

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
RSA No.1361 of 2016 (O&M)
Date of Decision: October 25, 2017**

Santosh

... Appellant

Vs.

Ram Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- Mr. Ranjit Saini, Advocate
for the appellant.

Mr. Sumit Sangwan, Advocate
for the respondents.

Amol Rattan Singh, J.

Civil Misc. No.3824-C of 2016

Learned counsel for the non-applicant-respondents has filed a reply to the application seeking condonation of a delay of 54 days in filing the appeal. The same is taken on record.

Having considered the contentions raised in the application, accompanied by an affidavit of the learned counsel for the appellant himself, for the reasons stated paragraphs 2 to 4 of the application, the application is allowed and the delay of 54 days in filing the appeal is condoned, as the delay is stated to have occurred only due to the fact that the grounds of appeal were not signed by the counsel.

Civil Misc. No.3823-C of 2016

By this application, permission is sought by the applicant-appellant to place on record copies of Annexures A-1 to A-5, which are already exhibited documents before the learned Courts below, as stated in the

application.

This application not really having been pressed in view of the fact that the records of the Courts below already stand summoned, it is disposed of as having been rendered infructuous.

RSA No.1361 of 2016

This is the second appeal by the defendant against whom the suit of the respondents-plaintiffs was decreed.

The facts, as taken from the judgments of the learned Courts below, in terms of the suit filed by the plaintiffs, are that the appellant-defendant was the owner of a 1/12th share of agricultural land falling in Khewat No.189, in village Sandwa, Tehsil Tosham, District Bhiwani, with the total land measuring 339 Bighas and 17 Biswas.

The plaintiffs entered into an agreement with the defendant on 12.11.2001, for the purchase of 28 Bighas and 6 Biswas (47 Kanals – 3.3 Marlas) of land, with the sale consideration settled at Rs.65,000/- per acre. Thus, the total sale consideration, as per the plaint, came to Rs.3,83,500/-. Of the aforesaid sum, Rs.1,15,000/- was stated to have been received at the time of the agreement, with the remaining to be paid to the defendant at the time of the execution of the sale deed, though no time limit for such execution was fixed. This was so, as stated in the plaint, because the defendant had told the plaintiffs that there was a suit pending between her husband and herself, in which there was a stay operating and as such, the sale deed would be executed after the vacation of the stay order and within 15 days after the defendant issued a notice in that regard to the plaintiffs. It was, therefore, contended by the plaintiffs that a duty was cast upon the defendant to inform the plaintiffs about the vacation of the stay order.

2. It was further contended that the defendant was in need of money

and therefore, on 05.08.2004, another sum of Rs.35,000/- was paid by the plaintiffs, in respect of which an endorsement was made on the back of the document of agreement and a receipt for the aforesaid amount was also written out, which was thumb marked by the defendant and signed by plaintiff No.1, Ram Kumar, in the presence of witnesses.

It was also contended that though the plaintiffs had enquired from the defendant many times with regard to the vacation of the stay, she did not disclose anything and eventually therefore, the plaintiffs had issued a notice to her, through their counsel, which she refused to receive.

It was averred that the plaintiffs had always been ready and willing to perform their part of the contract by paying the remaining sale consideration of Rs.2,33,500/- and to bear the expenses for execution of the sale deed but the defendants' intention had "become malafide" and she did not respond to their requests. Consequently, the suit, bearing no.166 of 2007, was instituted on 01.03.2007.

3. Upon notice being issued, the defendant filed a written statement taking preliminary objections with regard to the maintainability, limitation etc.

It is to be noticed that it is stated in the judgment of the learned Civil Judge, that in the written statement, the defendant had stated that "she was got married with plaintiff No.1 Ram Kumar" and that she had two sons and one daughter but the cousin (brothers) 'of the plaintiffs' were not happy with their marriage and they used to try and take possession of the property of the plaintiffs.

Note:- It is to be specifically noticed here that though in the judgment of the learned Civil Judge, it is stated that the defendant was married to "plaintiff No.1 Ram Kumar" and his cousins were not happy with

the marriage and they used to try and take possession of the property, a perusal of the written statement (which is in Hindi) shows that actually what is stated in paragraph 15 thereof is that the defendant was married to Ram Kumar son of Ram Swarup, resident of Sandva, Tehsil Tosham, District Bhiwani, and that from the said marriage she had two sons and one daughter.

However, in the judgment of the lower Appellate Court, it has been correctly stated that the defendant was married to Ram Kumar son of Ram Sarup. Obviously, the said Ram Kumar is different from plaintiff-respondent No.1 Ram Kumar, who has been shown to be the son of of Shree Chand.

