

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

ON THE 22nd DAY OF FEBRUARY, 2021

BEFORE:

HON'BLE SHRI JUSTICE ALOK KUMAR VERMA, J.

FIRST APPEAL NO. 02 OF 2017

BETWEEN:

1. Deepak Kapoor, S/o Shri Jagdish Chandra, R/o J-378 News Raj Nagar, New Delhi, through his power of attorney holder Rahul Setiya, S/o Late Shri S.D. Setiya, R/o 102 I.B.M. tower, Laxmi Road, Dalanwala, Dehradun.

2. Arun Sabbarwal, S/o Late Shri T.R. Sabbarwal, R/o 18/60 Punjabi Bagh (West) New Delhi-26 Proprietor M/s Arun Associates, through his power of attorney holder Rahul Setiya, S/o Late Shri S.D. Setiya, R/o 102 I.B.M. tower, Laxmi Road, Dalanwala, Dehradun.

3. Inder Arora, S/o Shri Madan Lal Arora R/o 450 B/3-C, Bholanath Nagar, Sahadra, New Delhi-32, through his power of attorney holder Rahul Setiya, S/o Late Shri S.D. Setiya, R/o 102 I.B.M. tower, Laxmi Road, Dalanwala, Dehradun.

..... Appellants/Plaintiffs

(By Shri. Neeraj Garg, learned counsel for the appellants)

AND :

1. Ashok D. Mehta, S/o Late Shri Col. M.L. Mehta, R/o s185 Rajpur Road, Dehradun.

2. Ajeet Christopher Mehta, S/o Late Col. M.L. Mehta, R/o s185 Rajpur Road, Dehradun.

3. Mohd. Kamil, S/o Shri Nazir Ahmed, R/o Village-Dhandhera, Tehsil-Roorkee, District-Haridwar.

4. Suresh Singh Rawat, S/o Late Shri Mangal Singh Rawat, R/o Village-Prempur Mafi, Post Office Kaulagarh, Dehradun.

5. Indresh, S/o Shri Salimuddin, R/o House No. 99, Jharwan, District-Saharanpur.

....Respondents/Defendants

6. Sunil Bansal, S/o Shri Rajendra Bansal, R/o Kamiyana Gate Maykhana, Faridkot, Punjab.

....Proforma Respondent

(By Shri Rajendra Singh Azad, learned counsel for the respondent nos.1 & 2 and Shri Ramji Srivastava, learned counsel for the respondent nos. 3 to 5.)

Reserved On: 02.08.2019
Delivered On: 22.02.2021

JUDGMENT

This appeal has been filed under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as, "the Code") being aggrieved by the judgment and decree dated 14.10.2016, passed by learned 1st Additional Civil Judge (Senior Division), Dehradun in Original Suit No. 274 of 2014, "Deepak Kapoor and two others Vs. Sri Ashok D. Mehta and others," whereby in a suit for specific performance of contract with ancillary relief of perpetual prohibitory injunction, a decree for specific performance of contract is refused and granted alternate relief of refund of earnest money a sum of Rs.25,00,000/- with compensation a sum of Rs.25,00,000/-.

2. Brief facts of the case are that the appellants-plaintiffs filed the suit seeking specific performance of the Agreement to Sell dated 03.10.2006, registered on

27.10.2006. It was pleaded by the appellants/plaintiffs that the respondent nos. 1 and 2/defendants were owners of property No. 185, Rajpur Road, Dehradun, measuring 2400.00 Sq. yards or 2007.00 Sq. mtrs. with a residential house. The respondent nos. 1 and 2 had entered into an agreement to sell with the appellants and proforma respondent no.6 on 03.10.2006 for the sale of the above mentioned property for a sale consideration of Rs.69,00,000.00/-. This agreement was registered on 27.10.2006. As per Clause No. 7 of the Agreement, it was agreed that the sale deed shall be executed within a period of three months from the date of the agreement or within one month from the date the probate was granted with regard to the Will of late Smt. Dorothy Margaret Mehta. According to this agreement, Rs.25,00,000.00/ was paid towards earnest money. The appellants were always ready to perform on their part of contract. But, the respondent nos.1 and 2 executed a Sale Deed dated 14.03.2012 in favour of the respondent nos.3 to 5, which was registered on 16.06.2012. The respondent nos. 3 to 5 had knowledge of the agreement dated 03.10.2006. The respondent nos.1 and 2 had no right or authority to sell the property-in-question and hence, they had committed breach of the Agreement to Sell dated 03.10.2006, in which, there was a specific clause of specific performance and hence the respondent nos. 1 and 2 had no right to transfer the property or execute the sale deed in favour of anyone except the appellants and proforma respondent no.6.

3. The appellants-plaintiffs instituted the suit for decree of specific performance of contract and in alternate refund of money with ancillary relief of perpetual prohibitory injunction.

4. Despite sufficient service of summons, the respondent nos. 1 to 5 failed to file written statement. The

suit was proceeded *ex-parte* against the respondent no.4 on 23.08.2014 and on his application the said order was recalled on 11.04.2016. On 06.10.2016, learned trial court closed the opportunity of the respondent nos.1 and 2 to file written statement and at the same time rejected the application of the respondent nos.3 to 5 for accepting written statement on record. Learned trial court allowed the application of the appellants, filed under Order 8 Rule 10 of the Code and fixed the case for delivery of judgment. Learned trial court passed the impugned judgment on 14.10.2016.

5. Heard learned counsel for the parties and perused the record.

6. Shri Neeraj Garg, learned counsel for the appellants submitted that while deciding the application of the appellants, filed under Order 8 Rule 10 of the Code, learned trial court fixed the case for delivery of judgment, without granting any opportunity to lead evidence to the appellants-plaintiffs; the procedure adopted by learned trial court is unknown to law. Learned counsel submitted that it is duty of the court to consider the case of the appellants-plaintiffs on merits and the judgment pronounced under Order 8 Rule 10 of the Code must satisfy the requirements of Section 2 (9) of the Code. In support of this plea, after arguments, judgment of the Hon'ble Supreme Court, passed in ***"Shantilal Gulabchand Mutha vs. Tata Engineering and Locomotive Company Limited and another"***, (2013) 4 SCC 396, is cited on behalf of the appellants. In this judgment, the Hon'ble Supreme Court referred to its earlier decision in ***"Balraj Taneja and another vs. Sunil Madan and another"***, (1999) 8 SCC 396, in which the Hon'ble Supreme Court held that "Judgment" as defined in Section 2 (9) CPC means the statement given by the Judge of the grounds for a decree or order. Therefore, the judgment should be a self-contained document from which it should appear as

to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. Learned counsel for the appellants relied upon a judgment of ***Balraj Taneja and another vs. Sunil (Supra)***, in which the Hon'ble Supreme Court has held that if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy.

7. Learned counsel for the appellants further submitted that the respondent nos.3 to 5 were not the bonafide purchasers and there was no pleading controverting the contents of plaint, therefore, the suit ought to have been decreed in toto. Learned trial court misinterpreted the provisions of Section 39 of the Indian Contract Act, 1872. The provisions of Section 39 are not attracted in this matter. During pendency of the suit, the respondent no.3 to 5 transferred the property-in-question to one Smt. Chhaya Khanna, and deliberately concealed this fact, which was hit by Section 52 of the Transfer of Property Act. Learned trial court erred in law in rejecting the application of the appellants-plaintiffs, filed under Order 1 Rule 10 of the Code for impleading her as a defendant. The said order dated 06.10.2016 is liable to be set aside. The appellants are in actual and physical possession of property-in-question as per the terms of agreement and in furtherance of registered agreement to sale dated 03.10.2006 any sale in contravention to law could not affect the rights of appellants-plaintiffs.

8. On the other hand, learned counsel for the respondents supported the judgment, however, they

contended that for the ends of justice, the written statements of the respondents should be admitted on the record.

9. A reading of Rule 1 of Order XVIII of the Code shows that the plaintiff has right to state his case and produce his evidence in support of his claim. Learned trial court referred Section 39 of the Indian Contract Act; but before passing the impugned judgment, statements of the appellants-plaintiffs, who were admittedly present, were not recorded. No reason is mentioned by learned trial court, why their statements were not recorded.

10. The provisions of Order VIII Rule 10 of the Code are not mandatory in the sense giving no option to the Court, except to pass a judgment. In ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2005 SC 3353***, the Hon'ble Supreme Court observed that the rules of procedure are made to advance the cause of Justice and not to defeat it. The rules or procedure are handmaid of justice and not its mistress. The Hon'ble Supreme Court held that on failure to file written statement under Order 8 Rule 10 of the Code, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In construing the provision of Order VIII Rule 1 and 10 of the Code, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII of the Code, the Court in its discretion would have power to allow the defendant to file written statement even after expiring of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 of the Code that after expiry of ninety days, further time cannot be granted.

11. The judgment pronounced under Order 8 Rule 10 of the Code should indicate that the Court has applied its mind to the merits of the case. It is duty of the Court to consider

the case of the plaintiff on merits after giving him opportunity to adduce his evidence and the Judgment pronounced under Order VIII Rule 10 of the Code must satisfy the requirements of Section 2 (9) of the Code. The Court can pass a Judgment only upon the consideration of the case of the plaintiff including appreciation of pleadings and evidence. The Judgment without discussion of evidence is no judgment in the eyes of law. While pronouncing Judgment, the courts should apply its minds to the facts of the case and give a reasoned Judgment thereon after duly evaluating the evidence. In the absence of a specific provision to that effect, the plaint and the allegations contained therein do not constitute any evidence on the basis of which the Court can act. It is, therefore, necessary to record evidence of the plaintiff. The Court is not entitled to act on the allegations of the plaint and it must act on the proved evidence before it. A mere order deciding the matter not supported by evidence is no Judgment at all. Where in a Judgment, there is no discussion of oral and documentary evidence, the Judgment does not fulfil the requirements of law.

12. The question as to whether an individual is a proper or necessary party to a suit would depend upon the facts of the case and nature of relief claimed. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed by the Court and a "proper party" is a party who though not a necessary party, is a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit. A person is added as a proper party so as to decide the suit finally and effectively and also to avoid multiple litigations. If a party is not impleaded as a proper party, chances are there that after the Judgment, the said person may file a suit afresh with the grievance that he was not impleaded as a party in the

previous suit. A subsequent purchaser of the subject property with notice of the previous agreement would be needed to be joined. In the facts and circumstances of case this Court held on 27.12.2017 that Smt. Chhaya Khanna is the necessary party. Therefore, to avoid multiplicity of proceedings and effectually adjudication the matter in issue, this Court is of the view that this is a case in which Smt. Chhaya Khanna ought to have been impleaded as a defendant by the court exercised its powers under Order 1 Rule 10(2) of the Code. Therefore, order dated 06.10.2016, passed by learned trial court is set aside.

13. Rule 4 of the Code seeks to achieve one of the several objects sought to be achieved by Rule 33 of the Code. The said provisions confer powers on the appellate court. In ***Banarsi and others vs. Ram Phal, (2003) 9 SCC 606***, the Hon'ble Supreme Court observed that Rule 33 and R 4 of Order 41 CPC have to be read necessarily together, Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33. These provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. The overriding consideration is achieving the ends of justice.

14. In the facts and circumstances of the case, the respondents shall suffer an irreparable loss if they are not allowed to prosecute the defence of the suit by allowing them one opportunity for written statement. Therefore, order dated 06.10.2016, passed by learned trial court is set aside and the respondents are granted one opportunity for written statement on payment of costs of Rs.4000/- by each of them.

15. It is true that order of remand should not be passed as a matter of course, however, after considering the submissions of learned counsel for the parties, and in the peculiar facts and circumstances of the case, it seems appropriate and proper to remand the matter to the trial court to decide the case afresh according to law.

16. Resultantly, the impugned judgment and decree dated 14.10.2016, passed by learned 1st Additional Civil Judge (Senior Division), Dehradun in Original Suit No. 274 of 2014, "Deepak Kapoor and two others vs. Sri Ashok D. Mehta and others" is set aside. The matter is remanded back to the trial court concerned to decide the case afresh according to law as expeditiously as possible.

17. The appeal is disposed of accordingly. No costs.

(Alok Kumar Verma, J.)