

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

RSA No.105 of 2010 (O&M)

Date of decision:26.02.2018

Mushtaq Ahmed

... Appellant

Vs.

Mohd. Ramzan and others

... Respondents

RSA No.106 of 2010 (O&M)

Mushtaq Ahmed

... Appellant

Vs.

Mohd. Ramzan and others

... Respondents

RSA No.107 of 2010 (O&M)

Mushtaq Ahmed

... Appellant

Vs.

Mohd. Anwar

... Respondent

RSA No.1200 of 2010 (O&M)

Mohd. Anwar

... Appellant

Vs.

Mohd. Ramzan and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Arihant Jain, Advocate with
Mr. Arun Jindal, Advocate
for the appellant(s).

Mr. Jatinder Singla, Advocate
for respondent No.2.

Mr. G.N.Malik, Advocate
for respondent No.3.

AMIT RAWAL J. (Oral)

This order of mine shall dispose of four Regular Second Appeals arising out of three suits, i.e., civil suit no.182 dated 25.08.1999 titled as Mushtaq Ahmed Vs. Mohd Anwar, (hereinafter called as “suit no.1) in pursuance to agreement to sell dated 08.04.1996 which was ultimately dismissed as withdrawn with liberty to file fresh one on the same cause of action, vide order dated 25.03.2003 by this Court, resulting into filing of fresh suit bearing No.154 of 2003 (hereinafter called as “suit no.1A) and civil suit No.209 of 15.06.2002 titled as Mohd. Ramzan Vs. Mohd. Anwar and another (hereinafter called as “suit no.2), seeking specific performance of the agreement to sell dated 30.06.1999 executed by Khushi Mohd., attorney of Mohd. Anwar on the basis of attorney dated 08.04.1996. The facts are being taken from suit no.1 and 1A.

Mohd. Anwar, vendor/ owner of the suit property, i.e., house had executed a sale deed dated 08.04.1996 for a total sale consideration of ₹2,70,000/- in favour of one Mohd. Mushtaq. The aforesaid agreement to sell did not envisage any specific date for execution and registration of the sale deed. On the same very date, Mohd. Anwar stated to have executed a registered Power of Attorney in favour of Khushi Mohd. The civil suit no.182 of 1999 was filed seeking specific performance of the agreement to

sell. However, the same was withdrawn by the counsel on 29.11.2000. The application was moved for restoration of aforesaid order on 12.04.2001 which was dismissed by the trial Court on 14.08.2002. Civil Revision bearing No.4906 of 2002 was preferred before this Court which was dismissed, vide order dated 25.03.2003 with liberty to the petitioner therein to file a fresh suit on the same cause of action, primarily for the reason that time was not essence. It is in that background of the matter suit no.154 of 2003 titled as Mohd. Mushtaq Vs. Mohd. Anwar was instituted on 07.05.2003.

During the interregnum, Khushi Mohd entered into an agreement to sell dated 30.06.1999 with Mohd. Ramzan for a total sale consideration of ₹2,50,000/- against the payment of earnest money of ₹1,50,000/-. Both the suits were consolidated, i.e, suit No.1A and suit no.2.

The civil suit no.2 qua discretionary relief was dismissed by granting alternative relief vis-a-vis recovery of earnest money alongwith interest and civil suit no.1A instituted afresh on the same cause of action, was decreed, vide judgment and decree dated 17.11.2005.

Three appeals were filed before the Lower Appellate Court, two appeals by Mohd. Anwar, qua decretal of the suit no.1A and other granting of discretionary relief in suit no.2, i.e., civil suit no.209 of 2002; third appeal by Mohd. Ramzan of not granting the discretionary relief in suit no.2, i.e, 209 of 2002.

The appeal filed by Mohd. Anwar qua suit no.1A had been allowed by holding that the suit was barred by law of limitation and qua refund with regard to Mohd Ramzan was dismissed. The appeal filed by Mohd. Ramzan for not granting the discretionary relief had been allowed. This is how four regular second appeals before this Court were filed.

