

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

RSA-5090-2012(O&M)

Date of decision:-14.10.2019

Habijur Rehman

...Appellant

Versus

Subhani and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Dhirinder Chopra, Advocate
for the appellant.

Mr.M.K.Mittal, Advocate
for the respondents.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiff Habijur Rehman had filed a suit against defendants – Subhani, Abdul Rajjak, Shakir, Niaz Mohammad, Nauman, Salman Khan, Sagoon and Sahbir, all residents of village Booraka, Tehsil Tauru, District Mewat seeking specific performance of agreement with consequential relief of permanent injunction.

As per the version of the plaintiff, the defendants had

entered into an agreement to sell with him in respect of the land measuring 8 kanals 0 marla for a sum of Rs.3,50,000/- receiving a sum of Rs.2,25,000/- as earnest money on 19.6.2001; the remaining was the bank loan of Rs.2,30,000/-; the sale deed was to be executed only after clearance of the bank loan; the final date for execution of the sale deed was extended from 15.6.2002 to 15.5.2003; the defendant No.1, who is mother of defendants No.2 to 8 had received a sum of Rs.31,000/- on the same day, in presence of witnesses and an endorsement in that regard was made on agreement dated 4.10.2002; on 15.5.2003, the plaintiff appeared before Sub Registrar and waited for defendants for execution of the sale deed in his favour but till evening nobody from the side of defendants turned up to do that, then the plaintiff got his presence marked before Sub Registrar. Thereafter the plaintiff requested the defendants several times to execute the sale deed in his favour but to no effect. As such, the plaintiff filed the suit.

On notice, the defendants appeared and filed a written statement contesting the suit denying that the defendants had ever entered into an agreement to sell with the plaintiff or had received any earnest money or for that purpose the defendants had granted any extension for execution of the sale deed. The defendants had rather filed a counter claim stating that they were in possession of the suit property and the plaintiff on the basis of wrong agreement wanted to

disturb their such possession and he be restrained from doing so. The defendants prayed that suit of the plaintiff be dismissed and their counter claim be accepted.

On the pleadings of the parties, following issues were framed:

1. Whether the defendant had executed to agreement to sell dated 11.5.2005 in favour of plaintiff if so its effect? OPP.
2. Whether the plaintiff has always been ready and willing to perform his part of agreement dated 11.5.2005? OPP.
3. Whether the defendant is entitled to relief of counter claim? OPD.
4. Whether the present suit of the plaintiff is not maintainable in the present form? OPD.
5. Whether the plaintiff have no cause of action and locus standi to file the present suit? OPD.
6. Whether the plaintiffs have concealed the true and material facts from the Court? OPD.
7. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD.
8. Relief.

In order to prove his case, the plaintiff had got his statement recorded as PW1 besides examining Sh.Ram Avtar as PW2, Sh.Mehmood, Lamberdar as PW3, Sh.Harbhagwan as PW4

and Sh.Kamruddin as PW5.

On the other hand, the defendants had examined Jan Mohd. as DW1, Sh.Niaz Mohd. as DW2.

No evidence in rebuttal was led, but some documents by the counsel for the plaintiffs were tendered.

After hearing the learned counsel for the parties, the trial Court decided issues No.1 and 2 in favour of the plaintiff, issue No.3 against the defendant, issues No.4 to 7 against the defendants. Resultantly, suit of the plaintiff was decreed, whereas counter claim of the defendants was dismissed. This was so done vide judgment and decree dated 23.12.2011.

Feeling aggrieved by the said judgment and decree, the defendants had filed an appeal which was decided by Additional District Judge, Nuh, who vide judgment dated 3.10.2012 accepted the appeal and the impugned judgment and decree passed by the trial Court were set aside inasmuch as the suit of the plaintiff was dismissed and counter claim filed by the defendants was decreed restraining the plaintiff from interfering in the possession of the defendants over the suit land forcibly and illegally.

The plaintiff is feeling dissatisfied with the said judgment recorded by Additional District Judge, Nuh and has knocked at the door of this Court by way of filing a regular second appeal praying that the same be accepted, the impugned judgment and decree passed

by Additional District Judge, Nuh be set aside.

On getting notice of regular second appeal, the defendants have appeared before this Court through counsel.

I have heard learned counsel for the parties besides going through the record.

The first Appellate Court referring to the testimony of plaintiff Habijur Rehman, PW2 Ram Avtar, PW3 Mehmood, Lamberdar, PW4 Har Bhagwan and PW5 Kamruddin (PW4 and PW5 both attesting witnesses of agreement Ex.P3) has observed that vide Ex.P1, defendants Subhani and Asru, since deceased, had received a sum of Rs.2,25,000/- from the plaintiff out of total sale consideration of Rs.3,50,000 and target date for the execution of sale deed was fixed as 15.6.2002; that there is due recital in the said agreement as regards the property being under mortgage with PLM Bank, Tauru and liability of the defendants to redeem the mortgage and if the sale deed was not executed for any reason, then the time limit for the execution and registration of the sale deed shall be deemed to be extended automatically. Similarly, execution of another agreement dated 4.10.2002 Ex.P3 was duly proved on record, which goes to show that it contains reference to the earlier agreement Ex.P1 and reason given therein for non-execution of the sale deed was that vendors Subhani and Asru had failed to redeem the land due to bad crop and failure of rainfall; on that day they had received another

sum of Rs.31,000/- and stipulated date was fixed as 15.5.2003 for execution and registration of the sale deed. Learned Additional Sessions Judge has observed that once the defendants had denied the due execution of Ex.P1 and Ex.P3, then it does not lie in their mouth to take the plea that the plaintiff was not ready and willing to perform the part of his contract. He has however found that the suit was time barred. The relevant paragraphs in that regard are being reproduced for ready reference as under:

16. Now having held so in the previous paragraphs of this judgment, the core question arises for consideration of this court as to whether the plaintiff has been able to prove that his suit has been filed within a period of limitation of three years. In this regard, the contention of learned counsel for the plaintiff is that cause of action to file suit arose to plaintiff from 16.7.2007 when the defendants finally refused to execute the sale deed and as such, the present suit having been filed on 25.7.2007 is within the period of limitation of three years. But in my opinion, the learned lower court faltered on this crucial aspect of the matter, and committed fundamental mistake by not giving detail findings as regards the suit being not time barred. Learned lower court though gave an oblique reference of the said plea in para no.17 of its judgment, but did not assign any reason whatsoever as to how it found that the case

of plaintiff was within the period of limitation. As per section 54 of Limitation Act, 1963, there is limitation of three years to seek the relief to specific performance from the date fixed for performance or if no such date is fixed, then when the plaintiff has the notice that specific performance is refused. Reliance in this case has rightly been placed by learned counsel for the defendants on case Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.)(supra). The contention of learned counsel for the plaintiff that neither the said plea was taken by defendants in their written statement nor any issue in this regard was framed, is devoid of any substance. A perusal of the written statement filed by defendants would go to show that in their written statement, they have categorically taken this plea, which is preliminary objection no.2, wherein it has been specifically stated that the suit is time barred. No doubt, learned lower court did not frame any specific issue in this regard, but it is discernible from the impugned judgment that this point was raised by learned counsel for the defendants but the learned lower court committed grave illegality in not paying any attention to this material aspect of the matter. The reasons of this court in coming to the conclusion that the suit of the plaintiff is time barred are as under:

17. Firstly, there are only two agreements available on the

file which are Exhibits P1 dated 19.6.2001 and Exhibit P3 dated 4.10.2002. It is not the case of plaintiff that besides the said two agreements, some another agreement was executed in continuation of the said two agreements and again the time was mutually extended. Thus, the plaintiff can not wriggle out of the terms and conditions as envisaged in agreements Exhibit P1 and P3, which in fact was executed in continuation and in consonance of agreement to sell Exhibit P1. Vide both the agreements, the plaintiff paid Rs.2,56,000/- to the defendants. In agreement, Exhibit P3, the target date for the execution of sale deed was fixed as 15.5.2003 and therefore, to my mind, when a specific date has been fixed for the execution of sale deed, the plaintiff ought to have filed his suit upto 14.5.2006 i.e. within three years as per section 54 of the Limitation Act. There is no force in the contention of learned counsel for the plaintiff that as the defendants did not get the land redeemed from the bank and further Asru, vendor died, therefore, the plaintiff having tremendous confidence in defendants' honesty, waited for the defendants that one day, they will perform their part of contract.

