

CR No.4099 of 2014 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CR No.4099 of 2014 (O&M)
Date of decision:18.02.2015**

Birinder Kumar

...Petitioner

Versus

Shri Sukhdev Bhatwa

...Respondent

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. IPS Bains, Advocate,
for the petitioner.

Mr. Navdeep Kalair, Advocate,
for the respondent.

Rakesh Kumar Jain, J.

The petitioner has challenged order dated 17.02.2014, dismissing his application, filed under Section 28 of the Specific Relief Act, 1963 (here-in-after referred to as the “Act”).

In brief, the plaintiff-respondent filed a suit for specific performance of the agreement to sell dated 05.06.1982 against the defendant-petitioner in respect of booth no.3, Sector 35-C, Chandigarh. The suit was decreed on 31.05.1985 and it was ordered that “*the suit of the plaintiff for specific performance of the agreement to sell in respect of Booth No.3, Sector 35-C, Chandigarh after making the requisite balance amount of ₹15,764.45/- is decreed with costs against the defendant*”.

The plaintiff filed the execution application dated 16.07.1985

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and also filed an application on 22.08.1987 under Order 21 Rule 34 of the Code of Civil Procedure, 1908 (here-in-after referred to as the “CPC”) seeking permission to file the draft of the proposed sale deed in the Court for the purpose of execution and registration. The Executing Court adjourned the case for 02.09.1987 and on that date, passed the following order:-

“Heard. In view of the facts and circumstances mentioned in the application, the application under Order 21 Rule 34 CPC is allowed. The draft of sale deed has been filed. Sh. Avtar Singh, Reader of this Court is appointed as Local Commissioner to execute and get register the sale deed. His fee is fixed at ₹500/- to be paid by the DH. Now to come up for further proceedings on 19.09.1987.”

The defendant-petitioner filed the objection under Section 47 of the CPC on 11.04.1988 alleging that the payment of the balance amount of sale consideration was not made to him before registration of the sale deed. The plaintiff-respondent filed reply to the objection on 07.05.1988 denying his obligation to pay the amount on the ground that nothing remains to be done in this regard after the execution of the sale deed and on 21.05.1988, the advocate appearing on behalf of the plaintiff-respondent made a statement that since the sale deed has been executed on 05.04.1988 in favour of the decree holder, therefore, he does not want to press the execution application and the same was withdrawn. Accordingly, the

execution was consigned to record and the objection, alleged to have been raised by the petitioner, was not decided. Thereafter, the petitioner filed an application under Section 28 of the Act for rescinding the contract on the ground that the plaintiff has not paid ₹15,764.45/- in terms of the decree but the said application has been dismissed by the trial Court and hence, the present revision petition.

Counsel for the petitioner has argued that he had filed the application for rescission of the contract in terms of Section 28(1) of the Act because the plaintiff did not comply with the decree but the Court below has dismissed the application on the ground of its maintainability. It is also submitted by him that as provided under Section 28(4) of the Act, he cannot file a separate suit in respect of any relief which may be claimed by him under Section 28 of the Act. It is further submitted that the plaintiff did not pay the balance sale consideration of ₹15,764.45/- either to the defendant or to Avtar Singh, Reader of the Court, at the time of execution of the sale deed but the learned Court below has erred in dismissing the application only on the ground that it is not maintainable after registration of the sale deed. He has submitted that the learned Court below has committed a patent error and in this regard, he has relied upon the following judgments:-

1. **Onkar Nath and another v. Basheer and others**, 1985
(2) PLR 432;
2. **Dr. J.S.Mumick v. Dhanda Engineer (P) Ltd.**, 1970
LR 565; and

3. **Rajinder Kumar v. Shri Kuldeep Singh and others,**
2014(1) R.C.R. (Civil) 980.

