

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 2679 of 2022 (O&M)

Date of Decision: 18.10.2023

Dharam Singh

... Appellant(s)

Versus

Gurmej Singh

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mrs. Rupinder K. Thind, Advocate
for the appellant(s).

Anil Kshetarpal, J.

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in *Pankajakshi (Dead) through LRs v. Chandrika and Others (2016) 6 SCC 157*.

2. In this second appeal, the correctness of the concurrent findings of facts, arrived at by both the Courts below, is assailed by the defendant. The respondent-Gurmej Singh filed a suit for possession by way of specific performance of the agreement to sell. In the alternative, he sought recovery of ₹40,00,000/- i.e. double the amount of the earnest money of ₹20,00,000/-. It has come on record that the agreement to sell dated 14.03.2011 was executed on receipt of ₹20,00,000/-, out of which ₹19,00,000/- was transferred in the bank account of the appellant (defendant before the trial

Court). As per the agreement to sell, the sale deed was to be executed and

registered on 12.10.2011. The plaintiff also claims that he further tried to make payment of ₹20,00,000/- through three cheques issued on 16.03.2011, 17.03.2011 and 02.04.2011, however, he had to stop payment because the appellant had entered into an agreement to sell with another person and had mortgaged the property. He was also not the owner of the tube-well.

3. The defendant, while contesting the suit, claims that the agreement to sell is a forged and fabricated document and in fact, his signatures have been taken on the blank papers. He further pleaded that he had paid ₹25,00,000/- as a loan to the plaintiff. The trial Court held that the plaintiff is not entitled to the relief of specific performance of the agreement to sell. However, the trial Court found that the plaintiff is entitled to refund of ₹20,00,000/- along with future interest @ 6% per annum. Against the judgment passed by the trial Court, two appeals were filed, one by the plaintiff and another by the defendant. The First Appellate Court, on re-appreciation of the evidence, ordered the defendant (appellant herein) to refund the amount of earnest money of ₹20,00,000/- along with the interest @ 8% per annum from the date of passing of the decree along with future interest at the similar rate i.e. 8%. This is how the defendant has come up in the second appeal.

4. The learned counsel representing the appellant contends that the respondent (plaintiff before the trial Court) has filed a suit for the grant of decree of permanent injunction on 07.04.2011, therefore, the subsequent suit is barred by Order II Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”). The learned counsel submits that on 07.04.2011, the cause of action to file the suit for specific performance of

the agreement to sell had already arisen. She further submits that the appellant's complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the 1881 Act") against the respondent has been allowed and the respondent has been convicted. She further submits that it is not proved that the plaintiff was always ready and willing to perform his part of the contract.

5. This Court has considered the submissions. As per the agreement to sell, the sale deed was to be executed and registered on or before 12.10.2011. The suit for grant of decree of permanent injunction was filed on 07.04.2011. The bar under Order II Rule 2 CPC is applicable only if the plaintiff had the cause of action to file the suit for specific performance on 07.04.2011. As already noticed, the sale deed was required to be executed and registered on 12.10.2011. Thus, on 07.04.2011, the plaintiff did not have cause of action to file the suit for specific performance. In fact, in a recent judgment passed by the Supreme Court in *V. Kalyanaswamy (Dead) through LRs. Vs. L. Bakhthvatsalam (Dead) through LRs 2020 SCC (Online) (SC) 584*, it has been held that the subsequent suit should be proved to have been filed on the same cause of action when the plaintiff intentionally omitted to claim another relief. The doctrine enshrined in Order II Rule 2 CPC is based on the plea of abandonment of the relief or waiver. A Division Bench of this Court in *Smt. Bhagwant Kaur v. Sh. Harinderpal Singh 1991 PLJ 681*, has held that the bar to maintainability of the second suit under Order II Rule 2 CPC would not get attracted if the suit for permanent injunction is filed before the agreed date for the sale of property.

6. Keeping in view the aforesaid facts, there is no substance in the first argument of the learned counsel representing the appellant.

7. The next argument of the learned counsel is also without any substance because the sale deed was agreed to be executed on 12.10.2011. The suit could be filed upto 12.10.2014. Since it was Sunday, therefore, the suit was filed on 13.10.2014. Thus, both the Courts below have rightly held that the suit was filed within limitation.

8. The next argument of the learned counsel representing the appellant is based on the conviction of the respondent under Section 138 of the 1881 Act. It would be noted here that as per Section 40 to 44 of the Indian Evidence Act, 1872 (hereinafter referred to as “the 1872 Act”), the relevancy of the previous judgment has been examined. The judgment passed in the proceedings under Section 138 of the 1881 Act does not fall within the scope of Section 40, 41 or 42 of the 1872 Act.

9. Keeping in view the aforesaid facts, no ground is made out to interfere with the concurrent findings of facts arrived at by both the Courts below. Hence, the present appeal is dismissed.

10. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

October 18, 2023
“DK”

Whether speaking/reasoned :Yes/No

Whether reportable : Yes/No