

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 6556 of 2016 (O&M)

Date of Decision: 07.02.2020

Ranveer Singh (now deceased) through his L.R.

... Appellant(s)

Versus

Chander Bhan (now deceased) through his L.Rs. and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. Sanjay Vashisth, Advocate
for the appellant.

Mr. Mukesh Rao, Advocate
for the respondents.

Anil Kshetarpal, J.

The defendant/appellant is in regular second appeal against the judgement passed by the learned first Appellate Court reversing the judgement & decree passed by the learned Additional Civil Judge (Senior Division), Hodal.

In the considered view of this Court, the following substantial question of law requires adjudication:

“If the defendant denies the execution of the agreement to sell in a suit for specific performance of agreement to sell, whether the plaintiff is not required to aver and prove that he was always ready and willing to perform his part of the contract”.

In a nutshell, the facts are that the plaintiffs filed a suit for possession by way of specific performance and for grant of permanent injunction as a consequential relief. The plaintiffs claimed that the

defendant/appellant had entered into an agreement to sell dated 22.09.1997 with respect to land measuring 15 kanals 1 marla for total sale consideration of ₹ 7,51,000/-, on receipt of ₹ 2,71,000/- as earnest money. It was agreed that the sale deed would be executed and registered by 22.11.1997. The plaintiffs assert that they were ready and willing to perform their part of the contract and hence, visited the office of Sub Registrar, but the defendant/appellant did not come forward. They got their presence marked by getting an affidavit attested on 24.11.1997 from the Sub Registrar as 22nd and 23rd were holidays.

The defendant contested the suit and pleaded that no agreement to sell was entered into. The plaintiff No. 1 is a money lender and the defendant had obtained a loan of ₹ 1,00,000/- from him. The defendant used to pay interest thereto every year and this practice continued upto the year 2000. The defendant repaid the entire loan amount to the plaintiff with interest. It was pleaded that the defendant had signed some papers in the year 1997 as surety for securing the amount of loan. It was further pleaded that the defendant did not receive an amount of ₹ 2,71,000/- from the plaintiffs as is being asserted in the plaint.

At the outset, it is to be noted that the agreement to sell dated 22.09.1997 is registered. The suit was filed on 15.01.2000.

The learned trial Court, on appreciation of evidence, dismissed the suit after recording finding that the plaintiffs failed to establish that they were ready and willing to perform their part of the contract. The Court held that the suit has been filed after a lapse of more than two years and 11 months from the date agreed to by the parties under a written contract and

there is no explanation for delay in filing the suit. Thus, the Court, in its discretion, ordered that the plaintiffs are not entitled to decree for specific performance while directing refund of earnest money along with interest at the rate of 9% per annum.

The learned first Appellate Court has reversed the judgement and decreed the suit for specific performance of the agreement to sell. The learned first Appellate Court has given the following reasons to reverse the decree:

- i) Time was not the essence of the contract;
- ii) The defendant has not pleaded hardship; and
- iii) Mere delay of more than two years and 11 months is not sufficient to deny the relief of specific performance of agreement to sell.

This Court has heard learned counsel for the parties at length and with their able assistance, has gone through the judgements passed by the learned Courts below and the requisitioned record.

Learned counsel for the appellant has submitted that the plaintiffs have not pleaded as to what steps have been taken by them after 24.11.1997 on the date on which they visited the office of the Sub Registrar. The learned first Appellate Court has erred in reversing the judgement passed by the learned trial Court. On the other hand, learned counsel for the respondents has submitted that the defendant is at fault because he did not apply to the Department of Income-Tax for permission to execute the sale deed in terms of section 230-A of the Income Tax Act, 1961. He further

submitted that since the defendant has denied the execution of agreement to

sell, therefore, the defendant cannot be permitted to defend on the ground that the plaintiffs were not ready and willing.

On consideration of the arguments of learned counsel for the parties, this Court is of the view that in this case, re-appreciation of evidence is required. No doubt, normally the High Court, while deciding the regular second appeal, is not expected to re-appreciate the evidence, however, in an appropriate case, there is no bar.

