

115.

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

RSA-5836-2016 (O&M)

Date of decision:11.01.2017

BISHAN DASS

... Appellant

versus

RAGHUBIR DASS & ANR

.... Respondents

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA

Present: Mr.Malkiat Singh, Advocate,
for the appellant.

HARI PAL VERMA, J.

The appellant-plaintiff has filed the present Regular Second Appeal against the judgment and decree dated 06.09.2016 passed by learned Additional District Judge, Hoshiarpur whereby the Lower Appellate Court while setting aside the judgment and decree dated 11.11.2013 passed by trial Court has partly accepted the appeal filed by defendant-respondent No.1.

Briefly stated the plaintiff-appellant filed a suit for possession by way of specific performance of agreement to sell dated 23.02.2007 in respect of land measuring 9 kanals 12 marlas as detailed in the plaint. Respondent-defendant No.1 was joint owner in possession of the suit land. He executed an agreement to sell dated 23.02.2007 whereby he agreed to sell the suit land in favour of appellant-plaintiff for a sum of ₹ 3 lakhs. The defendant received a sum of ₹55,000/- as earnest money. The sale deed was required to be executed on or before 30.04.2007. It was agreed that defendant No.1 will get the land redeemed from defendant No.2 i.e.

Punjab National Bank, Manhota, Tehsil Dasuya, District Hoshiarpur, before the execution and registration of the sale deed. After the agreement to sell, the appellant-plaintiff reminded defendant No.1 to get suit land redeemed from the bank, but he failed to pay any heed to the request of the appellant-plaintiff. The appellant-plaintiff remained present in the Tehsil office on 30.04.2007 for execution of the sale deed, but defendant No.1 did not turn up to perform his part of the agreement. The appellant-plaintiff served a legal notice upon defendant No.2 through his counsel on 04.05.2007 whereby defendant No.1 was asked to get the suit land redeemed from the bank and to execute the sale deed in terms of the agreement to sell on or before 21.05.2007. However, despite the said notice, defendant No.1 did not come present in the office of Sub-Registrar on 21.05.2007 though the plaintiff remained present in the office of Sub-Registrar, Garhdiwala and got his presence marked by executing an affidavit.

In the aforesaid background, the suit was filed for possession of the suit land on the basis of agreement to sell dated 23.02.2007 on payment of balance sale consideration of ₹2,45,000/-. In the alternative, the appellant-plaintiff has claimed ₹1,10,000/- along with interest @ 18% per annum from the date of agreement and future interest @ 12% per annum till realization of the amount.

The respondent-defendant contested the suit, took various preliminary objections including locus standi, lack of cause of action, maintainability etc. On merits, it was denied that defendant No.1 ever executed an agreement to sell in favour of plaintiff. Even the receipt of earnest money was denied. According to defendant No.1, he was a partner along with one Darshan Lal and the plaintiff, in a business of purchase of

standing trees which they sell after getting the trees cut. The plaintiff along with defendant No.1 and Darshan Lal purchased poplar trees from one Sohan Singh of Village Darapur Dharamkot for a sum of ₹3,50,000/-, but in the said transaction, they incurred a loss of ₹1,04,000/-, due to which, the relations between the plaintiff and defendant No.1 became strained. The plaintiff owned a Bolero vehicle and one Kuldip Singh, who was said to be the attesting witness of the agreement to sell in question, was driver of the plaintiff on the said vehicle. The other witness of the agreement was Master Shamsher Singh who was also very close to the plaintiff and contested the election of MLA from Garhdiwala constituency as a candidate of BSP. The plaintiff in connivance with Master Shamsher Singh called defendant No.1 at the house of Master Shamsher Singh where defendant No.1 was asked to become the polling agent for the purpose of counting votes etc. and was further told that for the said purpose, an identity card was required to be prepared for which he would have to purchase stamp paper. Accordingly, defendant No.1 along with plaintiff and other witnesses, namely, Kuldip Singh and Shamsher Singh came to Tehsil Complex, Dasuya for purchasing stamp paper where his signatures were obtained on blank papers and on some registers.

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

- “1. Whether defendant entered into agreement to sell the suit property and executed agreement dated 23.02.2007 after receiving earnest money? OPP*
- 2. Whether the plaintiff is ready and willing to perform his part of contract? OPP*
- 3. Whether plaintiff is entitled to possession by way of specific performance of the agreement dated 23.02.2007? OPP*
- 4. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP*

5. *Whether plaintiff is entitled to alternative relief of recovery of Rs.1,10,000/- ? OPP*
6. *Whether plaintiff has concealed the material facts from this court if so its effect? OPD*
7. *Whether suit is not maintainable in the present form? OPD.*
8. *Relief.”*

The trial Court decreed the suit and has returned a finding on issues No.3 and 4 as under:-

“From the above mentioned discussion it is now fully established that the defendant No.1 Raghubir Dass executed an agreement to sell dated 23.02.2007 Ex.P1 in favour of plaintiff Bishan Dass. Even the readiness and willingness of the plaintiff to perform his part of the contract is established. The plaintiff has also brought on record the jamabandi for the year 2001-02 Ex.P8 which clearly shows that Raghubir Dass is joint owner in possession of the suit property to the extent of 1/3 share. Even the agreement to sell was to the extent of his share i.e. 1/3 share. Thus he was fully competent to execute this agreement to sell. Thus in view of the above mentioned discussion the plaintiff is held entitled to possession by way of specific performance of agreement to sell dated 23.02.2007 and is also entitled to the relief of permanent injunction. Accordingly, issue nos.3 and 4 are accordingly decided in favour of the plaintiff and against the defendant.”

