

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision:7.2.2020

RSA- 6123 of 2014 (O&M)

Abdul Zalil

---Appellant

vs.

Ismail @ Israil now deceased through Lrs.

---Respondents

RSA- 2725 of 2015 (O&M)

Ismail @ Israil now deceased through Lrs.

---Appellants

vs.

Abdul Aaziz and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. C.B.Goel, Advocate
for the appellants in RSA-6123 of 2014

Mr. Piyush Aggarwal, Advocate
for the appellant in RSA-2725 of 2015
for respondents No. 1 and 2 in RSA-6123 of 2014

Mohd. Yousaf, Advocate
for respondent No. 6 in RSA- 6123 of 2014
for respondent No.1 in RSA-2725 of 2015

Rekha Mittal, J.

This order will dispose of RSA No. 6123 of 2014 and 2725 of 2015 as these have emerged out of the judgment and decree dated 30.9.2014 passed by the Additional District Judge, Mewat whereby appeal against the

judgment and decree dated 14.2.1990 passed by the trial court was allowed and decree of the trial court was modified and defendant No. 1 was directed to perform his part of the agreement dated 28.2.1985, subject to the following conditions:-

1. That the plaintiff shall pay balance sale consideration within a period of two months from today, failing which, the suit shall be deemed to have been dismissed.
2. That if the defendant fail to perform his part of agreement to sell Ex. P1 on the receipt of balance sale consideration, the plaintiff shall be entitled to get the sale deed executed and registered through the agency of the Court.”

RSA No. 6123 of 2014 has been filed by Abdul Zalil, defendant No. 5 therein whereas the other appeal has been preferred by Ishmail @ Israil, defendant No. 1. For facility of reference, facts are taken from RSA- 6123 of 2014.

Abdul Aziz, respondent-plaintiff staked his claim to the suit property measuring 48 kanal 15 marlas on the basis of agreement to sell dated 28.2.1985 whereby defendant No. 1 agreed to sell the suit land for Rs. 70,000/- out of which Rs. 55000/- was paid as part payment. It is pleaded that defendant No. 1 agreed to execute the sale deed on or before 14.3.1985 and remaining share upto 4.4.1986. The plaintiff filed suit for injunction against defendants No. 1 and 2 against sale of suit land and temporary injunction was issued. The defendant clandestinely sold land measuring 17 kanal 10 marals to Abdul Zalil (appellant herein) on 3.8.1985

without receiving any sale consideration with a view to nullify claim of the plaintiff. He also transferred land in favour of defendant Yamin. The sale deeds executed in favour of subsequent purchasers were challenged in the suit.

The trial court framed issues, noticed in para 7 of the judgment of said court. The trial court accepted claim of the respondent-plaintiff in respect of agreement to sell and his readiness and willingness to perform his part of the agreement while deciding issues No. 1 to 3 taken up jointly for discussion and determination. However, while deciding issue No. 4 “Whether sale made by defendants No. 1 and 2 in favour of defendants No. 3 to 5 are illegal, null and void, as alleged? OPP”, it was held that they are bona fide purchasers for consideration and as such sales in their favour cannot be held to be illegal, null and void and accordingly issue No. 4 was decided against the plaintiff. Issue No. 12 with regard to defendants No. 3 and 4 being bona fide purchasers for valuable consideration and without knowledge was answered in favour of defendants No. 3 and 4, in view of findings on issue No. 4. Eventually, trial court passed decree for recovery of Rs. 70,000/- by holding that the court is reluctant to use its discretion for allowing specific performance of contract as pecuniary compensation would afford adequate relief to the plaintiff and specific performance would result in disadvantage to defendants No. 3 to 5 who are bona fide purchasers for consideration.

The appeal preferred by respondent-plaintiff was allowed by the Appellate Court, as has been noticed hereinbefore.

Counsel for the appellant has assailed findings of the Appellate

Court primarily on two counts. It is argued that the trial court rightly held that defendants No. 3 to 5 are bona fide purchasers for valuable consideration without knowledge of the agreement of sale but the Appellate Court seriously faulted by setting aside findings of the trial court. Another submission made by counsel is that prior to institution of suit for specific performance on 19.4.1985, the respondent-plaintiff filed a suit for permanent injunction restraining the proposed vendor under agreement to sell from alienating the land but the suit was dismissed as withdrawn on 28.5.1985 without any permission to file a suit for specific performance of agreement to sell. It is further argued that as the respondent-plaintiff had expressed that his seller wanted to sell the suit land in violation of agreement entered with him, he was entitled to seek specific performance of the agreement even at the time when he filed the suit for injunction on 4.3.1985, therefore, instant suit is barred under Order II Rule 2 of the Code of Civil Procedure (in short “the Code”). In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **M/s Virgo Industries (Eng.) P. Limited vs. M/s Venturetech Solutions P. Limited 2012 (4) RCR (Civil) 372.**

Counsel representing the respondent-plaintiff has supported the decree and judgment passed by the Appellate Court with the submission that a serious error committed by the trial court declaring defendants No. 3 to 5 to be bona fide purchasers for consideration was rightly rectified and erroneous discretion exercised by the trial court rejecting claim of the plaintiff for specific performance of the agreement to sell has rightly been set aside. It is further argued that as per the settled position in law, it is for

the party who sets up a plea of bona fide purchaser to establish the same but in the instant case, neither defendants No. 3 and 4 nor defendant No. 5 had appeared in the court to prove their plea when otherwise defendants No. 3 and 4 have also not preferred any appeal against the decree passed by the Appellate Court.

While refuting contention of the appellants with regard to the suit being barred under Order II Rule 2 of the Code, it is argued that no such plea was raised either before the trial court or the Appellate Court and such plea being both factual and legal cannot be allowed to be raised for the first time in second appeal. It addition, it is argued that judgment in **M/s Virgo Industries (Eng.) P. Limited case (supra)** was rendered in peculiar facts and circumstances of that case and has got no bearing on the facts of the case at hand when otherwise there is nothing on record suggestive of the fact that the plaintiff had knowledge of sale deed dated 1.3.1985 executed in favour of defendant No. 5 when he instituted suit for injunction on 4.3.1985. Counsel would inform that target date for execution of sale deed was 14.3.1985 and as such cause of action to seek specific performance of the agreement had not accrued by the time the plaintiff filed suit for permanent injunction restraining his vendor from selling the suit land.

I have heard counsel for the parties, perused the paper book particularly the judgment impugned.

Before advertng to the submissions made by counsel for the parties, it is pertinent to note that counsel representing the appellant in RSA No. 2725 of 2015 Ismail @ Israil (since deceased) represented by his Lrs. Vendor under the agreement did not make any submissions.

Defendants No. 5 (appellant herein) filed the written statement raising the plea of bona fide purchaser for consideration in respect of land measuring 17 kanal 10 marlas purchased vide sale deed dated 1.3.1985. Later, there was no representation on his behalf and he never appeared in the witness box to establish his plea of bona fide purchaser in regard to aforesaid land subject matter of instant agreement of sale; appeal preferred by plaintiff Abdul Aziz decided by the Appellate Court and the judgment became subject matter of challenge in RSA No. 239 of 1991; the decree and judgment of Appellate Court was set aside and the matter was remitted to the Appellate Court for decision of appeal afresh with an opportunity to the present appellant to be heard in the matter as earlier his service was dispensed with and appeal was decided without an opportunity to him to be heard in the matter. The appellant never asserted his right to adduce evidence for proving his plea of bona fide purchaser either before this Court in RSA- 239 of 1991 or before the Court that decided the appeal vide impugned judgment and decree.

Indisputably, the appellant did not appear in the witness box to establish that he is bona fide purchaser of suit land for valuable consideration without knowledge of agreement of sale propounded by the respondent-plaintiff. The trial court committed a blatant and serious error while recording findings with regard to defendants No. 3 to 5 being bona fide purchasers for valuable consideration on the basis whereof the court refused to exercise its discretion in favour of the plaintiff for specific performance of the agreement despite answering issues No. 1 to 3 in his favour. In the given circumstances, the decree and judgment passed by the

Court in Appeal reversing those findings of the trial court cannot be faulted with on any score whatever. In this view of the matter, the first contention raised by counsel for the appellant is patently misconceived and accordingly rejected.

This brings the court to second submission with regard to suit being barred under Order II Rule 2 of the Code. Indisputably, no such plea was raised before the trial court and as such no issue was framed by the trial court in this regard. Similarly, no such contention was raised before the Appellate Court despite an opportunity was given to the appellant to be heard in the matter in view of decision dated 24.1.2014 by this Court. Counsel for the appellant has failed to advance any arguments much less meaningful to contend that a plea under Order II Rule 2 of the Code is only a legal plea or to say that it does not require the facts to be taken into consideration and as such can be raised for the first time in second appeal. This apart, the judgment relied upon by counsel for the appellant has got no bearing on the facts of the case at hand as the same was decided by Hon'ble the Apex Court in view of peculiar facts and circumstances of the referred authority. In the said case, the plaintiff in Civil Suit Nos. 831 and 833 of 2005, claimed that facts and events have occurred which entitle it to contend that defendant had no intention to honour the agreements dated 27.7.2005. It was held that in the aforesaid situation, it was open for the plaintiff to incorporate the relief of specific performance along with permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in Civil Suit No. 831

and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the court. Counsel for the appellant has failed to draw any similarity between the facts pleaded in the suit for permanent injunction by the plaintiff viz-a-viz the facts pleaded in Civil Suit Nos, 831 and 833 of 2005 that finds reference in the referred authority. That being so, the appellant can not derive any advantage to his contention from the referred authority to substantiate his plea that instant suit is barred under Order II Rule 2 of the Code, sought to be raised for the first time in second appeal.

No other point has been raised.

For the foregoing reasons, the appeals fail and are accordingly dismissed with costs.

(Rekha Mittal)
Judge

7.2.2020
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No