

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

**RSA-1491-2018 (O&M)
Reserved on 05.12.2022
Pronounced on: 13.12.2022**

Malook SinghAppellant

Versus

Pal SinghRespondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Argued by : Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Govind Chauhan, Advocate and
Ms. Nidhi Chokkar, Advocate
for the appellant.

Mr. Nitin Jain, Advocate and
Mr. G.S. Randhawa, Advocate
for the respondent.

MANJARI NEHRU KAUL, J.

Suit filed by the plaintiff/respondent for possession by way of specific performance of agreement to sell dated 11.05.2005 with consequential relief of permanent injunction was decreed by the learned Trial Court vide judgment and decree dated 20.10.2011. The appeal preferred by the defendant/appellant against the above judgment and decree was dismissed by the learned Lower Appellate Court vide order dated 10.08.2017. The defendant is now before this Court in Regular Second Appeal.

Parties to the *lis* hereinafter shall be referred to by their original positions in the suit.

Brief facts as averred by the plaintiff in his suit may be noticed as thus. Defendant was owner of agricultural land measuring 48 kanal 0 marla i.e. half share out of total land measuring 96 kanal 0

marla comprised in khewat No.55 min, khatoni No.108 min, khasra No.109(8-0), 110(8-0), 111(8-0), 112(8-0), 113(8-0), 114(8-0), 115(8-0), 116(8-0), 117(8-0), 118(8-0), 119(8-0), 120(8-0), kittas-12, total kittals-34 (whole khewat), situated in village Chibba, Tehsil Thanesar, District Kurukshetra (hereinafter referred to as 'suit land'). The defendant had obtained a loan from Punjab National Bank, Pipli and Punjab National Bank Ratgal, on his property which also included part of the above mentioned land. Vide agreement to sell dated 11.05.2005 (Ex.P1) the defendant agreed to sell the suit land to the plaintiff at the rate of Rs.5,50,000/- per acre, in order to discharge the liability of loan taken against the said land and for his certain other needs. Pursuant to the agreement to sell, he received a sum of Rs.9,09,000/- in cash from the plaintiff and agreed to execute and register the sale deed in favour of the plaintiff on or before 30.12.2005. It was assured by the defendant that he would get the land redeemed before the target date for execution and registration of the sale deed i.e. 30.12.2005. It was also agreed upon by the defendant that possession of the suit land would be handed over to the plaintiff at the time of execution of the agreement to sell, however, the defendant did not deliver actual possession of the suit land to the plaintiff. On a request made by the defendant to the plaintiff on 03.06.2005, the latter paid a sum of Rs.60,000/- as additional earnest money towards the sale consideration of the suit land. On 19.06.2005, the defendant again requested the plaintiff to make a payment of Rs.20,000/- for his medical treatment with an understanding that the said amount would be adjusted towards sale consideration. On 22.06.2005, yet again another amount of Rs.60,000/- was paid by the

plaintiff to the defendant which too was to be adjusted towards sale consideration. Receipts were duly executed and the previous agreement arrived at between the parties was also acknowledged. As such, the defendant received a total sum of Rs.10,49,000/- towards sale consideration of the land from the plaintiff. On 16.11.2005, the plaintiff approached the defendant to inquire if the bank loan had been cleared by him and the suit land redeemed, and also informed him about his readiness and willingness to perform his part of the contract, however, the defendant threatened to alienate the suit land in favour of some other person. The plaintiff then filed a suit for injunction on 21.11.2005 wherein the defendant was restrained from alienating the suit land. The plaintiff presented himself in the office of Sub Registrar, Thanesar on 30.12.2005 with the balance sale consideration and all other related expenses for registration, however, the defendant failed to appear. After getting his presence marked in the office of the Sub Registrar, Thanesar, the plaintiff issued a notice dated 04.01.2006 to the defendant which was duly received by him. Despite notice having been served upon the defendant, he failed to get the sale deed executed in favour of the plaintiff.

On being put to notice, the defendant in his written statement averred as thus: that the suit land was ancestral and thus, he was not competent to enter into any agreement to sell in respect of the suit land. The suit land had devolved upon him after the death of his father, who in turn, had been allotted by the Custodian Department in lieu of land left behind by him in Pakistan. Further, the plaintiff had obtained the agreement to sell from the defendant by taking advantage

of his illiteracy. In fact, the plaintiff and his father Surinder Singh agreed to send the defendant's son Narinder, to the USA, where three brothers of Surinder Singh namely Tehsildar Singh, Deputy Singh and Major Singh were already residing. It was stated that the plaintiff had assured the defendant that on the visit of the brothers of Surinder Singh to Bombay, they would take the defendant's son to the USA and for which the plaintiff and his father would charge Rs.11,00,000/- from him. The defendant paid a sum of Rs.2,00,000/- in cash on 01.05.2005 to the plaintiff and agreed to pay the remaining balance amount of Rs.9,00,000/- after his son reached the USA. Resultantly, the defendant's son reached Bombay on 08/09.05.2005 and was lodged in a hotel where he stayed for six days awaiting the arrival of Surinder Singh and his brother Tehsildar Singh. On 11.05.2005, the plaintiff and his father Surinder Singh insisted upon for getting a written undertaking with respect to the payment of balance sum of Rs.9,00,000/-. Therefore, the plaintiff took the defendant to a deed writer in the Tehsil compound at Thanesar where then a written document to the said effect was prepared. Still further, the contents of the documents were, however, not read out to him and being an illiterate person, the defendant in good faith signed the document which was on a stamp paper, which was later misused by the plaintiff by not only converting it into an agreement to sell of land but also it was fraudulently and falsely recorded therein that the defendant had received payment of Rs.9,09,000/- from the plaintiff. When the defendant's son returned from Bombay, the plaintiff was requested by the defendant to return the amount of Rs.2,00,000/- which had been

paid to him for sending his son to the USA, however, the plaintiff paid Rs.60,000/- on 03.06.2005, Rs.20,000/- on 19.06.2005 and Rs.60,000/- on 22.06.2005 and refused to pay back the balance amount of Rs.60,000/- on the ground that it was spent in the process of trying to send his son to the USA.

On the basis of the material and other evidence led, both the Courts below concurrently held that the plaintiff had duly proved the agreement to sell dated 11.05.2005 (Ex.P1) and his readiness and willingness to perform his part of the contract, however, on the other hand the defendant was unable to lead any cogent evidence in support of his case and accordingly decreed the suit of the plaintiff. Hence, this appeal.

Learned Senior Counsel for the appellant/defendant has vehemently argued that the impugned judgment and decree suffers from patent illegality as the Courts below while passing them have totally misread the evidence led and acted contrary to the settled principles of law. Learned Senior Counsel submits that the Courts below failed to appreciate that the plaintiff had earlier filed a suit for permanent injunction against the defendant on 21.11.2006 for restraining him from alienating the suit land. While inviting the attention of this Court to the plaint of that earlier suit (Ex.D4), learned Senior Counsel contends that the cause of action to seek the relief of specific performance of the alleged agreement to sell (Ex.P1) had already accrued at the time of institution of that suit, thus, the present suit which had been filed subsequently was clearly barred under Order 2 Rule 2 of the Code of Civil Procedure, 1908 (for short, 'the Code'). Learned Senior Counsel

further submits that though admittedly a specific plea qua the suit being barred under Order 2 Rule 2 of the Code was not taken in the written statement by the defendant, however, since the necessary evidence to substantiate the said plea was already on record, there was no embargo to it being raised at this stage.

Learned Senior Counsel has still further submitted that the plaintiff had not approached the Court with clean hands as he was guilty of concealment of material facts as it had been averred in the plaint by the plaintiff that the possession of the suit land had not been given to him, however, there was a specific recital in the agreement to sell (Ex.P1) qua possession of the suit land having been delivered to the plaintiff. Therefore, on this ground alone the suit deserves dismissal.

