

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

RSA No. 2487 of 2013 (O&M)

Date of decision : December 10, 2018

Asim Zafar

.....Appellant

Versus

Devi Ram Hathwalia and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Ashok Aggarwal, Senior Advocate with
Mr. Vipul Aggarwal, Advocate
for the appellant.

Mr. Hawa Singh Hooda, Senior Advocate with
Mr. Partap Singh, Advocate and
Mr. C.S. Singh, Advocate and
Mr. Naveen Kashyap, Advocate
for respondents No. 1 and 2.

LISA GILL, J.

Appellant - plaintiff is aggrieved of concurrent findings rendered against him by the learned Civil Judge (Senior Division), Gurgaon vide judgment and decree dated 12.01.2011 as well as by the learned Additional District Judge, Gurgaon vide judgment and decree dated 29.01.2013 whereby suit for possession by way of specific performance filed by the appellant has been dismissed.

Brief facts as pleaded by the plaintiff are that the defendants – respondents No. 1 and 2 are the allottees of SCO No. 87 measuring 137.50 square meters situated in Sector 56, Urban Estate, Gurgaon. It is pleaded that the defendants agreed to sell the above said SCO in favour of the plaintiff through defendant No. 4 - Atul Goyal for a consideration of ₹68 lakhs vide agreement to sell dated 04.02.2004. ₹ 7 lakhs was stated to

be paid as earnest money at the time of the agreement. Last date for payment

of balance amount was 45 days of sanction of permission to transfer the property from Haryana Urban Development Authority (hereinafter referred to as 'HUDA') or before 15.03.2004. A memorandum of understanding (MOU) was stated to be executed between the plaintiff and defendant No. 4 -Atul Goyal on 10.02.2004, in which it was agreed that the property in question would be transferred to the plaintiff. A copy thereof was supplied to defendants No. 1 and 2 who also agreed to transfer the plot in the plaintiff's favour. Permission to transfer the plot in favour of the plaintiff was granted on 26.03.2004. The plaintiff was ready and willing to perform his part of the contract but the defendants failed to perform their part of the contract despite request. Hence, the suit was filed.

Defendants No. 1 and 2 namely Devi Ram and Smt. Nirmal filed a joint written statement contesting the suit. Various preliminary objections were raised and averments on merits were controverted. It is stated that the plaintiff concealed true and material facts from the Court. Agreement as alleged by the plaintiff with defendants No. 1 and 2 was denied. While admitting themselves to be the owners of the suit property to the extent of half share each, it is stated that defendant No. 4 had approached defendant – Devi Ram requesting him to sell the suit property. When informed that the property was joint between defendant No. 1 and his wife, defendant No. 4 claimed that he could get the same partitioned as he was acquainted with officials of defendant No. 3 i.e. HUDA. Premium amounting to ₹36,44,000/- was settled by defendant No. 4 with defendant No. 1 qua his share only as defendant No. 2 did not want to alienate her share. Sum of ₹4 lakhs was paid by defendant No. 4 to defendant No. 1. Signatures of defendant No. 1 were obtained on a number of blank and

printed papers by defendant No. 4 on the pretext of getting the property partitioned. It is claimed that agreement dated 04.02.2004 was a forged document as first two pages of the agreement do not bear signatures of defendant No. 1. The amount has been changed on the first page and fraudulent alterations have been made. Defendant No. 4, it is stated, was unable to get necessary permission for partition of the property by 15.03.2004. He fraudulently applied for permission to transfer the entire property to the plaintiff while misusing the papers got signed from defendants No. 1 and 2 for partition of the property. Collusion between defendant No. 4 and the plaintiff was pleaded. Privity of contract between the plaintiff and answering defendant was denied.

Separate written statement was filed by defendant No. 3 – HUDA, stating that allottee of the plot applied for transfer of the plot in favour of the plaintiff on 22.03.2004 which was permitted on 26.03.2004. It was cancelled vide order dated 15.06.2004 as conditions of transfer were not complied with.

Defendant No. 4 filed a written statement completely admitting the claim of the plaintiff. Thereafter, he did not appear and was proceeded against exparte on 29.11.2010.

Replication was filed to the written statement filed on behalf of defendants No. 1 and 2.

