IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 320 OF 2022

Ajay Prabhakar Rawat__ Vs. ___Milind Madhusudan Alsundekar

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Mr. A.A.Dhawas, Advocate for appellant
Mrs. R.S.Sirpurkar, Advocate for Respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 21/09/2022

1] Heard Mr. Dhawas, learned counsel for the appellant and Mrs. Sirpurkar, learned counsel for the respondent.

2] In a suit for specific performance of the agreement dated 27.3.2013, in respect of Flat No. E-1, the total consideration for which was ₹.19,00,000/-, a part consideration of ₹. 10,00,000/- stood paid on the date of agreement of the sale itself, which is an admitted position. ₹. 4,00,000/- out of the balance consideration was agreed to be paid in May 2013 and the rest pf the balance consideration was to be paid within six months from the date of the agreement, on which date the sale deed was to be executed and registered, which would fix the date as 26.9.2013. The property admittedly was mortgaged with ICICI Bank and the appellant/defendant who was the owner was required to clear off the mortgage and bring the NOC before the time fixed for the execution and registration of the deed of sale.

3] On a suit filed by the plaintiff/respondent for specific performance, the trial Court by the judgment dated 30.10.2018 found that since the plaintiff/respondent failed to pay the part consideration of ₹.4,00,000/- on the date agreed, there was no readiness and willingness and therefore, dismissed the suit. In respect of the issue regarding refund of the amount of ₹.10,00,000/- with interest, the learned trial Court answered the issue in the negative holding that as the plaintiff had failed to pay the amount of ₹.4,00,000/- within the time fixed, the default was on part of the plaintiff and therefore, the forfeiture of the part consideration which was claimed to have been made on account of the notice dated 12.11.2013 (Exh.28), by which the agreement was also cancelled, was justified and refused to grant such relief.

4] The learned appellate Court in appeal has sustained the finding regarding absence of readiness and willingness of the plaintiff and consequent refusal of specific performance, however, has granted a decree for refund of the part consideration of ₹.10,00,000/- l with interest thereupon at the rate of 6% per annum from the date of the suit till its realization (paras 24 and 25, page 26).

5] Mr. Dhawas, learned counsel for the appellant, raises two grounds (i) that the learned appellate Court was not justified in granting refund since the same stood forfeited on account of default of the plaintiff in making payment of the part consideration of ₹. 4,00,000/- within the time agreed and (ii) since no relief for cancellation of the notice dated 12.11.2013 Exh.28 was made, the suit itself was not maintainable, placing reliance upon **I.S.Sikandar vrs. K. Subramani and ors, (2013) 15 SCC 27**, which has been referred in **Mohinder Kaur vrs. Sant Paul Singh, (2019) 9 SCC 358**. He further submits that presuming the plaintiff was entitled for refund, the Court was not justified in granting interest thereupon at the rate of 6% per annum.

6] Mrs. Sirpurkar, learned counsel for the respondent/plaintiff contends that the cancellation of the agreement by the notice dated 12.11.2013 Exh.28 cannot operate as a bar for a plea of refund of the part consideration received, as on account of absence of readiness and willingness the specific performance has already been refused. She further contends that since the transaction was of a commercial nature, the plaintiff was in fact entitled to greater amount of interest, however, 6% interest is the minimum which has been awarded, which cannot be faulted with.

7] The question of forfeiture has to be looked into on the basis of the terms of the agreement. A perusal of the agreement dated 27.3.2013 (pg.73) would indicate that there is no clause of forfeiture in the said agreement. The amount paid under the agreement was more than 50% of the total agreed consideration. In absence of any clause of forfeiture as contained in the agreement, the defendant by the notice dated 12.11.2013 Exh.28 could not have unilaterally made forfeiture as the condition of the agreement. Even otherwise, it would amount to an unjust enrichment of the plaintiff in the aforesaid facts and circumstances. Though no relief was claimed in the suit regarding cancellation of the agreement by virtue of the notice dated 12.11.2013, that by itself would not make the suit not maintainable vis-a-vis the relief of refund of part consideration paid. **I. S. Sikandar** and **Mohinder Kaur** (supra) do not lay down a proposition that in case the notice terminating the agreement is not challenged, a suit for refund of consideration is not maintainable and therefore, in so far as the judgment of the learned appellate Court in so far as it grants refund of the part consideration received, would not be applicable.

8] Under Section 34(1) of the CPC, where the terms of the agreement do not contain any clause regarding the amount of interest to be levied and the transaction is not of a commercial nature, the Court would be entitled to levy 6% per annum as the rate of interest. In the instant case, it cannot be disputed that the transaction was commercial one, in view of which the proviso to section 34(1) of the CPC would be attracted in which case the plaintiff would have been entitled to an interest more than 6% per annum as indicated therein. However, since no counter appeal has been filed by the respondent/plaintiffs, the interest granted at the rate of 6% per annum cannot be interfered with. I therefore do not see any substantial question of law arising in the present second appeal. The appeal is therefore dismissed no costs.

JUDGE

Rvjalit

Digitally sign byRAJESH
VASANTRAO JALIT
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Signing Date:21.09.2022 17:36