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

**RSA No. 3461 of 2017 (O&M)
Decided on: 24.08.2017**

Parkash Singh**Appellant**

versus

Gurdarshan Singh**Respondent**

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. S.S.Dinarpur, Advocate,
for the appellant.

Mr. Jitender Singh, Advocate
for the Caveator-respondent.

Rajbir Sehrawat, J.(Oral)

This is an appeal filed by the vendor-defendant against whom the suit for specific performance was decreed by the trial Court and whose appeal was also dismissed by the learned lower Appellate Court.

The brief facts of this case are that the respondent herein filed a suit for specific performance claiming that the defendant-appellant herein who was the owner in possession of the suit property had agreed to sell land measuring 28 Kanals 15 marlas, as detailed in the headnote of the plaint to the plaintiff at the rate of ₹8,50,000/- per acre vide agreement dated 13.06.2006 and had received ₹12.00 Lacs towards the part payment of sale consideration and agreed to execute and get registered the sale deed in favour of the plaintiff on or before 05.12.2006. It was claimed in the suit that the plaintiff-respondent had always remained ready and willing to

perform his part of the agreement. However, the appellant herein-defendant deferred the matter on one pretext or the other. On 08.07.2006, a legal notice was sent by the plaintiff through his counsel to the defendant requiring him to execute the sale deed on 08.08.2006 by receiving the balance consideration. On 08.08.2006, the plaintiff remained present in the office of Sub Registrar, however, appellant-vendor did not reach the office of the Sub Registrar. It is further pleaded that on 05.12.2006 the original target date fixed in the agreement for execution of the sale deed, again the plaintiff-respondent remained present in the office of the Sub Registrar and waited for the appellant-defendant. However, the defendant did not reach the office. Ultimately, respondent-vendee-plaintiff got his presence recorded in the office of the Sub Registrar by getting the affidavit attested. Thereafter, the suit was filed.

The present appellant-defendant resisted the suit and took a plea that although the agreement to sell dated 13.06.2006 was entered into between the parties but later on this agreement to sell was cancelled on 23.06.2006 by a cancellation deed and money was returned to the plaintiff. Therefore, it was pleaded that there was no cause of action for the plaintiff to file a suit for specific performance.

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

1. "Whether the plaintiff is entitled to get the possession of the suit property by way of specific performance of the agreement to sell dated 13.06.2006 executed by the defendant in favour of the plaintiff in respect of land measuring 28 kanal 14 marlas on payment of balance

- sale consideration of Rs. 18,54,688/-?OPP
2. Whether the plaintiff is entitled to a decree for permanent injunction as prayed for?OPP
 3. Whether the suit of the plaintiff is not maintainable?OPD
 4. Whether the aforesaid agreement to sell had already been cancelled on dated 23.06.2006 and the earnest money had been returned back to the plaintiff?OPD
 5. Relief.”

The parties led their respective evidence. After appreciating the evidence led by the parties, the trial Court recorded the findings that the agreement between the parties has been admitted. The vendor-defendants although had taken a plea of the agreement being cancelled and there being a cancellation deed in existence, however, the defendant-vendor has failed to prove the cancellation of the agreement by examining any attesting witnesses of the cancellation of deed. Therefore, the suit was decreed by the Trial Court.

Aggrieved of the judgment and decree passed by the trial Court, the present appellant-vendor filed appeal before the Additional District Judge, Yamuna Nagar. However, that appeal was also dismissed by the lower Appellate Court. While dismissing the appeal, the lower Appellate Court recorded a finding that the vendee-plaintiff has succeeded in proving the due execution of the agreement to sell, Ex.P1 and receipt of the earnest money, Ex.P2 by leading the cogent and convincing evidence. It was further recorded by the lower Appellate Court that otherwise also there is no denial on the part of the defendant regarding the execution of the agreement in question.

