

RAJASTHAN HIGH COURT

Deendayal

Vs.

Harjot Kanwar

Civil First Appeal No. 59 of 1998

(Prakash Tatia, J.)

18.03.2002

JUDGEMENT

Prakash Tatia, J.

1. Heard learned counsel for the petitioner and the learned counsel for respondent No. 1. None appeared for respondents Nos. 2 and 3 after service.
2. This is appeal against the judgment and decree dated 23-9-1999 passed by the Additional District Judge No. 3, Jodhpur in Civil Original Suit No. 4/1994 by which the trial Court dismissed the suit for specific performance of the contract filed by the plaintiff but granted the decree for Rs. 5,100/- along with interest at the rate of 18% per annum against defendant No. 1. The suit against defendant Nos. 2 and 3 was dismissed.
3. Brief facts of the case are that the plaintiff filed the suit for specific performance of the contract alleging that the plaintiff entered into agreement with defendant No. 1 by which the defendant No. 1 agreed to sell his plot No. 102 situated at Village Soothla, Chopasani Road, Jodhpur for a consideration of Rs. 90,000/- on 23-11-1993. The plaintiff alleged that he paid Rs. 5,100/- to defendant No. 1. The rest of the amount was to be paid at the time of registration of the sale deed in favor of the plaintiff. Both the parties agreed that the sale deed will be executed by the first week of January, 1994.
4. Defendant No. 1 submitted written statement and admitted the agreement with the plaintiff but stated that there was a condition in the agreement that in case the plaintiff will not get the registration of the plot in the first week of January, 1994, the earnest money will be forfeited. The plaintiff was not ready and willing to perform his part of

the contract. The plaintiff did not turn up in the first week of January, 1994 for getting the sale deed registered, therefore, defendant No. 1 sold the plot to defendant Nos. 2 and 3 on 21-1-1994.

5. The defendant Nos. 2 and 3, deposit service, did not appear before the trial Court and the trial Court passed the order to proceed *ex parte* against defendant Nos. 2 and 3. The issues were framed by the trial Court. The plaintiff appeared himself as PW 1 and produced witness PW 2 Bhanwar Lal and also produced documentary evidence, whereas defendant No. 1 appeared herself as DW 1 before the trial Court. Defendant Nos. 2 and 3 did not appear even as witnesses.

6. The trial Court, while deciding issue No. 1, held that the agreement dated 23-11-1993 is an admitted fact. The plaintiff was ready and willing to perform his part of the contract and the time was not the essence of the contract. The trial Court further, while deciding issue Nos. 5 and 6 held that by execution of the sale deed in favor of defendant Nos. 2 and 3 by defendant No. 1, the right of the plaintiff is not affected. Despite above findings, the trial Court, while deciding issue Nos. 2 and 3 held that the plaintiff is not entitled for decree for specific performance of the contract and the plaintiff is entitled for only damages in view of the fact that defendant Nos. 2 and 3 purchased the above plot from defendant No. 1 by registered sale deed dated 21-1-1994 and defendant Nos. 2 and 3 have considered their house over the land in dispute. Therefore, the relief of specific performance will cause legal complication and multiplicity of the proceedings. While deciding issue Nos. 2, 3 and 4, the trial Court also observed that defendant Nos. 2 and 3 are the *bona fide* purchasers of the plot in dispute. In sum and substance, findings on issue Nos. 2, 3 and 4 are under challenge in this appeal.

7. In the appeal, the learned counsel for the appellant vehemently submitted that the findings recorded on issue Nos. 2, 3 and 4 are not only contrary to the facts of the case but, in fact, the trial Court has committed grave illegality in deciding the above issues on the basis of absolutely non-existent pleas. It is submitted by the learned counsel for the appellants that defendant Nos. 2 and 3 did not appear before the trial Court after service of the summons and did not choose to controvert the facts mentioned in the plaint of the plaintiff. They have not even pleaded that defendant Nos. 2 and 3 are the *bona fide* purchasers for a valuable consideration and they had no knowledge of the agreement dated 23-11-1993 even they did not choose to appear as witnesses before the trial Court to rebut the case of the plaintiff much less to the setting up any case of *bona fide* purchasers for considerable value without notice, of earlier

agreement in favor of the plaintiff. Not only this but the finding of the trial Court that defendant Nos. 2 and 3 are the *bona fide* purchasers is clearly contrary to the evidence of the defense (DW 1) herself. Since there was no such pleas raised by the defendant, no issue was framed for this point and there is no pleading or issue that the defendants constructed the house over the plot. There is no evidence on record that the defendants No. 2 and 3 have constructed the house over the plot in dispute.

8. The learned counsel for the respondent vehemently submitted that defendant Nos. 2 and 3 have constructed the house over the land in dispute and also submitted that the plaintiff failed to get the registration of the documents within the period mentioned in the agreement to sell. It is also submitted that the time was essence of the contract, therefore, if the trial Court has not granted relief for specific performance of the contract, the trial court has not committed any illegality. The learned counsel for the respondent relied upon several judgments to show that the relief of specific performance of the contract is discretionary relief and the court can refuse to grant relief even if it is lawful to grant.

9. I perused the facts of the case. It is clear from the pleadings of the parties that the defendant Nos. 2 and 3 who only could have set up the defenses like *bona fide* purchasers of the property for valuable consideration without knowledge of agreement dated 23-11-1993, have not appeared before the trial Court and did not choose to take above defiance. Not only this but even defendant No. 1 also did not take such pleas and rightly she did not take these pleas as these pleas were available to the purchaser only.

10. Issue No. 2 is with respect to the relief whether the plaintiff is entitled for relief of specific performance of the contract and is also entitled for relief of possession from defendant No. 1. Issue No. 3 is with respect to the relief of injunction in case the suit is decided in favor of the plaintiff. Issue No. 4 is whether the plaintiff is entitled for declaration that the sale deed executed by defendant No. 1 in favor of defendant Nos. 2 and 3 ineffective against the interest of the plaintiff and that the plaintiff is not bound by the above sale deed. If issue Nos. 2, 3 and 4 if examined it is clear that they were not having any relation with above pleas nor the trial Court had any jurisdiction to record findings like defendant Nos. 2 and 3 are *bona fide* purchasers, the defendant Nos.2 and 3 constructed house and defendants No. 2 and 3 had no knowledge of agreement dated 23-11-1993 which were recorded by the trial Court while deciding issue Nos. 2, 3 and 4. This is unfortunate and very strange the manner in which the trial Court recorded the findings while deciding issue Nos. 2 and 4. More shocking is

that findings are merely not only without pleading and issue but also without any evidence on record. Even these questions were not put to the plaintiff in cross-examination by defendant No. 1 (assuming she was entitled to put) that whether defendants No. 2 and 3 had knowledge of the agreement or not before purchasing the property in dispute ? Whether defendants have constructed any house over the plot in dispute. If defendant Nos. 2 and 3 have raised any construction then what is that construction? Matter has not come to an end here but even defendant No. 1 who appeared to depose before the trial Court even did not state that defendant Nos. 2 and 3 are *bona fide* purchasers or they have constructed house over this plot after purchase. It appears that the learned Judge of trial court, to record finding in favor of defendant Nos. 2 and 3, ignored the statement of defendant No. 1 where she categorically stated that defendant No. 1 herself informed the defendant No. 2 that she entered into agreement to sell the plot to the defendant. She also stated that she had shown the copy of the agreement to Abubakkar defendant No. 2. Even for the alleged construction of house is concerned, only evidence available on record is that in cross-examination, the defendant No. 1 stated that she had no knowledge whether, before construction of house, Abubakkar purchaser, obtained any permission for construction or not ? This evidence of ignorance of defendant No. 1 that too only in answer with respect to obtaining permission for raising construction cannot be said to be any evidence to prove the fact that the defendant Nos. 2 and 3 have raised the construction of the house over the property in dispute. The trial Court even did not consider the admitted fact, like the date of agreement 23-11-1993, time for registry was up to first week of January, 1994. Notice was served by the plaintiff upon the defendant on 22-1-1994. Reply was given by the defendant on 7-2-1994, that too without disclosing the names of purchasers. The plaintiff filed the suit without any delay on 11-3-1994. In these circumstances even if the defendant Nos. 2 and 3 have raised any construction over the plot in dispute, it deserves to be ignored and relief to the plaintiff in these circumstances cannot be denied.

