



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ESA-9-2024 (O&M)

Reserved on: 05.08.2024

Pronounced on : 14.08.2024

AMIT MANOCHA

. . . . APPELLANT

Vs.

J.K. NANDA AND ANOTHER

. . . . RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Argued By:- Mr. Vikas Jain and Sumeet Jain, Advocates for the appellant.

Mr. S.K. Jain and Mr. Abhimanyu Garg, Advocates
for the caveator/respondents.

DEEPAK GUPTA, J.

Appellant herein was the third party objector in *Execution case No.71 of 2010* tilted as '*J.K. Nanda Vs. Suresh Kumar*' decided by the Court of learned Additional Civil Judge (Sr. Division), Derabassi on 20.12.2016. Appellant is aggrieved by the order dated 15.11.2016 passed by the said Executing Court, whereby objections filed by him have been dismissed. He has further assailed the order dated 08.11.2023 of learned Additional District Judge, SAS Nagar Mohali, dismissing the appeal against order dated 15.11.2016 of the Executing Court.

2. The status of the parties before the trial Court as under:

- (i) Suresh Kumar (owner of the suit property - judgment debtor
- (ii) J.K. Nanda (plaintiff) - decree holder.
- (iii) Amit Manocha (third party objector) - *appellant herein*
- (iv) Ashok Gulati (vendor of Amit Manocha).

3. The facts of the case, in brief, are as under:

3.1 Suresh Kumar-judgment debtor was owner of the suit property by virtue of a sale deed dated 15.06.2005 in his favour. He executed a full and final payment sale agreement/agreement to sell dated 19.06.2005 in favour of Suresh Gulati. At the same time, he also executed a Will dated 19.06.2005 besides a registered General Power of Attorney in favour of said Ashok Gulati. As per these documents, possession of the property was handed over to Ashok Gulati. However later on, the judgment

debtor-owner Suresh Kumar executed another subsequent agreement to sell dated 06.03.2006 in favour of J.K. Nanda i.e. decree holder in respect of the suit property. In the said agreement, possession of the plot was shown to have been handed over to the proposed vendee - decree holder. Target date for execution of the sale deed was fixed as 10.11.2006.

3.2 Civil Suit was filed by J.K. Nanda against Suresh Kumar for specific performance of the agreement to sell dated 06.03.2006, in February 2007. However Ashok Gulati, in whose favour the agreement to sell dated 19.06.2005, Will and registered Power of Attorney had been earlier executed by Suresh Kumar, executed a registered sale deed dated 4.06.2007 in favour of Amit Manocha i.e. objector. Possession was handed over to him. The Civil Suit, as filed by decree-holder J.K. Nanda, was decreed on 26.07.2010 and he then filed an application for execution of sale deed on 15.11.2010. Sale deed was executed in favour of decree holder on 30.8.2011 on the basis of decree passed in his favour. Warrant of possession was issued regarding the suit property.

3.3 On coming to know of the above said facts, the objector brought a Civil Suit on 03.12.2011 challenging the judgment and decree dated 26.07.2010 alleging the same to be null, illegal and void and not binding upon his rights being the collusive between the decree-holder and the judgment debtor and that he (*objector*) was a bona fide purchaser. He also prayed for injunction. At the same time, he also filed objections in the execution proceedings on the same ground that judgment & decree dated 26.07.2010 had been passed *ex parte* and that the same had been obtained by playing fraud upon the Court in connivance with the decree-holder and the judgment debtor. After getting reply to the objections by the decree-holder, necessary issues were framed. The Civil Suit, as filed by the objector, was ordered to be stayed under Section 10 CPC vide order dated 11.02.2013 in view of the pendency of the objections.

3.4 By way of the order dated 15.11.2016, the objections, as filed by the objector, were dismissed by learned Executing Court. The objector filed appeal in December, 2016 and during pendency of the appeal, he moved an application for leading additional evidence. Reply to the said application for leading additional evidence was filed on 06.09.2021. However, without deciding the application for additional evidence, the appeal was dismissed by way of the impugned order dated 08.11.2023.

3.5 It is in the aforesaid background facts that the order passed by the Executing Court dated 15.11.2016 as well as the order of dismissal dated 08.11.2023 passed by the Appellate Court, have been assailed before this Court.

4.1 Amongst various other contentions as raised by learned counsel for the appellant/objector, which are not being considered by this Court as of now, one of the contentions raised by learned counsel is that appeal could not have been decided by the learned Appellate Court without deciding the application for additional evidence.

4.2 Learned counsel for the appellant has drawn attention towards application (*Annexure A13*) which had been moved under Order 41 Rule 27 CPC, in which it was contended that *ex parte* judgment and decree dated 26.07.2010 in favour of decree holder J.K. Nanda against judgment debtor Suresh Kumar, had been obtained on the basis of forged and fabricated agreement to sell. It was pointed out that although it was stipulated in the agreement to sell dated 06.03.2006 that possession had been delivered to the decree-holder but it was admitted during evidence by the said decree-holder that he was not in possession of the suit property, which also indicated that agreement was a forged and fabricated document. Learned counsel submits that it was also alleged in the application that the signature of the judgment debtor i.e. Suresh Kumar was forged and fabricated, which was apparent from the naked eye and on comparison with the signatures of judgment debtor on the registered general power of attorney in favour of the objector. However, trial Court failed to even take note of the said difference in signatures at different places. Learned counsel contends that despite the fact that the reply to the application was filed by the decree-holder/respondent, opposing the application for additional evidence, the learned Appellate Court did not decide the said application and dismissed the appeal, which is illegal. Learned counsel has relied upon ***Sanjeev Goel Vs. Avtar S. Sandhu (2006) 9 SCC 748***; and ***Malayam Plantations Limited Vs. State of Kerala, AIR 2011 SC 559***.

5. Although learned counsel for the respondent refuted the aforesaid contentions by submitting that application under Order 41 Rule 27 CPC was moved at a very belated stage based upon the wrong facts but he also could not deny this fact that the Appellate Court of learned Additional District Judge did not decide the application for additional evidence under Order 41 Rule 27 CPC.

6. Submissions of both the sides have been considered.

7. It has been held by Hon'ble Supreme Court in **Sanjeev Goel** (supra) that non disposal of the application under order 41 Rule 27 CPC leads to the miscarriage of justice. It will be useful to reproduce the observations made by Hon'ble Supreme Court in this regard.

2. In the present appeal, at the outset, the learned counsel for the appellant brought to our notice the fact that an application under Order 41 Rule 27 CPC filed by the appellant before the learned Additional District Judge has remained pending throughout as no orders were passed on the said application by the learned Additional District Judge or by the High Court. The learned counsel appearing for the respondent is unable to dispute this fact that the said application has not been disposed of so far. Without expressing any opinion on the merits of the claim of the appellant in his application under Order 41 Rule 27 CPC we are of the view that the said application ought to have been disposed of by the learned Additional District Judge before deciding the appeal which was pending before him. Non-disposal of the said application has led to the miscarriage of justice. Accordingly, we set aside the impugned judgment of the High Court as well as the judgment dated 22-7-1997 of the learned Additional District Judge, Jalandhar and remand the matter back to the District Judge, Jalandhar for assigning the case to an appropriate court for decision of the appeal as well as the application of the appellant under Order 41 Rule 27 CPC on merits in accordance with law. This appeal is disposed of accordingly. The parties to bear their own costs.

8. Apart from above, in **Malayam Plantation Limited's case (supra)**, a party to the appeal submitted an application for reception of certain evidence in support of his claim under Order 41 Rule 27 CPC by moving application for additional evidence at the appellate stage but the High court passed no order on the application. Hon'ble Supreme Court observed as under: -

"8) Mr. Gupta, learned senior counsel for the State by taking us through the various documents filed in the said CMP demonstrated that if we consider the contents of the same, the entire claim of the Malayalam Plantations is to be rejected. He further submitted that in view of the fact that Order 41 Rule 27 of CPC enables the parties to place documents in support of their claim as additional evidence, the High Court though adverted to did not consider the same and no order was passed in the said CMP No. 8793 of 2001. Mr. Rao pointed out that if this Court scrutinizes each and every document, the claim of the State is to be rejected in toto and the stand of the appellant is to be accepted.

9) We are not inclined to go into the validity or acceptability of those documents/materials filed by both sides before the High Court. Order 41 of CPC speaks about procedure in respect of disposal of appeals from original decree. Among various rules, we are concerned about Rule 27 which reads as

"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

(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. "

10) In view of the above provision, in our opinion, when an application for reception of additional evidence under Order 41 Rule 27 of CPC was filed by the parties, it was the duty of the High Court to deal with the same on merits. The above principle has been reiterated by this Court in **Jatinder Singh & Anr. Vs. Mehar Singh & Ors. AIR 2009 SC 354 and Shyam Gopal Bindal and Others vs. Land Acquisition Officer and Another, (2010) 2 SCC 316.**

11) If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case.

12) Adducing additional evidence is in the interest of justice. Evidence relating to subsequent happening or events which are relevant for disposal of the appeal, however, it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case.

13) In the light of the separate application filed under Order 41 Rule 27 of CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion. In this view of the matter, we refrain from going into the merits of the materials placed by both sides and it is for the High Court to consider and take a decision one way or other as per the mandate of the said provision.”

9. Thus, the legal position as explained above by the Hon’ble Supreme Court, would make it clear that when an application under Order 41 Rule 27 CPC is moved during pendency of the appeal, it is incumbent on the part of the appellate Court to consider the same at the hearing of the appeal on merits so as to find out whether the documents for evidence proposed to be adduced have any relevance/ bearing on the issues involved or not. It is for the Appellate Court to do this exercise.

10. Consequent to the aforesaid legal position, the impugned order dated 8.11.2023 as passed by the Appellate Court can not be sustained, as it has been passed without considering the application under Order 41 Rule 27 CPC. Said order is hereby set aside. The Appellate Court is hereby directed to take a call and dispose of the application under Order 41 Rule 27 CPC in accordance with law and then decide the appeal with reference to the conclusion on the application under Order 41 Rule 27 CPC.

11. Despite repetition, it is made clear that this Court is refraining from going into the merits of the present appeal, as it is for the Appellate Court concerned to take a decision in one way or the other on the application under Order 41 Rule 27 CPC and then to decide the appeal accordingly.

12. As such, present Appeal is hereby accepted only to the aforesaid extent. Both the parties are directed to appear before the Ld. District Judge, SAS Nagar,

Mohali on 02.09.2024, who shall assign the same to the successor Court of the concerned Additional District Judge, who had earlier decided the appeal.

Disposed of.

14.08.2024

Vivek

(DEEPAK GUPTA)
JUDGE

Whether speaking/reasoned?	Yes
Whether reportable?	Yes