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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 3858 of 2023 (O&M)
Date of Decision: 31.07.2024

Ashok Kumar and another

.... Appellants

Versus

Deen Dayal

.... Respondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Sanjay Verma, Advocate
for the appellants-defendant Nos. 1 & 2.

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HARKESH MANUJA, J. (ORAL)

CM-13786-C-2023

Prayer in the present application moved on behalf of the appellants-defendant Nos. 1 & 2, is for condonation of delay of 92 days in re-filing the present appeal.

For the reasons mentioned in the application, which is duly supported by an affidavit of appellant No. 1 (Ashok Kumar), sufficient cause has been made out to condone the delay in re-filing the appeal; thus, the same is **allowed** and delay of 92 days in re-filing the appeal is condoned.

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Application is **allowed**, as prayed for, subject to all just exceptions. Exemption from filing the certified copies of impugned judgments and decrees dated 11.01.2019 & 31.05.2023 as well as grounds of appeal and copies of Annexures A-1 to A-6, is granted.

MAIN APPEAL

By way of present appeal, challenge has been laid to the judgment and decree dated 31.05.2023 passed by the Court of Additional District Judge, Gurugram **(hereinafter to be referred as "First Appellate Court"**), whereby an appeal preferred by appellants-defendant Nos. 1 & 2 against the judgment and decree dated 11.01.2019 passed by the Court of Additional Civil Judge (Senior Division), Pataudi, Gurugram **(hereinafter to be referred as "trial Court"**), partially decreeing the suit for possession by way of specific performance, filed at the instance of respondent-plaintiff to the extent of directing the defendants to refund the earnest money alongwith interest @ 6% per annum, was dismissed, thereby affirming the judgment and decree passed by the trial Court in favour of respondent-plaintiff.

[2] Briefly stating, based on an agreement to sell dated 30.07.2009, the respondent-plaintiff (Deen Dayal) filed a suit for possession by way of specific performance alongwith permanent injunction *qua* plot measuring 605 sq. yards. situated within the revenue estate of Village Sultan, Tehsil Farrukh Nagar, District Gurugram. It was pleaded that the suit property was owned by appellants-defendant Nos. 1 & 2 **(hereinafter to be referred as "the appellants")**, who entered into the aforementioned agreement to sell with respondent-plaintiff for a total sale consideration of Rs. 12 lacs, with 10.09.2010 being the target date and a sum of Rs. 10 lacs was received on account of earnest money. It was further pleaded that later, the respondent-plaintiff came to know about the sale deed dated 04.06.2009 executed by the appellants in favour of defendant No.3 (Ravinder Yadav) *qua* the same property followed by Mutation No. 5635, which compelled him to file the suit in hand.

[3] Upon notice, the appellants appeared and filed their written statement, disputing the factum of alleged agreement to sell executed by them in favour of respondent-plaintiff. It was pleaded that the agreement relied upon by the respondent-plaintiff was an act of fabrication and forgery on his part in collusion with the husband of his sister, namely, Joginder Singh, from whom a sum of Rs. 2 lacs was obtained as friendly loan by the appellants and in discharge thereof, five cheques worth Rs. 2.5 lacs were issued in his favour alongwith certain blank signed papers / stamp papers, which were misused for the purpose of creating the alleged agreement and thus, the suit was liable to be dismissed. It was further pleaded that the respondent-plaintiff never paid any earnest money / part of sale consideration to the appellants under the agreement in question and thus, the sale deed dated 04.06.2009 executed by the appellants in favour of defendant No. 3 was legal and valid.

[4] During pendency of the suit, the same was withdrawn by respondent-plaintiff against defendant No.3 i.e the purchaser of the suit property in terms of sale deed dated 04.06.2009. On the basis of the pleadings of the parties, the trial Court, vide order dated 23.12.2015 framed the following issues:-

> *" 1. Whether the plaintiff and the defendants entered into agreement to sell dated 30.7.2009 ? OPP*
>
> *2. If issue no. 1 is proved, whether the plaintiff is ready and willing to perform his part of agreement ? OPP*
>
> *3. If issues no. 1 and 2 are proved, whether the plaintiff is entitled to decree for possession by way of specific*

performance of the agreement to sell dated 30.7.2009 as prayed for? OPP

4. *Whether the plaintiff is entitled to decree for permanent injunction as prayed for ? OPP*
5. *Whether the present suit of plaintiff is not maintainable ? OPD*
6. *Whether the plaintiff has no locus standi and cause of action to file the present suit ? OPD*
7. *Whether the suit of the plaintiff is time barred ? OPD*
8. *Relief. "*

