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

**RSA No.1441 of 2016 (O&M) and other connected matters
Date of Decision:21.05.2018**

Garibo Devi and another

...Appellants

Versus

Jeewan Parkash and others ...Respondents

RSA No.1442 of 2016 (O&M)

Mata Ram and others

...Appellants

Versus

Jeewan Parkash and others

...Respondents

RSA No.1443 of 2016 (O&M)

Mata Ram and others

...Appellants

Versus

Jeewan Parkash and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Vikas Bahl, Sr. Advocate with
Mr.Parvinder Singh, Advocate for the appellants in
RSA No.1441 of 2016.
Mr.Harpreet Singh Multani, Advocate for the appellants in
RSA No.1442 and 1443 of 2016.
Mr.Rajiv Dhawan, Advocate and
Mr.Abhishek Jindal, Advocate for respondent No.1.

<u>ANIL KSHETARPAL, J.</u>

This judgment shall dispose of three appeals bearing RSA Nos.1441 of 2016 to 1443 of 2016, as the issue involved therein is common.

The defendants-appellants have filed these three appeals arising out of the suit which was disposed of by the learned trial court and the learned first appellate court by a common judgment.

A short issue involve in the present case is "whether the discretion exercised by the learned first appellate court, while granting a decree for specific performance of the agreement to sell needs any interference or not"?

The agreement to sell dated 22.2.2007 between the parties with respect to land measuring 41 bigha and 14 biswa, is admitted. It is also admitted fact that defendants No.1 to 10, the intended vendors, had received a sum of Rs.20,00,000/- as earnest money. As per the agreement to sell, it was stipulated that the intended purchaser would either pay the additional amount of Rs.20,00,000/- against receipt or the purchaser would be entitled to get the sale-deed of half of the land agreed to be sold registered in his favour on payment of proportionate balance sale consideration.

It is the case of the plaintiff that initially he sent a letter through registered post to the defendants on 21.5.2017. He went with the payment of Rs.20,00,000/- in the form of 10 bank drafts of Rs.2,00,000/- each for payment to the defendants to their village on 22.5.2007 but the defendants could not be located. It is further case of the plaintiff that on 18.6.2007, he issued a legal notice through Advocate, calling upon the defendants to come and execute the sale-deed as agreed on 20.8.2007, i.e. the date on which the sale-deed was to be executed. It is further pleaded case of the plaintiff that on 20.8.2007, he visited the office of Sub Registrar. He purchased the stamp papers for execution and registration of the sale-deed on the same day. He also got marked his presence. It is further pleaded case of the plaintiff that he went to the office of the Sub Registrar with the remaining balance sale consideration in the form of cheques and bank drafts. On 23.8.2007, the plaintiff once again issued notice calling upon the defendants to honour the agreement to sell and thereafter he filed the suit on 10.10.2007. It is also noticed that in the meantime, defendants No. 1 to 10 executed a sale-deed of the disputed land in favour of defendants No.11 and 12 on 8.10.2007, which was also challenged by the plaintiff.

On the other hand, defendants No.1 to 10 have asserted that three months' time elapsed on 21.5.2007 and on that day, they visited the office of Sub Registrar got their presence marked. However, the plaintiff did not come forward. It is further case of the defendants No.1 to 10 that they also visited the office of Sub Registrar on 20.8.2007 and got marked their presence.

Defendants No.11 and 12 claimed that they are bonafide purchasers without notice of the prior agreement and, therefore, they are to be protected.

The learned trial court, after appreciating the evidence available on the file, recorded a finding that execution of the agreement to sell is admitted. The plaintiff is proved to be ready and willing to perform his part of the contract. However, the learned trial court has chosen not to grant the relief of specific performance of the agreement to sell on the ground that defendants No.11 and 12 are bonafide purchasers for consideration without notice and, therefore, order of refund of the earnest money along with interest @ 12% per annum was passed.

The learned first appellate court, after re-examining the evidence available on the file, has chosen to reverse the discretion exercised by the learned trial court. That is how, these three appeals have been filed by the defendants.

As per Section 20 of the Specific Relief Act, 1963 (`the 1963 Act' for short), grant of the relief of specific performance of the agreement to sell is a discretionary relief but such discretion has to be exercised on sound and reasonable reasons guided by the judicial principle and such discretion is capable of correction by a court of appeal. Section 20 of the 1963 Act 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 II.— 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 party.

