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

Civil Revision No.8245 of 2017
Date of Decision: 30.10.2018

A.K. Jain .....Petitioner
Vs
Vikram Singh .....Respondent

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Naresh Prabhakar, Advocate
for the petitioner.

Mr. Roopak Bansal, Advocate
for the respondent.

****

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 17.10.2017 passed by the Civil Judge (Jr. Divn.) Chandigarh, whereby application filed by the petitioner under Order 7 Rule 11 CPC for rejection of the plaint was dismissed.

[2]. Respondent/plaintiff filed a suit for recovery of Rs.5 lakhs along with *pendente lite* and future interest @ 15% per annum from the due date till final realization of the amount. It was pleaded by the plaintiff that defendant approached him for sale of built up House No.80, Sector 10-A, Chandigarh comprising of 500 sq. yards. The house was owned by Sh. Tek Chand Chauhan, Gundharv Raj Chauhan, Vijay Bhushan Chauhan and Smt. Suniti Chauhan sons and daughter-in-law of

late Sh. Des Raj Singh. All were co-owners of the house in equal shares. Out of aforesaid, four co-owners, Tek Chand Chauhan was attorney of Vijay Bhushan and agreed to enter into agreement to sell to the extent of 50% share with the plaintiff and earnest money to the tune of Rs.10 lakhs was paid by way of two demand drafts each in the sum of Rs.5 lakhs. The total sale consideration was fixed as Rs.2.5 crores. The agreement to sell was executed on 12.12.2011.

[3]. Paras No.3, 4, 11 and 16 of the plaint read as under:-

> *"3. That it may be mentioned that the plaintiff also paid an amount of Rs.5 Lakhs in cash to Defendant by way of commission at the time of execution of the agreement to sell subject to the condition that in case of non-execution of agreement to sell Defendant shall refund the amount of Rs.5 Lakhs to the petitioner, The Defendant issued a receipt of Rs.5 Lakhs duly written in his own handwriting which was signed by two witnesses in addition to the respondent himself. One of the witness i.e. Shri Aman Thind, to the receipt is also a witness to the agreement to sell. A copy of the receipt executed by the defendant is annexed herewith as Exhibit P-4.*
>
> *4. That the amount of Rs.5 Lakhs by way of commission was paid by the plaintiff to the Defendant at Chandigarh and the agreement to sell was executed at New Delhi on 12th December, 2011.*

11. That respondent No.3 handed over the matter for investigation to the sub inspector Dharamvir Singh who recorded the statements of Defendant including that of the plaintiff as well as the witnesses to the receipt under and in terms of which the mount of Rs.5 Lakhs had been received by said Defendant. The witnesses to the receipt in their statement confirmed the allegations leveled by the plaintiff with regard to payment of Rs.5 Lakhs in cash to Defendant at the time of execution of the receipt of Rs.5 Lakhs by Defendant. The said Sub Inspector vide his report dated 03.09.2014 instead of registering an FIR against Defendant under Sections 418 and 420 of the Indian Penal Code, 1860, after recording that Defendant should have returned Rs.5 Lakhs of the complainant but failed to do so, as a result of which loss has been caused to the complainant and wrongful gain by the Defendant, opined that opinion of ADA (Legal) may be sought in the matter as to whether any cognizable offence is made out against Defendant. A true copy of the aforesaid report dated 03.09.2014 is annexed hereto as Exhibit P-9.

16. That the cause of action arose to the plaintiff against the defendant firstly on 06.01.2014 when the agreement with the co-owners i.e. Tek Chand Chauhan and Vijay Bhushan Chauhan was cancelled and they paid back the amount of 10 Lakh to the plaintiff which was given to them by the Plaintiff in the shape of two Bank Drafts of Rs.5 Lakh each. The cause of action thereafter *also arose two days earlier when the plaintiff again demanded his amount due from the defendant but he refused to make the payment."*

[4]. Defendant filed an application for rejection of the plaint on the ground that the defendant was only a broker, who got the parties introduced for execution of agreement to sell. He charged his brokerage and thereafter he had no role to play in the execution of sale deed. The amount received by the defendant towards brokerage/commission cannot be questioned by the plaintiff by filing a suit for recovery. The agreement to sell could not materialized and the amount of Rs.10 lakhs was refunded to the vendors. The plaintiff intended to recover the amount of Rs.5 lakhs paid to the defendant as his commission/brokerage for introducing the parties for execution of agreement to sell.

[5]. The aforesaid application filed by the defendant under Order 7 Rule 11 CPC was dismissed by the trial Court on the ground that at the time of consideration of application under Order 7 Rule 11 CPC, only averments in the plaint are to be seen. The agreement to sell dated 12.12.2011 executed between the plaintiff and the proposed vendors does not show any specific date for execution of sale deed, rather it was kept open and dependent upon fulfilment of certain contingent conditions mentioned therein. The violation of conditions, if any

and by which party would be a subject matter of evidence. The plea of limitation taken by the defendant was discarded on the premise that question of limitation is a mixed question of law and facts. As per averments made in the plaint, the agreement to sell was cancelled in the year 2014 and the plaintiff has sought recovery of commission allegedly given by him to the defendant. The cause of action pleaded by the plaintiff and the plea of limitation taken by the defendant would be a triable issue to be decided by the civil Court after taking evidence from both the sides.

[6]. Perusal of agreement to sell would show that defendant himself was attesting witness No.2 to the agreement to sell. Para No.8 of the agreement to sell reads as under:-

> "*8. That the bargain has been finalized with the joint efforts of Shri Anil Jindal & Company who will be entitled for the commission charges @ 1% each from both the purchaser and the sellers.*"

[7]. Anil Jindal & Company was shown to be the broker. Joint effort of Sh. Anil Jindal & Company was pleaded, resulting in execution of agreement to sell. The defendant pleaded himself to be the associate of Sh. Anil Jindal & Company and the said fact would be depending upon leading of evidence in the context of his association with Sh. Anil Jindal & Company as the amount of Rs.5 lakhs was paid to the

defendant vide receipt Ex.P-3.

[8]. The totality of facts and circumstances would show that triable issues are involved in the present case and arguments of learned counsel for the defendant/petitioner on the strength of ***Pursushotham Haridas and others vs. M/s Amruth Ghee Co. Ltd. Guntur and others, AIR 1961 Andhra Pradesh 143***; cannot be appreciated as the facts involved in the said case are distinguishable.

[9]. Petitioner being one of the attesting witness to agreement to sell cannot be presumed to be having only interest to be acting as a broker. The alleged plea if read in conjunction with para no.8 of the agreement to sell, would show that triable issues are involved in the present suit and the controversy cannot be decided at the threshold of Order 7 Rule 11 CPC. The averments made in the application are not sufficient to attract applicability of Order 7 Rule 11 CPC. In the event of proving agreement (if any) the petitioner being attesting witness may be called to depose in the context of agreement.

[10]. In view of aforesaid, this revision petition is found to be totally bereft of merits and the same is accordingly dismissed.

October 30, 2018 **(RAJ MOHAN SINGH)**

Atik **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No