

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

RSA No.4590 of 2010 (O&M)

Date of decision:04.05.2016

Mohinder Singh and another ... Appellants

Vs.

Jarnail Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

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

Present:- Mr. Animesh Sharma, Advocate
for the appellants.

Mr. Munish Jolly, Advocate
for the respondents.

AMIT RAWAL J.

The appellant-plaintiffs are in Regular Second Appeal challenging the judgments and decrees rendered by both the Courts below, whereby, suit seeking specific performance of the agreement to sell dated 02.09.1988 (Ex.P2), has been dismissed for want of readiness and willingness.

Mr.Animesh Sharma, learned counsel appearing on behalf of the appellant-plaintiffs submits that defendants No.1 and 2 through their attorney – Hardevinder Singh/defendant No.3 agreed to sell the property in dispute fully described in the head note of the plaint on the basis of the aforementioned agreement to sell in favour

of the appellant-plaintiffs. He submits that agreement to sell was executed at Rajpura and earnest money of ₹60,000/- was paid and the sale deed was to be executed on or before 15.05.1990. As per the terms and conditions of the agreement, a sum of ₹40,000/- was to be paid by the plaintiffs and Joginder Singh (their father) to the vendor/defendants on 15.05.1989 and the remaining sale consideration at the time of execution and registration of the sale deed. He also submits that plaintiffs and Joginder Singh deceased their father had come to Tehsil premises Rajpura on 15.05.1989 along with an amount of ₹40,000/- and remained present in Tehsil Complex from 9 A.M. to 5 P.M but the defendants did not turn up and accordingly, presence was marked on Ex.P1 affidavit, which was attested from the Executive Magistrate Rajpura regarding their presence. He further submits that defendants started negotiations with some third person to alienate the land in dispute and accordingly, suit seeking permanent injunction was filed on 22.05.1990. There is a categorical pleading in the plaint that the appellant-plaintiffs had always been remained ready and willing to perform their part of the contract. Even on 15.05.1989, the plaintiffs had come to the office of Sub Registrar, Rajpura along with the remaining balance sale consideration and amount of expenses for execution and registration of the sale deed but the defendants did not turn up, thus, an alternative relief for recovery of amount of ₹19,96,500/- i.e. ₹60,000/- earnest money and ₹19,36,500/- as

damages for loss of business and interest was also prayed for. He further submits that defendants committed breach of agreement in not getting the sale deed executed and accordingly, the present suit was filed on 22.05.1990, thus, there had been no delay in seeking the specific performance yet both the Courts below non-suited the appellant-plaintiffs by relying upon the provisions of Sections 49 and 55 of the Indian Contract Act (in short "the Act"), whereas, the aforementioned provisions do not apply in respect of agreement to sell. In fact, those provisions are in respect of contract, where, the promisor and promissory had agreed to perform the part of contract but did not adhere to same. In such circumstances, it has been held that aggrieved party cannot seek the redressal. The alleged legal notice dated 16.05.1989 (Ex.P6) is nothing but a ploy to wriggle out of the terms and conditions of the agreement as the agreement did not envisage the place for payment of ₹40,000/-. The defendants did not take the plea of time being essence of agreement and therefore, the Courts below ought to have granted the discretion as per the provisions of Section 20 of the Specific Relief Act, 1963 (in short "1963 Act"). A copy of the suit for permanent injunction and written statement have been proved on record which are Ex.D7 and Ex.D8. He further submits that another agreement to sell was also entered into with Balbir Kaur and date for execution and registration of the sale deed was 15.05.1989. Thus, on the same date, appellant-plaintiffs had to go to the office of the Registrar for execution and

registration of the sale deed and had also taken a sum of ₹40,000/- for payment to the respondent-defendants being part performance of the agreement to sell, aforementioned. The rate of the land agreed to be sold was ₹48,000/- per acre. The alleged legal notice dated 16.05.1989 cancelling the agreement to sell was intentional act of the vendor as he has turned dishonest, for, prices of the property had increased manifold. He further submits that defendants may come out with an objection that simpliciter suit for specific performance of the agreement to sell, in the absence of the seeking declaration qua cancellation of the agreement as indicated in the notice dated 16.05.1989 would not be maintainable, in view of the ratio decidendi culled out by the Hon'ble Supreme Court while answering point no.1 in **I.S.Sikandar (D) by LRs vs. K. Subramani and others 2014(1) R.C.R.(Civil) 236** as the facts and circumstances of the each case have to be seen as to whether the appellant-plaintiffs had actually been not ready and willing or otherwise. Whereas, right from the date of the agreement to sell, till filing of the suit, there had been a continuous/perpetual readiness and willingness as immediately after the expiry of date, i.e., 15.05.1989, when a sum of ₹40,000/- was to be paid and after expiry of the stipulated date, the present suit for specific performance was filed on 22.05.1990.

