IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 2943 of 2017 (O&M)
Decided on: 06.11.2017

Brahm Dutt **.....Appellant**

versus

Sarabjit Singh. **.....Respondent**

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Vijay Kumar Jindal, Sr. Advocate with
Mr. Deepak Arora, Advocate
for the appellant.

Mr. Dhiraj Chawla, Advocate
for the respondent.

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RAJBIR SEHRAWAT, JUDGE (ORAL)

This is a second appeal filed by the defendant challenging the judgments and decrees passed by the Courts below, whereby the suit of the plaintiff of specific performance has been decreed. For the convenience the parties would be referred herein as the plaintiff and the defendant as were described in the original suit.

The brief facts of the case are that the suit was filed by the plaintiff claiming that the defendant had entered into an agreement dated 14.02.2011 with him in for sale of a house, as detailed in the head note in the plaint, measuring 23 marlas. The sale consideration was fixed at Rs. 40,50,000/-. Out of that Rs.10,00,000/- were received by the defendant as earnest money. The target date for the execution of the sale deed was fixed as 20.04.2012. It was further claimed that on 20.04.2012 the plaintiff remained present in the office of the Sub Registrar, Gurdaspur; along with the balance sale consideration. However, the defendant did not reach there, to execute the sale deed. Resultantly, on the target date, the sale deed could

not be executed. It is further pleaded by the plaintiff that thereafter, he sent a legal notice dated 30.04.2012 informing the defendant that he could come to the office of the Sub-Registrar on 10.05.2012 for execution of the sale deed. However, again on this date, the defendant did not turn up. Therefore, the plaintiff filed the suit.

On notice, the defendant filed written statement taking routine preliminary objections. However, on merits it was claimed by the defendant that he had sent a legal notice dated 17.04.2012 informing the plaintiff that the agreement in question was not intended to be an agreement to sell and that this was signed only as a security for repayment of the amount which, according to the defendant, was taken as a loan @ 2% per month. Therefore, the defendant claims that this legal notice would tantamount to termination of the agreement. Still further, the defendant denied the pleading of the plaintiff that the agreement was intended to be an agreement to sell. However, the receipt of Rs.10 lac was admitted in written statement itself. Still further, the signatures on the agreement was also admitted. Still further, the defendant claimed the hardship to him, in case a decree of specific performance is passed in the suit.

Parties led their respective evidence.

To prove the agreement to sell, the plaintiff examined the attesting witnesses PW-2 Ranjodh Singh and the scribe of the agreement Ravi Kant Rehanil, Advocate as PW-3. Still further, Sh. Manjit Singh was examined as PW-4 who is also one of the attesting witness.

On the other hand, the defendant examined himself as DW-1 and also examined Gurjeet Singh as DW-2 to substantiate his plea regarding the agreement; being document of security for the repayment of the loan.

After hearing the parties and appreciating the evidence, the trial Court decreed the suit filed by the plaintiff. The trial Court recorded the finding that the witnesses examined by the plaintiff have duly proved the execution of the agreement in question. Still further, the trial Court recorded the finding that the legal notice dated 30th April 2012 Ex. P-5 and its postal receipt ExP-6 also stands proved. To show his readiness and willingness, Ex-P-7 is also proved on record, to show that the plaintiff remained in the office of Sub-Registrar, Gurdaspur on 10.05.2012 along with the balance sale consideration.

The trial Court also held that the onus to prove that the agreement to sell in question was not intended to be an agreement for transfer of the property, rather, it was intended to be executed as a security for repayment of loan amount taken by him, was upon the defendant. However, he has failed to prove his plea regarding the agreement being a document of security for repayment of loan. The only witness examined by him, DW-2 has admitted in cross-examination that he was not even present at the time of the execution of the agreement in question. Hence, the trial Court held that the agreement to sell stands proved as per the requirement of law. The defendant has not been able to extract anything from any of the witnesses of plaintiff to show that the agreement was intended to be a security document for repayment of the loan.

Aggrieved of this judgment and decree, the defendant filed an appeal before the lower Appellate Court. However, the lower Appellate Court also dismissed the appeal filed by the defendant.

While dismissing the appeal filed by the defendant, the lower Appellate Court also upheld the finding recorded by the trial Court that by examining the attesting witnesses, the plaintiff has proved the agreement to

sell in question. The lower Appellate Court also recorded a finding that the defendant has failed to prove his plea regarding the agreement in question being a security document for repayment of the loan, which the defendant claims to have taken at the interest rate of 2% per month.

Aggrieved against the judgement and decree the present appeal has been filed by the defendant.

While arguing the case, the learned Senior counsel for the defendant/appellant has submitted that the lower Appellate Court has gone wrong in law, in so far as it has not even dealt with the evidence pertaining to the legal notice sent by defendant on 17.04.2012 (Ex.D-1), whereby he had terminated the agreement in question. Therefore, the finding recorded by the lower Appellate Court are incomplete, if not perverse. Still further, learned counsel for the defendant has argued that once the agreement stands terminated, then unless the same is challenged by the plaintiff and a declaration of termination as illegal is sought by him and granted by the Court, he cannot file a suit for specific performance. To support his argument, learned counsel relies upon the judgment of the Hon'ble Supreme Court rendered in ***2013 (15) SCC 27 titled as I.S. Sikandar (D) by LRs. vs. K. Subramani and Ors***.

To buttress his plea regarding the termination of the agreement, the counsel submits that he had put suggestions to the witnesses as well as to the plaintiff in this regard. Therefore, this should be construed that this plea has been duly raised and argued before the Court. The next argument of the learned counsel for the appellant is that he is having only one house and if even this is given to the plaintiff by way of specific performance, this would cause undue hardship to the defendant. Therefore, the counsel prays that Section 20 of the Specific Relief Act should be resorted to, and the

plaintiff should be granted the alternate relief of return of money, as has been claimed also by him in his plaint. Further the counsel submits that the agreement was only a security document for repayment of loan.

Heard the learned counsel for the parties.

After hearing the counsel for the parties and perusing the record, with the able assistance of the counsel for the parties, this Court is of the considered opinion that the argument raised by the defendant/appellant do not deserve acceptance. The agreement in question has been duly proved by the plaintiff by examining the attesting witnesses as well as the scribes. The plaintiff could have done only this much to prove his claim before the Court to show that it was an agreement, intended to be as it has been recorded. This onus, he has; fully discharged. Even the counsel for the appellant/defendant could not dispute this fact that he has been able to prove the agreement by examining the attesting witness. To prove the plea that the agreement was meant to be a document of security of loan which he had taken at the rate of 2% per month the defendant has not led any evidence. He has not disclosed even the purpose for which he required this loan. On the contrary he has admitted that the amount of Rs.10 lacs taken by him from the plaintiff was lying in the Saving Bank Account of the defendant. He has also not led any evidence to prove that he ever paid the monthly interest to the plaintiff at the rate of 2%, as claimed by him. So the defendant has miserably failed to prove his plea that the agreement in question was only a security document for repayment of loan available by him.

However, the next argument of the defendant that the agreement stands terminated, though much stressed upon by the learned counsel, but the same is not found to be established as per the record. It has

come on record, by way of Ex.D1 that the defendant claimed to have sent a legal notice to the plaintiff on 17.04.2012, and for that purpose even the postal receipt has been placed on record as Ex.D3 and Ex.D4. However, besides these documents, nothing has been led in evidence to prove either the receipt of this notice by the plaintiff or the contents of the legal notice, allegedly sent by the plaintiff. So far as the postal receipt is concerned, there is no dispute that once postal receipt of registered letter, is proved on record, it is a valid proof of service upon the opposite side. However, a perusal of the receipt in the present case shows that it does not contain the address of the addressee. It only mentions the name of the plaintiff and name of the city. This, in the opinion of this Court, would not be a proof of a proper service upon the plaintiff. Possibility of there being so many persons of the same name in such a big city can not be ruled out. Hence, production of receipt in the present case is not the proof of the fact that this notice has been sent by the defendant to the plaintiff. Otherwise also, the receipt of this notice has been denied by the plaintiff. Despite the questions being put to the plaintiff in his cross-examination nothing could be extracted from him in the form of his admission that he ever received this notice. Therefore the cancellation,of agreement, as such, is not proved on record.

However, otherwise also the defendant could not have, unilaterally, cancelled the agreement in question. Unilateral cancellation of agreement to sell by one party is not permissible in law except where the agreement is determinable in terms of Section 14 of this Specific Relief Act. Such cancellation cannot be raised as a defence in a suit for specific performance. If any such a plea of cancellation/termination is raised by the defendant than the Court can just ignore this and the plaintiff need not

challenge such an alleged cancellation. If such unilateral cancellation of non-determinable agreement is permitted as a defence then virtually every suit for specific performance can be frustrated by the defendant. Therefore the Specific Reliefs Act has made detailed provisions for this aspect. The bare perusal of the provisions of the Specific Relief Act shows that once a party claims the right of revocation or rescission, of the agreement then such a party is required to seek a declaration from the Court regarding the validity of revocation or rescission, as the case may be. In the present case also, it was not the duty cast upon the plaintiff to challenge the alleged cancellation of agreement, which, otherwise also, is not proved on record. On the contrary, if the defendant so claimed that he had valid reasons to terminate the contract or rescind the contract then he should have sought a declaration from the competent Court, as required under Sections 27 and 31 of Specific Relief Act. Hence the plea of termination of agreement raised by the defendant has rightly not been accepted by the Courts below.

So far as the judgement of the Hon'ble Supreme Court in case of **I.S. Sikandar** (supra) is concerned, there is no dispute regarding the proposition laid down by the Hon'ble Supreme Court. However, that judgement is distinguishable on the facts of the present case. In the case before the Hon'ble Supreme Court, the defendant had, in fact, asked the plaintiff to make the payment of the money and to get the sale deed executed. On failure of the plaintiff to make the payment the agreement had become determinable and the defendant had terminated the contract by specific communication. This action of the defendant was within the realm of the Contract Act, as provided under Sections 38 and 51 of the Contract Act and Section 14 of Specific Relief Act, which provides that in case of the performance which was required of the plaintiff/promisee is refused by him

then the defendant/promisor need not perform his part of the agreement. In the present case, the appellant had not offered the performance on his part. Still further, in the present case, the termination as such has also not been proved on record, as has been held above.

Even on the plea of hardship, the defendant could not substantiate his claim. The plea of hardship itself is not sustainable in the present case. The genesis of the plea of the hardship claimed by the defendant goes to his plea, whereby he claimed the agreement to be a security document for repayment of the loan. However, as held above, the defendant has not even disclosed as to what was the circumstance or the purposes for which he had to avail this loan. Rather he admitted that the earnest money got by him was kept in Bank account. Hence no hardship to defendant is proved on record. Otherwise also he has come on record that no such hardship would be caused to the defendant, because it has come in his cross-examination that he is already having another house in the same city, where he can reside.

No other argument was raised.

In view of the above, the present appeal fails and the same is dismissed being devoid of any merits.

6th November, 2017 **[RAJBIR SEHRAWAT]**
Manju **JUDGE**

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