The lower Appellate Court recorded the finding that although the vendor-defendant had set up a plea of the agreement being cancelled by mutual consent through the cancellation deed; Ex-D1, however, the execution of the cancellation of deed between the parties was denied by the plaintiff. The plaintiff had denied its signatures on the cancellation deed. It was further recorded by the lower Appellate Court that to prove the cancellation deed; Ex.D1, the defendant has not examined anyone out of the attesting witnesses to the cancellation deed and that his self-serving statement as DW3 was not sufficient to prove the cancellation deed in question. It was recorded by the lower Appellate Court that although the defendant has examined handwriting and finger print expert who gave report in favour of the defendant regarding the signatures of the plaintiff on the cancellation deed, however, the plaintiff has also examined handwriting and fingerprints expert who had also submitted his report in favour of the plaintiff regarding his signatures on the cancellation deed being forged. Therefore, in view of the learned appellate court , the experts opinion in the present case was irrelevant and the matter has to be seen with reference to the evidence available on the file and the attending circumstances proved on record. It was further observed by the lower Appellate Court that Baljinder Singh, one of the attesting witness of the cancellation deed, though not produced as witness by the defendant, however, had appeared as PW-2 in the case and this document was not even put to him in his cross examination. It was further recorded by the learned lower Appellate Court that had the agreement been cancelled on 23.06.2006 then the

defendant would have definitely raised an objection to the demand of performance of this agreement by the plaintiff through a legal notice dated 08.07.2006. However, the defendant did not raise any objection to be notice served by the plaintiff. Still further it is recorded by the learned Appellate Court that the defendant himself had admitted that he had gone to Tehsil on 05.12.2006 to execute and get registered the sale deed in favour of the plaintiff but the plaintiff was not there. Therefore, the lower Appellate Court has recorded the finding that if an agreement had been cancelled as claimed by the defendant then there was no necessity for him to go for execution of sale deed pursuant to the said agreement; in December, 2006. Aggrieved of the judgment and decree filed by the learned lower Appellate Court the present appeal has been filed.

While arguing the case learned counsel for the appellant has stressed that the agreement to sell dated 13.6.2006, though not denied by the appellant, however, the same was cancelled vide cancellation deed on 23.6.2006. It is his further contention that the plaintiff was not ready and willing to get the sale deed executed because he has denied his signatures on the affidavit Ex.P6 and P8 which he had led as evidence; as a proof of remaining present before the Sub Registrar.

Next contention of the learned counsel for the appellant is that since the agreement to sell in question was already cancelled by the parties, therefore, the present suit for specific performance was not maintainable because the plaintiff has not challenged the cancellation deed regarding the agreement in question. To buttress

his argument he has relied upon the judgment of the Hon'ble Supreme Court in **2014(I) RCR (Civil) Page 236** titled as ***I.S.Sikandar (D) by Lrs. Vs. K.Subramani and others.***

I have considered the argument of the learned counsel for the appellant and have perused the file of the case. However, on perusal of the file, it is found that there is nothing wrong or illegal with the findings recorded by the learned Courts below. Both the Courts below have rightly recorded the findings that once the appellant-vendor had set up the plea of cancellation of the agreement to sell through a deed; which was duly claimed to be attested by the attesting witnesses; then the onus of proving cancellation deed was upon the appellant, particularly, in view of the fact that he did not deny the original agreement to sell entered into between the parties. However, admittedly, the appellant has not examined anyone of the attesting witnesses to this deed; to prove the execution of this cancellation deed. Not only so, one of the attesting witnesses of the alleged cancellation deed was examined by the plaintiff as PW-2 for disproving this cancellation deed. Even to this witness, no suggestion regarding cancellation was put up during his cross examination. Still further, the conduct of the appellant-vendor in claiming that he had gone to the office of the Sub Registrar on 05.12.2006 to execute and get the sale deed registered in favour of the plaintiff; also shows that there was no cancellation of the agreement to sell and that the story of cancellation deed was only devised as a method by the appellant-vendor to defeat the suit of the plaintiff. It deserves to be noticed here that this plea of cancellation of the agreement to sell saw the light of

the day only at the time when the suit for specific performance had already been filed by the plaintiff. First time, this plea was taken by the appellant-defendant in his written statement. Before this, there is no mention in cancellation of deed by the appellant.

Next contention of the learned counsel for the appellant that the plaintiff was not ready and willing to get the sale executed, is also to be noticed only to be rejected.

Both the Courts below have rightly held that the plaintiff was ready and willing to get the sale deed executed and for that he made efforts twice before and on the original target date fixed for execution of the sale deed. Not only that, he had even issued a notice to the appellant-vendor calling upon him to execute the sale deed to which the vendor did not respond. The plaintiff has duly produced the documents showing his presence before the Sub Registrar on the dates assigned for execution of sale deed. He has duly deposed in his testimony that he was present before the Sub Registrar on the said date and had moved an application for marking his presence. He had got attested his affidavits also as a mark of his presence in the office of the Sub Registrar. The argument of the learned counsel for the appellant that the plaintiff was not ready and willing to get the sale deed executed is also answered by the deposition of the appellant-vendor himself; who has admitted in his deposition that he himself was not ready and willing to execute the sale deed in favour of the plaintiff. When the defendant himself is claiming that he himself has not ready to execute the sale deed then he has no legal right to take the plea that the plaintiff was not ready

and willing to get the sale deed executed in his favour.

Next argument of the learned counsel for the appellant that the suit for specific performance was not maintainable since the agreement to sell has been cancelled through a cancellation deed is also misconceived. His reliance upon the judgment of the Hon'ble Supreme Court is not sustainable. The Hon'ble Supreme Court held the suit to be non-maintainable in the facts and circumstances of that case. In the case before the Hon'ble Supreme Court, the vendor had asked the vendee to perform his part of the agreement by paying the balance consideration and also for getting the sale deed executed and registered in his favour by a specified date. It was further stipulated in the notice served by the vendor in that case that if the vendee does not perform his part of agreement to sell then the legal action would follow. The vendor in that case; instead of performing his part; tried to delay the matter by giving further dates for execution of the sale deed. Resultantly, the vendor had sent a legal notice rescinding the agreement in question. This intimation regarding rescination of the agreement was duly sent; to the vendee in that case; through an advocate. In view of this situation, the Hon'ble Supreme Court had observed that since the agreement, had been rescinded and this rescination and termination of the agreement between the parties was duly communicated to the vendee, therefore, the earlier agreement did not survive and the suit for specific performance could not have been filed except by seeking prior declaration of the cancellation of the agreement to be void.

In the present case, there was no claim of unilateral termination/rescination of the agreement by the vendor. Therefore, there was no action of the vendor which the vendee was required to get declared as void. The vendor-defendant had tried to set up a plea of a cancellation deed as a defence in the suit. Therefore, it was for him to prove this cancellation deed, claimed by him to be a mutually agreed document, by examining the attesting witnesses and to defeat the suit of the vendee regarding specific performance. However, the vendee-defendant miserably failed to prove the cancellation deed by leading any cogent evidence. Therefore, both the Courts have rightly decreed the suit of the vendee-plaintiff.

Otherwise, also maintainability of the suit and merits of the suit are two different things. Once, the agreement to sell is admitted by the vendor then as per the provisions of the Specific Relief Act, the suit can very well be maintained for specific performance of agreement irrespective of the defence which the vendor may set up in his pleadings or the evidence. The plea of maintainability of the suit can be set up only if a vendor has communicated his decision to rescind the agreement before filing of the suit by the other party. In case of such unilateral rescinding of the agreement, the other party may have remedies against such rescination of the contract but the rescination shall have to be challenged by that other party to the contract; if that other party intends to insist upon the performance of that contract. It is in this context only that the Hon'ble Supreme Court has held the suit as not maintainable. However, in the present suit, as stated above, the

cancellation deed, which was not a unilateral decision of the one of the parties to the agreement under the provisions of the Contract Act, rather was claimed to be a mutually agreed deed; cannot be set up as a ground to question the maintainability of the suit as such. It is the different thing that if a cancellation deed is proved by the vendor then he can defeat the suit for specific performance on the ground that the vendee had agreed to terminate the original agreement itself. However, the suit for specific performance filed by the vendee shall very much be maintainable. In view of the above, there is no illegality or irregularity in the findings recorded by the learned Courts below. The same are, therefore, affirmed.

No other point was argued.

In view of the above, the present appeal fails and the same is here by dismissed.

24th August, 2017
shabha

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned	-	Yes
Whether reportable	-	Yes