IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-3778-2015 (O&M)
Reserved on: 06.11.2023
Date of decision: 01.01.2024

BALBIR SINGH **..Appellant**

Versus

M/S JTPL TOWNSHIPS PVT. LTD. **..Respondent**

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Ashish Aggarwal, Sr. Advocate
with Ms. Aashna Aggarwal, Advocate
& Mr. Vishal Pundir, Advocate
for the appellant.

Mr. R.S. Rai, Sr. Advocate
with Mr. Divanshu Jain, Advocate
for respondent.

ANIL KSHETARPAL, J(Oral)

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh, is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in ***Pankajakshi (Dead) through LRs Vs. Chandrika and others, (2016) 6 SCC 157***.

2. In this regular second appeal, the defendant assails the correctness of judgment passed by the First Appellate Court, which, in turn has reversed the judgment and decree passed by the trial Court.

3. On 12.08.2015, while admitting the appeal for regular hearing, the following order was passed:-

> *"Admit.*
> *The following substantial questions of law arise for consideration in the second appeal:-*
> *(i) Whether the Appellate Court was not in error in failing to properly appreciate a correct assessment*

of the trial Court that the plaintiff had not been ready and willing to perform his part of the contract, an incident which was mandated to be proved, especially when the plaintiff had adduced no proof for the fact that he had requisite fund of over `2 crores on the day on 15.05.2008 when the date was set for execution of the sale deed?

(ii) Whether the Appellate Court had not been in error in failing to note that the adequacy of consideration was not the issue but the plaintiff's inability to pay balance of consideration, as his own conduct evidenced that cheques issued by him earlier had bounced and the dates for performance had been extended on two occasions only on account of the inability of the plaintiff to garner enough resources?

I notice that the defendant has received `63,09,000/- under the agreement on various dates and considering further that this amount represents about 1/5th of the total consideration, it will be too high a sum to be found liable to be forfeited. The appellant is directed to deposit back ` 40 lacs within a period of 8 weeks before the trial Court and the appellant is at liberty to apply to the trial Court for suitable deposit of the amount in any bank. This direction is only to keep the scales even that the defendant-appellant does not get the benefit of retention of large slice of consideration even when he obtains an order of stay and puts an effective spoke in the enforcement of the decree. The observation relating to the amount being not liable for forfeiture is only for the purpose of giving this direction. The manner of how the amount deposited now and rest of the amount he is allowed to be retained will abide by the final outcome and directions in the second appeal. The respondent is at liberty to approach this Court for any modification of the order relating to the deposit. If the amount is not deposited within time as stipulated, stay granted shall stand vacated."

4. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

5. There is no dispute between the parties with respect to the execution of the agreement to sell on 03.02.2007, on receipt of Rs.48,09,000/- as earnest money out of total sale consideration of Rs.2,95,35,625/-, with respect to 54 kanal and 19 marlas of land at the rate

of 43,00,000/- per acre. The sale was to be executed upto 20.10.2007. On 19.10.2007, the date of execution of the sale was extended to 10.11.2007, which was further extended to 20.11.2017, vide agreement dated 10.11.2007. Thereafter, once again the period was extended to 30.11.2007 and finally it was extended upto 15.05.2008. It is the case of the defendant that these extensions were sought by the plaintiff due to the unavailability of sufficient funds. The various extentions for execution of the sale deed as per the agreement to sell are also not disputed by the parties. It is also not in dispute that the following two cheques were handed over to the defendant by the plaintiff in order to make additional payment:-

i. Cheque No.940183 (dated 20.12.2007) Rs.15,00,000/-, was dishonoured twice on account of insufficient funds but it was ultimately encashed.

ii. Cheque No.940184 (dated 15.01.2008), Rs.15,00,000/- was dishonoured on account of insufficient funds.

6. The plaintiff filed the suit on 07.06.2010, while claiming that it (company) was always ready and willing to perform its part of the contract and on 15.08.2008, the representative of the plaintiff-company remained present in the office of the Sub-Registrar along with two cheques drawn on Vijay Bank. It is asserted that on 01.12.2010, a notice was sent by the plaintiff to the defendant to perform his part of the contract. The defendant was time and again called upon to obtain a no objection certificate, however, the defendant did not perform his part of the contract. After giving numerous opportunities to the defendant to perform his part of contract, the plaintiff filed the suit on 07.06.2010. The defendant while contesting the suit

specifically asserted that the plaintiff-company had insufficient funds and the defendant went to the office of the Sub-Registrar on 20.11.2007, as well as on 15.08.2008.

7. On appreciation of evidence, the learned trial Court dismissed the suit filed by the plaintiff, whereas, the First Appellate Court has reversed the judgment and decree passed by the trial Court, resulting in grant of decree for possession by way of specific performance of the agreement to sell. As already noticed on 12.08.2015, the regular second appeal was admitted for regular hearing.

8. This Bench has heard the learned Senior counsels representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record.

9. Upon a thorough examination of the judgment passed by the First Appellate Court, the following reasons become apparent:-

> i. Affidavit (Ex.P-2) proves that the representative of the plaintiff-Company remained present in the office of the Sub-Registrar and he came along with the balance sale consideration and money to defray the expenses for execution and registration of the sale deed.
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> ii. The delay in serving the notice to the defendant by the plaintiff and filing the suit would not affect the plaintiff's case particularly when the suit was filed within the prescribed period of limitation.

iii. The defendant has failed to prove that he had obtained a non-encumbrance certificate from concerned authority before the execution and registration of the sale deed.

iv. As per the terms of the agreement to sell, the defendant had to produce all the necessary documents as per the direction of the Government of Haryana but he failed to procure those documents.

v. PW-1 Sh. Jai Singh has stated that he came along with cheque No.413711, dated 15.05.2008, drawn in Vijaya Bank, Delhi Cantt., in favour of Sh. Balbir Singh for Rs.2,47,26,925/- with another blank cheque No.413710 drawn on the aforesaid bank to withdraw cash to meet out the stamp, registration and other expenses.

vi. Subsequently, the cheque of Rs.15,00,000/- was encashed and therefore, the readiness and willingness on the part of the plaintiff is proved.

10. On the one hand, the learned counsel representing the appellant contends that as per the statements of account ExP-11 to Ex.P-14, it becomes evident that the total amount available with the plaintiff-Company in the various bank accounts was not more than Rs.4,00,000/-, whereas, the balance sale consideration to be paid to the appellant was approximately Rs.2,32,76,166/-. While referring to the agreement to sell (Ex.P-4), the learned Senior counsel contends that there was no stipulation that the defendant was required to obtain a no objection and non-encumbrance certificate. He submits that defendant No.2, the Director of the Company,

has admitted that the defendant was not required to obtain any no objection certificate.

11. On the other hand, the learned Senior counsel representing the respondent submits that a finding of fact has been arrived at by the First Appellate Court, which should not be interfered with. He submits that from the careful perusal of Ex.P-15 to Ex.P-18, it is evident that the plaintiff-Company had Rs.2,98,29,137/- in its various accounts. He submits that the aforesaid accounts are auto sweep accounts and the cheque would have been encashed.

12. On re-evaluation of the evidence produced on file, it becomes evident that it was the plaintiff-Company, that extended the period on various occasions for performing it's part under the contract. PW-2 Sh. Sanjay Dhingra, Director of the plaintiff-Company admitted that the defendant (appellant) was not required to apply and get any no objection certificate. The property of defendant was also not the subject matter of any charge. Thus, there was no difficulty in the execution of the sale deed.

13. On the other hand, it is evident that apart from the payment of the earnest money, the plaintiff-Company issued two cheques namely Cheque No.940183 and 940184 for Rs.15,00,000/- each. Cheque No.940183, dated 20.12.2007, was dishonoured twice before it was encashed and on both the occasions, it was dishonoured on account of insufficient funds in the account. Cheque No.940184, dated 15.01.2008, was dishonoured vide return memo Ex.D-4, with the remarks 'Insufficient Funds'. Moreover, the appellant has not examined any bank official to prove that the plaintiff-Company had wherewithal to pay Rs.2,32,76,166/- apart

from the payment of stamp duty and registration charges on 15.08.2008. The plaintiff has produced the details of as many as four different accounts to prove that the total amount available in four accounts (Ex.P-11 to Ex.P-14) was approximately Rs.3,50,000/-. The plaintiff did not examine any bank official, however, the defendant summoned the bank official along with the record of bank accounts of plaintiff-Company. Sh. Vinay Kumar Jain, Assistant Manager, Vijaya Bank, appeared in the Court as DW-3. During cross-examination, the plaintiff proved Ex.P-11 to Ex.P-14. Along with the aforesaid documents, the plaintiff also tried to prove that in the accounts Ex.P-15 to Ex.P-18, there was sufficient balance to honour the agreement to sell. However, it may be noticed here that the bank accounts Ex.P-15 to Ex.P-18 are 'FDR accounts'. A perusal of statement of accounts prove that account No.2092 and 2093 are 'cash credit limit accounts'. It was not stated by the bank official that the aforesaid amount was available for withdrawal through cheque. Although, the learned Senior counsel representing the respondent has tried to submit that the aforesaid accounts use the option of auto sweep facility, however, the Bank Manager made no statement to that effect.