4. It was further stated in the written statement that Ram Kumar, husband of the defendant, had signed a relinquishment deed on 28.05.2001, relinquishing his rights to 28 Bighas and 6 Biswas of land, i.e. the suit land. This was not liked by the cousins of the said Ram Kumar, namely, Puran Chand and Abhey Ram, who were also not happy with the marriage of Ram Kumar.

Further, it was stated in the reply of the defendant that she and her husband used to stay at the Housing Board, Bhiwani, and that the aforesaid Puran and Abhey Ram used to visit them many a time and used to incite her husband against her. One day they took the said Ram Kumar away from Bhiwani, and 'kept him with them and brought him under their influence', and also made him file a suit against her.

Still further, it was stated in the written statement that the defendant is an innocent illiterate woman who does not have much source of income and that she even did not have money to defend herself in the suit instituted by her husband against her.

Yet, further, it was stated in paragraph 18 of the written

statement that plaintiff No.1 Ram Kumar (not the appellant-defendants' husband) knew of this situation and after the filing of the suit by the appellants' husband against her, he started visiting her at Bhiwani and even got Shri D.D.Aggarwal engaged as a counsel for her at Bhiwani, to defend the said suit. He also paid the fee of the learned counsel and also accompanied the defendant to the Court in that suit on every date of hearing. It was also stated that plaintiff No.1, on occasion, used to visit her either in the company of Ranbir Singh, Numberdar, or of Umed Singh, Kanungo.

Thus, it was further stated, that since plaintiff No.1 had won the trust of the defendant, and further, as she had no means to defend the suit filed against her by her husband, she accepted Rs.35,000/- as a loan from plaintiff no.1 and affixed her thumb impression, at that time, at many places on blank papers. (Reference para 20 of the preliminary objections of the written statement, as pointed out by learned counsel).

It is also stated that she had neither signed the agreement to sell dated 12.11.2001, nor had she any desire to sell the suit land to anybody and further, she also did not know Shri Rakesh Nehra, Advocate of Bhiwani.

The reply on merits also essentially reiterated the above.

5. A replication having been filed by the plaintiffs, the following issues were framed by the learned Civil Judge:-

- “(i) Whether the plaintiff is entitled to a decree of specific performance of contract or in the alternate to a decree for recovery of Rs.1,50,000/- along with 2% per month as prayed for? OPP
- (ii) Whether the suit is within limitation? OPD
- (iii) Whether the suit is not maintainable in the present form? OPD
- (iv) Relief.”

6. The first plaintiff examined himself as PW1, one Satbir as PW2, Dharambir as PW3, the scribe to the agreement, Sh. Rakesh Nehra, Advocate, as PW4 and one Ranbir Singh as PW5. By way of documentary evidence, they tendered the following:-

- | | | |
|-------|--|-------|
| “i) | Agreement to sell | Ex.P1 |
| ii) | Endorsement wherein it is stated that Rs.1,15,000/- has been received by the seller and the same is signed by the defendant. | Ex.P2 |
| iii) | Receipt of the payment of Rs.35,000/- in favour of the defendant. | Ex.P3 |
| iv) | Notice | Ex.P4 |
| v) | Receipt | Ex.P5 |
| vi) | Registered letter | Ex.P6 |
| vii) | Copy of order dated 5.12.2001 filed in suit no.123 of 2001. | Ex.P7 |
| viii) | Copy of Vakalatnama of Shri Rakesh Nehra, Advocate | Ex.P8 |

The defendant did not lead any evidence at all, despite several opportunities given, as recorded in the judgment, borne out from a perusal of the record of the trial Court.

The defendant herself also did not appear to testify in support of her stand.

Therefore, her evidence was closed by an order of the Court dated 02.03.2013, after which the plaintiffs tendered the following five documents by way of ‘rebuttal evidence,’:-

- | | | |
|------|-------------------------------------|--------|
| “i) | Copy of judgment dated 27.8.2009 | Ex.P9 |
| ii) | Copy of decree-sheet | Ex.P10 |
| iii) | Copy of registered mutation no.2152 | Ex.P11 |

iv) Copy of Jamabandi for the year 2004-05 Ex.P12”

7. Upon appraisal of the evidence and the pleadings and arguments addressed before her, the learned Civil Judge found that the thumb impression of the defendant was not denied by her in her written statement but it was stated that her thumb impression was obtained on a blank paper. The agreement to sell, Ex.P1, and the receipt for a sum of Rs.1,15,000/- (Ex.P3), were also found to have been proved by the Civil Judge, with PW3 Dharambir having stood to testify in favour of both these documents, and the scribe of the agreement, i.e. Advocate Rakesh Nehra, having testified to that effect.

Further, the testimony of PW2 Satbir, with regard to receipt of Rs.35,000/- as part of the sale consideration, was also held to be further proof of the authenticity of the agreement, as was the testimony of the last witness, PW5 Ranbir Singh, who deposed that he too witnessed the agreement, which was drafted by the scribe on directions of both the parties.

8. It was also found by that Court that Ex.P4 was a registered notice sent to the defendant for executing a sale deed in terms of the agreement, with Ex.P6 being the registered cover on which the report of refusal was endorsed.

It was further noticed that Ex.P-8 was the power of attorney in favour of Sh. Rakesh Nehra, Advocate, in the suit filed by the defendants’ husband against her, with a copy of the order in that suit being Ex.P-7.

On the aforesaid findings, even while noticing that counsel for the defendant had ‘strongly’ argued that the agreement of sale was the result of a fraud with the agreement being a fabricated one in favour of the plaintiffs, with the defendants’ signatures having been obtained on a blank paper, the first issue of whether the plaintiffs were entitled to a decree of specific performance in their favour or not, was decided in their favour, also holding that no oral or documentary evidence had been led to prove the fact

that the agreement of sale, Ex.P-1, was the result of a fraud, as contended.

9. As regards the second issue, of limitation, it was held that the sale deed was to be executed upon vacation of stay in the suit filed by the defendants' husband against her, which fact would be intimated by the defendant to the plaintiffs, which she did not do despite several requests having been made in that regard. It was further found by the learned Civil Judge that the plaintiffs came to know about the 'vacation of stay' when it was brought to the notice of the first plaintiff that, in fact, the defendants' husband had never pressed for a stay in the suit filed by him.

Thus, upon the plaintiffs having come to know of that fact, the suit was filed, which was therefore held to be within limitation.

10. The third issue, of non-maintainability of the suit, is shown to have not been pressed on behalf of the defendant, in the judgment of the learned Civil Judge and was therefore also decided in favour of the plaintiffs.

Consequently the suit was decreed in their favour, with them held entitled to a decree of specific performance of the agreement of sale, Ex.P-1, which the defendant was directed to execute within a period of two months.

11. The present appellant-defendant having filed an appeal against the aforesaid judgment and decree, it came up for hearing before the learned District Judge, Bhiwani, who after noticing the pleadings of the parties and the issues framed by the learned Civil Judge, as also the witnesses examined by the plaintiffs, eventually also came to the conclusion that with the first plaintiff, the witnesses to the agreement, the scribe thereof, all having testified to the validity of the agreement, with PW-2 Satbir also being a witness to the receipt of Rs.35,000/- by the defendant from the plaintiffs, and no evidence to the contrary having been led at all by the defendants, the suit was rightly

decreed in favour of the plaintiffs.

While coming to the said conclusion, it was specifically noticed in paragraph 15 of the judgment, by the learned first appellate Court, that the thumb impressions of the defendant on the agreement were also not disputed, with her stand being that she was in need of money for pursuing the civil suit filed against her by her husband, and therefore, to obtain that money she had affixed her thumb impressions on some blank papers, which were then converted into an agreement to sell. However, with no evidence having been led at all to prove such fraud committed upon her, either by oral or documentary evidence, the same conclusion was reached by the first appellate Court, as was by the learned Civil Judge.

Consequently, the first appeal was dismissed.

12. When this appeal had earlier been heard by this Court on 28.07.2016, after hearing counsel in Court, it had, as a matter of fact, been dismissed by pronouncing an oral order to that effect, with the judgment to be dictated in chambers. Thereafter, upon the appeal having been taken for dictating the detailed judgment, this Court having a doubt on whether the appellant-defendant, being a widowed lady may actually have suffered a fraud committed upon her, with even the date of hearing of the case not communicated to her so that she could testify as her own witness, the matter was put up for re-hearing, with the following order passed on 28.07.2016:-

“When this case came up for hearing, after hearing learned counsel for the parties a short order was dictated in Court, to the effect that with the appellant not having stepped into the witness box to prove that her thumb impressions were obtained on a blank paper upon her having received Rs.35,000/-, there was no merit in the appeal. Consequently, it was pronounced to be

dismissed.

It is also to be noticed that though the learned counsel for the appellant had argued that the same lawyer who had defended the present appellant in the suit instituted against her by her husband, this Court had taken that to mean that it was Shri Rakesh Nehra, Advocate, who had stepped into the witness box as defendants' witness in the present *lis*, to testify that he had drafted the agreement to sell on the directions of both the parties. However, not much importance had been assigned to that aspect, on seeing that the appellant had not stepped into the witness box to defend herself.

Consequently, this appeal had been pronounced as dismissed on the said date, with the detailed judgment still to be dictated. Thereafter, in view of a rather lengthy judgment that this Court was seized of, the dictation in this and in some other cases got deferred and eventually when it was taken up for dictation of the detailed order, it appeared that, in fact, it was not Shri Rakesh Nehra, Advocate, but Shri D.D.Aggarwal who had defended the appellant-defendant in the suit filed against her by her husband, as also in the suit out of which this present second appeal arises. This fact has been stated in the written statement itself, filed by the appellant-defendant, through Shri D.D.Aggarwal.

Though it is surprising that the appellant-defendant did not step into the witness box, in support of the contentions in the written statement, a perusal of the grounds of appeal reveals that, allegedly, she was not informed of the dates of hearing, including

as to when her evidence was to be recorded. Though that contention is to be looked at with careful consideration because Shri D.D.Aggarwal is stated to have been engaged for the appellant-defendant in the suit filed against her by her husband, allegedly by plaintiff No.1, as has been stated in the written statement filed through Shri Aggarwal himself (as already noticed), however, a further perusal of the grounds of appeal shows that it has also been alleged that the scribe to the agreement earlier worked in the office of Shri D.D.Aggarwal, Advocate.

Consequently, without casting any aspersions on either of the two learned counsel named hereinabove, yet, keeping in view the fact that possibly an illiterate woman with three children may have been wrongly deprived of her property in the circumstances enumerated in the written statement, it is considered appropriate that the matter be put up for re-hearing.

Though, naturally, once an order is pronounced in Court, it normally is not put up again for re-hearing, however, it is also equally obvious that it is the ends of justice which is the objective and therefore, despite stating in Court that the appeal stands dismissed, with that order not having been signed, it is considered appropriate to do so.

In this context, a judgment of the Supreme Court, in **Kushalbai Ratanbhai Rohit v. State of Gujarat (2014) 9 SCC 124**, needs to be cited, wherein, after discussing earlier judgments on the issue, it was held (though in relation to a criminal appeal), that the order allowing/dismissing the case can

be recalled. Their Lordships quoted as follows from an earlier judgment (in another criminal appeal) in **Surendra Singh v. State of U.P.** (AIR 1954 SC 194):-

“12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of ‘locus paenitentiae’ and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallise into a full-fledged judgment and become operative. It follows that the Judge who ‘delivers’ the judgment, or causes it to be delivered by a Brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery.

But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge’s responsibility is heavy and when a man’s life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a Brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not

necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light dawn upon him before the delivery of judgment.”

While holding so, that a judgment can be recalled even when an order is pronounced, provided it has not been signed by the Judge, their Lordships also referred to a judgment of the Allahabad High Court, (obviously in a civil case), in **Sangam Lal v. Rent Control and Eviction Officer** (AIR 1966 All 221).

Similarly, a judgment of the Apex Court in **K.V. Rami Reddi v. Prema** (2009) 17 SCC 308 can also be cited, which was in the context of a civil case. It was held therein, as follows:-

“14. CPC does not envisage the writing of a judgment after deciding the case by an oral judgment and it must not be resorted to and it would be against public policy to ascertain by evidence alone what the “judgment” of the court was, where the final result was announced orally but the “judgment”, as defined in CPC embodying a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, was finalised later on.”

Consequently, this Court not being fully satisfied with the pronouncement of dismissal, on the ground stated hereinabove, it is directed that the appeal be put up for re-hearing on 14.09.2016, to be shown in the list of urgent motion cases.

Learned counsel for the appellant and the

respondents be immediately informed of the date for re-hearing.”

13. Thereafter, the matter having been listed on 14.09.2016, with the learned counsel for the respondents, not having appeared on that date, it was adjourned to 20.09.2016, on which date, as recorded in the order of that date, learned counsel for the respondents-plaintiffs had submitted that the ground taken by the appellant herein, that she was never informed by her Advocate of the dates on which she was to testify, thereby leading to her not appearing even as her own witness, was a contention falsified from the fact that even in the first appeal filed by her, she engaged the same counsel as had been engaged by her in the suit itself (as defendant). He further submitted that the other ground taken in the appeal, that the appellant-defendant was a lady living estranged from her husband, who would not sell her only source of income, i.e. agricultural land owned by her, was also a contention falsified by the fact that she had, in fact, mortgaged the suit property to a bank from which she had taken a loan and as such she was keen to get rid of debt ridden property.

14. Mr. Ranjit Saini, learned counsel for the appellant, on the other hand, had submitted on that date that he has no instructions with regard to whether the suit property had been mortgaged, though he submitted that no evidence in that regard was led before the Courts below.

Noticing the aforesaid contentions, this Court had considered it necessary to call for additional evidence, to see whether the suit property was actually mortgaged to any bank by the appellant-defendant, and if so for what loan amount, in order to determine as to whether any fraud has been played upon the appellant or not.

15. Thereafter, an application bearing Civil Misc. no.14446-C of

2016 was filed by the respondents, which came up for hearing on 25.10.2016, seeking to lead by way of additional evidence copies of 7 documents as Annexures R-1 to R-7, to prove that in fact a loan had been taken by the appellant-defendant, against the suit property, mortgaging the same to “The Bhiwani Distt. Primary Coop Agri & Rural Dev. Bank Ltd, Bhiwani, B.O. Tosham (in short “the PARD Bank”). The said documents (copies) are as follows:-

- i) Application dated 20.07.2015, filed in the execution petition in the present lis, (as Annexure R-1);
- ii) Interim orders dated 20.07.2015, 17.08.2015, 23.09.2015, 28.10.2015, 20.11.2015, 10.05.2016 and final order dated 05.07.2016, passed in the aforesaid execution proceedings by the learned Addl. Civil Judge (Sr. Divn.), Tosham, (as Annexure R-2 (colly);
- iii) Photocopy of receipt dated 22.03.2016 issued by the PARD Bank (as Annexure R-3);
- iv) Copy of a Register of mutation (as Annexure R-4);
- v) –ditto- as Annexure R-5
- vi) –ditto as Annexure R-6 and
- vii) A copy of an agreement of sale dated 31.10.2009, shown to be executed by the husband of the appellant in favour of one Kapoor Singh, (as Annexure R-7).

Certified copies of the aforesaid orders of the learned Executing Court have also been annexed along with the photocopies, as have certified photocopies of the mutation registers, as Annexures R-4 to R-6.

Annexure R-1 is an application seen to be filed by the present

respondents-plaintiffs, seeking permission from the Executing Court to allow them (applicants-decree-holders) to deposit an amount of Rs.1,63,000/- with the PARD Bank, Tosham, against the loan outstanding against the present appellant-defendant-judgment debtor.

As per the application, the decree-holders having purchased the property 'free from all encumbrances', but the aforesaid amount being due to the bank and the decree-holders also having deposited Rs.2,33,500/- (in the executing court) as the remaining consideration amount, to complete the sale, the said amount of Rs.1,63,000/- was sought to be paid out of the aforesaid amount of Rs.2,33,500/-, so as to make the suit property encumbrance free and therefore transferable to the plaintiffs-decree holders.

16. The interim orders of the learned executing Court show that adjournments having been sought time and again by the judgment-debtor to file a reply to the aforesaid application, first the following order was passed by that Court on 20.11.2015:-

“Present: Decree-holders represented by
Sh. V.S. Dhangar, Advocate.
None for the JD's.

None had appeared on behalf of JD's. It is
3.00 P.M. No further wait is justified. Hence, they are
hereby proceeded against ex-parte.

The decree-holder submitted that the JD Santosh obtained loan of Rs.1,63,000/- from PARD Bank, Tosham. They have already deposited the remaining sale consideration of Rs.2,33,500/-. They prayed that the amount of the loan taken by the JD's may be adjusted by making payment of loan taken by the JD's from the remaining sale consideration deposited by them.

In view of the facts narrated, the loan taken by the JD's has to be deposited before execution and registration of the sale deed in favour of decree-holder. Therefore, the decree-holders are directed to get the amount of loan paid out of remaining sale consideration deposited by them. Refund voucher be issued in favour of the DH's to withdraw the amount equal to the amount of loan for depositing of loan in PARD bank. They shall also furnish the draft sale-deed on or before 11.12.2015."

17. Thereafter, vide an order dated 10.05.2016, that Court noticed that the aforesaid amount of Rs.1,63,000/- had been withdrawn out of the deposited amount of Rs.2,33,500/- and the said amount of Rs.1,63,000/- having been deposited with the PARD Bank, Tosham, a 'no due certificate' had been issued by the bank on 22.03.2016.

Consequently, noticing that no order staying executing proceedings had been produced on behalf of the judgment-debtor, the Reader of the executing Court was appointed as the Local Commissioner, to get the sale deed executed in favour of the decree-holders as per Rules, and the matter finally adjourned to 05.07.2016, "for satisfaction of the execution".

On 05.07.2016, a sale-deed having been shown to be executed, a statement of the counsel for the decree-holders/present respondents, was made before the executing Court, that he no longer wished to pursue the executing proceedings, which were therefore ordered to be dismissed as withdrawn.

18. Notice having been issued by this Court in the aforesaid application, i.e. CM no.14446-C-2016, on 25.10.2016, none appeared for non-applicant/appellant for two dates in succession, after which, finally, with the learned counsel for the non-applicant/appellant-defendant having appeared

on 24.03.2017, no reply having been filed to the application, this Court allowed the application and took on record the documents as Annexures R-1 to R-7, noticing that vide mutation no.2122, 2970, 2971 dated 05.12.1992 and 25.08.2009, the applicants/respondents-plaintiffs wished to show that the appellant-defendant actually sold other land in her village also, including her house and therefore, the agreement of sale entered into between the parties was not a 'stray' incident arising out of any misapprehension or misunderstanding in the mind of the appellant-non-applicant.

The main appeal was thereafter adjourned for arguments and eventually came up for hearing on 04.05.2017.

19. Mr. Saini, learned counsel for the appellant-defendant, submitted that whereas the suit filed by the appellants' husband, seeking a declaration against her, was filed on 10.11.2001, the agreement of sale is shown to be dated 12.11.2001. He further submitted that the same lawyer as had been engaged by the appellant to defend her in the suit filed against her by her husband, was also engaged to defend the suit filed against her in the present lis by the respondents-plaintiffs, i.e Sh. D.D. Aggarwal, Advocate, with whom Sh. Rakesh Nehra, Advocate, had worked as junior. Mr. Nehra however actually appeared as a witness for the respondents-plaintiffs in the present lis.

Thus, Mr. Saini contended that the appellant being an illiterate lady was actually taken advantage of, with the agreement of sale having been drafted by the aforesaid Sh. Rakesh Nehra, Advocate.

Therefore, the contention of the learned counsel for the appellant is that a fraud having been played upon the appellant, including the fact that she was never intimated the dates on which she had to appear as a witness in her defence before the learned trial Court. He submitted that the judgment of the learned Courts below being based on the fact that the fraud could not be

proved by her, she not having stepped into the witness box or produced any documentary evidence to that effect, the said judgments and decrees are liable to be set aside on that ground alone.

(In fact the questions of law framed by the learned counsel in the grounds of appeal are mainly on that issue alone, with an additional ground of the suit being time barred also having been framed). The said questions of law, as framed by the learned counsel, are reproduced herein below:-

- “a. Whether the judgment and decree passed by the Courts below are vitiated as the same has been obtained by playing fraud upon the appellant and the Court?
- b. Whether the execution of agreement executed on 12.11.2001 is an act of fraud and misrepresentation and has been got prepared on the papers where the thumb impression of the appellant was already there?
- c. Whether in the facts and circumstances of the present case, the judgment and decree passed by the Courts below ordering the order of specific performance is justified?
- d. Whether the suit filed by the plaintiffs is hopeless time barred?”

20. On the other hand, Mr. Sangwan, learned counsel appearing for the respondents-plaintiffs, first pointed to the ‘zimni’ orders of the learned Civil Judge dated 02.03.2013 (at page no.331 of the record of the trial Court), by which the defence evidence was closed, the Court holding that a large number of opportunities having been granted to the defendant-appellant to lead evidence, she had not done so.

Mr. Sangwan further submitted that, as a matter of fact, this

Court while putting up the matter for re-hearing, had been under an impression that it was Sh. Rakesh Nehra, Advocate, who had been engaged as the counsel for the appellant-defendant in the present lis, whereas it was Sh. D.D. Aggarwal, Advocate. Further Sh. D.D. Aggarwal, had not been engaged by the husband of the appellant-defendant, but by the first plaintiff, i.e. respondent no.1 herein, in the suit against her by her husband. Thus, the confusion in the mind of this Court obviously arose from the fact that both, the husband of the appellant-defendant, as also respondent-plaintiff no.1, have the same name, i.e. Ram Kumar.

He further submitted that in fact the choice of engaging Sh. D.D. Aggarwal, Advocate, both in the civil suit in the present lis, as also in the first appeal filed by the present appellant, was obviously her own choice, even though as per her contention Sh. Aggarwal had been first engaged for her by respondent-plaintiff no.1 herein, in the suit filed against her by her husband. He submitted that the written statement in reply to the plaint in the present lis, was drafted by Sh. Aggarwal and as such, with him having appeared for her even before the first appellate Court, with a power of attorney duly executed by her in his favour, it was not believable that she had not been informed by Sh. Aggarwal that she had to depose as a witness in the suit before the learned trial Court.

21. Mr. Sangwan next pointed to paragraph 15 of the written statement filed on behalf of the appellant-defendant in reply to the plaint (in Hindi), wherein the fact that her husband had executed a relinquishment deed in her favour, (qua the suit property), has been stated, further showing that her husbands' cousins had taken him away from her and were instigating him against her.

Learned counsel submitted that it was very obvious that it was

due to this fact, as also the fact that the land had already been mortgaged to the bank, that the appellant-defendant wished to sell it, she also having sold other land in the village, as is obvious from the mutations sought to be placed on record by way of additional evidence as Annexures R-4 to R-6.

Hence, he contended, there was no question of a fraud having been played upon her, with that plea only taken before this Court to try and wriggle out of the agreement in question.

He further submitted that no reply was filed in the execution proceedings, to the application of the respondents-plaintiffs-decree holders seeking to pay Rs.1,63,000/- as remained the outstanding part of the loan due from the appellant to the PARD Bank, Tosham, which showed that as a matter of fact, she not being in a position to pay off the loan at all, simply wished to get rid of the property.

Hence, he submitted that the plea taken with regard to a fraud having been played upon the appellant, is wholly unsustainable and taken only to wriggle out of the agreement in question.

22. In rebuttal, Mr. Saini, learned counsel for the appellant-plaintiff, reiterated what he had submitted earlier, further stating that even if any other property was sold in the village, such properties may have been jointly held, due to which they were sold by the appellant-plaintiff (if so sold).

23. Having heard learned counsel for the parties, first of course, this Court is to adjudicate upon whether or not the documents called for by way of additional evidence are to be admitted or not as such additional evidence which has subsequently sought to be placed on record along with other additional evidence, in the form of copies of zimni orders and copies of mutations register.

24. As regards the evidence called for by this Court itself, to show

that the suit property was mortgaged to the bank by the appellant-plaintiff, though Annexure R-3 is shown to be a true photocopy of a receipt of Rs.1,67,520/- issued by the PARD Bank, Tosham, the same cannot be accepted as an exhibit by way of additional evidence, it being merely a photocopy and not even a certified copy, with in any case no application having been filed to lead secondary evidence. Hence, the application as regards the said annexure, i.e. Annexure R-3, as also Annexures R-4 to R-6 (copies of mutation entries), is rejected, no oral evidence having been also sought to be led by the applicant/respondents to prove the said mutation entries, by examination of any revenue official along with the original mutation registers, of which the aforesaid Annexures R-4 to R-6 are stated to be certified copies.

Similarly, Annexure R-7, being simply a translated copy of an agreement of sale, with the photocopy of the vernacular version thereof having also been annexed along with it, but with neither the original produced in Court nor any oral evidence in support thereof having been attempted to be led, the application seeking to place on record this document (Annexure R-7) is also rejected.

25. However, as regards Annexure R-1, i.e. an application filed before the executing Court, as also the interim orders of that Court (colly) as Annexures R-2, certified copies thereof having been annexed along with the photocopies, with no rebuttal to the correctness thereof having even been attempted to be made on behalf of the non-applicant/appellant-defendant, either by way of any reply to the application or any oral argument to that effect, the said application and orders being part of judicial record before the executing Court seized with the execution proceedings in this very lis itself, they are taken on record by way of additional evidence, they being public

documents in terms of Sections 74 and 76 of the Indian Evidence Act, 1872.

26. Though very obviously the aforesaid orders passed in execution proceedings would otherwise have no bearing on the suit itself, the orders having been passed in proceedings that were naturally not in existence at the time when the suit itself was being adjudicated upon by the learned Civil Judge, or at the time of the first appeal, yet, in the opinion of this Court, the said orders are relevant to be considered, even in terms of Section 43 of the Evidence Act, in view of the fact that the entire case of the appellant-defendant is that a fraud has been played upon her and in rebuttal to that argument, one of the arguments of the learned counsel for the respondents-plaintiffs was that no fraud had been played upon her and in fact she wanted to get rid of the land because of the fact that it stood mortgaged to a bank from which she had taken a loan against it, with no sufficient means to pay off the loan.

27. Thus, in view of the fact that the appellant never stepped into the witness box to rebut the evidence led by the respondents-plaintiffs, on the ground that she was never informed that she had to testify, it having been considered necessary by this Court to go to the root of the contention on behalf of the respondents-plaintiffs (that in fact no fraud had been played upon her and in fact the property stood mortgaged), it appears very obvious that the suit land, or at least a large part of it, was mortgaged to the PARD Bank, Tosham, with an amount of Rs.1,63,000/- still outstanding to be paid back in respect of the loan taken by the appellant-defendant, with no attempt made by her at all to pay off that loan on her own, even during the pendency of the execution proceedings, she not even having attempted to file a reply to the application, Ex.R-1, by which the respondents-decree holders sought to pay off the said loan from the remaining consideration of Rs.2,33,500/- as had

already been deposited by them with the executing Court.

Even if this Court was somehow to draw an assumption that the application filed in the execution proceedings was not brought to her notice, the fact that she is being represented constantly by her counsel before this Court in the second appeal, with no attempt having been made even here to show that she was willing to pay off the aforesaid amount of loan in order to redeem the mortgage, it has to be accepted that she was not willing to repay the loan from her own sources.

28. That being so, and it also having been shown by the learned counsel for the respondents-plaintiffs, that even while contending that she was not informed of the fact that she had to testify in her own defence before the learned trial Court, she still engaged the same counsel even in the first appeal filed by her, I do not see how that argument would be sustainable in any manner.

No doubt, this Court had also put up this matter for re-hearing having noticed that the same counsel was stated to have drafted the agreement of sale as had represented her in the suit against her by her husband, however, in the aforesaid circumstances, I do not see how she was made of a victim of fraud, when she engaged Sh. D.D. Aggarwal, Advocate, with whom Sh. Rakesh Nehra, Advocate is stated to have earlier worked. Simply because that counsel (Sh. Rakesh Nehra) drew up the agreement of sale, in my opinion, it does not prove that the said agreement was not drawn up at the instance of, or with the concurrence of the appellant-defendant, who has now simply tried to turn around and wriggle out of the agreement, with not even any additional evidence attempted to be led by her before this Court to prove any fraud, other than averring that she was misled by her counsel into not testifying on the date that she was supposed to appear as a witness in her own

defence.

To repeat, the same counsel having been engaged by her even in the first appeal, and no evidence having been attempted to be led to rebut the contention raised here, to the effect that she had mortgaged the suit land to the bank, I do not see how the allegation of fraud is sustainable in any manner.

29. Thus, the essential question of law (contained in the first three questions framed by learned counsel for the appellant, as reproduced in paragraph 19 hereinabove), is answered to the effect that there not having been proved to be any fraud or misrepresentation that the appellant was subjected to, at the hands of the respondents, the judgments and decrees of the learned courts below are not found to be vitiated on that count and therefore are upheld, not shown to be perverse in any manner, with in fact no other issue raised before this Court, other than the fact that the agreement was the result of fraud.

In fact, specifically, no arguments have been addressed on the question of limitation either, other than a simple statement to that effect.

30. Still, as regards the question on whether the suit was filed within limitation or not, the agreement in question was entered into on 12.11.2001, with no specific time limit fixed for execution of the sale deed and in fact, the onus left on the appellant- defendant to inform the respondents-plaintiffs as to when the stay in her husbands' favour, as projected by her, was vacated, after which the sale deed was to be executed (upon payment of the remaining consideration), within 15 days of the notice to execute it being issued by the appellant-defendant, to the respondents-plaintiffs.

About two years and nine months after the execution of the agreement, a further amount of Rs.35,000/- (other than the earnest money of Rs.1,15,000/-), was found by the learned Courts below to have been given by

the respondents-plaintiffs to the appellant-defendant in view of the need for money expressed by her. Thereafter, she never having issued any notice to them with regard to the stay being vacated in the suit filed by her husband against her, and the plaintiffs having then filed the suit on 01.03.2007, I agree with the findings of the Courts below in that regard also, that the suit was not filed beyond the period of limitation.

Hence, that question of law is answered to the above effect.

31. Consequently, finding no merit in this appeal, it is dismissed.

No costs.

October 25, 2017

Dinesh/vcgarg

**(AMOL RATTAN SINGH)
JUDGE**

Whether Reportable	Yes/No
Whether Speaking/Reasoned	Yes/no