

Court No. - 6

Case :- SECOND APPEAL No. - 224 of 1986

Appellant :- Chandra Bhan

Respondent :- Aditya Prasad

Counsel for Appellant :- H.S. Sahai, Avadhesh Kumar, Om
Prakash Pandey

Counsel for Respondent :- R.S. Pandey, Aditya Kumar
Tiwari, Chandra Bhooshan, Suyash Dwivedi, Vaishali Mishra

Hon'ble Rajnish Kumar, J.

1. Heard, Shri Avadhesh Kumar, learned counsel for the appellant and Shri Aditya Kumar Tiwari, learned counsel for the respondents.

2. This Second Appeal under Section 100 of the Civil Procedure Code 1908 has been filed against the judgment and decree dated 28.02.1986 passed by II Addl. District Judge, Faizabad in Civil Appeal No.410 of 1980; Smt. Ram Sanahi and others Versus Aditya Prakash which has been dismissed with cost affirming the judgment and decree dated 24.09.1980 passed by the Munsif, Hawali, Faizabad in Regular Suit No.182 of 1979; Aditya Prakash Pandey Versus Srimati Ram Sanahi and others, by means of which the suit had been decreed providing therein that the defendant no.1 would execute the registered sale-deed within one month after taking Rs.2000/- from the plaintiff failing which the plaintiff would get it done from the court on the expenses of defendants.

3. The substantial questions of law formulated in this appeal are as under:-

“(1) Whether the burden to prove that the transaction with an illiterate and infirm village lady was made, fairly, consciously and with independent advice of the lady or not was on the defendant-lady or on the plaintiff-respondents and as to whether without

proof of the same, the courts below were justified in decreeing the suit?"

(2) Whether the lower appellate court was justified in refusing the prayer of the lady to get herself examined in court and still drawing inferences for not examining herself."

4. The brief facts of the case giving rise to this appeal are that the plaintiff-respondents had filed suit for specific performance and damages with the allegation that defendant no.1 was the sirdar of the disputed land. She wanted to dispose of, for which an agreement for sale had taken place in between the plaintiff and defendant No.1 for Rs.8000/-. Out of which a sum of Rs.6000/- was paid to the defendant no.1 by the plaintiff. Defendant No.1 executed an Ikrarnama because at that time this land was Sirdari land of defendant no.1. Defendant no.1 agreed to execute a sale deed in favour of plaintiff in respect of the land in question after becoming the Bhumidhar. She also agreed to give the possession to the plaintiff and gave it after taking Rs. 6000/-. Defendants no.2 to 5 are the Pattidars of plaintiff. They kept enmity with him. They misguided the defendant no.1. When the plaintiff went to defendant no.1 to pay the remaining amount and get the sale deed executed, she refused to take it and she told that she executed a sale deed in favour of defendants no. 2 to 5 in respect of the land in question. Defendants no.2 to 5 had misguided the defendant no.1 and got the sale deed executed in their favour from her. Defendant no. 2 to 5 were knowing this fact that defendant no.1 had executed Ikrarnama in his favour even then they persuaded defendant no.1 to get the sale deed executed in their favour.

5. Defendant no.1 had filed written statement and alleged that she had executed a sale deed in favour of defendants no. 2 to 5 in respect of the land in question after taking consideration of Rs.9000/-. She alleged that she never talked with plaintiff to sale the land in question. She never executed any Ikrarnama in favour

of the plaintiff. She never talked with plaintiff to give the possession to him. The plaintiff was not in possession over the land in question. She never made her signatures or thumb impression over any plain and blank paper. The plaintiff never raised any objection for execution of sale deed in favour of defendants no.2 to 5.

6. Defendants no. 2 to 5 had filed their written statement alleging that defendant no.1 was the Sirdar of the land in question. She deposited twenty times land revenue and thereafter she became the Bhumidhar of the land in question. She executed a sale deed dated 24.06.1976 in favour of defendants no. 2 to 5. She delivered the possession to the defendants no. 2 to 5. They have been coming in possession over it. They have become the owner of it. The defendant no.1 never executed any agreement in favour of plaintiff. The alleged agreement is forged and fictitious. Plaintiff was never in possession over this land. The alleged Ikrarnama is antedated.

7. After exchange of pleadings six issues were framed by the Trial court and thereafter the evidence was adduced by the parties. After considering the evidence adduced by the parties learned trial court decreed the suit of the plaintiff-respondent with a direction that the defendant no.1 shall execute the sale deed after receiving Rs.2000/- from the plaintiff-respondent failing which the plaintiff-respondent would get it executed on the expenses of the defendant. Being aggrieved the defendant-appellants preferred appeal against the judgment and decree passed by the trial court. The appeal has been dismissed confirming the judgment and decree passed by the trial court, therefore the defendant-appellants are before this court in this second appeal.

8. Learned counsel for the appellants submitted that no agreement was made by the defendant no.1, namely, Smt.Ram Sanehi, with the plaintiff-respondents. She had denied her thumb impression or signatures on the alleged agreement to sale. The

suit for specific performance was filed on misconceived and baseless grounds on the basis of the forged agreement. The learned Trial court as well as the appellate court, without considering the pleadings of the parties, material and evidence on record decreed the suit and dismissed the appeal. He further submitted that the application for additional evidence filed before the First Appellate court had wrongly and illegally been rejected by means of the order dated 12.08.1983 by the First Appellate Court. In case the application would have been allowed and the thumb impression verified, the matter could have been settled. He further submitted that the defendant no.1 Smt. Ram Sanahi, the executor of agreement to sale died during pendency of the First Appeal, therefore the direction issued by the trial court has become non executable after her death and it cannot be executed. The agreement to sale could not be proved in accordance with Section 45 of the Evidence Act 1872. The evidence of the P.W.2 has wrongly and illegally been considered by the courts below.

9. On the basis of above, learned counsel for the appellants submitted that the judgments and decree passed by the courts below are not sustainable in the eyes of law, which are liable to be set aside and the appeal is liable to be allowed on the substantial questions of law formulated by this court. Learned counsel for the appellants relied on **Jagdish Prasad Patel (dead) through Legal representatives and another Versus Shivnath and others; (2019) 6 SCC 82, U.N.Krishnamurthy (since Deceased) through LRs Versus A.M.Krishnamurthy; 2022 (40) LCD 2445, Smt. Ram Rati and others Versus Gram Samaj, Jehwa and others; AIR 1974 Allahabad 106 Full Bench and Smt. Ram Dei Versus Joint Director of Consolidation and others; 2020 (38) LCD 1455.**

10. Per contra, learned counsel for the plaintiff-respondents submitted that the defendant no.1 had entered into an agreement with the plaintiff-respondents for agreement to sale of the land in

dispute and after receiving Rs. 6000/-, she had handed over the possession and the sale deed was to be executed after getting Bhumidhari rights because the land was sirdari land at that time. The plaintiff-respondent approached the defendant no.1 with Rs.2000/- for execution of sale deed, then she told that she has executed the sale deed of land in dispute in favour of defendants no. 2 to 5 i.e. the present appellants, therefore the plaintiff-respondent had to file the suit. The plaintiff-respondent proved the agreement by cogent evidence and he was always ready and willing to comply his part but the defendant no.1 has not complied. The defendant no.1 had not appeared in evidence to prove that the agreement to sale was not executed by her and her thumb impressions are not on the agreement, whereas one attesting witness of the agreement to sale and writer of agreement were produced to prove the agreement to sale and nothing could be extracted by the defendant-appellants from them, which may create any doubt about the veracity of their evidence. She could also have applied for expert opinion to prove that her signatures are not on agreement but it was not done. In view of Section 101 of the Evidence Act, 1872 burden of proof that the agreement to sale was not executed by Smt. Ram Sanahi was on her as she was alleging that she has not signed or put thumb impression on it because it was proved that the agreement to sale was executed by her. He further submitted that the thumb impression on agreement to sale is clear but no verification of thumb impression was made on the written statement and as per findings recorded by the courts below the thumb impression on the 'Vakalatnama' was also blurred, so that it may not be verified. He further submitted that the application under Order 41 Rule 27 of Civil Procedure Code has rightly and in accordance with law been rejected by the First Appellate Court. There is no illegality or infirmity in it. He further submitted that the objection filed under Section 9 A of the Consolidation of Holdings Act, 1953 by the Consolidation Officer was stayed in appeal, which is still

operative. The sale deed was executed without seeking permission from the consolidation authorities, therefore the suit itself was barred under Section 5(c) of the U.P. Consolidation of Holdings Act, 1953 and it was liable to be dismissed on this ground alone. Lastly learned counsel for the respondents submitted that the concurrent findings of facts recorded by the courts below cannot be interfered by this court in Second Appeal as there is no illegality, infirmity or perversity in the same as the findings have been recorded on the basis of the pleadings, material and evidence on record.

11. On the basis of above, learned counsel for the respondents submitted that the judgments and decree passed by the courts below have been passed in accordance with law and no substantial question of law arises in this appeal. The appeal has been filed on misconceived and baseless grounds and it is liable to be dismissed with cost. Learned counsel for the respondents relied on **Daulat Ram and others Versus Sodha and others; AIR 2005 Supreme Court 233, Robins Versus National Trust Company, Limited, and others; A.C. and Privy Council 515 and Narendra Bahadur Singh and others Versus Ram Manorath Singh and others; 2023 (41) LCD 2023.**

12. I have considered the submissions of learned counsel for the parties and perused the records.

13. The Suit for specific performance and damages was filed by the predecessor-in-interest of the plaintiff-respondents alleging therein that Smt. Ram Sanahi; the defendant no.1 was intending to sale her property, therefore, she had entered into an agreement to sale for Rs. 8000/- and after receiving Rs. 6000/-, the possession was handed over to him. The agreement to sale was executed on 28.05.1976. At the time of execution of agreement, Late Smt. Ram Sanahi was Sirdar of the land in dispute and the land in dispute was under consolidation operation and the agreement was executed to execute the sale deed by permission from the

Consolidation Officer after payment of the remaining amount of Rs.2000/-. In pursuance thereof after receiving Rs.6000/- the possession was handed over to the plaintiff-respondents. In the 1st week of August 1976 the plaintiff-respondent went to Late Smt. Ram Sanahi with Rs.2000/- for payment and execution of sale deed. Then the defendant no.1 told that she has already sold the land in dispute to the defendants no.2 to 5 i.e. the appellants. It was further alleged that the plaintiff-respondent was and is always ready and willing to pay the remaining Rs.2000/- and get the sale deed executed. The written statement was filed by the defendant no.1; Late Smt. Ram Sanahi denying the averments made in the plaint and stating that she has not made any signatures or put her thumb impression either on the agreement or on any plain paper. The plea was also taken that even if the signature or thumb impression is tried to be proved, even then no agreement has taken place between the plaintiff-respondent and the defendant no.1, therefore the same is totally forged and the plaintiff-respondent would not get any benefit out of it. The written statement was filed on 27.08.1979. A separate written statement was filed by the defendants no.2 to 5 i.e. the appellants denying the averments made in the plaint and stating that after deposit of 20 times land revenue the defendant no.1 has acquired the Bhumidhari rights and she has executed a sale deed in their favour on 24.06.1976 for a consideration of Rs.9000/- and has also handed over the possession. They have also denied that any agreement to sale was made by the defendant no.1 in favour of plaintiff-respondent.

14. Thereafter the evidence was adduced by the parties, in which the plaintiff-respondent had appeared as P.W.1 and the witness and writer of the agreement to sale as P.W.2 and P.W.3. They proved the agreement to sale and as to how it was executed. They deposed that the agreement was read over and explained to defendant no.1; Late Smt. Ram Sanahi and thereafter she put her

thumb impression on the agreement. Thereafter witnesses Hans Raj and Shiv Prasad had put their thumb impression/signature. Hans Raj, who had appeared as P.W.2 had proved the agreement to sale. Raj Bahadur the writer of the agreement to sale had appeared as P.W.3 and proved that it is the same agreement to sale, which was written by him. The writer P.W.3 has also stated that he had put his signature on the agreement. Thus the agreement was proved by the plaintiff-respondent by adducing cogent evidence.

15. The defendant-appellants though took a plea that no agreement to sale was executed by the defendant no.1 in favour of predecessor-in-interest of the plaintiff-respondents but the defendant no.1, who could have proved that the agreement to sale was not executed by her had not appeared in the witness box, whereas as per Section 101 of the Evidence Act, the burden was on the defendant no.1 to prove that the agreement was not executed by her because it was asserted by the defendant-appellants. The learned Trial court, after considering the pleadings of the parties and considering the evidence adduced before it, while deciding the issue no.5 as to whether the defendant no.1 has not put her thumb impression on the agreement to sale as asserted by her in paragraph 17 of her written statement, has recorded that the agreement to sale was put in sealed cover on the date of filing of the suit on 22.05.1979. The written statement was filed on 28.08.1979, though a copy was on record but the defendant no.1 has not made endorsement not admitted on the agreement or its copy, as such the same stands admitted. Learned trial court has also found that the defendant No.1 has stated that she has neither signed nor put thumb impression on the agreement to sale or any plain paper without going through the original agreement to sale, therefore she was determined to deny the execution of agreement to sale in any case. Even otherwise if she was illiterate and does not sign then the

question of stating that she has not signed or put thumb impression would not have been mentioned, when the photocopy was also on record. The learned trial court also found that the thumb impression of the defendant no.1 on the agreement to sale is clear, whereas on the written statement and the Vakalatnama it is blurred and it has also not been identified by any counsel. Learned Trial court also recorded a finding that the defendant no.1 was the best witness to prove that the agreement to sale was not executed by her but she had not appeared in the witness box to record her evidence on oath. Thus the thumb impression on the agreement to sale is of the defendant no.1. The Privy Council, in the case of **Robins Versus National Trust Company Limited and others (Supra)**, has held that onus is always on the person who attacks the will.

16. The learned Trial Court, while considering the issue no.1 as to whether the defendant no.1 has executed the agreement to sale after receiving Rs.6000/- as advance and has also handed over the possession to plaintiff-respondent, after considering the evidence and material on record has recoded the findings that P.W.1, P.W.2 and P.W.3 have proved the agreement to sale in accordance with law. The D.W.2 Govind though had stated about the possession of Raj Bahadur but he does not know as to whether he has given any evidence in the case of Ram Abhilakh Versus Hridai Ram or not. D.W.3 Ram Abhilakh has stated that he has not seen the possession of Aditya Prakash this time, but for any time, he can say nothing. He also could not tell the area of the land in dispute. He also could not tell the plots adjacent to the land in dispute. The plaintiff-respondent produced certain documents to prove their possession. On the contrary, the defendant-appellants had not filed any document to show their possession. Thus the issue no.1 was also decided in favour of the plaintiff-respondent. Accordingly the issue no.2 was decided. This court does not find any illegality or infirmity in the aforesaid findings recorded in

regard to the aforesaid issues on the basis of evidence and material on record.

17. The plea of illiterate and infirm village lady was not taken by the defendant no.1 either in her written statement or in the First Appeal filed by her along with the defendant-appellants, therefore, it cannot be said that the burden to prove that the transaction with the illiterate and infirm village lady was made fairly, consciously and with independent advise of the lady or not was on the plaintiff-respondent, rather in view of Section 101 of Indian Evidence Act, the burden to prove that the agreement was not made by her was on her because this plea was taken by her and the plaintiff-respondent has proved that the agreement was made by her by adducing cogent and convincing evidence. Since the plea of infirm and village lady was not taken by the defendant no.1 in her written statement or in the appeal filed by her, therefore this plea is not available to the defendant-appellants. Even otherwise it was not the case also. Therefore this court is of the view that the courts below have rightly and in accordance with law decreed the suit and dismissed the appeal. Thus the first substantial question of law does not arise in this appeal.

18. The defendant no.1 Smt. Ram Sanahi had not appeared in the witness box and after the judgment and decree was passed by the trial court, she filed first appeal and at the appellate stage she moved an application for her examination or for remanding the case for fresh decision after taking her evidence on the ground that she was not examined before the court, which has been criticized by the learned Munsif. It was further alleged that the appellants had been ill advised by their counsel and their failure to appear in the witness box was for the said reason. The learned first appellate court dismissed the application by means of the order dated 12.08.1983 holding that the ill advice of the counsel would not be a valid ground for taking the additional evidence and if she preferred to withheld herself from swearing the oath it

cannot be said that it has not been produced with due diligence. It has also been recorded that the counsel for the defendant-appellants admitted that it cannot be a ground for remand.

19. Order 41 Rule 27 of Civil Procedure Code (here-in-after referred as CPC) provides for production of additional evidence in appellate court in three contingencies. First of which is that the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. The second is that 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. The third is that the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The first two contingencies are not attracted at all in this case. So far as the third contingency is concerned, the appellate court can pass such order if it requires that it is necessary to enable it to pronounce the judgment or for any other substantial cause but this power can not be exercised to fill up the lacuna, if any. In this case since the agreement to sale was proved by adducing the cogent evidence before the trial court, therefore this court is of the view that there was no occasion for the first appellate court to pass any such order. In view of above this court does not find any illegality or error in rejection of the application by the learned first appellate court. However it does not preclude the court from drawing adverse inference to strengthen the view taken by it on the basis of pleadings, evidence and material on record. Thus the second substantial question of law is decided accordingly.

20. The appellants have filed an application bearing IA No.9 of 2022 under Order 41 Rule 27 CPC before this court for bringing on record certain documents as permitted by this court by means

of judgment and order dated 23.09.2021 passed in Review Petition No. 264 of 2003; Chandra Bhan Major and 4 others (Second Appeal No. 224 of 1986) Versus Aditya Prakash, which was filed for review of the judgment and order dated 14.08.2003 passed by this court in this Second Appeal, by means of which the appeal was dismissed without formulating the substantial questions of law after admission of appeal. The application has been filed for taking on record the certified copy of Registered Sale deed dated 24.05.1976, a copy of the judgment and order dated 04.05.2006 passed by the Consolidation Officer, Bikapur, Faizabad, photocopies of Khatauni and Khasra of the plots in dispute and report of finger print expert sought by the defendant-appellants from Mr. D. K. Patel at Ahmadabad. So far as the certified copy of the sale deed dated 24.05.1976 is concerned it could have been filed earlier. The order passed by the Consolidation Officer dated 04.05.2006 does not decide the title and it has been passed on account of pendency of this appeal and as argued it has been stayed in appeal and stay is still operating. Khasra and Khatauni of the land in question could have been filed by the defendants-appellants earlier also. Even otherwise the order dated 04.05.2006 passed by the Consolidation Officer has no material bearing on the present case as the same has been passed in consolidation proceedings only on the ground that the judgment and decree passed by the trial court has not been executed because the plaintiff-respondents have failed to show the payment of the remaining amount of Rs.2000/- within the time granted by the trial court and execution of sale deed thereafter because the appeal is pending. So far as the report of the finger print expert obtained by the defendant-appellants is concerned, the same has been given on the basis of the zerox copies and it is only provisional and subject to verification of original documents. Even otherwise it cannot be said that the thumb impression on the sale deed made in favour of the defendant-appellants are the admitted thumb impression of Smt. Ram Sanahi; the defendant

no.1 because the plaintiff-respondent has only averred in the plaint that the sale deed was executed by her as informed by her, when the plaintiff-respondent approached her with the remaining amount of Rs.2000/- for execution of sale deed. This court is of the view that the application moved under Order 41 Rule 27 CPC before this court is misconceived and baseless and liable to be rejected only.

21. The Hon'ble Supreme Court, in the case of **Jagdish Prasad Patel (dead) through Legal Representatives and another Versus Shivnath and others (Supra)** has summarized the principles for taking additional evidence on record under Order 41 Rule 27 CPC and held that the provisions does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment and the matter is entirely within the discretion of the court and it is to be used sparingly. The relevant paragraphs 29 and 30 are extracted here-in-below:-

“29. Under Order 41 Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

(I) where the trial court had refused to admit the evidence though it ought to have been admitted;

(II) the evidence was not available to the party despite exercise of due diligence; and

(III) the appellate court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, the court can receive additional documents.

30. In *Union of India v. Ibrahim Uddin* [*Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148 : (2012) 4 SCC (Civ) 362] , this Court held as under : (SCC pp. 167-68 & 170, paras 36-37, 40 & 47)

“36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in

appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide *K. Venkataramiah v. A. Seetharama Reddy* [*K. Venkataramiah v. A. Seetharama Reddy*, AIR 1963 SC 1526] , *Municipal Corpn., Greater Bombay v. Lala Pancham* [*Municipal Corpn., Greater Bombay v. Lala Pancham*, AIR 1965 SC 1008] , *Soonda Ram v. Rameshwarlal* [*Soonda Ram v. Rameshwarlal*, (1975) 3 SCC 698] and *Syed Abdul Khader v. Rami Reddy* [*Syed Abdul Khader v. Rami Reddy*, (1979) 2 SCC 601] .)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali & Co.* [*Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali & Co.*, (1978) 2 SCC 493] .)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.”

22. The trial court, while considering the issue no.3 as to whether the sale deed is against the Consolidation Act and illegal has held that since it was executed during consolidation proceedings, therefore in view of Section 5(1)(C) (II) of the U. P.

Consolidation of Holdings Act, 1953 read with Section 45(A) (2) it is illegal and non effective. The issue no.4, as to whether the agreement to sale is illegal and forged has been decided in negative and the issue no.5 that the suit is liable to be decreed. The appellate court also considering the pleadings of the parties, evidence and the grounds raised in the appeal held that the agreement was executed by the defendant no.1 in favour of the Plaintiff-respondents in respect of land in question and also upheld the findings recorded by the trial court in accordance with law. This court does not find any illegality or infirmity in the findings recorded by the courts below.

23. The Full Bench of this court, in the case of **Smt.Ram Rati and others Versus Gram Samaj, Jehwa and others (Supra)** has held that the provisions of Section 5(1)(c) (ii) could apply to transfer of part of holdings only, but no such plea has been taken in the present case, therefore it is not applicable.

24. The Hon'ble Supreme Court, in the case of **U.N. Krishnamurthy (Since deceased) through LRs Versus A.M.Krishnamurthy (Supra)**, has held that it is settled law that for relief of specific performance, the plaintiff has to prove that all along and till the final decision of the suit, he was ready and willing to perform his part of the contract. In the present case the plaintiff-respondents have proved their readiness and willingness of performance on their part and get the sale deed executed, till now.

25. A Co-ordinate Bench of this court, in the case of **Smt. Ram Dei Venus Joint Director of Consolidation and others (Supra)**, has considered the comparison of thumb impression made by the court but it is not applicable in the facts and circumstances of the present case because it is not the case herein.

26. The Hon'ble Supreme Court, in the case of **Daulat Ram and others Versus Sodha and others (Supra)**, has held that the

document has to be proved by primary evidence except where court finds that the document is to be proved by leading the secondary evidence.

27. It is settled law that the concurrent findings of facts recorded by the two courts below cannot be interfered unless the findings are without jurisdiction, perverse or against the evidence and record. A Co-ordinate Bench of this Court, after considering several judgments of the Hon'ble Supreme Court in the case of **Suryakunwari versus Nanhu and Others 2019 (37) LCD 2346**, has held that the concurrent findings of fact recorded by the two courts are not liable to be set aside unless and until the findings are perverse. The relevant paragraphs 11 to 16 are extracted here-in-below:-

"11. In this case, there are concurrent findings on facts by both the courts below. The Hon'ble Apex Court in catena of judgments has laid down the law that the concurrent findings of fact recorded by two courts below should not be interfered by the High Court in Second Appeal, unless and until the findings are perverse.

12. In a recent case of Shivah Balram Haibatti Vs. Avinash Maruthi Pawar (2018) 11 SCC 652 the Apex Court has held as under:- "..... These findings being concurrent findings of fact were binding on the High Court and, therefore, the second appeal should have been dismissed in limine as involving no substantial question of law."

13. In another recent case of Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564 the Hon'ble Apex Court held as under:-

"...interference in second appeal with finding of fact is permissible where such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or where that finding is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law permitting interference in Second Appeal."

14. In one more recent case Dalip Singh Vs. Bhupinder Kaur, (2018) 3 SCC 677 the Hon'ble Apex Court has held that if there is no perversity in concurrent findings of fact, interference by the High Court in Second Appeal is not permissible.

15. In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], the Apex Court held that a party is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

16. In State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92 the Hon'ble Supreme Court has held as under :-

"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final

decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."

28. One of the contention of learned counsel for the appellants in this appeal is that since the defendant no.1; Smt. Ram Sanahi who has not received the remaining amount of Rs.2000/- and executed the sale deed has died and no legal representative has been brought on record as she had no legal representative, therefore, the judgment and decree passed by the courts below is not executable. This court is of the view that the contention of learned for the appellants is misconceived and not tenable because the judgment and decree passed by the competent court of law cannot be frustrated merely by death of a person. Even otherwise the trial court has passed an order that if the defendant no.1 does not execute the sale deed, the plaintiff-respondent can get it done from the court on the expenses of defendants, therefore the appellants can deposit the remaining amount with the court concerned, who may pay to the claimant, if any, as and when comes forward on behalf of the defendant no.1 and the court can execute the sale deed.

29. In view of above and considering the overall facts and circumstances of the case this court is of the view that the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

30. With the aforesaid, this Second Appeal is **dismissed**. No order as to costs.

(Rajnish Kumar,J.)

Order Date :-18.07.2024
Banswar