

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

RSA No.3874 of 2013 (O&M)

Date of Decision.04.04.2018

Arun Gupta and anotherAppellants
Vs
Shashi Jain and anotherRespondents

2. **RSA No.91 of 2014 (O&M)**

Arun Gupta and anotherAppellants
Vs
Shashi Jain and anotherRespondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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

Mr. P.S. Guliani, Advocate and
Mr. B.S. Guliani, Advocate
for respondent No.1.
Mr. Ravijay Singh, Advocate for
Mr. Manjeet Singh, Advocate
for respondent No.2.

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AMIT RAWAL J.(ORAL)

C.M. No.10509-C of 2013 in RSA No.3874 of 2013

For the reasons stated in the application, delay of 6 days in re-
filing the appeal is condoned.

Application is allowed.

C.M. No.216-C of 2014 in RSA No.91 of 2014

For the reasons stated in the application, delay of 52 days in re-
filing the appeal is condoned.

Application is allowed.

Main cases

This order of mine shall dispose of two regular second appeals
bearing No.3874 of 2013 and 91 of 2014. The former is arising out of Civil

others” (hereinafter called as the ‘first suit’) for possession by way of specific performance of agreement to sell dated 30.12.2005 for 22 bighas 8 biswas of land which was partly decreed by the trial Court but in appeal the finding of the trial Court has been reversed and the latter is arising out of Civil Suit No.376 of 2009 titled as “Arun Gupta and another Vs. Seo Ram Jain and others” (hereinafter called as the ‘second suit’) claiming possession by way of specific performance of agreement to sell dated 30.12.2005 for 32 bighas which was partly decreed by the trial Court but in appeal the finding of the trial Court has been reserved, meaning thereby, the suit of the plaintiffs has been dismissed in toto. The facts are being enumerated from RSA No.3874 of 2013.

The appellants-plaintiffs instituted the aforementioned suit claiming specific performance of two agreements to sell of even date i.e. dated 30.12.2005 in respect of two parcels of land measuring 22 bighas 8 biswas and 32 bighas with specific relief of declaration challenging the sale deeds executed by defendant No.3 Seo Ram Jain along with his wife Shashi Jain-defendant No1 in favour of defendant No.2 vide vasika No.292 dated 10.04.2008 and vasika No.453 dated 15.4.2008 with alternative relief of recovery of ₹1,10,40,000/- and ₹77,28,000/-. It was averred that defendant No.1-Shashi Jain had entered into agreement to sell dated 30.12.2005 in respect of land measuring 22 bighas 8 biswas @₹13.80 lakhs whereby a sum of ₹15 lakhs in the first suit and ₹25 lakhs in the second suit as earnest money was paid. The date for execution of the sale deed was fixed as 31.5.2006. It was categorically averred that the defendants insisted to get the sale deeds executed on the basis of Collector rate fixed by the Government which was not acceded to by the plaintiffs, as they insisted for

the execution of the sale deeds on the basis of the price mentioned in the agreement to sell. The plaintiffs are stated to have made number of requests to get the sale deeds executed as per the agreements in question but at all times, the defendants insisted for execution of the same at the Collector rate. On 02.12.2008 when the plaintiffs visited the spot, they came to know that some other persons were present there and defendant No.1 had already executed sale deed in favour of defendant No.2 on 10.4.2008 and 15.4.2008. On inspection of the revenue record vasika No.292 dated 10.4.2008 and 453 dated 15.4.2008 with regard to aforementioned sale deeds came to their knowledge.

The aforementioned suit was contested by the defendant No.1 by filing separate written statement, taking preliminary objections that the suit was not maintainable and hopelessly barred by limitation. The plaintiffs had obtained ex parte stay by misrepresentation despite the fact that the caveat petition under Section 148-A of the Code of Civil Procedure had been filed. On merits, it was stated that the plaintiffs backed out from the terms and conditions of the agreement to sell. They did not come forward with balance sale consideration despite request of the defendants rather demanded back the earnest money. It is in these circumstances, the earnest money stood forfeited and the agreement was cancelled. After forfeiture of the earnest money, no action was taken by either of the parties for long period. Defendant No.2 purchased the suit land vide registered sale deeds and has raised the construction as per the sanctioned plan. The story of executing the sale deeds at the Collector rate is false as the agreement to sell did not envisage any such term and condition. It was averred that no notice was ever served on defendant No.1 by the plaintiffs and the notice

had been attached with the plaint just for the purpose of covering up of the alleged period of limitation.

Defendant No.2 filed separate written statement by raising the plea of bona fide purchaser and reiterated the stand in the written statement of defendant No.1.

Replication was also filed by controverting the averments made in the written statement and reiterating the averments of the plaint.

On the basis of aforementioned pleadings, the trial court framed the following issues in suit No.1 and suit No.2 respectively.

“Suit No.1

- 1. Whether the plaintiffs are entitled to the decree for specific performance of the agreement to sell dated 30.12.2005 as prayed for? OPP*
- 2. Whether the plaintiffs are entitled to the declaration as prayed for? OPP*
- 3. Whether plaintiffs are entitled to the permanent injunction as prayed for? OPP*
- 4. Whether the plaintiffs are entitled to recovery of Rs.1,10,40,000/- as prayed for? OPP*
- 5. Whether suit is not maintainable? OPD*
- 6. Whether suit is hopelessly time barred? OPD*
- 7. Whether plaintiffs have not come to the court with clean hands? OPD*
- 8. Whether proper court fee has not been affixed on the plaint? OPD*
- 9. Relief.*

Suit No.2

1. *Whether the plaintiffs are entitled to the decree for specific performance of the agreement to sell dated 30.12.2005 as prayed for? OPP*
2. *Whether the plaintiffs are entitled to the declaration as prayed for? OPP*
3. *Whether plaintiffs are entitled to the permanent injunction as prayed for? OPP*
4. *Whether the plaintiffs are entitled to recovery of Rs.1,10,40,000/- as prayed for? OPP*
5. *Whether suit is not maintainable? OPD*
6. *Whether suit is hopelessly time barred? OPD*
7. *Whether plaintiffs have not come to the court with clean hands? OPD*
8. *Whether proper court fee has not been affixed on the plaint? OPD*
9. *Relief.*

The plaintiffs in support of their pleaded case examined Arun Gupta as PW-1, Rajesh Kumar as PW-2 and tendered into evidence photocopies of postal receipts Mark-A to Mark-C, documents Ex.P1 to P7 and closed evidence. On the other hand, the defendants examined Rajiv Jindal as DW1 and defendant No.1 as DW2 and brought on record documents Ex.D1 to D10.

The trial Court on the basis of preponderance of the evidence decided issue No.1 to 3 & 7 against the plaintiffs and decided issue No.4 partly in favour of the plaintiffs and partly in favour of the defendants and issue No.5 and 6 in favour of the plaintiffs and against the defendants, in

annum from the date of execution of the agreement to sell till realization. However, in the appeal preferred before the lower Appellate Court, the judgment and decree rendered by the trial Court was set aside, meaning thereby, the suits of the plaintiffs were dismissed in toto.

Mr. Sanjay Mittal, learned counsel appearing on behalf of the appellants-plaintiffs in support of averments made in the memorandum of appeal raised the following submissions:-

(i) Both the Courts below have committed illegality and perversity in not adverting to the categorical stand of the plaintiff, which had been proved through the cross-examination of DW1, Rajiv Jindal son of Girdhari Lal Jindal, for, the plaintiffs' pleaded case had been that defendants insisted for execution and registration of the sale deed at the Collector rate and not on the rate mentioned in the agreement to sell.

(ii) In order to buttress his arguments, he drew attention of this Court to the cross-examination of DW-1 to submit that rate agreed between the vendor and the vendee was @₹17,90,000/- per acre vis-à-vis ₹13,80,000/- per acre entered between the parties, which was an act of greed at the behest of the vendor. It has also come in the testimony of the aforementioned witness that there was no agreement to sell between defendant No.1 and 3 and defendant No.2 and the total sale consideration was ₹2,43,00,000/- whereas the sale deeds were executed for ₹45,56,000/- and to a specific question in the cross-

examination, he categorically admitted that an excess amount of about ₹1,90,00,000/- was not reflected in the account book. The aforementioned piece of evidence proved the pleaded case of the plaintiffs but the same has been ignored by both the Courts below.

In support of his contentions, he relied upon the judgment rendered by this Court in **Parkash Wanti (deceased) Vs. Dial Singh 1993 (1) RRR 140** to contend that the vendor cannot be permitted to forfeit the amount as the defendant had not been able to prove on record any actual damaged suffered by him on account of non-performance of his part of contract by the plaintiff.

The defendants had insisted for altering the terms and conditions for executing the sale deed at the Collector rate, therefore, they cannot be permitted to enforce penalty clause. In respect of aforementioned submissions, he relied upon the ratio decidendi culled out by this Court in **Nazam Singh and another Vs. Rakesh Kumar 2012(2) PLR 562.**

Even if the appellant-plaintiff had not filed any appeal before the lower Appellate Court for grant of discretionary relief, the same can always be urged in the present appeal by taking the aid of provisions of Order 41 Rule 33 CPC. Before the lower Appellate Court, an application under Order 41 Rule 27 CPC was submitted by the appellant-plaintiff which was essential and necessary for the adjudication of the *lis* but the same has erroneously been dismissed. There was no breach on the part of the appellant-plaintiff for giving cause to the defendants to forfeit the amount as the defendants also did not appear before the Registrar, thus, urges this Court for setting aside the finding rendered by the lower Appellate Court.

Per contra, Mr. Guliani, learned counsel appearing on behalf of the respondents-defendants submitted that the plaintiff did not appear before the Registrar and therefore, the readiness and willingness as per the provisions of Section 16(c) of the Specific Relief Act, 1963 was conspicuously absent, as non-appearance of the defendant before the Registrar was on the premise that he was sick and lying on the bed and therefore, could not appear before the Registrar. There was a perpetual fault on behalf of the appellant-plaintiff in not honouring the terms and conditions of the agreement, therefore, cause of action arose to the defendant for forfeiture of the amount. In support of his contention, he relied upon the ratio decidendi culled out by Hon'ble Supreme Court in *Satish Batra Vs. Sudhir Rawal (2013) 1 SCC 345; 2012(4) RCR (Civil) 890.*

The cross-examination of DW-1, Rajiv Jindal cannot be relied upon as examination-in-chief has also to be looked into. The defendant had no option but to execute the sale deed in favour of defendant No.2 once the plaintiff failed to perform his part of the agreement. The plaintiff ought to have challenged the finding recorded by the trial Court on issue No.1, 2, 3 and 7 and cannot be permitted to take aid of provision of Order 41 Rule 33 CPC.

The notice, Ex.P5 was issued only after the sale of land by defendant No.1 and 3 to defendant No.2. The said notice would not have made any dent as it was served after 2 ½ years of the stipulated date. The notice was also wanting compliance of ingredients of Section 16(c) of the 1963 Act, thus, urges this Court for upholding the finding under challenge.

I have heard learned counsel for the parties, appraised the paper

book, records of the Courts below and of the view of that there is force and merit in the submissions of Mr. Sanjay Mittal in supporting the judgment and decree rendered by the trial Court for the purpose of granting alternative prayer of refund of earnest money along with interest @6%. Both the Court below have not only abdicated but had been repugnant in not referring to cross-examination of DW-1, Rajiv Jindal. For the sake of brevity, the same reads as under:-

“xxxxxx by Sh. Mukesh Gandhi, counsel for the plaintiff.

*It is correct that I have purchased the agriculture land vide Ex.D1 and Ex.D2. It is incorrect that no construction can be raised without getting change of land user from the concerned department. It is correct that the site plan was to be got approved from the Town Planning Department before raising construction at the spot. It is correct that we have got change of land user from the concerned department on 21.2.2009. It is correct that there is one of the condition at No.iv at Ex.D8 that promoter shall not undertake any development work until building plans are approved by competent authority. It is correct that the building plan for M/s Rama Devi Jindal Educational Charitable Society was approved on 10.2.2009. It is correct that the application for approval of building plan was submitted on 27.1.2009. **The society i.e. defendant No.2 has purchased the land in question at the rate of Rs.17,90,000/- per acre. It is correct that the sale deeds Ex.D1 and D2 were executed at Collector rates. I cannot say who has told us to execute the sale deed at the***

collector rate. However, it is the normal practice. I do not remember the date on which date the defendant No.2 filed the caveat petition. It is correct that in the written statement on behalf of defendant No.2, it is mentioned in para No.3 that the caveat petition was filed on 19.1.2009. It is incorrect that I have filed an affidavit before this Hon'ble Court with regard to the raising of construction at our own risk on 11.6.2009 and the affidavit is Ex.PX. It is incorrect to suggest that we have started the construction at the site in dispute after 10.02.2009. We came to know about the agreement to sell Ex.P2 about two days before the filing of caveat petition. We never talked with the plaintiffs with regard to the land in dispute. I do not know whether the plaintiffs have given any application against the defendants to the police authorities. It is incorrect that we have received any legal notice dated 4.12.2008 Ex.P5. It is incorrect to suggest that we have been told by Seo Ram Jain or by Shashi Jain with regard to the execution of agreement to sell with the plaintiffs. It is incorrect to suggest that we have raised construction after the passing of stay order by this Hon'ble Court Vol. The construction has already been completed. We have raised the construction upto third floor on 1 lac to 110 lac sq. feet area which including five blocks as on today. The said construction was raised without four months. The four blocks have been constructed upto the level of two floors upto the day of stay. There was no agreement to sell between the defendants No.1 and 3 and us.

I cannot tell the exact time between the date of deal and the execution of sale deeds. We came to know from Seo Ram Jain about the deal with the plaintiffs after receiving summons from the Court. I never visited the police station on the complaint made by the plaintiffs. I am not aware whether any of other office bearer of defendant No.2 has visited the police station on the complaint made by the plaintiffs to the police authorities. It is correct that the approximate value of total sale consideration was about 2 crore 35 lacs. It is correct that the sale deeds were executed for Rs.45,56,000/-. We have not shown the excess amount of about Rs.1 crore 90 lacs in our account books. We came to know about the dispute with regard to the execution of sale deed on collector rate or at the total rate after going through the pleadings of the plaintiffs. It is incorrect to suggest that we conspired with the Seo Ram Jain and Shashi Jain to execute the sale deeds at the Collector rates. It is correct to suggest that we have raised the constructions after the stay order passed by this Hon'ble Court. It is incorrect that the plaintiffs have filed a contempt petition against us for raising construction during stay orders. We have not received any legal notice dated 4.12.2008 from the plaintiffs. Seo Ram Jain defendant No.1 has not visited site during the construction or after the completion of construction. Vol. It is not in my knowledge. It is correct that after the institution of case we met to the plaintiffs and Seo Ram Jain. We have no relation with Seo Ram Jain. It is incorrect to

suggest that we have having prior knowledge about the execution of agreement to sell between the plaintiffs and Seo Ram Jain and Shashi Jain. We have inquired from the people of nearby locality with regard to the execution of any agreement or any dispute with any other person and they replied in negative. It is incorrect to suggest that we have been informed by Seo Ram Jain about the agreement to sell with the plaintiffs with regard to the land in dispute. It is incorrect to suggest that we have purchased the land in dispute despite the knowledge of prior agreement to sell. It is incorrect that I am deposing falsely.

RO&AC
sd/- 6/4/11

sd/-
ACJ (SD)/Dera Bassi/6.4.2011”

From the perusal of the aforementioned cross-examination following things have surfaced:-

- (i) Instead of ₹13,80,000/- per acre, defendant No.2 had purchased the land at a higher price i.e. ₹17,90,000/- per acre whereas the sale deed had been executed at Collector rate.
- (ii) Defendant No.1 and 3, the vendors have received balance amount of ₹1,90,00,000/- in cash, which has not been recorded in the accounts books of defendant No.2.
- (iii) Defendant No.2 had raised the construction by giving undertaking in a matter taken before this Court vis-a-vis grant of interim direction that the construction raised would be at their peril.
- (iv) There was no agreement to sell between defendant No.1 & 3 and defendant No.2.

(v) The plaintiff in para 3 of the unamended plaint categorically pleaded that the defendant insisted for execution of the sale deed on the basis of the Collector rate. The aforementioned pleading though had emphatically been denied in the corresponding paragraph of the written statement but the cross-examination of DW1 was in tandem with the averment made in the plaint.

In my view, the plaintiff had been successful in proving the pleaded case that defendant No.1 and 3 did not come forward to perform their part of agreement for execution and registration of the sale deed at the rate mentioned in the agreement to sell but insisted for Collector rate. Be that as it may, since the plaintiff could not prove readiness and willingness for the purpose of registration of the sale deed and the trial Court declined the discretionary relief, I do not intend to exercise powers under Order 41 Rule 33 CPC, thus, the finding rendered by the trial Court for non-granting discretionary relief is upheld.

The lower Appellate Court being last court of fact and law was required to refer to all the documentary and oral evidence. There is not even a whisper or reference to the cross-examination of DW-1, Rajiv Jindal *ibid*, therefore, there is fallacy.

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.

As an upshot of my finding, the judgments and decrees rendered by the lower Appellate Court in reversing the finding of the trial Court partly decreeing the suits for refund of ₹15 lakhs and ₹25 lakhs respectively as earnest money along with interest @6% per annum from the date of execution of the agreement till the actual realization is set aside and the judgments and decrees rendered by the trial Court are upheld.

Both the appeals are allowed. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

April 04, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No