REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8904-8907 OF 2010

M/S. SHIVALI ENTERPRISES ...APPELLANT(S)

VERSUS

SMT. GODAWARI (DECEASED)
THR. LRS. AND OTHERS ...RESPONDENT(S)

J U D G M E N T

B.R. GAVAI, J.

1. These appeals challenge the judgment dated 3rd March 2008 passed by the learned Single Judge of the High Court of Punjab and Haryana at Chandigarh in Regular Second Appeal Nos. 1206 and 1207 of 2005, thereby allowing the appeals filed by the respondents-defendants challenging the concurrent judgments and decrees dated 3rd January 2001 passed by the Additional Civil Judge (Senior Division), Faridabad (hereinafter referred to as the "trial court") in RBT 329/90/2000, and 8th February 2005 passed by the learned

District Judge, Faridabad (hereinafter referred to as the "Appellate Court") in Civil Appeal No. 11 of 2001. Vide the impugned judgment, the learned Single Judge of the High Court directed that, if the plaintiff desires to get the sale deed executed pursuant to the agreement(s) to sell, he would do so by paying the present prevalent market value as sale consideration. The appellant-plaintiff has also assailed the order dated 10th April 2008 passed by the learned Single Judge of the High Court, thereby dismissing the review applications being R.A. No. 19-C of 2008 in R.S.A. No. 1206 of 2005 and R.A. No. 18-C of 2008 in R.S.A. No. 1207 of 2005, filed by the appellant-plaintiff.

2. Facts in brief giving rise to the present appeals are as under:

The appellant-plaintiff through its partner Raj Kumar, entered into an agreement to sell dated 29th October 1983 with the respondents-defendants No. 1 to 4 with regard to the suit property, which was situated in the revenue estate of Chak Salarpur, Tehsil Dadri, District Ghaziabad (U.P.), at the rate of Rs. 2900/- per Bigha. Though the suit property initially was in the State of U.P., vide notification of the

Central Government dated 15th September 1983, it became a part of the State of Haryana. At the time of agreement to sell dated 29th October 1983, earnest amount of Rs.50,000/- was paid by the appellant-plaintiff to the respondents-defendants.

3. Due to a dispute between the State of U.P. and Haryana, the aforesaid sale deed could not be executed in favour of the appellant-plaintiff. Therefore, another agreement to sell was executed between the parties on 23rd August 1985. At the time of execution of the said agreement, an additional amount of Rs.1,00,000/- was paid by the appellant-plaintiff to the respondents-defendants. It is not in dispute that the total amount payable as per the terms of the agreement to sell dated 29th October 1983 was Rs. 1,65,000/- out of which, an amount of Rs. 1,50,000/- was duly received by the respondents-defendants on or before 23rd August 1985. As per the terms of the agreement(s) to sell, the remaining sale price was to be paid before the Sub-Registrar at the time of execution and registration of sale deed. It is not in dispute that the physical possession of the suit property was also delivered to the appellant-plaintiff by the respondents-defendants at the time of execution of the

agreement(s) to sell. It is also not in dispute that the appellant-plaintiff is thereafter in continuous possession of the suit property.

4. As per the terms of the agreement(s) to sell, the respondents-defendants were required to obtain Income-Tax Clearance (for short "ITC") Certificate and to also get the revenue records mutated to show them as the owners inasmuch as the Central Government was shown as the owner mistakenly. The agreement to sell further stipulated that, in case of default by the respondents-defendants, the appellant-plaintiff was at liberty to get the sale deed executed and registered.

5. After coming to know that the respondents-defendants were trying to create 3rd party rights, the appellant-plaintiff filed a suit for specific performance with further prayer for permanent injunction as against the respondents-defendants. The said suit was resisted by the respondents-defendants by filing their written statement. The learned trial court vide judgment and decree dated 3rd January 2001 decreed the suit. In an appeal filed by the respondents-defendants, the learned Appellate Court upheld

the findings of the trial court vide judgment and decree dated 8th February 2005.

