

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

RSA No. 5760 of 2015

Date of Decision: 04.07.2017

Sumit Gupta

.....Appellant

Vs.

Smt. Harjinder Kaur

.....Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Rajesh Garg, Senior Advocate, with
Mr. Sundeep Kumar, Advocate,
for the appellant.

Mr. J.K. Bhola, Advocate,
for the respondent.

AMOL RATTAN SINGH, J.

This is an appeal by the plaintiff, after his suit, seeking specific performance of a contract, was decreed by the learned Additional Civil Judge (Senior Division), Bahadurgarh, but on an appeal filed by the respondent-defendant herein, the judgment of the lower court was reversed by the first appellate Court, thereby dismissing the suit of the appellant-plaintiff.

2. The facts, taken from the judgment of the learned courts below, are that the respondent-defendant was stated to be the owner in possession of land/plot measuring 1000 square yards falling in khasra number 1666/44 min in the Modern Industrial Estate, Bahadurgarh, District Jhajjar, partly on the basis of a sale deed in her favour, bearing no. 3755, and a mutation entered on the basis of that, bearing no. 1083-A,m and partly she is stated to have inherited 500 square yards of the aforesaid plot after the death of her husband, Preetpal Singh.

As she was desirous of selling the entire plot, an agreement of sale was entered into between her and the plaintiff on 15.06.2004, qua all 1000 square yards. The total sale consideration was fixed at Rs. 24,50,000/- and a sum of Rs. 2,50,000/- by way of earnest money was received by her, of which Rs. 50,000/- is stated to have been paid in cash and Rs. 2,00,000/- by way of a cheque dated 16.06.2004. As per the agreement, the sale deed was to be registered on 30.09.2004.

However, as per the plaintiff, the defendant failed to appear in the office of the Sub-Registrar till the evening of that date and therefore, the plaintiff left the premises after marking his presence in the office by way of executing an affidavit of the same date.

3. The plaintiff having requested the defendant to perform her part of the contract but she not having done so, a legal notice is stated to have been sent to her through the plaintiffs' counsel on 25.11.2006, directing her to execute the registered sale deed on 04.12.2006 after receiving the balance consideration. Though the defendant still did not do so, but in the second week of March 2007, as contended by the plaintiff, she herself contacted him and requested that the sale deed be registered on 02.05.2007 or even earlier.

The plaintiff is stated to have again gone to the office of Sub-Registrar, Bahadurgarh, on 02.05.2007, but the defendant having failed to appear again, the suit was instituted on 08.08.2007, seeking specific performance of the contract, possession of the suit property and a decree of permanent injunction restraining the defendant and her legal heirs and representatives etc. from creating any third part interest on it.

4. Upon notice having been issued, the defendant submitted her written statement, challenging the maintainability of suit on grounds of *mala fide*

intention, suppression and concealment of material facts, with no cause of action having arisen.

On merits, it was admitted that she was the owner of a 500 square yard plot, while her husband, the late Sh. Preetpal Singh, owned the adjacent plot of 500 square yards, of which also she had become the owner upon his death on 25.12.1998. The said plot was stated have been bequeathed to her by way of a registered will executed by her husband.

5. The defendant admitted in her written statement that the plaintiff had approached her for the sale of the plot of 1000 square yards and that an agreement had also been entered into on 15.06.2004, with the date for execution of the sale deed fixed as 30.09.2004.

However, thereafter, though the plaintiff promised to complete the transaction within 15 days of the agreement itself, he did not do so even till 30.09.2004.

Hence, it was contended that it was actually the plaintiff who was neither ready nor willing to perform the contract, as he did not have the means to complete the same by payment of the balance sale consideration.

As per the defendant, in fact she had got issued legal notices dated 13.07.2004 and 30.09.2004, and even a telegram dated 30.09.2004, to the plaintiff.

Hence, it was contended that the suit was liable to be dismissed.

6. No replication having been filed by the plaintiff, the following issues were framed by the learned Additional Civil Judge:-

“1. Whether the defendant executed the agreement to sell, dated 15.06.2004 in favour of the plaintiff and received earnest money of Rs. 2,50,000/-? OPP.

