
(2005) 12 P&H CK 0003

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 9 of 2000

Smt. Mohini Kapoor and Others

APPELLANT

Vs

Deepak Uppal and Others

RESPONDENT

Date of Decision : 12-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Income Tax Act, 1961 — Section 230A

Specific Relief Act, 1963 — Section 10, 10(1), 14(1), 14(3), 22

Citation : (2006) 2 CivCC 160 : (2006) 142 PLR 584 : (2006) 1 RCR(Civil) 807

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : J.K. Sibal and K.S. Viridi, for the Appellant; Ashok Aggarwal Alok Jain and Promila Nain, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This is defendant's appeal filed u/s 100 of the Code of Civil Procedure, 1908 (for brevity Code) challenging concurrent findings of fact recorded by both the Courts below holding that the plaintiff respondent is entitled to specific performance of agreement to sell dated 18.08.1990. Both the Courts below have concurrently found that the defendant-appellants have failed to perform their part of the contract by not obtaining the Income Tax Clearance Certificate from the concerned Department and the required permission from the Estate Officer, HUDA. It has further been held that the plaintiff-respondents have always been willing and ready to perform their part of the contract. On the aforementioned issue, detailed discussion is available in Para 7 to 19. After referring to documentary as well as oral evidence of the parties and close analysis of the same, the learned lower Appellate Court has approved the view taken by the trial Court by observing as under:

From the discussion as above, there does not remain any doubt that the default was made by the appellants themselves. They, thus, had not honoured the

agreement (Ex.P1). They had not performed their part of the contract. They were not ready and willing to perform their part of the contract. They were very casual and indifferent to the transaction as they did not come forward to complete the formalities for obtaining transfer permission letter from HUDA as also ITC from the Income Tax Department. It was only thereafter that within 30 days, after making payment of the balance sale price, the respondent-plaintiff No. 1 could get the plot transferred pursuant to the agreement (Ex.P1). Statement of Deepak Uppal (PW-1) that he has always been ready and will and continues to be so, in performing his part of the contract (Ex.P1) and further that he has always been possessed of money sufficient to defray payment of balance sale consideration as also transfer and other expenses, has not been successfully assailed. Discussing pleadings and evidence of the parties and various legal aspects attending the issue in debate, the learned lower Court was right in coming to the following conclusion:

But in the present case it was the duty of defendant-vendor to obtain permission from HUDA on payment of extension fee as well as to obtain Income Tax Clearance Certificate. Both these documents were the condition precedent for execution of sale deed by the defendant in favour of plaintiff. After having obtained the necessary permission, it was the duty of defendant vendor to inform the plaintiffs of their intention to execute the sale deed on receipt of balance sale consideration. But the defendants neither obtained ITCC nor the transfer permission from the Estate Officer, HUDA. Thus, by no stretch of imagination it can be held that the defendants were ready and willing to perform their part of contract. On the other hand, it is established on record that the plaintiffs were ready and willing to perform their part of agreement.

2. On the question whether specific performance of contract of sale dated 18.08.1990 is to be ordered or decree was to be passed for the alternative relief of refunding double the amount of earnest money to the plaintiff-respondent, the lower Appellate Court again accorded approval to the findings recorded by the trial Court holding that specific performance of the agreement dated 18.08.1990 has to be ordered. In the agreement dated 18.08.1990, Clause 2 has provided for such an eventuality and the same is necessary to be reproduced which reads as under:

Clause 2:

That in case of First party refusing or is unable to get the said plot transferred to the Second party within the above specified period, the advance of Rs. 50,000/- will be refunded in DOUBLE by the First party to the Second party. In case, the second party fails to take the plot or is unable to make full payment to the First party within the above specified period, the advance paid by him will be forfeited by the First party. In the event of Estate Officer not permitting sanction for the transfer of the plot for any reasons whatsoever, the First party shall refund the Earnest money i.e. Rs. 50,000/- to the Second party".

3. The arguments based on the aforementioned Clause 2 has also been rejected by the learned lower Appellate Court by observing that merely because prayer for the alternative relief of refunding double the amount of earnest money has been made as per the terms of the agreement would not necessarily mean that the suit of the plaintiff-respondent for specific performance of agreement was to be dismissed by granting him alternative relief of damages to pay double the amount of earnest money. The learned lower Appellate Court has placed reliance on various judgments and has rejected the argument of the defendant-appellant by observing as under:

"In the present case the respondent-plaintiff has been ready and willing to perform their part of the contract. The appellant-defendants had been avoiding performance thereof. Untenable grounds have been taken by them. Incorporation of clause of payment of damages, as has rightly been argued by learned Counsel for the respondent plaintiffs, even otherwise cannot be interpreted to refuse specific performance of the agreement. In case Kapoor Singh v. Surinder Singh (1993) 1 P.L.R. 499, it was held that mere mention in the agreement of a sum to be paid as damages in case of default is no ground to deny the specific performance of the agreement. It was further observed that such mention was only made for the purpose of securing performance. In Sadiz Hussain v. Anup Singh AIR 1924 Lah 151, it was held that general rule of equity is that if a thing is agreed upon to be done through there is a penalty annexed to secure its performance. Yet the very thing itself must be done. Reference may be made to authority report Hukam Chand and Anr. v. Nikka Singh and Anr. 15 Punjab Record 1908 wherein it was ruled that party should not be allowed to evade merely because the agreement provided a penal clause. Still in another recent authority reported as B.C. Sharma Vs. M/s. Ashok Kumar Pradeep Kumar, it was held that merely because agreement indicated that the plaintiff would claim double the amount in case of breach, would not exclude the right of the plaintiff to enforce the agreement. Support has also been sought from the authorities reported as Smt. Shakuntla Devi Vs. Mohanlal Amrit Raj Jain Market, Pali, ; Ramani Ammal Vs. Susilammal, ; Narayan Nagorao Vs. Amrit Haribhau, ; Sadiq Hussain v. Anup Singh AIR 1924 Lah 151 Hukam Chand and Anr. v. Nikka Singh and Anr., 15 Punjab Record 1908; V.K. Kandasami Chettiar v. Shanmugha Thevara and Anr. AIR 1949 Mad 302 Kirpal Singh Vs. Mst. Kartaro and Others, and Vairaran v. K.S. Vidyanandam and Ors. 1996(4) L.L.R. 163.

Looking from another angle, relief of specific performance is to be ordinarily granted and is to be refused only in exceptional circumstances. In case of immovable property monetary compensation is not adequate. Mere mentioning of liquidated damages does not curtail jurisdiction of the Court to grant relief of specific performance.

Reference may be made to authority reported as Janga Singh v. Harbans Singh 1992 P.L.J. 7 (P&H); Gurdial Singh and Others Vs. Darshan Singh and Another, ; Anokh Devi and Others Vs. Trilok Singh and Others, M.L. Devender Singh v. Syed

Khaja AIR 1973 S.C. 2452; and Afsar Gujjar v. Barkha Ram 1989 P.L.J. 23 (P&H).

Still further it may be mentioned that in case of immovable property time is never the essence of the contract unless so is recited in the contract. Reference may be made to the authorities reported as Mohammad Nazir v. Chaudhari Jahangiri Mal and Ors. AIR (36) 1949 Lah 72 Bhagwan Singh v. Teja Singh alias Teja Ram 1996(3) L.L.R. 487 (P&H); and Gur Akbar Akal Kaur v. Tehal Singh 1994(1) L.L.R. 581 (P&H). Thus, plea of learned Counsel for the appellants that sufficient time having elapsed, the specific performance should be refused, cannot be accepted. The default lies with the appellants and refusing specific performance would be amounting to undue enrichment of wrong doers.

4. Mr. J.K. Sibal, learned Senior counsel has placed reliance on Clause 2 of the agreement to sell and has argued that once there is a contract between the parties entered with their free will giving option to one party to terminate the contract at any time and without assigning any reason then such a contract has to be considered as determinable within the meaning of Section 14(1)(c) of the Specific Relief Act, 1963 (for brevity the "Act"). According to the learned Counsel, in such like cases no specific performance of a contract of sale would be permissible and proper relief of refunding double the amount of earnest money would alone be sustainable in law. In support of his submission, learned Counsel has placed reliance on the observation in para Nos.56 and 57 of the judgment of the Supreme Court in the case of Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibai Haribai Patel and Others etc. etc., . Learned Counsel has also relied upon another judgment of the Supreme Court in Dadarao and Another Vs. Ramrao and Others, and argued that where the agreement itself provided for contingencies of sellers are refusing to sell and purchases are refusing to buy by stipulating the refund of earnest money then there was no obligation to complete the sale transaction by passing a decree for specific performance. Learned Counsel has then argued that when there is continuous steep rise in prices of the property in respect of a house located in an urban area then relief of specific performance of agreement could be refused by passing a decree for alternative relief of damages.

5. Mr. Ashok Aggarwal, learned senior counsel appearing for the plaintiff-respondent has argued that the law is well settled and merely because an alternative plea of refund of earnest amount and damages has been raised it cannot constitute a bar to claim a decree for specific performance of contract. In support of his submission, learned counsel has placed reliance on the judgment of the supreme court in the case of P.C. Varghese Vs. Devaki Amma Balambika Devi and Others, and P. D'Souza Vs. Shondriilo Naidu, . Learned Counsel has then argued that the agreement of sale by virtue of Clause 2 or any other clause would not become a contingent contract which could alone be performed on the happening of a particular event. According to the learned Counsel, Clause 2 firstly lacks mutuality and then the relief by filing the suit has been claimed without any delay. Learned Counsel has drawn my attention to the date of filing

the suit which is 18.05.1991 and the date of agreement to sell executed between the parties on 18.08.1990. There is a stipulation in the agreement to sell that the balance sale consideration was to be paid by the plaintiff-respondent to defendant-appellant Nos. 1 and 2 within 30 days from the date of issuance of transfer permission by defendant-respondent No. 3 and after obtaining of income tax clearance certificate from the concerned department. There was no communication sent by the defendant-appellants to the plaintiff-respondent so as to permit the commencement of period of 30 days. Replying to the argument of the learned Counsel for the defendant-appellant, Mr. Aggarwal has submitted that continuous steep rise in prices of property during the pendency of the suit cannot constitute the sole basis for refusing to grant a decree for specific performance and grant of the alternative relief of refund of earnest amount along with damages. Learned Counsel has also submitted that in any case Clause 2 cannot be interpreted to mean that the defendant-appellant has arbitrary discretion to refuse performance of the agreement to sell but the same has been incorporated in order to secure the performance of agreement to sell. Learned Counsel has also made a reference to the explanation appended to Section 10 and Section 22 of the act. The last submission made by the learned Counsel is that there are concurrent findings of fact which do not deserve to be interfered in exercise of jurisdiction u/s 100 of the code and that the plea of determination of contract based on Section 14(1)(c) has nowhere been raised by the defendant-appellant in the courts below. According to the learned Counsel, an issue of the aforementioned plea could have been framed, evidence could have been led and then finding could have been recorded and, therefore, such a plea cannot be permitted to be raised before the High Court in an appeal u/s 100 of the code.

6. After hearing the learned Counsel for the parties and perusing the judgments of both the courts below, I am of the considered view that this appeal does not merit admission because no substantive question of law requiring determination by this Court is involved. Both the courts below have concurrently found that the defendant-appellants have failed to perform their part of the contract whereas the plaintiff-respondents have always been ready and willing to perform their part. It has rightly been held that merely because a clause for payment of damages has been incorporated in the agreement to sell dated 18.8.1990 would not constitute a ground to refuse specific performance of the agreement. It is elementary to point out that a breach of contract cannot be adequately relieved by compensation in money. The aforementioned legal position emerges from the plain language of Explanation (1) of Section 10 and Section 23 of the Act. For the aforementioned purpose, reliance can be placed on the judgment of the Supreme Court in P.C. Varghese case (supra). It is also evident that Clause 2 merely contained sanction for securing the performance of the agreement to sell as contemplated by Section 23 of the Act. The aforementioned view is supported by the judgment of the Supreme Court in the case of Manzoor Ahmed Margray Vs. Gulam Hassan Aram and Others, . It is equally well settled that u/s 230-A of the Income Tax Act, 1961, clearance certificate for registration of transfer of property

has to be obtained by the defendant-appellants and an application was required to be submitted by them. In this regard, reference may be made to the judgment of Karnataka High Court in the case of Smt. Fouzia Shahi Nazeer v. B.K. Lingappa and Ors. 1990 ITR 342. It has been categorically found by the courts below that the defendant-appellants did not come forward to complete the formalities for obtaining transfer permission letter from HUDA or from the Income Tax Department. Moreover, both the courts below have exercised discretion in favour of the plaintiff-respondents by keeping in view the facts and circumstances of the case and the aforementioned discretion cannot be interfered with in exercise of jurisdiction u/s 100 of the Code because nothing has been shown from the record that there is any legal infirmity in the application of law or in respect of finding of fact. It has been repeatedly emphasized by the Supreme Court that this Court in exercise of jurisdiction u/s 100 of the Code should be extremely slow in setting aside the findings of fact as the first appellate court is the final court of fact as well as law. In this regard, reference may be made to the judgment of the Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., . In concluding portion of para 15 of the judgment their Lordships of have observed as under:

We need only remand the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one. (*italics added*)

8. Therefore, the appeal does not deserve admission as no substantial question of law requiring determination by this Court has been raised.