6. Being aggrieved thereby, the respondents-defendants filed second appeals before the High Court. Vide the impugned judgment, the High Court reversed the concurrent findings recorded by the trial court and the Appellate Court and passed the judgment as aforesaid. Being aggrieved thereby, the present appeals have been preferred by the appellant-plaintiff.

7. We have heard Shri Rishi Malhotra, learned counsel appearing on behalf of the appellant-plaintiff and Shri S.R. Singh, learned Senior Counsel appearing on behalf of the respondents-defendants.

8. Shri Malhotra submitted that the High Court has grossly erred in interfering with the concurrent findings passed by the trial court and the Appellate Court. He submitted that, since no substantial question of law arose for consideration before the High Court, the appeals deserve to be allowed on this short ground alone. He relies on the judgment of this Court in the case of ***Kondiba Dagadu***

Kadam v. Savitribai Sopan Gujar and Others[1] in this regard.

9. Shri Malhotra further submitted that, even assuming that in view of the provisions of Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as the "Punjab Act") it is not necessary to frame a substantial question of law, the jurisdiction of the learned Single Judge of the High Court would still be circumscribed by the provisions of Section 41 of the Punjab Act and any interference in second appeal would only be warranted if the case falls within the limited area as earmarked in Section 41 of the Punjab Act.

10. He further submitted that the respondents-defendants have not entered into the witness box and as such, the case of the appellant-plaintiff on the basis of the agreement(s) to sell has gone unchallenged. He therefore submitted that the appeals deserve to be allowed and the impugned judgments are liable to be quashed and set aside.

11. Shri Singh, on the contrary, submitted that the High Court has rightly allowed the second appeals. He submitted

1 **(1999) 3 SCC 722**

that, as per the terms of the agreement(s) to sell, the sale deed was to be registered only after the ITC Certificate was obtained and the property was mutated in the name of the respondents-defendants. He submitted that the respondents-defendants had filed a suit for getting the suit property mutated in their names on 4th June 1986 and the said suit came to be decreed only on 22nd December 2006. It is therefore submitted that the suit filed by the appellant-plaintiff on 17th October 1989 was premature.

12. Shri Singh submitted that in view of the Punjab Act, no substantial question of law was required to be framed. He relies on the judgment of this Court in the case of ***Kulwant Kaur and Others v. Gurdial Singh Mann (Dead) By LRs. and Others***[2]. The learned Senior Counsel further relies on the judgments of this Court in the cases of ***Kirodi (since deceased) Through His Legal Representatives v. Ram Parkash and Others***[3] and ***Satyender and Others v. Saroj and Others***[4] in support of this proposition. Shri Singh, further relying on the judgment of this Court in the case of

2 **(2001) 4 SCC 262**
3 **(2019) 11 SCC 317**
4 **2022 SCC OnLine SC 1026**

Nirmala Anand v. Advent Corporation (P) Ltd. and Others[5], submitted that there is no reason to interfere with the direction of the trial court which directs that if the plaintiff desires to get the specific performance, the same shall be done at the prevalent market rate. He further submitted that the suit itself was not tenable in view of Section 14 of the Specific Relief Act, 1963.

13. Section 41 of the Punjab Act reads thus:

> "**41. Second appeals** — (1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely:
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> (a) the decision being contrary to law or to some custom or usage having the force of law:
>
> (b) the decision having failed to determine some material issue of law or custom or usage having the force of law:
>
> (c) a substantial error or defect in the procedure provided by the Code of Civil Procedure 1908 [V of 1908], or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits;
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> [Explanation — A question relating to the existence or validity of a custom or usage shall be deemed to

5 **(2002) 5 SCC 481**

> be a question of law within the meaning of his section:]
>
> (2) An appeal may lie under this section from an appellate decree passed *ex parte*."

