
(12) Resultantly this revision is allowed. The impugned order dated 29th September, 1999 is hereby set aside. The decree holder-applicant is granted 30 days time from the date of pronouncement of this order to deposit the entire balance sale consideration with interest at the rate of 18% per annum from the date of decree till deposit. Once this amount is deposited, the learned executing Court shall proceed in accordance with law and the decree passed. However, in the facts and circumstances of the present case, there shall be no order as to costs.

S.C.K.

Before Swatanter Kumar, J
GURDEV SINGH,—Appellant

versus

HARDEV SINGH & OTHERS,—Respondents

R.S.A. NO. 2415 OF 2000

13th July, 2000

Specific Relief Act, 1963—Trial Court passing a decree for specific performance—Appellate Court affirming the said decree—Concurrent finding of facts & law—Appellant admitting the execution of the agreement—No grievance made either in the written statement before the trial Court or in the memo of appeal before the 1st appellate Court that alternative relief for recovery of money should be granted instead of specific performance—Appellant cannot raise new pleas in appeal before the High Court—Appeal liable to be dismissed.

Held, that in view of the written statement filed by the defendants before the trial Court on the basis of which the parties concluded their evidence and which are the very foundation of the judgment of the learned trial Court, new contentions cannot be raised for the first time in a regular second appeal. Even in the memorandum of appeal, before the first appellate Court none of these pleas was raised by the appellant. On that short ground alone and keeping in view the facts that there is concurrent finding of fact and law arrived at by the learned Courts below, I would have no hesitation in dismissing the appeal.

(Para 5)

Further held, that once the execution of the agreement is admitted and it has been found by both the Courts below that the said agreement was acted upon mutually by the parties by payment and delivery of possession, the fact that the agreement was not signed even if it is so assumed, would be hardly of any consequence. The contention that the alternative relief should have been granted by the Court was not raised by the appellant in the written statement. The expression "the plaint is vague" cannot be constructed and read as that "the agreement is vague" for want of definite particulars. If it was pleaded so specifically Courts would have framed an issue and parties would have led evidence in that regard. As no controversy was raised by the defendant, he cannot be permitted to take up the said plea in the second appeal.

(Para 8)

Argued by Amar Vivek, Advocate

JUDGMENT

Swatanter Kumar, J.

(1) This regular second appeal is directed against the judgment of the first Appellate Court dated 29th March, 2000 affirming the findings in relation to fact and law both.

(2) In order to show that the present appeal involves substantial questions of law, justifying admission of this appeal, learned counsel for the appellant contended :—

- (i) In the facts and circumstances of the case, the Courts below ought to have granted alternative relief for recovery of money and the decree for specific performance as passed by the courts below are not sustainable;
- (ii) The agreement was not signed by the vendee and as such it is not an agreement enforceable in law;
- (iii) The Courts have misconstrued the evidence on record including the statement of the appellant herein. Resultantly, the findings recorded by the Courts below are patently erroneous;
- (iv) The agreement is vague and does not specify the land which was sought to be sold under the terms of the agreement.

(3) During the course of arguments learned counsel for the appellants produced before the Court the copies of the pleading and evidence recorded by the learned trial Court.

(4) At the very out-set I must notice that none of the above said contentions are founded on the pleadings raised by the appellant in the written statement filed in the trial Court. In paragraph No. 5 of the preliminary objections taken in the written statement, it has been stated that the plaint is vague and the plaintiff has no cause of action. The written statement runs into three pages and the entire case of the defendant-appellant is pleaded in paragraph No. 1, where it is stated as under :—

“That para No. 1 of the plaint as alleged is wrong and incorrect hence denied. The alleged agreement too is a forged and invalid document. In fact the answering defendant never entered into an agreement to sell the land in question in favour of the plaintiff. The alleged mutation of inheritance has already been sanctioned much earlier in 1970. In fact the defendant has taken loan from the plaintiff which the answering defendant has repaid with interest to the plaintiff. Now the plaintiff is taking undue advantage of the alleged agreement. Moreover, the alleged agreement is time barred and cannot be enforced. The answering defendant never delivered the possession of the land in suit to the plaintiff. The land in question is in joint possession of all the co-sharers.”

Rest of the paragraphs of the plaint have merely been denied for one reason or the other.

(5) In view of the written statement filed by the defendants before the trial Court on the basis of which the parties concluded their evidence and which are the very foundation of the judgment of the learned trial Court, the above said contentions cannot be raised for the first time in a regular second appeal. Even in the memorandum of appeal before the first appellate Court none of these pleas was raised by the appellant. On that short ground alone and keeping in view the facts that there is concurrent finding of fact and law arrived at by the learned courts below and the principles enunciated by the Hon'ble Supreme Court of India in the case of *Kandiba Dagadu Kadam versus Savitri Bai (1)*, I would

(1) 1999 (3) ICC 620.

have no hesitation in dismissing the appeal. Still I will proceed, in the alternative, to discuss the merits of these contentions.

(6) The plaintiff had filed a suit for specific performance of the agreement to sell dated 27th May, 1986 for sale of land measuring 10 kanals and part of Khasra No. 785 as per the details given in the plaint. According to the plaintiff, the land was to be sold at the rate of Rs. 20,000/- per acre and defendant No. 1 had received Rs. 23,000/- as advance for sale price from the plaintiff and had agreed to execute the sale deed after one month from the date of sanction of mutation in favour of defendant No. 1 as the land was mortgaged. The possession of the land was delivered to the plaintiff. This suit was contested by the defendants as already noticed. However, the written statement is vague, indefinite and makes out hardly any case in favour of the appellant.

(7) A very important fact is that the appellant in his cross examination had practically admitted the case of the plaintiff except to the extent he stated that he had raised the loan,—vide the agreement Ex. PA. The relevant part of his cross-examination reads as under :—

“I had received Rs. 23,000 on agreement to sell from the plaintiff, which I had repaid. It is correct that my land, which was the subject matter of agreement was under mortgage with the bank. In the agreement, it was mentioned that the sale deed will be executed after one month of the mutation of redemption in my favour. I had not appended my signatures on Ex.PA under the pressure of any one. I know Sardara Singh attesting witness of the sale agreement, but I do not know the other attesting witness.”

(8) Once the execution of the agreement is admitted and it has been found by both the Courts below that the said agreement was acted upon mutually by the parties by payment and delivery of possession, the fact that the agreement was not signed even if it is so assumed, would be hardly of any consequence. The learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of *Kanshi Ram versus Om Parkash Jawal and others* (2) to contend that the alternative relief, can be granted by the Court and should have been granted in the present case. As I have already noticed, no such plea was raised in the written

statement. The expression "the plaint is vague" cannot be constructed and read as that "the agreement is vague" for want of definite particulars. If it was pleaded so specifically, Courts would have framed an issue and parties would have led evidence in that regard. As no controversy was raised by the defendant, he cannot be permitted to take up the said plea in the second appeal. Further more, it is a settled principle of law that relief of specific performance is always in the discretion of the Court. The Court can decline the specific performance even if the plaintiff was otherwise entitled to the same, if it is likely to cause serious prejudice and would imbalance the equities between the parties. To attract the applicability of this principle the parties must lead proper evidence showing serious prejudice to the right of the vendor in relation to the subject matter of the suit for the fault of the vendee/plaintiff. It is a matter of fact and cannot be presumed in favour of either party. Reference in this regard can be made to the judgment of this Court in the case of *Ram Dass versus Ram Lubhaya* (3).

(9) The learned Courts below have appreciated the evidence in its correct perspective and I see no reason to interfere in the concurrent finding of facts arrived at by the learned Courts below. Resultantly, the regular second appeal is dismissed *in limine*.

R.N.R.

Before V.M, Jain, J

KARNAIL SINGH,—*Petitioner*

versus

STATE OF PUNJAB,—*Respondent*

CRIMINAL MISC. NO. 25298/M OF 2000

11th August, 2000

Code of Criminal Procedure, 1973—Ss., 439(2) & 482—High Court ordering regular bail to the accused—Trial Court releasing the accused from custody on his furnishing bonds—Absence from the trial Court on the date fixed—Trial Court cancelling his bail, forfeiting bonds and issuing non-bailable warrants—whether trial Court has power to cancel the bail granted by the High Court—Held, yes—Trial Court has power to cancel the bail under the circumstances arising during trial—petition dismissed.

(3) 1998 (2) PLR 326.