

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.445 of 2013 (O&M)

Date of Decision: February 28th, 2018

Karnail Singh

...Appellant

Versus

Gurdial Kaur & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Mr.M.L.Saggar, Senior Advocate with
Ms.Veenu Garg, Advocate,
for the appellant.

Mr.Hardip Singh, Advocate,
for respondent Nos.2 to 8.

AMIT RAWAL, J.

Appellant-plaintiff is in Regular Second Appeal against the judgments and decrees rendered by both the Courts below in not granting the discretionary relief under Section 20 of the Specific Relief Act in respect of an agreement to sell dated 8.6.1989 and instead ordered for refund of earnest money to the tune of ₹10,000/- with interest @ 12% per annum from the date of execution of agreement to sell till realisation.

The plaintiff instituted the aforementioned suit seeking possession by way of specific performance of the agreement to sell over and above challenged to the judgment and decree dated 10.11.1990 passed in favour of respondent Nos.2 to 5 and sale deed dated 4.3.1991 passed in favour of defendants No.6 and 7 with alternative prayer of recovery of ₹75,000/-, i.e., ₹10,000/- paid in advance as earnest money and ₹65,000/- as

damages. The suit was filed against Sucha Singh (since deceased) being represented through L.Rs. and others on the premise that an agreement to sell dated 8.6.1989 in respect of land measuring 19 bighas 8 biswas comprising in Khasra No.208 to 211, situated in Village Dhindsa described in the plaint was executed between the appellant-plaintiff and respondent-defendant No.1 for a total sale consideration of ₹1.5 lacs and received ₹20,000/- as earnest money. The agreement to sell envisages that the sale deed was required to be registered in two parts, i.e., first to the extent of ½ share upto 15.7.1989 by adjusting ₹10,000/- in the said sale deed and the second sale deed for remaining ½ share upto 31.12.1989 by adjusting another sum of ₹10,000/- out of the earnest money.

It was further pleaded that defendant No.1 executed the registered sale deed to the extent of ½ share on 17.7.1989 in favour of the plaintiff by performing his part of the agreement, but for the remaining half share did not come present, though the plaintiff was always ready and willing to perform his part of the contract. The plaintiff had gone to the office of the Sub Registrar, Rajpura on 29.12.1989 with the remaining sale consideration of ₹65,000/- as 30.12.1989 and 31.12.1989 were holidays, but defendant No.1 did not turn up. The plaintiff waited in the office of Sub Registrar from 9.00 AM to 5.00 PM, which necessitated him to submit an application to the Sub Registrar on 29.12.1989 regarding marking his presence for the purpose of compliance of provisions of Section 16 (c) of the Specific Relief Act, 1963 (for short “the Act”).

It was also pleaded that a legal notice dated 5.4.1991, through one Khem Chand Dev Advocate, was also served upon defendant No.1 calling him to appear before the Sub Registrar on 15.4.1991, but he did not

come present. Even for ascertaining the presence of defendant No.1 on 15.4.1991, plaintiff submitted an application to the Sub Registrar, Rajpur but it was found that defendant No.1 did not turn up. However, since the plaintiff intended to seek the remedy in accordance with law, contacted the revenue official and obtained copy of jamabandi and found that defendant No.1 had already suffered a collusive, false and fictitious decree dated 10.11.1990 in Civil Suit No.159 of 7.3.1990 in collusion with defendants No.2 to 5, i.e., his sons. Even the sale deed dated 4.3.1991 executed by defendants No.2 to 5 in favour of defendants No.6 and 7, who were none else but party men of defendants No.2 to 5, had also been executed. It is in this backdrop of the matter, the judgments and decrees were challenged.

The aforementioned suit was contested by defendant No.2 on the ground that defendants No.6 and 7 were bonafide purchasers for consideration without notice of agreement to sell in dispute, much less execution of the agreement was also denied. It was further pleaded that the suit land had fallen to the share of defendants No.2 to 5 in a family settlement and the decree dated 10.11.1990 is fall out of the aforementioned settlement/arrangement. The agreement was, thus, not binding upon them.

Defendants No.6 and 7 filed separate written statement and contested the suit by taking plea of forged and fabrication of the agreement to sell. All the other allegations were denied.

The trial Court, on the basis of the pre-pleadings of the parties, framing the following issues:-

- 1) Whether defendant No.1 entered into agreement of sale in favour of plaintiff on 8.6.1989 regarding the suit land after receiving Rs.20,000/- as earnest money? OPP

- 2) Whether the plaintiff has been and is ready and willing to perform his part of contract? OPP
- 3) Whether the defendants have committed the breach of contract? OPP
- 4) Whether the plaintiff is entitled for possession by way of specific performance of the agreement dated 8.6.1989? OPP
- 5) Whether in the alternative plaintiff is entitled for recovery of Rs.75,000/- as alleged? OPP
- 6) Whether defendant No.6 and 7 are bonafide purchasers for consideration without notice of contract of sale dated 8.6.1989? OPD
- 7) Whether the agreement dated 8.6.1989 is false and fabricated document? OPD
- 8) Whether the suit against defendant No.7 is not legally maintainable? OPD
- 9) Whether the defendants No.3 to 5 have not been sued through their guardian? OPD
- 10) Relief.

The appellant-plaintiff in support of the pleadings and case, examined Budh Ram Deed Writer as PW-1 to prove the scribe of the agreement in favour of the plaintiff, PW-3 Satinder Singh, Tehsildar, PW-4 Gurdev Singh Retired Tehsildar and PW-5 Navdeep Singh, Handwriting and Fingerprints Expert. Plaintiff himself appeared as PW-2. All the aforementioned witnesses proved the documentary evidence, i.e., Ex.P1 to Ex.P34.

On the other hand, on behalf of the defendants, Harbans Singh stepped into the witness box as DW-1, Sikander Singh as DW-2 and closed their evidence.

The Courts below, on the basis of the evidence brought on record, held that the plaintiff was not entitled to discretionary relief under

Section 20 of the Act and ordered for refund of money and the appeal

preferred by the appellant also met with the same fate.

Mr.M.L.Saggar, learned Senior Counsel assisted by Ms.Veenu Garg, Advocate, representing the appellant-plaintiff in support of the grounds taken in the memorandum of appeal, for setting-aside the judgments and decrees of the Courts below for not granting discretionary relief, has raised the following submissions:-

1) From the evidence brought on record, it has been proved that Sucha Singh deceased had entered into an agreement to sell, which has been proved through the testimony of Expert, much less had also performed the part of the agreement by executing the sale deed dated 17.7.1989 (Ex.P2). Thus, there was no occasion for the Courts below in holding that the plaintiff was not ready and willing to perform his part of the agreement, i.e., for execution and registration of the remaining $\frac{1}{2}$ piece of the land, i.e., on 31.12.1989. In this regard, he drew the attention of this Court to documents Ex.P4 and Ex.P5, i.e., application and the noting of the Sub Registrar dated 29.12.1989 with regard to his intention to perform part of the agreement. He read out the contents of the order dated 29.12.1989 (Ex.P5) passed by the Sub Registrar that plaintiff remained present upto 4.55 PM;

2) In the application Ex.P6 dated 15.4.1991 submitted to the Sub Registrar, it was stated that the appellant-plaintiff was present for performing part of the agreement as indicated in the legal notice and Ex.P7 is the order passed on the application Ex.P6 by the Assistant Registrar;

- 3) Legal notice dated 05.4.1991 was also served upon the respondent-defendants, but no reply was given, which leads to an irresistible conclusion that the appellant-plaintiff was ready and willing to perform his part of the agreement;
- 4) In order to prove his presence in Ex.P6 and Ex.P7, the appellant-plaintiff examined PW-3 Satinder Kumar, Tehsildar, Sunam, who categorically stated that the application Ex.P6 was received for the purpose of execution and registration of the sale deed submitted by the plaintiff and Ex.P7 was the order passed by him. When questioned in cross-examination, he submitted that in those times, there was a practice prevailing with regard to marking the presence and passing the order by the Tehsildar;
- 5) PW-4 Gurdev Singh, Retired Tehsildar has also proved the application Ex.P4 and the order Ex.P5 passed thereon;
- 6) All these factors have not been taken into consideration, which irresistibly conclude that the appellant-plaintiff was ready and willing to perform his part of the agreement;
- 7) The factum of relationship with Maan Singh son of Sucha Singh, who had executed the sale deed, had also not been denied;
- 8) Purchasers, i.e., respondent Nos.9 and 10 were not aware of execution, therefore, could not set up the plea of bonafide purchasers as per the provisions of Section 41 of the Transfer of Property Act, 1887. Even consent decree suffered by Sucha Singh dated 10.11.1990 was during the subsistence of the

agreement to sell, though the suit was filed on 23.4.1991;

9) Sikandar Pal DW-2, when appeared in support of the sale deed, in cross-examination admitted that he was not related to Sucha Singh but to Maan Singh. Maan Singh is none else but son of Sucha Singh and, thus, urged this Court for setting-aside the findings and decreeing the suit in toto.

Mr.Hardip Singh, learned counsel representing respondents No.2 to 8 submitted that the legal notice dated 05.4.1991 has not been sent through registered post and, therefore, it could not carry any presumption under Section 27 of the General Clauses, thus, the legal notice has not been proved. It was an afterthought and a collusion to bring the case within the parameters of Section 16(c) of the Act. There was no practice of moving the application for marking the presence before the Registrar and passing the order thereon. This fact has been admitted by both the Tehsildars when subjected to cross-examination, who were working as Registrars.

It was further submitted that the readiness and willingness has to be proved throughout from the date of the execution of the agreement, during the pendency of the suit and till passing of the decree. All these factors weighed in the mind of the Courts below for forming an opinion and, thus, urged this court for upholding the concurrent findings.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr.Saggar.

Both the witnesses, i.e., the then Tehsildars have candidly admitted that there was practice of passing the order on the applications.

The order has been obtained by the appellant-plaintiff in order to ensure that

he would not be controverted with the non-compliance of the provisions of Section 16 (c) of the Act. No explanation has come forward as to why the legal notice dated 05.4.1991 was sent under postal service and not through registered post.

Ex.P4 revealed that the application was not entertained by the Clerk or the official of the Sub Registrar on 29.12.1989, which was not the date fixed for execution of the sale deed of the remaining part, which was actually 31.12.1989. Even second application dated 15.4.1991 does not bore any receipt whether it was ever submitted in the office of the Sub Registrar. In my view, the appellant-plaintiff has not been able to prove the readiness and willingness, which has to be continuous from the date of execution of the agreement, during the pendency of the suit till the passing of the decree. The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **B.Vijaya Bharathi Versus P.Savitiri & Ors., 2017 (4) Civil Court Cases 291 (S.C.)** (Para 17) and **K.Prakash Versus B.R.Sampath Kumar, AIR 2015 SC 9** (Para 21). In **B.Vijaya Bharathi's case (supra)**, it has been held as under:-

“17) It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for unless the sale made by Defendant No. 1 to Defendant No.2, and thereafter by Defendant No.2 to Defendant No.3 are set aside, no decree for specific performance could possibly follow. While Mr. Rao may be right in stating that mere delay without more would not disentitle his client to the relief of specific performance, for the reasons stated above, we find that this is not such a case. The High Court was clearly right in finding that the bar of [Section 16\(c\)](#) was squarely attracted on the facts of the present case,

and that therefore, the fact that Defendant Nos. 2 and 3 may not be bona fide purchasers would not come in the way of stating that such suit must be dismissed at the threshold because of lack of readiness and willingness, which is a basic condition for the grant of specific performance.”

In **K.Prakash's case (supra)**, the Hon'ble Supreme Court held as under:-

*“21. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the defendant-owner of the property. This aspect of the matter is considered by a three Judge Bench of this Court in **Nirmala Anand vs. Advent Corporation (P) Ltd. and Others**, (2002) 8 SCC 146, where this Court held :-*

“6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot

be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.”

Statement of DW-2 Sikander Singh also created a suspicion about the presence of the appellant-plaintiff on 29.12.1989.

For the reasons stated above, I do not intend to differ with the concurrent findings of both the Courts below. No ground for interference is made out, much less any substantial question of law arises. Resultantly, the appeal is dismissed.

February 28th, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No