

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

**RSA No. 3828 of 2013 (O&M)
Date of decision : 06.08.2015**

Samunder Singh & ors. ...Appellants
versus

Jagbir Sehrawat and anr. ...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Himanshu Puri, Advocate
for the appellants

RITU BAHRI , J.

This regular second appeal is directed against the judgment and decree dated 24.08.2013 passed by the Lower Appellate Court whereby the judgment and decree dated 23.02.2012 passed by the learned trial Court was set aside.

The case of the plaintiff/respondent No. 1 (for short 'respondent No. 1') before the Courts below was that appellant No. 1 and Brahm Prakash (since deceased) were owners of 1 kanal 11.4 marlas of land situated in village Daultabad Tehsil and District Gurgaon. They agreed to sell the suit land to respondent No. 1, vide agreement dated 20.10.2005 at the rate of Rs.525/- per sq yards and

agreement to this effect was written on the same day. The total sale price of the land came to be Rs.4,98,750/-. A sum of Rs.50,000/- was paid as earnest money (Rs.45,000/- vide cheque No. 022937 and 022938 and Rs. 5000/- in cash). The sale deed was to be executed on 21.12.2005. However, respondent No. 1 remained present in the office of Sub Registrar on 21.12.2005 along with balance sale consideration. However, appellant as well as Brahm Prakash did not turn up to execute the sale deed. Respondent No. 1 got his presence marked before the Executive Magistrate by swearing an affidavit in this regard. He again approached the defendants for execution of the sale deed, who assured to get the sale deed executed in near future and thus respondent No. 1 waited for the execution of the sale deed till 15.05.2006 but defendants had failed to execute the sale deed. Finally, a legal notice was sent to the defendants but to no avail.

On notice, defendant No. 1 admitted that he and his brother are owners of the suit land and had agreed to sell the same to respondent No. 1 but respondent No. 1 was never willing to perform his part of contract and he never approached the defendants or his brother who has since been expired on 30.10.2006. Since respondent No. 1 failed to perform his part of contract, therefore the agreement

stood terminated and earnest money of respondent No. 1 stood forfeited. Further the defendant along with his deceased brother and mother who all are co-sharers in the entire land entered into agreement to sell to Bir Singh on 10.01.2006 and had received the entire sale consideration by giving a liberty to Bir Singh to get the sale deed executed as per his wish.

Defendant No. 2 as well as defendant No. 3 both elected not to appear before the trial Court and they were proceeded ex parte by the trial Court.

From the pleading of the parties, the trial Court framed the following issues:-

- “1. Whether the plaintiff has been ready and willing to perform his part of contract? OPP*
- 2. If issue No. 1 is proved, whether the plaintiff is entitled to specific performance of the contract as prayed for? OPP*
- 3. Whether the suit is not maintainable in the present form? OPD*
- 4. Relief.”*

The trial Court after going through the entire evidence led

by the parties, dismissed the suit of respondent No. 1 on the ground that merely by producing affidavit (Ex P4) would not be sufficient to prove that respondent No. 1 was present in the office of Sub-Registrar along with balance sale consideration, as respondent No. 1 did not call anyone from the Registrar Office to prove the affidavit. It was held that respondent No. 1 was not ready and willing to perform his part of contract.

On appeal, the lower Appellate Court in its detailed judgment, reversed the finding of the trial Court by holding that for the mere fact that the Executive Magistrate who has attested the affidavit or the person who has identified respondent No. 1 is not examined, this affidavit has not been proved in accordance with law. From the evidence of respondent No. 1 coupled with the affidavit Ex P4, it has been established on record that he was ready and willing to perform his part of contract and had appeared before the office of Sub Registrar on 21.12.2005 but the defendants did not turn up. Further respondent No. 1 had deposited the balance sale consideration in the Court after filing of the present suit. This entire evidence of respondent No. 1 was held to be sufficient enough to establish his readiness and willingness to perform his part of contract.

Appellant No. 1 who is claiming that respondent No. 1 has never approached for getting the sale deed executed, never appeared before the office of Sub Registrar. Further appellant No. 1 when appeared as D.W.1 has only tendered his affidavit of examination-in-chief and has failed to turn up for the purpose of cross examination. In the absence of cross examination, his affidavit of examination in chief cannot be taken into evidence.

The judgment judgment and decree dated 24.08.2013 passed by the Lower Appellate Court dismissing the judgment and decree dated 23.02.2012 passed by the learned trial Court, calls for no interference on the ground that respondent No. 1 has able to lead sufficient evidence to prove that he was ready and willing to perform his part of contract and merely on the fact that he did not call anyone from the Registrar Office to prove the affidavit (Ex P4), his suit should not have been dismissed. Appellant No. 1 has admitted that he entered into agreement to sell with respondent No. 1. The dispute was about readiness and willingness to perform the part of contract which respondent No. 1 has duly proved that he was ready and willing to perform his part of Court. The Lower Appellate has rightly decreed the suit of respondent No. 1 to the effect that he is entitled to possession

of the suit land by way of specific performance of contract dated 21.10.2005 on payment of balance sale price to appellant No. 1 and LR's of appellant No. 2. Appellant No. 1 and 2 were directed to get the sale deed executed and registered in favour of respondent No. 1, within a period of one month from today.

No substantial question of law arises for adjudication by this Court.

The appeal is dismissed.

06.08.2015

G Arora

(RITU BAHRI)
JUDGE