In support of his aforementioned contentions, he relied upon the judgments rendered by the Hon'ble Supreme Court, Madras High Court, Rajasthan High Court and as well as, by this Court in

RSA No.2311 of 2015 titled as Bal Vir Sehgal vs. Sanjay Bansal and others decided on 11.01.2016; Mandhir Singh and others vs. Gurjant Singh and another 2014(3) R.C.R.(Civil) 728; Rajinder Singh @ Harjinder Singh and another vs. Paramjit Singh and others 2015(4) PLR 826; RSA No.2790 of 2015 titled as Sanjay Dhamija vs. Ram Kishan (deceased) through his LRs decided on 03.12.2015; RSA No.2572 of 2011 titled as Beant Singh and others vs. Karnail Singh and others decided on 12.02.2016; Abdul Sami vs. Smt. Neelu Dhandhiya 2014 SCC OnLine Raj 5888 and G.Sekar vs. K. Masilamani 2015 SCC OnLine Mad 2908 to contend that in all the aforementioned judgments, judgment rendered by the Hon'ble Supreme Court in I.S.Sikandar (supra) was referred to and held to be not applicable in view of the facts and circumstances of the case. Rather in one of the judgments rendered by this Court, i.e., in Maninder Singh (supra), this Court had an occasion to discuss the ratio and held that time was not essence of the agreement and therefore, the mala fide conduct of the seller immediately cancelling the agreement to sell after the date fixed for execution and registration of the sale deed would not dis-entitle the plaintiffs to seek discretionary relief. In the instant case also, there was a tearing hurry on behalf of the defendants to get rid of the agreement to sell and thus, urges this Court to formulate the following substantial questions of law which read thus:-

“i) Whether in the facts and circumstances of the case, both the Courts below have erred in holding that the appellants had defaulted in terms of Sections 49 and 55 of the Contract Act, when in fact it was proven that it was the respondents who had defaulted in executing the sale deed as per law?

ii) Whether in the facts and circumstances of the case, both the Courts erred in holding that the appellants were not ready and willing to perform their part of the contract and had violated the terms of the agreement dated 02.09.1988?

iii) Whether in the facts and circumstances of the case, both the Courts below ignored that time was not essence of the agreement?

iv) Whether the judgments and decrees by both the Courts below have been passed on the basis of total misreading and non-appreciation of evidence on record?”

On the other hand, Mr. Munish Jolly, learned counsel appearing on behalf of the vendor submits that as per the question raised and answered in the judgment rendered by the Hon'ble Supreme Court in I.S.Sikandar (supra), in the absence of seeking declaratory relief qua termination and cancellation of the agreement as indicated in the notice dated 17.05.1989 is not maintainable. Even

before the pendency of the appeal in this Court, no separate application has been moved seeking amendment of the plaint in order to overcome the legal hurdle. He further submits that legal notice dated 17.05.1989 cancelling the agreement to sell returned back with the report "refusal", thus, no cause of action accrued in favour of the appellants to seek injunction by filing a suit on 22.05.1990. Since the plaintiffs failed adhere to the terms and conditions of the agreement to sell in making the payment of ₹40,000/- agreed to be paid on 14.05.1989, had they approached office of the Sub Registrar, in respect of the execution and registration of the sale deed qua agreement to sell with Balbir Kaur though had been pleaded in the plaint, nothing prevented them to send a legal notice or any other intimation informing the defendants to appear before the Sub Registrar for receipt of said amount. In the absence of such action, readiness and willingness has rightly been held to be wanting. The plaintiffs in cross examination also admitted that in the agreement to sell, it was not recited that payment of ₹40,000/- was to be paid in Court Complex or anywhere else. Assuming for an argument sake, though not admitting that plaintiffs had intention to pay ₹40,000/- they could have approached during the interregnum, i.e., 14.05.1989 to 15.05.1990 for a period of one year for payment of the aforementioned amount and thus, urges this Court for dismissal of the aforementioned Regular Second Appeal by affirming the findings rendered by both the Courts below.

I have heard learned counsel for the parties and appraised the impugned judgments and decrees, much less, record of the Courts below and of the view that findings rendered by both the Courts below by relying upon the provisions of Section 49 and 55 of the Act, would not be applicable to the agreement to sell entered into under the Specific Relief Act as it is a separate Court and statute envisaging the different situations where a party can seek appropriate relief/defence and accordingly, the findings rendered by both the Courts below on such findings are hereby expunged/set aside.