14. This Court, in the case of ***Randhir Kaur v. Prithvi Pal Singh and Others***[6], after considering the scope of interference under the old Section 100 of the Civil Procedure Code, 1908 (for short "CPC") and Section 41 of the Punjab Act, has observed thus:

> "**15.** A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact."

15. It could thus be seen that this Court has held that, even when a court exercises jurisdiction under Section 41 of the Punjab Act, it cannot interfere with the findings of fact in second appeal on the ground that the said findings are erroneous, howsoever gross or inexcusable the error may

6 **(2019) 17 SCC 71**

seem to be. It has been held that the findings of fact would also include the findings on the basis of documentary evidence. The jurisdiction under Section 41 of the Punjab Act would be available only when there is a substantial error or defect in the procedure provided by the CPC or by any other law for the time being in force.

16. A bench of three learned Judges of this Court, in a recent judgment in the case of ***Satyender and Others*** (supra), has observed thus:

> "**17.** Be that as it may, though the requirement of formulation of a substantial question of law was not necessary, **yet Section 41 of the Punjab Courts Act, requires that only such decisions are to be considered in second appeal which are contrary to law or to some custom or usage having the force of law or the court below have failed to determine some material issue of law or custom or usage having the force of law. Therefore, what is important is still a "question of law". In other words, second appeal is not a forum where court has to re-examine or re-appreciate questions of fact settled by the Trial Court and the Appellate Court.** The plaintiffs had claimed right over certain agricultural land and their case was that they have the right to be declared the owner of this property and the possession be handed over to the them, for the reasons that on this particular property defendants and their predecessors-in-interest were the tenants of the plaintiffs. Their case was that defendant No. 2 was their tenant who had sub-let the property in favour of his son, that is defendant

No. 1 and therefore, the property should be reverted back to the plaintiffs and they should be declared the owner and should be given the possession of the property as well. Both the Trial Court as well as the First Appellate Court had held after evaluating the evidence placed by the plaintiffs that the defendant No. 2 and his brothers (who were not even made a party by the plaintiffs) were the tenants on the property and defendant No. 2 had not sub-let the property in favour of his son that is defendant No. 1 and the revenue entries being made in this regard in the year 1978 are wrong and without any basis as there was no order of any revenue authority for making such an entry. In short, the plaintiffs had failed to prove their case as owner of the land in dispute. Hence their case of declaration and possession was dismissed. The Second Appellate Court however, quite erroneously, and without any justification, gave an entirely new finding regarding two Killa Nos. 21//3/2 and 7//13 on which the plaintiffs claimed relief of declaration and possession, on the same grounds as raised by them for the other Killa Nos. The pleadings also show that the defendants had made a general denial of the plaintiffs' claim for all the plots. Yet, the High Court held that since the defendants had not made any claim for plot nos. 21//3/2 and 7//13 and therefore by logic a decree of declaration of possession ought to have been given to the plaintiffs for these plots! This reasoning of the second Appellate Court is erroneous for the simple reason that the burden of proof was on the plaintiffs to prove their case, which they had failed. They have not been able to prove to the satisfaction of the Trial Court as well as the First Appellate Court about their claim of any kind over this property. Merely because the defendant did not raise a counter claim on this property it would not *ipso facto* mean that a decree ought to have been granted in favour of the plaintiffs. Plaintiffs have to prove their case on the strength of their evidence. For this reason, the reasoning given by the Second Appellate Court for

> decreeing the claim of the plaintiff for plot nos. 21//3/2 and 7//13 is incorrect and to that extent is liable to be set aside."
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> [emphasis supplied]

17. It would thus be clear that this Court has held that, though it is not necessary to formulate a substantial question of law, the jurisdiction under Section 41 of the Punjab Act would permit only such decisions to be considered in second appeal which are contrary to law or to some custom or usage having the force of law, or when the courts below have failed to determine some material issue of law or custom or usage having the force of law. The Court held that second appeal is not a forum where the court is to re-examine or re-appreciate the question of fact settled by the trial court or the Appellate Court. It could thus clearly be seen that though in view of Section 41 of the Punjab Act, it is not necessary to frame a substantial question of law, the jurisdiction of the High Court under second appeal cannot be exercised for re-appreciation of evidence.

