

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

RSA No.5264 of 2016 (O&M)

Date of Decision.05.10.2016

Chamkaur Singh and others

.....Appellants

Vs.

Amarjit Singh

.....Respondent

Present: Mr. J.S. Brar, Advocate
for the appellants.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

C.M. No.13666-C of 2016

For the reasons stated in the application, delay of 209 days in
refiling the appeal is condoned.

Application is allowed.

C.M. No.13667-C of 2016

For the reasons stated in the application, permission for making
good the deficiency of court fee is granted.

Application is allowed.

RSA No.5264 of 2016 (O&M)

The appellants-defendants are aggrieved of the concurrent
finding of fact whereby the suit seeking specific performance of agreement
to sell dated 17.09.2005 in respect of land measuring 53 kanals 1 marla, has
been decreed.

Mr. J.S. Brar learned counsel appearing for the appellants
submits that the execution of the aforementioned agreement to sell was
admitted. The date for execution and registration of the agreement to sell
was 07.06.2006. The agreed sale consideration was ₹3,52,000/- per acre

money. Both the parties had appeared before the Sub Registrar on the target date and recorded their presence as Ex.P1 and D1. Prior to the filing of the suit, legal notice dated 26.05.2006 was served upon his client which was duly replied on 06.06.2006 which has not been taken into consideration by the Courts below, thus, there is gross illegality and perversity.

He further submits that the respondent-plaintiff in anticipation of getting the aforementioned agreement to sell and another agreement to sell of such nature, was entered with the different vendees, Ex.D3 to D5, as one of the vendees namely DW1, Satnam Singh, appeared in the Court . In fact, the respondent-plaintiff is a property dealer. In the cross-examination, it surfaced that he has no land except the land owned by his father, thus, the readiness and willingness was conspicuously missing, in essence, no amount to pay at the time of registration and execution of the sale deed. No statement of account has been placed on record except the marked documents which do not show the sufficient amount. Though he was subjected to cross-examination but made statement that he has some other record of these entries, which leads to irresistible conclusion that ingredients of Section 16(1)(c) of the Specific Relief Act were not complied with and therefore, even if the suit filed on 13.11.2006, the Courts below ought not to have exercised the discretion. In support of his contention, he has relied upon the ratio decidendi culled out in the judgment of Hon'ble Supreme Court in **Umabai and another Vs. Nilkanth Dhondiba Chavan (dead) by LRs and another 2005(6) SCC 243** to contend that conduct of the parties must be determined having regard to the entire attending circumstances, in essence, bald averment in the plaint would not be sufficient. The plaintiff must plead all the ingredients of Section 16(1)(c) of

the 1963 Act.

He further submits that the Courts below have erroneously ignored the factum of reply of legal notice instead heavily relied upon the statement of plaintiff qua the readiness and willingness. Once the plaintiff was not having adequate cash or capacity to pay, filing of the suit was nothing but to wriggle out of the liability, much less, the obligation envisaged in the agreement to sell.

All these attending circumstances had been proved on record and were sufficient to decline the discretionary relief, thus, urges this Court for reversing the judgments and decrees under challenge by formulating the substantial questions of law as drawn in the memorandum of appeal.

I have heard learned counsel for the appellants, appraised the paper book and of the view that the ratio decidendi culled out in **Umabai and another**'s case (supra) deals with specific plea that the plaintiff was/is ready and willing to perform the agreement on his part and also the situation where deposit of any amount in court at the appellate stage by itself could not establish the readiness and willingness. It is not a case of such nature.

The Hon'ble Supreme Court had had an occasion to deliberate upon the capacity and inadequacy of consideration in **Azhar Sultana Vs. B. Rajamani and others 2009 (2) RCR (Civil) 123.** For the sake of brevity, the relevant paragraph No.20 of the judgment reads thus:-

“20. We are, however, in agreement with Mr. Lalit that for the aforementioned purpose it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would lead to a conclusion that she was not ready and willing to

perform her part of contract.”

The Hon'ble Supreme Court had also an occasion to deal with the circumstances in which the time was not the essence of the agreement i.e. conduct of the parties in approaching the Court in **Saradamani Kandappan Vs. S. Rajalakshmi and others (2011) 12 SCC 18.** The relevant paragraph Nos.23 and 26 are reproduced as under:-

“23. The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.”

26. Relying upon the earlier decisions of this court in Gomathinayagam Pillai v. Pallaniswami Nadar [AIR 1967 SC 868; 1967 (1) SCR 227] and Govind Prasad Chaturvedi v. Hari Dutt Shastri [1977 (2) SCC 539], this Court further held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by

circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land.”

Mr. Brar, during the course of the arguments, has also read out the cross-examination of the respondent-plaintiff and to a specific question, his answer was that for 10-15 days, he and his father started withdrawing money. Such a question was fatal to the case/defence of the appellants-defendants. Even he also deposed that the father had withdrawn the amount from other bank accounts.

No evidence, much less, direct, cogent or corroborative has been led on record to show that the respondent-plaintiff was a property dealer. Agreement to sell in question does not envisage any assignment clause. The filing of the suit by the proposed vendee, in my view, is the correct approach as they could not have succeeded in seeking specific performance in the absence of assignment clause. Even though the stipulated date was prior to the one in the present case i.e. which according to Ex.P4 was 24.05.2006, the suit, as noticed, was filed in November 2006 i.e. after 5 months after the expiry of the stipulated date.

For the foregoing reasons, I am of the view that the concurrent findings of fact given by the Courts below are based upon correct appreciation of oral and documentary evidence, much less, the records which have been shown to me during the course of hearing. I do find any reason to differ with the same, much less, no substantial question of law arises for consideration. The second appeal is dismissed.

(AMIT RAWAL)
JUDGE

October 05, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No