IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No.3038 of 2010 (O&M)
Date of Decision: February 17th, 2015

Gurmeet Singh & others

...Appellants

Versus

Jaswinder Kaur (since deceased through L.Rs & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

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

Present: Mr.Sumeet Mahajan, Senior Advocate with
Mr.Amit Kohar, Advocate,
for the appellants.

Mr.M.L.Sarin, Senior Advocate with
Mr.Nitin Sarin, Advocate,
for the respondents.

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AMIT RAWAL, J.

The appellant-plaintiffs are aggrieved of the dismissal of their suit seeking specific performance of the agreement to sell dated 13.1.1990 and supplementary agreement to sell dated 31.1.1990 entered into between the parties to the lis for sale of land measuring 17 Bighas-0 Biswa-1 Biswani (11 acres) at the rate of ₹5,19,000/- per acre against the payment of earnest money of ₹50,000/- at the time of execution of the agreement to sell dated 13.1.1990, wherein the stipulated date for registration and execution of the agreement to sell was fixed as 30.10.1990. However, the parties, on account of their volition, entered into a supplementary agreement dated 31.1.1990, whereby the appellant-plaintiffs paid a sum of ₹14,50,000/- towards the part price of the sale consideration and not as earnest money.

Mr.Sumeet Mahajan, learned Senior Counsel assisted by Mr.Amit Kohar Advocate, appearing on behalf of the appellant-plaintiffs submits that the Courts below have misinterpreted and misdirected in not referring to the contents of the terms/conditions of the supplementary agreement dated 31.1.1990 and at the best could have exercised the discretion vis-a-vis 1/3rd share of the land as a sum of ₹14,50,000/- against the total price of ₹55,00,000/- had been paid, i.e., the suit could have been decreed for land measuring 3 acres approximately. The Court can always mould the relief in the absence of primary relief and cannot be thrown out for want of specific prayer. The moulding of relief is permissible under the Civil Procedure Code and in law. In support of the aforementioned contention, he has also relied upon the provisions of sub-section (4) of Section 12 of the Specific Relief Act, 1963 (for short "1963 Act"). The appellant-plaintiffs can not be shunted out for want of readiness and willingness, for, the suit was filed on 2.11.1993. There is no denial of the documents vis-a-vis receipt of payment of ₹14,50,000/-, which was paid towards part payment of total sale consideration. Certain reminders were sent by the appellant-plaintiffs for executing the sale deed, but the defendants put off the matter on one pretext or the other.

He further submits that the suit property was mortgaged with the Bank and unless and until the defendants did not redeem the property, the same could not have been sold. The legal notice (Ex.P-9) intimating the redemption of the property was not accompanied by the letter of NOC issued by the Bank, much less the defendants failed to prove on record any letter, except a letter Mark-A purported to have been sent by the Bank, in essence, no official of the Bank has been examined to prove the authenticity/ contents of the aforementioned letter. The alleged forfeiture, vide telegram dated 30.10.1990, is rendered redundant, as vide letter dated 6.12.1990 (Ex.P14), the defendants again showed their willingness. The story coined by the defendants vis-a-vis non-construction of the boundary wall was an attempt to wriggle out from the supplementary agreement, much less for not performing their part of the contract. In support of his contention, much less in order to supplement the argument while relying upon the provisions of sub-section (4) of Section 12 of 1963 Act, relied upon the judgment of the Hon'ble Supreme Court rendered in **Shree Hanuman Cotton Mills and others Versus Tata Air Craft Limited, 1969 (3) Supreme Court Cases 522.**

He further submits that whether the time is the essence of the contract or not pales into significance as the suit had been filed within the period of limitation, therefore, the trial Court ought not to have declined the discretionary relief vis-a-vis the payment and receipt of the part sale consideration amounting to ₹14,50,000/- and, thus, prays for formulation of following substantial questions of law as culled out in the memorandum of appeal:-

1) Whether non-execution of sale deed on the part of the defendants in respect of part of the suit land (approx. 3 acres) for which entire sale consideration admittedly stood paid amounts to refusal to perform agreement by defendants?

