

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

-.-

RSA 4080 of 2013 (O&M)
Date of decision: 08.02.2016

Dr. Amit Arya

.....Appellant

Versus

Smt. Kamlesh Kumari

.....Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

-.-

Present: Mr. Anurag Jain, Advocate
for the appellant

Mr. Vivek Suri, Advocate
for the respondent

-.-

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?

Rekha Mittal, J.

The present regular second appeal has been directed the judgment and decree dated 22.04.2013 passed by the Additional District Judge, Panchkula whereby an appeal preferred by the respondent against the judgment and decree dated 14.05.2011 passed by the Additional Civil Judge (Senior Division), Panchkula has been partly allowed and as a result, the suit of the appellant for specific performance of agreement to sell has been dismissed and he has been granted alternative relief for recovery of earnest money along with interest.

Facts relevant for disposal of the present appeal are that the respondent entered into an agreement to sell dated 11.12.2004 for sale of

property measuring 2 biswas 10 biswasi situated in Hadbast No. 393 Khata No. 68/119, Khasra No. 223/6 to the extent of 1/4th of total 1 kanal 10 marlas situated in Kalka, Tehsil Kalka District Panchkula. Out of total sale consideration of Rs.9,05,000.00, an amount of Rs.1,00,000.00 was paid as an earnest money at the time of execution of the agreement. The last date for execution of sale deed was fixed as 10.03.2005. It was agreed that in case the respondent failed to get the sale deed executed/registered, the appellant was entitled to recover Rs.2,00,000.00, double of the earnest money. It is averred that the appellant was always ready and willing to perform his part of the contract. On 10.03.2005, he remained present along with sale consideration and other expenses for registration of sale deed in the office of Sub Registrar, Kalka but the respondent failed to turn up for execution of sale deed. He got his presence marked by getting an affidavit attested. He also prepared a challan for purchase of stamp papers valuing Rs.72,400/-, got it passed from the concerned Treasury Officer. The appellant served a legal notice dated 29.11.2005, calling upon the respondent to execute the sale deed on/or before 06.12.2005 but the respondent sent reply to the legal notice wherein execution of the agreement and date fixed for registration of sale deed were admitted but it was wrongly claimed that the earnest money stood forfeited.

The respondent filed the written statement, inter alia, challenging maintainability of the suit. She admitted that the agreement to sell dated 11.12.2004 was signed by her but pleaded that at that time, the agreement was blank and was filled later. The appellant failed to turn up before Sub Registrar, Kalka on 10.03.2005, whereas the answering

respondent remained present in the office of Sub Registrar, Kalka throughout the day and got her presence marked by way of affidavit. The appellant failed to perform his part of the contract and earnest money stood forfeited as mentioned in the reply to the notice.

The controversy between the parties led to framing of following issues:-

- 1. Whether the defendant entered into an agreement to sell dated 11.12.2004 with the plaintiff of the suit property, as detailed in the head note of the plaint, situated in Kalka, Tehsil Kalka, District Panchkula, as alleged?OPP*
- 2. Whether the plaintiff is entitled for the relief of possession, as prayed for?OPP*
- 3. Whether the plaintiff is entitled for the relief of permanent injunction, as prayed for? OPD*
- 4. Whether the plaintiff is entitled for the alternative relief for the recovery of Rs.2,46,000.00 along with interest @ 18% per annum from the date of agreement to sell dated 11.12.2004, till the date of its actual realization, as prayed for? OPP*
- 5. Whether the plaintiff has no cause of action to file the present suit?OPD*
- 6. Whether the suit of the plaintiff is not maintainable in the present form?OPD*
- 7. Whether the plaintiff has not come to the Court with clean hands?OD*
- 8. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD*
- 9. Relief*

The trial Court permitted the parties to adduce evidence in

support of their respective claims.

The appellant appeared in the witness box as PW1, examined Jatinder Pal (PW2) and tendered into evidence documents Ex.P1 to 9.

