(2013) 12 P&H CK 0136

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No 945 of 1985 (O&M)

Nasib Singh APPELLANT

Vs

Anurodh Singh RESPONDENT

Date of Decision : 02-12-2013

Acts Referred:

Citation : (2014) 2 PLR 570

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Kannan, J.—The following substantial questions of law arise for consideration this second appeal:-

1. Whether the courts below were justified in refusing the relief of specific performance, having found the agreement to be true when the specific performance and not damages is the only adequate relief u/s 10 of the Specific Relief Act?

2. Whether the courts below were not in error in finding the purchase in the names of defendants No. 3 to 5 as bona fide when the vendors were not in possession of the property and the plaintiffs being in possession as mortgagees along with subsequent purchasers, the latter were bound by constructive notice that the plaintiffs had some interest even apart from the mortgage and that a purchase without inquiring with the plaintiffs cannot be said to be bona fide?

The plaintiffs are the appellants before this court. The plaintiffs suit for specific performance of the agreement of sale by defendants No. 1 and 2 on 9.6.1980 for a consideration of Rs. 32,000/- was decreed only for the relief of refund of the earnest money of Rs. 1,000/- paid by the plaintiffs. In the appeal by the plaintiffs, the plaintiffs'' claim was again dismissed on a different line of reasoning adopted that defendants No. 3 to 5 were subsequent purchasers for value without notice of the agreement in favour of the plaintiffs.

2. The plaintiffs and defendants No. 3 to 5 were already mortgagees in respect of the same property, each holding a half share. The recital in the agreement was that out of the sale consideration of Rs. 32,000/-, Rs. 1,000/- was paid as earnest and Rs. 11,000/- was to be adjusted towards the money payable for redeeming the mortgage and the balance of consideration was to be paid on 20.6.1980 on completion of the sale. Defendants No. 1 and 2 executed a sale on 3.7.1980 for the very same consideration of Rs. 32,000/- in favour of defendants No. 3 to 5. The plaintiffs'' contention was that the plaintiffs'' father and the 6th defendant were brothers. The 6th defendant himself was the father of defendants No. 3 to 5. The contention was that the agreement in favour of the plaintiffs was known to the defendants, but they had still secured a purchase which was not bona fide. Both the courts have found the agreement of sale in favour of the plaintiffs to be true. The denial of the relief has come only by the fact that the trial court found that on account of subsequent purchase, the plaintiffs could be rewarded only the relief of refund of earnest money while the lower appellate court found that defendants No. 3 to 5 had not known the agreement of sale and, therefore, their sale must be protected.

3. If the agreement of sale in respect of immovable property was established, then the relief of specific performance ought to be taken as the only appropriate remedy, unless the governing consideration u/s 20 of the Specific Relief Act in the manner of discretion was that the plaintiffs had disentitled themselves by any conduct ill deserving for the relief of specific performance. Section 10 of the Specific Relief Act states through an explanation that unless and until the contrary is proved, the_ breach of contract of transfer of immovable property could not be relieved by compensation and the specific relief is the only appropriate remedy. The plaintiffs were, therefore, entitled to a specific relief unless, as we have observed, either that the subsequent purchasers were bona fide purchasers for value without notice or the court''s discretion cannot be exercised by any of the parameters laid down u/s 20 of the Specific Relief Act.

4. In this case, bona fides of the purchasers must be examined from the context of how the vendors themselves were not parties in possession at the time of agreement and at the time of subsequent sale. The plaintiffs and defendants No. 3 to 5 were in joint possession of the property as mortgagees. They were residents of the same village. The burden of proof u/s 19 of the Act shall be only on the defendants (See, Jagan Nath Vs. Jagdish Rai and Others,). They must establish that they had made enquiries that there were no other claims by the plaintiff on the property at the time when the sale was taken. When the defendants knew that the vendors were not in possession and the plaintiffs themselves were in joint possession with them, law casts an obligation on such a subsequent purchaser to make inquires with co-mortgagee about any claim that he may have before defendants No. 3 to 5 concluded the transaction in their favour. In R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, , while detailing the nature of enquiry which a subsequent purchaser must make to qualify for bona fides, the court said that he was obliged

to enquire the status of person in possession. If he did not make a proper enquiry, he would be deemed to have notice of the existing affairs and could not claims to be a bona fide purchaser. The 6th defendant has been examined in this case and he has projected a new story which was not supported by the pleadings. He attempted to say that he had an earlier agreement of sale which the court below has rightly rejected. Defendants No. 3 to 5 claim that the plaintiffs and the defendants were not in talking terms and the defendants, therefore, did not know about the agreement in their favour. It has been elicited through Karam Singh, the 6th defendants, the father of the vendees, that defendants No. 1 and 2 were demanding more amount for creating the additional mortgage with the plaintiffs, but they (the plaintiffs) directed the defendants No. 1 and 2 to Karam Singh. He did not also agree for the additional mortgage. If the 6th defendant, therefore, knew that defendants No. 1 and 2 were toggling between plaintiffs and himself for some extra funds, their plea that the plaintiffs were not willing to pay for an additional mortgage could not be without a verification from the plaintiffs themselves.

5. In Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others, , the Supreme Court explained ''knowledge'' from ''notice'' and that Section 19 used only an expression ''notice''. The court said that between an equitable right to purchase through an agreement and an actual purchase, the bona fide purchasers will be protected only if his purchase was bona fide and without notice of a prior equitable right. The word ''notice'' is of wider import than the word ''knowledge''. The Court explained that ''a person may not have actual knowledge of a fact but he may have notice of it.

6. If the 6th defendant DW4 was stating that the plaintiffs had also actually sent defendants No. 1 and 2 to them on their disinclination to pay the amount, then that information must be from the plaintiffs directly and cannot be a matter of hearsay. At least we have no source of information for the 6th defendant about how defendants No. 1 and 2 had asked for money from the plaintiffs but they were not willing to give them. All this is only to show that the defendants were aware of the fact that defendants No. 1 and 2 were pressing for more money and that should have been only in the situation of a transaction for purchase. Indeed such an evidence was also given by the plaintiffs that both the plaintiffs and the defendants were negotiating for sale of the property. The courts held that such negotiation has not been proved. If they did not prove the joint negotiation, it at least ought to have put defendants No. 3 to 6 on notice that they could not purchase the property without a clear disclaimer from the plaintiffs. If they would be so foolhardy to take a purchase to defy the plaintiffs to make whatever claims that could have later, they were literally bargaining for litigation. The purchase in the names of defendants No. 3 to 5 could not be taken to be bona fide under the circumstances when they were mortgagees in possession along with the plaintiffs without actually conferring with the plaintiffs and the findings of the lower appellate court that defendants No. 3 to 5 were bona fide purchasers were clearly on erroneous appreciation of facts and law.

7. The law expounded u/s 19 of the Act brings out three important facets. One, the burden to prove the bona fide is only on the purchasers. Two, if the vendors were not in possession and the property is held by the plaintiffs themselves as mortgagees even along with the subsequent purchasers, the burden was all the more great for them to make specific inquiries with such mortgagees Three, the statute employs the expression ''without notice'' which was a larger expression than ''lack of knowledge'' of previous equitable right under the agreement Consequently, the nature of enquiry by a subsequent purchaser is more extracting. Learned counsel appearing for the respondents would plead that more than three decades have passed and it will be gross inappropriate to dislodge the possession of the defendants in favour of the plaintiffs. According to him, the discretion ought not to be exercised in favour of the plaintiffs on that score. The situation where the vendors have received only a very small advance and when the prices have gone several times fold, the courts have interfered to relieve the vendor only to see that he is not compelled to sell the property at the same price when the market prices had galloped several times the original contract price. In this case, the vendors are not actively in the fray. The fight is between the plaintiffs, who hold the agreement and the subsequent purchasers, whose purchase has not been found to be bona fide. There exists no equity for the subsequent purchaser that discretion u/s 20 of the Act cannot be invoked for the plaintiffs. The plaintiffs shall, therefore, secure a decree for specific performance and possession. Time for completion of sale, two months. The second appeal is allowed with costs. The counsel''s fee is assessed at Rs. 10,000/-.