18. A perusal of the plaint filed by the appellant-plaintiff would reveal that the appellant-plaintiff has specifically referred to the terms of the agreement(s) to sell. He has specifically stated that the respondents-defendants have

received an amount of Rs.1,50,000/-. He has further specifically stated that the respondents-defendants have delivered the actual possession of the suit property to him. It is averred that after the respondents-defendants obtained the requisite ITC Certificate and got the revenue records corrected, they were required to serve a notice upon the appellant-plaintiff informing him about the same having been done. After the receipt of such notice, the appellant-plaintiff was required to make the balance payment and get the sale deed executed. The appellant-plaintiff was also given liberty to use the suit property in any manner so as to plant trees, raise construction, install tubewells etc. It has been averred in the plaint as under:

> "10. That all the defendants have been admitting and acknowledging the plaintiff firm to be in possession of the suit land and seeing them spending huge amount over it. The plaintiff has been affecting costly improvements over the suit land and the defendants have been seeing plaintiff spending huge amount objected to it. They are estopped from denying the fact by their acts, conduct, omissions, laches and admissions.
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> 11. That the rates of the land in the dispute have started rising and the defendants out of sheer greed have threatened to take forcible possession, dispossess the plaintiff and to interfere in the peaceful enjoyment of the suit

land by the plaintiff about a month ago. They have also threatened to alienate the suit land in favour of the third parties. They have also refused to obtain the requisite Income Tax Clearance certificate and to execute the sale deed in favour of the plaintiff firm as agreed upon in accordance with the terms of the agreement of sale dated 23.8.1985.

12. That defendants No.1 to 4 were repeatedly approached to execute the sale deed in favour of the plaintiff in accordance with the terms of the agreement of sale dated 23.8.1985. The defendants were also further requested to desist from dispossessing the plaintiff, taking forcible possession or otherwise interfering in the peaceful enjoyment of the suit land by the plaintiff. However, defendants after prevarication for some time have finally refused to accede to the reasonable, just and legal request of the plaintiff about a week ago. Hence this suit.

13. That the plaintiff firm has all along been ready and willing to perform its part of the contract and is still ready and willing to do so. It has all along got the requisite amount of balance sale consideration and expense etc. with it. The defendants have thus committed breaches of agreement of sale as per details above with malafide intention.

14. That cause of action arose about a month ago and again about a week ago on the final refusal of the defendants."

19. It can thus clearly be seen that the appellant-plaintiff has specifically averred that due to the rising rate of the suit property, the respondents-defendants, out of sheer

greed, had threatened to take forcible possession and also threatened to alienate the suit property in favour of a 3rd party.

20. In the written statement, the respondents-defendants have stated that the appellant-plaintiff had obtained Power of Attorney from the respondents-defendants and had undertaken to obtain the ITC Certificate. It was further stated by the respondents-defendants that they had executed the Power of Attorney and one Mukhtar, an agent of the appellant-plaintiff, was required to take all the requisite steps to get the revenue records corrected. It will be relevant to refer to paragraph (11) of the written statement of the respondents-defendants as under:

> "11. In reply to Para No.11 it is denied that the plaintiffs are in possession of the land in suit; it is also denied that defendants Nos. 1 to 4 had to obtain the ITCC; it is also denied that the Plaintiff had the financial capability to purchase the land; **it is submitted that defendants Nos. 1 to 4 are in possession of the suit land as owners thereof and an entitled to alienate the same if so desired. It is also denied that the agreement to sell dated 23.8.1985 is in force.**"
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> [emphasis supplied]

21. A perusal of the aforesaid paragraph would reveal that the respondents-defendants had denied that the appellant-plaintiff was in possession of the suit property. The respondents-defendants further asserted their right to alienate the suit property, if they so desired.

22. The trial court, after perusal of the evidence, came to a finding that the execution of the agreement(s) to sell was admitted by the respondents-defendants. The trial court further came to a specific finding of fact that the appellant-plaintiff was always ready and willing to perform his part of contract. It found that, upon the respondents-defendants complying with the conditions as provided in the agreement(s) to sell, they were required to issue a notice to the appellant-plaintiff and after receipt of the said notice, the sale consideration was required to be paid within 30 days from receipt of the said notice.

23. In appeal, the learned Appellate Court affirmed the findings of fact recorded by the trial court. It held that the execution of the agreement to sell (Ex. PW1/3) and the

receipt of earnest money of Rs. 1,50,000/- was not disputed. It found that, as per the terms of the agreement(s) to sell, it was for the respondents-defendants No. 1 to 4 to get the revenue records corrected and they had also agreed to obtain the ITC Certificate and to send a copy of the same to the vendee. The learned Appellate Court held that even oral evidence to controvert these conditions incorporated in the written statement cannot be led in view of Section 92 of the Evidence Act, 1872. It held that the self-serving oral statement of Ajit Singh, defendant No. 7 was not sufficient to controvert the terms and conditions incorporated in the agreement(s) to sell. Insofar as the argument that the suit for specific performance was filed without the correction of revenue records, the learned Appellate Court found that since the respondents-defendants were intending to alienate the suit property, the appellant-plaintiff was justified in filing the suit.

24. The learned Appellate Court came to a specific finding that none of the respondents-defendants No. 1 to 4, who were signatories to the agreement, had entered into the witness box. Though Ajit Singh, defendant No. 7, who is the

husband of defendant No. 3, had appeared as a witness, the Appellate Court found that he was not a good substitute for defendants No. 1 to 4, who, being vendors, were the material witnesses. The learned Appellate Court, relying on the judgment of this Court in the case of ***Vidhyadhar v. Manikrao and Another***[7], held that on account of non-examination of any of the vendors, an adverse inference could be drawn against them.

25. The learned Single Judge of the High Court, vide the impugned judgment, has held that the appellant-plaintiff could seek specific performance of the contract only after the revenue record was corrected. It held that the suit for correction of the revenue record was filed by the respondents-defendants on 4th June 1986 and the same was decreed on 22nd December 2006. It therefore held that the suit of the appellant-plaintiff which was filed on 17th October 1989 was not tenable. The learned Single Judge therefore allowed the appeals and held that, in view of the judgment of this Court in the case of ***Nirmala Anand*** (supra), if the

7 **(1999) 3 SCC 573**

plaintiff desires to get the sale deed executed, he is required to pay the present prevalent market rate of the suit property.

26. We find that the learned Single Judge of the High Court has erred in interfering with the concurrent findings of fact recorded by the trial court as well as by the Appellate Court. The trial court as well as the Appellate Court had specifically found on the basis of the evidence that, though as per the terms and conditions of the agreement(s) to sell, the sale deed was to be executed only after the respondents-defendants obtained the ITC Certificate and got the revenue records corrected, the appellant-plaintiff was compelled to file the suit since the respondents-defendants were trying to alienate the suit property.

27. It is pertinent to note that the appellant-plaintiff has specifically averred that, though the respondents-defendants had neither obtained the ITC Certificate nor had the revenue records corrected, they were threatening to dispossess him and create 3rd party rights over the suit property. In these circumstances, the appellant-plaintiff was constrained to file the suit. In the written statement, the respondents-defendants have specifically stated that they were entitled to

create 3rd party rights. In this factual situation, the concurrent findings of the trial court and the Appellate Court that the appellant-plaintiff was justified in filing the suit could not have been faulted with.

