REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5822 OF 2019
(ARISING OUT OF SLP (CIVIL) NO. 32979 OF 2016)

RANDHIR KAUR .....APPELLANT(S)

VERSUS

PRITHVI PAL SINGH & ORS. .....RESPONDENT(S)

J U D G M E N T

HEMANT GUPTA, J.

Leave granted.

2) The appellant is plaintiff who has sought specific performance of agreement to sell dated November 5, 2004 in respect of land measuring 193 kanals 18 marlas at the rate of Rs.1,27,000/- per acre. A sum of Rs.12,50,000/- and Rs.1,00,000/- was paid to defendant Nos. 1 and 2 as earnest money at the time of execution of agreement to sale. The date of registration of sale deed was fixed as January 30, 2005. The suit for specific performance was filed on April 3, 2006.

3) The learned trial court vide judgment and decree dated April 13,

2010 decreed the suit. The appeal against said judgment and decree remained unsuccessful when such appeal was dismissed on August 11, 2012. However, in the second appeal, the decree for specific performance of the agreement was declined but instead decree for recovery of Rs.13,50,000/- paid by the appellant along with interest at the rate of 12% was granted. The High Court held that plaintiff was ready and willing to perform the agreement and that Dhanwant Singh was not the attorney to act on behalf of the appellant.

4) Learned counsel for the appellant-plaintiff argued that in view of the judgment of this Court in ***Pankajakshi (D) through LRs & Ors.*** v. ***Chandrika & Ors.***[1], substantial question of law may not be required to be framed but in second appeal, the finding of fact recorded cannot be interfered with even in terms of Section 41 of the Punjab Courts Act, 1918[2].

5) It is argued that the High Court has not recorded any finding which satisfies the tests laid down in Section 41 of the Punjab Act. It is further argued that though the first power of attorney dated September 29, 1999 was not in respect of land in question but in the subsequent power of attorney dated September 14, 2005, the appellant has ratified all the acts of the Attorney Dhanwant Singh including the purchase of movable and immovable property

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1 (2016) 6 SCC 157
2 for short, 'Punjab Act'

anywhere in her name. It is argued that the agreement dated November 5, 2004 was entered into by the appellant through her son Dhanwant Singh in whose favour registered power of attorney was executed on September 14, 2005. It is the said Dhanwant Singh who has paid the amount to the defendants. The plea of the defendants that Dhanwant Singh was not authorised to act on behalf of his mother is wholly untenable as the defendants having received the amount from Dhanwant Singh. The finding that sum of Rs.13,50,000/- was paid by the appellant through Dhanwant Singh has been accepted by the High Court when the Court recorded the following findings:

> "17. Adverting to the facts of the case in hand, agreement of sale dated November 05, 2004 (Ex.P-1) was executed by appellants/defendants No. 1 and 2 on their behalf as well as on behalf of defendants No. 3 and 4, on receipt of a sum of `13.5 lacs as earnest money. Though, amount of earnest money has been disputed by learned counsel for appellants-defendants No. 1 and 2 but there is no cogent and convincing evidence in this regard. So, it cannot be safely concluded that agreement of sale (Ex.P-1) was executed by defendants No.1 and 2 on receipt of a sum of Rs.13.5 lacs as an earnest money. Execution of document has also not been otherwise disputed by appellants-defendants and respondent-plaintiff. Otherwise also, no amount of oral evidence can be taken into consideration and pales into insignificance, in view of a recital contained in document."

6) In view of the findings recorded, it is argued that the High Court committed material illegality in declining the relief of specific performance on the ground that Dhanwant Singh was not authorised to act on behalf of the appellant and, that the appellant has not appeared as a witness herself.

7) It is also argued that defendants have not raised any plea in the written statement that Dhanwant Singh was not the authorised representative of the plaintiff to enter into agreement on her behalf.

8) On the other hand, Mr. Neeraj Kumar Jain, learned senior counsel appearing for the defendants, submitted that first power of attorney dated September 29, 1999 registered on January 18, 2000 does not relate to land in question nor it empowers Dhanwant Singh to purchase any other land. The power of attorney executed in favour of Dhanwant Singh on September 14, 2005 empowering him to purchase movable or immovable property but such power of attorney relates to purchase in future and not in respect of the agreement already executed. It is argued that plaintiff has never intimated the defendants about Dhanwant Singh, as being the attorney of the plaintiff. The High Court was justified in interfering in the second appeal as the decision of the courts below was contrary to law as the findings recorded by the trial court and the appellate court is not based upon facts on record.

9) This Court in ***Kirodi (since deceased) through his LR*** v. ***Ram Parkash & Ors.***[3] has held that judgments in ***Chand Kaur(D)***

[3] 2019 SCC OnLine SC 759

through LRs. v. ***Mehar Kaur(D) through LRs***[4] and ***Surat Singh(D)*** v. ***Siri Bhagwan & Ors.***[5], are contrary to the Constitution Bench judgment in ***Pankajakshi*** case, therefore, not correct law. It, thus, transpires that in terms of the Constitution Bench judgment, substantial questions of law are not required to be framed in second appeal but, the jurisdiction of the High Court is not to reverse the finding of facts in terms of Section 41 of the Punjab Act. The jurisdiction of the High Court in second appeal is circumscribed by the provisions of Section 41 of the Punjab Act. The first ground is that decision being contrary to law or to some custom or usage having the force of law. The argument of Mr. Jain is that decision of the first appellate court is contrary to law as the plaintiff has failed to prove readiness and willingness to perform the agreement. The readiness and willingness to perform a contract is a finding of fact on the basis of oral and documentary evidence led by the parties. The first appellate court has recorded the following findings on the question of readiness and willingness of the plaintiff:

> "19. … Now what is to be seen if both the parties appeared to be at fault because when the agreement to sell has been provide and the defendant Nos. 1 and 2 have also shown that they are entering into an agreement on behalf of defendant Nos. 3 and 4 being their power of attorney but till date the defendant Nos. 1 and 2 failed to produce any power of attorney in their favour on behalf of defendant Nos. 3 and 4 and defendant Nos. 3 and 4 had contested the bonafide of

[4] 2019 SCC OnLine SC 426
[5] (2018) 4 SCC 562

defendant Nos. 1 and 2 to enter into an agreement to sell on their behalf when there is no general power of attorney in favour of defendant Nos. 1 and 2. It appears that both the parties were playing hide and seek. Thus, the defendants now cannot take the plea that they had no knowledge that plaintiff Randhir Kaur had executed any power of attorney in favour of Dhanwant Singh. The plaintiff approached the Advocate, purchased the stamp for filing the suit and filed the suit for specific performance and there is no counter claim on behalf of the defendants and the plaintiffs were entitled either to a money decree or forfeiture of their earnest money as per agreement because there was no readiness and willingness on the part of the plaintiff. Therefore, it has to be held that the plaintiff was ready and willing to perform her part of contract."

10) The first and the foremost question arises in respect of scope of interference in second appeal in Punjab and Haryana is governed by Section 41 of the Punjab Act. Prior to amendment in the Code of Civil Procedure vide CPC (Amendment) Act, 1976 w.e.f. February 1, 1977, the scope of interference in second appeal under the Punjab Act as well as under the Code of Civil Procedure as it existed before the amendment was on similar grounds. Section 41 of the Punjab Act and Section 76 of CPC as it existed prior to April 1, 1977 reads as under:

Section 41 of Punjab Act	**Section 76 of CPC**
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	100 (1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court on any of the following grounds, namely: (a) the decision being contrary to law or to some usage having the

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; (2) An appeal may lie under this section from an appellate decree passed ex parte.	force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by this Code 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. (2) An appeal may lie under this Section from an appellate decree passed *ex parte*.

11) The effect of the Constitution Bench judgment in ***Pankajakshi*** is that in second appeal, the scope of interference within the Punjab and Haryana High Court would be the same as Code of Civil Procedure existed prior to 1976 amendment. The provisions of Section 41 of the Punjab Act and of Section 100 of the CPC are *pari materia*.

12) Some of the judgments of this Court dealing with the scope of the old Section 100 are required to be discussed. In a judgment reported in ***Deity Pattabhiramaswamy*** v. ***S. Hanymayya & Ors.***[6] **–** *Three Judges*, while examining the scope of Section 100 of CPC, held as under:

> "15. The finding on the title was arrived at by the learned District Judge not on the basis of any document of title but on a consideration of relevant documentary and oral evidence adduced by the parties. The learned Judge, therefore, in our opinion, clearly exceeded his jurisdiction in setting aside the said finding. The provisions of Section

[6] AIR 1959 SC 57

100 are clear and unambiguous. As early as 1891, the Judicial Committee in *Durga Chowdhrani* v. *Jawahir Singh* [17 IA 122] stated thus:

> "There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be". The principle laid down in this decision has been followed in innumerable cases by the Privy Council as well as by different High Courts in this country. Again the Judicial Committee in *Midnapur Zamindari Co.* v. *Uma Charan* [29 CWN 131] further elucidated the principle by pointing out:
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> "If the question to be decided is one of fact it does not involve an Issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents, have to be construed."

16. Nor does the fact that the finding of the first appellate court is based upon some documentary evidence make it any the less a finding of fact (See *Wali Mohammad* v. *Mohammad Baksh*, 11 Lahore 199). But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100 of the CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100 of the CPC. We have, therefore, no alternative but to set aside the decree of the High Court on the simple ground that the learned Judge of the High Court had no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence. In the result, the decree of the High Court is set aside and the appeal is allowed with costs throughout."

13) Later, in a judgment, reported in ***Kshitish Chandra Bose*** v.

Commissioner of Ranchi[7] **-** *three Judges,* of this Court held that the High Court has no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. The Court held as follows:-

> "11. On a perusal of the first judgment of the High Court we are satisfied that the High Court clearly exceeded its jurisdiction under Section 100 in reversing pure concurrent findings of fact given by the trial court and the then appellate court both on the question of title and that of adverse possession. In the case of *Kharbuja Kuer* v. *Jangbahadur Rai* [AIR 1963 SC 1203 : (1963) 1 SCR 456] this Court held that the High Court had no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. In this connection this Court observed as follows:
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> > "It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact.
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> > As the two courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding."
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> To the same effect is another decision of this Court in the case of *R. Ramachandran Ayyar* v. *Ramalingam Chettiar* [AIR 1963 SC 302 : (1963) 3 SCR 604] where the Court observed as follows:
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> > "But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court, however erroneous the said conclusions may appear to be to the High Court, because, as the Privy Council observed, however, gross or inexcusable the error may seem to be there is no jurisdiction under Section 100 to correct that error."

14) In another judgment reported in ***Gurdev Kaur & Ors.*** v. ***Kaki &***

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[7] (1981) 2 SCC 103

Ors.[8], the rationale behind permitting second appeal on question of law after the amendment was considered. It was held that after the 1976 amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The Court held as under:

> "71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 CPC have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.
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> 73. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a note of warning that no court in India has power to add to, or enlarge, the grounds specified in Section 100."

15) The Division Bench of Punjab and Haryana High Court in a judgment reported in ***Sadhu*** v. ***Mst. Kishni***[9] set aside the judgment of the learned Single Bench in an intra court appeal in terms of the provisions of law as it existed prior to 1976, and held as under:

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8 (2007) 1 SCC 546
9 1980 AIR (Punjab) 85

> "12. The scope of second appeal as envisaged by section 100 of the Civil Procedure Code and section 41 of the Punjab Courts Act has been a matter of judicial scrutiny a number of times by this court as well as by the final court, that is, the Suprems Court of India. The learned counsel for the appellant has actually made a reference in this regard to *Detty Paitabhiramaswami* v. *S. Hanymayya* [AIR 1959 SC 57.], *Madamanchi Ramappa* v. *Muthaluru Bojjappa* [AIR 1962 SC 1933.], *Bithal Dass Khanna* v. *Hafiz Abdul Hai* [1969 S.C. Notes 481.] and *Afsar Shaikh* v. *Soleman Bibi* [(1976) 2 SCC 142 : AIR 1976 SC 163.] . These pronouncements; in a nutshell, lay down that there is no jurisdiction to entertain a second appeal on the ground of a erroneous finding of fact, however gross or inexecusable the error may seem to be. Nor does the fact that the finding of the first appellate Court is upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate court based upon an appreciation of the relevant evidence. Their Lordships have further observed that the only ground on which such an appeal can be said to be competent is where there is an error in law or procedure and not merely on an error on a question of fact.
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> 14. In view of the above discussion, we are clearly of the view that the learned Single Judge exceeded his jurisdiction in setting aside the findings of the fact on issue No. 2. The provisions of section 100 being clear and unambiguous, there was no scope for interference with those findings. We thus allow the appeal and set aside the judgment of the learned Single Judge and affirm the judgment and decree passed by the District Judge. The parties are, however left to bear their own costs."

16) A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of

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

17) In view of the above, we find that the High Court could not interfere with the findings of fact recorded after appreciation of evidence merely because the High Court thought that another view would be a better view. The learned first appellate court has considered the absence of clause in the first power of attorney to purchase land on behalf of the Plaintiff; the fact that the plaintiff has not appeared as witness.

18) A perusal of the findings recorded show that the learned first appellate court has returned a finding that the plaintiff was ready and willing to perform the contract and that the defendants cannot take plea that they were not aware that Dhanwant Singh was power of attorney holder. Therefore, the findings recorded by the first appellate court cannot be said to be contrary to law which may confer jurisdiction on the High Court to interfere with the findings of fact recorded by the first appellate court.

19) Learned counsel for the respondents have not raised any argument that the first appellate court has failed to determine some material

issue of law which may confer jurisdiction on the High Court to interfere with the findings of fact nor there is any substantial error or defect in the procedure provided by 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 on merits. Therefore, the High Court was not within its jurisdiction to interfere with the findings of fact only for the reason that plaintiff has failed to prove power of attorney in favour of Dhanwant Singh.

20) The agreement to purchase the land was entered into by the plaintiff through her son Dhanwant Singh when a sum of Rs.13,50,000/- was paid to the defendants. The defendants could accept a sum of Rs.13,50,000/- from Dhanwant Singh but they disputed the authority of Dhanwant Singh to enter into agreement to purchase on behalf of his mother. Dhanwant Singh had appeared in the office of the Sub Registrar for execution of the sale deed on January 31, 2005 with the plea that he has brought the balance sale consideration but the defendants have not turned up. In fact, the defendants relied upon their presence before the Sub Registrar on January 28, 2005 i.e. even before January 30, 2005, i.e. the date on which the execution of sale deed was fixed. January 30, 2005 was Sunday. Therefore, in terms of provisions of Section 10 of the General Clauses Act, 1897, it will be the next working day i.e. January 31, 2005 which will be deemed to be the date for performance of the agreement and on the said date,

Dhanwant Singh appeared with balance sale consideration and marked himself present.

21) In respect of financial capacity, it has come on record that the sale deeds (Exh. P-15 and Exh. P-16) were executed by Randhir Kaur prior to January 30, 2005 for making payment to the defendants to execute the sale deed as per terms and conditions of the agreement. Therefore, the High Court was not within its jurisdiction to interfere in second appeal only for the reason that on the date of agreement, there was no specific power of attorney in favour of son of the plaintiff, Dhanwant Singh.

22) In view of the above, the judgment of the High Court is set aside and the decree passed by the lower appellate court is restored. The appellant is granted two months' time to pay balance sale consideration to defendant Nos. 1 and 2 and upon receiving the amount, the defendants shall execute the sale deed in favour of the plaintiff. If the defendants fail to receive the amount, the plaintiff will be at liberty to deposit the amount with the executing court and seek execution of the decree in accordance with law.

23) The appeal is allowed. No costs.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
JULY 24, 2019.