218 (1st case)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-5482-2014 (O&M)
Date of decision: May 24, 2023

Pargat Singh

….Appellant

versus

M/s Kakkar Bricks

….Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Munish Gupta, Advocate for the appellant.

Mr. B.R. Mahajan, Senior Advocate with
Mr. Daanish Mahajan, Advocate for respondent.

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ARUN MONGA, J. (ORAL)

CM-9407-C-2015

For the reasons stated in application, same is allowed subject to all just exceptions. Copy of order dated 18.07.2014 (Annexure R-1) is taken on record.

CM-14691-C-2014

This is an application for amendment of grounds of appeal.

No grounds for amendment are made out, at this stage.

Dismissed.

Main case (O&M)

For convenience, parties herein are addressed as per the recitals before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts below, appellant/defendant is in second appeal before this Court assailing learned trial Court judgment and decree dated 10.01.2012, as upheld by learned First Appellate Court vide its judgment and decree dated 18.07.2014 decreeing the

plaintiff/respondent's suit for possession by way of specific performance of the agreement to sell dated 27.10.2004 relating to land measuring 11 Kanals 19 Marlas i.e., 1/6th of land measuring 71 Kanals 13 Marlas bearing Killa numbers 50/3/2 (2-9), 8/1 (4-8), 63/8/2/2 (5-9), 9 (8-0), 13 (7-11), 11/1 (5-0), 11/2 (3-0), 3 (8-0), 10 (8-0), 8/1 (1-0), 50/7/2/2 (4-12), 63/8/2/2/1 (2-0), 50/6/2 (4-16), 6/3 (3-), 7/1 (1-4), 7/2/2 (1-8), 8/2 (1-12), 6/1 (0-4) bearing Khasra No.54/201 to 210 situated in the area of village Maure Kalan, Tehsil Ajnala, District Amritsar along with consequential relief of permanent injunction.

3. Briefly stated, facts, as noticed by learned Courts, are as below:

> "*2. Briefly stated, the facts of the case are that defendant agreed to sell the suit land measuring 11 kanals 9 marlas i.e. 1/6th of landmeasuring71 kanal 13 marlas in favour plaintiff for a value consideration of Rs.5,18,000/- per acre vide agreement to sell dated27.10.2004. At the time of entering into an agreement to sell dated 27.10.2004 with the plaintiff the defendant received a sum of Rs.2,00,000/- as earnest money from the plaintiff which was paid by the plaintiff and which was duly received by the defendant and after admitting the contents of agreement to sell dated 27.10.2004 to be true and correct defendant signed, put thumb impressions on the same in the presence of his attesting witnesses and the said agreement to sell was also duly signed by the plaintiff firm through Sh. Ramesh Chander Kakkar its Proprietor after admitting contents of the same to be true and correct. The defendant also agreed to redeem the land in question from the bank after paying the due amount to the bank before 29.11.2004 and further agreed to execute the sale deed in favour of the plaintiff on29.11.2004. Thereafter, the plaintiff through its proprietor Sh. Ramesh Chander Kakkar many a times approached the defendant before stipulated date for the redemption of the said land from the bank after paying the due amount and further requested to execute the sale deed in favour of the plaintiff on the due stipulated date but the defendant lingered on the matter on one pretext or the other. The plaintiff was always and is still ready and willing to perform his contractual part relating to the said agreement to sell dated 27.10.2004. On29.11.2004, the plaintiff approached the office of Sub Tehsil Complex, Lopoke for the purpose of registration of sale deed and remained present in the office of Sub Tehsil Complex, Lopoke till 5.00 p.m. but the defendant did not turn to perform his part and then the plaintiff moved an application before the Sub Registrar, Lopoke for marking his presence and his presence was duly marked. The plaintiff has also served a legal notice dated 17.01.2005 upon the defendant giving him time to execute the sale deed in his favour on 24.01.2005 and on 24.01.2005 the plaintiff remained in the office of Sub-Registrar, Lopoke for registration of sale deed in his favour but the defendant did not turn up. Again the plaintiff approached the*

defendant for registration of sale deed in his favour but instead of acceding to the legal and genuine requests of the plaintiff, the defendant rather threatened the plaintiff to alienate, sell, mortgage the property in favour of some other change the person and further threatened to nature of same which the defendant cannot do sounder law. Hence, the present suit."

4. Upon notice, defendant filed written statement with preliminary objections that plaintiff was a firm and suit of the plaintiff could not have been filed without Registration Certificate and suit of the plaintiff was hit by Section 69 of the Indian Partnership Act; that suit was also hit by Section 55 of the Indian Contract Act; that the suit was not maintainable and was highly misconceived and plaintiff had suppressed material facts from the court; that plaintiff was estopped to file the suit and was also hit by Section16 of the Specific Relief Act; that suit of the plaintiff was hopelessly time barred and that suit had not been properly valued for the purposes of court fee and jurisdiction.

4.1. On merits, it was admitted that plaintiff was a firm and further denied that plaintiff was entitled to file suit without Registration Certificate. It was averred that mortgage without possession was not hindrance in getting sale deed executed on dated 29.10.2004 in any manner and plaintiff himself had not got the sale deed executed on and before stipulated date i.e., 29.10.2004 and relinquished agreement to sell with his own sweet will while defendant was ready and willing to execute the sale deed on the stipulated date and got his presence marked before the Sub-Registration. Remaining assertions were denied in general and prayed for dismissal of the suit.

4.2. Plaintiff filed replication reiterating the stand taken in the plaint and controverting the grounds taken by defendant in written statement.

5. Based on the rival pleadings, following issues were framed:

"*1. Whether the plaintiff is entitled to possession by way of specific performance agreement to sell dated27.10.2004? OPP.*
2. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP.

> 3. *Whether the suit is hit by section 69 of the Indian Partnership Act? OPP.*
> 4. *Whether the suit is hit by section 56 ofthe Indian Contract Act? OPD.*
> 5. *Whether the suit is not maintainable in the present form? OPD.*
> 6. *Whether the plaintiff is estopped by his own act and conduct from filing the present suit as it is hit by Section 16 of the Specific Relief Act? OPD.*
> 8. *Whether the suit is hopelessly time barred? OPD.*
> 9. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD.*
> 10. *Relief.*"

6. The parties to the suit adduced their oral as well as documentary evidence in support of their pleadings and to discharge their respective onus as per the issues, *ibid*.

7. On appraisal of evidence vis-à-vis pleadings, learned trial Court decided issues No.1 to 6, 8 and 9 in favour of plaintiff. Consequently, suit of the plaintiff was decreed to the effect that he was entitled to possession by way of specific performance of the agreement to sell dated 27.10.2004 relating to land in question along with consequential relief of permanent injunction.

8. Feeling aggrieved against the said judgment and decree dated 10.01.2012, appellant/defendant preferred first appeal.

9. Learned First Appellate Court below dismissed the appeal, resulting in Regular Second Appeal before this Court.

10. I have heard learned counsel for the parties and perused the case file.

11. In its judgment, learned First Appellate Court, *inter alia*, observed, as under:

> "*12. Execution of agreement dated 27.10.2004 Ex.P1 and receipt of Rs.2,00,000/- as earnest money from the plaintiff is not denied by defendant in the written statement. As noted he has mainly contested the claim of the plaintiff on the ground that plaintiff has not been ready and willing to perform his part of the agreement. It is further denied that in reply Ex.P4 sent by defendant to the notice of plaintiff, execution of agreement dated 27.10.2004 and receipt of Rs.2,00,000/- as earnest money was denied. Issuance of this reply was admitted by defendant Pargat Singh in his cross-examination. So it is found that defendant has changed stand and as such cannot be*

trusted. In judgment "Dr. Pankaj Kumar Vs. K.L. Katyal 2013(4) Civil Court Cases 622" Hon'ble Delhi High Court laid down as under:-

> *(I) Evidence Act,1872,S.3-Defendant changing his stand-Defendant cannot be trusted.*

So when defendant denied execution of the agreement in reply Ex.P4, his claim of being ready and willing to perform his part of agreement cannot be accepted. He also cannot be heard to say that plaintiff was not ready and willing to perform his part of agreement. It is further worth considering that affidavit Ex.D1 was though got proved by the defendant from DW.2 Rattan Singh but he himself did not produce same in his cross-examination. He categorically stated that he has not produced any document which may show that he got his presence marked from Sub Registrar on 29.11.2004. However, there is reference of his getting his presence marked from Sub Registrar on affidavit dated 29.11.2004. DW.2 Rattan Singh was a witness of affidavit dated 29.11.2004 Ex.D1 and has proved same. At the same time, plaintiff also proved application dated 29.11.2004 Ex.P2 regarding his presence before the concerned Sub Registrar/Naib Tehsildar, Lopoke. So it is made out that both plaintiff and defendant got their presence marked from the concerned revenue authority on 29.11.2004. Though plaintiff is found to have thereafter served notice Ex.P3 upon the defendant asking him to execute sale deed but defendant seems to have taken no step and rather through reply Ex.P4 denied execution of the agreement itself. This fact alone is sufficient to discard the entire claim of the defendant as put up in the written statement that he was ready and willing to perform his part of agreement and that plaintiff committed default therein. This argument that suit was filed just before the expiry of three years of the stipulated date also does not help the defendant. Suit was filed within time. On the stipulated date plaintiff got his presence marked before the revenue authority and thereafter issued notice to the defendant. On the other hand defendant remained mum after stipulated date. In "Bhupinder Nath Vs. Satish Chand 2009(1) Law Herald (P&H) 128" it was laid down as under:-

> *"(A) Specific Performance-Agreement to sell Limitation - Suit for specific performance for agreement to sell property - Mere plea that it was filed on last day does not defeat right of respondent to seek specific performance"*

13. This argument that time was essence of the agreement is also without merit. Law is well settled that with regard to immovable property time is never essence of contract. In fact, there is no presumption of time being essence of the contract. It was so held by Hon'ble Supreme Court in case "K.S. Vidyanadam and others Vs. Vairavan 1997(3) SCC.1". Agreement Ex.P1 is silent regarding fact that time was made the essence. This argument that there was commercial transaction between the parties is also without merit. It was an agreement for purchase of agricultural land situated in village Maure Kalan, Tehsil Ajnala District Amritsar. So, judgment relied upon by learned counsel for the appellant is not applicable to the facts *of this case. In judgment "Vimaleshwar Nagappa Shet Vs. Noor Ahmed Sheriff 2011(3) Civil Court Cases 673(S.C.)" Hon'ble Supreme Court held that value of property escalates very fast in urban area so it would be inequitable to grant specific performance after lapse of long period of time. This is not the case here, as suit land is situated in village and is not in urban area. No evidence regarding escalation of value of suit land has been led. Even no hardship to be faced by the defendant in case specific performance of the agreement is allowed, has been alleged or proved.*

14. So, it is held that plaintiff was ready and willing to perform his part of agreement and is entitled to relief of specific performance of agreement. So far as question of maintainability of suit due to non-registration of plaintiff firm is concerned, arguments of learned counsel for defendant in this respect are without merit. Plaintiff has categorically claimed that M/s Kakkar Bricks is proprietorship concern of Ramesh Chander Kakkar. Defendant never even claimed that it is partnership concern and not proprietorship concern. Only partnership concern is required to be registered under section 69 of the Partnership Act. So plaintiff being proprietorship concern, it was not required to be registered and its non registration does not affect the maintainability of the suit. Proposition of law laid down in judgment "Loonkaran Sethia etc. Vs. Mr.Ivan E.John and others AIR 1977 336", relied upon by learned counsel for defendant, is thus not applicable to the case in hand.

15. As a result of foregoing discussion, it is held that plaintiff has succeeded in proving his case. Findings of learned trial court on the issues are hereby affirmed. Impugned judgment of learned trial court is legal and valid and is hereby affirmed. Present appeal being without merit is dismissed with costs. Decree sheet be drawn. Lower court file be returned. Appeal file be consigned to the record room."

12. My attention has been drawn to the agreement to sell dated 27.10.2004 (Annexure A-1). For ready reference, the relevant of said agreement reads as under:-

"*xx xx xx. The registry will be got executed in favour of the buyer, after getting the property redeemed, on 29 November 2004 and the remaining amount will be received. In the event of not getting the registry executed, in additional to a sum of Rs.2,00,000/- received today, I will be liable to pay additional sum of Rs. 2 lacs as compensation i.e. total Rs.4,00,000/- and I will be bound by the writing. In the event of buyer not getting the registry executed, then the earnest money will be forfeited. The instant agreement to sell has been executed. Dated : 27.10.2004.*"

12.1. A perusal of the aforesaid read with rest of the agreement reflects that transactions between the parties were to be carried out in the following sequence:

(i) Payment of earnest money on execution of the agreement in question;

(ii) Upon payment of earnest money, the seller was to get the mortgage redeemed from the Bank by paying the outstanding loan;
(iii) The receipt of balance of the consideration by the seller was incumbent on his having got the redemption of the mortgage from the Bank;
(iv) In case of failure of the buyer to perform his part of agreement by not arranging for the balance consideration by the target date, the earnest money paid to the seller was to be forfeited by him;
(v) Likewise, in case of failure of the seller to perform his part of agreement despite readiness and willingness of the buyer, he was to return double of the earnest money as per the agreement and will remain bound by terms of the agreement.

13. Having heard arguments, I am of the view that to the extent that learned Courts below have returned findings that plaintiff was ready and willing to perform his part of agreement and failure, if any, was that of the defendant-vender, I do not need to interfere in the same as the same are based on cogent and valid reasons and proper construction of the evidence adduced by the rival parties.

14. However, ambiguity arises out of mis-interpretation of the agreement to sell in question *qua* which both the learned Courts below fell in manifest error while doing so. Sequences of performances to be carried out by the respective parties have already been enumerated hereinabove. From the perusal thereof, it is clear that balance consideration was to be paid upon satisfaction of the outstanding loan from the Banker with whom the agricultural land in question was mortgaged and it is only thereafter, the sale-deed was to be executed. Both the parties claim that before the target date of execution to the sale-deed, they were ready to perform their part of the agreement. However, the same pales into insignificance as the Bank undoubtedly had a prior charge already on the land in question and in any case, once the redemption of the mortgage was not done, further part of the agreement could not have been performed till redemption of the mortgage deed executed between the vendor and the Banker and to that extent agreement to sell became *per se* unenforceable despite readiness and willingness of both the parties. It is also disputed before me that affirmative pleading of the plaintiff before the

Courts below was that defendant did not redeem the mortgage before the target date.

15. In the premise, I am of the view that only relief necessarily that could have been granted to the plaintiff was refund of earnest money in terms of agreement to sell. As regards, earnest money, I am of the view that purpose of refund of the same is to compensate non-erring party by the erring party depending upon loss suffered for the non-performance of agreement. In this respect, reference may be had to **M/s. Kailash Nath Associates Versus Delhi Development Authority and another**[1] wherein, it has been observed as under:

> "*43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-*
>
> *1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.*
>
> *2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*
>
> *3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.*
>
> *4. The Section applies whether a person is a plaintiff or a defendant in a suit.*
>
> *5. The sum spoken of may already be paid or be payable in future.*
>
> *6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means*

[1] (2015) 4 SCC 136

that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

16. Applying the aforesaid ratio, I am of the view that loss suffered by plaintiff can be compensated by granting refund of earnest money which has been till date retained by the defendant despite non-performance of agreement. Accordingly, money decree for an amount of Rs.2,00,000/- along with interest at the rate of 6% to be calculated w.e.f. 27.10.2004 the date of filing of agreement till actual payment is granted in favour of the plaintiff-respondent. Impugned decrees passed by the Courts below are modified to that extent.

17. Second appeal stands disposed of accordingly.

18. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

May 24, 2023
mahavir

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No