

(2015) 08 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 434 of 2006

Om Devi and Others

APPELLANT

Vs

Krishan Kumar and Others

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 107

Citation : (2016) 1 ShimLC 104

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Ajay Sharma, for the Appellant; K.D. Sood, Senior Advocate and Mukul Sood, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sharma, J—This Regular Second Appeal is directed against the judgment and decree, dated 01.09.2006, passed by the learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No. 75-N/XIII/03.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that the respondents-plaintiffs (hereinafter referred to as "the plaintiffs" for the sake of convenience) had filed a suit against the appellants-defendants (hereinafter referred to as "the defendants" for the sake of convenience) for possession by way of specific performance of contract of sale of land comprised in Khewat No. 29, Khatauni No. 68, Khasra No. 471/1, measuring 0-06-59 HM and Khewat No. 30, Khatauni No. 69, Khasra Nos. 468 and 472, plots 2, measuring 0-45-40 HM, total land measuring 0-51-99 HM, situated in Mohal and Mauza Bhungtial, Tehsil Nurpur, District Kangra (hereinafter referred to as "the suit land" for the sake of convenience), as per Jamabandi for the year 1991-92. According to the plaintiffs, an agreement was entered into between the parties on 20.09.1996 vide Ex. PW 1/A for sale of the suit land for consideration of Rs. 1,35,000/- and the defendants delivered the possession of the same to the plaintiff after receiving a sum of Rs. 20,000/- as earnest money. It was agreed

that since the suit land was attached under the Court order, therefore, as soon as it was released, sale deed would be registered within one month of the release order before the Sub Registrar, Nurgpur and balance money would be paid to the defendants. The suit land was released by the Court of learned Sub-Judge (I), Nurgpur on 03.11.1997 vide Ex. P2, as such, the plaintiffs had right to get the specific performance of contract of sale being performed by the defendants within one month. A legal notice was issued to the defendants calling upon them to execute the sale deed within a period of seven days. It was duly received by the defendants. However, the fact of the matter is that the sale deed was not executed. The plaintiffs were ready and willing to perform their part of the contract, but the defendants were avoiding the execution of the same on one pretext or the others.

3. The suit was contested by the defendants. It was denied by the defendants that they had entered into an agreement with the plaintiffs for the sale of the suit land for consideration of Rs. 1,35,000/-. They also denied that the possession was delivered after receiving a sum of Rs. 20,000/- as earnest money. However, it was admitted that the suit land was attached.

4. Replication was filed by the plaintiffs. The learned Sub Judge 1st Class (I), Nurgpur, District Kangra, H.P. framed the issues on 23.02.1999. He dismissed the suit on 26.05.2003.

5. Plaintiffs preferred an appeal before the learned District Judge, Dharamshala, H.P. against the judgment and decree, dated 26.05.2003. He allowed the same on 01.09.2006. Hence, this Regular Second Appeal.

6. This Regular Second Appeal was admitted on the following substantial questions of law on 11.06.2007:

"1. Whether illegal and wrong application under Order 41 Rule 27 CPC vitiated the impugned judgment and decree passed by the learned District Judge below?

2. Whether document Ex. PW 1/A without its proof having been marked as exhibit and read in evidence vitiated the impugned judgment and decree?

3. Whether Ex. PW 1/A particularly its clauses 4 and 5 stand misread and misappreciated by both the Courts below, thereby vitiating the judgment passed by learned District Judge and to that extent the same is against the defendants?

7. Mr. Ajay Sharma, learned counsel for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that application under Order 41 Rule 27 of the Code of Civil Procedure was wrongly allowed by the learned District Judge. He then contended that the plaintiffs have failed to prove Ex. PW 1/A. Clausess 4 and 5 of Ex. PW 1/A were misread and misappreciated.

8. Mr. K.D. Sood, learned Senior Advocate has supported the judgment and decree, dated 01.09.2006, passed by the learned District Judge, Dharamshala,

H.P.

9. I have heard the learned counsel for the parties and gone through the pleadings, judgments and the records, carefully.

10. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid the repetition of discussion of evidence.

11. PW-1 Krishan Kumar testified that the suit land was earlier owned by Todarmal, husband of Omi Devi. He was mentally ill. The defendants succeeded to his estate. Omi Devi used to reside at Nurpur. She was serving in the bank and was looking after the land of the defendants. They used to look after Todarmal and his mother and were cultivating their land. They had entered into an agreement with the defendants on 20.09.1996 for consideration of Rs. 1,35,000/-. They paid a sum of Rs. 20,000/- as advance as per agreement Ex. PW 1/A. It was scribed by Rajesh, document writer. He read over and explained the same to the defendants. The document was signed by all of them and Janak Suri and Tarlochan were marginal witnesses. It was also agreed that the remaining amount was to be paid at the time of registration of the sale deed. He further stated that they were already in possession of the suit land. They asked the defendants to execute the sale deed, but to no effect. A legal notice was issued vide Ex. PW 1/B, postal receipt of which is Ex. PW 1/C and acknowledgement is Ex. PW 1/D. They were ready and willing to perform their part of the contract.

12. PW-2 Rajesh Kumar, document writer has scribed the agreement Ex. PW 1/A. He could not register the same due to rush of work. PW-3, Janak Raj Suri is the marginal witness of the deed. He has admitted his signatures on Ex. PW 1/A. According to him, it was typed by Rajesh Typist.

13. PW-4 Nathu Ram, Numberdar testified that Todarmal remained mentally ill and Omi Devi used to reside at Nurpur. The suit land was looked after by the plaintiffs. The plaintiff used to provide food to Todarmal and his mother and the possession over the suit property was of the plaintiffs.

14. Plaintiffs have placed on record the copy of death certificate of Todarmal Ex.-PX, showing that Todarmal died on 18.03.1996. Ex. P1 is the copy of Jamabandi of the suit land and Ex. P2 is the copy of order passed by the learned Sub Judge 1st Class, Nurpur, dated 03.11.1997, whereby the suit land was released from attachment.

15. DW-1 Om Devi stated in her examination-in-chief that she never entered into an agreement with the plaintiffs. The age of her daughter Shashi Bala at that time was 17 years only. According to her, the plaintiffs have never redeemed the mortgage and even she had to pay the amount in the attachment case. The plaintiffs have not paid Rs. 20,000/-. However, the fact of the matter is that she has admitted her signatures on Ex. PW 1/A. She has also admitted that Janak

Raj Suri and Tarlochan Singh were marginal witnesses and PW-2 Rajesh Kumar has scribed the document. The contents of the documents were read over and explained by PW-2 Rajesh Kumar, document writer. She received a sum of Rs. 20,000/- as advance in the presence of the witnesses on that day. According to her, the consideration was for Rs. 2,35,000/- and not Rs. 1,35,000/-. She did not mention in the agreement that her daughter was minor.

16. DW-3 Shashi Bala is the daughter of defendant No. 1. She never entered into any agreement with the plaintiffs. However, she admitted her signatures in Ex. PW 1/A. In Ex. PW 1/A, the age of Shashi Bala has been shown as 20 years.

17. The defendants have also examined DW-4, Vijay Kumari Gupta, Head Teacher, G.P.S. Nurpur as well as DW-5 Nirso Devi, J.B.T. Teacher, to prove the certificate Ex.-D2. However, the fact of the matter is that the defendants have failed to prove that the age of Shashi Bala was 17 years at the time of execution of agreement, Ex. PW 1/A. Moreover, according to agreement, Ex. PW 1/A, as noticed above, the age of Shashi Bala was 20 years.

18. The plaintiffs have duly proved the execution of agreement Ex. PW 1/A, dated 20.09.1996 for consideration of Rs. 1,35,000/-. A sum of Rs. 20,000/- was already paid. They were put into possession of the suit land. The suit was dismissed by the learned Sub Judge 1st Class (I), Nurpur, District Kangra, H.P. only on one ground that as per Clause 4 of agreement Ex. PW-1/A, the plaintiffs were obliged to make payment of the money involved for getting the suit land released from Court attachment and that since the plaintiffs have not done so, they were not entitled to specific performance of the agreement of sale. The plaintiffs have moved an application under Order 41 Rule 27 of the Code of Civil Procedure for permitting them to place on record copy of judgment, dated 14.12.1979, rendered by the learned Sub Judge, 1st Class, Nurpur and a copy of judgment, dated 08.03.1982 rendered in appeal by the learned District Judge, Dharamshala, dismissing the appeal. The application was contested by the defendants. The application was allowed by the learned District Judge, Kangra at Dharamshala, H.P. and the plaintiffs were permitted to place on record the copy of judgment, dated 08.03.1982 rendered by the learned District Judge, Dharamshala in Civil Miscellaneous Appeal No. 13/1980, Ex.-PA and copy of judgment, dated 14.12.1979, rendered by the learned Sub Judge, 1st Class, Nurpur Ex. PB, copy of Execution application Ex. PC, copy of Jamabandi for the year 1975-76, Ex. PD, copy of jamabandi for the year 1975-76 Ex. PE, copy of Jamabandi for the year 1996-97, Ex. PF, copy of Jamabandi for the year 1996-97, Ex. PG, Copy of Misal Hakiat Bandobast Jadid Sani, Ex. PH and copy of Missal Hakiat Bandobast Jadid Sani, Ex. PJ. Learned Advocate appearing on behalf of the defendants had admitted before the learned First Appellate Court that the judgment rendered by the learned District Judge, dated 08.03.1982, Ex.-PA had attained finality, since no appeal or revision was filed against the same. A perusal of judgment, dated 14.12.1979, rendered by the learned Sub Judge 1st Class, Nurpur shows that Todarmal was declared as marginal farmer and it was

held that decree-holder Sugreev was not entitled to recover the disputed amount from him. The moment the judgment has become final after the judgment, dated 08.03.1982, rendered by the learned District Judge, Dharamshala, the entry of attachment was only a formal entry. The property could not remain attached after the judgment, dated 08.03.1982. The plaintiffs have not moved any application for release of the property/suit land from attachment. It is in these circumstances that the learned First Appellate Court has allowed the application under Order 41 Rule 27 of the Code of Civil Procedure. The plea raised by the plaintiffs in application under Order 41 Rule 27 was not in variance with the plaint. The order, dated 03.11.1997, Ex. P2, reads as under:

"Respondent, Sugreev Singh has given the statement that he has received a sum of Rs. 3405.50 from the J.D. and he has no objection in case the present application of the applicant is allowed. Accordingly, application is allowed and the property attached, i.e. land bearing Khata No. 23, Khatauni No. 26, Khasra Nos. 332, 340, 341, 346, measuring 11 Kanals 17 Marlas and Khewat No. 31, Khatauni No. 36, Khasra Nos. 337, 338, 339, plots 3 measuring 1 Kanal 15 Marlas as total area 13 Kanal, 12 Marlas, situated in Bungtial, Tehsil Nurpur, District Kangra, is ordered to be released."

19. It is reiterated that once Todarmal has been absolved of the liability to pay the amount, the entries in the subsequent record of rights qua the attachment of the suit land were mere paper entries as the charge or encumbrance on the suit land no more existed after the judgment, dated 08.03.1982, Ex.-PA, therefore, clog put in para-4 of Ex. - PW 1/A was otiose. It could not come in the way of plaintiffs to get the sale deed executed. There is nothing in Clause 4 of Ex. PW 1/A to suggest that in case the plaintiffs did not make payment of Rs. 3405-50/- to the defendants, the plaintiffs would not be entitled to seek execution of the sale deed. The plaintiffs had issued notice to the defendants vide Ex. PW 1/B, postal receipt whereof is Ex. PW 1/C and acknowledgement of the same is Ex. PW 1/D. But, the notice was not replied by the defendants.

20. What emerges from the facts enumerated hereinabove is that an agreement was entered into between the plaintiffs and the defendants on 20.09.1996 vide Ex. PW 1/A. The suit land was released from attachment. The defendants despite receiving the legal notice and release of the attachment, did not execute the sale deed, though a sum of Rs. 20,000/- was already received as earnest money. The learned First Appellate Court has correctly appreciated Clauses 4 and 5 of the agreement, dated 20.09.1996, Ex. PW 1/A. Agreement, dated 20.09.1996 Ex. PW 1/A has been duly proved by the plaintiffs by producing PW-2 Rajesh Kumar, deed writer and PW-3 Janak Raj Suri, marginal witness. Application under Order 41 Rule 27 of the Code of Civil Procedure has been allowed as per law by permitting the plaintiffs to place on record the documents which were necessary for proper adjudication of the case.

21. Their Lordships of the Hon"ble Supreme Court in North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., AIR 2008 SC 2139 :

(2012) 281 ELT 161 : (2008) 4 JT 587 : (2008) 6 SCALE 254 : (2008) 8 SCC 511 : (2012) 28 STR 417 : (2008) AIRSCW 3159 have held that 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". Their Lordships have held as under:

"12. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced are:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, (clause (a) of sub rule (1)) or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, (clause aa, inserted by Act 104 of 1976) or

(iii) 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. (clause (b) of sub rule (1)).

15. Again in *K. Venkataramiah Vs. A. Seetharama Reddy Ors.* a Constitution Bench of this Court while reiterating the afore-noted observations in *Parsotim's* case (supra), pointed out 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 "to 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. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits. 20. In any event, had the Court found the additional documents, sought to be admitted, necessary to pronounce the judgment in the appeal, in a more satisfactory manner, it would have allowed the application and, if not, the application would have been dismissed. Nonetheless, it was bound to consider the application before taking up the appeal. We say no more at this stage, as the

aforementioned applications are yet to be considered by the High Court on merits in the light of the legal position, briefly set out hereinabove. In view of the afore-noted factual scenario, we are of the opinion that the impugned judgment and the orders are erroneous and cannot be sustained."

22. Their Lordships of the Hon^{ble} Supreme Court in Union of India (UOI) Vs. Ibrahim Uddin and Another, (2012) 6 JT 466 : (2012) 4 RCR(Civil) 727 : (2012) 6 SCALE 476 : (2012) 8 SCC 148 : (2013) AIRSCW 2752 : (2012) 4 Supreme 585 have held that the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Their Lordships have held as under:

"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).

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the

additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjun Singh alias Puran Vs. Kartar Singh and others, AIR 1951 SC 193 : (1951) 2 SCR 258 ; and Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others, AIR 1976 SC 1053 : (1976) 3 SCC 28 : (1976) 3 SCR 620 : (1976) 8 UJ 334 .

23. It was incumbent upon the defendants to get the sale deed executed within the period prescribed as per agreement, dated 20.09.1996 after release of the property from attachment. The substantial questions of law are answered accordingly.

24. Accordingly, there is no merit in this appeal and the same is dismissed. The miscellaneous application(s), if any, also stand(s), disposed of. No costs.