Sr. No. 102

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 3165 of 2015(O&M)
Decided on: 19.09.2017

Mohinder Singh and others

..........Appellants

versus

Baldev Singh

..........Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Jai Bhagwan, Advocate
for the appellants.

Mr. Amarjit Markan, Advocate with
Mr. Kanwal Goyal, Advocate
for the respondent.

<u>Rajbir Sehrawat, J.(Oral)</u>

This is second appeal filed by the defendants in the suit against whom the suit for specific performance has been decreed and his appeal has also been dismissed.

The undisputed facts as pleaded and admitted by the parties are that an agreement was entered into between them to sell the land mentioned in the Head Note-A of the plaint @₹ 11.5 lakhs per acre on 03.01.2006. An amount of ₹ 23 lakhs was paid in cash and later on another amount of ₹ 8 lakhs was also paid in cash towards advance money. As such a total sum of ₹31 lakhs were paid to the defendants/appellants herein. Initially, the target date was fixed to be 27.07.2006. However, by paying the above said ₹ 8 lakhs on 11.08.2006 the target date for executing the sale deed was extended to 28.08.2006. It is claimed by the plaintiff that he appeared on the target date before the concerned Sub Registrar. However, the defendants did not appear and therefore, the sale deed could not be executed. However, the defendants/appellants herein claimed that they remained present before the Sub-Registrar and the plaintiff was not ready with the balance sale consideration, which was ₹1,14,50,000/- in all. Therefore, the sale deed could not be executed because the plaintiff was not ready and willing to get the sale deed executed by paying the balance sale consideration.

On 30.08.2006 itself, plaintiff files the suit claiming specific performance. On 1.9.2006 an interim injunction was issued by the Court restraining the defendants from alienating the suit land. On receipt of the notice, the defendants appeared on 7.09.2006 and filed a written statement saying that they were ready and willing to execute the sale deed even now and the plaintiff did not have the requisite money. It was further pleaded that the defendants are ready to execute the sale deed even on the date of filing the written statement if balance sale consideration is paid to them on that very day. Only thing at this stage required on behalf of the plaintiff was to pay the balance sale consideration immediately and to get the sale deed registered. In view of this situation, the only thing which was required to be done by the Court was to pass the decree for execution of the sale deed on payment of the sale consideration. However, that was not done. Then instead of paying the balance money the plaintiff chose to file replication on 23.09.2006 claiming that the land is under mortgage and the defendants have not got the mortgage redeemed as per the terms of the agreement. If the defendants are ready to execute the sale deed as per the terms of the agreement then the plaintiff is also ready to get the sale deed executed as per the terms of the agreement. However, it deserves mention here that in the agreement to sell it is nowhere mentioned, as a matter of fact, that the land agreed to be sold by the defendants was under any mortgage.

Thereafter, since the plaintiff had said that he is ready to pay the balance consideration and the defendants had said that they are ready to execute the sale deed even today, if balance sale consideration is paid to them, therefore, on 30.09.2006 statements were made before the Court to execute the sale deed. Hence the interim order already granted by the Court against the alienation was vacated and the parties were directed to get the sale deed executed and to report the matter to the Court on 14.10.2006.

At that stage, even before 14.10.2006 the plaintiff again filed an application before the Court praying for fixation of a date for execution of the sale deed. In the said application he raised a new plea that he had talked to the defendants regarding execution of the sale deed and that they are demanding ₹10 lakhs more for executing the sale deed. It was further pleaded by him that he was ready with the money to pay to the defendants. To this application, the defendants again filed a reply on the very next date, i.e., on 5.10.2006 saying that they were ready and willing to execute the sale deed and further that the plaintiff be directed to deposit the money in the Court itself and the Court thereafter may specify the date for execution of the sale deed and they would get the sale deed executed on the said specified date. It was further replied in their reply that they are ready to execute the sale deed on the same price as mentioned in the original agreement and further that the pleading raised by the plaintiff regarding the extra demand of ₹10 lakh was totally unsubstantiated and concocted. It was further said that they never demanded any extra money.

However, despite this, neither the money was deposited by the plaintiff in the Court nor was paid to the defendants. Again at that stage, the

Trial Court should have pass the decree for specific performance. However, the said Court did not pass the decree and instead issued a direction on 5.10.2006 that both the parties should appear before the Sub-Registrar on 9.10.2006 or on 12.10.2006. Shri Bhupinder Pal, Nazir of the Court was appointed as Local Commissioner. On 9.10.2006 the stamp papers were purchased by the plaintiff but there was no draft of balance consideration. The parties appeared before the Sub-Registrar. However, it is claimed by learned counsel that the Sub-Registrar had gone out on some other duty and therefore, was not available on that day. Therefore, the sale deed could not be got executed. On 12.10.2006 again both the parties appeared before the Sub-Registrar. However, on this date also, the Sub-Registrar was not available. But the plaintiff claimed that the defendants refused to execute the sale deed in terms of the agreement and the defendants claim that they never refused to execute the sale deed on 9.10.2006 or on 12.10.2006. The Local Commissioner appointed by the Court submitted a report saying that the defendants were ready to execute the sale deed on these dates. But the plaintiff had insisted that he would get sale deed executed in favour of some third person which he did not name. But Local Commissioner also said in report that plaintiff was having more than Rs. 1 crore on that date. The defendants filed objection against the report of this Local Commissioner saying that this was partly incorrect. It was also claimed that the plaintiff was not having money on those dates also. However, it was also mentioned that the defendants were ready to execute the sale deed in favour of the plaintiff on payment of the balance sale consideration at any time.

On 19.10.2006, the plaintiff filed another application for decreeing the suit by again repeating the same things that he had gone to the office of Sub-Registrar but the defendants had refused to get the sale deed executed. Therefore, in view of the written statement filed by the defendants the suit of the plaintiff be decreed. Reply to this application was filed by the defendants and the defendants again refuted the claim of the plaintiff that they were not ready and willing to execute the sale deed. Again it was mentioned in para 9 of this reply that the plaintiff be directed to submit the draft of balance sale consideration in the Court and they would executed the sale deed immediately. It was further claimed that, infact, the plaintiff does not have the requisite money with him. Therefore, he is trying to prolong the matter. In view of this reply, the proper course of the Court would have been to pass the decree by asking the plaintiff to pay the money immediately and by directing the defendants to execute the sale deed. However, again this was not done.

It is worth mentioned here that alongwith the reply to the application which was filed by the plaintiff for decreeing the suit, the defendants had also filed an application on 21.11.2006 to dismiss the suit of the plaintiff on the ground that he did not have the money. It was specifically pleaded in para 5 of this application that if the plaintiff intended to get the sale deed executed from the defendants then the plaintiff be directed to submit the bank draft of the balance sale consideration in favour of the defendants and that they were ready and willing to execute the sale deed as per the terms and conditions of the agreement. Again instead of decreeing the suit, the Trial Court passed an order directing the parties to appear before the Sub-Registrar on 4.12.2006 for execution of the sale deed and sent the Nazir of the Court as Local Commissioner. However, the sale deed, could not be executed on that day also. The defendants claimed that they were ready and willing to execute the sale deed executed on 4.12.2006, however, the plaintiff was not ready to get the sale deed because he was not having money. The plaintiff on the other hand, claimed that the defendants were not ready.

Although, the defendants had already filed an application for dismissal of the suit of the plaintiff on the ground that he was not ready and willing to execute the sale deed and that if he wanted to get the sale deed executed, then he be asked to bring the draft in the name of the defendants, however, neither any reply was filed to this application by the plaintiff nor any draft was presented by him before the Court.

Later on 1.03.2007, the plaintiff moved an application for placing on record the stamp papers purchased by him during their earlier appearance before the Sub-Registrar, repeating his same assertions as in the plaint and also prayed that his suit be decreed. However, application with this though stamp paper was placed on record but no draft in favour of the defendants was placed on record even at that stage.

Once again, on 7.01.2008 the defendants made a statement before the Court that they were ready to execute the sale deed on receipt of balance sale consideration. At that stage, the plaintiff also agreed that he would get the sale deed executed in his favour and he did not claim that the sale deed be got executed in favour of any third person. In view of this, the Trial Court again directed the parties to appear before the Sub-Registrar on 11.01.2008 to get the sale executed. However, on 11.01.2008, no sale deed was executed. Both the side filed their affidavits of appearance before the Sub-Registrar. Plaintiff claimed that the defendants were not present before the Sub-Registrar and the defendants claimed that the plaintiff although present but was not having any money with him to pay the balance consideration. Both these affidavits were attested by the same Sub-Regisrar regarding the presence of the parties.

As stated above, both the parties were blaming each other for not being ready to execute the sale deed. Hence the matter was taken up by the Trial Court on 14.01.2008. On this date, the plaintiff made a statement that he was ready to produce before the Court the Bank Draft of the Balance Sale Consideration or to produce the entire balance amount of sale consideration before the Court to show his readiness. To this, the defendants agreed immediately and stated that the plaintiff be asked to produce the Drafts of the balance sale consideration before the Court and then the defendants would execute the sale deed. Feeling this to be appropriate, the Trial Court directed the plaintiff to produce the Bank Drafts of the balance sale consideration before the Court on 21.01.2008. However, on that date no demand draft was produced by the plaintiff. The excuse put forward by the plaintiff for not bringing the demand draft on this date was that the amount involved in the demand draft was heavy and they could not arrange the money. The Court adjourned the case and again asked the plaintiff to bring the demand draft of the balance sale consideration on 31.01.2008. Again the plaintiff failed to bring the demand draft. This time the excuse put forward by the defendant was that there was a technical problem for not bringing the demand draft. Although no problem as such was disclosed before the Court.

