

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

**RSA No.1326 of 2012 (O&M)
Date of decision: July 18, 2016**

MADHUBALA AND OTHERS

... Appellants

Versus

RAM KAURI 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. Jai Vir Yadav, Advocate,
for the appellants.

Mr. R.A. Sheoran, Advocate
for the respondents.

AMOL RATTAN SINGH, J.

1. This is an appeal by the plaintiffs, in a suit filed by them seeking specific performance of a contract entered into by them with the defendant (now represented by their LRs), for the purchase of half a share in land measuring 48 kanals 16 marlas, situated at Bawani Khera, District Bhiwani.

The suit of the plaintiffs was decreed in their favour by the learned Civil Judge (Senior Division), Bhiwani, but on an appeal filed by the defendant (now represented by his LRs), the said judgment was reversed, and the appeal allowed by the learned first appellate court.

2. The facts, taken from the judgments of the Courts below, are that the aforesaid agreement was entered into, duly signed by both parties in the presence of witnesses, on 5.12.2005, with Rs.2 lacs settled as the consideration for the purchase of the suit land by the plaintiffs from the defendant. Of the said amount, Rs.1,30,000/- was received by the defendant from the plaintiffs, against a duly signed receipt.

The sale deed was to be executed in favour of the plaintiffs by 15.4.2006, on receiving the balance consideration of Rs.70,000/- and in case of failure of the plaintiffs to get the sale deed executed and registered by the due date, the amount paid by them as earnest money, would stand forfeited by the defendant.

On the other hand, in case the defendant failed to get the sale deed executed and registered, the plaintiffs were at liberty to get it 'registered through the Court', at the expense of defendant, or to recover double the amount of the earnest money, as per their wish.

It was contended that the 15th and 16th of April, 2006, being holidays, the plaintiffs remained present in the office of the Sub-Registrar, throughout the day on 17.4.2006, with the remaining sale consideration of Rs.70,000/-, but the defendant did not turn up.

A legal notice was sent by the plaintiffs to the defendant on 1.5.2006, through their counsel, asking him to get the sale deed executed and registered by 22.5.2006, or to pay a sum of Rs.2,60,000/-, i.e. double the amount of earnest money, by the said date, failing which the plaintiffs would avail of their legal remedy in Court.

3. Upon notice having been issued to him, the defendant filed a written statement taking the usual preliminary objections of locus standi, maintainability etc., including the fact that the plaintiffs had not come with clean hands, having concealed true and material facts from the Court.

The agreement and the payment of earnest money of Rs.1,30,000/- was admitted by the defendant, as was the date fixed in the agreement, for execution of the sale deed, i.e. 15.4.2005. However, it was contended that the defendant also remained present in the office of the Sub-Registrar on 17.4.2006, the 15th and 16th of April being holidays, but it was actually the plaintiffs who did not turn up to execute the sale deed.

Thereafter, it was contended in the written statement, that the defendant met the plaintiffs and requested them to get the sale deed executed, which they did not and consequently, the defendant had sent a notice to them, through his counsel, on 18.4.2006, requesting them to get the sale deed executed within 7 days on payment of the balance consideration, but despite that, the plaintiffs did not perform their part of the contract and consequently, the earnest money stood forfeited.

4. It was further alleged that the notice dated 1.5.2006, sent by the plaintiffs, was actually motivated by mala fides, as there was no mention therein of the notice sent earlier by the defendant on 18.4.2006. Even so, the defendant sent his reply to the notice of the plaintiffs on 9.5.2006, informing them that since they had failed to perform their part of the contract, they would not be entitled to a decree of specific performance.

