IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-3712-2019 (O&M)
Decided on: 29.09.2020

Inderjit Singh ....Appellant

Versus

Husan Lal & another ....Respondents

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr.Vaibhav Sehgal, Advocate, for the applicant/appellant.

G.S. SANDHAWALIA, J.

CM-10076-C-2019

The Court fees shall be deposited the moment the instructions are modified as such and physical presence is allowed. It is made clear that in case the needful is not done, the certified copy shall not be made available to the appellant by the office.

CM-10077-C-2019

Application for placing on record photocopy of the judgments and decree of the Courts below, is allowed, in view of the averments made in the application, duly supported by affidavit.

CM stands disposed of.

RSA-3712-2019 (O&M)

Challenge in the present regular second appeal has been raised by the appellant-defendant to the findings of the Courts below whereby suit has been decreed to the extent for recovery of the earnest money which he had received on account of the agreement to sell dated 20.11.2009 (Ex.P-3).

The Civil Judge (Jr.Divn.) Phillaur had decreed the suit on 11.09.2017 for Rs.20,70,000/- along with interest @ 6% per annum from the date of the judgment. In the appeal and counter-claim filed by both the parties, the Lower Appellate Court, vide judgment and decree dated 09.04.2019, modified the amount to be refunded as Rs.21,20,000/- and accordingly, interest @ 12% per annum from the date the payments were made till the date of filing of the suit, i.e. 29.06.2013 and thereafter, from the date of the decree @ 6% per annum till realization.

Counsel for the appellant has mainly argued on the readiness and willingness of respondent No.1-plaintiff that the same had not been proved since the suit was filed on the last date of limitation which was expiring on 30.06.2013. It was also faintly argued that there was a recital of possession in the sale deed and therefore, the agreement was not adequately stamped and could not have been taken into consideration.

<u>Pleadings</u>

The suit was filed by the plaintiff-respondent No.1 for specific performance of the agreement dated 20.11.2009 wherein 29 kanals 6 marlas of land was to be sold falling in Village Nagra, Tehsil Phillaur District Jalandhar. In the alternative, prayer for recovery of Rs.42,40,000/- was sought since Rs.21,20,000/- had been paid as earnest money and the balance was sought as damages, as per the terms of the agreement. The plaintiff's case was that a sum of Rs.12,00,000/- in cash had been received out of the Rs.40,00,000/- which had been agreed to be paid in cash as earnest money at the time of the execution of the agreement. The last date had been fixed as 30.04.2010 and possession had been delivered to the plaintiff. On 05.03.2010, another amount of Rs.6,50,000/- was received in cash by the appellant and the date was extended upto 30.06.2010 by writing at the back-side of the agreement duly signed by the plaintiff and the witnesses. Another sum of Rs.50,000/- was received on the same date by the appellant which fact was also incorporated at the back of the agreement. Thereafter, a sum of Rs.2,20,000/- was received in cash on 27.04.2020 and the last date was extended to 30.06.2010. The factum of the receipt was also entered at the back of the agreement. Resultantly, the appellant had received Rs.21,20,000/- in cash as earnest money. On 30.06.2010, the plaintiff had remained present before the Joint Sub-Registrar, Nurmahal from 9 AM to 5 PM along with the remaining amount of Rs.18,80,000/- but the defendant had failed to perform his part of the contract. Thereafter also, he had requested the defendant several times but he had lingered the matter on one pretext or the other.

The possession was taken by the appellant and defendant No.2 in February, 2013 forcibly and the plaintiff had taken a copy of the fard-jamabandi on 14.06.2013 for the year 2006-07 and came to know that the land detailed in the agreement was only 21 kanals 5 marlas and there was a clerical mistake in the revenue records. It had also come to his knowledge that the land had been sold to defendant No.2 on 13.03.2013 and mutation No.1474 had also been entered in his favour. He had obtained the sale deed on 21.06.2013 and thus, filed the suit on 29.06.2013 on the ground that he was still ready and willing to perform his part of the contract.