11. Further it is found from the certified copy of the sale deed (Ex. 6) executed by defendant No. 1 in favour of defendant Nos. 2 and 3 that stamps were purchased by the purchasers for registry on 13-1-1994. The sale deed was executed on 18-1-1994. The defendant No. 1 admitted in her evidence that she entered into contract for sale on 10-1-1994 with the defendant Nos. 2 and 3. Therefore, it can be presumed that negotiation for purchase of the property by defendant Nos. 2 and 3 must have started prior to 10-1-1994 which may come even within the period which was available to the plaintiff under the agreement dated 23-11-1993. The trial Court itself held that time

was not essence of the contract. It appears that the sale deed was got executed in hot haste knowing it well that the plaintiff has prior right to purchase the property in dispute. Therefore, when defendant Nos. 2 and 3 have purchased the property in this manner and started negotiation for purchasing even within period available to the plaintiff or within one or two days after the period available to the plaintiff in the agreement dated 23-11-1993 then there is no reason to hold that defendant Nos. 2 and 3 were *bona fide* purchasers of the property in dispute. Not only this but the plaintiff was ready to purchase the property for a consideration of Rs. 90,000/- whereas defendant Nos. 2 and 3 purchased the property for a consideration of Rs. 75,000/-. This fact also shows that defendant Nos. 1, 2 and 3 all were not *bona fide* in executing the above sale deed dated 18-1-1994. In fact, these facts clearly show the *mala fide* action on the part of defendant No. 1 in collusion with defendant Nos. 2 and 3 and it can be safely held that defendant Nos. 2 and 3 purchased the disputed plot despite the clear knowledge of the agreement to sell dated 23-11-1993 in favor of the plaintiff and his prior right to have the title of the property, the defendant Nos. 2 and 3 are held not to be *bona fide* purchasers.

12. The reason given by the trial Court for refusal of decree for specific performance of the contract on the ground that defendant Nos. 2 and 3 have raised the construction over the plot in dispute is also absolutely contrary to facts as well as the settled proposition of law that no one can be permitted to overreach the process of the court and no one can claim equity in his favor on the strength of money. It appears that defendant Nos. 2 and 3 were confident that once they will get the sale deed registered in their favor, they will invest the money over the plot in dispute by raising construction on the same, thereafter, the courts will be helpless and cannot grant the relief to a person claiming his legitimate right. The defendants were under absolutely mistaken impression.

13. It is clear from the above facts that the plaintiff tried his best to perform his part of the contract and within about two months of the period provided for registration in the agreement, filed the suit for specific performance of the contract before the trial Court. Despite this, the defendant Nos. 2 and 3, if have raised construction over the plot in dispute during pendency of the suit, their action of raising construction as well as investing money deserves to be ignored while considering relief to the plaintiff. It is settled law that the rights of the parties are to be considered as they were existed on the date when the suit was filed. Since the sale deed was registered in favour of the defendants only on 19-2-1994 and the plaintiff filed the suit on 11-3-1994 and if the

defendants Nos. 2 and 3 have raised the construction during the pendency of the suit then it is with object to overreach the process of the court. There is no reason to give benefit to defendant Nos. 2 and 3 of their illegal act. Therefore, also the trial Court has committed grave error of fact as well as error of law in refusing relief to the plaintiff for specific performance of the contract. Hence the findings on issue Nos.2, 3 and 4 are set aside.

14. The learned Counsel for the respondent tried to support his arguments by citing a number of judgments and relied upon the judgments of *Smt. Chand Rani (dead) by L.Rs. v. Smt. Kamal Rani (dead) by L.Rs.*, ¹ *K. S. Vidyanandan v. Vairavan*, ² *Smt. Bismillah Begum (dead) by L.Rs. v. Rahmatullah Khan (dead) by L.Rs.*, ³ *Smt. Kamal Rani v. Smt. Chand Rani*, ⁴ and *M/s. Venkateswara Minerals, Firm v. Jugal Kishore Chiranjit Lal, Firm*, ⁵ These authorities nowhere help the respondents because of the reason that the trial Court found that time was not essence of the contract in this case and I also perused the facts of the case, evidence produced by the parties and the agreement itself and I am of the firm view that the time was not essence of the contract in this case. Even the judgments relied upon by the learned Counsel for the respondents do not fully support the contentions raised by the respondents. The Constitution Bench of the Supreme Court in the case of *Smt. Chand Rani (dead) by L.Rs.* (AIR 1993 Supreme Court 1742) (supra) again considered in 2002 AIR SCW 417, held (para 8) :-

"It is a well-settled principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity, which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

(Emphasis supplied)

Therefore, submission of learned Counsel has no force.

15. The learned Counsel for the respondent also tried to submit that the plaintiff failed

to prove his readiness and willingness to perform his part of the contract for which the learned Counsel relied upon the judgments of : *Jugraj Singh v. Labh Singh*,⁶ *Umrao Lal v. Sunder Singh*,⁷ and *Munarma Devi alias Manorama Deve v. Gango Devi alias Gangia Devi*,⁸ The above judgments have no application to the facts of this case, particularly when the plaintiff was entitled to get the registration of the document till first week of January, 1994. He stated on oath that he made the efforts for getting the sale deed executed from defendant No. 1 within this period but defendant No. 1 sought time for execution of sale deed because of the illness of her husband and illness of defendant No. 1 husband is an admitted fact. No notice was given by the defendant No. 1 to the plaintiff disclosing her intention to rescind the contract. The plaintiff served notice immediately on 22-1-1994 which was received by defendant No. 1 on 25-1-1994. The defendant gave reply of the notice on 7-2-1994. The plaintiff filed the suit on 11-3-1994 just after one month of the refusal from defendant No. 1. These dates itself are sufficient indication of readiness and willingness of the plaintiff to perform his part of the contract.

16. The learned Counsel for the respondent further submitted that the relief of specific performance of the contract is equitable relief and since defendant Nos. 2 and 3 have raised construction of the house, therefore, the relief of specific performance of the contract may not be granted and the trial Court has committed no illegality in refusing relief to the plaintiff. I am unable to accept the contention of the learned Counsel for the respondent. In fact and reasons discussed above, all the equities lie in favor of the plaintiff for grant of relief of specific performance of the contract. Looking to the conduct of the defendants, they are not entitled to claim any equity in their favor.

17. In view of the above discussion, this appeal is allowed. The findings recorded by the trial Court on issue Nos. 2, 3 and 4 are set aside and the judgment and decree of the trial Court is set aside. The suit of the plaintiff is decreed for specific performance of the contract dated 23-11-1993 and it is held that the plaintiff is entitled to get the execution of the sale deed and its registration in pursuance of the agreement to sell dated 23-11-1993. The plaintiff shall deposit the balance amount of the sale consideration before the trial Court within one month from the date of the judgment of this Court. Upon depositing the above amount, the defendant Nos. 2 and 3 shall execute the sale deed in favor of the plaintiff to convey valid title in favour of the plaintiff for the disputed property. It is also held that the sale deed executed by defendant No. 1 dated 18-1-1994 and registered on 19-1-1994 in favor of defendant Nos. 2 and 3 will not affect the right, title and interest of the plaintiff flowing from the

agreement to sell dated 23-11-1993. The defendants shall hand over the possession of the land in dispute to the plaintiff after registration of the document.

18. In case of non-execution of the proper sale deed by defendant Nos. 1, 2 and 3 in favor of the plaintiff, the plaintiff shall be entitled to get the sale deed executed through the court on behalf of defendant Nos. 1, 2 and 3 and shall also be entitled to take possession of the vacant plot from the defendants through court and, consequently, the defendants will be free to remove any structure, if they have constructed over the plot in dispute, at their expenses and, in case, the defendants will not remove the structure from the plot in dispute, the plaintiff shall be entitled to remove the structure at the costs of defendant Nos. 2 and 3. Out of the balance amount of sale consideration deposited by the plaintiff Rs. 75,000/- will be payable to the defendant Nos. 2 and 3 as this amount has already been paid by the defendant Nos. 2 and 3 to defendant No. 1 against the cost of the plot and for the balance amount, cost of the suit and appeal will be refunded to the plaintiff and if amount remains thereafter it will be paid to defendant No. 1. Cost of the suit and appeal in the facts of the case is awarded against only defendant No. 1.

Order accordingly.

Cases Referred.

1. AIR 1993 SC 1742
2. AIR 1997 SC 1751
3. AIR 1998 SC 970
4. AIR 1980 Delhi 188
5. AIR 1986 Kar14
6. AIR 1995 SC 945
7. 1998 (3) Raj LW 1982
8. AIR 1997 Pat 10