2) Whether the finding recorded by the Courts below that plaintiffs were not ready to perform their part of the contract is perverse?

3) Whether the finding on Issue No.1 has been recorded by ignoring evidence led by the plaintiffs and by considering inadmissible evidence (Mark-A)?

4) Whether in a suit for specific performance of the agreement, it is necessary for the plaintiffs to prove the source of income for financing their transaction?

He further submits that mere inadequate consideration, as per Explanation-1 of Section 20 of 1963 Act is not a ground for declining the discretionary relief of specific performance. In support of the submissions with regard to the time of essence, availability of ready cash and ingredients of sub-section (3) of Section 12 of 1993 Act, has relied upon the following judgments:-

i) **Balasaheb Dayandeo Naik (Dead) through L.Rs and others Versus Appasaheb Dattatraya Pawar, (2008) 4 Supreme Court Cases 464;**

ii) Azhar Sultana Versus B.Rajamani & Ors., 2009(2) R.C.R. (Civil) 123; and

iii) Rachakonda Narayana Versus Ponthala Parvathamma and another, (2001) 8 Supreme Court Cases 173, thus, prays for setting-aside of the judgments and decrees of the Courts below.

During the course of arguments, he has also submitted at bar that his clients are willing to pay the entire balance sale consideration agreed in the supplementary agreement.

Per contra, Mr.M.L.Sarin, learned Senior Counsel assisted by Mr.Nitin Sarin, Advocate, appearing on behalf of the respondent-defendants submits that the plea of part performance of the agreement to sell vis-a-vis 1/3rd area of the land agreed to be sold has been taken for the first time in the Regular Second Appeal, which is not permissible in law. There is no whisper in the written submissions submitted before the Courts below. It is a consistent law that a concurrent finding of fact should not be interfered with, by invoking the provisions of Section 100 of the Civil Procedure Code unless and until substantial question of law arises. In the absence of any categoric pleadings vis-a-vis aforementioned assertion, the substantial questions of law sought to be formulated by this Court do not arise for adjudication, much less determination. The Courts below have rightly declined the discretionary relief as the suit was filed few days before the expiry of the limitation. Supplementary agreement is 19 years old. There is a considerable gap of time during all this period, prices have escalated and, therefore, specific relief should not have been granted. In support of his contention, he has relied upon the following case law:-

a) **Rattan Lal (since deceased) through his Legal Representatives Versus S.N.Bhalla and others, (2012) 8 Supreme Court Cases 659,** wherein the Hon'ble Supreme Court held that, where an agreement to sell, entered into in respect of the suit property situated in Vasant Vihar, New Delhi, but the matter reached upto the Hon'ble Supreme Court after a period of 34 years, keeping in view such factor, the discretionary relief was declined. It was also observed that the assertion/argument, much less any evidence beyond the pleadings, cannot be looked into;

b) K.S.Vidyanadam and others Versus Vairavan, AIR 1997 Supreme Court 1751; and

c) Sardadamani Kandappan Versus S.Rajalakshmi and others, (2011) 12 Supreme Court Cases 18 to contend that where the suit had been filed few months before the expiry of the limitation, discretionary relief should not be granted.

He further submits that assuming for argument sake, the aforementioned pleas are to be looked into, even then provisions of sub-section (3) of Section 12 of 1963 Act debar the appellant-plaintiffs to claim such relief. In this regard, he has drawn the attention of this Court to the provisions of sub-clauses (i) and (ii) of sub-clause (b) of sub-section (3) of Section 12 of 1963 Act. The plaintiffs must offer the payment of entire price for seeking execution and registration of the sale deed vis-a-vis 1/3rd share. Having not done so, such pleas should not be accepted and be thrown in the first instance. In support of this contention vis-a-vis exercise of discretionary relief, he has relied upon the following judgments:-

i) **Phool Pata and another Versus Vishwanath Singh and others, (2005) 6 Supreme Court Cases 40; and**

ii) Veerayee Ammal Versus Seeni Ammal, AIR 2001 Supreme Court Cases 2920.

He further submits that the defendants had obtained the NOC from the Punjab National Bank on 23.10.1990 and this fact was specifically stated in the legal notice dated 23.10.1990 (Ex.P9). Even three certificates from the Income Tax Department have been obtained vide letter dated

25.10.1990. The aforementioned legal notice was replied by the appellant-plaintiffs on 28.10.1990 (Ex.P10), wherein they had coined the story of not handing over the possession for the reason that the respondent-defendants had not taken permission from the Urban Land Ceiling Department. On 30.10.1990, the defendants went to the office of the Registrar, but the appellant-plaintiffs did not appear and the telegram in this regard was also sent on the same date. Thereafter, after expiry of two months of the stipulated date, letter dated 6.12.1990 (Ex.P14), intimating the willingness of the defendants, was sent, but the appellant- plaintiffs had been putting off the matter on one reason or the other and in letter dated 26.12.1990 stated that the possession was not taken over and the plaintiffs also went to the office of the Sub Registrar and thereafter the suit had been filed on 2.11.1993, readiness and willingness is conspicuously wanting. He has drawn the attention of this Court to the findings arrived by the Lower Appellate Court to show that the appellant-plaintiffs failed to prove on record any evidence/statement of account to show that they had any balance money for the performance of their part of the contract. In the examination of the plaintiffs, it has come on record that they arranged/borrowed a sum of ₹48,00,000/-for execution and registration of the sale deed, but in the cross-examination, the witness failed to show that receipt of ₹16,00,000/- lacs. Despite being the income tax assessee, no source of income has been shown and as per stipulation, neither they built any boundary wall nor went to the Office of the Sub Registrar. All these factors would lead to an irresistible conclusion that the readiness and willingness had evaporated as para No.9 of the plaint would show that a sum of ₹14,50,000/- had been referred to as earnest money and not as part sale consideration, therefore, the appellant-plaintiffs are precluded from raising the plea of seeking part performance, registration and execution of the sale deed vis-a-vis few acres of land. The prices have now escalated manifold and, therefore, the discretionary relief cannot be granted and, thus, prays for dismissal of the appeal.

Mr.Mahajan, in rebuttal, submits that there is a stark difference between the expression "sale consideration" and "earnest money". The contents of the supplementary agreement specifically define the same, whereas the Lower Appellate Court failed to refer to the aforementioned facts despite being the last Court of fact and law and rather in the impugned judgment and decree, held that the appellant-plaintiffs had no financial capacity to pay the balance sale consideration. He also submits that once the appellant-plaintiffs proved the readiness and willingness for execution and registration of the sale deed, the aforementioned amount of ₹14,50,000/- could not be forfeited.

I have heard the learned counsel for the parties, appraised the paper book and the case law cited by them.

It would be apt to reproduce Section 12 of 1963 Act:-

"12. Specific performance of part of contract.— (1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed

either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance".

On perusal of the contents of Section 12 (supra), the Legislature in their wisdom envisaged many stages after the execution of the agreement to sell. Vis-a-vis the provisions of sub-section (3) of Section 12, it prescribes that where a party to a contract is not able to perform the whole of his part of it, or the part which must be left unperformed either forms a considerable part of the whole, though admitting of compensation in money; or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance, but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement. However, sub-section (4) is an enabling provision that when a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

In order to appreciate the submissions and the controversy between the parties to the lis, it would be apt to reproduce the contents of the supplementary agreement, the true translated copy of which has been annexed as Annexure A-3:-

> "*Supplementary Agreement to Sell.*
>
> *We are, Ujjagar Singh, Jagir Singh, Pritam Singh sons of Shri Bhana Singh son of Shri Ram Ditta, residents of Mehmoodpura, District Ludhiana. Whereas we are owners in possession of the land out of measuring quarter to eleven acres comprising in Khasra No.24, 22, 31, 25, 30, 21, 23, 28, 29, 27, 26 and 20 situated at Mehmoodpura, Khata No.147/ 182-283-183/1, 184, Jamabandi for the year 1982-83 situated at Mehmoodpura, Tehsil and District Ludhiana is in our possession. We had entered into agreement to sell the above said land vide Agreement to Sell dated 13.1.90 which*

