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Kewal Singh Vs. Mukhtiar Singh

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Court : Punjab and Haryana

Decided On : Jan-03-2006

Reported in : (2006)142PLR768

Judge : M.M. Kumar, J.

Acts : Specific Relief Act, 1963 - Sections 12(3); Registration Act, 1908 - Sections 17; Code of Civil Procedure (CPC) , 1908 - Sections 100

Appeal No. : Regular Second Appeal No. 1736 of 2005

Appellant : Kewal Singh

Respondent : Mukhtiar Singh

Advocate for Def. : Shri. G.S. Bhatia

Advocate for Pet/Ap. : G.S. Bhatia, Adv.

Disposition : Appeal dismissed

Judgement :

M.M. Kumar, J.

1. This is defendant's appeal filed under Section 100 of the Code of Civil Procedure, 1908 challenging concurrent findings of fact recorded by both the Courts below holding that the suit of the plaintiff-respondent for alternative relief for

recovery of sum of Rs. 1,50,000/- with interest @ 12 per cent p.a. from the date of execution of the agreement to sell dated 8.10.1999 before the passing of decree and future interest @ 6 per cent p.a. from the date of decree till realisation on the principal amount deserved to be decreed in his favour. The prayer of the plaintiff-respondent for partial specific performance of the agreement to sell to the extent of land measuring 3 kanals 9 marlas as detailed in the head note of the plaint and for recovery of Rs. 42,190/- with interest has been declined. Both the Courts below have concurrently found that the agreement to sell dated 8.10.1999 has been amply proved on record and the theory of loan transaction as projected by the plaintiff-respondent has been held to be concocted one.

2. The trial Court had passed a decree for specific performance of a part of contract which in fact was entered into between the parties in respect of 7 kanals 3 marlas of land. The decree was passed by the learned trial Court in respect of 3 kanals and 9 marlas. The trial Court has further passed the decree for recovery of Rs. 42,190/- in favour of plaintiff-respondent which was the balance amount after working out the price of the land proportionately as stipulated in the agreement to sell. In other words, land measuring 3 kanals 9 marlas was found to be worth Rs. 1,07,810/- and since the plaintiff had already paid earnest money of Rs. 1,50,000/- vide agreement to sell dated 8.10.1999 balance amount of Rs. 42,190/- was to be recovered by the plaintiff-respondent from the defendant-appellant.

3. On appeal, filed by the defendant-appellant the decree passed by the trial Court, as noticed above, was held to be in contravention of the provisions of Section 12(3)(a)(b)(ii) of the Specific Relief Act, 1963 (for brevity 'the Act'): After quoting the aforementioned provisions, the learned appellate Court in para 12 of the judgment observed as under:-

The plain reading of the provisions of Section 12(3)(a)(b)(ii) of the Specific Relief Act clearly supports the contention of the counsel for the appellant. In case, the plaintiff wanted the specific performance of the contract, in respect of a part of the property, agreed to be sold to him, though the part left unperformed forms a considerable part, admitting compensation then, he was not entitled to claim the damages/compensation for the remaining part. The trial Court, being oblivious of

this provision, wrongly granted the relief of specific performance, in favour of the plaintiff.

4. The learned lower appellate Court after dealing with various judgments cited at the bar came to the conclusion that the plaintiff-respondent did not relinquish his claim with regard to compensation and damages which is, allegedly suffered on account of non-performance of the remaining part of the contract continued to observe as under:-. In the instant case, as stated above, while claiming specific performance of a part of the property, agreed to be sold, in favour of the respondent, he did not relinquish his claim, with regard to the compensation/damages, which he allegedly suffered, on account of non-performance of the remaining part of the contract... Since the conditions contained in Section 12(3)(a)(bb)(ii) were not fulfilled by the plaintiff, while seeking performance of a part of the agreement, and, on the contrary, he claimed compensation/damages, for the remaining part of the contract, left unperformed, no help can be drawn from the aforesaid authorities, by the respondent... However, as held above, the plaintiff had not filed the suit, with regard to the performance of the agreement to sell, in toto, by impleading the third party, in whose favour, a part of the land, in dispute was sold. This authority is also of no help, to the case of the respondent. The submission of the counsel for the respondent being without merit, must fail, and the same is rejected.

5. After rejecting the claim of the plaintiff-respondent for passing a decree for specific performance of the agreement, the learned appellate Court considered the question whether the plaintiff-respondent was entitled to recovery of the amount paid as earnest money as alternative relief. Holding that the prayer of the plaintiff-respondent was meritorious, the learned appellate Court observed as under:-

The next question, that arises for consideration is, as to whether, in these circumstances, the plaintiff was entitled to the recovery of the amount, sought by him, as an alternative relief, or not. It may be stated here that the execution of the agreement to sell, stood proved, and the theory set up by the defendant that it was a loan transaction, has been held to be a concocted one. Since, the defendant obtained a sum of Rs. 1,50,000/-, as earnest money, at the time of the execution

of the agreement to sell, he is liable to return the same, with interest, as it has been held that the plaintiff is not entitled to the relief of specific performance. The amount of Rs. 1,50,000/- was withheld by the defendant, for a sufficient longer period, improperly and illegally. Had this amount been paid to the plaintiff, in time, he would have certainly invested the same, in some business or deposited the same, in some bank. As a result whereof, interest would have accrued to him. The plaintiff is, thus, entitled to the recovery of a sum of Rs. 1,50,000/- with interest @ 12% p.a. from the date of agreement to sell, until the decree, with future interest @ 6% p.a. on the principal amount.

