

***Before Anil Kshetarpal, J.***

**JEEWAN LAL—Appellant**

*versus*

**TEJO AND OTHERS—Respondent**

**RSA No.1249 of 2013**

February 12, 2020

***Code of Civil Procedure, 1908 – S. 100 – O. 41 RI. 33 – Limitation Act, 1963 – Schedule – Art. 54 – Limitation – Suit wrongly held as time barred –Endorsement in the form of supplementary agreement on reverse side of agreement to sell that sale deed to be executed within one year of decision of pending case is the date to be considered.***

*Held that*, the Article 54 of the Schedule to the Limitation Act is in two parts. First part provides that the limitation would begin to run or reckoning date would be the date agreed to between the parties for execution and registration of the sale deed in the agreement to sell. Whereas the second part provide that if no date is agreed upon for execution and registration of the sale deed, the reckoning date would be the date of which the plaintiff has notice of refusal of the defendant to perform his part of the contract. Therefore, in this case, once there was an endorsement dated 23.09.1997 to the effect that the defendant would intimate decision of the pending case to the plaintiff, thereafter, within one year from the date of intimation, the plaintiff would get the sale deed executed, the limitation cannot be reckoned from 23.09.1997.

(Para 13)

***Failure to file cross appeal – Duty of Court to arrive at right conclusion.***

*Held that*, although, the defendant has not filed any appeal or cross-objections, however, this Court in exercise of powers under Order 41 Rule 33 CPC has the duty to look into the facts of the entire case and thereafter arrive at a right conclusion irrespective of the fact whether the defendant has filed a cross-appeal or not.

(Para 16)

Amit Jain, Advocate  
*for the appellant.*

R.K. Sharma, Advocate

for respondent Nos.2 to 4.

**ANIL KSHETARPAL, J.**

(1) The plaintiff-appellant is in the Regular Second Appeal against the concurrent judgments of the Courts below dismissing the suit filed for specific performance of the agreement to sell.

**FACTS:-**

(2) The plaintiff filed a suit for grant of relief of permanent injunction and mandatory injunction on 28.07.2004 with following prayers:-

“9. It is, therefore, respectfully prayed that:-

(a) A decree of permanent injunction restraining the defendant from alienating, selling or transferring and from raising illegal construction over the suit property i.e. plot measuring 50 square yards forming part of land bearing Khewat No.432/633, Rect. No.63, Killa No.1(1-15) 64(0-2) measuring 1 kanal 17 marlas, situated at Mauja Baselwa, Tehsil and District Faridabad, in the name of any other person, other than the plaintiff in any manner whatsoever, may kindly be passed in favour of plaintiff against the defendant.

(b) A decree of mandatory injunction directing the defendant to execute the sale deed in favour of plaintiff in respect of suit property i.e. plot measuring 50 square yards forming part of land bearing Khewat No.452/633, Rect. No.63, Killa No.1(1-15) 64(0-2) situated at Mauja Baselwa, Tehsil and District Faridabad, as fully detailed and described in para No.1 of plaint, on receiving the balance sale consideration from the plaintiff as per terms and conditions of agreement to sell dated 24.9.1996 executed between the parties to the suit and to deliver the peaceful vacant possession of the suit property to the plaintiff in accordance with law, may kindly be passed in favour of plaintiff and against the defendant.

Or any other relief, which this Hon'ble Court may deem fit in the best interest of the plaintiff vis-a-vis the affairs of the plaintiff by way of permanent injunction and mandatory injunction may kindly be granted.”

(3) The plaintiff had pleaded that the defendant late Sh. Puran Lal had entered into an agreement dated 24.09.1996 to transfer lease hold rights of plot measuring 50 square yards forming part of land bearing Khewat No.432, Khatoni No.633, Rectangle No.63, Killa Nos.1(1-15), 64(0-2), situated at Mauja Baselwa, Tehsil and District Faridabad for a total agreed sale consideration of **Rs.62,500/-**, on receipt of a sum of **Rs.52,500/-** towards part payment. The balance amount of **Rs.10,000/-** was payable at the time of execution and registration of the sale deed which was agreed to be executed on 23.09.1997. Before the date of execution of the sale deed, the defendant showed his inability to perform his part of the contract on the ground that there was some litigation regarding the plot in question pending before the Civil Court at Faridabad in the case titled as 'Raj Kumar Vs. Puran Lal'. It was agreed that as and when the litigation would come to an end, the defendant will intimate in writing to the plaintiff and, thereafter, within one year the registered sale deed would be executed. The defendant failed to intimate, hence, the suit was filed. A photocopy of the agreement to sell was produced alongwith the plaint. The defendant, on service of notice, contested the suit and pleaded that no agreement to sell has been entered into and the agreement to sell is forged and fabricated.

(4) Learned trial Court, while deciding an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, for grant of temporary injunction, passed a detailed order on 09.02.2005 wherein it was noticed that the plaintiff has not produced a copy of receipt evidencing receipt of **Rs.52,500/-** towards part payment. Thus, the application for injunction was dismissed.

(5) After framing of the issues in the civil suit, the case was fixed for evidence. The plaintiff filed an application dated 15.02.2006 for amendment of the suit praying for amendment of the plaint to add a prayer for specific performance of agreement to sell which was allowed on 23.08.2006.

(6) The plaintiff filed amended plaint. Thereafter, the trial of the suit commenced. The plaintiff tendered in his evidence affidavit dated 28.07.2004 on 26.10.2009 in lieu of examination-in-chief. The plaintiff was cross-examined on 26.10.2009 itself. The plaintiff thereafter, filed an application for permission to lead secondary evidence by alleging that original agreement to sell was misplaced on 19.08.2009. The application was allowed on 29.03.2010. Thereafter, the plaintiff once again appeared in evidence on 26.04.2010 and for the

first time, produced a photocopy of the receipt of **Rs.52,500/-** allegedly signed by defendant-Puran Lal.

(7) It may be significant to note here that Puran Lal died on 30.10.2009.

(8) Learned trial Court, on appreciation of evidence, dismissed the suit while observing that the plaintiff has failed to prove agreement to sell. Learned First Appellate Court, although, partially reversed the findings of the learned trial Court, while holding that execution of the agreement to sell has been proved on examination of both the marginal witnesses as also the plaintiff but went on to hold that the suit filed by the plaintiff was time barred.

(9) This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below.

(10) Learned counsel for the appellant has submitted that the finding of the First Appellate Court that suit filed by the plaintiff on 28.07.2004 is time barred, is erroneous. He drew attention of the Court to Article 54 of the Schedule to the Limitation Act, 1963 in support thereof.

(11) On the other hand, learned counsel for the respondents defended the judgment by contending that there is concurrent finding of fact arrived at by the Courts which should not be interfered with.

(12) At this stage, this Court proposes to divide this judgment in three separate parts. First part is with respect to limitation. Second part would be dealing with validity of agreement to sell and third part with respect to the relief.

### **LIMITATION:-**

(13) With regard to limitation, it may be noticed that learned First Appellate Court has erred while returning a finding that the suit filed by the plaintiff was time barred. It may be noted here that the agreement to sell in the present case is 24.09.1996. As per the agreement to sell, the sale deed was to be registered on 23.09.1997. Thereafter, there is endorsement in the form of a supplementary agreement on the reverse side of the leaf of the agreement to sell itself, wherein it is recorded that the sale deed would be executed after the decision of the pending case, within one year from the date, the defendant intimate the plaintiff about the decision. Learned counsel for the appellant is correct in contending that Article 54 of the Schedule to

the Limitation Act, is in two parts. First part provides that the limitation would begin to run or reckoning date would be the date agreed to between the parties for execution and registration of the sale deed in the agreement to sell. Whereas the second part provide that if no date is agreed upon for execution and registration of the sale deed, the reckoning date would be the date on which the plaintiff has notice of refusal of the defendant to perform his part of the contract. Therefore, in this case, once there was an endorsement dated 23.09.1997 to the effect that the defendant would intimate decision of the pending case to the plaintiff, thereafter, within one year from the date of intimation, the plaintiff would get the sale deed executed, the limitation cannot be reckoned from 23.09.1997.

(14) Learned First Appellate Court has although found that the original agreement to sell has not been produced and merely because secondary evidence was permitted to be led and the document was exhibited, the document cannot be said to have been proved. However, learned First Appellate Court has erred in observing that the endorsement on the reverse leaf of the first page of the agreement to sell is a separate document. Such finding is erroneous because such endorsement is part of the agreement to sell only and it is only to supplement what had been agreed upon. The First Appellate Court has also erred to hold that the suit filed by the plaintiff was beyond the prescribed time on the ground that the endorsement has not been pleaded in the plaint. Such pleadings are not necessary particularly when the suit had been filed on the basis of agreement to sell.

