

RSA No. 4066 of 2015 (O&M)

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

**RSA No. 4066 of 2015 (O&M)
Date of Decision: 27.7.2017**

Sanjeev Kumar

.....Appellant

Vs.

Jai Singh (since deceased) through LRs and another

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. Sanjay Mittal, Advocate
for the appellant.

RAMESHWAR SINGH MALIK J. (ORAL)

Feeling aggrieved against the impugned judgments and decrees passed by both the learned courts below, whereby his suit for possession by way of specific proformance of the agreement to sell was partly decreed, granting alternative relief of recovery of earnest money along with interest, plaintiff has approached this Court by way of present regular second appeal.

Brief facts of the case, as recorded by the learned first appellate court in para 2 and of its impugned judgment, are that that defendant executed an agreement to sell dated 2.6.2005 qua the suit property for total sale consideration of ₹1,10,000/-. On that day, ₹55,000/- was paid as earnest money and sale deed was to be executed on 15.10.2005. Further submitted that as per terms and condition of the agreement to sell dated 02.06.2005 were that sale deed was to be executed on 15.10.2005. It was also stipulated

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that there was a loan of ₹40,000/- upon the suit land from PLBD Bank, Narnaul and defendant No. 1 would pay the whole of the amount alongwith interest to the bank before the date of execution of sale deed. If defendant would not pay the amount of ₹40,000/- then plaintiff and proforma defendant No.2 would deposit the loan amount and same was to be adjusted towards ₹1,10,000/-. Further submitted that plaintiff and proforma defendant No. 2 stated from time to time to defendant No.1 to deposit an amount of ₹40,000/- along with interest with PLDB Bank and defendant No.1 assured that he would deposit the same but he did not deposit the amount of loan and interest till 12.10.2005, but on 12.10.2005 he had shown his inability to pay loan amount and interest and stated that amount would be about ₹50,000/-, therefore, would pay only ₹5,000/- on the basis of agreement to sell.

Further submitted that on 13.10.2005, one writing was made on the back side of the agreement to sell dated 02.06.2005 to the effect between defendant No.1 and Surat Singh in which it was stipulated that loan amount and interest was to be paid by the father of the plaintiff up to 30.04.2006 and after clearance of loan, sale deed was to be executed and there would be no objections to defendant No.1. Further submitted that on 13.10.2005, defendant No.1 received ₹5,000/- and made a tehrir on the agreement to sell and it was witnessed by Surender son of defendant No.1. Further submitted that loan of Rs. 40,000/- and interest from PALD bank total amount was ₹53,800/- and on 28.04.2006, an amount of ₹53,880/- was deposited in the bank in loan account of defendant No.1. Further submitted that original receipt was shown to defendant no.1 and requested to him to get execute the sale deed as an amount of ₹3,800/- was paid excess in his favour and same be returned but defendant No.1 stated that his health was deteriorating and

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he would execute the sale deed after one and two months and would pay ₹3800/- to the plaintiff and his father Surat Singh.

Further submitted that defendant No1 was the real uncle of plaintiff and real brother of the father of the plaintiff. Here, it is pertinent to mention that on 13.10.2005, when defendant No.1 received ₹5,000/- on account of agreement to sell. On that day there was writing for extending of the time on the agreement to sell and defendant No.1 assured that as and when he would deposit the loan amount, he would execute the sale deed. Further submitted that on 18.07.2006, defendant No.1 was requested to execute the sale deed in favour of plaintiff and proforma defendant no.2 on account of agreement to sell dated 02.06.2005. He stated that his health was deteriorating and he would get executed the sale deed later on. Further submitted that act and conduct of defendant No.1 shows that he was not ready to get execute the sale deed, therefore legal notice dated 19.07.2006 was got served upon the defendant no.1 and requested to him to come in the office of Sub Registrar, Narnaul on 28.07.2006 and to get execute the sale deed and plaintiff and proforma defendant no.2 would come alongwith expenses of the sale deed but notice was received by the defendant and he in collusion with postman to get mark endorsement on the notice registered letter he has gone outside. Further submitter that on 28.07.2006, plaintiff visited to the office of Sub Registrar, Narnaul alongwith all expenses and waited of him, but it was come in his notice that there was a holiday. Thereafter he visited to the village of defendant No.1 and brought all the facts to his knowledge and asked him to get registered sale deed on 31.07.2006.

