

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.2673 of 2013(O&M)

Date of decision: 27.7.2018

Hardev Singh

....Appellant

VERSUS

Kapil Singh and another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Vinod S. Bhardwaj, Advocate for the appellant.

Mr. Akshay Kumar Goel, Advocate for the respondents.

REKHA MITTAL, J.

CM No.7086-C of 2013

Prayer in this application is for condoning delay of 6 days in filing the appeal.

Heard.

In view of averments made in the application, the same is allowed. Delay of 6 days in filing the appeal stands condoned.

Disposed of accordingly.

RSA No.2673 of 2013

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit for possession by way of specific performance along with consequential relief of injunction was partly decreed by the trial Court allowing recovery of double of amount of earnest money i.e. Rs.12,00,000/- along with interest at the rate of 6% per annum from the date of execution of agreement to sell Ex.P1 till its

realization and the same came to be affirmed in appeal by the Additional District Judge, Fatehabad.

The respondents/plaintiffs prayed for specific performance of agreement to sell dated 18.01.2005 with the averments that the appellant representing himself to be owner in possession of a shop constructed over 2 marlas land comprised in khasra Nos.620 (3-3), 621 (2-17), 154 (0-2) with area measuring 18 ft x 28 ft. with boundaries detailed in the agreement situated in Main Bazaar Ratia, District Fatehabad agreed to sell the same for a sale consideration of Rs.49,00,000/-. A sum of Rs.12,00,000/- was received as earnest money at the time of agreement. The sale deed was agreed to be got registered on 30.05.2005. The date for execution and registration of sale deed was extended to 15.06.2005. The respondents always remained ready and willing to perform their part of the contract to get the sale deed executed and registered. On 15.06.2005, the respondents along with balance sale consideration and expenses on stamp duty/registration fee etc. visited the office of Sub Registrar, Ratia and waited for the appellant but he did not turn up. They got attested affidavit from Executive Magistrate i.e. Sub Registrar, Ratia.

Gurmel Singh son of Gurjant Singh, brother's son of the appellant obtained ad interim injunction dated 16.05.2005 in Civil Suit No.140-C titled Gurjant Singh Vs. Hardev Singh etc. from the Court of Civil Judge (Senior Division), Fatehabad. After coming to know the factum of stay from rapat roznamcha waqaiti No.866 dated 23.05.2005, respondents through their counsel got served registered notice dated 16.06.2005 upon the appellant calling upon him to get the stay order vacated and execute and register the sale deed but the appellant deliberately did not receive said notice that was received back with the

report of refusal. Thereafter, the appellant through his counsel sent a notice to the respondents and made out a new story that he had agreed for sale of only 2 marlas of land being 2/122 share of 6 kanal 2 marlas and suppressed the fact that he had agreed for sale of shop constructed over 2 marlas land to the respondents. The respondents sent reply to the notice dated 25.06.2005 through their counsel by way of registered post whereby the appellant was requested to obtain consent of other co-sharers of the khewat, got the stay vacated and execute the sale deed of the shop as per terms and conditions of agreement of sale.

The appellant filed the written statement, admitted the factum of execution of agreement of sale, receipt of earnest money of Rs.12,00,000/-, target date of 30.05.2005 being extended to 15.06.2005. It is averred that appellant was ready and willing to perform his part of the contract and was present in the office of Sub Registrar, Ratia to execute and registrar the sale deed in favour of the respondents. He kept on waiting for the respondents after the closing hours of the office but the respondents failed to cause appearance and he got his affidavit attested from Sub Registrar-cum-Executive Magistrate, Ratia in order to mark his presence. He has admitted the factum of sending notice to the respondents and a reply to the said notice being received by him. However, he has denied the allegations that the respondents always remained ready and willing to perform their part of the agreement i.e. payment of balance sale consideration of Rs.37,00,000/-.

As has been noticed hereinbefore, the Courts allowed alternative relief of recovery and entitlement of the respondents to get double of the amount of earnest money in terms of the agreement entered into between the parties.

Counsel for the appellant has challenged the judgments primarily on two counts. The first submission made by counsel is that only Kapil Singh, one of the respondents/plaintiffs appeared in the witness box but Satish Kumar, another plaintiff and a co-purchaser of the property in question did not appear in the witness box with regard to his readiness to pay half of the balance amount for getting the sale deed executed and registered. It is argued that Kapil Singh in his cross examination has deposed only with regard to amount of his share to the tune of Rs.22,50,000/- stated to be brought by him on the day when he purportedly visited the office of Sub Registrar, Ratia. He has failed to explain as to what was the source of amount of Rs.22,50,000/- which was stated to be brought by Satish Kumar on the date when Satish Kumar and Kapil Singh purportedly appeared in the office of Sub Registrar, Ratia.

The second argument raised by counsel is that in the civil suit preferred by one of the co-owners in which the order dated 16.05.2005 was passed by the Civil Judge (Senior Division), Fatehabad, there was only injunction against alienation of specific portion of the land in dispute, therefore, there was no bar against the appellant transferring the land of his share out of joint land measuring 6 kanal 2 marlas.

Counsel has also made a vain attempt to argue that even if the appellant had executed the sale deed in favour of the respondents/plaintiffs despite the stay granted by the Court, the same would have been subject to outcome of the suit for injunction, therefore, stay granted by the Court cannot be construed in favour of the respondents/plaintiffs or prejudicial to the interest of the appellant/defendant. In addition, it is argued that even by way of notice issued by the appellant, the appellant has expressed his readiness and willingness to execute the sale deed in favour of the

respondents/plaintiffs, therefore, he has unnecessarily been burdened with not only refund of earnest money but payment of double of the amount of earnest money along with interest.

Counsel representing the respondents has supported consistent findings recorded by the Courts whereby the Courts have allowed alternative relief for refund of double of the amount of earnest money in terms of the agreement between the parties as the appellant/defendant failed to perform his part of the agreement and one of his co-sharers sought injunction, may be in connivance with the appellant, to stall execution and registration of sale deed in compliance of terms and conditions settled between the parties whereby the appellant admittedly agreed to sell a shop constructed over 2 marlas of land with specific boundaries, detailed in the agreement of sale. It is argued with vehemence that in the notice issued by the appellant, he tried to create an impression as if he had agreed to sell his share out of joint land but measuring 2 marlas when on the contrary he had agreed to sell a shop constructed on 2 marlas out of joint land measuring 6 kanal 2 marlas. According to counsel, conduct of the appellant reflected in the notice dated 16.06.2005 is more than sufficient to prove that the appellant wanted to wriggle out of the bargain, therefore, he is not entitled to any relief.

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 mention that concurrent findings recorded by the Courts do not warrant interference unless they suffer from perversity or raise question of law. Equally true is that the Court in second appeal

cannot re-appreciate the evidence to record a finding different from what has been consistently held by the Courts.

Reverting to the case at hand, admittedly, the appellant agreed to sell a shop constructed on 2 marlas of land with area measuring 18 ft x 28 ft for a sale consideration of Rs.49,00,000/-. Perusal of the agreement of sale would make it evident that even the boundaries of the said shop have been duly recorded in the agreement. Out of total sale consideration of Rs.49,00,000/-, Rs.12,00,000/- were paid at the time of agreement and the sale deed was agreed to be executed on 30.05.2005 but the date was extended to 15.06.2005. The respondents/plaintiffs have proved that on 15.06.2005, they visited the Tehsil office, Ratia for getting the sale deed executed and registered and got affidavit Ex.P3 attested from the Executive Magistrate- cum- Sub Registrar in token of their presence along with balance sale consideration and expenses for registration etc. They have also marked the documents with regard to sending of notice dated 16.06.2005 which was received back with the report of refusal. It is also admitted position of the case that the appellant sent a notice dated 16.06.2005 through his Attorney. In para 1 of the notice Ex.D1/A, there is reference to agreement of sale qua 2 marlas land out of land measuring 6 kanal 2 marlas with its khewat, khatauni and khasra numbers detailed therein but the said notice does not say that the appellant agreed to sell a shop with specific boundaries constructed on an area measuring 2 marlas. It certainly creates a doubt qua bona fide of the appellant/defendant.

Kapil Singh, one of the plaintiffs appeared in the witness box to prove that the respondents/plaintiffs remained ready and willing to perform their part of the agreement. The readiness and willingness of a party can be gathered from conduct of the parties and materials available

on record. It has been proved on record that the respondents/plaintiffs visited the office of Sub Registrar, Ratia on 15.06.2005 and got attested an affidavit in token of their presence with balance sale consideration and necessary expenses. They issued a notice calling upon the appellant to execute the sale deed but the same was received back unserved with the report of refusal. Notice sent by the appellant dated 16.06.2005 was duly replied on 25.06.2005 wherein the respondents called upon the appellant to get the stay vacated and execute the sale deed of the property agreed to be sold on 18.01.2005. Counsel for the appellant has not disputed that vide order dated 16.05.2005 Ex.P8, in a suit for injunction filed by Gurmel Singh, one of the co-owners in land measuring 6 kanal 2 marlas, the Court granted interim injunction restraining the appellant and his brother Baldev Singh (defendants No.1 and 2) in civil suit No.140-C instituted on 13.04.2004 from alienating any specific portion of the land in dispute that remained pending till 06.02.2009. There is nothing on record suggestive of the fact that after receipt of reply to the notice vide Ex.PW1/A by the appellant, he ever informed the respondents/plaintiffs that stay granted by the Court has been vacated and he is ready and willing to perform his part of the agreement by execution of sale deed in favour of the respondents. The suit for possession by way of specific performance was instituted on 18.08.2006 approximately after two months of the target date i.e. 15.06.2006. Taking into consideration the materials on record and a cumulative view of the facts and circumstances obtaining in the case, it is difficult to interfere in findings of the Courts merely because one of the plaintiffs namely Satish Kumar did not appear in the witness box to corroborate testimony of Kapil Singh with regard to readiness and willingness of the respondents to perform their part of the agreement. Had

it been true that the respondents/plaintiffs were not ready or/and willing to perform their part of the agreement, they would not have responded to the notice issued by the appellant and thereafter instituted the suit just after two months of the target date.

So far as plea of the appellant that the injunction order issued by the Court did not create a bar against sale of share out of joint land, once the appellant had agreed to sell a shop constructed on 2 marlas land for a sale consideration of Rs.49,00,000/-, where was the occasion for the respondents to consent for execution of sale deed qua share in agriculture land as against a shop that was agreed to be sold for a huge amount of Rs.49,00,000/-. In this view of the matter, contention raised by counsel for the appellant that either the sale deed could be executed of a share or the sale deed of a shop could be executed subject to outcome of the suit is misconceived and a clever attempt to wriggle out of liability created under the agreement. In view of the above, I do not find any justifiable ground to interfere in the findings of Courts below.

No other point has been raised.

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

JULY 27, 2018

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned :

yes/no

Whether reportable :

yes/no