

S.No.116

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.4555 of 2019 (O&M)

Date of Decision:18.02.2020

Yashpal

.....Appellant

Vs.

Balbir (since deceased) through LRs

.....Respondents

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Rajesh Lamba, Advocate for the appellant.

Rajbir Sehrawat, J.(Oral)

This is the second appeal filed by the defendant in the original suit, challenging the concurrent judgments and decrees against him; passed by the Courts below in a suit for specific performance; filed by the plaintiff/respondent.

For convenience, the parties herein would be referred to as the plaintiff and the defendant; as they were described in the original suit.

Shorn off unnecessary details, the facts giving rise to the present appeal are that the plaintiff had filed a suit for specific performance of the agreement to sell dated 06.01.2015. It was pleaded that the defendant was the owner of the suit property. Defendant entered into an agreement to sell; as mentioned above. At the time of agreement, part payment amounting to Rs.3,79,000/-; out of the total sale consideration; was made to the defendant. Total sale consideration was settled to be Rs.5 lakhs. The target date fixed for execution of the sale deed was 02.07.2015. Since 02.07.2015 happened to be a holiday, therefore, the plaintiff went to the Office of the Sub-Registrar on the next working day, i.e. on 03.07.2015, along with the amount of the remaining sale consideration. However, the

defendant did not come present there. Therefore, the plaintiff got his presence marked in the Office of the Sub-Registrar by getting an affidavit attested from the Sub-Registrar, in his capacity as the Executive Magistrate. On the next day, the plaintiff personally met with defendant and requested him to execute the sale deed. However, the defendant refused to do the same. Therefore, despite the plaintiff being ready and willing all the times to get the sale deed executed, the defendant had not executed the sale deed. Hence the suit.

On notice, the defendant appeared before the Court. However, despite having been granted numerous opportunities, even the written statement was not filed by the defendant. Hence, his defense was struck off by order of the Court.

To substantiate his case, the plaintiff examined himself as witness. Besides this, the plaintiff also examined the scribe of the agreement Brij Mohan Vasistha as PW4. The attesting witness Babu Lal Dagar was examined as PW5. The other attesting witness Naim Pal was examined as PW3 and still another witness Shree Pal was examined as PW2. Besides this, the agreement was proved on record as Ex.P.1. The receipt of part payment was proved as Ex.P2. The affidavit qua the presence before the Sub Registrar was proved as Ex.P3. Besides this, the other documents related with the other issues connecting to the matter; were also proved on record. Since the defence of the defendant had been struck off, therefore, no witness was examined by him to lead any evidence. Hence, the proceedings remained without the written statement and the evidence of the defendant.

After considering the evidence led by the plaintiff, the trial Court decreed the suit filed by the plaintiff and directed the defendant to hand over the possession of the property after execution of the sale deed in favour of the plaintiffs on receipt of the remaining sale consideration. Aggrieved against the said judgment and decree, the defendant preferred appeal before the Lower Appellate Court. However, the Lower Appellate Court has also dismissed the appeal filed by the defendant. Hence, the present appeal has been preferred.

While arguing the case, learned counsel for the appellant/defendant has submitted that the defendant was wrongly denied opportunity to file the written statement and to lead the evidence. Still further, it is submitted that otherwise also, mere absence of the written statement on behalf of the defendant and absence of his evidence; is no ground to decree the suit filed by the plaintiff. The case of the plaintiff has to stand on its own legs. As per the evidence on file, the plaintiff has not proved either the agreement in question nor his readiness and willingness to get the sale deed executed. Hence, both the Courts below have gone wrong in law in decreeing his suit.

Having heard the learned counsel for the appellant/defendant, this Court does not find any substance in the argument of the counsel for the defendant. Although learned counsel for the appellant has submitted that the appellant/defendant was wrongly denied opportunity to file the written statement, however, this plea can hardly be permitted to be raised in second appeal. Otherwise also, the record shows that his defence was struck off

after granting him numerous opportunities; to file the written statement. Therefore, it was the choice of the defendant alone not to file the written statement. Now he cannot be permitted to take advantage of his own wrong.

Although learned counsel for the defendant is right in submitting that mere absence of the evidence of the defendant is not a ground for decreeing the suit filed by the plaintiff, however, this Court finds that irrespective of absence of the evidence of the defendant, the plaintiff has duly proved the agreement in question; by examining the relevant witnesses. The scribe of the agreement has been produced as a witness. He has proved the execution of the agreement. Still further, the attesting witnesses of the agreement, as well as, of the payment of earnest money has duly been examined before the Court. These witnesses have categorically proved the execution and the contents of the agreement in question. A perusal of the judgment passed by the Lower Appellate Court shows that the evidence of these witnesses has been dealt with in extensive details. Despite that, the Courts below have not found any deficiency in the evidence. This Court finds itself in agreement with the Courts below, and, therefore, is of the opinion that the plaintiff has duly proved the execution and the contents of the agreement, as well as, the payment of the earnest money.

So far as the readiness and willingness of the plaintiff is concerned, even that has duly been proved by leading evidence to the effect that the plaintiff was present before the Sub-Registrar on the next working

day than the date fixed for execution of the sale deed alongwith the balance sale consideration. The affidavit in this regard, duly attested by the Sub-Registrar, has been placed on record. It has been brought on record by way of testimony of the plaintiff that he was having the balance sale consideration with him on the said date, when the defendant did not appear. Therefore, there is no material on record to doubt this assertion of the plaintiff. Needless to say that, otherwise also, unless the defendant admits the agreement and claims his readiness to execute the sale deed, he would not be having even a right to question the readiness and willingness of the plaintiff, as such.

In view of the above, this Court does not find any illegality or perversity with the concurrent judgments and decrees passed by the Courts below. Otherwise also, the argument of the counsel for the appellant has been only to challenge the concurrent findings of the facts recorded by the Courts below. However, the concurrent findings qua the pure questions of facts cannot even be permitted to be questioned in the second appeal.

In view of the above, finding no merit in the present appeal, the same is dismissed.

February 18, 2020
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(RAJBIR SEHRAWAT)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No