SUPREME COURT OF INDIA

Surjit Singh

Vs.

Gurwant Kaur

C.A.No.8283 of 2014

(Dipak Misra and V. Gopala Gowda JJ.)

27.08.2014

JUDGMEN T

DIPAK MISRA, J.

Leave granted.

The respondent No. 1 instituted Civil Suit No. 78 of 2003 in the Court of the learned Additional Civil Judge (Senior Division), Patti, district Taran Taran, for specific performance of contract entered into between him and the appellant No. 1, the predecessor-in-interest of appellants Nos. 2 to 4 and the respondent No. 2 for sale of land admeasuring 28 K 12 M bearing khata Khatoni 330/1254, 1256, 331/1261 and Killa Nos. 34/25 (712), 40/1/1 (4-15), 10/2 min (0-8), 41/5 min (2-8) 6/1 (7-5) 15/1 (2-16), 34/162 (3-8), situated in village Talwandi Sobha Singh Tehsil Patti District Amritsar as per Jamabandi for the year 1997-98 at the rate of Rs.3,22,500/- per Killa which included all rights attached to the land.

It was averred in the plaint that the defendant in the Civil suit had received Rs.50,000/- on 7.2.2003 and a further sum of Rs. 50,000/- on 25.2.2003 as against the determined price of 3,22,500/- per killa as per the agreement. As stipulated in the agreement the balance amount was to be paid on 3.6.2013 at the time of execution and registration of sale deed before the sub Registrar, Patti. It was also recited in the agreement that the suit land was already mortgaged with the State Bank of Patiala and

the defendants should clear the loan before execution of the sale deed in favour of plaintiff failing which the deposited amount would be forfeited. The plaintiff, as averred in the plaint, went to the office of the sub- Registrar but the defendants did not turn up. As there was breach of contract by the defendants, for they failed to execute and register the sale deed in favour of the plaintiff, he initiated the civil action for specific performance of contract or in the alternative for recovery of Rs.2,00,000/- as compensation.

The defendants entered contest and filed the written statement contending, inter alia, that the suit was not maintainable; that the plaintiff was not ready with the balance amount; that the stand put forth by the plaintiff that he had come to Tehsil complex on 3.6.2003 along with the balance sale consideration and the attesting witnesses was farther from the truth, for the original defendants remained present in the office of Sub Registrar, Patti from 9.00 a.m. to 5.00 p.m. but the plaintiff did not turn up as he was not ready with the balance consideration; and that the defendants moved an application before the concerned Sub-Registrar for marking their presence and gave an affidavit which was duly signed by the Sub-Registrar. The further stand of the defendants was that the plaintiff and her relatives tried to take forcible possession of the property in dispute as a consequence of which FIR No. 97 dated 9.6.2003 for offences punishable under Sections 307, 326, 323, 148 and 149 of the Indian Penal Code and Section 25 of the Arms Act was registered.

The learned trial Judge framed as many as six issues, recorded the evidence and, eventually, dismissed the suit filed by the plaintiff. It is apt to mention here that during the pendency of the suit the plaintiff had filed an application under Section 151 of the Code of Civil Procedure (CPC) for filing of additional documents with the prayer that the said documents should be accepted as additional evidence. It was stated in the application that in her evidence she had already deposed that she had got Rs.9,00,000/- from her husband™s brother, Gian Singh, and he was having Rs.1,00,000/- in her account bearing No. 1313. It was also averred that she was under the impression that her father was prosecuting the case and had filed the statement of accounts bearing No. 1-29 of Gian Singh and of plaintiff™s bearing No. SB/17274 but inadvertently her father could not produce the said statement of accounts and pass books, and she had no knowledge about the same. In the said backdrop a prayer was made for acceptance of the documents.

