

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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Regular Second Appeal No.4751 of 2015 (O&M)
Date of Decision: February 29, 2016

Joginder Kumar Nagpal

...Appellant

Versus

Kamlesh Talwar

...Respondent

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Kanwaljit Singh, Senior Advocate
with Ms. Gurdeep Kaur, Advocate
for the appellant.

AUGUSTINE GEORGE MASIH, J. (ORAL)

Challenge in this appeal is to the judgment and decree dated 04.09.2012 passed by the Civil Judge (Junior Division), Chandigarh, whereby the suit preferred by the appellant-plaintiff for specific performance of agreement dated 31.03.2005 entered into between the parties for the sale of 50% share in SCO No.46, Sector 31-D, Chandigarh, has been dismissed primarily on the ground that the termination of the contract by letter dated 13.04.2005 Exhibit DA by the respondent-defendant has not been challenged and no declaratory relief to declare the termination of the agreement to sell as bad in law, has been prayed, appeal against which preferred by the appellant-plaintiff has also been dismissed by the Additional District Judge, Chandigarh, on 08.05.2015.

2. It is the contention of learned senior counsel for the appellant that an agreement to sell dated 31.03.2005 was entered into between the parties for 50% share in SCO No.46, Sector 31-D, Chandigarh. At the time of agreement to sell, ₹50,000/- was paid as earnest money and ₹2,50,000/- were to be paid on 02.04.2005. The total sale consideration was ₹30,00,000/- and the date for execution of the sale deed was fixed as 30.07.2005. When the appellant-plaintiff approached the respondent with an

amount of ₹2,50,000/- on 02.04.2005, the same were not received by the respondent but instead proceeded to send a letter dated 13.04.2005 Exhibit DA cancelling the agreement. On receipt of the said letter, a legal notice was served by the appellant-plaintiff dated 16.04.2005 Exhibit P-2 asserting therein that the appellant-plaintiff was always ready and willing to make the payment of ₹2,50,000/- on the stipulated date and had gone along with Mr. Ashok Kukreja PW-2 to make the said payment to the respondent but she had not accepted the same. Immediately thereafter the suit was filed on 05.05.2005 initially for mandatory injunction calling upon the respondent to accept the payment of ₹2,50,000/- as per the agreement dated 31.03.2005 but thereafter when the period for execution of the sale deed expired during the pendency of the suit, the same was amended by praying a decree for specific performance of agreement dated 31.03.2005 on 31.08.2005. This amendment was allowed and on the basis of which the present suit proceeded. He contends that the respondent in the written statement altogether denied the execution of the agreement to sell dated 31.03.2005 and on this basis, asserts that the respondent has not come to the Court with clean hands which is apparent from the findings recorded by the Lower Appellate Court, wherein the agreement to sell dated 31.03.2005 is said to be in existence and having been entered into between the parties.

3. In the light of the above facts, the learned senior counsel asserts that when the appellant-plaintiff was all through ready and willing to perform his part of the contract, especially when he approached the respondent along with Mr. Ashok Kukreja on 02.04.2005 with an amount of ₹2,50,000/- as per the agreement which the respondent refused to accept, she cannot be permitted to take the benefit of the refusal by her merely

because she had served a letter dated 13.04.2005 Exhibit DA rescinding the contract. It would virtually amount to giving premium to a person, who has not approached the Court firstly with clean hands and then rescinding the contract on the basis of her own refusal to accept the amount on 02.04.2005. Assertion has also been made that in the light of these facts, the declaration being bad in law with regard to the cancellation letter dated 13.04.2005 was not required. Assertion has also been made by him that the judgment relied upon by the Lower Appellate Court in *IS Sikander Versus K. Subramani 2014(1) RCR (Civil) 236* would not be applicable to the present case as in the said case, the agreement to sell stood admitted between the parties and the question was the compliance or non-compliance of the said agreement to sell by the parties.

4. Prayer has, thus, been made for setting aside the impugned judgments and decreeing the suit of the appellant-plaintiff. An alternative prayer has also been made by learned senior counsel that at least the earnest money which has been paid by the appellant-plaintiff along with damages should have been granted to him to settle equities between the parties.

