

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

1. RSA No.4091 of 2003 (O&M)  
Date of decision : 06.03.2019

Gopi

...Appellant

Versus

Passa @ Ram Chander and another

...Respondents

2. RSA No.4758 of 2003 (O&M)  
Date of decision : 06.03.2019

Passa @ Ram Chander

...Appellant

Versus

Gopi and another

...Respondents

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.**

Present: Mr. Sanjiv Gupta, Advocate  
for the appellant (In RSA No.4091 of 2003)  
for respondent No.1 (In RSA No.4758 of 2003)

Mr. Arun Jain, Sr. Advocate with  
Mr. Abhishek Dhull, Advocate  
for the appellant (In RSA No.4758 of 2003)  
for respondent No.1 (In RSA No.4091 of 2003)

\*\*\*\*

**ANIL KSHETARPAL, J.**

By this judgment, RSA Nos.4091 and 4758 of 2003 shall  
stand disposed of as both are arising from the suit filed by the plaintiff-

appellant in RSA No.4758 of 2003. Plaintiff as well as defendants have filed these appeals against a common judgment.

In the considered view of this Court, following substantial questions of law arise for determination by this Court:-

- 1) Whether adverse inference can be drawn against the defendant in the suit for specific performance of agreement to sell on account of his non-appearance in evidence particularly when sufficient evidence is available?
- 2) Whether in absence of evidence of loss or damages, refund of double amount of the earnest money can be ordered?
- 3) Whether judgment passed by the First Appellate Court is result of misreading of evidence?

Some facts are required to be noticed. Undisputed facts are that plaintiff Passa @ Ram Chander agreed to purchase land measuring 46 kanals from defendant No.1 Gopi vide agreement to sell dated 27.08.1994 at the rate of ₹95,000/- per acre (total sale consideration ₹5,46,250/-) and paid ₹80,000/- as earnest money. The land agreed to be sold was already under mortgage with possession in favour of the plaintiff vide mortgage deed dated 16.01.1992 for a sum of ₹50,000/-. The date for execution and registration of the sale deed was fixed as 10.06.1995.

The only dispute between the parties is whether plaintiff was ready and willing to perform his part of the contract or not. Plaintiff filed a suit on 04.04.1996. He pleaded that he was always ready and willing

and now also, ready and willing to perform his part of the contract and it is the defendant who failed to perform his part of the contract. It may be noted that defendant No.2 is subsequent purchaser of the property through registered sale deed.

Learned trial Court held that plaintiff was not ready and willing to perform his part of the contract. However, the learned trial Court ordered refund of the earnest money. Plaintiff filed first appeal. Learned First Appellate Court has held that the plaintiff was ready and willing to perform his part of the contract, however, the Court has held that sale in favour of defendant No.2 is bona fide and, therefore, plaintiff is entitled to refund, double of the amount of earnest money alongwith interest at the rate of 6% p.a..

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

Learned Senior Counsel appearing for the plaintiff-appellant has submitted that no information was given to the plaintiff that defendant has already obtained income tax clearance certificate before the target date. He further submitted that the land was under mortgage and the property in question was charged against loan from Oriental Bank of Commerce and State Bank of Patiala. He further drew attention of the Court to the statement of DW1 Scribe of the application filed before the Sub-Registrar for marking attendance. He also referred to the statement of official from the Sub-Registrar's office who was examined to prove that

defendant was present on 12.06.1995. He further submitted that defendant has not appeared in evidence and, therefore, adverse inference has rightly been drawn by the First Appellate Court. He further submitted that the plaintiff has appeared in evidence and proved his case.

On the other hand, learned counsel for the respondents has submitted that in the plaint, plaintiff has not asserted that on the target date he visited the office of Sub-Registrar. It may be noted here that the target date i.e. 10.06.1995 was a official holiday being Saturday, therefore, the next working day was 12.06.1995. He has submitted that on 12.06.1995, defendant visited the office of the Sub-Registrar and moved an application as plaintiff did not come forward and got his presence noted. He further submitted that on reading of the statement of the plaintiff, it is apparent that the plaintiff was not ready and willing to perform his part of the contract. He drew attention of the court to the statement of plaintiff wherein he has admitted that on 12.06.1995, he although visited the office of Sub-Registrar but came back at 2, 2:30 PM, although office time was upto 4:30 PM. He has further submitted that the total land owned by the defendant was more than 188 kanals whereas agreement to sell is only qua 46 kanals i.e. less than 1/4<sup>th</sup> of the total property. He submitted that total joint holding was 752 kanals and 13 marlas, in which, defendant had 1/4<sup>th</sup> share. Hence, he submitted that the finding of the Court that the plaintiff was always ready and willing is erroneous.

Let us analyze the arguments of the learned counsel for the

plaintiff-appellant.

On careful reading of the agreement to sell, it is apparent that defendant was required to apply and get income tax clearance certificate. It has come on record that income tax clearance certificate was applied on 29.05.1995 and clearance was granted on 30.05.1995. Both plaintiff and defendant No.1 are residents of same village. It will not be correct to assume that plaintiff was not having information of income tax clearance certificate having been obtained by the defendant. In the agreement to sell, there was no provision that the defendant would inform the plaintiff on receiving the income tax clearance. Hence, no information was required to be given. Still further, it is the case of the plaintiff himself that he went to the office of the Sub-Registrar alongwith the balance sale consideration, although not proved on file. Hence, now plaintiff cannot plead that he did not knew about the income tax clearance certificate having been obtained by the defendant and, therefore, he should be granted specific performance.

As regards second argument that the property was under loan, this fact was in the knowledge of the plaintiff. Plaintiff himself had given loan to defendant No.1 amounting to ₹50,000/- by executing a mortgage deed. Still further, as rightly contended by the learned counsel for the defendant, the agreement to sell is only with regard to land measuring 46 kanals whereas total holding of the plaintiff in this khewat was more than 188 kanals. Thus, less than 1/4<sup>th</sup> of the land was agreed to be sold. Still further, plaintiff never called upon the defendant to first pay the loan. The

learned First Appellate Court has misread the agreement to sell while recording a finding that it was the duty of the defendant to clear the loan and get the land unencumbered before the target date fixed for execution and registration of the sale deed. On careful reading of the agreement to sell, it is apparent that there is no such Clause.

As regards argument of learned counsel that defendant has not appeared in evidence and only his son has appeared and, therefore, First Appellate Court has rightly drawn adverse inference, also does not have substance because the plaintiff has to stand on his own legs. The adverse inference can only be drawn when the Court comes to a conclusion that sufficient evidence has not been led by the party to the suit, onus to prove whereof was on the aforesaid party. In the present case, defendant has appeared through his son, attorney holder. In a suit for specific performance, the plaintiff has to appear in evidence and prove his readiness and willingness. In view of the aforesaid, there is no substance in the argument of the learned counsel for the plaintiff-appellant that First Appellate Court has rightly drawn adverse inference against the defendants. In fact, the First Appellate Court fell in error in drawing adverse inference without recording a finding that there is not enough evidence on the file to prove the case set up by the defendant.

Last argument of learned counsel for the appellant while referring to the statement of Scribe of the agreement to sell, official from the Sub-Registrar's office and statement of son of the defendant, it may be noted that minor variation would not make a written document doubtful.

It may be noted here that the learned First Appellate Court has held that defendant when visited the office of Sub-Registrar on 12.06.1995, he moved an application before the Sub-Registrar intimating that he is present in the office but plaintiff has not come forward. Sub-Registrar on the aforesaid application made an endorsement that he had called out the name of the plaintiff but neither plaintiff was present nor any one on his behalf was present. The Sub-Registrar had put a seal and signed the aforesaid application. Learned First Appellate Court has recorded a finding that since signatures of the Sub-Registrar are with blue ink pen whereas the date under the seal has been written with a black pen, therefore, it creates a doubt about its genuineness. Learned First Appellate Court has also held that no serial number has been mentioned. It may be noted here that both the reasons given by the learned First Appellate Court are erroneous. The application moved by the defendant before the Sub-Registrar has been proved by examining an official from the Sub-Registrar's office who has stated that he recognizes the signatures of the Sub-Registrar. No question was asked to him as to why different pen was used by the Sub-Registrar while signing and putting the date. Had this question been asked from the witness, official would have explained. In absence thereof, the First Appellate Court clearly erred in holding that presence of defendant is not proved. Learned First Appellate Court has further erred while doubting the readiness of the defendant that he got his presence marked at 4:30 PM. It may be noted here that the defendant has pleaded that he visited the office of the Sub-Registrar in

