

*Before Sudhir Mittal, J.*

**HARWINDER SINGH** — *Petitioner*

Versus

**GURPREET SINGH AND ORS.** — *Respondents*

**RSA No. 74 of 2021(O&M)**

November 12, 2021

*Constitution of India, 1950—Art. 226—Code of Civil Procedure—O.2 RL.2—Doctrine of waiver—Documents of earlier litigation on record and parties alive of ongoing litigation—Issue of earlier pendency not argued and parties failed to raise an objection in regard to Order 2RL.2 at the High Court and even at the Appellate court—Hence the doctrine of waiver would apply—The issue of bar of Order 2 Rule 2 CPC is a mixed question of fact and law.*

*Held*, that the issue of bar of Order 2 Rule 2 CPC is not a pure question of law. For its application, the earlier pleadings need to be examined. It is, thus, a mixed question of fact and law. The Courts below have not had the opportunity of considering the same in the absence of objection/argument in this regard. In this view of the matter, this argument is also rejected.

(Para 11)

L.S. Mann, Advocate, *for the appellant.*

**SUDHIR MITTAL, J.**

(1) This Regular Second Appeal arises out of a suit for specific performance of agreement to sell. The date of the agreement to sell is 05.05.2006 and the same is Ex.P1 on the record. Defendant No.1 agreed to sell his land measuring 01 bigha, 16 biswa and 11 biswansi to the plaintiffs for a total consideration of Rs.2,10,000/-. The entire consideration was paid at the time of execution of agreement to sell and possession was also delivered. Defendant No.1 had undertaken to get the sale deed registered after mutation of inheritance from his mother, namely, Ravinder Kaur was sanctioned in his favour. Suit has been decreed and appeal has been dismissed. The second appeal has been preferred by defendant No.2 i.e. subsequent purchaser.

(2) Other relevant facts are that defendant No.1 i.e. the owner, threatened to alienate suit property in August, 2006 which led to the filing of a suit for permanent injunction by the plaintiffs. In reply,

defendant No.1 admitted the agreement to sell as is evident from the judgment of the trial Court. The suit was finally decided vide award dated 01.05.2010 passed by the Lok Adalat which is Ex.P4 on the record. The award is based upon statement dated 01.05.2010 of defendant No.1. He admitted the agreement to sell and stated that the sale deed would be executed within one week. He also gave an assurance that the suit property would not be alienated. Before that defendant No.1 had executed agreement to sell dated 03.08.2006 in favour of defendant No.2. Thereafter, defendant No.2 filed a suit for specific performance, wherein, defendant No.1 put in appearance and pleaded that he had already executed agreement dated 05.05.2006 (Ex.P1) in favour of the plaintiffs. The plaintiffs also sought impleadment as party defendants, however, before they could be impleaded, the suit was withdrawn on 27.11.2010 as defendant No.1 had executed two registered sale deeds dated 16.11.2010 in favour of defendant No.2. The suit land is also subject matter of the said sale deeds. Consequently, the plaintiffs instituted the present suit on 23.12.2010. In the written statement filed on behalf of defendant No.1, the agreement to sell dated 05.05.2006 (Ex.P1) was denied. It was stated that defendant No.1 borrowed a sum of Rs.50,000/- from the plaintiffs, whereupon, certain blank stamp papers were got signed from him. One Gulzar Singh was cited as a witness to this transaction. After six months, the money was repaid again in the presence of Gulzar Singh. Thus, the case set up by defendant No.1 was that the agreement to sell (Ex.P1) was a forged and fabricated. The reply filed in the suit for specific performance filed by defendant No.2 that agreement to sell dated 05.05.2006 had been executed, was sought to be explained by submitting that at the particular point in time, defendant No.1 was under the influence of the plaintiffs. Defendant No.2 contested the suit on the ground that he was a bona fide purchaser for consideration and that the agreement to sell dated 05.05.2006 (Ex.P1) was a fictitious document.

