IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.6466 of 2018 (O&M)
Date of Decision: 22.07.2019

Rajinder Singh and Another ....appellants

Vs.

Harbhajan Singh ....Respondent

CORAM: HON'BLE MR.JUSTICE DR. RAVI RANJAN

Present:- Mr.Vishal Munjal, Advocate, for the appellants.

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DR. RAVI RANJAN, J. (Oral Judgment)

CM No.9402-of 2019

This application has been filed to prepone the date of hearing of the main appeal as it is contended that the executing Court, vide its order dated 01.07.2019, has already issued warrants of attachment of the property of appellants on furnishing the list of properties on 29.07.2019.

In the facts and circumstances of the case, the prayer is allowed and accordingly, this appeal is fixed for hearing today itself.

RSA No.6466 of 2018

This appeal has been preferred assailing the judgment and decree dated 02.07.2018 passed by the Additional District Judge, Pathankot in Civil Appeal No.51 of 2017 (CIS No.38 of 2017) by which the first appellate Court has reversed the finding of the trial Court and allowed the suit and appeal of the respondent-plaintiff..

The plaintiff filed a suit for recovery of Rs.10,15,000/-i.e., Rs.5,00,000/- by way of refund of the advance money (earnest money) and Rs.5,00,000/- as stipulated damages and Rs.15,000/- as an interest @ 12%

per annum along with future interest till the date of realization.

It is alleged in the plaint that the defendants, claiming themselves to be the owner in possession of the land measuring 16 kanals 7 marlas situated in village Raj Parura, Tehsil and District Pathankot, agreed to sell it to the plaintiff on payment for consideration money of Rs.92,50,000/- and executed an agreement to sell dated 23.04.2014 after receiving the earnest money of Rs.5 Lacs. As per the terms of agreement, the balance was payable at the time of execution and registration of sale deed for which the date was fixed on or before 27.10.2014. The first appellants Court has noticed that it was specifically provided in the agreement that in case the defendants fail to perform their part of agreement on or before the date fixed for execution and registration of sale deed, they would be liable to refund advance money of Rs.5 Lacs along with equal amount as stipulated damages to the plaintiff. It also stands recorded in the agreement that the said property was under mortgage before Punjab Gramin Bank against a bank loan which the defendants undertook to clear and get the mortgage redeemed before the date of performance of agreement. The plaintiff alleged that the sale deed could not have been executed without the mortgage having been redeemed after clearing the debt due to the bank as the same would be clearly prohibited under law. It is further claimed that plaintiff was always ready and willing to perform his part of agreement. The plaintiff, after prior information to the defendants, reached the Tehsil Office, Pathankot on the date fixed, i.e., 27.10.2014 at 9:00 am with the balance sale consideration and sufficient funds to meet the expenses for execution and registration of sale deed but the defendants did not appear. The plaintiff then filed an application before the Sub-Registrar, Pathankot, and got his presence marked through his affidavit dated 27.10.2014. it is further alleged that the defendants intentionally committed breach of agreement to sell and sent a false notice dated 30.10.2014 to get the sale deed executed on 10.11.2014 only after ensuring that the said notice reaches the plaintiff well after the proposed date. The said notice was promptly replied by the plaintiff on 20.11.2014. The plaintiff further alleged that the defendants have clearly committed breach of agreement as they did not re-pay the loan amount and got the mortgage redeemed from the Punjab Gramin Bank and they willingly did not come on the date of execution and registration as fixed in the agreement. The defendants were asked to pay the aforesaid amount but they refused to do so. In that background, the plaintiff filed the present suit seeking a relief for refund of advance money of Rs.5 lacs along with Rs.5 Lacs as stipulated damages and Rs.15 thousand by way of interest.

The defendants, in response to the above, appeared before the trial Court and filed written statements raising several objections and making denial of allegations put forward in the plaint on diverse grounds. They came up with a case that in fact the plaintiff approached the defendants on 15.10.2014 and requested them to execute sale deed on 30.10.2014 as he could not arrange the balance consideration amount of Rs.87,50,000/-. Defendants fell pray to the greasy words and agreed to postpone the date of execution believing the plaintiff. The defendants visited the Tehsil Complex, Pathankot on 30.10.2014 only to know that plaintiff has got marked his presence at Tehsil Complex on 27.10.2014 in a pre-planned manner. It is averred that the defendants were always ready and willing to perform their part of agreement. Accordingly, they sent a legal notice dated 30.10.2014 to the plaintiff stating that if he failed to come for registration and execution of sale deed on 10.11.2014, the earnest money of Rs.5 Lacs would stand forfeited.

