

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

**R.S.A. No.1122 of 1989
Decided on: 11.02.2015.**

Jug Lal & Others . . . Appellants

Versus

Kalia @ Kalu & Others . . . Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Siddharth Sharma, Advocate for
Mr. Anupam Gupta, Advocate
for the appellants.

Mr. D.S. Bali, Senior Advocate with
Ms. Neetu Singh, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

1) The present regular second appeal was filed under Section 41 of the Punjab Courts Act. Framing of question of law was not necessary in the light of decision rendered by Full Bench of this Court in '**Ganpat versus Smt. Ram Devi and Ors. 1977 PLR Page-1**', wherein it was held that the provisions of Section 41 of the Punjab Courts Act, are in no way effected and curtailed by the amendment made in Section 100 of CPC. Now, since the regular second appeal is maintainable only with the aid of section

100 CPC, therefore, substantial questions of law is *sine qua non* for maintaining the appeal.

Prior to amendment of Section 100 CPC, a second appeal could have been filed before this Court on the grounds set out in clauses (a) to (c) of Section 100 (1) CPC i.e. (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law and (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Now the interference in the second appeal could only be made if substantial question of law arises in the case. Therefore, the interference cannot be only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim '*interest reipublicae ut sit finis litium*'. The underlined purpose was to bring finality to the issues/litigation at some point of time.

2) In the present appeal, the substantial question of law has not been framed. Thus the Court proposes to frame following substantial question of law in order to test the legality of claim of appellants:-

1. Whether specific performance of contract can be enforced in favour of plaintiffs, who failed to aver or prove readiness and willingness on his part to perform his obligations in terms of Section 16 (c) of the Specific Relief Act, 1963?

2. Whether the requirement of Section 16 (c) of Specific Relief Act will not militate against the plaintiffs in view of his averments in the plaint and even in the absence of issuance of notice to the defendants, calling upon them to perform their part of contract?
3. Whether limitation in terms of Section 54 of the Limitation Act would start when the vendor had notice that performance has been refused by the vendor?
4. Whether the concurrent findings of facts howsoever erroneous can be disturbed in second appeal and substantial question of law has to be distinguished from a substantial question of fact?
5. Whether all possible inferences drawn by the Courts below can be substituted by way of opinion by this Court in second appeal?

3) The plaintiffs are in second appeal against the concurrent judgments and decrees passed by the Courts below against them in a suit for specific performance of contract dated 20.02.1975.

4) The plaintiffs Jug Lal and others filed a suit for specific performance of contract dated 20.02.1975 in respect of 48 kanals of land on the basis of abovesaid agreement in which a consideration of ₹9,000/- was fixed. The total sale consideration was paid and the same was coupled with the delivery of possession. No target date for registration of the sale deed was fixed. Plaintiffs claimed that they are in possession of the land in question without payment of any rent.

5) The suit was contested by the defendants by taking all the customary pleas. Agreement to sell dated 20.02.1975 was not admitted and it was alleged that in fact the land was given to the plaintiffs as licensee and for that purpose the agreement was

sought to be executed by the parties and the plaintiffs executed the licence deed in favour of the defendants. The defendants alleged that plaintiffs might have forged and manipulated the agreement of licence into agreement of sale. In this way, the alleged agreement to sell was outcome of fraud and misrepresentation. Secondly, the alleged agreement to sell was claimed to be without consideration and was never acted upon between the parties and being a sham transaction was alleged to be void document.

6) After filing the replication, the trial Court framed the following issues:-

1. *Whether the plaintiffs have always been ready and willing to perform their part of contract as alleged? OPP.*
2. *Whether the agreement dated 20.02.75 is the result of fraud, misrepresentation and coercion as alleged? OPD.*
3. *Whether the suit is barred by law of limitation as alleged? OPD.*
4. *Whether the agreement dated 20.02.1975 is without consideration and was never acted upon by the parties as alleged in para No.2 of the additional pleas of the written statement? OPD.*
5. *Relief.*

7) Both the parties were allowed to lead evidence. Trial Court dismissed the suit by deciding Issue No.1 against the plaintiffs. Decision on Issues No.2 and 4 went against the defendants and the suit was not found to be barred by limitation as Issue No.3 was not pressed. Trial Court dismissed the suit primarily on the findings recorded under Issue No.1 to the effect

that the plaintiffs were not found ready and willing to perform their part of contract.

8) Plaintiffs unsuccessfully challenged the judgment and decree of the trial Court before the 1st Appellate Court, who dismissed the same vide judgment and decree dated 23.01.1989.

9) Plaintiffs got examined Krishan Lal (scribe) as PW-1, Jug Lal one of the plaintiffs appeared as PW-2, Ram Dia attesting witness to the agreement to sell as PW-3 and Jagdish Lal Lamberdar another attesting witness to the agreement to sell as PW-4, besides exhibiting agreement to sell as P-1, copy of jamabandi for the year 1980-81 as P-2, copy of order passed in Civil Suit No.660 of 1984, titled 'Kalu & Others versus Jug Lal' decided on 02.08.1984 as P-3, copy of khasra girdawari as P-4 and copy of jamabandi for the year 1975-76 as P-5.

10) On the other hand, defendants examined Fajar Ali, one of the defendants, as DW-1 and examined Sawan Ram as DW-2, besides exhibiting D-1 and D-2 copies of mutation on record.

11) Trial Court dismissed the suit of the plaintiff. Appeal was filed before the lower Appellate Court and an application for additional evidence in terms of order 41 Rule 27 CPC was also filed. The additional evidence was sought to be adduced at appellate stage to demonstrate that average price of land during the period 1975 to 1980 was only ₹1361.30 paisa and the said evidence would suffice to meet the observation of trial court on the point of consideration being meager and inadequate.

12) The said application was dismissed by the lower Appellate Court, who decided the appeal on merits and affirmed the findings of trial Court under Issue No.1 to the effect that the plaintiffs were not proved to be ready and willing to perform their part of contract. None issuance of notice to the defendants was construed to be an act of plaintiffs not being ready and willing to perform their part of contract. Since no good reasons were assigned for not getting the sale deed executed immediately after the agreement to sell, even after alleged payment of entire consideration, therefore, this was also construed to be an act of misgivings. Relief of specific performance is a discretionary relief, therefore, postponement of registration of sale deed for such a long time was also construed to be an act of passiveness. The lower Appellate Court dismissed the appeal on these broader issues.

13) The lower Appellate Court also recorded the findings under Issues No.2 and 4 that had it been a case of agreement to sell, the plaintiffs would not have waited for such a long time. They would have sought specific performance of contract promptly. Since no notice was issued to the defendants for making good their part of obligation, therefore, adverse inference was drawn against them and it was held that suit land was given to them on lease for 5 years. The appeal was dismissed.

14) In the present appeal, learned counsel for the appellants has argued that the execution of agreement to sell dated 20.02.1975 is duly proved by the testimonies of scribe and attesting witnesses. Even DW-1 Fajar Ali has also admitted

agreement to sell Ex.P-1, but in different context, describing the same to be a lease agreement for 5 years. Learned counsel further submitted that the alleged plea of fraud was never pleaded nor proved like a criminal trial and in the absence of that it can not be doubted. Time was not the essence of contract, therefore, none fixing of target date was not to be considered as mitigating circumstance to infer anything against the plaintiffs. Plaintiffs demonstrated their readiness and willingness in terms of Section 16 (c) of the Specific relief Act.

15) On the other hand, learned counsel for the respondents has argued that in fact the transaction was a lease deed for 5 years which was executed by way of writing. It was fraudulently transformed into agreement to sell by the plaintiffs themselves. No notice for the performance of agreement to sell was ever issued. Therefore, the plaintiffs were not found to be ready and willing to perform their alleged part of obligation. It has been again submitted that limitation under Section 54 of the Limitation Act is fully attracted to the facts of this case and under Section 3 of the Limitation Act, the trial court was under legal obligation to see that cause propounded by the plaintiffs was within limitation or not.

16) This Court has analyzed the evidence meticulously. Jamabandi for the year 1980-81 (Ex.P-2) shows the land to be *shamlet deh*, Kalu & Fazar Ali were shown to be co-sharers and their possession was through the plaintiffs as *gair marusian*. The *column* of rent was shown as '*bila lagan bavajah bai*'. Remarks column of the document did not contain any reference of lease or

otherwise. From this document, possession of the plaintiff was discernible. Secondly, the possession of the plaintiffs was discernible from the order dated 02.08.1984 passed in civil suit wherein defendants sought injunction to restrain the present plaintiffs from changing the existing condition of the land by way of raising any construction. After filing of the suit, plaintiffs (present defendants) Kalu and Fazar Ali got the same dismissed as withdrawn vide order dated 02.08.1984. From this order also, the possession of the plaintiffs was writ large. Even as per subsequent revenue record i.e. Khasra girdawari (Ex.P-4), the possession of plaintiffs was depicted. Jamabandi for the year 1975-76 also showed possession of the plaintiffs as *gair-marusian* under the defendants, with a recital of '*bila lagan bavajah bai*'. In the relief column, plaintiffs claimed that their possession was on account of part performance in terms of Section 53(A) of the Transfer of Property Act and therefore, it was protected and due execution of agreement to sell was also proved.

