IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Regular Second Appeal No.2809 of 2016 (O&M)
Date of Decision: June 02, 2016

Chander Mohan

...Appellant

Versus

Madan Lal Bhandari

...Respondent

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Samir Rathaur, Advocate
for the applicant-appellant.

<u>AUGUSTINE GEORGE MASIH, J.</u>

Challenge in this appeal is to the judgment and decree dated 18.11.2015 passed by the Additional District Judge, Chandigarh, whereby the appeal preferred by the respondent-defendant against the judgment and decree dated 18.02.2013 passed by the Civil Judge (Junior Division), Chandigarh, decreeing the suit filed by the appellant-plaintiff for specific performance of an agreement to sell dated 25.05.2004 in respect of House No.3256/2, Sector 44-D, Chandigarh, has been set aside allowing the appeal by modifying the judgment and decree of the trial Court and granting the appellant-plaintiff the alternative relief of recovery of ₹85,000/- along with interest at the rate of 9% per annum from the date of payment till the date of decision with future interest at the rate of 6% per annum till the date of realisation.

2. It is the contention of learned counsel for the appellant that the Lower Appellate Court has not appreciated the pleadings and the evidence of the parties and has interfered with the well reasoned and justified findings returned by the trial Court holding the appellant-plaintiff to be ready and willing to perform his part of the contract. He contends that the

factum of the agreement to sell dated 25.05.2004 having been entered into between the parties has been admitted. As per the agreement to sell, the respondent-defendant had to get the No Objection Certificate from the Chandigarh Housing Board for transfer of the house in the name of appellant-plaintiff but the said aspect having not been complied with, the respondent-defendant cannot be given the benefit thereof by holding that the appellant-plaintiff was not ready and willing to perform his part of the contract. His further contention is that the Lower Appellate Court has returned a finding with regard to the appellant-plaintiff being not ready to perform the contract on the ground that the remaining consideration amount was not available with the appellant-plaintiff, whereas ample evidence has been placed on record showing the sale of the jewellery and the estimates of the jewellery in possession which he intended to sell to perform his part of the contract. He contends that the findings as returned by the First Appellate Court, thus, cannot sustain. That apart, he asserts that the respondent-defendant had agreed to the extension of time to execute the sale deed as he had not been able to get the No Objection Certificate for fulfilling the obligations under the agreement to sell and, therefore, the onus was upon the respondent-defendant to show that he was ready and willing to perform his part of the contract, whereas the Lower Appellate Court has given benefit of the wrong to the respondent-defendant, which is not permissible in law. Accordingly, prayer has been made for setting aside the judgment and decree passed by the Lower Appellate Court and restoring that of the trial Court.

3. I have considered the submissions made by learned counsel for

the appellant and with his assistance, have gone through the impugned judgment.

4. The factum of an agreement to sell dated 25.05.2004 in respect to House No.3256/2, Sector 44-D, Chandigarh, having been entered into between the parties is not disputed nor has it been disputed that some earnest money had been paid on 23.05.2004 at the time of the oral agreement, thereafter on 25.05.2004 when the agreement to sell was reduced into writing. It is also not in dispute that as per the agreement to sell, the last date fixed for execution of the sale deed was fixed as 23.07.2004. In the light of the communication dated 25.08.2004 Exhibit P-11 which was posted on 27.08.2004 by the respondent-defendant which was addressed to the appellant-plaintiff, the date appeared to have been extended upto 20.08.2004. Notice through counsel was served by the appellant-plaintiff on 26.08.2004 to which reply was sent on 04.09.2004 Exhibit P-13, where again it was mentioned that the date for execution of the sale deed was extended firstly by mutual understanding till 30.07.2004 and then to 12.08.2004 and thereafter the final date was fixed as 20.08.2004. Although the appellant-plaintiff has asserted that the letter was sent by him on 20.09.2004 calling upon the respondent-defendant to execute the sale deed and he had extended the period upto 06.11.2004 and thereafter has refused to execute the same but there is no evidence on record suggesting so. Rather in the reply Exhibit P-13, it has been categorically stated that the token money (*bayana*) stood forfeited as per the agreement to sell dated 25.05.2004. Suit for specific performance was preferred by the appellant-plaintiff which was decreed by the trial Court *in toto*, appeal

against which preferred by the respondent-defendant, has been partly allowed by the Lower Appellate Court ordering the alternative relief of refund of the earnest money along with interest.

5. The reason for modifying the judgment and decree passed by the trial Court is that the appellant-plaintiff has failed to prove his readiness and willingness to perform his part of the contract and the essential requirement for the said purpose was to pay the balance consideration amount of ₹7,10,000/-.

6. It is not in dispute that as per Section 16 of the Specific Relief Act, 1963, not only the plaintiff is required to aver performance of and his readiness and willingness to perform the contract but has also to prove such assertion and for that purposes, it is mandated that he must possess the amount of balance sale consideration on the date fixed as also at the subsequent date for specific performance of his part of the contract. Reference in this regard can be made to the judgment of the Supreme Court in *Bal Krishna and another Versus Bhagwan Das (Dead) and others 2008(2) R.C.R.(Civil) 732*. If that be so, there has to be evidence on record to show the readiness and willingness on the apart of the plaintiff in the form of possessing the requisite amount on the date fixed for execution of the sale deed.

7. The onus lay upon the appellant-plaintiff to prove his readiness and willingness by demonstrating possession of the balance sale consideration on the due date. As per the evidence available on record, it has been admitted in his cross-examination by the appellant-plaintiff that he did not prepare any bank draft either before 23.07.2004 or thereafter i.e.

from 24.07.2004 to 20.08.2004 which is the extended date or even going by the averment of the appellant-plaintiff upto 06.11.2004, the extended date. There is no evidence on record which would show that he had the balance sale consideration available with him in his bank. Although it has been asserted that gold articles worth ₹3,14,703/- were sold by him to Shri Anil Chadha proprietor of Chadha Jewellers and the receipt dated 12.07.2004 has been placed on record as Exhibit P-4 but there is no evidence as to where this amount was deposited or kept. Exhibit P-4 does not bear the signature of any seller. PW-4 Anil Chadha failed to produce the purchase bill of the gold ornaments and even failed to disclose the details of the ornaments nor has he produced the ledger showing such purchase. Apart from this, the appellant-plaintiff has produced two estimates with regard to certain gold ornaments, which according to the appellant-plaintiff, he intended to sell to make available the remaining sale consideration but these two documents Exhibits P-5 and P-6 do not bear any details nor there is any serial number over the same and are merely on notepads. No evidence has been brought on record to prove as to which ornaments were being sought to be sold. Even going by the said estimates, it would come out that the appellant-plaintiff was in possession of two kilograms of gold which he intended to sell in the year 2004. No evidence has been brought on record showing purchase of such huge quantity of gold ornaments to prove their possession with the appellant-plaintiff. It appears to be a cooked-up story as these documents have been got prepared only to raise a plea and to support that he was in possession of the balance sale consideration.

8. Another aspect, which needs to be highlighted herein, is that an

application was moved by the respondent-defendant before the trial Court calling upon the plaintiff to deposit the balance consideration amount of ₹7,10,000/- in the Court as it was the positive case of the respondent-defendant that the appellant-plaintiff did not have any such amount with him. This was so done in the light of the admitted fact that the appellant-plaintiff is a property dealer and sells the properties on commission basis. Reply to the said application was filed and the same was contested. He did not make any effort to deposit the balance sale consideration. This also indicates that the appellant-plaintiff was not in possession of the balance sale consideration and thus, was not ready and willing to perform his part of the contract even during the pendency of the suit.

9. Much emphasis has been laid by the counsel for the appellant on the plea that the respondent-defendant was to obtain a No Objection Certificate from the department for clinching the deal but the said plea cannot be accepted as according to the agreement to sell, the requirement was to obtain a No Due Certificate. A No Due Certificate is different from the No Objection Certificate and in any case, this was never mentioned in the legal notice dated 26.08.2004 Exhibit P-7 which has been served upon the appellant at the first instance. This is an afterthought. That apart, it is an admitted fact that the appellant-plaintiff is a property dealer and he had booked the property for further sale. Reference in this regard can be made to clause 9 of the agreement to sell which reads as follows:-

> *"9. That the said property has been booked for*

> *further sale and the said purchaser has right to enter into agreement to sell with any intended purchaser for sale of the said house."*

10. In clause 10, the name of the agency dealing with property has been mentioned. These clauses clearly indicate that the intention of the appellant-plaintiff was not to purchase the said property but to sell the same on the basis of a commission. A conclusion can, therefore, be drawn that the deal with the prospective purchaser of the property did not materialise and, therefore, the appellant-plaintiff opted not to execute the sale deed. Since the appellant-plaintiff was unable to prove the availability and possession of the remaining sale consideration during the period when the bargain had to be clinched, he has not been able to prove his readiness and willingness to perform his part of the contract.

11. A perusal of clause 11 of the agreement to sell dated 25.05.2004 would show that the earnest money was liable to be forfeited in favour of the respondent-defendant as the appellant-plaintiff had not complied with his part of the contract within the stipulated time. The learned Lower Appellate Court probably has not taken the same into consideration while granting him alternative relief of recovery of earnest money along with interest at the rate of 9% from the date of payment till the date of decision with future interest at the rate of 6% per annum till the date of realisation.

12. No other point has been argued by the counsel for the appellant.

13. In the light of the above, the findings as recorded by the Lower Appellate Court, cannot be faulted with.

14. No substantial question of law is involved in the present appeal. Therefore, finding no merit in the appeal, the same stands dismissed.

15. In the light of the dismissal of the appeal, the application for stay i.e. CM No.7541-C of 2016, stands disposed of as infructuous.

June 02, 2016 **(AUGUSTINE GEORGE MASIH)**
Puneet **JUDGE**