2. Whether the plaintiff has been ready and willing to perform his part of the contract? OPP

3. Whether the plaintiff did not make payment of the

balance sale consideration to get the sale deed executed, despite repeated notices by the defendant and thus the plaintiff himself violated the terms and conditions of the agreement dated 15.06.2004? OPD

4. *Whether the date of execution of the agreement to sell was 30.06.2004? OPD*

5. *Whether the plaintiff tempered the agreement dated 15.06.2004? OPD*

6. *Whether the present suit is not maintainable in the present form, as per the provisions of law? OPD*

7. *Whether the plaintiff has concealed the material facts from the Court and the suit is liable to be dismissed on this ground alone? OPD*

8. *Whether there is no cause of action for the plaintiff to file the present suit? OPD*

9. *Relief.”*

7. The plaintiff examined himself and one Nikhil Gupta as Pws 1 and 2 and relied upon various documents including mutation nos. 1083-A and 1084-A (Ex. P-1 and Ex. P-2), the agreement of sale dated 15.06.2004 (Ex. P-3), a receipt dated 15.06.2004 (Ex. P-4), an affidavit of the plaintiff (Ex. P-5), the legal notice dated 25.11.2006 (Ex. P-6), a postal receipt (Ex. P-7), a registered cover (Ex. P-8), an acknowledgment-due slip (Ex. P-9), another affidavit, dated 30.09.2004, of the plaintiff, executed before the Executive Magistrate (Ex. P-10), an application marking his presence in the said office (Ex. P-11), Jamabandi for the years 1999-2000 (Ex. P-12), legal notice dated 30.09.2004 (Ex. PW1/D1), another acknowledgment-due slip (Ex. PW1/D2) and a receipt in respect of the earnest amount (Ex. PW-1/D3).

8. The defendant examined herself and by way of documentary evidence tendered a copy of the legal notice dated 30.09.2004 and the acknowledgement-due card and telegram also of the same date.

9. Upon appraising the evidence, learned Additional Civil Judge found that as regards the execution of the agreement, it stood admitted by the defendant, with her also admitting the receipt of Rs. 2,50,000/- as earnest money.

However, as regards the readiness and willingness to perform the contract, the stand of the defendant, that the date had been orally changed to 30.06.2004 instead of 30.09.2004¹, was disbelieved in the face of the agreement of sale, Ex. P-3, with that document admitted by both parties.

The plaintiffs' presence in the office of the Sub-Registrar on 30.09.2004, along with the balance sale consideration, was also held to have been proved by way of his affidavit of the same date, Ex. P-5, shown to be attested by the Executive Magistrate, Bahadurgarh.

The defendants' admission that she had not gone to the office of the Sub-Registrar on 30.09.2004, was therefore also taken to be sufficient proof of the fact that it was actually she who failed to perform her part of the contract on the said date.

On the contention on behalf of the defendant that the plaintiff did not actually have the money to pay the remaining sale consideration of Rs. 22,00,000/-, it was held that as he had stated that he was in possession of that much money and had also stated that he had reflected it in his income tax return for the year 2004, and moreover when the defendant did not turn up herself to perform the contract on the date fixed, it did not lie in her mouth to question the *bona fides* of the plaintiff.

10. On the 5th issue, of whether the agreement had been tampered with, on account of the fact that the entry entered in the register of the stamp vendor with regard to the sale of the stamp paper was shown to be 23.06.2004 whereas the agreement to sell was dated 15.06.2004, it was held that, firstly, the alleged late

endorsement or entry of the stamp paper in the register of the Stamp-Vendor could not be deemed to be tampering, and moreover, since the defendant herself was a party to the said act and was well aware about it at the time that the agreement of sale had been entered into on 15.06.2004, she could not be allowed to take benefit of her own wrong.

The issues of non-maintainability of the suit, concealment of material facts and lack of cause of action were also decided against the defendant, holding that she had not been able to prove them in terms of her averments.

11. Consequently, the suit of the plaintiff was decreed, directing the plaintiff to make a payment of Rs. 22,00,000/- to the defendant within a period of two months, after which the defendant was to execute a sale deed in respect to the suit property in favour of the plaintiff. She was also restrained from creating any third party interest on the property.

12. In the first appeal filed by the defendant against that judgment and decree, the learned District Judge, Jhajjar, after noticing the pleadings and the issues framed as also the evidence led by the parties, first went on to consider the argument on the tampering of the date of the agreement Ex. P-3, but in view of the fact that counsel for the appellant-defendant himself stated that the agreement itself was not doubted, the finding on the first issue, of whether the agreement was executed on 15.06.2004, on receipt of Rs. 2,50,000/-, was upheld.

13. On the readiness and willingness of the parties to perform their respective parts of the contract, it was found that the legal notice issued by the defendant through her counsel, Ex. PW-1/DW-1, to the plaintiff, had been proved, along with acknowledgement thereof, Ex. PW-1/D2, signed by the plaintiff. The telegram dated 30.09.2004 (Ex. D-3), was also found to have been proved along with the receipt thereof.

However, it was also found by the first appellate Court that the defendant had also duly proved his presence in the office of the Sub-Registrar on 30.09.2004 and therefore, up-till that date he was held to be ready and willing to perform his part of the contract.

Thereafter, however, the 1st appellate Court went on to hold that the plaintiff could not prove his readiness and willingness to perform his part of the contract, even up-till the date that he had issued notice to the defendant, i.e. 25.11.2006.

The Court went on to hold that even if it was accepted that the defendant had been requesting the plaintiff and her sons to execute the sale deed and she had promised to do so by 02.05.2007, and the plaintiff had also visited the office of the Sub-Registrar on that date, however, he not having approached the Court within a reasonable time thereafter, that was fatal to his case.

It was further held that the telegram informing him that his earnest money stood forfeited should have alerted him to the intention of the defendant, but despite that he showed “bovine indifference” to ground reality. Further, the defendant having refused to accept the notice dated 25.11.2006, the plaintiff still did not take any action and appeared before the Sub-Registrar instead, almost 06 months later, on 02.05.2007.

It was further held that the plaintiff not having placed on record any letter from the defendant that she would execute the sale deed on 02.05.2007, his affidavit proving his presence before the Sub-Registrar on the said date was of no consequence.

15. An argument on behalf of the plaintiff, that the mutation of inheritance in respect of 500 square yards of the plot inherited from the defendants' husband had not been sanctioned in favour of the defendant, which resulted in a

delay in filing the suit, was also noticed by the first appellate Court. However, it was held that even if that were to be accepted that the defendant continued to linger on the execution of the sale deed due to the mutation of inheritance not having been entered in her favour, there was still no hurdle in the path of the plaintiff to file a suit for specific performance at that stage, as non-sanctioning of the mutation did not create a bar to filing a suit.

16. On the aforesaid reasoning, it was held that the plaintiff had failed to establish that he was ready and willing to perform his part of the contract.

The contention on behalf of the defendant that the sale deed was actually to be executed on 30.06.2004 and not 30.09.2004 was, however, rejected.

17. The finding of the trial Court on issues no. 5 to 8 having not been argued by either side, they were held to be decided against the respondent.

Consequently, the appeal was allowed and the suit of the plaintiff dismissed by setting aside the decree of the trial Court in his favour, as regards the specific performance of the contract.

The defendant was, however, directed to refund the earnest money admittedly received, along with interest thereupon @ 12% per annum, running from the date of the agreement till the date of payment. The respondent (plaintiff) was somehow held entitled to costs.

18. In this appeal by the plaintiff, against the aforesaid judgment and decree of the learned first appellate Court, the following questions of law have been framed by learned counsel:-

“i. Whether the decree passed by the trial Court ought to have been maintained by the lower appellate Court, on the grounds sustained by the trial Court?

ii. Whether the suit filed by the plaintiff could be dismissed, even though filed within limitation, on the ground that it has not been filed within a reasonable time?

iii. *Whether the willingness of the plaintiff was evident from his presence on the scheduled date before the sub-registrar and in view of the quantum of earnest money paid?*

iv) *Whether the frivolous defence of the defendant was enough to decree the suit in view of the false plea of oral clauses raised in the written statement?*

v) *Whether the grant of a decree for specific performance should be the rule, even though the relief bring discretionary, where the defendant is proved to release a matter of indifference and not subject to any hardship at all?"*

19. Addressing arguments for the appellant-plaintiff, Mr. Rajesh Garg, learned Senior Counsel, after giving the facts of the case, submitted that the suit having been instituted on 08.08.2007, i.e. within three years of the last date fixed for execution of the sale deed (30.09.2004), the learned lower appellate Court wholly erred in holding that the suit (though within limitation) was filed too belatedly.

Mr. Garg submitted that in fact, with the matter continuing to be negotiated between the parties even till March 2007, the suit filed within five months thereafter could not have been held to be belated.

He further submitted that the intention of the defendant to back out of her part of the agreement is obvious from the fact that she admittedly got issued a notice on 30.09.2004 itself to the plaintiff, without actually turning up in the office of the Sub-Registrar, thereby showing her malafide intention.

Mr. Garg relied upon a judgment of the Supreme Court in **Mademsetty Satyanarayana v. G. Yelloji Rao and others** AIR 1965 SC 1405, in which it was held that even though Article 113 of the Schedule to the Limitation Act prescribes a period of three years from the date fixed for specific performance

of a contract, a mere delay, without extension, cannot be reason for a Court to exercise its discretion against granting the relief of specific performance, and neither can the scope of the discretion conferred by Section 22 of the Specific Relief Act be confined to waiver, abandonment or estoppel, i.e. after excluding the cases stipulated in Section 22 of the Act itself.

Their Lordships further went on to hold that there must be “some discretionary field unoccupied by the three cases” (given in the said provision), otherwise the substantive section is rendered otiose and that it would be better to leave diverse situations undefined, so as to grant enough discretion to the Court to not decree the claim of the plaintiff, but with such discretion obviously being exercised in a sound and reasonable manner, guided by judicial principles, capable of correction by a Court of appeal (but not by an arbitrary exercise of such discretion).

Hence, learned counsel senior counsel submitted that in the present case, simply because no suit had been instituted for almost three years beyond the date fixed in the agreement, but with the specific contention of the appellant that negotiations were on between the parties, right till March 2007, the 1st appellate Court wholly erred in exercising discretion against the appellant-plaintiff, rather than for him.

20. Mr. Garg next submitted that even in terms of Sections 10 and 20 of the Specific Relief Act, where an agreement of sale is admitted, and the readiness and willingness of a party is also shown, to perform his part of the contract, then Court should, at his instance, normally grant a decree of specific performance and possession thereupon.

In this context, he referred to a judgment of this Court **Bhaiya Ram & Anr. v. Rajesh Kumar & Anr.** 2007(5) RCR (Civil) 468, in which case also the

suit for specific performance was filed two years after the date fixed for execution of the sale, but this Court, in the absence of any hardship pleaded on behalf of the vendor, had held that simply the delayed filing of the suit for specific performance would be no reason to interfere with the decree of specific performance granted by the Courts below.

21. *Per contra*, Mr. J.K. Bhola, learned counsel appearing for the respondent-defendant, submitted that readiness and willingness of the appellant-plaintiff to perform his part of the contract was never proved and was in fact, disbelieved by the fact that he virtually admitted in his cross-examination that he did not have the money to the remainder Rs.22,00,000/- to pay the defendant vendor. This inference seems to be drawn by learned counsel from the fact that in his cross-examination, the appellant-plaintiff stated that he had brought cash for paying the said remaining sale consideration of Rs.22,00,000/-.

Learned counsel submitted that the plaintiff had further admitted that he was an income tax payee since 1998 but he could not show from the file that he actually had Rs.22,00,000/- to pay for the purchase of the suit property.

22. Mr. Bhola next submitted that no notice issued to the defendant by the plaintiff stated that he had actually come to Bahadurgarh for registration of the sale deed and in fact, the notice by the defendant sent on 30.09.2004, repudiated the agreement, the appellant not having paid the balance sale consideration and never having contacted the defendant till that date, to execute the sale deed.

He submitted that even the cross-examination of the plaintiff showed that he had no document, other than his affidavit, to prove that he had come present in the office of the Sub-Registrar, with Rs.22,00,000/- and enough money to purchase the stamp papers to execute the sale deed and therefore, even his presence, as per learned counsel, in the office of that authority, is not proved.

Learned counsel for the respondent relied upon a judgment of this Court in **Nirmal Kant Bansal v. Rajeev Garg and another** (RSA no.648 of 2012, decided on 15.02.2012), to submit that where there is no readiness and willingness proved by a party to perform his part of the contract, he cannot seek a decree of specific performance.

He next submitted that the appellant thereafter also filed a civil suit only almost three years later, i.e. on 08.08.2007, with only his oral contention to say that the respondent-vendor had extended the time upto 02.05.2007. Hence, as per Mr. Bhola, the reliance upon Sections 10 and 20 of the Specific Relief Act by learned counsel for the appellant, is wholly misplaced.

23. In rebuttal to the aforesaid contention, Mr. Garg referred to Explanation (i) to Section 16(c) of the Specific Relief Act, to submit that the appellant was not required to show that he actually had Rs.22,00,000/- cash in hand at the time that he came present on 30.09.2004 to get the sale deed executed in his favour.