It is also contended that, in fact, the plaintiff reached in the registration office in the Tehsil compound on 10.11.2014 but he was not ready with the balance amount and therefore, defendants moved an application and get their presence marked through an affidavit. The stand of defendants is that they have never breached the contract and non-appearance in Tehsil Complex on 27.10.2014 was only in view of misrepresentation. They have also stated that they already got the limit availed from bank cleared which would be reflected from the statement of bank account. They again sent a legal notice dated 12.01.2015 calling upon the plaintiff for execution and registration of sale deed but the plaintiff did not appear. Again they moved an application and got their presence marked before the Sub Registrar, Pathankot.

On the basis of pleadings of the rival parties, the trial Court framed the following issues:

1. Whether plaintiff is entitled to recovery of Rs.10,15,000/- alongwith interest as prayed for?OPP.
2. Whether plaintiff has no cause of action or locus standi to file the present suit?OPP.
3. Whether suit of plaintiff is not maintainable in the present form?OPD.
4. Relief.

The trial Court observed that the sale deed was to be executed on or before 27.10.2014 but a legal notice was served on 30.10.2014 through counsel whereas the plaintiff in his cross-examination has stated that now he is not ready to get the sale deed executed in terms of agreement. He has also denied that the value of property has increased rather he has deposed that value has decreased. The trial Court has also referred the testimony of defendant No.1 stating that on 27.10.2014, there was an outstanding amount in the loan account but observed that creation of mortgage is not a bar in selling a property by execution of a sale deed. The trial Court also observed that out of the total consideration amount, only Rs.5 Lacs was given as advance whereas the balance amount of Rs.87,50,000/- was still to be paid to the plaintiff. The trial Court came to the conclusion that plaintiff has not been able to show his financial position to pay the balance amount and, thus, to show that there was a readiness on his part to get the sale deed executed. The trial Court in this regard has placed reliance upon the decision of Hon'ble Supreme Court rendered in **G.Jayashree and others Vs. Bhagwandas S.Patel and others 2009(1) Civil Court Cases 785** holding that plaintiff was required to prove the continues readiness and willingness and the conduct of parties is also material. Accordingly, the trial Court decided the issue No.1 against the plaintiff and in favour of defendants and issues No.2 and 3 were also decided in favour of defendants. In the result, the suit was dismissed. The judgment and decree was put to challenge in the first appeal.

First appellate Court observed that the trial Court failed to understand that the suit was not filed by the plaintiff for specific performance of contract rather the same was filed seeking recovery of amount which was advanced to the defendants for execution of sale deed and ultimately has allowed the appeal holding that on the date fixed, the defendants were admittedly not having the property under sale free from all incumbrances as the mortgage was admittedly not redeemed on that date.

The first appellate Court has also noticed that it appears from the statement of bank account placed on record that the loan was existing and mortgage was never redeemed.

Eventually, the first appellate Court allowed the appeal and set aside the judgment and decree and has also allowed the suit but only up to recovery of the earnest money of Rs.5 Lacs along with simple interest @6% per annum. It did not allow additional Rs.5 Lacs by way of damages to the plaintiff.

In the aforesaid background of factual matrix, I have heard learned counsel for the appellants.

It has vehemently been argued on behalf of appellants that appellants were ready to execute a sale deed and such intimation was given to the plaintiff by legal notice dated 30.10.2014 and again on 12.01.2015 but the plaintiff did not turn up for execution and registration before the Sub Registrar, whereas, the defendants appeared and got their presence marked by the Sub Registrar. As such, it is contended that defendants' case of forfeiture of earnest money is legal and valid and the plaintiff is not entitled for refund of the earnest amount.

However, on giving anxious consideration to the submissions raised on behalf of appellants and going through the materials which are available on record, this Court does not find any force in the submission made on behalf of the appellants.

The case of the appellants is that it was the plaintiff who had approached the defendants to get the date of execution and registration of the sale deed shifted from 27.10.2014 to 30.10.2014 as they could not arrange balance amount of sale consideration Rs.87,50,000/-. However, considering this case not to be of specific performance of contract, if such is the assertion made in the written statement of the defendants, they were required to prove this also. There is no evidence on record as to how and in what manner and when the plaintiff approached them and requested for shifting of the target date and whether actually defendants were ready on that day for execution of the sale deed. Answer to the aforesaid issue has to be in negative as this is not the case of the defendants that on 27.10.2014, they were ready to execute the sale deed and as loan amount was neutralized and mortgage was redeemed. They claimed that before 30.10.2014 it was done but there is nothing on record to prove that. There is absolutely no evidence. The first appellate Court has observed that from the statement of account it is apparent that the cash credit was subsisting and assuming the defendants' stand to be correct then after redemption of mortgage the title deed must have been returned to them and in such case it was incumbent upon them to produce produce the title deed before the trial Court to show that actually the mortgage was redeemed. However, none of the Courts below have observed that such document was brought in evidence by the defendants. Secondly, the first appellate Court has also noticed that it is specifically provided in the agreement that in case the defendants failed to perform their part of agreement on or before 27.10.2014, they would be liable to refund the advanced money of Rs.5 Lacs along with equal amount as stipulated damages to the plaintiff. That statement having already been there, the defendants could not have any legal right to get the date shifted without the consent of the other party to the agreement and the other party would have always be a legal right to claim refund in accordance with the terms and conditions of the agreement to sell. It is admitted position that on

27.10.2014, the defendants were not in a position to executed the sale deed. The trial Court completely misunderstood the suit to be for specific performance of contract and has held otherwise.

Of course, the Hon'ble Supreme Court has held in many cases that there is distinction between readiness and willingness of performance of contract and readiness will always mean the capacity of plaintiff to perform the contract which includes his financial position to pay the purchase price but it has also been held that conduct of parties would be material for the said purpose. If the property was already mortgaged before a Bank and one of the condition was that the land, at the time of execution, should be free from all incumbrances, it was the bounden duty of the defendants to get it done and since admittedly it could not be done on the target date, the other terms and conditions would become operative giving right to the plaintiff to recover the amount. The first appellate Court has correctly placed reliance upon the pronouncement of the Hon'ble Supreme Court in **Laxman Tatyaba Kankate and Anr. Vs. Smt.Taramati Harishchandra Dhatrak 2010 AIR(SC) 3025,** in particular paragraph 13 thereof in which the Apex Court has held that there could be no reason for raising a presumption against the respondent on the face of the fact that the appellants chose not to lead any evidence on the aspects involved. Thus in my view, the purchaser in view of the provisions contained in Section 13(1) (c) of the Specific Relief Act was would have a right to compel the seller first to redeem the mortgage and obtain a valid discharge and then specifically perform the contract in his favour. Their lordships have held that even from that point of view, the right of respondent is fully protected. The first appellate Court has observed that the cash credit facility was regularly in use which would be apparent even from the statement brought on record and at no point of time the entire loan amount was cleared by the defendants. In fact no attempt was made to liquidate the debt and get the mortgage redeemed.

Since the plaintiff did not seek specific performance of agreement to sell and has asked for refund of the earnest money, which is the right which clearly flows from the terms of agreement to sell itself, i.e., to come out of agreement and seek recovery of the amount, the suit could not have been dismissed on such grounds on which the same has been dismissed by the trial Court. However, even though it appears from the agreement to sell, that the plaintiff has a right to recover double the amount of earnest money, the first appellate Court has not granted that and has merely allowed refund of the actual advance money along with simple interest of 6% per annum which in my opinion is very reasonable.

Having regards to the aforesaid discussion, this Court is of the opinion that learned counsel for the appellants has not been able to make out a good ground or any substantial question of law warranting interference in the judgment and decree passed by the first appellate Court.

In the result, being devoid of any merit, this appeal is dismissed.

(DR. RAVI RANJAN)
JUDGE

22.07.2019
anil

Whether speaking/reasoned Yes/No

Whether reportable Yes/No