

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

**RSA No4981 of 2018 (O&M)
Date of Decision: 22.01.2019**

Jagtar Singh

.....Appellant

Versus

Gurdhyan Singh

..... Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Fateh Saini, Advocate
for the appellant.

Mr. Sanjiv Kumar Aggarwal, Advocate
for the respondent.

LISA GILL, J.

Appellant-defendant is aggrieved of judgment and decree dated 18.10.2016, passed by the learned Addl. Civil Judge (Sr. Division), Naraingarh, as well as judgment and decree dated 02.07.2018, passed by the learned Additional District Judge, Ambala, whereby suit for possession by way of specific performance of agreement to sell dated 06.05.2011, filed by the plaintiff-respondent, has been decreed.

Brief facts necessary for the adjudication of the case are that plaintiff-respondent filed a suit for possession by way of specific performance of agreement to sell dated 06.05.2011 executed between the defendant and the plaintiff in respect of the land as described in the plaint. It was pleaded that the defendant was the owner of the suit land. Defendant represented that the suit land was free from all encumbrances and agreed to sell the same to the plaintiff at the rate of ₹20,00,000/- per acre. It was further pleaded that it was mutually agreed between the plaintiff and the

defendant that the plaintiff will pay ₹14,00,000/- at the time of execution of the agreement of sale and balance sale consideration will be paid at the time of execution and registration of the sale deed i.e. on 04.05.2012. It was further pleaded that agreement of sale was duly executed between the parties on 06.05.2011 and plaintiff paid a sum of ₹14,00,000/- to the defendant and the agreement was got attested from the Notary Public. On 04.05.2012 i.e., the date fixed for execution of the sale deed, plaintiff went to the office of Sub Registrar, Shahzadpur along with the remaining balance sale consideration of ₹25,00,000/- by way of Draft No. 949885 dated 03.05.2012 of Punjab National Bank, in favour of the defendant, besides ₹50,000/- in cash and the amount to meet expenses of stamps, execution and registration of sale deed. Plaintiff waited for the defendant for the whole day, but defendant did not turn up. It was further pleaded that the plaintiff was/is always ready and willing to perform his part of contract and he again approached the defendant for the execution of the sale deed on 05.05.2012. Plaintiff asked the defendant to get the sale deed executed, but the defendant flatly refused to do so while proclaiming that he had another buyer who was agreeable to purchase the suit property for higher consideration. Hence the suit was filed.

Defendant filed written statement while resisting the suit. Various preliminary objections were raised. Averments on merits were denied. It was stated that plaintiff was not ready and willing to perform his part of contract as he was not having the requisite sale consideration at the time of registration of the sale deed. It was further stated that it was the defendant who went to the office of the Joint Sub Registrar and waited for

the plaintiff for long time, but the plaintiff did not turn up for execution of the sale deed. The plaintiff thereafter got his presence marked on 04.05.2012. Dismissal of the suit was prayed for.

Replication was filed. From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether the plaintiff is entitled to decree for possession by way of specific performance of agreement to sell dated 06.05.2011 executed by the defendant after payment of balance sale consideration of Rs.25,00,000/-?
2. If issue no.1 is proved whether the plaintiff is entitled to decree for permanent injunction?OPP
3. Whether the plaintiff has concealed true and material facts from the Court?OPD
4. Whether no cause of action has accrued in favour of the plaintiff?OPD
5. Whether the suit of the plaintiff is liable to be dismissed for want of non-compliance of provisions of Order 7 Rule 1 (J) CPC?OPD
6. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the facts and circumstances as well as the evidence on record concluded that defendant had entered into agreement to sell with the plaintiff on 06.05.2011 but failed to honour his commitment by failing to execute the sale deed. Readiness and willingness on the part of the plaintiff to carry out his part of the contract was found proved from the evidence on record. Suit filed by the plaintiff was accordingly decreed.

Appeal preferred by the present appellant-defendant was dismissed by the learned Additional District Judge, Ambala, vide judgment and decree dated 02.07.2018.

Aggrieved therefrom, present appeal has been filed by the

appellant-plaintiffs.

Learned counsel for the appellants vehemently argues that both the learned Courts below have grossly erred in decreeing the suit filed by the plaintiff-respondent. Learned counsel for the appellant argues that the ingredients of Section 16(c) of the Specific Relief Act (for short 'Act'), are not complied with, inasmuch as readiness and willingness to perform his part of the contract, has not been pleaded by the plaintiff nor proved on record. It is argued that willingness on the part of the plaintiff to carry out his part of the contract was not proved on record. It is urged that the plaintiff merely by preparing a demand draft Ex.P-2, which was admittedly cancelled on 10.05.2012 cannot substantiate his claim of readiness and willingness to perform his part of the contract. At best it may indicate the plaintiff's financial capacity but does not prove his 'willingness' to execute the contract. Learned counsel for the appellant relies upon the judgment of Delhi High Court in **Ved Parkash Kharbanda Vs. Vimal Bindal, 2014 (10) R.C.R (Civil) 744**, to contend that there is a distinction between 'Readiness and Willingness'. 'Readiness' relates to financial capacity of the purchaser and 'Willingness' relates to intention of the purchaser. Learned counsel for the appellant further relies upon the judgment of the Hon'ble Supreme Court in **N.P.Thirugnanam (dead) by Lrs. Vs. Dr. R.Jagan Mohan Rao, 1996 (AIR(SC) 116** to buttress his arguments of readiness and willingness being required to be duly proved by the plaintiff as a condition precedent to grant the relief of specific performance.

It is further submitted that the plaintiff never intended to carry out his part of the contract. Moreover, the plaintiff did not serve any legal

notice upon the defendant-appellant calling upon him to execute the sale deed pursuant to agreement dated 06.05.2011. Learned counsel for the appellant relies upon the judgement of the Patna High Court in **Raj Kr. Singh Vs. Madhuri Kumari @ Madhubala and others, 2014 (23) R.C.R (Civil) 274**, to contend that in case notice is not served upon the seller, it would be indicative of absence of readiness and willingness to carry out his part of the contract. It is urged by learned counsel for the appellant that a separate issue regarding readiness and willingness of the plaintiff was not framed by the learned trial Court despite specific pleading. Therefore this appeal should be allowed on this ground itself as grave prejudice has been caused to the appellant.

Plaintiff himself, it is urged did not come-forward for execution of the sale deed. Learned Courts below have wrongly relied upon the evidence led by the plaintiff to prove that the plaintiff appeared before the Joint Sub-Registrar, Shahzadpur on 04.05.2012. Said documents have merely been prepared with a view to create evidence. Moreover, while referring to Section 20 of the Act, it is submitted that the relief of specific performance is a discretionary relief and the Court is not bound to grant the same to a party. In the present case, the defendant, it is claimed shall suffer a grave hardship, in case, both the judgements and decrees are not set aside. This is so for the reason that he would have no access to his land situated behind the land in dispute (candidly admitted to have been purchased subsequent to agreement to sell dated 06.05.2011). Learned counsel relies upon the judgment of the judgement of the Hon'ble Supreme Court in **Bal Krishna and another Vs. Bhagwan Das (dead) and others 2008(2) R.C.R**

(Civil) 732, to contend that decree for specific performance should not be granted if it would involve hardship to the defendant.

It is further argued vociferously that agreement to sell dated 06.05.2011 was executed merely as a security for a loan which the defendant had taken from the plaintiff on interest at the rate of 1%. The said amount was duly returned to the plaintiff. It is thus prayed that the present appeal be allowed and the impugned judgments and decrees passed by the learned Courts below be set aside. Consequently, suit filed by the plaintiff-respondent be dismissed throughout.

Learned counsel for the respondent while refuting the averments as above submits that both the learned Courts below have rendered concurrent finding of fact on proper appreciation of the evidence on record. Learned counsel for the respondent submits that there is specific pleading by the plaintiff-respondent in respect to his readiness and willingness. He refers to para no.4 of the plaint, which reads as under:-

“That the plaintiff has always been, is even now and will remain ready and willing to perform his part of the agreement of sale and get the sale deed executed and registered by meeting the expenses of stamps execution and registration etc.”

It is further submitted that readiness and willingness of the plaintiff to execute the contract is duly proved on record. Demand draft dated 03.05.2012 was prepared one day prior to the date fixed/agreed upon for execution of the sale deed. Merely because the draft was cancelled on 10.05.2012, is not indicative of lack of readiness and willingness on the part of the plaintiff in any manner. Once the defendant made it clear that he had no intention of executing the sale deed in favour of the plaintiff as he had

another buyer ready to pay higher consideration, cancellation of the draft can't be held against the plaintiff. Furthermore, the plaintiff not serving any legal notice on the defendant cannot be held against him as the suit in question was admittedly filed on 10.05.2012 itself. Learned counsel for the respondent submits that lack of *bona fide* on the part of the appellant is apparent from the fact that his son has subsequently filed a suit for declaration to the effect that impugned judgment and decree dated 18.10.2016 should be declared null, void and ineffective qua his rights. The appellant's son has claimed to be the owner of the disputed property along with other property claiming it to be ancestral Joint Hindu Family property. The said suit, it is stated was filed at the end of July 2018 after passing of the impugned judgment and decree dated 02.07.1018. It is thus prayed that the present appeal be dismissed and the impugned judgments and decrees passed by the learned Courts below be upheld.

I have heard learned counsel for the parties and have gone through the photocopy of the record produced in Court today by them.

Plaintiff in order to prove his case has produced a copy of the demand draft dated 03.05.2012 Ex.P-2 for a sum of ₹25,00,000/-. Copy of the account ledger of the plaintiff Ex.P1 and vouchers issued by the Punjab National Bank at the time of preparation of the draft are duly proved on record as Ex.P-3 and Ex.P-4. Ex.P-5, is the affidavit dated 04.05.2012 executed by the plaintiff in respect to his presence before the Sub-Registrar, Shahzadpur for execution of the sale deed. Ex.P-6, is the attendance certificate of the plaintiff, though not attested. Ex.P-10 is an application of the plaintiff for marking his presence before the Sub-Registrar, Shahzadpur,

which was returned to the plaintiff with the noting of the Sub-Registrar. PW-1-Dharmvir Singh, Officer of PNB Nanyala has proved the account ledger, copy of the draft, vouchers etc. PW-2-Parveen Kumar, stamp vendor has testified that stamp paper was sold by him to the plaintiff. Entry of the same is reflected in his register at Sr. No. 131 dated 04.05.2012. PW-3-Mr. A.S.Guliani, Advocate, Notary Public, has duly proved the execution of the agreement to sell dated 06.05.2011. Passing of the earnest money of ₹14,00,000/- stands duly proved. PW-5-Gurdhyan Singh, the plaintiff has categorically testified regarding the execution of the agreement to sell and handing over of the earnest money of ₹14,00,000/-.

It is relevant to note at this stage that the defendant-apellant in his written statement has not denied the execution of the agreement to sell dated 06.05.2011 neither has he denied the receipt of ₹14,00,000/- as earnest money. Agreement to sell dated 06.05.2011 and receipt of ₹14,00,000/- by the defendant stand admitted. It is the absence of readiness and willingness on the part of the plaintiff to conclude the agreement to sell which is pleaded. Preliminary objection no. 6 of the written statement filed by the defendant reads as under:-

“That the plaintiff has filed the present suit on false and baseless facts as the plaintiff was never ready and willing to perform his part of agreement to sell as he was not having the requisite sale consideration at the time of registration of the sale deed.”

It is categorically stated in the written statement that the terms and conditions of the agreement to sell are a matter of record. The plaintiff, it was pleaded was not ready and willing to get the sale deed executed as he

did not have the requisite sale consideration and other expenses for registration of the sale deed. It was further pleaded that the defendant-appellant went to the office of the Joint Sub-Registrar, Shahzadpur and waited for the plaintiff, who failed to appear for the execution of the sale deed. It is stated that the defendant got his presence marked before the Joint Sub-Registrar, Shahzadpur. Affidavit Ex.D-1, was produced to substantiate this plea.

It is pertinent to note that while the said pleas were taken in the written statement, the defendant when testifying as DW-1 before the learned trial Court, admitted that he was the owner of the suit property and that agreement to sell dated 06.05.2011 was entered into and he received a sum of ₹14,00,000/-. Defendant claimed to have gone to the office of Sub-Registrar, Shahzadpur on 04.05.2012, but it is the plaintiff who did not turn up and he committed breach of agreement to sell dated 06.05.2011. However, in his cross-examination, the defendant did a total volteface. He over turned his entire version by stating that he never entered into any agreement to sell with the plaintiff, but he took a loan from the plaintiff at the rate of 1% interest. Both the learned Courts below have rightly concluded that the defendant is trying to play hot and cold by stating different facts in his affidavit and something contrary in cross-examination.