At the outset, it must be noticed that the defendant has specifically pleaded that some documents have been got signed from him in the year 1997 by plaintiff No.1. Thus, the denial of the defendant is not complete. He has stated that his signatures were taken on various documents when he obtained loan from plaintiff No.1-Chander Bhan. It may be noted here that although the defendant, in the written statement, had taken stand that he took loan from plaintiff No.1, but still plaintiff No.1 has not appeared in evidence resulting in denial of an opportunity to the defendant or his counsel to cross-examine plaintiff No.1.

Plaintiff No.2-Laxmi Chand had appeared in the evidence. On reading of his statement, it becomes clear that the deposition of plaintiff No.2 cannot be relied upon. He contradicts himself. Firstly, he denied that there was any transaction of loan between the defendant and plaintiff No.1-Chander Bhan and the document was executed as a security. However, in the next sentence he states that he does not know that whether defendant No.1 had borrowed a sum of ₹ 1,00,000/- from plaintiff No.1. Subsequently, he has stated that he does not know as to whether any notice was sent to defendant No.1 or not. He states that this must be in the knowledge of the

Advocate. He went on to admit that the Advocate had prepared the suit and we, after accepting the pleading in the plaint to be correct, had signed the same.

On careful reading of the plaint, it becomes clear that the plaintiffs, after visiting the office of the Sub Registrar on 24.11.1997, have only stated that they had asked the defendant to execute and register sale deed in their favour several times, but the defendant kept evading on one pretext or the other. The plaintiffs have not produced any reliable evidence to prove that they ever contacted the defendant and requested him to execute the sale deed.

Now the stage is set for examining that whether it is necessary to aver and prove in a suit for specific performance of agreement to sell that the plaintiff(s) was always ready and willing to perform the essential terms of the contract which are to be performed by him. Section 16(c) of the Specific Relief Act, 1963 (hereinafter referred to as “the Act”), makes it mandatory for the plaintiff(s) to aver and prove that he has performed or has been always ready and willing to perform the essential terms of the contract. Section 16 of the Act is extracted as under:-

“16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) who has obtained substituted performance of contract under section 20; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at

variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction”.

The basic objective behind Section 16(c) read with explanation (ii) is that any person seeking benefit under the Act, must manifest that his conduct was without any blemish throughout so as to entitle him of the relief of specific performance. The Court is to grant or deny relief to the plaintiff on the basis of his conduct. Section 16(c) mandates that the plaintiff must aver and prove his readiness and willingness. It is a condition precedent for the plaintiff to plead and prove for the plaintiff before he is held entitled to the relief of specific performance.

Even in the absence of specific plea by the defendant, it is mandate of the statute that the plaintiff is required to comply with the

requirements of Section 16 (c) of the Act. When there is no compliance with this statutory mandate, the Court cannot grant specific performance of the agreement to sell.

This aspect has been examined by a three Judges Bench of the Hon'ble Supreme Court in the case of ***Ram Awadh (Dead) by LRs. & Others v. Achbalbar Dubey & Another (2000)2 SCC 428***. The Hon'ble Supreme Court was examining the issue in the context of the fact that whether a subsequent purchaser is entitled to defend the suit for specific performance of a previous agreement to sell. It was held that the suit filed by the plaintiffs must fail on the ground that he has failed to aver and prove that he was always ready and willing to perform his part of the contract. In that context, the Hon'ble Supreme Court, in para No.5, observed as under:-

5. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the

decision in Jugraj Singh's case is erroneous”.

It has been consistently laid down by the Supreme Court that in a suit for specific performance of agreement to sell, although there is no straight jacket formula to plead a particular fact, however, on the reading of the entire plaint, the Court must be in a position to conclude that the plaintiff has pleaded that he was always ready and willing to perform his part of the contract.

