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

Regular Second Appeal No.1302 of 2014 (O&M)
Date of Decision: November 20, 2015.

Mussarrat Khan

..........APPELLANT.

VERSUS

Ram Murti Lal Lamba and another

........RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Arun Jain, Senior Advocate with
Mr. Abhishek Dhull, Advocate
for the appellant (s).

Mr. S.S. Narula, Advocate
for caveator-respondent No.1.

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<u>SURINDER GUPTA, J.</u>

Appellant-plaintiff filed suit for specific performance of agreement to sell dated 14.02.2005 pertaining to the sale of Industrial Plot No.167, Industrial Area Phase-1, Panchkula (later referred to as 'plot in dispute'), which was decreed by Civil Judge (Junior Division), Panchkula but in appeal, the judgment and decree passed by the lower Court was set aside and the relief of specific performance was declined. As the drafts/pay orders vide which the earnest money paid, had not been got encashed by respondent-defendant No.1, as such, order for the refund of earnest money was also not passed.

(In the later part of the judgment, the parties will be referred as plaintiff and defendants as mentioned in the original suit)

2. The case of the plaintiff, in brief, is that defendant No.1 Ram Murti Lal Lamba entered into an agreement to sell the plot in dispute vide agreement dated 14.02.2005 for a total sale consideration of ₹98 lacs, out of which earnest money of ₹10 lacs was paid to defendant No.1 vide account payee order No.149104 dated 14.02.2005 drawn on ICICI Bank Limited, Sector-9, Chandigarh. Another sum of ₹3 lacs was paid vide account payee order No.148387 dated 03.03.2005 drawn on the same bank. The date for completion of bargain was fixed as 28.04.2005. However, it was stipulated that defendant No.1 would clear all outstanding dues 10 days before the last date fixed for completion of bargain and time shall be essence of the contract. Defendant No.1 continued putting of the deal on one pretext or the other despite several requests of plaintiff and took no steps for obtaining 'No Dues Certificate', 'No Objection Certificate' and 'Income Tax Clearance Certificate'. After repeated requests, he signed application for transfer of plot. Due to increase in the prices of immovable properties, defendant No.1 became greedy and started putting forth one excuse or the other, thereby avoiding the execution of the sale deed. In April 2006, plaintiff asked defendant No.1 to execute the sale deed. At that time, he had sufficient funds to pay the balance sale consideration, expenses for purchase of stamp papers, registration charges etc. but defendant No.1 threatened to let out the plot in dispute or to sell it to some other person who was offering high price than the plaintiff. Plaintiff was always ready and willing to perform his part of the contract. It was defendant No.1, who committed lapse of his

obligation under the agreement to seek 'No Dues Certificate' and intimate the plaintiff in this regard. Left with no alternative, plaintiff filed a suit for injunction to restrain defendant No.1 from alienating the plot in dispute, in the Court at Chandigarh, which was ultimately withdrawn as the relief of injunction could not be allowed to the plaintiff on the ground that plot in dispute was situated in Panchkula. On inquiry from the bankers, plaintiff came to know that defendant No.1 had not got encashed the account payee cheque of ₹13 lacs given to him as earnest money and kept this fact concealed. Vide order dated 20.10.2005, defendant No.1 asked defendant No.2 i.e. Estate Officer, Haryana Urban Development Authority (in short-HUDA), Panchkula not to issue 'No Objection Certificate' for the sale of plot in dispute. He had also not intimated the plaintiff that the plot in dispute had been resumed by HUDA due to non-construction of structure/building.

3. The plaintiff filed second suit against defendant No.1 seeking the relief of mandatory injunction in favour of plaintiff as per the terms of agreement to sell dated 14.02.2005 but the said suit was withdrawn on 15.01.2007 with permission to file the instant suit.

4. Defendant No.1, in his written statement, took the objection that this suit is barred under Order II Rule 2 Civil Procedure Code (for short-CPC) as the plaintiff had earlier filed suit for permanent injunction in the Court of Civil Judge (Senior Division), Chandigarh, which was withdrawn. Then he filed another suit for permanent and mandatory injunction in the Court of Civil Judge (Senior Division), Panchkula which was also withdrawn. The second suit seeking relief of permanent and

