

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.

RSA-826 of 2007

Date of decision: July 18, 2016

GHANSHAM DASS

... Appellant

Versus

PARKASH DEVI AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. D.S. Bali, Senior Advocate with
Ms. Neha Gupta, Advocate
for the appellant.

Mr. Amit Singla, Advocate
for the respondents.

AMOL RATTAN SINGH, J.

1. This is an appeal by one of the two plaintiffs who had filed a suit seeking recovery of Rs.1,25,000/- from the respondents-defendants, paid by the plaintiffs to the defendants, by way of earnest money/part consideration of the total consideration of Rs.3,80,000/- per acre, pursuant to an agreement entered into by the parties, for the sale of land measuring 9 kanal 4 marlas, by the defendants to the plaintiffs, in Village Satrod, Tehsil and District, Hissar. The agreement was dated 3.12.1991 and the date fixed for registration of the sale deed was 31.3.1992.

2. The facts, taken from the judgments of the Courts below, as are

not in dispute, are that the three defendants (one of whom is now represented by her LRs), had purchased the suit land vide registered sale deed dated 14.9.1990, (which is not an issue in dispute in any manner).

3. Pursuant to the agreement dated 3.12.1991, Rs.70,000 was paid by the plaintiffs on the said date itself and another sum of Rs.55,000/- was paid on the next day, i.e. 4.12.1991, in the presence of witnesses, which again was not denied by the defendants.

4. It was further the case of the plaintiffs that they went to the office of the Sub Registrar on 31.3.1992 and waited there till 05:00 p.m., but because the defendants were not in a position to execute the sale deed, it was not executed and registered, the reason being, according to the plaintiffs, that the defendants had not obtained an income tax clearance certificate from the Income Tax Department, in respect of the sale deed to be executed.

It was therefore pleaded by the plaintiffs, that the defendants were responsible for the breach of contract and as such, the plaintiffs were entitled to a refund of the earnest money of Rs.1,25,000/-, along with interest at the rate of 12% per annum, running from 7.12.1991 till the date of the filing of the suit, i.e. 30.3.1995.

It was further pleaded that the plaintiffs had sent a legal notice to the defendants for execution of the sale deed, or for refund of the earnest money, but neither of the two requests having been complied with, the suit was instituted.

5. Upon notice issued to them, the defendants filed a joint written statement taking preliminary objections of maintainability etc. and on merits admitting the agreement to sell, but denying that the plaintiffs were ready

and willing to get the sale deed registered in their favour.

The presence of the plaintiffs in the office of the Sub-Registrar on 31.3.1992 was denied and on the other hand, it was pleaded that in fact, the defendants, being ready to perform their part of the contract, had remained present in the office of the Sub-Registrar on 31.3.1992 and had also executed an affidavit in the said office, on that date. They had also got a 'challan' form from the Treasury office at Hissar, for purchasing the stamp paper etc., but since the money for the same had to be deposited by the plaintiffs and the same not having been paid by the plaintiffs, the stamp paper was not purchased.

It was therefore pleaded, that the defendants having always been ready to perform their part of the contract, and the plaintiffs on the other hand, not having done so, the earnest money of Rs.1,25,000/- stood forfeited to the defendants.

6. As regards the question of obtaining the income tax certificate, it was pleaded that, firstly, the sale deed could have been executed even in the absence of the certificate, as it was the duty of the Sub-Registrar to deduct the tax at source. Secondly, in any case, the defendants had handed over printed forms and blank papers to the plaintiffs, with the signatures of the defendants on those papers, for obtaining the certificate from the Income Tax Department, but the plaintiffs had not done the needful and as such, the defendants were in no way responsible for breach of the contract.

7. The plaintiffs having filed a replication, controverting the contents of the written statement, the following issues were framed by the learned Civil Judge (Senior Division), Hissar.

“1. Whether the plaintiffs are entitled for decree of

R.1,25,000/-? OPP

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the plaintiffs have no locus standi to file the present suit? OPD

4. Whether the proper court fee has not been affixed? OP

5. Whether the suit is against the facts? OPD

6. Whether the plaintiff has no cause of action to file the present suit? OPD

7. Whether the suit is bad for want of notice? OPD

8. Relief.”

8. By way of evidence, appellant-plaintiff No.1-Ghansham testified as PW-1 and also examined one Rishikesh/Rishiraj, Tehsildar, as PW-2, whereas the defendants examined one Bhagwan Dass as DW-1, A.P. Munjal as DW-2, with defendant No.3-Sadanand stepping into the witness box as DW-3 and Ram Gopal, i.e. the husband of the deceased second defendant, Shanti Devi, as DW-4.

