

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

**RSA No.1477 of 2010 (O&M)
Date of decision:29.09.2016**

Mange Ram

... Appellant

Vs.

Arvind Gulati

... Respondent

RSA No.6351 of 2014 (O&M)

Arvind Gulati and another

...Appellant

Vs.

Mange Ram and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Lokesh Sinhal, Advocate
for the appellant in RSA No.1477 of 2010 and
for the respondents in RSA No.6351 of 2014.

Mr. Arun Jain, Senior Advocate with
Mr. Mohit Sharma, Advocate
for the respondent in RSA No.1477 of 2010 and
for the appellants in RSA No.6351 of 2014.

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second Appeals. RSA bearing No.1477 of 2010 is arising out of decision of civil suit bearing no.756 of 2004 (hereinafter referred to as “suit no.1”) at the instance of the plaintiff seeking permanent injunction which has been dismissed by both the Courts below and RSA bearing No.6351 of 2014, whereby, both the Courts below have decreed the suit bearing no.429 of 2010 (hereinafter referred to as “suit no.2”) for specific performance of the agreement to sell, filed on 08.02.2010.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. Mohit Sharma, Advocate appearing on behalf of vendor, namely, Arvind Gulati, submitted that an agreement to sell dated 21.03.2003 in respect of plot measuring 405.94 sq. meter for a total sale consideration of ₹35 lacs was entered into for the sale of a plot bearing No.S-27/7, DLF Phase III, Gurgaon. In fact, it was realized that the area was little more. Instead of 450, it was 486 and the total sale consideration was increased to ₹37.86 lacs and against the payment of earnest money of ₹7 lacs, another ₹1 lac. was paid.

As per the terms and conditions of the agreement to sell, the appellant-vendor had to obtain the sale deed from the DLF and within one month thereafter vendee, Mange Ram and others was required to get the sale deed executed and registered. He further submitted that vendee instituted a suit no.1 on 17.07.2004 on the premise that the vendor had caused an advertisement dated 04.07.2004, in the newspaper to sell a plot in question. He also submitted that in the aforementioned suit, vendee categorically stated this fact. Once there was a breach, no explanation came forth in not filing the suit for specific performance which was filed in February, 2009. In fact, the suit no.2 for specific performance was barred by law of limitation, much less, hit by doctrine akin to Order 2 Rule 2 Code of Civil Procedure (hereinafter referred to as "CPC"). All these aspects have erroneously been ignored by both the Courts below. In fact, the agreement was frustrated as per the provisions of Section 156 of the Contract Act as the agreement to sell is a contingent one. Both the Courts below have erred in not taking into consideration the evidence led by vendee, wherein, he admitted that he had not deposited any charges towards the stamp and had

also not prepared any sale deed.

He further submitted that in cross examination, there is a categorical admission that after filing the suit for injunction in the year 2004, he had visited the office of DLF only in the year 2005 and had been in touch on telephone with the vendor but had no personal meeting with him. All these facts would reveal plaintiff was not always ready and willing to perform his part of the contract, in essence, there was no compliance of the provisions of Section 16 (c) of the Specific Relief Act, 1963 (hereinafter referred to as "1963 Act"), therefore, the discretion under Section 20 of 1963 Act ought not to have been granted and cited judgment rendered by the Hon'ble Supreme Court in **M/s Virgo Industries (Eng.) P. Ltd. Vs. M/s Venturetech Solutions P. Ltd. 2012(4) RCR (Civil) 372**, to contend that in case, the person has availed the remedy of injunction, though there was a breach, then suit for specific performance filed after almost six years was not maintainable in view of the embargo under Order 2 Rule 2 CPC.

He further submitted that as per simple and plain language of Article 54 of the Limitation Act, the cause of action to institute the suit, would be when there was breach. Once the breach had occurred in the year 2004, nothing prevented the plaintiff to seek the relief instead of pursuing the suit for injunction. In fact, the vendor did not have the sufficient funds, as deal was a speculative and kept on prolonging the matter. Even the notices dated 23.10.2003 and 27.10.2003 have also been sent, but yet he slept over it, rightly, civil suit seeking injunction was dismissed on 29.09.2009 on the premise that it was barred by statutory provisions of law, i.e., rigours of Section 41(h) of 1963 Act and it was also held that he was

not always ready and willing to perform his part of contract, but also availed the remedy by filing a statutory appeal, the same has also been dismissed on 10.12.2009. In this background of the matter, RSA bearing No.1477 of 2010 has been filed and this Court, vide order dated 14.03.2011 while admitting the same had framed the question of maintainability.