6. Shri G.S. Bhatia, learned Counsel for the defendant-appellant has made the following two submissions before me:

(a) That the suit filed by the plaintiff-respondent seeking specific performance of the agreement dated 8.10.1999 was not maintainable because the possession of the suit land has been delivered to him and the agreement to sell required registration under Section 17 of the Registration Act, 1908. In support of his submission, learned Counsel has placed reliance on a judgment of the Allahabad High Court in the case of Prag Narayan Mook Badhir Vidyalaya Smiti v. Hukam Singh and Ors. 1997(1) C.C.C. 458; and

(b) There is complete misreading of evidence by the Courts below in as much as son of Sohan Singh, one of the attesting witnesses has stated that Sohan Singh left India for abroad in April, 1999 and therefore there was no possibility for Sohan Singh to be an attesting witness on the agreement to sell dated 8.10.1999.

7. Having heard the learned Counsel I am of the considered view that no interference of this Court in the concurrent findings of facts recorded by both the Courts below would be warranted as no question of law for determination and consequential admission of the appeal has been raised. Both the Courts below have concurrently held that agreement to sell dated 8.10.1999 has been proved on record. It has also been accepted that the plaintiff-respondent has always been ready and willing to perform his part of the contract but defendant-appellant avoided to perform his part of the contract despite the fact that he remained present before the 'Sub-Registrar on 5.10.2001 and 8.10.2001. He has placed on

record his affidavit in token of his presence before the Sub-Registrar but the defendant-appellant did not turn up. The claim of the defendant-appellant that the earnest money has been paid back has been rejected by both the Courts below. The aforementioned discussion and conclusions are available in para 15 of the judgment of the trial Court where receipt Mark D1 were sought to be proved and the same has been ignored from the evidence. It has also been found that out of the total land which was subject matter of agreement to sell dated 8.10.1999 (Annexure P.2) defendant-appellant had sold his entire share except his share in some khasra numbers which has been worked out to be 3 kanals and 9 marlas. The plaintiff respondent has filed a suit for specific performance to that extent by asserting that the value of the property on the basis of the agreement to sell and the price determined is Rs. 1,07,810/. The plaintiff-respondent No. 1 sought part-performance and has claimed refund of Rs. 41,290/- after adjusting the price of the suit land with equal amount as damages. Under Section 12(3) of the Act the filing of such a suit has been permitted only when the plaintiff relinquishes all claims to the performance of the remaining part of the same contract which cannot be specifically performed. The learned lower appellate Court has thus rightly rejected the claim of the plaintiff-respondent for specific performance. I am further of the view that the alternative relief has been rightly granted by the learned lower appellate Court. Therefore, there is no room to interfere in the findings recorded by the Courts below. It is well settled that the learned lower appellate court is the best judge of facts and law as has been held by the Supreme Court in the case of Santosh Bazari v. Purshottam Tiwari (deceased) by LRs. : [2001]251ITR84(SC) .

8. The argument of the learned Counsel for the defendant-appellant that the suit was not maintainable would not require any detailed consideration because in any case specific performance has not been ordered and the alternative prayer made by the plaintiff-respondent for recovery of earnest money has been granted by the lower appellate Court. Therefore, it must be had that the suit for recovery of the earnest money along-with interest etc. was certainly maintainable and agreement to sell could be read for collateral purposes. The judgment in the case of Prag Narayana (supra) on which reliance has been placed by the learned Counsel has taken the view because the decree for specific performance in the aforementioned case had been passed which is not the position in the instant case where only

alternative relief of recovery of earnest money alongwith interest etc. has been granted. The judgment in Prag Narayan 's case (supra) cannot be considered laying down any proposition of law that an unregistered agreement to sell in respect of immovable property with possession would not constitute a basis for filing a suit to claim alternative relief of recovery of earnest money and damages. It only talks of registration of such an agreement to sell for the purposes of passing a decree for specific performance. Therefore, no support can be claimed from the aforementioned judgment. Moreover no such agreement has been raised in this regard and before this Courts which is now raised for the first time before this Court.

9. The other argument that agreement to sell dated 8.10.1999 (Annexure P-2) is liable to be rejected on the ground that one of the attesting witnesses Sohan Singh was not even present in this country cannot be accepted in view of the categorical finding recorded ,by both the Courts below. This would amount to reappreciation of evidence which is impermissible in view of the judgment of the Supreme Court in the case of Santosh Hazari (supra). Therefore, there is no room to interfere in the judgment and decree passed by the learned lower appellate Court and the appeal is liable to be dismissed.

For the reasons aforementioned this appeal fails and the same is dismissed.

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