[5] The trial Court vide judgment and decree dated 11.01.2019 though declined the relief of possession by way of specific performance in favour of respondent-plaintiff, however, granted him a decree for refund of Rs.10 lacs alongwith interest @ 6% per annum from the date of agreement to sell dated 30.07.2009 till its realization in his favour.

[6] Aggrieved thereof, the appellants filed first appeal, which came to be dismissed vide judgment and decree dated 31.05.2023 passed by the First Appellate Court. Hence, the present appeal.

[7] Impugning the judgments and decrees (supra) passed by the Courts below, learned counsel for the appellants submits that the fraud played upon the appellants by respondent-plaintiff in collusion with the husband of his sister, namely, Joginder Singh, is writ large on the face of it, as on earlier occasion, prior to the filing of the suit in hand, based on an agreement to sell dated 30.07.2009, legal notice dated 31.08.2010 (Ex. D-5) was served upon the appellants by the respondent-plaintiff, requesting them for getting the sale deed executed in his favour on the basis of agreement to sell dated 10.04.2009 pertaining to the same property. He further submits that the said notice dated 31.08.2010 was duly replied on 13.09.2010

(Ex.D9) by the appellants through their counsel. He also points out that as per the agreement dated 10.04.2009, as pleaded and relied upon by the respondent-plaintiff in his legal notice dated 31.08.2010, the sale consideration of the plot in dispute was Rs. 10,10,000/- against which a sum of Rs. 7,10,000/- was paid as earnest money by him in favour of the appellants; whereas as per the agreement dated 30.07.2009, which forms basis of the suit in hand, the total sale consideration was Rs.12 lacs out of which Rs.10 lacs was paid as earnest money. In view thereof, learned counsel for the appellants submits that once, there was already an agreement to sell dated 10.04.2009 in favour of respondent-plaintiff *qua* the property in question, as set up by him in the legal notice dated 31.08.2010, there was no question of entering into any subsequent agreement dated 30.07.2009 as pleaded in the suit in hand and thus, the fraud played upon by the respondent-plaintiff was established on record.

Learned counsel for the appellants further submits that the respondent-plaintiff filed a criminal complaint bearing ***COMI No.46 of 2015***, titled ***"Deen Dayal Versus Ashok Kumar and another"*** against the appellants alleging fraud played by them upon him, having entered into an agreement to sell dated 30.07.2009 post executing the sale deed dated 04.06.2009 in favour of defendant No. 3 regarding the same property; whereas in the said complaint, the appellants were acquitted by the Court of Judicial Magistrate First Class, Pataudi, Gurugram, vide judgment dated 01.10.2022 holding that the respondent-complainant (plaintiff) failed to prove beyond reasonable doubt about the execution of agreement to sell in his favour, besides appellants having received Rs.10 lacs from him; thus learned counsel contends, that in such circumstances, the suit filed at the instance of respondent-plaintiff was liable to be dismissed in *toto*.

No other argument has been addressed on behalf of the appellants.

[8] After hearing learned counsel for the appellants and having gone through the paper-book / records, I am unable to find substance in the submissions made on behalf of the appellants-defendant Nos. 1 & 2.

[9] A perusal of the written statement filed on behalf of the appellants before the trial Court shows that no such plea about issuance of any notice dated 31.08.2010 by the respondent-plaintiff mentioning about any prior agreement to sell dated 10.04.2009 by the appellants in his favour or issuance of any reply dated 13.09.2010 to the same was ever pleaded therein by the appellants. In the absence thereof, the documentary evidence produced and proved in the shape of legal notice dated 31.08.2010 (Ex. D-5) and its reply dated 13.09.2010 (Ex. D-9) were rightly ignored and not considered by the Courts below, the said evidence being beyond pleadings.

[9.1] Furthermore, a perusal of cross-examination of PW-1 / plaintiff shows that legal notice dated 31.08.2010 (Ex. D-5) which was being relied upon by the appellants or even its reply dated 13.09.2010 (Ex. D-9) were never put to the plaintiff in his cross-examination. In such circumstances, the respondent-plaintiff was deprived off his valuable right of responding to and about rendering explanation, if any, available regarding the aforementioned two documents at all the stages of trial and thus, no illegality or perversity can be found for the same being not relied upon by the Courts below while passing the impugned judgment and decree (supra). Moreover, a perusal of the judgment passed by the First Appellate Court shows that no such agreement was raised before it for consideration.

[10] In the humble opinion of this Court, no merit can even be found in the submission made on behalf of the appellants wherein reliance has been placed upon a decision dated 01.10.2022 passed in Criminal Complaint No.46 of 2015 (supra), whereby the appellants were acquitted by the Court, while holding that the respondent-complainant (plaintiff) could not prove beyond reasonable doubt that any fraud played upon him by the appellants about the execution of agreement to sell in question i.e. 30.07.2009, besides having received Rs.10 lacs as earnest money.

In this regard, it may be pointed out here that principle of evaluation of evidence in civil and criminal Courts are totally distinct. The consideration of evidence in the civil proceedings is based upon preponderance of probabilities, whereas in the criminal trial, the guilt has to be proved beyond reasonable doubt and thus, any such finding recorded by the Criminal Court exonerating the appellants of fraud not being proved beyond reasonable doubt by the respondent-plaintiff, cannot be held to be binding and conclusive on the Civil Court and thus, the appellants cannot draw any benefit of the decision dated 01.10.2022 (supra) passed by learned Judicial Magistrate First Class, Pataudi, Gurugram. More than that, before the Civil Court, the respondent-plaintiff was merely to prove the execution of agreement to sell dated 30.07.2009 in his favour by appellants against receipt of earnest money of Rs. 10 lacs by them and was not to prove the plea of fraud played upon him, which he failed to prove beyond reasonable doubt before the Criminal Court and thus, the judgment of Criminal Court was having no relevance in the matter.

[11] Furthermore, though the defence set up by the appellants in their written statement regarding the execution of agreement to sell dated 30.07.2009 was that the same was a result of fraud and fabrication on the part of respondent-plaintiff in collusion with the husband of his sister, namely, Joginder Singh, however, admittedly no complaint was ever given by the appellants to the police authorities about such alleged fraud played upon them.

Above all, the valid execution of agreement to sell dated 30.07.2009 (Ex. P-1) as well as payment of Rs. 10 lacs as the earnest money was duly proved on record by the respondent-plaintiff. In this regard, the respondent-plaintiff himself appeared as PW-1 and examined two marginal witnesses to the said agreement as PW-2 (Narender Kumar) and PW-4 (Partap Singh, Lambardar); whereas even the Stamp Vendor-Sanjeev Kumar, appeared as PW-3 and proved the purchase of stamp paper on 30.07.2007 at Sr. No. 7597 in his register. Even the financial capacity of the respondent-plaintiff towards payment of earnest money was established through the bank entries proved as Ex. P5 regarding withdrawal of Rs. 7 lacs from the accounts of his maternal uncle.

Equally important, even the readiness and willingness on the part of respondent-plaintiff to perform his part of agreement to sell in question dated 30.07.2009 was completely established on records through the legal notice dated 31.08.2010, calling upon appellants for execution of sale deed on the target date of 10.09.2010 was proved on record as Ex. P-4 besides proving his affidavit dated 10.09.2010 (Ex. P-3) reflecting his appearance in the office of concerned Sub-Registrar. In such circumstances, the grant of decree in favour of respondent-plaintiff for refund of earnest money alongwith interest @ 6% per annum from the date of agreement till the date of realization was fully justified, especially when the appellants failed to establish their plea of fraud against respondent-plaintiff.

[12] In view of the discussion made hereinabove, finding no illegality or perversity with the concurrent findings of the fact recorded by the Courts below, the present appeal being devoid of merits, the same is hereby **dismissed**.

[13] Pending miscellaneous application(s), if any, shall also stand disposed off.

July 31, 2024 **(HARKESH MANUJA)**
'dk kamra' **JUDGE**

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