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C.A.No. 4457 OF 1999  
ITEM No.101 (PH)

Court No.10

SECTION IV

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS

Civil Appeal No.4457 of 1999

Dalip Singh Appellant (s)

vs.

Mehar Singh Rathee & Ors. Respondent (s)  
(With office report)

Date:15/7/2004 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN  
HON'BLE MR. JUSTICE S.H.KAPADIA

For Appellant (s)

Mr. Ravindra Bana,Adv.

For Respondent (s)

Mr. P.K. Jain,Adv.

Mr. A.K. Sanghi,Adv.

UPON hearing counsel the Court made the following

O R D E R

The appeal is dismissed in terms of the signed order.

(Sarojbala)( Kanwal Singh)

PA to Addl.Registrar

Court Master

(The signed order is placed on the file)

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4457 OF 1999

Dalip Singh..Appellant

Versus

Mehar Singh Rathee & Others..Respondents

O R D E R

Dalip Singh, Defendant-appellant (hereinafter referred to as 'the appellant') was the owner of land measuring 69 kanals 10 marlas situated in the area of village Bichhnari, District Gohana in the State of Haryana. He entered into an agreement for sale of the suit land on 25.5.198

7 with Mehar Singh Rathee, plaintiff-respondent No.1 (for short the 'Respondent No. 1') for a consideration of Rs. 1,70,000/-. As per agreement the sale deed was to be executed on or before 25.7.1987. Appellant was required to obtain clearance certificate from the income tax department for the sale of the suit land and also to get mutation of the land sanctioned in his favour before the execution of the sale deed because he had received the land through a civil court decree in Civil Suit No. 122 dated 19.3.1984 titled Dalip Vs. Sarti. The date for execution of the sale deed was extended by mutual agreement on 18.7.1987 to 25.8.1987.

It came to the knowledge of respondent No.1 that the appellant was trying to sell the property to respondent nos. 2 to 4. He issued registered A/D notices dated 17.8.1987, 19.8.1987, 20.8.1987 and telegram dated 19.8.1987 calling upon the appellant to execute the sale deed in terms of agreement to sell. Appellant did not give any reply to the same nor did he give any information as to whether he had obtained the income tax clearance certificate and got sanctioned the mutation in his name. On 24.8.1987 it came to the knowledge of the respondent No. 1 that appellant had purchased three stamp papers of the value of Rs. 3,250/-, Rs. 3,250/- and Rs. 6,000/- for selling the land to respondent Nos. 2 to 4. Appellant appeared before the Sub-Registrar on 25.8.1987 along with balance consideration for execution of the sale deed but the appellant did not come to execute the said sale deed.

Apprehending that the appellant may sell the land to some one else, Respondent No. 1 filed a suit for permanent injunction in the Court of Sub-Judge, First Class, Gohana praying for a decree for permanent injunction restraining the appellant from selling the property to any other person and for mandatory injunction directing him to execute the sale deed in his favour only.

On 23.11.1987 respondent No.1 filed a suit for specific performance of the agreement dated 25.5.1987 in the court of Senior Sub-Judge, Sonapat. On 10.12.1987 respondent No. 1 withdrew the suit for permanent injunction filed in the court of Sub-Judge, First Class, Gohana as he had already filed a suit for specific performance. The trial Court dismissed the suit as withdrawn and passed the following order:

"Learned counsel for the plaintiff has made his statement that he withdraws his suit as the party has filed the suit for specific performance at Sonapat. In view of his statement, the suit of the plaintiff stands dismissed as withdrawn. File be consigned to the record room after due compliance."

On 8.3.1988 appellant filed a written statement in the suit for specific performance contending inter alia that the Court of Senior Sub-Judge at Sonapat did not have the territorial jurisdiction to try the suit. On 20.3.1989 the Court at Sonapat returned the plaint to respondent No.1 for presentation before the appropriate Court having jurisdiction. Immediately after the return of the plaint respondent No. 1 presented the plaint in the Court of Additional Civil Judge, Gohana on 21.3.1989.

The suit land was sold by the appellant to Respondent Nos. 2 to 4 through a registered sale deed on 22.3.1988. Respondent No. 1 moved an application for amendment of the plaint seeking impleadment of Respondent Nos. 2 to 4 and the sons and daughters of the appellant as Respondent Nos. 5 to 10 being necessary parties and also seeking amendment in the plaint including the relief clause. Additional prayer for declaration that the sale deed dated 22.3.1988 executed in favour of respondent Nos. 2 to 4 as null and void and not binding on him was made.

Upon notice the appellant entered appearance and contested the suit. He denied the execution of the agreement of sale. It was also stated that respondent No. 1 was not ready and willing to perform his part of the agreement. Respondent Nos. 2 to 4 in their joint written statement took up similar pleas. In addition, they took the plea that they were bona fide purchasers for consideration without notice and therefore protected under Section 41 of the Transfer of Property Act.

On the pleadings of the parties, the following issues were framed:

1. Whether defendant No. 1 entered into an agreement for sale on 25.5.1987 in respect of the suit land with the plaintiff? OPP
2. Whether the plaintiff is entitled for specific performance of the contract dated 25.5.1987? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiff has no locus standi to file the present suit? OPD

5. Whether the suit is barred by limitation? OPD

6. Whether the plaintiff has suppressed the material facts of the case. If so, its effect? OPD

7. Whether the defendants No. 2 to 4 are bona fide purchasers. If so, its effect? OPD

8. Relief.

Trial Court held that the appellant had entered into agreement of sale on 25.5.1987 in respect of the suit land with respondent No. 1 voluntarily on his own free will. That respondent No. 1 was ready and willing to perform his part of the obligation under the agreement to sell but the appellant was not prepared to execute the sale deed in favour of respondent No.1. Respondent Nos. 2 to 4 were held not to be the bona fide purchasers. The Trial Court further held that the transfer in their favour was hit by doctrine of lis pendens. The suit was however dismissed by holding that the suit was barred under Order 2 Rule 2, Code of Civil Procedure. Plea that the suit was barred by Order 2 Rule 2 CPC was neither taken in the written statement nor was an issue struck on this point.

Aggrieved against the order of the trial Court, respondent No. 1 filed the appeal. The first Appellate Court did not agree with the finding of the trial Court that suit was barred under Order 2 Rule 2, CPC and held that the finding in this regard was erroneous and accordingly set aside. Additional plea raised by the appellant that the suit was barred under Order 23 Rule 1, CPC for having withdrawn the suit for permanent injunction without obtaining the permission of the Court to file a fresh suit on the same cause of action was rejected. All other findings recorded by the trial court were affirmed. Resultantly, the suit filed by respondent No. 1 was decreed and specific performance of the agreement of sale dated 25.5.1987 was ordered on payment of balance amount of consideration.

Aggrieved against the order of the first Appellate Court, appellant filed the second appeal. Respondent Nos. 2 to 4 accepted the judgment of the first Appellate Court and did not file any appeal. The High Court in the second appeal affirmed the findings of the courts below that respondent No. 1 was ready and willing to perform his part of the contract whereas the appellant was not ready and willing to perform his part of the agreement. This finding being on facts was not seriously challenged before us. Otherwise also, there is no scope to interfere with this finding. The High Court on re-appreciation of the evidence on the record has come to the firm finding of fact that respondent No. 1 was always ready and willing to perform his part of the agreement but correspondingly the appellant was not ready to execute the sale deed as per agreement. Plea that the suit was barred by Order 2 Rule 2 CPC was rejected on merits as well as on the ground that such plea having not been taken in the written statement and the fact that no issue was struck on this point it was not open to the appellant to raise such a plea. It seems plea that the suit was barred by Order 23 Rule 1 CPC was not raised before the High Court.

Counsel for the appellant strenuously contended that the suit was barred under order 23 Rule 1 CPC as respondent No. 1 had withdrawn the suit filed by him for permanent injunction and filed the suit for specific performance without seeking permission of the Court. According to him, since the second suit was filed without obtaining the leave of the court the same was barred under Order 23 Rule 1, CPC. We do not find any substance in this plea. The plea that the suit was barred under Order 23 Rule 1, CPC was not taken in the written statement and no issue was framed to that effect. This plea was raised for the first time before the first appellate Court which was negatived. Plea that the suit was barred under Order 23 Rule 1, CPC was not taken before the High Court. Under the circumstances the appellant cannot be permitted to take this plea before us. Contentions of the learned counsel for the appellant that the suit filed by respondent No. 1 was barred under Order 2 Rule 2 CPC is not sustainable on two counts. Firstly, the plea of applicability of Order 2 Rule 2, CPC and the subsequent suit being barred was not taken by the appellant in his written statement filed in response to the notice of the suit nor any issue was framed on the point. The sine qua non for applicability of Order 2 Rule 2, CPC is that a person entitled to more than one relief in respect of same cause of action has omitted to sue for some relief without the leave of the Court. When an objection regarding bar to the filing of the suit under Order 2 Rule 2, CPC is taken, it is essential for the court to know what exactly was the cause of action which was alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the second suit is identical with the one that was the subject matter of previous suit. As the plea had not been raised in the written statement and an issue framed on this point, no opportunity was provided to respondent No.1 to lead evidence to rebut the same. In the absence of pleadings and proof of identity of cause of action. The appellant could not be permitted to raise the plea of bar of Order 2 Rule 2 CPC. The High Court had gone into merits as well and held that the two suits filed by the respondent No. 1 were not bas

ed of the same cause of action. We need not examine this on merit as we have held that in the absence of pleadings or the issue regarding the bar of order 2 Rule 2, CPC in filing the suit the appellant cannot be permitted to raise such a plea.

For the reasons stated above, we do not find any merit in this appeal and dismiss the same with no order as to costs.

?????????????.J.  
(Ashok Bhan )

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(S.H. Kapadia )  
New Delhi;  
July 15, 2004