

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

RSA No.1076 OF 2013 (O&M)
DATE OF DECISION : 17th AUGUST, 2015

Harbhajan Singh

.... Appellant

Versus

Sarup Singh

.... Respondent

CORAM : HON'BLE MR. JUSTICE SURINDER GUPTA

* * * *

Present : Mr. Kanwaljit Singh, Senior Advocate with
 Mr. Sandeep Jain, Advocate for the appellant.

Mr. M. L. Sareen, Senior Advocate with
Mr. Nitin Sarin, Advocate for the respondent.

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SURINDER GUPTA, J.

1. This is regular second appeal against the judgment dated 10.12.2012 passed by Additional District Judge, SAS Nagar, Mohali, whereby the judgment and decree passed by the lower Court allowing the relief of specific performance of agreement dated 18.02.2005, was modified and decree for recovery of ₹8,00,000/- (paid as earnest money) along with interest @ 18% per annum from the date of agreement i.e. 18.02.2005 till payment, was passed in favour of plaintiff with proportionate costs.

2. Plaintiff-Appellant-Harbhajan Singh filed suit seeking relief of specific performance of the agreement dated 18.02.2005 with regard to the land measuring 2250 square yard as fully described in the headnote of the plaint situated at village Saidpura, Tehsil Derabasi, District Mohali. As per

the appellant, defendant/respondent agreed to sell the above property for a sum of ₹24,00,000/- and received ₹8,00,000/- as earnest money at the time of agreement. The date for execution of the sale deed was fixed as 30.04.2005. On 30.04.2005 defendant-responder came to the house of appellant and expressed his inability to execute the sale deed as he had failed to get the land redeemed from the Bank and informed the appellant that after getting the land redeemed he will intimate him. As a result of assurance of defendant, the plaintiff postponed the programme of getting the sale deed executed and registered on 30.04.2005, on which date he was having sufficient amount with him for payment of balance sale consideration and to incur other expenses. However, at that time the defendant handed over the possession of only one room out of the property in question to the defendant as part performance of the agreement in question, where the appellant has been running his office. When no intimation was received from the defendant-responder, the appellant issued a legal notice dated 10.09.2007 upon the defendant, thereby calling upon him to execute the sale deed. However, that notice was got returned by the respondent with false report of postal authorities. Ultimately the suit for seeking the relief of specific performance was filed on 23.10.2007.

3. Learned Additional Civil Judge (Senior Division), Derabasi allowed the relief of specific performance with the observations that the defendant-responder was at fault in not clearing loan amount, which was a condition precedent for execution of the sale deed. Secondly, the defendant was at fault and wanted to take advantage of steep rise in the

prices of the property. The plea of defendant that he had been ready and willing to perform his part of the contract and had also appeared before the Sub-Registrar on 02.05.2005 as 30.04.2005 and 01.05.2005 were holidays, was discarded with the observation that 30.04.2005 was a working day. The defendant-respondent filed appeal wherein conclusion drawn by lower Court while allowing the relief of specific performance of the agreement that defendant was at fault in complying with the terms of agreement, was overruled with the observation that in order to succeed in suit for specific performance the plaintiff has to plead as well as to prove that he was always ready and willing to perform his part of the agreement. He cannot succeed merely by proving that defendant had not been ready and willing to perform his part of contract. On the basis of the document on record, it was observed that on 30.04.2005, the date fixed for execution and registration of the sale deed, was Saturday and as per the gazette notification dated 29.12.2004 the Government of Punjab had declared all Saturdays and Sundays in the year 2005 as holiday in public offices under the State Government. The appellate court took note of the fact that the defendant-respondent had appeared before the Sub-Registrar, Derabasi on 02.05.2005 and got his presence recorded vide affidavit Ex. DW1/B. The plaintiff-appellant had admitted that defendant told him about his coming to office of Sub-Registrar for execution and registration of the sale deed on 02.05.2005 but on that day the plaintiff avoided to go there. He had given explanation that he had not gone to the office of Sub-Registrar on

02.05.2005 as defendant had not cleared the loan taken against the land in question.

4. Major emphasis of learned counsel for the appellant is on the term recited in the agreement to sell Ex.P-1 that there was loan on the land which the owner will get cleared himself before executing the sale deed. It was argued that the loan was not cleared by the defendant-respondent, as such, the sale deed could not be executed. Ultimately the appellant served notice dated 10.09.2007 and then filed the suit seeking the relief of specific performance. The appellate Court has taken the delay in notice and filing of suit, as a vital circumstance while declining the relief of specific performance of the agreement, ignoring this fact that the lapse was on the part of the defendant-respondent, who failed to clear the bank loan on the plot. The loan was admittedly cleared during the pendency of the suit, as such, it was the defendant-respondent who has violated the term of agreement Ex.P-1.

