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Court : Punjab and Haryana

Decided On : Dec-01-2015

Judge : Raj Mohan Singh

Appeal No. : RSA No.565 of 2015

Appellant : Dharmender and Another

Respondent : Ravinder Singh

Judgement :

Raj Mohan Singh, J.

1. Defendants are in second appeal against the judgment and decree dated 28.10.2014 passed by Additional District Judge, Jhajjar vide which appeal of the plaintiff has been decreed in to to thereby entitling him for a decree of specific performance of agreement to sell dated 08.02.2006 and the judgment and decree dated 29.08.2011 passed by the trial Court to the extent of allowing recovery of L 6 lacs was modified to that extent.

2. The lower Appellate Court also directed the defendants to execute the sale deed by appearing before the Sub-Registrar, Bahadurgarh on or before 28.02.2015 on receiving balance sale consideration, failing which the plaintiff was held to get the sale deed executed by the process of the Court.

3. Plaintiff filed suit for possession by way of specific performance of contract in respect of suit land. Out of total land share of defendants came out to be 37 Kanals 11 Marlas. Defendants purchased the land vide registered sale deed dated 16.09.2003 and 08.11.2004 and mutations were also sanctioned in their favour. Defendants were willing to sell the land in question and hence they executed agreement to sell in favour of plaintiff on 08.02.2006 @ L 6 lacs per acre and also received L 3 lacs as earnest amount. Target date for registration of sale deed was fixed as 08.08.2006.

4. Plaintiff alleged that the defendants failed to fulfil their part of obligation as they failed to appear before the Sub-Registrar on the date fixed and even thereafter they were not ready and willing to perform their part of obligation. Plaintiff got his presence marked before the Sub-Registrar on the target date. Even a legal notice dated 25.10.2006 was sent, but the defendants did not turn up on 03.11.2006, the date fixed by way of legal notice. The suit came to filed with this background.

5. Defendants contested the suit by alleging that they were not competent to sell the land as the same was purchased by Hindu Undivided Family in their names from the common income of the HUF. Satbir Singh, Parmod and Harish were the coparceners whose consent was required for alienating the suit land.

6. Besides taking other grounds, it has been claimed that the plaintiff effected major changes and variations by way of cuttings and overlapping of lines in the agreement to sell without consent of the defendants and, therefore, agreement has been claimed to be unexecutable. Plaintiff was not ready and willing to perform his part of contract. Defendants also denied the allegations of the plaintiff on merits. Defendants also pleaded that they are owners of 2/5th share only and remaining 3/5th share is owned and possessed by Satbir Singh, Parmod and Harish.

7. Defendants further claimed that they had agreed to sell the suit land @ L 18 lacs per acre subject to the condition that plaintiff shall pay 10% of the cost of the land as advance to the defendants and agreed to execute the sale deed on or before 08.08.2006 on receiving the balance sale consideration. It has been denied that rate was fixed @ L 6 lacs per acre or the defendants had received L 3 lacs as

earnest amount.

8. Defendants further alleged that the rate of the land was approximately @ L 20 lacs per acre at the relevant time and they could not have sold this land on such low price as claimed by the plaintiff. Receiving of earnest money has been denied. Material alterations in the agreement to sell have been pleaded to make the agreement as a farce.

9. On the basis of the pleadings of the parties following issues were framed by the trial Court:-

"1. Whether defendants are owners in possession of 751/978 share in the suit land mentioned in para No.1 of the plaint? OPP

2. Whether on 8.2.2006 defendants executed an agreement to sell in respect of the suit land @ L 6 lacs per acre and also received a sum of L 3 lacs in cash as earnest money? OPD

3. Whether the plaintiff is entitled to the decree for specific performance of agreement dated 8.2.2006? OPD

4. Whether the plaintiff is entitled to the decree for permanent injunction as prayed for? OPD

5. Whether the plaintiff is entitled to the decree for vacant possession in the suit land? OPD

6. Whether the plaintiff has suppressed the material facts and has not come to the court with clean hands? OPD

7. Whether the plaintiff has not disclosed any genuine cause of action in favour of plaintiff and against the defendants/OPD.

8. Whether the plaint is bad for mis-joinder and non-joinder of necessary parties? OPD

9. Relief."

10. Vide order dated 29.08.2011, issues No.2, 3, 4 and 5 were re-framed in the following manner:-

"2. Whether on 8.2.2006 defendants executed an agreement to sell in respect of the suit land @ L 6 lacs per acre and also received a sum of L 3 lacs in cash as earnest money? OPP

3. Whether the plaintiff is entitled to the decree for specific performance of agreement dated 8.2.2006? OPP

4. Whether the plaintiff is entitled to the decree for permanent injunction as prayed for? OPP

5. Whether the plaintiff is entitled to the decree for vacant possession in the suit land? OPP"

11. Both the parties led their respective evidence to prove their case on the aforesaid issues.

12. Trial Court decreed the suit on the basis of argument of the defendants that they had not received the earnest money of L 3 lacs, but yet defendants have right to protect their land by all legitimate means and, therefore, they showed their willingness to pay L 6 lacs being double of the alleged earnest money in consonance with the recital of the agreement to sell. Trial Court decreed the suit to the extent of refunding the amount of L 6 lacs to the plaintiff within a period of two months from the date of passing of judgment and decree dated 29.08.2011.

13. Feeling aggrieved, plaintiff ventured to file appeal before the lower Appellate Court which was allowed by the lower Appellate Court in to to thereby directing the defendants to execute the sale deed within stipulated period.

14. Following questions of law have been formulated in para No.6 of the grounds of appeal:-

"(I) Whether the material alterations, changes, variations, scoring off material words and replacing of page of the agreement Ex.P-2 without the consent of the defendants appellants, have rendered the agreement Ex.P-2 unenforceable under

the law and the agreement Ex.P-2, receipt Ex.P-3 and the document Ex.D-4 have been wrongly interpreted by the first appellate while reversing the valid and sound reasoning adopted by the learned trial Court?

(II) Whether the receipt Ex.P-3 is a forged and fabricated document and it renders the entire transaction based on the alleged agreement Ex.P-2 as void?

(III) Whether the judgment of reversal passed by the Id. first appellate court is not in consonance with the mandatory provisions of Order 41, Rule 31 CPC?

(IV) Whether the approach of the learned first appellate court while reversing the money decree passed by the learned trial court into the decree for specific performance without taking into consideration the plea of hardship in terms of the provisions of section 20 of the Specific Relief Act is erroneous?

(V) Whether the Id. first appellate court has erred in law in decreeing the suit for specific performance when it is patent on the record that this would result in great hardship to the defendants-appellants herein?

(VI) Whether the impugned judgment and decree passed by the learned first appellate court suffer from perversity being completely contrary and misreading of the pleadings and evidence?

(VII) Whether the infirmity of excluding, ignoring and overlooking abundant material and evidence which if considered in proper perspective would have led to a conclusion contrary to the one taken by the learned first appellate Court?"

15. I have heard learned counsel for the parties and have perused the record.

16. Defendants are alleged to have served a legal notice dated 10.04.2006 rescinding the agreement to sell due to material tampering, alterations in the clause of the agreement to sell.

17. Issue No.1 was decided by the trial Court in favour of the plaintiff. It has been argued by the learned counsel for the appellants that the lower Appellate Court has not commented upon this issue at all, nor the findings have been reversed in any manner.

18. Issue No.2 was re-framed. The initial onus was on the defendants, but on recasting of the same the onus was fastened upon the plaintiff. The findings on this issue has been reversed by the lower Appellate Court. Issue No.3 was also re-framed and onus was shifted upon the plaintiff. This issue has been reversed by the Appellate Court. This issue is consequential and is based on findings recorded under issues No.1 and 2. Issues No.4, 5, 6 and 7 were decided by the trial Court in favour of the defendants, however the lower Appellate Court has not given any findings on these issues.

19. Learned counsel for the appellants contends that the lower Appellate Court was obligated to return findings on all the issues. It is mandatory in terms of Order 41, Rule 31 CPC for the first Appellate Court to give findings on independent assessment of the evidence of the parties on each issue.

20. Learned counsel further contends that since there were material alterations in agreement to sell Ex.P-2, therefore, it could not have been relied by the plaintiff. Agreement consists of three pages. First page of agreement does not contain signatures of proposed vendor or vendees. Second page of agreement contains cuttings at clause 6 of the agreement in the second line mentioned at point 'B' and other lines have been incorporated at point 'A' which contains the signatures of Parvinder. The third page of the agreement contains the signatures of Dharmender and Parvinder being proposed vendees and of Ravinder and Ajit. The receipt Ex.P-3 contains signatures of proposed vendor and vendees and of Ajit and of witness Naresh and Krishan.