18. In my considered opinion, the plaintiff failed to prove on record any written acknowledgment or any agreement to prove that the time was further extended from 15.5.2003 to some

another date. The unilateral act of plaintiff having got his presence marked before the S.R, Tauru on 16.7.2007 vide affidavit Exhibit P7 will not be able to enlarge the period of limitation for filing the suit because it is settled law that once the period of limitation begins to run, then it can not be stopped except by way of certain legal disabilities. Here in this case, the plaintiff failed to prove his affidavit Exhibit P4 and P7 to prove that on 15.5.2003 and on 16.7.2007, he indeed was present before S.R.,Tauru equipped with the balance sale consideration and stamp and registration charges because no amount of effort was made by the plaintiff to produce any official to prove the attestation of the Executive Magistrate with a view to prove that on the said two dates, the plaintiff was indeed present there with the requisite balance sale consideration etc. The plaintiff has further failed to prove that he called upon the defendants to remain present in the office of S.R.Tauru on 16.7.2007 to perform their part of contract. Even otherwise, though Exhibit P7 affidavit of plaintiff has been ruled out of the consideration as it could not be properly proved but even believing the said document, even then, It is a valueless document as the said document was presented after the expiry of period of limitation of three years. To my mind, cause of action for the plaintiff to file the suit accrued on

15.6.2003 and within a period of three years from the said date, meaning thereby, upto 14.5.2006, the plaintiff ought to have filed the suit before the court. There is absolutely no explanation as to why the plaintiff chose to File the suit on 25.7.2007 after expiry of more than one year and two months after the expiry of period of limitation as prescribed under section 54 of the Limitation Act.

19. It is settled law that the time is not essence of the period for agreement pertaining to immovable property unless its performance within in a particular period is made mandatory in the agreement itself. But in no case, the plaintiff is not supposed to file any such type of matter as per his wish and convenience even after the expiry of period of limitation. A Constitution Bench of Hon'ble Supreme Court of India in case Chand Rani Vs. Kamas Rani, AIR 1993 Supreme Court, 1742 has held that in a contract for immovable property, time is not the essence of contract, yet court may infer from the circumstances that it is to be performed within reasonable period. Thus, in my considered opinion, this aspect of the matter would go to the root of the case and is sufficient to knock down the claim of the plaintiff.

20. It is trite law that even if the plea of limitation is not taken by the defendants, as a defence, in his/her written

statement, even then under section 3 of the Limitation Act, the court is competent to dismiss the suit if the suit appears to be barred by limitation. But here in this case, the defendants indeed took preliminary objection no. 2 to the effect that the suit was time barred.

Learned Additional District Judge, Nuh has further noticed that the trial Court has ignored the pleadings laid down in the written statement inasmuch as the plaintiff had not taken the plea that vide agreement to sell Ex.P1 and Ex.P3, he was delivered the possession of the suit land and no evidence in that regard was led by the plaintiff to prove that plea. Further, in agreements Ex.P1 and Ex.P3, there is no recital with regard to delivery of possession but despite that the lower Court committed fundamental mistake by holding that the possession of the plaintiff over the suit land with the result that it again faltered by granting him a decree for permanent injunction besides granting him a decree for specific performance. The plaintiff had basically sought a decree for specific performance of agreement to sell and as a consequential relief had asked for decree for permanent injunction restraining the defendants from alienating the suit land in any manner.

Furthermore, the trial Court had not given any finding on

issue No.3 with regard to the counter claim of the defendants. The defendants were found to be in possession of the suit property. Though the plaintiff had approached the revenue authorities for correction of khasra girdawari with regard to the suit land by filing an application in that regard but the Collector had dismissed the application finding that plaintiff was not in possession of the suit land and the appeal filed against that order was also dismissed by Commissioner.

Though learned counsel for the appellant has tried to show that the suit was within limitation and was not time barred but counsel for the respondents/defendants has drawn my attention to cross-examination of plaintiff recorded on 11.11.2011 wherein he had stated that since the defendants had not executed the sale deed by 15.5.2003, in that way they had refused to do so. In that way, the suit could have been filed within three years of that date up to 15.5.2006. However, it was filed on 25.7.2007, therefore, is clearly time barred.

The judgment and decree passed by the trial Court in favour of the plaintiff and rejecting the counter claim of the defendants was based upon misappraisal of evidence and wrong interpretation of law, which resulted in miscarriage of justice. That wrong was undone by learned Additional District Judge, Nuh by setting aside that judgment and decree and dismissing the suit of the plaintiff while decreeing the counter claim.

Therefore, I do not find any merit in the present appeal and do not see any reason to disturb the legal, valid and well reasoned judgment passed by the Additional District Judge, Nuh.

The appeal stands dismissed accordingly.

14.10.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No