

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

RSA-3921-2019 (O&M)

Reserved on: 22.08.2023

Date of decision: 01.09.2023

M/s Victor Cycles Private Limited

..Appellant

Versus

Sh.Sarvesh Kumar Jindal

.Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. V.K.Jindal, Sr. Advocate with
Mr. Akshay Jindal, Advocate
Mr. Pankaj Gautam, Advocate
and Mr. Arman Goyal, Advocate
for the appellant

Mr. Puneet Jindal, Sr. Advocate with
Ms. Malvi Aggarwal, Advocate for the respondent

ANIL KSHETARPAL, J

1. The correctness of the concurrent findings of fact arrived at by the courts below while decreeing the suit for possession by way of specific performance of the agreement to sell, is challenged by the defendant in this Regular Second Appeal. The agreement to sell was executed on 07.01.2006 with respect to property bearing MC No.B.XXXIII 2175 measuring 2425 sq. yards area for a total sale consideration of Rs.1,31,00,000/-. The execution of the agreement to sell is not in dispute between the parties, although the defendant claims that this document was executed as a collateral security for the repayment of loan. The agreement to sell is scribed on as many as five non-judicial papers of Rs.50/-. Each page is signed by two Directors of

the appellant (defendant-Company). It has also come on record that on 06.01.2006 i.e a day prior to the agreement to sell, a resolution was passed in the Board meeting of the Company authorizing Sh. Revti Raman Gupta and Sh. Vinay Gupta, Directors of the Company to sign the agreement to sell in favour of the plaintiff (Sh.Sarvesh Kumar Jindal).

2. As per the agreement to sell dated 07.01.2006, Rs.20,00,000/- was paid as an earnest money, out of which Rs.2,00,000/- was paid in the form of a cheque dated 08.12.2005 whereas the remaining amount of Rs.18,00,000 was paid in cash. As stipulated in the agreement to sell, the plaintiff paid another sum of Rs.10,00,000/- on 15.02.2006 to the defendant-Company and an endorsement was made on the reverse side of last page of the agreement to sell, which was again signed by both the Directors. On 01.08.2006, another sum of Rs.5,00,000/- was paid against a similar endorsement, which was again signed by both the Directors. It has also come on record that in the balance sheet of the appellant-Company, a receipt of Rs.30,00,000/- as an earnest money for sale of the suit property is duly recorded. The appellant, while filing the written statement, has denied the passing of the resolution and pleaded that there was no intention to sell. As per the agreement to sell, the sale deed was to be executed on or before 31.03.2006. The appellant has stated that they received a loan of Rs.2 , 00,000 on 08.12.2005. Another sum of Rs.8,00,000 was received on the same day whereas on 03.12.2005, the appellant received Rs.4,00,000, on

17.12.2005, Rs.2,00,000, on 22.12.2005 Rs.2,00,000 and on 24.12.2005 Rs.2 ,00,000 was paid.

3. It has come on record that the appellant-Company is a Private Ltd. Company run by Sh. Revti Raman Gupta, his wife and son. Both the courts have found that the agreement to sell is proved.

4. Provisionally the plaintiff (respondent herein) filed a suit for the grant of decree of permanent injunction dated 18.11.2006, which was withdrawn on 24.04.2007.

5. An application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') for permission to lead the additional evidence in order to produce certified copy of the plaint of the previous suit filed by the respondents for grant of decree of permanent injunction, filed on 18.11.2006 has also been filed. The suit for specific performance of the agreement to sell was filed on 11.04.2007 i.e after a period of 11 days from the agreed date for the execution and registration of the sale deed.

6. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook, alongwith the requisitioned record. It may be noted here that on permission granted, the learned counsel representing the parties have also filed their written note of submissions. The brief synopsis filed by the appellant runs into 22 pages.

7. Learned senior counsel representing the appellant contended that the the appellant is not the owner of the suit property and therefore, the suit for specific performance of the agreement to sell could not be

decreed. While elaborating, he submitted that originally this property was allotted to a partnership firm namely Jaldhara General Industries consisting of as many as five partners. On 26.04.1980, the partnership firm Jaldhara was dissolved and the property was left in the hands of two partners namely Kapur Chand Jain and Sunil Kumar Jain. On 08.05.1980 a new partnership firm came into being namely M/s Victor Cycles consisting of Kapur Chand Jain, Sunil Kumar Jain, Sagar Gupta and Sh. Revti Raman Gupta. On 17.06.1981, Victor Cycles Pvt. Ltd was inducted as a partner to the extent of 40%. This partnership deed dated 17.06.1981 was dissolved vide dissolution deed dated 30.06.1981. Clause (iv) of the dissolution deed provided that all the assets and liabilities as per the balance sheet of the firm have been allocated and assigned to the Victor Cycles Pvt. Ltd. and the remaining partners relinquish, release, assign, disclaim and convey all rights and interests in the properties, outstanding privileges, trade-name, trademarks etc. in favour of Victor Cycles Pvt. Ltd. He contends that the ownership of the property did not vest in the appellant-Company.

8. It is further contended that the agreement to sell is a result of fraud as the agreement to sell has been forged and fabricated by PW1- Sh.Rajnish Gupta. It is submitted that Sh.Rajnish Gupta was the Chartered Accountant, who has also been working for the appellant in arranging loans and he manipulated the agreement to sell, as the name of the person, who has typed the agreement to sell has not been disclosed. The appellant also did not have a clear marketable title and the amount of Rs.2,00,000 has been refunded to the plaintiff. Allegations have also

been made that the spacing in between the lines of the agreement to sell is different and the date 07.01.2006 is written with the hand. It is further contended that the suit filed by the plaintiff (respondent herein) is barred under Order 2 Rule 2 of CPC as the plaintiff previously filed a suit for grant of decree of permanent injunction. The findings of fact with regard to the readiness and willingness of the plaintiff has also been questioned. It has also been contended that the conduct of the plaintiff shows that he is interested in the refund of Rs.35,00,000.

9. On the other hand, the learned senior counsel representing the respondent submits that the defendant (appellant herein) has never disputed the ownership of the appellant Company before the courts below. He, while referring to the deposition of Gopal Singh, District Industries Centre, Ludhiana (PW3), submits that the appellant is owner of the suit property and he was not cross examined on the aforesaid aspect by the learned counsel representing the appellant. He further submits that DW 1 - Sh. Revti Raman Gupta, while appearing as witness, has admitted that the Company is the owner of the property. While contending that no ingredients of fraud as required under Order VI Rule 4 CPC has not been pleaded and Sh.Rajnish Gupta was not the Chartered Accountant of the defendant-Company. He further contends that the plaintiff was always ready and willing and the findings of fact arrived at by the courts below are correct and the objection with regard to the maintainability of the suit in the context of bar under Order II Rule 2 CPC was given up by the learned counsel representing the defendant

before the court of first instance. Hence, they cannot be permitted to press this objection.

10. After having analyzed the arguments of the learned counsel representing the parties, this Court now proceeds to examine their contentions. On reading of the written statement, it is evident that the appellant did not contest the suit on the ground that the appellant-Company does not own the suit property. In the written statement, it is nowhere pleaded that the appellant-Company was not competent to enter into the agreement to sell as the property was not owned by the Company. Moreover, as already noticed, originally the property was allotted to Jaldhara General Industries consisting of as many as five partners. Gradually, certain partners retired and a new partnership deed was executed while changing the name of the firm to M/s Victor Cycles Pvt.Ltd. On 17.06.1981, M/s Victor Cycles Pvt.Ltd. (the appellant herein) was inducted as partner to the extent of 40% share and within a period of 13 days i.e on 30.06.1981, the dissolution deed of the partnership firm was executed, in which all assets and properties of the firm were relinquished/assigned in favour of the appellant-Company. Moreover, when PW3-Gopal Singh, an official from District Industries Centre, appeared in evidence, he stated that the property is owned by the appellant-Company. Learned counsel representing the defendant did not cross examine the official witness on this aspect. Learned counsel representing the appellant contends that in view of Section 17 read with Section 19 (b) of the Specific Relief Act, 1963 (hereinafter referred to as '1963 Act'), the question of ownership is required to be decided at the

first instance before a decree for specific performance of the agreement to sell is passed. In support of his submission, he relies upon a judgment passed by the Supreme Court in **Pemmada Prabhakar & Ors vs Youngmen's Vysya Association and others (2015) 5 SCC 355**. This Court has carefully read Section 17 of the 1963 Act, which provides that if a suit is filed for specifically enforcing the contract in favour of intended vendor or lessor, who knowing himself not to have any title to the property, has contracted to sell or let the property then such contract cannot be specifically enforced. Section 17 of the 1963 Act has no application because this suit has been filed by the intended vendee against the intended vendor. In other words, Section 17 of the 1963 Act would be applicable when the intended vendor has filed a suit against the intended vendee to perform his part of the contract, which is not the position in this litigation. Section 19 (b) of the 1963 Act is in the context of relief of specific performance against the parties or persons claiming by a subsequent title. It is in that context that the word 'title' has been used.

11. This Court has also read the judgment passed in **Pemmada Prabhakar's case (supra)**. In that case one Pemmada Venkateswara Rao was owner of the property. He died intestate and survived by his wife, three sons and three daughters, however, defendant no.1 and 2 (Pemmada's sons) entered into an agreement to sell. The Supreme Court also found that the property was purchased by the predecessor of the plaintiff for the purpose of the community. The Court further found that defendant no.1 and 2 do not have absolute title and right over the entire

scheduled property. In that context, while answering point no.1, the Court made certain observations. However, it was never held that the ownership of the property is required to be proved in the absolute terms before a suit for specific performance is decreed. Keeping in view the aforesaid discussion, there is no substance in the first argument.

12. The next argument of the learned counsel representing the appellant is based on the plea of fraud. It may be noted here that before both the courts, the appellant has not pleaded that the agreement to sell is a result of fraud. Rather in the written statement, the appellant itself pleaded that the agreement to sell was executed as a collateral security as it needed finances. In the considered view of this Court, before a party is permitted to take up the plea of fraud as laid down in Order IV Rules 4 of CPC, the ingredients of fraud were required to be pleaded. Moreover, the fraud has to be proved as like as in a criminal case. In this case, the appellant has failed to prove the fraud. As already noticed, the agreement to sell runs into five pages and on each page, two Directors have signed at the bottom. They have also signed while receiving the additional payment of Rs.10,00,000 and Rs.5,00,000. It is not the case of the Directors of the appellant-Company that the agreement to sell is not signed by them or their signatures are forged. In these circumstances, there is no substance in the contention with regard to fraud.

13. The next argument of the learned counsel representing the appellant is that the agreement to sell is not scribed by a regular deed writer and the name of the Typist also is not known. A careful perusal of

the agreement to sell Ex.P1 on the record of the trial court clearly shows that it is drafted in Gurmukhi (Punjabi) language, which is a local language. Both the Directors have put their signatures in English on each page of the agreement to sell in English. Even the stamp paper for execution of the agreement to sell has been purchased on 06.01.2006. Then, there are two different endorsements on receipt of Rs.10,00,000 (on 15.02.2010) and Rs. 5,00,000 (on 01.08.2006). The Directors of the appellant-Company were not illiterate. Sh. Vinay Gupta, one of the Directors of the Company has not stepped into the witness box. Sh. Revti Raman Gupta, when appeared in evidence, stated that his qualification is 10+2. In these circumstances, non-disclosure of the name of the Typist loses its significance.

14. The next argument of the learned counsel representing the appellant is based on Order 2 Rule 2 CPC. It may be noted here that before the trial court, a specific issue on maintainability of the suit in view of bar to the maintainability of subsequent suit as provided under Order II Rule 2 CPC was culled out but the learned counsel representing the appellant conceded that the suit is maintainable. However, in the First Appellate Court once again this argument was raised and the First Appellate Court, on re-appreciation of evidence, found that the present suit is not barred under Order II Rule 2 CPC. Anyhow, this Court, has once again, examined the objection. In fact, the appellant has also filed an application for additional evidence to produce the plaint of the earlier suit, which was filed on 18.11.2006 whereas as per the agreement to sell, the sale deed was to be executed on or before 31.03.2007. This Court

has taken note of the plaint of the previous suit, which is sought to be produced in additional evidence. Learned counsel representing the appellant, while referring to para 5 and 7 of the plaint of the previous suit, has submitted that the cause of action for filing the suit for specific performance of the agreement to sell had arisen on 18.11.2006, when the previous suit was filed. He relies upon the judgment passed in **Vurimi Pullarao s/o Satyanarayana vs. Vemari Vyankata Radharani w/o Dhankoteshwarrao and another 2020 AIR (SC) 395.**

15. As already noticed, the suit for grant of injunction was filed much before the date, on which the sale deed, as per the agreement to sell, was to be executed. In para 5 of the plaint of the previous suit, it has been pleaded by the plaintiff that the defendants have become dishonest and they are negotiating with some other persons for sale of the property. In para 7 it was pleaded by the plaintiff that cause of action accrued to the plaintiff yesterday when the plaintiff learnt about the negotiations of the defendants with some other persons and today when the defendants flatly refused to accede to the genuine request of the plaintiff. The learned counsel representing the appellant wants the court to read that the plaintiff had the knowledge that the defendant had finally refused to honour the agreement to sell. This aspect is required to be examined from various angles. Order II Rule 2(3) of CPC prescribes that if a person is entitled to more than one relief in respect of same cause of action, he may sue for all or any of such relief; but he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. Hence, the *sine qua non* for applicability of

bar to maintain a subsequent suit, under Order II Rule 2 (3) CPC is applicable when a person is entitled to more than one relief in respect of the same cause of action. The cause of action is a bundle of facts, which lead the party to file a civil suit. In **V.Kalyanaswamy (dead) by LRs and another vs. L.Bakthavatsalam (dead) by LRs and others (2020) SCC (online) 584**, the Supreme Court examined, in detail, the objection with regard to maintainability of the subsequent suit under Order II Rule 2 of CPC. Ultimately, it was held that the relief claimed or could be claimed does not determine the applicability of bar under Order II Rule 2 CPC. The expression used in CPC is identity of the cause of action on which both the suits are based to attract bar under Order II Rule 2 CPC. In fact, a Division Bench of this Court in **Smt. Bhagwan Kaur vs. Sh. Harinder Pal Singh (1992) (1) PLR 643** held that a previous suit filed for grant of injunction before the agreed date for execution of the sale deed would not attract bar under Order II Rule 2 CPC. The Court held that cause of action for previous suit for grant of injunction is different than the cause of action for filing the suit for specific performance. A Five Judges Bench of the Supreme Court in **Gurbaksh Singh vs. Bhura Lal 1964 AIR (SC) 1810** held that cause of action for previous suit of declaration and subsequent suit for possession, are different and therefore, bar under Order II Rule 2 CPC is not applicable. Moreover, it is for the defendant (appellant) to clearly establish that the subsequent suit is barred under Order II Rule 2 CPC but it has miserably failed.

17. This aspect can be examined from yet another angle. A party may be entitled to file a suit for specific performance before the

date on which the sale deed as per agreement is to be executed and registered, if the other party has finally refused to honour the agreement to sell. However, it is not mandatory. The intended purchaser may like to wait till the agreed date for execution of the sale deed in the hope that wisdom will prevail and the other party would honour the agreement to sell. In such circumstances, the identity of cause of action with regard to the subsequent suit is not the same. This Court has also carefully read the judgment passed by the Supreme Court in **Vurimi Pullarao's case (supra)**. In that case, the previous suit for injunction was filed much after the date of execution and registration of the sale deed. In that context, the Supreme Court held that the subsequent suit is barred under Order II Rule 2 CPC. Whereas in the present case, the position is otherwise. Hence, the aforesaid judgment is not applicable. Keeping in view the aforesaid discussion, there is also no substance in the argument of the learned counsel representing the appellant with regard to objection under Order II Rule 2 CPC.

17. Hence, formally the application for additional evidence would be deemed to have been allowed as the same has been taken into consideration by this Court.

18. The next argument of the learned counsel representing the appellant is with regard to readiness and willingness. It is proved that the plaintiff visited the office of the Sub-Registrar on 31.03.2007. It is evident that on 23.03.2007, the plaintiff sent a telegram calling upon the defendant (appellant) to come in the office of the Sub-Registrar on 30.03.2007 or on 02.04.2007 as 31.03.2007 was holiday. The plaintiff

remained present in the office of the Sub-Registrar on 30.03.2007 as well as on 02.04.2007 and got his affidavits attested but the defendant (appellant) failed to turn up in the office of the Sub-Registrar. Moreover, the suit was filed immediately within a period of 9 days from 02.04.2007. It was specifically pleaded by the plaintiff that he was always ready and willing to perform his part of the contract. Both the courts have also found that the plaintiff was always ready and willing to perform his part of the contract.

19. The last argument of the learned counsel representing the appellant is with regard to the amount of Rs.35,00,000. Before the First Appellate Court, the defendant prayed that the appellant should be directed to furnish a Bank guarantee of Rs. 35,00,000. Such prayer to the First Appellate Court would not disentitle the plaintiff to the relief of the specific performance of the agreement to sell.

20. Learned counsel representing the appellant does not raise any other issue. In view of the aforesaid discussion, finding no merit, the appeal is dismissed.

2. All the pending miscellaneous applications, if any, are also disposed of.

01.09.2023

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE