

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.1488 of 2016 (O&M)
Date of decision: 06.02.2019

Vijay Kumar and another

..... Appellants

Versus

Balwinder Singh

..... Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Jainainder Saini, Advocate
for the appellants.

Mr. Gagandeep Singh Sirphikhi, Advocate
for the respondent.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the judgment and decree for possession by way of specific performance of the agreement to sell passed by the Courts below. Both the Courts on appreciation of evidence have recorded a finding that execution of the agreement to sell and payment of earnest money has been proved. These finding of facts, although, challenged but require no interference.

However, lot of arguments have been addressed on the nature of the transaction and whether in such circumstances, relief of specific performance of the agreement to sell should be granted or not.

Section 20 of the Specific Relief Act enables the Courts to exercise their discretion in the facts and circumstances of each case. It is not mandatory that whenever execution of the agreement to sell and payment of earnest money is proved, the decree for specific performance of the

agreement to sell is to follow. The statute itself has made the relief of specific performance of the agreement to sell to be discretionary and therefore, the Courts are required to examine as to whether in the facts of the case discretion should be exercised or not. Both the Courts have failed to carry out that exercise. After hearing arguments of learned counsel for the parties, this Court is of the opinion that the discretion should not have been exercised in favour of the plaintiff-respondent. The reasons for arriving at such conclusion are as under:-

1. Agreement to sell is with respect to sale of a house measuring 6 marla, however, when the suit was filed, the plaintiff has stated in para 8 of the plaint that actual area at the spot is not 6 marla but it is 3 marla and 45 sq. feet approximately. Thus, the actual area of the house is little more than 50% of what was agreed to be sold. In normal circumstances, if some one is entering into deal to purchase immovable property, the agreement to sell would be entered into after knowing what is the exact area of the house or the property which is subject matter of contract. At the time of actual measurement, there can be slight deviation but such is not the case here. The actual area found is little more than 50% what was agreed to.

2. Agreement is sell between the parties is stated to be entered into on 09.09.2003 for total consideration of Rs.3,00,000/- out of which Rs.1,00,000/- was paid as earnest money. As per the agreement to sell, the target date for execution and registration of the sale deed was fixed as 09.03.2004. However, while writing dated 27.02.2004, although, disputed by the defendants, the target date was extended by a period of one year to 09.03.2005. Even on 09.03.2005, sale deed was not got registered and vide writing dated 01.03.2005, the date for execution and registration of the sale deed was extended to 01.03.2006. No reason is forthcoming as to why the

period for execution and registration of the sale deed was extended for a period of two years from the date fixed in the agreement to sell.

3. The plaintiff has not filed the suit with clean hands. The plaintiff lodged a complaint with the Police against the defendants on 17.05.2004 under Section 420 of the Indian Penal Code. However, lodging of the aforesaid FIR has neither been disclosed in the suit nor copy thereof has been produced. This FIR was got lodged as admitted by him while appearing in evidence. It has also come in evidence that he has lodged another complaint against the defendants on 06.03.2006. Although, in the cross-examination, the plaintiff has denied this fact but Kuldeep Singh, the marginal witness of the agreement to sell when appeared in the evidence, has admitted that the plaintiff got lodged a complaint against the defendants on 06.03.2006.

4. On reading of the evidence of the plaintiff, it is apparent that he is not telling the truth in the Court. When he was asked about the complaint with the Police on 06.03.2006 lodged by him against the defendants, he denied that fact whereas this fact was admitted by Kuldeep Singh, attesting witness when he appeared in the Court. Still further, on reading of the cross-examination, it is apparent that he has concealed material facts from the Court. He has stated that Kuldeep Singh-marginal witness is known to him because he purchased medicines from Kuldeep Singh once or twice in the year 2000 and thereafter, he never purchased medicines from him. However, when Kuldeep Singh appears in evidence, he has stated that he is known to Balwinder Singh-plaintiff since 1992-93. Kuldeep Singh-marginal witness has also admitted that he is not only witness to the agreement to sell but also appeared before the Police authorities in support of the plaintiff whenever he lodged the complaint. In such circumstances, it is apparent that relationship

between Kuldeep Singh and Balwinder Singh are not merely because of the fact that plaintiff was only occasional customer to the shop of Kuldeep Singh.

For the reasons stated above, this Court has come to a conclusion that the decree for specific performance of the agreement to sell is not proper in the facts of the present case particularly when the defendants in the written statement had pleaded that it was a loan transaction. Although, it was pleaded by the defendants-appellants that the payment has been made, however, in absence of any evidence, Courts have rightly held that repayment of the loan amount is not proved.

Accordingly, in place of a decree for possession by way of specific performance of the agreement to sell, the decree for refund of the earnest money along with interest @ 9% per annum from the date of agreement to sell till realization is passed in favour of the plaintiff and against the defendants.

Appeal is partly allowed.

06.02.2019

Dinesh Bansal

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No