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

**1. RSA-5119-2014 [O&M]
Date of Decision : May 26th, 2016**

Saroj Appellant

Versus

Sunita .. Respondent

2. RSA-5938-2014 [O&M]

Saroj Appellant

Versus

Rishi Pal .. Respondent

CORAM : HON'BLE MR. JUSTICE SHEKHER DHAWAN.

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporters or not? | |
| 3. Whether the judgment should be reported in the Digest? | Yes |

Present Mr.Munish Kumar Garg, Advocate,
for the appellant.

Mr. Atul Gaur, Advocate,
for Mr. Sumeet Goel, Advocate,
for the respondent.

SHEKHER DHAWAN, J.

Present Regular Second Appeals are against the concurrent findings of fact recorded by both the Courts below whereby, Civil Suit No. 359 of 2009 for partition filed at the instance of Saroj was dismissed and Civil Suit No. 358 of 2009 filed by Sunita against Saroj for specific

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performance was decreed and the appeals filed by Saroj were dismissed by learned Additional District Judge, Kaithal vide common judgment and decree dated 23.07.2014.

2. Two separate Civil Suits were filed before Civil Judge [Junior Division], Kaithal, one at the instance of Saroj, Civil Suit No. 359 of 2009 titled Saroj Vs. Rishi Pal for partition and the other suit bearing Civil Suit No. 358 of 2009 titled Sunita Vs. Saroj for specific performance of agreement dated 26.03.2006. Both the suits are in respect of same property and as such, both the suits were decided by the Court of first instance together by common judgment and decree dated 18.4.2011. Both the appeals were decided vide common judgment and decree dated 23.07.2014 by the Court of first Appeal. Accordingly, both the above mentioned Regular Second Appeals are also being taken up for disposal by this common judgment.

3. For the sake of convenience, parties are being referred to as per their status before the Court of first Instance.

4. Relevant facts of **RSA No.5119 of 2014** for the purpose of decision of this appeal; that plaintiff – Sunita filed a suit for specific performance of agreement to sell dated 26.03.2006 against defendant – Saroj being owner of the property agreed to sell the suit property against total sale consideration of Rs.13,00,000/-. A sum of Rs.2,50,000/- was paid as earnest money and the balance amount was to be paid at the time of execution of the sale deed, i.e. on or before 31.07.2006. The plaintiff was always willing and ready to perform her part of agreement, but the defendant failed to come forward despite notice. However, on the oral

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assurances of the defendant, the execution of sale deed was deferred. Thereafter, a notice dated 27.8.2006 was sent to the plaintiff for execution and registration of the sale deed till 11.9.2007, but the plaintiff replied that sale deed be executed on 14.12.2007 instead of 11.9.2007. On 14.12.2007, the plaintiff visited the office of Sub Registrar alongwith balance amount of sale consideration as well as amount required for stamp and registration charges, but the defendant failed to put in appearance. That way, the plaintiff was always willing and ready to perform her part of agreement and as such necessity of the suit.

5. Defendant contested the suit, *inter alia*, taking the plea that husband of the plaintiff alongwith defendant and one Asha daughter of Des Raj purchased a site of vacant plot from Surinder Kumar and Uma Devi vide sale deed dated 30.4.2001 in which the defendant was having share of 35/100. The defendant took the plea that the plaintiff was never willing and ready to perform her part of contract vide agreement dated 26.3.2006. Even the agreement was claimed to be forged document as manipulation was done and figure '3' was interpolated in line No. 3 of the agreement and the agreement dated 26.3.2006 is a forged and fabricated document and as such, the suit for specific performance be dismissed.

6. Taking the facts of **RSA No. 5938 of 2014**, plaintiff – Saroj filed a suit for partition claiming that the plaintiff and defendant [Rishi Pal] are the joint owners in possession of the suit property to the extent of ½ share each. The property in dispute was purchased by the parties to the suit alongwith one Asha daughter of Des Raj vide registered sale deed dated 30.4.2001 and on the basis of mutual partition, the three co-sharers

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partitioned the subject matter of sale deed dated 30.4.2001 amongst themselves.

