In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 7605 of 2018 (O&M)

Date of Decision: 20.12.2022
Reserved on: 22.11.2022

Gurbachan Singh (Now Deceased) through his Legal Heir and Others

... Appellant(s)

Versus

Bodh Raj and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Sumeet Mahajan, Senior Advocate
with Mr. Saksham Mahajan and Mr. Mandeep Singh,
Advocates, for the petitioner(s).

Mr. V.K.Jindal, Senior Advocate
with Mr. Gopal Soni, Advocate
for the respondent No.1.

Anil Kshetarpal, J.

1. The defendants assail the correctness of the concurrent findings of fact arrived at by the Courts. While admitting the appeal on 29.01.2019, the following substantial questions of law were identified:-

"(i) Whether in the absence of any relief sought for cancellation of sale deed dated 27.05.2011 (Ex.P-6) executed subsequent to the agreement to sell but prior to filing of the present suit would render the suit for specific performance of contract non-maintainable?

(ii) Whether the averment made in the plaint in paragraph-7 that subsequent sale would be null and void and not

> *binding upon the plaintiff and is liable to be set aside, can be considered as a relief sought for cancellation of such sale deed despite the fact that no such relief has specifically been sought in the relief portion of the plaint?*
>
> *(iii) Whether there was sufficient evidence on record to show that the plaintiff was willing to perform his part of contract especially with respect to the balance amount still to be paid?"*

2. The correctness of the agreement to sell executed by late Sh.Gurbachan Singh in favour of Sh.Bodh Raj (the plaintiff) on 07.04.2011 with respect to the land measuring 3 kanals and 13½ marlas on receipt of ₹5,00,000/- as earnest money out of the total sale consideration of ₹40,45,468/- is not disputed between the parties. As per the agreement, the sale deed was to be executed on 31.05.2011 after receiving the balance sale consideration. The plaintiff (Sh.Bodh Raj) claims that on the issuance of a receipt by late Sh. Gurbachan Singh and his wife, he paid an additional amount of ₹15,00,000/- on 23.05.2011. The plaintiff on 20.05.2011 filed a suit for grant of decree of permanent injunction alleging that the defendant No.1 intends to transfer the said property. In fact, the defendant No.1 did transfer the property in favour of his two sons (defendant No.2 and 3) on 27.05.2011. The plaintiff attended the office of the Sub Registrar in order to prove that he was ready and willing to perform his part of the contract. He got his affidavit attested. Thereafter, he filed the suit for possession by way of specific performance of the agreement to sell on 14.06.2016. The

defendants, while contesting the suit, stated that the plaintiff could not arrange the funds and came to their home on 31.05.2011 and obtained thumb impressions of late Sh.Gurbachan Singh on certain papers.

3. On appreciation of the pleadings, the trial Court framed the issues and permitted the parties to lead evidence. Both the Courts below have concurrently found that the plaintiff was always ready and willing to perform his part of the agreement and it was late Sh.Gurbachan Singh who defaulted in performance of the contract.

4. Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book.

5. The learned counsel representing the appellants has filed their written submissions as well as additional written submissions and the plaintiff has also filed the written submissions.

6. The learned counsel representing the appellants contends that the suit filed by the plaintiff could not be decreed as the plaintiff failed to challenge the sale deed executed by late Sh.Gurbachan Singh in favour of his two sons on 27.05.2011. While elaborating, he submits that the plaintiff has been in knowledge of the sale deed executed by late Sh.Gurbachan Singh in favour of defendant No.2 and 3 but he never sought its annulment. In the alternative, the learned counsel contends that the plaintiff did not lead evidence to prove that he had sufficient resources to pay the balance sale consideration which was more than ₹ 20,00,000/-. He submits that from a perusal of the income-tax returns of the plaintiff, it is evident that the plaintiff had an income of ₹22,000/- per month and he did not had sufficient amount in his bank account at the relevant time. He also relies upon the

judgment passed in ***I.S.Sikander (Dead) by LRs and Others v. K.Subramani and Others (2013) 15 SCC 27***.

7. Per contra, the learned counsel representing the respondent (plaintiff) contends that there is no requirement of seeking annulment and the judgment passed in ***B. Vijaya Bharati vs P. Savitri and Others (2018) 11 SCC 761*** is not applicable in the present case. The learned counsel, while placing reliance on ***Durga Prasad And Another vs Deep Chand And Others 1954 AIR (Supreme Court) 75*** contends that the sale deed is not required to be challenged by the plaintiff. He submits that the plaintiff has led overwhelming evidence to prove that he was always ready and willing to perform his part of the contract.

8. In the considered view of this Court, the following substantial question of law arises in the present case:-

> "If the vendor, after execution of the agreement to sell, transfers the property in favour of his own children, then, whether it is mandatory for the plaintiff to seek the relief of annulment of such transfer deed while filing a suit for possession by way of specific performance of the agreement to sell?"

9. Before answering the aforesaid question, it becomes necessary to examine the relevant provisions of the Specific Relief Act, 1963 (hereinafter referred to as "the 1963 Act"). Chapter V of the 1963 Act contains Sections 31 to 33 which deal with the cancellation of instruments. Section 31 of the 1963 Act provides that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable. The Court, in its discretion, while

adjudging it to be void or voidable, is entitled to order its cancellation. Sub Section 2 of Section 31 of the 1963 Act provides that when the Court cancels the registered instrument under the Indian Registration Act, 1908, a copy of such decree shall be sent to the officer for making endorsement of cancellation. Further, Section 32 of the 1963 Act provides for partial cancellation of the instrument, whereas, Section 33 of the 1963 Act is based upon the principle of equity and enables the Court to order the party who is granted the relief of cancellation to restore any benefit received or pay compensation as justice may require. Section 31, 32 and 33 of the 1963 Act are extracted as under:-

> *"**31. When cancellation may be ordered**.—(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.*
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> *(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."*
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> ***32. What instruments may be partially cancelle**d.—Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part*

and allow it to stand for the residue.

33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable*.—(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.*

(2) Where a defendant successfully resists any suit on the ground—

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby."

10. Section 34 of the 1963 Act has been placed in Chapter VI which deals with declaratory decrees. The same is extracted as under:-

> *"**34. Discretion of court as to declaration of status or right**. —Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.*
>
> *Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*
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> *Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."*

11. On the careful reading of Section 34 of the 1963 Act, it is evident that the suit can be filed by any person entitled to any legal character or to any right as to any property against a person who is interested in denying such title.

12. The difference between a suit filed under Section 31 and 34 of the 1963 Act has been explained in ***Suhrid Singh alias Sardool Singh v. Randhir Singh and Others (2010) 12 SCC 112***. The Supreme Court, in the context of liability to pay *ad valorem* court fee has explained the difference in para 7, which is extracted as under:-

> *"7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant*

seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A las to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A. the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(e) of the Act."

13. In view of the aforesaid discussion, it is evident that the plaintiff was not required to seek cancellation or annulment or rescission of

the sale deed because he is not party to the said instrument.

14. Now, let us examine Section 34 of the 1963 Act. It provides that if a person is entitled to any legal character, or to any property, he may institute a suit for declaration. The caption of Section 34 of the 1963 Act also mentions about seeking declaration of any status or right.

15. Further, Section 5 of the 1963 Act provides for maintainability of a suit for possession of specific immovable property in accordance with the provisions of CPC. In that context, once the relief of possession has been sought, by way of seeking the relief of specific performance, the relief of declaration is implicit or inherent therein. The relief of possession is a superior right. One can be entitled to relief of possession only if he has a superior right than the defendants. In such circumstances, the relief of declaration stands included in the relief of possession.

16. Further, if a person or his predecessor is not a party to the documents or instrument, he is not required to seek annulment or cancellation thereof. He can merely contend that the aforesaid documents/instruments does not affect his rights in any manner

17. Moreover, in numerous judgments, the Supreme Court has held that the suit for possession of immovable property can be filed without a prayer for declaration of title where there is no serious cloud of doubt over the plaintiff's title. Reliance in this regard can be placed on the judgments rendered in ***Muddasani Venkata Narasaiah (DEAD) Through Legal Representatives Vs. Muddasani Sarojana (2016) 12 SCC 288***, ***Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma alias Nacharamma (2008) 15 SCC 150*** and ***Anathula Sudhakar Vs. P.Buchi Reddy (2008) 4 SCC 594***.

18. This aspect can be examined from yet another angle. As per Section 19 of the 1963 Act, the relief of specific performance of the contract can be enforced even against any third person claiming title which is arising from a subsequent contract. The only exception is that the relief of specific performance cannot be claimed against a transferee for value, who has paid the money in good faith, without notice of the original contract. Section 19 of the 1963 Act does not provide that a suit for declaration is required to be filed apart from the suit for specific performance or such relief of declaration is required to be sought along with the relief of specific performance. Section 19 of the 1963 Act is extracted as under:-

> *"**19. Relief against parties and persons claiming under them by subsequent title**.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—*
>
> *(a) either party thereto;*
>
> *(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;*
>
> *(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;*
>
> *(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership*

which arises out of the amalgamation.

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company.

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

19. It would be noted here that the various High Courts have consistently held that the plaintiff, in a suit for specific performance, is not required to challenge the sale deed in favour of the subsequent purchaser. Reliance in this regard can be placed on the judgment rendered in ***Dilip Bastimal Jain v. Baban Bhanudas Kamble AIR 2002 Bombay 279*** and 1987 (2) Andhra Pradesh Law Journal 92 and ***Rajinder Singh v. Sushil Kumar 2007 (5) RCR (Civil) 298: 2007(10) AIC 549***. Recently, the aforesaid issue has again been examined by the Division Bench of the Himachal Pradesh High Court in ***Rakesh Sharma and Others v. Bhushan Lal and Others (2022) SCConline HP 640***. After noticing the judgments of the Supreme Court in ***B. Vijaya Bharati's case*** *(supra)* and ***I.S.Sikander's case*** *(supra)*, the Division Bench held that no separate relief of declaration is required to be sought.

20. This issue can be examined from yet another perspective. In

India, the Courts have always been leaning in favour of deciding the rights of the parties instead of defeating meritorious claims on mere technicalities. The Courts have always been making sincere endeavours for granting the substantive relief while refusing to decline the relief on technical objections unless such objections are based on statutory law. On a careful reading of the judgment passed in ***B. Vijaya Bharati's case*** *(supra)*, it is evident that the Supreme Court, after noticing that the vendee had not filed the suit, even after a period of two years had elapsed after the repudiation of contract and particularly when the vendor had already sold the property in the meantime, declined to grant the relief of specific performance Thus, the Court observed that when once, the vendor had escaped from the office of the Sub Registrar on 13.03.1992 while refusing to execute the general power of attorney in favour of vendee's husband, then, the vendee got the knowledge of vendor's refusal to honour the agreement, however, he still did not take any immediate remedial measures. Hence, the Court, in the facts of that case, held that the plaintiff was never ready and willing to perform his part of the contract. The aforesaid judgment has been decided on the peculiar facts of the case and the observations made in para 17 thereof cannot, with highest respect, be taken as laying down the *ratio decidendi*. This Court has also carefully read the judgment passed in ***I.S.Sikander's case*** *(supra)*. In the aforesaid case, after the execution of the agreement to sell, the possession was delivered to the vendees. Thereafter, defendant No.1 to 4, through their counsel, issued a notice on 06.03.1985 calling upon the plaintiff to comply with his part of the contract by paying the balance sale consideration on or before 18.03.1985 failing which the legal action would follow. On

16.03.1985, the plaintiff, while replying, requested defednant No.1 and 4 to receive the balance sale consideration and execute the conveyance deed on 23.05.1985. The vendor by telegram dated 18.05.1985 declined to execute the sale deed on 21.05.1985 and by letter dated 28.03.1985 rescinded the contract. Thus, the aforesaid case was decided in the peculiar facts of its own case and with greatest respect, the aforesaid judgment does not as a *ratio decidendi* lay down that the relief of specific performance cannot be granted unless the relief of declaration with regard to subsequent sale deed has been sought in the suit.

21. For arguments sake, even if the argument of the learned counsel representing the appellant was to be accepted, it is evident from the reading of para 7 of the plaint that the plaintiff has, explicitly, already alleged that the sale deed is illegal, null, void, ultravires and is having no binding effect on the rights of the plaintiff and thus, is liable to be set aside. It is well settled that the plaint has to be read in its entirety. The mere absence of a specific prayer for setting aside the sale deed would not result in dismissal of the suit particularly when in para 7 of the plaint, the necessary relief has clearly been sought.

22. The next argument of the learned counsel representing the appellants is with reference to the readiness and willingness of the plaintiff. The learned counsel contends that the plaintiff was not having sufficient amount to purchase the suit land. It would be noted here that the plaintiff had already paid nearly 50% of the amount to defendant No.1. The plaintiff has produced the sale deeds (Ex.P35 to Ex.P40) to prove that he had sufficient resources/assets to pay the balance sale consideration. Moreover, when the

appellant appeared in evidence, he admitted that Sh.Bodh Raj (plaintiff) visited the office of the Registrar and got his presence marked on 31.05.2011 and he was carrying the remaining sale consideration and expenses for execution of the sale deed along with him. It has also come in evidence that the plaintiff is a businessman who has the wherewithal to pay the amount. Moreover, both the Courts below have already appreciated the evidence in this regard and the attention of this Court has not been drawn to any material error or perversity in the appreciation of evidence.

23. Keeping in view the aforesaid discussion, there is no substance in the arguments of the learned counsel representing the appellants particularly when the suit was filed within a period of 14 days from the appointed date to execute the sale deed. Consequently, all the three questions of law, on which the appeal was admitted, stand sufficiently answered. Hence, the appeal is dismissed.

24. The miscellaneous application(s) pending, if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

December 20, 2022
"DK"

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