

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 4247 of 2011(O&M)
Date of Decision: July 9th, 2018

Sameer and another

---Appellants

vs.

Shamvir

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Amit Jain, Advocate
for the appellants
Mr. Anupam Gupta, Senior Advocate with
Ms. Harmanjeet Kaur, Advocate
for the respondent

Rekha Mittal, J.

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit for possession of land measuring 18 kanal out of land fully detailed in head note of the plaint by specific performance of the agreement to sell dated 7.10.1998 was decreed by the trial court vide judgment and decree dated 18.2.2009 and the appeal preferred by unsuccessful appellants/defendants did not find favour with the Additional District Judge (Ad hoc) Fast Track Court, Hoshiarpur (hereinafter to be referred to as “the Court in Appeal”).

The trial court decreed the suit to the effect that plaintiff is entitled to performance of agreement to sell dated 7.10.1998 (Ex. P1)

regarding land measuring 18 kanal comprised in khewat No. 86 to 91, described in head note of the plaint, executed by defendants in his favour. The defendants are directed to execute the sale deed in favour of plaintiff within a period of three months on payment of balance sale consideration failing which the plaintiff shall be entitled to get the sale deed executed through agency of the Court. Any subsequent sale of suit land during pendency of suit would be hit by doctrine of *lis pendence*. Defendants are further restrained from alienating the suit land to any other person except the plaintiff.

The facts, in brief, are that the appellants/defendants represented to the respondent-plaintiff that by virtue of a family settlement, they are owners of a specific part of land abutting Hoshiarpur-Chandigarh road. The respondent entered into an agreement to sell dated 7.10.1998 whereby the appellants agreed to sell the suit land for a sale consideration of Rs. 5,00,000/- and received an amount of Rs. 25,000/- towards earnest money. The remaining sale consideration was agreed to be paid at the time of execution of sale deed on or before 20.2.1999. On the day of execution of the sale deed it was found that no oral family settlement was reflected in the revenue record and defendants could not sell any specific piece of land. The defendants assured to get the family settlement implemented in the record and then to execute the sale deed in favour of the plaintiff but they failed to do so. The plaintiff served legal notice dated 22.12.2001 calling upon the appellants to get the mutation sanctioned and execute sale deed in his favour. The plaintiff always remained ready and willing to perform his part of the contract but the appellants failed to execute the sale deed. The

plaintiff prayed for a decree of specific performance of the agreement to sell but in the alternative, sought a decree for recovery of Rs. 5,00,000/- towards refund of earnest money and consolidated damages.

The appellants-defendants filed the written statement raising preliminary objections inter alia that the plaintiff has not come to the court with clean hands; suit is not properly valued for the purpose of court fee and jurisdiction. On merits, it was admitted that defendants are owners in possession of specific part of land abutting Hoshiarpur-Chandigarh road but it was denied that they agreed to sell the land to plaintiff for a sale consideration of Rs. 5,00,000/-. It was also denied that Rs. 25,000/- was received towards earnest money with the plea that the plaintiff has produced false and fabricated document. It is further denied that appellants assured to get the family settlement implemented in the revenue record and execute the sale deed in favour of the respondent-plaintiff. No notice was served upon the appellants. All other material averments of the plaint were denied with a prayer for dismissal of the suit.

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

1. Whether the defendant has executed an agreement to sell dated 7.10.1998 in favour of the plaintiff?OPP
2. If issue No. 1 is proved whether the plaintiff is entitled to possession by way of specific performance of agreement dated 7.10.1998? OPP
3. Whether the suit of the plaintiff is not maintainable? OPD
4. Whether the suit of the plaintiff is not properly valued for the

purpose of court fee and jurisdiction? OPD

5. Relief.

To prove his case, the plaintiff examined Surinder Kumar PW1 one of the attesting witnesses of the agreement to sell and Munish Kumar PW3 scribe of the agreement to sell and himself appeared in the witness box. To rebut evidence of the plaintiff, the appellants examined Vinod Kumar attorney of defendants as DW1. In additional evidence, appellants tendered into evidence jamabandi for the year 2006-07. The plaintiff examined Krishan Lal Patwari PW4 and Shaminder Singh PW5 in additional evidence.

Having heard counsel for the parties in the light of materials on record, the trial court answered issues No. 1 and 2 , taken up jointly for discussion and decision in favour of the respondent/plaintiff whereas issues No. 3 and 4 were determined against the appellants. Eventually, suit of the respondent-plaintiff was decreed in the terms noticed hereinbefore. The judgment and decree passed by the trial court came to be affirmed in appeal without any variance.

Counsel for the appellants has assailed the judgments and decrees passed by the courts by challenging findings qua agreement to sell propounded by the respondent as well as on the question of the respondent having failed to prove that he always remained ready and willing to perform his part of the agreement thus, entitled to discretionary relief of specific performance of the agreement. To bring home his contention qua failure of the respondent to prove the agreement in question, it is argued that Surinder Kumar PW1 is working as a Stamp Vendor in Tehsil complex but he did not

advise the parties to prepare the agreement by affixing stamps of the requisite value and for that reason the document was impounded being unstamped and the respondent-plaintiff was directed to deposit requisite stamp duty alongwith penalty to the tune of ten times of the stamp duty. The second submission made by counsel is that the agreement was not scribed by a licensed or regular Deed Writer and the same was not entered in the register of Deed Writer though Munish Kumar PW3 has deposed that he was working as junior associate of Sh. Raj Kumar, the regular Deed Writer.

Counsel would argue that even if the proposed vendor has denied execution of the agreement to sell, the vendee cannot escape his liability to prove essential ingredients of Section 16(c) of the Specific Relief Act. For this purpose, reference has been made to judgment of Hon'ble the Supreme Court **Dheeraj Developers Private Limited vs. Dr. Om Parkash Gupta and others 2016(2) RCR (Civil)461** wherein Hon'ble the Supreme Court has held that in a suit for specific performance there are several other aspects of the matter including the aspect of readiness and willingness which require consideration by the High Court and accordingly, the judgment passed by the High Court was set aside and the matter has been remitted for decision of the appeal afresh. It is further argued that as per plea of the respondent-plaintiff, the sale deed was agreed to be executed on 20.2.1999. Admittedly, on the stipulated date, the respondent did not visit the office of Sub Registrar concerned for performing his part of the agreement. Subsequent thereto, he remained silent till he purportedly issued legal notice dated 22.12.2001 though the same is not proved to be served

upon the appellants. The suit for specific performance was filed on 20.2.2002 i.e. on the last date of limitation on the expiry of period of three years from the target date. It is vehemently argued that aforesaid conduct of the respondent creates a serious doubt in his plea of readiness and willingness but the courts have failed to appreciate these facts in right perspective and committed a gross error by misusing their discretion in favour of the respondent by allowing specific performance of the agreement to sell. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **K.S.Vidyanadam vs. Vairavan 1997(2) RCR (Civil) 312**. Reference has been made to judgments of this Court **Harbhajan Singh vs. Sarup Singh 2016(5) RCR (Civil)172** and **Gurbhej Singh and others vs. Gurminder Kaur and others RSA No. 1450 of 2014** decided on 31.5.2016.

Counsel representing the respondent-plaintiff has supported concurrent findings recorded by the courts whereby plea of the respondent for specific performance of agreement to sell has been rightly accepted. It is argued that in the regular second appeal it is not open for the court to re-appreciate the evidence to record a finding different from what has been held by the courts below. It is further argued that counsel for the appellants has altogether failed to advance any meaningful much less convincing arguments that concurrent findings suffer from perversity or a question of law emerges in the present case that requires adjudication in regular second appeal.

Counsel would argue that the respondent examined himself, one of the attesting witnesses of the agreement to sell as well as its scribe. Nothing material and tangible has been brought forth in their cross

examination to create dent in evidential value of their statements. On the contrary, there is no rebuttal to evidence adduced by the respondent as the alleged attorney of the appellants did not have any personal knowledge of the terms and conditions settled between the parties as he was neither the attorney at the relevant time nor was otherwise present at the time of execution of agreement on the basis of terms and conditions settled between the parties. Vinod Kumar, attorney is a property dealer and he has admitted in his cross examination that he was given the power of attorney in order to execute the sale deed in favour of a third party. According to counsel, as the appellants or either of them failed to cause appearance in the witness box and their attorney did not have personal knowledge of the facts relied upon by the respondent, as a matter of fact, the appellants have not adduced even an iota of evidence to counter case of the respondent either with regard to execution of agreement to sell or the respondent having remained always ready and willing to perform his part of the agreement. In addition, it is contended that as per the agreement, the appellants agreed to sell 18 kanals of land out of land comprised in various khasra numbers recorded in the agreement to sell but boundaries of 18 kanals of land are specifically recorded in the agreement of sale. The appellants by way of written statement have admitted that they are owners in possession of specific part of land abutting Hoshiarpur-Chandigarh road. It is argued that though it has not been specifically recorded in the agreement of sale that the appellants would get mutation sanctioned on the basis of family settlement but they certainly assured the respondent to get the sale deed executed after getting the mutation sanctioned when the respondent contacted them at the time when the sale deed was to be executed in February 1999. The factum of

assurance by the appellants is also duly recorded in the notice issued in December 2001, which was received back. The last submission made by counsel is that the respondent candidly and categorically reiterated his plea by way of his evidence that he always remained ready and willing to perform his part of the agreement but in his cross examination, there is no challenge to his statement to that effect which amounts to admission on the part of appellants-defendants. It is further argued that since the appellants have denied execution of agreement to sell they possibly cannot raise a plea that it is the respondent- plaintiff who is to be blamed for non-execution of sale deed on the stipulated date or respondent was not ready and willing to perform his part of the agreement.

Counsel for the appellants, in reply, has submitted that in absence of any recital in the agreement creating an obligation upon the appellants to get the mutation sanctioned, the respondent cannot derive any advantage thereof to justify his failure to file the suit till the last date of prescribed period of limitation.

I have heard counsel for the parties, perused the paper book and copies of statements of the witnesses made available during course of hearing.

Before advertng to the submissions made by counsel for the parties, it is pertinent to note that in the regular second appeal it is not open for the court to re-appreciate the evidence or set aside the concurrent findings merely on the ground that a different view is possible.

The two submissions made by counsel for the appellants to assail findings of the courts on issue No. 1 qua agreement to sell dated 7.10.1998 san merit and liable to be rejected. Surinder Kumar PW1

appeared in the witness box on 28.4.2005. In the opening line of his examination-in-chief, he has stated that he is working as Stamp Vendor in Tehsil complex since four years meaning thereby that he started working as Stamp Vendor sometime in the year 2001. As the agreement to sell was executed on 7.10.1998 and Surinder Kumar was not working as a Stamp Vendor at that time, failure of Surinder Kumar to advise the parties to execute the agreement to sell on stamp paper of requisite value is of no consequence to impeach his credibility or create a dent in his testimony.

The witnesses of the respondent have consistently stated that agreement was executed at the shop of respondent Shamvir which was scribed by Munish Kumar who was brought by Vishal Son of Shamvir. Munish Kumar appeared in the witness box and stated that at the relevant time he was working as an Assistant with Raj Kumar, Deed Writer, Hoshiarpur. As Munish Kumar was not a licensed Deed Writer but working as an Assistant with a registered Deed Writer, therefore, he was not maintaining any register to make entry qua the agreement of sale. The mere fact that the agreement was not scribed by a licensed Deed Writer or it was not entered in a register cannot be taken adversely as the appellants failed to adduce any evidence worthy of consideration to counter evidence led by the respondent-plaintiff. Since the appellants did not appear in the witness box to say on oath that the agreement does not bear their signatures much less to substantiate their plea that the agreement is a forged or fabricated document, aforesaid contentions raised by counsel for the appellants are not at all sufficient to interfere in the consistent findings recorded in favour of the respondent-plaintiff.

Indisputably, the appellants have denied execution of the

agreement, therefore they did not raise a plea that sale deed could not be executed because of any lapse on the part of respondent. The respondent examined himself and categorically deposed that he always remained ready and willing to perform his part of the agreement. He was subject to cross examination at length, however, his testimony with regard to his readiness and willingness to perform his part of the agreement has not been touched during the course of cross examination. As per the settled position in law, if a witness is not cross examined on a particular aspect, it amounts to admission by the contesting party.

As per the agreement, the appellants agreed to sell 18 kanal of land with specific boundaries out of land comprising various khasra numbers, detailed in the agreement Ex. P1. The appellants, in para 1 of the written statement on merits have averred that it is not denied that defendants are owners in possession of specific part of land abutting Hoshiarpur-Chandigarh road. The factum of appellants having agreed to sell 18 kanals of land with specific boundaries coupled with their admission that they are owners in possession of specific part of land abutting Hoshiarpur-Chandigarh road, it certainly gives an inkling that there was an understanding between the parties that the appellants would get mutation sanctioned qua the land agreed to be sold and thereafter execute the sale deed in faovur of the respondent-plaintiff though the said fact has not been clearly recorded in the agreement to sell.

The respondent-plaintiff, in para 2 of the plaint has raised a categoric plea of his being always ready and willing to perform his part of the agreement by contending that he was in possession of sufficient amount to pay balance sale consideration and bear necessary expenses. In addition,

it has been averred that on the day fixed for execution of the sale deed, it was found that no oral family settlement is reflected in the revenue record and the defendants could not sell any specific piece of land to the plaintiff. Further averred that the defendants assured to get the family settlement implemented in the record and then to execute the sale deed in favour of the plaintiff. The respondents, in his testimony on oath has reiterated the facts averred in para 2 of the plaint. As has been noticed hereinbefore but for the sake of repetition that the appellants did not appear in the witness box to counter the allegations raised in para 2 of the plaint regarding assurance to get the mutation sanctioned qua the land agreed to be sold by specific boundaries. In the given scenario, no fault can be found with the respondent if he waited and gave sufficient time to the appellants to get the mutation sanctioned in order to enable them to execute sale deed of 18 kanals of land abutting Hoshiarpur-Chandigarh road which was agreed to be sold by way of specific boundaries. In this view of the matter, I find myself unable to accept contentions of the appellants that failure of the respondent to file the suit within reasonable time after the target date either negates his plea qua readiness and willingness to perform his part of the agreement or the discretion exercised by the courts allowing specific performance suffers from an error much less perverse. Taking a cumulative view of the facts and circumstances discussed hereinbefore, the appellants cannot derive advantage to their contention from the cited judgments, rendered in the light of peculiar facts and circumstances of those cases.

In **K.S.Vidyanadam's case (supra)** vendee woke up after two years to claim specific performance attracted by increase of prices of the property in the area. It was h

eld to be a case of total inaction for two and a half years, therefore, inequitable to grant relief of specific performance. In the instant case, at the time of notice of motion issued on 9.5.2014, a plea was raised that though the time is not essence of the contract but keeping in view the rise in price of the real estate the suit should have been filed earlier by the plaintiff otherwise he is only entitled to refund of the money. Counsel for the appellants has fairly conceded that there is no evidence on record to prove that there was rise in price of the real estate during the intervening period from February 1999 till February 2002. On the contrary, it has been proved on record that suit land was sold vide sale deed executed in the year 2006 (during pendency of the suit before the trial court) @ Rs. 5,00,000/-, the price at which it was agreed to be sold vide agreement dated 7.10.1998 (Ex. P1), sufficient to show that there was no increase in price of real estate in the area concerned. In this view of the matter, the appellants cannot seek any aid from the judgment in **K.S.Vidyanadam's Case (supra)**.

For the foregoing reasons, the appeal fails and is accordingly dismissed with costs. As a natural corollary, judgments and decrees passed by the Courts are affirmed.

(Rekha Mittal)
Judge

July 9th, 2018
paramjit

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