Learned counsel appearing for the respondents has relied upon a judgment passed in the case of ***Sant Singh v. Amarjit Singh 2015 (2) PLR 497***. On careful reading of the aforesaid judgment, it is clear that in the case of Sant Singh (supra), reliance was placed on the judgment of ***Jora Singh v. Lakhwinder Kumar 2011(1) RCR (Civil) 130***. Learned counsel has also relied upon the judgment passed in the case of ***Gurmail Singh v. Rajinder Kumar and Another 2014(61) RCR (Civil) 341*** to contend that once the defendant denies the execution of agreement to sell, it was not open to the defendant to raise an argument that the plaintiff has failed to prove his readiness and willingness.

This Court has carefully read all the three judgments. With great respect, this Court is of the view that the aforesaid judgments have been delivered without noticing the mandatory requirements of Section 16(c) of the Act. In the judgment of ***Gurmail Singh (supra)***, in para 8, it was observed that once the execution of agreement to sell was denied by the defendant, it is not open to the appellant to contend that the plaintiff was not ready and willing. Such observations cannot be considered to be a declaration of law. Similarly, in the case of ***Sant Singh (supra)***, reliance

was placed on ***Jora Singh*** (*supra*). On careful reading of the judgment passed in the case of ***Jora Singh*** (*supra*), it is not possible to conclude that it was laid down as a declaration of law that once the defendants denied execution of the agreement to sell, the plaintiff is absolved of the responsibility to aver and prove that he was always ready and willing to perform his part of the contract. Attention of the Court, in the aforesaid cases was not drawn to the statutory requirement as provided under Section 16 (c) of the Act. Therefore, such judgments are declared *per incuriam*.

Now let us examine the reasons recorded by the learned first Appellate Court to decree the suit filed by the plaintiffs. First reason that the time was not essence of the contract is result of misreading of the agreement to sell. It has been provided in the agreement to sell that the last date for getting the sale deed registered is 22.11.1997. Therefore, the first Appellate Court committed error. As regards, the second and third reasons given by the first Appellate Court noted above, no further discussion is required.

On re-appreciation of evidence, this Court has come to the conclusion that the plaintiffs are not entitled to relief of specific performance of the agreement to sell and the first Appellate Court erred in reversing the judgment and decree passed by the learned trial Court for following reasons:

- a) Non appearance of the plaintiff No.1 in the evidence has resulted in denial of an opportunity to the defendant or his counsel to cross-examine him, particularly when the defendant No.1 had specifically pleaded in his written statement that he had taken loan of ₹ 1,00,000/- from plaintiff No.1. No justifiable reason has been given as to

why the plaintiff No.1 did not appear in evidence;

- b) From the deposition of plaintiff No.2, it is apparent that he is not a reliable witness, particularly when his statement is contradictory and he does not know much about the case;
- c) The suit property is situated in District Faridabad adjoining to national capital Delhi. The increase in the market price of the land is more rapid in the area when compared to other areas;
- d) There is no justifiable explanation as to why the plaintiffs did not file the suit immediately. Why it took them a period of two years and 11 months to file the suit for specific performance of the agreement to sell. This rather supports the case set up by the defendant that till he was paying the interest of the loan amount, no suit was filed; and
- e) Learned trial Court, in its discretion exercised, had denied the relief of specific performance of agreement to sell. Learned first Appellate Court, without recording a finding that how the discretion exercised by the learned trial Court was erroneous, has chosen to set aside the same.

In view of the aforesaid discussion, it is held that even if the defendant denies the execution of agreement to sell while defending a suit for specific performance of agreement to sell, it is incumbent on the plaintiff

to aver and prove that he was always ready and willing to perform his part of the contract. Merely, because the execution of agreement to sell has been denied by the defendants, the suit for grant of decree for specific performance filed by the plaintiffs cannot be decreed, in the absence of pleadings and proofs that they were/are always ready and willing to perform their part of the contract.

Keeping in view the aforesaid facts, the present appeal is allowed. The judgment passed by the learned first Appellate Court is set aside and that of the learned trial Court is restored. The miscellaneous application(s), if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

February 07, 2020

“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No