

Regular Second Appeal No.2423 of 1993
Date of decision : 8th of August, 2024

....Appellant

....Respondent

3. Plaintiff filed civil suit seeking decree of possession by way of specific performance of the agreement dated 16th of January, 1989 *qua* land admeasuring 22 Kanals 17 Marlas as detailed in the plaint. As per the case of the plaintiff, the defendant represented himself to be the owner of 22 Kanals 17 Marlas i.e. the suit land and agreed to sell the same for a total sale consideration of Rs.29,000/- per acre. On 16th of January, 1989 when the agreement to sell was executed, the defendant received earnest money of



Rs.10,000/-. Both the parties agreed that the sale deed shall be executed on or before 25th of November, 1989 on payment of rest of the sale consideration. The plaintiff went to the office of Sub Registrar, Jalalabad with the balance amount. However, the defendant failed to turn up. An application was filed by the plaintiff which was taken up only on 27th of November, 1989 owing to General Elections in the State of Punjab. The same was returned to the plaintiff on 30th of November, 1989 after marking his presence. Plaintiff thereafter was constrained to call upon the defendant to execute the sale deed by serving legal notice dated 15th of December, 1989. The defendant having failed to respond even to the same, plaintiff filed the present suit on 9th of January, 1990. Suit was contested by the defendant, who claimed that the land was in dispute in a Civil Court. He denied execution of agreement to sell in favour of the plaintiff claiming that the market value of the land being Rs.60,000/-, it is highly improbable that any prudent man could agree to sell the same @ Rs.29,000/- per acre.

4. On the pleadings of the parties, Trial Court framed the following issues:

- “1. Whether the defendant executed an agreement of sale in favour of the plaintiff? OPP
2. If issue No.1 has been proved whether the plaintiff has been and is still ready and willing to complete his part of the agreement? OPP
3. If the relief of specific performance is not given whether the plaintiff is entitled to the alternate relief? OPP
4. Relief.”



5. Both the Courts have returned findings w.r.t. execution of agreement to sell, receipt of earnest money and readiness & willingness of the plaintiff to complete his part of the agreement and have decreed the suit.

6. Mr. Chopra, Ld. Senior Counsel for the defendant submits that both the Courts have erred in ignoring the fact that even as per the documents proved on record by the plaintiff, the defendant is not owner of the entire land and is owner to the extent of only 14 Kanal 17 Marlas. He further submits that by decreeing the suit and directing the defendant to execute the sale deed w.r.t. remaining land, he cannot be asked to perform the contract in part. He thus submits that the plaintiff, who was not diligent, cannot claim specific performance and alternate relief ought to have been granted to the plaintiff in these circumstances. The second limb of argument raised by Mr. Chopra is w.r.t. readiness and willingness. He thus submits that in view of Section 16 of the Specific Performance Act, it was incumbent upon the plaintiff to prove positively w.r.t. his readiness and willingness to perform his part of the agreement. It has come on record that he was not in position to pay the entire amount as the source of fund which he claimed while deposing before the Trial Court has been found to be false. He submits that in order to prove readiness and willingness, the plaintiff is required to adduce evidence to show the availability of funds to make payments in terms of the contract in time. The story w.r.t. getting money from the commission agent having not been proved and stands falsified by



way of testimony of DW-1, the Courts ought to have dismissed the suit. In order to hammer-forth his arguments, Ld. Senior Counsel relies upon law laid down in the case of '**Saradamani Kandappan vs. S. Rajalakshmi and others**', (2011) 12 SCC 18, '**U.N. Krishnamurthy (D) thr. Lrs vs. A.M. Krishnamurthy**', 2022(3) RCR (C) 479, '**Dulal Chand Nandi Decd. Thr. Lrs vs. Kiran Bala Mehru and another**', 2018 (172) DRJ 111 and RSA No.1499 of 2013 titled as '**Anita G. Hawa vs. Navtej Bains**' *decided on* 28.08.2022.

7. Per contra, Mr. Sidhu on the other hand submits that merely for the reason that part of the land has been later on found to be not under the ownership of the defendant/vendor, he cannot be allowed to frustrate the entire agreement. He further submits that once vendor has taken plea w.r.t. non-execution of the agreement to sell, he was precluded from raising plea challenging the readiness and willingness of the vendee. He further submits that positive evidence was adduced by the plaintiff that he remained ready and willing for performing his part of the agreement through-out and the same can be gazed from the fact that on the target date i.e. on 25th of November, 1989, the plaintiff appeared before the office of Sub Registrar and submitted the application for getting his presence marked. Thereafter, again went there on 28th of November, 1989. Immediately thereafter, legal notice was served which has been proved on record as Exhibit P-2, dated 16th of December, 1989 calling upon the defendant to get the sale deed executed and present suit was filed in January, 1990. He thus submits that



from the conduct of the plaintiff that has come on record, it is evident that he was always ready and willing to perform his part. In support of his contention, Mr. Sidhu relies upon the law laid down by the Apex Court in the case of **B. Santoshamma and another vs. D. Sarala and another, (2020) 19 SCC 80.**

8. I have heard counsel for the parties and have carefully gone through records of the case.

9. From the rival contentions raised by counsel for the parties the following two issues that arise for consideration of this Court in the present appeal :

“(a) Where the vendor enters into agreement to sell representing to be the owner of the land subject matter of agreement and thereafter claims to be not owner of part of the same, can he be allowed to frustrate the entire agreement?”

“(b) Whether in the facts and circumstances of the present case it can be said that the plaintiff was not ready and willing to perform his part of agreement and is thus not entitled for specific performance?”

10. While answering the first issue, it needs to be noticed that the defendant initially simply denied execution of agreement to sell and the defence posed was that the market price of the land was Rs.60,000/- per acre and no prudent man could have sold the same at Rs.29,000/- per acre.



Further plea raised was that the land was under litigation. Both the Courts found that so far as the execution of the agreement to sell is concerned, the same stood proved. The fact that later on the vendor/defendant has been found not to be the owner, cannot be a reason to grant him premium for his misrepresentation. Once, he himself represented to be the owner of 22 Kanals 17 Marlas and the vendee believing him entered into an agreement to sell and parted away with earnest money and claims that he was ready and willing to perform his part, cannot be allowed to frustrate the agreement to sell taking advantage of his own wrong. Trite it is that ‘doctrine of frustration’ is subject to ‘doctrine of severance’. It is settled law that where contract can be severed, the Court should always lean towards performance of rest of the contract and against frustration of the entire contract. The same principle has been embodied in Section 12 of the Specific Relief Act, 1963 which reads as under :

“12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed be a only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

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(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

- (a) forms a considerable part of the whole, though admitting of compensation in money; or
- (b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

- (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b) [pays or has paid] the consideration for the whole of the contract without any abatement; and
- (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.”



11. Interpreting the same, Supreme Court in the case of *B. Santoshamma and Anorther vs. D.Sarala and another* (supra) while dealing with the somewhat similar situation held as under :

“73. Where a party to the contract is unable to perform the whole of his part of the contract, the Court may, in the circumstances mentioned in Section 12 of the S.R.A., direct the specific performance of so much of the contract, as can be performed, particularly where the value of the part of the contract left unperformed would be small in proportion to the total value of the contract and admits of compensation.

74. The Court may, under Section 12 of the S.R.A. direct the party in default to perform specifically, so much of his part of the contract, as he can perform, provided the other party pays or has paid the consideration for the whole of the contract, reduced by the consideration for the part which must be left unperformed. In this case the Vendee had apparently tendered the full consideration within the time stipulated in the Agreement dated 21.3.1984, that is, within 45 days or if not 45, within 47/48 days from the date of its execution.

75. As observed above, the Vendee admittedly paid Rs.40,000/- from out of the total consideration of Rs.75,000/- on the date of execution of the agreement, a further sum, of Rs.5,000/- sometime thereafter, which was duly acknowledged and also offered to pay the balance Rs.30,000/- within 30.4.1984 that is, within 45 days from the date of execution of the contract, which the Vendor did not accept. A Demand Draft for equivalent amount of Rs.30,000/- was obtained from Canara Bank on 4.5.1984, that is the 47th day of the execution of the agreement.

76. Admittedly, a major portion of the full consideration, that is, Rs.45,000/- had already been paid by the Vendor to the Vendee and the Vendor had been ready to and had offered to pay the entire balance consideration to the Vendor. However, the Vendor



purported to sell 100 square yards of the suit land to Pratap Reddy by executing a registered deed of conveyance in his favour.

77. As argued by Mr. Navare, a registered deed of conveyance takes effect, as regards the property comprised therein, against every unregistered deed relating to the same property as provided in section 50 of the Registration Act.

78. The Vendee claimed specific performance of the agreement dated 21.3.1984 in its entirety, and sought execution and registration of a deed of conveyance in respect of the entire suit land comprising 300 square yards, but without impleading Pratap Reddy to whom ownership of 100 square yards of land had been transferred by a registered deed of conveyance.

79. A transferee to whom the subject matter of a sale agreement or part thereof is transferred, is a necessary party to a suit for specific performance. Unfortunately, the Vendee omitted to implead Pratap Reddy. By the time she filed an application to implead Pratap Reddy, in 1989, the suit for specific performance of the agreement dated 21.3.1984 had become barred by limitation as against Pratap Reddy.”

12. In view of above, this Court finds that the first argument raised by Mr. Chopra sans merit and deserves to be rejected.

13. Coming on to the second issue w.r.t. readiness and willingness on part of the plaintiff, in the considered opinion of this Court, both the Courts below have returned findings of fact appreciating that as per the agreement to sell which has been proved on record, the target date was 25th of November, 1989. Plaintiff successfully proved that on the said date he appeared before the Office of Sub Registrar and immediately within a month served legal notice upon the defendant calling him to come and execute the sale deed. By 9th of January, 1990, the instant suit was filed and the Court



rightly held that the defendant apart from stating that he is not ready to execute the sale deed, could not produce any defence to foreclose the right of the plaintiff.

14. In view of above, this Court does not find any reason to interfere in the pure finding of facts recorded by the Courts below which is well reasoned and based upon proper appreciation of the evidence on record. Trite it is that Second Appeal is not the forum to re-appreciate the evidence. In the absence of any legal infirmity, this Court is precluded from interfering in pure findings of fact recorded by the Courts below. Reliance can be placed upon law laid down by the Apex Court in **Randhir Kaur versus Prithvi Pal Singh & Ors. 2019(17) SCC 71** wherein it was held as under :-

“14. The Division Bench of Punjab and Haryana High Court in a judgment reported in **Sadhu v. Mst. Kishni, 1980 AIR (Punjab) 85** set aside the judgment of the learned Single Bench in an intra court appeal in terms of the provisions of law as it existed prior to 1976, and held as under:

"12. The scope of second appeal as envisaged by section 100 of the Civil Procedure Code and section 41 of the Punjab Courts Act has been a matter of judicial scrutiny a number of times by this court as well as by the final court, that is, the Supreme Court of India. The learned counsel for the appellant has actually made a reference in this regard to **Detty Paitabhiramaswami v. S. Hanymayya [AIR 1959 Supreme Court 57.]**, **Madamanchi Ramappa v. Muthaluru Bojjappa [AIR 1963 Supreme Court 1633.]**, **Bithal Dass Khanna v. Hafiz Abdul Hai [1969 S.C. Notes 481.]** and **Afsar Shaikh v. Soleman Bibi [(1976) 2 SCC 142 : AIR 1976 Supreme Court 163.]**. These

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pronouncements; in a nutshell, lay down that there is no jurisdiction to entertain a second appeal on the ground of a erroneous finding of fact, however gross or inexcusable the error may seem to be. Nor does the fact that the finding of the first appellate Court is upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate court based upon an appreciation of the relevant evidence. Their Lordships have further observed that the only ground on which such an appeal can be said to be competent is where there is an error in law or procedure and not merely on an error on a question of fact.

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14. In view of the above discussion, we are clearly of the view that the learned Single Judge exceeded his jurisdiction in setting aside the findings of the fact on issue No. 2. The provisions of section 100 being clear and unambiguous, there was no scope for interference with those findings. We thus allow the appeal and set aside the judgment of the learned Single Judge and affirm the judgment and decree passed by the District Judge. The parties are, however left to bear their own costs.

15. A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact.”



15. The said dictum was further elaborately echoed by three Judges Bench in **Satyender and others vs. Saroj and others, 2022 AIR (Supreme Court) 4732** as under:

“XXXX XXXX XXXX

17. Be that as it may, though the requirement of formulation of a substantial question of law was not necessary, yet Section 41 of the Punjab Courts Act, requires that only such decisions are to be considered in second appeal which are contrary to law or to some custom or usage having the force of law or the court below have failed to determine some material issue of law or custom or usage having the force of law. Therefore, what is important is still a "question of law". In other words, second appeal is not a forum where court has to re-examine or re-appreciate questions of fact settled by the Trial Court and the Appellate Court.....”

16. In view of above, this Court does not find any merit in the instant Second Appeal. Resultantly, the same is dismissed.

August 08, 2024
Dpr

(Pankaj Jain)
Judge

Whether speaking/reasoned : Yes
Whether reportable : Yes