On the other hand, learned counsel for the appellants submits that in view of Section19 of the 1963 Act, defendants No. 11 and 12 are bonafide purchases who have paid the money in good faith and without notice of the original contract and, therefore, the learned first appellate court committed an error while reversing the discretion exercised by the trial court.

Section 19 of the 1963 Act is reproduced as under:-

19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—
(a) either party thereto;
(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the impugned judgments passed by the courts below and record.

Although, lengthy arguments were heard, however, only issue which needs consideration is "whether the defendants are proved to be purchasers in good faith or not for consideration and not having any notice of the original contract".

In the considered opinion of this Court, defendants No.11 and 12 are not proved to be purchasers in good faith for the following reasons:-

(i) Defendants No.11 and 12 did not plead that there was any prior agreement to sell in their favour. However, a reading of the sale-deed dated 8.10.2007 executed in their favour by defendants No.1 to 10 records that there was a prior agreement under which payment of Rs.60,00,000/- in advance as earnest money has been paid out of which Rs.34,00,000/- has been paid in cash, whereas Rs.26,00,000/- has been paid through cheque, however, no date of agreement to sell has been mentioned. When defendant No.12 appeared in evidence, she also states that there was no prior agreement to sell. It is surprising that amount of Rs.60,00,000/- is alleged to have been paid in cash as well as through cheque as earnest money without any receipt or agreement to sell in writing.

(ii) As per the evidence led by defendants No.11 and 12, two days before the sale-deed was executed, they visited the village and met Patwari and thereafter, there and then they paid Rs.60,00,000/-. Defendants No. 11 and 12 are women. Son of defendant No.12 has appeared in evidence. He submits that talks of purchase of the land had taken place 2-3 days prior to the execution of the sale-deed but no doubt no document was executed, which is not plausible. Some one who is purchasing the land for Rs.1,46,00,000/- would close the deal and get the sale-deed registered within 2-3 days.

(iii) Son of defendant No.12 admits that after the suit was filed by the plaintiff they did not make any complaint to the police or any other authority that defendants No.1 to 10 have defrauded them. If the sale-deed was not result of collusion between defendants No.11 and 12 on one hand and defendants No.1 to 10 on the other hand, defendants No.11 and 12 ought to lodge some complaint to the authorities regarding complaining of cheating by defendants No.1 to 10.

(iv) Defendant No.12 when appeared in the evidence has admitted that she did not ask anybody before purchasing the land. She only stated that her son had gone for seeing the record with Patwari, whereas when her son appeared as DW-2, he stated that when he visited Patwari, his mother accompanying him.

(v) Defendants No.11 and 12 have not produced any evidence to prove that amount of Rs.60,00,000/- was paid two days before the execution of the sale-deed. Out of total payment of earnest money of Rs.60,00,000/- payment of Rs.26,00,000/- is alleged to have been paid through cheque drawn on the bank, however, no evidence has been produced to prove that fact.

Learned counsel for the appellants has submitted that the discretion exercised by the learned trial court could not be interfered by the learned first appellate court. The argument is without any substance as

Section 20 of the 1963 Act itself provides that discretion exercised by the learned trial court is capable of correction by a court of appeal. He has further argued that the learned trial court had seen demeanour of his witnesses and, therefore, the judgment of the learned trial court should not have been interfered with by the learned first appellate court.

In the present case, it is not demeanour of the witness but the evidence which is to be appreciated. Most of the facts are admitted. The learned trial court has failed to exercise the discretion in a proper manner and that is why, it has been corrected by the learned first appellate court.

Next argument of the learned counsel for the appellants is that defendants No.10 had died on 22.3.2013 and her legal heirs were not impleaded. This Court has seen that the learned first appellate court has noticed that fact. However, since all the legal heirs of defendant No.12 were already on record, therefore, no further order was passed by the court.

In last, learned counsel for defendants No.11 and 12 submitted that the payment made by them be secured.

This Court has considered the submission.

While upholding the judgment and decree passed by the learned first appellate court, defendants No.11 and 12 are directed to join defendants No.1 to 10 in executing the sale-deed in favour of the plaintiff. Defendants No.11 and 12 shall be entitled to make a prayer to the executing court for retaining the payment to be deposited by the plaintiff in the court, enabling defendants No.11 and 12 to file a suit for recovery of the amount.

No other argument was raised.

In view thereof, there is no ground to interfere with the impugned judgment passed by the learned first appellate court. All these three appeals are dismissed. Pending application(s), if any, shall also stand disposed of.

21.05.2018 **(ANIL KSHETARPAL)**
mks **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No