

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.985 of 2011(O&M)
Date of Decision-21.12.2018

Ramesh Chander Sharma ... Appellant
Versus

Poonam Goyal and another ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. J.K. Sibal, Sr. Advocate with
Mr. Sanjay Vij, Advocate
for the appellant.

Mr. Yogender Nath Bhardwaj, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Plaintiff/appellant is in regular second appeal against the concurrent judgments and decrees passed by the Courts below.

[2]. Brief facts of the case are that plaintiff/appellant filed a suit for specific performance of the agreement for sale with consequential relief of permanent injunction and possession. Defendants entered into agreement to sell on 26.02.2005 with the plaintiff/appellant in respect of land measuring 2500 sq. yards plotted area out of land owned and possessed by the defendants for a total sale consideration of Rs.5750/- per sq. yard which ultimately came out to be Rs.1,43,75,000/-. An earnest money to the tune of Rs.15 lacs was paid to the defendants through three cheques. Balance sale consideration was to be paid against the

allotment of the disputed area. The factum of payment of earnest money to the tune of Rs.15 lacs to the defendants was also recited in the agreement to sell dated 26.02.2005.

[3]. Before entering into agreement to sell dated 26.02.2005, defendants had entered into a collaboration agreement on 17.06.2004 with M/s Omaxe Housing and Developers Limited for the development and construction of residential complex/colony over the land measuring 61 kanals 3 marlas after obtaining licence from the Government of Haryana. As per the aforesaid collaboration agreement dated 17.06.2004, defendants were entitled to the total plotted area measuring 9154.50 sq. yards in the complex/colony. The sale deed was to be executed and registered by the defendants within four months after launching of the colony after taking requisite permission/licence to set up a residential plotted colony from the Government of Haryana. Plaintiff further pleaded that Government of Haryana granted the licence to the defendants for the aforesaid performance vide letter dated 29.12.2005 and the defendants with the help of their collaborator namely M/s Omaxe Housing and Developers Limited launched a residential colony after obtaining requisite licence in the month of January, 2006. Plaintiff alleged that he was always ready and willing to perform his part of obligation, but the defendants got issued a letter dated 03.03.2006 from their Advocate on the fabricated assertion that the agreement stood extinguished as the Government of Haryana

had not allotted the plot. Defendants wrongly incorporated Clause-2 of the agreement and got issued letter dated 03.03.2006 through their Advocate by saying that agreement to sell dated 26.02.2005 stood extinguished.

[4]. Defendants contested the suit by alleging that the suit was not maintainable and the plaintiff had no cause of action to file the same. The plotted area was to be sold to the plaintiff by the defendants only after getting an approved piece of land from the Government through its builder M/s Omaxe Housing and Developers Limited. Since licence was not granted, therefore, the claim of the plaintiff had become infructuous. Defendants also asserted that the suit was bad for mis-joinder of necessary parties as the Government of Haryana and M/s Omaxe Housing and Developers Limited were not impleaded as party defendants in the suit. Defendants were entitled to the plotted area measuring 9172.50 sq. yards in the complex from their builder M/s Omaxe Housing and Developers Limited and only after the allotment of approved area to the defendants, the claim of the plaintiff as regards the plotted area measuring 2500 sq. yards could have been answered. Since requisite licence was not granted to the builder, therefore, claim of the plaintiff was stated to be meaningless. Defendants further stated that the plaintiff had misinterpreted the terms and conditions of the agreement to sell particularly condition No.2, wherein it was specifically recited that if the colony was not launched within four months, then the

earnest money of Rs.15 lacs would be refunded by the defendants to the plaintiff without interest within 15 days, failing which the interest would be charged @ 12 % per annum on the aforesaid earnest money till its realization. There was no recital to the effect that the sale deed would be executed and registered by the defendants within four months after launching of the colony after getting the requisite licence from the Government. According to the defendants, period of four months was to be computed from the date of agreement to sell dated 26.02.2005 and not after launching of the colony on obtaining requisite licence from the Government. The licence was still awaited by the builder from the Government and therefore, there was no cause of action available to the plaintiff. The issuance of legal notice dated 03.03.2006 was claimed to be legal. The demand drafts/pay orders were kept by him and he remained silent for a substantial period and that amounted to acceptance of the transaction as per recital in the agreement to sell.

[5]. Both the parties went to trial on the following issues:-

“1. Whether the plaintiff is entitled to possession of the suit property by way of specific performance of the agreement to sell dated 26.02.2005? OPP

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

3. Whether the suit of plaintiff is not maintainable to the present form nor the plaintiff has any locus standi to file the same? OPD

4. *Relief.*”

[6]. Plaintiff examined himself as PW-1, Narender Solanki , District Town Planner, Sonipat as PW-2 and after tendering agreement to sell Ex.P1, notice Ex.P2, collaboration agreement Ex.P3, copies of *jamabandi* for the year 1999-2000 Ex.P4 and Ex.P5, licence Ex.P6, letter dated 31.12.2005 Ex.P7 and site plan Ex.P8, closed the evidence.

[7]. On the other hand, defendants examined Rajesh as DW 1 and tendered copy of letter as mark D1 and photocopy of licence mark D2.

[8]. Trial Court discussed issues No.1 and 2 together and decided both the issues partly against the plaintiff to the extent of disentitling him for the relief of specific performance, however, alternative relief of recovery of the earnest money as per recital in the agreement to sell was granted. Issue No.3 was decided in favour of the defendants, thereby holding that the plaintiff had no *locus standi* to file suit for specific performance and the suit was not maintainable. As a consequence of decision under the aforesaid issues, the suit was partly decreed to the extent of entitling the plaintiff to recover the amount of Rs.15 lacs with interest @ 12% per annum from 26.02.2005 upto 03.03.2006 and interest @ 6% per annum from the date of institution of the suit till final realization of the amount. Parties were left to bear their own costs.

[9]. Plaintiff went in first appeal before the Lower Appellate Court against the judgment and decree dated 18.02.2010 passed by the trial Court. Lower Appellate Court also affirmed the judgment and decree of the trial Court dated 18.02.2010 by dismissing the appeal vide judgment and decree dated 30.10.2010. That is how, the present regular second appeal came to be filed.

[10]. This Court while dealing with the stay matter on 19.09.2012, admitted the appeal on the following substantial questions of law:-

“(1) Whether the Courts below have misread and misconstrued the evidence on record and arrived at a perverse finding.

(2) Whether the Courts below are right in rejecting the plea for specific performance of the agreement for sale without recording a finding as to the readiness and willingness of the parties to perform their part of the contract.

(3) Whether the suit disclosing cause of action could be dismissed as pre-mature even if the suit was filed before ever a right accrued to the plaintiff.

(4) Whether the respondents could terminate the agreement for sale unilaterally when there was no default on the part of the appellant.”

[11]. I have heard learned counsel for the parties.

[12]. Learned Senior Counsel for the appellant vehemently contended that the suit was not necessarily to be dismissed

solely because it was pre-mature on the date of institution of the suit, if by the time the written statement came to be filed or by the time the Court was called upon to pass a decree, the plaintiff was found entitled to the relief as claimed. The dismissal of the suit on the ground of its being pre-mature would have been a travesty of justice particularly when the plaintiff was held entitled to a decree otherwise. Once the execution of agreement to sell was proved and admitted by the defendants, specific performance of the contract should have been granted notwithstanding any default in carrying out the contract within the specified period or in the absence of any hardship being projected by the plaintiff in terms of Section 20 of the Specific Relief Act. It was wholly inequitable not to grant the relief when the execution of the agreement to sell was duly proved and admitted between the parties and the time was not the essence of the contract. The contingencies recorded in the agreement to sell by way of some default clause would not be sufficient to deny the fruits of the transaction. Even if, clause was present in the agreement to sell, it would not bar the suit on the basis of that clause alone.

[13]. Learned Senior Counsel relied upon **Vithalbhai Pvt. Ltd. Vs. Union Bank of India, 2005(2) RCR (Civil) 124, Gomathinayagam Pillai and others Vs. Palaniswami Nadar, 1967 AIR (SC) 868, M.L. Devender Singh and others Vs. Syed Khaja, 1973 AIR (SC) 2457, T.G. Ashok Kumar Vs. Govindammal and another, 2010(14) SCC 370, Ram Baran**

Prasad Vs. Ram Mohit Hazara and others, 1967 AIR (SC) 744, Shah, Jitendra Nanalal Ahmedabad Vs. Patel Lallubhai Ishverbhai, Ahmedabad and others, 1984 AIR (Gujarat) 145 and Sau. Shatabai Vs. Manakchand Ratanchand Raka, 1988 AIR (Bombay) 82 and contended that the Court could have passed conditional decree for specific performance subject to exemption being granted by the authority or contingent factor was complied with at a subsequent stage. The Court could have taken judicial notice of subsequent event, even if, there was admission on behalf of the appellant that the licence was granted on 13.04.2007 for 2 years which expired on 12.04.2009 and letter dated 29.12.2005 was only a letter of intent issued by the Government of Haryana and not the licence.

[14]. Learned Senior Counsel further relied upon terms and conditions laid down in the agreement to sell. The agreement was executed on 26.02.2005 and as per the condition, the same at the most could have terminated after 26.06.2005. As per terms and conditions of the collaboration agreement dated 17.06.2004, the first party i.e. the defendants were required to get approved the piece of land measuring 2500 sq. yards from the Government through their builder. It was the onerous duty of the defendants to do the needful. The first party thereafter entered into agreement to sell of above mentioned approved piece of land measuring 2500 sq. yards which was to be allotted to them from the Government of Haryana through builder. The balance amount

was to be received against allotment of the above area plot and handed over with its ownership rights to the second party. The first party assured the second party i.e. the appellant that if the colony is not be launched within four months, then the said earnest money of Rs.15 lacs will be refunded by the defendants/respondents to the plaintiff/appellant without interest within 15 days, failing which the interest will be charged @ 12% per annum on the said earnest money. According to the appellant, the said clause was a dominant clause in the agreement and it was decided that if the first party makes some infringement in the terms and conditions of the agreement, then the second party would be fully at liberty to get the transaction completed through the process of the Court at the costs and expenses of the first party. Learned Senior Counsel submitted that letter dated 03.03.2006 got issued by the defendants through their Advocate was illegal.

[15]. On the other hand, learned counsel for the respondents very vehemently submitted that M/s Omaxe Housing and Developers Limited was to arrange contiguous land mass to be qualified for developing a colony. Thereafter, the developer was to submit an application supported by relevant documents to the Government of Haryana for obtaining approval. The grant of licence was subject to approval done by the Town and Country Planning Department of Haryana Government after finding the application to be completed in all aspects and fulfilling the

regulations framed by the Government. Thereafter, licence was to be granted to M/s Omaxe Housing and Developers Limited. The letter of intent was a first step for the licence which was to be granted after the conditions specified in LOI were completed by the developer. In many cases, the developers have not been able to fulfill the terms of LOI and therefore, several projects often get dropped and it was not certain as to how much time a builder might take in fulfilling the terms of the LOI. LOI was granted by the Government on 29.12.2005 and the same contained 12 major issues to be fulfilled by the developers. LOI was not the licence as claimed by the plaintiff, however, the plaintiff very candidly admitted at a later stage that the licence was granted only on 13.04.2007. Respondents being landowners did not have any control over the Government as it was the M/s Omaxe Housing and Developers Limited only who was entitled to submit the application for obtaining the licence and follow up till the same was granted. M/s Omaxe Housing and Developers Limited was to take all the steps without intervention of the respondents.

[16]. Appellant was a seasoned and experienced trader in Real Estate and on seeing the opportunity and potentiality to make profit out of the transaction entered into by the respondents with M/s Omaxe Housing and Developers Limited, entered into agreement to sell dated 26.02.2005 with the respondents on contingency basis that the plotted area might be allotted to the respondents. Appellant with his due diligence and estimation,

acted under a calculated notion and on that basis, he decided to wait for four months only for launching of colony and in Clause-2 of the agreement to sell, it was recited that if the colony was not launched within four months, the earnest money of Rs.15 lacs would be refunded by the defendants to the plaintiff without interest within 15 days and in the event of failure, with interest @ 12% per annum till final realization of the amount. The said agreement was valid for four months only and the same expired on 25.06.2005. Fifteen days after 25.06.2005, the plaintiff/appellant had nothing to loose as he was entitled to interest @ 12% per annum on the earnest amount of Rs.15 lacs. Appellant did not waive the amount accrued to him as interest after 25.06.2005. Respondents had nothing to gain by keeping Rs.15 lacs with them and therefore, through their Advocate, they got issued letter dated 03.03.2006 terminating the agreement and returned the earnest money with interest @ 12% per annum as envisaged under Cause No.2 of the agreement to sell dated 26.02.2005.

[17]. Learned counsel for the respondents referred to **M/s Citadel Fine Pharmaceuticals Vs. M/s Ramaniyam Real Estates P. Ltd., 2011(4) RCR (Civil) 894** and contended that specific performance of contract is a discretionary relief. Time was not the essence of the contract. When the agreement was contingent upon some requirements, then the vendor was well within his right to terminate the contract for non-performance of

part of the contract. When the consequences of non-completion of terms and conditions were recited in the agreement to sell and were clearly spelt out and in the event of non-fulfillment of those conditions, discretionary relief of specific performance could not be granted and the cancellation of agreement was just and appropriate step by the defendants and the plaintiff was not entitled to specific performance, rather alternative relief granted by the Courts below was just and appropriate in view of facts and circumstances of the present case.

[18]. I have considered the submissions made by learned counsel for the parties.

[19]. It is a settled principle of law that in case of specific performance of a contract, discretion of the Court is not to be exercised merely because it is lawful to do so. The Court is not obliged/obligated and bound to grant such relief, but the discretion has to be exercised on sound and reasonable grounds guided by judicial principles which are capable of being corrected by Court of appeal. It is true that once execution of lawful agreement is proved and judicial conscience of the Court is satisfied, then the equity demands that the agreement should be enforced, rather than to grant alternative relief of damages to the plaintiff. It needs to be reiterated that equity must give relief where equity demands. "*equitas nuquam liti ancillatur ubi remedium protest clare*". An erring person who violates the terms

and conditions of the agreement cannot be permitted to seek advantage over the other party in equity. In the aforesaid context, ratio laid down in **Atma Ram Mittal Vs. Ishwar Singh Punia, 1988(2) RCR (Rent) 423** and **M.L. Devender Singh and others Vs. Syed Khaja's case (supra)** can be relied. Jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds. Jurisdiction cannot be curtailed by mere fixing a sum even as liquidated damages.

[20]. The provision in terms of Section 20 of the Specific Relief Act is an exception to the rule of grant of relief of specific performance, but the same in itself cannot be construed as an absolute rule. The Courts are obligated to exercise this equitable jurisdiction in consonance with the settled principle of law and the discretion has to be exercised in a judicious manner. Even the alternative prayer made by the plaintiff in a suit cannot be construed to be a waiver or abandonment of the main claim. The object of the provisions is to avoid resultant undue hardship to one party while avoiding undue gain to other.

[21]. The aforesaid principles if tested in the light of facts on record, the answer would be in negative. The performance of the agreement was contingent upon availability of plotted area and launching of colony that was so recorded in the bilateral agreement and condition of four months was recited therein. Admittedly, colony was not launched within four months of the

agreement to sell dated 26.02.2005. Undoubtedly, the terms of the agreement were that the land measuring 2500 sq. yards was to be sold by the defendants to the plaintiff only on allotment of the same by the builder after getting the same approved from the Government of Haryana. It was apparent that the part agreed to be performed was not only dependent upon the third party i.e. builder who was to develop the colony, but also on the fourth party i.e. State of Haryana who was to grant licence to the builder. Neither the developer was impleaded in the suit, nor the State of Haryana as party defendant. It was an admitted proposition on record that the appellant very candidly admitted that due to some mistaken belief, it was stated that LOI was issued on 29.12.2005 (Ex.P7), whereas it was only a LOI and requisite licence was granted only on 13.04.2007 (Ex.P6) which was valid upto 12.04.2009, but the colony was not launched within the period of validity.

[22]. Learned counsel for the respondents also referred to **Dadarao and another Vs. Ramrao and others, JT 1999(8) SC 608**. The impending failure of the third party i.e. builder to hand over the approved plotted area to the defendants was visualized by both the parties at the time of execution of agreement to sell and a remedy in the form of Clause-2 was also devised by them. Plaintiff/appellant is an educated person who had drafted the agreement to sell himself and he was very much alive to the situation and contingencies. Both the parties formulated Clause-2

with open eyes. The fallibility of relief of specific performance by way of execution and registration of the sale deed of the plotted area was inherent in the agreement to sell, therefore, the plaintiff could not drive any benefit from the cited judgments. Clause-2 clearly provided that if the defendants failed to launch the colony within four months, then the earnest money of Rs.15 lacs would be refunded by the defendants to the plaintiff without interest within 15 days, failing which interest would accrue @ 12% per annum on the said earnest money. Admittedly, the colony was not launched within four months.

[23]. The interpretation of Clause-2 in the agreement would give unambiguous meaning that if the colony was not launched within four months, then the earnest money would be refunded to the plaintiff without interest within 15 days and thereafter with interest @ 12% per annum. Plaintiff in his cross-examination has admitted himself to be Commerce graduate and he further admitted to have drafted the agreement to sell (Ex.P1). The stand of the plaintiff that period of four months was meant to commence from the grant of licence for setting up residential plotted colony, cannot be appreciated as there was no specific mention in the clause which was drafted by the plaintiff himself. The import of clause in its letter and spirit would not give rise to any such conclusion as it being projected by the plaintiff/appellant. Clause irresistibly infers commencement of stipulated period of four months from the date of agreement and not otherwise.

[24]. The filing of suit on 20.03.2006 even before grant of licence on 13.04.2007 was pre-mature and ratio of **Vithalbhai Pvt. Ltd. Vs. Union Bank of India's case (supra)** would not be attracted as the performance of the agreement was not only depended upon obligation of the defendants, but also on the developer as well as State of Haryana who were not impleaded as party defendants in the suit. The contingencies could not have been cured by the defendants in the absence of performing parties to the transaction. Even Narender Solanki, District Town Planner while appearing as PW 2 has admitted that the respondents were granted permission for setting up residential colony on 13.04.2007 (Ex.P6). Vide letter of intent (Ex.P7), respondents were only called upon to fulfill certain conditions before issuance of licence. The commencement of stipulated period of four months as propounded by the plaintiff if believed, then after the grant of licence, nothing would have been left to further wait for formal launch of the colony and in such eventuality, the clause would have rendered meaningless and without any objectivity. There cannot be any dispute with regard to proposition as held in the cited judgments by the appellant, but no such factors are involved in the present case as bilateral agreement between the parties was only for four months and after expiry thereof in the absence of any licence, the only remedy available with the plaintiff was to get his earnest money

back without interest if the same was to be paid within 15 days and with interest thereafter.

[25]. In view of aforesaid, the questions of law as formulated in the order dated 19.09.2012 do not arise. The readiness and willingness on the part of the plaintiff cannot be appreciated in view of contingent agreement. The plain reading of the agreement itself is suggestive of the fact that after expiry of four months in the event of non-happening of the event for grant of licence, the remedy was only to receive the earnest money back. The mentioning of period of four months cannot be construed to be an essence of contract for adhering to the transaction. In the event of non-fulfillment of condition of grant of licence within the time prescribed, the transaction would only be a conditional transaction where time was not the essence of the contract. Even otherwise in case of immoveable property, time cannot be the essence of contract in view of ratio laid down by the Hon'ble Apex Court in **Smt. Chand Rani (dead) by LRs Vs. Smt. Kamal Rani (dead) by LRs, 1993(2) RRR 46.**

[26]. The issue of readiness and willingness of the parties does not arise in the present case as the agreement itself was dependent upon period of four months within which happening in respect of grant of licence was to be perceived and thereafter, both the parties had agreed that the plaintiff would receive the earnest money without interest within 15 days and with interest

thereafter. It was a plain agreement of bilateral obligations and those were reduced into writing. The question of enforcing the same does not arise, therefore, question No.2 does not arise at all.

[27]. In the light of contingent factors recorded in the agreement, filing of suit at a premature stage, cannot be appreciated. Plaintiff concealed the date of issuance of licence and labeled the same to be date of issuance of LOI. At a subsequent stage, the plaintiff admitted the aforesaid folly and admitted that the date of issuance of licence was 13.04.2007. The filing of suit on the aforesaid concealed notion, would not entitle the plaintiff to seek any equitable discretionary relief. The specific performance is not an absolute right of the plaintiff and the same can be denied in a case of present nature. In view of above, questions No.3 and 4 also do not arise for consideration of this Court. Even if, **Dadarao and another' case (supra)** was declared to be *per incuriam* in **P.D' Souza Vs. Shondriilo Naidu, (2004) 6 Supreme Court Cases 649**, still the plaintiff/appellant does not deserve any such consideration of specific relief.

[28]. In the appeal, an effort has been made by the appellant to file an application to place on record the documents on the basis of which licence was transferred from the respondents and developer to M/s Century Township Pvt. Ltd.

[29]. An application under Section 151 CPC i.e. CM No.9835-C of 2012 was filed for placing on record Annexure A-1 (licence) and Annexure A-2 (order for transfer of licence). The said application was dismissed vide order dated 19.09.2012 by holding that the application was misconceived and liberty was given to the plaintiff to file an application under Order 41 Rule 27 CPC for seeking permission to receive those documents as an additional evidence. Instead of filing the appropriate application, CM No.11614-C of 2013 was filed for placing on record copy of licence dated 13.04.2007 and copy of order permitting transfer of licence dated 07.12.2010. The said application was filed on 23.10.2013. Notice of that application was issued and reply to the application was filed by the respondents. The said application was got dismissed as withdrawn on 14.01.2014. Thereafter, another application i.e. CM No.11830-C of 2014 was filed. Notice of that application was issued to the respondents. The said application was ordered to be listed along with the main appeal. Vide order dated 26.04.2017, it was observed by the High Court that the application under Order 41 Rule 27 CPC was not filed despite the order dated 19.09.2012. The scope of CM No.11830-C of 2014 cannot be considered over and above the orders passed in CM No.9835-C of 2012 and CM No.11614-C of 2013.

[30]. For the reasons recorded hereinabove, concurrent findings of facts recorded by the Courts below cannot be held to

be the result of misreading of evidence or suffered with any perversity. No law point worth consideration is involved in the present appeal. The appeal is found to be totally devoid of merits and the same is accordingly dismissed. Parties are left to bear their own costs.

(RAJ MOHAN SINGH)
JUDGE

21.12.2018

Prince

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No