IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3239 of 2011(O&M)

Date of decision: 3.12.2018

Jai Deep and others …..Appellants

VERSUS

Kiran Gupta and others .....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Sumeet Mahajan, Senior Advocate with
Mr. Amit Kohar, Advocate for the appellants.

Mr. Karanvir Singh Khehar, Advocate for respondent No.1.

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REKHA MITTAL, J.

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts whereby suit for specific performance of agreements dated 16.05.1996, 17.05.1996 and 23.05.1996 with consequential relief of injunction was decreed by the trial Court to the following effect:-

> "In result, suit of the plaintiff is hereby decreed with costs. Defendants are hereby directed to execute and get registered a sale deed regarding the land in question, as detailed in the headnote of plaint, in favour of plaintiff upon receipt of balance sale consideration, as per terms of agreements dated 16.5.1996 Ex.P2; 17.5.1996 Ex.P4 and 23.5.1996 Ex.P6, within a period of three months from the date of passing of this judgment, failing which plaintiff shall be at liberty to get

it executed and registered through the process of court, as per law."

The appeal preferred by unsuccessful defendants/appellants did not find favour with the Additional District Judge, Yamuna Nagar at Jagadhari and the same was dismissed vide judgment and decree dated 05.05.2011. Indisputably, the appellants/defendants through their General Power of Attorney Sh. Satyendra Kumar entered into agreement of sale of land measuring 4 kanal 13 marlas out of land measuring 75 kanal 14 marlas at the rate of Rs.357/- per square yard and received Rs.50,000/- as earnest money against receipt in presence of witnesses. The sale deed was agreed to be executed and registered on 15.09.1996. On 17.05.1996, Rs.50,000/- more was paid to defendants through Sh. Satyendra Kumar against receipt. There is also no dispute that on 23.05.1996, plaintiff paid Rs.1,00,000/- more to Satyendra Kumar through Pay Order No.1020752 and 1020753 dated 23.05.1996. Another sum of Rs.3,50,000/- was paid to appellants through their Attorney Sh. Satyendra Kumar against receipt made on back of the agreement dated 23.05.1996. On 16.09.1996, a sum of Rs.2,50,000/- more was paid to defendants through their Attorney against receipt and in this way a total sum of Rs.8,00,000/- was paid to defendants as a part of property in question was mortgaged with Haryana Financial Corporation and they were to clear their dues as per terms of agreement dated 16.05.1996. As per case set up by the plaintiff, on 17.09.1996, another sum of Rs.2,00,000/- was paid in the account of firm M/s Garg Fruit Processor, Jagadhri through a voucher and Anuj Kumar – defendant No.5 made a writing that this amount was received from plaintiff against land and as such total amount of Rs.10,00,000/- was paid to defendants/appellants. It is further averred that 15.09.1996 was Sunday and on 16.09.1996 and 17.09.1996, defendants did not come present in office of the Sub Registrar, Jagadhri for execution and registration of sale deed despite receiving payment on 16.09.1996 and 17.09.1996 and as such she got her presence marked. Possession of land in question was delivered to her by defendants on 13.09.1996 and she has constructed a motel over the same. The plaintiff always been ready and willing to perform her part of contract and requested the defendants many a times to execute and get register the sale deed regarding land in question on receipt of balance sale consideration of Rs.6740/- but they failed to do so. Eventually, the plaintiff filed the suit seeking specific performance of the agreement with consequential relief of injunction restraining the defendants from alienating or creating any charge/encumbrance over the suit land on 15.09.1999.

Defendants No.1 to 4, 6 and 7 filed joint written statement and in turn raised preliminary objections inter alia that the suit is not maintainable; plaintiff is estopped from filing the suit by her own act and conduct; she has no locus standi to file the suit and she has not come to the Court with clean hands etc. On merits, they have not specifically denied execution of agreements as well as receipt of Rs.8 lakhs on various dates. However, they denied plea of delivery of possession of suit property to plaintiff with the averments that forcible possession of land in question was taken on the intervening night of 28/29.09.1996 regarding which matter was reported to the police by Satyendra Kumar Garg on 29.09.1996. They have denied receipt of Rs.2,00,000/- on 17.09.1996 either by their Attorney or by way of deposit in the account of M/s Garg Fruit Processor, Jagadhri. Anuj Kumar – defendant No.5 was never authorized to receive any money or issue any receipt on their behalf. It is further averred that on the last day fixed for execution and registration of sale deed Satyendra Kumar Garg, Attorney, remained present in office of the Sub Registrar, Jagadhri but respondent/plaintiff did not turn up. He got his presence marked through an affidavit. On 18.09.1996, their Attorney informed the plaintiff through registered A.D. letter that all her money paid till date was forfeited because of her default. Plaintiff did not reply the said letter, rather filed the suit on the last day of limitation. All other material averments have been denied with a prayer for dismissal of suit and for directing the respondent/plaintiff to vacate and hand over possession of suit property to them.

