

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

RSA No.6143 of 2014(O&M)

Date of decision: 8.10.2018

Sukhdev Singh

.....Appellant

VERSUS

Balbir Singh

.....Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Vikas Bahl, Senior Advocate with
Mr. Nitish Garg, Advocate for the appellant.

Mr. Sanjiv Pabbi, Advocate for the respondent.

REKHA MITTAL, J.

The present appeal directs challenge against decree and judgment dated 01.10.2012 passed by the Additional Civil Judge (Senior Division), Ferozepur (hereinafter to be referred as the trial Court) as well as judgment and decree dated 02.05.2014 by the Additional District Judge, Ferozepur (hereinafter to be referred as the Appellate Court) whereby suit for possession by way of specific performance of agreement to sell dated 19.09.2007 was partly decreed by the trial Court and the respondent/plaintiff was allowed alternative relief of recovery of Rs.2,00,000/- along with interest, detailed in para 29 of the judgment. The appeal preferred by plaintiff/respondent against rejection of his claim seeking specific performance of the agreement was accepted by the Appellate Court while modifying decree and judgment passed by the trial Court to the following effect:-

“...the plaintiff is held entitled to the grant of the relief of specific performance of the agreement to sell in dispute. Resultantly, the appeal having been filed by the plaintiff is accepted and allowed; whereas, the appeal filed by the defendant is dismissed. Consequently, suit filed by the plaintiff stands decreed for specific performance of the agreement to sell in dispute. The defendant is directed to execute the sale deed and get it registered in favour of the plaintiff on receipt of balance sale consideration within three months, failing which the plaintiff shall be at liberty to get the sale deed executed and registered through the agency of the Court after depositing the balance sale consideration before the learned Executing Court.”

The facts relevant for disposal of present appeal are that indisputably, the appellant/defendant entered into agreement of sale dated 19.09.2007 for sale of house measuring 1 kitta i.e. 8.27 marlas situated ahead of Gurdwara Ram Lal, Ferozepur City, detailed in head-note of the plaint for sale consideration of Rs.8,50,000/-. A sum of Rs.2,00,000/- was paid by the plaintiff to the defendant towards earnest money at the time of execution of agreement. The sale deed was agreed to be executed on or before 26.03.2008. The time for execution and registration of sale deed was extended to 30.04.2008.

As per plea of the respondent/plaintiff, he visited office of the Sub Registrar, Ferozepur along with balance sale consideration and other necessary expenses on 30.04.2008 and waited for the appellant whole day

but he did not turn up. He got his presence marked by filing an affidavit dated 30.04.2008 before the Sub Registrar, Ferozepur. He always remained ready and willing to perform his part of the agreement but the appellant/defendant failed to execute the sale deed. The suit for specific performance of the agreement was filed on 24.07.2008.

The appellant/defendant admitted the factum of execution of agreement of sale, receipt of earnest money of Rs.2,00,000/- and terms and conditions incorporated in the agreement. It is averred that respondent/plaintiff did not have balance sale consideration to be paid on 30.04.2008. Answering defendant got his presence marked before the Sub Registrar, Ferozepur by submitting affidavit dated 30.04.2008. The plaintiff has breached the terms and conditions of agreement so the earnest money stands forfeited and agreement dated 19.09.2007 stands automatically cancelled.

The respondent/plaintiff filed replication, reiterated his stand taken in the plaint while controverting the defence plea raised by the appellant.

The controversy between the parties led to framing of following issues by the trial Court:-

1. Whether the plaintiff is entitled to Specific Performance of the agreement to sell dated 19.9.2007 executed by the defendant in favour of plaintiff? OPP
2. Whether the plaintiff has paid Rs.2,00,000/- as earnest money to the defendant? OPP

3. Whether the plaintiff has been and still ready and willing to perform his part of contract? OPP
4. Whether the plaintiff is entitled for recovery of Rs.8,50,000/- as alternative relief? OPP
5. Whether the suit of the plaintiff is false, frivolous and vexatious to the knowledge of the plaintiff? OPD
6. Whether the plaintiff has not come to the court with clean hands? OPD
7. Whether the plaintiff is estopped from filing the present suit? OPD
8. Relief.

To prove his case, the respondent examined Kulwinder Singh, DEO, Suvidha Centre, SDM office, Ferozepur PW-1, Jagdish Lal son of Ami Chand PW-2, Rajinder Kumar Jain PW-4, Ashok Arora PW-5 and himself appeared as PW-3.

To rebut evidence of the respondent/plaintiff, the appellant examined himself as DW1.

Having heard counsel for the parties in the light of materials on record, the trial Court allowed the alternative relief of recovery, in view of findings recorded in paras 26 and 27 of the judgment. The reasoning adopted by the trial Court to deny the principal relief of specific performance is that the plaintiff has not approached the defendant after the stipulated date i.e. 30.04.2008 till issuance of notice in June 2008 requesting him to get the sale deed executed. Further held that as agreement to sell has been executed in the year 2007 and stipulated date

was finally fixed as 30.04.2008 and since then till today, there is escalation of price and if the relief of specific performance is granted, it will cause hardship to the defendant as price of land has increased many a times since the year 2008.

The Appellate Court decided the appeals preferred by the appellant as well as respondent/plaintiff vide common judgment dated 02.05.2014 whereby appeal preferred by the appellant was dismissed but appeal of the respondent/plaintiff was allowed and the plaintiff was granted principal relief of specific performance of agreement.

Counsel for the appellant/defendant has assailed the judgments by making few submissions. It is vehemently argued that as specific performance of agreement would result in extreme hardship for the appellant due to suit house being the only house owned by him, the decree passed by the Court in appeal may be set aside and the respondent/plaintiff may be allowed alternative relief of recovery of earnest money with damages etc., to be ascertained by this Court.

Counsel would argue that the respondent/plaintiff has failed to adduce satisfactory much less cogent evidence that either he was in possession of balance sale consideration of Rs.6,50,000/- or he had the source to arrange money for discharging his obligation under the agreement on the stipulated date i.e. 30.04.2008, therefore, the respondent has failed to prove one of the ingredients of Section 16(c) of the Specific Relief Act, 1963 that he always remained ready to perform his part of the agreement from the date of agreement till decision by the Appellate Court. In addition, it is argued that initially the date for execution of sale deed was

fixed for 26.03.2008 but as the respondent did not have requisite funds to pay, time for execution of sale deed was extended to 30.04.2008 by way of endorsement dated 18.03.2008.

Another submission made by counsel is that Kulwinder Singh PW-1, in his cross examination, has admitted that affidavit bearing No.26178 dated 30.04.2008 got attested by the appellant with regard to his presence in the office of Sub Registrar on the stipulated date was entered earlier viz-a-viz bearing No.26195 of the respondent/plaintiff, it clearly shows that respondent/plaintiff ante dated the affidavit to create evidence that he was present in the office of Sub Registrar, Ferozepur on 30.04.2008. In the alternative, it is argued that as Sukhdev Singh visited office of the Sub Registrar, Ferozepur on the stipulated date i.e. 30.04.2008, it substantiates his plea that he always remained ready and willing to perform his part of the agreement but the same could not fructify on account of respondent/plaintiff being not ready with enough money to discharge his obligation under the agreement.

Counsel has submitted that in the agreement Ex.P1, the vendee has been given right to recover damages (harj kharch) in case of failure of the vendor to execute the sale deed, therefore, he cannot claim specific performance of the agreement and, at best, can be allowed refund of earnest money along with interest and damages, if any. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **Dadarao and another Vs. Ramrao and others, 1999(8) JT 608.**

Counsel has further submitted that the trial Court has rightly taken note of escalation of price of suit property and rejected claim of the

respondent for specific performance of agreement of sale. A suggestion was put to the appellant by counsel opposite that there has been manifold increase in price of suit house. Under the given circumstances, the Appellate Court should not have interfered in the discretion exercised by the trial Court rejecting prayer for specific performance of the agreement and allowing alternative relief of recovery. Further argued that relief of specific performance is discretionary in nature and the Court should not allow the same merely because it is lawful to do so. For this purpose, reference has been made to judgments of Hon'ble the Supreme Court **Nanjappan Vs. Ramasamy and another, 2015(2) RCR (Civil) 224, Saradamani Kandappan Vs. S. Rajalakshmi and others, 2011 (4) RCR (Civil) 130** and **A.C. Arulappan Vs. Smt. Ahalya Naik, 2001 (4) RCR (Civil) 109.**

The last submission made by counsel is that as the Court in appeal has not specifically reversed findings of the trial Court on issue No.1, judgment and decree passed by the Appellate Court suffer from perversity and liable to be set aside. In support of his contention, he has relief upon judgment of this Court **Smt. Harjit Grewal and others Vs. Dr. Vinod Kumar Batra and others, 2010 (5) RCR (Civil) 340.**

Counsel for the respondent has supported findings of the Courts with the submission that the same are based upon detailed and meticulous appreciation of factual and legal aspects involved in the case. The testimony of Balbir Singh duly supported by Rajinder Kumar PW-4, Ashok Arora PW-5 and the documentary evidence with regard to his presence in the office of Sub Registrar on the stipulated date i.e.

30.04.2008 is more than sufficient to establish his plea that he always remained ready and willing to perform his part of the agreement. This plea further gets corroborated from the fact that suit for specific performance of agreement to sell was instituted on 24.07.2008, within a period of 3 months from the stipulated date i.e. 30.04.2008. It is further argued that Balbir Singh tendered into evidence his duly sworn affidavit by way of examination in chief reiterating his version with regard to his readiness and willingness to perform his part of the agreement i.e. payment of balance sale consideration and expenses of registration etc. but nothing tangible and material has been elicited in his cross examination to create a dent in his testimony with regard to his having not possessed sufficient means/money for discharging his liability under the agreement.

To refute contention of the appellant that allowing specific performance of the agreement would be of serious consequence/hardship on account of suit house being the only house owned by the appellant, it is argued that no such plea was raised in the written statement nor the appellant has adduced any evidence in this regard. According to counsel, no factual plea can be allowed to be raised for the first time in second appeal because if such a course is allowed to be followed, the contesting party would be taken by surprise and it would cause serious prejudice to his right to defend a factual contention raised for the first time.

I have heard counsel for the parties, perused the paper-book, copies of documents supplied during the course of hearing, correctness whereof has been vouched by counsel for the parties and judgments cited at bar.

Counsel for the appellant is not in a position to point out if the defendant/appellant ever raised any such plea that the suit house is the only residential house and in case sale deed is executed in favour of the respondent/plaintiff, it would result in extreme hardship for the appellant or his family. Once the appellant has not raised any such plea, he cannot be allowed to raise a factual plea for the first time in second appeal. This apart, the consistent stand taken by the appellant is that he always remained ready and willing to perform his part of the agreement but fault lies with the respondent/plaintiff to get the sale deed executed and registered for want of sufficient funds to discharge his obligation under the agreement. In this view of the matter, first contention raised by the appellant that specific performance of the agreement should not be allowed on account of hardship to the appellant is devoid of merit and rejected.

This brings the Court to the issue of readiness on the part of respondent/plaintiff to perform his part of the agreement namely payment of balance sale consideration of Rs.6,50,000/- and expenses of registration etc. The plea of the appellant that date for execution of sale deed was extended to 30.04.2008 which was initially fixed for 26.03.2008 on account of the respondent being not possessed of money to discharge his obligation has no legs to stand. Firstly, the endorsement with regard to extension of time does not make reference that the same has been extended at the request of the respondent much less on account of his inability to discharge his obligation under the agreement. Counsel for the appellant has laid much stress that as affidavit purported to be executed by the respondent with regard to his presence in the office of Sub Registrar bears

No.26195 as against affidavit of the appellant bearing No.26178, affidavit of the respondent has been manufactured later. The respondent/plaintiff examined Kulwinder Singh PW-1 and Jagdish Lal PW-2 to corroborate his version with regard to his having executed affidavit Ex.P1 dated 30.04.2008 which was got attested from the S.D.M., Ferozepur. Not only this, testimony of the respondent with regard to his presence in the office of Sub Registrar on the stipulated date i.e. 30.04.2008 gets corroborated from the testimony of Rajinder Kumar PW-4 and Ashok Arora PW-5. Counsel for the appellant has failed to point out any materials on record to prove that observations made by the Courts with regard to presence of the respondent in the office of Sub Registrar on 30.04.2008 suffer from perversity or is the result of mis-appreciation of evidence or failure to take into consideration evidence which has material bearing on this aspect of the matter. As has been rightly argued by counsel for the respondent, the very fact that the respondent filed suit for specific performance within a period of 3 months from the stipulated date goes a long way to corroborate his plea that he always remained ready and willing to perform his part of the agreement. Not only this, Balbir Singh – respondent/plaintiff was subject to searching and lengthy cross examination particularly with regard to balance sale consideration etc. He has deposed that he had sold his property for Rs.6,50,000/- 10 days prior to 30.04.2008, he got retired in September 2005 but retirement benefits amounting to Rs.14/15 lakhs were received by him after 5/6 months of his retirement. The balance sale consideration was lying at his home and he withdrew approximately Rs.1/1.5 lakh, one or two days prior to 30.04.2008 from his account in

State Bank of India. Counsel for the appellant never made a request to the trial Court that the respondent be directed to produce the documents with regard to sale of property or withdrawal from the bank. As per settled position in law, the proposed vendee is not required to prove that he had cash ready with him for payment of balance sale consideration and expenses for registration etc. On due consideration of cross examination of Balbir Singh, it is difficult to accept contention of the appellant that either Balbir Singh was not ready to perform his part of the agreement or findings recorded by the Court in this regard warrant intervention.

Counsel for the appellant has tried to draw some mileage from the recitals in the agreement by referring to judgment in **Dadarao and another's case** (supra). In **Dadarao and another's case** (supra), Hon'ble the Apex Court in para 6 has noticed that the agreement provided as to what would happen if either the seller refuses to sell or the purchaser refused to buy. What was provided in the agreement is that in addition to the earnest money of Rs.1000/- a sum of Rs.500/- was to be given back to Tukaram Devsarkar and that "no sale deed will be executed". In the given circumstances, it has been held that the agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same, there was no question of the other party being compelled to go ahead with execution of the sale deed. It was held that lower Appellate Court and the High Court erred in coming to the conclusion that successors in interest of Tukaram Devsarkar were in anyway entitled to a decree of specific

performance requiring the sale of 3 acres of land pursuant to agreement dated 24.04.1969.

Counsel for the appellant has failed to point out any such stipulation in the agreement in question to contend that referred authority can be applied to the facts of the case at hand. I have gone through copy of the agreement supplied during the course of hearing. At page 2 of the agreement a relevant extract (in Punjabi but translated in English), reads as follows:-

“I agree that upto 26.03.2008 I will execute and get register sale deed in favour of a person as per desire of the vendee on receipt of balance sale consideration. In case of refusal, vendee/purchaser shall be entitle to receive harj kharch through Court and I would be responsible for all the expenses of Court proceedings and Advocate etc. In case purchaser would be willing, he would be entitle to double of the amount of earnest money along with harjana kharch. In case the purchaser fails to get the registry done on the stipulated date, the earnest money given by him shall be deemed to be forfeited.”

On due consideration of the aforesaid extract leaves no manner of doubt that something remained missing in the first recital as to what would be the consequence of the vendor refusing to execute the sale deed. Had it been true that the parties agreed that the vendee would only be entitle to recover earnest money and damages, there was no reason to

make aforesaid two recitals in place of one. In the given scenario, the appellant cannot take undue advantage of something having remained missing in the first recital.

Another contention of the appellant that the trial Court has rightly taken note of escalation of price of suit property to reject claim for specific performance of agreement of sale is highly misconceived and untenable. Firstly, even if counsel for the respondent has put a suggestion to the appellant that there is increase in price of suit house, same is not a substantive piece of evidence. Counsel for the appellant has not pointed out that the appellant has admitted correctness of the suggestion given by opposite counsel with regard to increase in price of suit house. This apart, counsel for the appellant has failed to point out any materials on record that there is increase in price of suit house from the date of agreement till filing of suit instituted at the earliest possible opportunity or even till the decree was passed by the Court in appeal allowing specific performance of agreement. As a matter of fact, the trial Court mis-directed itself to deny the relief of specific performance merely by stating in para 26 of the judgment that agreement was executed in the year 2007, stipulated date was finally fixed as 30.04.2008 and since then till today there is escalation and certainly if the relief of specific performance is granted to the plaintiff, then it will cause hardship to the defendant as price of the land has arisen many a times since the year 2007. These findings by the trial Court are absolutely perverse being the result of imagination, presumptions and assumptions, therefore, cannot be allowed to sustain or hold the field even if it has not been specifically set aside by the Appellate Court. As a matter

of fact, the trial Court, for the reasons best known, ventured to make out a new case for the appellant/defendant in order to reject claim of the respondent/plaintiff for specific performance of agreement of sale.

Counsel for the appellant has made a vain attempt to argue that the Court in appeal has not specifically reversed findings of the trial Court on issue No.1. Perusal of judgment passed by the Court in appeal makes it evident that the Court in para 15 has held that findings given by the trial Court to grant alternative relief of recovery of impugned amount are not well-founded and call for interference. The impugned judgment and decree passed by the trial Court were set aside and the plaintiff was held entitle to specific performance of agreement to sell. In preceding para 14, the Court has assigned reasons as to why the respondent/plaintiff should be given principal relief of specific performance of agreement sell. As the discretion exercised by the trial Court disallowing relief of specific performance is totally arbitrary, whimsical and unfounded, no error much less perversity can be found in judgment of the Appellate Court setting aside the discretion exercised by the trial Court and allowing specific performance of agreement of sale.

For the foregoing reasons, the appeal fails and is accordingly dismissed with costs. As a consequence, judgment and decree passed by the Appellate Court are affirmed.

OCTOBER 8, 2018
'D. Gulati'

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

(REKHA MITTAL)
JUDGE