On 31.01.2008 the plaintiff again requested for time to produce the Draft. But this time the defendants opposed this attempt of plaintiff to enlarge the time. So the Court did not grant any time to the plaintiff to produce the draft. But adjourned the case for consideration for 8.02.2008. On 8.02.2008 also the drafts were not filed before the Court. The Court again adjourned the case for consideration on application already filed by the defendant for dismissal of suit. The next date fixed in the case was 29.02.2008. However, Court had not granted any further time to the plaintiff to produce the Bank Draft of the amount of Balance Sale Consideration.

It is further borne out from the record that on 14.02.2007 the plaintiff filed reply to the application already filed by the defendants for dismissal of the suit. In this reply besides repeating the same stand regarding the defendants not being ready, the plaintiff also asserted in para 5 that at that stage the defendants have no right to say that the plaintiff be directed to submit the draft of the balance sale consideration in favour of the defendants.

However, on 29.02.2008, the plaintiff filed an application that they have got the demand draft prepared and the photo copies of the demand draft were attached with the application with the plea that the original drafts were with the plaintiff and those would be handed over to the defendants at the time of registration of the sale deed. In this regard, the Trial Court recorded in the order that the original was seen and returned to the plaintiff. However, the fact remained that the original of the draft was never taken on record. These drafts were stated to have been prepared on 16.02.2008. On the next adjourned date, the defendants filed reply to this application saying that the plaintiff had never been ready and willing to get the sale deed executed by paying the balance sale consideration. The Court had repeatedly asked the plaintiff to bring the demand drafts, which they admittedly did not bring, therefore, the plaintiff had fortified his right to get the sale deed executed. It was further pleaded that the plaintiff was required to be always ready with the sale consideration. He has categorically shown that he was not ready with the sale consideration. Therefore, at this belated stage of about 2 years' delay, the plaintiff is not entitled to the specific performance of the agreement in question. Therefore, the application filed by the plaintiff and the suit was prayed to be dismissed.

Since the defendants had resisted an attempt on the part of the plaintiff to produce the alleged draft after a prolonged period of 2 years, therefore, the Court proceeded with the trial of the case. The issues were framed.

The evidence was led by the parties.

After appreciating the evidence and hearing the parties, the Trial Court decreed the suit of the plaintiff primarily on the ground that the plaintiff was entitled to get the sale deed executed in favour of any third person as per the terms of agreement and that the defendants refused to execute the sale deed in favour of third person. Secondly, it was recorded that the plaintiff had purchased the stamp paper and also got prepared the Bank Drafts, therefore, his readiness and willingness to get the sale deed executed is proved. However, interestingly, the Trial Court also recorded a finding that the defendants had also been ready and willing to execute the sale deed through-out but ultimately they refused to execute the sale deed when the drafts were produced by the plaintiff. Relying upon these reasoning, the Trial Court decreed the suit.

Aggrieved of the judgment and decree passed by the Trial Court the defendants preferred an appeal against the same before the lower Appellate Court. However, the lower Appellate Court also dismissed the appeal filed by the defendants/present appellants by relying upon almost identical reasoning as mentioned by the Trial Court. The lower Appellate Court also held that the plaintiff was ready and willing to get the sale deed executed in favour of third person. However, the defendants refused to execute the sale deed in favour of third person. Still further the lower Appellate Court relied upon the report of the Local Commissioner; who appeared as PW-2; to hold that the plaintiff was having ready the entire balance money and had purchased the stamp papers also. Therefore, the readiness on the part of the plaintiff is proved. Still further, the lower Appellate Court recorded that the plaintiff proved, the Bank Drafts of the balance sale consideration, which are marked as 'Mark-A to Mark-M'. Therefore, there is no question of plaintiff not being ready. The appeal of the present appellants was dismissed by the lower Appellate Court also.

Aggrieved against that concurrent judgments and decrees by both the Courts below the defendants in the suit have filed the present appeal.

While arguing the case, learned counsel for the appellants has vehemently argued that plaintiff/respondent herein has categorically shown from his conduct, as is reflected from the Court proceedings, that he has never been ready to get the sale deed executed at least, for a long period of more than 2 years from the year 2006 upto 2008. It is his further argument that while filing written statement itself the present appellants had offered to execute the sale deed, had the balance consideration been paid to them by the plaintiff. However, the plaintiff failed to pay any amount or to produce any amount before the Court. On the contrary, the plaintiff took an unsubstantiated and factually incorrect plea regarding mortgage just to delay the proceedings and to buy the time. Instead of paying to defendants or depositing with the Court the balance sale consideration, the plaintiff chose to take a new plea that the land was under mortgage and it has not been redeemed as per the terms of the agreement. It is the submission of learned counsel for the appellants that the land of the defendants was not under any mortgage on the target date. Nor was any such stipulation in the agreement that the land sought to be sold through the said agreement was under any mortgage. When the defendants clarified this point again asked the plaintiff to deposit the money in the Court then again he took a new plea that the defendants were demanding ₹10 lakhs extra besides the balance sale consideration. This was also factually incorrect plea because the defendants never demanded any extra money and they had given in writing, to this effect, to the Court also. When they again asked the plaintiff to pay the balance consideration or to deposit the same before the Court then again the plaintiff took a totally fabricated and false plea that the defendants were not ready to execute the sale deed in favour of a third person. It was argued by learned counsel for the appellants that right from the beginning till the end, plaintiff has failed to disclose as to who that third person was, in whose favour he wanted to get the sale deed executed. There was no such resistance by the defendants that they would not execute the sale deed in favour of a third person. In fact, the plaintiff was not having the requisite money even for getting the sale deed executed in favour of any third person. Therefore, he was not disclosing the name of any such third person.

