

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

RSA-374-2015(O&M)

Date of decision:-16.1.2019

Smt.Sunita and others

...Appellants

Versus

Rajender Singh and another

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Ashok Singla, Advocate
for the appellants.

Mr.Vikas Bahl, Sr.Advocate with
Mr.Nikhil Sabharwal, Advocate
for respondent No.1.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiff Rajender Singh had filed a suit against defendants Smt.Sunita – wife, Asha and Vicky @ Neshu – minor sons, Kajal – minor daughter and Smt.Bharto – mother of Sh.Raj Singh – deceased son of Lakhmi Chand, resident of village Bari, Tehsil Ganaur, District Sonapat seeking possession by specific performance of contract.

As per the case of the plaintiff, Sh.Raj Singh – deceased had entered into an agreement with the plaintiff to sell his agricultural land measuring 3 Kanals 0 marlas i.e. 6 marlas being 6/148 share of the land comprised in Khewat No.12 min, Khata No.17 min, rectangle and killa No.54/9 (7-8), 2 Kanals 14 Marlas i.e. 54/160 share comprised in rectangle and killa No.54/12(8-0), situated in the revenue estate of village Bari, Tehsil Ganaur, District Sonapat on 10.4.2006; that the plaintiff had paid a sum of Rs.4 lacs to Sh.Raj Singh – deceased as earnest money; that initially the date of execution of sale deed was fixed as 16.8.2006, however, as 'No Objection' Certificate was required to be issued by late Sh.Raj Singh; the plaintiff had agreed to cooperate for the purpose; that Sh.Raj Singh – deceased could not arrange such certificate within a stipulated period, therefore, with consent of plaintiff and Raj Singh, the date for execution of sale deed was extended firstly to 16.12.2006 and thereafter to 31.1.2007; however, due to non procurement of 'No Objection' Certificate, Sh.Raj Singh avoided the matter on one pretext or the other; that Sh.Raj Singh had filed a civil suit against the plaintiff with a dishonest intention to grab the earnest money; that the said suit was contested by the plaintiff; that Sh.Raj Singh had not agreed to accede to request of the plaintiff to execute the sale deed; that after his (Raj Singh's) death, his wife, children and mother had inherited his estate; that they are bound to execute the sale deed

in favour of the plaintiff in terms of the agreement to sell. According to the plaintiff, the legal notices dated 10.4.2006, 31.1.2007, 6.4.2009 and 8.5.2009 were issued to the defendants by the plaintiff calling upon them to execute the sale deed in respect of the suit land in terms of agreement entered into between the plaintiff and deceased Raj Singh, predecessor-in-interest of defendants after procuring 'No Objection' Certificate from the concerned department; that the defendants were directed to intimate the plaintiff or his Advocate in writing by one month's prior notice after receipt of 'No Objection' Certificate to execute the sale deed but the defendants did not do so. According to the plaintiff, he was ready to perform his part of contract so as to get the sale deed executed by making payment of balance sale consideration to Sh.Raj Singh during his life time and thereafter the defendants, but the latter dragged their feet in the matter giving rise to a cause of action to the plaintiff to bring the suit in question.

On notice, the defendants had appeared and defendants No.1 to 4 had filed a joint written statement contesting the assertions in the plaint. *Inter alia*, they had raised a preliminary objections that suit was not maintainable in the present form and it was time barred; that as per the terms and conditions of the agreement to sell dated 10.4.2006, the date of execution for the sale deed was fixed as on or before 16.12.2006 but on that date, the plaintiff failed to get the sale

deed executed by paying the balance sale consideration amount; that at request of the plaintiff, the defendants extended the date for execution of the sale deed. According to the defendants, their predecessor-in-interest was ready and willing to perform his part of contract, whereas it was not so with respect to the plaintiff; that the suit of the plaintiff was barred under Order 2 Rule 2 CPC because the suit was subsequent suit, which is not triable in the eyes of law; that the plaintiff could have filed a counter claim in the suit filed by Raj Singh. According to the defendants, no cause of action arose to the plaintiff to bring the present suit; that the plaintiff has no locus standi to file the same; that the suit is bad for non-joinder and misjoinder of necessary parties; that the suit is liable to be dismissed with special costs under Section 35(A) CPC. On merits, the defendants repeated on oath the assertions taken in the preliminary objections while refuting the averments in the plaint. They came up with a prayer for dismissal of the suit.

