

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.506 of 2012
Date of Decision: 19.10.2016

Harnarain Singh

... Appellant

Vs.

Satish Kumar and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Ms. Deepali Puri, Advocate,
for the appellant.

Mr. Rajat Malhotra, Advocate,
for respondent no.1.

Mr. Inderpal Singh Parmar, Advocate,
for respondent no.2.

Amol Rattan Singh, J.

This appeal has been filed by the defendant in a suit filed by the respondents-plaintiffs, seeking possession of the suit property by way of specific performance of an agreement entered into by the parties on 30.07.2002, for the purchase/sale of land measuring 22 kanals 5½ marlas, owned by the appellant-defendant (hereinafter to be referred to as the appellant) in village Mangli Nichi, Tehsil and District Ludhiana.

As per the suit filed by the respondents-plaintiffs (hereinafter to be referred to as the plaintiffs), the agreement was executed on the aforesaid date, with the sale consideration settled at Rs.16,00,000/- per acre, of which Rs.5,66,000/- were received by the appellant as earnest money from the

plaintiffs on the date of the agreement itself. The sale deed was to be executed and registered by 30.06.2003, i.e. 11 months later.

It was contended that the plaintiffs always remained ready and willing to perform their part of the contract and always had the consideration money available with them.

It was further contended that the appellant had agreed to get the land demarcated before the execution and registration of the sale deed.

However, the appellant did not get the land demarcated, nor in fact, did he move any application before the revenue authorities to get the needful done. Instead, it was contended, that he tried to put the blame upon the plaintiffs by sending a “false notice dated 24.07.2003”, through his counsel.

The plaintiffs are stated to have replied to the said notice on 01.08.2003; however, it was contended that the defendant was legally bound to get the sale deed executed and registered in favour of the plaintiffs, who had not committed any breach of the agreement.

When the plaintiffs came to know that the appellant is looking to sell the land to other people, they again made a request to him for fulfillment of the agreement but he having refused to do so, the suit was filed on 24.12.2003.

2. In the written statement filed by the appellant-defendant, upon notice being issued to him, he took preliminary objections with regard to maintainability etc., including one with regard to non-compliance of order VII Rule 1 (j) of the CPC.

It was further stated that there was no condition settled between the parties with regard to getting the agreement enforced through a Court of

law.

Yet further, it was contended that the appellant had got the suit land demarcated before the date fixed for execution and registration of the sale deed, i.e. 30.06.2003, and for the said purpose, he had moved an application for demarcation before the Tehsildar, Ludhiana (East) on 23.06.2003. It was further contended that one Gurmail Singh, a retired Kanungo, was appointed as the Local Commissioner for getting the demarcation done, which was done on 27.06.2003, after sending notices to the concerned parties on 24.06.2003, through the Halqa Patwari. In fact, it was contended that notice had also been sent to a marginal witness to the agreement, Balwant Singh, who was known to the plaintiffs and who had acknowledged receipt on the notice and was present at the time of demarcation and had also signed the demarcation report on 27.06.2003.

Yet further, the appellant in his written statement stated that he had appeared before the Sub-Registrar, Ludhiana, on 30.06.2003 and had got his presence marked there by moving an application for the purpose. He had also remained present before the Sub-Registrar the whole day and then got an affidavit attested in that regard from the Executive Magistrate.

It was, thus, contended that it was the plaintiffs who were the defaulting party, as they did not come forward for the registration of the sale deed by paying the full sale consideration. Consequently, the agreement stood cancelled, for which, a legal notice had also been sent by the counsel for the appellant, to the plaintiffs, on 24.07.2003, after which the appellant, being an NRI, had left for Canada on 27.07.2003, but only after meeting the plaintiffs. It was thereafter that the plaintiffs sent a reply to the notice dated 24.07.2003, on 01.08.2003.

3. On the aforesaid pleadings of the parties, the following issues were framed by the learned Additional Civil Judge (Senior Division), Ludhiana:-

- “1. Whether the defendant entered into an agreement to sell dated 30.07.2002 of the suit land with the plaintiffs as prayed for? OPP
2. Whether the plaintiffs have been ready and willing to perform their part of the contract as prayed for? OPP
3. Whether the plaintiffs are entitled to decree for specific performance of the agreement to sell dated 30.07.2002? OPP
4. Whether the suit is not maintainable in its present form? OPD
5. Whether the suit is liable to be rejected as the plaintiffs have failed to comply with the mandatory provisions of Order 7 Rule 1(j) of the CPC? OPD
6. Whether the plaintiffs have no cause of action to file the present suit? OPD
7. Relief.”

4. By way of evidence, the plaintiffs examined plaintiff no.2 Amarjit Singh as PW1, Daljit Singh as PW2, Satish Kumar-plaintiff as PW3, Ram Pal Singh, Clerk-cum-Cashier, Punjab National Bank, Ludhiana as PW4, Tejinder Singh Monga, Officer, Punjab National Bank as PW5, Himmat Singh, Clerk-cum-Cashier, Indian Overseas Bank, Ludhiana, as PW6 and Rachhpal Singh, Cashier, UCO Bank, Ludhiana as PW7. They also tendered documentary evidence, including copy of a sale deed, as Exs.PX to PZ/1.

The appellant-defendant examined himself as DW1, one Bant Singh as DW2, Harjit Singh as DW3 and Sarup Singh as DW4.

5. The agreement itself having been admitted to by the parties, therefore, the next aspect of whether the appellant had got the suit land

demarcated or not, in terms of the agreement, was gone into and it was found by the learned Additional Civil Judge, that the application filed before the Tehsildar, Ex.P5, was duly proved, as was the appointment of the retired Kanungo as the Local Commissioner for conducting the demarcation, which also stood proved by the report of the said Local Commissioner, Ex.D7, further corroborated by the application and report of demarcation of the land of one Parshotam Singh, whose land was adjoining the suit land.

The attestation of the report by the mediator (and attesting witness) to the agreement, Balwant Singh, was also held to be proved, showing that the demarcation was actually got done by the appellant before date fixed for execution and registration of the sale deed.

The presence of the appellant before the Sub-Registrar, on 30.06.2003, also stood duly proved by his application Ex.P10 and affidavit executed, Ex.D11.

6. On the other hand, it was held that the plaintiffs had not placed on record any documentary evidence to prove their readiness and willingness to execute the agreement. The issuance of the legal notice dated 24.07.2003, Ex.D12, informing the plaintiffs that they had lost their right to seek specific performance of the agreement and that their earnest money of Rs.5,66,000/- stood forfeited, was also found to be duly proved, as was the factum of the appellants' departure to Canada, on 27.07.2003, in the light of an entry in that regard on his Passport.

7. As regards the financial capacity of the plaintiffs to be able to pay the remaining consideration money on 30.06.2003, though bank officials are stated to have been examined by the plaintiffs (PWs3, 5, 6 and 7), to prove that there were sufficient funds in the accounts of the first plaintiff,

Satish Kumar, and his firm M/s Satish Estates Private Limited, however, it was held that it was not proved that the balance consideration of Rs.40,00,000/-, to be paid, was actually available with the plaintiffs. This was so held by the learned Additional Civil Judge, on the ground that plaintiff Amarjit Singh, who the Court observed was to pay half of the balance sale consideration, did not place on record any document to show that he had Rs.20,00,000/- available with him, except his oral evidence to the effect that he had the said amount available with him in cash, which was disbelieved by the Court.

8. Further recording a finding that the witnesses of the appellant-defendant, including the persons whose land adjoined that of the appellant, i.e. DWs2 and 3, Bant Singh and Harjit Singh respectively, had supported the demarcation report, further seen with the testimony of DW4 Sarup Singh, stated to be a partner of the marginal witness-cum-mediator, Balwant Singh, a property dealer, the Court held that the willingness of the appellant to execute his part of the contract stood proved, with the readiness and willingness of the plaintiffs not proved.

9. It was further held that there being no recital in the agreement, Ex.P1, that in case of default on the part of the defendant, the plaintiffs could get the sale deed executed through the Court, but there being a recital with regard to forfeiture in case of default by the plaintiffs, the plaintiffs could not seek the remedy of specific performance of the agreement to sell, but on the other hand, the appellant was entitled to forfeiture of the earnest money paid to him, the plaintiffs having failed to fulfill their part of the contract.

In this regard, a judgment of the Delhi High Court in **Kuldeep Gandotra v. Shailendra Nath Endlay** 2007 (5) RCR (Civil)s 773 was cited

by the learned Civil Judge. Further citing a judgment of this Court and that of the hon'ble Supreme Court in G. Jai Shree v. Bhagwandas S. Patel 2009 (1) CCC 785, it was further held that the relief of specific performance is a discretionary relief, which in the present case could not be sought by the plaintiffs, in the aforesaid circumstances.

10. As regards the reply of the plaintiffs dated 01.08.2003, to the legal notice sent by the appellant, dated 24.07.2003, it was found that the said reply basically contained what was stated in the suit itself, and that plaintiff Satish Kumar, being a registered colonizer and estate agent, was expected to be vigilant about his rights and to execute the sale deed but that not having been done, firstly no right to enforce an agreement by way of specific performance could be claimed through the Court in the absence of any recital in that regard in the agreement itself and secondly, even the alternative relief of claiming double the amount of the earnest money from the defendant (appellant herein), could not be claimed by the plaintiffs, they themselves having failed to prove their willingness to execute their part of the contract.

10-A. The technical objection with regard to non-compliance of the stipulation contained in Order 7 Rule 1(j) CPC, was however, held against the present appellant-defendant and in favour of the plaintiffs, to the effect that a cause of action otherwise did accrue to them and on that ground, the suit could not be dismissed. [Clause (j) of Rule 1 of order VII (as applicable to Courts in Punjab), is to the effect that a statement is to be contained in the plaint that no suit between the same parties etc., had been previously instituted on the same cause of action].

11. Having held as above, the suit of the plaintiffs was dismissed by the learned Additional Civil Judge.

12. In the first appeal filed under Section 96 of the CPC, before the learned Additional District Judge, Ludhiana, that Court, after noticing the pleadings and evidence led by the parties, and upon consideration of the judgment of the lower Court, as also the arguments raised before him, also found that as regards the execution of the agreement, there was no dispute between the parties.

However, it was held that the entire exercise of carrying out the demarcation of the suit land, was got done by the appellant-defendant at the back of the plaintiffs, taking advantage of the fact that he himself (the appellant-defendant) is a retired Patwari. It was also held that this was done in connivance with Gurmail Singh, retired Kanungo, i.e. the Local Commissioner appointed by the Tehsildar for the purpose of demarcation.

This was so held by the first appellate Court upon finding that in his cross-examination, the appellant had denied his association with Gurmail Singh and had also stated that Gurmail Singh was not present before the Tehsildar when the application was filed by the appellant before that officer, seeking demarcation of the land. However, it was proved from a reading of the application itself, Ex.D5, that there was a “special note” with regard to appointment of the aforesaid Gurmail Singh, on the request of appellant Harnarain Singh and that, in fact, Gurmail Singh had received the order on the same day itself. Thus, it was held that Gurmail Singh was obviously present (in the office of the Tehsildar), alongwith the appellant, on that date.

It was further found that there was nothing contained in the record with regard to any notice having been issued to the plaintiffs regarding the demarcation; and in fact, the appellant in his testimony had admitted that he had not given any notice, in writing, to the plaintiffs, with regard to the

demarcation, or with regard to appointment of the Local Commissioner, before or after such appointment by the Tehsildar. It was also admitted by him that he did not send a copy of the report to the plaintiffs.

Therefore, it was held by that Court that the aforesaid sequence of events showed that the plaintiffs were never informed about the process of demarcation, which had, thus, been obviously done in a clandestine manner by the defendant, in connivance with Gurmail Singh, retired Kanungo.

Hence, it was, in effect, held that as the plaintiffs were to pay the balance consideration after the demarcation and measurement of the land, they could not be expected to be present before the Sub-Registrar on the date fixed for executed and registration of the sale deed, they not being aware of the fact that the demarcation that was to be got done as an essential condition, prior to registration, had already been done.

13. Yet further, it was also found by that Court that the appellant had also admitted in his cross-examination that some of the khasra numbers which were mentioned in the agreement to sell, were not given in his application seeking demarcation. Hence, it was also held that neither the demarcation was complete, nor even was the demarcation report proved in terms of (Section 67 of) the Evidence Act, with Gurmail Singh, retired Kanungo, also not having been examined.

14. Coming to the notice issued by the appellant to the plaintiffs on 24.07.2003, Ex.D12, it was held that it was simply a notice unilaterally cancelling the agreement and further, that even this notice was silent with regard to any demarcation having been got done by the present appellant (defendant), or that he was still ready and willing to get the sale deed executed.

