

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 1431 of 1987 (O&M)
Date of Decision : 21.07.2016

Bhajan Kaur and another

....Appellants

Versus

Malkiat Singh and others

....Respondents

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Ramesh Sharma, Advocate
for Mr. Ashok Bhardwaj, Advocate
for the appellants.

Mr. D.S. Matya, Advocate
for respondent no. 1.

Surinder Gupta, J.

This is second appeal filed by defendants no. 1 and 3 Bhajan Kaur and Davinder Singh against judgment and decree passed by then Sub Judge, Ist Class, Nakodar, decreeing the suit filed by plaintiff-Malkiat Singh for specific performance of agreement dated 03.12.1978 for sale of 57 *kanals* 17 *marlas* of land. Defendants including appellants were directed to execute the sale deed in favour of plaintiff on payment of balance sale consideration. Judgment and decree passed by learned Sub Judge, Ist Class, Nakodar were affirmed in appeal by Ist Appellate Court, Jalandhar.

BRIEF FACTS

2. Case of plaintiff-Malkiat Singh, in brief, is that Santu son of Devi Chand was owner of suit land and had entered into an agreement to sell the same @ ₹20,000/- per *killa* vide agreement dated 03.12.1978. A sum of ₹30,000/- was paid as earnest money at the time of execution of agreement. Santu died on 08.01.1979, leaving behind defendants Bhajan

agreement a civil suit titled "*Bhajan Kaur vs. Santu*" was pending in the Court of learned Sub Judge, Nakodar and the sale deed was agreed to be executed within one month from the date of decision of that suit. It was stipulated in the agreement that on his failure to execute the sale deed as per terms of agreement, Santu will be liable to pay double the earnest money and in the event of failure of plaintiff to get the sale deed executed, the earnest money paid by him shall stand forfeited. The mortgage money due to the mortgagee was kept intrust with plaintiff for payment to them.

3. Plaintiff has alleged that he remained ready and willing to perform his part of the contract and to get the sale deed executed from defendants. Suit pending in the Court of Sub Judge, Nakodar was decided on 20.01.1979 but defendants no. 1 to 3 did not inform plaintiff about the same. A notice was sent to defendants calling upon them to execute the sale deed which was not replied. After execution of agreement, 8 *kanals* out of suit land was sold to defendant no. 4 by Santu, which sale is not binding on the right and title of plaintiff under agreement dated 03.12.1978. Plaintiff filed suit on 26.08.1981 and sought relief of specific performance of agreement dated 03.12.1978 and in the alternative for recovery of ₹60,000/-.

4. Defendants no. 1 and 2 contested the claim of plaintiff in their written statement *inter alia* pleading that Santu never executed the alleged agreement of his free disposing mind and with free consent. He was lying on death-bed and there was no pressing need for entering into agreement to sell his entire land. He was kept in his house by plaintiff and his father and was made to play in their hands. Santu was not in fit state of health for executing the alleged agreement by calling document writer in the village.

Defendant no. 1 is the wife and defendant no. 2 is the daughter of Santu,

who had no son. They had filed suit against Santu alleging that he was a person of insane and feeble mind. The relief was sought to restrain him from making alienation of his property and temporary injunction restraining him from making any alienation was allowed. The alleged agreement was got executed during pendency of temporary injunction order without any consideration.

5. Plaintiff and his father also got executed a Will of Santu at village Hussainabad in favour of defendant no. 3. When that Will was challenged, a compromise took place under which defendants no. 1 and 2 got $2/3^{\text{rd}}$ share and defendant no. 3 got $1/3^{\text{rd}}$ share in the suit land. Plaintiff then filed a suit for permanent injunction to restrain defendants from alienating the suit land on the basis of agreement dated 03.12.1978. This suit is barred under Order 2 Rule 2 CPC and deserves to be dismissed on account of delay, laches and acquiescence. All the other averments in plaint were contested, controverted and denied.

