

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

**RSA No.6028 of 2014 (O&M)
DATE OF DECISION : 12th FEBRUARY, 2020**

Smt. Indu Bala

.... Appellant

Versus

Smt. Anand Varsha

.... Respondent

CORAM : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

* * * *

Present : Mr. Arun Jain, Senior Advocate with
Mr. Amit Jain, Advocate and
Mr. Abhishek Dhull, Advocate for the appellant.

Mr. P. S. Jammu, Advocate for the respondent.

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RAJBIR SEHRAWAT, J. (Oral)

1. This is the second appeal filed by the defendant in the original suit, challenging the concurrent judgments and decrees passed against him by both the courts below; in suit for specific performance of the agreement qua sale of property.

2. For the convenience, the parties are being referred to herein; as plaintiff and the defendant; as they were described in the original suit.

3. Brief facts, giving rise to the present appeal, are that the plaintiff filed the suit for specific performance qua agreement to sell a double storied house. It was pleaded in the suit that the defendant is the wife of real brother of the plaintiff, Devender Singh. The defendant was the owner in possession of the double storied house; vide registered sale deed dated 19.06.2006. The defendant had taken loan from bank and even her son Gaurav had taken loan from ICICI Bank, Hisar, however,

they were not able to repay the same. Therefore, to arrange money for repayment of the said loan, the defendant entered into an agreement to sell dated 27.12.2007, to sell the above said double storied house to the plaintiff for a sale consideration of ₹32,00,000/- (Rupees thirty two lacs). An amount of ₹4,00,000/- (Rupees four lacs) was received by the defendant as earnest money; before the witnesses. The target date for execution of the sale deed was fixed to be 26.03.2008. On the said date the plaintiff appeared before the Sub-Registrar with the balance amount of the sale consideration and the registration charges; but the defendant did not turn up. Being within the family, when the plaintiff contacted the defendant and asked why she had not appeared to execute the sale deed, then the plaintiff was told that the amount of the loan availed by them from the banks could not be cleared with the earnest money. The defendant and her husband had told the plaintiff that the loan amount of the bank could not be repaid by them. Hence, they told that the sale deed would be executed if the plaintiff repays the loan to the bank and thereafter passes the balance amount of the sale consideration to them. Accordingly, the plaintiff; through her husband Ishwar Singh and her brother Jitender, deposited the said loan amount in the account of the defendant with the ICICI Bank, Hisar. A total amount of ₹15,64,154/- (Rupees fifteen lacs sixty four thousand one hundred and fifty four only) was deposited by the plaintiff in installments for repayment of the loan. However, even thereafter the defendant did not execute the sale deed. Rather, since the son of the defendant had been convicted in a murder case, therefore, taking advantage of that, despite being requested several

times, the defendant did not execute the sale deed in favour of the plaintiff.

4. The defendant contested the suit filed by the plaintiff. The main plea taken by the defendant, on merits, was that the agreement dated 27.12.2007 is a forged and fabricated document. It does not bear signature of the defendant. The defendant never entered into the agreement to sell with the plaintiff. The plaintiff did not deposit the amount of loan on behalf of the defendant. Instead, the defendant had shifted to Gurgaon, therefore, she had asked the husband of the plaintiff to deposit the installment of the housing loan taken by the defendant from the bank. The defendant used to send the amount of installments from Gurgaon to the husband of the plaintiff to deposit the same in the bank; and accordingly the amount was deposited by him and the receipts were obtained. Still further, it was pleaded that the affidavit dated 26.03.2008, which was pleaded by the plaintiff as mark of presence before the Sub-Registrar, was also a forged and fabricated document. The stamp paper of the affidavit was purchased much prior to 26.03.2008. Still further, it was pleaded that house in question was mortgaged with ICICI Bank, therefore, the defendant could not have even entered into the agreement to sell in respect of that house.

5. Considering the respective pleadings, the trial court framed the issues. To prove her claim, the plaintiff herself appeared in witness box as PW-3, examined Shamsheer Singh Malik, Handwriting Expert as PW-1 and Ishwar Singh, the attesting witness, was examined as PW-2. Besides this, the stamp vendor Ramphal was examined as PW-4. The

agreement in question was proved as Exhibit P-1. Affidavit dated 26.03.2008; as a mark of showing presence before the Sub-Registrar, was proved as Exhibit P-2. Thereafter, the receipts of deposit of loan amount were also exhibited by the petitioner. On the other hand, the defendant herself appeared as DW-4 and examined handwriting expert V. B. Bhatnagar as DW-1. Besides this, SI Ram Tirpathi was examined as DW-5 and Basant Lal Mittal was examined as DW-3.

6. After appreciating the respective evidence, led by the parties, the trial court decreed the suit filed by the plaintiff and issued a direction to the defendant to execute and register the sale deed. Feeling aggrieved of the same, the defendant preferred appeal before the lower appellate court. However, the lower appellate court has also dismissed the appeal filed by the defendant. Hence, the present second appeal has been preferred by the defendant, questioning the concurrent findings, judgments and the decrees of the courts below.

7. While arguing the case, learned counsel for the appellant has submitted that the agreement in question was totally forged and fabricated document. The same was never signed by the plaintiff. The said agreement has not been proved by the plaintiff in accordance with law. The scribe of the document has not been examined. Besides this, one of the attesting witnesses has also not been examined. The plaintiff has examined only the interested attesting witness, who is her relative, to prove the agreement in question. Still further, it is submitted that the assertion of the plaintiff that she was present before the Sub-Registrar on 26.03.2008 for getting the sale deed executed, is also not proved. Rather,

the evidence shows that the affidavit dated 26.03.2008, produced by the plaintiff, is forged on the face of it; because the stamp paper, on which it is typed, was purchased much earlier on 25.01.2008. The plaintiff never paid to the Bank the loan amount of the defendant. Rather, being in fiduciary relation with the plaintiff, the defendant was sending the money to the plaintiff to get the same deposited with the bank so as to repay the loan. The plaintiff has taken wrong advantage of the fiduciary relationship. It is further submitted by the counsel for the appellant that the plaintiff was not having any capacity to pay any sale consideration. The plaintiff is only a housewife. Therefore, she had no means to pay the hefty amount of ₹32,00,000/- (Rupees thirty two lacs only). Therefore, neither she was present before the Sub-Registrar with the balance consideration, nor she had the capacity to pay the same. Relying upon the judgment of the Supreme court in ***Dheeraj Developers Private Limited Versus Dr. Om Prakash Gupta and others, 2016(2) RCR (Civil) 461***, the counsel has submitted that the plaintiff has to prove the readiness and willingness all the times to get a decree in her favour. She has to prove the availability of funds with her all the times. Mere assertion that the plaintiff was ready and willing, is not sufficient. Carrying forward this argument, learned counsel for the appellant has also submitted that the very fact that the suit was filed after about 2 years of appearance before the Sub-Registrar, shows that the plaintiff was not having the necessary means to get the sale deed executed. The counsel has relied upon the judgment of Supreme Court rendered in ***Sita Ram & others vs. Radhey Shyam, 2007(4) RCR (Civil), 533***, to support his contention.

8. To support the plea of fraud in the agreement, the counsel for the appellant has submitted that the defendant/appellant had examined the handwriting expert DW-1 V. B. Bhatnagar, who has duly proved that the signatures on the agreement do not tally with the specimen signatures of the defendant. The report of the Handwriting Expert is duly proved on record. Hence, it is proved that the agreement in question was fabricated. So far as the Handwriting Expert Shamsheer Singh, examined by the plaintiff, is concerned, it is submitted by the counsel that his testimony is totally inconsistent and unreliable. Hence, the agreement cannot be taken as proved on the basis of his report. The courts below have wrongly appreciated the evidence on file. Therefore, both the judgments and the decrees; passed by the courts below; are perverse and the same deserve to be set aside. Hence, the present appeal be allowed and the suit filed by the plaintiff be ordered to be dismissed with cost.

9. On the other hand, the counsel for the plaintiff/respondent has submitted that the agreement in question has been duly proved by examining the attesting witness of the same. Still further it is submitted that the agreement has been written on stamp paper, which was purchased by Gaurav, the son of the plaintiff herself. The defendant has not even examined her son Gaurav to dispute the fact that he had purchased the stamp paper for the agreement in question. The receipt of earnest money has duly been proved on record. On the date fixed for execution of the sale deed, the plaintiff was duly present before the Sub-Registrar along with the balance sale consideration. However, the defendant was not present. Accordingly, the affidavit was duly got

attested from the Sub-Registrar in his capacity as the Executive Magistrate. The said affidavit has duly been proved on the record as Exhibit P-2. So far as the date of stamp paper of the affidavit, is concerned, it is submitted by the counsel that the said stamp paper was earlier purchased for registration of date of birth of the daughter's daughter of the plaintiff. However, before the formalities of the registration of the date of birth could be completed, the date of execution of the sale deed had arrived, therefore, the said stamp paper, which was purchased on 25.01.2008 was utilized for the affidavit. There is nothing wrong in such utilization of the stamp papers. The stamp vendor, who has been examined in evidence, has duly deposed that the stamp paper was purchased from him and that the said stamp paper could have been used at any time and for any purpose. It is further submitted by the counsel that although the plaintiff could have filed suit for specific performance immediately, however, the matter being within the family, the plaintiff asked the defendant and her husband as to why they had not come present for execution of the sale deed and then they had impressed upon the plaintiff that they would execute the sale deed if the plaintiff cleared the loan availed by them. Therefore, the plaintiff had cleared the loan first and then again had asked the defendant to execute the sale deed. Only on again refusal the plaintiff had filed the suit. In this process, the above said time was consumed. The fact that the plaintiff had repaid the loan of the defendant has been proved on record by proving the receipts of the deposits made by the husband and relative of the plaintiff. Even during the time, when the plaintiff was making the repayment of the loan of the defendant, the plaintiff kept impressing upon the defendant to

execute the sale deed. In the process, the husband of the defendant again reiterated on 05.04.2009 that the plaintiff should clear the entire loan and then the sale deed shall be executed in her favour by the defendant. A writing was also made in this regard in the presence of the family members of the parties. That writing has also been proved as Exhibit P-21 on record. After this compromise dated 05.04.2009; made by the husband of the defendant, plaintiff again deposited another installment of loan on 08.09.2009. However, despite clearance of the bank loan of the defendant by the plaintiff, the defendant did not come forward to execute the sale deed. Hence the suit had to be filed by the plaintiff.

10. So far as the readiness and willingness of the plaintiff, is concerned, it is submitted by the counsel that the plaintiff was ready and willing throughout; to pay the balance consideration and to get the sale deed executed. The earnest money was duly paid. The balance amount was always available with the plaintiff. However, since the defendant had asked the plaintiff to repay their loan as part of balance sale consideration, therefore, an amount of ₹15,64,154/- was deposited in the bank account of the defendant. The plaintiff has always been ready and willing with the balance sale consideration. So far as the capacity of the plaintiff to arrange the funds, is concerned, it is submitted by the counsel that the daughter of the plaintiff is working and residing in Australia. The husband of the plaintiff has also retired as Principal from a Government School. Therefore, the plaintiff had all means to arrange the balance amount. The capacity of the plaintiff to arrange requisite funds is, otherwise also, established by the fact that the plaintiff had repaid the

entire loan amount of the defendant on their asking and as per the fixed time.

11. The counsel has also submitted that the defendant has taken a plea qua fraud in the agreement. However, defendant could not lead any evidence, whatsoever, to prove any element of fraud in the agreement. Although, the defendant had tried to deny the signatures on the agreement and had examined alleged handwriting expert DW-1 V. B. Bhatnagar, to prove this fact, however, it has been duly established, and even admitted by the said handwriting expert, that he was not having any qualification in the science of handwriting comparison. Therefore, the said handwriting expert was not even qualified to do the work of comparison of handwriting. Still further, the said witness has admitted that he had not carried out any test in any lab qua the comparison. Therefore, the said witness and his report were totally incompetent evidence on the point of the alleged fraud. On the other hand, the plaintiff has duly examined the professionally qualified handwriting expert. He has duly proved that with the permission of the court, the file was inspected and the photographs were taken in the presence of Ahalmad of the Court. Thereafter, by following the due procedure for comparison of the handwriting, he had furnished the report that the signatures of the defendant are very much there on the agreement to sell. Hence, both the courts below have rightly held the agreement to be valid and enforceable. Accordingly, both the courts below have rightly decreed the suit.

12. Having heard learned counsel for the parties and having perused the record, this court does not find any substance in the arguments raised by the learned counsel for the appellant. The undisputed fact is that the parties are in family relations. Since, the plaintiff, as well as, the defendant, both are shown to be house wives only, therefore, it is apparent that the ladies were the front persons and all the transactions/proceedings were being done with the consent of all the members of the family. In the said process, the agreement in question was entered into. The very fact that the son of the defendant himself had purchased the stamp paper, on which the agreement in question has been typed, shows the participation of the defendant and her family members in execution of the agreement. The defendant has not even shown the courage to examine her son to disprove the fact that he had not participated in the process and that he had not purchased the said stamp paper. So far as the evidence of the plaintiff is concerned, the plaintiff has duly examined the attesting witness, who happens to be common relative of both the parties. He has duly deposed qua the validity of the agreement. Despite lengthy cross-examination, the defendant could not extract anything inconsistent in his testimony. Therefore the execution of the agreement has been duly proved.

