

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

RSA No.1783 of 2014 (O&M)

Date of Order: 10.12.2018

Suksham Lata @ Kusum Lata & Anr.

....Appellants

Versus

Jagdish Ram

....Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sunil Chadha, Sr. Advocate with
Mr. Naveen Gupta, Advocate for the appellants.

Mr. Akshay Jindal, Advocate for the respondent.

ANIL KSHETARPAL, J (ORAL)

Defendants-appellants are in the regular second appeal against the concurrent findings of facts arrived at by both the courts below decreeing the suit for possession by way of specific performance of agreement to sell dated 03.03.2005.

In the present case, execution of the agreement to sell, receipt of earnest money and the receipt of additional amount is not in dispute. As per agreement to sell, sale deed was to be executed and registered on 01.06.2005. It is the case of the plaintiff that he was ready and willing to perform his part of the contract and visited the office of the Sub Registrar and even got prepared a draft sale deed after purchase of the stamp papers but the defendants did not come forward to execute the sale deed. Plaintiff thereafter served a notice on the defendant on 19.6.2005. In the meantime, plaintiff came to know that some part of the land had already been acquired

by the PWD Department.

In the written statement, the defendants, who are the husband and wife took a stand that they were present in the office of the Sub Registrar whereas the plaintiff did not come forward to execute the sale deed. Defendants further stated that they had come to know of the acquisition of the part of land after receipt of notice.

On appreciation of evidence, both the courts below decreed the suit filed by the plaintiff and granted decree for possession by way of specific performance of the agreement to sell except the land, which has already been compulsorily acquired by the State Government.

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

Learned senior counsel appearing for the appellants submitted that in the affidavit, which was got attested by the plaintiff, it is nowhere asserted that the plaintiff is possessing remaining sale consideration either in the form of cash amount or draft. He further submitted that the agreement to sell had already been cancelled vide reply dated 08.07.2005, therefore in the absence of challenge to the cancellation, the suit was not maintainable. He relied upon a judgment passed by Hon'ble Supreme Court in case of **I.S. Sikandar (D) By LRs vs. K. Subramani and others, 2014 (1) RCR (Civil) 236.**

In the present case, plaintiff in the plaint has specifically stated that he was carrying cash amount representing balance sale consideration. In the affidavit, which was got attested on 01.06.2005 from the Sub Registrar, plaintiff had stated that he was ready and willing to perform his

part of the contract. Plaintiff when appeared in evidence has also stated that he was always ready and willing to perform his part of the contract. The suit was filed on 04.08.2005 i.e just two months and four days after the target date fixed in the agreement to sell. In view of the overwhelming evidence, this Court does not find any substance in the arguments of learned counsel for the appellants that since in the affidavit, plaintiff has not stated that he is carrying balance sale consideration, therefore, it must be assumed that the plaintiff was not ready and willing. The affidavit is filed only to prove that the plaintiff was present on the date when sale deed was to be executed and registered. No particular form of affidavit is required to be attested. It is only a piece of evidence to prove that the plaintiff was present. Still further, defendants in the written statement had pleaded that they were present on the date, sale deed was to be executed, however, no evidence has been produced.

As regards next argument of learned counsel while relying upon the judgment passed by Hon'ble Supreme Court in I.S. Sikandar's case (supra), it will be noted that neither in the written statement nor issue on this aspect was got framed or from the reading of the judgment of the trial Court, learned counsel could not point out that this point was ever pressed or even raised before the trial Court. The argument is being raised on the basis of a judgment passed by Hon'ble Supreme Court. Such objection ought to have been taken at the time of filing the written statement so that the plaintiff has opportunity to amend the plaint. At the stage of second appeal, if such argument is permitted to be raised for the first time, it would result in defeating a valid claim of the plaintiff. Still further, this aspect has been examined by this Court in detail in RSA No.4201 of 2012, decided on

02.02.2018. In view of the reasons recorded in the aforesaid judgment, the defendants-appellants cannot be permitted to raise this contention for the first time in second appeal.

Learned counsel for the appellant further submitted that the plaintiff has failed to show and prove that he was in possession of balance sale consideration. To avoid repetition, this Court has already noticed the pleadings of the plaintiff, his evidence and his affidavit. In these circumstances, plaintiff, who claims to be an agriculturist has specifically stated in his affidavit that he was in possession of the entire balance sale consideration. In the absence of evidence to the contrary, the evidence of the plaintiff has rightly been accepted by the courts below.

Learned senior counsel appearing for the appellant has further submitted that the plaintiff had got a draft sale deed prepared but that proves that the total sale consideration was got executed for Rs.4 lacs although total sale consideration as per agreement to sell comes to Rs.15,64,000/-. In this regard, the pleadings of the plaintiff have to be examined carefully. Plaintiff has stated that it was the defendants who had suggested that let the sale deed be executed at the collector rate in order to save stamp duty. Plaintiff while filing the suit has not prayed for specific performance of the draft sale deed. Sale deed is to be executed at the consideration agreed to between the parties. Decree for specific performance of agreement to sell has been passed and not of draft sale deed.

In view of the aforesaid, there is no ground to interfere with.

Dismissed.

December 10, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable : Yes/No