On the other hand, counsel for the respondent has submitted that after registration of the sale deed, the Executing Court has become *functus officio* and in this regard, he has relied upon a judgment of the Supreme Court in the case of **Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh v. Mangilal @ Mangtya**, 1997(2) R.C.R. (Civil) 296 and a judgment of this Court in the case of **Nispal Kaur and anr. v. Kulwant Singh and others**, 2007(1) R.C.R. (Civil) 562.

I have heard learned counsel for the parties and examined the record with their able assistance.

The facts are not much in dispute because in the decree, there was no specific time fixed for the purpose of paying the balance sale consideration. The suit of the plaintiff was decreed for specific performance only after making the payment of the balance sale consideration. No doubt that the plaintiff has paid ₹17,400/- to the Estate Officer, UT, Chandigarh vide receipt no.3960/55 dated 23.03.1988 in respect of the property in dispute, almost the same amount which was to be paid by him to the defendant and that the sale deed was executed and registered on 05.04.1988, whereas the application under Section 28 of the Act has been filed on 30.09.1995, after a gap of about 7 years.

The trial Court has non-suited the petitioner on the ground that after the sale deed is registered, the Executing Court becomes *functus officio*, therefore, the application under Section 28 of the Act cannot be

maintained, as has been held by the Supreme Court in **Sardar Mohar Singh's case (supra)** that from the language of Section 28(1) of the Act, it could be seen that the Court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes *functus officio* and the very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial Court retains its power and jurisdiction to deal with the decree of specific performance.

In the judgment relied upon by learned counsel for the petitioner in **Onkar Nath and another's case (supra)**, the suit was decreed for specific performance as per which the plaintiffs were to pay the balance sale consideration within the period of one month. The sale consideration was not paid by the plaintiffs within the stipulated time and, therefore, the defendants filed the application for rescinding the contract. On the other hand, the case of the plaintiffs was that they were ready and willing to pay the balance sale consideration and furnish the draft agreement but the defendants were not ready to comply with the decree and they refused to execute the sale deed. The petition was ultimately dismissed and the only question which was decided by this Court was as to whether the plaintiffs have failed to comply with the decree or not. In this background, this Court had held that since the plaintiffs failed to comply with the decree within the stipulated period, therefore, as per Section 28 of the Act, the contract was held to have been rescinded.

This judgment is not applicable to the facts and circumstances

of the present case because the issue involved in this case is as to at what stage the application under Section 28(1) could be filed.

In **Dr. J.S.Mumick's case (supra)**, the suit for specific performance was decreed on 31.05.1962 and the plaintiff was required to deposit the balance sale consideration by 31.07.1962. The said amount was duly deposited in the treasury on 28.07.1962. The defendant was not satisfied with the decree of the trial Court and filed appeal which was dismissed by the Division Bench on 27.11.1967 and directed that the sale deed be executed by the defendant in favour of the plaintiff within one month, failing which he would be entitled to have the sale deed executed through the Court. Before the plaintiff could have approached the Court for execution of the sale deed, the defendant applied to the trial Court under Section 28 of the Act for rescinding the contract and it was held that this matter can be gone into by the Executing Court in the execution proceedings and dismissed the revision petition.

In **Rajinder Kumar's case (supra)**, it has been held that the suit for specific performance does not come to an end on passing of a decree and the Court which passed the decree retains control over the decree even after the decree has been passed and the decree is sometimes described as the preliminary decree and the application under Section 28 of the Act is maintainable.

All these judgments relied upon by learned counsel for the petitioner are not addressing the question involved as to whether the Court would become *functus officio* as soon as the sale deed is registered as has

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been held by the Supreme Court in **Sardar Mohar Singh's case (supra)**.

Since the sale deed has already been registered in this case on 05.04.1988 and the application under Section 28 of the Act has been filed after a gap of 7 years, the judgment passed by the Supreme Court in **Sardar Mohar Singh's case (supra)** comes in the way of the petitioner who has been non-suited on the ground of maintainability.

In view of the aforesaid discussion, I do not find any merit in the present revision petition and hence, the same is hereby dismissed.

February 18, 2015
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(**Rakesh Kumar Jain**)
Judge