28. The respondents-defendants cannot be permitted to blow hot and cold at the same time. On one hand, they contended that the suit could not have been filed without getting the ITC Certificate and correction of revenue records, whereas on the other hand, they assert their right to alienate the suit property.

29. Shri Singh has heavily relied on the judgment of this Court in the case of ***Kulwant Kaur and Others*** (supra). No doubt that where it is found that the findings of the trial court and the Appellate Court are vitiated on wrong test and on the basis of assumptions and conjectures and resultantly, there is an element of perversity, the High Court will be within its jurisdiction to deal with the same. However, this can be permitted only in the event where such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice.

30. In the present case, apart from there being no perversity in the concurrent findings of fact, there is not even an observation in the judgment of the High Court to that effect. The judgment of the learned Single Judge of the High Court also does not discuss the issue of perversity vis-à-vis the concept of justice. As such, the said judgment, in our view, is not applicable to the facts of the present case.

31. Insofar as the reliance placed by the respondents-defendants on the judgment of this Court in the case of ***Nirmala Anand*** (supra) is concerned, the said judgment, rather than supporting the case of the respondents-defendants, would support the case of the appellant-plaintiff. In the said case, the suit filed by the appellant was partly decreed, thereby only awarding damages. The same was upheld by the Division Bench of the High Court. The defence of the defendant therein was with regard to impossibility of performance of the agreement entered into by the appellant with the respondents No. 1 and 2. In the said case, this Court found that the respondents-defendants could not be solely blamed for delay inasmuch as the completion of the building was dependent upon certain acts that were to be

done by the Corporation and the Government. In this background, this Court directed an additional amount to be paid by the appellant-plaintiff to the respondents-defendants to get the sale deed executed in her favour.

32. In the present case, it would be seen that out of an agreed amount of Rs.1,65,000/-, the appellant-plaintiff has already paid an amount of Rs.1,50,000/- on or before 23rd August 1985. He was already put in possession at the time of execution of the agreement(s) to sell. The balance sale consideration that was to be paid was only about 10% of the total agreed amount. Though the sale deed was to be executed upon the respondents-defendants getting the ITC Certificate and getting the revenue records corrected in the year 1986, in view of their greed since the prices were escalating, the respondents-defendants had tried to create 3rd party rights. In these circumstances, the appellant-plaintiff was required to file the suit. The respondents-defendants have also asserted in their written statement that they were entitled to alienate the suit property. Having accepted the agreement(s) to sell and the receipt of an amount of Rs. 1,50,000/- out of the total amount of Rs.1,65,000/-, the

respondents-defendants could not have been permitted to take a contrary stand that on one hand, the suit could not be filed before the ITC Certificate was obtained and the revenue records were corrected, and on the other hand that they were entitled to alienate the suit property.

33. We are of the considered view that the learned Single Judge of the High Court has erred in interfering with the concurrent findings of fact arrived at by the trial court and the Appellate Court upon correct appreciation of documentary as well as oral evidence.

34. In the result, we pass the following order:

(i) The appeals are allowed;

(ii) The judgment 3rd March 2008 passed by the High Court in Regular Second Appeal Nos. 1206 and 1207 of 2005 and order dated 10th April 2008 passed by the High Court in R.A. No. 19-C of 2008 in R.S.A. No. 1206 of 2005 and R.A. No. 18-C of 2008 in R.S.A. No. 1207 of 2005 are quashed and set aside; and

(iii) The judgments and decrees dated 3rd January 2001 passed by the trial court in RBT 329/90/2000 and

dated 8th February 2005 passed by the Appellate Court in Civil Appeal No. 11 of 2001 are upheld.

35. Pending application(s), if any, shall stand disposed of in the above terms. No order as to costs.

.....J.
[B.R. GAVAI]

.....J.
[C.T. RAVIKUMAR]

NEW DELHI;
SEPTEMBER 13, 2022.