

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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SAO No.47 of 2018 (O&M)

Reserved on : 15.02.2023

Date of Decision : 28.02.2023

Surender Kumar

....Appellant

VERSUS

Mukesh Kumar

....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Mani Ram Verma, Advocate for the appellant.

ALKA SARIN, J.

The present appeal has been preferred against the order dated 04.12.2017 vide which the application filed by the defendant-appellant under Order XLI Rule 21 of the Code of Civil Procedure, 1908 for re-hearing of the civil appeal was dismissed.

The brief facts relevant to the present *lis* are that the plaintiff-respondent filed a suit for specific performance of agreement to sell dated 22.10.2007. It was averred in the plaint that the defendant-appellant being the attorney holder of Balbir Singh (defendant No.2) entered into an oral agreement to sell on 22.10.2007 with regard to land measuring 15 *kanals* 8 *marlas* situated in the revenue estate of village Tatarpur Khalsa, Tehsil and District Rewari. It was further averred in the plaint that Balbir Singh (defendant No.2) had become owner of the land through a release deed executed on 22.10.2002 which was registered on 24.10.2002. It was further averred that the defendant-appellant as attorney holder received Rs.16,00,000/- as earnest money out of the total sale consideration of Rs.19,00,000/-. Balbir Singh (defendant no.2) had executed a power of attorney on 13.10.1992, registered on 15.10.1992, authorizing the defendant-

appellant to enter into an agreement to sell. The target date was fixed as 25.04.2008, however, since the defendant-appellant failed to execute the sale deed, the target date was extended to 30.06.2008 and since the sale deed was still not executed and the plaintiff-respondent was ready and willing to perform his part of the contract, the suit for specific performance was filed. Notice of the suit was issued. The defendant-appellant appeared in person but later failed to appear in the suit and was proceeded against *ex parte*. Balbir Singh (defendant no.2) was served by way of *munadi* and was eventually proceeded against *ex parte*. *Ex parte* evidence of the plaintiff-respondent was recorded. On the basis of the pleadings and the evidence, the suit was dismissed by the Trial Court vide judgment and decree dated 06.08.2011. An appeal was preferred by the plaintiff-respondent. The defendant-appellant and Balbir Singh (defendant No.2) were *ex parte* even before the First Appellate Court. The First Appellate Court partly allowed the appeal vide its judgment and decree dated 29.04.2013 and held the plaintiff-respondent entitled to recover Rs.16,00,000/- along with interest @ 9% per annum from the defendant-appellant. On 30.07.2016 an application was preferred by the defendant-appellant under Order XLI Rule 21 CPC for re-hearing of the civil appeal. Balbir Singh (defendant No.2) is shown to have died when this application was filed. The said application was dismissed vide order dated 04.12.2017. Hence, the present second appeal against order.

Learned counsel for the defendant-appellant has reiterated the arguments raised in the application under Order XLI Rule 21 CPC that he was not in the knowledge of pendency of the appeal and should not be condemned unheard.

I have heard learned counsel for the defendant-appellant.

In the present case, the judgment and decree dated 29.04.2013 passed by the First Appellate Court is not sought to be challenged in the present appeal. No Regular Second Appeal has been preferred challenging the said judgment and decree. The only challenge in the present second appeal is to the order dated 04.12.2017 dismissing the application filed by the defendant-appellant. Both the defendant-appellant and Balbir Singh (defendant No.2) were well aware of the pendency of the suit and the defendant-appellant chose not to file a written statement and was eventually proceeded against *ex parte*. Balbir Singh (defendant No.2) failed to appear despite service. The case set up in the application under Order XLI Rule 21 CPC was that the defendant-appellant was prevented from appearing before the First Appellate Court in view of the oral compromise arrived at between the parties on 14.11.2011 whereby he agreed to pay Rs.10,00,000/- to the plaintiff-respondent out of which Rs.3,00,000/- was paid in cash and a cheque amounting to Rs.7,00,000/- was issued in favour of the plaintiff-respondent. However, no receipt was produced by him which would show that an amount of Rs.3,00,000/- has been paid in cash to the plaintiff-respondent. There is also no proof of the cheque having been issued on 14.11.2011. A cheque for Rs.7,00,000/- was stated to have been issued on 30.06.2013 *qua* dishonour of which a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 was filed by the plaintiff-respondent. There was nothing on record to show that the defendant-appellant was prevented by sufficient cause from appearing before the First Appellate Court when the case was called for hearing.

In view of the above, I do not find any illegality or infirmity in the impugned order dated 04.12.2007 passed by the First Appellate Court. The present appeal, which is wholly devoid of any merit, is accordingly dismissed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

28.02.2023
jk

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: Yes/No