

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

RSA No.190 of 2017 (O&M)

Date of Decision: March 10, 2017

Gurdeep Singh

..Appellant(s)

Versus

Suresh Kumar

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Krishan Kumar Thakur, Advocate
for the appellant.

ANITA CHAUDHRY, J.

This is the defendant's second appeal challenging the judgment of both the Courts below.

At the outset it is necessary to mention that the defendant did not challenge the judgment of the lower Court nor had filed any cross-objections. The appeal was filed by the plaintiff before the first Appellate Court.

Suresh Kumar-plaintiff approached the Court seeking decree for specific performance of the agreement dated 10.02.2007. He claimed that Rs.5 lacs has been paid as earnest money. The last date for execution of the sale deed was stated to be 15.06.2008. It was pleaded that 15.06.2008 was a Sunday and therefore, he went to the office of Sub-Registrar on the next day and waited for the defendant but he failed to appear and he was ready and willing through out to perform his part of the contract.

The defendant pleaded that it was a case of fraud and forgery and he had filed a complaint before the Magistrate. It was pleaded that the defendant alongwith his brother had approached Mahavir Parsad, a Commission Agent to whom he used to sell the agricultural produce and his brother had gone abroad in 2007 and Mahavir had obtained signatures and thumb impressions on various stamp papers and blank papers to secure the sum of Rs.3,08,000/-. It was pleaded that the amount was repaid by Ram Nath on return in the presence of two witnesses and the papers which were got signed were converted into a fake and forged agreement.

The trial Court on the basis of the evidence led before it concluded that the execution of the agreement had been proved. It was noted that a legal notice was sent and the plaintiff had appeared before the Executive Magistrate to get his presence recorded. It noted that there was a discrepancy with respect to the story projected by the defendant as to the year in which his brother went abroad. The suit of the plaintiff was decreed but the main relief was declined on the ground that the defendant would become landless and it would be difficult for him to earn a livelihood and directed the defendant to repay the earnest money with 12% interest. The plaintiff was aggrieved as the main relief had been denied filed an appeal and urged before the appellate Court that there was no plea of hardship and the money decree alone could not be granted and he was entitled to the main relief of specific performance.

Before the appellate Court the defendant moved an application under Order 41 Rule 27 CPC, which was allowed. The Appellate Court noted that the additional document which had been produced demolished the case of the defendant as it noted that there were contrary stands in the written statement and that taken in the reply to the notice. The Appellate Court noted that invocation of the power under Order 41 Rule 33 CPC could not be invoked in a mechanical manner and the Court had to see the facts and circumstances and then decide whether recourse of the Provisions could be had. The Appellate Court refused to invoke the Provisions of Order 41 Rule 33 CPC considering the fact that there was no plea. It noted that the defendant had denied the execution of the agreement and it was not a case of hardship and allowed the appeal. It would be necessary to reproduce para nos.36 and 40 of the judgment of the first Appellate Court and made as under:-

“36. When the present case is considered in the light of law laid down in the afore quoted authorities it is made out that the court while considering the entitlement of plaintiff as to relief of specific performance has to peruse the pleading and analyse the evidence carefully and when such an exercise is undertaken in the context of present case it comes out that plaintiff has always been and is still ready and willing to perform his part of the contract inasmuch as he has proved on the record by proving his sworn affidavit Ex.P2 that on the target date he had gone to the office of Sub Registrar concerned along with balance sale consideration and stamp expenses but defendant had not turned up. In any case, in the present case, defendant has denied very execution of the agreement to sell but since this court has accepted the findings recorded by the learned trial court respecting the execution of the agreement to sell

Ex.P1 therefore it does not lie in the mouth of defendant to dispute the readiness and willingness of the plaintiff to perform his part of the contract. In any case defendant having not filed an appeal or cross-objection and his contention qua application of Order 41 Rule 33 CPC having been rejected he can not claim dismissal of the suit of the plaintiff by raising different arguments. What he possibly can do is to oppose the plea of the to appellant-plaintiff to decree the relief of specific performance in his favour by showing that granting specific performance would cause him hardship as has been found by the court below. Thus he can only support the lower court decree and nothing more.

40. I find considerable merit in the contention so raised on behalf of the appellant inasmuch as there is neither any plea nor proof that defendant would suffer hardship as a result of contract of sale being asked to be specifically performed. The court cannot just imagine that specific performance might result in hardship to the party concerned when no such plea is raised. Contention raised by ld. counsel for the respondent-defendant that the very fact that defendant is an agriculturist itself would lead to the conclusion that if the suit land on the strength of decree of specific performance goes to the plaintiff the same would cause hardship to the defendant is not tenable as he has failed to establish that the suit land going out of his hands would render him completely landless. Hence, the finding so recorded by the learned trial court is not based upon any plea or evidence and thus a grave error was committed by ld. trial court while declining to exercise discretion to grant relief of specific performance to plaintiff. Hence, finding to that effect is hereby reversed. Findings on all the issues are affirmed.”

I have heard the counsel for the appellant at great length and have also gone through the record.

The defendant had taken a position wherein he had denied the execution of the agreement. The plaintiff had examined the witness

to the agreement. There is no suggestion to the witness that there was any enmity nor the appellant could show that the witness had appeared because he had some animus against the defendant. The trial Court had recorded a finding on issue no.1 and it was held that the execution of the agreement had been proved and a sum of Rs.5 lacs had been paid as earnest money and that he had succeeded in showing that the plaintiff had been ready and willing throughout. It was also held that it was the defendant who failed to abide by the conditions. The defendant did not challenge the findings nor filed an appeal. He did not even file cross-objections. It is now for the first time that he wants to assail the findings recorded by the trial Court. He could not assail the same here as the order of the trial Court had attained finality as against him. It is only at the appellate stage that he raised the plea of hardship which was rightly rejected by the Court below. There is no ground to interfere. The plaintiff was entitled to the first relief since he had been able to establish the execution of the agreement and also his readiness and willingness. He had performed his obligations.

The findings recorded by the Appellate Court are affirmed.

The appeal is dismissed in limine.

(ANITA CHAUDHRY)
JUDGE

March 10, 2017
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No