

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

**RSA No.754 of 2012 (O&M) and
XOBS-No.15-C of 2012**

Date of Decision: 14.12.2015

Gurjinder Singh

.....Appellant

Versus

Paramjit Kaur and another

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Ashwani Chopra, Sr. Advocate with
Mr. G.S. Bhandal, Advocate and
Ms. Amrit Grewal, Advocate
for the appellant.

Mr. Vipin Mahajan, Advocate
for respondent No.1-Cross-objector.

RAJ MOHAN SINGH, J.

[1]. Vide this judgment **RSA No.754 of 2012** titled as
Gurjinder Singh Vs. Paramjit Kaur and another and **Cross-
objection No.15-C of 2012** are being decided.

[2]. Plaintiff Gurjinder Singh filed a suit for possession by
way of specific performance of agreement to sell dated
17.12.1999 in respect of land measuring 1 kanal as depicted in
the head-note of the plaint. In alternative, suit for recovery of
Rs.96800/- along with interest i.e. 80,000/- (Rs.40,000/- earnest

amount and 40,000/- penalty+ Rs.1680/- as interest @ 12 % per annum from 12.02.2000 upto 15.10.2002) and forfeiture interest @ 12 % per annum was also pressed into service. Plaintiff alleged that agreement to sell was executed on 17.12.1999 for a total sale consideration of Rs.3,74,000/-. Defendant No.1 received Rs.40,000/- as earnest amount at the time of execution of agreement to sell in the presence of attesting witnesses namely Purshotam Singh and Darshan Singh. The target date for registration of sale deed was fixed as 15.02.2000. It was agreed between the parties that in case plaintiff resiles from the agreement his earnest amount would be forfeited by the defendant No.1 and in case of default on the part of defendant, he would pay double of the earnest money. Plaintiff alleged that he remained always ready and willing to perform his part of contract and remained present in the Teshil Office on 15.02.2000 along with balance sale consideration but defendant No.1 did not turn up and he got his presence marked by way of affidavit. Subsequently, plaintiff came to know that defendant No.1 has illegally executed sale deed in favour of defendant No.2 on 13.11.2000 which is claimed to be collusive, null and void and is not binding upon the rights of the plaintiff. Defendant No.2 had full knowledge of agreement to sell because Purshotam Singh had already witnessed the

agreement to sell. Plaintiff got issued legal notice dated 12.04.2002 to the defendant but the same was received back unserved. Again a notice dated 24.09.2002 was received back as refused by defendant No.1.

[3]. The suit has been contested by defendant No.1 on all the grounds. Readiness and willingness on the part of plaintiff was denied. It was submitted that defendant No.1 remained present in the office of Sub Registrar but plaintiff did not turn up as he was not ready and willing to perform his part of agreement. Plaintiff did not turn up during working hours. Defendant No.1 got her presence marked by way of affidavit. She was in need of money and the plaintiff did not approach her even after the stipulated date. No notice was received by her. Defendant No.2 also contested the suit and claimed that he is a bona fide purchaser without notice. No litigation was pending at the time of purchase of land for valuable consideration.

[4]. Plaintiff filed replication. On the basis of pleadings of the parties, following issues were framed:-

“1. Whether the plaintiff is entitled to possession by way of specific performance of agreement dated 17.12.1999? OPP

2. Whether the plaintiff is entitled to alternative relief of recovery as

alleged? OPP

3. Whether the plaintiff was ready and willing to perform his part of agreement? OPP

4. Whether the suit is not maintainable? OPD

5. Whether the plaintiff has no cause of action to file the present suit? OPD

6. Whether the defendant No.2 is bona fide purchaser and he is protected under the provision of Section 41 of Transfer of Property Act? OPD

7. Relief.”

[5]. To prove their case, both the parties led their respective evidence.

[6]. Trial Court took issues No.1, 3 and 6 jointly and discussed the evidence of scribe Ajay Pal and other witnesses. Trial Court decided issues No.1 and 3 against the plaintiff and in favour of defendants. Issue No.6 was also decided in favour of defendants. It is only under issue No.2 the trial Court held that plaintiff is not entitled to specific performance as he was not ready and willing to perform his part of contract. Since the execution of agreement to sell and passing of earnest money have not been denied by defendant No.1 and defendant No.1 never opted to rescind the agreement to sell, therefore, in the

absence of any issuance of notice for forfeiture of the earnest money, trial Court made the defendant No.1 liable to refund the earnest money and decreed the suit of the plaintiff partly for recovery of Rs.40,000/- only with 6% interest per annum from the date of filing of the suit till actual realisation of the amount vide judgment and decree dated 08.10.2008.

[7]. Feeling aggrieved against the judgment and decree dated 08.10.2008, plaintiff-appellant as well as defendant No.1 went in appeal before Lower Appellate Court. Lower Appellate Court vide judgment and decree dated 28.09.2011 dismissed both the appeals. Now the present Regular Second Appeal has been filed by the plaintiff-appellant in which cross-objections under Order 41 Rule 22 CPC have been filed by defendant No.1.

[8]. In the grounds of appeal following substantial questions of law have been framed:-

“A. Whether the Courts below having found and held the due execution of the agreement to sell and receipt in token of having receiving the earnest money from the plaintiff/appellant are legally justified in denying the relief for specific performance of the agreement, especially in light of the provision of Section 16 of the Specific

Relief Act, 1963 and the well established law in this regard?

B. Whether non-consideration and/or misreading of the pleadings and the evidence render the impugned judgments and decrees, as illegal, without jurisdiction, as such unsustainable in the eyes of law?

C. Whether in light of the facts and circumstances of the present case, the Ld. Courts below are legally justified in exercising the discretion in not granting the decree for specific performance?

D. Whether the finding of the Courts below that the plaintiff/appellant was not ready and willing to perform his part of agreement, solely on the basis that legal notices were given after some delay, can be legally sustained?

E. Whether defendant/respondent No.1 could have legally executed the sale deed after having executed the agreement in favour of the plaintiff/appellant especially without canceling the same?

F. Whether the Ld. Courts below are legally justified in brushing aside cogent, consistent and un-rebutted oral evidence altogether while

returning the finding with regard to the readiness and willingness?

[9]. In the cross-objection, learned counsel for the cross-objector has also framed substantial questions of law in the following manner:-

“i) Whether once the Courts have come to the conclusion that plaintiff is not ready and willing to perform his part of contract then, can the plaintiff be granted relief of recovery of earnest money?

ii) Whether clause in the agreement of the sale that if the purchaser fails to perform his part of the contract, the entire earnest money would stand forfeited, would come into play thereby dis-entitling the plaintiff from recovery of earnest money?

iii) Whether the Ld. Courts below erred in not ordering for registration of FIR against the appellant/plaintiff once it is proved that he has made interpolations in the agreement of sale and signatures on Ex.P1 and Ex.P2 are different?”

[10]. I have heard learned counsel for the both the parties and have also perused the material on record with their due assistance.

[11]. Plaintiff has appeared as PW 1 and reiterated the version given in the plaint and stated that he always remained ready and willing to perform his part of contract. He remained present in the office of Sub Registrar on 15.02.2000 with balance sale consideration but defendant No.1 did not turn up. Plaintiff got his presence marked by way of affidavit (Ex.P2). Defendant No.1 has sold out the suit land in favour of defendant No.2 on 13.11.2000. Plaintiff served legal notice on 12.04.2002 and 29.04.2002 upon the defendant but they were received back unserved. Learned counsel also relied upon statement of PW-2 Ajay Pal deed writer and PW-3 Darshan Kumar attesting witness in support of his contention. Defendant No.2 had prior knowledge of the agreement as the attesting witness Purshotam Singh was the attesting witness of the sale deed.

[12]. Learned counsel for the appellant cites **Gurbachan Singh and another Vs.Gurmit Singh 2003(3) CCC 597** to contend that subsequent purchaser does not fall under the category of bona fide purchaser if the witness is marginal witness of agreement to sell and subsequent sale deed is the same. There cannot be any dispute with regard to the proposition held in the aforesaid judgment but here the case has been resisted upon readiness and willingness of the plaintiff which has been found to be lacking on the basis of evidence on

record and moreover, plaintiff himself has not fulfilled terms and conditions of agreement to sell by not making payment of Rs.60,000/- on 15.01.2000. Plaintiff himself has flouted the condition of agreement and tempering has been proved in agreement to sell as well as in the affidavit of presence submitted by the plaintiff himself where he has not signed the affidavit and his presence was not proved in the presence of Sub Registrar on 15.02.2000. The witness has himself admitted that he was not present in the office hours, rather he was present in the evening. The oral assessment of evidence makes out a case in favour of defendant No.1.

[13]. Learned counsel for respondent No.1 has submitted that she was in dire need of money. Plaintiff did not turn up on the date of execution of sale deed. She got her presence marked by way of affidavit Ex.D1. Even the plaintiff failed to make the payment of installment on the stipulated date. Time was the essence of the contract in view of her need. Thereafter, defendant No.1 had no option but to execute the sale deed in favour of defendant No.2. Learned counsel for defendant No.2 claimed defendant No.2 to be a bona fide purchaser without notice of any agreement to sell. He made necessary enquiries in respect of property before purchasing the same. Rather, defendant No.2 was informed by the plaintiff himself regarding

the suit property as plaintiff is a property dealer.

[14]. Agreement to sell is not in dispute. Receipt of earnest money is also not in dispute. The controversy revolves only in respect of readiness and willingness of the party to the agreement. Perusal of affidavit Ex.P2 shows that plaintiff got his presence marked on the date fixed for execution of agreement to sell. This version has been corroborated by Darshan Kumar PW-3 who has signed as witness on the affidavit. The plaintiff also tried to extract help from notices Exs.P4 and P6 in the context of proving his readiness and willingness. Defendant on the other hand also got her presence marked by way of affidavit Ex.D1 which was also admitted by Darshan Kumar-PW3 while appearing as defendant witness as DW2. PW 3 in his cross examination has deposed that plaintiff remained present after the evening. It means that plaintiff remained present in the office of Sub Registrar after working hours of the office. Willing party has to be present in the office of Sub Registrar during the working hours from 10 AM to 5 PM. It is necessary to pursue readiness and willingness of the plaintiff with reference to material on record.

[15]. Agreement to sell Ex.P1 contains a condition as below: "Note (2) Rs.60,000/- will be paid on 15.01.2000." Admittedly the said amount was not paid by the plaintiff on the date fixed

i.e. 15.01.2000. Question arises whether time was the essence of the contract or not? In normal circumstances, time is not the essence of the contract in case of immovable properties but it has to be culled out from the circumstances of each case. Parshotam Singh attesting witness who has also attested the agreement to sell while appearing as DW 3 has categorically mentioned that defendant No.1 was in dire need of money as she had entered into an agreement of purchase of one plot. For that she had to arrange funds from her relatives and she was insisting him to ask the plaintiff to make the payment as compromised by him on 15.01.2000. The witness approached the plaintiff but he showed his inability. Evidence on record shows that the witness was not cross examined by the plaintiff on the aforesaid fact. Even the defence of the defendant No.1 is categorical in respect of aforesaid fact when she was in need of finance. There is no replication to the written statement on these lines. The witness was not cross examined on this issue and if there is no specific denial in the replication to the specific averments made in the written statement, the fact has to be taken to be deemed admission. The plaintiff put off the matter despite the fact that time was shown to be the essence of the contract. Condition of the agreement to pay an amount of Rs.60,000/- on 15.01.2000 was not fulfilled despite the fact that

both the parties agreed to such condition. If the time was the essence of the contract, the plaintiff could have requested the defendant No.1 for extension of time for payment of Rs.60,000/- as agreed between them to be paid on 15.01.2000.

[16]. If terms and conditions of the agreement between parties shows time as essence of contract, the same can be considered by the Court even if the time is not essence in case of immovable property. The vendee himself performed his obligation within the time prescribed. In the absence of installment, vendee has flouted the agreement to sell himself. Even the notices Exs.P4 and P6 dated 12.04.2002 and 24.09.2002 respectively do not show readiness and willingness of the plaintiff. The contract date for execution of sale deed was 15.02.2000, an amount of Rs.60,000/- was to be paid by the vendee on 15.01.2000. From 15.02.2000 to first notice dated 12.04.2002 Ex.P4 the vendee took almost two years and in the intervening period development of execution of sale deed dated 13.11.2000 took place. Similarly the second effort in the form of notice dated 24.09.2002 Ex.P6 further aggravates the alleged readiness and willingness on the part of the vendee to perform his part of obligation. The present suit came to be filed on 15.11.2002. If the plaintiff was so ready and willing to perform his part of obligation, he could have resorted to lawful

proceedings after the target date of registration of sale deed dated 15.02.2000. There is no justification for such a long delay during which third party interest has been created. Even vendee has not fulfilled the terms and conditions of the agreement. Both the notices received back undelivered, therefore, the claim of the plaintiff/vendee is based on falsehood. Defendant No.2 while appearing as DW 4 has given a further jolt in the stand of the plaintiff/vendee. Defendant No.2 was in search of plot. He visited to Joban property dealer where plaintiff met him. Plaintiff told him that plot in dispute is for sale. Defendant No.2 went to the spot with the plaintiff and plaintiff demanded a sum of Rs.4 lac by saying that plot is owned by his relative. Thereafter, defendant No.2 was told by one Hans Raj, a shopkeeper running his shop just opposite to the site in question that the plot is owned by one Sukhjinder Singh. Sukhjinder Singh is husband of defendant No.1. Accordingly, deal was struck with the party in respect of suit property. Nothing incriminating come out from the cross examination of defendant No.2. Nothing was put by the plaintiff to defendant No.2 that he never met the plaintiff, nor the plaintiff took him to the suit property. It can be inferred that the plaintiff did not meet defendant No.2 and told him about availability of plot. This also shows that plaintiff is a property dealer and was intending to sell the suit property to

someone else on the basis of agreement to sell in order to earn profit. He himself never intended to purchase it. It shows that defendant No.2 purchased the plot in question without notice of agreement to sell. Both the Courts below have held that plaintiff is not entitled to relief of specific performance and defendant No.2 is a bona fide purchaser. Perusal of Ex.P1 on record reveals that two last lines have been added at a later stage at Note No.3. This note recites: "Gurjinder Singh Putar Kuldeep Singh Jis de naa chahe registry karwa sakda hai mainu koi itraj nai hovega".

[17]. The aforesaid recital is proved to be subsequently added. This recital does not find mention in the register of the stamp vendor Ex.P11 where the entries ended up to Note-2. Even the affidavit executed by Gurjinder Singh on 15.02.2000 Ex.P2 has its own explanation. The signatures of Gurjinder Singh as well as of Darshan Kumar appearing on this affidavit were compared with the signatures appearing on the sale deed. Signatures of Gurjinder Singh as Q1 and Q2 were compared with his admitted signature S1 appearing on the sale deed and signature of Darshan Kumar appearing as witness on affidavit as Q3 was also compared with his signature on the sale deed at S6. The report of the handwriting expert Ex.DW5/A shows that "after considering the above made observations, I am of the

opinion that the questioned signatures Mark as Q1 and Q2 are not in the hand of the person who has written standard signatures Mark as S1 to S5 of Sh.Gurjinder Singh. The questioned signatures Q1 and Q2 are the project of forgery by impersonation. I am also of the opinion that questioned signature Q3 is not in the writing of the person who has written standard signatures Mark S6 to S9 of Sh. Darshan Kumar. The questioned signature Q3 is the project of forgery by impersonation.”

[18]. In the light of aforesaid, the presence of plaintiff before the Sub Registrar on 15.02.2000 is highly doubtful and the evidence has been created in the form of affidavit Ex.P2 just to show the presence by lawful means. Even as per statement of the witness, the presence of the plaintiff was not during working hours, rather, the witness stated that he came present in the evening i.e. after the working hours of the office of Sub Registrar. The addition of concluding line in the agreement to sell and the forgery of signature on affidavit Ex.P2 go in a way to uproot the case of the plaintiff. Both the Courts below have rightly decided issues No.1, 3 and 6. Under issue No.2, Courts below have find that though the plaintiff was not ready and willing to perform his part of contract but since defendant No.1 did not deny the execution of agreement and receipt of earnest

amount and did not take effective steps to rescind the contract, nor issue any notice of forfeiture of the earnest money, defendant No.1 was obligated to refund an amount of Rs.40,000/- to the plaintiff along with interest @ 6% per annum from the date of filing of suit till final realisation.

[19]. Since the plaintiff himself has violated terms and conditions of the agreement and was not found ready and willing to perform his part of contract, therefore, as per terms and conditions of agreement to sell the amount was liable to be forfeited and for that no separate notice was required to be served upon the plaintiff. Terms and conditions of the agreement to sell are applicable only after admitting the terms and conditions of the agreement to be in operation between the parties.

[20]. In considered opinion of this Court, the observations of the Courts below are highly imaginary. The questions of law as formulated in the grounds of appeal do not arise at all. The controversy under question No.A has been rightly decided by the Courts below. Plaintiff is lawfully not found entitled to decree for specific performance under issues No.1, 3 and 6. Impugned judgments and decrees are not the result of any misreading of evidence and are not without jurisdiction, therefore, question No.B does not arise. Question No.C has to be answered in the

light of proving facts on record. The Courts have exercised its discretion vested on them by not allowing decree for specific performance, even the refund of Rs.40,000/- in considered opinion of this Court is not justified. Plaintiff is not proved to be ready and willing to perform his part of contract. The signature on the affidavit for marking presence in the office of Sub Registrar on 15.02.2000 are found to be tampered as per report of Expert, even the concluding part of the agreement to sell at Note-3 is found tampered. No such recital has been found in the register of stamp vendor. Therefore question No.D also does not arise. Question No.E is a question of fact. Question No.f does not arise as question of readiness and willingness has been duly answered in question No.D. The questions as formulated by the cross objector do arise in this case. Once the plaintiff is not found to be ready and willing to perform his part of contract then as per condition of agreement to sell the earnest amount has to be forfeited and question of paying the double of earnest amount does not arise. Plaintiff cannot be granted relief of recovery of earnest amount. Question No.2 also arises inasmuch as that in the absence of failure on the part of plaintiff to perform his part of contract, earnest money is liable to be forfeited and no recovery can be ordered in favour of plaintiff. Question No.3 does not arise for consideration of this Court

inasmuch as that the ground for expediency in the event of production of false and fabricated documents before the Court lies before whom such an event has taken place in the light of interpretation attached with the provisions of 340 Cr.P.C. Therefore this question does not arise for consideration of this Court.

[21]. Having considered the controversy in detail and in the light of cross objection filed by defendant No.1, impugned judgments and decrees passed by the Courts below are required to be modified, thereby forfeiting the earnest money to the tune of Rs.40,000/- in favour of defendant No.1 as per Clause of agreement to sell dated 17.12.1999. Accordingly, the appeal is dismissed and cross objections are allowed to the extent as aforesaid.

14.12.2015
Prince

(RAJ MOHAN SINGH)
JUDGE