5. I have considered the submissions made by learned senior counsel for the appellant and have gone through the impugned judgments but find myself not in agreement with him on his assertions.

6. The facts, as has been narrated by the counsel for the appellant except his approach to the respondent for payment of ₹2,50,000/- on 02.04.2005 along with Mr. Ashok Kukreja which is a question of fact, are not in dispute. As is apparent from the sequence of events and the findings, as has been recorded by the Lower Appellate Court, an agreement to sell dated 31.03.2005 was entered into between the parties. On the basis of the

said agreement to sell, an amount of ₹2,50,000/- was to be paid on 02.04.2005 by the appellant-plaintiff to the respondent which according to the respondent has not been paid to her, although it has been asserted otherwise that she had refused to accept the same. The cancellation of the agreement to sell by letter dated 13.04.2005 Exhibit DA has not been challenged, although in a short span of time, the appellant has served a legal notice dated 16.04.2005 and filed the suit initially on 05.05.2005 for injunction and thereafter amended the same on 31.08.2005 for specific performance. It is apparent from the pleadings that there is no challenge to the cancellation of the agreement to sell by letter dated 13.04.2005. In the absence of the challenge to the cancellation, the judgment of the Supreme Court in *IS Sikander's case (supra)* would go against the claim of the appellant-plaintiff.

7. The assertion of learned senior counsel for the appellant that the distinction between the principles as laid down in the said judgment and the present case is primarily the untruthfulness on the part of the respondent as she denied the agreement to sell altogether, would not be of any help to the appellant-plaintiff as the cancellation letter dated 13.04.2005 clearly asserts and accepts that as per the receipt-cum-agreement dated 13.03.2005, the appellant-plaintiff was required to pay a sum of ₹2,50,000/- on or before 02.04.2005 and he has not paid the said amount, the agreement stands cancelled being a breach thereof committed by the appellant-plaintiff. The language used in the said letter is clear and categorical and the effect thereof is the cancellation of the agreement to sell. If that be so, in the light of the law laid down by the Supreme Court in the above referred judgment, the prayer as made in the plaint could not have been accepted by the Courts

below and has rightly been rejected.

8. The plea of learned senior counsel for the appellant that for the refusal on the part of the respondent to accept ₹2,50,000/- on 02.04.2005, she has been given premium thereof. These arguments would have been relevant and the evidence which the appellant-plaintiff would have led in support thereof that he has indeed approached the respondent with an amount of ₹2,50,000/- on 02.04.2005 to make payment as per the agreement to sell dated 31.03.2005 to the respondent, could have been looked into if there would have been any challenge to the cancellation of the agreement to sell by letter dated 13.04.2005 as the validity or otherwise could have been gone into by the Court only if there would have been any challenge thereto. In view of the above, there is no merit in the submissions of learned senior counsel for the appellant.

9. As regards the prayer of learned senior counsel for the appellant with regard to the equitable relief of granting him the benefit of refund of the earnest money along with damages, the same also cannot be accepted in the light of the fact that the cancellation of the agreement has not been challenged by the appellant-plaintiff.

10. At this stage, learned senior counsel for the appellant requests for an adjournment to amend the suit to challenge the letter dated 13.04.2005 Exhibit DA and to pray for a declaration for setting aside the same but this request cannot at this belated stage be accepted, especially in the light of the fact that the appellant had ample opportunity to make the necessary amendments in the pleadings firstly before the trial Court and thereafter he had another opportunity at the appellate stage which option he had failed to exercise.

11. No other point has been raised or argued by learned counsel for the appellants.

12. Both the Courts below have returned concurrent findings after properly appreciating the pleadings and the evidence brought on record by both the parties and the same cannot be interfered with as there is no perversity or illegality in the same.

13. No substantial question of law is involved in the present appeal. Therefore, finding no merit in the appeal, the same stands dismissed.

14. In the light of the dismissal of the appeal, the application for stay i.e. CM No.11411-C of 2015, stands disposed of as infructuous.

February 29, 2016
Puneet

(AUGUSTINE GEORGE MASIH)
JUDGE