

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.1473 of 1989 (O&M)

Date of Decision: 19.12.2018

Simbhu and others

...Appellants

versus

Chander

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Sanjay Mittal, Advocate,
for the appellants.

Mr. M. L. Sarin, Sr. Advocate, with
Mr. Ritesh Aggarwal, Advocate,
for the respondent.

Amol Rattan Singh, J.

This second appeal has been instituted by the defendants in a suit filed by the sole respondent herein, seeking specific performance of an agreement of sale stated to have been entered into by him with the father of the appellants-defendants on July 05, 1977.

The suit was dismissed by the trial court qua the decree of specific performance but the plaintiff was held entitled to recover Rs.4400/- as was found to have been paid by him in terms of the aforesaid agreement, alongwith interest @ 6% per annum thereupon.

2. That judgment and decree was challenged by the appellants-defendants, with a cross-objection filed by the plaintiff, with the first appellate court having allowed the cross-objection and having decreed the suit for specific performance in favour of the plaintiff.

3. As per the case of the respondent-plaintiff (hereinafter to be referred to as the plaintiff), Man Singh, father of the appellants-defendants, (hereinafter to be referred to as the appellants), executed the agreement in

question in respect of agricultural land measuring 4 kanals and 18 marlas comprised in *khewat* no.94, *killas* nos. 11//23/2, (3 kanals 11 marlas), 11//24 (3K-12M) and 15//4/1 (1K-15M), situate in the revenue estate of village Surajanwas, Tehsil and District Mohindergarh (as per the *jamabandi* for the year 1974-75).

Thus, out of the total land of 8 kanals and 18 marlas, the agreement of sale was in respect of 4 kanals and 18 marlas, for a total sale consideration of Rs.4400/-.

4. As per the plaintiff, the sale consideration was received by Man Singh and it was agreed between the parties that after the mortgage on the suit land had been redeemed, a sale deed would be executed within 2 months thereof, with possession to be delivered to the plaintiff.

Man Singh (father of the appellants) is contended to have affixed his thumb impression on the agreement (Ex.P3 before the trial court), with the document in the custody of the plaintiff.

The mortgage existing qua the suit land, was stated to have been in favour of a land mortgage bank.

5. However, Man Singh is stated to have died, after which the appellants are alleged to have refused to execute the registered sale deed, though the plaintiff was ready and willing to do so.

He consequently served a written notice upon them on 02.08.1981, despite which they did not do the needful (as contended), leading to the institution of the suit on 15.10.1981 (Civil Suit no.167 of 1981).

In the suit, the plaintiff made an alternative prayer for recovery of the said Rs.4400/- alongwith compensation thereupon and costs, if the court did not consider it appropriate to issue a decree for specific performance of the

contract.

6. In the judgment of the learned trial court, it is stated that one Champa had been impleaded as defendant no.6, but it was found that she had already died at the time that the suit was filed and consequently her name was deleted, with those of her LRs substituted.

Subsequently, some more persons were also impleaded as defendants on an application filed under Order 1 Rule 10 CPC, on September 30, 1982, after which an amended plaint and written statements thereto were filed by the parties.

7. As per the appellants' written statement, in fact no agreement of sale had been entered into with their father by the plaintiff, with the document relied upon by the plaintiff alleged to be a forged and fabricated one.

Defendants no.6-C, 6-D and 6-E (LRs of defendant no.6) filed a separate written statement through their guardians, also denying the claim of the plaintiff.

All the defendants took the usual preliminary objections of the suit not being maintainable and it being time barred etc.

8. A replication having been filed by the plaintiff, the following issues were framed by the trial court:-

- “1. Whether Man Singh deceased entered into agreement of sale on 5.7.77 with the plaintiff for consideration of Rs.4400/- as alleged in the plaint? OPP
2. Whether plaintiff was ready and willing to perform his part of contract as alleged in the plaint? OPP
3. Whether suit is not maintainable in the present form? OPD
4. Whether suit is barred by time? OPD
5. Whether plaintiff is estopped from filing the present suit by his act, conduct and waiver? OPD
6. Whether suit is bad for non-joinder of necessary parties?

OPD

7. Whether defendants are entitled to special costs under Section 35-A CPC? OPD

8. Relief.”

9. In order to prove the main issues, the plaintiff examined 6 witnesses including himself and produced the following documents, by way of evidence:-

A postal receipt	Ex.P1
Agreement of sale	Ex.P3
Copy of a legal notice	Ex.P4
Copy of the <i>jamabandi</i> for the year 1974-75	Ex.P5
Copy of the <i>jamabandi</i> for the year 1979-80	Ex.P6

10. Upon consideration of the evidence and the arguments raised before the trial court, it first held that in the agreement, only the *kill*a (field) numbers had been mentioned, with no *khewat* or *khatauni* number given therein and no reference to the *jamabandi* (record of rights) had been made.

On the aforesaid finding itself, it was held that the suit land not having been completely described, the legal representatives of Man Singh were not bound to perform the contract even in terms of the agreement, Ex.P3.

It was further held that the contents of the agreement showed that the intention of Man Singh was only that he himself would be bound by the contract and even though legal representatives may otherwise be bound by such agreement, however, such intention of binding legal representatives was not found to be existent in the document.

Hence, referring to Section 46 of the Indian Contract Act, the defendants (present appellants) were held to be not bound to execute the sale

deed and thereby subsequently performed the contract, but were held bound to refund the amount of Rs.4400/- paid to Man Singh by the plaintiff.

11. Issue no.4 on the suit being barred by time was decided in favour of the plaintiff, holding that the account of the bank to which the suit land was mortgaged, was “adjusted on 23.06.1981” with the suit filed on 06.10.1981.

Issues no.3, 5 and 6 were also decided in favour of the plaintiff, with them found to have not been pressed/not argued, though the plaintiff was not held entitled to any special costs, issue no.7 being consequently decided against him.

12. In the appeal filed by the present appellants, and the cross-objection thereto by the plaintiff, the learned first appellate court, after noticing the pleadings and the issues framed, first upheld the finding of the trial court that there being no contradiction in the testimonies of the attesting witnesses to the agreement of sale as also the scribe thereof, the agreement therefore stood duly proved to have been executed.

It was also found that, in fact, as regards execution of the agreement, there was earlier also a decree passed on 06.02.1986 by the Subordinate Judge, Mohindergarh, Ex.D2 (*sic* Ex.D1) adduced as evidence by the defendants themselves in the present *lis*, by which in fact the agreement in question had been held to be proved.

13. Having upheld that finding of fact, the learned lower appellate court also upheld the finding that the entire sale consideration (of Rs.4400/-) was paid by the plaintiff at the time that the agreement was entered into, further finding that a notice had also been issued thereafter by the plaintiff through his counsel, calling upon the defendants to execute the sale deed qua the land as was subject matter of the agreement.

14. As regards the readiness and willingness of the plaintiff to perform his part of the contract, it was found that the loan taken from the bank was discharged by the defendants on 23.06.1981, with the aforesaid notice having been served upon them by the plaintiff on 21.08.1981, the suit thereafter having been filed on 15.10.1981; (06.10.1981 as per the trial court).

15. An argument having been raised on behalf of the appellants-defendants that since the plaintiff did not appear before the Sub-Registrar at the time when the sale deed was to be registered, therefore he could not be held to be ready and willing to perform his part of the contract, that argument was rejected on the ground that with the appellants-defendants never having indicated their willingness and readiness to execute the sale deed, even in response to the notice issued by the plaintiff, there was no compulsion on the plaintiff to appear before the Sub-Registrar on any particular date.

16. Having upheld the findings of the trial court on those issues and facts, however, as regards the lower courts' finding that description of the suit land was vague in the agreement, that was reversed by the first appellate court, holding instead that as a matter of fact the *rectangle* and *killa* numbers had been shown in the agreement, Ex.P3, and simply because the *khewat* number had not been shown, the description of the suit land could not be said to be vague.

Further, it was also found that Ex.P5 was a *jamabandi* duly showing Man Singh to be the owner of the disputed land and consequently, the contract could not be held to be uncertain.

Lastly, holding that a court of appeal could exercise jurisdiction in favour of any respondent even in an appeal filed by any appellant, in terms of Rule 33 of Order 41 of the CPC, the first appeal of the present appellant

was dismissed, with the cross-objection filed by the respondent-plaintiff held to be maintainable and having been allowed.

Hence, the present second appeal filed by the appellants-defendants.

17. It is to be noticed at the outset that in this appeal filed in the year 1989, as a matter of fact no substantial question of law had been framed, (no specific questions being usually framed as per practice), but learned counsel for the respondents has not raised any specific objection on that issue, obviously because firstly, the judgment of the lower appellate court is partly a judgment in reversal; and in any case, the 3 substantial questions of law that would arise are:-

- i) Whether the suit of the plaintiff was barred by time, even in terms of Section 46 of the Indian Contract Act, 1872?
- ii) Whether, without any reference to the record of rights (*jamabandi*), in the agreement of sale, it could be considered to be a vague contract, and therefore not executable in terms of Section 29 of the Indian Contract Act?
- iii) Whether the first appellate court erred in decreeing the suit for specific performance only on the cross-objections filed by the respondent-plaintiff, with no appeal having been filed by him against the judgment and decree of the trial court?

18. Learned counsel for the appellants first submits that in the agreement of sale (Ex.P-3), though the *killa* numbers have been given, the *Khewat* and *Khatoni* numbers have not been mentioned and therefore the trial Court did not err in holding that the agreement not having described the suit land properly, it was a vague agreement and therefore could not be enforced, though it still went on to grant the plaintiff the alternative relief of recovery of

the sale consideration paid.

He submits that in the *jamabandi* for the year 1979-80 (Ex.P-6), even the number of the *khasra* (field) is not reflected at all, with *khasra* number 24/1/1 having been depicted therein and that too in respect of land measuring 1 kanal and 7 marlas, whereas the agreement shows one of the *khasra* numbers to be '24', comprising 3 kanals and 12 marlas.

19. He further submits that even the sale consideration of Rs.4,400/- as given in the agreement of sale, was not proved to have been actually paid.

Thus, he submits that the learned lower appellate Court has wholly erred in issuing a decree of specific performance, which the learned trial Court had declined to issue.

20. *Per contra*, Mr.Sarin, learned Senior Counsel appearing for the respondent-plaintiff, on the other hand first points to the finding of the learned lower appellate Court as shown in paragraphs 10 to 15 therein, to submit that each and every contention, as has been raised by learned counsel for the appellants before this Court, has duly been answered by that Court, including the issue on the alleged vagueness of the agreement of sale. He submits that the *jamabandi* (record of rights) applicable, would be the one for the year 1974-75 (Ex.P-5), that being the one existent at the time that the agreement of sale was entered into, which tallies in fact with the *khasra* numbers given in the agreement of sale as also in the plaint, and consequently, there was obviously no vagueness in the agreement.

21. He next submits that the issue with regard to the agreement having been proved or not in any case could not have been raised by the defendants, on the principle of *res judicata*, that agreement already having

been proved to have been entered into between the parties in a previous *lis*, in which the appellants (defendants in the current *lis*), had filed a suit seeking a decree of permanent injunction against the plaintiff in the present *lis*, wherein the finding was that the said agreement had actually been entered into and the consideration paid. The said judgment and decree, as had become final, was duly exhibited as Ex.D2 before the trial Court, though not referred to by that court, but by the learned appellate court.

22. Consequently, he submits that concurrent of findings of fact had been recorded, as regards the agreement of sale having been proved and therefore, (as per learned Senior Counsel) even the *khasra* numbers contained therein not having been found to be vague, this Court in second appeal would not question that concurrent finding.

On that issue, Mr. Sarin cites two judgments of the Supreme Court in AIR 1959 Allahabad 57, Smt.Shama Bai and another vs. State of Utter Pradesh, Lucknow and others. and AIR 1989 Supreme Court 1509, Maniar Ismail Sab and others vs. Maniar Fakruddin and others.

23. Having considered the judgments of the learned courts below as also the arguments of learned counsel on both sides, in my opinion, this appeal cannot be allowed.

Taking the second question of law framed in paragraph 17 hereinabove first, in terms of the arguments made by learned counsel for the appellants, Section 29 of the Indian Contract Act is first reproduced hereinbelow:-

29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void. —

Illustrations

(a) A agrees to sell B “a hundred tons of oil”. There is nothing whatever

to show what kind of oil was intended. The agreement is void for uncertainty.

- (b) A agrees to sell B 100 tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.
- (c) A, who is a dealer in coconut-oil only, agrees to sell to B “100 tons of oil”. The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.
- (d) A agrees to sell to B “all the grain in my granary at Ramnagar”. There is no uncertainty here to make the agreement void.
- (e) A agrees to sell to B “1000 maunds of rice at a price to be fixed by C”. As the price capable of being made certain, there is no uncertainty here to make the agreement void.
- (f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given. The agreement is void.”

In terms of the aforesaid provision, it is to be seen whether the agreement in question, Ex.P3 before the trial court, is an 'uncertain agreement' or not.

Though Mr. Sarin had argued that both the courts below having come to a finding of fact that the agreement was not vague, and therefore this court in this second appeal would not interfere with that finding, and I do agree with him on that issue, yet, since the matter has been raised by learned counsel and it is a mixed question of fact and law if seen with Section 29 of the Contract Act, a perusal of the said document would not violate the principle of a court of second appeal not interfering with a concurrent finding of fact, in my opinion.

24. Having said that, it is seen that in the document (written in the *Devanagari* script) the suit land has been described as comprised in *killa* nos.11//23/2, 24 and 15//4/1. *Khasra* no.23/2 is shown to be consisting of 3 kanals and 11 marlas, *khasra* no.24/1 consisting of 3 kanals and 12 marlas and

khasra no.4/1 consisting of 1 kanal and 15 marlas, which is also shown to be so in the *jamabandi* for the year 1974-75, exhibited as P5 before the trial court, the said *khasra* numbers (alongwith others) shown to be in the ownership and possession of Man Singh, i.e. the father of the appellants.

The learned courts below as also learned counsel appearing for the respondent-plaintiff are correct in stating that the agreement in question having been entered into on 05.07.1977, that would be the relevant *jamabandi*, because the next *jamabandi* after 1975-76 would only be recorded 4 to 5 years thereafter (which is also seen to be factually so because Ex.P6 is the *jamabandi* for the year 1979-80), therefore, simply because the *khewat* number is not described in the agreement, that does not change the identity of the *killi/khasra* numbers, which are completely verifiable from the *jamabandi* (record of rights) as was relevant at the time of agreement. Further, *khewat* and *khatauni* numbers very often change from one record of rights (*jamabandi*) to the next, with *khasra* numbers always remaining the same, unless of course consolidation of holdings takes place in between, (in which case the *khasra* numbers also normally change), which is not the case presently.

Hence, in my opinion, the learned trial court erred in holding that the agreement did not describe the suit land properly, with the first appellate court having correctly reversed that finding while upholding the findings with regard to the validity of the agreement itself and the factum of the consideration having been paid (which was also stated in the agreement itself).

25. Hence, the 2nd question of law framed is answered to the effect that the agreement was not vague even in terms of Section 29 of the Indian Contract Act, with the suit land perfectly identifiable from the said agreement, when compared with the prevalent record of rights (*jamabandi*), Ex.P5.

26. As regards the first question, of whether the suit was filed on time or not, actually learned counsel for the appellants did not press much on that, other than raising a formal argument on it. Even so, with the agreement itself having stated that the sale deed would actually be executed within 2 months of the mortgage upon the suit land being redeemed from it, and the courts below having found that it was actually redeemed on 23.06.1981 by the appellants-defendants, with notice served upon them by the respondent-plaintiff on 21.08.1981, there is no violation found even of Section 46 of the Indian Contract Act, which is reproduced as follows:-

“46. Time for performance of promise, where no application is to be made and no time is specified.- Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.”

Hence, with the appellants not having fulfilled their part of promise within 2 months of getting the land redeemed from the mortgagee, as they were required to do in terms of the agreement, and the plaintiff having served a notice upon them within those 2 months, Section 46 of the Contract Act would be seen to be fully complied with, when even the suit was filed within 2 months of the notice being issued, i.e. on October 06/15, 1981.

27. That being so, the 1st question of law framed hereinabove is also answered to the effect that suit was instituted well within limitation.

28. Coming then to the last question of law framed, with regard to whether the appellate court was within its jurisdiction to decree the suit of the respondent-plaintiff in his favour (rather than simply upholding the decree granting a right of recovery to him), in the absence of any appeal filed by him but with a cross-objection stated to have been filed.

29. The first appellate court while decreeing the suit of the plaintiff, thereby directing specific performance of the contract entered into between the parties, invoked jurisdiction under Order 41 Rule 33 of the Code of Civil Procedure, which reads as follows:-

“33. **Power of Court of Appeal.**- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order.]”

30. Thus, the aforesaid provision confers power on an appellate court to pass any decree which ought to have been passed (by a trial court), even if an appeal is filed only challenging a part of decree and not the whole decree, and further, such power may be exercised even in favour of any respondent, though such respondent may not have filed an appeal or objection.

In the present case, the first appellate court has specifically stated in its judgment (not refuted by learned counsel for the appellants), that the respondent-plaintiff had filed cross-objections, which obviously would be in terms of Order 41 Rule 22 of the Code, the relevant part of which reads as

follows:-

“22. Upon hearing respondent may object to decree as if he had preferred separate appeal.”-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”

[*Explanation.*- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

XXXXX

XXXXX

XXXXX”

Consequently, the aforesaid provision also specifically providing for cross-objections to be filed by a respondent, instead of an appeal, I do not see how the contention of learned counsel for the appellants, to the contrary, has any basis.

The 3rd question of law is also therefore answered to the effect that the lower appellate court correctly exercised jurisdiction in decreeing the suit of the respondent-plaintiff qua the primary relief sought by him, even though he had not filed any appeal against the judgment and decree of the trial court but had filed only a cross-objection to the appeal filed by the present appellants.

31. In view of the aforesaid discussion, I see no reason to allow this appeal, which is consequently dismissed, with costs throughout.

December 19, 2018
pk/dinesh

(AMOL RATTAN SINGH)
JUDGE

- | | |
|-------------------------------|--------|
| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |