

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

**RSA No.4447 of 2012 (O&M)
Decided on: 18.05.2016**

Mohinder Singh

....Appellant

Versus

Piari and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. Atul Jain, Advocate
for the appellant.

Mr. Prateek Pandit, Advocate
for the respondents.

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

REKHA MITTAL, J.

The present appeal has been directed against the judgment and decree dated 26.07.2012 passed by the Additional District Judge, Kapurthala, whereby the appeal preferred by unsuccessful defendant – Resham Singh son of Bishan Singh (since deceased) represented by his legal representatives – Ms. Piari and others has been partly allowed, the judgment and decree passed by the trial Court has been modified and the relief of specific performance of the agreement has been converted to that of recovery of earnest money of Rs.2,54,000/- along with interest.

The question that arises for adjudication is:-

1. Whether intervention by the Appellate Court in discretion exercise by the trial Court by allowing specific performance of agreement dated 02.12.2002, is correct and based upon settled legal principles?

Counsel for the appellant has submitted that the Courts below have recorded consistent findings that Resham Singh executed agreement dated 02.12.2002 for sale of suit land measuring 08 kanal for a sale consideration of Rs.3,50,000/- out of which an amount of Rs.2,54,000/- was received as earnest money at the time of agreement and the sale deed was agreed to be executed and registered on or before 02.12.2003. The learned trial Court on a careful and detailed examination of the materials on record rightly held in favour of the appellant that he always remained ready and willing to perform his part of the agreement and the respondent defendant committed breach thereof and accordingly his claim for possession by way of specific performance of the agreement was accepted. It is further argued that the Court in appeal without application of mind and disregarding the material evidence on record has rejected claim of the appellant for specific performance of the agreement. Further dilating, it has been argued with vehemence that the Appellate Court reversed the findings of the trial Court primarily on the ground that the appellant/plaintiff himself has claimed the alternative relief of recovery along with interest @ 18% per annum. Further submitted that the reasoning adopted by the Appellate Court, recorded in Para 13 of the judgment is not at all sufficient to reverse the findings of the trial Court, therefore, the judgment passed by the Appellate Court modifying the judgment of the

trial Court cannot be allowed to sustain and the appeal is liable to be accepted.

Counsel for the respondent, on the contrary, has supported the judgment passed by the Court in appeal with the submissions that as the appellant failed to adduce cogent and convincing evidence on record that he was present in the office of Sub-Registrar on the target date i.e. 02.12.2003 and the affidavit Ex.P-3 purported to be executed by him in token of his presence in the office of Sub-Registrar on that day is not attested by the Sub-Registrar or an Executive Magistrate, no fault can be found in accepting his appeal partly by way of modification of the judgment passed by the trial Court. For this purpose, he has relied upon judgments of this Court ***“Gudial Sarup vs Kaushalya Kapur and others”***, 2003(2) RCR (Civil) 374, ***“Vijay Kumar vs Kushal Thakar and others”***, RSA No.262 of 2009 decided on 20.01.2009.

I have heard counsel for the parties and perused the records with their able assistance.

The appellant/plaintiff staked his claim to the suit property on the premise that agreement dated 02.12.2002 was executed by Sh. Resham Singh for sale of land measuring 08 kanals detailed in headnote of the plaint for a sale consideration of Rs.3,50,000/- out of which an amount of Rs.2,54,000/- was paid towards earnest money on the date of agreement. The sale deed was agreed to be executed on 02.12.2003 and he remained present in the office of Sub-Registrar, Kapurthala on that day along with balance sale consideration and expenses for execution

of the sale deed but the defendant did not turn up and he (plaintiff) got his presence marked. He sent registered notice dated 23.01.2004 and 12.02.2004 calling upon the respondent/defendant to fix a date for execution and registration of the sale deed but did not get any response.

The respondent/defendant contested his claim by raising a plea that he had taken a loan of Rs.50,000/- from the plaintiff for sending his son abroad in the presence of Resham Singh son of Nazar Singh and Balwinder Singh son of Gurbachan Singh and at that time, the plaintiff got signed some documents on the pretext that the same would be for security of the loan amount but subsequently converted into agreement to sell. It has further been pleaded that the agreement is the result of fraud, misrepresentation and fabrication.

