

## Om Prakash vs Amarjit Singh & Anr on 10 August, 1988

**Equivalent citations:** 1988 SCR, SUPL. (2) 362 1988 SCC SUPL. 780, AIRONLINE 1988 SC 10, 1988 SCC (SUPP) 780, (1989) 1 MAD LW 470, (1988) 2 KER LT 64, (1988) 3 JT 555, (1988) 3 JT 555 (SC), (1990) 186 ITR 571, (1991) 95 CURTAXREP 257, 1992 SCC (SUPP) 1 495

**Author:** A.P. Sen

**Bench:** A.P. Sen

PETITIONER:

OM PRAKASH

Vs.

RESPONDENT:

AMARJIT SINGH & ANR.

DATE OF JUDGMENT 10/08/1988

BENCH:

SEN, A.P. (J)

BENCH:

SEN, A.P. (J)

VENKATACHALLIAH, M.N. (J)

CITATION:

1988 SCR Supl. (2) 362 1988 SCC Supl. 780  
JT 1988 (3) 555 1988 SCALE (2) 567

ACT:

Civil Procedure Code, 1908: Section 105(2)-Order 9, Rule 7- Application for setting aside order placing defendant ex parte dismissed by trial court as unsigned-High Court in revision remitting application for disposal after allowing defendant to affix signature re\_Application dismissed by trial court as time barred-Suit for specific performance decreed on basis of witnesses examined in ex parte-District Court affirming that application was time barred, but remanding suit for fresh disposal-Remand order-Not appealed against-Assuming finality- Whether defendant entitled to adduce fresh evidence and recall witnesses examined ex parte, on remand.

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Specific Relief Act, 1963: Sections 20 and 34-Suit for specific performance-Grant of relief-Discretionary-Equitable and discretionary jurisdiction of Court-When can be

exercised.

HEADNOTE:

In a suit for specific enforcement of an agreement to sell the suit property filed by respondent No. 1, the appellant was placed ex parte for default of non-appearance, after he entered appearance and filed his written statement. Thereafter, the appellant's application under Order IX, r. 7 of C.P.C. for setting aside the above order was dismissed for default. After respondent No. 1 examined two of his witnesses, appellant filed an unsigned application for setting aside the aforesaid orders. This was also dismissed by the trial court because it was unsigned. The High Court in revision, allowed the appellant's prayer, and remitted the application for fresh disposal, after affording an opportunity to the appellant to sign the application. Thereafter the appellant signed the application, but it was again rejected by the trial court, as barred by time, reckoning the date of affixture of signature as the date of its filing, and the suit was decreed on the basis of evidence of two witness examined for the plaintiff when the appellant was ex parte.

On appeal, District Judge concurred with the trial court's view that the application for setting aside the dismissal order and the ex parte order was barred by time, but set aside the decree holding that the decree was not in accordance with law and not executable for a number of

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reasons and remanded the suit to the trial court for a fresh disposal, after giving an opportunity of hearing to both parties.

On remand, the trial court dismissed the suit. It held that the remand order having been upheld, the dismissal of the appellant's application for setting aside the order placing the appellant ex parte, must be understood to have excluded from the scope of the proceedings on remand, any entitlement of appellant to recall the witnesses examined when the appellant was ex parte. The District Judge, in appeal, confirmed this decision. The High Court rejected appellant's second appeal in limine.

In the appeal filed before this court, on behalf of the appellant, it was contended that the trial court should have tried the suit de-novo by affording an opportunity to both the parties to adduce evidence afresh, and that the scope of the remand also entitled the appellant to have the two witnesses examined earlier for the plaintiff recalled for cross-examination.

Allowing the appeal,

HELD: 1.1 An order, which is appealable under Order 43, Civil Procedure Code, if not appealed against, becomes final

and its correctness is no more open to examination in view of s. 105(2) of the Code. [368C]

:

Nainsingh v. Koonwarjee, [1971] 1 SCR 207 relied on.

In the instant case, the order of remand, not having been appealed against by either side, had assumed finality. Hence the jurisdiction of the trial court was circumscribed and fettered by the order of remand. [368E]

1.2 It is true that it would not be necessary for a party to get rid of an order placing him ex parte if the party wishes to participate in the proceedings at any particular stage onwards, provided that he does not seek to be relegated to the position he would have occupied if he had appeared at the earlier hearing or hearings and does not seek to set back: the hands of the clock. It means that he must accept all that has gone before and be content to proceed from the stage at which he has come in. [368F]

Sangram Singh v. Election Tribunal, Kotah, Bhurey Lal Baya, [1955] 2 SCR 1 and Arjun Singh v Mohindra Kumar and Ors., [1964] 5 SCR 946 referred to.

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In the present case, however, the appellant did seek to set the hands of the clock backwards and wanted to recall the witnesses for cross-examination. This was not possible having regard to the finality the order of remand had assumed. [368H]

2. In a suit for specific performance of an agreement to sell, grant of relief is discretionary. The Court after consideration of all relevant circumstances must be persuaded to exercise its equitable and discretionary jurisdiction in favour of specific enforcement. The jurisdiction is subject to all the conditions to which all discretionary jurisdictions are subject. [369A]

In the instant case, there are certain personal bars to relief. Respondent No. 1, who was the plaintiff in the suit, did not enter the box and tender evidence. The subject matter of the suit is a small piece of property of 68 sq. yds. and is said to be the only worldly goods of the appellant. Therefore having regard to all the circumstances of the case and in order that complete justice is done, the decrees of the courts below are set aside and the suit remitted for a fresh disposal after affording an opportunity to both parties to adduce fresh evidence on their respective sides. Appellant will also be entitled to have the witnesses examined in his absence recalled for cross examination. [369B-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No.2582 of 1988.

From the Judgment and Order dated August 6. 1987 of the Punjab and Haryana High Court in Regular Second Appeal No. 2569 of 1987.

A. K. Nag and Ms. Madhu Tewatia for the Appellant. K.K. Mohan and Ms. Amita Gupta for the Respondents. The following Order of the Court was delivered:

ORDER Special Leave granted. Arguments heard. This appeal by the unsuccessful defendant who has suffered decree of specific performance of an agreement to sell relating to a piece of immovable property, is directed against the order dated 6.8. 1987 of the High Court of PG NO 365 Punjab and Haryana in RSA No. 2569 of 1987 dismissings in limine, appellant's second appeal.

2. Amarjit Singh, Respondent 1, brought the Civil Suit No. 3397/82/259.80 in the Court of Sub Judge, Ist Class, Patiala for specific enforcement of an agreement to sell dated 14.4.1979 said to have been executed in his favour by the appellant respecting the suit property. After service of summons, appellant entered appearance and filed his written statement. But on 7.12.1981 he was placed ex-parte for "default of non-appearance". On 4.2.1982, plaintiff (respondent 1) examined two witnesses on his side. But later the same day appellant appears to have filed an application presumably under Order IX, r. 7 CPC to have the earlier order dated 7. 12. 1981 placing him ex parte set aside. This application was dismissed for default on 25.9.1982. On 30.9. 1982 appellant filed an unsigned application for setting aside that order of dismissal dated 25.9. 1982 and also for setting aside the order dated 7. 12. 1981 placing him ex parte. This application was dismissed by the trial court on 25.2. 1983 on the ground that it had not been signed by the appellant. However, the High Court in revision allowed appellant's prayer and remitted that application for a fresh disposal, after affording to the appellant the opportunity to sign that application. Pursuant thereto, that application was signed by the appellant on 12. 5. 1983 ; but on 16.9. 1983 the application was again dismissed by the trial court on the ground that it was barred by time. The trial court took the view that the date of affixture of the signature was to be reckoned as the date of its filing and, accordingly found it cut of time.

On the same day, the trial court on the basis of the evidence the two witnesses examined earlier for the plaintiff, decreed the suit.

3. Against this decree, appellant filed an appeal in the Court of Additional District Judge Patiala. The learned District Judge appears to have concurred with the trial court's view that the application dated 30.9. 1982 was barred by time. learned District judge held :

"..... For all these reasons I agree with the lower court that application dated 30.9. 1982 was barred by limitation and deserves dismissal on this ground . . . . . The reason for holding that the application was statutu- barred was that:

"Application dated 30.9. 1982 was admittedly not signed PG NO 366 when it was presented in court on that day but it was subsequently signed by defendant No. 1 on 12.5. 1983. There was no application in the eyes of law on 30.9. 1982 as it was not

duly signed by defendant No. 2. It became a proper application only on 12.5. 1983 when it was signed by defendant No. 1 and so it must be deemed to have been filed on that date"

The understanding by both the courts of the directions of the High Court in the revision proceedings permitting appellant to sign the application may not be a correct one. But that order was not assailed by the appellant in the appropriate proceedings. However, the learned District Judge set aside the decree dated 16.9.1985 on some other ground and remitted the suit to the trial court for a fresh disposal. The operative part of the judgment dated 14.2. 1986 of the learned District Judge is in the following terms ". ... In the result I accept the appeal set aside the judgment and decree passed by the lower court and remand the case to the lower court i.e. court of Shri J.R. Singla, which is successor court of the court of Shri G.K. Rai with the direction to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit afresh in the light of above observations by giving a clear findings according to law as to the suit property in respect of which any relief is granted to the plaintiff, nature of the relief declined or allowed to the plaintiff out of the reliefs prayed for and the conditions subject to which decree of specific performance and possession if any, is passed and the names of the defendants against whom it is passed. The lower court shall give proper opportunity of hearing to both the parties in accordance with law before passing afresh decree . . . .".

Referring to the need for, and the points which require to be decided on, remand the learned District Judge said:

"I have, however, found that in some other respects the decree passed by the lower court is not sustainable being not in conformity with law and not a executable decree due to the number of reasons . . . .".

PG NO 367 "..... The learned sub-judge has failed to give a clear finding as to what was the sale consideration for the disputed transaction of sale as entered into between defendant No. 1 and the plaintiff vide the agreement dated 14.2. 1979 executed by defendant No. 1 and as to how much consideration had already been paid at the time of agreement and what was the amount which remained for payment and in what manner and by what date it was to be paid by the plaintiff to defendant No. 1. The learned Sub-judge did not at all go into the question as to whether the property in suit was already mortgaged and what was the mortgage amount which was payable to the prior mortgagee. He has missed even to look into the admission made by the plaintiff in this regard in the plaint. Again the lower court has failed to give any finding on the prayer of the plaintiff for possession of the suit property and as to if it (sic) any conditions this relief could be granted to him while passing the decree in his favour. No direction was given in the impugned decree about the payment of any sale consideration under the agreement in dispute and accordingly no time was fixed for making the said payment as required under rule 12A of Order 20 CPC. Plan of the suit property in respect of which the decree for specific performance has been passed by the lower court has also not been got proved and referred to in the decree. In the absence of same, decree must be termed as vague and in executable .....

4. On remand, the trial court dismissed the suit by its judgment dated 30.5. 1986. The District Judge in appeal confirmed this decree for dismissal. The High Court by its order dated 6.8. 1987, now under appeal, rejected appellant's second appeal in limine.

5. Appellant's main grievance in this appeal is that pursuant to and in terms of the order of remand dated 14.2.1986 the trial court. should have tried the suit de- novo by affording an opportunity to both the parties to adduce evidence afresh and that the scope of the remand also entitled appellant to have the two witnesses examined earlier for the plaintiff recalled for cross examination. The trial court however understood the order of remand dated 14.2.1986 differently. It held that the order having upheld the dismissal of the appellant's application for setting aside the order, placing appellant ex-parte must be understood to have clearly excluded from the scope of the proceedings on remand, any entitlement of appellant to recall the witnesses examined at a time when appellant was ex-parte.

PG NO 368 This view of the trial court as to the scope of the proceedings on remand was endorsed by the first appellate court and must be held to have been approved by the High Court. Appellant assails its correctness here.

6. Appellant's entitlement to adduce fresh evidence and to have plaintiff's witnesses recalled for cross-examination turns upon and is circumscribed by the order of remand. The order of remand dated 14.2.1986 not having been appealed against by either side had assumed finality. As observed by this court in Nain SINGH v. Koonwarjee, [1971] SCR 207 an order, which is appealable under order 43 CPC, if not appealed against, becomes final and its correctness is no more open to examination in view of the provisions of Section 105 [2] of the Code which provides that where any party, aggrieved by an order of remand from which an appeal lies , does not appeal therefrom he shall thereafter be precluded from disputing its correctness. It is true that the correctness of the view taken by the District-Judge in the course of the remand order that the date of the signing of the application and not the date of its initial filing was the relevant date for purposes of reckoning limitation is open to doubt in the light cf. the directions of the High Court permitting application to sign that application. But that order of remand, as stated earlier. was not appealed against by the appellant. The trial court was right in its view that its jurisdiction on remand was circumscribed and fettered by the terms of the order of remand. The appeal to the principle in Sangram Singh v. Election Tribunal Kotah, Bhurey Lal Baya, [1955] SCR 1, in the circumstances is not much of assistance to the appellant. It is true that it would not be necessary for a party to get rid of an order placing him ex parte if the party wishes to participate in the proceedings at any particular stage onwards, provided that he does not seek to be relegated to the position he would have occupied if he had appeared at the earlier hearing or hearings and does not seek to set back the: hands of the clock. It means than he must accept all that has gone before and be content to proceed from the stage at which he has come in. [See also: Arjun Singh v. Mohindra Kumar and Ors., [1964] 5 SCR 946]. In the present case appellant did seek to set the hands of the clock back- wards; he wanted the witnesses to be recalled for cross examination. This, unfortunately was not permissible having regard to the finality the order of remand had assumed.

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7. But that does not appear to be the end of the matter. This is a suit for specific performance on an agreement to sell. The grant of relief is discretionary. The after consideration of all relevant circumstances must be persuaded to exercise its equitable and discretionary jurisdiction in favour of specific enforcement. The jurisdiction is subject to all title conditions to which all discretionary jurisdictions are subject. There are certain personal bars to relief. Respondent-1, who was the plaintiff in the suit, did not enter the box and tender evidence. The subject matter of the suit is a small piece of property of 68 Sq. yds. and is said to be the only worldly goods of the appellant.

Having regard to all the circumstances of the case and in order that complete justice is done, the order that commends itself as appropriate is to set aside the decrees of the courts below and remit the suit for a fresh disposal after affording an opportunity to both parties to adduce fresh evidence on their respective sides. Appellant shall also be entitled to have the witnesses examined in his absence recalled for cross examination The relief we grant might look a little over-liberal: we think that the appellant should have another opportunity to have his case put-forward and examined on the merits. This is done by compensating the first-respondent as to an costs which we determine at a sum of Rs. 1,000 which appellant shall pay to the first respondent in the trial court after the suit goes back before it.

8. Accordingly, the appeal is allowed. the decree; of the courts below set aside and the suit is remitted to the trial court to be re-registered in its original number and disposed .of in accordance with law and in the light of the observations made in the course of this judgment. Both the parties are directed to appear before the trial court of 30th of September 1988, for further proceeding in the suit on remand without the requirement of service of fresh notices to them from the trial court in this behalf. The trial court is directed to call this matter on 30th of September 1988, for this purpose.

N.P.V. Appeal allowed