mandatory injunction was filed knowing fully well that the same was not maintainable. The execution of the agreement is not denied and it was averred that out of total sale consideration of ₹98 lacs, plaintiff had agreed to pay ₹20 lacs as earnest money, however, he paid ₹10 lacs and expressed his inability to pay remaining amount of ₹10 lacs at that time. Under the settlement, it was agreed that the original amount shall remain in the custody of seller till the payment of another sum of ₹10 lacs. As the plaintiff failed to pay the remaining amount of ₹10 lacs, the original agreement remained in possession of defendant No.1. The agreement was written on a plain paper, however, in connivance with some deed-writer, plaintiff has forged the agreement to sell to the extent that same was shown as executed on a stamp paper. A bare perusal of the agreement shows that the stamp paper is dated 07.12.2014 when there was no negotiation for purchase of plot in question. The plaintiff was clearly told that if the balance earnest money of ₹10 lacs was not paid, the agreement shall stand cancelled and he can collect his bank draft/pay order as defendant would not encash the same. The plaintiff had brought a typed agreement to sell which was already filled up and parties signed the same. Some blank papers were also got signed from defendant No.1 on the ground that same were necessary for transfer of plot in dispute. On 03.03.2005, plaintiff brought another account payee pay order of ₹3 lacs and promised to bring remaining amount of ₹7 lacs within next 15 days. Defendant No.1 reluctantly agreed to give time of 15 days and clearly told the plaintiff that if the amount is not arranged then he will return his account payee orders of ₹13 lacs and agreement shall stand cancelled.

5. After 2-3 days plaintiff came to defendant and told him that on inspection of plot file, he had come to know that the plot was under resumption, as such, he was not interested in purchasing the plot. He also apprised defendant No.1 that earlier he had not seen the file and had relied on the words of an official of defendant No.2 that the title of plot was clear. By that time, defendant no.1 was not aware that the plot was under resumption. On inquiry, he came to know that a resumption order of the plot has been passed on 27.05.2004 at his back. Defendant No.1 then asked the plaintiff to take back the account payee orders treating the sale agreement as cancelled.

6. Again in July, 2005, plaintiff approached defendant No.1 and told him that he had arranged ₹7 lacs being the remaining amount of earnest money and requested defendant No.1 to give him another chance and to return the account payee pay orders for revalidation with the assurance that he will bring any bank draft/account payee order of ₹7 lacs i.e. total payment of ₹20 lacs. Defendant No.1 accepted the request and handed over the said two bank drafts/pay orders to the plaintiff but thereafter, the plaintiff never turned up. Last date for execution of the sale deed was fixed for 28.04.2005 and reasonable time/opportunity was given to the plaintiff to perform his part of the contract, but on the failure on the part of the plaintiff to perform his part of the agreement, the same stood cancelled.

7. It was further pleaded that at the time of transaction, defendant No.1 wanted to purchase a flat in IAS Society, M.D.C., Panchkula which was available at that time for ₹38 lacs. He could not purchase the flat due to cancellation of the agreement.

8. On appeal, the resumption order of the plot in dispute dated 27.05.2004 was withdrawn by the HUDA authorities vide order dated 11.10.2005. On getting knowledge of the restoration of the plot in dispute, plaintiff again approached defendant No.1 in December, 2005 to execute the sale deed, which he refused as the agreement had been cancelled.

9. The market price of the property had increased and defendant No.1 was no more interested in selling the plot in dispute. On 20.10.2005, he wrote a letter to HUDA, Panchkula not to issue 'No Objection Certificate' of plot in dispute as the plaintiff had got blank documents/papers signed from him including the letter for permission to transfer. He had used that letter by putting the date as 09.01.2006 and further getting the same attested from the Notary Public without his signature in the register of Notary Public. For this act of plaintiff, separate criminal proceedings were initiated against the plaintiff and said Notary. The plaintiff is a property dealer and at the time of execution of the agreement to sell, he had told the defendant that he would himself obtain the permission from HUDA for transfer of the plot in dispute. The witnesses to the agreement are also property dealers and partners of plaintiff. The plaintiff was not possessing the means to pay the earnest money or the balance sale consideration. The delay and breach of terms of contract were on the part of plaintiff and not on the part of defendant No.1.

