

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.2548 of 2009 (O&M)

Date of Decision: February 28th, 2018

Harjinder Singh (since deceased) through L.Rs.

...Appellant

Versus

Major Singh

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Sunil Chadha, Senior Advocate with
Ms.Swati Verma, Advocate,
for the appellants.

Mr.Vishal Sharma, Advocate,
for the respondent.

AMIT RAWAL, J.

Appellant-plaintiff is in Regular Second Appeal against the judgment and decree dated 5.6.2009 rendered by the Lower Appellate Court, whereby the suit claiming possession by way of specific performance of agreement to sell dated 4.9.1989 in respect of house measuring 100 sq.yards having three rooms, four walls, hand-pump and light fitting comprising in Khasra No.652, Khata No.9/11 as entered in the jamabandi for the year 1980-81, situated at Gill, Tehsil and District Ludhiana, agreed to be sold for a total sale consideration of ₹90,000/- against payment of earnest money of ₹15,000/-, has been dismissed while allowing the appeal of the respondent-defendant. In essence, the judgment and decree dated 28.10.2004 rendered by the trial Court decreeing the aforementioned suit, has been reversed.

Appellant-plaintiff instituted the suit claiming specific performance of the aforementioned agreement to sell on the premise that the stipulated date for execution and registration of the sale deed was 31.5.1990 and possession was to be delivered at the time of execution and registration of the sale deed. The parties were bound by the terms and conditions of the agreement. The intention of the defendant, after execution of the agreement to sell, turned dishonest as he intentionally got a notice dated 25.4.1990 (Ex.DW4/1) served calling upon the appellant-plaintiff to execute and register the sale deed upto 31.5.1990 and to be ready with sale consideration as the stipulated date was approaching fast. On receipt of the aforementioned notice, the appellant-plaintiff sent reply dated 5.5.1990 (Ex.P4) to the counsel showing readiness and willingness, wherein the respondent-defendant was called upon for appearance before the Registrar or in the cabin of the lawyer on 14.5.1990. Plaintiff stated to have sent legal notice dated 14.5.1990 (Ex.P8), whereby it was told that he had appeared in the cabin of the lawyer, but the defendant had not come forward. The defendant sent a notice dated 19.5.1990 (Ex.P11) to the counsel for the appellant Shri M.C.Sehgal, Advocate in reply to the notice dated 14.5.1990, stating therein that his client had gone to the cabin of the lawyer on 14.5.1990, but the appellant-plaintiff did not turn up, which showed that his client had malafide intention and was not ready and willing to perform his part of the agreement, but stated that his client would wait on 30.5.1990 or 31.5.1990 before the Registrar, i.e., the stipulated date for execution and registration of the sale deed.

Counsel for the appellant-plaintiff sent reply dated 23.5.1990 to the counsel for the respondent-defendant showing willingness of his client

to appear before the Registrar on 30.5.1990 as well as on 31.5.1990. Vide Ex.P17 dated 30.5.1990, plaintiff sent legal notice through his counsel to the respondent-defendant that his client had gone to the office of the counsel for execution and registration of the sale deed, but the same was refused. Another notice dated 31.5.1990 (Ex.P26) was also addressed to the defendant by the counsel for the plaintiff that his client had kept waiting on 30.5.1990, but he did not turn up for execution and registration of the sale deed and, therefore, was compelled to institute the suit on 11.6.1990.

The defendant contested the suit by filing written statement. He did not deny the execution of the agreement to sell, but denied that the appellant-plaintiff was not ready and willing to perform the part of the agreement. Neither the plaintiff remained present before the office of Sub Registrar and also expressed hardship. It was also stated that the defendant had entered into an agreement dated 26.1.1990 with one Nasib Chand for purchasing the property from the proceeds of the sale to be executed from the agreement to sell in dispute and had paid a sum of ₹20,000/- as earnest money, but owing to the non-appearance of the plaintiff, the agreement had fallen apart resulting into forfeiture of the earnest money. The plaintiff did not come to Ludhiana at any point of time.

Since the parties were at variance, the trial Court framed the following issues:-

- 1) Whether defendant Major Singh had entered into an agreement to sell dated 4.9.1989 in favour of the plaintiff? OPP
- 2) Whether the plaintiff has and is still ready and willing to perform his part of the contract? OPP
- 3) Whether the plaintiff is entitled for possession of the suit land by way of specific performance of the agreement to sell? OPP

- 4) Whether the plaintiff is barred by his act and conduct from filing this suit? OPP
- 5) Relief.

The trial Court, on the basis of the evidence brought on record by the parties to the lis, decreed the suit, but the Lower Appellate Court, being the last Court of fact and law, reversed the findings.

Mr.Sunil Chadha, learned Senior Counsel assisted by Ms.Swati Verma, Advocate representing the appellant-plaintiff submitted that readiness and willingness on the part of the appellant-plaintiff had always been there, throughout, from the date of execution of the agreement to sell, till the filing of the suit and during the pendency of the suit. The legal notices, referred to above, reflected that even the defendant was called upon to execute and register the sale deed on 14.5.1990, therefore, the findings of the Lower Appellate Court holding that the appellant-plaintiff was not having the sufficient means are neither here nor there. In support of his contention, relied upon the ratio decidendi culled out in **Santa Singh Versus Binder Singh and others**, 2007 (1) R.C.R. (Civil) 162 and **Aniglase Yohannan Versus Ramlatha and others**, 2005 (4) R.C.R. (Civil) 563 to contend that where a legal notice is served immediately after expiry of the contract period and the suit is filed, the discretionary relief under Section 20 of the Specific Relief Act, 1963 cannot be denied and also submitted that in pursuance to the judgment and decree, the balance amount within the time frame had already been deposited. He also relied upon the decision rendered in **Faquir Chand & Anr. Versus Sudesh Kumari**, 2007 (2) R.C.R. (Civil) 64 and **Darshan Singh Versus Ram Singh**, 2008 (4) R.C.R. (Civil) 919 to contend that where the vendee has been able to prove that the money was ready with him and withdrawn from the bank account

and vendor does not come forward for performance of his part of the agreement on the stipulated date, it cannot be alleged by the defendant that the plaintiff was not ready to perform his part of the agreement. He also relied upon the ratio decidendi culled out by the Hon'ble Supreme Court in **Azhar Sultana Versus B.Rajamani & Ors., 2009(2) R.C.R. (Civil) 123** to contend that it is not necessary for the purchaser to prove that he had enough liquid cash in his hand.

It was further submitted that the appellant-plaintiff had already submitted an application dated 14.5.1990 (Ex.P10) before the Sub Registrar that he was ready with the balance consideration, but the respondent-defendant had not come forward and for 30.5.1990, i.e., the actual stipulated date, an affidavit was got attested from the Oath Commissioner on 31.5.1990 to the effect that he was ready and willing to perform his part of the agreement. Certificate Ex.P28 issued by the State Bank of India and proved through the testimony of PW-2 Shamsheer Sharma that the plaintiff had sufficient money in his account as the liquid cash was not required to be shown at the time of execution in view of the judgment in **Azhar Sultana's case (supra)**. All these factors weighed in the mind of the trial Court, but the Lower Appellate Court committed illegality and perversity and, therefore, the findings are liable to be set-aside.

It was further argued that the Lower Appellate Court failed to appreciate the malafide intention on the part of the respondent-defendant in serving the notice dated 25.4.1990 (Ex.DW4/1) that the sale deed was to be executed on or before 31.5.1990. There was no occasion calling upon the plaintiff to get the sale deed executed before the date fixed. The Lower Appellate Court brushed aside the documentary evidence, i.e., Ex.P28 and

Mark PW2/1 purely on hyper technical ground that the aforementioned evidence was not proved on record. Lower Appellate Court had failed to appreciate that onus to prove that the appellant-plaintiff was not having the balance consideration, was upon the respondent-defendant. Although no plea of hardship had been taken by the defendant in the written statement, but the Lower Appellate Court committed illegality in making out entirely a new case. The alleged agreement dated 26.1.1990 executed by defendant with Nasib Chand has not been proved in accordance with law, therefore, reliance could not be laid and, thus, urged this Court for setting-aside the judgment and decree of the Lower Appellate Court.

Per contra, Mr.Vishal Sharma, learned counsel representing the respondent-defendant submitted that it has been proved on record that the appellant-plaintiff opened an account only on 31.5.1990 showing the balance amount. No documentary evidence prior thereto has been proved on record. The statement of account Mark PW2/1 has not been proved in accordance with law. There was a specific pleading in the written statement qua execution of the agreement with Nasib Chand, but the same has not been denied in the replication, much less plea of hardship. The appellant-plaintiff has failed to lead any evidence that at any point of time, except for one visit to Ludhiana, he was ready for performing part of his contract. Appellant-plaintiff has not proved his readiness by marking his presence before the Sub Registrar. On the contrary, the defendant has been able to prove the same by Ex.DW3/1. It is only a self-serving certificate and, thus, urged this Court for upholding the findings as the Lower Appellate Court discharged the obligation by referring to each and every document being the last Court of law and fact.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr.Chadha on the following reasons:-

- a) For marking the presence before the Sub Registrar, appellant-plaintiff had been able to prove the application (Ex.P10) submitted to the Sub Registrar and also an affidavit of even date, but for 31.5.1990, i.e., the agreed date for execution and registration of the sale deed, no such application was made vis-a-vis the application Ex.DW3/1 submitted by the respondent-defendant. Thus, in my view, findings relied upon in the judgment (supra) qua readiness and willingness, i.e., compliance of provisions of Section 16 (c) of the Specific Relief Act were conspicuously wanting. It is settled law that readiness and willingness has to be throughout and in my view, it had broken as plaintiff has failed to prove his presence on 31.5.1990, except sending of notice which is not in dispute.
- b) It was not a mischievous act on behalf of the respondent-defendant in sending the notice dated 25.4.1990, which was just an advance intimation to the plaintiff that he should be ready with the aforementioned amount;
- c) Certificate Ex.P26 shows that there was initial deposit of ₹45,000/- and another amount of ₹45,000/- was deposited only on 31.5.1990 proving that the appellant-plaintiff did not have sufficient money;
- d) Liquid cash is not required to be proved, but equally it would be one of the condition sufficing the requirement of

Section 16 (c) of the Act;

e) Appellant-plaintiff had not denied the specific averment in the written statement qua execution of the agreement dated 26.1.1990 by the respondent-defendant with Nasib Chand, therefore, there was no occasion for the respondent-defendant to prove the aforementioned agreement to sell, thus, the argument of Mr.Chadha that the agreement is not proved, is not able to cut ice;

f) Perpetual exchanging of telegrammes and the notices, in my view, has not helped the appellant-plaintiff at any stage, which fact is evident from Ex.P28;

g) Account statement mark PW2/1 has also not been proved. Nasib Chand stepped into the witness box as DW-2 and stated that he had entered into an agreement to sell with the respondent-defendant and the defendant was to give a sum of ₹80,000/- to him after receiving ₹75,000/- from the plaintiff Harjinder Singh on or before 31.5.1990. Since the sale deed could not be executed as the appellant-plaintiff did not give ₹75,000/-, defendant Major Singh failed to manage amount of ₹80,000/- and, therefore, the sale deed could not be executed from Nasib Chand and the amount of earnest money was forfeited. All these factors weighed in the mind of the Lower Appellate Court to reverse the findings of the trial Court.

For the reasons stated above, I do not differ with the findings rendered by the Lower Appellate Court, which are based on appreciation of oral and documentary evidence. No ground for interference is made. No

substantial question of law arises for determination by this Court.

Resultantly, the appeal is dismissed.

However, Mr.Chadha had stated that in compliance of judgment and decree of trial court the balance sale consideration had been deposited. Since I have upheld the judgment and decree of the Lower Appellate Court, resulting into dismissal of suit, the amount (balance) deposited is liable to be refunded to the appellant-plaintiff.

February 28, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No