9. The argument of the learned Counsel for the defendant appellants placing reliance on Clause 2 would not require any detailed consideration because such an argument has not been raised in terms before the courts below. The absence of such an argument before the courts below would be significant because it would have required pleadings, framing of issues and adducing of evidence by the parties. It is no doubt true that such a course can be adopted even at the stage of second appeal u/s 100 of the Code, but I do not wish to prefer to adopt the aforementioned course because there is nothing on the record to show that there was any intimation refusing to perform the contract. Therefore, it has to be concluded that the contract in terms of Clause 2 in any case had never been determined. No notice expressing the intention to determine the contract in terms of Clause 2 has ever been given and therefore, Section 14(1)(c) of the Act cannot be invoked. It is further appropriate to mention that the use of expression

"a contract" which is in its nature determinable in Clause C of Sub-section (1) of Section 14 of the Act would not include in its sweep the ordinary agreement to sell containing penalty clause which are aimed at securing the performance of the contract as envisaged by Section 23 of the Act. Moreover, Sub-section (3) of Section 14, has incorporated a non-obstante clause which provides that notwithstanding anything contained inter alia any clause of Sub-section (1) the court may still enforce specific performance where the suit is for enforcement of a contract.

10. It appears to me that the situation contemplated by Section 14(1)(c) is the one which was available in the case of *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, because in that case the finding recorded in the award was that the distributorship agreement was revocable and the same was admittedly for rendering personal service and in such a situation Section 14(1)(c) would automatically get attracted. It has further been made clear that Sub-section (1) of Section 14 of the Act specifies the contracts which cannot be specifically enforced and one of the type of contract mentioned is which is in its nature determinable. It is thus evident that Section 14(1) is attracted to those contracts which cannot be specifically enforced and it includes a contract which in its nature is determinable. The aforementioned provision when read with Explanation (1) of Section 10 then it becomes evident that breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. In other words, a presumption is available under Explanation (1) of Section 10 that the court must presume that the breach of a contract to transfer immovable property must be specifically enforced and the alternative relief of securing compensation in money would not be adequate. Therefore, on principle as well as on precedent the legal position is against the defendant-appellants.

11. The judgment of the Supreme Court in the case of *Her Highness Shanti Devi Gaekwad (supra)* does not apply to the facts of the present case because there the plaintiff had entered into an agreement with the defendant and it was to construct a portion of her land as dwelling units for weaker sections of society in accordance with a scheme evolved by the plaintiff under the Urban Land (Ceiling and Regulation) Act, 1976. An irrevocable power of attorney in favour of the plaintiff authorising him to administer the property, implement the housing scheme etc. was executed. However, subsequently, the plaintiff cancelled the agreement and power of attorney stating that they were illegal and inoperative. The trial court decreed the suit of the plaintiff and ordered specific performance of the agreement. The High Court dismissed the first appeal holding that the case was one of the agency coupled with interest and therefore, the agreement could not be rescinded and the power of attorney could not be revoked. On account of the fact that under the master plan the suit land was shown to be open space by the Urban authority and the residential building could not be constructed on it and, therefore, it was not possible to pass a decree for specific performance of the agreement between the parties. It was in these circumstances that the Supreme Court in para Nos. 56 and 57 has made

observation and reliance has been placed on Section 14(1)(c). It is obvious that the contract was determinable and the same could not be specifically enforced. Even otherwise, it was a contingent contract and did not involve any transfer of the property. Therefore, I find that the observation of the Supreme Court in para Nos. 56 and 57 of the judgment which have been relied upon by the learned Counsel have no application to the facts of the present case. I also do not find any substance in the argument that the continuous rise in the prices could constitute a basis for refusing specific performance of an agreement to sell. For the aforementioned proposition, reliance can be placed on a judgment of the Supreme Court in P. C. D "Souza "s case (supra).

12. For the reasons stated above this appeal fails and the same is dismissed. However, in the peculiar facts and circumstances of the case, I do not propose to impose any cost.