

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3400 of 2011 (O&M)
Date of Decision: 12.05.2015

Neeraj Sharma and others

..... Appellants

Versus

Amrit Lal

..... Respondent

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. A.K. Chopra, Sr. Advocate,
with Mr. Gursher Singh, Advocate,
for the appellants.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This is plaintiffs' second appeal in a suit for possession by way of specific performance of contract in respect of total land measuring 45 kanal 7 marlas purchased from different co-owners in different khasra numbers in Village Bosti, Tehsil Tohana, District Fatehabad as fully described in the plaint.

Shorn of unnecessary details, the short story told is that the defendant was sole owner in possession of suit land. He struck a bargain with the plaintiffs to sell his land for Rs.5.25 lacs per acre. Accordingly, parties executed an agreement to sell on April 10, 2006. Out of the total sale consideration an amount of Rs.5 lacs was paid in cash whereas Rs.1 lac was paid by two cheques dated April 11, 2006 drawn on a Nationalized Bank.

The date of execution and registration of sale deed was fixed as November 30, 2006. There was a stipulation that in case, there was failure to execute the sale deed, plaintiffs would have a right to get sale deed executed. Besides, the defendant would pay double the amount of earnest money in such event. In case, plaintiffs fail to perform their part of the contract, earnest money would stand forfeited.

The case set up was that a day before the date fixed for registration of the sale deed, the defendant requested plaintiffs on telephone that due to some family problem he would not be able to reach the Sub Registrar office. It is the say of the plaintiffs that the request was accepted in telephone conversation. Despite accepting the postponement of the date, the plaintiffs yet remained present in Tehsil compound, Tohana ready with the remaining sale consideration and towards expenses of stamp duty and registration fee. They spent the whole day on Tehsil Ccomplex but the defendant failed to turn up. The defendant backed out of the deal and was contacted many a time to come forward for execution of sale deed, but to no avail. Ultimately, plaintiffs served legal notice dated February 27, 2007 through their counsel calling upon defendant to execute the sale deed up to March 13, 2007. Reply was avoided and the date elapsed. It is said that plaintiff No.4 Anant Ram got an affidavit typed and approached the Sub Registrar, Tohana for attestation of the affidavit for the purpose of marking his presence but, the officer refused to oblige on the ground that they do not attest affidavits on the basis of notice issued by counsel. Therefore, the affidavit was got attested by Notary Public Tohana instead. Then a fresh notice through counsel was served by registered post dated May 16, 2007

calling upon defendant to execute sale deed which met with no response.

This was the position when the suit was brought to enforce the contract.

The defendant entered appearance and filed written statement contesting the case. He admitted execution of the sale agreement dated April 10, 2006 upon the terms stipulated therein. It was, however, averred that plaintiffs were never ready and willing to perform their part of the contract on the date fixed for execution of sale deed which they avoided. The defendant asserted that he was in Tehsil compound on November 30, 2006 but when the plaintiffs failed to turn up he got his presence marked on the affidavit by the Sub Registrar, Tohana. Therefore, as per agreement, the earnest money stood forfeited in favour of the defendant. The defendant candidly admitted that in the hope of the remaining sale consideration being made over to him he had in turn entered into an agreement to purchase some other property which he could not buy for want of balance money from the plaintiffs and thereby he suffered a loss. He stoutly denied that that the date fixed for execution of sale deed was postponed at the instance of the plaintiffs or by his consent. In fact it was the plaintiffs who had backed out of the deal but the defendant remained ready and willing to perform his part of the contract on the relevant date fixed for execution and registration of the sale deed. In such circumstances he was not required to show that he was ready and willing on the date of the suit as law permits to excuse him from the deal. He denied receipt of any legal notice dated February 27, 2007 nor was any served upon him. However, the registered legal notice dated May 16, 2007 was admitted by the defendant.

After replication was filed, the Court framed ten issues and parties

went to trial. They led their evidence both oral and documentary and closed it.

The short question to be determined was whether the story propounded by the plaintiffs was truthful. It was based on a telephone call by the defendant to the plaintiff expressing his inability to be present in Tehsil office for execution of sale deed due to some personal problems on the date fixed and that parties should meet up the next day for the avowed purpose. If the defendant had asked for postponement then the question was why did the plaintiffs visit the Tehsil office on the appointed day claiming to be ready and willing to perform their part of the contract. It was not their case, as I think a person in the same position might have done, that they sent a scout to the Tehsil office to see whether the defendant had turned up so that they could act swiftly in case he was present. If they were present in Tehsil Complex why should they have taken the risk to get their affidavit attested by the Notary Public, Tohana to establish presence by way of evidence. Was the story correct that the Sub Registrar, Tohana had refused to mark their presence on the specious plea that the office did not accept presence to be recorded on the face of a legal notice served by an advocate. This story is hardly believable that plaintiffs went to the Sub Registrar office at Tohana and when he refused to deal with the legal notice for the purpose of marking presence then why they did not follow regular procedure which would have taken hardly any time to make an affidavit acceptable to the Sub Registrar, Tohana. The fact remains that the defendant went on the appointed day and got his presence marked on an affidavit before the Sub Registrar, Tohana certifying that he was present and ready

and willing to perform his part of the contract but the plaintiffs had only weak evidence in support of their plea. This contrived story has not been believed by both the courts below which is clearly an afterthought based on a telephone conversation. There is nothing in writing to support it nor evidence establishing factum of contact over telephone. It is not that plaintiffs strove to establish that a call indeed was exchanged between the parties and efforts to supply call details from the service provider had failed to elicit information say on account of the call being an old one.