The learned trial Judge, after perusing the material on record, passed the following order: -

A perusal of file shows that the suit was filed on 23.7.2003 and issues were framed on 7.1.2004. Since then, plaintiff availed 14 opportunities to produce and conclude her evidence and ultimately closed it at her own on 11.5.05 and thereafter the case was fixed for defendant evidence. Defendant also took 19 opportunities to conclude their evidence and ultimately closed the same on 19.4.06 and after that the case was fixed for rebuttal evidence of plaintiff, for which plaintiff took 8 opportunities and then he came up with the present application. It is clear from the above facts that it was not mere inadvertence that these copies could not be produced by the plaintiff, rather the plaintiff did not act diligently herself. If the applicant was diligent, the application should have come on record, much earlier and not now and it appears only an attempt to seek time and fill up lacuna. Accordingly the application is dismissed. The aforesaid order was assailed in Civil Revision No. 6014 of 2008 before the High Court and the learned single Judge, after perusing the order passed by the learned trial Judge, dismissed the civil revision by ascribing the following reasons: -

Keeping in view the order, referred to above, this court is of the view that prayer made by the learned counsel for the grant of one opportunity to the petitioner to produce copies of statements of accounts by way of additional evidence cannot at all be accepted since number of opportunities were availed of by the plaintiff but failed to produce copies of statement of account in support of her case. Even otherwise, case is at the fag end stage and now this application for producing the afore referred documents in support of her case has been filed just to delay the proceedings of the case. That apart, the aforementioned copies of statement of accounts were very much in the knowledge of the plaintiff-petitioner and if the petitioner had been vigilant, she must have produced the same at appropriate stage. Approach of the learned trial court in dismissing the application for producing copies of statement of account by way of additional evidence cannot at all be said to be erroneous, which may warrant interference by this court. Thereafter the hearing of the suit proceeded and, as has been stated earlier, it was dismissed. Being grieved by the judgment and decree passed by the learned trial Judge, the plaintiff preferred an appeal before the Additional District Judge, Taran Taran. During the pendency of the appeal, the plaintiff-appellant filed an application under Order XLI Rule 27 of CPC for production of pass books and the statement of bank accounts as additional evidence. The said

application was resisted on many a ground. The learned Additional District Judge came to hold that the evidence being in nature of documentary evidence and being admissible, it was appropriate to allow the same. The lower appellate court also observed that the defendants-respondents would have the opportunity to rebut the same. Being of this view he allowed the application subject to payment of Rs.1,000/- as costs.

The said order was assailed in Civil Revision No. 5850 of 2011 and the learned single Judge by order dated 3.5.2012, declined to interfere on the ground that the lower appellate court had fairly appreciated the provisions in law and correctly opined that the documents were required for just decisions of the case. That apart, the learned single Judge observed that in a suit for specific performance of contract the ready and willingness of the plaintiff to perform her part of the contract, being an important factor, by allowing the application the lower appellate court had not committed any legal infirmity. The said order is under assail in the present appeal by special leave.

Calling in question the legal substantiality of the order, it is urged by Ms. Manjula Gupta, learned counsel appearing for the appellants, that once the application for additional evidence was rejected by the learned trial Judge and the same got the stamp of approval by the High Court in civil revision on being assailed, the said order operates as res judicata and, therefore, the lower appellate court could not have entertained the application. Learned counsel would further submit that the learned first appellate Judge has fallen into grave error not only in exercise of his jurisdiction inasmuch as the plea relating to ready and willingness was disbelieved by the trial court on the basis of material on record and the adroit made by the plaintiffs/ appellants at the appellate stage to produce books of accounts to show that they had money in their accounts, would not come within the ambit and sweep to make out a case under Order XLI Rule 27 of CPC. That apart, submits learned counsel for the appellants, the ingredients which are required to be satisfied for getting the benefit under the said provision, were not at all satisfied and hence, the impugned order is absolutely vulnerable. In support of her submissions, she has commended us to the decisions in Arjun Singh v. Mohindra Kumar and others[1], Kunhayammed and others v. State of Kerala and another[2] and Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapet[3].

Mr. Vikas Mahajan, learned counsel appearing for the respondents, per contra, would

contend that the first application was filed under Section 151 of CPC for filing additional documents before the trial court and it has no relevance when an application for filing of additional evidence under Order XLI Rule 27 of the CPC is filed before the appellate court. It is urged by him that acceptance of the said documents would subserve the cause of justice and when the appellate court and the High Court have accepted the stand of the respondents in proper perspective, the impugned orders do not warrant any interference by this Court. To bolster the said submission he has relied on the decisions in K. Venkataramiah v. A. Seetharama Reddy and others[4], Syed Abdul Khader v. Rami Reddy and others[5], Billa Jagan Mohan Reddy and another v. Billa Sanjeeva Reddy and others[6] and Wadi v. Amilal and others[7].

First, we shall deal with the application that was filed by the plaintiffs before the learned trial Judge. It was an application under Section 151 of CPC for filing of additional documents and the learned trial Judge passed an order refusing to take the additional documents on record. The said order having assailed before the High Court in the civil revision, the High Court had declined to interfere. The question that arises for consideration is when such an order passed by the learned trial Judge had been affirmed by the High Court in exercise of supervisory jurisdiction, would it still be permissible from the view of propriety on the part of the first appellate court to accept the documents in exercise of power under Order XLI Rule 27 of the CPC and, if not, was it not the duty of the High Court to lancinate it.

In this context, we may refer with profit to the authority in Satyadhan Ghosal and others v. Smt. Deorajin Debi and another[8]. It was a case where the landlords had obtained a decree for ejectment against the tenants. After the decree was made, the Calcutta Thika Tenancy Act, 1949 came into force. The decree had not yet been put for execution. The tenants preferred an application under Section 28 of the said Act for rescission of the decree passed against them. The said application was resisted by the landlords who were the decree-holders. The learned Munsif rejected the application holding that the tenants were Thika tenants under the Thika Tenancy Act. Against the said order the tenants moved the High Court of Calcutta under Section 115 of CPC. By the time the revision application was taken up for hearing, the Calcutta Thika Tenancy Act was amended in 1953. The amended Act omitted Section 28 of the original Act. The High Court considered the effect of the amendment made in the Act and opined that in view of the amended definition of the term Thika tenant and the evidence brought on record it can be held that the tenants were Thika tenants. Being

of this view, the High Court allowed the revision and set aside the order of the learned Munsif whereby he had dismissed the application of the tenants under Section 28 of the Act. After setting aside the order, the High Court remanded the matter to the court of learned Munsif for disposal in accordance with law. After remit the learned Munsif rescinded the decree. The said order was assailed under Section 115 of CPC which was rejected by the High Court. In revision, a contention was advanced that Section 28 of the Act was not applicable. The Learned Judge who heard the matter opined that the question as between the parties was res judicata. Against the said order an appeal was preferred before this Court on the strength of special leave. In that context, the Court ruled thus: -

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter " whether on a question of fact or a question of law " has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter gain. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

After so stating the Court laid down the principle of the applicability of the doctrine of res judicata between two stages of the suit: -

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again? After posing the said question the Court examined the Privy Council decisions in Moheshur Singh

v. Bengal Government[9], Forbes v. Ameeroonissa Begum[10] and Sheonath v. Ramnath[11] and accepted the observations made by the Privy Council in Moheshur Singh (supra) wherein it has been held thus:

We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication. Approving the said principle this Court opined that the appellants in that case were not precluded from raising the question that Section 28 of the original Thika Tenancy Act was not available to the tenants after coming into force of Thika Tenancy (Amendment) Act, 1953 as it was an appeal by special leave to the superior court.

The aforesaid decision was approved in Arjun Singh (supra) wherein the Court ruled thus:-

If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Similarly, as stated already, though S. 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching

such decision are some of the material and relevant factors to be considered before the principle is held applicable. Thereafter, the Court adverted to the applications which were filed in three suits for setting aside the ex parte orders passed against the appellant therein, and after deliberating the nature of the order, that is, one under Order IX Rule 7 and the rejection thereof by the trial court and affirmance thereof by the High Court, the filing of the application under Order IX Rule 13 and dismissal of the same on the ground of res judicata and concurrence thereof by the High Court, the court referred to the decision in Satyadhan Ghosal (supra) and after reproducing a paragraph from the same, opined thus: -

Does this, however, mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again? .... It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. After so stating, the Court observed that if the correctness of the order of the Civil Judge in disposing of the application under Order IX Rule 7 filed by the appellant was questioned in an appeal against the decree in the suit, these principles and the observations would have immediate relevance. In that context, the three-Judge Bench proceeded to deal with various kinds of interlocutory orders and opined that certain orders that are interlocutory in nature are capable of being altered or varied by the subsequent applications for the same relief, normally only on proof of new facts or new situations which subsequently emerge. The Court emphasised on the nature of the order and ruled that if it does not impinge upon the legal rights of parties to the litigation the principle of res judicata would not apply to the findings on which the order is passed. However, the Court observed that if applications were made for relief on the same basis after the same had once been disposed of the court would be justified in rejecting the same as an abuse of the process of the Court. Thereafter, the Court proceeded to state that the successive applications based on same set of facts, if they are interlocutory orders of different nature and are passed for preservation of property, do not in any manner decide the merit of the controversy in issue. They can be rejected on the ground of abuse of the process of the Court but not by principle of res judicata. The said principle was followed in The United Provinces Electric Supply Co. Ltd., Allahabad v. Their Workmen[12] and S. Malla Reddy v. Future Builders Cooperative Housing Society and others[13].

In the case at hand, we do not intend to deal with the submission whether rejection of an application to take additional documents on record during the trial and the affirmation thereof in civil revision by the High Court would operate as res judicata or not, when an application is preferred under Order XLI Rule 27 of the CPC, for the provisions are different. But, we intend to deal with the exercise of jurisdiction and justifiability of the same regard being had to the special factual matrix of the instant case.

At this juncture, it is necessary to clarify that sub-rule (1)(a) of Order XLI Rule 27 is not attracted to the case at hand inasmuch as the documents were not taken on record by the trial court and error, if any, in the said order does not survive for reconsideration after the High Court has given the stamp of approval to the same in civil revision. Similarly, sub-rule (1)(aa) would not be applicable as the party seeking to produce an additional evidence on the foundation that despite exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed does not arise, for the documents were sought to be produced before the trial court. Cases may arise under sub-rule (1)(b) where the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. However, exercise of the said power is circumscribed by the limitations specified in the language of the rule. It is the duty of the court to come to a definite conclusion that it is really necessary to accept the documents as additional evidence to enable it to pronounce the judgment. The true test is, as has been held in Parsotim v. Lal Mohan[14] where the appellate court was able to pronounce the judgment from the materials before it without taking into consideration the additional evidence sought to be adduced. The same principle has been accepted by a three-Judge Bench in Arjan Singh v. Kartar Singh and others[15].

Coming to the case at hand, the documents were sought to be introduced at the stage of hearing of the suit. Numerous opportunities were granted to file the documents, but the plaintiffs chose not to avail of the same. Therefore, the said documents were not accepted by the trial court. A civil revision was filed and dealt with on merits. Same set of documents were sought to be introduced before the appellate court as the additional evidence. The said documents are not such documents which are clinching and really essential for pronouncement of the judgment or for that matter any other

substantial cause. There may be cases where on acceptance of public documents the decision on the lis in question would subserve cause of justice and avoid miscarriage of justice. In the instant case, the documents which are sought to be filed before the appellate court as additional evidence are bank accounts which really are not clinching to put the controversy. As we find, it is extremely difficult to put the case under Order XLI Rule 27 (1)(b) to suggest that it is necessary to take the documents on record in the interest of justice and, additionally, when the said documents were rejected to be taken on record by the trial court and the said rejection had been affirmed by the High Court. We are conscious, the spectrum that can be covered under Order XLI Rule 27 (1)(b) may be in a broader one but in certain cases judicial propriety would be an impediment and the present case is one where the judicial propriety comes on the way. Therefore, we are of the considered opinion that the appellate court has erred in taking recourse to the said clause and allowing the application for taking additional evidence and similarly the High Court has committed illegality opining that the order passed by the lower appellate court does not suffer from any infirmity.

Be it stated, the learned counsel has referred to certain authorities which pertain to scope of Order XLI Rule 27 of the CPC, but they are distinguishable on facts as they relate to due diligency, relevancy of documents and the requisite approach. We have already opined that the documents are not so clinching to be accepted as additional evidence in exercise of jurisdiction under Order XLI Rule 27(1)(b), for the judicial propriety becomes an impediment and, therefore, there is no necessity to advert to the said authorities.

In view of the aforesaid analysis, the appeal is allowed and the orders passed by the lower appellate court and that of the High Court are set aside. There shall be no order as to costs.

[1] AIR 1964 SC 993
[2] (2000) 6 SCC 359
[3] (1969) 2 SCC 74
[4] AIR 1963 SC 1526
[5] AIR 1979 SC 553
[6] (1994) 4 SCC 659
[7] JT 2002 (6) SC 16
[8] AIR 1960 SC 941

[9] 7 Moo Ind App 283 at p. 302 (PC)
[10] 10 Moo Ind App 340 (PC)
[11] 10 Moo Ind App 431 (PC)
[12] (1972) 2 SCC 54
[13] (2013) 9 SCC 349
[14] AIR 1931 PC 143
[15] AIR 1951 SC 193