5. Before proceeding further it will be relevant to note that the appellant is a person who is in the trade of real estate. He was one of the Director of Shivalik Vihar Private Limited – a company dealing in real estate. He was facing a number of complaints relating to the dispute of allotment of plots etc. This shows that the appellant was not a novice in the matter of dealing with transactions for sale and purchase of properties. He was very well aware that when a date has been fixed for execution and registration of the sale deed in the agreement to sell, the same has got relevance and is required to be adhered to. A person in the business of real

estate will never allow a transaction to slip away by waiting for about two and half years after the date for execution and registration has matured. This plea that the appellant kept on waiting as the respondent had not cleared the loan amount as per the terms of the agreement to sell Ex.P-1, is just an excuse put-forth by the appellant to cover up the lapse on his part. Had he been ready and willing on 30.04.2005 to execute the sale deed, he would have responded to the call of respondent to appear in the office of Sub-Registrar, Derabasi for execution and registration of the sale deed. If he was under this impression that the clearance of the loan amount is a condition precedent for execution of the sale deed, he would have immediately served the notice to respondent calling upon him to clear the loan amount. Even otherwise, there is no legal bar in getting the sale deed of the property under mortgage, as the amount of mortgage can be adjusted in the sale consideration or can be paid by the vendee. The appellate Court while taking into consideration the observations of the Apex Court in the case of ***K.S. Vidyanandam Vs. Vairavan*** reported as ***1997 AIR (SC) 1751*** and ***Saradamani Kandappan Versus S. Rajalakshmi***, reported as ***(2011) 12 SCC 18 page 40*** observed in para 24 of the judgment as follows:

“24. In the instant case also, the plaintiff has brought the suit for specific performance of the agreement after about 2 ½ years of the date fixed for performance of the agreement. The property in question is situated in District Mohali. The plaintiff and his witness Ishar Singh have admitted that the rates of the properties in this area are increasing day by day. When it is made out that the evidence of the plaintiff showing his

*readiness and willingness to perform his part of the agreement is of doubtful nature, it is always safe to pass the decree for refund of the earnest money along with interest thereon, so that the plaintiff may not take the advantage of rise in the prices so as to cause a huge loss to the defendant by his unfair conduct. The judgment of Hon'ble Supreme Court in **Panchanan Dhara's case (supra)** relied upon by the learned counsel for the respondent does not apply to the facts of this case, as in that case it was found that the vendee had been time and again requesting the vendor to execute the sale deed and the vendor had been making promises to him to execute the sale deed. The vendee had filed the suit when the vendor refused to execute the sale deed. However in the instant case as already mentioned above, the plaintiff had issued notice Ex.P2 after about 2 years & 5 months and he has brought the suit after 2 ½ years of the date fixed for performance of the agreement. Under these circumstances, the findings of the learned trial Court on issue No.1 are not sustainable. However the argument of the learned Counsel for the appellant that the earnest money stands forfeited on account of the failure on the part of the respondent/plaintiff is concerned, the same is not tenable. It seems that the defendant has also not taken any appropriate step for performance of the agreement in question on his part and moreover he never issued notice to the plaintiff thereby intimating him that his earnest money stands forfeited for his failure to get the sale deed executed. Therefore the findings of the learned trial Court on issue No.5 are upheld. However the findings of the learned trial Court on issues No.1, 2*

and 4 are reversed and it is held that the plaintiff would be entitled to the earnest money along with interest at the rate of 18% per annum from the date of the agreement till payment thereof.”

6. Learned counsel for the appellant has relied upon the observations made in the case of ***K.Prakash Vs. B.R. Sampath Kumar*** reported as ***2014(4) Civil Court Cases, 348 (SC)*** and has argued that rise in price after agreement, is not a hardship calling for refusal of decree for specific performance. He has also relied upon the observations of a coordinate Bench of this Court in the case of ***Dayal Singh Vs. Avtar Singh & Anr.*** reported as ***2014 (4) Civil Court cases, 499 (P&H)*** and has argued that when the conduct of respondent was responsible for delaying execution of the sale deed the relief of specific performance cannot be denied to the appellant. He has also referred to the observation of the Hon’ble Supreme Court in the case of ***Zarina Siddiqui Vs. A.Ramalingam alias R. Amarnathan*** reported as ***2014(3) Local Acts Reporter, 212***, which are as follows:

“25. It is well settled that remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that Court’s discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.

XXX..... XXX..... XXX..... XXX.....

34. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.”

7. With due respect to the observation in above referred cases, I am of considered opinion that these have no application to the facts of present case. In a suit seeking relief of specific performance plaintiff has not only to prove his readiness but also his willingness to perform his part of the agreement and if the suit is not filed within a reasonable time, this fact can be looked into by the Court while exercising its discretionary jurisdiction of allowing or declining the grant of relief of specific performance. In the case of *M/s. J.P. Builders and another vs. A. Ramadas Rao and another* reported as **2011(1) SCC, 429**, Hon’ble Apex Court has observed that “plaintiff must allege and prove continuous readiness and willingness to perform the contract on his part from the date of contract”. Though there could not be any straightjacket formula to infer the readiness and willingness, it can be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The appellant has not come up with any valid explanation for two and half years’ delay in filing the suit. In these circumstances, the appellate court below has committed no error of law or fact while

exercising its discretionary powers to decline the relief of specific performance and to award alternate relief of refund of earnest money with proportionate cost and interest.

8. No substantial question of law requiring determination, arises in this appeal. The readiness and willingness on the part of the plaintiff to perform his part of the contract was not a question of law but a question of fact and it was also so observed by the Apex Court in the case of ***Veerayee Ammal, Vs. Seeni Ammal*** reported as ***2001 AIR (SC) 2920***. It was also so observed in the case of ***Phool Pata and another Vs. Vishwanath Singh and others***, reported as ***2005(6) SCC, 40***.

9. In view of my above discussion, this appeal has no merit and is accordingly dismissed.

10. As during the pendency of the appeal the sale deed was got executed by the executing Court in favour of the appellant as per the decree passed by the Additional Civil Judge (Senior Division), Derabasi, the same is ordered to be cancelled and the amount of the stamp papers of that sale deed be refunded to the appellant in accordance with law.

17th August, 2015
'raj'

(SURINDER GUPTA)
JUDGE