

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

107

RSA-1318-2018

Date of Decision:08.08.2023

KRISHNA DEVI

....Appellant

Versus

VIRENDER KUMAR ND ORS

...Respondents

CORAM:HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. P.K. Ganga, Advocate for the appellant.

SANJAY VASHISTH, J.(Oral)

1. Present regular second appeal has been filed by the plaintiff/appellant against the concurrent findings of dismissal of suit for recovery of amount of Rs.6,35,000/- (Principal amount of Rs.5,00,000/- and interest of Rs.1,35,000/-).

2. Defendant-Virender Kumar being seller entered into an agreement to sell with plaintiff-Krishna Devi for selling out a plot measuring 4 marlas in Rectangle No.29, Killa No.14(8-0) situated at Village Khajakhera, Tehsil and District Sirsa. The said agreement was reduced into writing on 27.02.2006. At the time of the agreement, earnest money to the tune of Rs.5,00,000/- (Five lacs) was paid by the plaintiff to the defendant by fixing the total sale consideration on the price of the plot as Rs.21,00,000/- (Twenty one lacs). Target date for execution of the sale deed was fixed as 15.05.2006.

3. Plaintiff instituted the Civil Suit No.200-C on 14.05.2009 for recovery of the earnest money alongwith interest over it, thus, the suit

is filed after a gap of three years, which is the limitation period for filing the suit for specific performance of the Act.

4. In the written statement filed by the defendant-Virender Kumar, it was pleaded that, he is always ready to execute the sale deed as per the agreement to sell dated 27.02.2006, rather, defendant-Virender Kumar expressed his willingness to execute the sale deed within next 15 days, if so desired by the plaintiff.

No replication was filed by the plaintiff. Accordingly, upon the pleadings of the parties, learned Trial Court framed following six issues, which are reproduced as under:

- 1. Whether the plaintiff is entitled for recovery of 6,35,000/- (5,00,000/- as principal and 1,35,000/- as interest) @ 75 paise per month, as prayed for? OPP*
- 2. Whether the suit of the plaintiff is not maintainable in the present form? OPD*
- 3. Whether the plaintiff has no cause of action to file the present suit? OPD*
- 4. Whether the plaintiff ha concealed the true and material facts from the court? OPD*
- 5. Whether the plaintiff is estopped by her own act and conduct to file the present suit? OPD*
- 6. Thereafter, the parties were allowed to lead their respective evidence.'*

5. While deciding issue No.1, trial Court has taken note of the fact that the readiness and willingness on the part of the seller to execute the sale deed is very much clear from the stand taken in the written statement, which is not even rebutted by the plaintiff by way of filing the replication. Trial Court has also noticed that this version of the contesting defendant remained unchallenged as no cross-examination was conducted on these facts and thus, the pleaded facts

in the written statement were considered to be the admitted facts by the plaintiff. For the sake of convenience, paragraph Nos. 14 and 15 of the judgment of trial Court is reproduced hereunder:

'14. The only question to be decided in this case is as to whether the plaintiff has been ready and willing to perform her part of contract. After giving my thoughtful consideration to the rival contentions of the learned counsel for the parties, I am of the considered opinion that the answer to this question should be in negative. It is basic and settled law that in case of agreement to sell, the plaintiff has to prove his readiness and willingness to perform his part of contract in order to get the relief under the agreement to sell. In order to discharge this burden, the plaintiff firstly examined PW1 Shri Amar Nath Clerk to Shri Y.P.Nanda, Advocate to show that legal notice dated 26.05.2006 Ex.P1 was sent to defendant No.1 through registered letter and proved the postal receipt Ex.P2 and acknowledgement Ex.P3. No doubt, the evidence shows that a legal notice Ex.P1 was served upon defendant No.1 and this fact has also been admitted by the contesting defendant in his pleadings, but at the same time, the defendant has categorically taken the stand that after receiving the said legal notice, he approached the plaintiff and other buyers to get the sale deed executed, but they did not bother about it. He Bas also categorically stated in his affidavit Ex.DW2/A that after 15.05.2006 he requested several times to the buyers to get the sale deed executed, but they showed their inability to perform their part of contract. However, this version of the contesting defendant remained unchallenged as no cross-examination was conducted on these facts and these facts shall be deemed to be admitted by the plaintiff.

15. The other material witness examined by the plaintiff is PW2 Rakesh Kumar, who tendered his affidavit Ex.PW2/A, in which he has recounted the entire assertions as made in the plaint. Again his evidence also cannot be accepted in toto particularly as far as question of readiness and willingness to perform his part of contract is concerned. Admittedly, he is the general power of attorney of the plaintiff. It is well settled law that the power of attorney cannot appear as a witness on, behalf of the plaintiff. He can only

appear as a witness for the plaintiff and his evidence is only relevant and admissible to the extent of the facts which are in his personal knowledge. The contesting defendant in his affidavit Ex.DW1/A has categorically, stated that he has been approaching the buyers to get the sale deed executed on payment of balance consideration. Although PW2 Rakesh Kumar has denied this averment, but the plaintiff has not admittedly appeared in the witness box. It was she who could have rebut this piece of evidence of the defendant because the offers were made to the buyer and not to her power attorney Rakesh Kumar and thus Rakesh Kumar being power of attorney cannot rebut the evidence of the defendant as far as it relates to the factum that he has been approaching the plaintiff/buyers to get the sale deed executed after receiving the balance sale consideration. Had it been the case of defendant No.1 that he had been approaching the power of attorney PW2 Rakesh Kumar in this regard, then matter may have been different. Not only this, the defendant in his pleadings and evidence has categorically stated that he was still ready to get the sale deed executed within fifteen days when he filed the written statement on 20.07.2009.'

6. Even, in the suit, plaintiff has also failed to appear in the witness box to prove his pleadings. Only one witness i.e. PW2-Rakesh Kumar has appeared and tendered his affidavit Ex.PW2/A. Thereafter, trial Court reached to the conclusion that from the evidence of the Power of Attorney holder; question of readiness and willingness to perform his part of contract cannot be decided. It is settled proposition of law that power of attorney cannot appear as a witness on behalf of the plaintiff, but he can only appear as a witness for the plaintiff, whose evidence would be relevant only to the extent of facts, which are in his personal knowledge. Thus, Court found that the evidence of power of attorney holder-Rakesh Kumar (PW2) is not of much help to prove the pleadings raised in the plaint.

7. It is worth noticing that in the present case, facts regarding execution of sale agreement, fixing of target date, amount of earnest money and the total sale consideration amount or factum of reaching to the office of Sub Registrar etc. for registration of sale deed are admitted facts. Primarily, Courts have held that in such circumstances, institution of the suit, only for recovery of the earnest money alongwith interest is not maintainable. While saying so, it would be pertinent to notice paragraph No.16 of the judgment of Appellate Court, which reads as under:

'16. The plaintiff filed a recovery suit for recovery of Rs.6,35,000/-. The plaintiff claimed Rs.5 lac as earnest money and Rs.1,35,000/- as interest. It is settled preposition of law that a party can recover an amount if the person is legally entitled to recover the same. Limitation is also one fact for consideration in recovery proceedings. In the present case the plaintiff based her claim on agreement to sell dated 27.2.2006 Ex.P1. Primarily this shows that the parties are bound by the agreement Ex.Pl. Perusal of Ex.PI reflected that it gives right to plaintiff for specific performance/ execution of sale deed in favour of plaintiff and in alternate refund of earnest money. In order to prove her case for specific performance, the plaintiff has to prove her readiness and willingness, which are two distant facts. The plaintiff placed on record an affidavit dated 15.5.2006 that shows that her willingness to perform her part of agreement Ex. Pl. But willingness is something different. It reflect the capacity of the person in pecuniary terms. There is nothing on file to prove that the plaintiff was having Rs. 16 lac(balance amount) on 15.5.2006. In this way the plaintiff was not entitled for specific performance of agreement Ex.P1. If the plaintiff is not entitled for the main relevant the alternate relief shall not be granted. Thus this court find no illegality in the judgment of learned trial court.'

8. Considering all the facts and circumstances, this Court is of the considered opinion that both the Courts below had examined the

evidence and facts in detail, therefore, **impugned judgment and decree are worth to be maintained.** Thus, finding no illegality, irregularity, perversity or involvement of any law point, appeal stands dismissed.

[SANJAY VASHISTH]
JUDGE

August 08, 2023
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Whether speaking/reasoned	Yes/no
Whether reportable?	Yes/no