

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision:3.4.2018

RSA No. 1148 of 2016(O&M)

Daya Ram through his Lrs.

---Appellant

vs.

M/s Avencer Properties Private Limited and another

---Respondents

RSA No. 1262 of 2016(O&M)

Daya Ram through his Lrs.

---Appellant

vs.

M/s Avencer Properties Private Limited and another

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Rao Ajender Singh, Advocate
for the appellants in both the appeals

Mr, Jaininder Saini, Advocate
for caveator-respondent No. 1 in both the appeals

Rekha Mittal, J.

This order will dispose of RSA Nos. 1148 and 1262 of 2016 as identical questions of law and fact are involved for adjudication. For facility of reference, facts are taken from RSA No. 1148 of 2016.

Briefly stated, M/s Avencer Properties Private Limited filed a suit for specific performance of agreement to sell dated 11.4.2005 with alternative relief for recovery of earnest money alongwith damages and costs. The plea of the respondent/plaintiff is that respondent M/s Avencer Properties Private Limited is a private limited company registered under the Companies Act having its office in Sector-7, Rohini (Delhi). Sh. Anil Kumar Aggarwal is authorized representative of the company for filing the suit and he has full knowledge of the facts of the case. Defendant No. 1 executed agreement to sell dated 11.4.2005 in respect of land measuring 13 kanal 9 marlas, detailed in para 2 of the plaint for a sale consideration of Rs. 32 lakhs per acre. He received Rs. 50,000/- in cash and Rs. 5,10,000/- vide cheque No. 328577 dated 11.4.2005 towards earnest money. Balance amount was agreed to be paid at the time of execution of the sale deed. The respondent-plaintiff always remained ready and willing for execution of the sale deed. Vide registered notice dated 22.11.2005, defendant No. 1 was informed that the plaintiff company is still ready to execute the sale deed. On 28.11.2005, Ashok Kumar, authorized representative of the company remained present in the office of Sub Registrar, Dharuhera alongwith balance amount of Rs. 48,20,000/-, stamp expenses, registration fee and witnesses but the defendant did not turn up to execute the sale deed. He, Ashok Kumar executed affidavit before Executive Magistrate, Dharuhera for marking his presence. Plaintiff again sent legal notices dated 1.12.2005 and 8.2.2006 through its counsel but of no use. Plaintiff came to know that defendant No. 1 sold land to defendant No. 2 vide registered sale deed No. 3551 dated 14.2.2006, which is not binding on the plaintiff

company.

Defendant No. 1 filed the written statement, admitted factum of agreement to sell dated 11.4.2005, terms and conditions incorporated therein as well as receipt of Rs. 50,000/- in cash and Rs. 5,10,000/- through cheque towards earnest money. However, it has been averred that the plaintiff company was not ready and willing to get the sale deed executed for want of balance sale consideration and expenses. He has also denied notice dated 22.11.2005 having been sent by the respondent-plaintiff and presence of a representative of the company in the office of Sub Registrar, Dharuhera on 28.11.2005 with averments that answering defendant remained present there from 9-00 am to 4.30 pm for execution of the sale deed but the plaintiff did not come. All other material averments were denied with prayer for dismissal of the suit.

Defendant No. 2/respondent No. 2 (proforma) filed separate written statement claiming itself to be bona fide purchaser for valuable consideration and without notice of alleged agreement to sell dated 11.4.2005. It has been averred that the plaintiff and defendant No. 1 colluded with each other to deprive the answering defendant of suit land by projecting the alleged agreement dated 11.4.2005.

The respondent-plaintiff filed replication to written statements filed by the defendants.

The controversy between the parties, led to framing of following issues and additional issue by the trial court:-

1. Whether the plaintiff is always ready and willing to perform his part of the agreement to sell” OPP

2. Whether the plaintiff has no cause of action and locus-standi to file the present suit?OPD

3. Whether Shri Ashok Garg is not competent to file the suit on behalf of the plaintiff?OPD

4. Relief

Additional issue

1. Whether the defendant No. 2 is a bona fide purchaser?OPD

The trial court permitted the parties to adduce evidence in support of their respective claims. However, defendant No. 1 passed away during pendency of the suit and his legal representative(s) did not come forward to contest the suit despite number of opportunities granted by the trial court to counsel for defendant No. 1 to file an appropriate application in this regard. After having heard counsel for the parties on the basis of materials on record, the trial court answered issue No. 1 in favour of the respondent-plaintiff, issues No. 2 and 3 against the defendants but additional issue was decided in favour of proforma respondent/defendant No. 2. Eventually, suit filed by respondent/plaintiff was partly decreed for specific performance of agreement of sale (Ex. P2) in respect of land measuring 8 kanal 9 marlas in place of 13 kanal 9 marlas on payment of remaining sale consideration as sale of land measuring 5 kanals purchased by defendant No. 2/respondent No. 2 vide sale deed dated 14.2.2006 Ex. DW1/A is affirmed on the basis of findings on additional issue. The respondent-plaintiff was directed to make payment of balance sale consideration of land measuring 8 kanals 9 marlas within two months failing which suit of the plaintiff would deemed to be dismissed. The

plaintiff was left at liberty to get the sale deed executed through process of the Court if defendant No. 1 failed to execute the same within the stipulated period of two months.

The judgment and decree passed by the trial court led to filing of two separate appeals, one by M/s Avencer Properties Private Limited (respondent-plaintiff) and the other by Surat Singh and others (appellants herein), legal representatives of Daya Ram defendant No. 1 (since deceased). Both the appeal were decided by a common judgment and decree dated 28.10.2015 passed by the Additional District Judge, Rewari whereby appeal preferred by the respondent-plaintiff in respect of land measuring 5 kanals in regard whereof sale deed was executed by Daya Ram in favour of M/s Pri Karma Infrastructure Private Limited was allowed and appeal preferred by Surat Singh and others was ordered to be dismissed. As a consequence, judgment and decree passed by the trial court were modified and claim of the respondent-plaintiff in respect of entire land measuring 13 kanal 9 marlas, subject matter of agreement to sell, was allowed.

Feeling dissatisfied, Surat Singh and others, legal representatives of deceased Daya Ram have filed the aforesaid two appeals.

It is pertinent to mention at the outset that though the Court in Appeal dismissed application for condonation of delay in filing the appeal but still decided the application for additional evidence as well as appeal on merits.

Counsel for the appellants has assailed findings of the Court in Appeal dismissing application under Order 41 Rule 27 of the Code of Civil Procedure (in short "CPC"). It is argued with vehemence that a serious

prejudice has been caused to the appellants as they have been deprived of an opportunity to prove registered Will dated 13.11.1995, three gift deeds Nos. 361 dated 11.7.2001, 414 dated 27.7.2001 and 424 dated 31.7.2001 executed by Daya Ram on the basis whereof, mutations were sanctioned in favour of the appellants. It is further argued that as the documents sought to be produced and proved by way of additional evidence are registered documents and could not be manufactured/manoeuvred by the appellants, order passed by the Court in Appeal rejecting application for additional evidence is liable to be set aside and as a result, judgment and decree passed by the said court require to be set aside and the matter be remitted to the Court in Appeal to decide the appeal afresh after providing an opportunity to the appellants to adduce additional evidence.

In the alternative, it is argued that even in case the application for additional evidence is not allowed, judgments and decrees passed by the courts below are otherwise liable to be set aside. To bring home his contention, counsel has three fold submissions to make. It is argued that the agreement of sale admittedly executed by Daya Ram in favour of M/s. Avencer Properties Private Limited contains an arbitration clause, therefore, dispute, if any, emerging out of the agreement of sale (Ex. P1) cannot be decided by the civil court and requires to be referred to the Arbitral Tribunal as per clause 12 of the agreement(Ex. P1).

The second submission made by counsel is that Sh. Anil Aggarwal through whom the suit has been filed by the plaintiff company was not competent to institute the suit, therefore, plaint was liable to be rejected for want of authority with Sh. Anil Aggarwal to sign the plaint and

institute suit on behalf of the plaintiff-company.

The third submission made by counsel is that the respondent-plaintiff is guilty of mala fide. It is argued that issues in the case were framed in the year 2008. Sh. Daya Ram, defendant No. 1 died in the year 2010. So long as Daya Ram was alive, the respondent-plaintiff did not adduce any evidence. Immediately thereafter, the plaintiff examined the witnesses and became successful to get a decree without an opportunity to Daya Ram or his successors in interest (appellants herein) to contest the proceedings.

Counsel representing the contesting respondent/plaintiff has supported findings of the Court in Appeal whereby suit of the plaintiff has been decreed in its entirety. It is argued that as defendant No. 2/respondent No. 2, the subsequent purchaser of land measuring 5 kanals of the suit land did not prefer an appeal against the judgment and decree passed by the Court in Appeal, findings of the first appellate court reversing findings of the trial court on additional issue are liable to be affirmed.

With regard to dismissal of application for additional evidence, it is argued that the application under Order 41 Rule 27 CPC filed by the appellants does not fall within the purview and ambit of the relevant provisions of the CPC. It is argued that as the appellants did not come forward to contest the suit after death of Daya Ram, thus did not file written statement raising any such plea that Daya Ram had executed registered Will dated 13.11.1995 or registered gift deeds dated 11.7.2001, 27.7.2001 and dated 31.7.2001 in their favour, appellants cannot seek leading of additional evidence to prove documents which are beyond

pleadings. Counsel would inform that in the written statement filed by Daya Ram, there is no reference to any such gift deeds having been executed by him in favour of his sons (appellants herein). The registered Will even does not find reference in the application for additional evidence.

To refute contention of the appellants that the dispute was required to be referred for arbitration, it is argued that contention raised by the appellants is wholly misconceived and untenable. Daya Ram, party to the agreement filed written statement, therefore, submitted to jurisdiction of the court. He never raised an issue much less filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to arbitration in terms of clause 12 of agreement to sell. It is argued with vehemence that as soon as Daya Ram submitted to jurisdiction of the civil court, appellants are debarred from raising a contention that civil court was not competent to entertain and decide the suit in the face of arbitration clause in the agreement of sale.

Sh. Anil Aggarwal was duly authorized by the company to institute the suit vide document Ex. PW3/A. It is further argued that the courts below on a thorough and correct appreciation of Ex. PW3/A has recorded findings in favour of the respondent-plaintiff that Sh. Anil Aggarwal was competent to file the suit on behalf of the plaintiff-company.

Counsel has refuted contention of the appellants that the respondent-plaintiff is guilty of misconduct or conduct actuated with malice. Counsel has pointed out that in the grounds of appeal, appellants have reproduced certain zimni orders recorded by the trial court. It is argued that on 28.7.2010, it was brought to notice of the court that

defendant No. 1 had died. Adjournment was sought for filing application for impleading legal representatives of defendant No. 1 and the case was adjourned to 7.9.2010. The matter remained pending on 7.9.2010, 8.12.2010 and 6.5.2011 for filing application for impleading legal representative(s) of defendant No. 1. On 6.5.2011, the case was adjourned to 13.5.2011 for evidence of the plaintiff with a clear stipulation that last opportunity is allowed. On the adjourned date i.e. 13.5.2011, counsel representing defendant No. 1 had made a statement that Daya Ram had expired and he had no instructions on behalf of LRs of defendant Daya Ram. The respondent-plaintiff examined four witnesses and the case was adjourned to 23.5.2011 for remaining evidence. According to counsel, if counsel for respondent No. 1 did not bother to file an application for impleading LRs of defendant No. 1 or the LRs did not bother to come forward to contest the suit, respondent-plaintiff cannot be accused for examining its witnesses on 13.5.2011 as the trial court had granted last opportunity to the plaintiff to adduce its evidence at own responsibility vide order dated 6.5.2011.

It is further argued that in view of amendment of Order 22 Rule 4 CPC by the Punjab and Haryana High Court, the suit shall not abate on account of death of one of the defendants or sole defendant as contract between the deceased defendant and his pleader continues even after death of a particular defendant. According to counsel, if counsel for the defendant did not bother to cross examine the witnesses of the plaintiff, appellant cannot shift the blame upon the respondent/plaintiff.

I have heard counsel for the parties, perused the paper book and records.

Before advertizing to the submissions made by counsel for the parties, it is appropriate to note that Daya Ram, defendant No. 1 had admitted execution of agreement of sale dated 11.4.2005, receipt of Rs. 5,60,000/- towards earnest money and the terms and conditions incorporated in the agreement. Counsel for the appellants has not advanced any arguments to assail findings of the courts below that the respondent/plaintiff has successfully proved that the plaintiff always remained ready and willing to perform its part of the agreement namely execution of the sale deed on payment of balance sale consideration and incurring expense on purchase of stamp papers/registration charges etc. As has been rightly argued by counsel for the respondent/plaintiff, defendant No.2/respondent No. 2 has not preferred an appeal against the judgment and decree passed by the first appellate court, therefore, there is no challenge to findings of the Court in Appeal negating plea of respondent No. 2 to be bona fide purchaser in respect of part of suit land vide sale deed No. 3551 dated 14.2.2006 executed by Daya Ram, defendant No. 1 in favour of M/s Prikarma Infrastructures Limited.

This brings the Court to the question of appellants being entitled to adduce additional evidence qua registered gift deeds and registered Will purported to be executed by Daya Ram, defendant No. 1.

Counsel for the appellants has not disputed that in view of amendment made in CPC by the Punjab and Haryana High Court in Rule 2 of Order XXII with effect from 11.4.1975, the duty to bring on record legal representatives of the deceased defendant shall be on the heirs of the deceased. He has also conceded that where within the time limited by law no application is made under sub rule (1) of Rule 4 CPC, suit shall not abate

as against the deceased defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death took place.

A relevant extract from notification No. GSR 39/CA/5/1908/S 12257 that came into force w.e.f. 11.4.1975 amending Rules 2 and 4 of Order 22 CPC, reads as follows:-

“After existing Rule 2 of Order XXII, insert :-

2-A. Every Advocate appearing in a case who becomes aware of the death of a party to the litigation (whether he appeared for him or not) must give intimation about the death of that party to the Court and to the person who is *dominus litis*.

2-B. The duty to bring on record the legal representatives of the deceased-defendant shall be of the heirs of the deceased and not of the person who is *dominus litis*.”

(i) In its application to the State of Punjab, Haryana and Chandigarh, the following shall be substituted for the existing sub-rule (3) to Rule 4 of Order XXII:-

“Where within the time limited by law no application is made under sub-rule (1) the suit shall not abate as against the deceased defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death take place.”

(ii) The following shall be inserted as sub-rule (4), (5) and (6) to Rule 4 of Order XXII:

“(4) If a decree has been passed against a deceased-defendant a person claiming to be his legal representative may apply for setting aside the decree qua him and if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record, the Court shall set aside the decree upon such terms as to costs or otherwise as it thinks fit.”

“(5) Before setting aside the decree under sub-rule

(4) the Court must be satisfied prima facie that had the legal representative been on the record a different result might have been reached in the suit.”

“(6) The provisions of Section 5 of the Indian Limitation Act (36 of 1963) shall apply to applications under sub-rule (4).”

The question whether amendment of Sub Rule 3 to Rule 4 by the Punjab and Haryana High Court is inconsistent or otherwise with the provisions of CPC as amended by the Amendment Act 1976 came up for consideration before the Full Bench of this Court in **Smt. Chand Kaur vs. Jang Singh and others**” 1978 PLR 746 and it was held that sub-rule (3) of Rule 4 of Order XXII CPC substituted by this Court on March 25, 1975 is not inconsistent with the provisions of the CPC as amended by the Amendment Act and consequently does not stand repealed.

Reverting to the case at hand, as the appellants did not contest the proceedings before the trial court nor filed written statement in their independent right to plead registered Will and gift deeds sought to be proved by way of additional evidence, by invoking Order 41 Rule 27 CPC, had the court in appeal allowed the application, it would have resulted in allowing the appellants to adduce evidence beyond pleadings. As per the settled position in law, no party can be allowed to lead evidence beyond pleadings at the cost and inconvenience of all the stake holders as well as wastage of precious time of the court and energy of the Presiding Officer. Under the circumstances, plea of the appellants to set aside the order dismissing application for adducing additional evidence is not tenable and liable to be rejected. I would hasten to add that reasoning adopted by the Court in appeal for rejecting application for additional evidence does not appear to be on sound footing but in view of discussion made hereinbefore,

appellants are not entitled to indulgence of this Court seeking permission to adduce additional evidence.

Contention of the appellants that dispute is liable to be referred for arbitration is also untenable. As has been rightly argued by counsel for the respondent/plaintiff, Daya Ram, predecessor in interest of the appellants and privy to the agreement of sale did not exercise his right to seek reference to arbitration. On the contrary, he filed the written statement and participated in the proceedings without any objection, therefore, he submitted to jurisdiction of the civil court and deprived himself and his successors in interest to raise an issue that the matter is liable to be referred to an Arbitrator in view of arbitration agreement between the parties.

The plea of the appellants that Sh. Anil Aggarwal was not competent to file the suit on behalf of the company is not meritorious and has rightly been rejected by the courts. Perusal of document Ex. PW3/A leaves no manner of doubt that Anil Aggarwal was duly authorized by plaintiff company to institute the suit on its behalf.

The contention of the appellants that the respondent-plaintiff is guilty of a mala fide conduct has no foundation/legs to stand. It is not open for the appellants to find fault in the judicial proceedings merely because they did not come forward to contest the suit after death of Daya Ram. The respondent-plaintiff cannot be blamed for examining its witnesses on 13.5.2011 as the trial court granted last opportunity for adducing evidence vide order dated 6.5.2011. As has been noticed hereinbefore but for the sake of repetition, the respondent-plaintiff examined its witnesses on 13.5.2011 in the presence of counsel engaged by Daya Ram but for the reasons best known, he did not cross examine the witnesses. In this view of

the matter, plea of the appellants attributing mala fide to the respondent-plaintiff is totally baseless and liable to be rejected.

No other point has been raised.

For the foregoing reasons, the appeals fail and are accordingly dismissed leaving the parties to bear their own costs.

April 3rd, 2018
paramjit

(Rekha Mittal)
Judge

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No