

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

**RSA No.2691 of 2017 (O&M)
Date of Decision-08.05.2019**

Baldev Singh and others ... Appellants
Versus

Vikas Sethi and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. V.K. Jain, Sr. Advocate with
Mr. Ravi Kadian, Advocate
for the appellants.

Mr. B.S. Jaswal, Advocate
for respondents No.1 and 2.

RAJ MOHAN SINGH, J.

[1]. Defendants No.1 to 11 are in regular second appeal against the concurrent judgments and decrees passed by the Courts below decreeing the suit of the plaintiffs for alternative relief of recovery of Rs.40,00,000/- already paid as earnest money along with interest @ 9% per annum from the date of receiving the earnest money till the date of recovery and future interest @ 6% per annum till realization.

[2]. Plaintiffs filed a suit for possession by way of specific performance on the basis of agreement to sell dated 26.12.2005 executed between the parties vide which defendants No.1 to 11 agreed to sell the suit land in favour of the plaintiffs @ Rs.41,00,000/- per acre. Plaintiffs sought declaration to the effect that sale deed dated 24.08.2010 executed by defendants No.1 to 11 in favour of defendants No.12 to 19 is illegal, null and void and

consequent mutation is also liable to be set aside. In alternative, plaintiffs sought recovery of Rs.2,44,97,500/- i.e. Rs.40,00,000/- already paid as earnest money and Rs.2,04,97,500/- as damages towards loss of interest and business along with interest @ 18% per annum till realization. Plaintiffs also sought permanent injunction, restraining the defendants from alienating or creating any encumbrance over the suit property. The total sale consideration of Rs.2,44,97,500/- was fixed out of which the defendants received earnest money of Rs.40,00,000/-. The date of execution and registration of sale deed was fixed on or before 10.06.2006 for receiving balance sale consideration. Initially, 19 defendants were impleaded in the suit, but the suit was dismissed as withdrawn qua defendants No.12 to 19. Plaintiffs alleged that they had gone to the office of Sub Registrar on 10.06.2006 along with balance sale consideration and miscellaneous expenses, but the defendants did not turn up and the sale deed could not be executed as it was holiday. Plaintiffs again contacted the defendants and requested them to come present on 12.06.2006 for executing the sale deed. Plaintiffs remained present in the office of Sub Registrar on 12.06.2006 along with balance sale consideration and miscellaneous expenses, but the defendants did not turn up to execute and register the sale deed. During pendency of the suit, defendants No.1 to 11 sold the land in favour of defendants No.12 to 19. With this background, the suit came to be filed.

[3]. Defendants No.1 to 11 contested the suit by filing joint written statement. Para Nos.1 and 4 of the written statement on merits are necessary to be quoted hereasunder:-

“1. That para No.1 of the plaint is incorrect, false, frivolous and hence denied. It s persistent to mention here that no such agreement to sell was signed by the defendants No.2 to 11 as alleged in the present para. Even otherwise, if any agreement is signed by the defendant No.1 as alleged on behalf of the other defendants that agreement is having no legal vale in the eyes of law and is not binding upon the other co-sharers.

4. That para No.4 of the plaint is incorrect, false, frivolous and hence denied. The defendant No.1 visited the office of Sub-Registrar, Rajpura on 10.06.2006 and on 12.06.2006 but the plaintiffs had failed to appear before the Sub-Registrar, Rajpura along with the sale consideration. The presence of the defendant No.1 was marked by the Tehsildar/Sub-Registrar, Rajpura as well as the affidavit by the Notary Public.”

[4]. Defendants No.12 to 19 have also contested the suit, thereby denying the execution of agreement to sell and receiving of earnest money by the defendants. They also took the stand that agreement to sell is an unregistered document. They denied readiness and willingness on the part of the plaintiffs.