5. The plaintiffs filed a replication denying the contents of the written statement, upon which the following issues were framed by the learned Civil Judge (Senior Division), Bhiwani :-

“Whether the plaintiffs are entitled for a decree of specific performance of the agreement of the sale dated 5.12.2005 as alleged in the head notice of the plaint? OPP

(2) Whether the plaintiffs were and are still ready and willing to perform his part of contract? OPP

(2-A) Whether the plaintiffs are entitled for the recovery of Rs.2,60,000/- i.e. double amount of Rs.1,30,000/- paid as earnest money at the time of execution of agreement to sell dated 5.12.2005 as alleged in the head note of the plaint in alternative? OPP

(3) Whether the plaintiffs have no locus standi nor any cause of action to file the present suit? OPD

(4) Whether the suit of the plaintiffs is liable to be dismissed from the own acts and conducts of the plaintiffs? OPD

(5) Whether the suit of the plaintiffs is liable to be dismissed as plaintiffs have suppressed the material facts from the Court? OPD.

(6) Whether the suit of the plaintiffs is not maintainable in the present form? OPD

(7) Relief.”

6. Plaintiff no.1 stepped into the witness box as PW-1 and also examined one Suresh Kumar as PW-2.

The defendant examined himself as DW-1 and further examined Karan Singh, Numberdar (attesting witness to the agreement) as DW-2 and Advocate Pawan Kumar Punia as DW-3.

7. Upon appraising the evidence, the learned Civil Judge found that, as a matter of fact, both, the plaintiffs as also the defendant had proved that they had come present before the Sub-Registrar on 17.4.2006 but obviously, one had avoided the other.

As regards the legal notices stated to have been sent by both parties, it was held that though the notice dated 1.5.2006, issued on behalf of the plaintiffs, was duly proved, however the notice stated to have been sent by the defendant on 18.4.2006 was not proved, as though Sh. P.K. Punia, Advocate, had testified with regard to having sent it on 18.4.2006, the postal receipt with regard to the same had not been proved, as the receipt relied upon was actually a postal receipt in respect of the reply sent by the defendant to the legal notice issued by the plaintiffs on 1.5.2006.

8. It was further held by the learned Civil Judge that the willingness of the plaintiffs to execute the sale deed, could also be inferred, other than from the fact that they had appeared before the Sub-

Registrar and had sent a notice on 1.5.2006 to the defendant, also from the fact that of the Rs.2 lacs that was settled as the consideration amount, 1,30,000/- already stood paid, and there would be no reason for the plaintiffs to back out of paying only Rs.70,000/- which was about 1/3rd of the total sale consideration.

An issue of compulsory registration of the agreement to sell having been raised by the counsel for the defendant, that was eventually repelled by the learned Civil Judge, on the ground that under the proviso to Section 49 of the Indian Registration Act, 1908, an agreement to sell can be produced as evidence, in a suit for specific performance, even without registration of the said document.

9. Thus having held that the plaintiffs had proved that they were ready and willing to execute their part of the contract, the suit was decreed in their favour by the Civil Judge.

10. In the appeal filed by the defendant (through his LRs), the learned first appellate Court, after appraising the evidence and considering the judgment of the learned Civil Judge, held that the finding of the lower Court to the effect that the notice dated 18.4.2006, (issued on behalf of the defendant to the plaintiff), was not proved to have been sent, was a perverse finding, as it was admitted by the defendant himself, in his written statement, that the said notice had been served upon him, though he described the notice to be 'patently false'.

It was further found that no suggestion was made to Sh. P.K. Punia, Advocate, (DW-3), that he had actually not sent the notice dated 18.4.2006. Hence, it was held that the notice issued on behalf of the

defendant on 18.4.2006 was duly served upon the plaintiffs, and after it had been received by them, it was incumbent upon them to prove as to why they did not get the sale deed executed within 7 days of such notice.

11. The finding of the lower Court that both the parties had tried to avoid each other on 18.4.2006 at the office of Sub-Registrar, was also a finding not upheld by the learned lower appellate court, on the ground that it was for the plaintiffs to prove their case.

It was further held that in fact it was the plaintiffs who should have examined the Sub-Registrar, Bawani Khera, to prove as to who was actually present in his office and as to the actual state of affairs.

Still further, it was held by the learned District Judge, that more credence was to be attached to the affidavit executed by the defendant, because he had also examined DW-Karan Singh, Numberdar, who had supported the swearing of the affidavit by the defendant, in the office of the Sub-Registrar.

