**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**101**

**CM-11921-C-2018 in/and**
**RSA-137-2014 (O&M)**
**Date of Decision : 31.07.2018**

Mukesh and others ...... Appellants

Versus

Ramesh Chand and another ...... Respondents

**CORAM : HON'BLE MR.JUSTICE AJAY TEWARI**

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Present :- Mr. Sanjay Vashisth, Advocate
for the applicants-appellants.

Mr. Avnish Mittal, Advocate
for respondent No.1.

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**AJAY TEWARI, J. (ORAL)**

**CM-11921-C-2018**

This is an application for leading additional evidence.

Counsel for the respondent No.1 states that he has no objection if this application is allowed.

For the reasons recorded, the application is allowed. Documents (Annexures A-1 to A-5(Colly)) are taken on record.

**RSA-137-2014 (O&M)**

This appeal has been filed against the concurrent judgments of the courts below decreeing a suit for possession by way of specific performance filed by the respondent No.1.

The respondent No.1 had filed a suit for specific performance against the appellants and the respondent No.2. His case was that the respondent No.2 was the general power of attorney of the appellants vide power of attorney dated 07.05.1997 and had entered into an agreement dated 07.10.2002 to sell residential house of the appellants and his siblings for a total consideration of Rs.7,10,000/- and he had received a sum of Rs.3 lakhs as earnest money. Further on the appointed date he appeared before the Sub-Registrar but since the sellers did not land up he was constrained to file a suit. In the written statement, the respondent No.2 and the appellants set up the case that they had never received any earnest money and they never agreed to sell their house. It was stated that the respondent No.1 had got the signatures of the respondent No.2 on the agreement to sell fraudulently without payment of any earnest money. The respondent No.1 examined two attesting witnesses. Interestingly, while deposing the respondent No.2 stated that he had executed agreement to sell but again reiterated that he did not receive the money. The courts below noticed that there was an acknowledgment of the receipt of the earnest money in the handwriting of the respondent No.1 and consequently did not believe the assertion of the sellers that no earnest money had passed and consequently decreed the suit.

During the pendency of this appeal, the appellants had placed on record a subsequent suit bearing No.294/2013 dated 08.10.2013 in which the respondents herein were the defendants and in the suit they sought a declaration that in fact they had executed power of attorney dated 07.05.1997 in favour of respondent No.2 for the limited purpose of partition of agricultural land. However, when they came to know that respondent No.2 was not taking any steps for the partition that power of attorney was cancelled by the appellant No.1 on 24.05.2001. It was further pleaded that despite knowing that the power of attorney was only in respect of the agricultural land the respondent No.2 in collusion with the respondent No.1 entered into the present agreement to sell. It was further pleaded that the appellants came to know about the agreement to sell only after 11 years i.e. on 01.10.2013 when the respondent No.1 started openly proclaiming that he had won the case for specific performance. They consequently prayed for a declaration that the agreement to sell was illegal, unauthorized and not binding on their rights and further sought injunction restraining the respondents from alienating, encumbering and creating third party rights. Interestingly, they did not challenge the decree which is in question in the present appeal.

The first argument of the counsel for the appellants is that the respondent No.2 had connived with the respondent No.1 to defeat the valuable rights of the appellants. He has further stated that even when the suit was filed the respondent No.2 had filed written statement which was not signed by the appellants. He has further argued that a bare perusal of the power of attorney would show that it related only to agricultural land. He has further argued that in any case the respondent No.1 had not been able to prove the payment of the earnest money. He has further argued that in fact the appellants were never served in the previous suit.

Counsel for the respondent No.1 has countered by arguing that this is a classic case where the appellants and the respondent No.2 have now entered into a collusion to defeat the valuable rights of the respondent No.1. He has argued that the assertion made today for the first time that the appellants were never served in the previous suit is a falsehood on the face of it. As per him, if as per the appellants they had come to know about the decree on 01.10.2013, it was open for them to have moved an application for setting aside the ex-parte proceedings. Further not only did they not did that but even in the civil suit they have now filed there is no assertion to this effect and consequently this argument cannot be accepted.

In my opinion, the stand of the counsel for the respondent No.1 carries more weight. Had the appellants not been served in the first suit, there was nothing to stop them from moving an application to set aside the ex-parte proceedings. Even if they did not want to do that, there was nothing to stop them for making such assertion in their own plaint but there is no such assertion to that effect. Resultantly, it has to be held that the appellants were properly served in the first suit. Once that is behind us, the other arguments raised by the counsel for the appellants also have to fail. It would then emerge that the appellants knowingly did not appear before the court below and allowed the respondent No.2 to represent them. They did not take the plea of cancellation of power of attorney by the appellant No.1. They did not take the plea that the power of attorney related only to agricultural land. Once that is so, they can not now be heard to argue on these issues because there would be bar under Order 2 Rule 2 CPC.

The last argument is regarding passing of earnest money. The bald statement of the respondent No.2 that he did not receive the money though he signed the acknowledgment and the agreement to sell, has rightly been rejected by the courts below. There is no explanation how and in what circumstances the respondent No.2 signed the agreement to sell and the acknowledgment without receiving the money.

Appeal is dismissed. No costs.

Since the main case has been decided, the pending civil miscellaneous application, if any, also stands disposed of.

**( AJAY TEWARI )**
**JUDGE**

**July 31, 2018**
*ashish*

Whether speaking/reasoned - Yes/No

Whether reportable - Yes/No