the morning and kept waiting but since the plaintiff did not come forward therefore, he got his presence marked.

Argument of learned counsel that the plaintiff has also stated that he visited the office of Sub-Registrar is clearly erroneous. In the plaint, plaintiff has not pleaded that he visited the office of Sub-Registrar on 10.06.1995, 11.06.1995 and 12.06.1995. In the evidence, he has stated that he visited the office of Sub-Registrar on that day but he came back at 2/2:30 PM. This statement is not backed by any corroborative evidence which proves such evidence.

As regards evidence of the Scribe of the application moved before the Sub-Registrar on 12.06.1995 stating that there is some overwriting in the figure i.e. 6 denoting month as it was initially written as 4 does not affect the merits of the case, particularly when on the date of the application 12.06.1995 has been written at three places. The endorsement by the Sub-Registrar refers to date 12.06.1995 on which there is no cutting. Under the seal of the Sub-Registrar, once again date 12.06.1995 has been clearly written.

In view of the aforesaid discussion, it is apparent that the First Appellate Court erred in recording a finding that the plaintiff was ready and willing to perform his part of the contract. It may be noted further that when plaintiff appeared in evidence, he has admitted that he met defendant on 13.06.1995 and 14.06.1995 and called upon him to execute the sale deed whereas in the further cross-examination, he has stated that he cannot say that whether Gopi Ram defendant had visited

the office of Sub-Registrar on 12.06.1995.

Now let us answer the questions of law which were framed in the anterior part of the judgment.

The answer to question No.1 is straight and simple. Adverse inference against a party for non-appearance in the evidence can only be drawn if sufficient evidence is not available on the file or a party has withheld some material evidence which ought to have been produced. In a case for specific performance of the agreement to sell, plaintiff has to prove his readiness and willingness, therefore, normally for non-appearance of defendant, adverse inference cannot be drawn unless there was some information with the defendant which could be gathered from him when he appeared in evidence. Hence, question No.1 is answered in favour of defendant-appellant.

As regards second question, the law is well settled. Plaintiff is not entitled to refund of double of the amount of earnest money unless he proves that he has suffered loss or damages entitling him to double of the earnest money. Plaintiff cannot be granted double of the amount of earnest money merely on the ground that there is contract between the parties. Accordingly, question No.2 is also answered in favour of the defendant-appellant.

For the aforesaid discussion, it is apparent that the First Appellate Court has misread the agreement to sell, the evidence of the parties as also the application which was filed for marking attendance.

Accordingly, question No.3 is also answered in favour of defendant-appellant.

Although, since this Court has found that the plaintiff was not ready and willing to perform his part of the agreement to sell, therefore, the amount of earnest money was required to be forfeited, however, defendant did not file first appeal against the order passed by the trial Court ordering refund. Hence, that part of the judgment of the trial Court has become final. Learned counsel for the defendant-appellant could not point out from the finding of the learned First Appellate Court, with regard to challenge to the order of refund of the earnest money during course of arguments by the counsel appearing for the defendant. Hence, the judgment passed by learned First Appellate Court is partially modified. Plaintiff shall be entitled to refund of the earnest money i.e. ₹80,000/- alongwith interest @ 6% per annum.

Accordingly, RSA No.4758 of 2003 is dismissed whereas RSA No.4091 of 2003 filed by the defendant is partly allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

**06.03.2019**

*Pawan*

**(ANIL KSHETARPAL)  
JUDGE**

**Whether speaking/reasoned:-      Yes/No**

**Whether reportable:-                Yes/No**