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

**Regular Second Appeal No.3587 of 2014 (O&M)
Date of Decision: January 20, 2016.**

Gopal Chand

..........APPELLANT(s).

VERSUS

Indira Devi

........RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Anil Kshetarpal, Senior Advocate with
Mr. I.S. Pabla, Advocate
for the appellant (s).

Mr. Devinder Singh, Advocate
for the respondent.

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SURINDER GUPTA, J.

This is appeal against the judgment and decree dated 07.02.2014 passed by Additional District Judge, Chandigarh whereby the judgment and decree passed by Civil Judge (Junior Division), allowing the relief of specific performance of the agreement to sell dated 05.11.2001 was set aside and the suit was ordered to be dismissed.

Case of plaintiff-appellant, in brief, is that Industrial Shed No.946 Phase-II, Ram Darbar, UT Chandigarh was allotted to plaintiff Gopal Chand and defendant Indira Devi by Chandigarh Industrial Tourism and Development Corporation. Plaintiff was having 75% while defendant was having 25% share in this shed. Both continued in partnership business, which ultimately dissolved on 31.10.2001 and they settled their accounts by mutual understanding. Under the settlement, defendant was paid for her 25% share in the shed and a writing to this effect was executed on 05.11.2001. As per this writing, total sale price of share of defendant in the shed was fixed as ₹2,25,000/-. The payment of which was made in following manner:-

(i) ₹20,000/- were paid in cash;

(ii) payment of ₹1 lac and ₹30,000/- was made through two demand drafts bearing no.1002133422 and 1002133410 respectively;

(iii) remaining ₹75,000/- were agreed to be paid in three equal instalments through post dated cheques of ₹25,000/- each having the encashment date as 25.04.2002, 25.10.2002 and 25.04.2003;

(iv) payment of first post dated cheque was made on 21.04.2002 and 24.4.2002 and the original cheque was taken back; and

(v) defendant got second cheque encashed through his banker.

Before encashment of last post dated cheque on 25.04.2003, plaintiff met the defendant on 24.04.2003 and apprised him about his domestic problem and sought 10 days time to clear last and final payment. The defendant agreed and assured that cheque dated 25.04.2003 will not be presented for encashment and allowed 10 days time to the plaintiffs. As per the assurance, plaintiff deposited ₹25,000/- with his banker on 03.05.2003 and informed the defendant to encash the last post dated cheque. Thereafter, plaintiff issued legal notice dated 30.05.2003 calling upon the defendant to present the cheque for encashment. However, on 01.06.2003, plaintiff received a notice from the defendant stating therein that the agreement dated

05.11.2001 stood cancelled and the amount paid under the agreement stood forfeited. He also informed about cancellation of general power of attorney and other documents. On receiving this notice, plaintiff came to know that the defendant with mala fide intention presented the last post dated cheque on 26.04.2003 for encashment to the bank which was dishonoured. The cancellation of agreement and other documents by the defendant was illegal and mala fide. The plaintiff was always ready and willing and is still ready and willing to perform his part of the contract and is entitled to specific performance of the agreement to sell dated 05.11.2001.

In the written statement, the defendant contested the claim of plaintiff with the plea that the agreement dated 05.11.2001 is null and void and unexecutable as plaintiff has committed breach of the terms and conditions of the agreement. It was denied that the industrial shed No.946, Industrial Area Phase-II, Ram Darbar, UT Chandigarh was allotted in the ratio of 75% and 25% to the plaintiff and defendant respectively, rather it was allotted in equal shares. Plaintiff was not paying share of defendant in the profit earned by the partnership concern and the circumstances forced the deferent to part with her share in the partnership firm and to enter into agreement to sell. The defendant took a plea that agreement to sell dated 05.11.2001 was executed under threat, force, undue influence and not of her free will and consent by the defendant.

The defendant, however, admitted that the sale price of her share in the shed was fixed as ₹2,25,000/- and she received the payment as alleged by the plaintiff in the plaint except of the last post dated cheque. She had filed a suit seeking declaration that agreement in question was null and void and unexecutable document. It was denied that the plaintiff ever met and requested the defendant not to present the last post dated cheque to the bank and sought 10 days time for payment of last instalment of ₹25,000/-. No notice dated 30.05.2003 was sent by the plaintiff to the defendant, rather defendant had sent a legal notice dated 28.05.2003, which was delivered to the plaintiff on 29.05.2003. It was after the receipt of notice dated 28.05.2003 that plaintiff might have fabricated the story of issuance of notice dated 30.05.2003. The plaintiff had failed to perform his part of contract as per the terms and conditions settled between the parties, as such, power of attorney and agreement to sell were rightly revoked by the defendant, forfeiting the earnest money paid to her.

Pleadings of the parties led to the framing of issues as follows:-

(i) Whether the plaintiff is entitled for the specific performance of the contract dt.5.11.2002? OPP

(ii) Whether the plaintiff was and is always willing and ready to perform his part of contract dt.5.11.2002? OPP

(iii) Whether the suit is not maintainable in the present form? OPD

(iv) Whether the plaintiff has concealed the material facts from the Court? OPD

(v) Whether the plaintiff has no cause of action to file the present suit? OPD

(vi) Relief.

Learned Civil Judge (Junior Division), Chandigarh reached the conclusion that the plaintiff has successfully proved his readiness and willingness to perform his part of the agreement and decreed the suit allowing the relief of specific performance of the agreement to sell dated

05.11.2001 on payment of remaining sale consideration.

The first Appellate Court, however, accepted the appeal and dismissed the suit for breach of terms of agreement to sell dated 05.11.2001.

I have heard learned counsel for the parties and have perused the paper book and record of the Courts below with their assistance.

Before proceeding further, it will be appropriate to look into the admitted facts of the case which are as follows:-

(i) The defendant executed the agreement to sell her share of 25% in the industrial shed to the plaintiff vide agreement dated 05.11.2001.

(ii) The sale price was fixed as ₹2,25,000/-.

(iii) The entire amount of sale consideration was paid at the time of agreement to sell in the manner as mentioned in para 2 of the agreement which reads as follows:-

> "2. That the said purchaser has paid Rs.2.25 lacs (Rupees two lacs twenty fine thousand only) to the said purchaser (sic seller), the details of which is given below:-
>
> Rs.20,000/- by cash
>
> Rs.1.00 lac through DD No.1002133422 dated 24.10.2001, payable at Kalka,
>
> Rs.30,000/- through DD No.1002133410 dated 23.10.2001 payable at Kalka,
>
> Rs.75,000/- through three post-dated cheques of Rs.25,000/- each having Nos. 451507, 451503, 451504, payable at State Bank of India, Ramdarbar, having its dates of encashment as on 25.4.2002 (first cheque of Rs.25,000/-),

25.10.2002 (second cheque of Rs.25,000/-) and on 25.4.2003 (third cheque of Rs.25,000/-).

(vi) The payment of ₹2 lacs i.e. ₹1,50,000/- was paid at the time of agreement and ₹50,000/- through two post-dated cheques, was received by the defendant.

(v) Last post dated cheque was dishonoured and the defendant issued a notice to plaintiff, thereby cancelling the agreement of forfeiting of earnest money.

Learned counsel for the respondent-defendant while referring to clause No.10 of the agreement has argued that the agreement has been rightly cancelled as the last post dated cheque was not encashed by the bank when presented, as such, not only the agreement was cancelled but also the sale price under the agreement stood forfeited.

Clause No.10 of the agreement reads as follows:-

> "10. In case any cheque is dishonoured in that eventuality, the present agreement to sell stands cancelled and the money so paid by the purchaser stands forfeited in favour of the seller. Further the seller shall have right to recover possession of her share immediately. In case of non encashment of any of cheques, the seller can get the power of attorneys cancelled and agreement to sell and indemnity bond having no force and are not executable/exercisable."

Perusal of the above clause shows that for dishonour of any post dated cheque given under the agreement, the seller has right to cancel the agreement and power of attorney executed by her but this clause is qualified and subject to the clause 9 of the agreement, which reads as follows:-

> "9. That in case the above said cheques (post dated cheques) are not encashed at any stage, then the purchaser will be liable for the same and he will/she will clear all such losses, if suffered by the seller from her estates/his estates or properties."

The first Appellate Court while justifying the cancellation of the agreement has only looked into clause No.10 of the agreement and has ignored clause No.9. Both the clauses are to be read harmoniously while construing the intention of the parties at the time of execution of the agreement. Both the parties have agreed that in the event any post dated cheque is not encashed, the seller is entitled to recover the amount of cheque with all the losses suffered by her from the properties/shed of the purchaser. Clause 10 of the agreement provides further right to the seller to take the extreme step of cancelling the agreement.

The question which call for answer in this appeal, which is also substantial question of law is, ***as to whether the act of defendant cancelling the agreement due to dishonour of 3rd post dated cheque is justified and is sustainable in the eyes of law.***

In this case, the sale transaction was completed on the day agreement was executed. No sale deed was to be executed under the agreement as the purchaser(plaintiff) had to seek transfer of share of respondent-defendant in his name from Estate Office, U.T. Chandigarh. The plaintiff was also given a power of attorney to do the needful under the agreement. It was agreed that the seller will become *benami* owner of the suit property i.e. her 25% share till the said share is transferred in the name of plaintiff or his nominee. She had also undertaken to sign all documents required to transfer the said property in favour of purchaser or his nominee and delivered the physical possession of the property along with all relevant documents. Plaintiff has alleged that a day before the post dated cheque dated 25.04.2003 was to be encashed, he approached the defendant not to present the cheque for 10 days due to some family problem. But the cheque dated 25.04.2003 was presented on 26.04.2003 and was dishonoured. Under clause No.9 of the agreement, vendor could recover the cheque amount along with losses suffered by her from plaintiff. Even if, the plea of plaintiff that he approached the defendant and requested her not to present the post dated cheque of 25.04.2003 for encashment, be disbelieved, still the plaintiff vide notice dated 30.05.2003 (Ex.PW1/6) had called upon the defendant to present the cheque and withdraw the amount. The copy of statement of account Ex.PW8/A shows that on 03.05.2003, plaintiff had enough balance in his account for encashment of post dated cheque of ₹25,000/- given to the defendant. This shows that at the most there is delay of few days in payment of last post dated cheque. The plaintiff had already paid about 90% of the sale consideration. He was also delivered possession of the suit property along with relevant documents. Under these circumstances, mere delay of few days in making the payment, had not empowered the respondent-defendant to cancel the agreement, forfeit the sale price, under clause 9 of the agreement (as mentioned in para 9 of the notice (Ex.PW1/7) issued by her). The first Appellate Court has taken a hyper-technical view in the matter ignoring the fact that the parties have been working together since long after the allotment of industrial shed to them in the year 1983 and had mutual understanding. It is evident that defendant under that trust and understanding, had accepted the payment of first post dated cheque dated 25.04.2002 in cash vide receipt No.21.04.2002 and 25.04.2002 (Ex.PW1/3 and PW1/4). The payment of the second post dated cheque dated 25.10.2002, as per the defendant, was received after a lapse of three months. The defendant never issued any notice on delayed payment of second post dated cheque. This plea of plaintiff that he requested the defendant not to present the last post dated cheque for encashment for 10 days, is worth reliance. Taking the worst, consequences for dishonour of the last post dated cheque would have followed under clause No.9 and not under clause No.10. The first Appellate Court has gone astray while upholding the action of defendant for non-payment of last post dated cheque. It has failed to appreciate that transaction was already complete and only payment of one cheque was due when the defendant issued notice cancelling the agreement. The first Appellate Court did not look into clause No.9 or tried to ascertain the reason as to why the defendant without resorting to the remedy available under clause No.9 had rushed to remedy available under clause No.10. Dishonour of last post dated cheque by the bank in no manner reflect that plaintiff was not ready and willing to perform his part of the agreement, rather there was no explanation on the part of defendant as to why she has not opted for receiving payment on receipt of notice dated 30.05.2003 (Ex.PW6/1) when the plaintiff had sufficient funds in his account on 03.05.2003 onwards for encashment of the cheque. It was a very clever act rather a clever tactic on the part of defendant that after receiving more than 90% of the sale price, she opted to cancel agreement and forfeit the entire sale consideration.

In view of my above discussion, the observations made by the first Appellate Court that plaintiff had violated terms of agreement dated 05.11.2001 are unsustainable and against the facts and circumstances as also the evidence on record. The substantial question of law is answered against the respondent-defendant.

The appeal has merits and is accepted. The judgment of the first Appellate Court is illegal, perverse, not sustainable and, hence, set aside. The matter in this suit relates to payment of balance amount of ₹25,000/-, which was payable in April, 2003. The judgment and decree passed by Civil Judge (Junior Division), Chandigarh is affirmed with modifications that:-

(i) Plaintiffs shall pay ₹25,000/- to defendant with interest @ 12% per annum from 25.04.2003 till actual payment within a period of two months.

(ii) The defendant will complete all the formalities necessary for transfer of her share in the industrial shed in the name of plaintiff by the Estate Officer within a period of six weeks of the receipt/deposit of the amount of ₹25,000/- with interest.

(iii) On failure of defendant to complete the required formalities within the stipulated period, the plaintiff will be entitled to execute the decree to get the needful done from the Estate Office.

Keeping in view facts and circumstances of the case, parties are left to bear their own costs.

(SURINDER GUPTA)
JUDGE

January 20, 2016.
Sachin M.