IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

C.R. No.330 of 2017 (O&M)
Date of Decision.14.03.2018

Bindu Chowdhary ......Petitioner

Vs

Raghbir Chand and another .....Respondents

2. **C.R. No.5438 of 2016**

Bindu Chowdhary ......Petitioner

Vs

Raghbir Chand and another .....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sanjay Joshi, Advocate
for the petitioner.

Mr. Pankaj Jain, Advocate
for the respondents.

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AMIT RAWAL J.(ORAL)

This order of mine shall dispose of two revision petitions bearing No.330 of 2017 and 5438 of 2016. C.R. No.5438 of 2016 arose out of impugned order dated 2.8.2016 (Annexure P-14) whereby the application submitted at the instance of the defendant under Order 14 Rule 5 read with Section 151 CPC for framing additional issue has been dismissed and C.R. No.330 of 2017 against the impugned order dated 2.1.2017, whereby the application submitted by the petitioner-defendant under Order 7 Rule 11 CPC for rejection of the plaint, has been dismissed.

It would be apt to give preface of the aforementioned controversy. The respondents-plaintiffs instituted the suit for possession by way of specific performance of agreement to sell dated 17.4.2003 and writings dated 15.4.2004, 14.3.2005 and 12.4.2006 in respect of property measuring 2000 sq. yards bearing House No.57, Sector 9A, Chandigarh which was purchased by the defendant vide sale deed bearing No.969 dated 23.2.1979 on the premise that the defendant received a sum of ₹25,00,000/- as earnest money. The defendant agreed to execute and register the sale deed in favour of the plaintiffs after the receipt of balance sale consideration on or before 16.4.2004. It was alleged that the agreement to sell was drafted by an Advocate and the same was registered on 17.04.2003 at Sr. No.287. The defendant was paid another amount as indicated in para 3 of the plaint but when he did not turn up for performing his part of the contract, the plaintiffs sought the specific performance of the agreement to sell.

Mr. Sanjay Joshi, learned counsel appearing on behalf of the petitioner-defendant submitted that the plaintiff did not purposely file the copies of the demand drafts mentioned in the plaint, which was a requirement of law as per the provisions of Order 7 Rule 14 CPC. The defendant was constrained to move application under Order 11 Rule 14 & 15 read with Section 151 CPC and only thereafter, the copies of documents were supplied to the defendant. However, on the basis of the documents available, the defendant filed the written statement (Annexure P-5) by taking various preliminary objections that the plaintiff did not approach the court with clean hands and concealed the material facts from the Court. In fact, the amount of ₹70 lacs advanced to the defendant was a loan transaction and the agreement to sell was entered into as a security. It is in that aspect of the mater, the original title deed of the property was taken by the plaintiffs at the time of entering into the agreement to sell, otherwise no sane person would hand over the original documents.

The trial Court on the basis of the aforementioned evidence, framed the following issues:-

> "*1. Whether the defendant had voluntarily entered into agreement dated 17.04.2003 and subsequent writings of 15.4.2004, 14.3.2000 and 12.4.2006 to execute the sale deed with regard to suit property? OPP*
>
> *2. Whether the amount of Rs.17 lakhs (corrected to Rs.70 lakhs through a later zimni order) received by the defendant was earnest money against the prospective sale of suit land? OPP*
>
> *3. Whether the plaintiff was always ready and willing to perform their part of contract when defendant failed? OPP*
>
> *4. Whether the plaintiffs are entitled to relief of specific performance of agreement or in the alternative? OPP*
>
> *5. Whether the suit is not maintainable? OPD*
>
> *6. Relief.*"

The petitioner moved an application under Order 12 Rule 5 CPC in pursuance to the liberty granted vide order dated 13.08.2012 passed in C.R. No.4662 of 2012. The aforementioned application was dismissed by the trial Court vide order dated 30.09.2014. However, in paragraph 12 of the said order, it was observed that the defendant had repeatedly been filing the applications for shrinking the controversy so that the parties could resist their evidence and the burden was on the plaintiff to establish why the recitals of the agreement were in contradiction with pleadings and on what account sum of ₹70 lacs was received. During the pendency of the aforementioned suit, application (Annexure P-11) under Order 14 Rule 5 read with Section 151 CPC was moved for framing the following additional issues:-

> "*6. Why the recitals of the agreement are in contradiction with*

pleading of the plaintiffs? OPP

7. *On what account Rs.70,00,000/- (rupees seventy lacs only) were received by plaintiffs from the defendant? OPP*

8. *Relief.*

The aforementioned application has erroneously been rejected despite having been contested by the respondents. The impugned order is not sustainable, for, proposed issues are essential and necessary for the adjudication of the *lis* as the Court did not frame the issue despite the fact that the petitioner-defendant had specifically taken the objection in the written statement. The plaintiff had taken 19 dates commencing from 26.11.2014 to 22.03.2016 in concluding the evidence but was aware of the order dated 30.09.2014 (Annexure P-9) whereby the trial Court while dismissing the application under Order 12 Rule 5 had observed regarding obtaining of the loan of ₹70 lacs, thus, urges this Court for setting aside the order by framing the additional issues.

He further submitted that in the issues already framed, particularly, the issue No.2, the word "or not" in the end of the issue was required to be incorporated.

As regards the other revision petition bearing No.330 of 2017, he submitted that the suit was not maintainable, for, the agreement to sell was registered but the subsequent writing was not. It is in that background of the matter, the application under Order 7 Rule 11 CPC was moved. It is settled law that where the document is sued upon and its terms are not set out in the plaint but referred to in the plaint, said document gets incorporated by reference in the plaint. As per the proviso (4) of Section 92 of the Indian Evidence Act where the contract is written and has been registered either because the law requires it to be compulsory registered, such instrument can be modified and rescinded only by way of registered document, therefore, the plaint was liable to be rejected but the trial Court dismissed the application in a most contumacious and erroneous manner. The provisions of Order 7 Rule 11 CPC does not restrict the defendant to move an application at a particular stage as it can be moved at any stage.

Per contra, Mr. Pankaj Jain, learned counsel appearing on behalf of the respondents-plaintiffs submitted that the petitioner-defendant is adopting all possible delaying tactics in adjudication of the suit, for, no doubt in the order dated 30.09.2014, there was a factum of recital of the agreement to sell being in contravention of pleadings but the fact of the matter is that the onus to prove the same was/is always upon the party ascertaining the same even though proper issue has not been framed but entire evidence on that aspect, as per the settled law, can always be looked into. The framing of the additional issue would not narrow down the controversy.

As regards the other revision petition, he submitted that no doubt the application under Order 7 Rule 11 CPC can be moved at any stage of the suit but for adjudication of the application under Order 7 Rule 11 CPC only averments in the plaint have to be seen. Subsequent writing would be a subject matter of evidence. The suit on such frivolous grounds cannot be thrown out in the manner and mode as has been chosen by the defendant, thus, urges this Court for dismissal of the revision petitions.

I have heard learned counsel for the parties and appraised the paper book. The respondent-plaintiff had filed the suit for specific performance whereas the petitioner-defendant had taken the stand that it was a loan transaction. However, in the written statement, following plea had been taken:-

> "*c) That the plaintiffs have intentionally concealed from the Hon'ble Court that they had, in fact, advanced a sum of Rs.70.00 (seventy lacs only) as a loan to the defendant. The impugned agreement to sell was entered into to secure the above said loan amount and therefore, the original title deed of the property, which is the subject matter of the suit, was taken by the plaintiffs at the time of entering the said agreement. The plaintiffs have further concealed from the Hon'ble Court that the said loan amount of Rs.70.00 lacs was received back by them and on receipt thereof, the original titled deed of the property was returned back to the defendant.*"

In view of these facts, I am of the view that the trial Court ought to have framed the issue or re-casted the issue No.2 by incorporating the words "or not" as it was categoric case of the petitioner-defendant that he had taken the loan whereas the plaintiff in the replication did not deny the same. However, as regards the additional issues sought to be incorporated, in my view, issue No.7 is not necessary, for, once the words "or not" are incorporated in issue No.2, it will take care vis-à-vis the recitals of the agreement being in contravention of the pleadings of the plaintiffs. The onus would not be on the plaintiff but on the defendant, however, the additional proposed issue sought to be framed at the instance of the petitioner-defendant is not required to be framed in the manner and mode as indicated but would be required to be framed as under:-

"*7. Whether the recitals of the agreement are in contradiction of the plaintiffs' pleadings? OPD*

Since the suit is fixed for petitioner-defendant's evidence, the defendant to lead evidence in respect thereof and the plaintiff would also be given the right to rebut the same by leading direct and cogent evidence.

Resultantly, the re-casted/re-framed issues are as under:-

"*1. Whether the defendant had voluntarily entered into agreement dated 17.04.2003 and subsequent writings of 15.4.2004, 14.3.2000 and 12.4.2006 to execute the sale deed with regard to suit property? OPP*

2. Whether the amount of Rs.17 lakhs (corrected to Rs.70 lakhs through a later zimni order) received by the defendant was earnest money against the prospective sale of suit land or not? OPP

3. Whether the plaintiff was always ready and willing to perform their part of contract when defendant failed? OPP

4. Whether the plaintiffs are entitled to relief of specific performance of agreement or in the alternative? OPP

5. Whether the suit is not maintainable? OPD

6. Relief."

Additional issue:-

7. Whether the recitals of the agreement are in contradiction of the plaintiffs' pleadings? OPD

The revision petition bearing No.5438 of 2016 is partly allowed.

However, with regard to other revision petition, I am of the view that plea with regard to deviation in the terms and conditions of the agreement as projected by the petitioner to be done under the Registration Act, is a mixed question of fact and law could be adjudicated only by leading evidence but not in the manner and mode by seeking rejection of the plaint. Even otherwise, this is not one of the grounds of Order 7 Rule 11 CPC for rejection of the plaint.

In view of the above, I do not find any illegality and perversity in the order under challenge in C.R. No.330 of 2017 and the same is hereby upheld. Resultantly, the revision petition bearing No.330 of 2017 is dismissed.

(AMIT RAWAL)
JUDGE

March 14, 2018
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	No