Following issues were framed by the learned trial Court on the basis of the pleading:-

1. Whether the defendant agreed to sell the suit property in favour of plaintiff vide agreement dated 04.02.2004?OPP.
2. Whether defendant received an amount of Rs.7,00,000/- (seven lacs) as earnest money?OPP

3. Whether plaintiff is still ready and willing to perform his part of contract?OPP.
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the plaintiff has no locus standi to file the present suit? OPD.
6. Whether the plaintiff has no cause of action to file the present suit?OPD
7. Whether plaintiff is estopped from filing the present suit by his own act and conduct?OPD
8. Relief.

Evidence was led by both the parties.

Learned trial Court dismissed the suit filed by the plaintiff while concluding that there was no privity of contract between the plaintiff and defendants No. 1 and 2 who are admittedly the allottees of the suit property. Moreover, the agreement could not have been executed on behalf of defendant No. 2, who was admittedly not a signatory to the agreement to sell. Moreover, the share is not partible as per the allotment letter. Appeal filed by the appellant was also dismissed by the learned Additional District Judge, Gurgaon vide judgment dated 29.01.2013. Aggrieved therefrom, present appeal has been filed.

It is noticed that respondents No. 1 and 2 are on caveat. Notice of motion has not been issued till date. Record of the learned courts below stands requisitioned and is available for perusal.

Learned senior counsel for the appellant vehemently argues that the learned courts below have grossly erred in dismissing the suit filed by the appellant – plaintiff. It is contended that both the courts below have wrongly held that the suit by the present plaintiff is not maintainable, there being no privity of contract between the plaintiff and defendants No. 1 and

2. Reference is made to Section 15 (b) of the Specific Relief Act, 1963 (for short – 'the Act') to contend that the plaintiff being assignee of defendant No. 4 is entitled to specific performance of the contract. It is submitted that application for transfer of the property in favour of the plaintiff was moved by the allottees which was duly accepted by HUDA. Ex. PE is the 'no objection' certificate issued by HUDA. Copy thereof has been duly endorsed to the plaintiff. Plaintiff's application to lead additional evidence and to place on record the application moved by the allottees for transfer has been wrongly dismissed. Moreover, defendant No. 1 has admitted agreement dated 04.02.2004 (Ex. PB) as well as receipt of ₹4 lakhs from Atul Goyal – defendant No. 4 who has further admitted the claim set up by the plaintiff in his written statement. It is argued that the learned Additional District Judge, Gurgaon has wrongly observed that it was incumbent upon the plaintiff to bring on record specific evidence so as to dispel the specific allegations of fraud. It is argued with great vehemence that onus of proving discrepancy, if any, regarding difference in the premium was upon the defendant as fraud was alleged by him. The impugned judgements and decrees are liable to set aside on this ground alone.

It is further argued that there was no necessity to have brought the MOU (Ex. PD) to the notice of defendants No. 1 and 2 and this fact in itself cannot be a ground to non-suit the plaintiff especially in the wake of the fact that 'no objection' certificate for transfer of property had been applied for by the allottees themselves. Similarly, non-appearance of defendant No. 4 after filing his written statement cannot lead to any adverse inference qua the plaintiff. Learned senior counsel for the appellant further contends that even if stand of defendant No. 1 is accepted to the extent that

he entered in agreement to sell to the extent of half share of the property, learned courts below should have decreed the plaintiff's suit to the extent of half share of the property. It is submitted that defendant No. 2 did not step in the witness box. Therefore, adverse inference has to be drawn qua her, as her stand could not be tested by cross examination. The plaintiff's application for leading additional evidence, it is submitted, was wrongly dismissed. The plaintiff wanted to prove the application submitted by defendants No. 1 and 2 for permission to transfer the property in favour of the plaintiff. Said application has been wrongly dismissed by observing that it is only an attempt to fill up lacunae whereas in fact it was necessary for the just and proper adjudication of the case. Learned senior counsel for the appellant reiterates that once defendant No. 1 has admitted his signatures on the last page of the agreement dated 04.02.2004, onus was upon him to prove the existence of any fraud etc. In the light of concluded contract/agreement, admission of agreement to sell his share (i.e. half of the property in question) by defendant No. 1 and receipt of ₹4 lakhs, in fact proves the case of the plaintiff. In respect to the so-called discrepancy in the amount, it is contended that not even a suggestion was put to the plaintiff in this respect.

Learned senior counsel for the appellant relies upon the judgements of the Hon'ble Supreme Court in Habiba Khatoon vs. Ubaidul Huq AIR 1997 SC 3236, Gurbax Kaur vs. Santosh 2010 (4) ICC 631, Surjit Singh versus Nanak Singh 2009 (5) RCR 191, Adivekkka vs. Hanamavva Kom AIR 2007 SC 2025, Kammana vs. Kalipatnapu AIR 2011 SC 103 and Ashok Kumar vs. Aman Kumar 2010 (1) RCR 937, to cement his arguments. It is, thus, prayed that this appeal be allowed,

impugned judgment and decree dated 12.01.2011 passed by the learned Civil Judge (Senior Division), Gurgaon as well as judgment and decree dated 29.01.2013 passed by the learned Additional District Judge, Gurgaon be set aside and suit filed by the appellant be decreed throughout.

Learned senior counsel for the caveator – respondents No. 1 and 2 refuted the above said arguments with equal vehemence. Learned counsel refers to Section 20 of the Act to submit that jurisdiction to grant decree of specific performance is discretionary though reasonably guided by judicial principals. Both the learned courts below it is submitted have rendered well reasoned logical judgments based on sound appreciation of evidence and application of law. It is argued that agreement dated 04.02.2004 (Ex.PB), even as per the case of the plaintiff, was not entered into between the plaintiff and defendants No. 1 and 2. The same was entered into between defendant No. 1 and defendant No. 4. First two pages of the said agreement are not even signed by defendant No. 1. The last page is signed by defendant No. 1 alone. Merely because defendant No. 2 is the wife of defendant No. 1, it cannot be presumed that the said agreement to sell was entered into by her as well. It is further contended that on being approached by defendant No. 4, who is admittedly a property dealer, defendant No. 1 agreed to sell his share of the property. It was agreed that premium of ₹36,44,000/- would be given and that too subject to HUDA giving permission to sell half share of the property. This is so for the reason that as per Regulation 18 of the Haryana Urban Development (Disposal of Land and Buildings) Regulations, 1978, fragmentation of the land or building is not permitted. Defendant No. 4 assured that he would be able to manage approval for partition of the property as he knew some officials in

the department. Defendants No. 1 and 2 accordingly signed certain papers for seeking partition of the property but defendant No. 4 misused the papers for seeking transfer of the entire property in favour of the plaintiff. Answering defendants No. 1 and 2 immediately sought cancellation of 'no objection' certificate issued by HUDA when they came to know the fraud committed by defendant No. 4. It is further submitted that onus to prove his case was upon the plaintiff and not upon the defendants. It is contended that the plaint itself is deliberately vague and bereft of material particulars. The plaintiff has miserably failed to prove that defendants No. 1 and 2 ever agreed to sell their property to the plaintiff. There is no privity of contract between the plaintiff and defendants No. 1 and 2. Defendant No. 4 did not even step in the witness box. He was proceeded against *ex parte* on 29.11.2010. In response to the application for transfer of the property not being permitted to be proved by way of additional evidence, it is submitted that PW3, an official from HUDA specifically testified that the application seeking no objection certificate for transfer is submitted at the window of the office. Signatures before any official are not even required. It is rightly held that leading of said additional evidence is only a method of trying to fill up the lacunae in the plaintiff's case. It is further contended that prayer for transfer of half share of the property is not tenable especially in view of the fact that this is not even the prayer in the plaint. The site in question is not partible. It is, thus, prayed that this appeal be dismissed and both the impugned judgments and decrees be upheld.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

Perusal of the record reveals that agreement dated 04.02.2004

Ex.PB, as per its recital, is executed between defendants – Devi Ram and Smt. Nirmal on one side and Atul Goyal – defendant No. 4 on the other. It is mentioned therein that the parties agreed to sale of the suit property to defendant No. 4 at a premium of ₹16,44,000/- or at the total cost of ₹51,56,000/-. It is further mentioned therein that a sum of ₹4 lakhs was paid as earnest money to defendants No. 1 and 2. The said agreement comprised of three pages. The last page is signed by defendant No. 1 – Devi Ram and defendant No. 4 – Atul Goyal. Vinod Kumar Advocate has signed the agreement as a witness. Receipt of ₹4 lakhs signed by Atul Goyal was tendered by the plaintiff as mark X1. Signatures of defendants No. 1 and 2 are conspicuously absent on the said document. Ex. PD is the 'MOU' dated 10.02.2004 arrived at a few days thereafter between defendant No. 4 and the present appellant – plaintiff. The said MOU reads as under:-

“ This MOU is executed on this 10th day of February, 2004 between Mr. Atul Goyal son of Ram Niwas Goyal H.No. 379, Jalvayu Vihar, Sector 30, Gurgaon (Ist Part) and Asim Zafar son of Zafar Naim R/o Axcelo Daewoo, opp. Raj Cinema, Old Delhi Road, Gurgaon (IInd Part).

Whereas Ist Part has agreed to purchase an SCO No. 87, Sector 56 measuring 137.50 sq. mtr. in Urban Estate, Gurgaon from Sh. Devi Ram Hathwalia and Smt. Nirmal R/o AD-51B Pitampura, New Delhi, who is allottee and owner of said SCO for a sum of Rs. 51,56,000((Rs. Fifty one lacs fifty six thousand only). That agreement for sale between Ist Part and said vendor Mr. Devi Ram and Mrs. Nirmal was executed on 04.02.2004. A sum of Rs. 16,44,000/- shall be paid to vendor as premium.

That Mr. Devi Ram and Mrs. Nirmal had received a sum of Rs. 4,00,000/- (Rs. Four lacs only) from Ist Part on date of execution of agreement for sale i.e. 04.02.2004 as part payment of sale consideration.

That entire amount paid to Mr. Devi Ram and Mrs.

Nirmal was paid by Sh. Asim Zafar (IInd Part). The Ist part has agreed to get sale deed executed in the name of IInd Part, who shall bear all the expenses incurred thereon. It is agreed that permission for transfer of SCO from office of HUDA shall be obtained in the name of Sh. Asim Zafar (IInd Part). Mr. Devi Ram and Mrs. Nirmal have also agreed to get sale deed executed in the name of Mr. Asim Zafar (IInd Part). Terms and conditions of agreement for sale dated 04.02.2004 have been read over and understood by the parties which shall remain same and IInd Part (Asim Zafar) has agreed.

This MOU has been executed by the parties to avoid any controversy in future. Both Ist and IInd Part shall abide by MOU.

IST PART
sd/-
(Atul Goyal)

IIND PART
sd/-
(Asim Zafar)”

Ex.PE is the 'No objection certificate' issued by HUDA in favour of defendants No. 1 and 2 for transfer of the plot to the plaintiff. Permission was granted subject to certain conditions, payments to be deposited as mentioned in Clause 9 of the said communication. Wholesome perusal of the entire record indeed indicates that the plaintiff has not revealed the entire and material facts. Respondent No. 4 was the one who entered into agreement with defendant No. 1. Defendant No. 2 has admittedly not signed the said agreement to sell. It is to be noticed at this stage that as per the pleadings, the plaintiff specifically averred that it was agreed that the property in question shall be sold for a total consideration of ₹68 lakhs which included the sum of ₹51,56,000/-. A sum of ₹7 lakhs was pleaded to have been received by the defendant as earnest money i.e. part payment of sale consideration at the time of execution of the agreement

dated 04.02.2004 while receipt of ₹4 lakhs was attached. Furthermore, perusal of agreement (Ex.PB) mentions the earnest money to be ₹4 lakhs and not ₹ 7 lakhs as alleged in the plaint. Though it is sought to be explained by the plaintiff in his testimony that the amount of ₹3 lakhs was given at a later stage by him to defendant No. 4 and thereafter conveyed to defendant No. 1, there is no such pleading to this effect and neither is there any receipt of the said amount of ₹ 7 lakhs (i.e. ₹3 lakhs allegedly given subsequently).

Another peculiarity in the case is that merely six days after execution of agreement dated 04.02.2004, MOU, Ex. PD, is stated to have been executed between defendant No. 4 and the plaintiff. As per the said MOU, it is mentioned that a sum of ₹4 lakhs was paid to the owners. It is further stated that the entire amount in question was paid by the plaintiff. It is categorically stated in the said MOU that defendants No. 1 and 2 agreed to get the sale deed executed in favour of the plaintiff. However, the alleged MOU though stated to be executed by the parties to avoid any controversy is paradoxically not signed by defendants No. 1 and 2. It is only the plaintiff and defendant No. 4, who have signed this document.

Testimony of the plaintiff – PW1 is extremely telling. In the plaint as well as affidavit (Ex.PW1/A), the plaintiff does not clearly state that defendants No. 1 and 2 had specifically agreed to sell the property in question to him. PW1 has deliberately used the term 'defendant' without specifying which of the four defendants'. Defendant No. 4 is admitted to be a property dealer and a resident of Gurgaon. PW1 stated that there were about two or three persons involved in the deal and he could not specifically depose as to whether payment was given by him to Atul Goyal or

defendant No. 2. Discrepancy regarding the earnest money, as mentioned above, is clearly reflected in his testimony. PW1 specifically stated that he was present at the time of execution of agreement on 04.02.2004. There is, however, no explanation as to why the agreement was not entered into with him by the allottees but with Atul Goyal. It stands to reason that in case the plaintiff was present at the time of execution of agreement to sell, his name could easily have been mentioned as assignee in case the agreement was not executed with him directly and the earnest money was also given by him as alleged. The plaintiff has further stated that at the time of execution of the agreement, signatures of defendant No. 1 were obtained on five to seven documents. There is no plausible explanation on record in this regard. All these facts collectively lend credence to the case of defendants No. 1 and 2.

Learned senior counsel for the appellant has vehemently argued that the present suit for specific performance was maintainable at the instance of the plaintiff, who is an assignee of defendant No. 4. Section 15 (b) of the Act reads as under:-

“(b) the representative-in-interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party.”

At this stage, it is pertinent to note that defendant No. 4 though

admitting the claim of the plaintiff did not step in the witness box. For a moment, even if it is accepted that the plaintiff is an assignee of defendant No. 4, it is apparent from the record that the plaintiff is not entitled to any relief as claimed. Agreement to sell dated 04.02.2004 though stated to be executed by defendants No. 1 and 2 does not bear the signatures of defendant No. 2 at any place. First pages of the said agreement do not bear signatures of defendant No. 1 either. The amount of earnest money mentioned in the said agreement is at variance with what has been pleaded by the plaintiff. Moreover, receipt Mark X1 further lends credence to the defence set up by defendants No. 1 and 2. The entire evidence on record casts a cloud of suspicion upon the authenticity of the same.

The appellant cannot derive any benefit from the observation of the learned First Appellate Court to the extent that when there are specific allegations of fraud, it was incumbent upon the plaintiff to have brought on record specific evidence to explain the facts. This is so for the reason that defendant No. 1 has not denied that he entered into an agreement to sell his half share to defendant No. 4 (and not to the appellant) subject to partition of the property being permitted by HUDA. It is the specific stand of defendants No. 1 and 2 that agreement dated 04.02.2004 placed before the Court was a fraudulent document as firstly the agreement was not executed with the appellant besides the first two pages were not signed by even defendant No. 1. Moreover, the amount in question has also been varied. Stand of the said defendants finds credence from the evidence on record. There is even a variation in the amount in question in the pleadings of the plaintiff and the evidence on record. Moreover, the plaintiff has not been able to give a reasonable explanation as to why the agreement to sell was

not executed by him directly with defendants No. 1 and 2, especially in the wake of alleged presence at the time of execution of agreement to sell and earnest money being allegedly given by him. As noticed earlier, defendants No. 1 and 2 are not signatories to the MOU, Ex. PD. In his cross examination PW1 has failed to specify as to whom the amount was handed over by him i.e. either to defendant No. 4 – Atul Goyal or defendants No. 1 and 2.

In this view of the matter, plaintiff has clearly failed to prove the passing of the earnest money by him to defendant No. 1. It is a matter of record that defendant No. 4 did not step in the witness box. He was proceeded against exparte. The judgements cited by the learned senior counsel for the appellant are of no avail to the appellant as they are not applicable to the facts and circumstances of the present case.

Last but not least, argument raised on behalf of the appellant was that specific performance of the agreement should have been decreed at least to the extent to half share of the property. As mentioned in the foregoing paras, fragmentation of the property in question is not permissible in terms of Regulation 18 of the Haryana Urban Development (Disposal of Land and Buildings) Regulations, 1978. Thus, this argument being devoid of any merit is rejected.

Both the learned courts below have rendered concurrent findings of fact against the appellant on a wholesome and proper appreciation of evidence on record which warrants no interference. In my considered opinion, no question of law much less a substantial question of law is involved in this appeal.

No other argument was addressed.

Learned counsel for the appellant is unable to point out any

illegality and infirmity in impugned judgment and decree dated 12.01.2011 passed by the learned Civil Judge (Senior Division), Gurgaon as well as judgment and decree dated 29.01.2013 passed by the learned Additional District Judge, Gurgaon which calls for any interference by this Court.

Accordingly, this appeal is dismissed with no order as to costs.

December 10, 2018
rts

(Lisa Gill)
Judge

Whether speaking/reasoned :	Yes/No
Whether reportable :	Yes/No