10. The plaintiff re-asserted his case in the replication and pleadings of the parties led to the framing of issues as follows:-

> (1) Whether defendant No.1 entered into an agreement to sell with the plaintiff on 14.2.2005 in respect of suit property as detailed in the head note of the plaint? OPP

(2) Whether defendant No.1 received the earnest amount of Rs. 10 lacs from the plaintiff as alleged? OPP

(3) Whether the plaintiff was and is still ready and willing to perform his part of the agreement as alleged? OPP

(4) Whether the plaintiff is entitled to the relief of permanent injunction as prayed? OPP

(5) Whether the suit is not maintainable in the present form nor the plaintiff has any locus standi to file the same? OPD

(6) Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD

(7) Whether the plaintiff has no cause of action in filing the present suit? OPD

(8) Whether the plaintiff has not come to the court with clean hands and he has suppressed material facts from the court? OPD

(9) Whether the suit is barred under Order 2 Rule 2 of CPC? OPD

(10) Relief.

11. The agreement to sell is not disputed. It is also admitted fact that plaintiff had given an account payee pay order to defendant No.1 worth ₹10 lacs on the date of agreement i.e. 14.02.2005 and another for ₹3 lacs on 03.03.2005. Plaintiff was aware that defendant No.1 had not got encashed both the pay orders. Learned lower Court did not accept the plea of defendant No.1 that a sum of ₹20 lacs was verbally settled to be paid as earnest money but the plaintiff paid only ₹13 lacs. It also took note of the fact that it was defendant No.1 who wrote to HUDA Authorities to issue NOC for transfer of the plot in dispute. It was held that it was defendant No.1 who was not interested to get the sale deed of the plot in dispute

executed in favour of plaintiff and plaintiff was always ready and willing to perform his part of the agreement and was entitled to the relief of specific performance of the agreement to sell. Learned Civil Judge also declined the plea of defendant No.1 that the suit is barred under Order 2 Rule 2 CPC on the ground that the Court at Chandigarh where first suit was filed, did not have jurisdiction to decide the matter and in the second suit, permission to file the present suit was allowed.

12. The first Appellate Court, however, set aside the judgment and decree of the lower Court observing that appellant-plaintiff was not ready and willing to perform his part of contract.

13. On perusal of agreement dated 14.02.2005, it is evident that the time was agreed to be the essence of the contract. The present suit was filed on 09.02.2007 i.e. about two years after the agreement and more than one year nine months after the date settled for the completion of sale transaction. In between the plaintiff indulged in misadventures when he filed first suit at Chandigarh despite knowing fully well that the plot in dispute is situated at Panchkula, as such, the Courts at Chandigarh had no jurisdiction. He withdrew that suit without seeking decision on his plea that Chandigarh Courts had jurisdiction in the matter. The suit at Chandigarh Court was dismissed as withdrawn on 01.11.2006. As per the settlement between the parties, the time seeking specific performance of the agreement had matured on 28.04.2005. The remedy available with the plaintiff was to seek the relief of specific performance of the agreement and show to the court that he was always ready and willing to perform his part of the contract and possessed sufficient funds to pay the balance sale consideration. Instead,

the plaintiff spent time in filing the suit seeking relief of permanent injunction. The matter did not end here. After the withdrawal of the suit on 01.11.2006, he again indulged in another misadventure and filed another suit for permanent and mandatory injunction at Panchkula. That suit was filed on 02.11.2006 and was ultimately withdrawn on 15.01.2007. Though the plaintiff made statement seeking permission to file suit for specific performance but the perusal of the order dated 15.01.2007 shows that no such permission was allowed. Filing of the suit for permanent injunction time and again shows that till 09.02.2007 plaintiff did not possess sufficient funds and was not ready and willing to perform his part of the contract.

14. In the instant case, the parties have specifically agreed that the time shall be the essence of the contract. In case of ***K.S. Vidyanandam Vs. Vairavan 1997(3) SCC 1***, Hon'ble Apex Court has categorically observed that limitation provided under the Limitation Act for filing suit seeking specific performance of agreement as three years does not mean that a purchaser can wait for three years to file a suit. It was categorically held that while exercising discretion in suits for specific performance, the Courts should bear in mind that when the parties prescribe a time period for taking certain steps for completion of the transaction that must have some significance and therefore, time/period prescribed should not be ignored. The Courts will apply great scrutiny and strictness when considering whether the purchaser was ready and willing to perform his part of the contract and frown upon suits which are not filed immediately after the breach/refusal.

15. The instant case was filed more than one year nine months after

the date fixed for completion of the sale proceedings. It is not a case where the plaintiff was not aware of the refusal of defendant No.1 in performing his part of the contract. On refusal of defendant no.1 to perform his part of contract, he had filed suit in the Civil Courts at Chandigarh in April, 2006 and then in Civil Courts at Panchkula in November, 2006. He has not come up with any explanation for the delay despite the fact that time was agreed to be the essence of the contract. Defendant No.1 pleaded that he required money to purchase a plot in IAS Society, MDC, Panchkula which was available at the time of agreement for ₹38 lacs which he could not purchase as the agreement with plaintiff did not mature. Defendant No.1 has also come up with a plea that at the time of agreement, it was settled that a sum of ₹20 lacs shall be paid as earnest money. In the agreement, earnest money is mentioned as ₹10 lacs and there was no such clause that remaining 10 lacs will also be paid as earnest money. However, there appears to be some substance in the submission of defendant No.1 because immediately after the agreement, plaintiff paid ₹3 lacs vide account payee order to defendant No.1. In case, there was no such term, plaintiff was not required to pay even ₹3 lacs.

16. Perusal of the notice dated 06.04.2006 Ex.P4 left no doubt in the mind of the plaintiff that defendant had refused to complete the sale transaction. There was no reason or occasion for him to delay the filing of suit for specific performance of agreement to sell. The filing of the suit for permanent/mandatory injunction and then withdrawing the same shows that the plaintiff was only gaining time for the reasons best known to him. This certainly reflect on his readiness and willingness to perform his part of the

contract. The first Appellate Court has rightly drawn the presumption that it was indicative of plaintiff not having enough money to honour the agreement. When time is essence of contract, the delay in payment of balance sale consideration is fatal to the claim of plaintiff, seeking specific performance of agreement. Hon'ble Apex Court relying on the observation of ***K.S. Vidyanandam (supra)*** has observed in case of ***Saradamani Kandappan Vs. S. Rajalakshmi and others 2011(4) RCR (Civil) 130(SC)*** as follows:-

> "Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.
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> 28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in ***K.S. Vidyanadam (supra)*** :
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> (i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
>
> (ii) Courts will apply greater scrutiny and

strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also `frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

17. Plaintiff Mussarrat Khan has stated that in December, 2005 he was not in employment and had returned from Saudi Arabia. He had 13 lacs in his account which he had paid to defendant No.1. Besides this amount, he had no other money in his account. He had to raise loan and some amount was to be taken from his brothers. However, this money was never called by him as on 28.04.2005 he came to know that the plot had already been resumed. The above statement of plaintiff shows beyond doubt that he did not possess sufficient funds for payment of balance sale consideration, purchase of stamp papers, registration charges etc. on the stipulated date fixed for execution and registration of sale deed. In view of the above facts, the first Appellate Court has committed no error of law and fact while reaching the conclusion that the plaintiff was not ready and willing to

perform his part of the agreement.

18. Learned counsel for the appellant-plaintiff has argued that the suit was not barred under Order 2 Rule 2 CPC as the suit was withdrawn by the appellant-plaintiff as the Civil Court at Chandigarh had no jurisdiction in the matter. While withdrawing second suit, the plaintiff had made statement before the Court that he wants to file suit for specific performance and the Court had allowed him to withdraw the suit in view of his statement, which impliedly means that he was allowed to file a suit for specific performance.

19. In the first suit filed by plaintiff, there was no findings on merit that it was filed before Court having no jurisdiction. The plaintiff had filed a suit at Chandigarh mentioning that the Courts at Chandigarh has the jurisdiction and without getting finding on this point, he simply withdrew that suit. In the second suit filed for permanent and mandatory injunction in Court at Panchkula, though he sought permission to file suit for specific performance but no such permission was specifically allowed which mean that the same was declined and this led the first Appellate court to draw the conclusion that the suit was barred under Order 2 Rule 2 CPC. Even if, the suit seeking relief of specific performance of agreement filed by the plaintiff is technically not barred under Order 2 Rule 2 CPC, still this fact that the plaintiff before filing instant suit had filed suit seeking relief of permanent injunction and then mandatory injunction after the cause of action for seeking relief of specific performance had accrued clearly reflect on his readiness and willingness to perform his part of the contract. The plaintiff was either deliberately filing the suit for injunction or he was not possessing

sufficient funds to pay the court fee to seek the relief of specific performance. Either way, this effect the grant of relief of specific performance of agreement sought by him and the first Appellate Court has committed no error of law or fact while declining the same.

20. No substantial question of law requiring determination arises in this appeal, which has no merits.

21. Dismissed.

(SURINDER GUPTA)
JUDGE

November 20, 2015.
Sachin M.