

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

**RSA NO. 5660 OF 2018
DATE OF DECISION: 02.02.2023**

Krishan Kumar and another **...Appellants**

Versus

Nirmala Devi and others **...Respondents**

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Lajpat Sharma, Advocate,
For appellants.

ARUN MONGA, J. (ORAL)

CM-15598-C-2018

For the reasons stated in the application, same is allowed and
delay of 42 days in filing the appeal is condoned.

CM-15597-C-2018

For the reasons stated in the application, same is allowed and
delay of 44 days in re-filing the appeal is condoned.

Main case (O&M)

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

2. Having suffered concurrent adverse findings by two Courts
below, plaintiffs are in second appeal before this Court assailing the
learned trial Court judgment and decree dated 12.03.2014, as upheld by
learned First Appellate Court vide its judgment and decree dated
19.12.2017, dismissing the suit for specific performance of contract filed
by appellant/plaintiffs.

3. Briefly stated, facts as noticed by Courts below are that defendants No.1 and 2, namely, Nirmala Devi and Jagdish were owners in possession of land measuring 12 Kanals 03 Marlas. It was inherited by them from their father Jainarain as per Jamabandi for the year 1988-89 comprised in Khewat No.106, Khatoni No. 229 and as per mutation No.791 dated 04.05.1994. The land is situated in revenue estate of village Mehrana, Tehsil Charkhi Dadri, District Bhiwani. In latest Jamabandi for the year 2003-04, their land has been shown by Khewat No.139, Khatoni No.250 out of total land measuring 36 Kanal 09 Marlas in which both defendants were depicted to be owners in 1/6th share each. It is further alleged that Jainarain was real brother of father of plaintiffs, namely, Bhagwan Singh. Nirmala is married to defendant No.3, Phul Singh, who holds general power of attorney on behalf of defendants No.1 and 2 since 1991, which is a registered document. Through said power of attorney, defendants entered into an agreement dated 12.09.1991 with plaintiffs for sale of their agricultural land measuring 12 Kanals 03 Marlas for sale consideration of Rs.1,38,000/-. A sum of Rs.68,000/- was paid as earnest money by plaintiff No.1, Nirmala Devi on 12.09.1991 and agreement was executed to this effect. It was agreed between parties to the contract to execute sale deed within six months and remaining sale consideration of Rs.70,000/- was to be paid at the time of registration of sale deed. It was further stipulated in the agreement that if defendants fail to execute the sale deed, they will pay double the amount of earnest money to plaintiff No.1 and in case plaintiffs refused to get the sale deed registered, the earnest money was to be forfeited. After one month of execution of agreement, plaintiff No.1 paid another sum of Rs.58,000/- to defendant No.3 and as such, Rs.12,000/- remained to be paid. Plaintiff no.1

requested defendants to execute the sale deed but defendants delayed the same on one pretext or the other.

3.1. It is further alleged that defendants started demanding more money on the ground that price of land has increased. Parties again reached a settlement in the year-1994 whereby plaintiffs agreed to pay further sum of Rs.20,000/- to the defendants in addition to Rs.1,26,000/- already paid and thereafter, sale deed would be executed. A writing to this effect was also executed on 26.07.1994 by defendant No.3 on behalf of defendants No.1 and 2. The possession of suit property was also handed over to plaintiffs.

3.2. Plaintiff No.2 Deepak Kumar had borrowed a sum of Rs.24,000/- from one Balwan and Hazari for paying Rs.20,000/- to defendants on 26.07.1994. In this manner, agreement dated 12.09.1991 was merged in subsequent writing dated 26.07.1994. Since parties were close relatives, so plaintiffs were not much worried about execution of the sale deed as they were cultivating the suit land since 1994, but all of a sudden, plaintiffs received the summons of an injunction suit filed by defendants No.1 and 2 through their attorney, defendant No.3 in civil Court, Charkhi Dadri. On receipt of the summons, the *mala fide* intention of defendants came to knowledge of plaintiffs. Thereafter, a meeting of Panchayat was also convened where defendants were asked to perform their remaining part of contract but defendant No.3, being attorney of defendants No.1 and 2, refused to execute the sale deed. Plaintiff No.1 remained present in office of Sub Registrar, Charkhi Dadri on 21.12.2007 but it was declared holiday on account of "Eid". On 24.12.2007, he again remained present along with requisite documents but defendants did not

appear. Plaintiffs performed their part of contract but defendants did not turn up, despite notice. Hence the suit.

4. Upon notice, respondent/defendants appeared and filed their joint written statement taking some preliminary objections with regard to maintainability; estoppels; locus standi; barred by limitation and concealment of facts etc.

4.1. On merits, it is stated by defendants that defendants No.1 and 2 agreed to sell the land in dispute to plaintiff No.1 alone for a sum of Rs.1,38,000/- vide agreement to sell dated 12.09.1991 executed by defendant No.3, being their attorney. He also received a sum of Rs.68,000/- as earnest money and remaining amount of sale consideration was to be received at the time of execution of sale deed. It was further pleaded in the written statement that sale deed was to be executed within six months of agreement to sell dated 12.09.1991 but plaintiff No.1 failed to do the same. Defendant No.3 remained present in the office of Sub Registrar Dadri on 11.03.1992 which was last day of expiry of six months to execute the sale deed but plaintiff No.1 did not turn up. Defendant No.3 got his presence marked by getting an affidavit attested from Executive Magistrate, Dadri. Thereafter, Deepak Kumar (brother of plaintiff No.1) got scribed a writing from defendant No.3 on the pretext that plaintiff No.1 would pay the remaining amount. On his assurance, writing dated 26.07.1994 was scribed. However, plaintiff No.1 did not turn up with money and therefore, the writing remained incomplete. Therefore, plaintiffs have no right to get the sale deed executed and registered in their favour now.

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

- “(1). Whether the plaintiffs were ready and willing to perform their part of the contract dated 12.09.1991? OPP*
- (2) Whether the writing dated 26.07.1994 was executed by defendant No.3? OPP*
- (3) Whether the plaintiffs are entitled to seek specific performance of contract dated 12.09.1991? OPP*
- (4) Whether the plaintiffs are entitled to relief of injunction as prayed for? OPD*
- (5) Whether plaintiffs have no locus standi and cause of action to file the present suit? OPD*
- (6) Whether the suit is not maintainable in the present form? OPD*
- (7) Whether the plaintiffs are estopped to file the present suit by their own act and conduct? OPD*
- (8) 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, issues No.1 to 5 and 7 were decided by the learned trial Court in favour of defendants and against plaintiffs, while issue No.6 was deemed to be given up as not pressed. Consequently, the suit of plaintiffs was dismissed with costs.

8. Feeling aggrieved, plaintiff/appellants went in appeal which was also dismissed by learned First Appellate Court, resulting in Regular Second Appeal by plaintiffs before this Court.

9. In its judgment, learned First Appellate Court, *inter alia*, observed as below:

““10. It is also admitted by the parties that later on, another writing was executed on 26.07.1994. It was disputed by the defendants that the aforesaid writing does not come

within the purview of an agreement of sale as it does not include the details of land agreed to be sold and other material particulars. It was denied by the defendants that the writing dated 26.07.1994 and the agreement dated 12.09.1991 does not match with later and remained incomplete as mentioned above and was never acted upon. Consequently, in present case, the dispute between parties in narrow compass is with regard to nature of the writings in shape of agreement dated 12.09.1991 and the later writing dated 26.07.1994. Therefore, this Court has to see as to what is the affect of the aforesaid writings. In this regard, this Court is of the considered opinion that the agreement dated 12.09.1991 was executed between the parties and the sale deed was to be executed within six months. However, till 26.07.1994, neither party served a notice to each other for execution of the sale deed. The term and condition settled between the parties clearly reveals that in case of breach of agreement, the amount was fixed between the parties. The defendants in case of refusal as to pay the double amount of earnest money, whereas in case of refusal by the plaintiffs, the earnest money was to be forfeited. Therefore, it appears that the aforesaid document was not an agreement rather the same was in shape of money transaction, which took place between the parties, who were relatives of each other. This Court is of the considered opinion that later on, both the parties came to term and further executed writing on 26.07.1994. The aforesaid later writing also require close scrutiny. Ex.P4 writing dated 26.07.1994 reveals that the prospective vendee, the present plaintiff after taking loan from Mr. Balwan and Mr. Hazari Lal paid an amount of Rs. 20,000/- to the defendants. It was agreed upon between the parties that the sale deed will be executed after returning of aforesaid Rs.24,000/- to Mr. Balwan and Mr. Hazari Lal and thereafter, the sale deed will be executed. The aforesaid writing did not find mention any term and condition of the agreement and therefore, this Court is of the considered opinion that it does not amount to extension of period for execution of the sale deed as mentioned in the earlier agreement. This Court is also of the considered opinion that it is not mentioned in this writing that an amount of Rs.20,000/- was paid on account of remaining sale consideration on account of advance additional earnest money. Consequently, this Court has no hesitation to hold that the time period which was fixed between the parties for execution of the sale deed in term of agreement dated 12.09.1991 was not extended. If it is so, the present suit filed by the plaintiffs for specific performance of the agreement Ex.DW1/A is not maintainable and the plaintiffs could not succeed in this case. This Court is also of the considered opinion that the writing Ex.P4 was executed in the year 1994 and thereafter, no steps were taken by either of the parties till the year 2007. A time of thirteen years elapsed between execution of document Ex.P4 and filing of the present suit.

Therefore, the delay and laches in filing the present suit for specific performance of the agreement cannot be decreed. Insofar as alternative remedy of refund of earnest money is concerned, this Court is of the considered opinion that the plaintiffs in their plaint, has not claimed that they are entitled for refund of earnest money in the alternative and therefore, the said relief cannot be granted to the plaintiffs.

11. This Court is also of the considered opinion that in order to succeed in a suit for specific performance of the agreement, the plaintiffs have to prove that throughout they were ready and willing to perform their part of the agreement. In present case, the agreement Ex.DW1/A was executed on 12.09.1991 and thereafter, the plaintiffs did not take any further step to get the sale deed executed in their favour. Despite execution of writing Ex.P4, the plaintiffs have not taken any step to show that they have been ready and willing to perform their part of the agreement and therefore, in absence of proving readiness and willingness on part of the plaintiffs, the present suit cannot be decreed. Even though, the plaintiffs have claimed that entire sale consideration was paid and therefore, the plaintiffs did not get the sale deed executed in their favour, however, this Court is of the considered opinion that even if, the entire sale consideration was paid, it was duty of the plaintiffs to serve notice to the defendants to execute the sale deed in favour of the plaintiffs. However, the plaintiffs have miserably failed to prove their readiness and willingness in this regard. This Court is also of the considered opinion that plaintiffs have not pleaded and proved a fact that the amount of Rs.20,000/- which was borrowed by the plaintiffs from 3rd parties, was paid to the 3rd parties and therefore, the plaintiffs failed to perform their part of the agreement. If the plaintiffs did not make payment of Rs.20,000/- to the 3rd parties question of starting point of limitation for serving notice of 10 days to the defendants as agreed upon in subsequent writing Ex.P4 does not start. If it is so, the plaintiff is not entitled to seek relief of specific performance of agreement Ex.DW1/A. Therefore, it is clear in aforesaid facts and circumstances that the plaintiffs have failed to prove their case, of which burden heavily lies upon them, therefore, the plaintiffs are to be non suited.

Xxx”

10. I have heard the learned counsel for appellants and perused the judgments of both the Courts below.

11. When this appeal came up for preliminary hearing before a Co-ordinate Bench of this Court on 05.07.2019, the following order was

“Ld. Counsel for the applicant/appellants seeks an opportunity to satisfy this Court that an alternative relief by way of refund of the consideration amount can be ordered by a Court even if not specifically prayed for in a situation where otherwise the prayer for specific performance is to be declined.

Adjourned to 11th September, 2019.”

12. On resumed hearing on 10.01.2020, learned counsel for appellants prayed for more time to answer the query raised vide order dated 05.07.2019 *ibid*. Today also, learned counsel has failed to cite any law on the issue.

13. In fact, the position in law is totally to the contrary, as against what is being canvassed by learned counsel for appellants. Reference may be had to the Apex Court judgment rendered in ***Desh Raj and others v. Rohtash Singh 2022 SCC online SC 1719***, relevant whereof is extracted herein below :

“32. On a plain reading of the above reproduced provision, we have no reason to doubt that the plaintiff in his suit for specific performance of a contract is not only entitled to seek specific performance of the contract for the transfer of immovable property but he can also seek alternative relief (s) including the refund of any earnest money, provided that such a relief has been specifically incorporated in the plaint. The court, however, has been vested with wide judicial discretion to permit the plaintiff to amend the plaint even at a later stage of the proceedings and seek the alternative relief of refund of the earnest money. The litmus test appears to be that unless a plaintiff specifically seeks the refund of the earnest money at the time of filing of the suit or by way of amendment, no such relief can be granted to him. The prayer clause is a sine qua non for grant of decree of refund of earnest money.

33. Applying these principles to the facts of the case in hand, we find that the Respondent has neither prayed for the relief of refund of earnest money in the original plaint nor he sought any amendment at a subsequent stage. In the absence of such a prayer, it is difficult to accept that the courts would suo moto grant the refund of earnest money irrespective of the fact as to whether Section 22(2) of SRA Act is to be construed directory or mandatory in nature.”

14. Moreover, on perusal of the impugned judgments, my considered opinion is that the submissions made before the Courts below were duly considered and repelled by recording sound and sufficient reasons consistent with record and the applicable law, with which I am inclined to agree.

15. To my mind, judgments under challenge have been rendered after due and correct appreciation of record including the evidence adduced by the parties.

16. There seems no perversity or illegality in the concurrent findings of facts returned by the Courts below. No interference is thus called for to disturb the said concurrent findings. In this second appeal, no fresh ground worthy of interference is made out.

17. No question of law, much less substantial one, a *sine qua non* for entertaining regular second appeal, is involved herein, for exercise of appellate jurisdiction of this Court under Section 41 of the Punjab Courts Act read with Section 100 of the Civil Procedure Code.

18. As an upshot of my preceding discussion, the appeal is dismissed, being bereft of any merit. Resultantly, both the impugned judgments and decrees passed by learned Courts below are upheld.

19. Pending application/s, if any, shall also stand disposed of.

20. No order as to costs.

FEBRUARY 02, 2023
Shalini

(ARUN MONGA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No