In the High Court of Punjab and Haryana at Chandigarh

Regular Second Appeal No. 1773 of 2012
Date of Decision: 25.1.2017

Mehar Singh .....Appellant

Versus

Ram Kishan (deceased) through LRs .....Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. S.K.Garg Narwana, Senior Advocate with
Mr. Naveen Gupta, Advocate
for the appellant.

Mr. R.N.Lohan, Advocate
for the respondents.

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ANITA CHAUDHRY, J

This is the defendant's second appeal aggrieved by the judgment passed by the Court below. The trial Court partly decreed the suit and allowed recovery of the earnest amount with 10% interest. The first Appellate Court modified the judgment and allowed specific performance of the agreement.

Defendant Mehar Singh entered into an agreement to sell land measuring 5 kanals 10 marlas to the plaintiff vide agreement dated 20.8.2005 comprised in khasra no. 1029 (1-12), 1031(1-11), 1033 (2-16), khatoni No. 305, khasra No. 1032 (1-2) khatoni No. 310 Rect. No. 1030/1 (0-9) shown in jamabandi for the year 2001-2002 situated in the revenue estate of village Ahirka, district Jind @ Rs. 6,98,000/- per acre. The total consideration agreed was Rs. 4,80,000/-. The earnest amount of Rs.

2,40,000/- was paid at the time of agreement. The agreement was scribed by Ajit Singh Saini, a document writer. A receipt below the agreement was signed in token of having received the earnest amount. It was agreed that the sale deed was to be executed on or before 20.9.2005. The plaintiff was given a right to get the sale deed executed through Court. On failure to get the sale deed registered by the plaintiff on or before the date fixed, the earnest amount was to be forfeited. The plaintiff was given liberty to get the sale deed executed in his own name or in the name of any other person and the defendant would have no objection. The sale deed was to be executed with all rights in the common land, right to water and right of way. The plaintiff claimed that the date of agreement was extended to 21.9.2005 at the request of the defendant. On the next day, he and his son reached the office of Sub Registrar along with the defendant and stamp papers worth Rs. 38,400/- were purchased in the name of Veer Bhan for executing the sale deed for total consideration of Rs. 4,80,000/-. The defendant along with the plaintiff and his son and the witnesses went to the document writer and the sale deed was being scribed and the first page had been written on a stamp paper worth Rs. 25,000/- when all of a sudden, the defendant refused to execute the sale deed and got the time extended till 21.10.2005 on the same terms and conditions. The plaintiff took the balance money and along with the witnesses visited the office of the Sub Registrar on 21.10.2005 but the defendant did not turn up. He filed an application before the Sub Registrar and got his presence marked to show his readiness and willingness. The plaintiff waited for the defendant the whole day but the defendant did not come. It was pleaded that Sub Registrar returned the application in original to the plaintiff as there was no provision to get the presence marked. The plaintiff had taken the plea that he was ready and willing to perform his part of the agreement and since the stamp papers had been purchased and to avoid the documents being wasted he returned them to the competent authority and Rs. 3840/- (being 10%) was deducted and his plea was that it was liable to be adjusted towards the sale consideration. The plaintiff sent a legal notice. The defendant did not send his reply nor executed the sale deed. It was also pleaded that the plaintiff was suffering loss of Rs. 2400/- per month and he could have earned interest on the amount and the defendant was liable to pay Rs. 4800/- per month besides other damages.

The defendant took preliminary objections that the suit was not maintainable and material facts had been suppressed and the suit was filed only to cause harassment. The execution of the agreement was denied. It was pleaded that no sale consideration was fixed between the parties and therefore question of receiving any amount or earnest money did not arise. The defendant also denied that he had signed or thumb marked the agreement. It was pleaded that the agreement was a result of fraud and forgery. It was pleaded that in fact the defendant had entered into an agreement for sale in respect of this land with Veer Bhan son of the plaintiff on 19.2.2005 and the last date for execution of the sale deed was fixed as 21.8.2005 and on the date of execution of the alleged agreement, the agreement with Veer Bhan was subsisting and there was no reason that he would enter into another agreement. The defendant claimed that Veer Bhan did not have sufficient funds for execution and registration of the sale deed and the earnest money was forfeited. His plea was that the plaintiff in collusion with his son had forged the agreement. It was admitted that the agreement referred to by the plaintiff had the same set of attesting witnesses and there was a doubt regarding the legality of the agreement. It was denied that the plaintiff had purchased any stamp papers or those were returned. It was pleaded that the plaintiff under the garb of this agreement was pressurizing him to return the amount that had been paid as earnest money by his son.

