

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(1) RSA No.3697 of 2017 (O&M)
Date of Order: 09.08.2017

Narender Kumar

..Appellant

Versus

Diwan Singh and others

..Respondents

(2) RSA No.3505 of 2017 (O&M)

Shiv Ram and another

...Appellants

Versus

Diwan Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Tarun Sharma, Advocate, for
Mr. P.S.Jammu, Advocate,
for the appellant (in RSA No.3697 of 2017)

Mr. Amit Jain, Advocate,
for the appellants (in RSA No.3505 of 2017)

ANIL KSHETARPAL, J.

C.M.No.8997-C of 2017

Prayer in this application is for condonation of delay of 84 days
in re-filing the appeal.

For the reasons given in the application, which is supported by
an affidavit, the same is allowed and delay of 84 days in re-filing the appeal
is condoned.

C.M.No.8998-C of 2017

Prayer in this application is for condonation of delay of 13 days in filing the appeal.

For the reasons given in the application, which is supported by an affidavit, the same is allowed and delay of 13 days in filing the appeal is condoned.

Main case

By this common judgment, the above referred appeals are being disposed of as both the appeals arise out of a suit.

Plaintiffs are in regular second appeal. Regular Second Appeal No.3697 of 2017, has been filed by Narender Kumar, plaintiff no.3, whereas Regular Second Appeal No.3505 of 2017, has been filed by plaintiffs no.1 and 2.

Plaintiffs had filed a suit for specific performance of the agreement to sell with respect to 3/5th share i.e. 19 kanals 17 marlas out of land measuring 29 kanals 16 marlas agreed to be sold, as per agreement to sell dated 02.07.2004.

It may be significant to note here that three plaintiffs and two defendants i.e., defendants no.2 and 3 are alleged to have entered into an agreement to sell with defendant no.1 with regard to land measuring 29 kanals 16 marlas. However, defendants no.2 and 3 did not file the suit for specific performance. Three plaintiffs filed the suit only with respect to 3/5th share out of the total land agreed to be sold (29 kanals 16 marlas).

In the written statement, defendant no.1 took a stand that plaintiff no.1, namely, Shiv Ram is his nephew, who had played fraud not only with defendant no.1 but also with sons of defendant no.1, who are defendants no.2 and 3. It was asserted that plaintiffs no.2 and 3 are close

associates of plaintiff no.1, who managed to copy the signatures of answering respondent and sons of plaintiffs on the alleged agreement to sell. It was further asserted that defendant no.1 has sold some part of the suit lands to different persons and it was to the knowledge of the plaintiffs. However, plaintiffs never objected to the same. The readiness and willingness of the plaintiffs was also disputed. It was also asserted that the plaintiffs have no capacity to pay the balance sale consideration. The defendant no.1 further asserted that the suit filed by the plaintiffs for part of the land agreed to be sold, is not maintainable in view of Section 12 of the Specific Relief Act, 1963.

Learned trial Court after appreciating the evidence available on the file, dismissed the suit filed by the plaintiffs.

Two separate appeals were filed, one by plaintiffs no. 1 and 2 and other by plaintiff no.3. Learned First Appellate Court after re-appreciating the evidence available on the file, directed refund of the earnest money to the plaintiffs and proforma defendants.

Learned counsel for the appellants has challenged the aforesaid judgment passed by the learned first appellate Court.

In my opinion, two issues arise for consideration in the present case:-

- (i) Whether a suit for specific performance of part of contract is maintainable?
- (ii) Whether the judgment passed by the learned first appellate Court ordering refund of the earnest money is correct in law?

Section 12 of the Specific Relief Act, 1963 (hereinafter referred

to as 'the Act') deals with specific performance of a part of the contract.

Section 12 of the Act is extracted as under:-

“12. Specific performance of part of contract

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), 3[pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquished all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When apart of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation: *For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter*

existing at the date of the contract has ceased to exist at the time of its performance.”

Section 12(1) of the Act provides that specific performance of a part of the contract cannot be ordered. Sub-Sections 2, 3 and 4, however, provide for the situations when specific performance of a part of the contract can be permitted.

The case of the plaintiffs do not fall within the provisions of sub-Sections (2),(3) and (4) of Section 12 the Act. In this case, the plaintiffs filed a suit with respect to 3/5th share of the total land agreed to be sold through agreement to sell.

Learned counsel for the appellant has vehemently argued that the specific performance of a part of the contract can be ordered in such circumstances. Learned counsel has referred to the judgment passed by the Hon'ble Supreme Court of India reported as **Surinder Singh vs. Kapoor Singh (Dead) through LRs. and others, (2005) 5 Supreme Court Cases 142.** This was a case where brother and sister were owner to the extent of equal share and brother had entered into an agreement on behalf of sister also. In such circumstances, the Court granted permission to amend the plaint and granted decree with respect to the share of the brother. It was held by the Court that in fact there is no agreement with the sister as she is not signatory. In those circumstance, Section 12(3) of the Act was applied and plaintiff was granted decree with regard to ½ share of total land belonging to the brother.

Learned counsel for the appellant has further relied upon judgment reported as **Hanumappa Channappa Hullur (D) by LRs. v. Shivamaruthappa Parappa Kalli and others, 2015(4) R.C.R(Civil) 203.** In this case also, the land was jointly owned by father and his two sons. Father

had entered into an agreement to sell with regard to the entire land but the sons had not signed the agreement to sell. In those circumstances, the Court held that the agreement to sell is not binding on the sons and decree for specific performance of 1/3rd share was granted. Therefore, the judgment cited by learned counsel for the appellant do not apply to the facts of this case.

Here is a case where plaintiffs have themselves prayed for specific performance of a part of the contract. The case of the plaintiffs would fall under Section 12(1) of the Act, which clearly bars the Court to grant decree of specific performance of a part of the contract. Thus, issue no.1 is answered against the appellant.

ISSUE NO.2

I have carefully gone through the judgment passed by the learned first appellate Court. It has been noticed by the Court that the agreement to sell is dated 02.07.2004. The stipulated date for registration of the sale deed was 02.12.2006. The suit for specific performance came to be filed on 31.07.2008. The Court also noticed that plaintiff no.1 is nephew of defendant no.1, whereas two other intended purchasers were sons of defendant no.1.

Taking into consideration the aforesaid facts, the Court with a view to balance equities, has ordered refund of the amount. The finding arrived at by the first appellate Court are not shown to be perverse or erroneous.

The suit filed by the plaintiffs was otherwise liable to be dismissed as per the finding recorded while answering issue no.1. However, the first appellate Court has ordered refund of the amount, there is no appeal

by defendant no.1. Hence, issue no.2 is also answered against the appellant(s).

For the reasons recorded above, both the appeals filed by the plaintiffs are ordered to be dismissed.

August 09, 2017
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(ANIL KSHETARPAL)
JUDGE

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