

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

**CR No.4816 of 2016
Decided on: 29.07.2016**

Surinder Kumar

....Petitioner

Versus

Ishwar Dass and another

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. C.B. Goel, Advocate
for the petitioner.

REKHA MITTAL, J.

The present petition under Article 227 of the Constitution of India has been filed by the unsuccessful plaintiff who had filed a suit for possession by way of specific performance of an agreement to sell dated 29.04.2006 in regard to land situated in village Dhanoura, Tehsil Jagadhari, District Yamuna Nagar and has preferred an appeal against the judgment and decree dated 03.04.2012 passed by the trial Court, now pending in the Court of Additional District Judge, Yamuna Nagar at Jagadhari.

Precisely, the controversy involved in the present petition is with regard to correctness and validity of order dated 04.07.2016 passed by the Appellate Court whereby application filed by the petitioner under Order 14 Rule 5 read with Section 151 of the Code of Civil Procedure (in short 'CPC') for framing of additional issues and another application seeking correction/amendment of the application for framing of additional issues were ordered to be dismissed.

Counsel for the petitioner has submitted that the

respondents/defendants contested the suit, filed the written statement raising preliminary issues *qua* maintainability and cause of action. However, execution of the agreement to sell, receipt of earnest money of Rs.5,00,000/- and fixation of the target date were admitted with the averments that the petitioner/plaintiff was not ready and willing to perform his part of the contract. It was further averred that the defendants remained ready and willing to perform their part of the contract, purchased the requisite stamp papers for execution of the sale deed on 14.09.2006. The sale deed was reduced into writing on the stamp papers of Rs.1,06,000/- but the petitioner could not pay the balance sale consideration of more than Rs.15,00,000/-.

It is further argued that the learned trial Court did not frame proper issues in respect of various disputed questions of fact alleged by the petitioner and the respondents, denied by each other, resulting in deprivation of petitioner to adduce proper evidence in the light of issues arising out of pleadings of the parties. The Court of appeal committed a serious error rather illegality by dismissing the application primarily on the ground that the same has been filed with an ulterior motive to linger on decision of the main appeal and is sheer abuse of process of law. It is vehemently argued that the petitioner being the appellant can never be interested in delaying disposal of the appeal when on the contrary, a serious prejudice would be caused to him in case the issues as proposed in the application are not framed and the petitioner is not permitted to adduce further evidence in the light of additional issues.

Another submission made by counsel is that failure of the petitioner or his counsel to raise an issue with regard to non-framing of proper issues at an appropriate stage of the proceedings before the trial Court can neither create an estoppel against him nor can circumvent an obligation of the Court to frame proper issues in view of the relevant provisions of Order 14 CPC. In addition, it is submitted that the learned trial Court in its judgment has observed that the only question remained is whether the plaintiff was ready and willing to perform his part of the contract and is entitled to a decree for specific performance but no such issue regarding readiness and willingness was framed by the trial Court.

I have heard counsel for the petitioner and perused the paperbook particularly the order impugned.

At the outset, it is pertinent to mention that the judgment passed by the learned trial Court has not been appended with the petition. However, it is an undisputed position of the case that as the respondents/defendants admitted execution of the agreement to sell, receipt of earnest money of Rs.5,00,000/- and the date fixed for execution of the sale deed, no issue was framed by the trial Court qua the agreement in question. The trial Court framed the following issues vide order dated 10.04.2007:-

1. *Whether the plaintiff is entitled to the relief of specific performance of contract, as prayed for? OPP.*
2. *Whether the suit is not maintainable? OPR.*
3. *Relief.*

The petitioner filed the application for framing of additional issues by invoking the provisions of Rule 5 of Order 14 CPC and proposed framing of following additional issues:-

1. *Whether the plaintiff was not in possession of sufficient funds to get the sale deed executed in his favour from the defendants, as alleged? OPD.*
2. *Whether the plaintiff was ready and willing to perform his part of contract and is entitled to decree for specific performance of contract or not?*
3. *Whether now the earnest money paid by the plaintiff to the defendant stands forfeited as alleged and the agreement of sale stands cancelled, as alleged? OPD.*

The Court of appeal in para 13 of the impugned order has noticed, reads thus:-

“This Court has perused the impugned judgment and decree dated 03.04.2012 passed by the learned lower court and the perusal thereof goes to show this fact at first blush that the learned lower court has very much considered all the material aspects of the case.”

It has further been noticed in para 14 that the issues were framed by the lower court vide order dated 10.04.2007 in the presence of counsel for both the parties. It was the duty of counsel for plaintiff to have raised objection if the issues that touch the controversy between the parties were not properly framed or if any issue arising out of pleadings was not framed. During pendency of the suit, no such plea was taken on behalf of the appellant/applicant as no such application

was filed. Moreover, parties to the suit also led their evidence in respect of all the aspects of the case required for proper adjudication of the controversy between the parties.

Counsel for the petitioner has not disputed correctness of factual aspects of the case duly considered by the Court of appeal. This Court is not oblivious of the fact that failure of a party to raise objection with regard to non-framing of proper issues may not be taken seriously by the Court of appeal. However, in view of the fact that a consolidated issue was framed by the trial Court with regard to entitlement of the plaintiff to the relief of specific performance of contract as prayed for and the parties having adduced their respective evidence knowing fully well their pleadings and obligations, the petitioner cannot be heard to say that either any additional issues are required to be framed or he needs to be provided an opportunity to lead further evidence.

Counsel may be right in his submission that delay itself may not be a ground to reject a well-founded claim but delay assumes significance in the circumstances when a prayer has been made with an ulterior motive to achieve. In the case at hand, the petitioner knew it very well that the respondents have controverted the allegations of the plaint that the petitioner always remained ready and willing to perform his part of the agreement resulting in earnest money being forfeited and cancellation of the agreement of sale. The petitioner was under an obligation to prove the essential ingredients incorporated in Section 16(c) of the Specific Relief Act to claim the relief of specific performance prayed for in view of issue No.1 framed by the trial Court.

It appears to the Court that as the petitioner failed to adduce sufficient and tangible evidence to substantiate his plea with regard to his readiness and willingness to perform his part of the agreement, the present application was filed in order to get an opportunity to adduce additional evidence by subverting the relevant provisions envisaging additional evidence at appellate stage.

The petitioner has proposed framing of 03 additional issues with a prayer that onus of issues No.1 and 3 should be cast upon the respondents/defendants. Issue No.2, as proposed, is covered by Issue No.1, already stands framed. Issues No.1 and 3 (proposed now) pertains to facts pleaded by defendants/respondents to counter the allegations raised in the plaint that the petitioner/plaintiff always remained ready and willing to perform his part of the agreement and would be required to be proved. If the petitioner is able to discharge the initial onus laid upon him under Issue No.1 (already framed). It further appears that the petitioner by the instant application has sought to achieve what is otherwise against settled position in law pertaining to burden of proof. The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule has been adopted not because it is impossible to prove a negative but because the negative does not admit of direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In this view of the matter, I find myself unable to accept the submissions that the Court of appeal has committed any error much less the order impugned is perverse or absurd.

So far as the plea that the learned trial Court has made observations that the only question remained is whether the plaintiff was ready and willing to perform his part of the contract, such a plea would be subject-matter of adjudication by the Court of appeal at the time of hearing the parties on merits.

In view of what has been discussed hereinabove, finding no merit, the petition fails and is accordingly dismissed *in limine*.

29.07.2016
yakub

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No