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

+ CM (M) 490/2022 & CM No. 25113/2022, CM No. 25114/2022

KRISHAN KAKKAR Petitioner
Through: Mr.Aman Usman and
Ms.Suman Arora, Advs.

versus

KIRAN CHANDER Respondent
Through: Mr.Sanjeev Sahay and
Mr.Shashit Pratap Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T(O R A L)

% **25.05.2022**

1. This petition, under Article 227 of the Constitution of India, assails orders dated 8th July, 2021 and 6th May, 2022, passed by the learned Additional District Judge (the learned ADJ) in CS 412/2021 (*Kiran Chander v. Krishan Kakkar*).

2. The order dated 8th July, 2021 rejects an application filed by the petitioner, as the defendant in CS 412/2021, seeking dismissal of the suit under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). Towards the conclusion of the impugned order dated 8th July, 2021, the learned ADJ directes the respondent (as the plaintiff in CS 412/2021) to file two documents. The subsequent order dated 6th May, 2022, passed by the learned ADJ, which constitutes the second order under challenge in these proceedings, disposes of an application, filed by the petitioner under Section 151 of the CPC, seeking a

direction to the respondent-plaintiff to comply with the order dated 8th July, 2021 “in its true spirit” and, accordingly, to extend the time available with the petitioner to file written statement. The learned ADJ has, *vide* the second impugned order dated 6th May, 2022, held that the respondent had complied with the directions contained in the first impugned order dated 8th July, 2021 regarding filing of documents, and has extended the time available with the petitioner to file written statement in the suit by a period of four weeks from 6th May, 2022.

3. CS 412/2021 was filed by the respondent against the petitioner, alleging that, having purchased 500 sq. ft. of land from the respondent *vide* sale deed dated 30th July, 2012, and having also executed an agreement to sell dated 14th August, 2012 in respect of an additional 400 sq. ft. of land, the petitioner had paid only part consideration against the said transactions and that the time available with the petitioner to pay the balance consideration had expired. The suit, therefore, sought a decree of possession as well as injunction and *mesne* profits, in favour of the respondent-plaintiff.

4. During the pendency of the suit, the petitioner-defendant filed an application under Order VII Rule 11 of the CPC, which stands dismissed by the first impugned order dated 8th July, 2021. Mr. Aman Usman, learned Counsel for the petitioner has restricted his challenge qua the impugned order dated 8th July, 2021, which rejects the said application, to the findings of the learned ADJ with respect to the plea, advanced by the petitioner, predicated on Section 53A of the Transfer

of Property Act, 1882. The other allegations, raised in the application of the petitioner under Order VII Rule 11 have been given up by Mr. Usman in Court.

5. The submissions in the application under Order VII Rule 11, dealing with Section 53A of the Transfer of Property Act, read thus:

“11. UNDER ORDER 7 RULE 11 (d) ON ACCOUNT OF APPARENT BAR OF A LAW: That on a meaningful reading of the plaint, the submission of the Plaintiff emerges that:

- the Plaintiff contracted to transfer for consideration (Rs. 1.01 Crore herein) the immovable property (Suit property herein) by writing signed by her (by way of the "**Said Agreement**" dated 14.08.2012 herein);
- the Defendant, in part performance of the contract (the "**Said Agreement**" herein), took possession of the property (Suit Property herein);
- the Defendant has done some act in furtherance of the contract (by making several payments to the Plaintiff spanning over eight years of the tenure of the "**Said Agreement**" dated 14.08.2012)

That on the basis of the above, it appears that the present Suit is barred by the Provisions under Section 53 A of the Transfer of Property Act, 1882 which state clearly that the Plaintiff is debarred from enforcing any right in respect of the Suit Property against the defendant other than a right expressly provided by the terms of the contract (the **Said Agreement** herein).

That the relevant section 53A of the Transfer of Property Act, 1882 is being reproduced as under:

Section 53A in The Transfer of Property Act, 1882

"53A. Part performance.- Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the **contract: Provided that nothing in this section shall effect the rights** of a transferee for consideration who has no notice of the contract or of the part performed thereof "

12. That the Plaintiff has withheld that vital document, viz. the "**Said Agreement**" dated 14.08.2012 from the court intentionally to avoid the rigour of Section 53 A of the TP Act and consequently the rigour of provision under Order 7 Rule 11 CPC. That however, the language of the provision of Order 7 Rule 11 (d) of CPC "*where the suit appears from the statement in the plaint to be barred by any law;*" is sufficient to reject the plaint squarely at this stage."

6. With respect to the aforesaid allegation, figuring in the petitioner's application under Order VII Rule 11 and predicated on Section 53A of the Transfer of Property Act, the impugned order dated 8th July, 2021 of the learned ADJ holds that the plaint did not reflect

existence of the requisite ingredients of Section 53A and, at best, the plea regarding the suit being barred by Section 53A would have to be examined during trial. The relevant observations in this regard, as they find place in the impugned order dated 8th July, 2021, read thus:

“Similarly from plaint nothing as to plea of sec 53 A TPA can be inferred so as to reject the plaint. Entire plaint is pointing towards lack of essential ingredients of Sec 53A and any contention of sec 53A to be raised will be in the nature of defence which can be raised only by way of written statement.”

7. Section 53A of the Transfer of Property Act engrafts a statutory proscription on a transferor of immoveable property enforcing, against the transferee, certain rights in respect of the immoveable property, in the circumstances envisaged by the provision. Pared down to its essentials, Section 53A applies where a person contracts in writing for transfer, for consideration, of immoveable property. In the event of such a contract of transfer of immoveable property, the provision applies either (i) where the transferee has, in part performance of the contract, taken possession of the property or part of the property, or (ii) where the transferee is already in possession of the property, continues in possession thereof and does some act in furtherance of the contract. Mr. Usman, learned Counsel for the petitioner submits that his case falls under circumstance (i) as, even as per the averments in the plaint, the petitioner has, in part performance of the contract with the respondent, taken possession of the suit property.

8. Section 53A does not, however, end there. In addition to these circumstances, the provision requires, for its application, an additional

circumstance, i.e., that “the transferee has performed or is willing to perform his part of the contract”. It is only, therefore, where, in addition to one of the two circumstances (i) and (ii) in para 6 *supra*, *there is, additionally material to indicate that the transferee has performed or is willing to perform his part of the contract* that the proscription in Section 53A would come into play.

9. It is trite, as held in *Srihari Hanumandas Totala v. Hemant Vithal Kamat*¹ that, while adjudicating on an application under Order VII Rule 11 of the CPC, the Court is entitled only to look at the averments in the plaint and the documents filed therewith and at nothing else. The averments in the written statement or in other documents, which do not accompany the plaint, are irrelevant. Nor is it permissible for the defendant to set up a case for dismissal of the plaint under Order VII Rule 11 – as the defendant appears to have done in the present case – on the ground that the plaintiff has suppressed documents which, had they been placed on record, would have disclosed that the plaintiff had no sustainable cause of action. To reiterate, the scope of examination by the Court exercising jurisdiction under Order VII Rule 11 has necessarily to peregrinate at all times, within the boundaries of the plaint and the averments contained therein, read with the documents filed with the plaint, and cannot venture any further.

10. Mr. Usman very fairly acknowledges that the plaint, as filed by the respondent-plaintiff does not contain any assertion that the

¹ (2021) 9 SCC 99

petitioner was willing to perform his part of the contract. This, however, according to Mr. Usman, is reflected in certain communications between the respondent and the plaintiff which the plaintiff has deliberately suppressed.

11. Even if that were so, however, the Court could not examine such documents while adjudicating on an application under Order VII Rule 11. The Court, to reiterate yet again, can only examine the averments in the plaint and the documents filed with the plaint.

12. The learned ADJ has not rejected the petitioner's challenge to the maintainability of the suit, predicated on Section 53A of the Transfer of Property Act. He has merely held that no case for rejecting the suit, under Order VII Rule 11 of the CPC, could be said to exist on the basis of the averments contained in the plaint. This finding is, in my view, clearly unexceptional. Needless to reiterate, neither would the impugned order, nor would the present judgment, inhibit the petitioner from retaining the right, at any subsequent stage of the suit and in accordance with law, to press for dismissal of the suit as being barred by Section 53A of the Transfer of Property Act. It and when such a plea is raised, at the appropriate stage, the Court would, needless to say, decide the plea in accordance with the law.

13. For these reasons, no fault can be found with the impugned order dated 8th July, 2021, insofar as it rejects the petitioner's application under Order VII Rule 11 of the CPC. The order is, therefore, upheld in its entirety.

14. The second impugned order dated 6th May, 2022 is essentially a sequel to the first impugned order dated 8th July, 2021. The learned ADJ had, in the order dated 8th July, 2021, required the respondent to file the agreement and the e-mail reply, on which the petitioner-defendant had relied, during the proceedings which took place on 8th July, 2021.

15. The respondent, purportedly in compliance with the said directions, did place certain documents on record. These documents, according to the petitioner, do not amount to compliance with the directions contained in the order dated 8th July, 2021. For this reason, the petitioner moved a further application under Section 151 of the CPC, for a direction to the respondent to place the aforesaid documents, as per the order dated 8th July, 2021, on record, by complying with the order “in its true spirit” and, consequently, to extend the time available with the petitioner-defendant to file its written statement in response to the plaint.

16. The latter relief stands granted by second impugned order dated 6th May, 2022 grants the second relief sought, inasmuch as it has extended the time available with the petitioner to file written statement by a period of four weeks. However, it has rejected the petitioner’s prayer for a further direction to the respondent to comply with the order dated 8th July, 2021 in its true spirit.

17. With respect to this latter aspect, the learned ADJ holds that, as per the respondent, it had filed certified copies of the aforesaid documents, which had been relied upon by the petitioner in CS SCJ 734/2021, instituted by the petitioner against the respondent. This, according to the respondent, amounted to sufficient compliance with the direction contained in the concluding paragraph of the order dated 8th July, 2021.

18. The learned ADJ has observed that the respondent had made a categorical submission that she had filed all the documents on which she chose to rely, which included the documents which were requisitioned by the order dated 8th July, 2021, and that the respondent did not seek to place any other documents on record. The learned ADJ has observed that it was beyond doubt that, for proving her case, the respondent would have to stand on her own feet and could not be forced to file documents on which she did not choose to rely. Needless to say, if the respondent was remiss in filing documents which were necessary for substantiating the case set up by her, as the plaintiff before the learned ADJ, the consequences would follow.

19. It is, however, axiomatic, that, in any litigation, the choice of the documents which are to be brought on record is the sole prerogative of the party who files the documents. No Court can compel a party to file documents on which the party did not choose to rely, save and except in respect of certain specific eventualities for which provisions are contained in the CPC.

20. No exception can, in my view, therefore, be taken to the finding of the learned ADJ, in the second impugned order dated 6th May, 2022, to the extent it holds that no further directions were required to be issued, to the respondent, for complying with the directions contained in the first impugned order dated 8th July, 2021.

21. It is reported that the petitioner has already filed the written statement in accordance with the liberty granted by the learned ADJ *vide* order dated 6th May, 2022.

22. The costs imposed by the learned ADJ stand waived.

23. This petition stands disposed of in the aforesaid terms.

C.HARI SHANKAR, J

MAY 25, 2022/kr