12. The notice issued by the plaintiffs on 1.5.2006 was held to have lost its significance, in view of the fact that the notice issued earlier on behalf of the defendant, on 18.4.2006, was proved. As regards the postal receipt in respect of the said notice having been sent on behalf of the defendant, it was held by the first appellate Court that non-production of the receipt was not fatal to the case of the defendant, when the plaintiffs themselves had admitted receipt of such notice in the pleadings.

13. However, a contention on behalf of the defendant was rejected, that the alternative relief of deposit of double the amount of

earnest money could also have been resorted to, and that in fact 'a wrong suit' had been filed by the plaintiffs.

Hence, essentially on the ground that the defendant had been able to prove that it was in fact he who had issued the notice first to the plaintiffs for execution of the contract, which despite having been served upon them, they did not execute within 7 days, the appeal of the defendants was allowed and the suit of the plaintiffs dismissed, by the first appellate Court.

14. Before this Court, Mr. Jai Vir Yadav, learned counsel for the appellants, reiterated the facts, and the findings of the learned Civil Judge, and submitted that the defendant having himself denied his willingness to execute the sale deed, both in reply to the notice of the plaintiff, as also in the written statement filed in the suit itself, the learned Civil Judge had not erred in decreeing the suit of the plaintiffs, in their favour.

He further submitted that the learned first appellate Court wholly mis-interpreted the replication filed by the plaintiffs to the written statement of the defendant, by holding that the plaintiffs had admitted that the notice dated 18.4.2006 had been served upon them but that it was a false notice. Learned counsel pointed to the record of the learned Courts below, specifically to the replication filed by the plaintiffs (the replication being in Hindi), wherein in paragraph 7 thereof, the words used, in reference to the notice, are as under (the Devnagri script being substituted by the Roman script, but the language reproduced hereinunder remaining to be Hindi):-

“Darasal prativadi ki niyat kharaab thi aur uske karyalaya Sub Registrar sahib Bawani Khera se saaj baaj karke dinank 17-4-2006 ko galat v jhutha bayan halfi tasdeek karvaya hai, aur dinank 18-4-2006 ko notice bhi bilkul jhutha dilvaya hai”

Thus, learned counsel submitted that what the first appellate Court has interpreted to be service of the notice upon the plaintiffs, actually simply translates as saying that the notice dated 18.4.2006 was falsely got issued. He submitted that the Hindi word ‘Dilvaya’ cannot in any manner be interpreted to say that it was served upon the plaintiffs. All that was meant was that the notice was falsely got issued from the Advocate, that is to say, that the said notice was actually not issued but was shown to be issued.

Mr. Yadav submitted that this would be further strengthened from the fact that, as held by the learned Civil Judge, there was no receipt to prove that such a registered notice was ever issued. The lower appellate Court wrongly shifted the onus on to the plaintiffs to have failed to examine an official from the Postal Department to prove that the notice had not been issued. In fact, the averment of the notice dated 18.4.2016 having been issued being that of the defendant, the onus lay upon the defendant to prove that the notice was actually issued and served upon the plaintiffs, which he did not discharge even by proving any receipt to show that it had been issued from the Post Office by registered post, as contended.

15. Hence, Mr. Yadav submitted, that the reversal of the judgment of the learned Civil Judge, by the first appellate Court, being based wholly upon the defendant having allegedly issued a notice on 18.4.2006, before the plaintiffs issued the notice dated 1.5.2006, the judgment of the lower appellate Court deserves to be set aside and that of the learned Civil Judge upheld, thereby decreeing the suit of the plaintiffs in their favour.

16. In response, Mr. Ram Avtar Sheoran, learned counsel for the respondents (LRs of the defendant), submitted that not only was the notice dated 18.4.2006 duly proved, along with the presence of the defendant before the Sub-Registrar, but the very fact that the suit for specific performance was filed 7 months after the notice dated 1.5.2006 was issued by the plaintiffs, shows that they were not actually willing, or not able to, execute the sale deed by the stipulated date, i.e. 15/17.4.2006.

