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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA 222/2014 & CM APPL. 9468/2014

SHRI PAWAN KAPOOR Appellant

Through: Mr. Sumit Sarna, Advocate
(M:9650941688)

versus

VINEET ARORA & ORS Respondents

Through: Mr. Pramod Kumar Ahuja,
Advocate for R-1 along with R-
1 in person**CORAM:****HON'BLE MS. JUSTICE MINI PUSHKARNA****J U D G M E N T****03.07.2023****MINI PUSHKARNA, J.****CM APPL. 9468/2014 (under Order XLI Rule 27 read with Section 151 CPC for permission to produce additional documents)**

1. The present application has been filed on behalf of the appellant seeking permission to produce additional documents.
2. It is the case on behalf of the appellant that he has suffered huge financial losses due to the inaction of the respondent no. 1 in not completing the sale transaction pursuant to Agreement to Sell and Purchase between the appellant and respondent no. 1 herein. Therefore, by way of the present application, fresh documents in that regard are sought to be placed on record.
3. An Agreement to Sell and Purchase dated 26.03.2005 was entered between the appellant and respondent no. 1 wherein



respondent no. 1 agreed to purchase basement and ground floor without terrace/roof rights of property no. D-6, Ranjit Nagar, Commercial Complex, New Delhi-110008, for total consideration of Rs. 17,50,000/- that was to be paid on or before 23.07.2005. An amount of Rs. 4,00,000/- was paid by respondent no. 1/plaintiff towards earnest money.

4. It is the case on behalf of the appellant that the execution of the documents for sale of the property in question was mutually extended by appellant and respondent no. 1 initially till 23.08.2005, which was further extended till 07.09.2005, 22.09.2005, 07.10.2005 and 07.11.2005. However, the respondent no. 1/plaintiff in the suit, showed inability to pay balance consideration. Therefore, appellant sent legal notice dated 05.11.2005 to the respondent no. 1/plaintiff.

5. In response to the legal notice dated 05.11.2005, respondent no.1/plaintiff sent legal notice dated 30.11.2005 thereby confirming the time to execute the sale deed on 05.12.2005.

6. It is the case on behalf of the appellant that the appellant visited the office of the Sub-Registrar on 05.12.2005 and was ready to execute the sale deed in favour of respondent no. 1/plaintiff. However, respondent no. 1/plaintiff did not appear before the office of the Sub-Registrar for execution of the sale deed.

7. Subsequently, respondent no. 1/plaintiff filed a suit for recovery of Rs. 4,00,000/- along with interest, which respondent no. 1 had paid as earnest money towards purchase of the property in question. The said suit of the respondent no. 1/plaintiff was decreed by the impugned judgment and decree dated 18.03.2014, wherein decree for



recovery of Rs. 4,00,000/- along with 12% interest per annum was passed in favour of respondent no. 1/plaintiff. The present appeal has been filed challenging the aforesaid judgment and decree dated 18.03.2014 passed in favour of respondent no. 1 herein.

8. It is the case on behalf of the appellant that the respondent no. 1/plaintiff did not file any suit for specific performance of the agreement and chose to file only suit for recovery. Thus, it is contended that the respondent no. 1/plaintiff had no intention to complete the transaction in terms of Agreement to Sell and Purchase dated 26.03.2005.

9. The present application has been filed by the appellant seeking to place on record documents to show that he suffered huge financial losses on account of inability of the respondent no. 1/plaintiff to pay the balance sale consideration of Rs. 13,50,000/- and execute the sale deed.

10. It is submitted on behalf of the appellant that he was desirous to sell the property in question to respondent no. 1/plaintiff, as he was in need of money. The said money was needed for completion of a Collaboration Agreement dated 15.05.2005, which the appellant had entered into with some third person for development, construction and completion of fresh building on his property bearing no. 25/23, East Patel Nagar, New Delhi. Since the respondent no. 1 did not purchase the property in question, the appellant was unable to complete the development of the property at East Patel Nagar within the scheduled time under the Collaboration Agreement. Thus, the cost of construction increased drastically.



11. It is further contended on behalf of the appellant that since construction had to be started in the property in question, he moved into a rented accommodation with his family at property bearing no. 5/2, Old Rajinder Nagar, New Delhi on monthly rent of Rs. 8,900/- on 30.03.2007. Thus, along with increased cost of construction, the appellant was also bearing the burden of rent.

12. Furthermore, the appellant had to take home loan from India Bulls for an amount of Rs. 20,25,000/-. The appellant paid the entire loan amount of India Bulls after taking an additional loan from Punjab National Bank.

13. Therefore, it is submitted on behalf of the appellant that the documents pertaining to the aforesaid would show that the appellant suffered loss due to failure of respondent no. 1 to fulfil his terms. Hence, the present application has been filed for taking on record the additional documents in this regard.

14. The application is vehemently opposed on behalf of respondent no. 1. It is submitted that the appellant herein had moved an application before the learned Trial Court under Order XVIII Rule 17 read with Section 151 CPC with prayer to produce documents and to prove them by further evidence, much after the conclusion of the plaintiff evidence. The said application of the appellant was allowed by the learned Trial Court vide its order dated 03.12.2012. At that time, the documents which are subject matter of the present application were very much in knowledge and possession of the appellant herein. However, the said documents were not filed before the learned Trial Court.



15. It is further contended on behalf of respondent no. 1 that he had already arranged the required money and was always ready to make payment to the appellant for execution of the sale deed in his favour. However, it was the appellant who did not execute the relevant documents in his favour.

16. Having heard the parties, this Court is required to consider whether the appellant can be allowed to adduce additional evidence in the form of filing of fresh documents at this stage.

17. The provision for production of additional evidence in Appellate Court is contained under Order 41 Rule 27 CPC. The said provision enables the Appellate Court to take additional evidence in exceptional circumstances. However, the liberty to produce additional evidence at appellate stage cannot be sought as a matter of right. Thus, in the case of *Union of India Vs. Ibrahim Uddin And Another*¹, Supreme Court has held as follows:-

“36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by

¹ (2012) 8 SCC 148



the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co. [(1978) 2 SCC 493 : AIR 1978 SC 798])

38. Under Order 41 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 [AIR 1965 SC 1008] .)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give



further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101] .)

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48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

18. The present case pertains to a suit for recovery that was filed by the respondent no. 1 as plaintiff in the suit. Now, by way of the present application, the appellant herein, who was defendant no. 2 in the suit, has sought to place on record fresh documents in order to show that the appellant had suffered huge financial losses on account of respondent no. 1/plaintiff not paying the balance sale consideration for execution of the sale deed. The plea sought to be raised on behalf



of the appellant is completely extraneous to the issue in hand. No such plea was ever raised by the appellant before the learned Trial Court. In his written statement before the Trial Court, the appellant as defendant no. 2 had simply stated that the appellant had suffered huge losses and reserved his right to claim damages. However, the facts now sought to be averred before this Court with respect to any Collaboration Agreement having been entered by the appellant or other loss suffered due to moving in a rented accommodation, were not pleaded before the Trial Court. Para 25 of the written statement filed on behalf of appellant before the learned Trial Court as defendant no. 2 is reproduced as under:-

“25. That the contents of para no.25 of the plaint are wrong and denied and subject to strict proof.

On assurance from the plaintiff, the defendant no. 2 reached the office of Sub-registrar on 05-12-2005 for execution of the agreement at 10:00 A.M. alongwith defendant no.3 and waited upto 1:00 P.M. but the plaintiff did not come to pay the balance amount of Rs.13,50,000/- to the answering defendant. Further the plaintiff could not be contacted on his address not at mobile phone. In order to safeguard his interest, the defendant no. 2 got recorded his presence in the office of Sub-registrar, Delhi on 05-12-2005 by way of registration form no. 3, and also sworn an affidavit in this regard which was duly attested by the notary public on the said date. This shows the bonafide of the answering defendant who was duped by the plaintiff and due to the malafide intentions of the plaintiff the answering defendant suffered huge losses and reserves his right U/O 2 Rule 2 to claim, damages from the plaintiff for which the answering defendant seeks leave of this Hon'ble Court.”

19. Besides, in the application, the appellant has specifically stated



that he intended to file separate suit for damages suffered by him, however, the same was not filed by his earlier counsel. Therefore, the appellant is clearly in the knowledge of the fact that his claim for damages, if any, is a separate cause of action which the appellant was required to establish by leading evidence in that regard. However, no such suit for damages was filed by the appellant. It would be relevant to refer to paras 10 and 11 of the present application, which are reproduced as under:-

“10. Appellant specifically stated in para 25 of the written statement that he will file separate suit for damages suffered by him.

11. Appellant had provided relevant information to his previous Counsel and instructed him to file the claim for damages, however, the same was not filed by earlier Counsel and the Appellant was always informed that the same is also listed with the suit of the Respondent No. 1. Appellant engaged Counsel and was vigilant enough therefore the Appellant be not penalized for the acts of his Counsel who has expired and Appellant shall suffer irreparable loss and injury if the documents filed with this appeal are not looked into in this appeal.”

20. Moreover, perusal of the Trial Court Record shows that vide order dated 03.12.2012, the learned Trial Court had allowed application on behalf of appellant herein for filing of certain documents, which as per him were important and essential for proper adjudication of the case. The said application was filed on behalf of appellant as defendant no. 2 before the learned Trial Court when the evidence on behalf of defendants was going on and DW-1 had already been examined and discharged. Further, the appellant had sought re-



calling of DW-2 for tendering fresh documents in his additional evidence. Thus, by order dated 03.12.2012, the learned Trial Court allowed the application of the appellant herein as defendant no. 2 for production of new documents and for re-calling DW-2 for tendering the fresh documents as evidence. Order dated 03.12.2012 passed by the learned Trial Court is reproduced as below:-

Suit no: 932/08

03.12.2012

Present: Plaintiff with Sh. Manoj Khatri, advocate.
Defendants no. 1 and 2 with Sh. Shantanu Rastogi, advocate.
Defendant no. 3 is exparte.

Cost paid. DW 1 has been examined and discharged. No other DW is present or summoned for today. An application U/o 18 rule 17 and Section 151 CPC has been filed on behalf of defendant no. 2 with certain documents. Copies supplied. After going through the same Sh. Khatri chose not to file written reply. Arguments on the application have been heard.

Defendant claims that some of the vital documents namely legal notice dated 05.11.2005 got issued to the plaintiff, affidavit, receipt issued by the office of Sub Registrar, West District could not be tendered in evidence. The proof of dispatch of legal notice could not be filed in this



case as only photocopies were supplied by the then counsel for defendants which got mixed up in his old files. It is stated that the documents are important and essential for proper adjudication of the case and that the plaintiff will not be adversely prejudiced. DW 2 is also sought to be recalled for tendering such documents in his additional evidence.

Plaintiff has opposed the application on the ground that none of these documents was shown light of the day by the defendants in the evidence which is to be concluded today. He has also doubted the authenticity of documents sought to be produced by the defendants.


The copies of documents except the ones showing dispatch of legal notice 05.11.2005 are already available on record. The plaintiff therefore, cannot claim to have been surprised by the attempt of defendants to tender them in evidence. The postal documents now sought to be adduced can neither be claimed to be extraneous nor irrelevant. The defendants, of course will be delaying the conclusion of evidence and disposal of suit thereby for which the plaintiff can be suitably compensated.

In view of above the application of defendant no. 2 for production of new documents and for recalling him for tendering them as per the legal provisions, is allowed subject to the application bearing cost of



Rs. 4,000/-. The plaintiff may exercise right to lead rebuttal evidence in respect of the additional evidence of defendants.

Fixed 07.02.2013 for payment of cost by defendant no. 2 and additional statement of DW2.


(Sunil Kr. Aggarwal)^{03/12/12}

Addl. District Judge (Central)-10
Delhi: 03.12.2012

21. Perusal of the aforesaid shows that appellant had taken an opportunity before the learned Trial Court for filing additional documents at the stage of evidence. It is not the case on behalf of the appellant that the additional documents now sought to be adduced viz. the Collaboration Agreement dated 15.05.2005 or the Rent Agreement dated 30.03.2007, were sought to be produced as evidence before the learned Trial Court and refused by the said Court. It is also not the case on behalf of the appellant that the aforesaid additional documents were not within his knowledge or could not be produced before the learned Trial Court even after exercise of due diligence. Further, the fresh documents as sought to be produced on behalf of the appellant are not material documents for the purposes of enabling this Court to pronounce judgment.

22. Furthermore, fresh documents cannot be allowed to be adduced solely for the purposes of patching up the weakness of the evidence of the unsuccessful party before the Trial Court, as held by Supreme



Court in the case of *A. Andisamy Chettiar Vs. A. Subburaj Chettiar*², wherein it has been held as follows:-

“13. In K.R. Mohan Reddy v. Net Work Inc. [K.R. Mohan Reddy v. Net Work Inc., (2007) 14 SCC 257] this Court has held as under: (SCC p. 261, para 19)

“19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction.”

14. In North Eastern Railway Admn. v. Bhagwan Das [North Eastern Railway Admn. v. Bhagwan Das, (2008) 8 SCC 511] this Court observed thus: (SCC pp. 515-16, para 13)

“13. 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 CPC, 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 CPC. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist.”

15. In N.Kamalam v. Ayyasamy [N.Kamalam v. Ayyasamy, (2001) 7 SCC 503] this Court, interpreting Rule 27 of Order 41 of the Code, has observed in para 19 as under: (SCC p. 514)

² (2015) 17 SCC 713



“19. ... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal— it does not authorise any lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way.””

23. Considering the detailed discussion hereinabove, the present application is found to be devoid of any merits. The same is accordingly dismissed.

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24. List before the Roster Bench on 22.08.2023, the date already fixed.

**(MINI PUSHKARNA)
JUDGE**

JULY 03, 2023

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