

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 4597 of 2013 (O&M)
Date of Decision : 28.11.2018

Gurmail Singh

....Appellant

Versus

Gurcharan Singh

....Respondent

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Gurcharan Dass, Advocate
for the appellant.

Mr. Pranav Handa, Advocate
for the respondent.

Surinder Gupta, J.

Case of appellant-Gurmail Singh (plaintiff), in brief, is that respondent-Gurcharan Singh (defendant) was owner in possession of 1/3rd share of land measuring 86 *kanals* situated in village Mal Singh Wala, *Tehsil* Budhlada, District Mansa, as fully described in headnote of the plaint. He agreed to sell land bearing *khasra* no. 86//13 (8-0), 77//23/1 (4-0), 86//3 (8-0), 8(8-0) @ ₹2,26,000/- per *killa* vide agreement dated 22.01.2005 and received ₹1,50,000/- as earnest money. The date for execution of the sale deed was fixed as 07.05.2005, which was extended vide writing dated 05.05.2005 to 20.05.2005. Plaintiff was ready and willing to perform his part of the contract and has been requesting the defendant to execute the sale deed. The defendant has represented himself to be owner of 32 *kanals* but on perusal of revenue record he was found to be owner of 28 *kanals* 3 *marlas* i.e. 1/3rd share of the land measuring 86 *kanals*. On 20.05.2005, plaintiff remained present

in the office of Sub-Registrar with balance sale consideration and other expenses from 08.30 a.m. to 05.30 p.m. but the defendant did not turn up to execute the sale deed. Even later on he was requested to execute the sale deed but of no avail, hence this suit.

2. The defendant admitted execution of agreement dated 22.01.2005 and alleged that he has always been ready and willing to perform his part of the contract. On the date fixed for execution of the sale deed i.e. 20.05.2005, he had approached the plaintiff and in the presence of Hardev Singh, *Namberdar* and other witnesses requested him to get the sale deed executed as he himself had entered into an agreement to purchase some other land and given ₹2 lakhs as earnest money. The plaintiff apprised that he was not having the balance sale consideration and was arranging for money. On 20.05.2005, the defendant alongwith Hardev Singh *Namberdar* and other witnesses remained present in the office of Sub-Registrar from 09.00 a.m. and waited for the plaintiff, who did not turn up. They got their presence marked with Sub-Registrar. The plaintiff had entered into an agreement to sell with a view to get better price of the land, which he could not get as prices of the land had fallen down. Now after the increase in prices of land he has filed this suit. Due to the conduct of the plaintiff, the defendant had suffered great loss. He could not get executed sale deed of the land he intended to purchase and his earnest money was forfeited.

3. Pleadings of the parties led to framing of the issues as follows:-

(1) Whether the plaintiff is entitled to possession by way

of specific performance of agreement to sell dated 22.01.2005? OPP

- (2) Whether the plaintiff is entitled to the alternative relief of refund of earnest money amounting to ₹1,50,000/- and ₹1,50,000/- as compensation (agreed) and ₹5,00,000/- as compensation i.e. total ₹8 lakhs with interest as prayed for? OPP.
- (3) Whether the plaintiff has no *locus standi* and cause of action to file the present suit? OPD.
- (4) Whether the suit is not maintainable in the present form? OPD.
- (5) Whether the plaintiff is estopped from filing the present suit, if so, its effect? OPD.
- (6) Whether the suit of the plaintiff is false and fictitious and as such defendant is entitled to special costs under Section 35-A of the CPC? OPD.
- (7) Relief.

4. The suit of the plaintiff was decreed for specific performance of agreement to sell dated 22.01.2005 on payment of remaining sale consideration. The defendant filed appeal, which was allowed and the suit of the plaintiff seeking the relief of specific performance of agreement or alternate relief for refund of the earnest money was dismissed.

5. Learned Ist Appellate Court did not set aside the finding of the trial Court regarding execution of the agreement and writing dated

05.05.2005. It also rejected the plea of defendant that there was any material alteration in the agreement. Observation of learned Ist Appellate Court to this effect contained in para 17 of the judgment are reproduced as follows:-

“17. The perusal of file shows that execution of agreement to sell Ex. P1 and its extension Ex. P2 is not disputed between the parties. The contention raised by learned counsel for the appellant-defendant that there are material alterations in the agreement to sell and same is void and ineffective. The perusal of Ex. P1 shows that khasra number appears to have been added lateron but it does not appear to be material alterations because it is clearly mentioned in the agreement to sell that defendant agreed to sell 32 kanals land pertaining to his ownership and possession and its stipulated date for execution of the sale deed was extended vide endorsement Ex. P2. If there were any material alterations in the agreement to sell, then defendant would have never signed the endorsement Ex. P2. So this contention of learned counsel for appellant is devoid of any merit and same is hereby rejected.”

6. Learned Ist Appellate Court observed that plaintiff has not proved that he was ready and willing to perform his part of the agreement. While making above observation, a note of following facts

was taken:-

- (i) Application (Ex. P3) allegedly moved by plaintiff before Sub-Registrar, Budhlada regarding his presence before him on 20.05.2005 was not duly proved;
- (ii) Plaintiff placed on file affidavit sworn before Sh. P.K. Arora, Notary but this affidavit was never put to him when he appeared as PW-2;
- (iii) Defendant in order to prove his readiness and willingness proved on file Ex. D1 regarding his presence in the office of Sub-Registrar; and
- (iv) Plaintiff has stated that he withdrew ₹7,50,000/- from State Bank of Patiala, Malkerkotla but did not produce his pass-book and any bank record to this effect that on the date fixed for execution of the sale deed he was having ready cash available with him.

7. The only question, which calls for attention in this appeal is, as to whether finding recorded by Ist Appellate Court that plaintiff has not been able to prove his readiness and willingness to perform his part of the agreement is based on evidence on record?

8. The plaintiff while appearing as PW-1 has stated that he was ready and willing to perform his part of the contract as per agreement (Ex. P1). The date for execution of the sale deed was fixed as 07.05.2005, which with consent of both the parties was extended on 05.05.2005 to 20.05.2005. On 20.05.2005, he remained present in the office of Sub-

Registrar and got his presence marked before him and also executed an affidavit, which was attested by Notary Public.

9. Plaintiff has placed on file application he allegedly moved before the Sub-Registrar as Ex. P-3. However, to prove the fact that this application was produced before the Sub-Registrar on 20.05.2005, no witness was examined from the office of Sub-Registrar. There is solitary statement of plaintiff to this effect, which finds no corroboration. The plaintiff has also placed on file affidavit (Ex. P-4), which he allegedly had sworn and got attested from Sh. P.K.Arora, Notary, who appeared as PW-2 but this affidavit was neither put to him nor it was enquired from him that plaintiff had sworn this affidavit and the same was attested by him. In this manner, plaintiff was left with no evidence except his bald statement to prove that he was ready and willing to perform his part of the agreement and had appeared before the Sub-Registrar on the date fixed for execution of the sale deed to get the sale deed executed. Though, plaintiff has alleged that he had withdrawn ₹7.5 lakhs from his bank on 20.05.2005 but this statement of plaintiff is also not corroborated by any evidence on record.

10. Hon'ble Apex Court in case of **N.P. Thirugnanam (dead) by LRs vs. Dr. R. Jagan Mohan Rao, 1995 (5) SCC 115** while discussing the mode to adjudicate the readiness and willingness of plaintiff has observed as follows:-

“5. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms

of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of

contract.”

11. In case of **Man Kaur (dead) by LRs vs. Hartar Singh Sangha, 2010 (10)SCC 512**, it was observed by Hon'ble Apex Court as follows:-

“11. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no

personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.”

12. Taking note of above principle as laid down by Hon'ble Apex Court and observations of learned Ist Appellate Court, I find myself in agreement with observations of learned Ist Appellate court that plaintiff has failed to prove vital document i.e. Ex. P-3 and Ex. P-4 i.e. application he allegedly moved before Sub-Registrar on 20.05.2005 and affidavit of his readiness and willingness attested by notary or has been able to place on file any evidence to show that he has always been ready and willing to perform his part of the contract and it was the defendant, who committed breach of contract.

13. Learned counsel for the appellant has argued that though, plaintiff has not produced his bank record, it was the defendant, who had moved application to summon record of the plaintiff and deposited diet money but has not examined the bank official, which shows that he was aware that plaintiff had enough amount in his bank account to pay the sale consideration. This confirms readiness and willingness on the part of plaintiff to perform his part of the agreement.

14. On giving a careful thought to submission of learned counsel for the appellant, I find no reason to agree with him as onus was on the appellant to prove his readiness and willingness. The defendant even if had moved application to summon a witness but later thought it appropriate not to summon him cannot be a reason to draw adverse inference against him or a fact favouring the plaintiff. There was no bar

for the appellant (plaintiff) to summon the witness to prove withdrawal of money from the bank on the date fixed for execution of the sale deed. The plaintiff has not issued any notice to defendant after 20.05.2005, when he failed to appear to get the sale deed executed. The defendant has come up with a specific plea that he himself had entered into an agreement to purchase some other land, which transaction on his part failed. He has stated that plaintiff is in fact a property dealer and entered into an agreement to earn margin in the sale transaction. As the rate of land after agreement fell down, he avoided to get the sale deed executed. Thereafter, when rates of the land increased he filed this suit. Due to lapse on the part of plaintiff (appellant), the earnest money given by the defendant for purchase of land also got forfeited.

15. Learned Ist Appellate Court while accepting the appeal has committed no error while observing that the onus was on the plaintiff to prove that he was ready and willing to perform his part of the contract, which he has failed to prove.

16. On perusal of trial Court record, I find no illegality or infirmity in the judgment of Ist Appellate Court calling for any interference in this appeal, which has no merit.

17. Dismissed.

November 28, 2018
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No