7. Defendant contested the suit for partition on the ground that the suit was bad for non-joinder of necessary parties since Smt. Sunita wife of Rishi Pal and Gurdial Singh were necessary parties. Plaintiff had agreed to sell her entire share vide agreement dated 26.03.2006 in favour of Sunita, who is plaintiff in the other suit for specific performance. At that time possession was also delivered to Smt. Sunita and Sunita was in possession of the suit property and she had already raised construction of boundary wall and workshop by spending huge amount. More so, the jurisdiction is of revenue courts only.

8. On these facts, the Court of first instance settled the issues. Parties led their respective evidence and after appreciating the entire oral as well as documentary evidence brought on record by the parties, the Court of first instance returned the finding that the agreement of sale was duly executed and the plaintiff was willing and ready to perform her part of contract, but the defendant failed to perform her part of agreement. As such, the suit for specific performance was decreed and the suit for partition was dismissed by the Court of first instance. The appeal filed before the Court of first Appeal was dismissed. The first Appellate Court also dismissed the appeal of plaintiff - Saroj filed against the judgment and decree of Court of first instance in suit for partition as well. As such, the present Regular Second Appeals.

9. Learned counsel for the appellant - Saroj while assailing the findings having been recorded by the Courts below in the suit for specific

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performance of agreement submitted that both the Courts below failed to appreciate that the plaintiff was not willing and ready to perform her part of the agreement. The plaintiff herself had admitted that she was not ready with the balance money on 27.8.2007. If readiness and willingness on the part of the plaintiff is not proved before the Court below, Civil Suit for specific performance cannot be decreed and both the Courts below have not appreciated this aspect while recording the findings.

10. Learned counsel for the appellant also submitted that once the agreement in question had already been terminated, the plaintiff was required to file a suit challenging the termination of the agreement itself and that has not been done. On this point, reliance was placed on a decision of Hon`ble Supreme Court in **I.S.Sikandar [D] by Lrs Vs. K. Subramani & Ors, 2014(1) CCC 439.**

11. Learned counsel for the respondent(s) took the plea that both the Courts below have already recorded concurrent findings that the agreement in question was duly executed. The plaintiff in the suit for specific performance was always willing and ready to perform her part of the agreement and for that purpose, she had come present in the office of Sub Registrar on the date mutually fixed by the parties and thereafter issued legal notice and subsequently filed suit for specific performance. In fact, there was no readiness and willingness on the part of appellant – Saroj and all these facts were taken into consideration by both the Courts below and the concurrent findings of fact have been recorded which do not call for any interference by this Court and the present appeal pertaining to suit for specific performance is liable to be dismissed.

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12. Learned counsel for the respondent also submitted that since suit for specific performance has been filed, there was no necessity to file a separate suit challenging alleged termination of the agreement. By filing a suit for specific performance, the plaintiff has also taken all the pleas which are legally available to her. So, the present appeal is without any merit. More so, there is no substantial question of law involved in the present appeal and the same deserves to be dismissed.

13. As regards to the appeal filed in respect of suit for partition filed at the instance of Saroj, who is defendant in second suit for specific performance, learned counsel for the respondent submitted that the same is bound to fail and the suit for partition has rightly been dismissed by the Courts below and no interference is called for in the concurrent findings of facts recorded by the Courts below.