Another aspect involved in the matter is that although the defendant had claimed the agreement to be forged and fabricated, however, it is not even the plea taken by the defendant that the signatures on the stamp paper, on which the agreement is written, were obtained on blank papers and for a different purpose and the same have subsequently

been misused by the plaintiff for creating the agreement. Rather, the defendant has adopted a plain denial of the signatures on the agreement; and thus pleaded fraud. Neither any specifics of the modalities of the fraud have been pleaded in the written statement by the defendant, nor has any witness been examined by her to prove any element of fraud in the agreement. Only to produce an opinion of expert qua signatures of the defendant on the agreement being forged, the defendant had produced DW-1 V. B. Bhatnagar as Handwriting Expert. However, the said witness himself has admitted that he is not qualified for the profession of handwriting comparison. He has admitted that he has no qualification in the science or art of handwriting comparison. Still further, he has admitted that he had not carried out any lab test etc. for the comparison of the signatures. Therefore, being totally unqualified for the job, he cannot be taken as expert by any means. Hence, his testimony has rightly been discarded by both the courts below. On the other hand, the plaintiff has duly examined Handwriting Expert Shamsheer Singh Malik, who has deposed having taken the photographs in the presence of the court staff after due permission from the court. He has duly proved his report to the effect that the signatures on the document were the signatures of the defendant herself. Therefore, whatever the degree of fraud in the agreement was pleaded by the defendant, the same stand demolished by the positive evidence led on file by the plaintiff.

13. Although the counsel for the appellant has disputed the presence of the plaintiff before the sub-Registrar on 26.03.2008, which was the target date for execution of the sale deed, on the ground that the

stamp paper of the affidavit was purchased on 25.01.2008 and not on the date of execution of the affidavit, however, this court does not find any substance in this argument as well. Firstly, it is not the case of the defendant that she was also present before the Sub-Registrar on the target date. Therefore, by any means she cannot claim the personal knowledge of the fact whether the plaintiff was present before the sub-Registrar on the said date or not. On the other hand, the plaintiff has duly appeared before the court and proved the fact that she was present before the sub-Registrar on the said date. She has also proved the affidavit which she got attested on the said date from the Executive Magistrate. So far as the date of stamp paper of the affidavit, is concerned, this fact has been fully explained by the plaintiff by submitting that the said stamp paper was purchased earlier for the purpose of registration of birth of daughter of her daughter, however, before the formalities of the same could be completed, the target date for execution of the agreement had arrived. Hence, this stamp paper was used for the affidavit. This explanation is quite natural and worth acceptance. Otherwise also, date of stamp paper of the affidavit is totally immaterial in view of the testimony of the stamp vendor, who has deposed that any stamp paper can be used at any time and for any purpose. The defendant has not controverted the factum of registration of birth of daughter's daughter of the plaintiff by leading any evidence to show that no such birth was required to be registered near-about that time. Despite being family member, who was supposed to be aware of the fact whether birth of any child was required to be registered or not, the defendant has chosen not to controvert this aspect. Therefore, this court has to draw adverse inference that the defendant was very

much aware of the fact that the birth of a child was to be registered and for that purpose, the stamp paper could have been purchased by the plaintiff earlier.

14. Learned counsel for the appellant has also submitted that the readiness and willingness of the plaintiff has to be seen on the date of execution of the sale deed and not only at any subsequent time, however, in the present case, the affidavit duly sworn, and the testimony of the plaintiff and the attesting witnesses, duly show that the plaintiff was fully ready and willing even on the date of execution of the sale deed, alongwith the balance consideration. Although in normal routine the plaintiff would have filed the suit immediately or within reasonable time thereafter, but the plaintiff has taken time of about two years in filing the suit. However, this court finds the explanation given by the plaintiff in this regard to be fully justified and proved on file in accordance with law. The plea of the plaintiff, to show the readiness and willingness all the times and also to explain the time taken in filing the suit for specific performance, has been that before filing the suit; being the family members, the plaintiff approached the family members of the defendant to inquire why they had not come present before the Sub-Registrar for executing the sale deed and that the defendant and her husband had impressed upon the plaintiff and her family that they should clear bank loan first; which was outstanding towards the defendant, and only thereafter the sale deed would be executed. To prove this assertion, the plaintiff has placed on record all the Bank receipts of deposit of loan amount on behalf of defendant. Not only this, there is a separate writing

on behalf of the husband of the defendant, which is exhibited by the plaintiff as Exhibit P-21; wherein, again it was promised that the sale deed would be executed after the plaintiff cleared the entire loan. This writing is dated 05.04.2009. Even thereafter the plaintiff deposited the installment on 08.12.2009. Hence, it is fully established that the plaintiff was depositing the amount on the asking of the defendant. The defendant has not shown the courage even to examine her husband as a witness to dispute the writing Exhibit P-21. Therefore, by no means, the defendant can claim that she had not asked the plaintiff to clear the loan and that the loan was not cleared by the plaintiff. Otherwise also, it is not even disputed by the defendant that the loan amount was deposited by the plaintiff. Rather; her assertion has been that the money of this deposit was being sent by her from Gurugaon and then the same was being deposited by the husband of the plaintiff. However, the defendant has not led any evidence of any kind to prove her assertion that she ever sent any amount to the plaintiff; for being deposited towards the loan installment. There is not even any attempt made by the defendant towards proving this fact. Hence, it is established on record that the loan amount was repaid by the plaintiff on behalf of the defendant, as part of the consideration. This also shows that the plaintiff had the means to pay the sale consideration and that she actually had paid an amount of ₹19,64,154/-, including the earnest money and the loan installments deposited on behalf of the defendant, as part of sale consideration.

15. This court finds substance in the argument of the learned counsel for the plaintiff/respondent that the plaintiff was ready and willing to get the sale deed executed and that she had the necessary

means to arrange the funds. This court also finds substance in the argument of the learned counsel for the plaintiff that actual cash in hand is not required to be shown to the defendant to prove the readiness and willingness. It is well settled by now; that to show readiness and willingness, the plaintiff is required only to show that the plaintiff had the means to arrange the necessary funds to get the sale deed executed. The said capacity has duly been proved by the plaintiff by being fully ready with the money and by depositing the loan installments of the defendant as and when so required. Still further, it has specifically been pleaded and not even denied by the defendant; that the daughter of the plaintiff is residing and working in Australia and that the husband of the plaintiff has retired as a Principal from a Government School. Moreover, the defendant has not even disputed the readiness and willingness of the plaintiff in the written statement filed by her; nor has the defendant led any evidence to question the plea of readiness or willingness of the plaintiff, which has otherwise been established by the plaintiff through cogent evidence and is also evident from her conduct throughout. Otherwise also, since the defendant herself has disputed the agreement itself, therefore, she is estopped from questioning the readiness and willingness of the plaintiff, which is otherwise fully supported by the documents on record and the conduct of the plaintiff, which includes the repayment of the loan amount of the defendant, as and when so required. Although learned counsel for the defendant/appellant has relied upon judgment in case of ***Dheeraj Developers Private Limited and other judgment*** (supra), however the said judgments are totally distinguishable on the facts of the cases. The readiness and willingness is a state of mind

of the plaintiff, which the plaintiff can prove by appearing as a witness. In the present case, the plaintiff did appear as a witness. Nothing can be extracted from her cross-examination that she was not ready and willing. Otherwise the affidavit filed by the plaintiff duly shows that she was ready and willing. The conduct of the plaintiff in depositing the loan on behalf of the defendant continuously, also shows her continuous readiness and willingness. Not only this, Exhibit P-21, which has gone unrebutted, also shows that even the defendant and her family was fully aware of the readiness and willingness and of capability of the plaintiff to pay the amount. Only because of the capacity of the plaintiff to pay the amount, the family of the defendant was, repeatedly, asking her to repay the loan amount, which was accordingly paid by the plaintiff. Therefore, by any means, the defendant cannot be now permitted to raise a question mark over the readiness and willingness of the plaintiff.

16. No other argument was raised. No substantial question of law has been pointed out by the counsel for the appellant before this court.

17. Hence, this court does not find any illegality or irregularity in the concurrent findings recorded by the courts below.

18. In view of the above, finding no merit in the present appeal, the same is dismissed.

12th FEBRUARY, 2020
'raj'

(RAJBIR SEHRAWAT)
JUDGE

Whether speaking/reasoned:

Yes

No

Whether Reportable:

Yes

No