6. Defendant no. 3 in his separate written statement also contested the claim of plaintiff. He alleged that in view of judgment dated 10.04.1981 passed in earlier suit to which plaintiff was also party, claim made by him is barred by principle of *res judicata* and under Order II Rule 2 CPC. The sale deed executed in favour of defendant no. 4 was upheld in that suit. All the other averments made by plaintiff were contested, controverted and denied.

7. Pleadings of parties led to framing of the issues as follows:-

- (i) Whether Santu deceased executed an agreement to sell dated 03.12.1978 in favour of the plaintiff? OPP
- (ii) If issue no. (i) is proved, then whether the agreement to sell is the result of fraud, misrepresentation and undue

influence? OPD

- (iii) Whether the suit is bad under Order 2 Rule 2 CPC? OPD
- (iv) Whether the plaintiff is barred to file the suit by his act and conduct? OPD
- (v) Whether the suit land is not properly described, if so its effect? OPD
- (vi) Whether the agreement is void for uncertainty? OPD
- (vii) Whether the plaintiff throughout upto now remained ready and willing to perform his part of the agreement?
OPP
- (viii) Whether Santu deceased or defendants no. 1 to 3, committed breach of agreement? OPP
- (ix) Whether as an alternative relief, the plaintiff is entitled to recovery of ₹60,000/- as earnest money and damages?
OPP
- (x) Whether the plaint requires amendment, as per preliminary objection no. 10 of the written statement?
OPD
- (xi) Whether defendant no. 4 is *bona fide* purchaser of 8 *kanals* of land out of the suit land? OPD
- (xii) Relief.

8. Learned counsel for appellants has argued that Courts below have committed grave error while not appreciating the fact that plaintiff has utterly failed to prove his readiness and willingness to perform his part of the contract. In para 3 of the plaint, plaintiff has alleged that he remained ready and willing to get the sale deed executed from defendants, which is

not sufficient compliance of Section 16(c) of Specific Relief Act, which mandates readiness and willingness on the part of plaintiff to perform his part of contract and it is a condition precedent for obtaining relief of specific performance of agreement. Plaintiff has nowhere pleaded that he is still ready and willing to perform his part of the contract. While referring to provisions of Order 6 Rule 3 CPC, learned counsel for appellants has argued that pleadings of plaintiff were not in accordance with the Form No. 47 as given in Appendix 'A' of CPC, which make it mandatory for plaintiff to plead that 'he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant had notice'. Plaintiff has alleged execution of agreement to sell dated 03.12.1978 by Santu. No date for execution of sale deed was fixed and it was recited in the agreement that sale deed will be executed within one month of the decision of civil suit which was pending at that time. In fact no civil suit was pending at that time. Bhajan Kaur wife of Santu had moved application for fixation of her maintenance. This application, which was filed on 07.01.1978, was dismissed on 20.01.1979. The present suit was filed on 26.08.1981. There is neither any pleading nor any evidence to explain the readiness and willingness of plaintiff for a period of about 32 months after dismissal of application filed by Bhajan Kaur. Plaintiff-Malkiat Singh was resident of village Hussainabad where Santu was residing, as such, he cannot allege that the factum of death of Santu was not in his notice. Plaintiff has pleaded in para 3 of the plaint that suit pending in the Court of Sub Judge, Nakodar was decided on 20.01.1979 and it is defendants no. 1 to 3, who had resiled from executing the sale deed. Though, time is not the essence of contract, still the delay of 32 months in filing the suit after death of Santu shows that

plaintiff was not ready and willing to perform his part of the contract. In support of his submission he has relied on the observations of Hon'ble Supreme Court in case of **Padmakumari and others vs. Dasayyan and others, 2015 (8) SCC 695**. He has further argued that the suit land, as per admission by plaintiff himself is in possession of defendants. A period of 38 years has already elapsed after the agreement and during this period, prices of immovable property have skyrocketed and it will not be appropriate to allow the relief of specific performance of agreement to plaintiff, rather he can be allowed the alternative relief with additional amount of compensation and has relied on observations in case of **Nanjappan vs. Ramasamy and another, 2015 (2) RCR (Civil) 224**.

9. Learned counsel for respondent no. 1 has argued that plaintiff pleaded and proved his readiness and willingness to perform his part of the contract and both the Courts below have recorded finding in favour of plaintiff on this issue, which cannot be interfered in this regular second appeal. Moreover, it is nowhere the case of appellants that plaintiff was not ready and willing to perform his part of the contract. So far as delay in filing the suit is concerned, lapse does not lie solely with plaintiff-respondent no. 1 and he cannot be denied the relief of specific performance on this score.

10. A substantial question of law, which arises for consideration in this appeal, is as to whether plaintiff has pleaded and proved his readiness and willingness to perform his part of the contract as per provisions of Section 16 (c) of Specific Relief Act and while recording the finding in favour of plaintiff-respondent no. 1 on this issue, whether the Courts below have ignored or misread or wrongly appreciated the pleadings and

evidence?

11. Section 16 of Specific Relief Act specifically provides that relief of specific performance of contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. The mere fact that defendants-appellants have not taken the plea that plaintiff was not ready and willing to perform his part of the contract is irrelevant. Defendants in the written statement have denied the readiness and willingness to perform his part of the contract by plaintiff besides denying the execution of agreement dated 03.12.1978 by Santu.

12. Learned Sub Judge, Nakodar while recording the finding on issue no. 7 “whether plaintiff throughout upto now remained ready and willing to perform his part of the contract?” observed as follows:-

“19. As both the issues are inter-connected, so these are discussed together. The plaintiff has stated on oath that throughout he remained ready and willing for the registration of the sale deed in his favour by making payment of the balance consideration to the defendants. For the registration of the sale deed in his favour, the plaintiff has filed this suit. The plaintiff has also produced evidence that notice was given to the defendants in this respect. On the other hand, the case of the defendants is of total denial of the execution of the agreement and in that situation they could not be expected to register the sale deed in favour of the plaintiff. Thus, it is definitely established that the

plaintiff throughout uptil now remained ready and willing to perform his part of the agreement and the defendants have committed breach thereof. Taking this view of the matter, both the issues are decided in favour of the plaintiff and against the defendants.”

13. Learned Ist Appellate Court affirmed the above finding recorded by learned Sub Judge. The first question which arises for consideration is as to whether plaintiff-respondent no. 1 has pleaded his readiness and willingness to perform his part of the contract? In para 3 of the plaint, plaintiff has pleaded his readiness and willingness to perform his part of the contract as follows:-

“3. That Santu, original owner of the land in suit died on 08.01.1979 and the defendants 1 to 3 are his legal representatives and heirs. The plaintiff remained ready and willing to get the sale deed executed from the defendants and the suit pending in the court of Sub Judge Nakodar was decided on 20.01.1979 but the defendants 1 to 3 did not inform the plaintiff about the same. The plaintiff is even now ready and willing to get the sale deed executed from the defendants 1 to 3 and will always be ready and willing for the same till the end of the trial but the defendants 1 to 3 have resiled from the terms of the agreement and have refused to execute the sale deed of the above land according to the terms of the agreement above mentioned.”

14. Above pleading confirm and comply with the requirement of

Section 16 (c) of Specific Relief Act. Plaintiff has pleaded that he has always been ready and willing to perform his part of the contract and is still ready and willing to get the sale deed executed. Form no. 47 in Appendix 'A' CPC also requires similar pleading, as such, this argument of learned counsel for appellants that pleadings of plaintiff do not fulfill the requirement of Section 16 (c) of Specific Relief Act are without merits and are discarded.

15. The suit seeking specific performance of agreement to sell dated 03.12.1978 was filed on 26.08.1981 i.e. within the period of limitation. The Courts have to see the conduct of a party seeking the relief of specific performance of agreement to find as to whether it has wasted any time in claiming the relief or has committed lapse in performing its part of contract. A coordinate Bench of this Court in case **Manoj son of Shri Mange Ram vs. Umesh and others, 2015 (3) RCR (Civil) 1008** while pondering over the principle that time is not the essence of contract, took a note of the observation of Hon'ble Supreme Court in case of **Saradamani Kandappan vs. Rajalakshmi and others, 2011 (12) SCC 18** and observed as follows:-

*“5. The fundamental understanding that in any suit for specific performance of immovable property time cannot be of the essence of the contract, is stating the old law. Things have changed and the Supreme Court has considered this aspect in two cases. It would be worthwhile to reproduce the observations of the Supreme Court in **Saradamani Kandappan Vs. S. Rajalakshmi and others 2011 (12) SCC 18** in paras 24*

and 25 as follows:-

"24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market

values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. *The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but*

*the circumstances that existed when the said principle was evolved, no longer exist (emphasis supplied). In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for ₹ One lakh and received ₹ Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining ` Ninety Thousand, when the property value has risen to a crore of rupees." The same point was also brought out by yet another judgment of the Supreme Court in **M/s Citadel Fine Pharmaceuticals Vs. M/s Ramaniyam Real Estates P. Ltd. and another** 2011(9) SCC 147. The relevant portion is reproduced as under:-*

"In case of contract relating to sale of immovable property, time is not normally of

essence. However, this is not an absolute proposition and has several exceptions. In a contract relating to commercial enterprise, Court is strongly inclined to hold time to be of the essence of the contract. Court can take judicial notice of fact that price of real estate is constantly escalating and clear intention of parties, as it appeared from the stipulations of the agreement, was to treat time as of the essence of contract."

16. Hon'ble Apex Court in case of **K.S. Vidyandam vs. Vairavan, 1997(3) SCC 1** has also dealt with the aspect of law as to whether the time is essence of the contract in India in case of agreement of sale relating to immovable property and has observed in para 10 as follows:-

"10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in

*the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this court in **Chand Rani v. Kamal Rani, [1993] 1 S.C.C. 519**, "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident ?) : (1) From the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract". In other words, the court should look at all the relevant circumstances including the time-limits specified in the agreement and determine whether its discretion to grant specific performance should be exercised....."*

17. The Apex Court in the above referred case while taking note of the fact that the plaintiff was sitting quite without taking any steps to

perform his part of contract under the agreement for the period of 2½ years observed as follows :-

“.....Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limits for taking steps by one or the other party, it must have some significance and that the said time-limits cannot be ignored altogether on the ground that time has not been made the

essence of the contract [relating to immovable properties].”

PROOF OF READINESS AND WILLINGNESS OF PLAINTIFF TO PERFORM HIS OBLIGATION UNDER AGREEMENT

18. Plaintiff appeared as PW-2 and has stated that he had been asking Santu to execute the sale deed but he resiled and thereafter he gave notice to Bhajan Kaur vide receipt Ex. P-2. After death of Santu, he asked Bhajan Kaur and Davinder Singh etc. to execute the sale deed but they also refused. He had always remained ready and willing to perform his part of the contract and was still ready and willing to do so.

19. The statement of plaintiff though is an attempt to meet with requirement of Section 16 (c) of Specific Relief Act yet leaves a lot of gaps and missing links to infer his readiness and willingness to perform his part of the contract. The mere use of words “I had always been ready and willing to get the sale deed executed and is still ready and willing for the same” is not suffice to infer that plaintiff has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him. It is a settled principle of law that readiness and willingness of a party to perform its part of the contract is to be inferred from all surrounding circumstances and conduct of parties to contract. The statement of plaintiff falls much short of compliance of requirement of Section 16 (c) of Specific Relief Act for the reasons as follows:-

(i) Plaintiff states that during life time of Santu he had been asking him to execute the sale deed but he refused. This has given a cause of action to plaintiff during life time of Santu to give him a notice calling upon him to execute the sale deed or to file a suit for specific performance of agreement. Santu had died on 08.01.1979 i.e. after a period of about one month five

days of execution of agreement and the present suit was filed on 26.08.1981 i.e. after a period of 32 months (i.e. 2 years 8 months) of death of Santu. (ii) Plaintiff during life time of Santu had become aware that he was not willing to perform his part of the contract. There was a recital in the agreement that the sale deed will be executed within one month from the decision of civil suit pending at that time. The maximum that can be taken in favour of plaintiff is that under the agreement he could wait for decision of the civil suit pending between Santu and his wife Bhajan Kaur. There was no injunction order, either pleaded, produced or proved on file, passed in the application filed by Bhajan Kaur claiming maintenance from her husband restraining him (her husband) from alienating the suit property, as such, there was no bar for plaintiff to seek execution of the sale deed from Santu during his life time. (iii) Plaintiff belongs to village of Santu and was well known to him. He came to know about death of Santu on 08.01.1979. He was aware of the litigation relating to inheritance of estate of Santu. A civil suit had been instituted by Bhajan Kaur and her daughter on 03.02.1979 in which plaintiff-respondent no. 1 was also arrayed as respondent no. 2. Copy of the judgment passed in civil suit (Ex. D-4) shows that Bhajan Kaur in that suit had also challenged the alleged agreement and issue no. 2 was also framed regarding validity of that agreement as follows:-

“(ii) Whether Santu executed an agreement dated 03.12.1978

to sell his land measuring 57 K-17 Mls. in favour of defendant no. 2? OPD-2.”

Learned Sub Judge while deciding that suit vide judgment dated 10.04.1981 (Ex. D-4) refrained from recording any finding on the validity of agreement with the observation that this matter may be decided in case Malkiat Singh (plaintiff-respondent no. 1 in this appeal) file suit seeking specific performance of agreement. (iv) One factor is clear that agreement had come under challenge in the suit filed on 03.02.1979 i.e. immediately after death of Santu. The Court was also seized of the matter as to whether agreement was executed by Santu? The evidence was also led by parties on this issue. The vital question which both the Courts below ignored is as to what prevented plaintiff from seeking the relief of specific performance of agreement dated 03.12.1978 immediately after filing of the suit by Bhajan Kaur and her daughter on 03.02.1979 or claiming the same relief by way of counter-claim. Plaintiff remained silent and did not seek the relief of specific performance till that suit was decided. (v) From the facts discussed above, it is apparent that plaintiff remained silent and did not seek the relief of specific performance of agreement when Santu refused to execute the sale deed in his favour and even when Bhajan Kaur claimed her title over the suit property and made plaintiff a party to that suit and challenged his plea about execution of the agreement by Santu in his favour as incorrect. (vi) Plaintiff-respondent no. 1

has taken guarded plea while appearing as PW-2 that Santu did not inform him about decision of the suit as mentioned in the agreement which has no substance. He being co-villager came to know about death of Santu on 08.01.1979. The claim made by Bhajan Kaur and his daughter Santokh Kaur also came to his notice when the civil suit was filed by them on 03.02.1979 in which he filed written statement setting up the agreement in his favour, which was denied by plaintiffs (Bhajan Kaur etc.) in that suit. (vii) Long silence on the part of plaintiff for about 32 months after death of Santu is not explained and flattens his plea that he was ready and willing to perform his part of the contract. Had he been? he would have filed suit immediately after Santu refused to execute the sale deed; after death of Santu; or at the most after filing of suit by Bhajan Kaur and her daughter Santokh Kaur on 03.02.1979. The fact that he waited till 26.08.1981, shows that he had not performed or has not always been ready and willing to perform his part of the contract so as to comply with the provisions contained in Section 16 (c) of Specific Relief Act.

20. Plaintiff has pleaded that cause of action to file the suit arose on the date he served notice on defendants. He alleged that he served defendants vide acknowledgment receipt dated 26.05.1981. This acknowledgment receipt does not help plaintiff in any manner, firstly, because copy of notice sent to defendants-appellants has not come on file. A draft (Ex. P-6) has been proved by PW-6, Parkash clerk of Sh. Kailash Nath, Advocate, which is not a copy of notice. Secondly, plaintiff was well aware

after the decision of civil suit filed by Bhajan Kaur on 10.04.1981 vide Ex. D-4 to which he himself was a party that estate of Santu was inherited by Bhajan Kaur, her daughter Santokh Kaur and Davinder Singh son of Dhanna Singh but no notice was given to Santokh Kaur wife of Mohinder Singh daughter of Santu and Davinder Singh son of Dhanna Singh, which further shows that plaintiff had never called upon all the legal heirs of Santu before filing of the suit calling upon them to execute the sale deed. Even while appearing as PW-2, plaintiff has stated that after refusal by Santu, he gave notice to Bhajan Kaur only. No date for execution of the sale deed was fixed vide agreement (Ex. P-1). There is no evidence that plaintiff before sending the alleged notice dated 26.05.1981 to Bhajan Kaur had taken any step either to contact or ask other legal heirs of Santu to execute the sale deed as per agreement in his favour. No doubt, the finding regarding readiness and willingness of plaintiff to perform his part of the contract is the finding of fact but in regular second appeal a finding of fact which is perverse, based on misreading of evidence on record; ignoring the vital evidence and wrongly appreciating the evidence on file or where the Court had failed to take into consideration any relevant fact, can be interfered and a different conclusion can be drawn. In case **Hero Vinoth (minor) vs. Seshammal, 2006 (5) SCC 545**, Apex Court while drawing exception to general rule that High Court will not interfere with concurrent findings of the Courts below observed as follows:-

“25. *The principles relating to Section 100 CPC, relevant for this case, may be summarized thus:-*

- (i) xx xx xx xx xx
- (ii) xx xx xx xx xx

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

21. On appraisal of law discussed above, pleadings and evidence on record, I am of the considered opinion that while recording finding that plaintiff has been ready and willing to perform his part of the contract, the Courts below had not taken into consideration the relevant facts, evidence and pleadings and said findings are perverse, based on misreading of evidence and law on the point, as such, are reversed.

22. As the relief of specific performance of agreement cannot be allowed to plaintiff-respondent no. 1 for his failure to prove his readiness and willingness to perform his part of the contract, the other arguments addressed by learned counsel for appellants regarding long delay of 38 years after filing of suit and claiming hardship to defendants in the event of relief of specific performance of agreement being allowed to plaintiff calls for no discussion.

23. Learned counsel for appellants has not addressed any argument

challenging the finding of Courts below about the proof of execution of agreement and payment of earnest money of ₹30,000/- to Santu.

24. In view of this and keeping in view the principle that Santu and after his death to his legal heirs, plaintiff-respondent no. 1 cannot be allowed undue enrichment, they are held liable to refund of earnest money with interest @ 12% per annum from the date of execution of agreement till the date of actual payment.

25. As a sequel of my above observations, the substantial question of law framed in this appeal are answered in favour of appellants. Consequently, this appeal has merit and is accepted. The judgment and decree passed by Courts below allowing the relief of specific performance of agreement dated 03.12.1978 is set aside and plaintiff is allowed alternate relief of refund of earnest money with interest @ 12% per annum from the date of agreement till the date of actual payment. The amount so due shall remain a charge on suit land till payment. Keeping in view the facts and circumstances of the case, the parties are left to bear their own costs.

July 21, 2016
jk

(SURINDER GUPTA)
JUDGE