(15) Thus, the First Appellate Court erred in this regard. Hence, the finding of the First Appellate Court on the question of limitation is reversed.

**AGREEMENT TO SELL:-**

(16) In the present case, although the learned First Appellate Court has held that the execution of the agreement to sell and payment of earnest money has been proved, however, this Court on re-consideration and re-appreciation of the entire evidence, finds that such finding is not only erroneous but perverse. Although, the defendant has not filed any appeal or cross-objections, however, this Court in exercise of powers under Order 41 Rule 33 CPC has the duty to look into the facts of the entire case and thereafter arrive at a right conclusion irrespective of the fact whether the defendant has filed a cross-appeal or not.

(17) As noted above, primary evidence i.e. the agreement to sell dated 24.09.1996, endorsement dated 23.09.1997 and the receipt dated 24.09.1996 have not been produced on file. No doubt, application for permission to lead secondary evidence was allowed by the learned trial Court, however, the Court is required to examine the conduct of the plaintiff. Mere production of oral evidence of two alleged marginal witnesses is not sufficient to hold that the agreement to sell stands proved.

(18) As noticed, the plaintiff when filed the suit, produced only a photocopy of the agreement to sell dated 24.09.1996. While dismissing an application for grant of temporary injunction, it was specifically observed by the Court in the order dated 09.02.2005 that the plaintiff has not produced copy of receipt. The plaintiff originally had prayed for direction to direct the defendant to execute a sale deed in compliance with the contract. The plaintiff appeared in evidence on 26.10.2009 and tendered his affidavit attested on 28.07.2004 in lieu of examination-in-chief. It is surprising that five years old affidavit was permitted to be produced in the examination-in-chief. The plaintiff was cross-examined by counsel appearing for the defendant on 26.10.2009 i.e. on the day the affidavit in examination-in-chief was tendered. The plaintiff at that stage also did not produce the receipt.

(19) Thereafter, the plaintiff filed an application for permission to lead secondary evidence by asserting that the agreement to sell has been misplaced on 19.08.2009 which was allowed on 29.03.2010.

(20) It is significant to note that when the plaintiff appeared in the Court for getting recorded his deposition on 26.10.2009, he did not bring to the notice of the Court that the original agreement to sell and the receipt have been lost. The plaintiff now asserts that the aforesaid documents were misplaced on 19.08.2009 and a DDR to that effect was registered on the same day, however, there is no explanation when the plaintiff tendered his affidavit in lieu of examination-in-chief and was cross-examined by learned counsel representing the defendant, why he did not disclose that the agreement to sell and the receipt have been misplaced. After the evidence of the plaintiff concluded, thereafter he filed an application on 26.10.2009 for permission to lead additional evidence. Still further, although copy of the DDR has been produced but not proved. The aforesaid document has not been exhibited in evidence.

(21) Still further, a reading of the evidence of Gopi Chand Tewatia, Advocate, alleged scribe of the agreement to sell, receipt and

endorsement, impression left with this Court is that this witness is not reliable. He does not remember who had typed the agreement to sell. He very casually states that so many years have elapsed, therefore, he does not remember. If Gopi Chand Tewatia Advocate is regularly scribing the agreements to sell/or other document, he is expected to maintain some record of the documents drafted by him. No register/notebook in this regard has been produced. Such an agreement, original whereof, has not been produced, cannot be relied upon.

(22) The defendant has also been deprived of an opportunity to prove that the signature of Puran Lal-defendant, who by then had died, did not exist on the agreement to sell, the receipt and the endorsement.

(23) Still further, on careful perusal of the alleged agreement to sell Ex.PW3/A, it is apparent that the signatures of Puran Lal-defendant as well as of marginal witness Pankaj Tyagi have been squeezed in the vacant spaces. The name of Pankaj Tyagi is written with hand whereas name of other witness Dashrath is written with typewriter. Pankaj Tyagi has signed at the bottom/end of the page on the extreme right side.

(24) Hence in view of the aforesaid facts, the agreement to sell cannot be said to have been proved.

(25) Keeping in view the aforesaid facts, this Court is of the considered view that the appeal filed by the appellant has no merit and, therefore, dismissed, although for different reasons.

(26) All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

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*Shubreet Kaur*