Defendant No.5 filed his separate written statement in line with the plea in defence raised by other defendants. It is averred that he has no concern with the account of M/s Garg Fruit Processor, Jagadhri. He has neither received a sum of Rs.2,00,000/- on 17.09.1996 from plaintiff nor such amount was deposited in the account of firm. Alleged writing on bank voucher is a forgery committed by plaintiff and her husband in connivance with bank officials.

The respondent/plaintiff filed replication to different set of written statements and re-affirmed her stand taken in the plaint.

The controversy between the parties led to framing of following issues by the trial Court:-

1. Whether plaintiff is entitled to possession of the suit land by way of specific performance of agreements dated 16.5.1996, 17.5.1996 and 23.5.1996, as alleged? OPP

2. Whether plaintiff is entitled to the injunction, as prayed for? OPP

2(a). Whether defendants are entitled to get the actual, physical possession of the suit property, as prayed in counter-claim? OPD

3. Whether present suit if not maintainable? OPD

4. Whether plaintiff is estopped from filing the present suit by her own act and conduct? OPD

5. Whether plaintiff has no locus standi or cause of action to file the present suit? OPD

6. Relief.

The parties were permitted to adduce evidence in support of their respective contentions. The respondent/plaintiff adduced oral and documentary evidence taken note of in para 9 of judgment of trial Court. Similarly, appellants/defendants adduced evidence as detailed in para 10 of the judgment.

Having heard counsel for the parties in the light of materials on record, the trial Court decided issues No.1 and 2 in favour of the respondent/plaintiff. Issues No.2(a), 3 to 5 were decided against the appellants/defendants and eventually the suit was decreed in the terms noticed hereinbefore. The appellants/defendants failed to get any relief from the first Appellate Court as their appeal was dismissed.

Counsel for the appellants has assailed impugned judgments primarily on two counts. The first contention raised by counsel is in regard to factual controversy with regard to payment of Rs.2,00,000/- on 17.09.1996 that was deposited in the account of M/s Garg Fruit Processor, Jagadhri and later credited in the account of Haryana Financial Corporation on the basis of cheque issued by Sh. Anuj Kumar. Counsel has also raised a legal issue with regard to suit being not maintainable by relying upon judgment of Hon'ble the Supreme Court **I.S. Sikandar (dead) by LRs Vs. K. Subramani and others, (2013) 15 SCC 27.**

To bring home his contention with regard to payment of Rs.2,00,000/- on 17.09.1996, it is vehemently argued that as all the earlier payments making a total sum of Rs.8,00,000/- including earnest money of Rs.50,000/- paid on the date of agreement on 16.05.1996 were paid to Sh. Satyendra Kumar Garg, Attorney of the appellants, there was no occasion with the respondent/plaintiff to pay a sum of Rs.2,00,000/- for deposit in the account of M/s Garg Fruit Processor, Jagadhri vide voucher Ex.P13. It is further argued that as a matter of fact, amount of Rs.2,00,000/- was deposited by Anuj Kumar in the account of M/s Garg Fruit Processor, Jagadhri from his own sources but the respondent and her husband in connivance with the officials of the bank made addition in the voucher that the said money pertains to sale of land. Further argued that if alleged payment of Rs.2,00,000/- on 17.09.1996 is taken out of consideration and the respondent/plaintiff has failed to prove her readiness to pay the balance amount of Rs.2,06,740/- on 16.09.1996 on which date Attorney of the appellants appeared in office of the Sub Registrar for executing the sale deed, the Courts have seriously erred rather committed perversity by allowing specific performance of agreement of sale when otherwise the respondent/plaintiff even cannot press for refund of an amount of Rs.8,00,000/-, admittedly paid, being defaulter to perform her part of the agreement.

With regard to the legal submission qua non-maintainability of the suit, it is argued that as the agreement of sale stood cancelled and earnest money was forfeited by way of communication dated 18.09.1996 Ex.D7, admittedly received by the respondent/plaintiff, suit seeking specific performance of agreement of sale without challenging the cancellation of agreement or forfeiture of earnest money cannot be entertained, as has been held by Hon'ble the Supreme Court in **I.S. Sikandar's case** (supra).

Counsel representing the respondent/plaintiff has supported consistent findings recorded by the Courts. It is argued that the Court in second appeal cannot re-appreciate evidence nor can interfere in concurrent factual findings merely because another view is possible in the circumstances. It is further argued that on a detailed and meticulous appreciation of pleadings and evidence on record, the Courts have negated plea of the defendants that amount of Rs.2,00,000/- admittedly deposited in the account of aforesaid firm was available with Anuj Kumar from his own sources or the same was not paid by the respondent/plaintiff or her husband had forged the voucher Ex.P13, a document produced by a witness of the bank examined by the respondent/plaintiff. It is further argued that the judgment in **I.S. Sikandar's case** (supra) has got no bearing on facts of the case at hand wherein no such objection was raised by the appellants either in written statement or during the course of hearing before the Courts that suit for specific performance is not maintainable without seeking declaration against cancellation of agreement of sale.

I have heard counsel for the parties, perused the paper-book and records.

Before adverting to the submissions made by counsel for the parties, it is pertinent to recapitulate that consistent factual findings recorded by the Courts are not amenable to intervention by re-appreciation of evidence and on the premise that a view different from what has been held by the Courts is possible. Equally settled is that the second appeal can be admitted for hearing if it raises a question of law for determination.

Counsel for the appellants has primarily raised two grounds, one factual and the other legal to assail the judgments. Before dealing with the factual aspect, I would like to deal with the legal aspect of disentitlement of the respondent to seek specific performance without seeking declaration against wrong cancellation of agreement of sale. This contention raised by counsel for the appellants is patently misconceived and merits outright rejection. Perusal of the document Ex.D7 dated 18.09.1996 makes it evident that no such fact has been recorded therein that the proposed vendors have cancelled the agreement of sale on account of alleged default of the buyer. In para 2 (un-numbered) of Ex.D7, there is only reference to forfeiture of money that stood paid till date as the plaintiff is stated to have deliberately avoided to perform her duties completely as enshrined in the agreement by the stipulated date i.e. 15.09.1996 or even 16.09.1996 as 15.09.1996 being Sunday. In **I.S. Sikandar's case** (supra), while answering point No.1 (Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?), the Court has held in paras 37 and 38, quoted thus:-

"37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5."

As in the case at hand, there is no such notice issued by the appellants terminating the agreement of sale or rescinding the contract, there is no occasion with the respondent/plaintiff to seek declaratory relief to declare the cancellation of agreement of sale as bad in law.

This brings the Court to the factual controversy with regard to payment of Rs.2,00,000/- on 17.09.1996. Undisputedly, at the time of execution of agreement to sell dated 16.05.1996 part of land in question was mortgaged with Haryana Financial Corporation. One of the recitals in the agreement is that the same shall be got redeemed out of sale consideration, contained in para 4 of the agreement to sell. It has been proved on record that an amount of Rs.2,00,000/- in cash was deposited on 17.09.1996 in the account of M/s Garg Fruit Processor, Jagadhri in Central

Bank of India, Jagadhri. On 17.09.1996 itself, Anuj Kumar – defendant No.5 issued a cheque of Rs.2,00,000/- from the said account of the firm in favour of Haryana Financial Corporation, Yamuna Nagar towards clearance of loan obtained against the land in question. The trial Court in para 43 of the judgment has noticed that Anuj Kumar DW-17 had stated in cross examination that he deposited the said amount in the account of firm M/s Garg Fruit Processor, Jagadhri after collecting it from the market and it was not taken from any individual. Satyendra Kumar Garg, his father DW-16 and General Attorney of defendants had stated in cross examination that Anuj had taken the money from market and Rs.1,50,000/- was paid by him. Further stated that he cannot tell the name of persons in the market from whom money was taken. He never asked Anuj from where he had taken the money deposited in the account of firm. Taking into consideration the facts elicited in cross examination of Anuj Kumar and Satyendra Kumar Garg, the Court refused to accept plea of the defendants that amount of Rs.2,00,000/- deposited in the account of firm was the money collected from source other than alleged payment made by the respondent/plaintiff. The Court also refused to believe contention of the defendants that writing on voucher Ex.P13 that money was received from Kiran Gupta on account of land is the result of forgery committed in connivance with the officials of the Bank. Counsel for the appellants has failed to advance any meaningful and convincing argument to assail correctness of factual findings in this regard by referring to materials on record much less to convince this Court that the factual findings are the result of misreading of evidence or failure to take into consideration evidence which has material bearing on adjudication of this aspect of the matter. I would hasten to add that perusal of statement of account of the firm M/s Garg Fruit Processor, Jagadhri would reveal that besides credit of Rs.2,00,000/- on 17.09.1996 which was credited to the account of Haryana Financial Corporation by way of clearance of cheque dated 17.09.1996 issued by Sh. Anuj Kumar, the credit entries in that account are of small amounts less than Rs.35,000/-. To be precise, there are only four other credit entries of Rs.25,000/- on 08.01.1996, Rs.8000/- on 18.05.1996, Rs.34,000/- on 20.05.1996 and Rs.4,000/- on 01.06.1996. This apart, failure of Anuj Kumar to lead convincing evidence qua source of Rs.2,00,000/- for deposit in the account of firm and contradiction in the stand of Anuj Kumar and Satyendra Kumar qua source of that amount of Rs.2,00,000/- has rightly been noticed by the Courts while deciding on the basis of balance of probabilities that amount of Rs.2,00,000/- deposited in the account of firm was actually paid by the respondent/plaintiff and for that reason an endorsement was made on the voucher Ex.P13 that the said payment has been made by Kiran Gupta in respect of land.

Before parting with this order, it is pertinent to mention that conduct of the appellants/defendants is not fair and clean. They raised an issue that the respondent has taken forcible possession of land on 28/29.9.1996. They initiated criminal proceedings in this regard but counsel for the appellants has failed to point out if any criminal action was taken against the respondent or her family members or others in view of the allegations raised by the appellants. On the contrary, it has come on record that the police has cancelled the case. The story propounded by the appellants that payment of Rs.2,00,000/- on 17.09.1996 was not made by the respondent or this money was deposited by Anuj Kumar in the account of firm from his own sources has been found to be false and defendants have been discredited in this regard. This apart, the respondent/plaintiff has proved two affidavits dated 16.09.1996 and 17.09.1996 with regard to her presence in office of the Sub Registrar for getting the sale deed executed and registered. Affidavit dated 17.09.1996 Ex.P12 in para 3 records the factum of deposit of Rs.2,00,000/- in the bank account. The said affidavit has been attested by Executive Magistrate, Jagadhri on identification of one Sh. Som Parkash. Counsel for the appellant has failed to make any submissions to challenge correctness of evidentiary value of documents Ex.P11 and P12 much less that the same has been prepared later by ante-dating. It is difficult to accept that if the amount of Rs.2,00,000/- had not been paid by Kiran Gupta and the same was deposited in the bank account, where was the occasion for Kiran Gupta to know that a sum of Rs.2,00,000/- has been deposited in the bank account on 17.09.1996. This averment in para 3 of affidavit Ex.P12 goes a long way to substantiate plea of the respondent that payment of Rs.2,00,000/- which was deposited in the bank account was actually made by Kiran Gupta towards price of the land and for that reason Anuj Kumar, on the very same day, issued a cheque of Rs.2,00,000/- from the account of firm in favour of Haryana Financial Corporation in order to clear the outstanding liability as agreed upon between the parties in view of the terms and conditions incorporated in the agreement. The appellants/defendants tried to wriggle out of their obligation by hook and crook but remained unsuccessful. In the given scenario, the appellants are not entitle to any relief on equitable considerations.

In view of what has been discussed hereinabove, finding no merit, the appeal fails and is accordingly dismissed with costs. Miscellaneous applications, if any, filed by the appellants shall be deemed to be disposed of.

DECEMBER 3rd, 2018 **(REKHA MITTAL)**
'D. Gulati' **JUDGE**

Whether speaking/reasoned : yes/no
Whether reportable : yes/no