

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

**R.S.A. No. 1762 of 2011 (O&M)
Date of Decision: January 08, 2015.**

Nafe Singh

..... Appellant

VERSUS

Krishna and another

..... Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Keshav Partap Singh, Advocate
for the appellant.

Mr. Akshay Kumar Goel, Advocate
for the respondents.

SURINDER GUPTA, J

This regular second appeal has been filed by plaintiff-appellant seeking modification of judgment and decree dated 24.1.2011 passed by Additional District Judge-II, Bhiwani, whereby the judgment and decree passed by court below was modified and instead of relief of specific performance of agreement to sell, appellant was allowed money decree for recovery of earnest money with interest.

Brief facts:

Nafe Singh appellant filed suit for possession by way of specific performance of agreement dated 23.7.1996 against respondents Krishna widow of Suresh Kumar and Dharam Kaur wife of Subha Chand, with the plea that Suresh Kumar son of Subha Chand had entered into an agreement to sell his 1/4th share in total land measuring 99 kanals 12 marlas @ ₹65,000/- per acre and received earnest money of ₹1,80,000/-. The sale deed was to be executed and registered on 14.6.1997. The appellant was ready and willing to perform his part of agreement and also served notice dated 17.6.1997 to Suresh Kumar calling upon him to get the sale deed registered on the stipulated date but he did not appear before the Sub-Registrar on 14.6.1997 which was Saturday or on 16.6.1997 Monday.

Suresh Kumar died on 14.2.1998. Thereafter, plaintiff-appellant gave notice to respondents dated 28.3.1998 calling upon them to execute and get the sale deed registered as the legal heirs of Suresh Kumar but in vain, which resulted in filing of suit by the appellant.

The respondents contested the claim of appellant with the plea that the suit land belongs to joint Hindu family comprising of Suresh Kumar, Krishna and Dharam Kaur, in which they all had 1/3rd share. As Suresh Kumar was not absolute owner of suit land, he could not enter into an agreement to sell the same. The execution of agreement dated 23.7.1996 and receipt of earnest money was also denied and the agreement was termed as forged and fabricated.

Pleadings of parties led to the framing of issues as follows :-

1. *Whether Suresh Kumar (since deceased) had entered into a contract of his land 24 kanals 18 marlas detailed in head note of the plaint with the plaintiff at the rate of Rs.65,000/- per acre on 23.7.1996 and after receiving Rs.1,80,000/- as earnest money handed over the possession of the suit land to the plaintiff and executed an agreement on the same day in favour of the plaintiff?OPP*
2. *Whether the defendant (since deceased) had received a sum of Rs.1,80,000/- as earnest money at the time of agreement to sell dated 23.7.1996, if so what effect?OPP*
3. *Whether the plaintiff was/is ready and willing to perform his part of contract as per agreement to sell dated 23.7.1996, if so, its effect?OPP*
4. *Whether the alleged agreement dated 23.7.1996 is based on fraud, misrepresentation and without legal necessity as alleged in para no.2 of the written statement?OPD*
5. *Whether the suit land was joint Hindu family property, if so, to what effect?OPD*
6. *Whether the plaintiff has got no locus standi to file the present suit?OPD*
7. *Whether the present suit is not maintainable in its*

present form?OPD

8. *Whether the present suit is false and frivolous, if so its effect?OPD*

9. *Relief.*

Additional Civil Judge (Sr. Division), Charkhi Dadri decreed the suit and allowed relief of specific performance of agreement thereby directing the respondents-defendants to execute the sale deed as per agreement dated 23.7.1996 on payment of balance sale consideration by plaintiff within one month of passing of decree.

On appeal, the Additional District Judge-II, Bhiwani modified the relief of specific performance of agreement and decreed the suit for alternate relief with the observations in para 36 and 37 of judgment, which reads as follows :-

“36. It is admitted in the course of argument that the agreement of sale was executed in the year 1996 by Suresh Kumar. Suresh Kumar had died and accordingly his widow Krishna widow and mother Dharam Kaur were brought on record in the capacity of his legal heirs on the allegations that they have inherited the suit land from Suresh Kumar (deceased). The defendant Krishna and Dharam Kaur are not having any other agricultural land. If a decree for specific performance is passed then it will bring them to road as they will not be left with no source of income. Accordingly, in my considered opinion this is fit case in which the plaintiff Nafe Singh (present respondent No.1) is not entitled for specific performance of agreement but the ends of justice shall be met if the alternative relief of refund of the amount of earnest money along with simple rate of interest at the rate of 6% per annum is granted in his favour thereby converting the suit as a suit for recovery.

In view of my discussion above, the finding of the learned trial court under issues No.1 to 5 stands modified. Consequently, it is directed that plaintiff/respondent No.1 shall be entitled to recover the amount of Rs.1,80,000/- along with

interest at the rate of 6% PA to be calculated on the said amount of Rs.1,80,000/- w.e.f. 23.7.1996 till its realization.

37. The finding of the learned trial court under remaining issues are not assailed before me.”

Feeling aggrieved, plaintiff-appellant has come with with the instant regular second appeal.

I have heard learned counsel for parties and have perused the paper book and lower court record with their assistance.

The execution of agreement by Suresh Kumar (since deceased) and receipt of ₹1,80,000/- as an earnest money; that the plaintiff-appellant was always ready and willing to perform his part of contract, are not disputed.

The substantial question of law which arise for consideration in this case is as to whether appellate court was justified in modifying the relief of specific performance as allowed by lower court and allowing alternative relief of recovery of earnest money?

Learned counsel for appellant has argued that it was no where pleaded by the respondent in their written statement that defendant-respondent are not having any other agricultural land and in the event of decree of specific performance being allowed, they will face any difficulty or it will be a case of hardship. The first appellate court has modified the relief allowed by lower court without any pleading or evidence to this effect in an arbitrary and whimsical manner. The observations of first appellate court are not based on any facts or evidence on record.

Learned counsel for respondent has very fairly conceded that there is no pleadings that respondents did not own any other land except the suit land or that in the event of relief of specific performance being allowed, they will be put to a hardship. He has, however, argued that Suresh Kumar has been survived by his wife Krishan and mother. Relief of specific performance, if allowed, will put respondents under hardship as they will loose a valuable piece of land at a paltry rate of ₹65,000/- per acre which was agreed in the year 1996. The first appellate court has taken a sympathetic view in facts and circumstances of the case and allowed alternative relief as the same was also claimed by appellant.

The argument of learned counsel for respondent make out no ground to decline the relief of specific performance of agreement. Merely because the plaintiff claimed damages in a suit for specific performance of contract as an alternative relief, does not debar him to claim main relief of specific performance of contract itself. It was so observed by Hon'ble Supreme Court in case *Motilal Jain vs. Ramdasi Devi*, (2000) 6 SCC 420. The execution of agreement by Suresh Kumar is proved. The payment of earnest money in the year 1996 is not disputed. The respondents have not challenged the findings that plaintiff-appellant was ready and willing to perform his part of contract. There is no pleading that execution of sale deed will put the defendant-respondent to any hardship. In these circumstances, there was no reason made out on record to decline the relief of specific performance of agreement and to allow alternate relief. Normal rule is to grant the relief of specific performance of agreement. For declining the said relief, there has to be some special circumstances which the defendants-respondents have neither pleaded nor proved.

Section 20 of Specific Relief Act lays down that the court is not bound to grant the relief of specific performance because it is lawful to do so; but discretion of the court is not arbitrary but sound and reasonable, guided by judicial principle and capable of correction by court of appeal. One of circumstance, where court may exercise the discretion not to allow the decree for specific performance as laid down in Section 20 (2) (b), reads as follows :-

“Section 20 - Discretion as to decreeing specific performance

:-

- (1) xxx xxx xxx
- (2) xxx xxx xxx
- (a) xxx xxx xxx

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

- (c) xxx xxx xxx

(3) & (4) xxx xxx xxx”

In case, ***Sampat vs. Lakshmi Narain, 2009 (4) ICC 129***,
Coordinate Bench of this Court had observed as follows :-

“Once it has been held on appreciation of evidence, that the agreement to sell was executed on receipt of earnest money, and that plaintiffs always remained and were still willing to perform their part of contract, the relief could not be denied.....”

The appellant never pleaded or projected by leading evidence that in the event of relief of specific performance of agreement being allowed, they will face hardship or will be without any source of income. The reason for declining the relief of specific performance as taken into consideration by the first appellate court are just flimsy and are beyond pleadings and evidence on record. As such, modification of decree passed by first appellate court is not tenable. The substantial question of law is decided in favour of appellant.

As a sequel of my above discussion, this appeal has merits and the same is accepted. The judgment and decree passed by first appellate court, modifying the judgment and decree of the trial court, is set aside and suit is ordered to be decreed in terms of judgment and decree passed by trial court.

In the facts and circumstances of the case parties are left to bear their own costs.

January 08, 2015.
deepak

(SURINDER GUPTA)
JUDGE