9. Upon consideration of the evidence, the learned Civil Judge, of course found that there was no controversy with regard to the execution of the sale deed dated 31.3.1992, the payment of Rs.1,25,000/- as earnest money to the defendants and the agreement upon the date fixed for execution of the sale deed, i.e. 31.3.1992.

However, the suit of the plaintiffs was dismissed on essentially three grounds:-

i. That in terms of Section 22 (1)(b) of the Specific

Relief Act, 1963, refund of earnest money could only be claimed if the prayer for specific performance of the agreement to sell was refused. No such prayer having been made and in fact, the suit not even having been filed seeking specific performance of the agreement to sell, the relief of refund of the earnest money (as the principal relief) could not be granted.

ii. That there was no condition in the agreement to sell dated 3.12.1991 to the effect that the defendants must obtain an income tax clearance certificate, as a pre-requisite before the sale deed could be executed.

Further, it was held by the learned Civil Judge that the statutory requirement for obtaining an income tax clearance certificate was only in respect of properties, the circle rates of which were shown to be more than Rs.2 lacs but there was no evidence led to show that the circle rate of the property in question was for a value of more than Rs.2 lacs, even though the sale consideration was for Rs.3,80,000/- per acre.

iii. In any case, it was further held, that any weakness in the defendants' case could not be taken advantage of by the plaintiffs, who had to stand on their own legs to show that they were ready and willing to perform their part of the contract, and though they had shown that they were present in the office of the Sub-Registrar on 31.3.1992, they had not been able to prove that they actually had the remaining

consideration of Rs.3,67,126/- with them. (The sale consideration being Rs.3,80,000/- per acre and the suit land being 9 kanals and 4 marlas, it was stated in the judgment that the total sale consideration actually came to Rs.4,37,000/-, and after deduction of the earnest money of Rs.1,25,000/-, the remainder, i.e. Rs.3,12,000/- + stamp paper and registration charges of Rs.54,625, came to Rs.3,67,126/-).

It was found by that Court that even if the statement of the first plaintiff was to be believed, to the effect that he was carrying a sum of Rs.3,15,000/- with him, the said amount obviously did not come to Rs.3,67,126/-, and with the remaining sum of the consideration money and stamp duty and registration charges not being available with the plaintiffs on 31.3.1992, it was obvious that they were not actually ready and willing to perform their part of the contract.

On the aforesaid reasoning, the suit of the plaintiffs was dismissed.

10. In the first appeal filed by the plaintiffs, the learned District Judge, Hissar, after considering the entire evidence and pleadings, also came to the same conclusion that the plaintiffs had not been able to prove that they actually had the remaining consideration, along with stamp duty and registration charges available with them on 31.3.1992, for executing their part of the contract. In fact, the first Appellate Court noticed that the

plaintiff, upon a query put to him, had not been able to even give the exact figure as to the amount that was to be paid by the plaintiffs, so as to complete the contract. He had first stated that he had a sum of Rs.3 lacs but thereafter, had corrected himself to say that he actually had a sum of Rs.3,15,000/- available with him and that this money was received by him by selling some property for Rs.1,90,000/-, with the remaining amount already available with him at home. The testifying plaintiff, i.e. the present appellant (Ghansham), had given his age to be 72 years and when he was asked to disclose his occupation, he stated that he was not doing any work. Further, he had not been able to show as to what his source of income was, by which he could arrange the remaining consideration of Rs.3,67,126/- (including stamp duty and registration charges).

11. It was also further noticed by the learned District Judge, that as regards the income tax certificate, the defendants had proved the preparation of a treasury challan, Ex.D2, bearing the signatures of the Treasury Officer on 31.3.1992. Their presence at the Sub Registrars' office also stood duly established from their affidavit, Ex.D3, attested by the same Executive Magistrate who had attested the affidavit of the plaintiffs.

The contention on behalf of the plaintiffs that the treasury challan was a subsequently created document, was repelled by the first Appellate Court, holding that there was also a reference to the said document in the reply of the defendants, Ex. D1, to the notice issued by the plaintiffs.

Thus, holding as above and reiterating the reasoning of the learned Civil Judge, to the effect that there was no evidence led that the circle rate was higher than Rs.2 lacs, that plea of the plaintiffs was also

rejected.

12. It was further held by the learned first Appellate Court, that a person who is willing to perform his part of the contract, would file a suit for specific performance at the earliest, after the failure of the other party to fulfill the contract. However, the suit was actually filed in the present case three years after the date fixed for execution of the sale deed, i.e. on 30.3.1995, and that too only by way of a suit for recovery of the earnest money.

Hence, the non-willingness/non-ability of the plaintiffs to actually execute their part of the agreement, became further obvious from the aforesaid fact.

Consequently, the first appeal was also dismissed.

13. Before this Court, Mr. D.S. Bali, learned Senior Advocate appearing for the appellant-plaintiff, had submitted that the Courts below have failed to appreciate the mandate of the proviso to sub-section 2 to Section 22 of the Specific Relief Act, 1963, by which it has been stipulated that an amendment of the plaint shall be allowed at any stage. Thus, he contended that the appellant-plaintiff having moved an application for amendment and that having been dismissed, the matter would need to be remitted to the Civil Judge, by allowing the application for amendment of the plaint and thereafter rehearing the entire suit itself.

14. Mr. Amit Singla, learned counsel appearing for the respondents, on the other hand, had submitted that at this stage of a second appeal, this issue cannot be raised, since the dismissal of the application for amendment of the plaint was not challenged by way of any revision filed by the plaintiff-appellant.

He further submitted that other than the above, however, a perusal of the judgments below shows that the suit and the appeal of the plaintiff were eventually dismissed on the ground that the appellant-plaintiff could not show that he was ready and willing to perform his part of the contract to purchase the suit property, in terms of the agreement dated 03.12.1991.

The reasoning adopted by the Courts below to come to that conclusion, was in view of the fact that, firstly, the appellant-plaintiff instituted the suit on 31.03.1995, whereas the date for execution of the contract, as given in the aforesaid agreement, was 31.03.1992. Secondly, it was found on the basis of the evidence that the appellant could not show, by any means whatsoever, that he actually had the means to pay the consideration money, even on the date that he appeared before the Sub-Registrar, to execute the sale-deed for purchase of the suit land.

He therefore, submitted that the appeal be dismissed.

15. Thus, essentially, these were the arguments addressed by both the learned counsel, other than reiterating the contentions raised on behalf of the plaintiffs and defendants respectively, as were raised before the Courts below.

Having considered the aforesaid arguments as also the judgements of the Courts below, on the question raised by Mr. Bali, that amendment of the plaint can be allowed at any stage, even at the stage of the second appeal, I find no reason to even entertain such a request at this stage, for the reason that, the merits of that contention apart, the facts of the case do not warrant such a course of action to be taken, in view of the fact that I find no reason to interfere in the finding of fact by the learned Courts below, that

the plaintiffs could not, in any manner, other than their presence before the Sub- Registrar, show that they were actually ready and willing to perform their part of the contract, by payment of the remaining consideration money, along with the stamp duty and registration charges etc.

Without doubt, it is not necessary, for a prospective vendee to show, in every circumstance, that he was actually carrying the remaning consideration amount on the date that the sale deed was to be executed and registered. However, in the context of the present case, such ability to pay, by way of the amount being available at the time of execution of the sale deed, was necessarily to be proved by the plaintiffs, in view of the fact that 31.3.1992 was the last date on which the sale deed had actually to be executed and registered. Thus, the plaintiffs not having been able to show that they even had money in the Bank, to the tune of Rs.3,67,126/-, the bald statement of the plaintiff in his testimony, that he actually had Rs.3,15,000/- in cash with him in the office of the Sub-Registrar, is wholly unbelievable. Firstly, the payability of such amount by cash, rather than by a cheque/draft/other bank instrument, was not proved to have been legally valid.

Secondly, even if that fact were to be, for any reason, ignored, even the factum of the plaintiffs actually having that much cash, with them, without any proof thereof as to where from they came by such cash, other than Rs.1,90,000/- that the appellant-plaintiff deposed that he had received from the sale of some other land, was not established, (even presuming that he had sold some land for the aforesaid sum of Rs.1,90,000/-). I also see no fault in the reasoning of the learned first Appellate Court, that being a 72 year old man, showing no source of income at all, as to where he could

show the remaining consideration money to have come from. If at all there were any borrowings made by him, or if his co-plaintiff, i.e. his son, had come up with the money from anywhere, that fact had to be established by the plaintiffs themselves, which they could not do.

16. Next, I agree with the reasoning of the learned lower appellate Court, that the very fact that the suit was instituted on the last date before limitation to file such a suit ran out, and that too the suit not having been filed for specific performance of the contract, further proves the non-willingness of the plaintiffs to execute the contract.

No doubt, they had established that they had issued a notice to the defendants in March 1993 as given in the plaint, but actually seen to be 12.2.1993, i.e. about 10½ months after the date fixed for execution of the sale deed. However, the defendants replied to the said notice on 09.03.1993 itself, yet, the suit was filed only on 19.3.1995, and to repeat, only for seeking recovery of Rs.1,25,000/-, with interest thereupon.

Hence, I see no error in the reasoning given by the learned Courts below in arriving at the conclusion that the plaintiffs were actually not ready and willing to perform their part of the contract and as such, it being a condition of the agreement dated 3.12.1991, that in case of a breach of contract by the prospective vendees (plaintiffs), the earnest money would stand forfeited.

17. As regards the non-obtaining of the income tax clearance certificate by the defendants, though I do not agree with the first part of the reasoning given by the learned Courts below, to the effect that it was not in evidence that the 'Collector rates' for the suit land were more than Rs.2 lacs, (the consideration money itself being Rs.3,80,000/- per acre), I agree with

the latter part of the reasoning, to the effect that, firstly, there was no stipulation in the agreement dated 3.12.1991 that the defendant was to obtain such a certificate. Thus, with nothing reduced to writing, as to who was to obtain any income tax clearance, if at all it was required, the plaintiffs cannot take a plea that it was the defendants who were actually to obtain that certificate.

18. Thus, with the plaintiffs not being able to prove that they actually had the balance consideration money, along with money to be paid for purchase of stamp papers and for registration charges etc. and secondly, they not having even sent a notice to the defendants for non-performance of the contract for about 11 months after the date fixed for execution of the sale deed, and further, the suit itself having been instituted only 3 years after such date and that too only to seek recovery of the earnest money, (along with interest thereupon), I see no reason at all to interfere with the judgments of the courts below.

Yet further, the defendants on the other hand, even proved that they had got a treasury challan drawn up on the date fixed for registration of the sale deed, i.e. 31.3.1992, which could not be given effect to only because of non-performance of their part of the contract by the plaintiffs.

19. As regards Mr. Balis' contention that the matter should be remitted to the first Court itself, i.e. the Court of the learned Civil Judge, allowing the plaintiff to amend the suit, I also find absolutely no ground to entertain such a prayer at this stage, for another reason, even if learned counsel's contention is accepted to be correct that an application to do so had been dismissed by the Court of the learned Civil Judge itself, for the reason that no such plea is seen to be taken before the first Appellate Court

and even de hors that, when on merits, the appellant has not been able to show that he was in a position to actually execute the contract on the date fixed for such execution, the attempt now to get the whole matter reopened, is obviously only in view of the fact that property prices have obviously shot up manifold in the past 24 years (since the sale deed was to be executed).

This is also for the reason that even assuming that the application for amendment in the plaint had been allowed at the stage when the application for amendment had been filed in terms of the proviso to sub-section (2) of Section 22 of the Specific Relief Act, 1963, it would have made no difference, in view of the fact that on merits, the plaintiffs were not able to prove that they were ready and willing to perform their part of the contract at the time when it was to be performed, i.e. on 31.03.1992.

Hence, other than the fact that such a prayer would normally not be entertainable in any case, at the stage of second appeal, further, also for the reasons discussed in detail on the merits of the case, there is no ground to reopen the matter all over again by allowing the plaintiff to amend his plaint, now, 21 years after the suit was filed.

20. Consequently, finding no merit in the appeal, it is dismissed, but with no order as to costs.

(AMOL RATTAN SINGH)
JUDGE

July 18, 2016
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