

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RSA 225/2010

% Date of decision: May 18, 2012

AJAY KUMAR DECD THROUGH LRS Appellant
Through Mr.Shailendra Paul, Adv.

versus

SANJAY RAJU GOEL & ORS Respondent
Through Ms Renuka Arora, Adv.

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J (Oral)

1. By way of this Regular Second Appeal under Section 100 read with Order XLII CPC, appellants have challenged the impugned judgment/decreed dated 4th May, 2010 passed by the learned Addl. District Judge, Delhi in RCA No.55/2005 whereby the judgment/decreed dated 24th August, 2005 passed by learned Civil Judge in Suit No.141/02 filed by respondent no.1/plaintiff for specific performance and injunction, has been upheld.

2. The case of respondent no.1 herein i.e., plaintiff before the learned Civil Judge was that he was living in the suit property i.e., house no.4800-1 Ram Bazar, Cloth Market Delhi with his parents and brothers at the ground floor, first floor and third floor and was carrying on business as well. As per him property was owned by

Ajay Kumar since deceased through L.Rs. i.e., appellants and respondents 2 to 4. On 5th October, 1986, an agreement to sell in respect of property bearing no.4800-1, Ram Bazar, Cloth Market, Chandni Chowk, Delhi-7, comprising of four storey building over a plot of 64 sq. yds was entered into between respondent no.1/plaintiff on one hand and deceased Ajay Kumar i.e., defendant no.2 before the trial court on the other hand for a consideration of Rs.98000/- and a sum of Rs.10000/- was received as a earnest money and a receipt was also executed by Ajay Kumar(deceased) in his name as well as in the name of respondents 2 to 4. The deceased Ajay Kumar and respondents 2 to 4 were defendants 1 to 4 before the Ld. Civil Judge. After the death of Ajay Kumar, his L.Rs., i.e., appellants were brought on record. The other terms were settled as per agreement to sell dated 5.10.1986 and sale deed was to be executed within one month of the execution of the agreement to sell i.e., before 5.11.1986. The case of respondent no.1/plaintiff was that deceased Ajay Kumar i.e., defendant no.2 and respondents 2 to 4 i.e., defendants 1, 3 and 4 did not come forward and on 6.11.1986, respondent no.1/plaintiff got issued legal notice calling upon them to do the needful as he was ready to perform his part of transaction. Thereafter respondent no.1/plaintiff came to know that they were negotiating with other parties, as such respondent no.1/plaintiff was constrained to file civil suit no.141/2002 for specific performance and injunction wherein it was prayed that appellants i.e., L.Rs of defendant no.2 and respondents 2 to 4/defendants 1, 3 & 4 be directed to execute and register the sale deed in favour of respondent no.1/plaintiff in respect of suit property and a further prayer was made that deceased Ajay Kumar and respondents 2 to 4 i.e.,

defendants before the Ld.Civil Judge be restrained from transferring the suit property in any manner to any one.

3. The said suit was contested by deceased Ajay Kumar and respondents 2 to 4 who were all defendants before the learned Civil court by filing a common written statement wherein it was denied that suit property is a four storey building. As per them, it was only a three storey building. They had denied that they had entered into agreement to sell dated 5.10.1986 with respondent no.1/plaintiff and executed any receipt, as was alleged. Respondents 2 to 4/i.e., defendants 1, 3 and 4 before the learned trial court had stated that deceased Ajay Kumar i.e., defendant no.2 had no right or authority on their behalf to enter into or sign any agreement. It was further alleged that agreement to sell and receipt are forged and fabricated documents. They had also taken a stand that deceased Ajay Kumar/defendant no.2 and respondents 2 to 4/defendants 1, 3 & 4 had already entered into agreement to sell in respect of suit property with one Hari Chand and others on 2.8.1986 for a consideration of Rs.1,90,000/-. They had also pleaded that respondent no.1/plaintiff and some of his family members are tenant in respect of a shop on the ground floor and in respect of first floor of suit property. Appellants and respondents 2 to 4/i.e., defendants admitted receipt of envelope purportedly sent by respondent no.1/plaintiff but as per them, same was containing only a piece of old newspaper for which they had lodged a police report on 25.11.1986. They had specifically taken a stand that suit property was jointly owned by deceased Ajay Kumar as well as respondents 2 to 4/defendants, as

such deceased Ajay Kumar/defendant no.2 had no authority to execute agreement to sell on their behalf.

4. After completion of pleadings, issues were framed and evidence of parties was recorded. Before the learned Civil Judge, respondent no.1/plaintiff has proved on record agreement to sell/receipt Ex.PW1/A, copy of notice Ex.PW 1/B, postal receipt and AD card Ex.PW1/C and PW1/D respectively. Respondent no.1/plaintiff has also proved on record site plan Ex.PW1/E. The defence of appellant and respondents 2 to 4/defendants before the learned trial court was that on the day of execution of agreement to sell i.e., on 5.10.1986 appellant Ajay Kumar/defendant no.2 was at Agra and not at Delhi. However, no evidence was led by the deceased Ajay Kumar and respondents 2 to 4 i.e., defendants before the learned Civil Judge to substantiate their stand. Further to prove that agreement to sell/receipt Ex.PW1/A was a forged and fabricated document, no evidence was led by them. Appellants and respondents 2 to 4/defendants admitted having received envelope but as per them, same was containing only a piece of old newspaper. Their defence was that they had lodged a police complaint against respondent no.1/plaintiff. However, no such police complaint was proved on record. As regards their stand that there is an agreement to sell dated 2.8.1986 in respect of suit property, the learned Civil Judge also held that the appellants and respondents 2 to 4/defendants have failed to prove on record any agreement to sell dated 2.8.1986 which is alleged to have been executed between them and Hari Chand and others. Accordingly, learned Civil Judge held that there exists a legal and valid agreement to sell dated 5.10.1986 between

the parties. As regards plea of respondents 2 to 4/defendants 1, 3 and 4 that they had never authorized deceased Ajay Kumar i.e., defendant no.2 before the learned trial court to enter into agreement to sell on their behalf as it was a joint property, the learned Civil Judge has held that respondent no.1/plaintiff has not proved on record any documents which would show that appellants/defendant no.2 was authorized or having attorney on behalf of other defendants to execute or enter into agreement to sell in question. The order of Ld.Civil Judge shows that during the pendency of the suit, respondent no.1/plaintiff had moved an application under section 12 of the Specific Relief Act praying therein that in case the court holds that the specific performance can not be granted in respect of the entire property, specific performance may be granted in respect of 5/16 share of appellants i.e., deceased defendant no.2 before the trial court. Relying on the aforesaid provisions as well as judgment in Rakesh Kumar & Ors Vs Sat Pal AIR 2001 Punjab and Haryana, the learned Civil Judge held that conditions enumerated in section 12 of the Specific Relief Act are satisfied and accordingly LRs of defendant no.2 i.e., appellants were directed to execute the sale deed in favour of respondent no.1/plaintiff relating to 5/16 share of the suit property on receiving the balance payment of Rs.88000/- from respondent no.1/plaintiff within one month from the date of the order vide judgment dated 24.8.2005.

5. Aggrieved with the aforesaid judgment, appellants i.e., L.Rs of defendant no.2 had filed an appeal i.e. RCA 55/2005 before Ld. Addl. District Judge, Delhi. The Appellate Court has dismissed the appeal vide impugned judgment/decreed dated 24th August, 2005.

6. Aggrieved with the same, present second appeal is filed.
7. I have heard counsel for the parties.
8. Learned counsel for the appellants has contended that there was already an agreement to sell dated 2.8.1986 in respect of the suit property in favour of Hari Chand and ors and the said plea was specifically taken in the written statement before the learned Civil Judge. It is contended that said Hari Chand and ors had filed a civil suit no.849/1990 before this court against appellants as well as respondents 2 to 4 i.e., defendants before the learned Civil Judge and the said suit has been decreed in favour of Hari Chand on 26.9.2000. It is contended that in pursuance of that order, sale deed has been executed on 24.7.2003 as per orders of this court and the entire suit property has been transferred in favour of Hari Chand and others including the share of appellants for which decree has been passed by the courts below which is under challenge. It is contended that in these circumstances, it is not possible to implement the orders passed by the courts below.
9. On the other hand, learned counsel for respondent no.1 has contended that aforesaid argument of appellants has already been rejected by the learned Additional District Judge vide order dated 4.4.2009. It is contended that the said order was also challenged before this court vide CM(M) and this aspect has attained finality, as such, the same cannot be re agitated in the second appeal and no substantial question of law arises in the present case and the appeal is liable to be dismissed.

10. Perusal of record shows that during the pendency of appeal before the First Appellate Court, appellants had moved an application under Order 41 Rule 23 & 27 read with section 151 CPC for setting aside of the judgment and decree dated 24th August, 2005 passed by the learned Civil Judge and had sought remand of the case by giving then opportunity to lead additional evidence. The said application was dismissed by the Ld. Appellate Court vide orders dated 4.4.2009 wherein it was specifically held that suit decreed by the learned Civil Judge was filed against appellants in the year 1986 whereas the second suit 849/90 which was decreed by this court vide judgment dated 26.9.2000 and in pursuance whereof sale deed was executed in respect of suit property, was filed in the year 1990 and respondent no.1/plaintiff was not a party to the said suit. In such a situation, the suit property would be governed by doctrine of lis pendens under Section 52 of the Transfer of Property Act. The relevant finding of Ld. Appellate Court are as under:-

“xxxxxxxxxxxxxxxx The suit of the appellant was filed in the year 1986 whereas the second suit 849/90 in which the judgment and decree dated 26.9.2000 was passed and sale deed came to be executed by the order of the Hon’ble High Court on 24.7.2003 was filed subsequently in the year 1990. Respondent No.1 in the present appeal before this court who was plaintiff in the suit was not a party to the subsequent suit. The suit property in the two suits is common. In such a situation it would be governed by doctrine of lis pendens under Section 52 Transfer of Property Act. The judgment and decree in the later suit 894/90 passed by the Hon’ble High Court and subsequent execution of the sale deed would in no way effect the right and interest of respondent no.1 in the present appeal. By decision of subsequent suit and execution of the sale deed the claim of respondent no.1 herein in the suit property cannot be defeated.

The subsequent transfer of the sale property will be hit by Section 52 Transfer of Property Act. The status of Hari Chand and ors subsequent to the execution of sale deed dated 24.7.2003 in their favour is that of a transferee pendent lite. The principal underline Section 52 Transfer of Property Act is that a litigating party is exempted from taking notice of a title acquired during the pendency of litigation. The effect is that mere pendency of a suit does not prevent one of the party from dealing with the property constituting the subject matter of the suit. The Section will only postulated a condition that the alienation will in no manner effect the rights of the other party under any decree which may be passed in the suit unless the property is alienated with the permission of the Court.”

11. The aforesaid order was challenged by the appellants before this court vide CM(M) 722/2009 which was also dismissed vide order dated 30.7.2009. The relevant portion of the said order is reproduced which is as under:-

“Having heard learned counsel for the petitioner and perused the impugned order I find no infirmity in the said order and no reason to interfere with the same. Admittedly, the suit preferred by the respondent was the earlier suit. If during the pendency of that suit the property was dealt with or transferred, Section 52 of the Transfer of Property Act would clearly apply to any such transfer. The additional evidence sought to be brought on record does not have any bearing on the determination of the issues that arose in the respondent’s suit and which are now pending adjudication before the appellate court. The petitioner has already put the respondent to notice about the factum of the decree being passed on 26.9.2000 in favour of the Hari Chand and ors in pursuance of the said decree. It is now up to the respondent plaintiffs to take whatever action they deem appropriate in view of

the said development. I see no infirmity in the order. Dismissed.”

12. The aforesaid order has attained finality as the same was not challenged in any higher forum by the appellants. In view of this, appellants cannot reagitate the issue.

13. Further the First Appellate Court while dismissing the appeal has also noticed the conduct of appellants and respondents 2 to 4/defendants. It is noticed that appellants and respondents 2 to 4/defendants have deliberately concealed the pendency of civil suit filed by the prospective buyer Hari Chand and others against them. The relevant finding is as under:-

“7. During the course of hearing of this appeal a very important revelation has come to the notice of this court i.e, that a separate suit having title “Hari Chand and Ors Vs. Ajay Kumar and Ors” and suit no.849/90 was filed by prospective buyer under agreement to sell executed between appellant and co owners of the suit property and Sh.Hari Chand on 02.08.86. Court is apprised that appellant had initially contested that suit by filing a WS but later they stopped participating therein. Finally that suit was decreed in the original side of Hon’ble High Court vide judgment and decree dated 26.09.2000. An execution under that decree was also filed by Sh.Hari Chand and on 24.07.03 registered sale deed already stands executed by Joint Registrar of Hon’ble High Court qua the entire suit property in favour of Decree Holder.

It is of utmost importance here that the appellant herein was a defendant not only before Hon’ble High Court in the Original Side but also before Ld.Civil Judge in the matter in hand. Appellant and respondent no.2 to

4 had filed written statement in both these suits but the factum of pendency of the other suit was clandestinely concealed from both the courts. Such has been the conduct of the appellants and respondents no.2 to 4 that even though Sh.Arun Kumar appeared as a witness before Ld.Civil Judge on 26.02.04 that too after more than 4 ½ years of passing of a decree of specific performance of this suit property by Hon'ble High Court after 7 months of execution of sale deed, he concealed these facts not only from the plaintiff but also from the court. Had Ld.Trial Court been informed of passing of a decree by Hon'ble High Court in paralled proceedings, I see no reason that Ld.Civil Judge would have still passed a decree in the form it exits today. It is starling and disturbing to observe that two separate suits of specific performance qua the sale proceedings were pending before Hon'ble High Court as well as before Ld.Civil Judge simultaneously and even though the appellant was party in both of them, pendency of the one was concealed from the other. This concealment was nothing but a deliberate act of defrauding the judicial process. In plethora of judgments Hon'ble Supreme Court as well as Hon'ble Delhi High Court has ruled that any party which approaches the court with unclean hands not only needs to be reprimanded and burdened with cost but also it should be dismissed and thrown out of the court. (emphasis supplied)

14. The above observation of Appellate Court shows that appellants and respondents 2 to 4/defendants have concealed the factum of filing of suit for specific performance of contract by Hari Chand and others against them from the court of Ld. Civil Judge. Similarly the pendency of suit for specific performance of contract in respect of same property by respondent no. 1/plaintiff is also concealed in the suit filed by Sh. Harichand and others. The concealment is also intentional. Noticing their aforesaid conduct, the Appellate Court has dismissed the appeal burdening the

appellants (jointly) and respondents 2 to 4 with cost of Rs.50000/- each totaling Rs.2 lacs.

15. The appellants have failed to give any explanation to aforesaid concealment as noted by the Appellate Court in the court below as well as before this court.

16. The findings of Ld.Civil Judge as are noted above are based on evidence on record. The First Appellate Court has also rightly dismissed the appeal as the appellants and respondents 2 to 4/defendants have defrauded the judicial process by concealing material facts.

In view of above discussion, no substantial question of law arises in the appeal. Accordingly, second appeal under Section 100 CPC can't be entertained. The appeal stands dismissed.

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In view of the order passed in the appeal, no further order is required in the present application. The same stands disposed of accordingly.

VEENA BIRBAL, J

MAY 18 , 2012

ssb