[5]. From the pleadings of the parties, following issues were framed on 24.02.2012:-

“1. Whether the plaintiffs are entitled to possession by way of specific performance as prayed for? OPP

2. *Whether plaintiffs are entitled for alternative relief of recovery as prayed for? OPP*
3. *Whether plaintiff is entitled for permanent injunction as prayed for? OPP*
4. *Whether suit of the plaintiff is not maintainable? OPD*
5. *Whether plaintiff has no locus standi to file the present suit? OPD*
6. *Whether plaintiff has not come to the Court with clean hands? OPD*
7. *Whether plaintiff was stopped from filing the present suit by his act and conduct? OPD*
8. *Whether suit of the plaintiff is hopelessly time barred? OPD*
9. *Whether plaintiff has no cause of action to file the present suit? OPD*
10. *Whether plaintiff has not affixed proper court fee? OPD*
11. *Whether defendant No.12 to 19 are bona fide purchaser for valuable consideration? OPD”*

[6]. Thereafter, additional issues were also framed on 24.05.2014 to the following effect:-

“1A. Whether the defendant No.1 to 11 entered into the agreement of sale dated 26.11.2005 to sell the suit land to the plaintiff and received Rs.40,00,000/- as Biana? OPP

1B. Whether the plaintiffs had always been ready and willing to perform their part of contract in pursuance of the agreement to sell dated 26.12.2005? OPP

BA. Whether defendants No.12 to 19 could be impleaded as parties on 18.10.2010 when the suit for specific performance against them would be time barred? OPP”

[7]. Plaintiffs got examined Rajesh Kumar as PW 1, Mahesh Garg as PW 2, R.V. Vashishta, Handwriting and Fingerprints Expert as PW 3 and after tendering documents Exs.PX, PY and PZ closed their evidence. On the other hand, defendants examined Baldev Singh as DW 1, Dhararm Singh as DW 2, Dr. Jassy Anand, Handwriting and Fingerprints Expert as DW 3 and after tendering documents Exs.D3 to D5 closed their evidence.

[8]. Under issues No.1, 3, 1B and BA, plaintiffs withdrew the suit for specific performance of agreement to sell and therefore, the aforesaid issues became redundant. On 04.07.2014, joint statement was made by the plaintiffs, relinquishing their claim in the suit measuring 23 bighas, 18 biswas by way of specific performance and they pleaded no objection in dismissal of the suit for specific performance by accepting the registered sale deed dated 24.08.2010 executed in favour of defendants No.12 to 19 by defendants No.1 to 11. In view of the joint statement, the suit for specific performance was dismissed as withdrawn, however, the plaintiffs continued their suit for recovery against defendants No.1 to 11.

[9]. Trial Court decreed the suit for alternative relief of recovery by appreciating the fact that agreement to sell was

evasively denied by the defendants. During pendency of the suit, nature of property was changed from agricultural to gadams (godowns) and the purpose for filing specific performance had turned futile, therefore, the plaintiffs withdrew their suit against defendants No.12 to 19 and continued with the suit for recovery. *Jamabandi* of the land in question i.e. Ex.DA projected the nature of land to be *gair mumkin gadam*. Defendants No.2 to 11 at the first instance denied the execution of agreement to sell and competence of defendant No.1 to execute or sign agreement to sell on their behalf. In view of above, the plea of readiness and willingness on the part of the defendants was also not tenable. The plea of fraud taken by the defendants could not be proved with reference to any material. Defendant No.1 was stated to be signatory to the agreement to sell. Defendants projected that defendant No.1 had the authority to execute the agreement to sell on behalf of all other defendants, but in the written statement, defendants pleaded contradictory stand and were playing hot and cold in the same breath. If defendant No.1 had the authority to execute the agreement to sell on behalf of all the defendants, then it was required to be mentioned in the written statement.

[10]. Perusal of the stand taken by defendants No.1 to 11 in para Nos.1 to 4 would show that defendants No.2 to 11 have alleged that no such agreement was signed by them. Agreement to sell if found to have been signed by defendant No.1, then the same has no legal value in the eyes of law and the same is not

binding upon other co-sharers i.e. defendants No.2 to 11. Further the defendants have alleged that defendant No.1 visited the office of Sub Registrar on 10.06.2006 and 12.06.2006, but the plaintiffs did not turn up. Defendant No.1 got his presence marked before the Tehsildar/Sub Registrar and got the affidavit duly notarized by the Notary Public. Defendants No.12 to 19 filed their separate written statement.

[11]. Perusal of the stand would further show that defendants No.1 to 11 have taken dual stand in para No.1 of the written statement on merits. Firstly, defendants No.2 to 11 have denied the competence of defendant No.1 to execute agreement to sell on their behalf. Secondly, in para No.4, they have supported the presence of defendant No.1 before Sub Registrar on 10.06.2006 and 12.06.2006 for the purposes of showing readiness and willingness on their part to honour the obligation arising out of agreement to sell.

[12]. In the affidavit dated 12.06.2006 executed by defendant No.1, language used was plural which itself advanced dual stand of the defendants that the agreement to sell was entered into by defendant No.1 on their behalf as well. Written statement filed by defendants No.1 to 11 coupled with statement of DW 1 proves that defendant No.1 had no power of attorney on behalf of defendants No.2 to 7 and 9 to 11. Defendants have not distinguished their stand viz-a-viz defendant No.8 Rajesh Kumar

who along with defendant No.1 allegedly visited the office of Sub Registrar on 10.06.2006 and marked his presence which was of no use as 10.06.2006 was holiday. Further, if Rajesh Kumar was ready to execute the agreement to sell, then why he did not visit along with defendant No.1 on 12.06.2006 to execute the agreement to sell. Even Rajesh Kumar never stepped into the witness-box.

[13]. Owing to the conduct of the defendants, trial Court observed that the stand taken by the defendants was discrepant and there was no specific denial pleaded by the defendants in terms of Order 8 Rule 3 CPC. Defendants were not entitled to raise plea of readiness and willingness against the plaintiffs. As a consequence of observations made by the trial Court, the suit was partly decreed to the extent of recovery of earnest money along with interest vide judgment and decree dated 06.05.2015 passed by the trial Court. Defendants unsuccessfully contested the appeal before the Lower Appellate Court which was dismissed vide judgment and decree dated 17.02.2017.

[14]. In the present regular second appeal, after hearing learned counsel for the parties and on the basis of controversy involved in this appeal, I proceed to consider the following substantial questions of law:-

1. Whether judgments and decrees passed by the Courts below are vitiated on account of misreading of evidence?

2. Whether readiness and willingness as per Section 16(c) of the Specific Relief Act can be answered in favour of the defendants on the basis of pleadings and material on record?

[15]. Learned counsel for the appellants relied upon **Mangal Singh Vs. Champa Lal, 2014(3) CivCC 604, Punjab Urban Planning and Dev. Authority Vs. M/s Shiv Saraswati Iron & Stell Re-Rolling Mills, 1998(2) RCR (Civil) 292, N.P. Thirugnanam (dead) by LRs Vs. Dr. R. Jagan Mohan Rao, 1995(2) RCR (Rent) 647, K.S. Vidyanadam Vs. Vairavan, 1997(2) RCR (Civil) 312, Dadarao and another Vs. Ramrao and others, 1999(8) SCC 416, Umabai and another Vs. Nilkanth Dhondiba Chavan (dead) by LRs and another, 2005(6) SCC 243, Ouseph Varghese Vs. Joseph Aley and others, 1969(3) SCC 539, Ishar and others Vs. Sheo Ram and others, 1987 PLJ 421, Abdul Khader Rowther Vs. P.K. Sara Bai, 1990 AIR (SC) 682 and Ram Awadh (dead) by LRs Vs. Achhaibar Dubey, 2000 AIR (SC) 860** and contended that with the dismissal of the suit for specific performance, plea of readiness and willingness cannot be answered in favour of the plaintiffs. If the plaintiffs were not found to be willing to execute sale deed as per agreement to sell, then the defendants were entitled to forfeit the earnest money. Plaintiffs have to prove their own case and weakness in the case of the defendants cannot be credited in favour of the plaintiffs. Remedy for specific

performance is an equitable remedy and depends upon discretion of the Court. Such discretion requires to be exercised according to settled principles of law. Once the execution of agreement to sell is proved, normal consequence is to grant decree for specific performance unless and until the case of the defendants is found under the exception of Section 20 of the Specific Relief Act.

[16]. In the instant case, converse proposition is involved, wherein plaintiffs themselves were not interested in specific performance and they withdrew the suit qua specific performance by making joint statement on 04.07.2014 before the trial Court and therefore, the plaintiffs were not entitled for alternative relief of recovery of earnest money as continuous readiness and willingness was the condition precedent for relief of specific performance. Two distinct broad features were involved. First issue was breach by the defendants vendors which gave cause of action to the plaintiffs to file suit for specific performance. Second was related to personal bar to enforcement of a specific performance as per Section 16 of the Specific Relief Act. Plaintiffs have to aver and prove that they have performed or have always been ready and willing to perform the essential terms and conditions which were legally to be performed by them and now they are barred from claiming specific performance. In the absence of any such pleadings, the plaintiffs cannot prove continuous readiness and willingness to perform their part of

obligation which was a condition precedent for relief of specific performance.

[17]. The case laws cited by learned counsel for the appellants are in different context and do not squarely fit in the frame of things as involved in the present case. Dual stand has been taken by the defendants in the written statement. Execution of agreement to sell was admitted in a very evasive manner. Firstly, defendants No.2 to 11 have denied the execution of agreement to sell so far as their status of co-sharership was concerned. In the same breath, they have owned presence of defendants No.1 and 8 before Sub Registrar on two accessions. Defendant No.1 was signatory to the agreement to sell. The denial on behalf of defendants No.2 to 11 would not give plea of readiness and willingness to be raked up by the defendants. Defendants No.2 to 11 having denied the agreement to sell, cannot raise the plea of non-readiness and non-willingness on behalf of the plaintiffs. Since the suit property changed hands during pendency of the suit in favour of defendants No.12 to 19 and nature of property was also changed from agricultural to *gair mumkin*, therefore, dismissal of the suit for specific performance as withdrawn, would not create any impediment in maintaining alternative suit for recovery by the plaintiffs. In the affidavit dated 12.06.2006, language used was plural and the same was in utter disregard to the plea taken by defendants No.2 to 11 in para No.1 of the written statement on merits. Further on the point of

authority, words used in the written statement were that defendants No.2 to 11 never gave authority to defendant No.1 to execute agreement to sell. If that was the stand on behalf of defendants No.2 to 11, then what inspired them to file joint written statement with defendant No.1 which could not be explained on record. Defendants No.2 to 11 never stepped into witness-box in order to remove the cloud arising out of conflicting stand in the written statement. Para Nos.1 and 4 of the written statement ultimately gave rise to both stands taken by the defendants. The presence of defendant No.1 before Sub Registrar on 10.06.2006 and 12.06.2006 would remain explanatory for want of authority to execute power of attorney on behalf of defendants No.2 to 11 who never gave authority in favour of defendant No.1. They did not distinguish their stand with regard to defendant No.8 Rajesh Kumar who allegedly visited the office of Sub Registrar along with defendant No.1 on 10.06.2006 and marked his presence. Since 10.06.2006 was holiday, defendant No.8 was required to accompany defendant No.1 to execute the sale deed. Rajesh Kumar (defendant No.8) did not visit the office of Sub Registrar on 12.06.2006, nor accompanied defendant No.1 in any manner and he even did not appear in the witness-box to explain the stand.

[18]. It is the case of attempted fraud on behalf of the defendants to usurp the amount of earnest money. Fraud vitiates all solemn acts and has no equities in law. The person

committing fraud can be thrown out at any stage of litigation in view of ratio laid down by Hon'ble Apex Court in **S.P. Changalvaraya Naidu (dead) by LRs Vs. Jagannath (dead) by LRs, 1994 AIR (SC) 853, Hamza Haji Vs. State of Kerala and another, 2006(7) SCC 416, A.V. Papayya Sastry and others Vs. Government of A.P. and others, 2007(2) RCR (Civil) 431, Balwant Rai Tayal Vs. M/s Subhash Oil Company, Hisar through Sh. Raghunath Sahi, 2003(2) RCR (Rent) 148, Badami (deceased) by her LR Vs. Bhali, (2012) 11 SCC 574** and **Ramesh Kumar and another Vs. Furu Ram and another, (2011) 8 SCC 613.**

[19]. The issue of readiness and willingness is a mixed question of fact and the same has to be proved with reference to evidence. Such issue cannot be treated to be preliminary issue. Readiness and willingness has to be established as a matter of fact in order to examine whether legal requirement under Section 16(c) of the Specific Relief Act is satisfied. It is mandated under Section 16(c) of the Specific Relief to be stated in plaint, cause of action for suit has to be gathered from the pleadings and thereafter, material has to be brought on record by the parties. The stand taken by the appellants that they have never received any earnest money from the respondents cannot be appreciated in view of affidavits dated 10.06.2006 and 12.06.2006 executed by defendant No.1 and supported by defendant No.8. Acceptance of earnest money to the tune of Rs.40,00,000/- never remained in

dispute. Plaintiffs have specifically pleaded alternative relief in the plaint itself.

[20]. Defendant No.1 while appearing as DW 1 specifically pleaded in his examination-in-chief that plaintiffs have filed the frivolous suit as the agreement to sell was not signed by defendants No.2 to 7 and 9 to 11. Defendant No.1 was not having any power of attorney, nor was competent to execute agreement in question on behalf of defendants No.2 to 7 and 9 to 11. He further pleaded that plaintiffs were not having funds and they were not ready to get the sale deed executed in their favour. Defendants No.1 and 8 were ready to execute the sale deed pertaining to their share out of the suit land in favour of the plaintiffs. Therefore, on 10.06.2006, the deponent and Rajesh Kumar remained present in the office of Sub Registrar, but the plaintiffs did not turn up. Both got their presence marked and affidavit was duly got executed from Notary. On 12.06.2006, the deponent remained present in the office of Sub Registrar, but the plaintiffs did not turn up. In para No.4 of examination-in-chief, DW 1 stated that alleged agreement to sell was not enforceable as the same was not signed by all the co-sharers except defendants No.1 and 8.

[21]. If the aforesaid stand of defendant No.1, read in conjunction with joint written statement of defendants No.1 to 11 is appreciated, the stand of the defendants would be ventilated.

Even if the buyers are found to be guilty of breach of contract and were not ready and willing to perform their part of obligation, the sellers cannot fortify the entire amount of earnest money without establishing real loss suffered by them due to such breach.

[22]. In the instant case, there was no loss suffered by the defendants, rather conduct of defendants No.1 to 11 was found to be questionable in not honouring the commitment and by selling the land in favour of defendants No.12 to 19 during pendency of the suit. An attempt has been made to usurp the amount of Rs.40,00,000/- paid to them as earnest money.

[23]. In my considered opinion, questions of law as framed do not arise for consideration in the present case. The findings recorded by the Courts below are based on evidence. The plea of readiness and willingness is to be adjudged with reference to conduct of the parties. In the instant case, the conduct of the defendants in accepting the execution of agreement to sell in an evasive manner and thereafter, pleading conflicting stand taken in the written statement, would not advance their case to show that plaintiffs were required to establish their case by standing on their own legs. The conduct of the parties would play pivotal role in appreciating the readiness and willingness on the part of the parties. Defendants have not suffered any damages, rather they have attempted to swallow the amount of earnest money paid to them without establishing any real loss suffered by them due to

breach of any contract on behalf of the plaintiffs. Since, defendants No.1 to 11 had already sold the property to defendants No.12 to 19, therefore, they have not suffered any loss.

[24]. In view of above, the findings of fact recorded by the Courts below are not found to be suffered with any perversity or the result of misreading of evidence. No question of law worth consideration is involved in the present appeal. The substantial questions of law as framed cannot be answered in favour of the appellants. This appeal is found to be totally devoid of merits and is accordingly dismissed.

08.05.2019
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking	Yes/No
Whether reportable	Yes/No