

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

RSA No.5512 of 2017 (O&M)

Date of Order: 12.03.2018

Gurmail Singh and another

..Appellants

Versus

Jagdish Pal Singh

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sumeet Mahajan, Senior Advocate, with
Mr. Amit Kohar, Advocate,
for the appellants.

Mr. Vikas Bahl, Senior Advocate, with
Mr. Vaibhav Sehgal, Advocate and
Ms. Japneet Kaur, Advocate,
for the respondent.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the judgment passed by the learned first appellate court, decreeing the suit for possession by way of specific performance of the agreement to sell dated 17.01.2005.

The substantial question of law arises for consideration:-

- (i) Whether the discretion exercised by the learned trial court while refusing the specific performance of the agreement to sell and ordering refund can be interfered by the learned first appellate court without recording finding that the discretion exercised by the court is not based on sound judicial principles of law?

Plaintiff filed a suit for possession by way of specific

performance of the agreement to sell dated 17.01.2005. It was pleaded that out of total sale consideration of Rs.1,35,00,000/-, Rs.10,00,000/- was paid as earnest money and the date for execution and registration of the sale deed was fixed as 15.06.2005. Plaintiff filed a suit on 14.01.2008.

Defendants contested the suit. In the written statement, it was pleaded that defendant no.1 drives tempo/auto rickshaw and for purchase of a mini bus, a loan of Rs.7,00,000/- was to be taken and in that context a security document i.e. agreement to sell was executed showing earnest money of Rs.10,00,000/-.

Learned trial court after appreciating the evidence available on the file, held that the agreement to sell and payment of earnest money is proved. However, learned trial court after taking into consideration that the suit has been filed after a period of 2 years and 6 months from the target date fixed for the execution and registration of the sale deed declined to grant relief of specific performance. Learned court further held that although, in the replication, plaintiff had pleaded that on the target date he went to the office of Sub-Registrar but no evidence was produced. Learned trial court further noticed that the plaintiff did not produce on record any notice calling upon the defendants to come and execute the sale deed.

Learned first appellate court has chosen to reverse the aforesaid discretionary relief granted by the trial court by recording a finding that once the execution of the agreement to sell is denied, plaintiff is not required to prove his readiness and willingness. The first appellate court has further held that the grant of decree for specific performance of the agreement to sell is a rule, whereas denial thereof is an exception. Once the plaintiff has proved his readiness and willingness, the specific performance

cannot be refused as defendant could not prove any hardship.

Now the stage is set to answer the question of law framed above.

QUESTION (i)

Whether the discretion exercised by the learned trial court while refusing the specific performance of the agreement to sell and ordering refund can be interfered by the learned first appellate court without recording finding that the discretion exercised by the court is not based on sound judicial principles of law?

It may be significant to note here that 15.06.2005 was the target date agreed upon by the parties for execution and registration of the sale deed. The suit came to be instituted on 14.01.2008. In the plaint, plaintiff pleaded that he was always ready and willing to perform his part of the contract. While pleading cause of action, plaintiff pleaded that the cause of action accrues to him on 17.01.2005 when the agreement to sell was executed and cause of action further accrued to the plaintiff when the defendants refused to perform their part of the contract. Plaintiff has not pleaded any positive step taken by him in order to show his readiness and willingness. In para 3 of the plaint, plaintiff pleads as under:-

“3. That the intentions of the defendants have now turned dishonest and they are not agreed to execute the sale deed in favour of the plaintiff as per terms of the agreement to sell dated 17.1.2005 as the rates of the properties have increased manifolds in Jagraon. The defendants are threatening that they would not execute the sale deed in favour of the plaintiff at the rate mentioned in the agreement to sell dated 17.1.2005. Not only this the defendants are also threatening to alienate the property at higher rate to some other person than the plaintiff by changing the existing position of the same i.e. by carving out plots in the property. The defendants

have no right to alienate the property to anybody else or to change the existing position of the same in violation of the terms and conditions of the agreement to sell dated 17.1.2005. The threatened acts of the defendants have violated an obligation existing in favour of the plaintiff. Thus the plaintiff is entitled to a decree of permanent injunction along with decree of specific performance as there is no other efficacious remedy available to the plaintiff except for filing the present suit. The defendants have failed to complete all the documents required for execution and registration of sale deed and they cannot be permitted to take the benefits of their own wrongs. In spite of making of requests by the plaintiff, the attitude of the defendants has become adamant and they have openly proclaimed that they are not going to execute and get registered the sale deed in favour of the plaintiff as per terms of agreement to sell dated 17.1.2005 and the plaintiff has every right to get the sale deed executed and registered the same in his favour through court. The plaintiff is still ready and willing to make payment of balance sale consideration to the defendants and the plaintiff even went to the defendants several times with balance sale consideration and tendered the same to the defendants but the defendants did not accept the same for malafide reasons. The plaintiff has been compelled to file the present suit on account of adamant attitude of the defendants and all the expenses being incurred by the plaintiff on the litigation like court fee, counsel fee and other miscellaneous expenses may also be ordered to be deducted from the balance sale consideration as no fault lies with the plaintiff and the suit is being filed on account of malafide intentions of the defendants.”

Plaintiff appeared in the evidence. He has stated in the cross examination that he appeared before the Tehsildar on the date fixed for

registration of the sale deed. He moved an application but he does not remember what happened to that application. He further states that he moved an application before the Tehsildar on 6.03.2005, which is Ex.P2 on the file. However, when counsel confronted him, he admitted that there is no Ex.P2 on the file. During cross-examination, plaintiff has stated as under:-

“I was to file the present suit only when I felt the need for the same. I had been moving to police station for execution of the sale deed. Even the police did not get the sale deed executed from the defendants.”

Further reading of the cross-examination shows that the plaintiff has only stated that he was trying to get the sale deed executed through police. In cross-examination he admits that after 15.06.005, he never called upon the defendants through notice for execution and registration of the sale deed. A relevant extract of the cross-examination of the plaintiff is extracted as under:-

“All the time from 15.6.2005 to 10.01.2008 I did not serve any notice to the defendants. When I moved the complaint to the police against the defendant with regard to non-performance of agreement, the police did not advise me to knock the door of the court.”

Still further, plaintiff has not produced on record any evidence to prove that he ever visited the office of the Sub-Registrar for execution and registration of the sale deed on the target dated i.e. 15.06.2005, along with the balance sale consideration which was Rs.1,25,00,000/-.

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 photocopy of the record produced by the learned counsel

for the parties.

In this case, this court finds 4 reasons to deny the relief of specific performance of the agreement to sell:-

- (i) Plaintiff filed a suit after a period of 2 years and 6 months from the date of agreement to sell and plaintiff failed to prove that during this period, he took any step showing his readiness and willingness to perform his part of the contract;
- (ii) When confronted in the cross-examination, plaintiff has stated that he could file the suit whenever he felt the need for the same. Such being the position, learned trial court rightly refused to grant specific performance;
- (iii) Plaintiff was required to prove that he was always ready and willing to perform his part of the contract. In the present case, plaintiff failed to prove that fact. It is normal that on the date fixed for execution and registration of the sale deed, parties go to the office of Sub-Registrar to get the sale deed registered after getting it scribed. If one of the party is willing and other refuses, than the party normally get his presence marked by getting an affidavit attested from the Sub-Registrar. In this case, in evidence plaintiff asserts that he moved an application but that has not been produced on file.
- (iv) Plaintiff asserts that there was some dispute and defendants had become dishonest. He has submitted that he had moved an application before the Sub-Registrar on

16.03.2005. Once plaintiff came to know that the defendants have become dishonest, it was for the plaintiff to immediately move the court seeking specific performance of the agreement to sell. Hence, the conduct of the plaintiff shows otherwise. Plaintiff has not been successful in proving his readiness and willingness on the target date i.e. 15.06.2005. There is a complete inactivity on the part of the plaintiff to get the agreement to sell specifically enforced for more than 2½ years.

In view of the aforesaid, this court does not find that the discretion exercised by the trial court was required to interfere with.

The reasons assigned by the learned first appellate court is against the provisions of Section 16(C) of the Specific Relief Act. Section 16(C) of the Specific Relief Act specifically provides that the plaintiff must assert and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. Merely because the defendants has denied the execution of the agreement to sell does not absolve the plaintiff from the duty to assert and prove that he was always ready and willing to perform his part of the contract. Reference in this regard can be made to the judgment passed by the Hon'ble Supreme Court reported as **Saradamani Kandappan v. S. Rajalakshmi and others, (2011) 12 Supreme Court Cases, 18.** Paragraph 43 of the judgment is extracted as under:-

“43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam :

(i) The Courts, while exercising discretion in suits for

specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing ' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

In the considered opinion of this court, it was for the plaintiff to plead and prove that he was always ready and willing to perform his part of the contract.

Learned counsel for the plaintiff-respondent has vehemently argued that the conduct of the defendants be examined. He has submitted that execution of the agreement to sell is denied by the defendants. He has further submitted that purchase of the mini bus for which the alleged loan was taken, has not been proved.

In the considered opinion of this court, the conduct of the defendants can only be seen, once the plaintiff is able to establish his case.

Plaintiff in the present case has failed to fulfill the requirements of Section 16(C) of the Specific Relief Act.

In view thereof, the question of law framed earlier is answered in favour of the appellants. The judgment passed by the learned first appellate court is set aside and the judgment and decree passed by the trial court is restored.

The regular second appeal is allowed.

March 12, 2018
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No