On the pleadings of the parties, following issues were framed by the trial Court:-

1. *Whether the plaintiff is entitled to specific performance of agreement to sell dated 20.8.2005 as alleged? OPP*
2. *Whether the plaintiff is entitled to damages to the tune of Rs. 4800/- per month from the date of filing the suit, as alleged? OPP*
3. *Whether the suit is not maintainable in the present form? OPD*
4. *Whether the plaintiff has no cause of action and locus standi to file the present suit ? OPD*
5. *Whether the suit of the plaintiff is false and frivolous and is liable to be dismissed with special compensatory costs? OPD*
6. *Whether the plaintiff has not come to the court with clean hands? OPD*
7. *Relief.*

The trial Court though gave the finding that the execution of the agreement to sell had been proved but held that the agreement to sell was illegal from the beginning since no co-sharer could alienate specific khasra number though he had a right to sell his share in the property and the property was joint and had not been partitioned by metes and bounds. It noted that the defendant was a co-sharer in the suit property and defendant had agreed to sell specific khasra numbers to the plaintiff and it could not be agreed to be alienated by referring to specific khasra numbers. It also gave a categoric finding that the defendant had received Rs. 2,40,000/- from the plaintiff and he was bound to return that amount with interest. The suit of the plaintiff was partly decreed with proportionate costs and a decree for recovery of the earnest money with interest @ 10% per annum was passed. The relief regarding specific performance was declined.

The plaintiff was aggrieved since the main relief of specific performance was declined and preferred an appeal. The Appellate Court noted that the defendant had not challenged the finding nor had filed cross appeal or objections and held that a co-sharer was competent to sell his share in a property but a specific khasra number could not be sold and it was subject to the outcome of partition.

The defendant before the first Appellate Court had contended that the land shown in the jamabandi was in bighas-biswas while the agreement was in kanals and marlas therefore the parties were not *ad idem* qua the area of the land. The plea was rejected by the first Appellate Court. The submission of the defendant that since a long period had elapsed and the prices had gone up and would cause hardship to the vendor, was also rejected. The appeal was allowed and the defendant was directed to execute the sale deed within two months subject to payment of remaining amount. In case of failure, the plaintiff could get the sale deed executed through Court.

The judgment of the first Appellate Court has been challenged in this regular second appeal raising almost the same grounds that were raised before the Court below.

I have heard both the sides at great length and have gone through the record with their able assistance.

The counsel for the appellant relied upon ***Ram Kishan versus Bhagwan Sarup Nagar, 2006(1) RCR (Civil) 440***, ***Baba Shadi Ram Kataniwala (since deceased) versus Padam Dev Auplish and others 2007(2) RCR 328***, ***Santosh Hazari versus Purushottam Tiwari (deceased) By LRs. 2001(3) SCC 179*** and ***Shashidhar and others versus Smt. Ashwini Uma Mathad and another 2015(1) R.C.R. (Civil) 616*** and the submissions on behalf of the appellant primarily was regarding the execution of the sale deed. Both the Courts below have given a finding after evaluating the evidence that an agreement had been entered into. The execution had been proved by the scribe and the attesting witnesses. A finding was recorded that the defendant could not lead any evidence to show that any fraud had been played. It is settled that whenever fraud is pleaded, the onus is upon the person who pleads that fact. The defendant did not aver, how fraud had been played nor could lead any evidence. No specific issue was pressed at the time of framing of issues. The trial Court had dealt with this aspect in para 15 of the judgment and I find no infirmity in the finding. The finding was not challenged in appeal by the defendant. He did not even filed cross appeal or objections. None of authorities assist the case of the appellant.

Counsel for the appellant had also also relied upon ***Kanshi Ram versus Om Prakash Jawal and others AIR 1996 Supreme Court 2150***, ***S.P.Chengalvaraya Naidu (dead) by LRs versus Jagannath (dead) by LRs and others AIR 1994 Supreme Court 853***, ***P. Purushotham Reddy***

and another versus M/s Pratap Steels Ltd. 2003(2) Civil Court Cases 339 (A.P.), ***G.Rosaiah versus C. Balarami Reddy and another AIR 1989 Andhra Pradesh 179*** and ***Ram Niwas and another versus Rakesh Kumar and others AIR 1981 Punjab and Haryana 397*** and '***Tarsem Singh versus Sukhminder Singh 1998(3) PLR 802'*** and it was urged that there was a mistake which was essential to the agreement as the property was shown in bighas and biswas in the jamabandi but the area shown in in the sale deed was in kanals and marlas which conveyed different impression regarding the area and the parties were not *ad idem* with respect to the unit of measurement.

I have gone through the authorities. The facts of that case were entirely different. There is no mistake of fact here nor this plea was ever taken that there was any confusion or mistake. According to the defendant-appellant he had agreed to sell same area to the son of the plaintiff. For him to say that there was a mistake and the agreement could not be enforced has to be rejected. The agreement refers to the exact area agreed to be sold and it refers to the khasra numbers.

The next submission of the appellant was that the plaintiff had not come with clean hands and no amount was paid before the Deed Writer and he made a statement that money was not paid in his presence. It was pointed out that Veer Bhan was present when the agreement is alleged to have been executed but he did not step into the witness box to support the plaintiff. In my view this argument has also to be rejected. Firstly because the appellant did not challenge the findings recorded by the first Court and also because the execution had been proved. The witnesses have deposed with regard to passing of consideration. The defendant did not lodge any

FIR or file complaint with any authority that he had not received the amount. The presence of Veer Bhan was not necessary at the time of the execution of the agreement, therefore, it was not necessary for him to step into the witness box either. The defendant had set-up a plea that he had entered into an agreement with the son of the plaintiff but he did not send any notice that the amount had been forfeited nor he had produced that agreement on record. The plaintiff's case was that he could get the sale deed executed in his own name or in the name of any other person which was an arrangement between the parties and there is a recital in this regard in the agreement Ex. P1. No attempt was made by the defendant to get the thumb impressions compared. There was no reason why the attesting witnesses would depose against the defendant. The agreement was scribed by a regular scribe. There is a receipt below the agreement acknowledging the receipt of the earnest money and is witnessed by Om Parkash and Krishan. The plaintiff has proved his readiness and willingness. He had gone to the office of Sub Registrar to get his presence marked. He had also sent a notice thereafter to which the defendant did not respond.

Lastly, counsel for the appellant while relying upon '***Ramdas versus Sitabai and others 2009(4) Civil Court Cases 259'*** urged that the property had not been partitioned and the Appellate Court had granted a decree of possession and possession cannot be delivered as the property has not been partitioned.

Counsel for the respondent had relied upon ***Baldev Singh (deceased) through LRs versus Harbhajan Singh and others 2015(3) R.C.R. (Civil) 59***, ***Narinderjit Singh versus North Star Estate Promoters Limited 2012(3) R.C.R. (Civil) 168***, ***Swaran Singh versus Bagga Singh***

2008(4) R.C.R. (Civil) 426, Mange Ram and others versus Baru Ram and others 1999(1) CivCC 435. Piru versus Fakir Chand 2006(4) R.C.R. (Civil) 208, ***Abhay Singh and others versus Ramesh Kumar and others 2009(3) PLR 490, Abdul Sattar and others versus Pitamber Singh 2008(3) R.C.R. (Civil) 424*** and ***Balkar Singh and others versus Ashok Kumar 2009(4) R.C.R. (Civil) 465*** and had urged that a co-sharer was within his right to sell the specific portion out of joint khata though the same would be deemed to be of a share out of the joint land and a decree for specific performance could be passed with respect to the share unless the vendor was shown to be in possession of a specific portion of a joint land.

It is necessary to notice how the issue was dealt with by the first Court. Para 14 and 15 of the judgment of the first Court reads as under:-

> *"14. After giving thoughtful consideration to the matter in controversy and perusing the oral as well as documentary evidence available on record, it transpires that the agreement to sell dated 20.8.2005 Ex. P1 is illegal on the basis of the fact that no co-sharer can alienate specific khasra number though he has a right to sell his share vide a sale deed. In the suit at hand, the suit property is joint and the same is not partitioned by metes and bounds. In the instant case, defendant is a co-sharer in the suit property. He being a co-sharer had agreed to sell specific khasra numbers to plaintiff i.e. land measuring 5 kanals 10 marlas bearing Khewat no. 214, Khata No. 303, Khasra No. 1029 (1-12), 1031(1-11), 1033 (2-16), Khatoni No. 305, Khasra No. 1032 (1-2) Khatoni No. 310 Rect. No. 1030/1*

(0-9), vide agreement to sell dated 20.8.2005 Ex. P1 @ Rs. 6,98,000/- per acre. The suit property is not partitioned by metes and bounds. Thus, the suit property could not be agreed to be alienated by mention of specific khasra numbers of which defendant has received the earnest money to the tune of Rs. 2,40,000/- from the plaintiff.

15. The stand taken by the defendant is that a fraud has been perpetuated upon him by obtaining his thumb impressions on the alleged agreement to sell Ex. P1. I am of the view that only vague stand has been taken by the defendant that he never agreed to sell the suit land by way of executing the agreement to sell Ex. P1 in favour of plaintiff. The statement of the defendant is of no consequence regarding complete denial of execution of agreement to sell Ex. P1 and alleged non-passing of consideration. Admittedly defendant has entered into an agreement to sell the land measuring 5 kanals 10 marlas in the presence of the witnesses namely, Satbir, Krishan, Pritam Lal and the agreement to sell Ex. P1 was scribed by Ajit Singh Saini document writer. Thus due execution of the agreement to sell Ex. P1 is proved on the record but in the light of my above observation that the land measuring 5 kanals 10 marlas bearing specific khasra numbers i.e. Khewat No. 214 Khata No. 303 Khasra No. 1029 (1-12), 1031(1-11), 1033 (2-16), Khatoni No. 305, Khasra No. 1032 (1-2) Khatoni No. 310 Rect. No. 1030/1 (0-9) was sold vide agreement to sell Ex. P1 and thus this agreement to sell was not binding on the other co-

sharers because sale of a specific khasra number of joint property amounts to sale of share only. My views find support from the law laid down in a case titled 1996 CLJ 193 wherein it was observed that mere share can be given by co-sharer and no specific killa number can be sold. Perusal of record shows that defendant is a co-sharer in the suit property which is not partitioned as yet amongst its co-sharers. Therefore, defendant could not alienate any specific khasra number in favour of plaintiff. On this point, I placed reliance on a case titled Rajinder and another vs. Smt. Namarta Bahal and another 2006(2) SLJ 1181 wherein it was observed that a co-sharer cannot alienate any specific portion of the joint property ti the property is duly partitioned."

The Appellate Court had upset the finding recorded by the trial Court and had allowed the main relief and there is no infirmity. The discretion exercised by the Appellate Court was warranted in the given set of circumstances. Once the execution was proved and fraud had not been proved, the Court was bound to grant the main relief as that is the normal rule.

In ***Abhay Singh and others versus Ramesh Kumar and others 2009(3) PLR 490,*** it has been held as under***:-***

14. Once execution of the agreement to sell stood established, the next important question that is to be seen is - whether specific performance has been rightly granted by the lower appellate court. Section 20 of the Specific Relief Act, 1963 (in short "the Act") deals with the discretion of the court in *directing specific performance of an agreement of sale and Section 21 of the Act provides for awarding compensation in suitable cases. The aforesaid provisions came up for consideration before this Court in* ***Dharampal Sood v. Atul Thapar, 2006 (3) R.C.R. (Civil) 221****, wherein while analyzing the aforesaid provisions, it was held that :-*

> *"17. A bare reading of Section 20 of the Act shows that the discretion has been conferred on the court to decree a suit for specific performance and the court is not bound to pass such a decree merely because it is lawful to do so but the discretion has to be exercised in a judicial and reasonable manner and should not be arbitrary. The discretion has to be exercised keeping in view the facts of the case and to do justice between the parties. Sub-section (2) of the said Section clearly enumerates the cases in which the Court should not exercise discretion in passing a decree for specific performance. Sub-section (3) provides wherein the court may exercise discretion to decree specific performance where the plaintiff has done substantial acts and suffered losses in consequence of a contract which is capable of specific performance. The court under sub-section (4) shall not refuse specific performance merely on the ground that the contract is not enforceable*

at the instance of the other party. Section 21 of the Act provides for jurisdiction of the Court to award compensation in certain cases."

15. Further, this Court in ***Swaran Singh v. Swarn Kaur and others, (2004-2)137 P.L.R. 184*** *had held that in a suit for specific performance of an agreement with regard to the sale of immovable property, the normal rule is to allow the specific performance and it is only in rare circumstances that the said relief may he denied. Nothing could be shown that the normal rule has to be deviated in the present case or that the discretion exercised by the lower appellate court directing specific performance of agreement to sell is erroneous or perverse in any manner."*

In ***N.P.Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao 1995 (2) RCR (Rent) 647,*** wherein, the Court held:-

"It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract

which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

In Atma Ram Mittal v. Ishwar Singh Punia, 1988 (2) RCR (Rent) 423, the Apex Court held that once execution of lawful agreement is proved and the judicial conscience of the Court is satisfied, then the equity demands that the agreement should be enforced rather than to grant alternate relief of damages to the plaintiff. It needs to be reiterated that equity must give relief where equity demands. 'equitas nuquam liti ancillatur ubi remedium protest clare"

An erring person who violates the terms and conditions of the agreement cannot be permitted to seek advantage over the other party in equity. In M.L. Devender Singh and others v. Syed Khaja, AIR 1973 SC 2447, the Apex Court held that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds. "Guided by judicial principles and capable of correction by a court of appeal". The jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damage.

The provision in terms of Section 20 of the Act is an exception to the rule of grant of relief of specific performance but the same in itself cannot be construed as a rule. The Courts are obligated to exercise this equitable jurisdiction in consonance with the settled principle of law and the discretion has to be exercised in judicious manner. Even the alternate prayer made by the plaintiff in a suit cannot be construed to be a waiver or abandonment of his main claim. The object of the provisions is to avoid resultant undue hardship to one party while avoiding undue gain to other. Mere lapse of time and inadequate consideration on that count are no grounds to exercise such discretion under Section 20 of the Specific Relief Act.

The appellant has not taken the plea of hardship nor had led any evidence. Since the defence of hardship was not taken the grant of specific relief was the natural consequence when due execution of agreement to sell had been proved.

It is settled principle of law that even if specific khasra numbers are made subject matter of sale out of joint land, still the area sold would be deemed to be sale of share. In this regard, reference can be made to ***Sant Ram versus Nagina Ram, 1961 Punjab 528*** which was followed in ***1981 PLJ Page 204 Bhagtu Ram'***s case (Full Bench). The escalation of prices is no ground to deny the relief of specific performance.

I find no merit in the appeal. The appellant shall execute and get the sale deed registered on receipt of payment of the balance amount within two months failing which the plaintiff would get the sale deed executed through Court. It is also clarified that the plaintiff would be entitled to possession on partition by metes and bounds for which he can take recourse to the remedies which are available to him under law.

To that extent the findings are modified. The appeal is dismissed.

(ANITA CHAUDHRY)
JUDGE

January 25, 2017
Gurpreet

Whether speaking/reasoned	**:**	**Yes**
Whether reportable	**:**	**Yes**