The defence of the appellant along with defendant No.2 was that Gursev Singh, defendant No.2 was a bona fide purchaser and the land was sold for Rs.41,20,000/- and it had been mentioned in the sale deed that defendant No.1 had also not executed sale of the property in favour of anyone. The possession had also been delivered to defendant No.2 and the agreement was forged, fabricated and therefore, the plaintiff was not entitled for any relief. A denial was also made of the execution of the agreement by defendant No.1-appellant on account of the fact that the agreement was not registered with the Sub-Registrar and that he had not received any earnest money from the plaintiff.

The following issues were framed by the Trial Court:

> 1.Whether the plaintiff is entitled to possession of the suit land by way of specific performance of agreement to sell dated 20.11.2009 as prayed for? OPP
> 2. Whether the plaintiff has ready and willing to perform his part of the contract? OPP
> 3. Whether the plaintiff is entitled to consequential relief of permanent injunction as prayed for? OPP
> 4. Whether the plaintiff is entitled to recovery of Rs.42,40,000/- in the alternative, as prayed for? OPP
> 5. Whether the sale deed dated 13.03.2013, executed by the defendant no.1 in favour of defendant no.2 of the suit land is legal and valid sale deed, if so its effect? OPD
> 6. Whether the suit of the plaintiff is not maintainable? OPD
> 7. Whether the plaintiff has got no locus standi to file the present suit?OPD
> 8. Relief.

Findings of the Courts below:

The Trial Court, on issues No.1 to 3, came to the conclusion that the agreement had been entered into between the parties and more so, the appellant had not appeared in the witness-box to corroborate his version. Thus, an adverse inference was rightly drawn against the present appellant, while placing reliance upon **Iswar Bhai C.Patel @ Bachu Bhai Patel Vs. Harihar Behera & another 1999 (3) SCC 457**. The endorsements, Exs.P-1, P-2 and P-4 on Ex.P-3 were taken into consideration while taking into account the statement of Paramjit Singh, PW-1, the attesting witness of the endorsement dated 05.03.2010 and 27.04.2010 (Exs.P-1 & P-2). The other witness, Sukhraj Singh having died on 27.01.2015, resultantly his sister, Narinderjit Kaur was examined as PW-2 who identified the signatures on the agreement to sell, thus, proving the fact that the consideration had exchanged hands. The plaintiff also appeared in support of his case as PW-3 and proved the affidavit dated 30.06.2010 whereby his presence was marked before the Sub-Registrar (Ex.P-5) showing his readiness and willingness. The Deed Writer, Jagtar Chand was examined as PW-5 who not only proved the agreement to sell but also the endorsement dated 05.03.2010 and 27.04.2010. The appellant and defendant No.2 had, on the other hand, merely examined the witnesses to prove the subsequent sale deed dated 13.03.2013 in favour of defendant No.2. Resultantly, the Trial Court rightly came to the conclusion that under issue No.5, the sale deed had been executed in favour of defendant No.2 which was legal and valid. Keeping in mind the fact that the suit was filed on the last date when the limitation was to expire on the next day and the fact that the defendant No.1 kept mum for 3 years, the suit was only decreed for the recovery of

Rs.20,70,000/-.

The reasoning of the Trial Court not to grant recovery for Rs.50,000/- which was paid on 05.03.2010 was that Sukhwinder Singh, PW-4 the attesting witness had not been examined and therefore, it only decreed the suit for Rs.20,70,000/- by deciding issues No.1 to 3 in favour of the plaintiff and holding that it could not be held that defendant No.2 had any such knowledge regarding the execution of agreement (Ex.P-3) in favour of the plaintiff.

Before the Lower Appellate Court, the plaintiff also filed a counter-claim/cross-objection in the appeal filed by the appellant claiming the full amount of Rs.21,20,000/- and not pressing for the relief of specific performance. The appellant having given the receipt of Rs.21,20,000/- (Ex.P-2) dated 27.04.2020 in total which thus included the amount of Rs.50,000/- which had been paid and endorsed it in writing and therefore, the Trial Court had wrongly not decreed the amount of Rs.50,000/-. It was also noticed that since the appellant-defendant No.1 had not stepped into the witness-box to rebut the findings, the amount claimed of Rs.21,20,000/- was justified. It was also noticed that once the plaintiff had appeared before the Sub-Registrar and his affidavit (Ex.P-5) proved the said fact the execution of the agreement stood proved from the statement of Jagtar Chand, the Deed Writer along with the attesting witnesses, Kulwinder Singh and sister of the deceased-witnes, Sukhraj Singh, namely, Narinderjit Kaur. The argument that the Deed Writer was not licenced was held to be without any basis. Resultantly, the judgment and decree was modified to the extent that the plaintiff was entitled for interest @ 12% per annum on the amount of Rs.12,00,000/- from 20.11.2009, on the amount of Rs.7,00,000/- from 05.03.2010 and on the amount of Rs.2,20,000/-, from 27.04.2010 till the date of filing of the suit. Thereafter, from the date of the decree i.e. 11.09.2017, the interest was to run @ 6% per annum.

Conclusion:

The argument raised that the plaintiff was not ready and willing, is without any basis. Plaintiff had appeared and proved his presence in the office of the Sub-Registrar on 30.06.2010 and provided the necessary affidavit as the endorsement of his presence. It was for the appellant to disprove the said fact by appearing in the witness-box and offering himself for cross-examination which he failed to do. Therefore, the Courts below have rightly come to the conclusion that an adverse inference is necessarily to be drawn against the present appellant. The execution of the agreement stands duly proved by the plaintiff by examining the Scribe and the witnesses along with the sister of the deceased-witness.

The Apex Court in **Man Kaur Vs. Hartar Singh Sangha (2010) 10 SCC 512** while examining the issue of power of attorneys, came to the conclusion that if a person does not offer himself for cross-examination to the other side, a presumption would arise that his case was not correct. It was categorically held that in case of specific performance, the issue of readiness and willingness can only be pressed if the plaintiff steps into the witness-box as an attorney holder who does not have any personal knowledge being a third party, cannot give the evidence about readiness and willingness. Reliance was placed upon the judgment of the Apex Court in **Vidhyadhar Vs. Manik Rao 1999 (3) SCC 573** regarding the presumption which was to be drawn against a person not appearing in the witness-box. A Division Bench of this Court has also held to the same effect in **Bhagwan Dass Vs. Bishan Chand AIR 1974 Punjab & Haryana 7**, by holding that a presumption is to be drawn against such a person under Section 114 of the Evidence Act.

The Courts below, thus, have rightly decreed the suit for recovery of the amounts received by the appellant in instalments. The last date of execution was extended on two occasions and eventually the land was sold by the present appellant to respondent No.2/defendant No.2 at a later point of time at a higher rate of Rs.41,20,000/- inspite of the fact that the plaintiff was ready and willing and had appeared before the Sub-Registrar on the date fixed inter se the parties.

The alternative argument that agreement was not properly stamped since there was a recital of possession, would not take the appellant a long way. There is no such pleadings taken to object to the admissibility of the agreement on that account. Rather there was a denial regarding entering into any agreement with the plaintiff and it was claimed to be forged and fabricated document which has not been accepted rightly as a plea has to be specific regarding such defence. Rather the appellant has not even appeared in support of his plea and therefore, he cannot retain almost half of the amount fixed as he has chosen to alienate the property during the period of limitation. It is settled principle that in a Regular Second Appeal, a novel argument cannot be raised which has not been pleaded and proved before the Courts below.

Resultantly, keeping in view the above discussion, this Court is of the opinion that the findings recorded by the Courts below are well justified and do not warrant any interference in a Regular Second Appeal. No question of law much less any substantial question of law arises in the present appeal and accordingly, the same is hereby dismissed in limine.

29.09.2020 **(G.S. SANDHAWALIA)**
Sailesh **JUDGE**

Whether speaking/reasoned: *Yes/No*

Whether Reportable: *Yes/No*