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Neutral Citation No:=2024:PHHC:136478
2024:PHHC:136478
2024:PHHC:136479

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Reserved on: 17.09-2024
Pronounced on: 14.10.2024

I. RSA-4958-2012

LAKHPAT RAI AND ANR

. . . .APPELLANT

Vs.

J.D GUPTA AND ORS

. . . . RESPONDENTS

II. RSA-3117-2012

RAMESH KUMAR

. . . .APPELLANT

Vs.

J.D. GUPTA AND OTHERS

. . . . RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Argued by:- Mr. Vijay Kumar Jindal, Senior Advocate with
Mr. Akshay Jindal, Advocate and
Mr. Pankaj Gautam, Advocate for
the appellant in RSA-3117-2012.

Mr. Amit Jain, Senior Advocate with
Mr. Anupam Mathur, Advocate for
appellants In RSA-4958-2012 and
for respondent Nos.3 & 6 in RSA-3117-2012.

Mr. Sumeet Mahajan, Senior Advocate with
Mr. Saksham Mahajan, Advocate,
Mr. Shrey Sachdeva, Advocate,
Ms. Rabani Attri, Advocate and
Ms. Shruti Singla, Advocate
for respondent Nos.1 & 2.

Ms. Ramandeep Kaur, Advocate for
Mr. Sharan Sethi, Advocate for
respondents in RSA-4958-2012.

Mr. S.K. Garg Narwana, Senior Advocate with
Mr. Naveen Gupta, Advocate for
respondent No.5 in RSA-4958-2012.

DEEPAK GUPTA, J.

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Suit filed by the plaintiffs *(respondents herein)* seeking decree for specific performance in respect of the property in dispute, has been decreed by the trial Court. The appeal filed by the defendants has been dismissed by the First Appellate Court. Out of four defendants impleaded in the suit, three of them have filed these two separate appeals against the concurrent findings of the Courts below.

2. Subject matter of dispute is House No.1, Sector 28A, Chandigarh. Admittedly, said house was owned by five persons namely, Sh. Jokhi Ram, his wife Smt. Chawli Devi, two sons Shri Lakhpat Rai & Shri Ramesh Kumar and one of the daughters-in-law namely Smt. Kamlesh Rani w/o Lakhpat in equal shares i.e. 1/5 share each by virtue of a sale deed dated 19.09.1979. This property was mortgaged with State Bank of India, Sector 8, Panchkula.

Pleaded case of the plaintiffs:

3.1 As per the case set up by the plaintiffs, all the five owners i.e. Jokhi Ram, his wife Chawli Devi, two sons Lakhpat Rai & Ramesh Kumar and daughter-in-law - Kamlesh Rani agreed to sell the suit property to plaintiff No.1 Shri J.D. Gupta for total consideration of ₹12 lakh vide an agreement dated 24.07.1994 (Ex.P1). An amount of ₹2 lakh was paid as earnest money, out of which ₹1.5 lakh was paid through 5 cheques of ₹30,000/- each in the name of 5 co-owners and the remaining amount was paid in cash. The suit property was already mortgaged with State Bank of India, Sector 8, Panchkula. Last date for execution and registration of the sale deed was agreed to be 25.12.1994. Prior to the said target date, the sellers were required to obtain `No Objection Certificate' from the Estate Officer and also the income tax clearance certificate from the respective departments. They were further required to take clearance from the State Bank of India, Sector 8, Panchkula, after making payment of the loan to the bank. *Barsati* portion of the suit house was in possession of a tenant, so sellers had undertaken to hand over the vacant possession of the whole house. It was required for them to get the tenanted portion vacated before the target date. It was agreed that in case, sellers failed to get the

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Barsati portion vacated from the tenant, then they will be entitled to receive total sale price of ₹10 lakhs i.e. the sale price was to be reduced by ₹2 lakh. Plaintiff No.1 J.D Gupta i.e., purchaser was authorized by the sellers to sell the house to any other person.

3.2 Plaintiffs pleaded further that as defendants failed to get the *Barsati* portion vacated up to 25.12.1994, therefore, defendants are entitled to receive total sale price of ₹10 lakh, out of which ₹2 lakh had already been paid. It was pleaded that plaintiff No.1 wanted to get the sale effected in favour of plaintiff No.2, a private limited company, in which plaintiff No.1 is the Managing Director. Plaintiffs pleaded further that plaintiff No.1 has always been ready and willing to perform his part of contract. He insisted upon the defendants to take necessary permissions from the Estate Officer and the Income Tax Department to obtain the necessary certificates but they did not take any step in this direction for one or the other excuse.

3.3 It was further pleaded that prior to the target date, plaintiff No.1 sent a telegram to the defendants on 23.12.1994 to be present in the Office of Sub Registrar, UT, Chandigarh on 26.12.1994 for execution and registration of the sale deed, since 24th and 25th of December were holidays being Saturday and Sunday. Unfortunately, on account of death of Giani Zail Singh, the Ex-President of India, 26th and 27th of December were declared holidays and therefore, plaintiff No.1 informed the defendants through telegram dated 26.12.1994 to be present in the Office of Sub Registrar, UT Chandigarh on 28.12.1994 for execution and registration of the sale deed. It was pleaded that plaintiff No.1 was ready with the amount of sale price of ₹10 lakh in the shape of bank drafts as well as the sum of ₹1,55,000/- for stamp papers and registration charges. Plaintiff No.1 remained present on 28.12.1994 in the Office of Sub Registrar, UT Chandigarh along with bank draft and cash amount since morning till evening and also got attested two affidavits in this regard so as to mark his presence, but defendants failed to turn up. Plaintiffs also gave details of the payment of ₹10 lakhs, which were to be made by him to the defendants.

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3.4 It was alleged that defendants failed to perform their part of contract and rather, they were trying to dispose of the suit property. Prior to filing of the suit, plaintiff No.1 also sent a legal notice dated 20.02.1995 under registered AD as well as UPC Post, but despite the same, defendants failed to perform their part of contract. Plaintiffs also came to know about the death of one of the co-owner Jokhi Ram, prior to serving the notice dated 20.02.1995. It was pleaded that as plaintiffs did not know the name of all the legal heirs of Jokhi Ram or the persons entitled to inherit him, so plaintiffs reserved their right to implead them as a party.

3.5 With all these averments, prayer was made for passing a decree of specific performance on the basis of agreement to sell dated 24.07.1994 for the sale of the suit property with direction to the defendants to execute and get the sale deed registered in favour of plaintiff No.2 or in the alternative, in favour of plaintiff No.1.

4. It may be noted here itself that suit was filed against four defendants/ co-owners of the suit property namely, Smt. Chawli Devi, Lakhpat Rai, Smt. Kamlesh Rani and Ramesh Kumar as defendants N: 1 to 4 respectively.

<u>Stand of defendants N: 1 to 3:</u>

5.1 Defendant No.1-Chawli Devi, defendant No.2-Lakhpat Rai and defendant No.3-Kamlesh Rani filed a joint written statement, in which they alleged the agreement dated 24.07.1994 relied by the plaintiffs to be a forged and fabricated document. According to them, defendants No.2 and 3 had taken loan amount of ₹2 lakh from plaintiff No.1 and that their signatures were obtained by the plaintiff on blank papers. They never executed any sale agreement. As per these defendants N: 2 & 3, their signatures taken on blank papers have been converted into the alleged agreement to sell.

5.2 It was further alleged that signatures of defendant N: 1 Smt. Chawli Devi and that of defendant No.4 on the agreement are forged and that they had never signed the same.

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VERDICTUM.IN
Neutral Citation No:=2024:PHHC:136478

5.3 It was also submitted that suit house was already mortgaged with State Bank of India, Panchkula and is still under mortgage and so, there was no question of entering into any agreement to sell with the plaintiffs, without getting the same redeemed from the said bank. It was contended that since the suit property was never intended to be sold, so there was no question of obtaining any Income Tax Clearance Certificate or permission from the Estate Officer, as alleged. Further, there was no question of alleged willingness on the part of the plaintiffs to perform their part of contract, as there was no agreement to sell. The receipt of the legal notice and the telegrams, as sent by the plaintiffs, is not disputed but it is claimed that these did not have any relevancy and that the notice was uncalled for and as such, it was not responded. Defendants submitted that in the absence of any agreement to sell between the parties, there was no question of claiming specific performance of the alleged agreement to sell the suit property or the possession thereof.

With this stand, these defendants prayed for dismissal of the suit.

Stand of defendants N: 4:

6. In a separate written statement filed by defendant No.4-Ramesh Kumar, he denied any privity of contract between him and the plaintiffs and alleged the agreement dated 24.07.1994 to be a forged document, which was never executed by him. As per this defendant, the document dated 24.07.1994 has been procured by the plaintiff on false allurements given to Lakhpat Rai. In fact, plaintiff- J.D. Gupta, his brother-in-law Tarsem Lal, Kabul Singh and Sumesh Gupta had business relations with each other and they had procured the documents by putting force upon defendant No.2-Lakhpat Rai and that too against the interest of the answering defendant i.e. Ramesh Kumar. He also pleaded that he, Chawli Devi and Jokhi Ram were never party to the agreement to sell and as such, the same is false and fabricated having no legal force and not binding upon them. He also denied having received any earnest money.

With this stand, this defendant also prayed for dismissal of the suit.

Rejoinder by Plaintiffs:

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7. In replication to the written statement of respondents No.1 to 3, the plaintiffs reiterated their case and refuted the stand of the defendants. In the separate replication to the written statement of respondent No.4, plaintiffs pleaded that Sumesh Gupta had no concern with the case and that they do not know any such person named Sumesh Gupta and that defendants were colluding with each other. Plaintiffs reiterated their case, refuting the stand of defendant No.4.

Issues:

8.1 Following issues were framed by the trial Court : -

"1. Whether the plaintiff are entitled for specific performance of the Agreement of sale deed dated 24.07.1994 and possession of House No.1 Sector 28-A, Chandigarh? OPP

2. Whether the plaintiffs are entitled to get the sale deed effected in favour of plaintiff No.2? OPP.

3. Whether the suit is not maintainable? OPD

4 Whether the proper court fee had been affixed on the plaint? OPD

5. Whether any cause of action has been accrued to the plaintiffs against the defendant No.4? OPD

6. Whether there is any privity of contract between the plaintiffs and defendant No.4? OPD

7. Whether the document i.e. agreement dated 27.04.1994 is false and fabricated document, if so, its effect? OPD

8. Whether the plaintiff has locus standi to file the present suit against the defendant No. 4? OPD

9. Whether the plaintiff No.2 had made unnecessary parties and suit is bad on account of non judicial of necessary parties? OPD

10. Relief."

8.2 Plaintiffs closed their evidence on 21.11.2001.

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VERDICTUM.IN

8.3 During the pendency of the suit, defendant No.1- Smt. Chawli Devi expired. An application dated 08.02.2002 moved to bring on record her legal representatives was allowed on 20.02.2002, whereby apart from her two sons Lakhpat Rai and Ramesh, already party to the suit, two daughters, namely, Smt. Urmila and Smt. Raj Dulari were impleaded as her LRs.

8.4 These daughters Urmila & Raj Dulari, impleaded as LRs of Chawli Devi also moved an application seeking permission to lead evidence, but that application was declined on 26.11.2004.

8.5 Evidence of the defendants was closed on 07.09.2005.

8.6 After hearing both the sides, the suit was decreed by the trial court on 04.11.2008.

9. Against the judgment and decree of the trial court, only one of the defendants, namely, Ramesh Kumar filed the appeal before the District Court. Ld. Additional District Judge, Chandigarh vide his judgment dated 20.04.2012, dismissed his appeal.

10. Against this dismissal, two appeals have been filed. RSA-4958-2012 has been filed by defendants No.2 & 3 Lakhpat Rai and his wife Kamlesh Rani; whereas RSA-3117-2012 has been filed by Ramesh Kumar, who was the only appellant before the First Appellate Court.

Contentions raised in RSA 3117-2012:

11.1 Assailing the judgments of the Courts below, learned Senior Advocate Sh. Vijay Jindal for the appellant in RSA-3117-2012 has drawn attention of this Court towards agreement to sell Ex.P-1 in the light of evidence brought on record by both the parties and contends that signature of Sh. Jokhi Ram and that of Sh. Ramesh Kumar have been specifically denied by all the defendants. Even Lakhpat Rai and his wife Kamlesh have explained, as to how their signatures were obtained by the plaintiff No.1 J.D. Gupta on blank papers on the pretext of loan documents, as Lakhpat wanted to take loan from him.

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VERDICTUM.IN

11.2 It is argued that plaintiff as well as attesting witnesses Tarsem Singh and Kabul are property dealers, as has come in their statements. In fact, Tarsem is co-brother (wife's sister's husband) of the plaintiff working in the same office; and that all three of them under conspiracy to deprive the defendants of their valuable property, fabricated the agreement to sell by forging the signatures of Jokhi Ram and Ramesh thereon.

11.3 It is pointed out that apart from two attesting witnesses to the agreement to sell Ex.P-1 i.e., Tarsem Lal and Kabul Singh as PW-2, another person shown to be associated with the agreement is Sumesh Gupta, who is referred as mediator of the deal in clause N: 12 of agreement to sell but he is neither signatory to the agreement nor examined by the plaintiffs. Rather, contradictory stand has been taken by the plaintiffs qua him. In rejoinder to the written statement of defendant no.4, plaintiffs plead that Sumesh Gupta has no concern with the case and that they (plaintiffs) even do not know any such person. However, in his statement as PW1, JD Gupta plaintiff says that Sumesh had told him that the house in question was for sale. In the agreement to sell Ex.P1, there is specific reference that deal was struck through Sumesh Gupta, to whom both the parties had agreed to pay certain commission. Learned counsel points out that it is defendants, who examined said Sumesh as DW-7 and who demolished the case of the plaintiffs by denying any deal regarding sale of the house between plaintiffs and defendants.

11.4 Learned Senior Advocate further points out that that scribe to the agreement to sell Ex.P-1 has not been examined. Even the name of the scribe/typist, who typed the agreement to sell is neither disclosed in the agreement Ex.P1 nor any of the witnesses examined by the plaintiffs divulged his name. So, much so, the statements of PW1 plaintiff JD Gupta and PW2 Tarsem are contradictory, as to where the agreement Ex.P1 was typed, who got it typed and when or where it was typed.

11.5 Learned Senior Advocate then argued that signatures of Jokhi Ram and Ramesh on the agreement to sell Ex.P-1 to be forged are duly proved on record. It is pointed out that Ramesh, Lakhpat Rai and Urmila, the three

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VERDICTUM.IN

children of Jokhi Ram, who have entered the witness box as DW3, DW4 & DW6 respectively have specifically deposed that Jokhi Ram used to sign only in *Landi* language and never signed in English. It is pointed out that agreement to sell Ex.P-1 bears the purported signatures of Jokhi Ram in English as **Gokhi** Ram. Attention is drawn towards the fact that even the purported signature of Jokhi Ram in English are different - one on the said agreement to sell as **Gokhi** Ram and the other on the account opening form Ex.P65 as **Jokhi** Ram, submitted in the Bank on 9.8.1994. Learned counsel contends that not even a single document has been produced by the plaintiffs to show that Jokhi Ram in his entire life ever signed any document in English. No witness has been examined to prove that in their presence, Jokhi Ram ever signed in English. It is contended that in these circumstances, the observations made by the courts below to the effect that Jokhi Ram might have learnt English in the later stage of his life, is based on just conjectures and assumptions.

11.6 Similarly, pointing out towards the testimony of DW3 Ramesh, it is argued by Ld. Senior advocate that he (Ramesh) never signed the agreement to sell Ex.P-1 and specifically denied his signatures thereon. Even Lakhpat Rai in his testimony deposed that Ramesh had not signed Ex.P1. Learned Senior advocate then drewn attention towards the testimony of the Handwriting and Finger Print Expert Navdeep Gupta, who examined by the defendants as DW5 proved that he had examined the standard signature of Ramesh Gupta and compared the same with the disputed signature on Ex.P1 and that the same were not affixed by the same person. He proved his report in this regard with the help of photographic enlargements. Still further, it is pointed out that plaintiffs had moved an application to summon Shri K.N. Parshad, Handwriting Expert, resident of H.No.819 sector 8, Chandigarh along with report regarding the signatures of defendants and said witness was duly served but plaintiffs did not dare to examine him, and so, adverse inference is to be drawn that he had refused to supports the case of the plaintiffs.

11.7 It is argued that even the thumb impression of Smt. Chawli Devi on agreement to sell Ex.P1 are not proved, inasmuch as in the written statement

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filed by the defendants No.1 to 3, it has been specifically pleaded that she had never signed/thumb marked the agreement to sell. Same stand was taken by the defendant No.4- Ramesh Kumar. However, apart from the statements of PW-1 and PW-2, no witness has been examined by the plaintiffs to prove the thumb impression of Smt. Chawli Devi on the agreement to sell Ex.P-1.

11.8 Learned senior counsel contends that in these circumstances, the finding of the courts below to the effect that agreement to sell was proved to have been executed by all the five co-owners, is absolutely not tenable.

11.9 Learned senior counsel has then pointed out that Jokhi Ram had already a bank account N: 15655 in Syndicate Bank, as evident from Ex.D1 proved by PW4. In case, he had received any cheque of ₹30,000/- towards earnest money as is contended by the plaintiffs, he would have deposited the same in his own account. However, the plaintiffs in collusion with Lakhpat Rai and his wife Kamlesh, got opened two joint bank accounts on 9.8.1994. Account N: 18272 was got opened in the joint names of Lakhpat Rai, Ramesh and Smt. Chawli Devi, in which Lakhpat Rai became the proposer, as per Ex.P64. Another account N: 18273 was opened in the joint names of Kamlesh Rani and Jokhi Ram, in which also Lakhpat Rai was the proposer, as per Ex.P65. Attention is drawn towards the statement of PW4 Chandrashekhar, Clerk, Syndicate Bank, who proved Ex.P64 & Ex.P65 based on record brought by him but concedes in his cross-examination that these forms were not filled in his presence and that specimen signature cards were not signed in his presence.

11.10 It is pointed out that all the five cheques of ₹30,000/- each are shown to have been deposited in these two accounts and there is absolutely no evidence that Jokhi Ram, Ramesh and Chawli Devi ever withdrew the said amount, as PW4 is unable to tell as to who had signed the withdrawal forms. It is also contended that the stand of the plaintiffs to the effect that amount of ₹1,50,000/- by way of five cheques was paid on 24.7.1994 at the time of execution of agreement is also demolished by own statement of account Ex.P-63 of the plaintiff, which would indicate that there was no sufficient amount in the said account on that day and that by way of a sundry entry, an amount of

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VERDICTUM.IN

₹1,50,000/- was deposited in his account on 10.8.1994 and then, on the same date, five cheques of ₹30,000/- each are shown to be debited from this account on that day i.e. 10.8.1994.

11.11 It is also contended that photographs as well as signatures of Jokhi Ram and Ramesh on the account opening forms are forged, as their purported photographs appearing on these account opening are of some fake person, as has been proved by the witnesses examined by the defendants, including the neighbours.

11.12 Learned Senior Advocate contends that though these appeals are against the concurrent findings of the Courts below and while hearing regular second appeal, the High Court has limited scope to intervene but the High Court can certainly intervene, when there is complete misreading of the evidence on record by the Courts below. It is further argued that when plea of fraud is taken by the defendants, the burden of proof pales into significance and rather, it becomes imperative for the plaintiffs to prove the document beyond any shadow of doubt. It is argued that the defendants by producing sufficient evidence have proved that the agreement Ex.P-1 i.e. agreement to sell is a forged document and that the plaintiffs have failed to prove due execution and the validity thereof.

Contentions raised in RSA 4958-2012:

12.1 Supplementing the afore said contentions, Sh. Amit Jain, learned Senior Advocate appearing for appellants Lakhpat Rai and Kamlesh contends that though these appellants did not deny their signatures on Ex.P-1 but it is testified by DW4 Lakhpat Rai that their signatures were taken by way of fraud on blank papers on the pretext of granting them loan and they had never intended to sell the suit property. However, he refutes the contention of Shri Vijay Jindal, Senior Advocate to the effect that these defendants were colluding with the plaintiffs.

12.2 It is also argued that there is a default clause in the agreement to sell to pay double the earnest money, with no specific clause that in the event

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of breach, the aggrieved party will be entitled to specific performance, and therefore, the suit for specific performance is not maintainable.

<u>Contentions for respondent Urmila:</u>

13.1 Sh. S.K. Garg Narwana, Senior advocate appearing for respondent-Urmila (daughter of Jokhi Ram) and one of the LRs of Smt. Chawli Devi has supported all the contentions as have been raised by Ld. Senior advocate Shri Vijay Jindal in RSA 3117-2012. In addition to the same, he contends that Jokhi Ram, had expired prior to filing of the suit, so it was imperative for the plaintiffs to implead all the legal heirs of Jokhi Ram as defendants, in case said Jokhi Ram had executed the alleged agreement to sell, as to represent his estate. Jokhi Ram left behind five legal heirs. Though, two sons Ramesh & Lakhpat Rai and widow Smt. Chawli Devi of Jokhi Ram were impleaded in their individual capacity as defendants but the two daughters Urmila and Raj Dulari were also impleaded as party to the suit and therefore, suit is bad for non-joinder of necessary parties.

13.2 It is contended that even after being impleaded as LRs of Chawli Devi, when they moved an application for producing the evidence, their application was declined.

14. With all the afore-said submissions, prayer is made by Ld. Senior counsels for the appellants as well as counsel for respondent-Urmila to allow these appeals and to set aside the impugned judgment and decrees passed by the Courts below.

<u>Contentions for contesting respondents - plaintiffs:</u>

15.1 Replying to the contentions raised on behalf the appellants and respondent Urmila, it is contended by Shri Sumeet Mahajan, learned senior counsel for the contesting respondents- plaintiffs that agreement to sell dated 24.07.1994 is duly proved not only by the testimony of plaintiff- PW-1 J.D. Gupta but further supported by statement of another attesting witness namely PW-2 Tarsem Lal. Learned counsel contends that both these witnesses have

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VERDICTUM.IN

testified that all the five sellers i.e. defendants alongwith Jokhi Ram had come to his office on 24.07.1994 and had appended their signature thereon. These witnesses have also deposed about payment of the earnest money of ₹2,00,000/-, out of which ₹1,50,000/- was paid by way of 5 cheques of ₹30,000/- each to the five sellers and ₹50,000/- paid in cash.

15.2 Learned counsel has further drawn attention towards the written statement of defendants no.1 to 3, in which they have not disputed the signature of Lakhpat Rai and Kamlesh Rani. DW-4 Lakhpat Rai has also admitted his signature on the agreement to sell. He has also not disputed about the receipt of the legal notice. Learned counsel also draws attention towards the statement of PW-3 Vinod Kumar, an official of the State Bank of Patiala so as to contend that receipt of earnest money by the defendants and their active participation in the execution of the agreement is duly proved. Besides, PW-4 Chander Shekhar proves that the five cheques were deposited in two different joint accounts of the five vendors and that all of these were got encashed. It is also the contention of the counsel that terms and conditions of the agreement to sell dated 24.07.1994 indicate that it could not have been executed without the active participation of all the sellers i.e. defendants and Jokhi Ram.

15.3 Ld. Senior advocate points out that DW5 Navdeep Gupta, document expert examined by the defendants, compared the disputed signature of Ramesh only with the standard signatures affixed by him on the documents, which came in existence after filing of the suit and that those signatures were made by changing the style and as such, no reliance can be placed on the testimony of such an expert.

15.4 Learned senior counsel for the respondents- plaintiffs further argues that readiness and willingness on the part of the plaintiff for execution of the sale deed in terms of the agreement to sell dated 24.07.1994 is well proved on record. He has drawn attention towards the testimony of PW-1 plaintiff J.D. Gupta in this regard. Apart from the letter dated 02.12.1994 Ex.P-2, which was sent by the plaintiff to the defendants along with the requisite form to obtain

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the NOC, further attention is drawn towards the telegram sent on 23.12.1994 and then on 26.12.1994 so as to contend that prior intimation was sent to the defendants for execution of the sale deed. Learned counsel further argues that affidavits Ex.P-42 and P-43 further proves the presence of the plaintiff- J.D. Gupta in the office of Sub-Registrar on 28.12.1994 along with the balance sale consideration, whereas defendants failed to turn up and that in view of these circumstances, readiness and willingness, prior to and after the execution of agreement on the part of the plaintiff is well proved on record.

15.5 It is contended further that appellant/ defendant N: 4 Ramesh is estopped to take the plea of his forged signature as he got encashed the cheque of ₹30,000/- issued in his name towards payment of earnest money.

15.6 It is also contended that onus to prove that plaintiff had obtained signature of defendant Lakhpat Rai and his wife Kamlesh on blank papers on the pretext of advancing loan of ₹2,00,000/- was entirely upon them and that except for the oral statement made by Lakhpat Rai in this regard, no other evidence has been led so as to discharge this onus.

15.7 Attention is also drawn towards statement of DW6 Urmila, who admitted that she knew that her brothers were selling the suit property. It is argued that all the defendants are now colluding with each other, by alleging collusion between plaintiffs & Lakhpat Rai, which is established from the fact that all of them are living together in same house with no dispute amongst them as admitted by DW6 Urmila.

15.8 With all the aforesaid contentions, Ld. Senior advocate urges that there is no scope to interfere in the concurrent findings of facts as recorded by the courts below and so both the appeals deserve dismissal.

16. Contentions raised by Ld. Senior Advocates for both the sides have been considered and with their able assistance, trial court record has been perused. Various authorities cited from both the sides shall be referred during discussion.

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17. After hearing submissions of both the sides at length, this court finds that following points need consideration: -

- Whether the onus to prove the agreement to sell, particularly to prove allegation of fraud/fabrication was rightly placed?

- Whether agreement to sell dated 24.07.1994 Ex.P1 was executed between plaintiff No.1 and the four defendants along with Sh. Jokhi Ram?

- Whether defendant No.2 - Lakhpat Rai and his wife Kamlesh Rani had taken loan of ₹2 lakh from the plaintiff and their signatures were obtained on blank papers on the pretext of granting loan and the same have been converted into alleged agreement to sell?

- Whether the document dated 24.07.1994 i.e. the alleged agreement to sell does not bear the signature/thumb impressions of Jokhi Ram, Smt. Chawli Devi and Ramesh Kumar?

- What is the scope of interference in the Regular Second Appeal by this Court in the concurrent findings of facts as recorded by the Courts below?

- One of the executants of the alleged agreement to sell, namely, Jokhi Ram, having already expired prior to filing of the suit, whether the suit is bad for non-joinder of necessary parties, as his legal heirs, who include his two daughters Urmila and Raj Dulari, were not impleaded as party to the suit; whereas widow & two sons i.e., Chawli Devi, Ramesh and Lakhpat Rai were impleaded in their individual capacity being co-owners and not as legal heirs of Jokhi Ram?

- If it is found that suit is bad for non-joinder of all the legal heirs of Jokhi Ram; or if it is found that Chawli Devi or Ramesh Kumar or Jokhi Ram had not signed the alleged agreement to sell, whether suit for specific performance can be decreed partly against the other defendants Lakhpat Rai and his wife Kamlesh Rani, who have not denied their signatures,

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considering the fact that suit property is situated in Chandigarh, where the fragmentation of the residential property is not permissible under law?

- Whether Appeal filed by Lakhpat Rai and Kamlesh Rani before this Court, who had not approached the First Appellate Court against the judgment of the trial Court, is maintainable before this Court, in the light of the provisions of Order 41 Rule 33 CPC?

- Whether plaintiff No.1, the executant of the alleged agreement to sell, has always been ready and willing and is still ready and willing to perform his part of contract?

- As there is a default clause in the agreement to sell and there is no specific clause in the agreement that in the event of breach, the aggrieved party will be entitled to specific performance, whether in these circumstances, the suit for specific performance is maintainable or not?

- Whether in all the aforesaid facts and circumstances, equity is in favour of the plaintiffs to grant decree for specific performance and whether the discretion in this regard has been rightly exercised by the Courts below?

Analysis by this court:

Onus to prove a document propounded by plaintiff and alleged to be forged by the defendant:

18. Since entire case of the plaintiffs revolve on the validity and due execution of agreement to sell Ex.P1, which the defendants have alleged to be a forged document, so one of the question to be answered is as to whether it is the plaintiff, who is required to prove the validity and due execution of agreement to sell Ex.P-1, or whether it is for the defendants to prove the said document to be forged and fabricated.

19. It has been held by Hon'ble Supreme Court that though the onus is upon the party who propounds the document, who will have to prove it but it is not the firm proposition of law that in case fraud is alleged, then it is for the

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party alleging fraud, who has to prove it. In ***"Thiruvengadam Pillai v. Navaneethammal and anr." 2008 (2) RCR (Civil) 262***, explaining the said proposition, Hon'ble Supreme Court held as under:

> "The trial court had analyzed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, it was for the defendants to establish that the document was forged or concocted, is not sound proposition. The first appellate court proceeded on the basis that it is for the party, who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case, plaintiffs came to court alleging that the first defendant had executed an agreement of sale in favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative. The issues also placed the burden on the plaintiff to prove the document to be true. No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses. But the various circumstances enumerated by the trial court and High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of PW 1 to 3. We are therefore of the view that the decision of the High Court, reversing the decision of the first appellate court, does not call for interference."

20.1 Similarly, in ***"Rangmal v. Kuppuswani" (2011) 12 SCC 220,*** genuineness of a document was in question. Hon'ble Supreme Court held that burden lied on the person, who relies on a validity of document to prove its genuineness. However, onus will shift upon the opposite party to dislodge such proof and establish the document is sham or bogus only when its validity and genuineness is proved. Hon'ble Supreme Court referred to Section 101 of the Evidence Act, which read as under:

> **"101. Burden of proof.** - Whoever desires any court to give judgment as to any

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VERDICTUM.IN

legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

20.2 Hon'ble Supreme Court then held as under:

"21...........Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

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29. It may be relevant at this stage to cite the ratio of the decision of this Court delivered in the matter of ***Subhra Mukherjee vs. Bharat Coaking Coal Ltd (AIR 2000 SC 1203***), whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness.........

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31. Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in ***Subhra Mukherjee case*** and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was "whether the transaction in question was a bona fide and genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious. This ratio can aptly be relied upon in this matter as in this particular case, it is the plaintiff/respondent No.1-Kuppuswami who relied upon the alleged sale deed dated 24.2.1951 and included the subject-matter of the property which formed part of the sale deed and claimed partition. This sale deed was denied by the defendant/appellant on the ground that it was bogus and a sham transaction which was executed admittedly in 1951 when she was a minor."

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21. Thus, as per legal position enunciated above, when the question before the court is as to *"whether the transaction in question was a bona fide and genuine one",* it is for the party/plaintiff relying on the transaction, who has to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious.

22. It is in the light of above legal position that evidence brought on record is required to be analysed.

Whether execution of agreement to sell is proved:

23. Perusal of the agreement to sell (Ex.P1) would reveal that it is four pages document typed on a stamp paper. The stamp paper is purported to have been purchased on 19.07.1994 in the name of Jokhi Ram. Except for the date appearing on the first page as 24.07.1994, all other contents in the document are typed. All the four pages are purported to be signed by Kamlesh, Ramesh Kumar, Jokhi Ram and Lakhpat Rai and thumb marked by one person, whose name is not mentioned. Two attesting witnesses to the said agreement are Tarsem Lal and Kabul Singh. There is no mention in the agreement as to who had typed this agreement. As per clause No.12 of the agreement, the bargain was struck through Sumesh Gupta, to whom both the parties had agreed to pay 1% as commission, though he is not signatory to agreement Ex.P1. On the reverse of page No.1 and 2 of the agreement, there is typed receipt of ₹2 lakh, as per which five cheques of ₹ 30,000/- each, all dated 19.07.1994, are purported to have been issued in the name of five vendors and ₹50,000/- is shown to have been paid in cash i.e. ₹10,000/- each to the five vendors.

24.1 In order to prove the afore-said agreement Ex.P1, plaintiff – J.D. Gupta appeared as PW1 and also examined one of the attesting witnesses Tarsem Lal as PW2. Both of them in their respective testimonies proved due execution of the said agreement Ex.P1 as well as receipt Ex.PW2/A by the five vendors. However, cross examination of these witnesses is quite material.

24.2 In his cross-examination, PW1 J.D. Gupta, discloses that Tarsem

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Lal, i.e. one of the attesting witness is his co-brother i.e. wife's sister's husband. As per him, 15 days prior to the execution of the agreement to sell, Sumesh Gupta had told him that house in question was for sale and then Kabul had shown house to him. As per him, 2-3 days prior to the execution of the agreement, negotiations for sale had been struck with defendant No.2 Lakhpat Rai at his office in Sector 22. Agreement to sell was got typed after settlement of terms and conditions 2-3 days before it was signed. The draft of the said agreement was taken by defendant No.2 in order to show it to the other defendants, again said, to show to defendant No.4. One day prior to the agreement to sell, defendant No.2 Lakhpat Rai came to his office and confirmed about the bargain. PW1 discloses further that he is not aware, as to from where the agreement to sell was typed. As per him, stamp papers were purchased on 19.07.1994. He pleaded ignorance that Jokhi Ram used to sign only in *Landi* language. He denied the suggestion that he in collusion with Lakhpat Rai had fabricated the agreement to sell by forging the signatures of Ramesh and Jokhi Ram.

24.3 PW2 Tarsem Lal in his cross-examination not only admitted his relationship with plaintiff J.D. Gupta but further admits that he was also working in the same office of property dealing of Mr. J.D. Gupta. He further says during cross-examination that on 24.07.1994, initially defendant No.2 – Lakhpat Rai came to the Office of plaintiff, followed by the other defendants, then negotiations took place so as to sell the house in his presence and that Kabul Singh was appearing on behalf of the defendants and that said Kabul Singh was also the property dealer. He too pleaded ignorance as to where the agreement to sell was got typed. However, he is specific that when all the defendants came and the negotiations were completed, then the agreement to sell was typed within half an hour/ an hour. He pleaded ignorance as to who went to get the agreement to sell typed and from where it was typed but he is specific that it was not typed in the Office of the plaintiff.

25. It is apparent from the testimonies of both the above witnesses that they are quite contradictory on numerous material points. As per PW1-

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plaintiff J.D. Gupta, terms and conditions of the agreement to sell were settled only between him and Lakhpat Rai and not with the other defendants and that these terms were settled 2-3 days prior to the execution of the agreement. It has also emerged in his testimony that the agreement to sell was typed at least 2-3 days prior to its due execution and then the draft agreement was taken by Lakhpat Rai to show it to other defendants / defendant- Ramesh. Contrary to the same, Tarsem Lal says that agreement to sell was typed within half an hour/ an hour from the settlement of the terms and conditions on 24.07.1994 with all the defendants. Most importantly none of these witnesses have been able to disclose the name of typist, who typed the said agreement. None of them are able to tell as to where it was typed and who got it typed. No such typist has either been named or examined in the evidence by the plaintiffs.

26. Further the stamp paper for agreement is purported to have been purchased on 19.07.1994 in the name of Jokhi Ram. It is not explained that in case, the terms and conditions were settled 2-3 days prior to the execution of the agreement as per PW1, or on 24.07.1994 i.e. on the date of agreement as per PW2, why the stamp paper was purchased on 19.07.1994, in the name of Jokhi Ram. Stamp Vendor has not been examined to prove as to whether Jokhi Ram had put his signatures in his relevant register.

27. The only other person associated with the agreement to sell is stated to be Sumesh Gupta as duly referred in the agreement to sell Ex.P1, through whom the bargain was struck and both the parties had agreed to pay commission to him. However, said Sumesh Gupta has not been examined by the plaintiffs. Rather, contradictory stand has been taken by plaintiffs even in this regard, in as much as in replication to the written statement of defendant No.4, plaintiffs denied any concern with said Sumesh Gupta to the extent that plaintiff No.1 even does not know any person by the name of Sumesh Gupta. However, this is contrary to the statement of PW1, when he says that Sumesh Gupta had told him about the suit property to be available for sale. This is also contrary to the terms of Ex.P1, wherein there is specific mention about Sumesh Gupta to be the mediator of the bargain.

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28. Proceeding further, it is wrongly contended by learned counsel for the respondents- plaintiffs that thumb impressions of Smt. Chawli Devi on the agreement to sell Ex.P1 have not been disputed. The written statement of defendants No.1 to 3 clearly indicate they have denied the thumb impression/ signatures not only of Chawli Devi but also of Ramesh and Jokhi Ram. Though PW1 and PW2 proved the agreement to have been executed even by Smt. Chawli Devi but no supporting evidence has been produced to show that the thumb impression appearing on all the pages of agreement to sell Ex.P1 are that of Chawli Devi.

29.1 Apart from above, three children of Jokhi Ram namely, DW3 Ramesh, DW4 Lakhpat Rai and DW6 Urmila have specifically testified that Jokhi Ram never signed in English and that except the *Landi* language, said Jokhi Ram never signed in any other language. There is no rebuttal to this evidence. PW1 J.D. Gupta in his cross-examination has pleaded ignorance that except *Landi*, Jokhi Ram did not use to sign in any other language.

29.2 However, the purported signature of Jokhi Ram on agreement to sell Ex.P1 appear in English and that too, as Gokhi Ram and not Jokhi Ram. This is even contrary to the account opening form Ex.P64, wherein Jokhi Ram is purported to have signed in English as Jokhi Ram. Even on appraisal by the naked eye, the two signatures of Jokhi Ram on Ex.P1 & Ex.P64 are different. Plaintiffs have not examined even a single witness, who ever saw Jokhi Ram signing in English or any other language other than *Landi.* Said Jokhi Ram expired in 1994 but no document whatsoever is produced by the plaintiffs to show that said Jokhi Ram ever signed in any language other than *Landi.*

29.3 Defendants have proved on record the sale deed dated 19.09.1979, copy of which is Ex.D11, whereby the defendants along with Jokhi Ram had purchased the suit property. In the said sale deed, the signatures/ thumb impressions of all the vendees are quite evident. The said sale deed reveals that Jokhi Ram signed the same in *Landi* language. Signature of Jokhi Ram also appears in his bank account, copy of which is Ex.D1 in *Landi* language,

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though PW4 has stated that the said signature is in Urdu. The bare perusal of Ex.D1 and Ex.D11 would reveal that they are signed by the same person.

29.4 Thus, plaintiffs have utterly failed to prove that Jokhi Ram ever signed in a language other than *Landi.* In these facts and circumstances, it is established beyond doubt that Ex.P1 i.e. agreement to sell is not signed by deceased - Jokhi Ram.

30. Proceeding further, DW3 Ramesh has specifically testified that he did not sign the agreement to sell Ex.P1. He denied his signature on the said document. In order to support this contention, defendants have even examined DW5 Navdeep Gupta, Document Expert, who compared the standard signature of Ramesh Gupta taken from various documents, e.g., written statement, vakalatnama etc., sale deed Ex.D11, with the disputed signature of Ramesh appearing on Ex.P1 & Ex.PW2/A and then gave his report Ex.D14 to the effect that disputed signatures are not of the same person, who affixed the standard signatures.

31. The contention of learned counsel for the contesting respondents- plaintiffs that said document expert compared the disputed signature of Ramesh Gupta only with the standard signatures taken from the documents executed during pendency of the suit, is without any merit, because his standard signatures appearing on Ex.D11 i.e. sale deed of 1979 has also been compared with the disputed signatures by DW5 Shri Navdeep Gupta and it has been clearly opined by him that these don't match.

32. There is no rebuttal on the part of the plaintiffs so as to rebut the report of document expert i.e. PW4 Navdeep Gupta. As has been rightly pointed out by learned counsel for the appellants that at one point of time, plaintiffs had summoned one K.N.Parshad, Handwriting Expert to prove his report regarding the signatures of the defendants, which indicates that plaintiffs had got examined the disputed signatures of Jokhi Ram and Ramesh. Said K.N. Parshad was even served on the summons sent to him. However, said witness has not been examined by the plaintiff for the reasons best known to him and

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that the only inference which can be drawn against the plaintiffs is that had the said witness i.e. K.N. Parshad been examined by the plaintiffs, he would not have supported their case.

Opinion evidence of expert, when to be discarded:

33.1 Learned counsel for the plaintiffs contends that since the attesting witness had identified the signature of the vendors on the agreement to sell Ex.P1, the statement of handwriting expert lost its significance and thus, burden placed upon the plaintiffs was duly discharged. It is contended that the allegation of fraud was required to be proved by the defendants. Reliance is placed upon ***"Rattan Singh & anr. v. Nirmal Gill and Others (2021) 15 SCC 300***.

33.2 By drawing attention towards ***"Karam Chand v. Ombir" 2016 (2) Law Herald 1501***, it is contended by Ld. counsel for the respondents- plaintiffs that defendant Ramesh was habitual of signing differently on different documents as is apparent from the various documents proved on file and therefore, he cannot be relied.

34. This Court is not convinced with this contention. It is noticed from the various documents as proved on record that said Ramesh Kumar used to sign in two manners - either as 'R. Kumar' or as 'Ramesh Kumar'. His admitted signatures are available on the record in the form of his signature on written statement, power of attorney etc. No doubt that these signatures of the defendant Ramesh Kumar are post-litigation. However, it has not been disputed that signature of Ramesh Kumar on the sale deed of 1979 Ex.D-11 are of period much prior to, when the litigation started or even the agreement to sell Ex.P1 was executed. As per the report of the document expert, the alleged signature of defendant Ramesh Kumar on the agreement to sell Ex.P-1 and the receipt Ex.-PW2/A do not tally even with those signatures as appearing on Ex.D-11. In these circumstances, the contention of counsel for the plaintiffs that statement of Ramesh, denying his signature on Ex.P1 as not reliable, is not tenable.

35.1 It is further important to notice that in order to prove passing of the earnest money to the five vendors, plaintiffs have examined PW4 Chander

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VERDICTUM.IN

Shekhar, a Clerk in the Syndicate Bank so as to prove that the five cheques of ₹30,000/- were got encashed by the five vendors. In this regard also, the case of the plaintiffs is not believable.

35.2 First of all, it is not explained by learned counsel for the plaintiffs that in case, terms and conditions of the agreement to sell were settled just 2-3 days prior to the execution of the agreement as stated by PW1; or on 24.07.1994 itself i.e. the date of the execution of the agreement as stated by PW2, how the date of 19.07.1994 was inserted in the cheques of ₹30,000/- each, as is clearly mentioned in the receipt Ex.PW2/A. In case, the terms and conditions were settled on 24.07.1994, obviously the sale price was the most important part of the sale bargain and only then the parties could have come to know about the sale consideration and then only, the amount of earnest money could have been mentioned in the cheques.

35.3 Moreover, the testimony of PW4, the own witness examined by the plaintiffs would clearly indicate that Jokhi Ram was already having an account N: 15655 opened in 1991 in Syndicate Bank, as evident from Ex.D1. In case cheque of earnest money of ₹30,000/- had been handed over to said Jokhi Ram on 24.7.1994, as is the case of the plaintiffs, obviously Jokhi Ram would have deposited that cheque in his already existing personal account. However, the evidence on record would indicate that on 9.8.1994, two joint accounts were opened in the Syndicate Bank. As per Account opening forms Ex.P64 & Ex.P65, one account i.e. Account No.18272 was opened in the joint names of Lakhpat Rai, Jokhi Ram and Smt. Chawli Devi with Lakhpat Rai as proposer; whereas, account No.18273 was opened in the joint names of Smt. Kamlesh Rani and Jokhi Ram, in which the proposer is again Lakhpat Rai. It is only after the opening of these accounts on 09.08.1994 that five cheques of ₹30,000/- each are shown to have been credited in these two accounts as is evident from Bank statement of plaintiff Ex.P63 on 10.08.1994.

35.4 Still further, the photographs of Jokhi Ram and Ramesh appearing on the account opening forms Ex.P64 and Ex.P65 do not pertain to them, as is

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proved by the testimonies of DW3, DW4 and DW6 and even of neighbours i.e., DW1 & DW2. Testimony of DW5 Navdeep Gupta also proves that the purported signatures of Ramesh on the account opening form Ex.P64 are forged. It has already been noticed that purported signature of Jokhi Ram on Ex.P65 are in English as Jokhi Ram, whereas in the agreement Ex.P1, he is purported to have signed as Gokhi Ram. It has already been proved that Jokhi Ram never signed in English.

35.5 All the aforesaid circumstances clearly indicate that Lakhpat Rai was colluding with the plaintiffs. Initially, he procured the draft agreement to sell from the plaintiffs and appears to have struck the bargain to sell the property without knowledge of the other vendors. Thereafter, he and his wife, in collusion with plaintiffs got opened two joint accounts, in the name of all the five vendors. In one of the account, Lakhpat Rai became one of the account holder; whereas, in the other, Kamlesh w/o Lakhpat Rai became one of the account holder. In normal course, if joint accounts are to be opened by husband and wife, they will open one such joint account and will not become joint account holders in two separate accounts.

35.6 Above circumstances also compel this court to assume that after opening of the two joint accounts, amount of all the five cheques has been drawn only by said Lakhpat Rai and his wife Kamlesh, otherwise there was no necessity to introduce name of Lakhpat Rai in one account and that of Kamlesh Rani in other account. PW4 Chander Shekhar, the Clerk of Syndicate Bank has clearly admitted that he was not present, when these account opening forms were submitted in the Bank. He is not aware as to who had signed the specimen signature part. He is not aware as to who had submitted the withdrawal forms, in order to withdraw the amounts of the cheques.

35.7 In the face of aforesaid evidence, it is held that plaintiffs have even failed to prove the passing of earnest money to all the vendors as was alleged by them.

36. By placing reliance upon ***"Shashi Kumar Banarjee v. Subosh Ku-***

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mar Banarjee" AIR 1964 SC 529, judgment of three judges bench of Hon'ble Supreme Court, it is argued by Ld. Counsel for the plaintiffs-contesting respondents that mere opinion of the expert cannot override the positive evidence of the attesting witnesses so as to prove the agreement Ex.P1. For the same preposition, further reliance is placed on ***"Chennadi Jalpathi Reddi v. Baddam Pratapa Reddy and anr." (2019) 14 SCC 220***

37. There can be no dispute to the legal position that evidence of handwriting expert, being an opinion evidence, can rarely be given precedence over the substantive evidence such as testimony of attesting witnesses. But this proposition of law is applicable, when the attesting witnesses to the document in question are reliable. When attesting witness(s) is/are not reliable and document is alleged to contain forged signature of executant, the unrebutted opinion of document expert assumes significance and can certainly not be ignored.

38. In ***Shashi Kumar Banarjee v. Subosh Kumar Banarjee's* case *(supra),*** valid execution of a WILL was in dispute. Hon'ble Supreme Court found that the two attesting witnesses were quite reliable, with no reason to disbelieve them. No suspicious circumstances were found to exist surrounding the Will. It was in these circumstances that it was held that mere opinion of the expert cannot override the positive evidence of the attesting witnesses

39. Similarly, in ***"Chennadi Jalpathi Reddi v. Baddam Pratapa Reddy (supra),*** attesting witnesses to the document were found to be reliable, with no reason to disbelieve them but the High Court had rejected their statements and gave preference to opinion evidence. It was in these facts and circumstances that Hon'ble Supreme Court observed as under:

> "8.In any case, to satisfy our conscience, we have gone through the evidence of PWs 1, 2, and 3. As rightly observed by the Trial Court, there is no reason to disbelieve these witnesses, whose evidence is consistent, cogent, and reliable. Though they were subjected to lengthy cross examination, nothing noteworthy has been brought out from their deposition to discard their evidence. Thus, the evidence of PWs 1, 2, and 3 fully supports the case of the plaintiff and in our considered opinion, the High Court was not justified in rejecting their evidence.

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9. As mentioned supra, the High Court mainly relied upon the opinion evidence of DW2, the handwriting expert, who opined that the signature of the first defendant on the agreement of sale Ext. A1 did not tally with his admitted signatures.

10. By now, it is well settled that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive in nature. It is also settled that it may not be safe to solely rely upon such evidence, and the Court may seek independent and reliable corroboration in the facts of a given case. Generally, mere expert evidence as to a fact is not regarded as conclusive proof of it. In this respect, reference may be made to a long line of precedents that includes ***Ram Chandra and Ram Bharosey v. State of Uttar Pradesh, AIR 1957 SC 381, Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529, Magan Bihari Lal v. State of Punjab, (1977) 2 SCC 210, and S. Gopal Reddy v. State of Andhra Pradesh, (1996) 4 SCC 596.***

11. We may particularly refer to the decision of the Constitution Bench of this Court in ***Shashi Kumar Banerjee (supra),*** where it was observed that the evidence of a handwriting expert can rarely be given precedence over substantive evidence. In the said case, the Court chose to disregard the testimony of the handwriting expert as to the disputed signature of the testator of a Will, finding such evidence to be inconclusive. The Court instead relied on the clear testimony of the two attesting witnesses as well as the circumstances surrounding the execution of the Will."

40. Contrary to the facts of ***Shashi Kumar Banarjee (supra) and Chennadi Jalpathi Reddi (supra)*** as above, wherein the testimony of attesting witnesses were found to be quite reliable, with no reason to disbelieve them despite their lengthy cross-examination, facts in present case are entirely different. As noticed earlier:

- The testimonies of PW-1 & PW-2 are not reliable. PW-2 Tarsem Lal is the close relative being wife's sister's husband of plaintiff, working in his office as property dealer.

- Plaintiff – vendee as well as both the attesting witnesses are property dealers, who acted under conspiracy to grab the property of

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five co-owners in collusion with one of them namely Lakhpat Rai.

- None of the plaintiff's witnesses have been able to disclose this Court as to who typed the agreement to sell, where it was typed and who got it typed and on what date. There are inherent contradictions regarding the date of the typing of the agreement.

- Scribe neither examined by the plaintiffs nor by Sumesh Gupta, referred as mediator of the deal in Ex.P1. Rather, he was examined by defendants as DW7, Sumesh Gupta did not support plaintiff's case.

- The draft agreement to sell was handed over only to defendant Lakhpat Rai, who told the plaintiff that he had shown it to defendant No.4 Ramesh Kumar. Thus, participation of other sellers is not at all proved in the execution of the agreement.

- The evidence on record has also established that signature of Ramesh Kumar and Jokhi Ram on the agreement to sell as well as receipt are forged documents.

- Respondents- plaintiffs have also not been able to convince this Court as to why two joint bank accounts were opened, one in the name of three sellers, in which Lakhpat Rai was one of the account holder; and the other in the joint name of Kamlesh Rani and Jokhi Ram. Lakhpat Rai was the proposer at the time of opening both the accounts. It is particularly necessary to notice that Jokhi Ram was already having a saving account in the same bank i.e. Syndicate Bank. It is beyond comprehension, as to why a person will get a joint account opened, when he is already having an individual saving account in the same bank.

- There is no evidence to prove that apart from Lakhpat Rai & Kamlesh Rani, anybody else had withdrawn the amount.

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VERDICTUM.IN

41. In the above said facts and circumstances, plaintiffs – contesting respondents cannot be given any advantage of ***Shashi Kumar Banarjee and Chennadi Jalpathi Reddi (cited supra)*** to discard the unrebutted testimony of DW5 Navdeep Gupta with regard to the forged signatures of Ramesh & Jokhi Ram on agreement to sell Ex.P1.

42. In view of all the aforesaid circumstances, it is held that agreement Ex.P.1 was not at all proved to be executed by Jokhi Ram, Chawli Devi and Ramesh Kumar and the same is proved to be forged and fabricated document by forging the signatures of these co-owners.

Collusion between plaintiff JD Gupta and defendant Lakhpat Rai:

43. The evidence and the circumstances clearly indicate the collusion between the plaintiff JD Gupta and Lakhpat Rai. It is Lakhpat Rai, who appears to have colluded with said plaintiff to the prejudice of all other sellers, just in order to obtain money from the plaintiff, although his contention to the effect that he had taken the loan of ₹2,00,000/- and on that pretext, he and his wife Kamlesh had signed the blank documents, is not proved convincingly. Why two joint accounts were got opened by him on 9.8.1994 and then, all 5 cheques got encashed on 10.8.1994 as evident from Ex.P63, the bank statement of plaintiff. It is because on 24.7.1994, there was no sufficient money in the account of plaintiff. It is only on 9.8.1994 that he deposited ₹1,50,000/- in his account and then the 5 cheques were encashed on 10.8.1994 after opening of the two joint accounts in the name of vendors on 9.8.1994. All these circumstances taken cumulatively clearly indicate the collusion between the plaintiff JD Gupta and defendant Lakhpat Rai in order to grab the property of other co-owners.

44. As far as contention of learned counsel for the respondents-plaintiffs that onus to prove that plaintiff had obtained signature of defendant Lakhpat Rai and his wife Kamlesh on blank papers on the pretext of advancing loan of ₹2,00,000/- was entirely upon them and that except for the oral statement made by Lakhpat Rai in this regard, no other evidence has been led so as to discharge this onus, it has merit. Reliance is rightly placed in this regard on

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"Laxman Tatyaba Kankate Vs. Taramati Harishchandra Dhatrak" (2010) 7 SCC 717.

45. However, this Court has already observed that though the stand of the defendants Lakhpat Rai is not proved to the effect that his signatures were obtained by the plaintiff on the blank papers but the collusion of the defendant- Lakhpat Rai with the plaintiff is large in the facts and circumstances of the case, as have been noticed earlier and which is certainly to the prejudice of the other sellers, particularly Jokhi Ram and Ramesh.

46. The contention of Ld. Counsel for contesting respondents that all defendants are residing together with no dispute amongst them, is without any merit. DW6 Urmila came to picture only when she alongwith Raj Dulari was impleaded as LR of Chawli Devi in 2002. She was not even aware about her right in the suit property or about proposed sale one month prior to her appearing in the witness box as has come in her testimony. In the circumstances, her statement that there was no conflict amongst her brothers is irrelevant. Statements of two neighbours DW1 Satpal Goyal & DW2 Sanjay Sharma to the effect that Jokhi Ram was living along with his two sons Ramesh and Lakhpat Rai in same house also don't prove the collusion between all the defendants. As such contention of contention of contesting respondents in this regard is hereby rejected.

Readiness and Willingness:

47. Learned counsel has referred to ***"Subhash Chand v. Surjit Singh" RSA-2089-2016 (PHHC)*** and ***"Balwant Singh v. Pritam Singh" RSA-4678-2012***, wherein reply to the legal notice was not sent. No criminal complaint was filed alleging forgery. It was held that agreement to sell was duly proved.

48. Learned counsel for the contesting respondents further refers to ***"R. Lakshminathan v. Devaraji" (2019) 8 SCC 62*** in order to contend that the facts are identical, as correspondence in that case and legal notices proved that plaintiff was communicating with the defendants that he was ready with the balance sale consideration for the sale deed to be executed, which established

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his readiness and willingness. Learned counsel contends that it is the clear cut case where defendants wanted to wriggle out of the agreement and therefore, decree of specific performance in favour of the plaintiff has been rightly granted.

49. This court is unable to accept the contention in the light of facts and circumstances of present case, as proved on record. The question of readiness and willingness on the part of plaintiffs will arise only in case the valid execution of agreement to sell is proved on record. In the present case, once the agreement to sell Ex.P1 is not proved to be validly executed particularly between the plaintiff and Jokhi Ram & Ramesh, any readiness and willingness on the part of the plaintiff loses its significance. Simply because defendants did not respond to the legal notice will not mean that they admitted the agreement to sell or they were bound to execute the sale deed.

Concurrent finding of facts – scope to interfere by the High Court:

50. Another contention raised by learned counsel for the respondents- plaintiffs is that there is concurrent finding of fact and that there is no reason to interfere in the same. Again, this Court does not find merit in the contention, having regard to all the facts and circumstances of the case and when the Court is convinced that both the Courts have grossly erred in appreciating the evidence on file.

51. Learned counsel for the plaintiffs – contesting respondents has referred to ***"Avtar Singh & ors. v. Bimla Devi & ors. (2021) 13 SCC 816*** in order to contend that even as per Section 41 of Punjab Courts Act, 1918, the concurrent finding of fact cannot be interfered with, howsoever erroneous, gross or inexcusable the error may seem to be, in exercise of second appellate jurisdiction.

52. Reliance is also placed upon ***"Shivali Enterprises v. Godawari" 2022 SCC Online SC 1211,*** wherein it has been held by Hon'ble Supreme Court that:

> "17. It would thus be clear that this Court has held that, though it is not neces-

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sary 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 reexamine or reappreciate 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 reappreciation of evidence."

53. As it has been found in the present case that plaintiffs failed to prove due execution of agreement to sell Ex.P1 and rather, the same is proved to contain forged signatures of at least two of the executants namely, Ramesh and Jokhi Ram and without the plaintiffs having proved the validity of Ex.P1, the trial court while framing issues, wrongly put the burden to prove the forgery of the document on the defendants and besides this findings of courts below are found to be perverse in total disregard to the evidence on record, so question is as to whether High Court cannot intervene even in such circumstances.

54. Though, burden of proof may not be of much significance after both the parties led the evidence but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way will definitely vitiate the judgment. There are several precedents on the issue of the scope and ambit of the appreciation of evidence; interference in second appeal; the question of burden of proof; question of substantial question of law and such aspects but it is in the light of the facts and circumstances of the present case that it is required to be seen whether this court should intervene in the concurrent findings of facts of the courts below.

55. In ***"Mst. Chand Kaur v. Mst. Jiwi" 1968 Crl.J.554***, this Court referred to ***"N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board,***

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Madras" AIR 1949 Privy Council 157 and held that Section 115 of the Civil Procedure Code *(pertaining to revision)* empowers the High Court to satisfy itself, inter alia that in exercising jurisdiction the trial Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial, which is material in that it may have affected the ultimate decision. The crucial words are those that have been underlined. The error of procedure committed by the trial Court in wrongly casting the burden of proof on the defendants in respect of this issue, is a palpable or a gross error, which will materially affect the ultimate decision of the Court, on this issue.

56.1 In ***"Municipal Committee, Hoshiarpur v. Punjab State Electricity Board" 2010 (13) SCC 2016,*** Hon'ble Supreme Court considered as to when the second appeal is maintainable, where the finding of the Courts below is perverse. It has been held by as under:

> "17. While dealing with the issue, this Court in ***Leela Soni & Ors. v. Rajesh Goyal & Ors., (2001) 7 SCC 494***, observed as under:
>
> > "20. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.
> >
> > 21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:
> >
> > xx xx xx
> >
> > 22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal

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> provided the evidence on record is sufficient, in any of the following two situations: (1) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (2) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

56.2 After referring to Section 100 & 103 CPC, Hon'ble Supreme Court held as under:

"22………..Thus, it is evident that Section 103 C.P.C. is not an exception to Section 100 C.P.C. nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 C.P.C. in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

23. There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. ***(Vide: Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604; Karnataka Board of Wakf v. Anjuman- E-Ismail Madris-Un-Niswan, AIR 1999 SC 3067; and Dinesh Kumar v. Yusuf Ali, AIR 2010 SC 2679).***

24. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural

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irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. ***(Vide: Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685)***

25. In view of above, the law on the issue can be summarised to the effect that a second appeal lies only on a substantial question of law and it is necessary to formulate a substantial question of law before the second appeal is decided.

The issue of perversity itself is a substantial question of law and, therefore, Section 103 C.P.C. can be held to be supplementary to Section 100 C.P.C., and does not supplant it altogether. Reading it otherwise, would render the provisions of Section 100 C.P.C. redundant. It is only an issue that involves a substantial question of law, that can be adjudicated upon by the High Court itself instead of remanding the case to the court below, provided there is sufficient evidence on record to adjudicate upon the said issue and other conditions mentioned therein stand fulfilled. Thus, the object of the Section is to avoid remand and adjudicate the issue if the finding(s) of fact recorded by the court(s) below are found to be perverse. The court is under an obligation to give notice to all the parties concerned for adjudication of the said issue and decide the same after giving them full opportunity of hearing."

57. Similarly in ***"Easwari v. Parvathi" 2014 (15) SCC 255***, there was concurrent finding of Courts below. It was held by Hon'ble Supreme Court that there is no absolute ban on the High Court in second appeal to interfere with the facts. High Court cannot be precluded from reversing the order and judgment of the lower and Appellate Court, if there is perversity in the decision due to mis-appreciation of evidence.

58. In ***"Kashmir Singh vs. Harnam Singh" 2008 AIR Supreme Court 1749***, Hon'ble Supreme Court has reiterated the fact that though High Court will not interfere with the concurrent findings of the Courts below but it is not an absolute rule. There are some exceptions to it, such as - ignoring material evidence or acting on no evidence; drawing wrong inferences from the proved

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fact by applying the law erroneously; wrongly casting the burden of proof; basing the decision upon no evidence; where there is the evidence, but taken as a whole, it is not reasonably capable of supporting the finding.

59. In ***RSA-5792-2019 decided on 30.01.2024 titled "Sukhdev v. Manish Aggarwal and Others"***, a co-ordinate Bench of this Court discussed the scope of Section 41 of the Punjab Courts Act besides Section 100 of the Code of Civil Procedure in respect of the scope of interference in the Regular Second Appeal by holding that scope of interference in RSA is wider under Section 41 of the Punjab Courts Act when compared with Section 100 CPC. It will be relevant to produce the observations made by the Court in this regard:

> " 13. First of all, the scope of interference in regular second appeal is required to be examined. In the States of Punjab, Haryana and Union Territory Chandigarh, the filing of Regular Second Appeals is governed by Section 41 of the Punjab Courts Act, 1918, which reads as under:-
>
> ***"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 :
>
> (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; Explanation—A question relating to the existence or validity of a custom or usage shall be deemed to 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.
>
> (3) [Repealed by Section 2B of Punjab Act 6 of 1941]"
>
> 14. While interpreting Section 100 of the Code of Civil Procedure (hereinafter referred to as 'CPC'), the Hon'ble Supreme Court has consistently held that there is no prohibition in entertaining a second appeal provided the Court is

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satisfied that a finding of fact stand vitiated by non consideration of material evidence or erroneous approach. Reliance in this regard can be placed on the judgment passed in ***Municipal Committee, Hoshiarpur, vs. Punjab State Electricity Board and others, 2011 (1) CCC 1.*** In ***Vidhyadhar vs. Manikraoo and another, (1999) 3 SCC 573,*** the Supreme Court held that perverse finding based on no evidence is liable to be interfered with. ***In Easwari vs. Parvathi and others, (2014) 15 SCC 255***, it was held that when the finding is not supported by evidence due to misapplication of evidence, interference in second appeal is permissible. Similarly, in ***Shri Hafzat Hussain vs. Abdul Majeed, (2001) 7 SCC 189***, the Supreme Court held that non-interference in the finding of fact is not an absolute rule. In ***Yadarao Dajiba Shrawane (dead) by LRs vs. Nani Lal Harakchand Shah (Dead) and others, (2002) 6 SCC 404***, the Court held as under:-

> "31. From the discussions in the judgment it is clear that the High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades the records are voluminous. The High Court as it appears from the judgment has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance."

15. Under Section 41 of the Punjab Courts Act, 1918, the scope of interference in the regular second appeal is wider when compared with Section 100 CPC. On careful reading of the three sub clauses of Section 41(1) of the Punjab Courts Act, 1918, it is evident that the decision which is contrary to law or the decision which failed to determine some material issue of law as also a sub-

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stantial error or defect in the procedure provided under the Code of Civil Procedure 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, are amenable to interference in second appeal. Sub-clause No.(c) of Section 41 (1) of the Punjab Courts Act, 1918, enables the High Court for the States of Punjab, Haryana and Union Territory, Chandigarh, to re appreciate the evidence, if the decision is suffering from substantial error or defect resulting in defect in the decision of the case. Consequently, it is permissible for the Court while deciding second appeal to re-appreciate the evidence if the decisions of the Courts suffer from perversity. However, it is not permissible to interfere if two views are possible. The interference in the second appeal has to be restricted to rare and exceptional cases where the court finds that the findings of fact stand vitiated by erroneous approach based on miss application of evidence or reliance on inadmissible evidence."

60. To conclude, legal principles, which can be culled out are that though High Court is not to interfere with the concurrent findings of the Courts below but it is not an absolute rule. There are some exceptions for interference by the High Court, when it is found that:

- When finding of fact by the Courts below is vitiated by non consideration of material evidence or erroneous approach.
- The Courts have drawn wrong inferences from the proved facts by applying the law erroneously.
- The Courts have wrongly cast the burden of proof.
- When decision is based upon no evidence, which would mean that not only there is total dearth of evidence but also, where is the evidence taken as a whole, is not reasonably capable of supporting the finding.
- When the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence.

61. In the light of above exceptions, when the evidence on record in the present case is analysed, it is found that courts below not only wrongly cast

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the burden of proof on defendants to prove fabrication/fraud in respect of agreement to sell Ex.P1, the execution of which the plaintiffs as propounder failed to prove, the courts below have even drawn wrong inferences from the proved facts by applying the law erroneously. The judgment of trial court and also of the first appellate court as final Court of fact, is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence and by ignoring material evidence. It is found that the evidence taken as a whole, is not reasonably capable of supporting the findings returned by the courts below.

62. As such, the contention of Ld. Counsel for contesting respondents to the effect that there is no reason to interfere in concurrent finds of facts of courts below, is found to be devoid of any merit and, so the same is rejected.

Effect of non-joinder of necessary party:

63. Proceeding further, it is not in dispute that there are five co-owners of the property in dispute. Apart from the defendants, i.e., Smt. Chawli Devi, Lakhpat Rai, Ramesh Kumar and Smt. Kamlesh Rani, Jokhi Ram are co-owner to the extent of 1/5th share. Jokhi Ram is also alleged to be one of the executants of the agreement to sell (Ex.P1). Prior to filing of the suit, Jokhi Ram had admittedly expired. Therefore, in order to seek the relief of specific performance based upon the agreement (Ex.P1) purported to have been executed by all the five co-owners, it was imperative for the plaintiffs to implead all the co-owners, i.e. executants of the agreement to sell. However, legal heirs of Jokhi Ram were not impleaded as a party to the suit.

64. It is not in dispute that apart from his widow Smt. Chawli Devi, Jokhi Ram had left behind four other legal heirs, i.e., two sons, (namely Ramesh Kumar and Lakhpat Rai) and two daughters, (i.e., Raj Dulari and Urmila). On the death of Jokhi Ram, succession opened regarding his estate, as succession never remains in abeyance and therefore, his 1/5th share in the suit property devolved upon his five legal heirs, which means that Urmila and Raj Dulari had 1/25th share each in the suit property. Thus, even at the time of filing the

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suit, said Raj Dulari and Urmila had 1/25th share each, inasmuch as on the death of Jokhi Ram, they had become co-owners of the suit property to this extent. Simply by pleading in the plaint that the plaintiffs were not aware about the legal heirs of Jokhi Ram, will not absolve the plaintiffs from the necessity to implead all the legal heirs of Jokhi Ram.

65. The contention of learned counsel for the contesting respondents that Chawli Devi, Ramesh and Lakhpat Rai were duly impleaded as a party to the suit; and that Raj Dulari and Urmila were also brought on record after the death of Chawli, has no substance. First of all, Lakhpat Rai, Ramesh and Chawli Devi were impleaded in their individual capacity being co-owners of 1/5th share each in the suit property and not as legal heirs of Jokhi Ram to represent his estate. Further, Urmila and Raj Dulari were brought on record after the death of Chawli Devi as her LRs and not in the capacity of LRs of Jokhi Ram, so as to represent his estate. Even in 2002, when legal representatives of Urmila were brought on record, plaintiffs did not take any step to implead the legal heirs of Jokhi Ram as a party to the suit. So much so, when Urmila alongwith Raj Dulari moved an application to produce evidence before the trial Court, the application was declined, as noticed earlier.

66. To know the effect of non-joinder of necessary parties, Oder 1 Rule 9 CPC is relevant, which reads as under:-

> "***Order I Rule 9 CPC*** - ***Misjoinder and non-joinder.***—No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:
>
> Provided that nothing in this rule shall apply to non-joinder of a necessary party."

67. Reading of the above Rule makes it clear that as a general principle, a suit cannot be defeated by the reason of mis-joinder or the non-joinder of the necessary parties and that Court may decide the controversy in question so far as the rights and the interest of the parties actually before it,

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are concerned. However, this general principle is not applicable, when it is a case of non-joinder of such a necessary party, in whose absence the controversy can not be decided and the main relief claimed in the suit cannot be granted.

68. Reliance can be placed on ***Moreshar Yadaorao Mahajan Versus Vyankatesh Sitaram Bhedi 2022 SCC OnLine SC 1307.*** In that case, suit property was jointly owned by the defendant, his wife and three sons. Defendant entered into agreement to sell with the plaintiff. Suit for specific performance filed by plaintiff was decreed by the trial court. The appellate court affirmed it. Bombay High Court, in the appeal filed by defendant, set aside the judgments of courts below and declined relief of specific performance, as it was found that suit was bad for non-joinder of necessary parties. Plaintiff approached Apex Court. Dismissing the appeal, it was observed by Hon'ble Supreme Court as under:

> "17. This Court, in the case of ***Mumbai International Airport Private Limited (2010) 7 SCC 417,*** has observed thus:
>
> > "15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."
>
> 18. It could thus be seen that a "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed.

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> 19. As already discussed hereinabove, the plaintiff himself has admitted in the plaint that the suit property is jointly owned by the defendant, his wife and three sons. A specific objection was also taken by the defendant in his written statement with regard to non-joinder of necessary parties. Since the suit property was jointly owned by the defendant along with his wife and three sons, an effective decree could not have been passed affecting the rights of the defendant's wife and three sons without impleading them. Even in spite of the defendant taking an objection in that regard, the plaintiff has chosen not to implead the defendant's wife and three sons as party defendants. Insofar as the reliance placed by Shri Chitnis on the judgment of this Court in the case of ***Kasturi (supra)*** is concerned, the question therein was as to whether a person who claims independent title and possession adversely to the title of a vendor could be a necessary party or not. In this context, this Court held thus:
>
> > "7. …….From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are" (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."
>
> 20. It can thus be seen that what has been held by this Court is that for being a necessary party, the twin test has to be satisfied. The first one is that there must be a right to some relief against such party in respect of the controversies involved in the proceedings. The second one is that no effective decree can be passed in the absence of such a party.
>
> 21. In view of the plaintiff's own admission that the suit property was jointly owned by the defendant, his wife and three sons, no effective decree could have been passed in their absence.
>
> 22. In that view of the matter, we find that no error can be noticed in the judgment of the High Court. The appeals are therefore liable to be dismissed."

69. Facts of the present case are squarely covered by the abovesaid judgment. In the present case also, Smt. Urmila and Raj Dulari are co-owners in the suit property to the extent of $1/25^{th}$ share each at the time of filing of the suit, so obviously they were necessary party to the suit. It has already been

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noticed that legal heirs of Jokhi Ram, who was allegedly one of the executants of the agreement to sell, were not brought on record. In these circumstances, this Court has no hesitation to conclude that suit is bad for non-joinder of necessary parties and on this ground alone, the suit was liable to be dismissed.

Non-filing of appeal before first appellate court by appellants other than Ramesh – effect thereof:

70.1 Another contention of counsel for the contesting respondents is that only Ramesh had filed the appeal before the First Appellate Court and no other defendants and so, appeal filed by Lakhpat Rai and Kamlesh before this court is not maintainable. Learned counsel refers to ***"Shri Gangai Vinayagar Temple & another" 2015(3) SCC 624*** in order to contend that principle of res judicata is applicable to appeals under Section 96; that losing party must file appeal in respect of all adverse decrees. Once decree is not assailed, it assumes the character of former suit. Law considers it an anathema to allow a party to achieve a result indirectly, when it has deliberately or negligently failed to directly initiate proceedings towards this purpose.

70.2 It may be noted that in the above cited case i.e. ***Shri Gangai Vinayagar Temple and another (supra)***, multiple suits were disposed of by one common judgment but by separate decrees. Appeal was preferred against the decree passed in one suit only. The suit, in respect of which decree was passed but appeal was not preferred against, was held to have assumed the character of the former suit.

70.3 The facts of present case are quite distinguishable and therefore, principles laid in ***Shri Gangai Vinayagar Temple's case*** are not applicable to the facts of the present case.

71. Learned counsel for the respondents also referred to ***"Joginder Singh & Anr. v. Jugal Kishore & Anr." 2017 (1), RSA No.175 of 2015 Rent LR 140.*** In that case, judgment of the trial Court attained finality against defendant Nos.2 & 3, who had not filed the appeal. It is only defendant No.1, who had filed appeal before the first Appellate Court. The other defendants had not

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joined him in the appeal. It was held by this court that second appeal by defendant Nos.2 and 3 was not maintainable.

72. On the other hand, it is argued by Ld. Counsels for appellants Lakhpat Rai and Kamlesh and also by counsel for respondent Urmila that fragmentation of the property in Chandigarh is not permissible under law and as such, Lakhpat Rai and Kamlesh, even if did not file the appeal before the First Appellate Court, their appeal before this court is maintainable under Order 41 Rule 33 CPC.

73. It is no doubt true that except for defendant No.4 Ramesh Kumar, who filed the first appeal, none of the other defendants had filed the appeal before the first Appellate Court. However that in itself cannot be ground to reject these appeals considering the fact that fragmentation of the residential property in Chandigarh is not permissible under law. It has already been noticed that suit is also bad for non-joinder of necessary party, as estate of Jokhi Ram remained unrepresented.

74. Capital of Punjab (Development and Regulation) Act, 1952 regulates the developments in the city of Chandigarh. In the year 1960, the Government of Punjab in exercise of the powers conferred under Section 5 and 22 of the 1952 Act had made Chandigarh (Sale of Sites and Buildings) Rules 1960. Rule 14 of the said 1960 Rules prohibits the fragmentation or amalgamation of any site or building. In ***"Residents Welfare Association v. Union Territory of Chandigarh", 2023 Live Law (SC) 24***, Hon'ble Supreme Court of India has prohibited the conversion of independent residential units as apartments in Chandigarh Phase-I to preserve the heritage character of Corbusier's city. Any fragmentation, division, bifurcation and apartmentalization of residential unit in Phase-I of Chandigarh are prohibited.

75. Since in the present suit, the suit property, i.e. House No.1, Sector 28A falls in the above category, i.e. Phase-I of Chandigarh, which is an undisputed fact, therefore, by permitting part performance of the contract, fragmentation cannot be allowed by this Court, as it will be in clear violation of law.

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76. For the above reasons, contention of Ld. Senior advocate for the plaintiffs – contesting respondents to reject the appeal of Lakhpat Rai & Kamlesh, cannot be accepted.

Absence of clause in the agreement for seeking specific performance:

77. In order to contend that plaintiff is not entitled for specific performance, as alternative was already provided in the agreement, counsel for the appellants have relied upon ***"Jai Kishan Garg v. Randhir Singh", Civil Appeal No.7896 of 2024 (SLP) Civil No.24741 of 2019***, decided by Hon'ble Supreme Court on 22.07.2024, wherein it was observed that the relief of specific performance is a discretionary relief and where an alternative was already provided in the agreement itself and there was a valid reason for the defendant to not execute the sale deed, the alternative relief ought to have been granted.

78. In reply to the contention of counsel for the appellants that there is no specific provision in the agreement to sell Ex.P-1 so as to entitle the plaintiff to seek the relief of specific performance and that there is a mention only of the alternative remedy of claiming the refund of earnest money with double the amount, learned counsel for the respondents has relied upon ***"Man Kaur v. Hartar Singh Sangha" (2010) 10 SCC 512***, wherein it has been held by Hon'ble Supreme Court ;

> "28. It is thus clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a pro-

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vision for specific performance, the court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible.

29. We may attempt to clarify the position by the following illustrations (not exhaustive):

> (A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

> (B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.
>
> (C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

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30. In this case, clauses 11 and 12 of the agreement deal with consequences of breach. They are extracted below :

> "11. That in case the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in this agreement to sell in matter of execution of the sale deed and its registration, on the receipt of the balance sale price, he shall be liable to pay double the amount of the earnest money received by her from the purchaser.
>
> 12. That in case the purchaser fails to get the transaction of the sale completed by means of execution and registration of sale deed according to the terms of this agreement for sale, he shall forfeit his earnest money of Rs.10,000/- advanced by the purchaser to the said seller."

The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract."

79. Thus, the fact that there is no clause in the agreement to seek the remedy of specific performance and that the contract provides for the alternative in case of default, in itself cannot be a reason to decline the relief of specific performance.

80. In the present case, it is no doubt true that there is no mention about the relief of specific performance in the agreement to sell but that in itself cannot be a reason to decline specific performance to the plaintiffs- respondents, but only when the legality and validity of the agreement to sell and all other necessary ingredients so as to grant this relief are proved on record. However, in this case, validity of the agreement itself is not proved and as such, it is held that the plaintiffs- respondents have been wrongly granted the benefit

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of specific performance by the Courts below.

Effect of efflux of time and escalation of price :

81. Learned counsel for the respondents has also cited various authorities in order to contend that efflux of time and escalation of price of the property by itself cannot be a valid ground to deny the relief of specific performance. Reliance has been placed upon ***"Zarina Siddiqui v. Ramalingam" (2015) 1 SCC 70; "K. Prakash v. B.R Sampath Kumar" (2015) 1 SCC 705; "Narinderjit Singh v. North Star Estate Promoters Ltd." (2012) 5 SCC 712***.

82. This is true that escalation in prices cannot be a ground to decline the relief of specific performance nor the hardship on the part of vendors be a ground but still the Court is required to look into all the facts and circumstances in order to see as to whether the equity lies in favour of the plaintiff to grant the relief of specific performance. After all, the equitable relief is to be granted and the discretion is to be exercised based upon the sound judicial principles.

Specific Performance - Discretionary relief:

83. It is contended by learned Sr. Counsel for the contesting respondents-plaintiffs that in case, the court comes to the conclusion that suit is bad for non-joinder of necessary parties, as legal heirs of Jokhi Ram were not impleaded as a party, plaintiffs are entitled to a decree for specific performance in the suit property at least to the extent of 80%, i.e. qua the share of defendants impleaded in the suit.

84. There is no merit in the contention. The Court is not inclined to exercise the discretion of granting the relief of specific performance to a person like plaintiff, who has approached the Court on the basis of forged and fabricated document and in collusion with one of the defendant Lakhpat Rai, opened joint accounts in the name of five vendors so as to show the payment of money to them.

85. While deciding as to whether or not to grant the relief for specific performance, the Court must be cognizant of the conduct of the parties, the

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escalation in the prices of the suit property is considered whether one party will be unfairly benefited for the decree as has been held of Hon'ble Supreme Court in case of ***"Shenbegam v. K.K. Rathinavel", 2022 SCC Online SC 71.***

86. In ***"C. Haridasan v. Anappath Parakkattu Vasudeva Kurup & Others" 2023 LiveLaw (SC) 31***, the High Court had declined the relief for specific performance by placing reliance on the Section 20 of the Specific Relief Act prior to the same being substituted by way of Act No.18 of 2018. Matter went to the Hon'ble Supreme Court. It was held as under:

> "12. The High Court has relied on Section 20 of the Act, prior to the same being substituted by way of Act No. 18 of 2018, to deny the relief of specific performance to the plaintiff. Section 20 of the Act as it stood prior to the Amendment Act of 2018 provided that the jurisdiction to decree specific performance is discretionary. It said that the Court is not bound to grant such relief merely because it is lawful to do so. Such a discretion, however, was not to be exercised arbitrarily, but ought to have been based on sound and reasonable judicial principles. The Section also specified the circumstances in which the Court may properly exercise the discretion not to decree specific performance and it also specified when, in an appropriate case, a decree could be given by proper exercise of discretion. Section 20, as it then stood was not an exhaustive provision, but merely illustrative as it was not possible to define the circumstances in which equitable relief could or could not be granted. If, therefore, on a consideration of all the circumstances of the case, the Court thought that it would be inequitable to grant the relief prayed for, it should not do so.
>
> 13. However, in Shenbagam vs. K.K. Rathinavel, 2022 SCC OnLine SC 71, this Court reiterated that in deciding whether or not to grant the relief of specific performance, the Courts must be cognizant of the conduct of the parties, the escalation in the price of the suit property and consider whether one party will unfairly benefit from the decree.
>
> 14. By way of the Specific Relief (Amendment) Act, 2018 (hereinafter "the Amendment Act"), Section 20 of the Act has been substituted, thereby rendering the relief of specific performance to be a statutory remedy, instead of a discretionary remedy. Previously, the unamended provision granted the

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courts the discretion to deny the relief of specific performance, on the basis of judicially developed exceptions, even where it would otherwise be lawful to direct specific performance. Now, such statutorily created exceptions have been excluded. The Amendment Act has eliminated the discretion of the courts in cases involving specific performance of contracts and grants a right to an aggrieved party to seek specific performance of a contract in certain cases, subject to the provisions contained in Sections 11(2), 14 and 16 of the Act. These Sections deal with 'Cases in which specific performance of contracts connected with trusts being enforceable', 'contracts which cannot be specifically enforced' and 'personal bars to relief,' respectively.

15. It is however to be noted that notwithstanding substitution of Section 20 of the Act, the position of law on all material aspects, such as the essential elements of readiness and willingness and other aspects under the unamended Section 16 remains the same. In this regard, the decision of this Court in Mehboob-Ur-Rehman (Dead) through LRs vs. Ahsanul Ghani – [(2019) 19 SCC 415] may be referred to. In the said case, this Court held that even following the amendment of the Specific Relief Act, 1963, by way of Act No. 18 of 2018, the position of law on all material aspects remains the same. It was observed that, even following the amendment, the law was to the effect that specific performance of a contract could not be granted or enforced in favour to the person who fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms of which, the performance has been prevented or waived by the other party.

16. Reference may also be had to the decision of this Court in Sughar Singh vs. Hari Singh (Dead) through LRs and Ors., A.I.R. 2021 SC 5581. In the said case, the question as to applicability of the unsubstituted provision of Section 20 of the Act on transactions entered into prior to the date on which the Amendment Act of 2018, was kept open. However, the Court held that the provisions subsequently substituted, may act as a guide to Courts in exercising discretion in matters dating prior to the substitution, even though such provisions may not apply retrospectively. The relevant observations of this Court have been extracted as under:

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> "10. Now, so far as the finding recorded by the High Court and the observations made by the High court on Section 20 of the Act and the observation that even if the agreement is found to be duly executed and the plaintiff is found to be ready and willing to perform his part of the Agreement, grant of decree of specific performance is not automatic and it is a discretionary relief is concerned, the same cannot be accepted and/or approved. In such a case, many a times it would be giving a premium to the dishonest conduct on the part of the defendant/executant of the agreement to sell. Even the discretion under Section 20 of the Act is required to be exercised judiciously, soundly and reasonably. The plaintiff cannot be punished by refusing the relief of specific performance despite the fact that the execution of the agreement to sell in his favour has been established and proved and that he is found to be always ready and willing to perform his part of the contract. Not to grant the decree of specific performance despite the execution of the agreement to sell is proved; part sale consideration is proved and the plaintiff is always ready and willing to perform his part of the contract would encourage the dishonesty. In such a situation, the balance should tilt in favour of the plaintiff rather than in favour of the defendant – executant of the agreement to sell, while exercising the discretion judiciously. For the aforesaid, even amendment to the Specific Relief Act, 1963 by which section 10(a) has been inserted, though may not be applicable retrospectively but can be a guide on the discretionary relief. Now the legislature has also thought it to insert Section 10(a) and now the specific performance is no longer a discretionary relief. As such the question whether the said provision would be applicable retrospectively or not and/or should be made applicable to all pending proceedings including appeals is kept open. However, at the same time, as observed hereinabove, the same can be a guide." (emphasis by me)

17. In B. Santoshamma vs. D. Sarala and Anr., (2020) 19 SCC 80 this Court, while examining the amendment made to Section 10 of the Act observed that after the amendment to Section 10, the words "specific performance of any contract may, in the discretion of the Court, be enforced" have been substituted with the words "specific performance of a contract shall be

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> enforced subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16". It was concluded that although the relief of specific performance of a contract is no longer discretionary, after the amendment, the same would still be subject to Section 11, Section 14 and Section 16 of the Act.
>
> 18. Applying the law discussed above to the facts of the present dispute, I am of the view that even in the absence of discretionary power under Section 20 to deny the relief of specific performance, the plaintiff was not entitled to claim such relief as a matter of right. The position of law, even following the amendment of 2018 remains that the provisions of Section 16 of the Act have to be mandatorily complied with by the party seeking the relief of specific performance. The relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract………"

87. In ***"P. Purushotham Reddy vs. M/s Pratap Steels Ltd." (D.B.) AIR 2003 (A.P.) 141,*** a Division Bench of Andhra Pradesh High Court by referring to ***"P.V. Joseph's Son Mathew v. Kuruvila's Son" AIR 1987 Supreme Court 2328*** held as under:

> "Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to court as to decreeing specific performance. The court is not bound to grant specific relief merely because it is lawful to do so. It is true, the discretion conferred upon the courts is not arbitrary but is required to be exercised in a reasonable and sound manner guided by judicial principles. While exercising the discretion, the court is required to meticulously consider all the facts and circumstances of the case. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff."

88. In the present case, plaintiffs don't deserve the discretion of specific performance for following main reasons, amongst others:

1. Agreement to sell (Ex.P1) is not proved to have been executed by Jokhi Ram and Ramesh. Rather, the signatures of Jokhi Ram and Ramesh on the agreement to sell (Ex.P1) are proved to be forged. Even the thumb

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impressions of Smt. Chawli Devi on the agreement are not proved beyond doubt.

1. When a party does not approach the Court with clean hands, it is not entitled for the discretionary relief like specific performance by the Court. Plaintiffs having approached the Court on the basis of a forged document, cannot claim the relief for specific performance even in respect of the part of the suit property.
2. Suit is bad for non-joinder of necessary parties, as legal heirs of Jokhi Ram, one of the co-owner of the suit property have not been impleaded as party defendants.

89. Looking into the entirety of the facts and circumstances, which includes the conduct of the plaintiffs, this Court is not inclined to grant the relief of specific performance to the plaintiffs, even in respect of any part of the suit property. It is also held that the Courts below committed grave error in granting the said relief of specific performance to the plaintiffs, by ignoring the material evidence on record.

<u>Conclusion:</u>

90. Consequent to entire discussion as above, it is held that the judgment passed by the Courts below cannot be sustained in the eyes of law. Plaintiffs- respondents have not been able to make out a case for grant of specific performance. Judgments and decrees passed by the courts below granting the relief of specific performance are hereby set aside.

91. However. It is made clear that since defendant Lakhpat Rai along with his wife Kamlesh Kumari have admitted the receipt of the amount of ₹2,00,000/- on 24.07.1994 from plaintiff N: 1, therefore, they are bound to refund it to said plaintiff. As such, a decree for recovery of ₹2,00,000/- in favour of the plaintiff N: 1 is granted against defendant Nos.2 and 3 only i.e. Lakhpat Rai and Kamlesh. The said amount shall be refunded to him along with interest @ 9% per annum from the date of receipt of amount i.e. 24.07.1994 till it is actually paid to the plaintiff. Appeals are partly allowed accordingly.

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92. Photocopy of this judgment be placed on the file of connected case.

14.10.2024 **(DEEPAK GUPTA)**
Neetika Tuteja **JUDGE**

Whether speaking/reasoned? *Yes*
Whether reportable? *Yes*

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