It is pertinent to mention here that before suit no.2 could be filed on 15.06.2002, the power of attorney dated 08.04.1996 was cancelled on 31.08.1999, meaning thereby on the date of filing, Khushi Mohd. did not have any power to defend the suit, though he was arrayed as defendant no.2. In both the cases, two agreements dated 08.04.1996 and 30.06.1999 were not denied.

Mr. Arihant Jain, learned counsel appearing on behalf of the appellants/Mushtaq Ahmed submitted that the entire sale consideration of ₹2,70,000/- had been paid at the time of execution of the agreement to sell dated 08.04.1996, therefore, the time limit was not fixed for execution and registration of the sale deed. On request submitted by the plaintiff Mushtaq Ahmed for execution and registration of the sale deed, the vendor Mohd. Anwar, did not accede compelling him to institute suit no.1A.

In the written statement, Mohd. Anwar did not deny the execution of the agreement but as stated that it was withdrawn and liberty was granted, therefore, suit no.1A could not be said to be barred by law of limitation, in view of the provisions of Article 54 of the Limitation Act. The counsel was not authorized to withdraw the suit. It is in that

background, this Court had granted the liberty to the petitioner in the revision petition to file fresh suit on the same cause of action, therefore, the cause of action would relate back to institution of suit no.1, when the breach was attributed towards vendor. Since the suits were consolidated, therefore, the suit preferred by Mohd. Ramzan was not decreed in toto by granting him relief of recovery.

The Lower Appellate Court ought not to have decreed the suit and allowed the appeal of Mohd. Anwar vis-a-vis suit no.1A being barred by law of limitation. The power of attorney executed by Mohd. Anwar in favour of Khushi Ahmed was cancelled on 31.08.1999. The agreement to sell was of 13.06.1999 and the suit was filed on 15.06.2002. Mohd. Anwar did not appear in the aforementioned suit. Attorney could not have deposed on the basis of principal, once he has lost the powers of an agent way back on 31.08.1999 and thus, urged this Court for allowing the appeal by restoring back the judgment and decree of the trial Court in suit no.1A and dismissing the appeal of Mohd. Anwar.

Mr. Jatinder Singla, learned counsel appearing on behalf of the Mohd. Anwar/vendor submitted that this Court could not have granted the liberty to the petitioner therein to file a civil suit on the same cause of action. The advocate as per the power of attorney executed by his client was empowered to withdraw the civil suit, therefore, no separate affidavit was required on behalf of the plaintiff, i.e., Mushtaq Ahmed, as revision petition was dismissed and not allowed. Suit no.1A was barred under the provisions of Order 23 Rule 3 CPC and the remedy was to seek revival of the suit but

not to institute a fresh suit.

Since the agreement to sell dated 30.06.1999 was admitted by the attorney holder, who had the powers to execute the same, as power of attorney dated 8.4.1996 was in vogue and therefore, any act done by the agent requires to be respected and honoured. The judgment and decree of the Lower Appellate Court is liable to be upheld. Attorney holder supported the version of vendor and the matter was compromised between vendee and vendor, therefore, no cause of action arose to file suit no.2 as application for restoration was moved in April 2001, i.e., almost 5 months from the date of withdrawal of the suit.

Mr.G.N.Malik, learned counsel appearing on behalf of respondent no.3 submitted that relationship between the principal and agent was fiduciary in capacity as per the terms and conditions of the GPA which was valid at the time when the agreement to sell was entered into, even earnest money of ₹1,50,000/- was also passed on to the vendor. It was not a case of vendor that he did not receive the balance sale consideration and therefore, the suit was rightly decreed and prayed for maintaining the judgment and decree.

I have heard the learned counsel for the parties and appraised the judgments and decrees of both the Courts below.

The facts noticed above are not in dispute. The only point to be seen whether in view of the order dated 25.03.2003, passed in CR No.4960 of 2002, suit no.1A in the absence of time being essence was liable to be

dismissed on the ground of limitation or not, if the answer is in affirmative, i.e., there is no limitation, obviously suit no.2 cannot be decreed and the judgment and decree of the trial Court ordering for refund of earnest money is liable to be maintained.

As regards withdrawal of the suit, powers given to the counsel in the power of attorney for withdrawal of the suit, the same has been a question of debate and ponderence before the Supreme Court of India in **Himalayan Cooperative Group Housing Society Vs. Balwan Singh 2015 (3) RCR (Civil) 394**, wherein, while adjudicating fiduciary relationship between a client and advocate, it has been held that powers in the power of attorney cannot be exercised with impunity in the cases where conscious decision is taken to withdraw a suit, for that independent affidavit of the party is required in order to rule out an element of fraud or extraneous situation. It would be apt to reproduce the principles culled out in the aforementioned judgment which read thus:

- i) *Lawyers owe fiduciary duties to their clients – lawyers should follow the client's instructions rather than substitute their judgment for that of the client.*
- ii) *A lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement.*
- iii) *Lawyers should follow the client's instructions rather*

than substitute their judgment for that of the client.

iv) In some cases lawyers can make decisions without consulting client – while in other, the decision is reserved for the client.

v) It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make a decision that can affect his rights.”

There was hardly any delay in moving the application for restoration of the suit which was dismissed by the trial Court but this Court had allowed the plaintiff, Mushtaq Ahmed to institute a suit. For the sake of brevity, order dated 25.03.2003 reads as under:-

“Mr. Arihant Jain, counsel for the petitioner, states that the petitioner had filed a suit for specific performance of the agreement, in which he had also paid the entire amount to the respondent-defendant. Despite that, the counsel for the plaintiff-petitioner made a statement in the Court, praying that the plaintiff wants to withdraw the suit. Counsel for the petitioner contends that although stay had been granted in favour of the petitioner, yet the statement for withdrawing the suit was made, though the petitioner had never authorised the counsel to make such a statement. Mr. Jain states that the suit has already been withdrawn. He, however, prays that the petitioner be allowed to file a fresh suit on the same cause of action.

After hearing the learned counsel for the petitioner, I dismiss the revision petition with liberty to the petitioner to file a fresh suit on the same cause of action.”

The aforementioned order has remained intact, therefore, in my view, would not be hit by provisions of Order 23 Rule 3 CPC. There is no denial to the fact that agreement to sell dated 08.04.1996 did not envisage any stipulated/target date for execution and registration of the sale deed. In these circumstances, Article 54 of the Limitation Act provides limitation of three years from the date of the breach or refusal, is attracted which reads thus:-

54.	For specific performance of a contract.	Three years	The date of fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
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It is on account of breach, appellant- Mushtaq Ahmed instituted a suit no.1 in the the year 1999 , though same was withdrawn on 29.11.2000 with no demur or reservation but fact of the matter is that once this Court had granted liberty, statement pales into insignificance. The finding given by the trial Court in suit no.1A while decreeing the suit on 17.11.2005 is the the correct appreciation of law as the plaintiff therein had complied with the provisions of Section 16(c) of Specific Relief Act, 1963. Khushi Mohd. had lost the right to act as an agent on 15.06.2002 when the suit no.2 was instituted. The trial Court rightly dismissed the suit by granting the recovery rights as the execution of the agreement to sell was not denied by the agent and vendee.

It is a matter of record that vendor did not appear in the aforementioned suit. All these factors, in my view, were required to be looked into by the Court below, therefore, the judgment and decree of the Lower Appellate Court in holding suit no.1A being barred by law of limitation is erroneous, much less suffers from illegality and perversity and the judgment and decree dated 17.11.2005 is liable to be restored. In essence, the judgment and decree of the Lower Appellate Court in decreeing the suit no.2 in toto is not sustainable. Accordingly, the same is set aside.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case

(supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to

such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

In view of what has been observed above, the appeals stand disposed of.

February 26, 2018

savita

Whether Speaking/Reasoned

Whether Reportable

(AMIT RAWAL)

JUDGE

Yes/No

Yes/No