

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

RSA No. 3319 of 2018(O&M)

Date of decision: 1.5.2019

Bed RamAppellant

VERSUS

Vijay PalRespondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. C.B. Goel, Advocate for the appellant.

REKHA MITTAL, J.

The present appeal directs challenge against judgment and decree dated 27.04.2018 passed by the Additional District Judge, Faridabad whereby appeal against judgment and decree dated 27.05.2015 passed by the Additional Civil Judge (Senior Division), Faridabad (hereinafter referred to as the trial Court) was allowed, judgment and decree passed by the trial Court was modified and the respondent/plaintiff was allowed principal relief of specific performance of agreement to sell dated 12.12.2008 Ex.P1.

The respondent/plaintiff filed suit for possession by way of specific performance of agreement dated 12.12.2008 on payment of balance sale consideration. Further prayer was made for restraining the defendant/appellant from alienating the suit property except to the plaintiff. As per the case set up by the respondent, the appellant entered into agreement with the plaintiff for sale of land measuring 8 kanals, for sale consideration of Rs.20,00,000/- on 12.12.2008. The appellant received a

sum of Rs.6,50,000/- as earnest money and executed the agreement and receipt in presence of witnesses. The date for execution of sale deed was fixed as 15.06.2009. It was also settled that if the appellant fails to get the property partitioned, the date for registration of sale deed would be automatically extended. It is further averred that the respondent was always ready and willing to perform his part of the agreement. On 15.06.2009, he remained present in the office of Sub Registrar Ballabhgarh along with balance consideration and got his attendance marked. A legal notice was issued on 14.09.2011 asking the appellant to get the sale deed executed but to no avail.

The appellant/defendant filed the written statement raising preliminary objections inter alia that the plaintiff has no cause of action and no locus standi to file the suit and he has not approached the Court with clean hands. He has denied execution of agreement, receipt of earnest money and his liability to execute the sale deed. It has been submitted that the respondent has filed the suit in league with one Nirmal Yadav from whom he (defendant) had taken friendly loan of Rs.4,50,000/- on interest basis and at the time of said transaction, Nirmal Yadav got his signatures on some blank papers and stamp papers as security. The answering defendant has already paid a sum of Rs.8,50,000/- to Nirmal Yadav but upon assurance of Nirmal Yadav, he did not demand the signed blank papers and stamp papers from Nirmal Yadav. It is further alleged that plaintiff being relative of Nirmal Yadav misused the said blank papers and has filed the present suit. All other material averments of the plaint have been denied with a prayer for dismissal of the suit.

The trial Court framed issues reproduced in para 5 of the judgment. Having heard counsel for the parties in the light of materials on record, the trial Court accepted case of the respondent that the appellant executed agreement to sell on 12.12.2008 and a sum of Rs.6,50,000/- was paid to him by the plaintiff/respondent. However, the trial Court negated plea of the respondent that he always remained ready and willing to perform his part of the agreement and as a consequence, the respondent/plaintiff was held entitle to refund of Rs.6,50,000/- with interest at the rate of 6% per annum from the date of passing of consideration till realization.

As has been noticed hereinbefore, the appeal preferred by the respondent/plaintiff was allowed by the first Appellate Court and findings of the trial Court on the question of readiness and willingness of the plaintiff/respondent to perform his part of the agreement were set aside and the said question was answered in favour of the respondent/plaintiff and eventually the plaintiff was allowed principal relief of specific performance of agreement of sale.

Counsel for the appellant would argue that as per the case set up by the respondent/plaintiff, agreement to sell was executed on 12.12.2008 and sale deed was to be executed on 15.06.2009. It is argued that for a period of more than 2 years w.e.f. 15.06.2009 till 14.09.2011, no steps were taken by the respondent/plaintiff seeking specific performance of the agreement as he purportedly issued notice on 14.09.2011. It is further argued that even after issuance of notice on 14.09.2011, the instant suit was filed more than 3 months thereafter on 15.12.2011 meaning thereby that suit for specific performance was filed two years and more

than five months from the date fixed for execution of sale deed. It is vehemently argued that the trial Court had rightly taken notice of conduct of the respondent/plaintiff while negating his plea with regard to readiness and willingness to perform his part of the agreement and exercising its discretion in rejecting claim of the respondent/plaintiff for specific performance of the agreement of sale but the Appellate Court grossly erred by reversing findings of the trial Court on this vital aspect of the matter. Counsel would point out that in para 19 of the judgment of Court in appeal, it is mentioned that the respondent got his presence marked by Executive Magistrate on 15.06.2009 contrary to the facts on record as the affidavit with regard to attendance is attested by notary and not an Executive Magistrate. It is further argued that the respondent failed to adduce clear much less cogent and convincing evidence with regard to his source to pay balance sale consideration and incur expenses of registration etc on the stipulated date i.e. 15.06.2009. The last submission made by counsel is that since price of the land in question had increased as has been averred by the respondent/plaintiff in para 7 of the plaint, the instant suit was filed just few months before expiry of limitation reckoned w.e.f. 15.06.2009, the date allegedly fixed for execution of sale deed.

I have heard counsel for the appellant, perused the paper-book and copies of documents made available during the course of hearing.

Before advertng to the submissions made by counsel for the appellant, it is pertinent to mention at the outset that the appellant neither filed an appeal to challenge the judgment and decree passed by the trial Court nor filed cross objections to assail findings of the trial Court in respect of agreement of sale dated 12.12.2008 and payment of an amount

of Rs.6,50,000/- by respondent to the appellant towards earnest money out of sale consideration of Rs.20,00,000/- and as such findings of the trial Court on the aforesaid aspect attained finality between the parties.

The only issue that survived for consideration before the Appellate Court as well as in second appeal is with regard to respondent's readiness and willingness to perform his part of the agreement i.e. payment of balance sale consideration and meeting expenses of registration etc. Since the appellant had denied execution of agreement of sale, he possibly could not raise a plea that he was ready and willing to get the sale deed executed on the stipulated date but fault for non-execution lies with the respondent/plaintiff.

Perusal of the judgments passed by the Courts leaves no manner of doubt that subsequent to the stipulated date for execution of sale deed i.e. 15.06.2009, the first step taken by the respondent/plaintiff was issuance of notice dated 14.09.2011 and thereafter the suit was filed on 15.12.2011. The respondent/plaintiff appeared in the witness box and tendered into evidence his duly sworn affidavit Ex.PW1/A and document Ex.P1 to P6. A plain but careful reading of cross examination of the respondent/plaintiff would make it evident that there is no challenge to his testimony with regard to his presence in the office of Registering Authority on 15.06.2009 along with Rs.14,50,000/- in cash. There is not even a suggestion to the respondent/plaintiff that either he was not ready or willing to perform his part of the agreement.

It is a settled proposition in law that if testimony of a witness is not challenged on a material aspect, it amounts to admission on the part of contesting party. This apart, it assumes greater significance when

viewed in the light of conduct of the appellant who denied execution of agreement though admitted his signatures by raising a plea of blank signatures which he failed to substantiate.

Much stress has been laid by the appellant qua delay in issuance of notice on 14.09.2011 and filing of suit in December 2011 after the stipulated date for execution of sale deed expired on 15.06.2009. There cannot be denial that ordinarily in contracts for sale of immovable property, time is not essence of contract unless so intended by the parties. In the case at hand, findings of the trial Court with respect to agreement of sale have attained finality. In clause 3 of the agreement, it was mentioned that date for registration of sale deed is 15.06.2009 but in case the land agreed to be sold was not partitioned upto the stipulated date, the period of agreement would be deemed to be extended. A similar recital was made in clause 5 dealing with entitlement of purchaser to forfeit earnest money in case the vendee failed to get the sale deed executed upto the stipulated date but subject to the condition that title on the basis of partition gets cleared. There is nothing on record suggestive of the fact that the appellant got the land partitioned either upto the stipulated date i.e. 15.06.2009 or even till filing of the suit in December 2011. Once the parties had agreed that the stipulated date for execution of sale deed would get extended automatically in case the land was not got partitioned, the appellant can neither be allowed to take advantage of his own wrong nor to contend that the respondent/plaintiff was not ready and willing to perform his part of the agreement as he instituted the suit two years and about five months after expiry of stipulated date i.e. 15.06.2009. The trial Court failed to take into consideration this vital aspect of the matter, thus, misdirected in deciding

the question of readiness and willingness against the respondent/plaintiff. That being so, discretion exercised by the trial Court in favour of appellant was patently erroneous and has rightly been set aside by the Appellate Court by granting specific performance of agreement of sale. The mere fact that the Appellate Court has mentioned that the respondent got his presence marked by Executive Magistrate in place of Notary is not a circumstance to uphold plea of the appellant that the judgment passed by the Appellate Court suffers from perversity or raise a question of law that needs determination after notice to the contesting party.

In view of what has been discussed hereinabove, finding no merit, the appeal fails and is accordingly dismissed in limine. No order as to costs.

MAY 1, 2019

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned : yes/no

Whether reportable : yes/no