15. On the issue of readiness and willingness of the plaintiffs to execute their part of the deal, it was found that as per Ex.PW3/3 to Ex.PW3/9, Ex.PW5/C, Ex.PW4/A, Ex.PW6/A, Ex.PW7/B, Ex.PW5/A and Ex.CW3/10, Rs.16,80,621/- were available with plaintiff Satish Kumar and further, it was proved by sale deeds, Exs. CW3/11 to CW3/15, that he had purchased property worth Rs.31,10,000/- during the relevant period and as such, it was held that the plaintiffs had a “financial capacity” of more than Rs.47,00,000/-, at the relevant time.

Though the factual finding of the Additional Civil Judge to the effect that there was no evidence that plaintiff Amarjit Singh had Rs.20,00,000/- available with him was upheld, however, it was further held by the first appellate Court that there was no condition in the agreement that both the plaintiffs, namely Amarjit Singh and Satish Kumar, were to pay 50% each, of the total sale consideration. Thus, in the absence of such a recital, it was held that either of them could have paid the balance sale consideration of Rs.40,00,000/- and any adjustment of funds *inter se* the plaintiffs, was obviously not the concern of the present appellant-defendant.

16. Citing a judgment of the Supreme Court in **Man Kaur v. Hartar Singh Sangha and another** 2011 (1) RCR (Civil) 189 and another of this Court, in **Abhey Ram v. Miyan Singh and others** 2007 (3) RCR (Civil) 630, it was held that simply because the agreement to sell did not contain a recital that the vendee could get the agreement enforced through a Court of law, did not debar a suit for specific performance.

17. On the above findings, the judgment of the Additional Civil Judge was set aside by the first appellate Court and the suit of the plaintiffs (respondents herein), seeking specific performance of the agreement to sell

dated 30.07.2002, was decreed in their favour, subject to their depositing the balance sale consideration within two months from the date of the judgment of the Court.

18. In this appeal, filed by the defendant-judgment-debtor, Ms. Deepali Puri, learned counsel for the appellant, submitted that the demarcation of the land was duly got conducted and the report in that regard was Ex.D7 and therefore, there being no condition in the agreement, Ex.P1, that the demarcation had to be got done in the presence of the plaintiffs, the learned first appellate Court has wholly erred in decreeing the suit of the plaintiffs on the ground that the demarcation was done behind the back of the plaintiffs.

She further submitted that admittedly, the plaintiffs never appeared on 30.06.2003 to get the sale deed registered, whereas the appellant duly appeared before the Sub-Registrar, as proved, and even thereafter, the plaintiffs did not approach the appellant with regard to either getting the demarcation done, since their contention was that it had not been done, nor did they even approach the appellant in any manner to get the sale deed executed. Thus, 24 days after the date stipulated for execution of the agreement, when it was time for the appellant to return to Canada, he eventually sent them a notice on 24.07.2003, rescinding the agreement, in the aforesaid circumstances.

Learned counsel further submitted that the finding of the learned Additional Civil Judge, that the plaintiffs could not even prove their financial capacity to pay the remaining amount of Rs.40,00,000/-, was also wholly erroneously reversed by the first appellate Court, simply on the ground that plaintiff Satish Kumar had purchased property worth Rs.31,00,000/- during

the relevant period. Hence, simply by purchase of property, it was contended, that the balance sale consideration of Rs.40,00,000/- being available for actual payment on the date fixed for registration of the sale deed, was in no manner proved, with only Rs.16,80,621/-, shown to be available in cash, in the bank accounts of plaintiff Satish Kumar.

Hence, learned counsel contended that with not even a notice having been issued by the plaintiffs to the appellant, asking him to either get the demarcation done or to execute the sale deed and get it registered, further seen with the fact that they could not prove that they had Rs.40,00,000/- lying with them to be paid to the appellant, the learned Additional Civil Judge had correctly come to the conclusion that they were not, in fact, ready and willing to perform their part of the contract, at the time when the sale deed was to be executed and registered, on 30.06.2003.

19. She relied upon a judgment of the Supreme Court in **I.S.Sikandar v. K.Subramani and others** 2014 (1) RCR (Civil) 236, to submit that, firstly, though time may not be of the essence in a contract for the sale/purchase of immovable property, however, if the agreement in that respect specifies a time, then it does become essential to the contract.

On the issue of readiness and willingness of a party to a contract not being proved, in the absence of the party showing that he had money to pay as an essential part of the contract, Ms. Puri relied upon a judgment in **N.P.Thirugnanam v. Dr. R. Jagan Mohan Rao and others** AIR 1996 SC 116.

Yet further, she relied upon a judgment of the Supreme Court in **Sita Ram and others v. Radhey Shyam** 2007 (4) RCR (Civil) 533, to submit that in a suit seeking specific performance of a contract, the plaintiff must

show that his conduct has been blemishless, to show that he is entitled to the relief claimed, which would otherwise be barred in terms of Section 16(c) of the Specific Relief Act, 1963.

On the prospective vendee not coming forward to get the sale deed executed in his favour, thereby debarring him from seeking a decree of specific performance, learned counsel cited a judgment of a coordinate Bench of this Court in Amar Singh v. Jaswant Kaur 2007 (2) RCR (Civil) 3, in which again the judgment in *N.P. Thirugnanams'* case (supra), was cited by this Court.

20. In response, Mr. Rajat Malhotra and Mr. Inderpal Singh Parmar, learned counsel appearing for respondents no.1 and 2 respectively, i.e. the two plaintiffs, submitted that, firstly, as regards the application for demarcation, Ex.D5, stated to have been moved by the appellant-defendant, before the Tehsildar, the said application and process of the demarcation, were not in consonance with Section 101 of the Punjab Land Revenue Act, 1887, which reads as under:-

“101. Power of Revenue-officers to define boundaries.

(1) A Revenue-officer may, for the purpose of framing any record or making any assessment under this Act, or on the application of any person interested, define the limits of an estate, or of any holding, field or other portion of any estate, and may, for the purpose of indicating those limits, require survey-marks to be erected or repaired.

(2) In defining the limits of any land under sub-section (1) the revenue-officer may cause survey-marks to be erected on any boundary already determined by, or by order of, any Court, Revenue-officer or Forest Settlement-officer, or restore any survey-marks already set up by, or by order of any, Court or any such officer.”

Thus, learned counsel submitted that as per sub-section (2) of Section 101, the revenue officer is required to cause survey-marks to be erected or to refer to any boundary already determined on order of the authorities given therein, including by restoration of any such survey-marks set up.

He further submitted that even the khasra numbers given in the application are different to the ones in the agreement to sell, which was admitted by the appellant-defendant, in his cross-examination.

Learned counsel next submitted that the earnest money received by the appellant was sought to be forfeited by him, by way of the notice dated 24.07.2003, despite the fact that no notice had ever been served upon the respondents informing them either of the time and place of the demarcation, nor the exact measurement of the land, nor the balance sale consideration to be paid, upon the exact demarcation of the land.

21. Further, it was submitted that no notice having been served by the appellant, requiring the plaintiffs to be present before the Registrar on 30.06.2003, or even informing them that the demarcation had been got conducted, revealed his malafide intent because in the agreement, it was not stated that the sale deed would be executed on 30.06.2003 but by 30.06.2003, which according to learned counsel, was a condition incorporated by the appellant-vendor himself.

It was further contended that the notice dated 24.07.2003 was actually received on 29.07.2003 and immediately thereafter, the reply thereto was given by the plaintiffs through their counsel on 01.08.2003, informing the appellant with regard to the plaintiffs' willingness to perform their part of the contract and about the default of the appellant.

He was again asked to get the land demarcated, so that the balance sale consideration could be calculated and the sale deed executed. However, he never came forward thereafter to get the demarcation done in the presence of the plaintiffs, nor to get the sale deed registered as per the terms of the agreement.

Consequently, the suit for specific performance was filed without any delay, as per learned counsel, on 24.12.2003, i.e. in less than five months of the notice having been received by them.

22. With regard to the financial condition of the plaintiffs to pay the balance consideration money, it was submitted that the sound financial position of plaintiff Satish Kumar was duly demonstrated by way of the bank accounts, duly supported by evidence of the witnesses in that regard, as also by showing that he had sufficient property, recently purchased by him, thus proving his total financial capacity of Rs.47,00,000/-.

23. Learned counsel thereafter reiterated the entire reasoning given by the learned first appellate Court to reverse the finding of the learned Additional Civil Judge.

24. In support of their arguments, learned counsel relied upon a judgment of a co-ordinate Bench of this Court in **Mandhir Singh and others v. Gurjant Singh and another** 2014 (3) RCR (Civil) 728, wherein it was held that with the sellers terminating the agreement the very next day of the date when the sale deed was to be registered, showed that they were in a hurry to get the contract terminated.

Various judgments of different High Courts were also cited, to submit that time is not of the essence in a contract for the sale/purchase of immovable property, and on what constitutes readiness and willingness on

the part of the parties to execute a contract.

Lastly, learned counsel referred to two judgments of the hon'ble Supreme Court, in *Man Kaurs'* case (supra) and **A. Abdul Rashid Khan v. P.A.K.A. Shahul Hamid** 2001 (4) RCR (Civil) 824, to submit that the finding of the trial Court, that in the absence of a specific recital in the agreement to the effect that the agreement can be got enforced through a court of law, no suit for specific performance would lie, was an erroneous finding.

25. Learned counsel for the respondent-plaintiffs also submitted that no question of law having been framed and no question of law arising in the present second appeal, the same is not entertainable at all by this Court.

In that regard, various judgments of the Supreme Court were also cited.

26. Having heard learned counsel for the parties and having considered the judgments of the Courts below, as also a part of the relevant evidence from the records of those Courts, the first aspect which needs to be settled is as to whether any question of law is involved in this second appeal or not.

In this regard, it must be stated that it has been held by a Constitution Bench of the hon'ble Supreme Court in **Pankajakshi (Dead) Through L.Rs. & Others v. Chandrika & Orthers** (2016) 6 SCC 157, that with regard to this Court, and other High Courts where State enactments govern the procedure and grounds for filing a second appeal, it would not be Section 100 of the Code of Civil Procedure, 1908 (as amended), but the relevant State enactments, that would prevail with regard to the parameters of maintainability etc. of a second civil appeal.

Thus, as regards this Court, it is Section 41 of the Punjab Courts

Act, 1918, that would govern the essential parameters required to be fulfilled for the maintainability of a second civil appeal before this Court.

However, that issue is not being dwelled upon further, in view of the fact that, in the opinion of this Court, the following two questions of law do arise in the present second appeal:-

- i) Whether a suit for specific performance is maintainable when the agreement to sell/purchase immovable property does not specifically contain a recital to the effect that the agreement would be enforceable by either party by recourse to the remedy of such a suit, before the civil Court?
- ii) Whether, in the circumstances of this case, a decree of specific performance of the agreement to sell dated 30.07.2002, could have been passed by the learned first appellate Court, in view of the bar contained in Section 16 (c) of the Specific Relief Act, 1963; i.e. would the bar operate in the circumstance of this case or not?

28. Coming then to the first essential question, of the maintainability of a suit filed by the plaintiffs, seeking a decree of specific performance of the agreement in question, with no recital contained in the agreement for enforcement of the agreement, by seeking remedy before the civil Court.

That question need not detain us any longer in view of the specific ruling on that issue by the hon'ble Supreme Court in *Man Kaur's* case (supra) (2010) 10 SCC 512), wherein it was held as follows:-

“The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific

performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract.”

(Para 31, SCC citation)

Hence, in view of the above authoritative pronouncement, it is held that the judgment of the learned Additional Civil Judge was erroneous to that extent and as regards that aspect (though not decided by that Court as a part of issue no.4 on the maintainability of the suit), the learned first appellate Court, vide the impugned judgment, correctly reversed that finding, holding that even in the absence of any such recital in the agreement, a suit for specific performance was maintainable.

29. Coming next to the issue of whether the discretionary relief of specific performance was correctly issued by the learned first appellate court, reversing the judgment of the learned Additional Civil Judge.

In that regard, I am in agreement with learned counsel for the appellant, that in the circumstances of the case, for the reasons given hereinafter, the first appellate Court wholly erred in decreeing the suit of the plaintiffs, directing the appellant-defendant to execute a sale deed in favour of the plaintiffs qua the suit land.

30. The first question is, whether a valid demarcation was carried out by the appellant in terms of the agreement or not. Though the demarcation is stated to have been carried out in the presence of the attesting witness to the agreement, i.e. Balwant Singh, who is also stated to be a property dealer and a mediator to the agreement, firstly, of course, the said Balwant Singh was not

examined as a witness by the appellant. Only a person stated to be his partner, Sarup Singh, was examined as DW4, who though supported the case of the appellant, is not seen to be a signatory to the demarcation report, Ex.D7, though signatures of at least 6 to 7 persons are visible on the said document.

That apart, no notice is actually seen to have been served upon the plaintiffs, with regard to the date and time of the demarcation. Simply because two persons whose land was adjoining that of the appellant, i.e. Bant Singh and Harjit Singh, were examined as witnesses by the appellant-defendant, who stated that the land was demarcated in their presence, it is not understood as to how the learned Additional Civil Judge came to the conclusion that the plaintiffs, who are not shown to be residents of village Mangli Nichi, i.e. the village where the land is situated, would come to know of the date and time of the demarcation, without being given due notice of the same, either by the Local Commissioner appointed by the Tehsildar, or by the appellant himself. No document informing the plaintiffs of the time and date of such demarcation, has been brought to the notice of this Court by learned counsel for the appellant, and none is seen to be discussed in the judgments of the Courts below.

Hence, as regards the demarcation process, it is held that it was carried out at the back of the plaintiffs, as held by the learned Ist appellate Court and that the learned Additional Civil Judge erred in holding to the contrary.

The argument of Ms. Puri, learned counsel, that the plaintiffs were not required to be informed of the date of the demarcation and the demarcation process itself, cannot be accepted because though no detail has been given in the agreement, Ex.P1, with regard thereto, however, it has been

stated that the demarcation would be got done before the registration of the sale deed. Obviously, since possession of the land was to be handed over to the respondent-plaintiffs, upon determination of the exact area of the land to be sold to them, it was implicit in the agreement, that they would be required to understand the exact dimensions of the suit land.

Even if it was not essential to inform the respondent-plaintiffs of the date of demarcation, since the demarcation was to be got done before the execution of the sale deed, it was incumbent upon the appellant to at least inform them subsequently, that the demarcation had been got done and consequently, they could now get the sale deed executed.

That not having been done, it is held that the demarcation process was held at the back of the respondent-plaintiffs and the appellant-defendant failed to fulfill his duty in informing them that the condition precedent to the execution and registration of the sale deed, had been fulfilled.

31. However, as regards the contention of learned counsel for the respondent-plaintiffs that the demarcation was not carried out as per the procedure prescribed in Section 101 of the Punjab Land Revenue Act, that contention does not appear to be correct, because a reading of the report, Ex.D7, shows that the actual demarcation has been shown to be conducted in reference to boundary points already erected during consolidation proceedings, obviously upon orders of the authority concerned. Hence, Section 101 (2) of the Punjab Land Revenue Act would be seen have been complied with.

Yet of course, that does not detract from the fact that whatever demarcation was carried out, as per the report, Ex.D7, was so carried out at the back of the plaintiffs, who were not given any notice of the date and time

of such demarcation, as already noticed.

It is also found to be a matter of fact, as held by the learned first appellate Court, that the khasra numbers in the agreement, Ex.P1, which form a part of the suit land, are not entirely covered in the application for demarcation made by the appellant-defendant to the Tehsildar, Ex.D5. Khasra no.32//21/5 and 32//22/2, though are a part of the sale agreement, are not given as part of the land which was sought to be got demarcated by the appellant in his application, Ex.D5.

32. Having said that, the next question is as to whether, even though the demarcation was conducted without informing the respondent-plaintiffs, the plaintiffs' suit could have been decreed to the extent of directing the appellant-defendant to execute a sale deed in their favour, pursuant to the agreement in question (Ex.P1).

In that regard, in the opinion of this Court, the learned first appellate Court wholly erred, inasmuch as, though the appellant has been found by this Court also to have not conducted the demarcation so as to enable the plaintiffs (prospective vendees) to know the exact measurement of the land in their presence, what cannot be lost sight of, is the fact that the last date fixed, by which the sale deed was to be executed, was 30.06.2003. Learned counsel for the respondents are correct to the extent that 30.06.2003 was not the date on which specifically, the sale deed was to be executed and registered, but yet, most definitely, it was the last date by which the needful was required to have been done. Thus, with the plaintiffs not having issued even a single notice to the appellant with regard to timely demarcation of the land, or for the execution of the sale deed by the stipulated date, and even not having done so immediately after the stipulated date, their readiness and

willingness to perform their part of the contract cannot be inferred in any manner, in the opinion of this Court.

33. Further, I agree with learned counsel for the appellant, that simply owning land worth Rs.31,00,000/-, as was sought to be shown by the first plaintiff, Satish Kumar, by way of sale deeds, most definitely did not show that cash of Rs.40,00,000/- was available with the plaintiffs to pay the appellant the remainder sale consideration, on the last date by which the sale deed had to be executed.

Though, of course, an argument could be raised that the agreement in question, Ex.P1, not having fructified into an actual sale deed, the plaintiffs utilized money available with them, towards purchasing some other land. However, firstly, that has not been specifically argued and further, at least two of the sale deeds show that they were executed on 30.10.2002 and 03.12.2002, i.e. about seven to ten months before the last date by which the sale deed qua the suit land had to be executed.

Of course, the contention on behalf of the plaintiffs can be that had the plaintiffs had enough notice of the exact date of demarcation of the suit land and thereafter, of the date for execution of the sale deed, they could have arranged for the remaining sale consideration by sale of the property possessed by them etc.; and that would be valid reasoning; however, with the plaintiffs never having even attempted to adopt any process, either prior or immediately after the last date fixed for execution of the sale deed, it cannot be said that they were actually ready and willing to execute their part of the contract by way of paying the remaining consideration and actually executing the the sale deed by the date fixed.

In that regard, the judgment of the Supreme Court relied upon by

learned counsel for the appellant, in *I.S.Sikandars'* case (supra), needs to be referred to, wherein, the following passage from Halsbury's Laws of England was referred to as follows:-

“Where time is of the essence of the contract. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contract on a failure to complete by the date so fixed.” (para 22, RCR citation).

Consequently, with no period of extension shown in the agreement, Ex.P1, beyond 30.06.2003, it was obvious that time was of the essence to the contract in question in this case, especially since the appellant is stated to be a Non-Resident Indian, who had to go back to Canada, as noticed by the learned Additional Civil Judge.

Therefore, simply replying, on 01.08.2003, to the notice of cancellation sent by the appellant on 24.07.2003, would not clothe the

plaintiffs with an intention by which they had shown their readiness and willingness to execute their part of the contract by the stipulated date, i.e. 30.06.2003.

Hence, in the opinion of this Court, the learned first appellate Court wholly erred in holding that the plaintiffs were able to prove their readiness and willingness at all times to get the sale deed executed and registered, with neither ready money of Rs. 40 lakhs shown to be available with them on 30.06.2003, nor they having issued even a notice to the appellant, before or immediately after that date, to execute the contract. Merely replying on 01.08.2003, to the notice issued by him on 24.07.2003, would not, in my opinion, prove their readiness and willingness to execute the sale deed by 30.06.2003, i.e. the last date fixed in the agreement.

34. Consequently, it is held that the plaintiffs not having been able to prove their readiness and willingness to execute their part of the contract within the time stipulated, the bar contained in Section 16 (c) of the Specific Relief Act would operate against them and as such, they were not entitled to a decree of specific performance of the agreement to sell entered into between the parties on 30.07.2002.

The impugned judgment and decree of the learned first appellate Court are, therefore, set aside.

35. However, the question that then arises is, that with both sides not having fulfilled their respective parts of the contract, i.e. the appellant-defendant by non-issuance of due notice of demarcation (to be done or even having been done), to the plaintiffs, and the latter by non-issuance of any written notice to the appellant to fulfill his part of the contract, can the appellant be allowed to forfeit the earnest money paid to him, i.e.

Rs.5,66,000/-, paid by the plaintiffs at the time of entering into the agreement on 30.07.2002?

In the opinion of this Court, since both parties have failed to fulfill their respective parts of the contract entered into, the appellant- vendor cannot take the benefit of the penalty clause of forfeiture of the earnest money.

Hence, though no specific alternative relief of refund of the earnest money was made by the plaintiffs in the plaint, but there was a general alternative prayer made to the effect that “any other additional or alternative relief to which the plaintiffs may be found entitled may also be granted to the plaintiffs”, consequently, while setting aside the judgment and decree of the learned first appellate Court, decreeing the suit of the plaintiffs in toto, instead, their suit is decreed partly, to the extent of the alternative relief of refund of the earnest money paid by them to the appellant-defendant, of an amount of Rs.5,66,000/-. Since the earnest money was paid in the year 2002, i.e. 14 years ago, the plaintiffs would also be entitled to interest @ 6% per annum, running from the date of the institution of the suit, i.e. 24.12.2003, till the date of its realisation, if the amount is refunded by the appellant within three months and fifteen days from the date of pronouncement of this judgment. If the aforesaid amount, alongwith interest, is not refunded to the plaintiffs within the aforesaid period, then from the first day thereafter, interest @ 9% per annum would be paid on the principal amount, i.e. the amount of earnest money, by the appellant, till the date of realisation of the entire amount.

36. This appeal is thus partly allowed as above. The parties are, however, left to bear their own costs.

A decree-sheet be prepared accordingly.

October 19, 2016
dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes