

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-623-2022 (O&M)

Date of decision:05.07.2022

Reserved on: 24.02.2022

Gurdev Kaur (since deceased) through her LR

....Petitioner

Versus

Chinder Kaur and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Namit Gautam, Advocate for the petitioner

ANIL KSHETARPAL, J

The plaintiff through her legal representative, assails the correctness of the order passed by the trial court, while rejecting her application to debar defendant No. 3 to 6 from cross examining the plaintiff.

In the considered view of this Bench, a short but interesting question arises for consideration, which is as follows:-

“Whether a lis pendente vendee can be debarred from cross examining the plaintiff’s witnesses, particularly, when the original defendant/owner (who entered into an agreement to sell) does not choose to contest the suit for grant of decree of specific performance of the agreement to sell. ”

Some peculiar facts are required to be noticed. Smt. Chinder Kaur was the owner of shop-cum-flat bearing No. 8, plot D, Model

Town, Extension Part II, Ludhiana. It is claimed by the plaintiff that she appointed one person named Sh. Rajkumar Sharma as her General Power of Attorney, who in turn entered into an agreement to sell with the plaintiff, for a total sale consideration of Rs.10,75,000/-. Sh. Raj Kumar Sharma, General Power of Attoreny of Smt. Chinder Kaur informed her and also executed a Special Power of Attorney in favour of Manjit Singh s/o Hazur Singh. Complaining non-performance of the agreement to sell, the plaintiff filed the suit for the grant of decree of specific performance of agreement to sell. Smt. Chinder Kaur chose not to contest the suit whereas defendant No. 3 to 6 were impleaded as defendants.

After completion of the pleadings, the issues were framed. When the case was fixed for plaintiff's evidence, he examined Balbir Singh as PW1. The court granted opportunity to defendant No. 3 to 6 to cross-examine the witness. An application was filed by the plaintiff for not permitting defendant No. 3 to 6, to cross-examine the witnesses produced by the plaintiff. The trial court dismissed the application vide order dated 24th January, 2022 which has been questioned in the present revision petition.

Heard learned senior counsel representing the petitioner at length and with his able assistance perused the paper book. Learned senior counsel contends that defendants are lis pendente purchasers of the suit property. Therefore, they have only stepped into the shoes of the first defendant. While relying upon the judgment passed in **AIR 1997 SC 3720**, the learned senior counsel contends that subsequent purchaser

does not get any right to lead evidence or cross-examine the plaintiff's witnesses. He also relies upon the judgment passed in **Jaswinder Singh versus Sohan Singh and others 2005 (1) PLR 593** and the judgment passed in **Sukhdev Singh and others versus Mohan Singh and others 2011 (4)PLR 95**.

Before this Bench proceeds to analyse the judgments relied upon by the learned counsel representing the parties, it would be appropriate to reckon with the basic provisions of law. Section 137 and 138 of the Indian Evidence Act, 1872, falls in Chapter X of the Indian Evidence Act, 1872. The expressions "examination-in-chief, "cross-examination" and "re-examination" are defined in Section 137 whereas Section 138 lays down the manner in which examination-in-chief, "cross-examination" and "re-examination is required to be recorded. When a witness is produced, firstly he shall be examined in-chief and thereafter he shall be cross-examined by the adverse party i.e. the party other than the one who summoned the witness and thereafter, if required, the party, who called the witness, shall be permitted to re-examine the witness for the explanation of the matters arising in the cross-examination. Section 138 provides that witness shall be first examined in-chief, then if the adverse party so desires, be cross-examined, then if the party calling him so desires, re-examine him. Section 137 and 138 are produced as under.

137. Examination-in-chief.—*The examination of a witness by the party who calls him shall be called his examination-in-chief.*

Cross-examination.—*The examination of a witness by the adverse party shall be called his cross-examination.*

Re-examination.—*The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*

138. Order of examinations.—*Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—*The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.*

As per the Code of Civil Procedure, 1908, the examination of a witness is governed by the Order 18 Rule 4 CPC. Order 18 Rule 4 of CPC provides for a procedure to record the evidence of the witness, which is extracted as under:-

“4. Recording of evidence.—(1) *In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:*

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) *The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:*

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.

(3) *The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in*

writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule.”

It is evident that in sub rule 1, the examination-in-chief shall be made on an affidavit and the copies thereof shall be supplied to the opposite party, by the party, who calls in the witnesses. Thereafter, opportunity shall be given to the opposite party to cross-examine the witness and its re-examination, if prayed for. Thus, there is no provision which debars the pendente purchasers from cross-examining the witnesses produce by the opposite party. This Court has carefully read short order passed in Dhana Singh’s case (supra). In the aforesaid case, a suit for decree of permanent injunction restraining the defendants from filling any part of the property by sand and also restraining the defendant from alienating any portion of the said property was filed. Pending the suit, the defendant did not lead any evidence. The court by an order

dated 22nd September, 1995, foreclosed the evidence of the defendant on the statement of the counsel that the first defendant was not willing to lead any evidence. Subsequently, an application for impleadment was filed by a person claiming to be a subsequent purchaser, which was allowed. After impleadment the subsequent purchaser filed an application for permission to lead evidence, which was rejected. The court found that the subsequent purchaser has stepped into the shoes of the original defendant, who had already given up the right to lead evidence. In such circumstances, the court dismissed the appeal. In the considered opinion of the Court, such judgment has no application on the facts of the present case. In view of the aforesaid position, the judgment referred to above is not applicable to the present case.

The next judgment relied upon by the learned counsel is in **Jaswinder Singh's case (supra)**. In the aforesaid case, the court found that the subsequent vendee only enters into the shoes of the vendor and has no locus standi to contest the suit for specific performance pending against the vendor and has no right to file a separate written statement and lead evidence.

It may be noted here that the aforesaid judgment is basically based on a previous judgment passed by Supreme Court in **Jugraj Singh versus Labh Singh** (1995) 2 SSC 31. It may be noted here that the aforesaid view was subsequently reversed by the larger Bench in **Ram Avadh dead by LRs and others versus Achhaibar Dubey and others** (2000) 2 SCC 428. Para 6 of this judgment reads as under:-

“6. The obligation imposed by Section 16 is upon the court not to grant specific performance to

a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh case [(1995) 2 SCC 31] is erroneous.”

In view of the larger Bench judgment in **Jaswinder**

Singh’s case (supra), the subsequent judgment passed on the basis in Sukhdev Singh and others cannot be relied upon. In the present case, the original defendant has chosen not to contest the suit. The subsequent purchasers have been left to defend their title and contest the suit on behalf of the original defendant. Unless the subsequent purchasers are given opportunity to contest the suit properly, the evidence produced in the plaintiff’s suit would go on un rebutted. Hence, it is necessary for the court to grant opportunity to the subsequent vendees to cross-examine the plaintiff’s witnesses. As already noticed, there is no statutory provision debarring the subsequent vendee from availing opportunity to cross-examine the witnesses or produce evidence. In fact in **Ram Avadh’s case (supra)**, the Supreme Court recognises that the subsequent vendees have stepped into the shoes of the original defendant and have all the rights including to prove that the plaintiff was never ready and willing to perform his part of the contract.

This matter can be examined from another perspective.

Order 22 Rule 10 of the Code of Civil Procedure, 1908, provides for assignment before the final order in a suit. It provides that in cases of an assignment, creation or devolution of any interest during the pendency of the suit, the suit may, by leave of the court, be continued by or against a person upon whom such interest has come or devolved. This provision also does not debar the assignee from contesting the suit which includes filing of the written statement and also cross-examining the witnesses produced by their opposite party as well as producing sufficient evidence to prove their case.

Keeping in view the aforesaid discussion, the conclusion is inevitable. Consequently, the revision petition is dismissed.

05.07.2022

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE