

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

RSA No. 1484 of 2016 (O&M)

Date of Decision: 17.08.2016

Kamal Devgun

..... Appellant

Vs.

Santosh Kumari

..... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Suvir Sidhu, Advocate,
for the appellant.

AMOL RATTAN SINGH, J.

This is the second appeal of the plaintiff who filed a suit seeking specific performance of an agreement entered into by him with the respondent-defendant on 19.02.2005, for the sale of a plot measuring 311 sq. yards, (fully described in the headnote of the judgment of the learned Civil Judge), situated at Dhandran, Tehsil and District Ludhiana.

He further sought permanent injunction restraining the defendant from alienating the suit property in any manner.

2. The case set up by the appellant, as taken from the judgments of the Courts below, was that the defendant being the owner in possession of the aforesaid plot, had agreed to sell it to the appellant for a total sale consideration of Rs. 20,43,270/-, with earnest money of Rs. 4,00,000/- stated to have been paid on the date of the agreement, i.e. 19.02.2005. The date fixed for executing the sale deed was 15.05.2005 and in between, on 28.02.2005, another sum of Rs. 2,00,000/- is stated to have been paid to the

respondent-defendant by the appellant.

15.05.2005 being a Sunday, the appellant asked the respondent to come to the office of the Sub-Registrar, Ludhiana, on 16.05.2005 but allegedly she did not respond properly and also did not turn up in the office of the Sub-Registrar.

However, the appellant stated that he went to the said office and got his affidavit attested to that effect by the Executive Magistrate, marking his presence in the office on 16.05.2005.

3. As per the appellant-plaintiff, thereafter on 25.06.2007, the respondent sent him a “false legal notice” cancelling the agreement “dated 16.01.2005” (shown in the notice - as per the appellant-plaintiff - to be 16.01.2005, but actually being the agreement dated 19.02.2005). The said notice also informed the appellant-plaintiff with regard to forfeiture of the earnest money paid by him.

Thereafter, the appellant again approached the respondent, requesting her to execute the sale deed but allegedly she postponed the matter and consequently, the appellant got a notice-cum-reminder served upon her on 06.02.2008, requesting her to execute the sale deed on 15.02.2008.

It was further alleged that the respondent neither replied to that notice nor executed the registered sale deed in favour of the appellant. He further stated that he again appeared in the office of the Sub-Registrar on 15.02.2008 and marked his presence there. Thereafter, he received a reply dated 12.02.2008 to his reminder dated 06.02.2008, “admitting the contents of the agreement”.

Consequently, alleging that he had always been ready and willing to perform his part of the contract, but the respondent having failed to execute the sale deed in his favour and then having threatened to alienate the suit property, he filed the suit on 29.02.2008, out of which this second appeal arises.

4. Upon notice issued to her by the learned Civil Judge, Ludhiana, the respondent-defendant appeared through her counsel and filed a written statement, first taking the usual preliminary objections of it being a false and frivolous suit etc. and thereafter stating that the plaintiff did not perform his part of the agreement, which therefore stood cancelled with the earnest money forfeiting to the defendant.

The factum of Rs. 6,00,000/- in all having been paid to her was admitted, as was the date fixed in the agreement for execution and registration of the sale deed, i.e. 15.05.2005. It was further contended in the reply of the present respondent-defendant that the plaintiff never remained ready to perform his part of the agreement as he did not have sufficient funds to pay the balance consideration and that as a matter of fact, the defendant also had come to the office of the Sub-Registrar on 16.05.2005 to execute the sale deed but despite her remaining present in that office through out the day, the plaintiff did not turn up.

She too got her presence marked by way of an affidavit attested on that very day, showing her presence in the office of the Sub-Registrar.

It was further contended in the written statement that the defendant still decided to give one more opportunity to the appellant to get the sale deed executed and consequently, sent him a notice on 25.06.2007, but despite that he did not come forward to fulfill his part of the contract.

5. A replication was filed by the appellant, controverting the contents of the written statement, after which the following issues were framed by the learned Civil Judge (Junior Division), Ludhiana:-

1. Whether the plaintiff is entitled to possession by way of specific performance of the agreement to sell dated 19.02.2005? OPP
2. Whether the plaintiff is entitled permanent injunction as prayed for? OPP
3. Whether the plaint is not maintainable? OPD
4. Relief.

6. The plaintiff examined himself and four other witnesses, other than tendering documentary evidence.

7. Upon appraising the evidence, considering the pleadings and arguments before her, the learned Civil Judge found that the agreement and the payment of Rs. 6,00,000/- was admitted and with both parties having executed affidavits showing their presence before the Sub-Registrar on 16.05.2005, thereafter the defendant sent a notice to the plaintiff on 25.06.2007, i.e. two years later, asking him to execute the sale deed within 15 days from the date of the receipt of the notice. However, even then, the plaintiff did not get the sale deed executed. Only on 06.02.2008 was a notice issued on his behalf to the defendant, asking her to come and execute the sale deed on 15.02.2008 before the Sub-Registrar.

He also sought to prove vide Ex. P-15, that he had an amount of Rs.8,31,000/- in his account on 19.02.2008, before which there was Rs.15,00,000/- in his account which was credited to his account a few days before. He, however, could not prove as to from where he came by that amount, with no income tax returns filed nor any evidence shown of it having been borrowed from a friend.

It was further held by that Court that though the statement of account was proved, however PW-3, a bank official, had admitted in his cross-examination that he had not obtained certified copies as required under the bankers book and had further stated that the documents were not prepared in his presence and he also could not identify the signature of the bank officials concerned, on it.

8. After discussing the above evidence, the learned Civil Judge came to the conclusion that the specific relief of performance of a contract being a discretionary relief and the plaintiff not having been able to prove his readiness and willingness by way of any action before 06.02.2008 , to fulfill his part of contract, he was not entitled to the said relief, especially as he also could not prove that he had the balance consideration with him when the sale deed was to be executed and registered.

It was also seen by that Court that no alternative relief regarding recovery of the earnest money paid to the defendant had been prayed for.

Consequently, the suit was dismissed.

9. In the first appeal filed by the present appellant, the learned Additional District Judge having considered the evidence as also the judgment of the Court below, also referred to an application moved before him by the appellant-plaintiff, under Order 41 Rule 27 CPC, for leading additional evidence in the form of a sale deed dated 04.05.2005, “supplied on 27.07.2012” and a mutation dated 12.05.2005, also “supplied on 27.07.2012”, as also for leading by way of evidence two applications dated 22.08.2012 and 23.08.2012. A reply of the Tehsildar-cum-APO, dated 03.09.2012, was also sought to be led by way of additional evidence, as was a copy of an application dated 06.11.2012 to the Public Information Officer,

Tehsildar West, Ludhiana. A statement of account in the name of the firm of the appellant, for the period 28.01.2008 to 31.03.2008, was another document that the present appellant wished to led in evidence before the First Appellate Court.

That Court, however, firstly held that the said documents should have been led by way of evidence before the Civil Judge and that the applications to the Public Information Officer had been filed with an “ulterior motive”, only in order to file the application under Order 41 Rule 27 CPC.

Eventually holding that the said documents could not be taken on record at the stage of the appeal, the application was dismissed.

10. On the merits of the case, it was found that though the appellant-plaintiff had stated in his cross-examination that he was present in the Office of the Sub-Registrar with the cash to be paid as part of sale consideration, there was nothing other than the oral evidence to prove the same. Still further, even thereafter, he never was able to show any willingness to execute the contract (till 06.02.2008).

Consequently, relying upon various judgments, the lower Appellate Court also came to the conclusion that the appellant having failed to show his readiness and willingness to perform his part of the contract within the time stipulated, and having eventually filed a suit also only virtually on the last date that limitation ran out, he did not deserve the relief prayed for. The appeal was also, therefore, dismissed.

11. Before this Court, Mr. Suvir Sidhu, learned counsel for the appellant, after giving the facts of the case has further submitted, that in fact, the appellant had, on 30.06.2007, replied to the legal notice dated

25.06.2007, by which the respondent had asked him to execute the contract within 15 days, failing which the agreement would stand cancelled and the earnest money paid by him forfeited. However, despite that, the respondent-defendant did not execute the contract.

Thereafter, vide a notice dated 06.02.2008, he had asked her to execute the contract on 15.02.2008 before the Sub-Registrar which she did not do and instead sent a reply dated 12.02.2008, stating that the contract stood cancelled, though that reply was received after 15.02.2008.

Learned counsel therefore submitted that in any case, the time limit of 15.05.2005/16.05.2005 stood repudiated on 25.06.2007 itself, with the respondent admittedly allowing the appellant to execute the contract within 15 days thereafter. Hence, time no longer remaining of the essence and the appellant having proved that before 15.02.2008 he had money available with him, to the extent of Rs. 15,00,000/-, which was more than the sum of Rs. 14,43,000/- remaining to be paid towards the sale consideration, the Courts below wholly erred in dismissing the suit and the appeal filed by the present appellant.

12. Having considering the aforesaid arguments, I am not inclined to interfere in the judgments of the Courts below, for the reasons given hereinafter.

13. Even accepting that a letter/reply was written by the appellant on 30.06.2007, his conduct even upto that period, i.e. for the two years following 15.05.2005, showed that he was not willing to execute the contract, as not even a single reminder to the respondent has been pointed out at any stage, till the notice dated 25.06.2007 was issued by the respondent-defendant to the appellant. Obviously, simply by marking his

presence before the Sub-Registrar on 16.05.2005, did not prove his willingness to execute the contract in any manner, because neither was any evidence led that he actually had Rs. 14,43,000/-available with him to pay the appellant on 16.05.2005, as remained to be paid towards the total sale consideration, nor anytime thereafter did he take any steps to show his readiness to execute the sale, right upto 06.02.2008, i.e. for more than 2½ years.

Even if the letter dated 30.06.2007, is accepted to have been written by him, in reply to the notice dated 25.06.2007 issued by the respondent, nothing is shown, in any manner whatsoever, that he made any attempt to execute the contract within the 15 days given to him, or even soon thereafter, vide the notice dated 25.06.2007.

Only more than seven months later, i.e. on 06.02.2008, did he issue a notice for execution of the contract, which was refused by the respondent-defendant, on the ground that the agreement already stood terminated 15 day after 25.06.2007.

14. Perhaps it may have been a different issue if the appellant had filed a suit immediately after 25.06.2007 or a month thereafter, thereby showing his readiness and willingness to execute the contract, also showing that he had the money available with him to pay the sale consideration to the respondent-defendant. That not having been done, the notice dated 06.02.2008 was far too belated to ask the defendant for execution of the sale deed, the agreement already having been terminated 15 day after 25.06.2007.

Thus even presuming that as per the bank statement produced by him before the learned Civil Judge, that he had Rs. 15,00,000/- available, from whatever source, on 05.02.2008, and continued to have it available till

the date that he had requested the respondent to execute the sale deed by, the amount of consideration having become available with him more than two and half years after the original date fixed for execution of the sale deed and more than seven months after the extended date given to him by the respondent, I agree with the view taken by the Courts below and find no ground to interfere in the judgments and the decrees issued.

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15. Coming next to the fact that even with this appeal, the applicant-appellant has filed this application under Order 41 Rule 27 CPC, seeking to lead additional evidence, in the form of the following two documents:-

- (i) The letter/reply by the Public Information Officer, Suvidha Centre, Ludhiana, to the appellant, dated 13.07.2012, as Annexure A-8;
- (ii) A reply from the Tehsildar, Ludhiana (West), to the appellant, dated 26.11.2012, under the RTI Act, as Annexure A-9.

16. The first information pertains to the opening and closing times of the Suvidha Centre, the time of its lunch break, from 1:30 p.m. to 2:00 p.m., the number of affidavits entered before affidavit No. 15200 (stated to be executed by the respondent-defendant) and the number of affidavits entered in the record thereafter, as also the number of affidavits entered in the computer before the affidavit executed by the appellant on 16.05.2005 and the number of such affidavits entered thereafter.

The reply from the Tehsildar, Ludhiana (West), is with regard to no copies of a 'Jamabandi' having been issued before the 'Jamabandi' dated 17.05.2005 qua mutation No. 9539. The letter also states that no 'Fard' had been issued and no copy of the 'Fard Jamabandi' had been issued.

regards the first document, i.e. the reply from the Suvidha Centre, it would show that almost two affidavits were issued per minute, during the working hours of the Suvidha Centre, which is very difficult and therefore, no authenticity can be attached to the issuance of such affidavits by the Executive Magistrate present at the Suvidha Centre, as within that much time, the Magistrate could have no time to actually determine whether the person presenting the affidavit is actually the deponent who is shown to have executed the affidavit.

As regards the letter from the Tehsildar (West), learned counsel has not really been able to explain the context in which this document would be relied upon by him in reference to the issue at hand, i.e. the readiness and willingness of the appellant to perform his part of the contract.

18. Be that as it may, as regards the first document, though this Court obviously sees the implication of what the applicant-appellant wishes to say, but I do not see how that would help the appellant in the context of the present appeal, in view of the fact that he himself also obtained a receipt of such an affidavit on the same date that the respondent did, i.e. on 16.05.2005 and he had himself obtained such an affidavit even on 15.02.2008. Secondly, even if the appellant is trying to attempt to show that actually the respondent was not present on 16.05.2005 in the office of the Sub-Registrar, his own presence is also very obviously disproved. Still further, as already noticed, no evidence has been led by him to show that on the said date, i.e. 16.05.2005, he had the the money constituting the remaining sale consideration available with him, for payment to the respondent, i.e. a sum of Rs. 14,43,272.

Hence, seeing that these documents would make no difference to

the merits of the issue, I see no reason to accept the application, which is accordingly dismissed.

19. It may also be stated here that even if the documents sought to be led by way of additional evidence before the learned first Appellate Court had been accepted by that Court by way of such evidence, for the same reason as has been stated in the context of the present application, it would have made no difference to the issue at hand, i.e. the applicant not being able to show that he was actually ready and willing, in any manner, to execute the contract between 16.05.2007 and 30.06.2007, or even within 15 days or soon thereafter.

20. Consequently, having considered all aspects of the matter, for the reasons already given before dismissal of the aforesaid application filed under Order 41 Rule 27 CPC, (in paragraphs 13 and 14 hereinabove), finding no merit in the appeal either, it is dismissed *in limine*, with no order as to costs.

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The appeal itself having been dismissed on merits, this application seeking condonation of a delay of 5 days in filing the appeal is rendered academic and is not gone into.

(AMOL RATTAN SINGH)
JUDGE

August 17, 2016
nitin

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No.