

**(1974) 11 P&H CK 0013**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Second Appeal No. 1450 of 1971, Civil Miscellaneous No"s. 1371 and 1636/C of 1974

Satinder Kaur

APPELLANT

Vs

Iqbal Singh

RESPONDENT

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**Date of Decision :** 25-11-1974

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 42 Rule 2

**Citation :** AIR 1975 P&H 194

**Hon'ble Judges :** Pritam Singh Pattar, J

**Bench :** Single Bench

**Advocate :** S.P. Goyal, R.L. Aggarwal and H.S. Kathuria, for the Appellant; R.L. Batta, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

Pritam Singh Pattar, J.—This is a regular second appeal filed by Shrimati Satinder Kaur, plaintiff, against the judgment and decree dated April 14, 1971 of the District Judge, Chandigarh, dismissing her appeal against the judgment and decree dated May 30, 1970 of the Sub-Judge 1st Class, Chandigarh, whereby her suit for specific performance of the agreement to sell the property in dispute was dismissed, but the defendant-respondent, Iqbal Singh, was directed to refund Rs. 2.000 to her.

2. The facts of this case are that Iqbal Singh, defendant, is owner of plot No. 65, Street A. Sector 18-A, Chandigarh, and he agreed to sell the same to Smt. Satinder Kaur, appellant, and executed agreement deed. Exhibit P-I, dated January 18, 1965, in her favour. The sale price of the plot was fixed at Rs. 8,500, out of which the vendee was required to pay Rs. 3,000 as earnest money, which she paid to him by means of cheque, dated January 14, 1965, and the balance price was to be paid within three months of the execution of the agreement, before the Sub-Registrar, at the time of the registration of the sale deed. The vendor was required to execute a power of attorney in favour of the vendee or

her nominee to do all acts in connection with the construction of the building on the site and for the execution of the sale deed. The building on the plot was to be constructed as per rules framed by the Administration of the Capital Project, Chandigarh, and the building so constructed by the vendee was to be deemed to have been constructed on behalf of the vendor. After the completion of the building, or earlier on the removal of the restrictions imposed by the Government in this respect, viz. sale of the plots, the plot was to be transferred in the name of the vendee. In case the vendor could get a loan of Rs. 16,000/- sanctioned for the construction of the house under the House Buildings Loan Scheme, he was required to make available the said amount to the vendee and in that case, the price of the plot shall be deemed to have been fixed as Rs. 9,350/-. and the vendee shall pay additional sum of Rs. 850/- to the vendor as the additional price of the plot in dispute. In case the vendee failed to perform her part of the contract, the earnest money shall stand forfeited. The plaintiff-appellant alleged in the plaint that the defendant-respondent failed to perform his part of the contract and that a decree for specific performance of the contract may be passed in her favour against Iqbal Singh. defendant, on payment of the remaining sale price and in the alternative, decree for Rs. 6,600/- on account of earnest money. interest and damages may be passed in her favour against the defendant.

3. The suit was contested by the defendant. He denied that he failed to perform his part of the contract. On the other hand, it was pleaded that the plaintiff failed to perform her part of the contract. On the pleadings of the parties, the following issues were framed by the trial Court:--

1. Whether the agreement between the parties is forbidden by law and therefore, is unenforceable ?
2. Whether there were any terms and conditions different from those given in the agreement ?
3. Whether the agreement stands vitiated on account of fraud and misrepresentation as alleged by the defendant?
4. Whether the alleged agreement was with Manohar Singh and not with Satinder Kaur ?
5. Whether the plaintiff was willing and ready to perform her part of the contract ?
6. Whether the defendant was ready and willing to perform his part of the contract ? If not, what is its effect ?
7. Whether the plaintiff has suffered any damages for alleged non-performance on the part of the defendant and if so to what extent ?
8. Whether the defendant has suffered any damages on the Part of the plaintiff and if so to what extent ?
9. Whether the plaintiff is entitled to the refund of earnest money ?

10. Whether the time was the essence of contract ?

11. Relief.

The learned Subordinate Judge decided issues Nos. 1, 2, 3 and 4 against the defendant and issues Nos. 5, 7 and 10 were decided against the plaintiff. Issue No. 6 was decided in favour of the defendant. Under issue No. 8, it was held that the defendant suffered Rs. 1,000/- only as damages and that the plaintiff, therefore, was entitled to the refund of Rs. 2,000/-, out of the amount of Rs. 3,000/- paid as earnest money to the defendant and issues Nos. 8 and 9 were decided accordingly. As a result, the suit for specific performance of the agreement to sell was dismissed with costs. However, the defendant was ordered to refund Rs. 2,000/- to the plaintiff out of the amount of Rs. 3,000/- forfeited by him. Feeling aggrieved, the plaintiff filed appeal against this decree in the Court of the District Judge, who dismissed the same with costs on April 14, 1971. Thereafter, the plaintiff-appellant has filed this appeal.

4. At the outset, Mr. R.L. Batta, the learned counsel for the respondent, raised a preliminary objection that the appeal is barred by limitation as the copy of the judgment of the trial Court was not filed along with the memorandum of appeal, that this COPY was filed in Court long after the expiry of the limitation and, therefore, there was no proper appeal before the Court.

5. The judgment of the District Judge, Chandigarh, is dated April 14, 1971. An application to get copies of the judgment and decree of the Court of the District Judge was made on April 23, 1971, and the copies were ready on April 28, 1971, and were delivered to the appellant on April 29, 1971. This regular second appeal was instituted on July 20, 1971, and along with the memorandum of appeal the copies of the judgment and decree of the District Judge, Chandigarh, were only attached. The High Court Office on July 24, 1971, raised the following objection:--

"Value for purposes of court-fee should be correctly stated in the opening sheet. Trial Court's judgment is not forthcoming. Returned to be refiled within a week."

The appeal was refiled on August 23, 1971, and the counsel for the appellant made a note below the above-mentioned office note on the appeal:--

"1. Copy of the plaint is attached for purposes of verification of court-fee value.

2. Trial Court judgment is attached with this appeal,

Refiled after compliance."

6. Again, the office raised the following objection on August 24, 1971:--

"Trial Court's judgment now filed has not been stamped. Returned to be filed within a week."

After affixing the requisite stamp on the copy of the judgment of the trial Court, the appeal was refiled on September 1, 1971.

7. Order 42. Rule 1, Civil Procedure Code, lays down that the rules of Order 41 shall apply, so far as may be. to appeals from appellate decrees. The Punjab and Haryana High Court added the following rule No. 2 in Order 42 of the Code of Civil Procedure:--

"In addition to the copies specified in Order 41. Rule 1, the memorandum of appeal shall be accompanied by a copy of the Judgment of the Court of first instance, unless the Appellate Court dispenses therewith."

8. Order 41, Rule 1, Civil Procedure Code, runs as under :--

"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded."

9. In *State of Punjab v. Niranian Singh*. (1968) 70 PLR 229 (Division Bench decision of this Court), the facts were that the District Judge, Ambala. decreed the suit of the plaintiff on January 28. 1966. Regular Second Appeal was filed by the State of Punjab against this decree without being accompanied by a certified copy of the judgment of the trial Court. May 19, 1966, was the last day of limitation for filing the second appeal after excluding the period of 21 days from February 8. 1966, to February 28. 1966. spent by the appellant in obtaining copies of the judgment and decree of the first appellate Court. Certified copy of the judgment of the trial Court was ultimately filed in this appeal on July 6. 1966. A preliminary objection was taken by the counsel for the respondent that the appeal was barred by limitation as it was deemed to have been filed on July 6. 1966. when the certified copy of the trial Court judgment was submitted in the registry of the Court. On these facts it was held that under Order 42, Rule 2 of the Code of Civil Procedure, the memorandum of second appeal is also to be accompanied by a certified copy of the judgment of the Court of first instance and no second appeal is competent without being accompanied by a certified copy of the trial Court judgment. The appeal was dismissed as barred by limitation.

10. In *Harbant Singh v. State of Punjab* 1972 PLJ 681. it was held that the reading of Rule 2 of Order 42 of the CPC as added by the High Court of Punjab shows that it is a mandatory rule and without a copy of the trial Court's judgment, the appeal is incomplete and. therefore, not an appeal in the eye of law. In this case also the appeal was dismissed as barred by limitation.

11. In *Bikram Dass Vs. The Financial Commissioner, Revenue, Punjab, Chandigarh and Others*, . the facts were that according to Rules 2 and 3 of Chapter 2-C of the High Court Rules and Orders. Volume V the memorandum in a letters patent appeal should be accompanied by three typed copies of (a) memorandum of appeal, (b) judgment appealed from, and (c) paper book, which was before the Judge from whose judgment the appeal was preferred and the

Deputy Registrar is not to receive a letters patent appeal if the said three typed copies are not supplied along with the memorandum. It was held that the provisions of these Rr. 2 and 3 of Chap. 2-C of the High Court Rules and Orders. Volume V. were mandatory and failure to submit three typed copies of the paper book along with the memorandum would show that the appeal was incomplete and thus there was no appeal in the eve of law and if the paper book is filed beyond the period of limitation, the appeal will be barred by limitation,

12. The legal position, therefore, is that the provisions of Order 42, Rule 2. CPC (as added by the Punjab and Haryana High Court) are mandatory and the memorandum of a regular second appeal must also be accompanied by a certified copy of the judgment of the trial Court unless the Appellate Court dispenses therewith. There is no valid regular second appeal in the eve of law until a copy of the judgment of the trial Court, if not dispensed with, is also filed. If the copy of the judgment of the trial Court is filed later after the expiry of the period of limitation prescribed for the appeal, then the appeal is time-barred.

13. In the instant case, as mentioned above, the last date for filing this appeal was July 20, 1971. The certified copy of the judgment of the trial Court was filed in Court on August 23, 1971. i. e., long after the expiry of the period of limitation. The application to get copy of the judgment of the trial Court was made on August 10, 1971. and the copy was obtained on that day. but it was filed in Court on August 23. 1971. This delay of 13 days is also not explained. The appellant has to explain each day's delay and there is no explanation how this delay of 13 days also occurred. Therefore, in view of the law laid down in the abovementioned cases, there was no proper appeal filed in this Court on July 20. 1971, and the certified copy was filed firstly on August 23, 1971. and it was not properly stamped and again it was refiled on September 1, 1971. Therefore, the appeal must be deemed to have been validly instituted in Court on September 1, 1971. or at least on August 23. 1971. and was, therefore, clearly barred by limitation.

14. Shri S.P. Goval the learned counsel for the appellant, contended that the provisions of Order 42. Rule 2, Civil Procedure Code, are not mandatory, but are directory, because the Appellate Court can dispense with the filing of the copy of the judgment of the Court of first instance along with the memorandum of second appeal. In support of this contention, he relied on a Division Bench case of Calcutta High Court reported as Brojendra Lal Saha and Others Vs. Jana Mondal and Others, . In the judgment, it is not mentioned what was the proviso added to Rule 1 of Order 42 of the CPC by the Calcutta High Court, This is a short judgment of 6/7 lines, wherein no rule was discussed and it was not mentioned whether the provisions were mandatory or directory and it was simply remarked that the defect was one in form only. This decision cannot be followed in view of the decisions of our own High Court discussed above,

15. According to Order 41. Rule 1, Civil Procedure Code, the memorandum of appeal shall be accompanied by a copy of the decree appealed from and unless

the Appellate Court dispenses therewith of the judgment on which it is founded. In Rampravesh Singh and Others Vs. Mahesh Singh and Others, . it was held as under:--

"Under Order 41", Rule 1 (I), there is no valid appeal unless the memorandum of appeal is accompanied both by a copy of the decree and a copy of the judgment appealed from, unless the latter is dispensed with. If the copy of the Judgment is filed later, after the expiration of the period of limitation prescribed for the appeal, the appeal is time-barred; this is because there is no valid appeal until a copy of the judgment, if not dispensed with, is also filed.""

16. According to the ratio of this decision, there is no valid second appeal unless the memorandum of appeal is accompanied by a copy of the Judgment of the trial Court. Since the copy was filed after the expiry of the period of limitation, the appeal is clearly barred by limitation. The contention of the counsel for the appellant that the provisions of Order 42. Rule 2. Civil Procedure Code, are directory and not mandatory has no force and is, therefore, rejected.

17. The appellant made Civil Miscellaneous No. 1636-O of 1974 on May 14, 1974 u/s 5 of the Limitation Act and read with Section 151 Civil Procedure Code, stating that the office of the High Court reported on 24-7-1971 that the copy of the trial Court was not forthcoming, that no intimation of this report was given to the counsel for the appellant and that as soon as the appellant's counsel came to know about the defect, he informed her on 9-8-1971 and the application to Get the copy was made on 10-8-1971 and the copy was obtained on the same day and thereafter she fell ill and she was able to contact the counsel on 23-8-1971 and the copy was delivered to him and that delay in filing the copy may be condoned. An additional affidavit was filed by the appellant in support of this petition on 17-7-1974, stating that the papers for filing this appeal were handed over to her counsel in June, 1971, and he told her that the appeal was in order and the needful would be done in time, that the petitioner remained seriously ill and could not move out from 5-8-1971 to 30-8-1971 and due to this she could not contact her lawyer. These grounds do not constitute sufficient cause for not filing the certified copy of the judgment along with the memorandum of appeal, The last date of limitation was 20-7-1971 and till then no application to get the certified copy was made. Admittedly, application to get certified copy of the trial Court judgment was made on 10-8-1971. It is not explained why this copy was not obtained prior to the filing of the appeal. The reasons given in the affidavit dated 17-7-1974 of the petitioner seem to be an after thought. This appeal was filed in the year 1971 and no application for condonation of delay was made for about more than 2 1/2 years. The respondent made Civil Miscellaneous No. 1371-O of 1974 on 22-4-1974 stating that the appeal is barred by limitation and it may be dismissed and it was thereafter that the application for condonation of the delay was given by the appellant.

18. For the reasons given above, it is held that there is no ground to condone the delay and the application for condonation of delay filed by the appellant is

rejected.

19. Lastly, it was urged by the counsel [or the appellant that this appeal was admitted by the learned Single Judge and he must be deemed to have condoned the delay in filing the appeal. This contention is without force and it must be rejected. It is well settled law that the Bench admitting the regular second appeal must pass a specific order that the delay in filing the appeal was condoned as it was due to good and sufficient cause. The pointed attention of the Bench has to be drawn to the fact that the appeal as filed was barred by time and condonation of delay may be made for the reasons to be stated by the appellant. If after applying its mind to the facts, the Court comes to the conclusion that the delay was due to sufficient cause, the delay may be condoned, but the mere admission of the appeal without the attention of the Bench being invited to the fact that it was barred by time will not have the effect of condonation of delay, vide Mahant Bikram Dass's case (supra). In the instant case, it was not known even to the appellant or her counsel that the appeal was barred by limitation when it was admitted. The application for condonation of the delay was made for the first time in May, 1974. and consequently the question of condonation of the delay by the Admitting Bench on October 12, 1971, did not arise. This contention, therefore, is rejected as devoid of force.

20. For the reasons given above, it is held that this appeal is barred by limitation and the same is dismissed with costs