There is a clear cut admission on the part of the defendant in regard to the execution of the agreement to sell dated 06.05.2011 and receipt of ₹14,00,000/- as earnest money. Execution of the agreement to sell dated 06.05.2011 as well as receipt of the earnest money is therefore not in doubt. Though contradictory pleas taken by the defendant are by themselves

sufficient to dismiss the appeal, arguments urged by learned counsel for the appellant are being dealt with. Argument that willingness on the part of the plaintiff, is not borne out from the evidence on record is devoid of any merit. There is no denial of the fact that draft dated 03.05.2012 for the remaining amount of ₹25,00,000/- was duly prepared by the plaintiff. Merely because notice was not issued to the defendant to come-forward and execute the sale deed or that demand draft dated 03.05.2012 was cancelled, is not sufficient to non-suit the plaintiff. This is so for the reason that the plaintiff has promptly and immediately filed the suit for possession by way of specific performance on 10.05.2012 itself i.e. within a week from 04.05.2012 i.e. the date fixed for execution of the sale deed. The demand draft was duly prepared on 03.05.2012, one day prior to the date fixed/agreed upon by the parties i.e. 04.05.2012. It is the specific case of the plaintiff that when he contacted the defendant-appellant for execution of the sale deed on 05.05.2012, the defendant flatly refused. Demand draft dated 03.05.2012 was thus cancelled and the suit was promptly filed on 10.05.2012.

There is no doubt that 'readiness and willingness' are distinct from each other. 'Readiness' deals with the financial capacity of the purchaser and 'Willingness' regarding the intention of the purchaser. In the present case, both readiness and willingness on the part of the plaintiff to execute his part of the agreement are clearly established by the evidence on record. In case, the plaintiff was not willing to execute the sale deed, he would not have filed the suit for specific performance immediately on 10.05.2012. Reference can gainfully be made in this regard to the judgment of this Court in **Ram Kumar @ Ram Kumar Vs. Surinder Kumar Sood**

and another 2012(4) PLR 716. In **Ved Parkash Kharbanda's** case (**Supra**), on which reliance has been placed by the learned counsel for the appellant. It is specifically mentioned therein that a purchaser is expected to immediately file a suit for specific performance. Any delay in this regard may indicate his intention to the extent that he is not ready and willing. The present suit was admittedly filed on 10.05.2012 in a prompt manner without any delay. At this juncture, it is relevant to note that the conduct of the defendant reveals that he was the one seeking to back out of the agreement to sell dated 06.05.2011.

Another argument raised by learned counsel for the appellant is that proper issues were not framed especially in regard to the readiness and willingness of the plaintiff to execute the sale deed thereby causing grave prejudice to the defendant, consequently, relief of specific performance should be denied. There is no merit in this argument as it is a settled position of law that an omission to frame an issue would not vitiate the trial in a suit, where the parties went to trial fully knowing the rival case and evidence was led in support of their respective contentions. Reference can gainfully be made to the judgment of the Hon'ble Supreme Court in **Kannan (dead) by Lrs and others Vs. V.S.Pandurangam (dead) by Lrs and others, 2008(1) R.C.R (Civil) 193**. A perusal of the pleadings in this case as well as the evidence led reveals that the defendant-appellant was very much alive to the controversy in hand. Evidence was led by the parties in this regard. Moreover, issue no.1 succinctly covers the entire controversy.

Learned counsel for the appellant has also argued that relief of specific performance should be denied to the plaintiff as grave hardship shall

be caused to the appellant. Apart from the fact that there is no such pleading, there is nothing on record to justify denial of the relief of specific performance to the plaintiff in the given facts and circumstances of the case.

Learned counsel for the appellant-defendant is unable to point out any question of law much less substantial question of law which may be involved for consideration in this regular second appeal. Both the impugned judgements are well reasoned judgements rendered after proper appreciation and consideration of the evidence on record.

No other argument has been raised.

Keeping in view the facts and circumstances as discussed above, the impugned judgments and decrees dated 18.10.2016 and 02.07.2018 passed by the learned Additional Civil Judge (Sr. Division) Naraingarh and learned Additional District Judge, Ambala, respectively, are upheld.

Present appeal is, consequently, dismissed with no order as to cost.

22.01.2019
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.