14. Moreover, it is evident that PW-1 Sh. Jai Singh, the representative of plaintiff-Company has stated that on 15.05.2008, he had brought two cheques, one for making payment to the defendant, whereas, other to defray charges for the stamp duty and registration, however, both the cheques have not been produced. The plaintiff-Company has failed to explain the reasons for not producing the aforesaid cheques. Additionally, as per the agreement to sell (extended), the sale deed was to be executed on or

before 15.05.2008, whereas, the plaintiff for the first time issued notice to the defendant on 01.02.2010 i.e. after a period of 19 and ½ (half) months. No reason whatsoever, have been proved, that justifies the delay. Apart from the aforesaid fact, while filing the plaint, the plaintiff has alleged that defendant was asked to obtain a no-objection certificate, which he did not obtain. A perusal of the agreement to sell clearly proves that there was no stipulation regarding the requirement of a no objection certificate, hence it's non-production would not affect the terms of the agreement to sell. PW-2 Sh. Sanjay Dhingra has admitted in the cross-examination that no objection certificate was not required.

15. It is further evident that the plaintiff has failed to prove the arrangements made in order to pay the amount or transfer of balance payable amount to the vendor. It has also failed to prove the steps taken by the representative of the plaintiff-Company to purchase the requisite stamp paper for paying the stamp duty, which costs minimum Rs.20,00,000/-. For issuance of stamp papers, the amount was required to be deposited in advance in the government treasury and bearer cheque, if any, will not be sufficient to purchase the stamp papers. It is not the case of the plaintiff that the stamp paper could have been purchased from the Government treasury by tendering a bearer cheque.

16. This Bench now proceeds to analyze the reasons recorded by the First Appellate Court while reversing the judgment passed by the trial Court.

17. The first reason recorded by the First Appellate Court is erroneous, as the presence of the representative of the plaintiff-company at

the office of Sub-Registrar in no way guarantees the execution or registration of sale deed as the funds in the accounts of plaintiff-company were insufficient. It is also evident that the First Appellate Court has relied upon a judgment, which observes that a plea of inadequate consideration, shall not be made the reason for declining the specific performance of the contract. It is a well settled principle that the plaintiff is required to proved that it was always ready and willing to perform its part of contract. In order to prove the readiness and willingness, the plaintiff was required to prove that steps taken by the plaintiff-company to call the defendant to execute the sale deed after 15.05.2008, the stipulated date of the execution of agreement to sell. The company was completely silent for nearly 19 and ½ (half) months and this silence proves that it was not ready and willing to get the sale deed executed on payment of balance sale consideration. Hence, the second reason given by the First Appellate Court is also erroneous.

18. The third reason of the First Appellate Court is erroneous as there is no stipulation in the agreement to sell regarding the requirement of a non-encumbrance certificate issued by a competent authority.

19. The fourth reason assigned by the First Appellate Court is also insubstantial because in the agreement to sell it was stipulated that the defendant shall produce all the documents as required by State of Haryana, but it was just a passing reference not a mandatory requirement. However, no evidence has been led by the plaintiff to prove the requirement of the certain documents for executing and registering the sale deed. Moreover, PW-2 Sh. Sanjay Dhingra admits that the defendant was not required to take any step. With respect to the fifth reason given by the First Appellate Court,

the matter has already been examined by this Court in para 15, which does not require reiteration.

20. The sixth reason assigned by the First Appellate Court is also fallacious because cheque No.940183 was later on encashed, however, it proves that the plaintiff did not have wherewithal to pay the balance amount.

21. Keeping in view the aforesaid discussion, this Court is left with no choice but to accept the appeal filed by the defendant. However, the amount of Rs.15,00,000/-, which was additionally paid to the defendant (appellant) was not part of the earnest money. Hence, it cannot be permitted to be forfeited.

22. The appellant has also filed an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908, in order to produce the uncertified copy of the plaint filed in a civil suit titled as "Hukam Singh Vs. JMT Cititech Pvt. Ltd." and the decree passed in the aforesaid suit and subsequent orders. In the considered view of the Court, the aforesaid company is stated to be a sister concern of the respondent-Company. The respondents have filed their reply to the aforesaid application.

23. After having considered the contents of the application, this Court is of the view that JMT Cititech is an independent company. Hence, the financial constraint of the aforesaid company would have no bearing on the present case. Hence, the application filed by the appellants under Order XLI Rule 27 of the Code of Civil Procedure, 1908, is dismissed.

24. The learned counsel representing the parties have also filed their respective synopsis along with the compilation of judgments in support of their plea. The learned counsel representing the respondent relies upon the

judgment passed in ***Basant Ram (Died) and others Vs. Sukhbir Singh and others, 2023 (1) RCR (Civil) 527***. In the peculiar facts of the aforesaid case, the Court held that the plaintiff is not required to tender the amount in cash so as to prove his readiness and willingness. The aforesaid case was decided by the Court in the peculiar facts of that case and the judgment does not apply to the facts of the present case.

25. Similarly, in ***Gaddipati Divija and another Vs. Pathuri Samrajyam and others, 2023(3) RCR (Civil) 19***, the Court examined the question of plaintiffs' entitlement to specific performance of the agreement to sell in the context of the question "whether the time is of the essence in the agreement to sell or not?" While dismissing the appeal, the Supreme Court held that the plaintiff led sufficient evidence to prove his readiness and willingness and the plaintiff was not required to flash cash in his pocket to prove the necessary wherewithal. In fact, in this judgment the Supreme Court relied upon the observations made by privy counsel in ***Bank of India Vs. Jamsethji A.H. Chinoy and Company (1949) LR 77 IA 76***. This judgment is also not applicable to facts of the present case as the plaintiffs in this case failed to lead sufficient evidence to prove their readiness and willingness to perform their part of the contract.

26. Similarly, in ***Gomathinayagam Pillai and others Vs. Palaniswami Nadar, 1967 AIR (Supreme Court) 868***, the Supreme Court again relied upon the aforesaid privy counsel judgment. In this case also, the Court examined the question "whether time is an essence of the contract?", which again is not the point in issue in the case at hand.

27. Similarly, in ***Bavyanath represented by Power of Attorney Holder Vs. K.V. Balan (Dead) through LRs, 2020 (11) SC 790***, the Court held that the plaintiff must establish, if it is contested that he was ready and willing from the date of contract to perform his obligations. However, there was no requirement to prove the availability of immediate cash.

28. Similarly, in ***Sughar Singh Vs. Hari Singh (Dead) Through LRs and others, 2021(4) RCR (Civil) 632***, the Court examined the exercise of discretion in terms of Section 20 of the Specific Relief Act, 1963.

29. The aforesaid judgments relied upon by the learned Senior counsel representing the respondent do not help the respondent's case. In this case, they have miserably failed to prove that they were having the wherewithal to pay the balance amount to the plaintiff.

30. While admitting the appeal, the appellant was directed to deposit back Rs.40,00,000/- before the trial Court, however, the amount of earnest money of Rs.48,09,000/- out of total sale consideration of Rs.2,95,35,625/- comes to 16.28%, which is not excessive. Moreover, the respondent is a developer, whereas, the appellant is a farmer. In these circumstances, in terms of the agreement to sell, the entire amount of earnest money is liable to be forfeited. However, the appellant is liable to refund the additional amount that was not a part of the earnest money with interest @ 9% per annum on the amount of Rs.15,00,000/- i.e. the additional amount, from the date of filing of the suit i.e. 07.06.2010, till its payment.

31. Consequently, the defendant's appeal is allowed. The plaintiff's suit stand partly decreed while directing defendant No.2 to refund the amount of Rs.15,00,000/- along with the interest @ 9% per annum from the

date of payment i.e. January, 2015 till its payment. Remaining amount, if any, be refunded to the defendant.

32. With the aforesaid modification, the appeal is allowed.

33. All the pending miscellaneous applications, if any, are also disposed of.

January 01st, 2024 **(ANIL KSHETARPAL)**
Ay **JUDGE**

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