

(1997) 10 P&H CK 0058
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 764 of 1997

Kedar Nath Dhingra and Another	Vs	APPELLANT
Kanwal Bhatia		RESPONDENT

Date of Decision : 14-10-1997

Acts Referred:

Specific Relief Act, 1963 — Section 28

Citation : AIR 1998 P&H 86 : (1998) 118 PLR 230 : (1997) 4 RCR(Civil) 625

Hon'ble Judges : Sarojnei Saksena, J

Bench : Single Bench

Advocate : Ashutosh M. Punchhi, for the Appellant; Mahesh Grover, for the Respondent

Judgement

Sarojnei Saksena, J.—Defendants -appellants have filed this second appeal against lower appellate Court's judgment and decree dated January, 16, 1997, whereby time for payment of balance amount of sale consideration was extended from September 10, 1996 to January 31, 1997.

2. Adumbrated facts of the case are that the plaintiff-respondent filed suit for specific performance of contract in the Court of Additional Civil Judge (Sr. Division), Faridabad, averring that the parties had entered into an agreement to sell a residential plot. This agreement was entered into between the parties on April 8, 1995. At the time of the agreement, Rs. 10,000/- were paid by the plaintiff to the defendants. He also paid Rs. 30,000/- to the defendants on April 11, 1995. The balance amount of sale consideration of Rs. 5,33,750/- was to be paid on or before June 16, 1995, the date fixed for execution and registration of the sale deed in favour of the plaintiff. Plaintiff averred in the plaint that he was pursuing the defendants to execute the sale deed to transfer the suit plot in his name and to accept the balance sale consideration, but the defendants did not pay any heed. On June 16, 1995, plaintiff went to the Sub-Registrar's office for the due performance of the contract, but the defendants did not turn up. Hence, the suit.

3. After being noticed, the defendants appeared before the lower Court and filed an application on March 7, 1996, showing their willingness to execute the sale deed in favour of the plaintiff on receipt of the balance sale consideration. They admitted receipt of Rs. 10,000/- and Rs. 30,000/- from the plaintiff. They pleaded that payment of the balance sale consideration was the essence of the contract, which was to be made on or before June 16, 1995, and thereafter the suit property was to be transferred in 1 vow of the plaintiff. They were already ready and willing to perform their part of the contract, but the plaintiff essentially failed to perform his part of the contract as he could not arrange huge balance sum. They prayed that the plaintiff be directed to pay the balance sale consideration and on receipt of the said amount, they will get the plot in dispute transferred in his favour.

4. As no written statement was filed, no issue was framed and the plaintiff's suit was decreed and it was ordered by the trial Court that the plaintiff shall pay the balance sale consideration on or before September 10, 1996, and then the defendants shall execute the sale deed in plaintiff's favour, after getting the necessary permission from the Haryana Urban Development Authority, Faridabad, if at all it is required. All the terms and conditions of the agreement to sell dated April 18, 1995, shall be binding on the parties. The lower Court also observed that in case the plaintiff fails to pay/deposit the balance sale consideration on or before the extended date, the plaintiff's suit shall stand dismissed and in case, even after depositing the balance sale consideration, "the defendants fail to get the sale deed in respect of the plot in question executed in plaintiff's favour, then the plaintiff shall get the same executed and registered through the Court. Parties were left to bear their own costs. The lower Court delivered this judgment on August 8, 1996.

5. Being aggrieved by the judgment/decreed of the trial Court, plaintiff filed appeal on September 25, 1996, which was decided by Shri R.S. Baswana, Additional District Judge (IV), Faridabad, on January 16, 1997. Plaintiff's only grouse was that costs were not awarded to him by the trial Court though his suit was decreed. On being noticed, defendant-appellants submitted an application that as the plaintiff had failed to deposit the balance sale consideration on or before September 10, 1996, in favour of the defendants and instead filed appeal, which is also not competent because Court-fee of Rs. 27,370/- was required to be affixed while the plaintiff had only affixed Court-fee of Rs. 25/- on the Memo of Appeal. Hence, the appeal is under-valued. Therefore, the plaintiff-appellant should be directed to make up the deficiency of the Court-fee and then the appeal be heard.

6. In that appeal, plaintiff-respondent also filed an application to stay the operation of the judgment and decree of the trial Court. In reply to this application, the defendants-appellants submitted that the plaintiff-respondent had failed to deposit the amount in question as per orders of the learned Additional Civil Judge (Sr. Division), Faridabad, dated August 8, 1996. Hence, the

plaintiff-respondent is not entitled to any relief of injunction order. He has failed to deposit the balance sale consideration. The defendants are suffering loss and damage for non-deposit of the amount of balance sale consideration by the plaintiff, he has not approached the Court with clean hands, because, on one hand, he intends not to deposit the amount in question and, on the other hand, he intends to challenge the sale to some other person.

7. After hearing both the counsel for the parties, the lower appellate Court decided the appeal, affirmed the judgment and decree of the trial Court, but extended the time for payment of the balance sale consideration from September 10, 1996 to January 31, 1997.

8. Appellants-defendants' learned counsel valiantly argued that the respondent-plaintiff was never ready and willing to perform his part of the contract, though the appellants-defendants were always ready and willing to perform their part of the contract. The conduct of the respondent-plaintiff is borne out from the judgments of both the Courts below. Without giving any prior notice to the appellants-defendants to execute the sale deed and to accept the balance sale consideration, the respondent-plaintiff filed the suit before the lower Court. On the first date of hearing, the appellants-defendants filed an application on March 7, 1996, stating therein that they are ready and willing to perform their part of the contract, but the plaintiff had not paid the balance amount of sale consideration, which was the condition precedent. Therefore, the sale deed could not be executed by them (appellants-defendants). They also challenged that the appeal was incompetent as only Court fee of Rs. 25/- was affixed on the Memo of Appeal, though Court-fee of Rs. 27,370/- was required to be affixed. The plaintiff was directed by the lower Court to pay the balance sale consideration by September 10, 1996. Instead of paying/depositing the balance sale consideration to the appellants-defendants, the respondent-plaintiff wanted to while away the time and without complying with the terms given by the trial Court, he filed appeal against the said judgment before the lower appellate Court, only on the ground that the trial Court had not awarded costs of the suit to him. These facts only show that the respondent-plaintiff never wanted to perform his part of the contract as the trial Court had specifically directed that in case the plaintiff fails to pay the balance sale consideration by September 10, 1996, his suit shall stand dismissed. In view of this direction, the lower appellate court should have dismissed the plaintiff's suit as he failed to pay the balance sale consideration to the defendants on or before September 10, 1996. Instead, without any prayer being made by the respondent-plaintiff, the lower appellate Court has extended the time for payment of the balance sale consideration. Hence, the lower appellate Court's impugned judgment/decreed should be set aside.

9. The respondent's learned counsel, relying on *Mangala Ghosh Vs. Rabindra Nath Hazra*, , *Tapan Kumar Chatterjee Vs. Kalyani Debi*, , and *Smt. Periyakkal and Others Vs. Smt. Dakshyani*, , submitted that the lower appellate Court had jurisdiction to extend the time for making payment of the balance sale

consideration u/s 28 of the Specific Relief Act as well as u/s 148, Civil Procedure Code. Thus, according to him, the lower appellate Court has rightly extended the time for payment of the balance sale consideration. He also submitted that the lower appellate Court had decided the appeal on January 16, 1997, and on January 17, 1997, the plaintiff-respondent has deposited the balance sale consideration in the lower appellate Court to be paid to the defendants-appellants.

10. The plaintiff-respondent's learned counsel also submitted that in this case time is not the essence of the contract. Therefore, the trial Court's order that if by September 10, 1996, the balance sale consideration is not paid to the defendants by the plaintiff, his suit for specific performance of contract shall stand dismissed was in essence an order in terrorem and not intended to divest the appellate Court of its power to pass other consequential orders including an order for extension of time expressly conferred by the provisions of the Specific Relief Act.

11. After hearing the rival contentions, in my considered view, there is no merit in this appeal. It is settled law that primarily in all contracts for sale of immovable property time is not essence of the contract unless circumstances show otherwise. Reliance can be placed on *Ruldu Singh (Deed.) v. Inder Singh* 1974 RLR 542, *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, *Amba Lal Umrao Singh Ji Vs. L. Harish Chander and Others*, and *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, . Even from the circumstances of this case, it is evident that time was not the essence of the contract. Parties agreed that the sale deed was to be executed on or before June 16, 1995. The plaintiff-respondent filed the suit for specific performance of contract on July 19, 1995, which was decreed by the trial Court on August 8, 1996. Even before the trial Court, the defendants-appellants never agitated that time was the essence of the contract. Conversely, they expressed their willingness to execute the sale deed in plaintiff-respondent's favour provided he pays the balance sale consideration on any date fixed by the Court. The trial Court decreed the suit directing the plaintiff-respondent to make payment of the balance sale consideration on or before September 10, 1996. Putting it as a condition in terrorem, the trial Court directed that in case the balance sale consideration is not paid by September 10, 1996, the plaintiff's suit for specific performance shall stand dismissed. This condition is in essence an order in terrorem and was not intended to divest the Court of its power to pass other consequential orders including an order for extension of time expressly conferred by the provisions of Section 28 of the Specific Relief Act.

12. Even before the lower appellate Court, the defendants-appellants never contended that time was the essence of the contract or that the plaintiff-respondent was not at all ready and willing to perform his part of the contract and is adopting delaying tactics. During arguments, the learned counsel failed to point out that before the lower appellate Court, the plaintiff-respondent had filed

an application for staying the operation of the judgment and decree passed by the trial Court. The defendants-appellants filed reply to that application averring that on the one hand, the plaintiff does not intend to deposit the amount in question and, on the other hand, he intends to show that the defendants-respondents have no legal right to alienate the plot in dispute to some other person. In the application dated September 24, 1996, the plaintiff only prayed before the lower appellate Court that the operation of the judgment and decree under appeal be stayed. He never prayed that the defendants-appellants be restrained from alienating the suit property to anybody else. Thus, the contention of the defendants-appellants" that the lower appellate Court has extended the time for depositing the balance sale consideration upto January 31, 1997, without any prayer being made by the plaintiff-respondent, is devoid of any merit. u/s 148, Civil Procedure Code, Court has jurisdiction to extend time to comply with the terms of the decree. Thus, this argument has no bearing that the plaintiff-respondent never made such a prayer before the lower appellate Court that time be extended. Because time was running against the plaintiff, therefore, he specifically prayed that the operation of the trial Court's decree be stayed. Resultantly, his prayer was that time for making payment of the balance sale consideration be extended. In my considered view, the lower appellate Court has not fallen into an error in extending the time for making payment of the balance sale consideration.

13. But, to balance the equity between the parties, it is hereby ordered that as plaintiff has not paid the balance sale consideration to the defendants-appellants firstly on or before June 16, 1995 as per the terms and conditions of the agreement to sell and again by September 10, 1996, as ordered by the trial Court, and has deprived the defendants appellants of balance sale consideration in the sum of Rs. 5,33,750/- it is hereby ordered that the plaintiff respondent shall pay Rs. 10,000/- (Rs. Ten Thousand only) to the defendants -- appellants as compensation, besides costs of this appeal. Counsel's fee Rs. 2000/- is allowed, if certified.

14. With this direction, the appeal is disposed of.