17. Mr. Sheoran next submitted that decreeing the suit in favour of the plaintiffs at this stage, would actually amount to hardship to the defendants, 10 years after the agreement to sell had outlived its validity.

In the alternative, he submitted that the respondents, that is the widow and sons and daughters of the defendant, are willing to pay double the earnest money, if this Court comes to the conclusion that the plaintiffs were willing to execute their part of the contract.

Learned counsel, however, eventually prayed that the learned lower appellate Court having come to a correct finding and the judgment of the learned Civil Judge was perverse, this appeal deserves to be dismissed.

18. In rebuttal, Mr. Yadav referred to the judgment of the lower appellate Court, to submit that the issue of recovery of double the earnest money was even actually not agreed to even by the Court which had allowed the appeal in favour of the respondents-defendants. Hence, he submitted that the question of payment of double the earnest money, at this stage, did not arise.

19. Having heard learned counsel for the parties, it is very obvious that there is less a question of law and more a question of fact involved in this appeal.

The question is as to whether in the facts and circumstances of the case, the evidence was correctly appreciated by the learned Civil Judge, or by the learned first appellate Court, and whether the suit of the plaintiffs deserves to be decreed in their favour, at this stage, granting them the relief of specific performance, even if the finding of the lower appellate Court is found to be wholly erroneous. Also, the relief of specific performance being undoubtedly a discretionary relief, whether it should be granted to the plaintiff or it would actually amount to hardship on the respondents.

20. Having considered the judgments of both the Courts below, I find the contention of learned counsel for the appellants, based upon the judgment of the learned Civil Judge, to be worthy of credence, rather than the erroneous finding arrived at by the learned lower appellate Court.

21. With both, the plaintiffs and the respondents, having proved their affidavits dated 17.4.2006, duly attested by the Executive Magistrate, with regard to their presence in the office of the Sub-Registrar

on that day, the other question is whether the plaintiffs were willing to actually execute the agreement by making the remainder payment of Rs.70,000/- + stamp duty and registration charges, or whether they had got their presence marked only to fulfill a formality, so as to avoid forfeiture of their earnest money.

I am in agreement with the finding of the learned Civil Judge that, firstly, with Rs.1,30,000/-, i.e. $\frac{2}{3}$ rd of the consideration amount of Rs.2 lacs having already been paid by way of earnest money, an inference would definitely be drawn in favour of the plaintiffs, that they would rather be willing to pay the remaining $\frac{1}{3}$ rd of the consideration and obtain the land that they had agreed to purchase, rather than lose not only the paid amount, i.e. Rs.1,30,000/-, as also the land which they had agreed to purchase. Of course, incidents of prospective vendees backing out of their agreements on inability to pay the remaining consideration, are not at all unknown; however, with the plaintiffs having first got their presence marked in the office of the Sub-Registrar and thereafter having admittedly issued a notice to the defendant within two weeks thereafter, on 1.5.2006, for execution of the contract, this Court would hold that the plaintiffs had duly shown their willingness to execute the sale deed. On the other hand, the defendant, even within 9 days of that notice, i.e. less than one month after 17.4.2006, replied to that notice on 09.05.2006, to state that he was not willing to execute the contract any longer, taking the ground that the plaintiffs had not come present before the Sub-Registrar on that date.

22. No doubt, in the said reply dated 9.5.2006, to the notice issued by the plaintiffs, a reference has been made to the registered notice

stated to have been issued on behalf of the defendant, by his counsel. However, I am in agreement with learned counsel for the appellants, that the onus to prove that the said notice dated 18.4.2006 had actually been sent to the plaintiffs, was upon the defendant, by producing the receipt in respect of such registered notice having been sent.

Upon perusal of the record, the finding of the Civil Judge is found to be correct, that the postal receipt led by way of evidence on behalf of the defendant (Ex.D4), is actually a postal receipt in respect of a registered post sent carrying the reply to the plaintiffs' notice dated 1.5.2006. This would be obvious from the fact that the postal stamp on the said document shows that it is of the month of May 2006 and not April 2006. The exact date on the stamp is obliterated, but there is no manner of doubt that the month that shows on the stamp, is that of May (the 5th month) and not of April.

Hence, the notice by the defendant, asking the plaintiffs to get the sale deed executed within one week of that notice (dated 18.4.2016), not having been proved to have been actually sent, I see no error in the finding of the learned Civil Judge.

23. Yet further, I am fully in agreement with the learned counsel for the appellants, that the Hindi word 'Dilvaya' cannot be construed in any manner, even in the context in which it has been used in the replication of the plaintiff, to be interpreted as an admission that the notice dated 18.4.2016 was served upon them. Very obviously, the connotation, and the word itself, show that what the plaintiffs had pleaded in their replication was that a fake notice had been got issued by the

defendant and not that a fake notice had been served upon them, as interpreted by the first appellate Court.

24. Thus, with the plaintiffs having shown their presence in the office of the Sub-Registrar and then having sent a notice to the defendant within two weeks thereafter, and the suit for specific performance having been instituted about 9 months thereafter, in the opinion of this Court, they have duly proved that they were ready and willing to perform their part of the contract, especially having paid Rs.1,30,000/- of the total consideration money of Rs.2 lacs.

Undoubtedly, the defendant also proved his presence in the office of the Sub-Registrar on 17.4.2006, but very obviously, the two parties did not meet each other in the office, or even if they met, subsequently they denied having met there. Of course, very unfortunately, different parties to agreements getting their presence marked even after office hours is not wholly unknown, but with no proof in that regard, either in favour or against either party in the present case, nothing further is said on that, having to accept that at some point of time, they both came present in the office of the Sub-Registrar, on 17.4.2006.

Thus, with the plaintiffs having proved their willingness to execute the agreement, in the opinion of this Court, as discussed hereinabove and the defendant having repudiated the agreement even less than one month after 17.4.2006 (i.e. vide his notice dated 9.5.2006), and he not having proved that the legal notice dated 18.4.2006 was actually sent, asking the plaintiffs to execute the agreement within one week

thereof, it is held that the defendant on the other hand, was not willing to execute the sale deed as would be obvious from his conduct.

25. The question then is, as to whether at this stage, it would amount to a hardship on the defendants, as contended by Mr. Sheoran, their learned counsel, in case a decree of specific performance is passed by this Court; or, in other words, if the judgment and decree of the learned Civil Judge (Senior Division), Bhiwani is upheld.

In the opinion of this Court in the aforesaid circumstances, where the defendant in fact tried to project something completely against the facts, by concocting a notice which was actually not shown to have been sent by him, no plea of hardship can be taken by him or his legal representatives in any case. The plaintiffs on the other hand, having duly paid 2/3rd of the consideration money and remaining willing to pay the remaining Rs.70,000/-, along with stamp duty and registration charges, are entitled to a decree of specific performance, as was awarded in their favour by the learned Civil Judge.

26. Consequently, this appeal is allowed and the impugned judgment of the learned lower appellate Court, i.e. of the Additional District Judge, Bhiwani, is set aside. The judgment and decree of the learned Civil Judge (Senior Division), Bhiwani, dated 15.6.2011, is affirmed, with the suit decreed in favour of the plaintiffs. The plaintiffs shall deposit the remaining Rs.70,000/- of the consideration money, along with appropriate charges for stamp duty and registration within a period of 2 months from the date of receipt of a certified copy of this judgment, after which the respondents shall execute the sale deed in favour of the

plaintiffs, transferring the suit land to the plaintiffs, failing which the plaintiffs would be entitled to get the sale deed executed by initiating process in that regard.

The appellants-plaintiffs are also held entitled to costs, quantified at Rs.10,000/-.

A decree sheet be drawn up accordingly.

(AMOL RATTAN SINGH)
JUDGE

July 18, 2016
SwarnjitS