14. Having considered the submissions made by learned counsel for the parties and appraisal of record, this Court is of the considered view that the first point involved in the appeal arising out of judgment and decrees passed by the Courts below in the suit for specific performance is whether Sunita [plaintiff in CS No. 358 of 2009] was entitled to seek relief of specific performance of the agreement or not. Both the Courts below have recorded concurrent findings of fact on the basis of oral and documentary evidence available on the file that execution of agreement dated 26.03.2006 was duly proved on the file especially as the same is not in dispute between the parties. More so, examination of attesting witnesses and deed writer is not required to prove the execution of agreement and reliance was rightly placed on the Division Bench decision of Hon`ble Andhra Pradesh High

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Court in Jaksani Lakshman Rao & Ors. Vs. Ellandula Ravinder 2007

(5) RCR (Civil) 574.

15. As regards to the plea taken by learned counsel for the appellant that the agreement is a forged document as the same involves cutting therein, whereby date of the agreement has been changed from 16.3.2006 to 26.3.2006 and date fixed for execution of sale deed has been changed from 1.7.2006 to 31.7.2006, both the Courts below have rightly taken the view that it is not a material alteration on the basis of which the findings may be returned that the agreement is a forged document. The said change, if any, was not going to affect the rights of either of the parties at any time including the period of limitation for filing the suit. Otherwise all the main ingredients of the agreement are admitted to be correct by both the parties.

16. As regards to readiness and willingness of the parties, plaintiff-Sunita had shown and proved on the file that she was willing and ready to perform her part of the agreement and for that purpose, she had got her presence marked through notary on 31.07.2006 and before the Executive Magistrate on 14.12.2007, but the defendant did not appear. At any rate, the defendant being a party to the agreement itself was also required to come forward for specific performance of the agreement and to establish her *bona fides*, she could get her presence marked in the office of Sub-Registrar, but that has not been done in the present case. These facts were rightly made the basis for both the Courts below to record concurrent findings on the point of readiness and willingness on the part of plaintiff-Sunita.

17. As regards to termination notice Ex. PX, the Courts below have

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rightly taken the view that notice Ex.PX cannot be considered as termination of agreement. Rather, the same conveyed conditional termination only which is always in such like cases of agreement of specific performance. As such, there was no such necessity to file separate suit so as to challenge termination of agreement. Rather, vide Ex. PX, the defendant had asked the plaintiff to get sale deed executed on 11.9.2007 and the plaintiff made counter offer/request to execute the sale deed on 14.12.2007. However, the defendant did not show her willingness and readiness so as to get her presence marked on 11.9.2007 and 14.12.2007 as well. On these basis, both the Courts below rightly recorded the finding that plaintiff – Sunita was entitled to seek specific performance of agreement in question. As such, the judgment relied upon by learned counsel for the appellant in **I.S.Sikandar's case [supra]** is of no help to her.

18. In view of the above, civil suit filed at the instance of Saroj for partition was to be dismissed and the same was rightly dismissed by the Court of first instance and the Court of first Appeal rightly dismissed her first appeal. The concurrent findings having been recorded by both the Courts below, on the basis of facts and evidence available on the file, call for no interference by this Court.

19. As per view taken by Hon`ble Supreme Court in **Deity Pattabhiramaswamy Vs. S. Hanymayya and others**, AIR 1959 SC 57, the provisions of Section 100 CPC are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous findings of fact. As per view taken by Hon`ble Supreme Court in **Commissioner**

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Hindu Religious & Charitable Endowment Vs. P.Shanmugama & Ors.,

JT 2005 (1) SC 201 and Biswanath Ghosh [Dead] by LRs and Ors. Vs.

Gobinda Ghosh alias Gobindha Chandra Ghosh & Ors. AIR 2014 SC

1582, second appeal cannot be entertained if there is no substantial question of law involved therein.

20. In the present second appeals, there is no substantial question of law involved, rather both the Courts below have already appreciated the entire evidence. Hence, the present appeals are not maintainable as per provisions of Section 100 of the Code of Civil Procedure, 1908.

21. In view of the above, the present Regular Second Appeal Nos. 5119 of 2014 and 5938 of 2014 stand dismissed.

(SHEKHER DHAWAN)
JUDGE

May 26th, 2016
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