

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

Sr. No.102

RSA-5703-2015 (O&M)

Date of Decision: 01.02.2023

Anil Kumar

.... Appellant

Versus

Rajiv Chopra and another

... Respondents

CORAM: HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present: Mr. Vikram Bajaj, Advocate
for the appellant.

Ms. Ekta Thakur, Advocate
for the respondents.

TRIBHUVAN DAHIYA, J.

This is defendant's second appeal against the concurrent findings recorded by both the Courts below.

2. The pleaded facts of the case are, the respondent No.1/plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for specific performance of the agreement to sell dated 24.11.2000 with regard to 3 *marla* land/suit land. The agreement was executed by respondent/defendant No.2 being General Power of Attorney (GPA) of the appellant/defendant No.1 (hereinafter referred to as 'defendant No.1') for a sale consideration of ₹50,000. The plaintiff paid earnest money of ₹48,000 to defendant No.2 in presence of marginal witnesses. The date for execution and registration of sale deed was fixed as 04.11.2002, i.e., after about two years of execution of the agreement to sell. The plaintiff also claimed that at the time of the execution of the agreement, possession of the suit land was handed over to

him. On the date fixed for execution of sale deed, the plaintiff was present with the balance sale consideration but the defendant did not turn up, which led to filing of the suit for specific performance, and in the alternative, relief of recovery of ₹96,000, i.e., double the amount of earnest money.

3. The suit was contested by defendant No.1 pleading that was a case of collusion between the plaintiff and defendant No.2, who were close relatives, and that the agreement to sell was completely false and fabricated document. The general power of attorney given to defendant No.2 was to supervise the plot in question and defend any litigation. This power of attorney was also cancelled on 27.11.2000. Defendant No.2-GPA holder of defendant No.1, filed a separate written statement and admitted the plaintiff's claim. He, however, submitted that after the receipt of earnest money, the general power of attorney was revoked by defendant No.1, and, therefore, the sale deed could not be executed.

4. On pleadings of the parties, following issues were settled by the trial Court:

1. Whether the agreement to sell dated 24.11.2000 has been executed by defendant No.1 under a lawful authority of defendant No.2 for consideration and in a bonafide manner? OPP
2. Whether the plaintiff is entitled to specific performance of the agreement to sell dated 24.11.2000? OPP
3. Whether the plaintiff has always been ready and willing to perform his part of the agreement to sell and is still ready and willing for the same? OPP
4. Whether the plaintiff is entitled to the alternative relief of recovery of ₹50,000 by way of refund of earnest money etc? OPP

5. Whether the power of attorney dated 31.10.2000 by defendant No.2 in favour of defendant No.1 was only to supervise the plot in question? OPD
6. Whether the present suit is an act of collusion in between the plaintiff and defendant No.2 to grab the plot in question of defendant No.1 by fabricating the agreement to sell in question? OPD
7. Whether the possession of the plot in question was delivered to the plaintiff at the time of agreement to sell in favour of the plaintiff? OPP
8. Whether defendant No.2 is in the habit of grabbing the properties of others by playing frauds to cause wrongful losses to other and to have wrongly gains? OPD
9. Relief.

5. On Issues No.1, 5, 6 and 8, the trial Court held, since defendant No.1 has categorically admitted the agreement to sell dated 24.11.2000, no other proof in that regard is required. Execution of the power of attorney by defendant No.1 in favour of defendant No.2 is also an admitted fact on record. It was got cancelled only on 27.11.2000, after execution of the agreement in question. Since there is a recital in the power of attorney (Ex.P6) as well as in the deed cancelling the same (Ex.D1) that the power of attorney holder is authorized to sell the suit land in question, there can be no escape from concluding that the agreement to sell has been validly executed by the person competent, on receipt of the earnest money. It is also recorded that there was no suggestion put to the witness that the earnest money was not received by defendant No.1. Since there was no evidence on record to establish the alleged collusion or forgery on the part of plaintiff in execution of the agreement to sell, it was held by the trial Court that plaintiff had

established that the agreement to sell was executed under lawful authority on

due consideration in a *bona fide* manner. The Issues No.1, 5, 6 and 8 were accordingly decided in favour of the plaintiff.

6. On Issues No.2 and 3, it was held that plaintiff was not entitled to specific performance of the contract since the transaction appeared to be a loan transaction. It is because at the time of execution of the agreement on 24.11.2000, almost entire sale consideration of ₹48,000 out of ₹50,000 was paid as earnest money, still the date for execution of sale deed was fixed about two years later. Accordingly, findings on these two Issues were returned against the plaintiff, who, however, was held entitled to the relief of recovery of double the amount of earnest money along with interest, which was alternatively sought by him.

7. While returning findings on Issue No.7, it was held that evidence on record established that possession of the suit land was not delivered to the plaintiff at any point of time.

8. In view of the aforesaid findings, the trial Court partly decreed the plaintiff's suit with costs, granting the alternative relief of recovery of earnest money against both the defendants along with interest at the rate of 6% per annum.

9. Both, plaintiff as well as defendant No.1, filed appeals against judgment and decree dated 24.02.2014 of the trial Court before lower appellate Court, which affirmed the findings of the trial Court and dismissed both the appeals vide judgment and decree dated 17.07.2015. The instant regular second appeal has been filed only by defendant No.1.

10. Learned counsel for the defendant has contended that the suit in question was barred under Order II Rule 2 CPC since the plaintiff earlier

filed a suit for permanent injunction with respect to the suit land, as

mentioned in para 13 of the plaint, which was dismissed as withdrawn. Liberty to institute a fresh suit was not granted to him, and, therefore, he was not entitled to file the suit in question seeking specific performance. In support of his contention, he has placed reliance upon a judgment of the Supreme Court of India passed in *Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited*, (2013) 1 Supreme Court Cases 625. Secondly, it has been argued by the learned counsel that the document/agreement to sell dated 24.11.2000 required compulsory registration to be admissible in evidence, since possession was delivered to the plaintiff based on that.

11. *Per contra*, learned counsel for the respondent/plaintiff has supported the findings of the Courts below, contending that provisions of Order II Rule 2 CPC are not attracted to the case.

12. Learned counsel for the parties have been heard, and record perused.

13. The following substantial question of law arises for consideration in this appeal:

- i) Whether provision of Order II Rule 2 CPC will bar filing of the instant suit for specific performance by the plaintiff, since his earlier suit for permanent injunction with respect to the suit land was dismissed as withdrawn?

14. To consider the first submission of the learned counsel for the appellant it is apposite to refer to para 13 of the plaint, which reads as under:

13. That previously suit was filed against the defendants for permanent injunction restraining the defendants from alienation the above said land to some

body else but the same was withdrawn after the stipulated date for the execution and registration.

15. Apart from this paragraph in the pleading, there is no other material on record in that regard. Neither the pleadings of the earlier suit for permanent injunction are on record, nor is the order passed by the trial Court dismissing the earlier suit as withdrawn, or the statement, if any, based on which the earlier suit was withdrawn, is on record. The fact, however, has not been disputed that the earlier suit was actually dismissed as withdrawn. It, therefore, needs to be examined whether withdrawal of the earlier suit for permanent injunction without permission to institute a subsequent/fresh suit with respect to the suit land, will bar filing of the instant suit under Order II Rule 2 CPC, in terms of law laid down in *Virgo Industries (Eng.) Private Limited* case (*supra*).

16. In *Virgo Industries (Eng.) Private Limited* case (*supra*), two agreements to sell were entered into between the plaintiffs and defendant therein on 27.07.2005 with respect to different parcels of immovable property. The plaintiffs apprehended that defendants were attempting to frustrate the agreement in question. Therefore, in 2005 they filed two suits pleading that as the period of six months fixed for execution of the sale deeds under the agreements in question was not yet over, the relief of specific performance of the agreements was not being claimed. They only sought decree of permanent injunction restraining the defendant from alienating the properties to any third party. Later, in 2007 two more suits for specific performance were filed by the plaintiffs based on the same agreements to sell dated 27.07.2005, seeking a decree for execution and registration of the sale deeds with respect to the same property and for

delivery of possession thereof. In this factual background and by examining the pleadings of the two suits, it was held that the foundation for the relief of permanent injunction earlier sought by the plaintiffs therein, had furnished complete cause of action to them to sue for the relief of specific performance as well. But they omitted to do so, and were not granted leave by the Court to institute the suit subsequently. Cause of action to institute both the suits remained the same, i.e., defendant's attempt to frustrate the agreement to sell, cancel it and sell the property to someone else. Regarding the second plea that at the time of filing the first set of suits in 2005, the suit for specific performance was pre-mature, it was held that there was no absolute bar on filing a suit claiming the relief to which the plaintiff might become entitled subsequently. Besides, there was no provision in the Specific Relief Act, 1963, requiring the plaintiff to wait for expiry of the due date for performance of the agreement when the defendant had made his intention clear by an overt act not to honour the same. Relevant paragraphs no. 14 to 16 of the judgment holding thus, read as under:

14. The averments made by the plaintiff in CSs Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when CSs Nos. 831 and 833 of 2005 were instituted, namely. 28-8-2005 and 9-9-2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27-7-2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along with the relief of permanent

injunction that formed the subject-matter of the above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in CSs Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

15. Furthermore, according to the plaintiff, which fact is also stated in the plaints filed in CSs Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27-7-2005 had not elapsed. According to the plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the defendant to execute the sale deeds despite the issuance of legal notice dated 24-2-2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, cannot per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of

the Court" as held by this Court in Vithalbhai (P) Ltd. v. Union Bank of India.

16. In Vithalbhai (P) Ltd. case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless "there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event", the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts.

17. *Ratio decidendi* of the judgment is, the cause of action of earlier suit for permanent injunction has to furnish the cause to institute the subsequent suit for specific performance also, to hold that the latter is barred under Order II Rule 2 CPC. Therefore, it has to be specifically established that the cause of action upon which the earlier suit was filed by the plaintiff,

was the same on which he filed the subsequent/instant suit. However, there

is nothing on record to establish what was the cause of action of the plaintiff's earlier suit for permanent injunction. In the absence of any evidence regarding the previous suit, its plaint, or the order of dismissal being on record, it cannot be said that the foundation to claim the relief of permanent injunction, earlier sought by the plaintiff, is the same as that of the suit in question, later filed by him claiming the relief of specific performance, though both the suits are with respect of the suit land.

18. Still further, it cannot be lost sight of that normally causes of action to institute a suit for permanent injunction and specific performance of agreement, are two different and distinct causes. A reference in that regard can be made to judgment of the Supreme Court in *Sucha Singh Sodhi (Dead) through Legal Representatives v. Baldev Raj Walia and another* (2018) 6 SCC 733, wherein two suits were filed; the first one for permanent injunction and the second for specific performance of an agreement. The issue whether the second suit was barred, was decided by holding that the cause of action in the former suit accrued when the plaintiff's possession was threatened over the suit premises or otherwise a case of injury to the plaintiffs in relation to the suit premises arose. Cause of action to file the latter suit, however, arises from the date fixed for performance or when the plaintiff notices that the performance is refused by the defendant. Therefore, cause of action to the two causes being different, factual ingredients to constitute the respective causes of action would also be different. It is not possible to claim both the reliefs together on one cause of action. That is the reason the limitation for two reliefs is governed by separate Articles of the Limitation Act, 1963. Resultantly, provisions of Order II Rule 2 CPC would

not apply. This *ratio* of the judgment is reflected in paragraphs 28 to 29, which read as under:

28. In other words, the question that arises for consideration is whether Sucha Singh (original plaintiff) could claim the relief of specific performance of agreement against the respondents/defendants in addition to his claim of permanent injunction in the previously instituted suit.

29. Our answer to the aforementioned question is in favour of the plaintiffs (appellants) and against the defendants (respondents). In other words, our answer to the aforementioned question is that the plaintiff could not claim the relief of specific performance of agreement against the defendants along with the relief of permanent injunction in the previous suit for the following reasons:

29.1. First, the cause of action to claim a relief of permanent injunction and the cause of action to claim a relief of specific performance of agreement are independent and one cannot include the other and vice versa. In other words, a plaintiff cannot claim a relief of specific performance of agreement against the defendant on a cause of action on which he has claimed a relief of permanent injunction.

29.2. Second, the cause of action to claim temporary/permanent injunction against the defendants from interfering in the plaintiff's possession over the suit

premises accrues when Defendant 1 threatens the plaintiff to dispossess him from the suit premises or otherwise cause injury to the plaintiff in relation to the suit premises. It is governed by Order 39 Rule 1(c) of the Code which deals with the grant of injunction. The limitation to file such suit is three years from the date of obstruction caused by the defendant to the plaintiff (see Part VII Articles 85, 86 and 87 of the Limitation Act). On the other hand, the cause of action to file a suit for claiming specific performance of agreement arises from the date fixed for the performance or when no such date is fixed, when the plaintiff has noticed that performance is refused by the defendant. The limitation to file such suit is three years from such date (see Part II Article 54 of the Limitation Act).

29.3. Third, when both the reliefs/claims, namely, (1) permanent injunction, and (2) specific performance of agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both the reliefs/claims are governed by separate articles of the Limitation Act, then, in our opinion, it is not possible to claim both the reliefs together on one cause of action.

19. In view of the law laid down in *Sucha Singh Sodhi* case (*supra*)

that the causes to institute the two suits are different, there is no substance in

the argument raised by learned counsel for the appellant/defendant No.1 that the plaintiff's suit would be hit by Order II Rule 2 of CPC. Merely because the plaintiff's earlier suit for permanent injunction was with respect to the land in question, it cannot be held that it was on the same cause of action on which the subsequent/instant suit for specific performance was filed by him. At the cost of repetition, it is stated that there is no evidence on record to establish what was the cause based upon which the earlier suit for permanent injunction was filed by the plaintiff, and in the absence whereof no presumption can be raised against him. It cannot be said he could have claimed the relief of specific performance also at the time of filing the earlier suit of permanent injunction, which was withdrawn to file the instant one. Cause of action arises on a set of facts which need to be pleaded in a suit. It is not something to be presumed by referring to the subject matter of a suit, which can give rise to more than one causes of action, as laid down in *Such Singh Sodhi* case (*supra*) too. Therefore, the plaintiff's suit for specific performance is not barred under Order II Rule 2 CPC. The substantial question of law stands answered, accordingly.

20. The second argument of learned counsel for the appellant/defendant No.1 regarding requirement of compulsory registration of the agreement to sell, is based on the premise that possession stands delivered to the plaintiff at the time of execution of the agreement. The argument has no legs to stand upon since the fact of possession having been delivered to the plaintiff has not been believed by both the Courts below. There is a finding of fact recorded by trial Court on Issue No.7 that possession of the property has not been delivered to the plaintiff, and the same stands affirmed by the lower appellate Court. There is no ground to

disturb the factual finding. Therefore, the second submission of the learned counsel is also rejected.

21. In view of the above discussion, the appeal stands dismissed.

(TRIBHUVAN DAHIYA)
JUDGE

01.02.2023
Maninder

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes