

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

RSA No. 5338 of 2017 (O&M)

Date of decision : December 10, 2018

Omwati and others

.....Appellants

Versus

Hanif Khan and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Shiv Kumar, Advocate
for the appellants.

LISA GILL, J.

Appellant – defendants No. 2 to 5 are aggrieved of concurrent findings rendered against them by the learned Additional Civil Judge (Senior Division), Hodal vide judgment and decree dated 07.03.2014 as well as by the learned Additional District Judge, Palwal vide judgment and decree dated 23.11.2016.

Suit filed by the plaintiff – respondent No. 1 seeking a decree for possession by way of specific performance of the agreement to sell dated 30.03.2007 and for declaration to the effect that sale deed dated 22.05.2007 besides mutation No. 1114 dated 14.11.2007 are illegal, inoperative qua his rights was decreed by the learned trial Court and upheld by the learned first Appellate Court.

Brief facts necessary for adjudication of the case are that as per averments in the plaint, respondent No. 2 (defendant No. 1 before the learned trial Court) entered in an agreement to sell dated 30.03.2007 of 6/7 share out of total land measuring 10 kanal 6 marlas as

detailed in the plaint for a total sale consideration of ₹3,00,000/-. A sum of ₹2,00,000/- was received as earnest money by defendant No. 1 in the presence of witnesses and remaining amount of ₹1,00,000/- was agreed to be paid on or before 23.09.2007 i.e. the date fixed for execution of the registration of the sale deed. The receipt in token of earnest money was also executed by defendant No. 1 on the same day. It was pleaded by the plaintiff that he was always ready and willing to perform his part of contract, however, defendant No. 1 in collusion with defendants No. 2 to 5 despite having knowledge of agreement to sell dated 30.03.2007 and in violation of the terms and conditions thereof executed sale deed dated 22.05.2007 in an illegal secretive manner in favour of defendants No. 2 to 5. Hence, the present suit was filed.

Upon notice, defendant No. 1 filed written statement taking various preliminary objections. It was admitted that defendant No. 1 was the owner in possession of the suit land and agreement dated 30.03.2007 for sale of the land, as mentioned hereinabove, was entered into. A sum of ₹2 lakhs was received. It is, however, stated that the date of execution of the sale deed has been wrongly mentioned as 23.09.2007 whereas it was orally settled between the parties that the sale deed shall be executed by 15.05.2007. It was stated that defendant No. 1 wanted to sell his land in order to purchase alternate land in the locality where he had already purchased another parcel of land. The date for execution of the sale deed of the alternate agricultural land was almost coinciding with the date fixed for the execution of the sale deed in the present case. It was stated that the plaintiff was in fact was not ready and willing to perform his part of the contract whereas defendant No. 1 was prepared to perform his part of the

contract within stipulated period i.e. by 15.05.2007. It is further stated that defendant No. 1 executed sale deed dated 22.05.2007 in favour of defendants No. 2 to 5 when the plaintiff failed to perform his part of the contract as defendant No. 1 was required to make the payment for the alternate site that he wished to purchase. It is specifically stated that the sale deed dated 22.05.2007 was executed with notice to, consent of and in presence of the plaintiff. Defendants No. 2 to 5 filed a separate written statement taking various preliminary objections. Averments on merits were controverted. It was stated that the plaintiff had procured a pre-dated agreement to sell dated 30.03.2007 after the execution and registration of sale deed dated 22.05.2007. Agreement to sell dated 30.03.2007 was based on fraud committed by the plaintiff in collusion with defendant No. 1. Defendants No. 2 to 5 claimed to be bona fide purchasers for valuable consideration. It is further pleaded that no part of sale consideration was ever paid by the plaintiff to defendant No. 1. Defendants No. 2 to 5 claimed to be bona fide purchasers. Hence, dismissal of the suit was prayed for.

Following issues were framed by the learned trial Court on the basis of the pleading:-

1. Whether in pursuance to agreement to sell dated 30.03.2007 defendant No. 1 being owner in possession of the suit land mentioned in para no. 1 of the plaintiff had agreed to sell the suit land in favour of plaintiff for a total sale consideration of Rs.3,00,000/- and received a sum of Rs.2,00,000/- as earnest money?OPP
2. Whether plaintiff is entitled to the decree for possession by way of specific performance of contract of sale deed 30.03.2007 in respect of suit land mentioned in para 1 of the plaint?OPP
3. Whether sale deed bearing Vasika No. 681 dated 22.05.2007

and mutation No. 1114 dated 14.11.2005 sanctioned on the basis of sale deeds are illegal, null and wrong and same are not binding upon the rights of the plaintiff and are liable to set aside?OPP

4. Whether the plaintiff is entitled to the decree for permanent injunction as prayed for on the grounds mentioned in the plaint?
5. Whether suit is not maintainable in the present form? OPD.
6. Whether plaintiff has no locus standi and cause of action to the present suit? OPD.
7. Whether suit has not come to the Court with clean hands and has suppressed the true and material facts from the Court?OPD
8. Whether defendants No. 2 to 5 are bonafide purchasers for valuable consideration?OPD
9. Relief.

Evidence was led by both the parties.

Learned trial Court concluded that the plaintiff successfully established the execution of agreement to sell dated 30.03.2007. Defendant No. 1 had sold the property in question even before the stipulated date fixed for execution of the sale deed, without notice to the plaintiff. Plea of defendants No. 2 to 5 being bona fide purchasers for consideration was negated. It was specifically held that the subsequent purchasers had no right to raise the ground of plaintiff not being ready and willing to execute the sale deed in pursuance to agreement to sell dated 30.03.2007. Accordingly, suit filed by the plaintiff was decreed. Defendants No. 2 to 5 preferred an appeal which was dismissed by the learned Additional District Judge, Palwal vide judgment and decree dated 23.11.2016. Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellants vehemently argues that

present appellants are bona fide purchasers of the suit property of the plaintiff – respondent No. 1. It is further contended that even if the appellants are not proved to be the bona fide purchasers for consideration, they are entitled to raise the plea of readiness and willingness of the plaintiff to execute the agreement to sell dated 30.03.2007. The plaintiff has failed to prove his readiness and willingness to carry out his part of contract pursuant to agreement to sell dated 30.03.2007. The fact that the present appellants are subsequent purchasers is not a bar for raising this plea. Both the learned courts below, it is contended, have wrongly held that the appellants are not entitled to raise this plea. Learned counsel for the appellants relies upon the judgment of the Hon'ble Supreme Court in **B. Vijaya Bharathi versus P. Savitri and others 2018(1)RCR (Civil) 4** in this respect.

It is, thus, prayed that this appeal be allowed, impugned judgment and decree dated 07.03.2014 passed by the learned Additional Civil Judge (Senior Division), Hodal as well as judgment and decree dated 23.11.2016 passed by the learned Additional District Judge, Palwal be set aside and suit filed by the plaintiff – respondent be dismissed throughout.

I have heard learned counsel for the appellants and have gone through the record, which was requisitioned.

It is proved by the evidence on record that agreement to sell dated 30.03.2007 was indeed executed between the plaintiff and defendant No. 1 i.e. respondent No. 2 in this appeal (now represented by his legal representatives). Defendant No. 1 - Shaukat has specifically admitted the execution of the said agreement to sell dated 30.03.2007. It is, however, sought to be explained that date of execution of the sale deed was in fact 15.05.2007. Specific plea was taken in the written statement that defendant

No. 1 required money not for domestic purposes but due to the fact that he wanted to purchase alternate land in the locality where he had earlier purchased land. The stipulated date in the agreements to purchase alternate agricultural land by defendant No. 2 was almost coinciding with the sale of the present suit land. Therefore, date for execution of the sale deed was orally fixed as 15.05.2007. A perusal of agreement to sell dated 30.03.2007 (Ex.P1) reveals that the stipulated date for execution of the sale deed was fixed as 23.09.2007. Agreement to sell dated 30.03.2007 has been duly proved on record by the plaintiff. The same is in fact admitted by the defendants. There is nothing on record to show that the stipulated date was ever preponed or that defendant No. 1 had ever asked the plaintiff to have the sale deed executed prior thereto. Defendant No. 1 – Shaukat in his affidavit (Ex.DW5/A) admitted that agreement to sell dated 30.03.2007 was entered into and a sum of ₹2 lakhs, received by him as earnest money. It is stated that he required money as his daughter was to get married, therefore, the land in question was sold to defendants No. 2 to 5 who were apprised of the execution of agreement to sell dated 30.03.2007. Defendants No. 2 to 5 had assured that they would settle the matter with the plaintiff. A sum of ₹5 lakhs was withheld by defendants No. 2 to 5 to be given to the plaintiff. Defendant No. 1 – Shaukat, who deposed as DW5 admitted all the facts except the suggestion that sale deed in favour of defendants No. 2 to 5 was executed illegally.

It is relevant to note at this stage that DW5 Shaukat deposed in his cross examination that possession of the suit property was still with him. In this respect, learned Additional District Judge, Palwal has rightly observed that there is no explanation as to why possession of the suit

property was not taken by the appellants when the sale deed was executed.

As far as the present appellants being the bona fide purchasers for consideration is concerned, the said plea is not substantiated by the evidence on record. To the contrary, DW1 Dharamwati i.e. appellant No. 2 (defendant No. 3 before the learned trial Court) has specifically admitted that she was aware of agreement to sell dated 30.03.2007 between the plaintiff and defendant No. 1. There is a specific admission in this respect. It is to be noticed that DW1 deposed that the entire consideration amount was paid in the presence of the Tehsildar. However, as per the sale deed (Ex. D1) there is no endorsement of the amount being paid in the presence of the Tehsildar. Recital therein states that ₹3 lakhs were paid outside. DW2 Billu, examined to prove execution of the sale deed dated 22.05.2007 stated that neither any receipt for consideration was written in his presence nor any exchange of money took place.

DW6 Sadiq, who is the witness of the subsequent sale deed dated 22.05.2007, admitted that defendant No. 1 sold the suit property in favour of defendants No. 2 to 5 before the stipulated date in agreement to sell dated 30.03.2007. It is further admitted that defendants No. 2 to 5 had specific knowledge of agreement to sell dated 30.03.2007. DW6 further stated that defendants No. 2 to 5 had proclaimed that they would take care of plaintiff by themselves. Possession of the suit property is stated to be of defendant No. 1 - Shaukat. DW6 stated that defendants No. 2 to 5 never remained in possession of the land in question. DW6 - Sadiq deposed that the plaintiff failed to make arrangement of the balance sale consideration and Shaukat had to marry off his daughter, therefore, the suit property was sold to defendants No. 2 to 5. DW6 in his cross examination conducted on behalf of the present appellants admitted that sale consideration in sale deed

22.05.2007 in favour of defendants No. 2 to 5 was ₹8 lakhs. It is, thus, clear that defendant No. 1 duly entered into agreement to sell dated 30.03.2007 with the plaintiff. However, he sold the land in question even prior to the stipulated date i.e. 22.05.2007. It is not proved on record that defendant No. 1 had ever given any kind of notice to the plaintiff for preponement of the execution of the sale deed or that he had rescinded agreement to sell dated 30.03.2007.

Learned counsel for the appellants has vehemently argued that the plaintiff himself was not ready and willing to carry out his part of the agreement executed on 30.03.2017. Learned courts below have wrongly held that the present appellants are not entitled to question the readiness and willingness on the part of the plaintiff. Therefore, it is vehemently urged that both the judgments and decrees 07.03.2014 and 23.11.2016 should be set aside on this ground alone. The Hon'ble Supreme Court in **B. Vijaya Bharathi's** case (supra) opined that it is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) of the Specific Relief Act, 1963 (for short – 'the Act') has not been complied with. There can indeed be no quarrel with the proposition as above. However, in **B. Vijaya Bharathi's** case (supra) the Hon'ble Supreme Court was dealing with a matter wherein an agreement to sell was entered into between the parties for sale of property for consideration of ₹1,80,000/-. ₹1,30,000/- was paid in advance and balance consideration of ₹50,000/- was to be paid later, as and when vendee gave notice that she was ready to get the property registered and on intimation from the vendor to pay the balance consideration. It is apparent that no specific date for execution of the sale deed was fixed or stipulated in the said agreement to sell. In the

meanwhile, the property in question was sold by the vendor to another person who in turn further sold it. Both the sales were through registered conveyance. It is in this background that the Hon'ble Supreme Court held that the plaintiff though aware of two registered conveyances of the same property did not ask for their cancellation. It was, thus, held that the bar of Section 16 of the Act was squarely attracted in the facts of the said case and the subsequent purchasers would be entitled to raise the ground of lack of readiness and willingness on the part of the plaintiff, which is a basic condition for grant of specific performance.

A perusal of the evidence on record, as referred to in the foregoing paras reveals that it cannot be said that readiness and willingness of the plaintiff to perform his part of the contract is not proved on record. ₹2 lakhs earnest money had been handed over to defendant No. 1. It is specifically pleaded by the plaintiff in his plaint that he was ready and willing to perform his part of the contract. There is a specific recital by the plaintiff while deposing as PW1 by the learned trial Court in this respect. A perusal of testimony of PW1 Hanif - the plaintiff reveals that there is nothing forthcoming to even suggest that defendant No. 1 had ever sent any notice whatsoever to the plaintiff for the execution of the sale deed prior to 23.09.2007 i.e. the date stipulated in the agreement dated 30.03.2007 which stands admitted and that the plaintiff ever expressed his unwillingness for executing the sale deed. There is no such evidence on record to substantiate this plea. It was argued that no notice was issued by the plaintiff to defendant No. 1 for execution of sale deed in his favour after he came to know about the execution of sale deed dated 22.05.2007 in favour of defendants No. 2 to 5. Said argument is untenable, hence rejected. This is so

for the reason that once the plaintiff came to know of the execution of the subsequent sale deeds, merely because he did not serve a notice asking defendant No. 1 for executing the sale deed in his favour, cannot be taken against him. The suit in question was filed without much delay on 03.11.2007. Moreover, it is admitted that the present appellants were aware of the execution of the earlier agreement to sell and they are not even in possession of the suit land despite the entire consideration amount allegedly given by them to defendant No. 1. Appellants have been unable to prove any collusion between the plaintiff and defendant No.1. In the given fact and circumstances, it cannot be said that the suit filed by the plaintiff should be dismissed on the ground that the plaintiff was not ready and willing to execute his part of the agreement. Therefore, in the factual matrix of the case, it cannot be held that the suit filed by the plaintiff deserves to be dismissed on this ground.

Both the learned courts below have rendered concurrent findings of fact against the appellants on a wholesome and proper appreciation of evidence on record which warrants no interference. In my considered opinion, no question of law much less a substantial question of law is involved in this appeal.

No other argument was addressed.

Learned counsel for the appellants is unable to point out any illegality, infirmity or perversity in impugned judgment and decree dated 07.03.2014 passed by the learned Additional Civil Judge (Senior Division), Hodal as well as judgment and decree dated 23.11.2016 passed by the learned Additional District Judge, Palwal which calls for any interference by this Court in second appeal.

Accordingly, this appeal is dismissed with no order as to costs.

December 10, 2018

Whether speaking/reasoned :
Whether reportable

(Lisa Gill)
Judge

Yes/No
Yes/No