17) This Court has considered the arguments. According to Section 16 (c) of the Specific Relief Act, the plaintiffs have to prove readiness and willingness even if the time was not the essence of the contract. Requirement of sending notice to the defendants, requiring them to execute the sale deed as per agreement was *sine qua non*. In the absence of notice it could not have been presumed that the plaintiffs were ready and willing to perform their part of contract.

18) Even as per Section 16 (c) of the Specific Relief Act, readiness and willingness on the part of the plaintiffs has to be treated as a condition precedent for obtaining such relief. Plaintiffs must allege and prove their continuous readiness and willingness from the very inception of agreement till filing of suit. In a sale of immovable property there can be no presumption as to time being essence of contract. Even if it is not an essence of contract, the Courts may always infer that it is to be performed within a reasonable time. Since time period is more than 8 years from the agreement and the filing of suit, therefore, such a period can not be construed as a reasonable period. Reference can easily be made to **'Chand Rani versus Kamla Rani AIR 1993 (SC) 1742'**.

19) It is true that in a suit for specific performance no specific words are required to be used to aver that plaintiffs were ready and willing to perform their part of obligation and this will not militate against the plaintiffs if entire pleadings are capable of indicating the aspect of readiness and willingness. In the instant case, bare reading of the plaint does not advance the case. There was no recital of any notice having been issued to the defendants to perform their part of obligation. The conduct of the plaintiff in not adhering to the essential requirement, disentitles them from claiming such equitable discretion at the hands of the Court.

20) Specific performance is a discretionary relief. Court is not bound to grant such relief merely on the ground it is lawful to do so. The discretion cannot be exercised in arbitrary manner, but it has to be on sound and reasonable judicial principles which are

amenable to correction in appeal. Court is not obligated to grant the aforesaid discretionary relief of specific performance merely on the strength of niceties of legal aspect. The Court can refuse the same where the performance of the contract would involve some hardship to the defendants which they did not foresee at the time of execution of agreement. However, the deviation from the normal rule should be based strictly in consonance with the exemptions defined under Section 20 of Specific Relief Act.

21) In view of **2002 (3) PLJ 729 Suresh Singla versus Smt. Phoolwati & Anr'** intention of the parties should be appreciated for postponing of registration of sale deed for such a long period. In view of Section 20 of the Specific Relief Act, the Court is not bound to grant relief of specific performance in such a situation.

22) Even if agreement to sell is proved to be lawfully executed, the case of the plaintiffs has to be tested on the touchstone of Section 16 (c) of the Specific Relief Act. Both the Courts have recorded findings of fact. In second appeal these findings of facts howsoever erroneous cannot be disturbed. The substantial question of law has to be distinguished from a substantial question of fact. The substantial question of law as framed stands answered in this manner.

23) It is equally true that if two inferences are possible in a given set of circumstances, then the view taken by the lower Appellate Court has to be preferred in regular second appeal. This is also cardinal principle of law that High Court cannot substitute its

opinion for the opinion of 1st Appellate Court unless the conclusion arrived at by the lower Appellate Court is found to be the result of misreading of evidence or contrary to the mandatory requirement of law or having suffered with any perversity. I am squarely fortified in my view on the strength of decision rendered in **2006 (4) R.C.R. (Civil) 319 Mst. Sugani versus Rameshwar Dass & Anr.'**

24) Since the possession of the plaintiffs was found to be subsisting over the suit land and even as per revenue record, it is projected. According to the plaintiffs, the possession was on account of part performance and this fact was sought to be corroborated by pleadings. The suit for possession filed by the defendants has already been dismissed. Since there is no material to this effect on record, therefore, this Court declined to answer such an issue. The plaintiffs may have their own remedies in the this context.

25) In the present appeal set of circumstances, substantial question No.1 as formulated is answered in favour of the defendants as the plaintiffs were not proved to be ready and willing to perform their part of obligation. Therefore, the plaintiffs are not entitled to discretionary relief of specific performance. For want of notice to the defendant, question No.2 is also answered against the plaintiff. Since no time was prescribed for execution of sale deed and no notice was served upon the defendant to execute the sale deed, therefore, the period of limitation cannot be stretched to infinity. Consequently, question No.3 is also decided against the plaintiff. On the basis of decision on aforesaid questions, the

decisions on questions No.4 & 5 can be given that questions of law are always distinct than a question of fact and the inferences drawn by the Courts below on facts cannot be disturbed in second appeal on reappreciation of evidence. Hence this Court cannot substitute the findings of facts recorded by the Courts below with its opinion on the basis of reappreciation of evidence as no misreading of evidence is involved, nor the findings of the Courts below can be said to be perverse.

26) Consequently, impugned judgments and decrees passed by the Courts below do not call for any interference. The appeal is dismissed as such, leaving the parties to bear their own costs.

[Raj Mohan Singh]
Judge

11.02.2015
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