Learned Senior Counsel has also argued that the alleged agreement to sell (Ex.P1) was a forged and fabricated document having been fraudulently procured. In fact, the money transaction between the parties was on account of the assurance given by the plaintiff to the defendant to send his son Narinder Singh to the USA. In pursuance to the said assurance, the defendant had even paid a sum of Rs.2,00,000/- to the plaintiff, out of which an amount of Rs.1,40,000/- was later on refunded to the defendant by the plaintiff. However, the plaintiff misused the blank papers signed by the defendant and fabricated the alleged receipts (Ex.P11, 12 and 16) to give an altogether different colour to the said transaction between the parties. Hence, it was evident that a huge fraud had been played upon the defendant by the plaintiff.

Learned Senior Counsel still further submits that even otherwise, the suit land was ancestral joint Hindu family property, thus,

the defendant had no right to enter into an agreement to sell qua the same. In support of his submissions, learned Senior Counsel has placed reliance upon *Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others : (1996) 5 Supreme Court Cases 589; Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited : (2013) 1 Supreme Court Cases 625; Arjan Singh Vs. Babu Ram : 2001(4) RCR (Civil) 409; Jayantilal Chimanlal Patel Vs. Vadilal Purushottamdas Patel : 2017 AIR (Supreme Court) 1157; S. Nazeer Ahmed Vs. State Bank of Mysore and others : 2007(1) RCR (Civil) 705 and Vurimi Pullarao Vs. Vemari Vyankata Radharani : (2020) 14 Supreme Court Cases 110.*

Per contra, learned counsel appearing for the plaintiff while controverting the submissions made by the counsel opposite contends that the concurrent findings of fact recorded by the courts below are in accordance with the pleadings of the parties and the evidence led. Learned counsel submits that the defendant in his written statement had neither pleaded that the suit of the plaintiff was barred under Order 2 Rule 2 of the Code nor was it urged during the course of arguments before the trial court or even before the lower appellate court. Hence, in the absence of any specific pleadings coupled with the fact that no issue qua the suit being barred under Order 2 Rule 2 of the Code was framed by the Trial Court, the defendant could not be now allowed to go beyond his pleadings at the stage of second appeal and raise an altogether new ground, more so, when it was a mixed question of law and fact.

Learned counsel further submits that though the defendant

had raised a specific plea of fraud in his defence, however, admittedly no evidence at all was led to substantiate the same. Therefore, in view of the fact that the agreement to sell dated 11.05.2005 as well as the readiness and willingness of the plaintiff was duly proved by way of cogent evidence, the instant appeal deserved dismissal. In support of his submissions, learned counsel has placed reliance upon ***Kamlesh Rani Vs. Kartar Chand (dead) through LRs : 2010(6) RCR (Civil) 779; Harphool Singh Vs. Subhash Chander : 2013(6) RCR (Civil) 693; International Institute of Neuro Sciences & Oncology Ltd., Chandigarh and another Vs. Sahibjit Singh Sandhu and others : 2017(3) RCR (Civil) 554; Karan Singh and others Vs. Rani Malik and another : 2017(4) RCR (Civil) 501; Bakhtawar Singh Vs. Gurdial Singh : 2003(1) RCR (Civil) 242; Manmohan Singh and others Vs. Kewal Krishan and others : 2013(10) RCR (Civil) 664 and Ram Kishan and another Vs. Bijender Mann alias Vijender Mann and others : 2013(2) RCR (Civil) 419.***

I have heard learned counsel for the parties and perused the relevant material on record with their able assistance.

At the outset, this Court would first and foremost proceed to deal with the plea of the learned Senior Counsel for the defendant qua the suit in question being barred under Order 2 Rule 2 of the Code.

The Constitutional Bench of Hon'ble Supreme Court in the case of '***Gurbux Singh Vs. Bhooralal***' decided on 22.04.1964, while dealing with the principle on which Order 2 Rule 2 of the Code was founded, observed as under:-

"6. In order that a plea of a bar under Order 2, Rule 2(3), Civil Procedure Code should succeed the defendant who

raises the plea must make out (1) 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....."

The object behind Order 2 Rule 2 of the Code is to prevent multiplicity of suits and further to avoid a person from being vexed twice for one and the same cause. It would also be relevant to point out here that plea of Order 2 Rule 2 of the Code is a mixed question of law and facts since it involves an inquiry/investigation into the contents of the plaint of the previous suit, so as to establish the oneness of the cause of action in both the suits.

Adverting to the case in hand, a perusal of the written statement filed by the defendant reveals that he has nowhere, even by way of a whisper, raised the plea of the suit being barred under Order 2 Rule 2 of the Code. Thus, in the absence of any specific pleadings, no issue was rightly framed by the Trial Court qua the suit being barred under Order 2 Rule 2 of the Code. Admittedly, even before the Lower Appellate Court, no such plea of the suit being barred under Order 2 Rule 2 of the Code was urged by the defendant and it is only now at this stage that for the first time the said plea is being raised by the defendant, which in the opinion of this court is impermissible. The Hon'ble Supreme Court in ***The National Textile Corporation Ltd. Vs. Naresh Kumar Badrikumar Jagad and others : 2012 AIR (Supreme Court) 264*** in similar facts and circumstances observed and held as under:-

"6. In the instant case, no reference had ever been made by the appellant to the effect of the provisions of the Act 1995 before the trial court while filing the written submissions; neither any issue has been framed; nor arguments had been advanced in regard to the same; this issue has not been agitated either before the appellate court or revisional court. Before us, an application has been filed to urge additional grounds regarding the application of the Act 1995 without seeking amendment to the pleadings (WS).

7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar, AIR 1953 Supreme Court 235; State of Maharashtra v. M/s. Hindustan Construction Company Ltd., 2010(2) RCR (Civil) 614 : 2010(2) Recent Apex Judgments (R.A.J.) 479; and Kalyan Singh Chouhan v. C.P. Joshi, 2011(1) RCR (Civil) 865 : 2011(1) Recent Apex Judgments (R.A.J.) 455.

8. In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors., AIR 1987 Supreme Court 1242, this Court held as under:

"in the absence of pleadings, evidence if any, produced by the parties cannot be considered no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

Similar view has been reiterated in Bachhaj Nahar v. Nilima Mandal & Ors., 2009(1) RCR (Civil) 855 : 2009(1) Recent Apex Judgments (R.A.J.) 574."

Further, the argument raised by the learned Senior Counsel for the defendant that since the evidence to substantiate the plea of Order 2 Rule 2 of the Code was duly led by the defendant, therefore, there was no bar to raise an additional plea even at this stage, is devoid

of merit. No doubt, the aforesaid argument at the first instance does sound very attractive, however, a distinction has to be drawn between a case where an additional plea is being raised on the basis of pleadings and material available on record, and on the other hand, a case where additional plea has been raised without any pleadings to that effect. In this regard the Hon'ble Supreme Court in ***J. Jermons Vs. Aliammal and others : (1999) 7 SCC 382*** observed as under:-

"..... there is a fundamental difference between a case of raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the pleadings. In the former case no amendment of pleading is required, whereas in the latter it is necessary to amend the pleadings...The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision."

In the present case, concededly the plea of Order 2 Rule 2 of the Code being raised before this Court is not borne out of any pleadings to the said effect in the written statement, therefore, this Court has no hesitation in holding that the defendant cannot be permitted to set up a new case at this stage by raising an additional ground. Still further, it is also a settled principle of law that though a pure question of law can be raised at any stage, however, a mixed question of law and fact, such as the one involved in the instant case, cannot be permitted to be raised for the first time in a Regular Second Appeal. Therefore, in the aforesaid facts and circumstances, the plea qua the suit in question being hit by Order 2 Rule 2 of the Code stands rejected and even the case laws relied upon by learned Senior Counsel in this regard would not be applicable to the instant case and thus, would not come to his rescue.

Proceeding further with the merits of the case, the plaintiff in order to prove the agreement to sell (Ex.P1) examined its scribe (PW1), attesting witness (PW7), stamp vendor (PW3) as well as notary public (PW4). All these witnesses deposed on similar lines, affirming the pleaded case of the plaintiff and nothing adverse came forth in their cross-examination. Not only this, the defendant himself did not dispute his signatures on the agreement to sell (Ex.P1) and all other related documents.

The plaintiff further led sufficient cogent evidence to show that he was always ready and willing to perform his part of the contract. The target date fixed for execution and registration of the sale deed was 30.12.2005 when the plaintiff presented himself in the office of the Sub Registrar, Thanesar, with the balance sale consideration and all other related expenses. It is also a matter of record that the plaintiff got his presence marked before the Sub Registrar, Thanesar by way of an affidavit (Ex.P20). Besides this, the challan for purchase of stamp papers (Ex.P18) and the legal notice (Ex.P21) along with the postal receipts (Ex.P22 and P23) further fortifies the readiness and willingness on part of the plaintiff to perform his part of the contract.

Defendant, on the other hand, has miserably failed to substantiate his plea qua the agreement to sell (Ex.P1) being a forged and fabricated document, having been fraudulently procured from him by the plaintiff. Other than his bald assertions, the defendant did not lead any cogent evidence in support thereof, during trial.

Further, it was the specific case of the defendant that the exchange of money between the parties was pursuant to an alleged

assurance given that the defendant's son would be sent to the USA, and even a sum of Rs.2,00,000/- was paid by the defendant to the plaintiff in the said regard. However, no evidence to prove the factum of the aforesaid payment having been made to the plaintiff was led by the defendant. Rather, in his cross-examination, the defendant admitted that no receipt was given against the above-mentioned payment by the plaintiff. Furthermore, the defendant alleged that the plaintiff had misused the blank papers bearing his signatures, however, strangely neither the defendant ever made any complaint against the plaintiff to the police nor approached any Court of law qua such a huge fraud having been played upon him, which indeed creates a big question mark regarding the authenticity of the pleaded case of the defendant.

A perusal of Ex.P11 (Receipt of Rs.60,000/-), Ex.P12 (Receipt of Rs.60,000/-) and Ex.P16 (Receipt of Rs.20,000/-) reveals that there is a reference made in these documents qua the sale of 6 acres of land and receipt of an earlier amount of Rs.9,09,000/-, Rs.60,000/- and Rs.20,000/-. Not only this, Ex.P16 (Receipt of Rs.20,000/-) reveals that there is a mention made therein qua the receipt of Rs.9,69,000/-. All the evidence, when seen and considered in totality, leaves no manner of doubt that the defendant has miserably failed to discharge his onus to prove the alleged fraud committed upon him by the plaintiff.

This Court also finds no force in the submissions made by learned Senior Counsel for the defendant that the plaintiff had not approached the Courts with clean hands. Merely because the plaintiff in his plaint had averred that he did not receive the possession of the suit land at the time of entering into the agreement to sell could not by itself

mean that he was guilty of concealing material facts.

The defendant has also moved an application under Order 41 Rule 27 of the Code (CM-3901-C-2018) for placing on record Annexures A-5 and A-6, which are jamabandis pertaining to the suit land for the year 2009-10 and 2014-15, by way of additional evidence. The aforesaid documents in the opinion of this Court are not necessary for adjudication of the instant appeal as the plaintiff in his plaint had categorically stated that the possession of the suit land was not handed over to him. Hence, the instant application (CM-3901-C-2018) for additional evidence stands dismissed accordingly.

Coming to the last contention of the learned Senior Counsel appearing for the defendant that the defendant was not competent to enter into an agreement to sell qua the suit land as it was ancestral property, deserves to be rejected. No cogent evidence was led by the defendant in support of his pleaded case of the suit land being ancestral in nature. No doubt, the defendant placed reliance upon Ex.D1 (declaration form), Ex.D2 and D3 (sanad), however, these documents would not by themselves prove that the suit land was in fact ancestral. The defendant failed to lead any evidence that the suit land had been inherited by him through three descendants and even the agreement to sell (Ex.P1) is totally silent with respect to the nature of the suit land being a joint Hindu family property.

On being pointedly asked, learned Senior Counsel for the defendant failed to bring to the notice of this Court anything on record to show that the conclusions arrived at by both the Courts below were either contrary to record or suffered from any material illegality.

As a sequel to the above, this Court thus does not find any error in the concurrent findings recorded by the Courts below. Accordingly, the instant appeal being devoid of any merit is dismissed.

13.12.2022

(MANJARI NEHRU KAUL)

JUDGE

Vinay

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No