He also submitted that the vendee cannot enlarge the period of limitation owing to the findings given by the Lower Appellate Court in suit no.1 that he should have filed a suit for specific performance and in this regard, relied upon paragraphs 9 and 17 of the findings rendered by the Hon'ble Supreme Court in **Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas and another 2008(2) RCR (Civil) 936** and un-reported judgment rendered by this Court in **RSA No.155 of 2010 titled as Umrao vs. Lala and others decided on 03.08.2016.**

Vis-a-vis, limitation, he relied upon the un-reported judgment of the Hon'ble Supreme Court passed in **Civil Appeal bearing no.6687 of 2006 titled as Madina Begum and another vs. Shiv Murti Prasad Pandey and others decided on 01.08.2016.**

As regards, the suit being hit by provisions of Order 2 Rule 2 CPC, relied upon the judgment of this Court in **Sikander Singh and another vs. Gian Chand and others 2015 (Supplementary) Civil Court Cases 583.**

He also drew the attention of this Court to the averment made in paragraph 7 of the suit, wherein, it was been categorically stated that the vendor willfully failed to perform his part of the contract despite various

letters dated 23.10.2003 and 27.10.2003. All these factors would draw an irresistibly conclusion that the vendee was aware of the breach, yet he did not avail the remedy of specific performance through all the years as late as till February, 2010 and thus, urged this Court for dismissal of suit no.2 and as well as, RSA arising out of suit no.1.

Per contra, Mr. Lokesh Sinhal, learned counsel appearing on behalf of the vendee – Mange Ram, plaintiff in civil suit nos.1 and 2 submitted that area prescribed in the agreement to sell was not 405 square meter but in fact, it 406 square meter which is equivalent to 485 square yards and the price fixed was ₹35 lacs. He further submitted that the agreement envisaged the cause of action for the vendee for seeking execution and registration of the sale deed after the vendor had obtained the registered sale deed from the office of DLF and till then, vendor was required to bear all the expenses including the maintenance one.

He also submitted that to a specific question in cross examination, it was asked whether the vendor had obtained any sale deed from the office of DLF, the answer given was, in negative. He also submitted that no cause of action, as per the terms and conditions of the agreement to sell, had accrued for seeking the specific performance.

As regards the objection qua Order 2 Rule 2 CPC, he relied upon the ratio decidendi culled out by this Court in **Daulta Ram vs. Hari Ram and another 2003(2) RCR (Civil) 269** and as well as, **Sukhdev Mittar vs. Rameshwar Dass Gupta 1994(4) RCR (Civil) 196**.

In order to rebut the argument of Mr. Jain, *vis-a-vis* the suit being barred by law of limitation, Mr. Sinhal, relied upon the ratio

decidendi culled out by the Hon'ble Supreme Court in **Ramzan vs. Hussaini 1990 (1) Supreme Court Cases 104** to contend that when agreement to sell is a contingent one, the date fixed for performance would not be acceptable in the face of the contract deed but can be pressed into service only when date is ascertained and on similar lines, the judgments rendered by this Court in **Hukam Chand (deceased) through LRs vs. Jodha Ram (deceased) through LRs 2006(2) RCR (Civil) 424** and **Harbans Singh and others vs. Mohinder Singh and others AIR 2003 294**.

He further submitted that he had examined the Manager of DLF as PW3, and as per his statement, there was no such person in the name of Mrs. Bansal as the vendor in the written statement in a suit for permanent injunction had stated that he had obtained a copy of the sale deed from the office of DLF, in essence had not performed his entire part. In fact, intention of the vendor had become greedy as he was asking for interest @ 12% w.e.f. April 2003, evident from the averments made in paragraph 5 of the written statement and also, the maintenance charges which was not liability of the vendee. In fact, the vendee had always been ready and willing to perform his part of the contract and kept on waiting for a date or intimation regarding the act of defendant no.1 in obtaining the sale deed from the office of DLF but vendor failed to clear the dues of DLF, much less, did not obtain necessary deed of plot, thus, it is the vendor backed out from the contract and thus, urges this Court for affirming the findings under challenge in suit no.2, wherein specific performance of the agreement to sell has been ordered.

I have heard learned counsel for the parties and appraised the judgments and decrees of the Courts below and of the view that there is merit and force in the submissions of Mr. Jain, as all the judgments cited by Mr. Sinhal, are prior to decision rendered in M/s Virgo Industries (Eng.) P. Ltd's case (supra), i.e., on the applicability of Order 2 Rule 2 CPC. For the sake of brevity, paragraphs 10 and 11 of the judgment read thus:-

*“10. The object behind enactment of Order 2 Rule 2 (2) and (3) of the Civil Procedure Code is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order 2 Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in **Gurbux Singh v. Bhooralal**, AIR 1964 SC 1810 may be usefully recalled below :*

"In order that a plea of a bar under Order 2, Rule 2 (3), Civil Procedure Code should succeed the defendant who

raises the plea must make out(1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief,(3) that being thus entitled to more than one relief the plaintiff,without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

*The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments **Deva Ram & Anr. v. Ishwar Chand & Anr., 1995(3) R.R.R. 717 : 1995 (6) SCC 733** and **M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr., AIR 1997 SC 1398.***

11. The cardinal requirement for application of the provisions contained in Order 2 Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action,

*particularly, in view of the clear enunciation in a recent judgment of this Court in the **Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee, 2012(3) Recent Apex Judgments (R.A.J.) 600 : 2012(3) R.C.R.(Civil) 811 : JT 2012 (6) SC 149.** The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted hereinbelow:*

"Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

As per the ratio decidendi in the present case where breach had already occurred, therefore, the vendee had a cause of action to seek specific performance but yet instituted a suit for injunction on 17.07.2004 and the

suit for specific performance has been filed as noticed above on 08/04.02.2010. Nothing prevented the vendee to seek specific performance owing the breach, since the parties were at loggerhead, particularly according to the plaintiff, vendor had failed to obtain the conveyance deed. For the sake of brevity, paragraph 7 of the plaint giving alleged cause of action to the plaintiff and prayer clause read thus:-

“7. That the cause of action for the present suit is although cannot be said to be legally accrued prior to the date when the defendant no.1 would get sale conveyance deed of the plot in suit from the defendant no.3 in his favour but sine long period had elapsed due to deliberate non-performance of part of contract by the defendant no.1 for the reasons stated in para nos.4 and 5 of the plaint, still suit is being filed for compelling the defendant no.1 to have the formal sale conveyance deed from the defendant no.3 at the first instance and thereafter perform his part of contract in favour of the plaintiff by receiving the balance sale consideration within the stipulated period of one month to be commenced thereafter. The cause of action finally arose on or about 28.04.2009, when the defendant nos.1 and 2 under the guise of false plea of different type of mistakes finally refused to get formal sale conveyance deed from the present defendant no.3 and thereafter to execute the formal sale conveyance deed in favour of the plaintiff.”

“(i) a decree specific performance of the contract mentioned in para no.2 of the plaint qua the plot mentioned in para no.1

of the plaint on payment of balance sale consideration of Rs.27,00,000/- (Rupees Twenty Seven Lac. Only) or any other amount, which the Hon'ble Court deems just and proper payable to the defendant no.1, besides expenses for stamp and registration charges to be borne by the plaintiff for formal execution and registration of the sale conveyance deed by the defendant no.1 in favour of the plaintiff in respect of the plot in suit but prior thereto the defendant no.1 would get executed and registered a formal sale conveyance deed from the defendant no.3 in his favour at his own expenses and thereafter inform the plaintiff in writing in this regard and then the plaintiff would make payment of balance sale consideration within a period of 30 days thereof and;”

The same very relief could have been sought in the earlier suit or at least after going through the contents of the written statement, nothing prevent vendor to seek amendment of the suit but kept on pursuing the same upto this Court,

Therefore, in my view, the suit was/is barred according to the provisions of Order 2 Rule 2 CPC. Even the suit was/is barred by law of limitation on going through the plain and simple language of Article 54 of the Limitation Act. For the sake of brevity, the same reads thus:-

For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
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Where the agreement to sell does not prescribe the date for

seeking specific performance, then the same should be from the date of notice when performance is refused. Once according to the vendee, there was a breach owing to the advertisement, there was no occasion for him to seek the remedy which was, *ex facie*, was barred as per the provisions of Section 41(h) of the Act. Even in the injunction suit, finding has been given by the Court below that vendee had never been ready and willing to perform his part of the contract.

I do not subscribe to the view of Mr. Jain vis-a-vis area of the property as agreement to sell only mentioned 406 square meters which is equivalent to 480 square yards and total sale consideration was ₹35 lacs and not ₹37.25 lacs. Once according to the vendee, the vendor had already faulted in not obtaining the sale deed, the prayer sought in the suit filed in the year 2010 as noticed above could have been sought. All these factors escaped from the notice of the Courts below, yet the Court had formed the opinion that the vendee had always been ready and willing to perform his part of the contract and erroneously exercised discretion under Section 20 of 1963 Act.

No doubt, this Court, on earlier occasions, had been framing the substantial questions of law while deciding the appeal but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213** wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, whether provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure. The

Constitutional Bench of Hon'ble Supreme Court held that the decision in *Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262* on applicability of Section 97(1) of CPC was not correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back and therefore, I do not intend to frame the substantial questions of law while deciding the appeals aforementioned.

In view of the discussion made herein-above, the ratio decidendi culled out in the judgments cited by Mr. Sinhal also does not apply to the instant case.

Accordingly, the judgment and decree in suit no.2 seeking specific performance is hereby set aside. Resultantly, the suit is dismissed. The appeal at the instance of vendor is allowed and Regular Second Appeal arising out of suit No.1 seeking injunction is hereby dismissed.

(AMIT RAWAL)
JUDGE

September 29, 2016
savita

Whether reasoned/speaking Yes/No

Whether reportable Yes/No