

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

**RSA No.1543 of 2007 (O&M)
Date of Decision: August 27, 2015**

Rameshwar Dass Gupta

.... Appellant

vs.

Shri Kailash Chander Sharma

.... Respondents

CORAM: HON'BLE MR. JUSTICE KULDIP SINGH

Present: Mr. Avinash Mittal and Mr. Ravi Kant Sharma, Advocates
for the appellant.

Mr. Raghuvinder Singh, Advocate
for respondent Nos.2 to 5.

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment? yes*
- 2. To be referred to the Reporters or not? yes*
- 3. Whether the judgment should be reported in the Digest? yes*

Kuldip Singh J.(Oral)

Impugned in the present regular second appeal is the judgment dated 12.01.2007 passed by learned Addl. District Judge, Fast Track Court, Ambala affirming the judgment and decree dated 31.01.2004 passed by learned Addl. Civil Judge (Sr. Divn.), Ambala Cantt., whereby the suit of the plaintiff was dismissed on the ground that it is barred under Order II, Rule 2 CPC and the plaintiff has no locus standi to file the suit.

Briefly stated, the plaintiff-appellant had filed a suit for specific performance of the agreement dated 16.01.1995 executed by defendant No.1 with the plaintiff regarding house No.751/10, Sikliqar Mohalla, Ambala Sadar, Ambala Cantt. It was stated that defendant No.1 representing himself to be the exclusive owner of the

disputed house agreed to sell the same to the plaintiff-appellant vide agreement to sell dated 16.01.995 for ₹1,52,000/-. The sale deed was to be executed on or before 15.04.1995 before the Sub Registrar, Ambala. ₹20,000/- were paid as earnest money and balance amount was to be paid before the sub Registrar at the time of registration of the sale deed. The possession was to be delivered at the time of execution of the sale deed. The plaintiff was always ready and willing to perform his part of the contract. However, defendant No.1 turned dishonest and got filed a false suit against himself by his daughter Mamta and others for permanent injunction restraining him and others from alienating the property in question to the plaintiff. On the said pretext, defendant No.1 refused to execute the sale deed, although, no objection certificate was obtained from Municipal committee, Ambala Sadar, Ambala Cantt. The office of the sub Registrar was closed due to holidays from 11.04.1995 to 16.04.1995. Therefore, on 17.04.1995, the plaintiff got his presence marked before the Sub Registrar. Though, defendant No.1 was present there but avoided the execution of sale deed on the pretext of suit filed by Ms. Mamta and others against him. He assured that the sale deed would be got executed later on. Both the defendants now in connivance with each other fully knowing about the agreement to sell dated 16.01.1995, made a deal regarding the house in question. Defendant No.2 purchased the house in question vide sale dated 09.06.1995 for ₹1,48,000/-. The actual sale consideration is much higher. Therefore, the sale deed executed by

defendant No.1 in favour of defendant No.2 on 09.06.1995 is illegal and not binding on rights of the plaintiff. Defendant No.2 is not a bonafide purchaser. The defendants are bound by said agreement.

In the written statement, defendant No.1 took the legal objections that the suit is barred under Order II, Rule 2 CPC. Defendant No.1 stated that he had every right to entered into the agreement dated 16.01.1995. The sale deed was to be executed on or before 15.04.1995 but the plaintiff failed to perform his part of the contract. The plaintiff was never ready and willing to perform his part of the contract. The receipt of ₹20,000/- as earnest money was also admitted. It was submitted that Ms. Mamta and others filed a civil suit against defendant No.1. No stay was granted in the said suit and defendant No.1 was hotly contesting the said suit. The plaintiff filed a suit for permanent injunction on 05.09.1995 though at that time remedy of the specific performance was available to him. Therefore, the present suit is barred under order II, Rule 2 CPC. It was pleaded that the plaintiff had failed to perform his part of the contract. Defendant No.1 sold his house in question to defendant no.2 at lower price. Defendant No.2 in the written statement took the plea that he is bonafide a purchaser for valuable consideration.

From the pleadings, following issues were framed:

“Whether plaintiff is entitled to possession of the suit property by way of specific performance of the agreement dated 16.1.1995? OPP

2. Whether plaintiff has no locus standi to file the present suit? OPD

*3. Whether suit is barred under order 2 rule 2 CPC ?
OPD*

*4. Whether defendant No.2 is bonafide purchaser of the
suit property, if so, its effect ? OPD*

5. Relief.

Thereafter, both the parties led their evidence. Issue Nos.1 and 3 were taken up together and decided against the plaintiff. Issue No.2 was also decided against the plaintiff. Issue No.4 was decided against defendant No.2 and consequently, the suit was dismissed.

The appeal filed by the plaintiff was also dismissed by the learned Addl. District Judge, Fast Tract Court, Ambala vide order dated 12.01.2007.

I have heard learned counsel for the parties and have also carefully gone through the case file.

The following substantial law point arises for determination:

“Whether the provisions of Order II, Rule 2 CPC have been correctly applied on the facts of the case and evidence available on the file?”.

A perusal of the file shows that learned Addl. Civil Judge (Sr. Divn.), Ambala has returned the findings on issue Nos.1 and 3. against the plaintiff primarily on the ground that the suit is barred under Order II, Rule 2 CPC.

Before the lower court, the plaintiff examined Manohar Lal, attesting witness of the agreement. He also proved No Objection

Certificate regarding transfer of the suit property and also appeared in the witness box.

Learned Addl. Civil Judge (Sr. Divn.), Ambala had recorded the findings that on 13.06.1995, the plaintiff instituted a suit against defendant. Copy of which is mark 'B'. Therefore, he waived of his right to file the present suit for specific performance and consequently subsequent suit was hit by the provisions of Order II, Rule 2 CPC.

Here the few dates are required to be noted. The date of present agreement of sale is 16.01.995. The date of execution of sale deed was 15.04.1995. Since, there were holidays from 11.04.1995 to 16.04.1995, therefore, the plaintiff got his presence marked before the Sub Registrar on 17.04.1995. The defendant is also claimed to present there but he did not execute sale deed on the pretext of suit filed by his daughter Mamta and his sons. It also comes out that Mamta, daughter and two minor sons of defendant Kailash Chander Sharma filed a civil suit against him for restraining him from alienating the disputed house. The said suit was instituted on 10.04.1995 i.e. five days before the dated fixed for execution of the sale deed and was dismissed under Order IX, Rule 8 CPC on 17.05.1996. However, in the said suit no stay was granted. Meaning thereby that defendant No.1 was at liberty to execute the sale deed. Both the parties had come present in the premises of Sub Registrar. Both of them claim that the other party was not ready and willing to perform his part of the contract. It further comes out that thereafter

defendant No.1 executed a sale deed dated 09.06.1995 for ₹1,48,000/- in favour of defendant No.2. A perusal of copies of the orders Ex.PA and PC shows that in the meanwhile, the plaintiff had instituted a suit on 13.06.1995 against defendant No.1 restraining him from selling or alienating the disputed house. Copy of the statement Ex. PA shows that the plaintiff had made a statement withdrawing the said suit. The order passed in this regard is Ex.PB.

Now, the question would arise whether in such situation, provisions of Order II, Rule 2 CPC are attracted as held by both the courts below?

Order II, Rule 2 CPC provides as under:

“2. Suit to include the whole claim— (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

It means that if the plaintiff files a suit relinquishing or omitting part of the claim, he could not afterward sue in respect of the portion so omitted.

Admittedly, the palintiff had filed a suit for injunction against defendant No.1 on 13.06.1995 i.e. after the time for execution of sale deed had expired and the sale deed 09.06.1995 was executed in favour of defendant No.2 by defendant No.1. When the sale deed was not executed on 15.04.1995, the plaintiff could file the suit against defendant No.1, immediately, on breach of the agreement or could wait till the expiry of limitation of three years, during which he could file the suit. In case of execution of the sale deed in favour of third person regarding disputed property, he could immediately file the suit. Therefore, when on 09.06.1995, defendant No.1 executed the sale deed in favour of defendant No.2, he could, immediately, file the suit. What claim was made in the suit for permanent injunction is not on file. In EX.PA and Ex.PB, there is only heading of the suit on the file, wherein injunction was sought against defendant No.1.

The pleadings of the suit for permanent injunction were not brought on file to see as to whether the plaintiff had claimed that defendant No.1 has executed a sale deed in favour of defendant No.2.

The matter regarding applicability of provisions of Order II, Rule 2 CPC was discussed by Hon'ble the Supreme Court in case of “ ***Inbasegaran and another vs S. Natarajan (Dead) through***

Lrs”, 2014(4) R.C.R. (Civil) 872, wherein the plaintiff had filed a suit for permanent injunction for restraining the defendant from taking forcible possession. However, during the pendency of the suit, the defendant exhibited his intention of not performing his part of sale agreement. Therefore, the suit for specific performance was filed. It is held that the second suit was not barred under Order II, Rule 2 CPC.

In “*M/s bengal Waterproof Ltd. Vs M/s. Bombay Waterproof Manufacturing Company and another*”, *AIR 1997 Supreme Court 1398(1)*, it was held by Hon'ble the Supreme Court that to attract the bar under Order II, Rule 2 CPC the pleadings of first suit should have been brought on record. In the absence of pleadings, no interference can be drawn about such bar.

A similar view was expressed by this Court in “*Smt. Bhagwan Kaur vs Shri Harinder Pal Singh*”, *1992(1) PLR 643*.

Therefore, the defendants were required to prove that in the first suit for injunction, the plaintiff had the knowledge of sale deed dated 09.06.1995 and despite that he failed to sue for specific performance. When the suit for permanent injunction was filed, the plaintiff seek simple injunction and he had the hope that defendant no.1 will perform his part of the agreement. Since, the pleadings of the first suit are not on file, therefore, it cannot be said that the relief for specific performance could have been availed when first suit was filed and therefore the bar of under Order II, Rule 2 CPC is attracted.

Consequently, the findings of both the courts below on issue No.3 are set aside.

Now, the question would arise as to whether the plaintiff was ready and willing to perform his part of the contract and whether decree for specific performance was to be passed?

I am of the view that the plaintiff was ready and willing to perform his part of the contract. On 17.04.1995, he appeared before the Sub Registrar and got his presence marked. He claimed that defendant No.1 was also present but he did not execute the sale deed on the pretext that his daughter Mamta and his sons have filed a suit for permanent injunction against him only 5-6 days before the date fixed for execution of sale deed. Later on, when the suit was pending, defendant No.1 executed a sale deed on 09.06.1995 in favour of defendant No.2. The suit was withdrawn by said Mamta and others much later on 17.05.1996. It goes to show that defendant No.1 was not willing to perform his part of the contract. The fact that the plaintiff had even sought permanent injunction for restraining defendant No.1 from alienating the suit property, goes to show that the plaintiff was ready and willing to perform his part of contract. Consequently, it is held that the plaintiff is entitled to specific performance of the agreement to sell dated 16.01.1995.

As the result of the foregoing discussion, the impugned judgment and decree dated 12.01.2007 passed by learned Addl. District Judge, Fast Track Court, Ambala affirming the judgement and decree dated 31.01.2004 passed by learned Addl. Civil Judge (Sr. Divn.), Amabla Cantt., are hereby set aside. The suit of the plaintiff is decreed with costs. A decre for specific performance of agreement

dated 16.01.1995 is passed in favour of the plaintiff-appellant. Defendant No.1 is directed to execute the sale deed regarding the disputed property in favour of the plaintiff within a period of two month from the date of the passing of the judgment after receiving the balance sale consideration. Defendant No.2 is directed to join defendant No.1 in the execution of the sale deed. If the defendants fail to execute the sale deed in favour of the plaintiff, the plaintiff shall be at liberty to get the same executed through the process of court. The plaintiff shall also be entitled to the possession of the disputed property. The costs of the suit throughout are also allowed.

August 27, 2015
sarita

(KULDIP SINGH)
JUDGE