

IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

THE HON'BLE JUSTICE Kesang Doma Bhutia.

C.O. No. 2043 of 2021

Sri Bikash Mukherjee

-VS-

Addwitiya Co-operative Housing Society Limited & Anr.

For the Petitioner : Mr. Dhiman Kumar Sengupta,
Ms. Sweta Saha,

For the Opposite Party
No & 2 : Mr. Ashit Kr. Chakraborty,
Mr. Sunanda Mohan Ghosh,

Hearing concluded on : 23.12.2021

Judgment on : 18.01.2022

Kesang Doma Bhutia, J:- Being aggrieved by the order of rejection of an application under Order 41 Rule 27 Civil Procedure Code by West Bengal Co-operative Tribunal in Appeal No. 11 of 2020 on 07.10.2021, the petitioner has filed the present application under Article 227 of the Constitution of India.

The dispute amongst the parties revolves around a ground floor flat no.2 of premises No. HB- 327, Sector-III, Salt Lake City, Kolkata-700106. The property is a part of Addwitiya Co-operative Housing Society Limited. The respondent no. 2 Utpal Kumar Dutta is a member allottee of Addwitiya Co-operative Housing Society in respect of the flat in dispute. Being the owner of the flat-in-question the respondent no.2 entered into an agreement of sale of the disputed flat with the petitioner Sri Bikash Mukherjee for Rs.11,50,000/- on 20.07.2002 and received a sum of Rs.1,75,000/- as an advance. Then respondent no. 2 made necessary prayer before the Co-operative Society for transfer of his membership and transfer of his two shares in the name of petitioner. The membership has been duly transferred in the name of petitioner but no shares as well the flat has been transferred by the society as he has failed to pay the balance consideration money to the respondent no.2 till date.

It is the case of the petitioner when the agreement of sale was entered between him and the respondent no. 2, the flat in-question was

in incomplete condition. He had to complete the construction of the flat and make it habitable by spending money from his pocket. Whatever amount was due to the respondent no. 2 was adjusted towards the completion of the incomplete construction of the flat.

Further, it is the case of the respondent no. 2 when the petitioner could not make payment of the balance consideration money, then he requested the Society not to transfer his two shares in the name of the petitioner in 2010, but he has also returned the advance consideration money amounting to Rs,1,75,000/-by cheque vide letter dated 21.07.2011.

When the dispute between the petitioner and respondent no.2 could not be settled then the matter was referred to an Arbitrator, who is Deputy Registrar Co-operative Society of West Bengal for adjudication. Learned Arbitrator in his award dated 12.07.2013 was pleased to set-aside so called transfer of membership, share, right, title and interest over the flat no. H-B 327/2 between the petitioner and respondent no. 2. The defendant no. 2 was given liberty to start process of transfer de novo with the plaintiff and to pay the plaintiff cost of flat no. HB 327/2 at the market value to be determined by the Registrar of Assurance Kolkata or Additional District Sub-registration Officer, Bidhannagar at the time of execution of deed of re-allotment in favour of the defendant no 2 in

presence of defendant no. 1 as confirming party in terms of section 87 (1) of West Bengal Co-operative Society Act, 1987 and now under Section 92 (1) of the West Bengal Co-operative Society Act, 2006 within 4 weeks from the date, otherwise the flat will belongs to the plaintiff only.

Being aggrieved by such award the petitioner has preferred an Appeal being No. 11 of 2020 before West Bengal Co-operative Tribunal. In such appeal the petitioner/appellant has filed an application under Order 41 Rule 27 of Civil Procedure Code, seeking leave to adduce additional evidence to prove the flat-in-question was in incomplete condition when sale agreement was executed in the year 2002. He had to complete the construction and make the flat habitable and for which he had incurred huge expenditure. That no money is payable to the respondent and for which the respondent no.1 the Society is bound to transfer the flat in his name. The petitioner to prove his above claim has filed an application under order 41 Rule 27 CPC and wanted to produce quotation given by one Rita Enterprise, ceiling fan voucher, one voucher showing purchase of marble, electricity bills, payment of fees to the Society and correspondence that had taken place between him and the Society in respect of the disputed flat as additional evidence.

However, the Appellate Court after hearing the parties was pleased to reject the application under order 41 Rule 27 Civil Procedure Code on

the ground that it was not the case of the petitioner/plaintiff/appellant that he had produced those documents before Arbitrator and it was the Arbitrator who has failed to admit the same or that in spite of exercise of due diligence such evidence was not within his knowledge or even after exercise of due diligence he could not produce the same. In fact the petitioner has alleged that he had handed over those documents to his lawyer and who failed to produce the same before the Arbitrator.

It was also held that on execution of agreement of sale between the petitioner and respondent no.2 in the year 2002 and on the prayer of the respondent no.2 the membership was transferred in the name of the petitioner/plaintiff and petitioner/plaintiff is in possession of the disputed flat, but mere possession does not confer title.

Further, learned Tribunal held those documents which the petitioner wants to adduce as additional evidence are not required for pronouncement of the judgement as the main dispute between the parties is whether there is payment of full consideration money by the petitioner/transferee member to the respondent no.2/promotee member.

Let see whether the impugned order suffers from illegality and material irregularity and liable to be set aside.

It is undisputed facts that on execution of the agreement of sale of disputed flat between the petitioner and respondent no. 2 way back in 2002 and on the prayer of the respondent no.2 the allottee/promoter member of the respondent no.2 Society, the Society has transferred the membership of the respondent no.2 in the name of the petitioner and petitioner is in possession of the disputed flat since then by taking electric connection and by making payment of maintenance charges.

The actual dispute between the petitioner and respondent no.2 is whether there is payment of entire consideration money by the petitioner. Learned Arbitrator in its award has clearly stated the petitioner has failed to produce any documents to prove payment of balance consideration money of Rs.9,75,000/- to the respondent no.2.

The Award is silent about the petitioner alleging before the Arbitrator when the agreement was executed and possession was handed over to him, the flat in question was in incomplete condition or that he had to complete the construction of the flat-in-question by incurring huge expenditure. He has merely alleged before the Arbitrator that he had made some unauthorized construction. That as per enquiry report of Bidhannagar Municipality regarding alleged unauthorized construction it was found that there was illegal construction of a small wall between kitchen and veranda.

Now, it appears by filing the petition under Order 41 Rule 27 CPC the petitioner at the appellate stage wanted to set up a new case that when he took possession of the disputed flat it was in incomplete condition and he made it habitable after incurring huge expenditure and payment of balance consideration money was adjusted with such expenditure. It is settled law no new additional evidence can be allowed at the appellate stage in order to enable one of the parties to remove lacuna and fill up the gap.

However, for the sake of argument perused the documents of alleged expenditure made by petitioner to complete the construction of disputed flat and filed before the learned Appellate Tribunal. Those documents appear to be quotation for house hold electrical goods, voucher for purchase of ceiling fan and marble voucher issued by some unknown entity. Therefore, those documents nowhere reflect the flat in question was in incomplete condition when agreement was entered between the parties and possession was handed over. Thereafter, petitioner had to complete the construction.

The main dispute between the petitioner and respondent no. 2 appears to be none-payment of balance consideration money of Rs.9,75,000/- by the petitioner to the respondent no.2 till date, even

after transfer of membership and delivery of possession after execution of agreement of sale in the year 2002.

Therefore, this court does not find any merit in the application under Article 227 of the Constitution of India to interfere with the finding of learned Tribunal while rejecting the petition under Order 41 Rule 27 CPC. This court does not find any illegality or material irregularity in the impugned order passed by the learned Tribunal, who has rightly held that there is no necessity of those documents which the petitioner wants to bring on record by way of additional evidence for determination or adjudication of the actual dispute between the petitioner and respondent no.2.

Accordingly, **C.O. 2043 of 2021** is dismissed.

Interim order, if any, stands discharged.

There will be no order as to costs.

In view of the order made above affidavits are not invited. Allegations made shall be deemed to be denied.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for be given to the parties upon compliance of the requisite formalities.

(Kesang Doma Bhutia, J.)