Learned counsel for the appellants has further argued that the entire effort of the plaintiff was to prolong the time, as much as he could. Therefore, he kept on changing his excuses for not making the payment of the balance sale consideration from time to time. In fact he had no funds whatsoever with him. It is his further argument that ultimately when the plaintiff himself agreed to submit the Bank Draft of the balance sale consideration before the Court and time was granted by the Court for that purpose, even then he could not produce the Bank Draft of the balance sale consideration. This shows that he was never ready with the money for getting the sale deed executed. It is his further argument that merely the fact that some photocopy of the Bank Draft has been placed on record does not show the readiness of the plaintiff with the balance sale consideration even on the date when such photostat copies are presented. It is his argument that the original of the said Bank Drafts have never been placed on record of the case. Moreover, the fact that these drafts were ever got prepared from any bank had not been proved on record by examining any bank official from where these drafts were got prepared. Therefore, these drafts are not exhibited documents and can not even be read in evidence. No application was moved for leading secondary evidence. According to learned counsel this puts a final nail in the case of the plaintiff.

It is his further argument that Ex:D-8 and Ex: D-9 which are the jamabandies of the land in question have been totally misread by the lower Appellate Court. Even as per the entries in these jamabandies there is no mortgage of the suit property i.e. regarding the land under the ownership of the present appellants/defendants. Rather the entry of mortgage is regarding the share of one Dhanna Singh, who is not even party in the present suit. Therefore, the lower Appellate Court has wrongly taken these documents in consideration against the appellants. Still further, it is the argument of learned counsel for the appellants that the bank statements of the plaintiff were duly produced on record and even the plaintiff was cross-examined on this point. Therefore, it has come on record that at the time of the target date mentioned in the agreement the plaintiff was not even having a bank account much less to speak of having more than ₹ 1 crore with him. Still further, even subsequently when the bank account was opened by the plaintiff the amount in his bank account has never crossed more than few lakhs of rupees. It is further argued that the income tax return of the plaintiff also shows very meager income of plaintiff every year, which by no means, can aggregate to the balance sale consideration; even if it is taken as it is. Learned counsel for the appellants has submitted that the Courts below have totally ignored all these aspects and have decreed the suit without appreciating the evidence on record.

Learned counsel for the appellants relies upon the judgment of the Hon'ble Supreme Court rendered in ***2011(1) SCC 429 titled as M/s J.P.Builders and anothers vs. A.Ramadas Rao and anothers*** and referred to para 12 of the judgment to contend that readiness on the part of the plaintiff has to be continuous through out to succeed in a suit for specific performance and further that the readiness and willingness to perform his part of the contract has to be determined with reference to the conduct of the party. Learned counsel for the appellants further relied upon the judgment of the Hon'ble Supreme Court reported in ***1995(5) SCC 115 titled as N.P.Thirugnanam(Dead) by LRs versus Dr. R.Jagan Mohan Rao*** to contend that the continuous readiness on the part of the plaintiff is a condition precedent for grant of relief of specific performance. The amount of consideration which he has to pay to the defendants must, of necessity, be proved to be available right from the date of execution of agreement till the date of decree. It is for him to prove that he was always ready and willing to perform his part of the contract. Further, that the readiness and willingness of the plaintiff has to be determined from the conduct of the party and the attending circumstances. He further relies upon the judgment of the Hon'ble Supreme Court rendered in ***AIR 1987 Supreme Court 2328 titled as Parakunnan Veetil Joseph's Son Mathew vs. Nedumbara Kuruvila's Son and others*** to contend that it is the duty of the Court to see that the litigation is not used as an instrument of oppression to have unfair advantage to the plaintiff. Therefore, it is the contention of learned counsel for the appellants that the plaintiff has totally failed to prove his readiness and willingness to pay the balance sale consideration. Rather, it is proved on record; and is also reflected from the Court orders; that during the pendency of the suit he had admitted that he had no money and he could not produce the drafts of balance sale consideration because the amount was heavy.