(3) As mentioned hereinabove, the trial Court decreed the suit on a consideration and appreciation of the evidence produced by the parties. To prove the agreement to sell dated 05.05.2006 (Ex.P1), PW2, namely, Harpal Singh, an attesting witness was examined. He not only proved, the agreement to sell dated 05.05.2006 (Ex.P1), but also proved receipt (Ex.P2) evidencing payment of entire sale consideration. The plaint of the suit for specific performance filed by defendant No.2 was produced and proved on record as Ex.P10 and the written statement filed by defendant No.1 in that suit was produced and proved

as Ex.P11. Application of the plaintiffs for impleadment as party defendants in the said suit was produced and proved as Ex.P12. The trial Court was, consequently, convinced that defendant No.1 had executed agreement to sell dated 05.05.2006 (Ex.P1) and had also received the entire sale consideration. The same had been proved on record through evidence and also through his admission in award dated 01.05.2010 (Ex.P4) which was based upon a statement Ex.P3 as well as his written statement in the suit for specific performance filed by defendant No.2. These findings of fact have been upheld by the First Appellant Court as appeal of defendant No.2 has been dismissed.

(4) It may be noted that defendant No.1 did not challenge the judgment and decree passed by the trial Court.

(5) As an argument has been raised on the basis of issues framed, the same are being reproduced below for ready reference:-

‘(1) Whether the defendant No.1 executed an agreement to sell dated 05.05.2006 in favour of the plaintiffs? OPP.

(2) Whether the plaintiffs are/were ready and willing to perform their part of contract? OPP

(3) If issues Nos.1 and 2 are proved in affirmative, whether the plaintiffs are entitled to the relief of specific performance as prayed for? OPP

(4) Whether the plaintiffs are entitled to the alternative relief of recovery of Rs.2,10,000/- alongwith interest as prayed for? OPP.

(5) Whether the sale deeds dated 16.11.2010 executed by defendant No.1 alongwith Gurvinder Kaur and Jagbir Singh in favour of defendant No.2 are illegal, null and void? OPP

(6) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for? OPP

(7) Whether the agreement to sell dated 05.05.2006 is forged and fabricated? OPD

(8) Whether the suit is not maintainable in the present form? OPD

(9) Whether the plaintiffs have no locus standi and cause of action to file the present suit? OPD

(10) Whether the plaintiffs are estopped by their own act

and conduct to file the present suit? OPD

(11) Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD.

(12) Whether the suit is time barred? OPD

(13) Relief.

(6) A perusal of copy of grounds of appeal filed before the First Appellate Court shows that lengthy explanations have been given while challenging finding regarding validity of agreement to sell dated 05.05.2006 (Ex.P1) and grant of relief of specific performance. Objection of suit being barred by limitation, though raised, is very perfunctory. No attempt has been made to explain how it is so. A perusal of the judgment of the First Appellate Court also shows that no argument was raised regarding the suit being barred by limitation. Order 2 Rule 2 CPC as well as Order 23 Rule 4 CPC were also not pressed into service. These objections were not even raised in the written statement as is evident from the judgment of the trial Court. It has not been submitted that reproduction of contents of written statement in the judgment is erroneous.

(7) Learned counsel for the appellant has argued that a perusal of the facts of this case shows that the plaintiffs had in the first instance filed a suit for injunction as there was a threat by defendant No.1 to alienate the suit property. Even though, according to the agreement to sell dated 05.05.2006 (Ex.P1), sale deed was to be executed after sanction of mutation in favour of defendant No.1, there being a genuine perception in the mind of the plaintiffs that sale deed would not be executed in their favour, a cause of action arose to file a suit for specific performance. The same having not been done, would be deemed to have been abandoned. Thus, the suit was barred by Order 2 Rule 2 of the Code of Civil Procedure, 1908. In support of the argument that a cause of action arises to file a suit for specific performance, even though, the date for execution of sale deed has not come, reliance has been placed upon judgment of the Supreme Court in *M/s Virgo Industries (Eng.) P. Ltd. versus M/s Venturetech Solutions P. Ltd.*<sup>1</sup>

(8) Regarding non-pleading of the bar of Order 2 Rule 2 CPC, it has been submitted that a pure question of law can be raised at any stage. For this purpose, judgment of the Supreme Court in

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<sup>1</sup> 2012 (4) RCR (Civil) 372

*Tarinikamal Pandit and others versus Perfulla Kumar Chatterjee (dead) by LRs*<sup>2</sup> has been pressed into service. The doctrine of waiver would not apply in this case as laid down by the Supreme Court in *State of Punjab versus Bua Das Kaushal*<sup>3</sup>. So long as, relevant evidence is available on record and parties are alive to the issue in dispute even non-framing of a specific issue would not matter. For this purpose, reliance has been placed on judgment of the Supreme Court in *Swamy Atmananda and others versus Sri Ramakrishna Tapovanam and others*<sup>4</sup>.

(9) The next argument raised is that the suit is barred by limitation. The onus to prove the same was wrongly placed upon the defendant. Section 3 of the Limitation Act, 1963 (hereinafter referred to as the Limitation Act) places a duty upon the Court to decide the issue of limitation, even though, defence of limitation has not been set up. There is no evidence on record that mutation was sanctioned in favour of defendant No.1 any time between 23.12.2007 and 23.12.2010 and thus, bar of limitation was attracted. Reliance has been placed upon a single Bench judgment/order dated 18.05.2016 of this Court in CR-2659-2016 titled as *Pritam Singh versus Amar Singh through LRs and others*. Finally, it has been argued that Order 23 Rule 4 of the Code of Civil Procedure bars the present suit as at the time of adjustment of the suit filed for injunction, no permission was taken to file a fresh one on the same cause of action.

(10) First and foremost, I shall take up the argument regarding limitation. While deciding this issue, the trial Court has held that the suit was within limitation as registered sale deed was to be executed only after sanction of mutation in favour of defendant No.1. Since, defendant No.1 had not led any evidence to show that he intimated the fact of sanction of mutation to the plaintiffs at any earlier point of time, it can be validly inferred that the said fact came to knowledge of the plaintiffs only when statement dated 01.05.2010 (Ex.P3) was recorded by defendant No.1 in the suit for permanent injunction. Thus, the suit was within limitation. The grounds of appeal filed before the First Appellate Court shows that there is no stress on this issue. Very perfunctorily, it has been averred that the suit was barred by limitation. The judgment of the First Appellate Court shows that the issue was not

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<sup>2</sup> AIR 1979 (SC) 1165

<sup>3</sup> AIR 1971 (SC) 1676

<sup>4</sup> 2005 (3) RCR (Civil) 404

argued at all. It is, thus, evident that the appellant-defendant No.2 consciously chose not to effectively raise and argue the point of limitation before the First Appellate Court. There being a finding against him in the judgment of the trial Court, defendant No.2 was very much alive to and aware of the same, but, consciously chose not to press this point before the First Appellate Court. In my considered opinion, this leads to the conclusion that appellant-defendant No.2 had waived the objection of limitation and he cannot be permitted to raise this ground in the Regular Second Appeal. The doctrine of waiver has been very well elaborated upon by the Supreme Court in Civil Appeal Nos.2943-2944 of 2020 decided on 10.03.2021 titled as **Kalpraj Dharamshi and another versus Kotak Investment Advisors Limited and another**<sup>5</sup>. After considering the definition of ‘waiver’ as given in Halsbury’s Laws of England, 4<sup>th</sup> Edition, Para No.1471, it has been held that waiver can be inferred from the conduct of a party. If, a party acts in a manner inconsistent with its rights, it would be deemed to have waived the rights. A statutory right is also subject to this doctrine provided no public interest is involved. Judgment of the Supreme Court in **Manak Lal versus Dr. Prem Chand**<sup>6</sup> has also been referred to. In that case, an Advocate was held guilty of professional mis-conduct by a Tribunal of three members. This decision was challenged before the High Court and one of the objections taken was that one of members of the Tribunal had appeared on behalf of the complainant and was accordingly disqualified from acting as a member. Since, no objection was raised in this regard before the Tribunal, the objection was rejected on the ground of waiver. The judgment in **Bua Das Kaushal’s case** (supra), cannot come to the aid of the appellant as in the said case, the Supreme Court held that waiver would not apply as the objection of *res judicata* was considered not only by the trial Court, but by the First Appellate Court as well. The judgment which was held to be *res judicata*, was on the record. The facts in that case were that a Head Constable had been dismissed from service which order was upheld by rejection of his departmental appeals. Writ petition also failed as did the Letters Patent Appeal. Leave to Appeal was refused by the Supreme Court. Thereafter, the Head Constable filed a suit for declaration that the order of dismissal was violative of Article 311 of the Constitution. The same was dismissed. First appeal also failed. In second appeal, the High

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<sup>5</sup> 2021 (166) SCL 583

<sup>6</sup> AIR 1957 SCR 575

Court called for a report from the trial Court on two additional issues, whether, the decision of the Letters Patent Appeal operated as *res judicata* and whether, the plea of *res judicata* had been waived by the State. The trial Court sent a report that the earlier decision did not operate as *res judicata* and that the State had waived the said plea. The second appeal was heard and allowed by holding that the State had waived the plea of *res judicata*. The Supreme Court held that there was no question of waiver as the parties were alive to this issue, even though, no specific plea was taken in the written statement nor any issue was framed. In the present case, the defendant did not argue the bar of limitation before the First Appellate Court, even though, there was a finding against him by the trial Court, whereas, in the case before the Supreme Court, even though, a bar of *res judicata* was not pleaded by the defendant, relevant evidence was available on record and the issue was raised before all the Courts. Findings on the said issue were returned by the trial Court and the First Appellate Court in its favour and under the circumstances, it was held that the doctrine of waiver was not applicable.

(11) In *M/s Virgo Industries (Eng.) P. Ltd. (supra)*, it has been held that suit for specific performance can be filed even before the agreed date for execution of registered sale deed, if the facts of a particular case so dictate. Thus, appellant-defendant No.2 would have been perfectly entitled to raise the bar of Order 2 Rule 2 of the Code of Civil Procedure in his written statement. Having not done so nor having raised this point either before the trial Court or before the First Appellate Court, he would be deemed to have waived this right as well. Judgment of the Supreme Court in *Swamy Atmananda's case (supra)* is distinguishable. In the said case, the High Court held that a concurrent finding of fact had been arrived at in an earlier suit that the schools in respect of which the suit had been filed, were recognized in the name of Tapovanam and that the appellants before the Supreme Court had recorded a concession that Tapovanam was the educational agency in respect of the said institutions and all the documents stood in its name. Thereafter, Tapovanam filed a suit claiming to be the absolute owner of the schools and properties which were subject matter of the said suit with consequential relief of possession. The earlier judgment in the suit filed by the appellants before the Supreme Court was extensively relied upon. This was not traversed by the appellants before the Supreme Court. All relevant documents were on record and the trial Court as well as the First Appellate Court held that the earlier judgment operated as *res judicata* and decreed the suit. Objection

raised before the Supreme Court that no issue regarding *res judicata* having been framed, the same could not be argued or considered was rejected on the ground that the parties were alive to the same and no prejudice has been caused. That is not the situation in the present case. The documents of the earlier litigation may have been on record, but Order 2 Rule 2 of the Code of Civil Procedure was not raised either before the trial Court or before the First Appellate Court. Thus, the principle laid down in this judgment does not get attracted. On the contrary, being alive to this objection and having not raised the same, the doctrine of waiver would apply. The argument that a pure question of law can be raised at any stage cannot succeed because a question of law not involving any investigation of facts can be permitted to be raised as has been held in ***Tarinikamal Pandit's case*** (supra). The issue of bar of Order 2 Rule 2 CPC is not a pure question of law. For its application, the earlier pleadings need to be examined. It is, thus, a mixed question of fact and law. The Courts below have not had the opportunity of considering the same in the absence of objection/argument in this regard. In this view of the matter, this argument is also rejected.

(12) The final argument raised is regarding the bar of Order 23 Rule 4 CPC. This is an argument of desperation as is evident from perusal of the said rule. Rule 4 of Order 23 of the Code of Civil Procedure states that nothing in this order would apply to any proceedings in execution of a decree or order. This means that Order 23 CPC is not applicable to proceedings in execution of a decree or an order. I fail to understand, how, this rule bars the instant suit. Actually, it seems that learned counsel for the appellant wants to argue that Order 23 Rule 1 sub-rule 4 of the Code of Civil Procedure is attracted as no permission was taken to file a fresh suit at the time of disposal of the earlier suit. The said sub-rule also does not apply in this case as the earlier suit was neither withdrawn nor any part of the claim had been abandoned. In fact, perusal of the decree of the Courts below leads to the conclusion that the same was decreed on the basis of the statement of defendant No.1.

(13) A related argument could be raised on the basis of Order 23 Rule 3 CPC which provides for a decree being passed in case a suit is decided on the basis of compromise. Thus, it could be argued that earlier decree should have been executed instead of filing of a suit for a specific performance. However, this argument also cannot be accepted because the objection was neither raised in the written statement nor



was it argued before the Courts below. Accordingly, the same is also deemed to have been waived.

(14) The appeal has no merit and is accordingly, dismissed.

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*Dr. Payel Mehta*