

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(1)

RSA No.1855 of 2013(O&M)
Date of Order: 16th May, 2018

Smt. Sharda Sharma

...Appellant

Versus

Bhagwan Dass

..Respondent

(2)

RSA No.1856 of 2013

Smt. Sharda Sharma

...Appellant

Versus

Bhagwan Dass

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

**Present: Dr. Parveen Hans, Advocate,
for the appellant.**

ANIL KSHETARPAL, J.

By this judgment Regular Second Appeal Nos.1855 and 1856 of 2013 shall stand disposed of as the property in dispute as well as parties to the litigation in both the appeals are common. For facility of reference, parties are being referred by name.

Smt. Sharda Sharma, the appellant, was owner of the property in dispute. It is undisputed that Sharda Sharma entered into an agreement to sell with Bhagwan Dass, the respondent, on 12.11.2003 and received an earnest money to the tune of Rs.2,00,000/-. As per the agreement to sell,

sale deed was to be executed and registered on 11.10.2004. On 11.10.2004, the date for execution and registration of the sale deed was extended to 10.04.2005.

Sharda Sharma, the appellant, filed a suit on 31.05.2005 seeking declaration that she is owner in possession of the land in dispute and the earnest money of Rs.2,00,000/- paid under the agreement to sell dated 12.11.2003 stood forfeited. She also prayed for relief of injunction, restraining Bhagwan Dass from interfering in her possession.

Bhagwan Dass appeared on notice in the suit filed by Sharda Sharma before the court on 11.06.2005. Bhagwan Dass filed written statement and pleaded that the amount has not been forfeited and it was in fact Sharda Sharma who was not ready and willing to perform her part of the contract. Bhagwan Dass also pleaded that on the extended target date, he had visited the office of Sub-Registrar along with the balance sale consideration but Sharda Sharma did not come forward. Bhagwan Dass further pleaded that he had got served a notice on Sharda Sharma on 03.05.2005.

The written statement was filed on 30.07.2005. Injunction application was disposed of granting temporary injunction in favour of Sharda Sharma vide order dated 08.04.2006.

Bhagwan Dass filed civil suit seeking possession by way of specific performance of the agreement to sell, on 24.05.2006. Both the suits were consolidated and after appreciation of the evidence, both the courts have decreed the suit filed by Bhagwan Dass for specific performance of the agreement to sell, whereas the suit filed by Sharda Sharma has been dismissed.

In this case, notice was issued, summons were served, however, no one has come present on behalf of Bhagwan Dass.

In the considered opinion of this Court, following substantial questions of law arise:-

(i) Whether before granting a decree for specific performance of the agreement to sell the court is required to analyze and adjudicate whether decree for specific performance should be granted or alternative relief of refund would be appropriate?

In the present case, unfortunately, both the courts below have mechanically passed the decree for specific performance of the agreement to sell without examining whether decree for specific performance is to be passed or not. A reading of Section 20 of the Specific Relief Act, 1963 establishes that the discretion should not be exercised arbitrarily. However, discretion as provided under Section 20 of the Specific Relief Act, 1963 is to be based upon sound and reasonable judicial principles. Such discretion is capable of correction by a court of appeal. Section 20 of the Specific Relief Act, 1963 is extracted as under:-

20. Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may

properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases

where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Counsel for the appellant in both the appeals contends that Sharda Sharma, the appellant, had filed a suit on 31.05.2005 and notice was issued to the defendant-Bhagwan Dass, who had appeared in the court through counsel on 11.06.2005. However, still suit for specific performance of the agreement to sell was filed on 24.05.2006 i.e. after a period of 11 months of appearance in the Court in a suit filed by Sharda Sharma seeking declaration on that agreement to sell has cease to exist. Learned counsel has further submitted that after the target date fixed for execution and registration of the sale deed, Sharda Sharma issued notices to Bhagwan Dass, respondent, on 22.04.2005 and 09.05.2005 calling upon him to come and execute the sale deed. He hence, submits that courts below have erred in ignoring these facts while decreeing the suit for specific performance of the agreement to sell and dismissing the suit filed by the

appellant. He has further submitted that when Bhagwan Dass appeared in the evidence he admitted that the target date for execution and registration of the sale deed was extended on his request.

He has further submitted that Bhagwan Dass when appeared in the witness box has also stated that the amount of earnest money was borrowed from the relatives. He has further submitted that Rs.50,000/-, the balance sale consideration was also borrowed from his brother, namely, Suresh Kumar who has not been examined in evidence. Hence, he submitted that Bhagwan Dass is not proved to be ready and willing to perform his part of the contract.

From the contention as noticed above, it is apparent that it was Bhagwan Dass who was delaying the execution of the sale deed. Bhagwan Dass while appearing in the evidence has admitted that the date for execution and registration of the sale deed was extended on his request.

Still further, Sharda Sharma filed a suit for declaration claiming that the agreement to sell has come to an end on 31.05.2005. She has pleaded that the earnest money stands forfeited. Bhagwan Dass appeared in the aforesaid suit on 11.06.2005, but still he did not chose to file a suit for specific performance of the agreement to sell or filed any counter claim. He waited almost a year and kept on contesting the suit filed by Sharda Sharma before he filed the suit for specific performance.

Further Sharda Sharma had sent notices to Bhagwan Dass on 22.04.2005 and 09.05.2005 calling upon Bhagwan Dass to come and get the sale deed registered after paying the balance sale consideration. Both the notices were sent to Bhagwan Dass through registered post. However, Bhagwan Dass did not take steps to get the sale deed registered. Had he

responded to the notices, no litigation would have ensued. Service of notices on behalf of Sharda Sharma establishes her willingness to honour the agreement upto 09.05.2005. Address given on the notice is same as is the address given by Bhagwan Dass while filing the suit. This was the address given on which notice issued in the suit filed by Sharda Sharma was served upon him. Further Bhagwan Dass has stated that the amount payable for earnest money as well as the amount of balance sale consideration was borrowed. It has been stated that the balance amount was borrowed from Suresh Kumar, however, he has not been examined in evidence.

In view of the aforesaid reasons, this court is of the considered opinion that Bhagwan Dass is not entitled to relief of possession by way of specific performance of the agreement to sell.

Hence, question of law as framed above is answered in favour of the appellant.

Although, learned counsel for the appellant-Sharda Sharma has vehemently argued that the amount has been forfeited, however, this court is of the considered opinion that merely because discretionary relief has not been granted, the amount of earnest money paid cannot be declared to have been forfeited.

In view of the aforesaid, the judgments and decrees passed by the courts below are modified. The suit filed by Bhagwan Dass is decreed while granting him alternative relief of refund of the earnest money along with interest @ 9% per annum from the date of agreement to sell i.e. 12.11.2003 till the amount is paid by Sharda Sharma to Bhagwan Dass.

Consequently, the decree passed in the suit filed by Sharda Sharma is also modified. Sharda Sharma is held entitled to only a decree for

permanent injunction restraining the defendant from interfering in her peaceful possession and ownership.

16th May, 2018
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(ANIL KSHETARPAL)
JUDGE

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