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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.5421 of 2016 (O&M).
Decided on:-March 29, 2017.

Ramesh Kumar Kapur and another

.........Appellants.

Versus

Tara Singh Bajaj (deceased) through LRs and others

.........Respondents.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

Present:- Mr. Baldev Raj Mahajan, Senior Advocate with
Mr. Akhilesh Vyas, Advocate
for the appellants.

HARI PAL VERMA, J.

The appellants-defendants have filed the present regular second appeal against the judgment and decree dated 21.04.2016 passed by learned Additional District Judge, Amritsar whereby their appeal against the judgment and decree dated 14.08.2013 passed by learned Additional Civil Judge (Senior Division), Amritsar, was dismissed.

Briefly stated, the respondents-plaintiffs have filed a suit for possession by way of specific performance of the agreement to sell dated 25.01.2005 in respect of Kothi No.128 measuring 440 square yards comprised in Khasra Nos.2994/743, 744 min, situated within the area of Urban Circle No.109, Rani Ka Bagh, Amritsar (hereinafter referred to as the suit property). An alternative relief of recovery of Rs.9,10,000/-as advance sale price of the suit property along with equal sum of Rs.9,10,000/-as compensation, besides 18% interest from the date of agreement to sell till the date of recovery has also been sought. Further relief of permanent injunction restraining the defendants to alienate, transfer or sell the suit property to anyone else except the plaintiffs has also been prayed.

The plaintiffs have claimed themselves as Non-Resident Indians (NRI) and have pleaded that they have migrated from London to India in September, 1989 and at present, are residing at Kothi No.1536, Sector 38-B, Chandigarh. The plaintiffs No.1 and 2 are senior citizens. They wanted to settle at Amritsar permanently so as to visit Golden Temple daily in the last days of their lives. For this purpose, they intended to purchase the suit property from the defendants. Plaintiff No.3 is their daughter-in-law and her name is added in the agreement to sell dated 25.01.2005 out of their love and affection. The defendants have entered into an agreement to sell with the plaintiffs regarding the suit property for a total sale consideration of Rs.65,10,000/- out of which a sum of Rs.9,10,000/-was received by the defendants as advance sale price. The defendants have undertaken to execute the sale deed of the suit property on or before 24.06.2005. It was also agreed that at the time of execution of the sale deed, the vacant possession of the suit property would be handed over by the defendants to the plaintiffs. In order to incorporate the terms and conditions orally settled between the parties, the written agreement to sell was also executed on 25.01.2005 in the presence of Raman Kumar, property dealer, and Amit Kapoor.

Pleaded case of the plaintiffs is that they were always ready and willing to perform their part of the contract and are still ready and willing to perform the same. The plaintiffs No.1 and 2 are having saving bank account in HDFC Bank and Rs.59,59,726.96 Ps. are lying in the said account of plaintiff No.1. Besides that, an F.D.R. of Rs.45,00,000/- is lying in the account of plaintiffs in the same bank. That, the plaintiffs were financially sound to purchase the suit property even before the date fixed for the execution of the sale deed. On 24.06.2005, the plaintiffs No.1 and 2 informed the defendants that they are coming to Amritsar for the execution of the sale deed. But the defendants failed to appear before the office of Sub-Registrar, Amritsar on that day. The plaintiffs moved an application before Sub-Registrar along with an affidavit dated 24.06.2005 to show their bonafide to get the sale deed executed and registered in their favour. They remained present in the office throughout the day, but the defendants did not come present.

Thereafter, the plaintiffs through their counsel Sh. Pankaj Bhardwaj, Advocate, served a legal notice upon the defendants intimating them that they are always ready and willing to perform their part of the contract and were present in the office of Sub-Registrar, Amritsar on 24.06.2005 to do the needful. The defendants sent reply dated 26.07.2005 to the said notice through their counsel Sh. H.S.Arora, wherein they admitted the execution of agreement to sell, receipt of earnest money of Rs.9,10,000/- as well as the fact that the stipulated period for execution and registration of the sale deed was fixed as 24.06.2005. But in the said reply, they set up a new case, that the plaintiffs were not having balance sale consideration with them and they were not present in the office of Sub-Registrar, Amritsar on 24.06.2005 and, therefore, the advance sale consideration paid by the plaintiffs to the defendants stands forfeited and the agreement to sell dated 25.01.2005 is cancelled.

Instead of getting the sale deed executed and registered in terms of the agreement to sell dated 25.01.2005, the defendants rather filed a civil suit for permanent injunction against the plaintiffs No.1 and 2 restraining them from forcing the defendants to make the payment of Rs.18,20,000/-on the basis of agreement to sell dated 25.01.2005. The defendants have also refused to perform their part of the contract. Hence, the present suit has been filed by the plaintiffs.

On notice, the defendants appeared and filed their written statement taking various preliminary objections i.e. maintainability; cause of action; locus standi; suit is not properly valued for the purpose of Court fees and jurisdiction; suit has been filed by the plaintiffs with malafide intention just to grab the property of defendants and the plaintiff No.3 has been unnecessarily impleaded as party.

On merits, the very execution of the agreement to sell dated 25.01.2005 for a total sale consideration of Rs.65,10,000/- and receipt of Rs.9,10,000/-as advance sale price from the plaintiffs has been denied. It is alleged that, in fact, the defendants were in need of some money for investment in the business and for this purpose, they approached the plaintiffs. The plaintiffs agreed to give financial assistance to the defendants and gave Rs.9,00,000/-to the defendants through cheque. However, for the satisfaction of the plaintiffs regarding repayment of loan of Rs.9,00,000/- given by the plaintiffs, they got executed the agreement to sell with respect to the suit property just as a security of loan amount taken by them from the plaintiffs. The defendants had no intention to sell their only residential house. Rather, it was agreed between the parties that when the defendants would repay the loan amount, the said agreement would stand cancelled. The defendants have also agreed to pay interest on the said loan amount @ 10% per annum to the plaintiffs. In case, the specific performance of the agreement to sell is granted, the defendants would suffer a great hardship. It has further been pleaded that the plaintiffs were neither ready and willing to get the sale deed executed and registered, nor, they were having financial capacity to purchase the suit property. It has been admitted that the defendants had sent a reply to the notice issued by the plaintiffs through their counsel, but the reply was sent by their counsel without any proper instructions and they are not bound by the same.

On the basis of pleadings of the parties, the trial Court formulated the following issues:

1. Whether the defendants had entered into agreement to sell dated 25.01.2005 with the plaintiffs regarding the selling of their house? OPP

2. Whether the defendants had received an amount of Rs.9 lacs as an earnest money? OPP

3. Whether the plaintiffs have always been ready and willing and are still ready and willing to perform their part of the contract? OPP

4. Whether the defendants executed agreement to sell as security for the loan amount of Rs.9 lacs received

through cheque? OPD

5. Whether the suit is not maintainable in the present form? OPD

6. Whether the plaintiffs have no locus standi and cause of action to file the suit? OPD

7. Whether the plaintiffs have concealed the material facts from this Court? OPD

8. Whether the plaintiffs are entitled to the possession of the suit property by way of specific performance? OPP

9. Whether the plaintiffs are entitled to the alternative relief as claimed in the suit? OPP

10. Relief.

Vide judgment and decree dated 14.08.2013 passed by the trial Court, suit of the respondents-plaintiffs was decreed and a decree in favour of the plaintiffs and against the defendants for specific performance of contract on the basis of the agreement to sell dated 25.01.2005 was passed. The defendants were directed to get the sale deed executed in favour of the plaintiffs on receipt of the balance sale consideration within a period of three months, failing which the plaintiffs were held entitled to get the sale deed executed in accordance with law. The defendants were also restrained from alienating the property permanently.

Aggrieved with the aforesaid judgment and decree dated 14.08.2013 passed by the trial Court, the appellants-defendants preferred an appeal before the lower appellate Court. But the same has also been dismissed by learned Additional District Judge, Amritsar vide judgment and decree dated 21.04.2016.

Still aggrieved, the appellants-defendants have filed the present regular second appeal.

Following substantial questions of law have been raised by the appellants-defendants:

a) Whether judgment and decree of lower appellate Court are liable to set aside as the Court decided the appeal without deciding applications for additional evidence?

b) Whether judgments and decree of the Courts below suffer from perversity contrary to evidence on record and against settled principles of law?

c) Whether the discretion exercised by the Court below in granting the decree for specific performance under Section 20 of Specific Relief Act is not sustainable in the facts and circumstances of the case?

d) Whether the Courts below have failed to draw adverse inference in terms of Section 114 of Evidence Act since none of the plaintiffs stepped into the witness box?

e) Whether the finding of the Courts below that respondent-plaintiffs were ready and willing to perform their part of the contract is contrary to evidence on record and hence unsustainable?

Mr. B.R. Mahajan, learned senior counsel for the appellants-defendants has argued that the Courts below have committed legal error in not appreciating the fact that the appellants-defendants have taken a categorical stand regarding the alleged agreement to sell dated 25.01.2005. The said agreement was executed for a limited purpose of securing the loan amount in favour of the respondents-plaintiffs. Therefore, the findings recorded by the Courts below that the appellants-defendants have admitted the execution of the agreement to sell in favour of the respondents-plaintiffs, cannot be accepted. The Courts below have arrived at a wrong conclusion that the appellants-defendants have admitted the execution of the agreement to sell in the reply to the legal notice which was prepared by the counsel without any proper instructions. The contents of reply of the legal notice do not amount to admission on the part of the defendants qua the genuineness of the agreement to sell. Even otherwise, learned lower appellate Court has committed a legal error, as when the matter was pending before the lower appellate Court, the appellants-defendants have moved two applications for leading additional evidence and the respondents-plaintiffs had filed reply to these applications. But, those applications remained pending and were never decided by the lower appellate Court during pendency of the appeal or at the time of final decision of the appeal vide judgment and decree dated 21.04.2016.

He has further argued that it is the duty of the Court to decide all the applications moved by either side one way or other and nothing can remain pending more particularly when the appeal is finally decided. The respondents-plaintiffs have failed to prove the requirement of Sections 16 and 20 of the Specific Relief Act, 1963 (for short, the 1963 Act). If Section 16 of the 1963 Act has been complied with, even in that case, the Courts are not duty bound to decree the suit for specific performance filed by the plaintiff. Similarly, Section 20 of the 1963 Act empowers discretionary relief to the civil Court i.e. to grant decree of specific performance or to grant alternative relief. But in the case in hand, the Courts below have erroneously granted the relief of specific performance by holding that the plaintiffs have complied with the provision of Section 16 of the 1963 Act. The Courts below have exercised the discretion in favour of the respondents-plaintiffs, but in a wrong manner. The findings recorded by the Courts below that the plaintiffs were ready and willing to perform their part of the contract and the plaintiffs had the financial capacity to pay the amount on the alleged due date i.e. 24.06.2005, are also wrong, being contrary to record.

He has further contended that an application under Order 41 Rule 27 read with Section 151 CPC for leading additional evidence was filed by the appellants-defendants on 22.04.2015 so as to incorporate subsequent events and the said application was adjourned to 08.05.2015. It was only on 12.05.2015, reply to the said application was filed. Similarly, another application under Order 41 Rule 27 CPC was filed by the appellants-defendants on 17.09.2015 to produce orders in criminal proceedings relating to the same property. Both these applications seeking additional evidence were not decided and remained pending.

Mr. Mahajan, in support of his contention, has argued that when the application for leading additional evidence is filed at the appellate stage, the appellate Court is required to decide such application before deciding the appeal or at least at the time when the appeal is decided. He has placed reliance on the judgments of this Court in ***Raj Rani and another Versus Naranjan Singh through Daljit Kaur and another 2016(4) Law Herald 3309*** and ***Shri Naresh Chandra and another Versus Shri Mahavir Singh and others 2000 (2) RLR 437***.

I have heard learned senior counsel for the appellants-defendants and perused the file.

The respondents-plaintiffs have filed a suit for possession by way of specific performance of the agreement to sell dated 25.01.2005 in respect of the suit property, or in the alternative, for the recovery of Rs.9,10,000/- as advance price paid by the plaintiffs along with compensation, besides 18% interest from the date of agreement to sell till date of recovery.

The crucial issues framed by the trial Courts were (i) whether the defendants had entered into agreement to sell dated 25.01.2005 with the plaintiffs regarding the selling of their house? OPP; (ii) whether the defendants had received an amount of Rs.9 lacs as an earnest money? OPP; (iii) Whether the plaintiffs have always been ready and willing and are still ready and willing to perform their part of the contract? OPP; and (iv) whether the defendants had executed agreement to sell as security for the loan amount of Rs.9 lacs received through cheque? OPD.

The trial Court had decreed the suit and returned a finding of fact that the defendants have executed the agreement to sell dated 25.01.2005 in favour of the plaintiffs for a total sale consideration of Rs.65,10,000/- and have received Rs.9,10,000/- as earnest money, but have failed to perform their part of the agreement. Accordingly, the appellants-defendants were directed to get the sale deed executed and registered in favour of the plaintiffs on receipt of the balance amount of consideration.

One of the arguments raised by learned counsel for the appellants-defendants is that the agreement to sell dated 25.01.2005 was merely a security document executed by the defendant in favour of the respondents-plaintiffs, as the defendants executed the same for the limited purpose of securing loan amount. Therefore, the appellants-defendants have nowhere admitted that they have executed the agreement to sell in favour of the respondents-plaintiffs for the purpose of selling their house. However, this Court finds that this argument raised by learned counsel for the appellants-defendants, cannot be accepted for the reason that after the execution of the agreement to sell dated 25.01.2005, when the appellants-defendants did not come forward to get the sale deed executed on 24.06.2005, a legal notice dated 11.07.2005 (Ex.P4) was issued to the defendants by the respondents-plaintiffs. Para No.4 of the said legal notice (Ex.P4) served by the respondents-plaintiffs to the present appellants-defendants reads as under:

> *"4. That it is pertinent to mention here that out of the consideration amount, you have already received Rs.9,10,000/-. My clients are still ready and willing to perform their part of the agreement to sell and are ready with the balance consideration amount. It is worthwhile to mention here that though for your non-presence in the office of the Sub-Registrar my client is free to initiate the legal proceedings against you, however, in an earnest attempt to maintain the good relations shared with you, vide this legal notice an opportunity is being given to you to perform your part of the agreement and to get the sale deed executed at the earliest after the receipt of this legal notice.*"

The said legal notice (Ex.P4) was duly replied by the appellants-defendants and para No.4 of the reply is as under:

> *"4. That para No.4 of the notice regarding receiving the amount of Rs.9,10,000/- is admitted but rest of the para is wrong and denied. As your client failed to perform their part of agreement to get the sale deed executed in their favour, so as per the terms and conditions of the agreement to sell, the earnest money is forfeited and agreement to sell dated 25.01.2005 is cancelled/rescinded and your clients have now no right to ask my clients to execute the sale deed.*"

On the basis of the aforesaid reply as submitted by the present appellants-defendants, it is clear that the defendants have accepted the receipt of Rs.9,10,000/- as consideration amount at the time of execution of the agreement to sell dated 25.01.2005. But in the said reply, it has been mentioned that it is the plaintiffs, who have failed to perform their part of the contract to get the sale deed executed in their favour as per the terms and conditions of the agreement to sell and, therefore, for this reason, the earnest money is forfeited and the agreement to sell dated 25.01.2005 is cancelled/ rescinded. The cumulative effect of this reply clearly shows that the appellants-defendants have admitted the very factum of the execution of the agreement to sell dated 25.01.2005. Rather, the defendants have alleged that it is the plaintiffs, who have failed to perform their part of the contract to get the sale deed executed.

The record reveals that the trial Court has formulated a specific issue as to "whether the plaintiffs have always been ready and willing and are still ready and willing to perform their part of the contract?" When the present suit has been filed promptly, it is the manifestation of readiness and willingness on the part of the plaintiffs to perform their part of the agreement. In the present case, the agreement in question entered between the parties on 25.01.2005, whereas the date of execution and registration of the sale deed was fixed as 24.06.2005. The present suit was filed on 02.01.2006 i.e. after about 7 months w.e.f. 24.06.2005, i.e. the date of execution of the sale deed. This shows that the respondents-plaintiffs were ready and willing to perform their part of the contract and there was no delay in filing the present suit.

Further, the bank record of the respondents-plaintiffs i.e. Ex.PJ, which is the certificate from the bank, shows the FDR amount of Rs.45 lacs in the account of respondent-plaintiff Tara Singh and closing balance in his saving account to the tune of Rs.31,50,000/- as well as Ex.P2, which is the FDR in the name of Sheetal Bajaj wife of Tara Singh to the tune of Rs.65,23,496/- proves the financial capacity of the respondents-plaintiffs to purchase the suit property. Therefore, on the basis of the financial details, it can be stated that the respondents-plaintiffs were financially sound.

The appellants-defendants, while admitting the execution of the agreement to sell dated 25.01.2005, have filed a separate suit that they have rescinded the agreement. But on the plea that the plaintiffs were not ready and willing to perform their part of the contract and the suit having been dismissed, the defendants have coincided their version by taking loan from the respondents-plaintiffs and rather started denying the execution of the agreement to sell. Thus, the appellants-defendants are consistently changing their stand as per their own convenience. This is one of the reasons that even the prayer of comparative hardship cannot be accepted.

Learned senior counsel for the appellants-defendants has also raised an argument that when the applications under Order 41 Rule 27 read with Section 151 CPC seeking additional evidence were pending consideration before the lower appellate Court, the same were required to be adjudicated before deciding the appeal or in any case, along with the appeal. An application for additional evidence at an appellate stage is to be considered and decided by the Court while hearing the appeal on merits so that the Court would be in a position to say if additional evidence is necessary or otherwise for doing substantial justice.

This Court finds that when there is a categorical admission on the part of the appellants-defendants regarding receipt of earnest money and the agreement to sell is not in dispute, the applications filed under Order 41 Rule 27 read with Section 151 CPC and decisions thereof are not very material. Even otherwise, perusal of these two applications so filed by the appellants-defendants, it emerges that these applications are not reflecting much relevance viz. a viz. the controversy involved in the present case. Merely because such like applications are filed by the appellants-defendants at the advance stage of the appeal before the lower appellate Court, the impugned judgment and decree dated 21.04.2016 passed by the lower appellate Court, cannot be set aside.

In one of the applications filed under Order 41 Rule 27 CPC, whereby the appellants-defendants have sought to lead additional evidence, their plea is that when the plaintiff No.1 Tara Singh Bajaj has died and plaintiff No.2 Sital Kumari Bajaj has shifted to England, whereas the plaintiff No.3 Shalini Bajaj is a permanent resident of England, the very purpose for which the suit property is intended to be purchased no more survives. On the other hand, the appellants-defendants and their family which consists of their two sons, their wives and children have got no other residential house in any part of Amritsar or in India. Thus, the application sought to lead additional evidence was meant to establish hardship to the appellants-defendants. But it does not dispute the very execution of the agreement to sell entered into between the parties.

Similarly, the other application under Order 41 Rule 27 read with Section 151 CPC for leading additional evidence filed by the appellants-defendants relates to some criminal complaint filed against the respondents-plaintiffs Tara Singh Bajaj and Sital Kumari Bajaj under Sections 499/500/501/384 IPC wherein the appellants-defendants have intended to place on record the order dated 12.11.2013 passed by the Judicial Magistrate 1st Class, Amritsar whereby respondent-plaintiff Sital Kumari Bajaj had been declared as a "proclaimed person". In the said application, the appellants-defendants have further wanted to bring to the notice of the Court that the respondents-plaintiffs have sold their Kothi during pendency of the court proceedings. So, even this application is not relevant so as to deal with the controversy involved in the present case.

So far as the judgments in ***Raj Rani and another's case (supra)*** and ***Shri Naresh Chandra and another's case (supra)*** referred by learned counsel for the appellants that the application under Order 41 Rule

27 CPC for leading additional evidence is to be decided before deciding the appeal are concerned, this Court finds that the same are not applicable to the facts and circumstances of this case because once there is a specific admission by the appellants-defendants regarding execution of the agreement and receipt of earnest money, the filing of such applications seeking additional evidence in appeal as provided under Order 41 Rule 27 CPC is not only irrelevant, rather, an attempt to delay the proceedings.

Hon'ble Apex Court in ***Karnataka Board of Wakf Versus Government of India and others 2004(3) Civil Court Cases 326*** has held that the appellant shall not be entitled to produce additional evidence unless it is shown that in spite of due diligence, he could not produce the same during trial and the same is required to enable the Court to pronounce proper judgment. The relevant para No.6 of the said judgment reads as under:

> "*In the circumstances, the learned counsel for the appellant, reiterated the claim made before the High Court that they should be permitted to adduce further evidence before the court to substantiate their claim but when the matters were pending before the Trial Court and the High Court they had ample opportunity to do so. If they had to produce appropriate documents, they could have done so and also it is not clear as to the nature of the documents which they seek to produce which will tilt the matter one way or the other. The scope of Order XLI, Rule 27, CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to*

> *pronounce proper judgment. In this view of the matter, we do not think there is any justification for us to interfere with the orders of the High Court. However, in view of the arguments addressed by the learned counsel for the appellant, we have also gone into various aspects of the matter and have given another look at the matter and our findings are that the view taken by the High Court is justified. However, one aspect needs to be noticed. The High Court need not have stated that the first respondent is entitled to the relief even on the basis of adverse possession. We propose to examine this aspect."*

In the present case, no such material has been placed on record by the appellants-defendants that in spite of due diligence, they could not produce the additional evidence during trial or during the appeal.

No other point was argued.

Therefore, this Court does not find any illegality in the concurrent findings of facts recorded by the Courts below. Even no substantial question of law arises in the present regular second appeal.

Accordingly, the impugned judgments and decrees passed by the Courts below are upheld and the present regular second appeal is dismissed.

(HARI PAL VERMA)
JUDGE

March 29, 2017
Yag Dutt

Whether speaking/reasoned: Yes

Whether Reportable: No