

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

RSA No.2719 of 2013 (O&M)

Date of Decision: 21.02.2019

Gurmeet Kaur and others

---Appellants

Versus

Harpal Singh

---Respondent

Coram: Hon'ble Mr. Justice Harinder Singh Sidhu

Present: Mr. H.S. Diwana Advocate
for the appellants.

Mr. Vijay Rana, Advocate
for the respondent.

HARINDER SINGH SIDHU, J.

The defendants have filed this regular second appeal against the judgments of the Courts below whereby the suit for specific performance of agreement to sell filed by the plaintiff has been allowed.

The plaintiff filed the suit for possession by way of specific performance of agreement to sell dated 24.06.2003. It was his case that the defendants were the owners of land measuring 14 kanal 8 marla situated at Village Ariyan Majra, Tehsil and District Fatehgarh Sahib. They agreed to sell this land to the plaintiff @ of Rs.4,20,500/- per Killa and an agreement dated 24.06.2003 was entered into between the plaintiff and the defendants. A sum of Rs.1,50,000/- was received by them as earnest money. The sale deed was to be executed on or before 10.12.2003. On the date fixed for execution of the sale deed, the plaintiff

consideration and money required for incidental expenses but the defendants did not turn up. The plaintiff got his presence marked before the Sub-Registrar on 11.12.2003. He sent a legal notice dated 29.12.2003 through his counsel calling upon the defendants to perform their part of the agreement but without success. Hence, this suit.

The defendants denied that they had entered into agreement to sell with the plaintiff or had received the earnest money as alleged. Their case was that about that one week before 24.06.2003, the plaintiff had approached the defendants to give their share of the land on lease/rent for 30,000/- per year for a continuous period of five years. He had agreed to take possession of the suit after harvesting of the Kharif crop for the year 2003 and agreed to pay Rs.1,50,000/- as lease amount for five years on 24.06.2003. The plaintiff approached defendant No.2 and paid her Rs.1,50,000/-, which was meant for all the defendants. Plaintiff also got some blank stamp papers signed from defendant No.2 under the pretext of security for the payment. Defendant No.1 and 3 did not give the plaintiff any stamp paper nor did they sign the same. Their signatures on the documents are false and fabricated.

In support of his case, the plaintiff examined Kulwant Singh as PW-1, Pritpal Singh as PW-2. Plaintiff Harpal Singh appeared as PW-3.

For the defendants, defendant Gurmit Kaur appeared as DW-1, defendant Paramjit Kaur appeared as DW-2 and defendant Gupreet Kaur appeared as DW-3.

PW-1 Kulwant Singh, attesting witness in his evidence stated that the agreement to sell was executed by the defendants in favour of the plaintiff in

respect of land measuring 14 kanal 8 marla situated in village Ariyan Majra @ of Rs. 4,20,500/- per Killa and they had received Rs.1,50,000 as earnest money. He identified the signatures of plaintiff, the defendants and the other attesting witness Pritpal Singh on the agreement. Pritpal Singh PW-2, the second attesting witness also deposed regarding the agreement having been executed and the earnest money having been received. He also identified the signatures of the parties on the agreement. Plaintiff PW-3 proved the agreement Ex.P-1 and deposed as per his averments in the plaint. He proved his affidavit Ex.P-3 and legal notice Ex.P-4.

On the other hand, each of the defendants reiterated their stand as per the written statement. They denied the execution of agreement to sell. They stated that Rs.1,50,000/- was given as lease amount by the plaintiff as he had taken land on lease @ of Rs.30,000/- per year for five years. They denied their signatures on the agreement Ex.P-1 and stated that it was a forged and fictitious document.

The learned Trial Court held that the plaintiff had been able to prove the agreement by the deposition of the plaintiff and the attesting witnesses. On the other hand the defendants, who alleged the agreement to be forged and fabricated, had not been able to explain as to how their signatures appeared on every page of the agreement. They had not examined any expert to prove that the signatures on the agreement did not tally with their standard signatures. Moreover, defendant No.2 Paramjit Kaur had admitted that she had signed the stamp papers. The defendants had not been able to substantiate their assertion that the land had been given on lease by them to the plaintiff and they had received Rs.1,50,000/- as lease money. Accordingly, the suit was decreed with costs. The defendants were directed to execute the sale deed upon receipt of balance money.

Before the learned lower Appellate Court, the defendants urged with reference to pleadings that the plaintiff had previously instituted a suit for permanent injunction which fact was not disclosed by him in the plaint. He was thereby guilty of concealment of facts and dis-entitled to any relief. It was also urged that the said suit was withdrawn without permission to file a fresh suit. Hence the second suit for specific performance was barred under the provisions of Order 2 Rule 2 of CPC. It was urged that this aspect had not been gone into by the learned trial Court.

The learned Lower Appellate Court rejected the aforesaid contention by observing that the previous suit was a simple suit for permanent injunction whereas the present suit was one for specific performance. At the time when the previous suit for injunction was instituted by the plaintiff he did not have a cause of action to file the suit for specific performance. As the reliefs claimed in both the suits were different the contentions of the defendants with regard to concealment of material facts as well as the suit being not maintainable in view of the provisions of Order 2 Rule 2 of the Code of Civil Procedure, were rejected. The findings of the trial Court regarding the agreement having been proved were affirmed. Additionally, the Court noticed that the stand of the defendants that they had taken Rs.1,50,000/- as lease money was falsified by their cross-examination. DW-1 in her cross-examination deposed that she had never given her share of land to any person on lease. She also admitted that her younger sister might have taken some money. DW-3 Gurpreet Kaur also admitted that her sister Paramjit Kaur might have executed the writing after taking money from plaintiff. Paramjit Kaur appearing as PW-2 in her cross-examination specifically denied the receipt of

Rs.1,50,000/- from the plaintiff. From this, the learned lower Appellate Court concluded that their stand was contrary to the pleadings as well as their version in their examination-in-chief. As such their stand remained unproved. The appeal was dismissed.

Mr. N.S. Diwana, learned counsel for the defendants primarily argued that the suit for specific performance was not maintainable being barred by Order 2 Rule 2 CPC. Additionally he urged that in any case the plaintiff was not entitled to any relief as he concealed the factum of filing of the earlier suit for permanent injunction. He argued that during the pendency of the first appeal the defendants had filed two applications under Order 6 Rule 17 CPC. In the first application prayer was made to add preliminary objection No. 6 to the written statement to the following effect:

“The suit of the plaintiff is barred under Order 2 Rule 2 and Order 23 of CPC. Prior to filing of the present suit the plaintiff had filed suit No. 398 of 20.09.2003 against the defendants on basis of the agreement to sell in question stating therein same cause of action which suit was unconditionally withdrawn by the plaintiff on 24.03.2004. As per averments of the plaint of the said suit No. 398 cause of action for present suit had arisen to the plaintiff and the plaintiff instead of filing the suit for present relief merely filed suit for permanent injunction and waived the present relief.”

The second application was for amending the written statement to incorporate a ground of hardship. While the second application was dismissed but no order was passed on the first application.

In any case the defendants have filed an application under Order 41

Rule 27 for placing on record certified copies of plaint dated 19.09.2003 in the

earlier suit, certified copy of the statement of Counsel dated 24.03.2004 that the suit be dismissed as withdrawn as plaintiff had filed a suit for specific performance and the order dated 24.03.2004 of the Ld. Civil Judge (Sr. Division), Fatehgarh Sahib permitting the suit to be dismissed as withdrawn. He urged that clearly the present suit is barred by Order 2 Rule 2 CPC. He relies on a decision of Hon'ble Supreme Court in **Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd., (2013) 1 SCC.**

Ld. Counsel for the plaintiff on the other hand argued that the cause of action of both the suits were different and hence Order 2 Rule 2 is not attracted. He supported the decision of the Courts below.

Heard Ld. Counsel for the parties.

First of all, it is necessary to deal with the application under Order 41 Rule 27 CPC whereby the defendants by way of additional evidence seek to place on record certified copy of the plaint in the suit for permanent injunction by the plaintiff, certified copy of the statement of his Counsel dated 24.03.2004 that the suit be dismissed as withdrawn as plaintiff had filed a suit for specific performance and the order dated 24.03.2004 of the Ld. Civil Judge (Sr. Division), Fatehgarh Sahib permitting the suit to be dismissed as withdrawn. Ld. Counsel has contended that it is essential for the decision of the case that the application be allowed because the plaintiff having earlier filed a suit for permanent injunction and not seeking relief for specific performance without obtaining leave of the Court was precluded from later filing the suit for specific performance.

The law in relation to Order 41 Rule 27 is well settled. It has been held that the appellate court may permit additional evidence only in exceptional

circumstances and only if the conditions laid down in this Rule are found to exist.

In Union of India v. Ibrahim Uddin, (2012) 8 SCC 148, Hon'ble Supreme Court elaborately discussed the issue as under:

“36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy, Municipal Corpn. of Greater Bombay v. Lala Pancham, Soonda Ram v. Rameshwarlal and Syed Abdul Khader v. Rami Reddy.)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.)

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to

pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham.)

39. *It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava and S. Rajagopal v. C.M. Armugam.)*

40. *The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.*

41. *The words “for any other substantial cause” must be read with the word “requires” in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.”*

In Satish Kumar Gupta v. State of Haryana, (2017) 4 SCC 760

Hon'ble Supreme Court set aside the order permitting additional evidence by observing as under:

“19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order 41 Rule 27 CPC. The provision is reproduced below:

“27. Production of additional evidence in appellate court.—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

The appellate court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.”

20. *It is clear that neither the trial court has refused to receive the evidence nor it could be said that the evidence sought to be adduced*

was not available despite the exercise of due diligence nor it could be held to be necessary to pronounce the judgment. Additional evidence cannot be permitted to fill in the lacunae or to patch up the weak points in the case. There was no ground for remand in these circumstances.”

In the present case also it is not the case of the defendant-appellants that the the trial court has refused to receive the evidence nor is it their case that this evidence was not available despite the exercise of due diligence. It has only been pleaded that though the documents have been referred to in the pleadings of the defendants but they could not be exhibited in evidence inadvertently. Ld. Counsel for the appellant/defendants however has not been able to substantiate this assertion that these documents had been filed along with the pleadings before the lower court.

In view thereof, in the light of the decisions of Hon'ble Supreme Court aforementioned, there is no ground to allow this application and the same is dismissed.

Regarding the plea on the basis of Order 2 Rule 2 CPC it need only be noticed that Hon'ble Supreme Court in **Gurbux Singh v. Bhooralal, (1964) 7 SCR 831** held that the plea of a bar under Order 2 Rule 2 CPC being a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It was held that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits.

Procedure Code should succeed the defendant who raises the plea must make out; (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable.

Learned Counsel for the appellant, however, drew our attention to a

passage in judgment of the learned Judge in the High Court which read:

“The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court.”

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge. “The two courts have, however, freely cited from the record of the earlier suit” is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under Order 2 Rule 2 of the Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under Order 41 Rule 27 of the Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under Order 41 Rule 27 of the Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit.”

In the absence of the pleadings in the previous suit being on record it is impermissible to opine on the plea of defendant-appellants of the present suit being barred under Order 2 Rule 2. Consequently there is no merit in the argument of the Ld. Counsel that the suit must fail because of the bar of Order 2 Rule 2 CPC.

However, there is merit in the plea of the Ld. Counsel for the defendants that the plaintiff having not disclosed the factum of the filing of the earlier suit is dis-entitled to the discretionary relief of specific performance.

Ld. Counsel has referred to the pleadings of the parties. In paragraph No. 14 of the plaint it was stated that:

“That no other suit is pending or decided between the same parties regarding the same subject matter on the same subject cause of action by any court of law”

The defendants in Para 14 of the written statement controverted this assertion by stating:

“That para No.14 of the plaint is wrong and denied. The plaintiff has filed suit for permanent injunction which is dismissed as withdrawn from the Hon'ble Court of Sh. G.S. Dhillon, Additional Civil Judge (Senior Division) Fatehgarh Sahib on dated 24.03.204. Hence plaintiff has concealed this fact from this Hon'ble Court to get undue advantages and to cause wrongful loss to the defendants. Photocopy of order dated 24.03.204 is attached herewith.”

Despite this in Para 14 of Replication the plaintiff again reiterated the contents of the plaint:

“Para 14 of the written statement is wrong and denied and that of plaint is correct and reiterated. Nothing has been concealed by the plaintiff. “

Ld. Counsel for the defendants has argued that PW 3 Harpal Singh in his cross examination admitted that he had earlier filed the suit for permanent injunction. He admitted that he did not disclose this fact in his present suit. He

however denied the suggestion that he had not disclosed this fact with a view to succeed in the present suit.

It well settled that grant of relief of specific performance is discretionary and will not be granted if the party seeking the same has not approached the court with clean hands.

In **Zarina Siddiqui v. A. Ramalingam, (2015) 1 SCC 705**, it was observed :

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although Defendant 2 held a registered power of attorney on behalf of Defendant 1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorised the second defendant only to look after and manage the property but also withheld the said power of attorney from the court in order to misguide the court from the truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitles them to ask the court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and misleads the court, the court has inherent power to exercise its discretionary jurisdiction

in order to prevent abuse of process of law.”

In Mohammadia Coop. Building Society Ltd. v. Lakshmi Srinivasa Coop. Building Society Ltd., (2008) 7 SCC 310 the same view was expressed as under :

“71. Grant of a decree for specific performance of contract is a discretionary relief. There cannot be any doubt whatsoever that the discretion has to be exercised judiciously and not arbitrarily. But for the said purpose, the conduct of the plaintiff plays an important role. The courts ordinarily would not grant any relief in favour of the person who approaches the court with a pair of dirty hands.”

To the same effect are the observations in **G. Jayashree v. Bhagwandas S. Patel, (2009) 3 SCC 141** :

“32. The civil courts, in the matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. Discretionary jurisdiction albeit must be exercised judiciously and not arbitrarily or capriciously. A plaintiff is expected to approach the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. In Mohammadia Coop. Building Society Ltd. v. Lakshmi Srinivasa Coop. Building Society Ltd. this Court held: (SCC p. 327, para 71)

“71. Grant of a decree for specific performance of contract is a discretionary relief. There cannot be any doubt whatsoever that the discretion has to be exercised judiciously and not arbitrarily. But for the said purpose, the conduct of the plaintiff plays an important role. The courts ordinarily would not grant any relief in favour of the person who approaches the court with a pair of dirty hands.”

In this case the plaintiff did not disclose the pendency of the earlier

thus dis-entitled himself from the relief of specific performance.

However as noted by the Courts below the plaintiff had by leading cogent evidence proved the execution of the agreement to sell with the defendants and that the defendants had received Rs.1,50,000/- as earnest money. The defendants had not been able to substantiate their assertion that the money was received by them for the land leased by them to the plaintiff for five years. The defendant-appellants had not been able to show as to how these findings are perverse or not borne out from the evidence on record.

Thus this appeal is partly allowed. The judgment and decree of the courts below directing the defendants to execute the sale deed in favour of he plaintiff is set aside. However in view of the fact that an amount of Rs.1,50,000/- is proved to have been received by the defendants from the plaintiff, the defendants are required to return the same to the plaintiff. The defendants are directed to return the amount of Rs.1,50,000/- to the plaintiff within two months with interest @ 12% p.a. from the date of receipt of the amount i.e., 24.06.2003 till payment. If the amount is not returned within two months it shall carry an interest of 15% per annum.

The appeal is disposed of in the above terms.

February 21, 2019

(HARINDER SINGH SIDHU)

JUDGE

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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No