

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

RSA No. 3771 of 2014(O&M)

Date of decision: 9.1.2018

Krishan Kumar and others

....Appellants

VERSUS

Ramji Lal

.....Respondent

CORAM: **HON'BLE MRS. JUSTICE REKHA MITTAL**

Present: Mr. K.S. Malik-I, Advocate for the appellants.

Mr. J.P. Sharma, Advocate for the respondent.

REKHA MITTAL, J.

The present appeal directs challenge against consistent findings recorded by the Courts below whereby suit filed by the respondent for specific performance of agreement of sale dated 01.01.2008 has been decreed with a direction to the respondent/plaintiff to pay remaining sale consideration to defendant No.1 within three months with liberty to get the sale deed executed through process of the Court in case defendant No.1 fails to execute the same.

The facts relevant for disposal of the present appeal are that as per case of the respondent/plaintiff, Chhaju Ram – defendant No.1 agreed to sell land measuring 8 kanals comprised in killa No.21/11 for sale consideration of Rs.4,00,000/- and executed agreement to sell dated 01.01.2008. An amount of Rs.2,80,000/- was paid towards earnest money and remaining sale consideration was to be paid at the time of execution of sale deed on 30.06.2008. The time for execution of sale deed was

extended to 01.08.2008. The plaintiff always remained ready and willing to perform his part of the contract. On 01.08.2008, the plaintiff visited office of Joint Sub Registrar Nangal Chaudhary with balance sale consideration and other expenses but defendant No.1 did not come present to perform his part of the agreement. The plaintiff got his presence marked by way of an affidavit attested from the Executive Magistrate Nangal Chaudhary. He got issued legal notices dated 12.08.2008, 31.07.2009, 11.11.2009, 10.02.2010, 01.05.2010 and 15.03.2011 through his counsel but defendant No.1 did not execute the sale deed. Defendant No.1 executed release deed dated 11.04.2008 in favour of defendants No.2 to 4 on the basis whereof mutation No.687 dated 03.11.2009 was sanctioned which is wrong and liable to be declared null and void.

The defendants filed joint written statement and, in turn, denied the allegations raised by the plaintiff. It is averred that defendant No.1 never executed agreement to sell dated 01.01.2008 nor received Rs.2,80,000/- by way of earnest money. Defendant No.1 is an illiterate person who does not know to append his signatures and used to put his thumb impressions. The plaintiff is an Advocate by profession and if he procured any affidavit to create evidence, the same is not binding on the defendants. The plaintiff never issued registered notice to the defendants. Defendants No.2 to 4 are the co-parceners in the suit property. Defendant No.1 is an extravagant person and already sold 12 kanals out of 30 kanals of land. All other material averments of the plaint are denied with a prayer for dismissal of the suit.

The defendants also raised preliminary objections inter alia maintainability, locus standi, cause of action, suit being time-barred and court fee.

The plaintiff filed replication, reiterated his stand in the plaint and controverted averments raised in the written statement.

The trial Court framed the following issues for determination:-

1. Whether the defendant has executed an agreement to sell dated 01.01.2008 for the sale consideration of Rs.4,00,000/- and has received Rs.2,80,000/- as an earnest money? OPP
2. Whether the plaintiff is/ was ready and willing to perform his part of contract as alleged in the plaint? OPP
3. Whether the plaintiff is entitled to a decree for specific performance of contract in respect of the suit land as alleged in the plaint? OPP
4. In alternate, whether the plaintiff is entitled to recover Rs.2,80,000/- along with interest at the rate of 18% pre annum? OPP
5. Whether the suit is not maintainable in the present form? OPD
6. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
7. Whether the plaintiff has concealed the true and material facts from the Court? OPD
8. Whether the present suit is time barred? OPD
9. Relief.

The trial Court permitted the parties to adduce evidence. The respondent/plaintiff examined Ramanand Sharma Deed Writer PW1,

Shimbhu Dayal PW-2, Ved Prakash PW-3, Ram Niwas PW-4, Pawan Kuamr Record Keeper PW-5, Shamsheer Singh Malik Handwriting and Fingerprints Expert PW6, Raj Kumar Chaudhary, Advocate PW-8 and himself appeared as PW-7. To rebut evidence of the plaintiff, Chhaju Ram – defendant No.1 appeared in the witness box.

In rebuttal, the plaintiff tendered into evidence certified copy of judgment dated 17.04.2007 Ex.PX.

The trial Court took up issues No.1 to 3 together and answered the same in favour of the respondent/plaintiff. Issue No.4 was decided against the respondent/plaintiff as not pressed. Issues No.5 to 8 were determined against the defendants/appellants as not pressed. The findings recorded by the trial Court were affirmed in appeal by the Additional District Judge, Narnaul vide judgment and decree dated 25.02.2014.

Feeling aggrieved against verdict of the Courts below, the instant appeal has been preferred by the appellants/defendants.

Counsel for the appellants has assailed findings of the Courts below primarily on three counts. The first submission made by counsel is that Chhaju Ram did not agree to sell the suit land nor executed agreement to sell dated 01.01.2008 and the said agreement is the result of fraud and forgery practised upon him. It is further argued that the agreement has been procured by respondent/plaintiff taking advantage of illiteracy and fiduciary relationship between Chhaju Ram and the respondent/plaintiff who is an Advocate by profession and had been representing Chhaju Ram in a case lodged by CBI.

The second submission made by counsel is that as per averments made in the plaint, Chhaju Ram executed a release deed dated

11.04.2008 in favour of appellants No.1 to 3/defendants No.2 to 4 (his sons), therefore, Chhaju Ram was left with no right or interest in the suit land after the said release deed, thus, he was not competent to enter into an agreement extending time for execution of the sale deed upto 01.08.2008.

It is argued with vehemence that finding recorded by the Courts below that the respondent/plaintiff always remained ready and willing to perform his part of the contract is the result of mis-appreciation of materials on record in the light of settled position in law. To bring home his contention, it is argued that as per case of the respondent/plaintiff, he issued the first notice dated 12.08.2008 calling upon Chhaju Ram to execute the sale deed but he failed to do so. It is further argued that though there is no requirement in law to issue a legal notice to the proposed vendor but if the proposed vendor had not executed the sale deed despite issuance of legal notice, there was no occasion for the respondent/plaintiff to issue further notices and wait till April 2011 in filing the suit for specific performance. According to counsel, the respondent by taking advantage of his knowledge being a professional Advocate had been creating evidence in his favour but without having any willingness to perform his part of the contract or seek specific performance thereof. It is argued that conduct of the respondent in failing to file the suit for specific performance immediately on expiry of the alleged date fixed for execution of sale deed or at least within a reasonable time from issuance of first legal notice dated 12.08.2008 speaks volumes that the respondent was not willing to get the alleged agreement to sell specifically enforced. The last submission made by counsel is that as per the settled position in law, party seeking specific performance has to be ready and willing throughout i.e. from the date of execution of agreement, during its

subsistence, during pendency of the suit and till passing of the final decree. For this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court of India **Sita Ram and others Vs. Radhey Shyam, 2007 (4) RCR (Civil) 533.**

Counsel for the respondent/plaintiff, on the contrary, has supported consistent findings recorded by the Courts below with the submission that judgment passed by the trial Court and affirmed in appeal does not suffer from an error much less illegality or perversity. It is argued that the respondent visited the office of Joint Sub Registrar Nangal Chaudhary on 01.08.2008 with a clear intention to pay balance sale consideration and incur expenses for registration etc. in order to facilitate execution of sale deed by Chhaju Ram. He executed an affidavit in token of his presence in the aforesaid office, attested by the Executive Magistrate Nangal Chaudhary. Immediately thereafter, he got issued legal notice dated 12.08.2008 calling upon the proposed vendor to execute the sale deed. It is strenuously argued that had the respondent/plaintiff not been willing to get the sale deed executed by way of specific performance of the agreement of sale, there was no reason for him to issue repeated notices to defendant No.1 for execution of the sale deed. Counsel would inform that the respondent filed an application for execution of the decree wherein the sale deed has been executed in his favour and possession of suit land has been delivered and the decree stands satisfied.

Counsel for the appellants, in reply, has refuted contention of the respondent/plaintiff that possession of land in question has been delivered in favour of the respondent. However, counsel has offered to refund the amount of Rs.2,80,000/- along with interest, if any, awarded by this Court even though defendant No.1 has neither executed the agreement

nor received the alleged amount towards earnest money, in case the decree for specific performance is set aside by this Court.

I have heard counsel for the parties, perused the paper-book and records of the Courts below.

There is no dispute that the respondent/plaintiff is a professional Advocate and resident of Narnaul, District Mahendergarh. The appellants/defendants had denied execution of the agreement and receipt of earnest money by defendant Chhaju Ram. The respondent/plaintiff examined as many as 8 witnesses including himself to prove that agreement to sell Ex.P1 was executed by Chhaju Ram. Except the fact that it has been brought in cross examination of respondent/plaintiff that he had been representing Chhaju Ram in a case CBI Vs. Chhaju Ram and others, counsel has failed to point out any materials on record to uphold plea of the appellants that agreement to sell does not bear signatures of Chhaju Ram much less the same being the result of fabrication/forgery. In this view of the matter, findings recorded by the Courts below on issue No.1 are liable to be affirmed and ordered accordingly.

Counsel for the appellants has contended that Chhaju Ram was not competent to extend the date for execution of the sale deed vide Ex.P2 as he had executed a release deed in favour of his sons on 11.04.2008. Neither Chhaju Ram nor his sons can take advantage of this deceitful practice adopted by the defendants to wriggle out of liability created under the agreement to sell or by way of extension of time for execution of the sale deed. If such a practice is allowed to prevail, it would amount to shaking public faith in transactions for sale of immovable

property. In this view of the matter, contention raised by counsel for the appellants in this regard is not meritorious and liable to be rejected.

This brings the Court to the issue of readiness and willingness of the respondent to perform his part of the agreement. The trial Court in para 23 of the judgment, after referring to factum of respondent having got marked his presence by way of an affidavit attested from the Executive Magistrate Nangal Chaudhary on 01.08.2008, legal notices and judgment of this Court **Dharampal Sood Vs. Atul Thaper, 2006(2) LJR 671** has held to the following effect:-

“23....Court may infer from the facts and circumstances of the case whether the vendor/plaintiff was ready and willing to perform his part of contract. Readiness may mean the capacity of plaintiff to perform the contract which includes his financial position to pay the price of land. In order to determine his willingness to perform his part of contract his conduct has to be properly scrutinized. In the considered view of this plaintiff is entitled for decree of specific performance of contract on the basis of agreement to sell Ex.P1 and agreement for extension of time Ex.P2.”

The Court has not at all adverted to the question as to why the respondent/plaintiff kept on issuing repeated legal notices despite failure of defendant No.1 to execute the sale deed on the stipulated date i.e. 01.08.2008 and in pursuance of first legal notice dated 12.08.2008. It appears that the trial Court had shirked from its responsibility to examine the question of willingness of respondent who issued repeated legal notices and filed the suit just four months prior to the expiry of period of limitation despite knowing fully well that relief of specific performance is discretionary in nature and plaintiff has an obligation in law to prove ingredients of Section 16(c) of the Specific Relief Act, 1963.

The Court in appeal in para 17 of the judgment has held on the question of readiness and willingness, reads thus:-

“17....I do not find any merit in the argument raised by learned counsel for the appellants-defendants as from mere issuance of legal notice it cannot be taken that there was no readiness and willingness on the part of plaintiff. It is clear from Ex.P3 that plaintiff-respondent was present in the office of Sub Registrar, Nangal Chaudhary for whole day on 1.8.2008 with the remaining sale consideration etc. As per the record of the case, plaintiff-respondent filed suit on 26.4.2011 i.e. within limitation. As per Ex.P1 sale deed was to be executed upto 30.6.2008 and time was extended upto 1.8.2008 vide Ex.P2.”

A plain reading of the aforesaid extract leaves no manner of doubt that even the Court in appeal has not adverted to the question that if the respondent/plaintiff was willing to perform his part of the agreement, why did he keep on sending repeated legal notices despite being well aware of the position in law coupled with the factual position that defendant No.1 did not come forward to execute the sale deed on 1.8.2008 nor in response to first legal notice dated 12.08.2008 despite the fact that as per plea of the respondent/plaintiff, he had been agreeing to execute the sale deed. As a matter of fact, both the Courts below have failed to take adequate note of conduct of the respondent who failed to file the suit for specific performance at the first and earliest available opportunity. It further appears to the Court that the respondent/plaintiff issued repeated legal notices with a clear intent to create evidence but without having willingness to perform his part of the agreement. Perusal of the statement of respondent/plaintiff as a witness does not give any explanation much less cogent and convincing as to why he remained sending repeated notices without filing the suit for specific performance at the earliest available

opportunity despite failure of defendant No.1 to execute the sale deed on the stipulated date or in pursuance of the first legal notice.

There cannot be any dispute that suit for specific performance can be filed within the stipulated period of limitation of three years. However, the relief of specific performance is discretionary in nature. The respondent/plaintiff is a professional Advocate, therefore, he was well aware of legal implications and obligation to be discharged by plaintiff who seek indulgence of the Court in exercise of its discretionary jurisdiction for allowing specific performance of agreement of sale. Taking into consideration conduct of the respondent/plaintiff, it can be safely concluded that the respondent/plaintiff was not willing to perform his part of the contract and for that reason he kept on sending repeated legal notices with a different motive to be satisfied. The findings recorded by the Courts below on the issue of readiness and willingness on the part of respondent/plaintiff are not well-founded and rather bereft of reasoning. In this view of the matter, findings of the Courts below on issue No.2 cannot be allowed to sustain and ordered to be set aside. As a natural corollary, respondent/plaintiff can neither seek specific performance of agreement of sale nor setting aside of release deed executed by defendant No.1 in favour of defendants No.2 to 4.

Ordinarily, if the plaintiff has failed to prove his readiness and willingness to perform his part of the contract, disregarding his being not entitled to seek specific performance of the agreement, he may not be allowed refund of earnest money. However, in the present case, counsel for the appellants offered to refund the amount of Rs.2,80,000/- along with interest, if any. Under the circumstances, despite this Court having set aside findings of the Courts below on issue No.2, it would be equitable to

allow alternative relief in favour of the respondent/plaintiff qua recovery of Rs.2,80,000/- along with interest at the rate of 7% per annum w.e.f. 01.01.2008 till realization.

For the foregoing reasons, the appeal is partly allowed. The judgments and decrees passed by the Courts below allowing specific performance of agreement to sell dated 01.01.2008 are set aside. However, by way of modification of the judgments and decrees, the respondent/plaintiff is held entitled to recover the earnest money of Rs.2,80,000/- along with interest at the rate of 7% per annum w.e.f. 01.01.2008 till its realization. No order as to costs.

JANUARY 9, 2018

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no