21. Learned counsel further contends that the discrepancy with regard to pages of agreement whether it was consisted of two pages is found to be incorrect because agreement consists of three pages. Statement of plaintiff Ravinder has been found to be at wrong footing on this premise, besides tampering in the agreement to sell.

22. Learned counsel argues that defendants have taken specific stand in para No.6 of the written statement and preliminary objection No.10 which recites that the plaintiff has effected major changes/variations by way of adding and cuttings some words/lines in para No.6 of the impugned agreement dated 08.02.2006 without the consent of the defendants, therefore, alleged agreement cannot be

enforced in the Court against the defendants.

23. In para No.6 of the written statement, it has been recited that the corresponding part of the plaint is wrong and denied. It is specifically denied that on 08.08.2006, plaintiff went to the office of Sub-Registrar, Bahadurgarh for execution of the sale deed in his favour and waited for defendants till evening as alleged by him. There is material denial to the claim of the plaintiff in para No.6 of the written statement. Apparently, no replication was filed by the plaintiff. In examination-in-chief of the plaintiff, no explanation has come forth regarding tampering of the document i.e. agreement to sell.

24. Learned counsel for the appellants further submitted that if the statements of witnesses Krishan and Ajit are appreciated, the factum of agreement to sell being tampered has come to fore. PW-1 Ravinder has admitted in his cross examination that no receipt of L 3 lacs has been prepared and the fact that amount of L 3 lacs has been advanced was incorporated in the agreement itself, whereas plaintiff himself filed the receipt Ex.P-3, but no such amount has been mentioned in Ex.P-3 that any amount was given as earnest money when receipt Ex.P-3 was prepared.

25. Contention is that PW-2 Ajit in his cross-examination has stated that it had been mentioned in the receipt that L 3 lacs were being given as earnest money, but the amount of L 3 lacs does not find mention in Ex.P-3. PW-3 Krishan has also stated in his cross-examination that on the cutting both the brothers had put signatures, but on the second page of the agreement signature of Parvinder is found and not of Dharmender. The statement of PW-2 Ajit further aggravated the stand viz-a-viz. the existence of agreement to sell in four pages.

26. Learned counsel for the appellants further contends that there is no explanation coming forth on record by the plaintiff in respect of tampering of agreement to sell and it was on the concession given by the defendants that the trial Court decreed the suit for recovery of double of the earnest amount.

27. DW-1 Naresh has been examined by the defendants who has stated that no amount had been advanced by the plaintiff to the defendants as earnest amount on 08.02.2006. In fact page of the agreement was replaced by the plaintiff thereby

mentioning the rate of land as L 6 lacs instead of L 18 lacs.

28. Learned counsel further stressed that perusal of receipt Ex.D-1 and receipt Ex.P-3 reveals that the signatures of Ajit are missing in Ex.D-1. Presence of Ajit at the time of execution of agreement to sell becomes doubtful and it appears that plaintiff got the signatures of Ajit subsequently, though photocopy of the receipt had already been given to the defendants. Therefore, agreement Ex.P-2 contains cuttings and it is doubtful that the first page of the agreement might have been replaced by the plaintiff mentioning the rate of L 6 lacs instead of L 18 lacs.

29. Further it has been highlighted that plaintiff while appearing as PW-1 has stated in his cross-examination that the agreement Ex.P-2 is consisting of two pages whereas the agreement is found to be consisting of three pages. Lower appellate Court commented upon the pleadings and evidence of the defendants by observing that they have taken contradictory stand and have not made out any positive case in their favour. Agreement to sell refers to payment of earnest amount to the tune of L 3 lacs. Signatures of Parvinder were duly obtained on the cuttings.

30. Affidavit dated 08.08.2006 Ex.D-3 was duly attested by the Executive Magistrate indicating the presence of defendants/respondents before the office of Sub-Registrar. This affidavit has been considered to be an indication that defendants despite issuing legal notice dated 10.04.2006 Ex.P-8 themselves waived the notice by getting his presence marked before the Sub-Registrar by way of executing affidavit.

31. Appellants/defendants were not supposed to appear before the Sub-Registrar on 08.08.2006 in view of stand by them. The legal notice dated 25.10.2006 Ex.P-6 sent by the plaintiff calling upon them to come present before the Sub-Registrar on 03.11.2006 for execution of sale deed stood replied by the defendants on 31.10.2006, asserting repudiation to agreement vide legal notice dated 10.04.2006 and hence they refused to come present on 03.11.2006.

32. The stand taken by the defendants was opined to be twisted stand by the lower Appellate Court and the judgment and decree passed by the trial Court was

held to be illegal to the extent of awarding only alternate relief of double of the earnest money. The lower Appellate Court commented upon the composition of agreement to sell viz-a-viz. in two pages or in three pages. The agreement was comprising of two pages whereas it was found to be in three pages. The trial Court based the aforesaid anomaly to be the reason for declining the relief for specific performance.

33. Lower Appellate Court negated the view of the trial Court by observing that unless and until the case of hardship is proved by the vendor, grant of specific performance of agreement is a rule and grant of money decree is an exception. Since no exceptional hardship has been proved on finding the agreement to be in two pages or in three pages and since there is no evidence of fraud proved on record, therefore, the lower Appellate Court found the agreement to sell to be validly executed and grant of specific performance as a rule. On that premise the lower Appellate Court granted the relief of specific performance in to to.

34. The statements of witnesses viz. PW-1, PW-2 and PW-3 are found to be on different frequencies. The signatures of witnesses appearing under the cuttings are also found on the divided notes. The agreement to sell does not contain the signature of the proposed vendor or vendee. Subsequent lines are tampered and another line incorporated at point 'A' contains signature of Ravinder. Third page of agreement contains signature of Dharmender and Parvinder being proposed vendees. The receipt does not contain any earnest amount at all. It contained the signatures of proposed vendor and vendee and witnesses Ajit, Naresh and Krishan. Since the lower Appellate Court has not decided all the issues, so it would be just and proper to obligate the lower Appellate Court to see these facts.

35. If the aforesaid anomalous situation is read in consonance with the non-reversal of findings by the lower Appellate Court under issues No.1 and 4 to 7, then it will be found that it was mandatory on the part of the lower Appellate Court to give findings on all the issues under Order 41, Rule 31 CPC in view of mandatory nature of provision as held by the Hon'ble Supreme Court in H. Siddiqui (D) by LRs. v. A. Ramalingam, 2011(4) SCC 240. Secondly the alterations in the agreement to sell without the consent of the defendants is exactly the same as

that of cancelling the deed. The legal notice dated 10.08.2006 got issued by the defendants in consonance with the said alterations and the defendants on account of those alterations rescinded the agreement to sell and issued the legal notice in respect thereof. Since the notice, rescinding the agreement to sell has not been assailed in the suit itself, therefore, it would also be a debatable issue in reference to maintainability of suit itself.

36. Since the defendants have voluntarily come forward by way of offering an amount of L 6 lacs to the plaintiff and that was accepted by the trial Court while decreeing the suit for recovery to the tune of L 6 lacs, therefore, lower Appellate Court ought to have discussed all the issues framed and decided by the trial Court.

37. The judgment rendered by the lower Appellate Court is in utter disregard of mandatory provisions of Order 41, Rule 31 CPC which obligates the lower Appellate Court to give independent findings under all the issues. Since the issue No.1 and 4 to 7 have not been commented upon by the lower Appellate Court and the findings recorded by the trial Court have not been reversed, therefore, the precedent cited on the point in H. Siddiqui's case (supra) has full force in the facts and circumstances of the present case.

38. In view of fact that lower Appellate Court has not decided issues No.1, 4 to 7, therefore, there is mandatory noncompliance of Order 41, Rule 31 CPC as discussed above.

39. Before deliberating upon the questions so formulated in the appeal, it would be just and expedient to call upon the lower appellate Court to consider issues No.1, 4 to 7 and decide the appeal comprehensively by giving findings on all the issues.

40. At this stage, this Court is not in a position to give final verdict on over all assessment of evidence on record. Any observation made in respect of evidence in the context of issues No.1, 4 to 7, would deprive any of the party from valuable right of first appeal before the lower Appellate Court. In such a situation, it would be lawful to obligate the lower Appellate Court to have assessment of material on record and decide all the issues on merits without being influenced by any observation made herein above.

41. With these observations, this case is remanded back to the lower Appellate Court for fresh decision. Both the parties are directed to appear before the lower Appellate Court on 11.01.2016.

42. Appeal stands disposed of.

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