

Before M.M. Kumar, J

SANT RAM—Defendant/Appellant

versus

BRIJ MOHAN KAURA (DECEASED) BY HIS L.Rs.
& ANOTHER—Respondents

R.S.A. No. 2342 of 1984

17th January, 2006

Specific Relief Act, 1963—S. 20—Code of Civil Procedure, 1908—Respondent No. 2 executing two agreements of sale one each in favour of respondent No. 1 and appellant—Trial Court dismissing suit of respondent No. 1 for specific performance of agreement to sell and accepting the agreement to sell executed by respondent No. 2 in favour of appellant—Agreement between respondent No. 2 & appellant is much earlier than the agreement entered into between respondents No. 1 & 2—Trial Court also finding the appellant mortgagee in possession—1st appellate Court reversing the findings of the trial Court—1st Appellate Court discarding the agreement to sell by respondent No. 2 in favour of appellant, subsequent agreement extending the date of execution of sale deed and doubting the registered sale deed without any evidence on record—No dispute regarding the mortgage deed executed by respondent No. 2 in favour of appellant alongwith possession—Findings of 1st Appellate Court based on conjectures & surmises—Appeal allowed, judgment & decree passed by 1st appellate Court set aside while restoring those of the trial Court.

Held, that the lower Appellate Court has rejected the agreement dated 8th July, 1974 (Ex. D1) and the other agreement dated 8th February, 1975 (Ex. D2) extending the time of execution of the sale deed by observing that the original agreement Ex. D1 has been substituted by the subsequent agreement and, therefore, there was complete novation which indirectly refer to Section 62 of the Contract Act, 1872. The other factor which weighed with the Lower Appellate Court to discard the aforementioned document was the omission to mention pronote dated 12th July, 1973 worth Rs. 4,000 in the agreement dated 8th July, 1974 (Ex. D1). Merely because the mortgage deed Ex. D7 was executed about a week before the date of promissory note dated 12th July, 1973, which is worth Rs. 4,000 the lower Appellate

Court has rejected the documents by observing that it would be difficult to believe that defendant—respondent No. 2 Karam Singh could require the amount of Rs. 4,000 after the receipt of Rs. 1,000 only week earlier and needed to borrow Rs. 4,000 against a promissory note. The absence of the non-production of the promissory note on the record has been considered to be a vital fact contributing to the finding that the agreement dated 8th July, 1974 Ex. D1 is a fictitious and forged document. The approach of the learned lower Appellate Court lacks complete application of mind and it highlights that the judgment of the trial Court was not even read by the learned lower Appellate Court.

(Para 21)

Further held, that the lower Appellate Court has shown complete disregard in performing its duties. It has discarded the document Ex. D1 dated 8th July, 1974 which is an agreement between defendant-appellant and defendant-respondent No. 2 Karam Singh. It has also discarded the subsequent agreement Ex. D2 dated 8th February, 1975, extending the date of execution of the sale deed and has doubted the registered sale deed, Ex. D3, dated 10th July, 1975. There is virtually no evidence on record to show or any one referred to by the lower appellate Court, to reach the aforementioned conclusion except the conjectures and surmises which has overtaken the thinking process of the lower Appellate Court. There is no warrant in doubting the agreement to sell dated 8th July, 1974 on the ground that the pronote dated 12th July, 1973 has not been produced or the same was improbable as a week before the execution of the promissory note. Karam Singh defendant-respondent No. 2 had executed the mortgage deed Ex. D7 dated 6th July, 1973 and the reasoning that he would not need an amount of Rs. 4,000 after he had received Rs. 1,000 a week earlier to execution of mortgage deed. It is totally conjectural conclusion reached by the lower Appellate Court.

(Para 22)

Further held, that the vendor and the owner-defendant respondent No. 2 has not filed any appeal. On the contrary he has supported the plaintiff-respondent No. 1 in condemning the agreement to sell set up by the defendant-appellant. Any decree of specific performance of contract in favour of the plaintiff-respondent No. 1 would result into disturbing long possession of 32 years of the mortgage

i.e. the defendant-appellant. It would, therefore, be equitable to grant the plaintiff-respondent No. 1 alternative relief as has been ordered by the trial Court.

(Para 26)

Sanjay Bansal, Advocate, *for the Appellant.*

M.L. Saggar, Advocate, *for the Respondents.*

JUDGMENT

M.M. KUMAR, J.

(1) This is defendant's appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for brevity, 'the Code') challenging the view taken by the learned Lower Appellate Court holding that the plaintiff-respondent No. 1 Brij Mohan Kaura (now represented by his L.Rs.) is entitled to a decree in his favour for possession by specific performance of agreement to sell dated 28th December, 1974 (Ex. P1). The aforementioned decree has been passed against the defendant-appellant Sant Ram (the vendee) and Karam Singh, defendant-respondent (the vendor, who is now represented by his LRs.). According to the decree, plaintiff-respondent Brij Mohan Kaura is required to pay the balance price of Rs. 40,000 to the defendant-appellant Sant Ram within the specified period of two months. Sant Ram along with defendant-respondent No. 2 is further required to execute the sale deed in respect of the suit land in favour of the plaintiff-respondent No. 1 on the receipt of the aforesaid amount. In case of their failure, plaintiff-respondent No. 1 was to deposit the balance amount in the Court of learned Sub Judge and the sale deed was to be executed through the Court. The expenses for registration of the sale deed and purchase of stamps is to be borne by the plaintiff-respondent No. 1. It is pertinent to mention that the trial Court had dismissed the suit by accepting the agreement to sell, dated 8th July, 1974 (Ex. D1) executed by the defendant-respondent No. 2 in favour of defendant-appellant Sant Ram. It was held that the agreement to sell dated 8th July, 1974 (Ex. D1) was a genuine document and it could not be considered as fictitious. However, findings of the learned trial Court have been reversed by the learned Lower Appellant Court.

Facts :

(2) Plaintiff- respondent No. 1 filed a Civil Suit No. 54T on 30th January, 1979 for possession by specific performance of agreement to sell, dated 28th December, 1974 (Ex. P1) against defendant-respondent No. 2 with a further direction to him and defendant-appellant to execute the sale deed. According to the assertion made by the plaintiff- respondent No. 1 defendant- respondent No. 2 was the owner of the suit land and he entered into an agreement to sell in writing for a total consideration of Rs. 50,000 on 28th December, 1974. It was alleged that the defendant- respondent No. 2 had received a sum of Rs. 10,000 as earnest money at the time of execution of the agreement to sell and the date fixed for execution of the sale deed was 31st December, 1975. Plaintiff- respondent No. 1 has claimed that he was always ready and willing to perform his part of the contract as he had adequate funds. He issued a telegram to defendant- respondent No. 2 on 27th December, 1975, to reach Sub Registrar's office on 30th December, 1975. He asserted that he remained present before the Sub Registrar on 30th December, 1975, when he had sent another telegram stating that he was waiting there. Thereafter still another telegram was sent on 30th December, 1975, intimating to the defendant- respondent No. 2 that he had failed to reach the office of the Sub Registrar and requested him to execute the sale deed failing which the plaintiff- respondent No. 1 was to file a suit for specific performance. He further claimed that he had even then visited the office of Sub Registrar on 31st December, 1975, yet defendant- respondent No. 2 did not reach there. Thereafter, two legal notices were sent through his counsel (*vide* Notice No. 103, dated 1st January, 1976 and Notice No. 1213, dated 16th/19th February, 1976, under UPC), which remained un-replied. Plaintiff- respondent No. 1 claimed to have met defendant- respondent No. 2 with a request to execute the sale deed but in vain. He is stated to have sent two other legal notices No. 398, dated 4th May, 1976, under Registered A.D. and No. 1044, dated 28th September, 1976. It was alleged that the defendant- respondent No. 2 sold 4 *bighas* of that land to defendant-appellant illegally,—*vide* sale deed dated 11th July, 1975, which has also been challenged because plaintiff- respondent No. 1 had already entered into an agreement to sell with the defendant-respondent No. 2. It was asserted that the defendant-appellant was fully aware of the agreement to sell with the plaintiff-respondent No.

1 and he acted with *mala fide* intention to obtain execution of the sale deed. The plaintiff- respondent No. 1 has also claimed alternative relief in the shape of damages of Rs. 20,000, as per the term specified in the agreement to sell.

(3) Defendant- respondent No. 2 in his written statement admitted execution of agreement to sell dated 28th December, 1974 (Ex. P1) for selling the land for Rs. 50,000. The receipt of Rs. 10,000 as earnest amount has also been admitted along with receipt of telegrams dated 27th December, 1975 and 30th Dec., 1975. The notices issued by the plaintiff- respondent No. 1 have also been admitted by the defendant- respondent No. 2. He has also conceded the sale of land to the defendant-appellant to the extent of 4 *bighas* and also accepted introduction of a fictitious oral mortgage with fictitious sum of Rs. 15,000. He conceded that the aforementioned amount was not due to anyone. The defendant- respondent No. 2 further pleaded that Rs. 9,300 and 8,700 were fictitiously introduced in the sale deed. He disclosed that all these documents were prepared with the help of one Salamat Rai, Petition Writer, at the same time and day when the sale deed dated 11th July, 1975 (Ex. D3) was executed in favour of the defendant-appellant.

(4) However, the stand taken by the defendant-appellant is that on 8th July, 1974, the defendant- respondent No. 2 had entered into an agreement to sell (Ex. D1) with him. The aforementioned agreement to sell has to prevail as it was earlier in point of time than the agreement to sell executed in favour of the plaintiff- respondent No. 1. The sale deed dated 11th July, 1975 (Ex. D3) was executed by the defendant- respondent No. 2 in pursuance to the agreement to sell, dated 8th July, 1974 (Ex. D1), which was supported by lawful consideration. The allegation of *mala fide* were denied asserting that the sale deed is lawful and genuine. It was further claimed that the plaintiff- respondent No. 1 was not entitled specific performance as they had purchased a part of the land. The allegation against the plaintiff- respondent No. 1 further is that he was not ready and willing to perform his part of the contract and defendant- respondent No. 2, who is the owner of the land, did not commit any breach thereof.

