

IN THE HIGH COURT OF PUNJAB & HARYANA  
AT CHANDIGARH

RSA No.486 of 2000 (O&M)

Date of Decision:22.11.2018

Harbhajan Singh and another

...Appellant(s)

**Versus**

Hazur Singh and another

...Respondent(s)

**CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL**

**Present:** Mr.Arun Jain, Senior Advocate with  
Mr.Abhishek Dhull, Advocate for the appellants.  
Mr.R.C.Takoria, Advocate for respondent No.1.  
Mr.R.K.Sharma, Advocate for respondent No.2.

**ANIL KSHETARPAL, J.**

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below, while decreeing the suit for specific performance of the agreement to sell as also relief of possession.

In the considered view of this Court, following substantial questions of law arise in the present case:-

- (i) Whether a subsequent suit for specific performance of the agreement to sell would be barred under Order 2 Rule 2 of the Code of Civil Procedure if in the previous suit for injunction, the plaintiff has pleaded that defendant has finally refused to honour the agreement to sell and has suffered a compromise decree in favour of other persons?
- (ii) Whether the courts are required to examine the evidence in detail before passing any judgment?

(iii) Whether in the facts and circumstances of the case particularly when the date on which the alleged agreement to sell was executed is found doubtful, it would be appropriate to grant decree for specific performance of the agreement to sell?

The parties are being referred to by their name. Pala Singh was owner of the property. He sold the property to defendants No.2 and 3 namely Sewa Singh and Harbhajan Singh, sons of Gulzar Singh-appellants herein. Ash Kaur, daughter of Pala Singh, filed a suit, claiming superior right of pre-emption. The aforesaid suit was decreed on 1.4.1983, upheld in the appeal as well as in the second appeal.

Sewa Singh-defendant No.2/appellant herein filed a suit against Ash Kaur, challenging the decree for pre-emption on 27.8.1984 on the ground that Sewa Singh was a minor and he was not represented by his father properly in the suit for pre-emption. A compromise was arrived at during the pendency of the suit and through a compromise, effect of decree for pre-emption of the sale-deed was nullified. Ash Kaur even withdrew her amount i.e. 1/5<sup>th</sup> of sale consideration deposited in the court while filing a suit for pre-emption.

The plaintiff-respondent claims that Ash Kaur had entered into an agreement to sell with respect to land measuring 50 kanals and 10 marlas being half share of 101 kanals and 1 marla in his favour on 20.7.1984. Out of total sale consideration of Rs.1,26,250/-, Rs.80,000/- is stated to have been paid in cash and it was agreed that the sale-deed would be executed and registered on 12.6.1985. The plaintiff-respondent herein Hazoor Singh filed a civil suit for grant of decree for injunction on 6.4.1985. Defendants-

appellants were defendants in the suit for grant of decree of injunction. The pleadings of the plaintiff, as mentioned in para 5 to 9 of the plaint, are extracted as under:-

“XXX XXX XXX XXX XXX  
XXX XXX XXX XXX

5. That the plaintiff has come to know that defendant no.1 has got a collusive and compromise decree after the execution of the abovesaid agreement of sale with a view to harm the plaintiff in favour of defts. no. 2 & 3.

6. That on the basis of the abovesaid collusive decree **recurred** by collusion by defendants no. 2 & 3. They are threatening to dispossess the plaintiff forcibly and illegally because the plaintiff is not a party to that decree and is not bound by the same.

7. That plaintiff is bound to suffer an irreparable loss and injury in case defendant no.2 and 3 succeed in dispossessing the plaintiff on the basis of above said collusive decree.

8. That the defendants have been repeatedly requested not to dispossess the plaintiff from the land in suit forcibly and illegally, but the defts. are adamant and have finally refused to do so on 27.3.85 at village Masat Garh tehsil Guhla. Hence this suit.

9. That the cause of action has accrued to the plaintiff and against the defendants on 20.7.84 the date of agreement of sale and finally on 27.3.1985 the date of final refusal by the defendants and is daily arising at village Masatgarh tehsil Guhla, Distt. Kurukshetra, within the territorial jurisdiction of this court and this Court has therefore got the jurisdiction to try and entertain this suit on the facts stated above.”

Thereafter, the plaintiff filed the present suit on 21.5.1986 for specific performance of the agreement to sell dated 20.7.1984, pleadings that Ash Kaur-defendant No.1 is not honouring agreement to sell executed by her. It would be significant to note that the plaintiff claimed that he is in

possession of the property agreed to be sold pursuant to the agreement to sell.

Ash Kaur filed the written statement, pleading that the agreement to sell is a result of fraud and hence not binding on her. Defendant No.2 filed a written statement, pleading that the present suit is barred under Order 2 Rule 2 of the Code of Civil Procedure and the plaintiff is not in possession, in fact, defendants No.2 and 3 are in possession of the property and agreement to sell does not confer any right.

During the pendency of the suit, counsel appearing for the appellants made a statement on 13.5.1991 that the plaintiff has been dispossessed by defendants No.2 and 3 and therefore, he sought adjournment for filing application for amendment, which was granted and thereafter, the plaintiff was permitted to amend the plaint, to add the relief of possession.

Both the courts have decreed the suit filed by the plaintiff for possession by way of specific performance of the agreement to sell. Hence, the present appeal.

The learned first appellate court has recorded following observations:-

(i) Ash Kaur has failed to substantiate her plea of fraud. Even particulars of the fraud have not been pleaded;

(ii) Piara Singh, one of the attesting witness of the agreement to sell and Scribe Chander Bhan have been examined apart from the plaintiff and therefore the agreement to sell is proved;

(iii) There is no requirement of the plaintiff to examine a Fingerprint and Handwriting Expert to prove the thumb

impressions of Ash Kaur;

(iv)The suit filed by the plaintiff is not barred under Order 2

Rule 2 of the Code of Civil Procedure;

(v)The compromise decree dated 3.9.1984 is a result of collusion between Ash Kaur on the one hand and Sewa Singh and Harbhajan Singh on the other hand.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record available.

In the present case, some part of the evidence would be required to be discussed. Chander Bhan, Scribe, has been examined as PW-1. He in the first line of the cross-examination states that he has not brought the register in which entries are made of the documents scribed and he does not have the register. He further states that he does not remember where it has gone because he had left the shop. The aforesaid register is checked by the concerned officials of the office of the Registrar periodically so as to ensure that each entry is numbered and register is page marked. On further cross-examination, he stated that it is wrong to suggest that he had not intentionally brought the register. He voluntarily stated that entry of the agreement to sell in question is at Serial No.190 in the register and on the next date of hearing, he will produce a register after searching the same but no register was produced. Apart therefrom, the plaintiff and one of the marginal witness-Piara Singh have been examined.

If one carefully looks at the alleged agreement to sell, the aforesaid agreement to sell is executed on a non-judicial stamp paper of Rs.2.25/-. The person who has purchased the stamp paper has not signed at

the time of purchase. No stamp vendor who has issued the stamp paper has been examined. The civil suit for permanent injunction was withdrawn by the plaintiff on 20.8.1986.

Now the stage is set for considering the questions of law as framed above.

**Question No.1**

**“Whether a subsequent suit for specific performance of the agreement to sell would be barred under Order 2 Rule 2 of the Code of Civil Procedure if in the previous suit for injunction, the plaintiff has pleaded that defendant has finally refused to honour the agreement to sell and has suffered a compromise decree in favour of other persons?”**

As per Order 2 Rule 2 of the Code of Civil Procedure, the plaintiff is required to include his entire claim with respect to cause of action and if the plaintiff omits to sue any claim in respect of the cause of action, he will not be permitted to file subsequent suit. Order 2 Rule 2 of the Code of Civil Procedure is extracted as under:-

***2. Suit to include the whole claim***

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

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

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

In the present case, it is apparent that on the day, the plaintiff filed the present suit for permanent injunction, i.e. on 6.4.1985, he knew that Ash Kaur has refused to honour the agreement to sell finally and she

has entered into a compromise with defendants No.2 and 3-appellants herein. So the cause of action for filing the suit for specific performance of the agreement to sell had arisen, however, the plaintiff did not include the relief of specific performance. The pleadings of the plaintiff-respondent as extracted above clearly prove that defendant had finally refused to honour the agreement to sell, therefore, on the date of the filing of the suit, cause of action to file the suit for specific performance of the agreement to sell had already arisen.

This aspect has been examined in detailed by Hon'ble the Supreme Court in the case of **M/s. Virgo Industries (Eng.) P.Limited Vs. M/s Venturetech Solutions P. Limited, 2013 (1) SCC 625**, wherein it has been held that once a suit for injunction has been filed when the plaintiff had a notice of final refusal on the part of the defendant to honour the agreement to sell, the plaintiff is required to include the relief of specific performance in the first suit for injunction itself, failing which the subsequent suit would be barred under Order 2 Rule 2 of the Code of Civil Procedure.

In view thereof, question No.1 is answered in favour of the appellants.

**Question No.2.**

**“Whether the courts are required to examine the evidence in detail before passing any judgment?”**

In the present case, on reading of the judgments by the courts below, it is apparent that the courts have failed to examine the evidence in detail but for referring that the Scribe has been examined, the courts have over looked that the Scribe has failed to prove that the agreement to sell was executed on 20.7.1984. The evidence of Scribe namely Chander Bhan has

been noted above and need not be repeated. It is apparent that Chander Bhan could not prove that the agreement to sell was executed on 20.7.1984. Still further, stamp vendor has not been examined or his register has not been produced to prove that the non-judicial stamp paper was purchased on 20.7.1984. Only oral evidence has been produced.

Both the learned courts below over looked that as per the alleged agreement to sell, possession of the land is stated to have been delivered to the plaintiff on the date of contract itself. The plaintiff when filed the suit for permanent injunction also claimed that he has been delivered possession, however, his counsel made a statement on 13.5.1991 that defendants No.2 and 3-appellants herein have taken forcible possession and thereafter an application for amendment was moved and allowed. However, when the plaintiff appeared in evidence on 12.6.1991, he does not utter a word that he has been dispossessed during the pendency of the suit. Both the courts have over looked this aspect of the matter.

Accordingly, question No.2 is also answered.

**Question No.3**

**“Whether in the facts and circumstances of the case particularly when the date on which the alleged agreement to sell was executed is found doubtful, it would be appropriate to grant decree for specific performance of the agreement to sell?”**

The facts in detail have been noticed in the foregoing paragraphs. There is a clear suspicion about the date on which the alleged agreement to sell, specific performance whereof is being sought, was entered into. The plaintiff has failed to prove that the agreement to sell was entered into on 20.7.1984 and was not ante dated. Still further, the plaintiff has filed the suit with incorrect assertions that the possession has been

delivered. Further, the plaintiff on the date when the suit for injunction was filed, i.e. 6.4.1985, knew that the property transferred as per the compromise decree is under the ownership of defendants No.2 and 3 but still he waited for more than 1 year to file the present suit.

In the facts and circumstances of the present case, both the courts below were not correct in granting decree for possession by way of specific performance of the agreement to sell particularly when Sewa Singh and Harbhajan Singh are owners of the property pursuant to a compromise decree passed on 3.9.1984.

Accordingly, in the facts and circumstances of the case, the plaintiff is held not entitled to relief of possession by way of specific performance of the agreement to sell.

In view thereof, question No.3 is also answered in favour of the appellants.

This Court has already dealt with the reasons assigned by the learned first appellate court on Order 2 Rule 2 of the Code of Civil Procedure. The findings of the learned first appellate court with regard to failure of Ash Kaur to plead the particulars of the fraud and lead evidence require no interference, however, the findings of the court with regard to agreement to sell having been proved by examination of one attesting witness Surjan Singh and Scribe Chander Bhan have been found erroneous as discussed by the court in the previous part of the judgment.

As regards the requirement of examination of Fingerprint and Handwriting Expert by the plaintiff also does not require any interference. However, the learned first appellate court has wrongly held that the compromise and judgments and decrees, Ex.D4 and Ex.D5 are result of collusion between Ash Kaur on one hand and Sewa Singh and Harbhajan

Singh on the other hand in absence of reliable evidence to that effect. The plaintiff has not pleaded that defendant No.1 on the one hand and defendants No.2 and 3 on the other hand have colluded. Still further, there is no substantive evidence to support the aforesaid findings. Hazoor Singh- the plaintiff when appeared does not say a word about the same.

In view of the above, the regular second appeal is disposed of. The decree for possession by way of specific performance of the agreement to sell is substituted with a decree for recovery of the earnest money along with interest @ 9% against defendant No.1-Ash Kaur from the date of payment till realisation.

Pending application(s), if any, shall also stand disposed of, in terms thereof.

**22.11.2018**  
**mks**

**(ANIL KSHETARPAL)**  
**JUDGE**

**Whether speaking/reasoned: Yes/No**

**Whether Reportable: Yes/No**