Further submitted that on 31.07.2006, plaintiff along with defendant no.2 came in the office of Sub Registrar and waited for the

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defendant no.1 till evening but he did not come, therefore, he got marked his presence by swearing his affidavit. Further submitted that plaintiff was always ready and willing to perform his part of contract but due to the greed, defendant No.1 did not execute the sale deed when he had no right to do so and he requested to defendant No.1 several times to execute the sale deed but to no effect.

Having been put to notice, defendant No.1 appeared and filed his contesting written statement, raising more than one preliminary objections. Proforma defendant No.2 filed his separate written statement, admitting the claim of plaintiff. Replication was filed. On completion of pleadings of the parties, learned trial court framed the following issues:-

1. Whether plaintiff is entitled for decree of specific performance of the contract on the basis of agreement to sell dated 02.06.2005 and plaintiff was always ready and willing to perform the part of contract ? OPP
2. Whether suit is within limitation? OPP
3. Whether plaintiff is estopped by his act and conduct to file the present suit ? OPD
4. Relief.

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, the learned trial court came to the conclusion that although plaintiff has duly proved the execution of agreement to sell dated 2.6.2005, yet he could not establish his readiness and willingness to perform his part of contract. Accordingly, his suit was partly decreed, granting him alternative relief of recovery of earnest money along with interest, vide impugned judgment and decree dated 18.11.2011. Feeling dissatisfied, plaintiff filed his first appeal which also came to be

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dismissed by the learned first appellate court, vide its impugned judgment and decree dated 8.4.2015. Hence this regular second appeal at the hands of plaintiff.

Heard learned counsel for the appellant.

Exceptions apart, pleadings alone would never be sufficient to decree the suit. It also goes without saying that initial onus is always on the plaintiff to prove his case, in accordance with the averments taken in the pleadings. In the case in hand, plaintiff-appellant failed to prove on record his readiness and willingness to perform his part of the contract. He was not found having requisite amount of money on the target date for the purpose of execution of the sale deed. Affidavit filed by the plaintiff at a later stage would be hardly of any significance.

It was also stipulated in the agreement to sell that land sought to be sold was under mortgage with the Bank and if the defendant would not pay the loan amount advanced by the Bank, it will be plaintiff and proforma respondent No.2 who would deposit the loan amount, which will be adjusted from the remaining amount of sale consideration. Plaintiff failed to prove that he deposited the loan amount with the Bank, because defendant No.1 admittedly failed to repay the amount. Having said that, this Court feels no hesitation to conclude that the learned courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld.

Relief of specific performance is a discretionary relief. Even after proving the agreement to sell on record, it is not automatic or mandatory that a decree of specific performance has to follow in every given situation. The learned court of competent jurisdiction shall be doing well, while denying the relief of specific performance to the plaintiff in more than

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one peculiar fact situations namely i) in case the plaintiff is not found ready and willing to perform his part of contract, ii) plaintiff is found to gain undue advantage on the defendant, and iii) it is found a case of undue hardship against the defendant.

These are just few illustrations and not an exhaustive list. It also goes without saying the learned courts of competent jurisdiction would decide each case as per its own peculiar facts and circumstances, striking a balance between the parties, while proceedings on a holistic, pragmatic and constructive approach, with a view to do substantial justice. So far as the case in hand is concerned, the learned courts below have been found well justified, while passing the impugned judgments and decrees and the same deserve to be upheld, for this reason also

The view that has been taken by this Court also finds support from the following judgments of the Hon'ble Supreme Court as well as this Court: -

- 1. *S. Venkatappa Vs. Narayanappa, 2001 (4) SCC 705 (SC).***
- 2. *Veluyudhan Sathyadas Vs. Govindan Dakshyani, 2003 (1) RCR (Civil) 28 (SC).***
- 3. *Most. Etwari Devi and others Vs. Most. Parvati Devi, 2006 (2) SCC 327 (SC).***
- 4. *State of Madhya Pradesh Vs. Nomi Singh and another, 2015 (4) RCR (Civil) 594 (SC).***
- 5. *K. Prakash Vs. B.R. Sampath Kumar, 2015 (1) SCC 597 (SC).***
- 6. *Sujan Kaur Vs. Chand Singh, 2003 (3) RCR (Civil) 660 (P&H).***

Before arriving at a judicious conclusion, the learned Additional District Judge rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct

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perspective. Relevant and cogent findings recorded by the learned first appellate court in para 13 and 14 of its impugned judgment, which deserve to be noticed here, read as under:-

Further, with regard to the readiness and willingness on the part of appellant-plaintiff and proforma respondent-defendant from the evidence, it comes out that undisputedly a sum of Rs. 40,000/- was to be paid to PALD bank as loan taken against the suit property for which a stipulation was mentioned in the agreement to sell Ex.PW2/A itself and the loan amount firstly was to be repaid by the respondent-defendant no. 1 and in case of his failure it was to be repaid by the appellant plaintiff and proforma respondent-defendant. Certainly, the appellant-plaintiff has tried to establish that at one point of time the respondent-defendant no. 1 was in need of money of Rs. 5,000/- on 13.10.2005. When the respondent-defendant no. 1 received Rs. 5,000/- from Surat Singh father of appellant-plaintiff and made endorsement to this effect on the writing in the presence of witnesses. Also, the appellant-plaintiff tried to establish that loan amount was to be deposited by Surat Singh, father of appellant-plaintiff and proforma respondent-defendant no. 1 on 28.04.2006 with PALD Bank against receipt Ex.PW4/A, whereas, the respondents-defendants have taken a defence that Surat Singh father of appellant-plaintiff was called through his son Surender to whom a sum of Rs. 55,000/- was given to deposit the same with PALD Bank, who was accompanied by his son Surender, however, this defence as well as evidence led by respondent-defendant no. 1 to prove this fact is not sufficient to disbelieve the oral as well as documentary evidence led by the appellant-plaintiff and proforma respondent-defendant from which, it is proved that receipt Ex.PW4/A the loan amount was paid to PALD Bank. However, had the plea of appellant-

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plaintiff and proforma respondent-defendant that a sum of Rs. 53,800/- was deposited in the bank by them been true and believable then there was no occasion for them for not getting the no dues certificate from the bank and the receipt Ex.PW4/A also remains unproved, therefore, it cannot be said that this amount was deposited by the appellant-plaintiff.

Thus, taking into account all the peculiar facts and circumstances of this case, this Court is of the considered view that certainly, the appellant-plaintiff has been able to prove the execution of agreement to sell, however, the appellant-plaintiff and proforma respondent-defendant have not been able to establish the fact that they were ready and willing to perform the contract on their part. Therefore, the appellant-plaintiff and proforma respondent-defendant are not entitled for a decree of specific proformance, which even otherwise, is a discretionary relief. However, receipt of payment of Rs. 55,000/- by the respondent-defendant no. 1 as earnest money in pursuance of the agreement to sell Ex.PW2/A on 02.06.2005 and subsequently the receipt of Rs. 5,000/- on 13.10.2005 vide Ex.PW1/A (Tehrir) has been duly proved on the judicial file. Thus, in view of the above, it is held that the appellant-plaintiff and proforma respondent-defendant are not entitled for the discretionary relief of specific proformance, rather entitled to refund of Rs. 60,000/- along with interest only.”

During the course of hearing, learned counsel for the appellant failed to point out any patent illegality or perversity in either of the impugned judgments passed by the learned courts below. He also could not refer to any question of law much less substantial question of law, which is sine qua non for entertaining a regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the

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Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

27.7.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No