

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

R.S.A. No. 5161 of 2013

Date of decision:- 08.11.2019

Kanha Ram

...Appellant

Versus

Mahabir

...Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. P.K.Ganga, Advocate
for the appellant.

Mr. Ashok Singla, Advocate with
Mr. Ankush Singla, Advocate
for the respondent.

RITU BAHRI J.

The present appeal is directed against concurrent finding of facts recorded by both the Courts below whereby suit filed by plaintiff/respondent for possession by way of specific performance of contract, has been decreed.

Brief facts of the case are that the defendant was owner of land measuring 24 kanals as per jamabandi for the year 2001- 02 read with mutation no.1247. On 03.10.2007 he agreed to sell suit land to plaintiff at the rate of Rs.5,58,000/- per acre. Agreement to sell was got drafted from Sh.Mukesh Singla Advocate Sirsa on asking of the defendant in favour of Plaintiff in presence of witnesses after receiving amount of Rs. 1,50,000/- as earnest money. As per agreed terms and conditions, the plaintiff went to defendant on 07.11.2007 along with Ram Kishan, Member Panchayat of village Dhukra for payment of Rs.3,50,000/- (being additional earnest money). However, defendant flatly refused to receive said amount and now

he intended to sell suit land at higher rate. Ultimately plaintiff sent an account payee cheque of Rs.3,50,000/- to defendant which was received back as unserved. On 22.4.2008 i.e target date, plaintiff came present in the office of Sub Registrar, Nathusari Chopta along with balance sale consideration and other expenses but he failed to turn up. Ultimately, plaintiff got his presence marked by swearing affidavit before Executive Magistrate, Nathusari Chopta. As the defendant failed to perform his part of contract, a legal notice was issued upon him. It was replied wrongly on frivolous grounds. The defendant was approached many times for needful action but to no effect. Hence this suit.

Upon notice, the defendant appeared, filed a written statement taking preliminary objections that suit is not maintainable; that plaintiff has got no cause of action to file the present suit; that plaintiff has not come to court with clean hands and that the suit is false and frivolous.

On merits, it is submitted that defendant is still owner and in possession of suit land. It is admitted that there was agreement dated 3.10.2007 between parties as per terms and conditions. It is further stated that the plaintiff intentionally violated terms and conditions as he failed to pay Rs.3,50,000/- to defendant (additional earnest money) without any reasonable cause. Thereafter defendant had got issued a legal notice through Sh.Purshotam Phutela Advocate on 8.11.2007 duly received by plaintiff. He gave wrong reply by giving fabricated version in shape of legal notice. However, there is no violation of said agreement on part of defendant. It is denied that plaintiff came to him on 7.11.2007 with Ram Kishan, Member Panchayat for payment of Rs.3,50,000/- as well as that he refused to accept the said amount. Since plaintiff never came to him for making payment on

07.11.2007, then question of denying same does not arise. Hence, it is plaintiff who has failed to perform his part of contract and due to same sale agreement stood cancelled in all respects. Amount paid as earnest money also stood forfeited in favour of defendant. Other averments have been denied and prayed for dismissing the suit with costs.

From the pleadings of the parties, following issues were framed by learned trial court:-

- “1. Whether plaintiff is entitled to get possession of suit land by way of specific performance of sale agreement dated 3.10.2007? OPP.*
- 2. Whether suit is not maintainable? OPD.*
- 3. Whether plaintiff has got no cause of action to file present suit? OPP.*
- 4. Whether plaintiff is estopped by his own act and conduct to file the present suit? OPP.*
- 5. Relief*

The learned trial Court after going through the evidence led by the parties, decreed the suit of the plaintiff to the effect that he is entitled for refund of earnest money of Rs.1,50,000/- along with interest at the rate of 18% per annum from the date of execution of agreement to sell Ex PI dated 03.10.2007 till final realization. However, the suit of the plaintiff seeking specific performance of contract is declined on the ground that agreement to sell is a un-registered document.

However, on appeal, the lower Appellate Court decreed the suit of the appellant for possession by way of specific performance of contract by relying upon judgment of this Court in a case of ***Sukhwinder Kaur vs. Amarajit Singh, AIR 2012 (P&H)*** and judgment of Hon'ble the Supreme Court of India in a case of ***S. Kaladevi v. V.R. Somasundaram, 2008 (2) CCC 697 (SC)*** wherein it has been held that it is an admitted fact that an

agreement to sell by itself does not create any right and title or interest with parties to the suit. It has been held that the suit of the plaintiff/appellant for specific performance after withdrawal of the suit for permanent injunction was neither barred by Order 2 rule 2 CPC nor by the principles of resjudicata

Learned counsel for the appellant has referred to judgment of Hon'ble the Supreme Court in a case of ***Saradamani Kandappan vs. S. Rajalakshi and others, 2011 AIR SC (Civil) 1812*** to contend that the Lower Appellate Court has wrongly decreed the suit of the respondent for specific performance, as the Hon'ble the Supreme Court has held that time for payment of consideration was essence of contract. Non-payment of consideration by specified time. Contract rightly cancelled by vendors

Reference has further been made to judgment of Hon'ble the Supreme Court of India in a case of ***S. Abdul Khader vs. Abdul Wajid (D) by LRs. & ors, 2008 (4) R.C.R (Civil) 509*** to contend that the suit for specific performance granting relief of specific performance is purely discretionary and is dependent on the provisions of Section 20 of the Specific Relief Act and the Court under Section 20 of the Act and the Court under Section 21 of the Act has the power to award compensation for breach of contract instead of decreeing the suit for specific performance.

Reference has then been made to judgment of Hon'ble the Supreme Court of India in a case of ***Suraj Lamp and Industries Pvt. Ltd vs. State of Haryana and another, 2011 (4) R.C.R (Civil) 669*** wherein Hon'ble the Supreme Court dealt with controversy regarding performance of agreement to sell, power of attorney and the will and has curtailed discretion

as contemplated under Section 20 of the Specific Possession of Transferee, and held that protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party.

The judgment in *Surai Lamp's case (supra)* is not applicable to the fact of the present case. The Lower Appellate Court discussed this judgment in detail in para No. 20 of the judgment and discarded the same keeping in view that in the present case, it was not a case of sale made by General Power of Attorney. It is a case of agreement to sell which was not in dispute between the parties. This Court was only required to examine the intention of the parties with regard to terms and conditions of the agreement to sell dated 03.10.2007 (Ex PI).

Even the judgments cited by learned counsel for the appellant in *Saradamani Kandappan's case (supra)* and *S. Abdul Khadar's case (supr)* are not applicable to the facts of the present case.

Reference at this stage can be made to a judgment of Hon'ble the Supreme Court in a case of *Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas and another, 2008 (2) RCR (Civil) 936* wherein it has been held that the issues which arise in the subsequent suit were directly and substantially in issue in the earlier suit, indisputably Section 11 of the

Code would apply. The provisions of Order 2 Rule 2 bars the jurisdiction of the Court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. In para 28, Hon'ble the Supreme Court has laid down the ingredients of Section 11 of CPC, which reads as under:-

"28. Having noticed the effect of a stray observation made by a superior court viz-a-viz applicability of the principle of res judicata we may also notice the applicability of the principle of issue estoppel.

*In **Sheodan Singh vs. Daryao Kunwar: [1966] 4 SCR 300**, this Court laid down the ingredients of Section 11 of the Code of Civil Procedure stating*

9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(Hi) The parties must have litigated under the same title in the former suit;

(iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied."

The question which is, thus, required to be posed is what was in issue in the earlier suit, the provisions thereof shall supply.

Reference at this stage can further be made to judgment of this

Court in a case of **Narinderjit Singh vs. North Star Estate Promoters, 2011**

ICC 657. In para No. 18, 19, 20 and 24, it has been observed as under:-

“18. Thus, after considering the arguments raised by learned counsel for the parties, the Lower Appellate Court found that the discretion as provided under Section 20 of the Specific Relief Act was not exercised properly by the trial Court, as the trial Court had taken wholly erroneous view while refusing the relief of specific performance of the agreement in question as plea of unfair advantage and that the specific performance of the contract would cause any hardship to the appellant was not taken by the appellant in his pleadings and the only plea taken by him regarding fraud was found to be false. While passing the impugned judgment and decree, the Lower Appellate Court also found that escalation in the prices of the property is not a ground for refusing the specific performance and the delay in filing of the suit was of no consequence as the same was filed well within limitation.

*19. The plea of hardship is a question of fact. The escalation of price of the real estate, inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature have not been considered as sufficient grounds by the Hon'ble Supreme Court in various judgments to decline the decree for the specific performance of the agreement. Reference can be made to **Gobind Ram v. Gian Chand, 2000 (4) RCR (Civil) 674 : (2000) 7 SCC 548, K. Narendra v. Riviera Apartments P. Ltd., 1999(3) RCR (Civil) 292: 1999 (5) SCC 77 and Sargunam (Dead) by LRs. v. Chidambaram, 2004 (4) RCR (Civil) 721 (SC).***

20. It is well settled that grant of a decree for specific performance of the agreement is a discretionary relief and the Court is not bound to grant such relief merely because it is lawful to do so. However, discretion of the Court is not arbitrary but sound and reasonably guided by the judicial principles and capable of correction by the Court of appeal. Therefore, if the discretion has not been exercised properly, the Lower Appellate Court could rectify such error. As noticed above, the appellant had not raised any plea regarding willingness and readiness of the plaintiff-respondent at each and

every stage of the contract before the Lower Appellate Court and as raised before this Court As a matter of fact the findings of the Lower Appellate Court were not challenged by the appellant by filing any appeal.

24. The factum of readiness and willingness to perform the plaintiff's part of the contract is to be adjudged with the conduct of the parties and the attending circumstances. In the present case, it may be noticed that according to the terms and conditions of the agreement in question, the plaintiff-respondent was to make a payment of Rs. 9,00,000/- to the appellant on 23.11.1996 and on receipt of the aforesaid payment, the appellant was to allow the plaintiff-respondent to carry out the development activities However, it has been established on record that the appellant refused to receive the aforesaid amount of Rs. 9,00,000/- on 23.11.1996. There is no evidence on record that the appellant ever allowed the plaintiff-respondent to carry out development activities in the land in question. Thus, thereafter, there was no occasion for the plaintiff-respondent to further perform its part of the contract on subsequent dates as argued. Still there is no evidence on record placed by the appellant to prove the fact that the plaintiff-respondent was not ready to get the sale deed executed on subsequent dates as per the terms and conditions of the agreement in question. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness, may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price whereas determining the willingness to perform his part of the contract, the conduct of the parties has to be scrutinized. In the present case, there is no evidence placed on record to show that the plaintiff-respondent was not having the money for execution of the sale deeds on subsequent dates. The plaintiff respondent had demonstrated his willingness to pay Rs.9,00,000/- on 23.11.1996 by placing on record the demand draft of Rs.9,00,000/- in favour of the appellant. However, as noticed above, since the appellant refused to accept the same, the plaintiff-

respondent was prevented from performing its part of the agreement by offering money for execution of the sale deeds on subsequent dates.

In the present case, the conduct of the appellant from the very beginning that he wanted to avoid execution of the agreement to sell, as appellant agreed to sell suit land to plaintiff/respondent at the rate of Rs.5,58,000/- per acre. He received an amount of Rs.1,50,000/- as earnest money. As per agreed terms and conditions, plaintiff/respondent went to appellant/defendant on 7.11.2007 alongwith Ram Kishan, Member Panchayat of village Dhukra for payment of Rs.3,50,000/- (being additional earnest money) but defendant/appellant flatly refused to receive said amount. On 08.11.2007, the appellant/defendant sent a legal notice (Ex D1) for cancellation of agreement to sell dated 03.10.2007 (Ex PI) and forfeiture of amount of Rs. 1,50,000/-. Despite this, the plaintiff/respondent on the agreed date i.e 22.04.2008 had gone to the office of Sub Registrar, Nathusari Chopta with remaining amount of sale consideration but defendant/appellant did not turn up. The respondent/plaintiff got his presence marked by swearing affidavit (Ex P2) and issued legal notice dated 25.04.2008 (Ex P3) upon defendant for execution of sale deed. Thereafter, plaintiff filed a suit for permanent injunction restraining the defendant from selling/alienating/transferring the land in question. But the said suit was ordered to be dismissed as withdrawn on the statement given by the plaintiff that he does not want to pursue the present suit.

Further in the present case, in the agreement to sell dated 03.10.2007, there was a specific clause that if the seller refuse to get the registry done, then the plaintiff/respondent can get the registry done through

the Court. At the time of registry, jamabandi was to be reflected that the land was being cultivated by the seller was to be done by the defendant. It was agreed that the Registry will be got done in the name of anybody. The plaintiff/respondent had further proved that he had the capacity to make the payment of additional earnest money, he has got examined P.W.5 Suresh Chander, DDO, PNB, Jamal. According to him, the respondent/plaintiff has account in their bank and proved the copy of the same as Ex P.W.5/A. On 01.11.2007, he withdrew Rs.4,70,000/- from his account but this amount was not accepted by the appellant. The amount of Rs. 3,50,000/- was redeposited by the respondent on 12.11.2007 and entry in this regard is Ex PW5/A. Thus, it is proved on record that plaintiff had the capacity to make payment of additional earnest money and he was always ready and willing to perform his part of contract but the defendant cleverly sent the legal notice dated 08.11.2007 (Ex D1) upon respondent/plaintiff for cancellation of agreement to sell dated 03.10.2007 (Ex PI) and forfeiture of amount of Rs.1,50,000/-. Initially the plaintiff filed a suit for permanent injunction on 16.11.2007 on the basis of agreement to sell vide which the date of registration was fixed as 22.04.2208 but since the defendant did not turn up on the target date agreed between the parties, therefore plaintiff issued a legal notice dated 25.04.2008 (Ex P3). Since the defendant did not perform his part of contract, the cause of action arose in favour of the plaintiff to file a suit for specific performance. Thereafter, he withdrew his earlier suit for permanent injunction, vide Ex P6.

Thus, the plaintiff had taken all his legal steps in time and the Lower Appellate Court had rightly exercised its discretion for granting relief of specific performance by accepting the appeal filed by the plaintiff.

The suit of the plaintiff for specific performance was not barred under Order 2 Rule 2 CPC.

In this backdrop, the finding of facts recorded by Lower Appellate Court does not require any interference by this Court, as it does not suffer from any infirmity or illegality.

No substantial question o of law arises for adjudication by this Court.

The appeal stands dismissed.

08.11.2019
G Arora

(*RITU BAHRI*)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No

The issue indisputably was the claim of entitlement to Gaddi by the first respondent and a plea contra thereto raised by the appellants. Once the issue of entitlement stood determined, the same would operate as res judicata. We may notice some vrecedents for appreciating the underlying principles thereof. Section “18. Thus, after considering the arguments raised by the learned counsel for the parties, the Lower Appellate Court found that the discretion as provided under