To rebut evidence of the appellant, the respondent examined herself as DW1, Surjit Singh (DW2), Chander Singh (DW3), Mahavir (DW4) and tendered into evidence document, Ex. D1.

After having heard counsel for the parties in the light of issues framed for determination and evidence adduced on record, the learned trial Court answered issues No. 1 to 3 in favour of the appellant and as a result, the suit filed by the appellant was decreed for possession by way of specific performance of the agreement and the respondent was directed to execute sale deed in favour of the appellant on receipt of balance sale consideration of Rs.8,05,000.00 within two months, failing which the appellant was left at liberty to get the sale deed executed through process of the Court.

Feeling aggrieved against the judgment and decree passed by the trial Court, the respondent preferred an appeal which was partly allowed in favour of the respondent and as a result, the judgment and decree passed by the trial Court allowing specific performance of the agreement has been set aside and the appellant has been held entitled to recover a sum of Rs.2,00,000.00, double of the amount of earnest money, with interest @ 9% per annum from the date of agreement till realization of the amount.

Feeling aggrieved by the judgment and decree passed by the appellate Court, the present appeal has been preferred by the appellant/plaintiff.

A perusal of the record would make it evident that there is no

dispute between the parties that agreement to sell dated 11.12.2004 was executed by the respondent in favour of the appellant and an amount of Rs.1,00,000.00 out of total sale consideration of Rs.9,05,000.00 was paid as earnest money at the time of execution of the agreement. The Courts below have recorded consistent findings in regard to claim of the appellant that the respondent executed the agreement in question on receipt of Rs.1,00,000.00 towards earnest money. Counsel for the parties have fairly conceded that they have nothing to submit to challenge the findings of the Courts below in this regard.

The sole question that survives for consideration is “whether the appellant is entitled to specific performance of the agreement to sell or the appellate Court has rightly allowed alternative relief of recovery in the facts and circumstances of the present case?”

Before advertng to the rival submissions made by counsel for the parties which would be dealt with in the later part of the judgment, it is appropriate to take note of the reasons which weighed in the mind of the Court in appeal to negate plea of the appellant for specific performance of the agreement. The appellate Court in Para 14 of the judgment has given four reasons and precisely, the same reads as under:-

- 1) No document of ownership of the suit land was produced and proved in evidence by the plaintiff/appellant.
- 2) The agreement to sell contains clause of payment of double of the earnest money in case the purchaser fails to get the sale deed executed till 10.03.2005.
- 3) The legal notice Ex.P4 was issued by the

respondent after about more than 8 months from the date fixed for execution of the sale deed and the same raises a doubt if the appellant was ready and willing to perform his part of the contract. In addition, it is mentioned that the respondent has also produced her affidavit Ex.D1 got attested by her to mark her presence in the Tehsil on 10.03.2005 but the said affidavit was not discussed in the judgment by the trial Court.

4) No specific issue was framed as to whether the respondent was entitled for specific performance of the agreement to sell Ex.P1

Counsel for the appellant would contend that the reasoning adopted by the Court in appeal to reverse the findings of the trial Court is not only erroneous but is the result of complete non-application of mind as well as against the settled principles in law that specific performance of an agreement is the rule in case proposed vendee is able to establish his claim with regard to execution of the agreement and his readiness and willingness to perform his part of the agreement. It is further argued that Hon'ble the Supreme Court of India has allowed specific performance of the agreement even in a case where the agreement of sale only provided for damages in the event of breach by other party, in other words, the agreement did not provide for specific performance in the event of breach by the vendor. For this purpose, he has cited *Man Kaur (dead) by LRs v. Hartar Singh Sangha (2010) 10 Supreme Court Cases 512*.

The next submission made by counsel is that the mere fact that the agreement contained a recital for payment of liquidated damages would not enure to benefit of the respondent by denying the relief of specific

performance in favour of the appellant. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court ***P D Souza v. Shondrilo Naidu (2004) 6 Supreme Court Cases 649.***

Counsel for the respondent, on the other hand, has supported the judgment passed by the Court in appeal with the submissions that relief of specific performance is discretionary in nature and the appellate Court for well founded reasons has denied the said relief to the appellant. It is further argued that the respondent was very well present in the Tehsil office, Kalka on 10.03.2005 for executing the sale deed in favour of the appellant, but it was the appellant, who committed breach of the agreement. Silence on the part of the appellant for a period of more than 8 months from 10.03.2005 till issuance of notice dated 29.11.2005 speaks volume that he was not ready and willing to perform his part of the agreement. The respondent sent reply to the notice and raised a categorical plea that the amount of earnest money stands forfeited as the appellant failed to get the sale deed executed on the stipulated date i.e. 10.03.2005. It is argued with vehemence that the appellant has not challenged cancellation of the agreement, therefore, he has otherwise disentitled himself to the relief of specific performance. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court ***I S Sikandar (d) by LRs v. K Subramani and others, 2014(1) RCR (Civil) 236.***

Another submission made by counsel is that as time is essence of contract for transfer of immovable property and failure of the appellant to get the sale deed executed on 10.03.2005 would entail his disentitlement to seek specific performance of the agreement and thus, the Court has rightly granted him alternative relief of damages. For this purpose, he has referred

to judgment of Hon'ble the Supreme Court ***Saradamani Kandappan v. S Rajalakshmi and others, 2011 (4) RCR (Civil) 130.***

I have heard counsel for the parties and perused the records.

The substantial question of law that arises for consideration is *'whether the reasons which weighed in the mind of the appellate Court for disallowing specific performance of agreement to sell, Ex.P1 are valid and can stand the test of judicial scrutiny?'*

As has been noticed hereinbefore, the appellate Court has recorded four reasons for differing with the trial Court and rejecting claim of the appellant for specific performance of the agreement to sell. As the respondent never raised any issue that she is not owner of the suit land and has rather admitted execution of the agreement, where was the reason for the appellant to adduce any evidence to prove ownership of the respondent.

The mere fact that agreement to sell contained a stipulation that in case the proposed vendor failed to execute sale deed till 10.03.2005, she would be liable to pay double the amount of earnest money cannot be used to gain advantage by the guilty party. Hon'ble the Supreme Court in P D Souza's case (supra), by referring to clause (7) of the agreement therein providing for payment of liquidated damages and after taking into consideration provisions of Section 23 of the Specific Relief Act 1963 has held that clause (7) of the agreement of sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having an option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract

would not be maintainable. The findings recorded by the appellate Court in sub Para 2 of Para 14 are in complete violation of what has been held by the Supreme Court in P.D.Souza's case (supra).

The learned appellate Court has recorded two reasons to negate plea of the appellant for his readiness and willingness to perform his part of the agreement. The first reason is that legal notice, Ex.P4 was issued after about more than 8 months from the date fixed for execution of sale deed. The second is that the respondent in her evidence has produced her affidavit Ex.D1, in token of her presence in the Tehsil office on 10.03.2005 but said affidavit was not discussed in the judgment by the trial Court. Firstly, there is no requirement in law for the proposed vendee to serve a legal notice upon the proposed vendor either within a particular period of time or even before filing of the suit for specific performance. Secondly, the notice was issued after about 8 months from the date fixed for execution of sale deed and the suit was instituted in January 2006 within a period of 10 months from the said date though admittedly, period of limitation is three years. In contract for sale of immovable property, ordinarily the time is not essence of the contract unless so intended by the parties either expressly or by way of necessary implication. It is none of the plea of the respondent that in the circumstances of the present case, time was essence of the contract. Even otherwise, if the respondent herself is guilty of not executing the sale deed on the stipulated date, she cannot be allowed to take advantage of her own wrong to deny the relief of specific performance by raising any such plea that time was essence of the contract.

To be fair to the respondent, counsel has raised a submission

that time is essence of contract in sale of immovable property. The judgment relied upon by counsel for the respondent in this regard has got no bearing. In Saradamani Kandappan's case (supra), the Hon'ble Supreme Court has left the issue, if time is essence of contract in sale of immovable property as there is galloping increase in the prices of immovable property and market values of property are no longer stable or steady, to be considered in an appropriate case. I would hasten to add that there is nothing on record to suggest that in the year 2005 either there were any such market trends showing market value of property being no longer stable or steady when otherwise no such finding has been recorded by the appellate Court of which the respondent can derive advantage, in the circumstances of the present case.

So far as failure of the trial Court to consider affidavit Ex.D1, the same cannot be a reason to hold against the appellant. The appellate Court is empowered to re-appreciate the entire evidence while examining correctness and legality of the findings recorded by the trial Court. In this view of the matter, the reasoning adopted by the appellate Court in Para 14 is the result of non-application of mind and demonstrates that the presiding Officer did not bother to look into the various precedents available and relevant in the context, for the reasons best known.

The appellate Court in Para 14 has further stated that no specific issue was framed as to whether the appellant was entitled for specific performance of the agreement to sell. It is not only surprising but shocking that the Court in appeal can reverse the findings merely because a specific issue has not been framed by the trial Court. The appellate Court is

empowered to frame an additional issue and if need be, seek a report from the trial Court on the said issue and then decide the appeal. Even otherwise, as the trial Court framed issue No. 2 in respect of entitlement of the appellant for relief of possession, the parties adduced evidence knowing fully well their contesting claims, it otherwise cannot be held that either the trial Court did not frame any issue in regard to entitlement of the appellant to seek specific performance of the agreement or any prejudice has been caused to the respondent for failure of the trial Court to do so. In view of the cumulative effect of the facts and circumstances discussed hereinbefore, it can be safely held that the appellate Court without legal and valid reason reversed the judgment of the trial Court for reasons which are whimsical, arbitrary and against the settled principles in law.

This brings the Court to the aspect if the appellant is not able to prove his readiness and willingness to perform his part of the agreement, one of the essential requisites for specific performance of the agreement. The appellant appeared in the witness box and reiterated his plea that on 10.03.2005, he went to Tehsil Kalka with balance sale consideration and miscellaneous expenses required for purchase of stamp papers etc. He further produced on record the challan forms attested by the Treasury Officer for purchase of stamp papers worth Rs.72,400.00. He has proved his affidavit Ex.P2 dated 10.03.2005 duly attested by the Executive Magistrate, Kalka in regard to his presence in the Tehsil Office Kalka on 10.03.2005. During his cross examination, nothing material and useful has been elicited to successfully challenge correctness of his deposition and the documents relied upon much less to impeach his credibility. On the

contrary, his presence in the tehsil office on 10.03.2005 has been admitted by the respondent, in view of suggestions put to him by opposite counsel, reads as under:-

It is wrong to suggest that I got attested affidavit and challan form from the tehsil office Kalka on 10.03.2005 after 4.00 p.m.. It is wrong to suggest that I came to my house after seeing the respondent present in Tehsil Kalka.

Keeping in view the testimony of the appellant duly supported by Jitender Pal (PW2), the documents exhibited in his statement and suggestions put to the witness, there remains no dispute that the appellant was present in the Tehsil complex on 10.03.2005 for execution and registration of the sale deed.

The respondent has also exhibited her affidavit ExD1 to prove that she was also present in the Tehsil office Kalka on 10.03.2005 for getting the sale deed executed/registered. To substantiate her contention, she has examined her husband Chander Singh (DW3) and Mahavir (DW4). Chander Singh (DW3) has deposed that on 10.03.2005, he, his wife Kamlesh Kumari and Mahavir Sharma, his neighbourer, had gone to tehsil Kalka for registration of the plot in dispute. During his cross examination, he has deposed that he cannot tell that on 10.03.2005, he was present in Tehsil complex Kalka. He did not get attested any affidavit in this regard. He cannot tell if his wife got the affidavit entered in Tehsil office on 10.03.2005. He cannot tell if signatures of Mahavir were obtained on any affidavit or other paper. He cannot tell if he had signed any document along with his wife. Mahavir (DW4) has also admitted that he had not appended his signatures on any document, in token of his presence in Kalka Tehsil on

10.03.2005. As per affidavit Ex D1, the deponent was identified by Mehma Ram, Numberdar. The affidavit Ex.D1 does not bear any attestation by Chander Singh or Mahavir. Mehma Ram, Numberdar has not been examined to corroborate version of the respondent that she was present in the Tehsil office on 10.03.2005 for the purpose of executing and registering sale deed in favour of the appellant. Under these circumstances, the mere fact that the respondent has proved affidavit Ex.D1 is not at all sufficient to counter the evidence adduced by the appellant to prove his readiness and willingness to perform his part of the agreement on 10.03.2005. Not only this, the appellant served a legal notice upon the respondent calling upon her to execute the sale deed on 05.12.2005. In response thereto, the respondent refused to get the sale deed registered with a plea that earnest money stands forfeited. The appellant filed the suit in January 2006 i.e. less than one year from the date fixed for registration of the sale deed. When the facts and circumstances of the present case are analyzed on the touchstone of principle of balance of probabilities, the same certainly and unhesitatingly lies in favour of the appellant to hold that the appellant always remained ready and willing to perform his part of the agreement.

Counsel for the respondent has raised an issue that as the appellant did not challenge cancellation of agreement to sell, he is not entitled to seek any relief on the basis of agreement to sell, in view of enunciation of law laid down in I S Sikandar's case (supra). The contention raised by counsel for the respondent in this regard is misconceived and merits outright rejection. A bare reading of the reply to the legal notice by the respondent would make it manifest that no such plea was raised in the reply that the agreement stands cancelled. On the contrary, the plea is only

that the earnest money stands forfeited. That being so, the respondent cannot seek any aid to her contention from the observations made in I S Sikandar's case (supra). Even otherwise, the respondent has not challenged the judgment passed by the appellate Court allowing alternative relief of recovery which can be allowed only during subsistence of the agreement to sell. Furthermore, counsel for the respondent has not made any submission to assail the findings of the appellate Court with regard to liability of the respondent to pay double of the amount of earnest money along with interest. Conversely, counsel for the respondent has submitted that the respondent has already deposited more than Rs.3,00,000.00 in the trial court in compliance with the judgment and decree passed by the Court in appeal. These facts negate plea of the respondent that either the agreement was cancelled in view of reply to the legal notice or the appellant cannot maintain the suit for specific performance for want of challenge to cancellation of the agreement in the light of ratio laid down in I S Sikandar's case (supra)

Counsel for the respondent has made a submission by way of mercy plea that in case the appellant's claim for specific performance is allowed, it would cause a great hardship and inconvenience for the respondent and her family. The husband of the respondent was an employee of the Hindustan Machine Tools at Pinjore and the said company has wound up its business. The disputed plot is the only property with the respondent and her family and in case the same is not saved from sale, they would not be in a position to have roof for shelter.

The plea in regard to hardship and inconvenience is based upon facts. No such plea was raised in the written statement originally filed nor

an application was filed to seek amendment of pleadings. In absence of any such facts on record with an opportunity to the appellant to controvert the same, it is difficult to accept plea of the respondent and deny specific performance of the agreement, in the present scenario.

No other point has been raised.

In view of what has been discussed herein-above, the appeal is allowed, judgment and decree passed by the appellate Court is set aside and that of the trial Court is restored. The respondent shall be liable to pay costs throughout.

(Rekha Mittal)
Judge

08.02.2016
mohan bimbira