant agreed to sell the land measuring 16 kanals for a total sum of Rs.32,00,000/-, out of which Rs.30,00,000/- was paid as earnest money and remaining payment was to be made at the time of execution and registration of the sale-deed i.e. on 14.12.2010. The agreement to sell is registered having photographs of the parties as well as of marginal witnesses. Present suit was filed on 7.9.2011.

The defendant denied the execution of the agreement to sell and pleaded that in fact husband of the plaintiff had agreed to sell the land to one Rajbir and his partner and since partner of Rajbir had issued cheques in lieu of earnest money, therefore, as a security document, present agreement to sell was executed. It was further pleaded that deal between husband of the plaintiff and Rajbir and his partner did not materialise. Therefore, it was pleaded that the suit filed by the plaintiff should be dismissed.

On appreciation of evidence, both the courts have decreed the suit after finding that agreement to sell, payment of earnest money and plaintiff being always ready and willing to perform her part of the contract has been proved.

As regards first contention of learned counsel for the appellant with respect to the suit being barred under Order 2 Rule 2 CPC, it may be noticed that the target date for execution and registration of the sale-deed as per agreement to sell was 14.12.2010. The suit for injunction is dated 4.3.2010. So the target date for execution and registration of sale deed had not matured. Therefore, cause of action to file the suit for specific performance of the agreement to sell as per Article 54 of the Schedule to the

Limitation Act, 1963 did not begin to run. The bar to maintainability of subsequent suit under Order 2 Rule 2 CPC can only be invoked and applied once the court comes to a conclusion that when the first suit was filed, cause of action to file subsequent suit had already arisen and the plaintiff omitted to claim the relief which is being claimed in the subsequent suit without leave of the court.

Learned counsel appearing for the appellant, while drawing attention of the Court to the contents of plaint filed in a suit for injunction, has submitted that plaintiff in the aforesaid suit had herself pleaded that the defendant is not ready and willing to perform his part of the contract and he is threatening to alienate the property in dispute. He has further submitted, while reading para 5 of the plaint in the suit for injunction, that the plaintiff also pleaded that the defendant had refused to accept the request of the plaintiff. Hence, he submitted that on that day, the cause of action to file suit for specific performance of the agreement to sell had accrued. He relied upon a judgment of the Hon'ble Supreme Court in the case of *M/s. Virgo Industries (Eng.) P. Ltd. Vs M/s. Venturetech Solutions P. Ltd., (2013) 1 SCC 625*.

On the other hand, learned counsel appearing for the respondent has submitted that the judgment passed by the Hon'ble Supreme Court in the case of *M/s. Virgo Industries (Eng.) (supra)* has been subsequently analysed and explained in the case of *Rathnavathi and another Vs. Kabita Ganashamdas, (2015) 5 SCC 223* and *Sucha Singh Sodhi (D) Thr. LRs Vs Baldev Raj Walia and another, (2018) 6 SCC 733*. He further relied upon a Division Bench judgment of this Court in the case of *Smt.Bhagwan Kaur Vs. Shri Harinder Pal Singh, 1991 PLJ 681*.

This Court has heard the learned counsel for the parties and with their able assistance gone through the judgments passed by the courts below and also carefully gone through the case law cited above as well as the facts of the present case.

It is not in dispute that on the day the suit for injunction was filed, target date fixed in the agreement to sell for execution and registration of sale-deed had not arrived. The judgment passed by the Hon'ble the Supreme Court in **M/s.Virgo Industries' case (supra)** is in the facts of that case. The Supreme Court was dealing with a situation where the suit for injunction was filed after the amount paid as earnest money through cheques was returned. On those facts, the Supreme Court has held that bar of Order 2 Rule 2 CPC to the maintainability of the subsequent suit would be maintainable. As far as position of law, it is apparent that whenever the maintainability of the suit on account of bar under Order 2 Rule 2 CPC is to be invoked, the court must carefully examine the pleadings of the parties and facts of the case.

In the present case, no doubt plaintiff has pleaded that defendant is threatening to alienate the property and is refusing to accept the request of the plaintiff, however, there is no pleadings that defendant has refused to honor the agreement to sell or defendant has taken some steps which proves that defendant has finally refused to honour the agreement to sell. The suit for injunction is based upon threat of the defendant to alienate the property. Refusal to honour the agreement to sell and threat to sell the property agreed to be sold are two different things. Hence, in the considered view of this Court, the present suit is not barred under Order 2 Rule 2 CPC.

Now let us examine the second contention of learned counsel for the appellant.

Learned counsel for the appellant, while referring to the oral evidence of the plaintiff, has submitted that payment of Rs.30,00,000/- has not been proved as her evidence is shaky. He has further submitted that no payment was made before the Sub Registrar.

On careful reading of the agreement to sell, a registered document, shows that the defendant-appellant had accepted that he has received Rs.30,00,000/- in the presence of witnesses. The agreement to sell is a written contract registered with the Sub Registrar. Once the receipt of payment had been acknowledged in a written contract, there is very little window left for the defendant to prove that no payment was made. It may be noted here that the defendant had pleaded that the agreement to sell was executed as a security document on account of a different deal between husband of the plaintiff Ranbir Singh with Rajbir and his partner Mr.Kaushal. However, the defendant has not examined the aforesaid Rajbir or Mr.Kaushal. Defendant has only appeared in the evidence and his bald statement has been disbelieved by the courts below. Had there been any other deal between Ranbir Singh on the one hand and Rajbir and his partner Mr.Kaushal on the other hand, defendant who has stated that he got executed this agreement to sell as a security, some document to that effect would have been produced or Rajbir or Mr.Kaushal would have been examined in the evidence to prove that fact. Defendant has signed the agreement in Hindi and the agreement to sell is also scribed in Hindi. In the agreement to sell, payment of the amount has been acknowledged and accepted. Hence, this Court does not find any substance in second argument

of the learned counsel for the appellant.

In view of the above, there is no scope to interfere. Hence, regular second appeal is dismissed. Pending application(s), if any, shall also stand disposed of, in terms thereof.

02.04.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No