View of the Trial Court :

(5) The trial Court found that the plaintiff- respondent No. 1 was ready and willing to perform his part of the contract and defendant- respondent No. 2, who was the owner of the land, had committed the

breach. It was further held that the defendant-appellant was a bona fide purchaser without notice and the defendant-respondent No. 2 had sold the land to defendant-appellant for Rs. 40,000, vide registered sale deed dated 11th July, 1975 (Ex. D3). The plaintiff-respondent No. 1 was held entitled to alternative relief of Rs. 20,000.

(6) On the crucial issue of *bona fide* nature of the purchase of land by the defendant-appellant without notice and whether the defendant-respondent No. 2 had sold the land measuring 4 bighas to defendant-appellant for Rs. 40,000,—vide a registered sale deed, dated 11th May, 1975, the trial Court examined in details the documentary evidence, produced by the defendant-appellant, Exs. D1 to D7 along with the oral statements made by defendant-respondent No. 2-Karam Singh, defendant-appellant Sant Ram and the deed writer Salamat Rai (DW5) and others. Ex. D1 is an agreement between the defendant-appellant and defendant-respondent No. 2 and the findings of the trial Court in respect thereof are as under :—

“The execution of that document is proved from the statement of DW1 Karam Singh. He admitted that agreement Ex. D1 bears his signatures. Then there is statement of DW-2 Sant Ram and he stated that the agreements were executed by Karam Singh. Then there is statement of DW 5 Salamat Rai, who is scribe of Ex. D1. He stated that the same was written at the instance of Karam Singh. It was read over to him and he signed the same after hearing and understanding to be correct. Then there is statement of DW 7 Bikram Singh who is attesting witness of Ex. D-1. He stated that it was written at the instance of Karam Singh. It was read over to him and he signed the same after hearing and understanding to be correct. So execution of the agreement Ex. D1 is proved from the statements of DW 1 Karam Singh, DW 2 Sant Ram, DW5 Salamat Rai and DW 7 Bikram Singh that agreement is dated 8th July, 1974.”

(7) In respect of document Ex. D2, dated 8th February, 1975, which is another agreement to sell, the trial Court again found it to be proved by observing as under :—

“Then there is another agreement Ex. D2, dated 8th February, 1975. The execution of the same is also proved from the statement of DW 1 Karam Singh, who admitted that

Ex. D2 bears his signatures. Then there is statement of DW2 Sant Ram that two agreements were executed by Karam Singh in their favour. Then there is statement of DW4 Gulzar Singh who stated that agreement Ex. D2 was written at the instance of Karam Singh. It was read over to him and he signed the same, after hearing and understanding to be correct. Then there is statement of DW5 Salamat Rai. He also stated that he is scribe of the agreement Ex. D-1 and that was written at the instance of Karam Singh. It was read over to him and he signed the same after hearing and understanding to be correct. Then there is statement of Inderjit DW6. He stated that Ex. D2 was written at the instance of Karam Singh and it was read over to him and he signed the same after hearing and understanding to be correct. So execution of the agreement Ex. D2 is also proved.”

(8) Registered sale deed Ex. D3, dated 10th July, 1975 executed by defendant-respondent No. 2 has also been found to be in order and proved. The findings of the trial Court in that regard read as under :—

“Then there is sale deed Ex. D3 executed by Karam Singh in favour of defendant no. 2. That sale deed is for Rs. 40,000 and execution of the same is proved from the statement of Karam Singh DW1. He stated that Ex. D3 sale deed bears his signatures. DW2 Sant Ram also stated that sale deed Ex. D3 was written at the instance of Karam Singh and he signed the same after hearing and understanding to be correct and that was for Rs. 40,000, Rs. 9,300 and 8,700 were regarding agreements Rs. 15,000 was regarding mortgage Rs. 2,000 was paid before the Sub Registrar and Rs. 5,000 was regarding draft. Then there is statement of Gulzar Singh DW4. He is attesting witness of Ex. D3. He stated the sale deed Ex. D3 was written at the instance of Karam Singh. It was read over to him and he signed the same after hearing and understanding to be correct. He stated that Rs. 9,300 and Rs. 8,700 were regarding previous agreements. Rs. 15,000 was regarding mortgage amount. Then there is statement of Salamat Rai DW5.

He is scribe of Ex. D3. He stated that Ex. D3 was written at the instance of Karam Singh defendant. It was read over to him and he signed the same after hearing and understanding to be correct. So, execution of Ex. D3 is proved. It is admitted by Karam Singh that he received Rs. 2,000 in cash and Rs. 5,000 by draft and Rs. 7,500 was amanat of one Gulzar Singh. The sale deed was for Rs. 40,000 Rs. 2,000 was paid before the Sub Registrar in cash Rs. 5,000 by means of draft and Rs. 15,000 regarding mortgage amount and that is proved from the document Ex. D7 which is mortgage deed for Rs. 15,000 and that is registered one and that document is dated 6th July, 73, much earlier than the agreement written in favour of defendant No. 2."

(9) The trial Court thereafter recorded the conclusion that Ex. D1, which is an agreement between the defendant- respondent No. 2 Karam Singh with defendant-appellant is much earlier than the agreement to sell Ex. P1 dated 28th December, 1974 entered into between plaintiff- respondent No. 1 and defendant-respondent no. 2. The plea of the plaintiff-respondent no. 1 that the documents were fabricated has been categorically rejected by making a detailed reference to earlier two agreements, i.e., Exs. D4 and D5 and the mortgage deed Ex. D7. The findings of the trial Court rejecting the plea of the plaintiff- respondent No. 1 as well as that of defendant- respondent No. 2 read as under :—

"Ex. D1 dated 8th July, 74 and Ex. P1 dated 28th Dec., 74, Rs. 15,000 as regarding mortgage, Rs. 8,700 and Rs. 9,300 were regarding earlier agreement and that is proved from the document Ex. D4, D5 and D6 Ex. D4 was executed on 18th April, 73 Ex. D5 was executed on 12th July, 72 and Ex. D6 as executed on 28th June, 71 earlier than the agreement to sell. There was no question of fabricating this document because that was entered into deed writer register and there (sic?) were written on the dates when the stamp papers were purchased; so it is proved that there was an earlier agreement between Karam Singh and Sant Ram, Ex. D1 dated 8th July, 74 and the agreement of the plaintiff Ex. P1 dated 28th Dec., 74 was executed

afterwards. So defendant no. 2 Sant Ram purchased the land vide earlier agreement and he is *bona fide* purchaser for value and consideration. It is stated by Karam Singh that he told Sant Ram about the agreement of Brij Mohan. Sant Ram might be stating so, because now Karam Singh seems to be conniving with the plaintiff because he admitted whole of the claim of the plaintiff. It is allegation of Karam Singh that all the documents were executed by him in favour of Sant Ram on one day. This version of the defendant cannot be taken into consideration, because document Ex. D1 was executed on 8th July, 74, Ex. D2 was executed on 8th February, 75 Ex. D3 was executed on 10th May, 75 Ex. D4 was executed on 18th April, 73, Ex. D5 was executed on 15th July, 75, Ex. D6 was executed on 28th June, 71 and Ex. D7 was executed on 6th July, 73 and there is entry of these documents in the deed writer register and documents Ex. D7 and D3 are registered documents. So question of getting all these documents executed on one date does not arise. There is an (sic?) evidence of DW4 Gulzar Singh who stated that land was mortgaged with him and one more person by Karam Singh vide document Ex. D7 mortgage deed.” (emphasis added)

(10) The plea of the plaintiff- respondent No. 1 that the possession of the land continued with defendant- respondent No. 2 did not find favour with the trial Court and the finding recorded is that the defendant-appellant is the mortgagee with possession. Referring to the Jamabandi (revenue records of rights), the trial Court has observed that plaintiff- respondent No. 1 did not deliberately produce Jamabandi of the years subsequent to the date of execution of mortgage deed in favour of the defendant-appellant and went on to observe as under :—

“After 1971-72 next jamabandi of 1976-77 is prepared, which is not produced. When the mortgage was with possession that means the possession was of the mortgage when defendant no. 2 Sant Ram purchased the land through an agreement Ex. D1 dated 8th July, 74 and that was earlier to the agreement of the plaintiff Ex. P1 dated 28th Dec., 74.”

(11) The trial Court further held that defendant-appellant did not have any notice or knowledge and, therefore, he is a *bona fide* purchaser. The findings of the trial Court runs as under :—

“Sant Ram was not in knowledge of the agreement between the plaintiff and Karam Singh because that is not registered document and not notice to all. So, the question of knowing that agreement by Sant Ram defendant No. 2 does not arise. So it is proved that defendant No. 2 Sant Ram is a *bona fide* purchaser without notice. It is also proved that Karam Singh defendant has sold the land measuring 4 bighas to defendant no. 2 Sant Ram for Rs. 40,000 vide sale deed dated 11th July, 75 so both these issues are decided in favour of the defendant no. 2.”

Reversal of view by the lower Appellate Court :

(12) On appeal filed under Section 96 of the Code, by the plaintiff- respondent No. 1, the learned Lower Appellate Court reversed the findings by holding that the agreements to sell dated 8th July, 1974 (Ex. D1) set up by defendant-appellant was not a genuine document as it was not actually executed on 8th July, 1974.

(13) Those findings are discreditable from para Nos. 17, 18 and 20 and the same read as under :—

“17. xxx xxx The only document which has weighed with the learned Sub Judge in declining the relief of specific performance to Shri Brij Mohan is that agreement dated 8th July, 74 Ex. D1 because the agreement Ex. D3 and sale deed Ex. D2 are subsequent in point of time to agreement Ex. P.1. After going through the evidence on record I find myself in agreement with the learned counsel that agreement Ex. D1 is not a genuine one and was not actually executed on 8th July, 74.

18. Mortgage-deed Ex. D7 is dated 6th July, 73. As per this mortgage-deed Karam Singh had mortgaged 4B-16B-9B out of the suit land with possession in favour of Sant Ram and his brother Gulzar Singh for Rs. 15,000. Out of this amount only Rs. 1,000 was paid in cash and the remaining amount was adjusted under different count. There is a

recital in agreement Ex. D1 dated 8th July, 74 that out of the amount of Rs. 9,300 a sum of Rs. 4,000 was being adjusted towards the amount of Rs. 5,300 was being paid in cash in the presence of the witnesses. The witnesses may tell lies but documents do not. The mortgage-deed Ex. D7 is dated 6th July, 73, while the pronote of Rs. 4,000 was said to have been executed on 12th July, 73. There is an interval of one week only between the execution of these two documents. It is difficult to believe that Karam Singh could require the amount of Rs. 4,000 after the receipt of Rs. 1,000 only one week prior and could borrow Rs. 4,000 against a pronote. The cannot, therefore, be said to be a bonafide purchaser and is bound by the agreement Ex. P1. The findings of the learned Sub Judge to the contrary are reversed and it is held that Sant Ram was not a *bona fide* purchaser for value, nor he had agreed to purchase the land in question prior to Brij Mohan." (Reasons highlighted)

Arguments of the parties :

(14) Mr. Sanjay Bansal, learned counsel for the defendant-appellant has made the following submissions before me :—

- (a) That there was no plea raised in the pleadings by the plaintiff-respondent No. 1 that the agreement dated 8th July, 1974 (Ex. D1) was fictitious or it was without any consideration nor any issue to that effect was framed. Even no evidence with regard thereto was adduced.
- (b) That there was no challenge to the validity of registered mortgage deed, dated 6th July, 1973 (Ex. D7) nor the plaintiff-respondent No. 1 had any *locus standi* to challenge the same as he was not party to the said deed. Therefore, no amount of evidence could be taken into account as has been held by the Supreme Court in the case of *Smt. Chander Kali Bail & others versus Jagdish Singh Thakur & another*, (1).

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- (c) That the plaintiff- respondent No. 1 cannot be considered as a *bona fide* purchaser for valuable consideration because there is not even an iota of pleading asserting that any enquiry was held by him before executing the agreement to sell dated 28th December, 1974 (Ex. P1). The land is already mortgaged with possession in pursuance to a registered mortgage deed, dated 6th July, 1973 (Ex. D7) with the defendant-appellant Sant Ram and his brother Gulzar Singh. Therefore, the suit for specific performance of agreement dated 28th December, 1974 (Ex. P1) could not be decreed. In this regard reliance has been placed on the judgments of this Court in the cases of **Ram Dass versus Shisha Singh (2)** and **Bahadur Singh versus Lakhwinder Singh (3)**.
- (d) That the plea of novation under Section 62 of the Contract Act, 1872, required to be specifically pleaded, an issue framed and evidence adduced, as has been pointed out by the Supreme Court in the case of **Babu Ram versus Indra Pal Singh (4)**. Therefore, the findings recorded in para 27 by the learned Lower Appellate Court on the aforementioned issue cannot be sustained. He has also placed reliance on a judgement of this Court in the case of **Zorawar Singh versus Sarwan Singh (5)** and judgment of the Supreme Court in the case of **R.K. Mohammed Ubaidullah versus Hajee CC. Abdul Wahab (D), (6)**.
- (e) That the judgment of the learned Lower Appellate Court is based on surmises and conjectures and the statement made by Salamat Rai, the scribe of the agreements dated 8th July, 1974 (Ex. D1) and 8th February, 1975 (Ex. D2) as well as that of Sant Ram, defendant-appellant or the attesting witnesses have not been considered, which were taken into account by the learned trial Court and, therefore,

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- (2) 2001 (3) PLR 544
(3) 2002 (2) PLR 83
(4) AIR 1998 S.C. 3021
(5) 2002 (2) PLR 580
(6) 2000 (2) PLR 502

the view taken by the learned Lower Appellate Court while reversing the judgment of the trial Court suffers from non-application of mind and is, thus, liable to be set aside.

- (f) That the defendant-appellant is admittedly in cultivating physical possession of the land in pursuance to the mortgage deed dated 6th July, 1973 (Ex. D7) till date and by now more than 32 years have rolled by. In such circumstances, specific performance of agreement to sell, dated 28th December, 1974 (Ex. P1) did not deserve to be decreed in favour of the plaintiff-respondent No. 1.
- (g) That there is unexplained delay in seeking specific performance of agreement to sell dated 28th December, 1974 (Ex. P1) because the suit was filed on 30th January, 1979, although the same was within limitation. The sale deed was required to be executed by 31st Dec., 1975 and thereafter legal notices were served. The last legal notice was served on 26th/28th September, 1976. No explanation of delay of 16 months has been tendered. In support of his submission, learned counsel has placed reliance on the judgment of the Supreme Court in the case of **Moti Lal Jain versus Smt. Ramdasi Devi and others, (7)** and **Ram Niwas Gupta versus Mumtaz Hassan, (8)**.

(15) Mr. M.L. Saggarr, learned counsel for the plaintiff-respondent No. 1 has made the following submission :—

- (a) That there is specific stand taken in paras 1 and 2 of the replication filed by the plaintiff-respondent No. 1 asserting that the agreement dated 8th July, 1974 (Ex. D1) and 8th February, 1975 (Ex. D2) were fictitious documents and it cannot be argued by the defendant-appellant that no plea was set up. Issue Nos. 4 and 5 are all pervasive, which have been decided by the Courts below. In such circumstances, in the ordinary course specific performance of the agreement to sell must be granted as has been held by this Court in the case of **Raj Singh versus Inderjit Singh, (9)**.

(7) 2001 (1) PLR 231

(8) 2002 (2) PLR 353

(9) 2005 (2) PLR 136

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- (b) That the findings are against the defendant-appellant and his agreement to sell dated 8th July, 1974 (Ex. D1), has been found to be executed after the date of agreement to sell dated 28th December, 1974 (Ex. P1) and, therefore, it was the duty of the defendant-appellant to make enquiry failing which the agreement to sell dated 28th December, 1974 (Ex. P1) must be taken to its logical end by ordering specific performance. Reliance has been placed on Section 111(g) of the Evidence Act, 1872 and Sections 41 and 59 of the Transfer of Property Act, 1882.
- (c) That there are findings of fact, which cannot be reopened by this Court in exercise of jurisdiction under Section 100 of the Code, even if this Court is inclined to take a view different than the one taken by the learned Lower Appellate Court. Therefore, the appeal is liable to be dismissed.
- (d) That the parties belong to a small village and the agreement to sell could not remain a secret. It must have come to the knowledge of the defendant-appellant. For the aforementioned proposition, the learned counsel has placed reliance on the observation made by this Court in the case of **Joginder Singh versus Surinder Pal Singh, (10)**.

(16) After hearing learned counsel for the parties, perusing the judgments of the Courts below, and the record consisting of oral as well documentary evidence, I am of the considered opinion that the following two questions of law would arise for determination of this Court :—

- (A) Whether the lower Appellate Court could set aside the findings of the trial Court without meeting the detailed reason given in support thereof by the trial Court ?
- (B) Whether there is unexplained delay in seeking the specific performance of agreement to sell, dated 28th December, 1974 (Ex. P1), disentitling the plaintiff-respondent No. 1 from the relief of specific performance, especially when the possession of the land is with the defendant-appellant being a mortgagee ?

Re : Question (A)

(17) Before advertng to the documentary evidence on record I find that there are following basic reasons recorded by the learned lower Appellate Court to reverse the findings, which are as under :—

- (i) The original agreement dated 8th July, 1974 (Ex. P1) lapsed as there was a novation of that agreement of sale by another agreement dated 8th February, 1975 (Ex. P2) whereunder the time for execution of the sale deed was extended;
- (ii) The mortgage amount of Rs. 15,000 under the mortgage deed dated 6th July, 1973 (Ex. D7) consisted of fictitious items; and
- (iii) The agreement dated 28th December, 1974 executed by the defendant-respondent No. 2 Karam Singh in favour of the plaintiff-respondent No. 1 Brij Mohan took precedence over the agreement dated 8th July, 1974 (Ex. D1) executed by the defendant-respondent No. 2 in favour of the defendant-appellant Sant Ram and his brother Gulzar Singh.

(18) A close examination and scrutiny of the documents Exs. D1 to D7 show that all these documents have been duly executed by defendant-respondent No. 2 Karam Singh. A careful glance at document Ex. D1, which is an agreement to sell, dated 8th July, 1974 would show that stamp paper was purchased by Karam Singh on 8th July, 1974, which is worth 5.25 paise (Rs. 4 + 50 paise and 75 naya paise). As per the oral statements made by various witnesses, as appreciated by the trial Court, the document has been proved (for discussion, see para 7 of the judgment of the trial Court). Similarly documents Ex. D2 dated 8th February, 1975, which is again an agreement to sell between defendant-appellant and defendant-respondent No. 2, would show that Karam Singh s/o Bir Singh has purchased the stamp paper and the same has been duly signed and executed by him. Both the documents Exs. D1 and D2 have been signed by Karam Singh in 'Urdu'. This pattern is again discernible from the perusal of mortgage deed Ex. D3, dated 10th May, 1975. Again the stamp paper has been purchased by Karam Singh himself

on 10th May, 1975. This document is duly registered. Ex. D4 is again another agreement to sell between the defendant-appellant and defendant-respondent No. 2, which is signed in 'Urdu' by Karam Singh. The stamp paper again has been purchased by Karam Singh from a different stamp vendor. Exs. D5 and D6 again have been duly signed by defendant-respondent No. 2 Karam Singh and the stamp paper has been purchased still from another stamp vendor. The next document Ex. D6, categorically record the receipt of Rs. 4,500 by Karam Singh which he acknowledges in Urdu language, written with his own hands and the same has been duly signed. The stamp paper has been purchased on 28th June, 1971 from a stamp vendor, who is entirely different than the earlier stamp vendor. Then Ex. D7 is the registered mortgage deed dated 6th July, 1973. Defendant-respondent No. 2 Karam Singh has again signed the mortgage deed in the presence of the Sub Registrar.

(19) The Supreme Court has repeatedly emphasised that the findings recorded by the trial Court based on oral statements should not ordinarily be set aside because the trial Court had the opportunity to observe the demeanour of the witnesses. It has been repeatedly reminded to the first Appellate Court about its duty to meet the reasoning recorded by the trial Court, especially when it reverses the findings recorded by the trial Court. In the case of **Santosh Hazari versus Purushottam Tiwari** their Lordships have observed as under :—

“First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial Court is an easier one.....while writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the

same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact.....Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on the questions of law unless such question of law be a substantial one.”

(20) The aforementioned principles have been followed, applied and reiterated in the cases of **Govinda Raju versus Mariammam, (12) Madhukar versus Sangram (13)** and **Achintya Kumar Saha versus Nanu Printers, (14)**.

(21) Even otherwise it appears to be well settled that a certificate of registration issued in respect of a registered document under Section 60 of the Registration Act, 1908 is considered to be an ample proof of the fact that the document is registered. Under Section 79 of the

(12) (2005) 2 S.C.C. 500

(13) (2001) 4 S.C.C. 756

(14) (2004) 12 S.C.C. 368

Evidence Act, 1872, the Courts must take judicial notice and registration certificate shall be presumed to be genuine. Such a document can be discarded only by producing evidence of unimpeachable character. On the record of this case, no evidence of such a character has been produced which may warrant a conclusion that the document Exs. D1 to D7 are the result of forgery. The allegations of forgery are serious in nature and has to be substantiated by furnishing detailed and cogent evidence. The defendant-respondent No. 2 Karam Singh, by merely asserting that the documents were executed on the same date and time without anything more cannot be regarded to have proved the forgery. His signatures on the document have been admitted. It is not the case of the defendant-respondent No. 2 or the plaintiff-respondent No. 1 that Karam Singh, defendant-respondent No. 2, was an illiterate person or he was misled by active misrepresentation or fraudulent conduct of the defendant-appellant. It is equally well settled that extrinsic evidence with regard to terms of a contract which has been reduced to form of a document cannot be adduced except the document itself or secondary evidence of its content which is evident from the perusal of Sections 91 and 92 of the Evidence Act, 1872. However, the lower Appellate Court has rejected the agreement dated 8th July, 1974 (Ex. D1) and the other agreement dated 8th February, 1975 (Ex. D2) extending the time of execution of the sale deed by observing that the original agreement Ex. D1 has been substituted by the subsequent agreement and, therefore, there was complete novation which indirectly refers to Section 62 of the Contract Act, 1872. The other factor which weighed with the Lower Appellate Court to discard the aforementioned document was the omission to mention pronote dated 12th July, 1973 worth Rs. 4,000 in the agreement dated 8th July, 1974 (Ex. D1). Merely because the mortgage deed Ex. D7 was executed about a week before the date of promissory note dated 12th July, 1973, which is worth Rs. 4,000, the lower Appellate Court has rejected the documents by observing that it would be difficult to believe that defendant-respondent No. 2 Karam Singh could require the amount of Rs. 4,000 after the receipt of Rs. 1,000 only a week earlier and needed to borrow Rs. 4,000 against a promissory note. The absence of the non-production of the promissory note on the record has been considered to be a vital fact contributing to the finding that the agreement dated 8th July, 1974 Ex. D1 is a fictitious and forged document. The approach of the learned lower Appellate Court lacks complete application of mind and

it highlights that the judgment of the trial Court was not even read by the learned lower Appellate Court. Learned trial Court has discussed in details under Issue Nos. 4 and 5 as to how the aforementioned documents stood proved. A registered document and a written document cannot be thrown to winds merely because a party to it makes an irresponsible statement that all the documents were recorded on one date. If that was so then defendant-respondent No. 2 Karam Singh would have moved heaven and earth by filing criminal prosecution against the culprits. On the contrary it is amazing that defendant-respondent No. 2 went on to execute another agreement to sell with the plaintiff-respondent No. 1 Brij Mohan Kaura (now represented by his LR's).

(22) When the aforementioned principles are applied to the facts of the present case, it becomes evident that the lower Appellate Court has shown complete disregard in performing its duties. It has discarded the document Ex. D1 dated 8th July, 1974, which is an agreement between defendant-appellant and defendant-respondent No. 2 Karam Singh. It has also discarded the subsequent agreement Ex. D2, dated 8th February, 1975, extending the date of execution of the sale deed and has doubted the registered sale deed, Ex. D3, dated 10th July, 1975. There is virtually no evidence on record to show or any one referred to by the lower appellate Court, to reach the aforementioned conclusion except the conjectures and surmises which has overtaken the thinking process of the lower Appellate Court. There is no warrant in doubting the agreement to sell dated 8th July, 1974 on the ground that the pronote dated 12th July, 1973 has not been produced or the same was improbable as a week before the execution of the promissory note. Karam Singh defendant-respondent No. 2 had executed the mortgage deed Ex. D7 dated 6th July, 1973 and the reasoning that he would not need an amount of Rs. 4,000 after he had received Rs. 1,000 a week earlier to execution of mortgage deed. It is totally conjectural conclusion reached by the lower Appellate Court. On the contrary the trial Court has analysed the evidence in detail in para 7 of the judgment while discussing Issues No. 4 and 5. It would be very dangerous preposition of law to be laid down that the document duly executed between the parties could be thrown to the winds merely for asking. The documents Exs. D1 and D7 have been duly supported by the scribe, attesting witnesses and other attending circumstances. Due execution of these documents

has been admitted by Karam Singh defendant-respondent No. 2. On the ground that defendant-respondent No. 2 Karam Singh, who had executed agreement to sell dated 28th December, 1974 (Ex. P1) preferred to allege that all these documents were executed on one date, would not constitute a valid ground to discard them. The document Ex. D1 looks to be a natural agreement of sale and the total price of the land recorded in the agreement to sell is Rs. 40,000, whereas defendant-respondent No. 2 Karam Singh appears to have entered into another agreement of sale with plaintiff-respondent No. 1 subsequently. In any case, the agreement of sale having been executed earlier in point of time would clearly show that the view taken by the trial Court is the only possible view which a reasonable person would take. The findings of the trial Court have been illegally reversed by the learned lower Appellate Court on conjectures and surmises. There is further no evidence to show that the agreement Ex. D1 dated 18th July, 1974 has been ante-dated. Such an evidence could have been produced by summoning the register of the scribe because an entry with regard to document made subsequently would require some adjustment in the register. No such effort has been made although scribe Salamat Rai has appeared in the witness box.

(23) Therefore, the findings recorded by the learned lower Appellate Court are set aside and the document Exs. D1, D2 and D3 are held to be genuine documents.

Re : Question (B)

(24) It is admitted position that the defendant-appellant is a mortgagee in respect of the suit land belonging to the defendant-respondent No. 2 Karam Singh along with possession. The property is in his possession for the last about 32 years. This fact remains undisputed. The mortgage deed dated 6th July, 1973 (Ex. D7) has nowhere been disputed. The plaintiff-respondent No. 1 is not in possession of any part of the land. It is well settled that even in cases where time has not been made the essence of contract then specific performance has to be sought within a reasonable time. A Constitution Bench of the Supreme Court in **Chand Rani versus Kamal Rani, (15)**, has held that in case of sale of immovable property there is no presumption as to time being of essence of the contract. Even then

the Court may infer that the contract has to be performed in reasonable time and for the purposes of granting relief the reasonable time has to be ascertained from all the facts and circumstances of the case. The aforementioned view was upheld and applied by the Supreme Court in the case of **K.S. Vidyanadam versus Vairavan, (16)** and **Veerayee Ammal versus Seeni Ammal, (17)**. In the case of Veerayee Ammal (supra) the word "reasonable" has been defined as under :—

"13. The word "reasonable" has in law *prima facie* meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case....."

(25) In the present case, the agreement to sell dated 28th December, 1974 (Ex. P1) has been found to be executed between plaintiff-respondent No. 1 and defendant-respondent No. 2. The sale deed was to be executed by 31st December, 1975. The plaintiff-respondent No. 1 has been found to be ready and willing to perform his part of the contract as he had remained present before the Sub Registrar on 30th December, 1975 and 31st December, 1975. Before that he had issued a telegram on 27th December, 1975 also. Thereafter, the plaintiff-respondent No. 1 served various legal notices on the defendant-respondent No. 2 through Registered A.D. and the last notice served was dated 28th September, 1976. However, no expeditious effort was made to seek specific performance of the agreement and the suit was filed after lapse of two years on 30th January, 1979, which was though within limitation but beyond a reasonable period. The possession of the defendant-appellant as mortgagee since 1973 is undisputed. In these circumstances, it has to be considered whether specific performance of contract dated 28th December, 1974 would be

(16) 1997 (3) S.C.C. 1

(17) (2002) 1 S.C.C. 134

a proper relief under Section 20 of the Specific Relief Act, 1963, or the alternative relief deserves to be granted. In para 23 of the judgment in the case of **Nirmala Anand versus Advent Corporation (P) Ltd. and others (18)**, their Lordships' have furnished the guidelines in such type of cases and the same reads as under :—

“23.Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefore. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic? consideration) the totality of circumstances of each case.

.....” (emphasis added)

(26) A unique feature of the present case is that the vendor and the owner-defendant-respondent No. 2 has not filed any appeal. On the contrary he has supported the plaintiff-respondent No. 1 in condemning the agreement to sell set up by the defendant-appellant. Any decree of specific performance of contract in favour of the plaintiff-respondent No. 1 would result into disturbing long possession of 32 years of the mortgagee i.e. the defendant-appellant. It would, therefore, be equitable to grant the plaintiff-respondent No. 1, alternative relief as has been ordered by the trial Court.

(27) For the reasons aforementioned this appeal succeeds. The judgment and decree passed by the learned lower Appellate Court is set aside and those of the trial Court are restored. Accordingly, the suit of the plaintiff-respondent for specific performance of agreement to sell, dated 28th December, 1974 is dismissed and his prayer for alternative relief is granted, as has been done by the trial Court. The parties are, however, left to bear their own costs.

R.N.R.