Gurwinder Singh son of Partap Singh, resident of 777, Samrala Road, Ludhiana, Kamaljit Singh son of Shri Amar Singh, resident of New Model Town, Ludhiana and Gurmit Singh son of Pyara Singh, resident of 825, Islam Ganj, Ludhiana in equal share for Rs.Five lacs nineteen thousand (Rs.5,19,000/-) per acre (8 Kanals) in equal share and an amount of Rs.50,000/- (Rs.Fifty thousand only) has been received by Pritam Singh from Gurwinder Singh as earnest money (Peshgi Biana) and now we are in need of money for developing business and property. Now we in our full sense and presence of mind out of remaining sale consideration, Rs.Fourteen lacs fifty thousand (Rs.14,50,000/-) have been received as per details herein- Rs.four lacs fifty thousand (Rs.4,50,000/-) vide Pay Order No.115519 in the name of Pritam Singh from Gurwinder Singh and Rs.Five lacs (Rs.5,00,000/-) vide Pay Order No.115521 in favour Jagir Singh from Gurmit Singh and Rs.Five lacs (Rs.5,00,000/-) vide Pay Order No.115520 in favour of Ujjagar Singh from Kamaljit Singh dated 30.1.1990 payable at Indian Bank, Dugri have been received. As such till date, we have received Rs.Fifteen lacs (Rs.15,00,000/-) till today and the purchasers can raise the boundary wall between 24.4.90 to 15.5.90 at their own costs and the possession of the land will be delivered to the purchasers at the time of registration of sale deed. It is agreed that the sale deed will be executed by 30.10.1990. If as agreed, we will not get the sale deeds registered, then the purchasers may get the sale deed executed through the Court and we will be responsible for paying all the expenses of the registration through court along with penalty. If the purchasers do not get the sale deed registered as agreed, then the earnest money will be forfeited. All the expenses will be borne by the purchasers. The purchasers can get one or more than one sale deeds registered in the name of anyone. In the land there is motor and trees which are our property which we will remove before execution of the sale deed and if we will not *remove the same, it will be property of the purchasers. The land is mortgaged with Punjab National Bank, Dhandran and we will be bound to get the clearance certificate before the prescribed date, from the Bank and will get the sale deed executed. The deal has been finalized through Kuldip Singh, Sarpanch, Dugri, Ludhiana to whom 2 per cent commission from our side and 2 per cent commission by the purchasers will be paid. With the execution of sale deeds, the commission of Kuldip Singh will be paid according to the amount of the sale deed executed. The successors of both the parties will also be bound to these terms and conditions. In case of any defect in ownership or any other encumbrance is proved or due to any objection from our successors, the purchasers suffer any loss of any type, for that we and our remaining property will be responsible for the loss causes to the purchasers. Hence this Supplementary Agreement has been executed for reference and record and for use at the time of need.*

Dated: 31.1.1990.

Witnesses	*Deponents*
Sd/-Ranjodh Singh	*Sd/-Pritam Singh*
Sarpanch, Mehmudpura	*above sellers*
Ludhiana Sd/-	*Purchasers*
Kuldip Singh	*Sd/-Gurwinder*
Singh and	
Sarpanch, Dugri	*Sd/-Kamaljit Singh*
Tehsil Ludhiana	*Sd/-Gurmit Singh*
Sd/-"	

On perusal of the aforementioned terms and conditions of the supplementary agreement to sell, the parties were alive to the situation vis-a-vis the "Earnest Money" and "Sale Consideration". The earnest money was defined as ₹50,000/-, whereas the sale consideration in respect of the part sale consideration of the entire land was received by the vendors-respondents-defendants on the date of its execution. It also provided that in case the vendees do not get the sale deed registered, only the earnest money shall be forfeited. There is no forfeiture of the sale consideration as mentioned above and the plaintiffs were given right to get one or more than one sale deeds registered in the name of anyone. In view of such situation read with provisions of sub-section (4) of Section 12, ibid, I am of the view that there is no force in the plea of Mr.Sarin that in the absence of the pleadings, much less evidence, party seeking the discretionary relief can be denied the relief. Statute itself provides moulding of relief vis-a-vis specific performance of part of the contract, in essence, the specific relief can be segregated. The parties were not ignorant of the term "earnest money" and "sale consideration". Similar situation had arisen in the judgment **Shree Hanuman Cotton Mills (supra),** wherein the Hon'ble Supreme Court came to the rescue of the purchaser. Para 21 of the judgment defining term "earnest" vis-a-vis sale consideration read thus:-

> "*21. From a review of the decisions cited above, the following principles emerge regarding "earnest":*
>
> *(1) It must be given at the moment at which the contract is concluded.*
>
> *(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.*
>
> *(3) It is part of the purchase price when the transaction is carried out.*
>
> *(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.*
>
> *(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."*

Law with regard to moulding of relief is no longer *res integra* and I am supported by the dictum/ratio laid down by the Hon'ble Supreme

Court in **Rachakonda Narayana (supra),** as the appeal is the continuation of the suit. When the Appellate Court hears the appeal, the whole matter is at large. The Appellate Court can go into any question relating to rights of the parties which a trial court was entitled to dispose of, provided the plaintiff possesses that right on the date of filing of the suit. The aforementioned fact had totally been ignored by the Lower Appellate Court by drubbing the right of the plaintiffs in not granting the discretionary relief, vis-a-vis specific performance of 1/3rd of the land, for which the balance sale consideration of ₹14,50,000/- has been received by the defendants. The earnest money, as noticed above, was only to the tune of ₹50,000/-. Mere inadequate sale consideration cannot be a ground for declining discretionary relief. I am supported by the judgment rendered by the Hon'ble Supreme Court in **Azhar Sultana (supra).**

No doubt, the discretionary relief should not be granted if the party seeking specific performance has not shown the readiness and willingness. Since the appellant-plaintiffs had filed the suit just few days before the expiry of the limitation, but the fact remains that the sale consideration, noticed above, was paid on 31.10.1990 and thereafter there had been correspondences between the parties and ultimately the appellant-plaintiffs sought the vindication of their grievance by filing the suit, thus, the facts of judgment in **K.S.Vidyanadam's case (supra)** are not applicable.

So far as the ratio decidendi culled out in **Rattan Lal's case and Satya Jain (Dead) through L.Rs and others Versus Anis Ahmed Rushdie (Dead) through L.Rs and others, (2013) 8 Supreme Court Cases 131** concerning the sale, it was a case where the Hon'ble Supreme

Court found that as more than 30 years elapsed for seeking performance of the contract, the discretionary relief should not have been granted. However, the case in hand, as noticed above, is different.

In my view, the provisions of sub-section (3) of Section 12 of 1963 Act, vehemently relied upon by Mr.Sarin, would not come in the aid of the respondent- defendants to show that for specific performance of the agreement to sell, vis-a-vis payment of ₹14,50,000/-, the appellant-plaintiffs are required to deposit the entire amount of sale consideration, i.e., ₹55,00,000/-. The readiness and willingness has to be seen from the act, conduct and intention of the parties. Once the respondent-defendants had received the sale consideration of ₹14,50,000/-, nothing prevented them for offering sale of part of the land. Both the Courts below have completely been swayed away from the fact that the appellant-plaintiffs failed to prove the bank account or payment of the receipt of the balance sale consideration, which is not essential requirement of law as per the judgment of the Hon'ble Supreme Court (supra) and as well as Explanation-1 of Section 20 of 1963 Act.

Keeping in view the aforementioned facts and circumstances, the judgments and decrees of both the Courts below are partly modified. The suit of the appellant-plaintiffs is partly decreed by granting specific performance of the agreement to sell vis-a-vis the area for which sale consideration of ₹14,50,000/- had been paid and relief of specific performance qua other area is declined, much less findings of the Courts below are affirmed. The substantial questions of law are answered in favour of the appellant-plaintiffs and against the respondent-defendants to the aforementioned extent.

The appeal is accordingly partly allowed.

February 17th, 2015 **(AMIT RAWAL)**
ramesh **JUDGE**