

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.8300 of 2017 (O&M)

Date of decision: 28.11.2017

Manjit Kaur

....Petitioner

V/S

M/s Sutran conveyors Pvt. Ltd. and ors.

.....Respondents

CORAM: HON'BLE MR. JUSTICE B.S. WALIA

Present : Mr. Lokesh Chander Aggarwal, Advocate for the petitioner.

Mr. Vikas Bali, Advocate for the caveator/respondents.

B.S WALIA, J. (Oral)

CM No.25375-CII of 2017

CM is allowed subject to all just exceptions.

CR No.8300 of 2017 (O&M)

1. Prayer in this petition is for quashing of order dated 18.9.2017 (Annexure P-1) passed by the learned Civil Judge (Junior Division) Ludhiana, whereby application (Annexure P-2) filed by the defendant-petitioner to recall order dated 31.5.2017 whereby the cross-examination of PW-1 was treated as Nil was dismissed with a further prayer for granting opportunity to the defendant-petitioner to cross-examine PW-1 i.e plaintiff-respondent.

2. Learned counsel for the defendant-petitioner contended that the plaintiff-respondent had filed a suit for declaration that agreement to sell dated 13.11.2013 executed between plaintiff-respondent and defendant-petitioner in respect of property bearing Khasra No.68/13, 4, Khata No.328/341 as per jamabandi for the year 2006-07 situated at village Dhandari Kalan, Rectangle No.241 in front of Ashirwad Dharam Kanta, Sua Road, Dhandari Kalan, having area of 760 sq.yards in which one linter and shed of approximately 13500 sq.feet had been built and one electricity connection of 99 KW and submersible had been installed was null and void and not binding upon the plaintiff-respondent.

3. As per the case set up by the defendant-petitioner, agreement to sell i.e. Annexure P-4 dated 13.11.2013 was executed between him and plaintiff-respondent for total sale consideration of ₹1,35,00,000/- out of which ₹33.75 lacs were paid by the defendant-petitioner at the time of agreement and later on ₹10.8 lacs was paid i.e. 5 lacs on 21.5.2014 and ₹5.80 lacs on 23.5.2014 out of which ₹80,000/- was in cash to the plaintiff-respondent as part consideration. However, later on it came to the knowledge of the defendant-petitioner that the plaintiff-respondent was owner in possession of area of 760 sq.yards only and shed of 13500 sq.yards was not in existence at the site in question and the linter of the shed was only 13500 sq.feet.

4. In the aforementioned background, the defendant-petitioner alleging fraud having been played by plaintiff-respondent with her, stopped further payment and approached the plaintiff-respondent through its Directors with the request either to settle the account by calculating the actual value of the property in question, as per the rate fixed for the total

area of 14260 sq. yards in the agreement to sell or to return her amount of earnest money along with penalty as well as interest. Eventually the plaintiff-respondent filed a civil suit as well as complaint under Section 138 of the Negotiable Instruments Act (for short 'the Act') against the defendant-petitioner by concealing the true and material facts. However, in the case under Section 138 of the Act, the defendant-petitioner has been acquitted by the learned trial Court vide judgment dated 18.7.2017 (Annexure P-5). At this stage, learned counsel for the plaintiff-respondent states that appeal has been filed against the acquittal of the defendant-petitioner and the same is pending adjudication.

5. It is further the stand of the defendant-petitioner that on receipt of notice in the suit filed by the plaintiff-respondent, the defendant-petitioner appeared and filed written statement on 28.1.2015 whereafter, the suit was fixed for PWs evidence on a number of dates i.e. approximately 10 dates. However, no PW was present on said dates and it was only on 28.9.2016 that the plaintiff-respondent tendered his evidence by way of affidavit and the case was fixed for his cross-examination on 27.10.2016. However, since the document tendered by PW-1 i.e plaintiff-respondent was not complete as per report of Ahlmad, the case was adjourned to 8.12.2016 for completion of the documents. On 8.12.2016, the plaintiff-respondent filed an application for placing on record Ex.P-6 whereupon the case was adjourned to 24.1.2017. On 24.1.2017, the Presiding Officer was on earned leave whereupon the case was adjourned to 3.3.2017 for the purpose already fixed. On 3.3.2017, the documents were not tendered and PW-1 was also not present. Thereupon, the case was adjourned to 7.4.2017 for tendering the

documents and for cross-examination of PW-1 i.e. Plaintiff-respondent. On 7.4.2017, PW-1 i.e. Plaintiff-respondent tendered document Ex.P-6 and the case was fixed for his cross-examination on 20.4.2017. On 20.4.2017, PW-1 i.e. Plaintiff-respondent was present but counsel for defendant-petitioner requested for an adjournment. Thereupon, the case was adjourned to 2.5.2017 for cross-examination of PW-1 subject to payment of costs of ₹1000/-. On 2.5.2017 again PW-1 was present but counsel for defendant-petitioner again requested for adjournment whereupon the case was adjourned to 17.5.2017 for cross-examination of PW-1 subject to payment of ₹2,000/-. On 17.5.2017, PW-1 was again present but counsel for defendant-petitioner was not present to cross-examine PW-1. Costs were not paid whereupon order was passed by the learned trial Court recording that opportunity was given for cross-examination of PW-1 but the same was treated as Nil and the case was adjourned to 31.5.2017 for remaining PWs. Order dated 31.5.2017 records that PW-1 Sunil Bhalla again tendered his affidavit dated 13.8.2014 as Exs.P-7 and P-8 and Mark A and B and closed his evidence by suffering a separate statement whereupon the case was adjourned to 13.7.2017 for Dws. However, learned counsel for the parties jointly state that the aforementioned order does not record the correct actual position as PW-1 had already tendered his evidence on 28.9.2016.

6. In the aforementioned background, the defendant-petitioner filed an application (Annexure P-2) on 16.8.2017 for recalling order dated 31.5.2017 with a prayer that opportunity be granted to her to cross-examine PW-1. It is the stand of the defendant-petitioner in the revision petition before this Court that the counsel for the defendant-petitioner was

under the bona fide impression that on 31.5.2017, the case was fixed for cross-examination of PW-1 and the same was also evident from the fact that in response to the averments in the application for recalling of order dated 31.5.2017 wherein it had been mentioned that counsel for the defendant-petitioner could not remain present in Court on 31.5.2017 for cross-examination of PW-1, it has been admitted in the reply to the said application that the same was a matter of fact. Learned counsel for the defendant-petitioner contended that from the same, it was evident that counsel for both the parties were under the impression that no proceedings had taken place on 17.5.2017 and the case had been simply adjourned to 31.5.2017 for cross-examination of PW-1. Learned counsel further states that on 31.5.2017, counsel for the defendant-petitioner could not cross-examine PW-1 on account of being busy in another Court and by the time he reached the Court, the proceedings were already over. The only argument of learned counsel for the defendant-petitioner is that the defendant-petitioner prays only for one opportunity to cross-examine PW-1 otherwise irreparable loss would be caused to her besides, she is an old lady who usually remains ill and was dependant upon one Satnam Singh who was taking care of her case on her behalf but had cheated her and DDR had also been got registered against said Satnam Singh and Power of Attorney given by the defendant-petitioner to Satnam Singh had been cancelled and that Satnam Singh had duped her for monetary consideration.

7. Learned counsel lastly contended that although the plaintiff-respondent had been given about 13 opportunities for leading evidence yet on the very first date on which the defendant-petitioner sought an

adjournment for cross-examining PW1 costs of ₹1000/- was imposed while on the second date ₹2000/- costs were imposed and on the third date, due to non-availability of counsel for the defendant-petitioner, order dated 17.5.2017 was passed treating the opportunity for cross-examination of PW-1 having been given but be treated as Nil.

8. Per contra, learned counsel for the plaintiff-respondent states that the plaintiff-respondent closed his evidence by suffering a statement on 31.5.2017 whereupon the case was adjourned to 13.7.2017 for defendant witnesses. However, none was present on behalf of the defendant-petitioner on 13.7.2017, 21.7.2017, 3.8.2017 and it was only on 16.8.2017 that an application was moved for recalling of order dated 31.5.2017 whereas it ought to have been for recalling of order dated 17.5.2017. The said application was dismissed on 18.9.2017. Thereafter, the case was fixed for 9.10.2017 for defendant evidence but no DW was present. Therefore, the matter was adjourned to 1.11.2017 for defendant evidence subject to final and special opportunity. Thereafter, an application was moved under Section 65 of the Indian Evidence Act for leading secondary evidence on agreement to sell dated 13.11.2013. Learned counsel for the plaintiff-respondent states that said application has also been dismissed. On the basis of the same, learned counsel contends that there are no circumstances warranting intervention and grant of indulgence to the defendant-petitioner.

9. I have considered the submissions made by learned counsel for the parties and have gone through the record with their able assistance.

10. Admittedly, close to 10 opportunities were given to the plaintiff-respondent for leading evidence and it was only on 7.4.2017 that PW-1

i.e. the plaintiff-respondent tendered document Ex.P-6 and the case was fixed for his cross-examination on 20.4.2017. However, on the said date, the case was adjourned to 2.5.2017 and thereafter, to 17.5.2017 on payment of costs of ₹1000/- and ₹2000/- respectively. On 17.5.2017 despite PW-1 having come present, counsel for defendant-petitioner did not come present to cross-examine PW-1. Costs were not paid. Therefore, opportunity given for cross-examination of PW-1 was treated as Nil and the case was adjourned to 31.5.2017 for remaining PWs. Although the cross-examination of PW-1 was treated as Nil on 31.5.2017 yet it is apparent that both the counsel for the parties before the learned trial Court were under the impression that no proceedings had taken place on 17.5.2017 and the case had been adjourned to 31.5.2017 for cross-examination of PW-1. This view is apparent from the averments made in the application as well as response in respect thereto in the reply to the said application wherein it has been mentioned that para No.2 of the application was a matter of record so far as the case was fixed for cross-examination of PW-1 but the contents of the rest of the para were wrong and denied.

11. Taking the aforementioned aspect of the matter into account, I am of the considered view that though the conduct of the defendant-petitioner in not cross-examining PW-1 despite two opportunities having been given is not commendable but since innumerable opportunities had been given to the plaintiff-respondent for leading evidence, therefore, it would be in the interest of justice if one effective opportunity is granted to the defendant-petitioner for cross-examining PW-1. However, taking into account the fact that the conduct of the defendant-petitioner in not

conducting the cross-examination despite opportunities having been given cannot be said to be in consonance with the conduct required from a diligent litigant one effective opportunity is granted solely with a view to prevent great prejudice being caused to the defence of the defendant-petitioner herein by being deprived of the opportunity to cross-examine PW-1.

12. Although in view of the position as noted above, it cannot be said that the order passed by the learned trial Court dated 18.9.2017 (Annexure P-1) as well as order dated 31.5.2017 (Annexure P-19) suffers from any infirmity yet for the reasons as have been recorded above, the revision petition is allowed in the interest of justice by granting one effective opportunity to the defendant-petitioner to cross-examine PW-1 on 7.12.2017 i.e. the date already fixed before the learned trial Court subject to payment of costs of ₹15,000/- to the plaintiff-respondent as a pre-condition to cross-examine PW-1. Since the defendant-petitioner has already availed number of opportunities but has not led evidence despite three special last opportunities as also imposition of costs, it is ordered that the defendant-petitioner would lead entire evidence on one effective date to be granted by the learned trial Court at her own risk and responsibility. It is further ordered that since the plaintiff-respondent had closed his evidence on 31.5.2017 on account of non conduct of his cross-examination by the defendant-petitioner, therefore, it would be open to the plaintiff-respondent to lead further evidence, if he so desires pursuant to his cross-examination by defendant-petitioner. However, in case the plaintiff-respondent desires to lead further evidence, the same would be led by the plaintiff-respondent on one effective date to be granted by the

learned trial Court. Learned trial Court would also try to conclude the proceedings as expeditiously as possible preferably within a period of three months from 7.12.2017. Revision petition allowed in the aforementioned terms.

November 28, 2017*ps***(B.S. WALIA)****JUDGE**

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.