IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.176 of 2020
WITH
CIVIL APPLICATION NO.1347 OF 2018
WITH
INTERIM APPLICATION NO.16334 OF 2023
IN
SECOND APPEAL NO.176 of 2020

Adarsh Arjunan	...Appellant
Versus	
Asta Manna Haripada Manna and Ors.	...Respondents

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Dr. Abhinav Chandrachud with Mr. Saurish Shetye i/b. Mr. Prem Kumar Pandey, Ms Khushboo Pathak and Pavan Kumar Pandey for the Appellant.
Mr. Akshay R. Kulkarni i/b. Mr. Ashutosh M. Kulkarni for Respondent Nos.3 and 4-CIDCO.
Mr. Kamlesh Ghumre, Mr. Sanket Patil and Ms Sonali Jadhav for Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI J.

DATED: 17th OCTOBER, 2023.

P.C.:-

1. This appeal under Section 100 of the Civil Procedure Code, has been preferred against the impugned judgment and order dated 09/08/2018 passed by learned Ad-hoc District Judge, Thane, in Regular Civil Appeal No.258 of 2016. By the impugned judgment, the learned District Judge confirmed the judgment and decree dated

26/09/2016 passed by learned Civil Judge, Senior Division, Thane, in Special Civil Suit No.204 of 2007 whereby the Trial Court dismissed the suit for specific performance.

2. The Appellant shall be hereinafter referred to as the Plaintiff and the Respondent Nos.1 and 2 shall be hereinafter referred to as the Defendant Nos.1 and 2 respectively.

3. The Defendant No.1 was the owner of the Apartment No.B-4/7/15 situated at Belapur, Navi Mumbai. The said flat shall be hereinafter referred to as the 'suit premises'. It is the case of the Plaintiff that by agreement dated 25/11/2006 the Defendant No.1 agreed to sell to him the suit premises for sale consideration of Rs.6,80,000/-. He paid to the Defendant No.1 part sale consideration of Rs.3,01,300/- and on receipt of the same they entered into a registered agreement for sale dated 25/01/2007. The Plaintiff claims that the Defendant avoided giving him the original documents and terminated the agreement by notice dated 22.02.2007 contending that the sale transaction was not concluded within the prescribed period of limitation. The Defendant No.1

thereafter sold the suit premises to the Defendant No.2 by deed of sale dated 5.3.2007. The Plaintiff claims that Respondent Nos.3 and 4 have given permission and sanction to transfer the suit premises in favour of the Defendant No.2 and that the Respondent No.5 has acknowledged the Defendant No.2 as an owner of the suit premises and admitted him as a member. The Plaintiff claims that the termination notice dated 22.02.2007 is null and void and that the sale deed executed in favour of the Defendant No.2 is illegal and not binding on him. The Plaintiff further averred that he is ready and willing to perform his part of agreement and filed a suit for specific performance, declaration and perpetual injunction.

4. Defendant Nos.1 and 2 filed a written statement denying the execution of agreement dated 25.11.2006. It is claimed that pursuant to the registered agreement for sale dated 25.01.2007, the Defendant No.1 received from the Plaintiff earnest money of Rs.10,000/-. The Plaintiff was to execute the sale deed within four weeks and pay the balance sale consideration at the time of execution of the said sale deed. The Plaintiff failed to perform his part of contract, hence Defendant No.1 terminated the agreement

and refunded the earnest money, and sold the property to Defendant No.2 after obtaining requisite permission from Defendant Nos.3 and 4. Defendant Nos.3 and 4 have stated that they have granted permission for sale after following the due procedure.

5. The trial court dismissed the suit mainly on the ground that the Plaintiff did not produce agreements for sale dated 25.11.2006 and 25.01.2007, or the receipt issued by the Defendant No.1 for having received the earnest money. Learned Judge observed that in the absence of the said documents it is not possible to ascertain the terms and conditions of the sale transaction. Being aggrieved by dismissal of the suit, the Plaintiff filed an appeal under Section 96 of the Civil Procedure Code.

6. The Appellate Court observed that though by order dated 21.11.2014 in Writ Petition No.4502 of 2014 this Court had allowed the Plaintiff to lead secondary evidence, the Plaintiff had only filed an application (Exhibit 154) seeking permission to lead secondary evidence without placing on record copies of the documents. The Appellate Court therefore held that the Trial Court was justified in

rejecting the said application. The Appellate Court also observed that the Plaintiff had failed to produce such evidence at appellate stage. The Appellate Court therefore confirmed the findings of the Trial Court that the Plaintiff has failed to prove the terms and conditions of the agreement. The Appellate Court also observed that the Defendant No.1 has already sold the property to the Defendant No.2 after obtaining permission from the Defendant Nos.3 and 4 and that the Defendant No.2 is residing in the suit premises alongwith his family. In such circumstances, the Appellate Court held that the Plaintiff is not entitled for the relief of specific performance, declaration or injunction. These concurrent findings are challenged in this appeal under Section 100 of CPC.

7. The Plaintiff has filed an application under Order 41 Rule 27 of the CPC seeking leave to produce copy of the agreement for sale and other documents. Shri Abhinav Chandrachud, learned counsel for the Appellant- Plaintiff submits that Order 41 Rule 27(b) enables the Appellate Court to permit additional evidence when the Appellate Court requires such additional evidence to enable it to pronounce judgment or any other substantial cause. Relying upon

the decision of the Apex Court in ***Union of India vs. Ibrahim Uddin and Anr. (2012) 8 SCC 148*** he submits that the documents sought to be produced are relevant to decide the issue.

8. I have perused the records and considered the submissions advanced by the learned counsel for the Plaintiff.

9. The Plaintiff had filed a suit for specific performance of agreement dated 25/01/2007 for sale of suit premises. The Plaintiff claimed that he had produced the original agreement alongwith the affidavit-in-evidence and since the documents were misplaced the Plaintiff by application (Exhibit-133), filed before the Trial Court sought directions that the original documents be searched. The said application was dismissed by the Trial Court and the said order was challenged in Writ Petition No.4502 of 2014, which was disposed of by order 21/11/2014. This Court observed that the material placed on record by the Plaintiff was not sufficient to hold that the Plaintiff had produced the original documents alongwith the list at Exhibit-80 and hence held that the order of the Trial Court rejecting the application at Exhibit-133 cannot be faulted. This Court further held

that if the Plaintiff is not in a position to produce the original documents, it would always be open for the Plaintiff to file an appropriate application to lead secondary evidence by laying the foundation of the said application on the prerequisites, which are prescribed by Section 65 of the Indian Evidence Act.

10. The records reveal that pursuant to the said order the Plaintiff filed an application before the Trial Court for producing secondary evidence, however, he did not produce alongwith the application photocopy or the certified copy of the agreement for sale, which was admittedly a registered document. The impugned judgment reveals that the Plaintiff had failed to produce copy of the agreement even before the Appellate Court. In view of the dismissal of the First Appeal, the Plaintiff filed the Second Appeal on 29/09/2018. On 26/11/2018 the counsel for the Plaintiff had sought leave to produce the copy of the application under Order 41 Rule 27 of the CPC purportedly filed before the First Appellate Court. On 11/09/2023 the Plaintiff filed an application under Order 41, Rule 27 before this Court, stating that he has now realised that such an application under Order 41 Rule 27 was not filed before the First

Appellate Court. The Plaintiff has sought leave to produce total 29 documents including the agreements for sale. The Plaintiff claims that the said documents are necessary to establish his case that he was ready and willing to perform his part of the contract and the termination of the agreement is illegal. The Plaintiff further claims that production of the said documents would not amount to adducing fresh evidence as both the parties have advanced arguments on the basis of the said documents.

11. In ***Ibrahim Uddin and Anr*** **(supra)** the Apex Court has observed as under:-

> "**Order XLI Rule 27 C.P.C.**
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> *36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the*

evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide: K.Venkataramiah v. A. Seetharama Reddy and Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham and Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwarlal and Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy and Ors., AIR 1979 SC 553).

37. The appellate court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd.S.K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co. AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate court has the power to allow a document to be produced *and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].*

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of

U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.

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48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under

> *either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."*

12. In the instant case, the suit was filed in the year 2007 and leave to file an application to lead secondary evidence was granted on 21/11/2014. As noted above, the Plaintiff did not adduce secondary evidence before the Trial Court. The Plaintiff did not file an application under Order 41 Rule 27 of CPC before the First Appellate Court. The Plaintiff has not assigned any reasons for

not producing secondary evidence before the Trial Court or for not adducing additional evidence before the First Appellate Court. The contention of the Plaintiff that production of said documents does not amount to adducing fresh evidence cannot be countenanced as it is not in dispute that the Plaintiff was not cross-examined on these documents. Furthermore, these documents, which are not admitted by the Defendants cannot be read in evidence without following the procedure under Rules 28 and 29 of Order 41 of CPC.

13. The Plaintiff, had ample opportunity to produce the secondary evidence before the Trial Court or additional evidence before the First Appellate Court, despite which the Plaintiff elected not to produce such evidence. This being the case the Plaintiff, who has not been diligent, cannot seek production of additional evidence at such belated stage as a matter of right. As it has been held by the Apex Court in ***Ibrahim Uddin*** (supra) the mere fact that certain evidence is important, is not in itself a sufficient ground for admitting the evidence in appeal and in the present case in the Second Appeal. It is also well settled that gross negligence and callousness cannot be condoned as a matter of judicial generosity,

particularly considering the fact that the Defendants have been contesting the suit since last over 17 years. Needless to state that time and energy spent and the mental agony that the litigant goes through over the years of litigation cannot be compensated in terms of money and the rights accrued in favour of a litigant cannot be defeated in a routine manner. In such circumstances, allowing the application without there being any satisfactory explanation for non-production of secondary evidence before the Trial Court or not filing an application for additional evidence before the First Appellate Court, will promote injustice.

14. Now coming to the merits of the matter, both the Courts below have recorded concurrent findings that the Plaintiff has failed to establish the terms of the contract, which is sought to be enforced. Both the Courts have also held that the Plaintiff has failed to prove payment of earnest money of Rs.3,01,300/-. The findings recorded by the Trial Court as well as the First Appellate Court are not perverse. The appeal does not involve substantial question of law. Hence, the appeal is dismissed.

15. The interim applications stand disposed of in view of dismissal of the appeal.

(SMT. ANUJA PRABHUDESSAI, J.)