In view of this situation, it is the contention of learned counsel for the appellants that the suit of the plaintiff should have been dismissed.

On the other hand, learned counsel for the respondent relies upon the judgment of the Hon'ble Supreme Court reported in ***AIR 1996 Supreme Court 2510 titled as Sukhbir Singh and others vs. Brij Pal Singh and others*** and argued that once the plaintiff was present before the Sub-Registrar and got an affidavit attested then it has to be presumed that he was ready with the money and further that he is not supposed to have the cash or the amount ready all the times. He further relies upon the judgment of the Hon'ble Supreme Court reported in ***2011(15) SCC 247 titled as Jogendra Ram and another versus Phullan Mian(D) by*** **LRs. *& Ors.*** to contend that whether the plaintiff was ready and willing to perform his part of the contract is not a question of law and therefore, this point cannot be agitated in the second appeal. It is his further argument that even if the lower Appellate Court committed illegality in recording finding of fact then also the High Court should not interfere with the judgment and decree of the lower Appellate Court in second appeal.

After hearing learned counsel for the parties and perusing the records, this Court is of the considered opinion that the findings recorded by the Courts below are totally perverse. Both the Courts below have blatantly misread the provision of Section 16(c) of the Specific Relief Act, 1963. Therefore, both the judgments and decrees passed by the Courts below deserve to be set aside for the reasons coming herein below in the following paragraphs.

The defendants have repeatedly been showing their willingness to execute the sale deed at any point of time. Repeatedly they have said that the plaintiff should pay the money and they would execute the sale deed immediately. All these pleas they have made in writing before the Court below. However, the Trial Court for one reason or the other kept the case pending, although the same should have been decreed on the first available occasion when there was no fact in issue between the parties. However, the Trial Court did not pass the requisite decree. Beyond this, regarding the conduct of the Trial Court; as reflected from the record, lesser said about is better. The Court prolonged the matter for approximately 2 years for no legally sustainable reason. Even the lower Appellate Court has made observations regarding the conduct of the Trial Court in this regard. The perusal of the record of the Trial Court leaves one with the impression that somehow the Trial Court used the legal methodologies to prolong the matter to help out the plaintiff to buy time to arrange the money, which he fails to arrange right upto the last moment.

As is clear from the record, the defendants had come in written pleadings; repeatedly saying that they were ready and willing to execute the sale deed at any given moment; if the balance sale consideration is paid to them. It has also been their categorical stand, through out, that the plaintiff was not having any money with him to get the sale deed executed and therefore, he had been prolonging the proceedings of the suit on one pretext or the other. Perusal of the records also shows that not even once the defendants have ever tried to deny execution of the sale deed, atleast, till the plaintiff failed to produce the Bank drafts of the balance sale consideration; even within the time given by the Trial Court.

On the other hand, the plaintiff has taken every possible step to delay the proceedings and to create some kind of evidence in favour of his plea of readiness to execute the sale deed. First he took up the unsubstantiated plea that the defendants have not got the mortgage redeemed, although, as a matter of fact the suit property was never under any mortgage. Then he took another plea that the defendants were demanding ₹ 10 lakhs extra for execution of the sale deed. Although, he could not substantiate this allegation by any cogent evidence. However, the fact remains that the defendants had immediately given in writing to the Trial Court that this plea raised by the plaintiff was thoroughly concocted and that they were ready to execute the sale deed at the agreed price only. Still further the plaintiff took another plea that he was ready to get the sale deed executed, however, he wanted to get the sale deed executed in favour of a third person and that the defendants refused to execute the sale deed in favour of a third person. This plea of the plaintiff is also not believable because right from the starting point; when he took this plea for the first time; till the end he never disclosed as to who that third person was in whose favour he wanted to get the sale deed executed. When it is the claim of the plaintiff that he wanted to get the sale deed executed in favour of a third person and that third person was present before Sub-Registrar, on the dates, when the parties appeared before the Sub-Registrar pursuant to the order of the Trial Court, then to substantiate this plea taken by him it was incumbent upon the plaintiff to atleast disclose the name of that third person and to examine that third person as a witness; to prove that he was ready to get the sale deed executed in his favour; as claimed by the plaintiff. However, the plaintiff has neither disclosed the name of any such third person nor has any such third person been examined by him as witness. This conduct of the plaintiff clearly shows that he tried to evade the performance of his part of the agreement and his entire effort was to buy the time to arrange the money if possible, which happened to be a heavy amount. This also shows that he has never been ready and willing to perform his part of the agreement.

The plea of the defendants that the plaintiff was not having any money to pay the balance consideration; at any time; is also proved to be correct by the conduct of the plaintiff when he failed to produce the Bank Drafts of the balance sale consideration before the Court within the time prescribed by the Trial Court, although he himself had offered to bring these drafts of the balance sale consideration before the Court. Not only once, the Court granted him time twice to produce the said drafts by giving him the dates to bring the draft of the balance sale consideration. However, the plaintiff, in effect admitted that he was not having money to pay the balance sale consideration when it was stated by him before the Court that he could not bring the bank draft of the balance sale consideration because the amount was very heavy. This leaves no doubt that he was not ready with the amount of the balance sale consideration. At this stage, the Trial Court should have dismissed his suit straightway. However, the Trial Court again proceeded with the trial of the suit, purportedly, on the ground that some photocopies of drafts of the balance sale consideration were produced by the plaintiff. It is a different matter that during the trial also the original of these drafts were never placed on the file of the Court nor the preparation of these drafts was ever proved before the Court by examining the officials from the bank from where these drafts were purportedly got prepared.

Learned Courts below recorded the finding that the plaintiff was ready to get the sale deed executed in favour of third person without appreciating the fact that such third person has not even been named by the plaintiff anywhere in any pleading or in any deposition before the Court, much less to speak of examining such third person as a witness before the Court to substantiate this plea that such third person was ready to get the sale deed executed in his favour. Mere the fact that the plaintiff purchased stamps amounting to ₹ 8 lakhs is no ground to show his readiness to pay ₹ 1,14,50,000/- which was balance sale consideration. This purchase of the stamp papers appears to be the essential step devised by the plaintiff to keep his claim alive till the decision of the suit. This conclusion is supported by the fact that he could not pay the balance sale consideration even during the pendency of the suit and despite the fact that he was asked by the Court to pay the same. Hence this fact of purchase of stamp paper has to be held only as an attempt to create evidence by the plaintiff in his favour to delay the matter and to gain the time to make the payment of the money. Next ground taken by the lower Appellate Court that the plaintiff had produced the drafts of the amount and therefore he has proved his readiness with the money is totally fallacious and is in disregard of the basic law of evidence. The Court has lost sight of the fact that original of these drafts have never been placed on record of the case. The defendants have not even been shown these drafts much less to speak of being given any opportunity to cross-examine any bank official on preparation of these drafts. These drafts have not even been exhibited on the file. More over the evidence produced on file also shows that the plaintiff never had any money in his account on the initial target date or on any dates subsequent thereto for the Bank drafts in question. Moreover, these drafts were produced after the time granted by the Court had lapsed and therefore, production of these drafts does not revive the right of the plaintiff to seek specific performance which stood extinguished; the day he failed to produce the drafts of the amount within the time twice granted by the Court. While appreciating this aspect it has to be borne in mind that right from the day one the defendants have been insisting that plaintiff be asked to pay the money immediately and they would execute the sale deed immediately in his favour. Further it has been the categorical plea of the defendants that the plaintiff was trying to avoid the execution of the sale deed because he was not having any money. Besides this, it also has to be appreciated that these alleged drafts though recorded to have been shown to the Court, yet it has to be kept in mind that photo copies of these drafts have been placed on record after about two years from the date when the defendants first submitted that the plaintiff be directed to pay the money and get the sale deed executed in his favour.

The reliance of the lower Appellate Court on the alleged statement of PW-2, the Local Commissioner to arrive at conclusion that the plaintiff was having money with him when the parties went to the Sub-Registrar, is also not sustainable. Although this witness had said that the plaintiff was having money on those dates to pay the balance consideration. However, when cross-examined this witness, has categorically admitted that he was not aware of the amount which the plaintiff was having because he never counted the money in the hand of the plaintiff. Therefore, the testimony of this witness is not a testimony on the fact that the plaintiff was having entire or even substantial part of balance sale consideration with him when the parties went to the office of the Sub-Registrar. Not only this, the same very witness PW-2, Local Commissioner has also admitted in cross-examination that the defendants were very much ready and willing to execute the sale deed in favour of the plaintiff. But the plaintiff was not ready to get the sale deed executed in his favour. Rather he insisted that the sale deed be executed in favour of some third person. Even this witness has not disclosed as to who that third person was. Hence, the testimony of this witness also goes to show that it was the plaintiff who tried to evade the execution of the sale deed and the defendants were categorically ready to execute the sale deed in favour of the plaintiff.

One fact has very heavily been relied upon by both the Courts below that the plaintiff had a right to get the sale deed executed in favour of a third person in terms of the agreement to sell and that the defendants refused to execute the sale deed in favour of the third person, therefore, they have defaulted in execution of sale deed. This plea of the plaintiff is proved to be false by his own witness PW-3, Milkha Singh Nambardar; whom the plaintiff examined to show his readiness. In cross-examination this witness has categorically admitted that it was wrong to suggest that the plaintiff wanted to get the sale deed executed and registered in favour of some third person and not in his name. This leaves no doubt that the plea of getting the sale deed executed in favour of third person is a total concoction and not supported even by the witness produced by the plaintiff himself. At the cost of repetition this is to be written again that plaintiff has never disclosed as to who that third person was. The conclusion driven by the lower Appellate Court that the mortgage was to be redeemed by the defendants; which they have failed and therefore, they were not ready and willing is also totally misconceived. The documents placed on record Ex:D-8 and Ex:D-9 admittedly show that the share of the defendants was not under mortgage. In fact it was the share of some other person Dhanna Singh which was under mortgage as shown in these documents. Moreover, there was no such stipulation in the sale deed that, as a matter of fact, this land was under any mortgage. Viewed from any angle, the findings recorded by the Courts below are not supported by any evidence.

Learned counsel for the appellants has rightly relied upon the judgments of the Hon'ble Supreme Court rendered in ***M/s J.P.Builders and anothers(supra), N.P.Thirugnanam(Dead) by Lrs(supra) and Parakunnan Veetil Joseph's Son Mathew(suupra).*** The Hon'ble Supreme Court has categorically held that for the plaintiff to succeed in suit for specific performance he has to prove the continuous readiness to pay the balance sale consideration. In the present case, the plaintiff has failed to demonstrate his readiness even before the Court despite the orders passed by the Court during the trial. Therefore, the judgment of the Hon'ble Supreme Court entitle the defendants to get the suit of the plaintiff dismissed. It has also been held by Hon'ble the Supreme Court that the right from the date of execution of the agreement till the date of decree the plaintiff must be ready and to show his readiness, the amount of consideration which he has to pay to the defendants must be, of necessity, proved to be available with him through out this period. The defendants can directly derive support from this judgments of the Hon'ble Supreme Court because he plaintiff not led any evidence to show that the money was availabe with him through out. It is further held by Hon'ble the Supreme Court in the above said judgments that the plaintiff can not take the advantage of any weakness in the defendants case to get a decree and that it is the duty of the Court to see that litigation is not used as an instrument of oppression to have unfair advantage to the plaintiff. The plaintiff has failed in all these tests prescribed by Hon'ble the Supreme Court in the above said judgments.

Reliance of the Counsel for the plaintiff/respondent upon Section 16(c) explanation (i) is totally misplaced. In fact these provisions support the case of defendants and totally go against the plaintiff/respondent herein and both the Courts below have totally mis-appreciated these provisions. Secondly, Section 16(c) prescribes that the plaintiff has to prove that he has always been ready and willing to perform his part of agreement unless waived by the defendants. Still further explanation (i) to the Section shows that 'it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money *except when so directed by the court*'. In the present case, the plaintiff was specifically directed by the

Court to produce the bank draft of the balance sale consideration and was granted time twice for this purpose. However, he admittedly failed to produce any draft as per the direction of the Court. When after giving sufficient time the Court stopped asking him to deposit any draft then he produced some photocopies of the draft on record. This was patently beyond the time granted by the Court. Moreover, these photocopies of the drafts were not even admissible in an evidence and have not even been proved by leading any evidence as stated above. The judgment of the Hon'ble Supreme Court relied upon by learned counsel for the respondent does not help him and the same is distinguished on the facts of the present case. In the judgment before the Hon'ble Supreme Court mentioned in ***Sukhbir Singh and others (supra)*** the defendants were not present before the Sub-Registrar when the plaintiff went there. Therefore, it was held by Hon'ble the Supreme Court that once the plaintiff has shown his readiness by coming present before the authority and the defendants have not even come to execute the sale deed then, the plaintiff shall be presumed to possess the requisite sale consideration and the defendants cannot take the plea of non-readiness of the plaintiff.

As a last resort, learned counsel for the plaintiff/respondent has relied upon Section 148 of the Code of Civil Procedure(for short, 'CPC') to contend that the Court had the authority to grant and enlarge the time to produce the drafts and he produced the drafts within that time enlarged by the Court. Therefore, according to him, the amount was duly tendered before the Court and his readiness was proved by tender of these bank drafts. However, the argument of learned counsel for the respondent is totally misplaced. Section 148 of CPC is not simply applicable in the present case. Relevant provision of Section 148 CPC is reproduced here in below:-

> *"**148 Enlargement of time:-** Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period [not exceeding thirty days in total], even though the period originally fixed or granted may have expired."*

A bare perusal of this Section shows that this relates to enlargement of time granted by the Court for doing any act *prescribed by the CPC or allowed by provisions of CPC* and this Section puts an outer limit of 30 days of such permissible enlargement by the Court. Tendering the balance sale consideration in a suit for specific performance is not an Act *prescribed* by the CPC nor does any provision of the Civil Procedure Code specifically *allows* tender of money in a suit for specific performance. This provision relates, exclusively, to those acts which are prescribed to be done or specifically allowed by the CPC to be done and then the Court fixes time to do such prescribed or allowed act within a specified time and not to any other fixation of time by it in exercise of its inherent Court powers. In any case, otherwise also the plaintiff/respondent herein cannot draw any benefit from this Section. *Firstly*, he did not tender the bank draft within time prescribed by the Court and *Secondly*, the drafts were even tendered beyond more than 30 days from the date when the time was first fixed by the Court. *Thirdly,* when these drafts were produced by the plaintiff there was no order from the Court directing him to produce the drafts and no time was enlarged by the Court for production of these drafts beyond 30.01.2008. There is no order on the file to grant any time to the plaintiff/respondent herein granting him any further time to produce the draft. Hence this provision does not come to the help of the plaintiff/respondent herein.

In the end the respondent has argued that in second appeal the finding of fact cannot be gone into by the High Court. Further he has contended that second appeal cannot be entertained except on a substantial question of law and no substantial question of law is involved or framed by the Court in this case.

However, both the contentions of the learned counsel for the respondent are liable to be rejected. The Constitution Bench of the Hon'ble Supreme Court in the case of ***Pankajakshi(Dead) Through L.Rs & Others vs. Chandrika & others, 2016(2) RCR(Civil) 245*** has held that the law laid down in case ***Kulwant Kaur & Others vs. Gurdial Singh Mann(Dead) by LRs and others, 2001(2) RCR(Civil) 277,*** to the effect that Section 41 of the Punjab Courts Act, 1918 stands repealed due to amendment of Section 100 of CPC, requiring the substantial question of law for maintainability of second appeal, is not a good law. So it held that filing of second appeals in Punjab and Haryana High Court shall be governed by Section 41 of the Punjab Courts Act. The Section 41 of the Punjab Courts Act, 1918 is reproduced for ready reference herein:-

> **"*Section 41***
>
> ***41. Second appeals:- (1)*** *An appeal shall lie to the [High Court] from every decree passed in appeal by any Court subordinate to the [High Court] on any of the following grounds, namely:-*
>
> *(a) the decision being contrary to law or to*

> *some custom or usage having the force of law;*
> *(b) the decision having failed to determine some material issue of law or custom or usage having the force of law;*
> *(c) a substantial error of defect in the procedure provided by the Code of Civil Procedure, 1908, (V of 1908) or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.*
> ***[Explanation:-*** *A question relating to the existence of validity of a custom or usage shall be deemed to be a question of law within the meaning of this section].*
> *(2) An appeal may lie under this section from an appellate decree passed ex-parte.*
> *(3) [Sub-section 3 omitted by Punjab Act 6 of 1941, section 2(b).]"*

A bare perusal of the Section 41 of the Punjab Courts Act, 1918 above makes it clear that against the judgments and decrees passed by the Courts under jurisdiction of Punjab and Haryana High Court, the second appeal shall be maintainable if the decision appealed against is contrary to any law or custom. So involvement of or framing of substantial question of law is not a *sine qua non* for maintainability of second appeal before this Court. The appeal would lie even if there is any illegality in the decision appealed against.

It has repeatedly been held by Hon'ble the Supreme Court that if the findings are perverse or based on no evidence then the perversity of the finding recorded by the Courts below itself is a question of law requiring the court to entertain second appeal. Therefore, second appeal is maintainable and the High Court can very well go into the perversity/illegality of the findings recorded by the Courts below. In the present case, as found above, the findings recorded by the Courts below are totally perverse. Therefore, this Court is duty bound to correct the injustice to the defendants involved in this case.

The argument of learned counsel that the High Court cannot go into the question of facts and cannot interfere in the concurrent findings of fact recorded by the Courts below is also not sustainable. Section 103 of the CPC specifically confers powers upon High Court to determine any issue of even fact; if the records on the file so warrants and it has been wrongly determined by the Courts below or is against the law. In the present case both the Courts below have totally misread the Section 16 of the Specific Relief Act, 1963 and have wrongly recorded a finding in disregard of that Section; to the effect that; the plaintiff/respondent herein was having the requisite money with him. As per Section 16 of the Specific Relief Act, 1963 he was required to be '*always'* ready to perform his part of contract. On the contrary, the record in the file shows that he was specifically asked to produce the bank draft of the amount even by the Court and he had failed to produce that draft of balance sale consideration even pursuant to the Court Order. Hence the findings of the Courts below are required to be rectified being totally perverse. Therefore, this Court has the jurisdiction to rectify the findings recorded by the Courts below.

In view of the above facts; that the plaintiff has not proved on record his readiness and willingness through out the pendency of the suit and in view of the fact that he has not produced the bank drafts within the specified time granted by the Court and the fact that he admitted that amount was heavy and therefore he could not produce the draft, a necessary inference has to be drawn and it is held that plaintiff was not ready and willing to perform his part of the agreement. Therefore, the suit filed by the plaintiff deserves to be dismissed and the appeal filed by the defendants/appellants herein deserves to be allowed.

In view of the above; the judgments, decree and the findings recorded by both the Courts below are reversed. The suit filed by the plaintiff is ordered to be dismissed. The present appeal is allowed in the above said terms.

19th September, 2017 **[RAJBIR SEHRAWAT]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*