However, in view of the facts noticed above, I am of the view that appellant-plaintiffs had not been always ready and willing to perform their part of the contract and therefore, appeal is liable to be dismissed, for, no explanation has come forth in not offering a sum of ₹40,000/- as stipulated in the agreement to sell on the date fixed, i.e., on 15.05.1989. Pleading in the plaint qua execution and registration of the sale deed in respect of agreement to sell having executed with Balbir Kaur, date stipulated being 15.05.1989, are conspicuously wanting. No attempt has been made to plead and prove such facts by moving an appropriate application, in accordance with law. Had the plaintiffs been ready and willing to perform their part of the contract, they could have approached the defendants during the intervening period, i.e., from 16.05.1989 till 15.05.1990 having offered a sum of ₹40,000/-.

It is a matter of record that in the agreement to sell, no place was fixed for payment of ₹40,000/-. The plaintiffs could have prepared a draft or pay order of ₹40,000/- and dispatched it by way of registered letter in order to show prima facie readiness and willingness and treated the balance in their favour. On the contrary, legal notice dated 17.05.1989 though refused by the plaintiffs, had been pleaded and brought on record in a suit for permanent injunction and thus, appellant-plaintiffs were not taken by surprised for the first time when the written statement was filed in a suit for specific performance as they were aware of the cancellation of the agreement to sell. For the sake of brevity, the contents of the legal notice dated 17.05.1989 (Ex.D6) reads thus:-

*“From the office of Shri Ramesh Kumar Saini Advocate
Rajpura*

Notice Dated 16.5.1989

To

- 1. Joginder Singh son of Amar Singh s/o Sunder Singh*
- 2. Mohinder Singh 3) Manmohan Singh s/o Joginder Singh s/o Amar Singh r/o vilage Nahera, Tehsil and District Ambala.*

Dear Sir,

I hereby serve you through this notice as per the instructions of my client Smt. Balbir Kaur w/o Mahabir

Singh r/o village Dharamgarh, Tehsil Rajpura, District Patiala.

1) That you have entered into an agreement for sale of the land measuring 73 bighas 17 biswas as per agreement to sell dated 2.9.1989.

2) That as per agreement you are required to the present before the office of Sub Registrar, Rajpura for execution and registration of sale deed as per the terms and conditions of the agreement mentioned above.

3) That my client remains in the office of Sub Registrar, Rajpura from morning till the close of the date. But you had not paid the money for the purchase of stamp paper and also you are failed to perform your part of contract, i.e., agreement to sell, my client was ready and willing to perform his part of contract. That my client had got an affidavit regarding his presence in the Court.

4) That you had not perform your part of contract, i.e., agreement of sale, the stamp paper.

It is, therefore, the agreement of sell stands cancelled and the advance money is forfeited as per the terms of the agreement to sell dated 2.9.1988.

Copy retained in the office of the undersigned.

Yours sincerely

Ramesh Kumar Saini, Advocate”

On perusal of the contents of the legal notice, it is evident that defendants had in unequivocal terms mentioned that agreement to sell stands cancelled and earnest money deemed to be forfeited, in view of the non-willingness of the appellant-plaintiffs in execution and registration of the sale deed, much less, on account of non-payment of demand as agreed amount. Despite having known about the cancellation of the sale deed and as well as, case law rendered in 2014, had wisdom been dawned upon the plaintiffs, they could have sought the cancellation of the agreement to sell by declaratory decree and even during the stage of appeal in this Court by moving an appropriate application. For the sake of brevity, the question raised with regard to the maintainability of the suit in the suit for specific performance and in view of the cancellation of the agreement to sell, as culled out by the Hon'ble Supreme Court in I.S Sikandar (supra) read thus:-

“The first point is answered in favour of the defendant No.

5 by assigning the following reasons:

It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos.1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them

at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the

sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985.

The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such

prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5.”

No explanation has come forth in not offering a sum of ₹40,000/-, during the period of one year. Filing of the suit for permanent injunction without offering a sum of ₹ 40,000/- would not bring the plaintiffs within the expression “always ready and willing”. Though the trial Court dismissed the suit in toto but the Lower Appellate Court by taking into consideration the aforementioned facts and circumstances ordered for refund of earnest money along with interest.

Keeping in view the aforementioned facts and circumstances of the present case, I am of the view that no case is made out for interference while exercising the discretion under Section 100 of the Code of Civil Procedure. Thus, question of law (i)

as noticed above, is answered in favour of the appellant-plaintiffs and rest of the questions are against the appellant-plaintiffs and in favour of the respondent-defendants. Judgment and decree qua specific performance is hereby affirmed and the findings qua plaintiffs having not conformed to the provisions of Sections 49 and 55 of the Act, are hereby set aside. Accordingly, the judgment and decree of the Lower Appellate Court to the aforementioned extent is hereby modified to the aforesaid extent. Suit is ultimately ordered to be dismissed.

Accordingly, appeal is also dismissed.

(AMIT RAWAL)
JUDGE

May 04, 2016
savita