On the pleadings of the parties, following issues were framed vide order dated 8.11.2011:

1. Whether late Raj Singh executed agreement to sell regarding his land as mentioned in para No.1 of the plaint on dated 10.4.2006 in favour of plaintiff? OPP.
2. Whether a decree for possession by way of specific performance of agreement to sell is liable to be passed in

favour fo the plaintiff against the defendants on the grounds mentioned in the plaint? OPP.

3. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
4. Whether the plaintiff has no cause of action to file the present suit? OPD.
5. Whether the plaintiff has no locus-standi to file the present suit? OPD.
6. Whether the suit of the plaintiff is hopelessly time barred? OPD.
7. Relief.

In order to prove his case, the plaintiff Rajender Singh had himself appeared as PW1 besides examining Dharampal as PW2 and tendering documents Ex.P1 to Ex.P8.

On the other hand, the defendants had examined Umarpal as DW1, Subhash as DW2 and Jeet Singh as DW3, who submitted their respective affidavits in evidence. The defendants also tendered in evidence documents Ex.D1 to Ex.D6.

After hearing the learned counsel for the parties, the trial Court decided issue No.1 in favour of the plaintiff, issue No.2 decided partly in favour for the plaintiff, issues No.3 to 5 against the defendants, issue No.6 against the defendants. As a result of findings on issues 1, 2 and 6, the trial Court decreed the suit directing the

defendants to pay Rs.4 lacs to the plaintiff along with simple interest at the rate of 8% per annum from the date of filing of the suit till actual realization within a period of two months.

When this judgment and decree were challenged before the First Appellate Court by the plaintiff/appellant, the appeal was accepted. The judgment and decree dated 10.9.2013 passed by the trial Court was modified and the plaintiff/appellant was held entitled to possession of the suit property by way of specific performance and agreement dated 10.4.2006. The plaintiff/appellant was directed to deposit the balance sale consideration amount either with respondent/defendant or in the trial Court within one month from the judgment and decree passed by the First appellate Court observing that thereafter the respondents/defendants would execute the sale deed and get it registered within three months from the date of judgment and decree passed by the First Appellate Court, failing which, the plaintiff would be at liberty to get the sale deed executed and registered through the trial Court.

Being dissatisfied with the judgment and decree passed by the First Appellate Court, the defendants had filed the present Regular Second Appeal before this Court, notice of which was issued and the respondent-plaintiff appeared through counsel.

I have heard learned counsel for the parties besides going through the record.

The first and foremost argument advanced by learned counsel for the appellants/defendants has been that suit was clearly time barred, which fact was not properly considered by the Courts below while deciding the suit. He has contended that in the agreement to sell dated 10.4.2006, which was entered into between the plaintiff and late Sh.Raj Singh – predecessor-in-interest of the defendants, the final date for execution of sale deed was fixed as 16.8.2006, which was extended as per version of the plaintiff finally till 31.1.2007. Under the circumstances the suit for specific performance could have been filed within three years thereof up to 31.1.2010 but it having been filed on 1.2.2010 is clearly time barred and deserves to be dismissed on that short ground.

Whereas learned counsel for the respondent/plaintiff has contended that though the defendants in the written statement filed before the trial Court had taken an objection that suit was time barred and an issue was struck by the trial Court as issue No.6 to the effect *“Whether the suit of the plaintiff is hopelessly time barred? OPD”* but then the said issue was adjudged in favour of the plaintiff and against the defendants. This issue was not pressed by the defendants/respondents before First Appellate Court as is mentioned in para No.17 of the judgment dated 11.9.2014 passed by Additional District Judge, Sonapat. Therefore, this issue cannot be agitated by the appellants in the Regular Second Appeal.

After hearing the learned counsel for the parties and going through the record, I conclude that the suit is clearly time barred, which is apparent on the face of it. Even as per own case of the plaintiff though in the original agreement to sell dated 10.4.2006, the date for execution of sale deed was fixed as 16.8.2006, however, the date was extended firstly up to 16.12.2006 and thereafter up to 31.1.2007. As per own case of the plaintiff, he had gone to the office of Sub Registrar on 31.1.2007 and got his presence marked there by executing an affidavit. However, since defendants did not come forward for the purpose of execution of the sale deed, the transaction could not be completed. Thus according to the plaintiff even the date for execution of sale deed was extended lastly up to 31.1.2007. The limitation for filing of a suit for specific performance is three years under Article 54 of the Limitation Act, which starts from the date when cause of action arises to the plaintiff to bring the suit. The cause of action in this case arose to the plaintiff on 31.1.2007. He could have filed suit up to 31.1.2010 at the most but it has not been so done and suit was filed on 1.2.2010. The same is accordingly time barred.

Section 3 of the Limitation Act, 1963 deals with bar of limitation, which provides that subject to the provisions contained in **sections 4 to 24 (inclusive)**, every suit instituted, appeal preferred, and application made after the prescribed **period** shall be dismissed,

although **limitation** has not been set up as a defence. Sub Section 2 provides that for the purposes of this Act,— (a) a suit is instituted,— (i) in an ordinary case, when the plaint is presented to the proper officer. In this case the plaint was presented on 1.2.2010 i.e. after the prescribed period. For that very reason, the suit was liable to be dismissed but the trial Court did not do so. While dealing with this issue No.6 in para No.14 of the judgment, the trial Court has given very strange reasoning stating that time was not essence of the contract in a suit for specific performance of immovable property. True it is so but then suit for specific performance has to be filed within a period of limitation prescribed by the Limitation Act and hurdle of limitation cannot be avoided stating that time is not the essence of contract. The trial Court did not understand the meaning of that proposition of law properly, which relates to the situation when sale deed cannot be got executed on the date, which had been agreed upon by the parties and the plaintiff files a suit for specific performance later on stating that though he had been ready and willing to perform his part of contract but the same could not mature for the reason of the defendant(s) dragging his/their feet in the matter. The trial Court had completely misinterpreted the law in that regard and finding in that respect is not sustainable.

Learned counsel for the appellants has referred to judgment by the Apex Court i.e. **Kamlesh Babu and Ors. Versus**

Lajpat Rai Sharma and Ors., 2008(2) RCR(Civil)872 wherein it was observed that when a suit is filed beyond period of limitation, Section 3(1) of the Limitation Act casts a duty upon the Court to dismiss a suit or an appeal, if made after the prescribed period, although, limitation was not set up as a defence. It was further observed that a point of limitation is prima facie admissible even in the Court of last resort, although it had not taken in the lower courts. In the instant case, the defendants had taken up a specific plea in the written statement filed by them before the trial Court and issue in that regard had been struck by the trial Court, which was duly pressed by learned counsel represented by defendants during the course of arguments, though the trial Court by an erroneous approach had observed that suit was not time barred.

Learned counsel for the respondent/plaintiff had argued that the Courts below having found the suit was not time barred, this issue cannot be raised in the regular second appeal. In support of his that contention, he had referred to authority **Partap Singh Versus Gurdial Kaur, 1998(4) RCR(Civil 374** by a Co-ordinate Bench of this Court wherein it was observed that when an issue of limitation specifically framed but not pressed before the trial Court and the lower appellate Court, issue no more open to challenge before the High Court in second appeal. He further referred to authority by a Co-ordinate Bench of this Court i.e. **Ved Parkash Versus Mahender**

and others, 2018(2) RCR(Civil)641 wherein it was observed that the limitation is a mixed question of fact and law and defendant is required to prove limitation by leading cogent evidence to satisfy that suit was time barred.

However, I am not in agreement with learned counsel for the respondent/plaintiff in that regard. The limitation is a legal plea, which can certainly be raised at any stage though it might not have been set up as a defence in the courts below. This was so observed in the authority ***Kamlesh Babu and Ors. Versus Lajpat Rai Sharma and Ors.***(supra) referred to by learned counsel for the appellants. Furthermore, there cannot be any estoppel against the statute. The authorities referred to by learned counsel for the respondent/plaintiff are not applicable due to different facts and circumstances. In the instant case, the defendants had taken up a specific plea in the written statement that suit was time barred. An issue in that regard had been framed by the trial Court, which was vehemently pressed by counsel representing the defendants during arguments. Though due to non application of mind by the trial Court, the issue was decided against the defendants. There is no question of the issue being abandoned. As far as the judgment of First Appellate Court is concerned, it has been observed in para No.17 that counsel for respondents/defendants had not pressed issues No.3 to 6. It is not believable that the defendants would not argue a very strong point in their favour. It

seems that the First Appellate Court in order to avoid dealing with the issues in detail by giving proper reasoning chose the easier path of writing that such issues were not pressed by the counsel for respondents. Even if for a moment, it is taken that counsel representing respondents/defendants had not pressed such issues, which included an important issue of limitation, it was incumbent upon the First Appellate Court to see whether the suit was within time or not since the duty is cast upon the Court to do so in terms of Section 3 of the Limitation Act. Dealing with such an important matter in a casual and cursory manner was most uncalled for. The suit being time barred on the face of it, the limitation in this case cannot be said to be a mixed question of law and fact. The authorities referred to by learned counsel for the respondent/plaintiff do not help him in any manner.

Furthermore, this Court has power in terms of Order 41 Rule 33 CPC to pass any decree or order, which ought to have been passed.

Learned counsel for the appellants had raised another point that the minor defendants had not been sued properly in terms of Order 32 Rule 3 CPC and the suit should have been dismissed for that reason. In support of his such contention, he has referred to authority **Gurpreet Singh Versus Chatterbhuj Goel, 1991(2) RRR 504** by a Division Bench of this Court.

However, learned counsel for the respondent/plaintiff had submitted that the minors were sued through their mother and natural guardian. Such minors along with their mother had filed a joint written statement, they have jointly filed the present appeal and no prejudice is shown to have been caused to the plaintiffs. Therefore, this contention of learned counsel for the appellants is without merit.

After hearing the rival contentions and going through the record as well as perusing the authority referred to by learned counsel for the appellants, I find that Order 32 Rule 3-A CPC makes the thing very clear providing that no decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reasons of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree.

Here there is nothing on record to show that mother of the minors had any interest adverse to that of the minors or that any prejudice has been caused to the minor defendants for the said reason. Therefore, the impugned judgments and decrees cannot be set aside for the reason that provisions of Order 32 Rule 3 CPC were not complied with in this case.

Learned counsel for the appellants had argued that the

decree for specific performance should not have been granted since that would result in exceptional hardship to the defendants and in terms of Section 20 of the Specific Relief Act, the specific performance be declined to the plaintiff. However, learned counsel for the respondent/plaintiff contended that no such plea was taken by the defendants in the written statement and no exceptional hardship could be established. Therefore, the relief could not be denied to the plaintiff for that reason.

After hearing the counsel for the parties, I find that though under Section 20 of the Specific Relief Act, 1963, the jurisdiction to decree a specific performance is discretionary but then it has to be exercised in a judicious manner and not in an arbitrary manner as has been mentioned in that section itself. The case of the defendant does not fall within any of the eventualities discussed in Sub-Section 2 of Section 20 of Specific Relief Act. Therefore, this argument by learned counsel for the appellants is rejected.

One more contention put forward by learned counsel for the appellants was that specific performance has been allowed to the plaintiff despite the fact that he had failed to prove that he has been ready and willing to perform his part of contract throughout. Learned counsel for the respondent/plaintiff has submitted that both the courts below have returned finding in that regard in favour of the plaintiff, which being findings of the fact the defendants cannot wriggle out of

the same and start finding faults with the verdict given by the Courts below in that regard.

Giving a thoughtful consideration to such contentions, I find that the trial Court has not framed the issues properly. No issue as to whether the plaintiff has been ready and willing to perform his part of contract has been framed with onus of proving it being there on the plaintiff. It was a vital issue to be struck. It was incumbent upon the plaintiff to show that he was having sufficient money with him to pay the balance consideration amount on the due date and even thereafter and will that he had a wish to get the sale deed executed in his favour. A perusal of the record goes to show that in the agreement to sell, the date for execution of sale deed has been fixed as 16.8.2006, which was subsequently extended to 16.12.2006 for the reason that 'No Objection' Certificate was to be obtained by Raj Singh. Interestingly, there is no mention of Raj Singh obtaining any 'No Objection' Certificate for the purpose of execution of sale deed in the agreement to sell itself. By way of extending the date up to 16.12.2006, it was mentioned that during this period up to 10.11.2006, an amount of Rs.5 lacs would be paid by the plaintiff to the defendant, which was admittedly not paid. In the extension dated 16.12.2006, there is mention of 'No Objection' Certificate to be obtained by 31.1.2007. As already discussed above, there was no mention of taking 'No Objection' Certificate in the recital of the

agreement to sell. In the first extension also, it was not so mentioned. It was in the second extension that the same cropped up to be there. The plaintiff himself is not sure as to what sort of 'No Objection' Certificate was required and in its absence sale deed could not be executed. Interestingly, he had filed the suit without specifying as to for what purpose 'No Objection' certificate was required and it was to be issued by which Authority/Office/Department. It seems that this phrase was introduced just to get the date of execution of sale deed extended. The trial Court had declined specific performance of agreement to the plaintiff. The First Appellate Court though granted the same to plaintiff but without convincing and justifiable reasons.

Under the circumstances, the impugned judgments and decrees passed by both the Courts below are not sustainable and are liable to be set aside by way of acceptance of the appeal.

This appeal is accordingly allowed. The impugned judgments and decrees passed by the courts below were set aside, consequently suit filed by the plaintiff stands dismissed.

16.1.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No