S.No.108

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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RSA No.4689 of 2018 (O&M)
Date of Decision:27.01.2020

Paramjit Singh and others .....Appellants

Vs.

Sakattar Singh and others .....Respondents

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Puneet Jindal, Senior Advocate with
Ms. Neha Anand Mahajan, Advocate for
the appellants.

Mr. Prateek Sodhi, Advocate for the respondents.

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Rajbir Sehrawat, J.(Oral)

This is second appeal against the judgment of part-reversal of judgment and decree passed by the Lower Appellate Court, whereby in a suit for specific performance, the decree passed by the trial Court granting relief of double the amount of the earnest money has been reversed and the suit filed by the plaintiffs has been decreed in toto.

For the convenience, the parties herein would be referred to as the plaintiffs and the defendants; as they were referred in the original suit.

Shorn off any unnecessary details, the brief facts giving rise to the appeal are that the plaintiffs had preferred the instant suit claiming therein that the defendants had entered into an agreement to sell the agriculture land measuring 45 kanals 7 marlas situated in Village Nangali Tehsil and District Amritsar, at the rate of Rs.35 lakhs per killa; vide agreement dated 03.04.2004, as per their share mentioned in the agreement. Earnest money of Rs.20 lakh was paid to the defendants and the balance sale consideration was to be paid at the time of execution of the sale deed.

Further, since the defendants had represented that the share of one of their brother, namely, Ravail Singh; had also fallen to their share as per the family settlement, therefore, they would produce their brother Ravail Singh for execution of the sale deed or they would get the land of his share mutated in their favour before the date fixed. Still further, the killa No.82//24 (7 kanal 7 marlas), which is part of land agreed to be sold, was mortgaged by the defendant No.1 with Amritsar Kashtriya Gramin Vikas Bank and that before the date of execution of the sale deed, the said mortgage shall also be re-deemed. Accordingly, the target date for execution of the sale deed was fixed to be 02.07.2005. However, 02.07.2005 happen to be a holiday; and 03.07.2005 being Sunday, the plaintiffs appeared before the Sub-Registrar on 04.07.2005; with the requisite balance sale consideration. However, the defendants did not come present. Since the defendants had not appeared before the Sub-Registrar on 04.07.2005, therefore, on 06.07.2005, notice was sent to them to come present for execution of the sale deed. However, finding no response from the defendants, the suit was preferred by the plaintiffs on 21.05.2007.

The defendants contested the suit filed by the plaintiffs on various grounds. Although the defendants had also taken a plea; that although the agreement talks of the consideration being Rs.35 lakhs per acre, however, the plaintiffs had verbally agreed to pay a higher rate of Rs.60 lakhs per acre, yet the defendants appeared before the Sub-Registrar on 04.07.2005 to execute the sale deed even at the agreed rate of Rs.35 lakh per acre. They had got their presence marked by moving application before the Sub-Registrar. They also got an affidavit attested from the Executive

Magistrate on the said date to show their presence. However, the plaintiffs did not come present on the said date. Neither the plaintiffs were ready to get the sale deed executed due to lack of funds with them, nor did they make any effort of getting the sale deed executed by appearing before the Sub-Registrar. Not even the requisite stamps were purchased by the plaintiffs on the said date. The legal notice of plaintiffs was replied immediately and they were informed that since the plaintiffs had not come to Office of Sub-Registrar on 04.07.2005, therefore, the agreement stood cancelled and the earnest money stood forfeited. Accordingly, it was prayed that since the plaintiffs were not ready and willing to get the sale deed executed, therefore, their suit deserves to be dismissed.

The plaintiffs led their evidence. In the evidence, plaintiff No.1, who was signatory to the agreement appeared himself in the witness box. One Mahabir Singh was produced by them to show the availability of funds with the plaintiffs. Besides this, one Joga Singh appeared as General Power of Attorney holder on behalf of plaintiff Harjinder Singh claiming the GPA dated 19.03.2007. He appeared on behalf of plaintiff No.3 also as General Power of Attorney Holder on the basis of alleged Power of Attorney dated 05.01.1994. Similarly, Joga Singh also appeared on behalf of plaintiffs No.7 and 8 on the basis of an alleged Power of Attorney dated 02.05.2008. Thus, plaintiffs No.3, 7, 8 and 9 were represented by above-said Joga Singh claiming to be General Power of Attorney holder. On the other hand, the defendants Bua Singh himself appeared as DW1. Similarly, Manjit Singh appeared as DW2 and defendant No.1 Paramjit Singh himself appeared in the witness box as DW3. Similarly defendant No.2 also appeared as DW4. They also led in evidence, besides other evidence, the copy of the legal notice dated 08.07.2005; sent by defendants to the plaintiffs as Ex.D6. Application before the Sub-Registrar was led in evidence as Ex.D9 and the affidavit in this regard was led in evidence as Ex.D10. Several other documents were also placed on record to prove the peripheral issues.

Having appreciated the evidence and arguments of the parties, the trial Court came to the conclusion that the agreement in question was not even disputed by the parties. The question revolved around only the readiness and willingness of the parties. However, since the plaintiffs have proved on record Ex.P18 and Ex.P.19, i.e., the application moved by plaintiff No.1 before the Sub-Registrar and the affidavit attested by Executive Magistrate, along with J-Forms of the plaintiffs and the jamabandi of the land owned by the plaintiffs, showing their capacity to have the sale consideration, therefore, the readiness and willingness on part of the plaintiffs stood proved. But the trial Court held that since one of the khasra numbers was under mortgage and the plaintiffs have not even shown their inclination to purchase the said khasra number with mortgage or even by adjusting the mortgage money, therefore, the specific performance could not be granted to the plaintiffs. Accordingly, as per the terms of the agreement, the double of the amount of earnest money was granted as the liquidated damages in favour of the plaintiffs.

Aggrieved against the above-said judgment and decree, appeals were filed by both the sides. The plaintiffs claimed that their suit should be decreed in toto, whereas the defendants claimed that the suit deserves to be dismissed because the readiness and willingness of the plaintiffs; to get the sale deed executed on the date of agreement; has not been proved on record. The Lower Appellate Court accepted the appeals filed by the plaintiffs and dismissed the appeal filed by the defendants and decreed the suit of the plaintiffs in toto, by directing the defendants to execute the sale deed in favour of the plaintiffs. Aggrieved against this judgment and decree passed by the Lower Appellate Court, the present appeal has been preferred by the defendants.

During the course of arguments, at the initial stage, the plaintiff/ respondents in the present appeal, had raised an objection that when there were two appeals before the Lower Appellate Court, then the defendants were required to file two appeals before this Court as well. Unless they pay the ad-valorem Court fees qua the relief of liquidated damages, the defendants cannot be permitted to the challenge the decree to that extent. Faced with this situation, the appellants had moved separate application for affixing the additional Court fees; to cover the claim against the liquidated damages as well in the present appeal. Although; the defendant/ appellants had submitted that since ultimately one consolidated decree has been passed by the Lower Appellate Court, therefore, all reliefs granted to the plaintiffs could be challenged in a single appeal, however, the defendants have now even paid the additional Court fees. Accordingly, the application moved by the defendant/ appellants has been allowed by a separate order of the even date, and this issue no more survives.

Arguing the case on behalf of the defendants, the learned counsel for the appellant/ defendants has submitted that there is nothing on record to show that the plaintiffs were ready and willing to execute the sale deed on the said date. Referring to the application Ex.P18, moved by the plaintiffs before the Sub-Registrar, counsel has pointed out that in the said application, although the plaintiffs have submitted that they were present before the Sub-Registrar on the said date, however, the application moved by the plaintiffs nowhere says that the defendants were not present before the Sub-Registrar on the said date. Moreover, this application has been filed only by one of the plaintiffs. There is nothing even to suggest that the other plaintiffs had even authorised him to get their presence marked before the Sub-Registrar. The same is the situation qua the alleged affidavit Ex.P19, got executed by the plaintiffs and got attested by the plaintiffs from the Executive Magistrate on 04.07.2005. Hence, the plaintiffs themselves have not led any documentary evidence even to remotely suggest that the defendants were not present before the Sub-Registrar on the target date to execute the sale deed. On the other hand, the defendants have positively claimed that they were present before the Sub-Registrar. They had got their presence marked and all the defendants have duly signed the said application, as well as; the affidavit got attested on the said date from the Executive Magistrate. Therefore, there is nothing on record to show that the defendants were not present on the target date to execute the sale deed, rather the evidence shows that they were present before Sub-Registrar to execute the sale deed. The sale deed could not be executed on the said date only for the reason that the plaintiffs were neither present before the Sub-Registrar nor the plaintiffs were having any funds to get the sale deed executed. Although the plaintiff No.1 claims to have given legal notice dated 06.07.2005 to the defendants on behalf of all the plaintiffs, however, this legal notice was promptly replied by the defendants on 08.07.2005 itself, in which it was duly informed to the plaintiffs that the plaintiffs were not present on the target dates, whereas the defendants were duly present, accordingly, the agreement stood cancelled. Despite that, the plaintiffs did not file the suit within a reasonable time. Instead, the suit was filed after about two years on 21.05.2007. This reflects upon the fact that the plaintiffs were not ready and willing to get the sale deed executed. Learned counsel for the defendant/ appellants have relied upon the judgment of the Supreme Court rendered in **AIR 2017 SC 3934 - B. Vijaya Bharathi v. P. Savitri and others.**

Learned counsel for the defendants further argued that there is nothing on record to show the readiness and willingness on the part of the plaintiffs. Except the plaintiff No.1, none of the plaintiffs have even entered the witness box to face the cross-examination. The plaintiffs are represented by the power of attorney holders. However, the said power of attorney holders are neither the signatory to the agreement nor they claim to be present on behalf of the plaintiffs before the Sub-Registrar. Relying upon the judgment of the Supreme Court in **2010 AIR (SCW) 6198 – Man Kaur (dead) by LRs v. Hartar Singh Sangha,** counsel has submitted that the evidence of the power of attorney holder cannot be relied upon qua the readiness and willingness to perform the contract on the part of the plaintiffs. The evidence of such power of attorney holder could not become a substitute for the plaintiffs to give evidence about the intentions of the plaintiffs or their readiness and willingness which were within their personal knowledge. Hence, in this case the statement of the power of attorney holders of the plaintiffs cannot be considered for coming to the conclusion that the plaintiffs were ready and willing for getting the sale deed executed. Still further, it is submitted by the counsel that otherwise also, Joga Singh was not having a valid power of attorney on the target date for execution of the sale deed. The power of attorney of the plaintiffs in his favour are either much prior in time or much later and even those have not been proved in accordance with law. Even if the same are taken to be proved, then also the Power of Attorney of the year 1994 cannot be taken as valid authorisation for the property or transactions which were not even in existence or even contemplated on the date of execution of that Power of Attorney; and actually which occurred after about ten years of the said Power of Attorney. Similarly, the Power of Attorney executed in the year 2007 or 2008 cannot be read as any authority to the holder of the Power of Attorney wayback in the year 2004. Hence, the testimony of Joga Singh cannot be read as any testimony for any purpose. Learned counsel for the defendants have also submitted that since the defendants had intimated to the plaintiffs through a legal notice that the agreement stood cancelled due to default of the plaintiffs, and the said cancellation of the agreement has not even been challenged by the plaintiffs, therefore, the present suit itself was not maintainable. Counsel has relied upon judgment of the Supreme Court rendered in **2013(15) SCC 27 – I.S. Sikandar (D) By LRs v. K. Subramani and others** in this regard. Qua the aspect of actual readiness and willingness of the plaintiffs to get the sale deed executed, it has been submitted by counsel for the appellant/defendants that firstly the plaintiffs had not even asserted before the Sub-Registrar on the target date that the defendants were not present, whereas the defendants had specifically written in their application that the plaintiffs were not present. Hence, the very presence of the plaintiffs before the Sub-Registrar on the target date is doubtful. This fact is also clear from the very fact that the plaintiffs do not even claim to have purchased the requisite stamps for execution of the sale deed on the said date.

Still further, it is submitted that even there is no evidence on file to show the actual readiness and willingness of the plaintiffs to get the sale deed executed. Although the plaintiffs claims to be in possession of amount of Rs.2 crore in cash on the said date, however, the plaintiffs have specifically denied having withdrawn any such amount from the account of anyone of such persons. The entire amount is claimed to be lying at their home which is beyond the acceptable norms for preponderance of probabilities. Although the plaintiffs have tried to claim that they had the capacity to arrange the funds, even the said capacity is not proved on record. Although J-Forms of certain plaintiffs have been placed on record to show the sale of crops by them to the commission agent, however, neither the person who issued the said J-Forms has been examined nor have the said plaintiffs themselves entered into the witness box. Hence, the authenticity of the said J-Forms itself has gone unproved as per the requirements of the law. The plaintiffs claimed that they had borrowed part of the money from their relatives, however, even the said relatives have not been produced as witness to face the cross-examination. Accordingly, it is submitted that neither the actual readiness and willingness on the target date is proved, nor is the capacity of the plaintiffs to arrange the funds on the said date has been proved in accordance with law. Therefore, it is prayed that the appeal be allowed and the judgment and decree passed by the Lower Appellate Court be set aside.

On the other hand, counsel for the plaintiff/ respondents have submitted that the plaintiffs were dully present before the Sub-Registrar on the said date. The legal notice Ex.P20 was duly submitted to the defendants in this regard. In the said notice, it was also clarified that on the target date, the defendants were not present before the Sub-Registrar. Counsel has further submitted that since the defendants have even tried to deny the agreement on the ground of consideration being 60 lakhs per acre, therefore, this shows the fact that the defendants were not interested in executing the sale deed in favour of the plaintiffs. Relying upon the judgment of the Supreme Court rendered in **Civil Appeal No.2420 of 2018 – R. Lakshmikantham v. Devaraji**, counsel for the plaintiff/ respondents has argued that since the defendants were to get the NOC after redemption of the mortgage and they had failed to get the land redeemed, therefore, the defendants could not have cancelled the agreement as claimed by them. The readiness and willingness of the plaintiffs have been duly proved on record, firstly, by the testimony of PW3 Mahabir, who has proved the J-Forms issued by his son; as well as; by another witness Joga Singh who has shown the capacity of the plaintiffs to arrange the funds on the said date. The counsel has further submitted that testimony of Joga Singh can be read in evidence because he was purchasing the property on behalf of family members and this fact has been stated even by DW5 in his examination-inchief. Counsel for the respondent/ plaintiffs has also submitted that to show the readiness and willingness, the plaintiffs are not required to show the exact cash amount in hand to the defendants. It would be sufficient if the plaintiffs show that on the given date, they had the capacity to arrange the funds. Relying upon the judgment of the Supreme Court rendered in **2012 (4) RCR (Civil) 283 - Rattan Lal (since deceased) through his Legal Representatives v. S.N. Bhalla and others,** counsel has also submitted that merely because the suit was filed after about two years of the target date, it cannot be taken as any circumstance against the plaintiffs. The suit has been filed within a period of limitation. Hence, no fault could be found in the case of the plaintiffs merely on the fact that the suit was not filed immediately after the target date fixed for execution of the sale deed. In the end, counsel for the plaintiffs had relied upon the judgment of the Hon'ble Supreme Court rendered in **2019(3) RCR Civil 877 - Randhir Kaur v. Prithvi Pal Singh and others,** to contend that the readiness and willingness is a finding of fact. Both the Courts below have recorded a finding qua the readiness and willingness of the plaintiffs to get the sale deed executed. The said finding of fact cannot be disturbed in the second appeal. Hence, it is submitted that the present appeal be dismissed and the judgment and decree passed by the Lower Appellate Court be upheld.

Having heard the learned counsel for the parties and having perused the record, this Court finds substance in the argument of the learned counsel for the appellants. On the other hand, arguments of the learned counsel for the respondent/ plaintiffs are liable to be noted only to be rejected. Undisputedly, none of the parties is questioning the execution of the agreement as such. The defendants/appellants have not even disputed the fact that after execution of the agreement, they were paid Rs.20 lakhs as the earnest money. However, the entire case depends upon only the readiness and willingness of the plaintiffs to get the sale executed on the date fixed for execution of the same. The undisputed facts are also that the agreement to sell in question is dated 03.04.2004. The target date for execution of the sale deed was fixed for 02.07.2005. However, 02.07.2005 happened to be a Saturday, and therefore, a non-working day for the Office of the Sub-Registrar. Next day, i.e. 03.07.2005 was Sunday. Hence, none of the parties have disputed that the sale deed in question was to be executed on 04.07.2005. Further undisputed fact is that the legal notice Ex.P.20 was sent by the plaintiff No.1 to defendant No.1 on 06.07.2005 saying that the plaintiffs were ready and willing to get the sale deed executed. The said legal notice was promptly replied by the defendants on 08.07.2005 itself, vide Ex.D6 in which it was stated that the defendants were duly present before the Sub-Registrar on the said date and the plaintiffs were not present, therefore, the agreement stood cancelled. The suit is thereafter filed on 21.05.2007, approximately about after two years. Undisputedly, plaintiff No.1 filed suit on his own behalf. One of the vendees Karnail Singh died before filing of the suit. However, plaintiff No.9 claimed a Will of Karnail Singh in his favour but the suit itself is filed through Power of Attorney holder Joga Singh on behalf of the plaintiffs No.3, 7, 8 and 9.

Coming to the evidence led by the parties, this Court finds itself in agreement with the counsel for the appellants/defendants that even the documents Ex.P18 and P.19, i.e. the application moved by plaintiff No.1

before Sub-Registrar and the affidavit got attested by him from the Executive Magistrate/ Sub Registrar on 04.07.2005 itself do not contain assertion that the defendants were not present before the Sub-Registrar. In the said application, filed on behalf of the plaintiff No.1, although it is written that he was present there, however, it is not even alleged that the defendants were not present for execution of the sale deed. Therefore, the assertion of the defendants, that they were present before the Sub-Registrar on 04.07.2005 for execution of the sale deed gets credence. The other factor is that even this application and affidavit are signed only by plaintiff No.1. The other plaintiffs/ vendees are neither signatory to this application nor is their presence before the Sub-Registrar on 04.07.2005 shown by any other document of that date. No such document dated 04.07.2005 has been placed on record by the plaintiffs to show that the plaintiffs were present before the Sub-Registrar on that date for getting the sale deed executed. Although the legal notice sent by the plaintiff No.1 to the defendant No.1 claims that the other plaintiffs were also present on the said date, however, this is a document of subsequent date and is a document self-created by the plaintiffs. Therefore, the said document cannot be read as evidence for the fact that the plaintiffs were present before Sub-Registrar on the stipulated date of execution of the sale deed. This is confronted in the face by the fact; that the defendant/ appellants have placed on record Ex.D8, the application moved by the defendants before the Sub-Registrar and the affidavit Ex.D9, attested by the Executive Magistrate on 04.07.2005 i.e. the date stipulated for execution of the sale deed. Both these documents are duly signed by all the defendants. Hence, since the application presented by the plaintiffs before the Sub-Registrar does not say that the defendants were not present before the Sub-Registrar and on the other hand, the application presented by the defendants before the Sub-Registrar on the same day specifically asserts that they were present before the Sub-Registrar, this Court is inclined to accept the fact that the defendants were present before the Sub-Registrar but the plaintiffs did not have even courage to allege in their application that the defendants were not present before the Sub-Registrar. This omission in the application and the affidavit presented before the Sub-Registrar; though only by plaintiff No.1; shows the inherent falsity of the claim of the plaintiffs only to be present before the Sub-Registrar. Had they pleaded in their application and affidavit that the defendants were not present before the Sub-Registrar, then the Sub-Registrar would have confirmed the fact whether the defendants were present there or not. On this being asked, the defendants would have confirmed to the Sub-Registrar that they were present. Only to avoid such confirmation by the Sub -Registrar, the plaintiffs avoided writing in their application and affidavit that the defendants were not present. Hence, even if the application and the affidavit are taken as evidence of the fact that the plaintiffs were present before the Sub-Registrar, it is no evidence of the fact that the defendants were not present on the said date. This aspect would have a relevance qua the readiness and willingness on the part of the plaintiffs, which is discussed in the following paragraphs of this judgment. Moreover, Ex.P18 and Ex.P.19 are signed only by plaintiff No.1. Therefore, even the presence of the other plaintiffs cannot be presumed on the basis of these documents.

So far as the readiness and willingness is concerned, this Court finds the substance in the argument of the counsel for the appellants that the delay of about two years in filing the suit itself reflects upon the fact that the plaintiffs were not ready and willing to get the sale deed executed. Reliance of the appellant on the judgment of the Supreme Court rendered in **B. Vijaya Bharathi** (supra) is well placed. No doubt, the suit was filed within the limitation, however, this fact of delay in filing of suit is not being considered qua the maintainability of the suit of the plaintiffs on the ground of limitation, rather this fact can very well be taken as a factor reflecting upon the readiness and willingness of the plaintiffs on the stipulated date. Once the defendants had specifically intimated to the plaintiffs qua cancellation of agreement vide legal notice Ex.D6 on 08.07.2005 itself, then had the plaintiffs been always ready and willing to get the sale executed then the suit would have been filed immediately after the receipt of the legal notice terminating the agreement or, at the best, within the reasonable time thereafter. Hence, this factor also shows that the plaintiffs were not always ready and willing to get the sale deed executed. It gives an inference that the plaintiffs were not having any funds at the relevant time, therefore, they could not file the suit immediately.

Otherwise also, the sole reliance of the plaintiffs to show the readiness and willingness on the part of the plaintiffs, other than the plaintiff No.1, is the testimony of Joga Singh, who has filed this suit as power of attorney holder and only he is the one who has appeared in the witness box on behalf of the plaintiffs. This Court finds the case of the plaintiffs covered by the judgment of the Hon'ble Supreme Court rendered in **<u>Man Kaur (Dead) by LRs (supra)</u>**, in this regard. None of the plaintiffs have had the courage to enter into the witness box and to face the cross-examination qua their presence before the Sub-Registrar or qua availability of funds with them. As held by the Hon'ble Supreme Court in the above-said judgment, the readiness and willingness to get the sale deed executed involves the state of mind of a person, qua which the GPA holder is not even in a position to depose. Otherwise also, Joga Singh, the GPA Holder is not signatory on behalf of the vendee- plaintiffs in the agreement. He is not a signatory even as a witness. Therefore, PW Joga Singh cannot be presumed to have any specific personal knowledge qua the affairs of the plaintiffs, much less to speak of the personal knowledge qua the state of mind of the plaintiffs. Otherwise also, one of the Power of Attorney in favour of Joga Singh is ten years prior to the date of agreement in question. The said Power of Attorney, by any means, cannot be read as an authority in his favour to execute even the documents which were totally unknown or unforeseen at the time of execution of alleged Power of Attorney in his favour. There is nothing on record that the instant agreement of the year 2004 was even contemplated wayback in the year 1994, the year in which Joga Singh claims Power of Attorney in his favour. Not only this, the Power of Attorney of the other plaintiffs is also of the date much after the date of the agreement. Hence, this power of attorney can also not be taken as conferring any authority upon the holder of the Power of Attorney to depose the facts in hindsight; as on date when he was not even contemplated as power of attorney holder. So by any means, the testimony of Joga Singh is totally irrelevant and inadmissible in evidence. Therefore, his testimony cannot be taken as any evidence of the fact of the readiness and willingness of the persons whom he claims to be representing in the suit.

Although the plaintiffs have examined PW Mahabir Singh to prove J-Forms of the son of the plaintiffs; to show their capacities to arrange the funds, however, even the said J-forms have not been proved in accordance with law. Neither the person to whom the J-Forms were issued has been examined as witness nor the person who issued these forms has been examined. Therefore, the authenticity of the Forms has totally remained unproved. Although the plaintiffs have examined the father of the person who issued the J-Forms, however, he can also prove, at the best, the signatures of his son, which he says he recognise, however, so far as the contents of the J-Form are concerned, these can; by no means; be proved by him. Hence, even the capability of the plaintiffs to pay the hefty amount of Rs.2 crore have gone totally unsubstantiated. The other witness who has tried to prove the capacity of the plaintiffs to arrange the funds is the above-said Joga Singh, whose testimony is not relevant, as mentioned above.

So far as the actual availability of the balance amount of consideration with the plaintiffs on the said date is concerned, this fact is not even remotely proved by any documentary evidence on record. The evidence claimed by the plaintiffs in this regard is totally non-sustainable. Although the plaintiffs have claimed that they were having cash amount of Rs.2 crores on the said date, however, they have not disputed the fact that they had not withdrawn any amount from any bank account on or about the said date. The assertion of the witnesses is either to say that they were having this amount at their home or that they had borrowed part of it from their relatives. However, neither any evidence qua availability of such hefty amount at home has been proved nor have the said relatives been examined to prove the fact that they had paid the money to the plaintiffs. Therefore, this Court finds substance in the argument of the counsel for the appellant/defendant that it is not within the preponderance of probabilities that such a huge amount would be available or be kept at home by the plaintiffs, particularly when they have not even appeared to face the cross-examination on that aspect.

Although learned counsel for the respondents have submitted that the defendants tried to dispute the agreement itself by claiming the rate of sale to be Rs.60 lakhs per acre, this Court finds that this was only taken as an additional plea of extra and oral agreement by the defendants; over and above the written agreement. The defendants had throughout stated that they were ready to execute the sale deed even at the rate which was mentioned in the written agreement. For that, they had gone to the Sub-Registrar as well. Therefore, nothing much can be read into the fact that the defendants had tried to plead an extra fact, which was not even permitted by the trial Court to be raised.

Still further, although learned counsel for the respondent/ plaintiffs has submitted that the availability of liquidated amount of balance consideration is not to be proved before the Court to claim readiness and willingness, however, this Court finds that this argument also cannot be sustained. The judgment relied upon by the learned counsel for the respondents in this regard is distinguishable on the facts of this case. Once the defendants themselves have claimed the readiness to execute the sale deed as per the agreed term; without disputing the agreement as such, then mere proving of capacity of the plaintiffs to arrange the funds cannot be taken as sufficient to prove the readiness and willingness of the plaintiffs to get the sale deed executed. In case the defendant/vendor claims that he was ready and present before the Sub-Registrar on the stipulated date to execute the sale deed; then the level of proof of readiness and willingness of the plaintiffs/ vendee also gets raised. In that situation, the plaintiffs have to show that on the stipulated date, they were actually having the balance amount of the sale consideration. Their capacity to arrange the fund is totally irrelevant in that situation. A person may have the assets to show his capacity but still he may not be in a position to arrange that exact amount on that particular day when the defendant is present before Sub-Registrar to execute the sale deed. As mentioned above, there is nothing on record to prove the actual availability of Rs.2 crore with the plaintiffs on the stipulated date. Even the capacity of the plaintiffs to arrange this much amount has gone unsubstantiated. Neither the plaintiffs have come forward to prove their capacities nor the J-Forms, statedly produced by some other person, have been proved in accordance with law.

Although while relying upon the judgment of the Supreme Court in case of **Randhir Kaur (supra),** learned counsel for the respondent- plaintiffs has submitted that the concurrent findings of fact cannot be disturbed in the second appeal, however, this Court finds the argument to be non-sustainable. The judgment relied upon by the learned counsel for the respondents is totally distinguishable on the facts of the present case. Even as per the reading of the above said judgment of the

Supreme Court, the substantial question of law is not required to be framed in Regular Second Appeals before Punjab and Haryana High Court. The appeal is maintainable on error of law or error of procedure as well. If finding of a fact is recorded by wrongly applying the law or by not following the proper procedure, in such a situation, even the finding of a fact becomes a mix question of law and fact. In that situation, if violation of law is established even in second appeal, the concurrent finding recorded by the Courts below cannot claim any extra sanctity or immunity from being challenged. Even the concurrent findings recorded by the Courts below can very well be set aside if the same are shown to be in violation of law or to be perverse in the face of the evidence available on the file. In the present case, the appellant has rightly submitted that the plaintiffs have neither themselves filed the suit nor have they appeared in the witness box to face the cross-examination qua the facts which forms the basis of the concurrent findings recorded by the Courts below. The findings recorded by the Courts below are based on the testimony of a witness, who appeared only as a Power of Attorney Holder of the plaintiffs and whose testimony could not have been read in evidence in view of the judgment of the Supreme Court rendered in case of **Man Kaur (dead) by LRs (supra)**. Besides this, had the findings been recorded on reading of some documents only; then the matter may have still been different. However, documents produced by the respective parties themselves are dependant upon oral testimony of the witnesses, which have not even proved these documents, like the J-Form. Hence, in view of this Court, there is no bar against interfering with the concurrent findings recorded by the Court below; qua the readiness and willingness of the plaintiffs to get the sale deed executed.

No other arguments were raised.

In view of the above, finding merit in the present appeal, the same is allowed with costs. The suit filed by the plaintiffs is ordered to be dismissed with costs. Let the decree be drawn accordingly.

January 27, 2020 **(RAJBIR SEHRAWAT)**
renu **JUDGE**

Whether Speaking/reasoned Yes/No
Whether Reportable Yes/No