Thus, the appellant-plaintiff was held entitled to the main relief of specific performance.

Aggrieved against the judgment and decree dated 11.11.2013 passed by learned trial Court, respondent-defendant No.1 had filed an appeal before the learned Lower Appellate Court. However, in the said appeal, the findings of the trial Court on issues No.1 to 4 were modified vide judgment and decree dated 06.09.2016 and the appellant-plaintiff was held entitled to the alternative relief of refund of earnest money of ₹55,000/- along with interest @ 12% per annum from the date of agreement till the date of decree and future interest @ 6% per annum till realization of the

06.09.2016 passed by learned Lower Appellate Court, the appellant-plaintiff has filed the present appeal.

Learned counsel for the appellant-plaintiff has argued that the plaintiff was entitled to be granted the equitable relief of specific performance instead of alternative relief of recovery of earnest money along with interest. He further argued that respondent-defendant No.1 has taken a stand of complete denial and at the same time, he has claimed that his signatures were obtained on some blank papers. In this manner, the defendant has raised inconsistent pleas. There is no evidence that the plaintiff and the defendant had ever carried a business of purchasing trees in partnership. The plaintiff served a legal notice upon defendant to execute sale deed on 21.05.2007 and thereafter, got his presence marked. Therefore, it cannot be said that the plaintiff was not ready and willing to perform his part of the agreement.

I have heard learned counsel for the parties.

The execution of agreement to sell dated 23.02.2007 (Ex.P1) by the defendant has duly been proved as the plaintiff has examined Shamsher Singh as PW1 who was a witness to the agreement and according to this witness, defendant had received a sum of ₹55,000/- in cash as earnest money. The agreement was scribed by Deedwriter-Ajit Singh and was attested by him along with other attesting witness, namely, Kuldeep Singh. Therefore, the plea of the defendant that his signatures were obtained under the pretext of getting prepared an identity card so as to act as a polling agent on behalf of PW1-Shamsher Singh, who was contesting election for MLA, has not been proved. Even the fact that Shamsher Singh had contested the election of MLA has also not been proved. Therefore, the

execution of the agreement in favour of appellant-plaintiff and receipt of a sum of ₹55,000/- from him as earnest money, is duly proved. As per the terms of the agreement to sell dated 23.02.2007 (Ex.P1), the sale deed was required to be executed on or before 30.04.2007. However, on 30.04.2007, the plaintiff neither came present in the office of Sub-Registrar nor got his presence marked and in his examination-in-chief, the appellant-plaintiff had simply stated that he requested the defendant to get his land redeemed from Punjab National Bank so as to execute the sale deed on or before 30.04.2007, but the defendant did not turn up in the Tehsil Complex for execution and registration of sale deed. It is only thereafter, the plaintiff got served a legal notice dated 04.05.2007 upon the defendant asking him to appear in the office of Sub-Registrar on 21.05.2007. Thus, it is established that on 30.04.2007, the plaintiff had not appeared before the Sub-Registrar. The plaintiff appeared before the Sub-Registrar only on 21.05.2007. Moreover, the relief of specific performance is a discretionary relief and proof of plaintiff being ready and willing is a condition precedent. Since the plaintiff-appellant has failed to prove that he was having the balance sale consideration with him for execution of the sale deed on 30.04.2007, the learned Lower Appellate Court has rightly granted the alternative relief to the plaintiff.

There is no evidence on record to establish that the appellant-plaintiff is an income tax assessee and on the relevant date i.e. 30.04.2007, he had sufficient amount in his account to arrange an amount of ₹2,45,000/-. Thus, the readiness and willingness on the part of the appellant-plaintiff has been considered in that connotation.

There is no illegality in the impugned judgment and decree dated 06.09.2016 passed by learned Lower Appellate Court whereby the finding recorded on issues No.1 to 4 have been modified. The appellant-plaintiff has been granted the alternative relief claimed in the suit and has been held entitled for the relief of earnest money of ₹55,000/- along with interest @ 12% per annum from the date of agreement till the date of decree and future interest @ 6% per annum till realization of the decretal amount.

Thus, no substantial question of law arises in the present regular second appeal and the same is, accordingly, dismissed.

CM-15321-C-2016

Prayer in the instant application filed under Order 39 Rules 1 and 2 read with Section 151 CPC is for restraining the respondent No.1 from alienating the suit property in dispute, in any manner, to anyone, during the pendency of present appeal.

Since the regular second appeal has been dismissed by this Court, the application has become infructuous and is dismissed as such.

(HARI PAL VERMA)
JUDGE

11.01.2017
sanjeev

Whether speaking/reasoned?	Yes/No
Whether reportable?	Yes/No