He further submitted that the argument with regard to the income tax returns not showing the appellant to have Rs.22,00,000/- available with him, has never been raised and cannot be accepted at this stage.

24. Having considered the arguments of learned counsel on both sides as also judgments of the learned Courts below, I find myself unable to interfere with the judgment and decree passed by the 1st appellate court, reversing that of the learned Additional Civil Judge.

This is for the reason that it is difficult to believe that the appellant simply turned up on 30.09.2004 with Rs.22,00,000/- cash in hand to pay the respondent-defendant (vendor), without even making a phone call to her or more correctly, having sent a written communication to her, that he had such money

available with him, and that she should therefore execute the sale deed in his favour by coming to the office of Sub-Registrar on the date fixed.

The appellant not having the requisite sale consideration with him, i.e. a large sum of Rs.22,00,000/-, with only Rs.2,50,000/- having been paid as earnest money, can further be inferred from the fact that he admitted that he was filing income tax returns since 1998, but even from such returns he had not proved that he actually had the money on that date. It needs specific notice here that though the learned Civil Judge has, in her judgment, accepted the statement of the appellant that he had also reflected his possession of Rs.22 lakhs in his income tax return for the year 2004, however, on the contrary the specific finding of the leaned lower appellate Court is that no such income tax returns were proved. In fact, even before this Court, nothing has been shown from the record of the Courts below, that any such income tax return was led by way of evidence, to prove that the appellant-plaintiff had that much money available with him in the year 2004, to pay the remaining sale consideration on 30.09.2004.

The contention of learned senior counsel that this argument on non-showing of the money in the income tax returns cannot be raised at this stage, is not acceptable, in view of the fact that the argument of learned counsel for the respondent-defendant has been made by specifically by pointing to that part of the testimony of the appellant-plaintiff, as PW1 before the learned trial Court, where he is shown to have actually admitted to the fact that he could not prove that he had Rs.22,00,000/-, even from his income tax returns. Hence, obviously the learned Civil Judge erred in holding that it had been proved that the plaintiff actually had Rs.22 lakhs to pay the balance sale consideration at the relevant time. Further, learned counsel for the appellant-plaintiff has also erred in contending that the argument was never raised earlier.

25. Even presuming, in the absence at that time of any specific bar on payment of such a large sum by cash, that the appellant did have the money and actually came present on 30.09.2004, which is, to repeat, very difficult to believe, though his presence may actually be accepted; however, the fact that there is no communication on record to prove that the parties were actually in negotiation with each other between 30.09.2004 till the time that the appellant issued a notice on 25.11.2006 (Ex.P6), would further strengthen the case of the respondent-defendant that it is for the reason that the appellant did not actually have the money with him, that he never even attempted to communicate with her for more than 2 years, that he was still ready and willing to perform his part of the contract.

Mr. Gargs' contention that the respondent-vendor was obviously in haste to cancel the contract, in view of the fact that a telegram and notice were sent by her on 30.09.2004, may actually be a contention which is true, inasmuch as, she may not have at that stage wanted to go ahead with the contract, with prices possibly having risen in the meanwhile, but in the opinion of this Court, even if that is accepted, the fact that such cancellation of the contract was done only on the last date fixed for execution of the sale deed and with the appellant not having shown that he had ready money by which he could prove that he was actually willing to perform his part of the contract, either on that date or even for more than two years thereafter, in the opinion of this court, simply his presence at the office of the Sub-Registrar on 30.09.2004, cannot be taken to be sufficient evidence of his being willing to execute the contract.

Therefore, the judgments cited by learned senior counsel, both in *Mademsetty Satyanarayana* and *Bhaiya Rams'* cases (supra), would not come to his rescue, as, in the opinion of this Court, in such a situation, exercising of discretion against the appellant, by the learned lower appellate Court, was not

arbitrary but correct.

26. In view of the above, with the learned lower appellate court already having directed that the earnest money of Rs.2,50,000/- be returned by the respondent-defendant to the plaintiff, with interest @ 12 % per annum, running from the date of the agreement till the date of payment, I see no reason to interfere in that judgment and decree, by which the suit of the plaintiff was dismissed.

Consequently, this appeal is dismissed but with the parties left to bear their own costs.

July 04, 2017
nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes