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Ct. No. 04

akd

S.A.T. 233 of 2023

CAN 1 of 2024

Sri Mihir Mitra

Vs.

**Swapan Adhikary (deceased) substituted by
Mrs. Sabita Adhikary & Ors.**

Mr. Sovan Mukherjee

... for the appellants.

Mr. Sounak Bhattacharya,

Mr. Sounak Mondal,

Mr. Abhirup Haldar,

Mr. Anirban Saha Ray.

... for the respondents.

The suit for recovery of possession on the ground of revocation of licence stood decreed by the Trial Court and such decree is affirmed by the 1st Appellate Court.

It is a specific case of the plaintiffs/respondents that they being the owners of the suit property initially intended to make construction and after such construction was completed, the appellant approached them for being inducted as a tenant in respect of a shop room and after such negotiation the appellant is running a Gold Smith shop in the name and style "*Sonar Kella Rupar Kella*" in the year 1989. It is further averred that the said tenancy was subsequently surrendered on 3rd May, 2000.

The plaint further proceeds that the plaintiffs/respondents were approached by the appellant for purchasing a flat at the first floor of the newly constructed building and it was agreed by and between the parties that the total consideration would be at Rs.1,72,000/-, out of which a sum of Rs.20,000/- was paid as and by way of earnest money. There was a

stipulation with regard to the schedule of payment of the consideration money which according to the plaintiffs/respondents was not honoured.

However, it is pleaded that subsequent to the said agreement an approach was further made by the appellant, as he was facing a trouble in running the shop room residing elsewhere, to permit him to occupy the suit premises as a licensee which, in fact, was granted in anticipation of the fact that the appellant would purchase the said flat upon payment of total consideration money. It is alleged that neither the remaining consideration amount was paid nor the appellant vacated the suit premises despite having demanded by the respondents and instituted a suit for recovery of possession and mesne profits.

The appellant took a defence that the plaintiffs and his brother intended to construct a multi-storied building over the plot of land by appointing one Sasti Das as contractor for the construction but having faced financial problems the construction work could not be started and for such reason the appellant accommodated the plaintiffs with Rs.23,000/- on different dates so that the construction may be started. It is further averred that the shop room was settled in favour of the appellant as a tenant and after the completion of the shop room the possession was handed over to the appellant. The appellant further averred that on several dates the considerable amount was paid as a part payment towards the total consideration money. It is further averred that despite the payment of considerable amount towards the consideration money, the plaintiffs/respondents did not execute and register the sale deed.

Apropos the above, it is averred that since the execution and registration of the sale deed was being delayed, the appellant was put into possession on the basis of the said agreement in an unfinished flat which he could make it habitable by spending considerable amount. The sum and substance of the entire dispute as it appears is that the possession was given in furtherance of the agreement for sale and the story made out by the plaintiffs/respondents that the appellant is a licensee is a pure myth and concocted. On the basis thereof, the parties went in trial and it would appear from the deposition of the plaintiff as first witness that an oral agreement was entered into in respect of the suit property on 1st January 1990 for a total consideration of Rs.1,72,000/-. The said witness has further admitted to have received Rs.20,000/- on 1st January 1990 as earnest money and boldly asserted that he never terminated the oral contract by any written agreement.

On the other hand, the defendant's first witness in his deposition stated that he was previously a tenant in respect of a shop room and subsequently showed his intention to purchase a flat at the first floor of the said premises at the consideration of Rs.1,87,000/-. He further asserted that he paid a sum of Rs.20,000/- as earnest money and further a sum of Rs.30,000/-, 40,000/- and Rs.10,000/- on diverse dates. The said witness further admitted that he never demanded the execution and registration of the said deed nor instituted any suit in relation thereto. The pith and substance of the entire episode which we see from the respective pleadings that there was an oral agreement entered into between the appellant and the respondents and a part payment was made towards the total consideration price.

The question begging an answer is whether the possession in respect of the suit premises was in furtherance of an agreement for sale or it was a bare licence granted to the appellant in anticipation that the said flat would be purchased by him. Both the Courts found that the appellant could not prove that the possession was in furtherance of an agreement for sale and therefore, the possession of the appellant cannot be regarded as protective possession. An application under Order 41 Rule 27 of the Code was taken out by the appellant before the First Appellate Court wherein he seeks to adduce additional evidence by proving the agreement for sale entered into between his wife and the plaintiffs / respondents in respect of the suit premises. The Trial Court rejected the said application as it does not find that the appellant has been able to fulfill the requirement envisaged under Order XLI Rule 27 of the Code.

The learned Counsel for the appellant is very much vocal in his submission that the Court ought to have permitted the appellant to adduce additional evidence more particularly to prove the agreement for sale as it would belie the stand of the plaintiffs/respondents. He drew our attention to paragraph 3 of the said application which according to the learned Advocate for the appellant is required to be considered in the perspective of the provisions contained under Order XLI Rule 27 of the Code. In support of the aforesaid contentions he placed reliance in case of ***K. Venkataramiah vs. Seetharama Reddy & Ors.*** reported in ***AIR 1963 Supreme Court 1526.***

There appears to be a fallacy in the submissions made on behalf of the appellant for the simple reason

that a party has to restrict the case on the basis of the pleadings and the evidence adduced in support thereof. The case, which has not been pleaded nor discerned in course of the trial, cannot be raised at the bar as the new case cannot be permitted to be made out by the Counsel when his client has not taken such defence or plea of attack in the pleadings.

The judgement of the Apex Court in case of **K. Venkataramiah (supra)** did not lay down the proposition of law in absolute terms that the Appellate Court should allow the parties to lead additional evidence as and when any of the parties chooses to do so. Order XLI Rule 27 of the Code envisages the situations within which the Court should consider the said application; which should not be stretched in such manner that the appellate Court is obliged to permit any party to adduce evidence.

Paragraph 3 of the instant application vividly discloses the fact that the said purported agreement for sale with the wife was all along within the knowledge of the appellant, but such agreement was kept in a safe manner which could not be traced out as the appellant was at that relevant point of time working at Bombay and frequently visited Kolkata for the purpose of the said suit. The story goes further to the extent that the purported agreement for sale was discovered or traced out after the judgement was delivered by the Trial Court.

The provisions contained under Order XLI Rule 27 of the Code envisage three situations for which the Appellate Court may permit the party to adduce additional evidence. The said provision is quoted as under:

“27. Production of additional evidence in Appellate Court.—(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

1[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

It is thus manifest from the aforesaid provision that the Appellate Court may permit a party to adduce additional evidence either orally or documentary provided such document was tendered in evidence before the Trial Court but refused to admit the same in evidence which ought to have been admitted or the party seeking to adduce additional evidence despite due diligence, but such evidence was not within his knowledge or could not after such exercise be produced at the time when the decree appealed against was passed and lastly the Appellate Court requires any such document or the witnesses to be examined to enable it to pronounce the judgement or for further substantial cause.

Precisely paragraph 16 of the Apex Court judgement rendered in case of **K. Venkataramiah** (supra) is founded on third eventuality, i.e. the

requirement of the Appellate Court to pronounce the judgement on the basis of such document. What has been highlighted that if anything remain obscured and contrary and there are sufficient materials if unearthed would render complete and effective judgement to be delivered; there is no fetter on the part of the Appellate Court to permit the parties to adduce additional evidence. The enlightening observations made in paragraph 16 of the above noted report are reproduced as under:

“16. *In view of what the High Court has stated in this passage it is not possible to say that the High Court made the order for admission of additional evidence without applying its mind. It seems clear that the High Court thought, on a consideration of the evidence, in the light of the arguments that had been addressed already before it that it would assist them to arrive at the truth on the question of Seetharam Reddy's age if the entries in the admission registers of the school were made available. It was vehemently urged by the learned counsel for the appellant that there was such a volume of evidence before the High Court that it could not be seriously suggested that the Court required any additional evidence “to enable it to pronounce judgment”. The requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable “us” to pronounce judgment. Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence “to enable it to pronounce judgment” but also for “any other substantial cause”. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence “be enable it to pronounce judgment”, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence “for any other substantial cause” under Rule 27(1)(b) of the Code.”*

The Apex Court has also cautioned that the aforesaid clause 'b' should not be liberally construed or to be applied solely on the score that the additional evidence would enable the Appellate Court to pronounce the judgement unless there is an apparent and inherent lacuna or the defects having manifested from the examination of the evidence in the following:

17. *It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. That is why in Parsotim case [58 IA 254] the Privy Council while discussing whether additional evidence can be admitted observed:*

"It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna effect becomes apparent'."

We do not find that there is any obscurity or inherent defect in evidence which would activate Clause 'b' of Order XLI Rule 27 of the Code in the instant case. Apart from the same the applicability of Clause 'b' of Order XLI Rule 27 can also be visualized from the perspective of bringing further light to the core issue involved in the case and have a material bearing thereupon. The lack of material evidence or defect in the examination of the witnesses as held by the Apex Court in the above noted decision are some of the relevant factors to be borne in mind, but such factor must be relatable to the stand of the parties which they took in their respective pleadings.

Order XLI Rule 27 of the Code never envisaged a situation that a complete contrary case or a case foreign to the pleadings can be permitted to be taken through the fiat of Order XLI Rule 27 of the Code. The additional evidence can be permitted in correlation with the pleadings and the stands of the parties in the case and the same is never intended for the purpose of making out a new case completely foreign to an issue and unrelated to the pleadings of the respective parties.

It was the specific stand of the appellant in the written statement as well as the evidence that an agreement for sale was entered into between him and the plaintiffs/respondents, but by way of additional evidence, it is sought to be contended that the agreement for sale was entered into between his wife and the plaintiffs/respondents, which is completely new and contrary to the stand already taken in the written statement.

We, thus, do not find any substance in the stand of the appellant in this regard. So far as the plea of possession on the basis of an agreement for sale is concerned, we do not find that any shelter under Section 53A of the Transfer of Property Act, 1982 can be resorted to. The said provision postulates that where a possession is given in respect of an immoveable property on the basis of a contract for transfer executed in writing and signed by the parties, such possession may be termed as protective possession. Undeniably, there is no written agreement between the appellant and respondents; rather the first witness of the appellant has admitted that there was no written agreement but an oral agreement entered into between the parties. The said Section postulates the extension of

protection only in the event the written agreement is executed between the parties duly signed by them and does not expand its horizon to a case based on an oral agreement. We are conscious that Section 53A of the said Act is used as shield and not a sword, but we do not find any shield or the protective umbrella having available to the appellant on the basis of the facts as indicated hereinabove.

We, thus, do not find any involvement of any substantial questions of law.

The appeal is dismissed without any order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)