What is argued is that there was an another agreement to sell in which the appointed day was November 29, 2006 though pertaining to a different property and the presence of the plaintiffs was recorded and duly documented in accordance with law establishing plaintiffs' presence in the Sub Registrar's office. The trial Court in its judgment and decree dated February 10, 2009 did not buy the argument of the plaintiffs that they had tried their best to get their presence marked in the office of Sub Registrar, Tohana and the officer refused to help. This part of the evidence was discarded as being beyond pleadings. The story was not pleaded in the plaint and, therefore, no amount of evidence could be led in proof of the averment. It is settled that no amount of evidence or argument can be looked into or considered in the absence of pleadings. To make matters worse for the plaintiffs they did not tender the original affidavit which they wanted to get attested from Sub Registrar, Tohana on November 30, 2006 which leads to the direct inference that plaintiffs were not present on the said date. The inference drawn by court was correct.

When the Naib Tehsildar Rajesh Kumar appeared as DW-2 no

suggestion was put to him in his cross examination that he refused to mark the presence of the plaintiffs on the fateful day. The story spun was found as one based on falsehood. Thus, the foundational fact necessary to secure the relief of specific performance as to readiness and willingness to perform part of the contract was missing from the judicial file. If plaintiffs were not ready and willing to perform their part of the contract then they are disentitled to the discretionary relief of possession by way of specific performance. The sale agreement then cannot be enforced against the innocent defendant who was ready and willing to perform his part of the contract but there was failure on the part of the plaintiffs to perform their part of the contract.

The next question which arises is as to whether any truthful attempt was made to extend the date of execution of sale deed. The courts below have found nothing from the evidence adduced by the parties to return a solid finding that the date was mutually extended for execution of sale deed. The service of notice dated February 27, 2007 has not been proved on file and neither the acknowledgement due. Nor any date was placed on record of a certificate from the Postal Department nor is any report forthcoming from the official quarters. Thus, the courts placed little faith on Ex.P-6 i.e. the postal receipt or that it was sufficient evidence to presume service upon defendant. The trial court discarded the argument of service of notice as bereft of merit because the address mentioned in the postal receipt Ex.P-6 is not correct and, therefore, there was no due service upon the defendant-vendor. The trial Court meticulously placed its finger on the address given in the memo of parties where the defendant's address is

different from the address on the postal receipt. This was clinching evidence against the plaintiffs. In the absence of complete address, it cannot be presumed that the legal notice dated February 27, 2007 was served upon the defendant. There was thus no occasion for the defendant to turn up for execution of sale deed on March 13, 2007 the date imagined by the plaintiffs. The second registered legal notice dated May 16, 2007 the receipt of which was honestly admitted by the defendant was served after expiry of more than six months from the original date fixed for execution of sale deed in the sale agreement. The trial Court also did not accept the proposition that time was not the essence of the contract. The stipulation in the agreement to sell Ex.P-1 puts paid to the argument of time not being the essence of the contract since the parties agreed by contract that in the event of failure to execute the sale deed, the earnest money will be forfeited. Non presence on the appointed day would activate the forfeiture clause and it would come into existence forthwith on failure to act in terms of the contract. The question merely is as to which of the parties tried to avoid performance. On these premises, the suit failed.

The appeal carried to the learned Additional District Judge-II, Fatehabad was turned down on March 31, 2011 by affirming the findings of the trial court on the spinal issues of which *inter alia* were with respect to lack of readiness and willingness to execute the contract. It is not found necessary to traverse what the court of first appeal said since it was a repeat performance of the views expressed by the trial court on the evidence. The application for leading additional evidence made under Order 41 Rule 27 CPC was rightly rejected while passing the main judgment. By this

application, the plaintiffs sought to introduce facts from another deal struck relating to a different subject matter though involving an issue of specific performance of an agreement to sell property applied for in order to establish the presence of the plaintiffs before the Sub Registrar, Tohana on November 30, 2006, the eventful day for claiming a successful court of appeal decree in favour of the plaintiffs but involving third parties which had nothing to do with the defendant and the deal that he had agreed to strike with the plaintiffs. The court of first appeal correctly rejected the application by holding that since defendant is not a party to that appellate decree, the same cannot be used against him in the present case. Multiple presences on the same day with respect to different deals cannot be used collaterally to establish that the plaintiffs were in any case present in Tehsil office at Tohana to strike another deal and, therefore, the plaintiffs should be assumed to be ready and willing to perform their part of the contract viz-a-viz the defendant. In my view also plaintiffs have miserably failed to prove that they are entitled to the discretionary relief of a decree specific performance of the contract, the existence of which was not disputed. The preponderance of probabilities leans verily in favour of the defendant-vendor and against the vendee plaintiffs that they were not present on the appointed day and time was not extended by mutual agreement either orally or in writing.

No questions of law or fact arise in this appeal which merit admission of the appeal for any further consideration nor is there any cogent reason to upturn the sound reasoning recorded by the courts below to dismiss the suit.

The appeal is accordingly dismissed so also the suit.

(RAJIV NARAIN RAINA)
JUDGE

12.05.2015
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