It is an undisputed position of the case that both the Courts have refused to accept plea of the respondent/defendant that either the agreement was prepared on blank signatures obtained on the pretext of securing the alleged loan of Rs.50,000/- or the same is the result of forgery or misrepresentation. Admittedly, the respondent has not preferred any appeal or cross-objection against his liability under the agreement. This apart, counsel for the respondent has not made any submissions to challenge concurrent findings in favour of the appellant that agreement in question was executed by the respondent for sale of suit property. As the respondent did not admit execution of the agreement, there was no occasion for him to say something about readiness and willingness of the appellant to perform his part of the agreement.

The learned trial Court, after taking into consideration testimony of the plaintiff on oath, affidavit got attested by him from an Oath Commissioner on 02.12.2003 in token of his presence in the office of Sub-Registrar on the stipulated date, copies of notices Exhibits P3 and P4 coupled with the evidence adduced by the respondent, upheld plea of the appellant that he always remained ready and willing to perform his part of the agreement.

The First Appellate Court in view of its findings recorded in Para 13 differed with the trial Court in regard to readiness and willingness of the appellant to perform his part of the agreement. A relevant extract from Para 13 of the judgment of the Appellate Court reads as follows:-

“..... The learned counsel for the respondent has not raised any substantial arguments why the affidavit showing as readiness and willingness has been attested by Oath Commissioner instead of being attested from the officials of Sub Registrar. The learned counsel for the respondent has not raised any substantial arguments to refute the assertions made by the appellants so far as the plea of alternative relief of recovery is concerned. Moreover, the respondent/plaintiff himself has claimed the alternative relief of recovery alongwith interest @ 18% per annum and learned counsel for the respondent has argued that the appellants have not even returned the amount received by them to the extent of Rs.2,54,000/-. The learned counsel for the respondent has further argued that if the alternative relief is granted in favour of the respondent/plaintiff then the interest may kindly be granted @ 18% per annum on the alleged amount

mentioned in the agreement.”

On the basis of what has been extracted hereinbefore, the Court partly accepted the appeal and the appellants therein were directed to pay the amount of Rs.2,54,000/- along with interest @ 18% per annum from the date of execution of the agreement till the date of decree and interest @ 12% per annum from the date of decree till realization of the decretal amount.

A plain reading of Para 13 extracted hereinbefore would evident that the Court has not at all adverted to the materials on record, judgment of the trial Court or reasoning adopted by the said Court in allowing specific performance of the agreement. It further appears that as the Appellate Court wanted to deny the relief of specific performance, it has tried to harp upon the alternative relief of recovery claimed by the plaintiff, further being supported by a contention of counsel that in case alternative relief is to be allowed, the plaintiff should be allowed interest @ 18% per annum. The haste in which the Appellate Court has proceeded to wind up the issue with regard to entitlement of the plaintiff to the relief of specific performance of the agreement, certainly shows the Court in poor light.

The affidavit in support of plea of the appellant that he remained present in the office of Sub-Registrar on 02.12.2003 is admittedly not got attested from an Executive Magistrate. On the contrary, the affidavit has been got attested from an Oath Commissioner, Kapurthala, namely, Sh. H.K. Sharma, Advocate. To be fair, counsel for the respondent raised a plea that there is cutting in the

date beneath attestation of the Oath Commissioner. It was also suggested to the appellant during cross-examination that the affidavit is ante-dated. The appellant appeared in the witness-box and was cross-examined at length by counsel for the respondent. No explanation was sought from him as to why the affidavit Ex.P-3 was got attested from the Oath Commissioner or was not got attested from the Executive Magistrate. In absence of seeking explanation in this regard, it is difficult to take an adverse view of the affidavit being attested by an Oath Commissioner in place of a public officer. So far as the cutting in the date beneath attestation by the Oath Commissioner, the Oath Commissioner has fixed a stamp on both the pages of the affidavit wherein he has entered the Serial No.2446 dated 02.12.2003 and there is no cutting in those dates. Similarly, the affidavit in type contains date at two places as 02.12.2003 and there is no cutting thereon. In the date beneath attestation of the Oath Commissioner, there is cutting only in describing the year and it appears that the figure 04 has been converted to 03. The present suit was filed by the appellant in April, 2004 and in the plaint there is a specific reference made with regard to getting an affidavit attested in token of presence of the appellant in the office of Sub-Registrar on 02.12.2003. As the suit was instituted prior to December, 2004, possibility of affidavit having been ante-dated from 2004 to 2003 is otherwise ruled out.

Counsel for the respondent has referred to judgments of this Court to support the findings of the Appellate Court on the ground of affidavit being got attested from an Oath Commissioner. In ***Gudial***

Sarup's case (supra) the First Appellate Court while holding that the plaintiff was not ready and willing to perform his part of the contract had found that on 30.12.1977, the plaintiff had not got his presence marked with the Sub-Registrar. On the other hand, he had only sworn an affidavit which was got attested from an Oath Commissioner and this was of no consequence to prove that on 30.12.1977, the plaintiff was ready and willing to perform his part of the contract. It was also found by the Additional District Judge that after 30.12.1977, the plaintiff took no steps for getting the sale deed registered and did not serve any notice upon defendant till he filed the suit on 29.07.1980. The other judgment in *Vijay Kumar's case (supra)* has been relied upon the judgment in *Gudial Sarup's case (supra)*.

There cannot be any dispute about settled position in law that before applying a judgment as a precedent in a case, the Court has to draw similarity between the facts and circumstances of the case at hand and the referred authority. Counsel for the respondent while referring to the judgment of this Court did not appreciate that in *Gudial Sarup's case (supra)* after 30.12.1977 the target date, the plaintiff took no steps for getting the sale deed registered and the suit was filed almost close to three years from the target date. On the contrary, in the case at hand, the target date was 02.12.2003 on which the appellant statedly appeared in the office of Sub-Registrar and got prepared affidavit Ex.P-3. Few days thereafter, on 23.01.2004 he sent a registered notice calling upon the respondent to fix a date for registration of the sale deed and another notice dated 12.02.2004 was

sent with a specific stipulation that in case he did not receive response upto 01.04.2004, the appellant would initiate legal proceedings for getting the sale deed executed. Not only this, immediately thereafter the suit was filed on 15.04.2004. Keeping in view the facts and circumstances of the present case, the respondent cannot derive any advantage to his contentions from what has been held in ***Gudial Sarup's case (supra)*** and ***Vijay Kumar's case (supra)***.

Mohinder Singh – appellant appeared in the witness-box and reiterated his stand. Counsel for the respondent has failed to point out any material facts elicited during his cross-examination to create any doubt in his testimony with regard to his appearance in the office of Sub-Registrar on 02.12.2003. The affidavit Ex.P-3 is a supporting evidence of his appearance in the office of Sub-Registrar on 02.12.2003. The plea of the appellant in regard to his appearance in the office of Sub-Registrar and his readiness and willingness to perform his part of the agreement further gets corroborated from the two notices dated 23.01.2004 Ex.P-4 and dated 12.02.2004 Ex.P-7 and institution of the suit without any loss of time on 15.04.2004. The First Appellate Court totally disregarded the evidence i.e. notices sent by the appellant and his conduct in approaching the Court at the earliest possible opportunity. I would hasten to add that as a matter of fact, there is no rebuttal to the testimony of the appellant with regard to his presence in the office of Sub-Registrar on 02.12.2003 as Resham Singh – respondent in his cross-examination has deposed that he did not know that the appellant appeared in the office of Sub-Registrar on 02.12.2003

and executed an affidavit on that day in token of his presence. Keeping in view the oral and documentary evidence on record coupled with conduct of the parties, I have no hesitation to hold that disallowing relief of specific performance by the Appellate Court by way of modification is totally unwarranted, arbitrary, patently illegal and against the settled canons of law that specific performance cannot be denied if the plaintiff is able to prove the agreement and his readiness and willingness unless the case falls within the purview of Section 20 of the Specific Relief Act. As a consequence, the aforesaid question is answered in favour of the appellant and against the respondent.

In view of what has been discussed hereinabove, the appeal is allowed with costs. The judgment and decree passed by the Appellate Court rejecting claim of the appellant for specific performance of the agreement and allowing alternative relief of recovery is set-aside. The judgment and decree passed by the trial Court is ordered to be restored. The respondent represented by his legal representatives is directed to get the sale deed executed and registered in his (appellant's) favour within a period of 01 month on payment of balance sale consideration failing which the appellant shall be entitled to seek recourse to process of the Court for getting the sale deed executed and registered.

18.05.2016
yakub

(REKHA MITTAL)
JUDGE