

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

Decided on: 20.05.2013

+ **RFA (OS) 67/2011, C.M. NO.11120/2011 & 11121/2011**

SH. D.P. SINGH Appellant
Through : Sh. Dhiraj Sachdeva, Advocate.

versus

SH. GAGAN DEEP SINGH (SINCE DECEASED)
THROUGH LR's Respondent
Through : Sh. Narendra Gautam, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. This is a first appeal against the judgment of a learned Single Judge in CS (OS) 280/2005 dismissing the suit of the Appellant.
2. The Appellant sought a decree of specific performance of an Agreement to Sell dated 19th August, 2004, of Flat No. 97, HIG Category, Mahabhadra Kali CGHS Limited, Plot No. 6, Sector 13, Dwarka, New Delhi between the appellant/plaintiff (buyer) and the defendant/respondent (seller). The agreement stipulated that the flat was to be sold for a total consideration of ₹21,15,000/-, with an advance amount of ₹2,00,000/- paid by the buyer to the seller as earnest money in part-payment of the whole. The other obligations

stipulated in the agreement were to be completed by 9th November, 2004: from the seller's side – the production of a 'No Dues Certificate' and a 'No Objection Certificate' for sale of the said flat from Mahabhadra Kali CGHS Limited Society, production and handing over of all original title documents and delivery of vacant physical possession of the said flat, and from the buyer's side: payment of the balance sale consideration of ₹19,15,000/- and production of non-judicial stamp paper of the requisite amount. These respective obligations were to be carried out by each party on 9th November at the office of the Sub-Registrar, Janakpuri, New Delhi at the time of execution and registration of the documents and the sale deed.

3. The Appellant alleged that the Respondent failed to meet his obligations under the sale agreement and did not appear before the Sub-Registrar's office on 9th November, 2004 with the required documents nor did he hand over possession of the suit property. The Appellant claims that he provided opportunities for curing this breach of contract through legal notices dated 11th November, 2004 and 17th November, 2004 calling upon the Respondent to receive the balance sale consideration from the Appellant (within one week of each of those notices), and hand over vacant possession of the flat along with the documents required under the agreement. At the other end of the obligations in question, the Appellant claims that he was, on 9th November 2004, and has been since ready and willing to fulfil his obligations under the contract – i.e. on that date, the Appellant reached the Sub-Registrar's office around noon with a banker's cheque of

₹19,15,000 drawn in favour of the Respondent from ICICI Bank, bearing number 114666 dated 9th November, 2004 and with judicial stamp paper of the required amount. To make out a case for specific performance under Section 16 of the Specific Relief Act, 1963, i.e. to demonstrate that the Appellant was ready and willing to perform the essential terms of the contract himself, the Appellant also relies upon a telegram sent, and a phone call made, to the Respondent on 8th November, one day before the stipulated date in the agreement, confirming that the balance payment was ready and the same shall be paid on the following day. On 9th November, however, the Appellant claims that on reaching the Sub-Registrar's office at noon, the Respondent was not present and despite getting in touch through several phone calls, the transaction could not be completed due to the Respondent's breach. The Appellant also submits that a telegram was also sent at 05.45 PM on the same day to the Respondent relating to this breach. Given these facts, the Appellant submits that *first*, a breach of the terms of the sale agreement by the Respondent is made out, and *secondly*, that the appropriate relief in this case is that of specific performance of the agreement (i.e. mandating transfer of the flat) under Section 16 of the Specific Relief Act.

4. The case, therefore, revolves around the performance of obligations by each party, and the consequential relief, if any, available to the appellant. The issues as framed before the Learned Single Judge in this background were as follows:

- “1. *Is the suit not maintainable?*
2. *Has the plaintiff been always ready and willing to perform his*

part of the agreement dated 19.8.2004?

3. *Is the plaintiff entitled to a decree of specific performance?*

4. *Relief?"*

5. The Learned Single Judge held that the suit was maintainable, contrary to the defendant's pleadings, given that the written statement did not disclose any particulars as to how the suit was not maintainable. (paragraph 6 of the impugned order). On the second issue, the Single Judge noted that on a consideration of the evidence brought on record and the oral testimony of parties, the balance of the evidence indicated that the Appellant was not ready and willing to perform his obligations on the stipulated date:

"8. Surprisingly, neither the Plaintiff nor the Defendant had been vigilant in getting their presence recorded in the Office of the Sub-Registrar concerned by moving an application there to establish the presence at the Office of the Sub-Registrar concerned and both sides are relying upon their oral evidence as well as of their companions and upon scrutiny of the same, I find that it is just not possible to reasonably conclude that either of them was present in the Office of the Sub-Registrar on the appointed date for execution of the Sale Deed in pursuance to the Agreement in question. The best evidence has been withheld by the Plaintiff, He claims to be in possession of the banker's cheque for the balance sale consideration, but he fails to place on record its copy and has not even placed on record any proof regarding his giving phone calls to the Defendant by disclosing the phone number of the Defendant. Even the assertion of the Plaintiff that he was in possession of the stamp paper and the banker's cheque on 8th November 2004, i.e., a day before the appointed date, remains unsubstantiated Rather, the Plaintiff stands contradicted

in cross-examination where he admits that in anticipation of collection of stamp papers as well as bank draft, he had given a telegram on 8th November 2004 that he was in possession of the same, though on that day, he neither had the banker's cheque/bank draft nor the stamp papers with him. This shows the Plaintiff has not come with clean hands before the Court and is thus, disentitled to seek discretionary relief of Specific Performance of Agreement to Sell. More so, when Plaintiff stands falsified from the deposition of Mr. Amarpal Singh (DW-3) from the Treasury Office, who has given the date of delivery of the stamp papers as 11th November 2004, whereas, Plaintiff claims that with the requisite stamp papers, he was in the Office of the Sub-Registrar concerned on 9 November, 2004 for the execution of the Sale Deed on those stamp papers. It is so said, as there is unchallenged evidence of Amarpal Singh (DW-3) to the effect that the cash for the purchase of stamp papers was deposited on 9 November 2004 and the challan for the same was deposited with the Treasury on 10th November 2004 and so non-judicial stamp papers could be made available for delivery on 11th November 2004 only. Another pertinent aspect is that as per the deposition of Amarpal Singh (DW-3) the aforesaid stamp papers were not delivered to the Plaintiff but to one Mr. Raj Kumar, with whom, Plaintiff fails to establish any connection.....”

6. Based on these “fundamental contradiction in the Plaintiff’s case,” (paragraph 8 of the impugned order), along the Appellant’s failure to bring on record the banker’s cheque – which he claimed to have made available at the Sub-Registrar’s Office on the 9th of November – the Single Judge disbelieved the Appellant’s case regarding production of the necessary documents indicating his readiness and willingness to perform the contract. Moreover, the

Single Judge noted that the oral testimony led by the Plaintiff with regard to production of the stamp papers, (*“I cannot explain it false or true, if the stamp papers were in fact released from Treasury on 9th November 2004 at 4 PM. (Volunteered) I had collected these papers from the Rohilla Documentation Center, at 11 or 12 noon or that the amount for issuance of these stamp papers was deposited on 9th November, 2004 at 11 to 12 PM.”*) was contradictory as the Appellant claims to have been in the office of Sub-Registrar along with the stamp paper at the time he, in the above statement, claims to have received the stamp paper himself.

7. On the third issue, the Single Judge held that the Appellant – having not met the requirements of Section 16 – is not entitled to specific performance, but in light of the fact that the Respondent was also in breach on the stipulated date, having admitted to not having the ‘No Dues’ Certificate, he is entitled to return of the earnest money of ₹2,00,000/- with 6% interest with effect from 9th November, 2004.

8. It is crucial here to note that of the several documents sought to be relied upon by the Appellant, most were not produced before the Single Judge and have been sought to be adduced in the present appeal through an application under Order 41, Rule 27 of the CPC, CM No. 11120/2011, which will be dealt with later. These documents unavailable before the Learned Single Judge were: (a) Copy of telegram dated 08.11.2004, (b) Copy of telephone call receipt/bill dated 08.11.2004, (c) Copy of banker’s cheque of ₹19,15,000/- dated 09.11.2004; (d) Copy of the required non-judicial stamp paper dated 09.11.2004; (e) Copy of receipt dated 09.11.2004 towards payment of

registration fees at the Sub-Registrar's Office; (f) Copy of telephone call receipt/bill dated 09.11.2004.

9. Going by the issues framed before the Learned Single Judge, the first question that arises for consideration is whether the Appellant was ready and willing to perform his obligations under the contract, for which it must be proven that the Appellant was present before the Sub-Registrar on 9th November, 2004 with the required non-judicial stamp paper and the banker's cheque for ₹19,15,000/-. On this count, as the Single Judge rightly notes, the best evidence to be offered was an application before the Sub-Registrar to record his presence, and the banker's cheque itself. Neither of these were produced before the Learned Single Judge. Indeed, the Appellant's oral testimony demonstrating his presence at the office was also later contradicted by his assertion that he collected the non-judicial stamp paper from the Rohilla Documentation Centre at around the same time on that day (11 am or 12 noon). Indeed, even otherwise, the deposition of Mr. Amarpal Singh from the Treasury Office indicates that the stamp paper was issued only on the 11th November, with the money having been paid in on the 9th. This evidence went unchallenged in the course of the proceedings before the Learned Single Judge. Equally, the delivery of these stamp papers to one Mr. Raj Kumar, with whom the Appellant failed to establish any connection or indicate how these stamp papers were received by him on the 9th of November, 2004, created sufficient doubt so as to deny the Appellant's prayer. Indeed, even in the present appeal proceedings, the Appellant does not offer any justification for this, noting instead that "*.....it is of no*

relevance to whom the aforesaid stamp papers were delivered or that the appellant (plaintiff) failed to establish any connection with Mr. Raj Kumar” (Ground N, Appeal Memorandum).

10. The fact that the Appellant called the Respondent on the 8th of November indicating that “*he was ready with everything in this deal*” (Cross-Examination of DW-1) does not by itself supplant the absence of material on record establishing the Appellant’s presence with the necessary documents in the Sub-Registrar’s office. Equally, contrary to the Appellant’s contention, DW-1’s admission that he “*did not have with (him) a No Due Certificate from the President of the Society in respect of the suit flat*”, while certainly justifying a breach of contract on the Respondent’s part does not touch upon the Appellant’s willingness to perform. On the question of the Appellant’s presence at the Sub-Registrar’s office, the Appellant relies on the telegram sent and calls made on 9th November, as also the payment of the registration charges at the office of the Sub-Registrar on that day. A consideration of the latter is subject to allowing C.M. 11120/2011, and that apart, the mere fact of calling the Respondent or sending a telegram does not, by itself, establish the Appellant’s presence at the Sub-Registrar’s office given the other evidence that could possibly have been adduced to prove that fact. Moreover, the Appellant’s admission that he was collecting that stamp papers at the Rohilla Documentation Centre at 11 AM or 12 noon on 9th November still remains unexplained, further adding doubt to the Appellant’s version of the facts. Indeed, the Appellant notes in the Appeal that:

“T.....*by no stretch of imagination mean (sic)*

that the appellant was not ready and willing to perform his part of the obligation or that the required stamp papers were not available with him on the appointed date”

However, the very fact that the Appellant claims that he was at the Rohilla Documentation Centre *collecting* the stamp paper *and* at the Sub-Registrar’s office *with* the stamp paper at the same time cannot be true, and having been offered no explanation of this contradictory chronology of the events on the day, the Appellant’s readiness to perform the contract remains in doubt.

11. It would be relevant to recollect here that the Supreme Court noted in *RC Chandiok and Anr. v. Chuni Lal Sabharwal and Ors.*, [1971] 2 SCR 573, that

“..... Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.....”

The facts and circumstances, as discussed above, do betray a substantial doubt – given the contradictions and absence of documentary proof – that the Appellant was not ready and willing to perform his part of the contract on 9th November, 2004. Indeed, the existence of a plea in itself is insufficient to satisfy the requirements of law; there has to be proof for the assertions: *Pushparani S. Sundaram and Ors. v. Pauline Manomani James and Ors.*, ((2002) 9 SCC 582. There, it was held that

“so far as there being a plea that they (the Appellants) were ready and willing to perform their part of the contract ... this by itself is not sufficient to hold that the

appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same.....”

The evidence available on record in this case, as the Learned Single Judge held, is clearly insubstantial to establish the Appellant’s plea that he was ready and willing to perform his obligations.

12. Finally, given the Respondent’s admitted failure to perform his part of the contract as well on the stipulated date, the Learned Single Judge rightly noted that the Appellant – though disentitled to specific performance – is entitled to a return of the earnest money of ₹2,00,000/- with 6% interest, in order to place parties at the position they were in before the contract came into existence, so as ensure that neither party gains from its non-performance and *restitutio in integrum* is ensured.

13. On the question of C.M. No. 11120/2011, an application under Order 41 Rule 27 CPC, seeking to adduce additional evidence in this appeal, the documents in question are indeed documents that the Learned Single Judge considered as ‘best evidence’, and are possibly such evidence as could assist the Appellant’s case. The question before the Court is whether this application is to be allowed under the terms of Rule 27, which categorically states that

“(1) [t]he parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court.”

A limited exception is carved out, whereby such additional evidence may be introduced, if

“(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced ... to enable it to pronounce judgment, or for any substantial cause ...”

14. The Appellant seeks to adduce the additional documents on the ground that *“the same could not be done earlier as the appellant had already provided the copies of the said documents to his earlier counsel who did not file the same on the court record and the appellant not being legal person was entirely dependant upon his counsel ...”* (paragraph 3 of the application), and further, because *“this Hon’ble Court would be unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands.....”* (paragraph 7 of the application).

15. On the first ground, this very question was considered by a Single Judge of this Court in *Sriniwas v. Vidyawati and Others*, MANU/DE/2707/2005, where the Court negated this contention, holding categorically that *“[n]egligence of counsel is no ground available in Order 41 Rule 27.”* (paragraph 3). Indeed, in considering the scope of Order 41, Rule 27, the Supreme Court in *Mahavir Singh and Ors. v. Naresh Chandra and Anr.*, 2000 (7) SCALE 356, restricted the scope of application of Rule 27 and noted in paragraph 5:

“.....Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order XLI, Rule 27 CPC was examined by the Privy Council in Kesowji Issur v. G.I.P. Railway, AIR 1931 PC 143, in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no jurisdiction to admit such evidence in cases where this rule does not apply.....”

16. The grounds under Rule 27, thus, are limited and exhaustive, and the Appellant's vague claim (brought in 2011, although the documents were presumably handed over to the counsel 6 years earlier in 2005 at the time of institution of the suit) as to counsel's fault does not permit the limited exception of Rule 27 to be transformed into a gateway to bypass the cardinal rule that all evidence must be adduced at the trial stage and not before the Appellate Court. The documents sought to be adduced were clearly within the Appellant's knowledge at the time of the institution of the suit, and indeed, could easily have been produced before the Court. In fact, in *N. Kamalam (Dead) and Anr. v. Ayyasamy and Another*, 2001 (5) SCALE 65, the Supreme Court held that:

“the provisions of Order 41 Rule 27 has not been

engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up.....”

16. Here, this is precisely the reason for which the Appellant seeks to adduce the additional documents in the present proceedings. Crucially, in such cases, where the Appellant has “*had a sufficient opportunity to exhibit (the evidence) in the trial Court*” (ref., *P. Palaniswami Gounder Dead v. C. Swaminathan*, AIR 1997 Mad 160), the document cannot be produced before the Appellate Court. Equally, on the second ground that such evidence is required “*to enable (this Court) to pronounce judgment*”, this is only in cases where a lacuna in the evidence prevents the Court from delivering the judgment, and such lacuna does not refer to an evidentiary lacuna in the Appellant’s case that merely renders its case weak. Indeed, “*where even without such evidence (the Appellate Court) can pronounce judgment in a case*”, there exists a bar from letting in fresh evidence as Rule 27, as held in *Municipal Corporation for Greater Bombay v. Lal Pancham of Bombay and Ors.*, [1965] 1 SCR 542, does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way.

17. In this case, the Court is not unable to pronounce a judgment based on the evidence and facts available, and indeed, as the judgment of the Single Judge demonstrates, the evidence on record can lead to a speaking and reasoned order considering the performance of contractual obligations under the agreement to sell on a balance of

probabilities. For these reasons, C.M. No. 11120/2011 also has to be dismissed. Accordingly, given the evidence available on record and the above discussion on the merits of this appeal, the judgment and order of the Learned Single Judge does not merit any interference. The appeal and accompanying applications are therefore dismissed without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

MAY 20, 2013