

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

RSA No.5901 of 2015 (O&M)

Date of decision:01.03.2018

Narain Singh

... Appellant

Vs.

Rubi and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Gopal Sharma, Advocate
for the appellant.

Mr. Dinesh S. Rawat, Advocate
for respondent No.1.

Mr. Sandeep Moudgil, Advocate
for respondent No.2.

AMIT RAWAL J.

The appellant-defendant No.1 is in Regular Second Appeal against the judgment and decree dated 03.08.2015 rendered by the Lower Appellate Court, whereby, judgment and decree dated 31.07.2014 of the trial Court dismissing the suit, has been modified.

It would be apt to give factual matrix of the suit.

Plaintiff-respondent No.1 instituted a suit in the month of July, 2008 claiming declaration to the effect that plaintiff is legally entitled to the flat to be constructed by defendant no.2, i.e., The New Haryana Officer Co-operative Group Housing Society Limited, GH-2, Sector 6 MDC, Panchkula in place of defendant no.1/appellant-Narain Singh being bonafide member of the Society being allottee of plot No.GH 2, Sector 6, MDC, Panchkula on

the basis of documents, i.e., agreement dated 17.12.2004, registered General Power of Attorney dated 17.12.2004 and Will dated 22.02.2007 against the receipt of ₹10,80,000/- by challenging the cancellation of all the documents with a consequential relief of permanent injunction restraining defendant no.1 from alienating share in defendant no.2 on the premise that defendant no.2 was a registered Group Housing Society and defendant No.1 became a member of the same and had deposited the required amount of the share entitling him to a dwelling unit/flat to be constructed by the Society. A share certificate was also issued for construction of the multi-storey flats in the site duly allotted by the Estate Officer, HUDA, Panchkula.

It was averred that defendant No.1 deposited his share money with defendant no.2 for purchase of the land from the Estate Officer, HUDA, Panchkula, who had allotted the site, *ibid*, for construction of the multi-storey flats. That due to some financial constraints, defendant no.1 could not deposit further installments with defendant no.2 and in order to safeguard the financial interest showed his willingness by offering share/rights in defendant no.2 to the plaintiff after accepting the offer. Resultantly, an agreement to sell dated 17.12.2004 was executed in favour of the plaintiff by defendant no.1 for a total sale consideration of ₹10,80,000/- which was allegedly paid to defendant no.2 against the receipt duly executed by defendant no.1 on the back of the first page of the agreement to sell dated 17.12.2004 in the presence of witnesses. Defendant no.1 further executed a GPA which was duly registered with the Sub Registrar Panipat, a Will dated 17.12.2004 and also sworn three affidavits before the Executive Magistrate Panipat required for transfer of the share of

defendant no.1 by defendant no.2 in favour of the plaintiff.

It was pleaded that plaintiff had been paying the installments to defendant no.2 without any default but acquired the knowledge that there was some dispute regarding the eligibility of plaintiff to acquire the membership of defendant no.2 which was pending before the Registrar, Cooperative Societies, Haryana, resulting in delay in transferring the membership. The plaintiff was shocked and surprised to see the letter dated 31.05.2007, whereby, appellant/defendant no.1 cancelled all the documents executed in favour of the plaintiff, depriving the right, despite receiving the full and final payment by defendant no.1.

Plaintiff acquired the knowledge that membership of defendant no.1 by the Registrar, Cooperative Societies was restored, resultantly, approached defendant no.1 for transfer of the share but instead of acceding to the request of plaintiff, defendant no.1 flatly refused to do so and threatened to alienate the suit property. It is in that background of the matter, suit aforementioned was filed alongwith an application under Order 39 Rules 1 and 2 of Code of Civil Procedure (in short 'CPC) for interim stay.

Appellant/defendant No.1 contested the suit by taking certain preliminary objections qua locus-standi, maintainability, court fee, concealment of certain facts, much less suit barred by law of limitation. On merits, it was denied that defendant no.1 was in financial constraints or was not able to deposit the installments with defendant no.2-Society. Even the execution of the agreement with the plaintiff qua his share and right in defendant no.2, GPA and Will, much less receipt of ₹10,80,000/- was

emphatically denied, equally three affidavits.

It was averred that Ram Krishan, the then Secretary of the Society requested defendant no.1 to execute General Power of Attorney dated 17.12.2004 and Will dated 17.12.2004 which were later on duly cancelled in favour of the plaintiff for the purpose of looking after the interest of appellant-defendant no.1 in defendant no.2-Society.

After obtaining permission from Managing Committee for transfer of share of defendant no.1 in the Society, all the terms and conditions of the sale were to be settled and thereafter, agreement to sell and other documents required to be executed. In fact, possession of the land was not given to defendant no.2-Society till 17.12.2004 nor any flat was constructed, therefore, there was no occasion to enter into an agreement to sell or transfer the flat, on 17.12.2004.

In November 2006, appellant/defendant no.1 was surprised to see letter dated 27.02.2006 issued by the then Secretary of the Society regarding non-approval of the membership of defendant no.1, but amount of ₹2,53,000/-, vide cheque no.179338, was refunded. The plaintiff, who was the General Power of Attorney holder of defendant no.1 was not having any interest in the affairs of the Society and due to that reason, no action was taken by the plaintiff to safeguard the interest of defendant no.1 and on account of aforementioned fact, GPA and Will were got cancelled.

It was specifically pleaded that defendant no.1 paid the amount of installments in cash to the plaintiff but the plaintiff in order to play fraud with defendant no.1 issued cheques etc. regarding the payment of the installments. In fact, the entire amount of installments paid by the plaintiff

had already been received by the plaintiff, for, plaintiff did not raise any objection when the GPA and Will dated 17.12.2004 were revoked on 22.02.2007. In the year 2007, i.e., on 14.07.2007, sale certificate was issued in favour of defendant no.1 but in October 2007, defendant no.2 refunded the amount of ₹3,03,000/- by way of cheque and cancelled the membership of defendant no.1 without any reason. In the year 2008, a General Body Meeting of defendant no.2 Society ordered for restoration of the membership of all the members expelled by the earlier President. On acquiring the knowledge, plaintiff filed the suit with malafide intention as the price of the land and flats to be constructed increased manifold. GPA and Will did not contain any particular number of the plot or scheme. It was specifically pleaded that all the installments had been paid by appellant-defendant no.1 from his account to defendant no.2-Society and in case, the plaintiff had allegedly paid the full and final payment and the court fee on the said amount was required to be paid. The receipt dated 17.12.2004 was not properly stamped, much less agreement to sell was not registered, therefore, these documents cannot be legally looked into evidence. With the aforementioned averments, a prayer was made for dismissal of the suit.

Defendant no.2 Society filed a separate written statement by giving the facts that appellant-defendant no.1 had applied for membership of the Society on 01.09.2003 but at that time, the Society was in liquidation w.e.f. 31.03.2003 till 03.07.2004. On holding of fresh elections on 29.07.2007, Smt. Neelam Pardeep Kasani, IAS was elected as President and it was decided that the applications submitted during the liquidation period, their membership be cancelled. Rule 15 of the bye-laws clearly envisaged

that no member could sell or transfer his/her membership until or unless possession of the said flat was not handed over to the member. Defendant no.1 having filed the arbitration proceedings under Sections 102 and 103 of the Haryana Cooperative Societies Act, 1984 before the Registrar Cooperative Societies Haryana which was dismissed in default, vide order dated 07.08.2008 which was not denied. In para 2, society specifically pleaded that defendant no.1 was expelled from membership and entire amount deposited with defendant no.2 was refunded.

Since the parties were at variance, the trial Court framed the following issues:-

- i) *Whether the plaintiff is bona fide member of defendant no.2 society as claimed? OPP*
- ii) *Whether the plaintiff is entitled for allotment of flat in her name in defendant no.2 society in place of defendant no.1 as prayed for? OPP*
- iii) *Whether the plaintiff is entitled to restrain defendant no.1 for alienating the share and transferring the membership of flat in defendant no.2 society in any manner what soever? OPP*
- iv) *Whether the suit is not maintainable in the present form? OPD*
- v) *Whether the plaintiff has concealed the true and material facts from this Court? OPD*
- vi) *Whether the suit is barred by limitation? OPD*
- vii) *Relief.”*

Plaintiff in support of plaint examined four witnesses by relying upon the following documents:-

- Ex.P1 - Sale agreement dated 17.12.2004
- Ex.P2 - Receipt
- Ex.P3 - GPA
- Ex.P4 - Will
- Ex.P5 to Ex.P10 – Receipt of postal correspondence.

On the contrary, appellant-defendant no.1 examined three witnesses by relying upon the following documents:-

- Ex.D1 - Cancellation of GPA
- Ex.D2 - Cancellation of Will
- Ex.D3 - Photocopy of postal receipt.
- Ex.DA - GPA
- Mark X - Minutes of meeting.
- Mark BX - Affidavit.
- Mark BY - Affidavit
- Mark BZ - Affidavit.

The trial Court, on the basis of the evidence dismissed the suit on the premise that eligibility of plaintiff qua right in flat was dependent upon the eligibility of defendant no.1 to transfer his right which on account of denial by defendant no.1 could not be established.

Respondent no.1/plaintiff assailed the judgment and decree dated 31.07.2014 before the Lower Appellate Court. The Lower Appellate Court, vide judgment and decree dated 03.08.2015 declined to grant declaration but while exercising powers under Order 7 Rule 7 CPC held that

appellant-defendant no.1 could not escape the liability of refund of the aforementioned amount which was received from the plaintiff and ordered for return of the same alongwith interest @ 7% per annum by drawing a preliminary decree calling upon the plaintiff to pay the court fee.

Mr. Gopal Sharma, learned counsel for the appellant in support of memorandum of appeal has raised the following submissions:-

- i) The Lower Appellate Court erred in not appreciating the real controversy involved in the present case, much less did not advert to the pleadings and documents. There was a categorical pleading in the plaint that the entire amount was paid by the plaintiff to defendant no.2 Society, therefore, the appellant could not be ordered for refund of amount alongwith interest aforementioned. Despite the fact that it upheld the finding of the trial Court qua maintainability of the suit *vis-a-vis* claim of declaration. The said decree was unknown to the settled canon of justice, whereas the District Judge granted the relief of recovery of ₹ 11,53,050/- on deposit of court fee by passing a preliminary decree.
- ii) There was no foundation of pleading for which other side could be called upon.
- iii) The Lower Appellate Court has also exceeded its jurisdiction while exercising the powers under Order 7 Rule 7 CPC as the aforementioned relief could not have been granted owing to the decision rendered by the Supreme Court of India in **Shiv Kumar Sharma Vs. Santosh Kumari 2007 (4) RCR**

(Civil) 515, wherein it was specifically held that the Court cannot grant damages on equitable consideration even if the plaintiff was found entitled to it and the ratio decidendi culled out by the Patna High Court in **Gobind Prasad Sinha Vs. Mst. Kulwanti and others 1985 AIR (Patna) 31**, that the Court cannot make out a new case for a party, in other words, the Courts are not at liberty to grant relief not brought in plaint or that flowed naturally from claim.

iv) The suit itself was not maintainable as plaintiff was required to file a suit for specific performance by claiming the alternative relief, therefore, the exercise of discretionary power under Order 7 Rule 7 CPC cannot over-ride the statutory provisions of law by relying upon the judgment rendered by the Supreme Court of India in **Thakamma Mathew Vs. Azamathulla Khan 1993(1) RRR 323**. The Appellate Court could not make out a new case which was not pleaded by either of the parties nor could grant relief of preliminary decree for recovery because the parties were bound by the pleadings.

v) The Lower Appellate Court erroneously imposed the responsibility upon the appellant to recover the amount despite holding that plaintiff was at fault for relief of declaration, could not be sought.

vi) There is abdication, much less non-adherence to the cross-examination of plaintiff, who deposed that the amount of ₹10,80,000/- written in her affidavit was shown to be paid to

defendant no.2-Society and feigned ignorance about issuance of the receipt of aforementioned amount. The said witness also admitted of not approaching Society for depositing any installment nor had any knowledge regarding number of installments having allegedly been paid or deposited.

vii) The judgment and decree of the Lower Appellate Court is based upon the assumptions by referring to certain averments in the written statement on behalf of the appellant, particularly para 3 which was required to be looked into entirety and not in isolation.

viii) The agreement to sell dated 17.12.2004, Ex.P1, and receipt were forged and fabricated documents. Respondent no.1/plaintiff candidly admitted that she did not know Narain Singh-appellant nor had met him face to face.

ix) The plaintiff's witnesses remained silent regarding the place of execution of agreement to sell which was allegedly executed at Panchkula. GPA was registered at 4.00 p.m on 17.12.2004 at Panipat. The said fact was mentioned in the agreement to sell, Ex.P1, thus, for all intents and purposes, agreement to sell was executed after registration of the GPA and all the witnesses deposed that agreement to sell was executed prior to the execution of GPA.

x) PW4 - Rakesh Kumar, husband of plaintiff deposed in examination-in-chief that agreement to sell dated 17.12.2004

was executed in favour of plaintiff by defendant no.1 and total consideration of ₹10,80,000/- was paid to defendant no.2 against, receipt, duly executed by defendant no.1 on the back of the first page of agreement to sell. In this scenario, there was no occasion for the Lower Appellate Court for directing the appellant to refund the amount. Only the photocopy of the bank draft of amount referred to in agreement to sell dated 17.12.2004 was brought on file, in essence, plaintiff failed to prove the same by summoning the record of Bank which was issued on 17.12.2004 from IDBI Bank, Panchkula Branch. Moreover, there was no evidence on record that the said bank draft was ever encashed by the appellant.

xi) PW3 – M.L.Jindal deposed that he never met with Secretary on 17.12.2004. All these evidence, if read in cumulative, leads to irresistible conclusion that there was no execution of the agreement to sell, much less GPA and Will. The agreement to sell and receipt had been prepared after filling up the blank spaces by PW3 - Manohar Lal Jindal. Even the review application was also filed against the judgment and decree of the Lower Appellate Court but the same was erroneously rejected, vide order dated 09.09.2015 which is also subject matter of challenge in the present appeal and thus, urged this Court to formulate the substantial questions of law as carved out in para 23 of the memorandum of appeal.

Per contra, Mr. Dinesh S.Rawat, learned counsel for respondent

no.1/plaintiff submitted that agreement to sell, Ex.P1 bore a separate receipt of ₹10,80,000/- signed by appellant/defendant no.1. The agreement to sell was proved through the testimony of attesting witness—M.L.Jindal. Defendant no.1 has not been able to belie signatures on the aforesaid agreement to sell nor placed on record any material to show that draft was presented in the account or not and thus, the Court had no other occasion but drew adverse inference.

No doubt, the plaintiff should have filed the suit for specific performance with an alternative relief but in the cases of the society, where bye-laws expresses bar for transferring the property, the member executes the documents as referred to above and after expiry of the period render assistance for transfer of the certificate and the Will is executed only to protect the interest of vendee, in case of some mis-happening during the interregnum. It was a contract, as per the provisions of Section 202 of Indian Contract Act which is enforceable in law.

There was a categoric admission in the written statement with regard to receipt of the amount. Non-execution of the registered Will and agreement to sell had not been proved on record. GPA was registered document which carried a presumption of truth. In fact, it was dishonest act on the part of defendant no.1 to back out from the agreement on restoration of the membership. During the interregnum, the prices of the property had increased tremendously. The findings of the Lower Appellate Court are based upon the equity and as per the provisions of Order 7 Rule 7 CPC and thus, the same are liable to be upheld.

Mr. Sandeep Moudgil, learned counsel appearing on behalf of

respondent no.2-Society adopted the arguments of Mr. Dinesh S. Rawat, Advocate for respondent no.1 and raised the argument in terms of the stand taken in the written statement with regard to cancellation of membership of defendant no.1 as application was submitted during the period when the Society was in liquidation but later on the same was registered.

I have heard the learned counsel for the parties, appraised the judgments and decrees, as well as record of both the Courts below and of the view that there is no force and merit in the submissions of Mr.Gopal Sharma. It would be apt to reproduce paragraph 3 of the written statement of defendant no.1 which reads thus:-

“3. That the contents of para no.3 of the plaint are absolutely wrong and hence denied. It is specifically denied that the answering defendant was in financial constraints and not able to deposit the installments with the defendant no.2-Society and in order to safe guard his financial interest shown his willingness and offered to sell his share/right in the defendant no.2-Society. It is also denied that the answering defendant ever entered into sale agreement with the plaintiff in respect to his share/right in the defendant no.2-Society. The answering defendant never entered into agreement to sell with the plaintiff on 17.12.2004 and also no amount was received by the answering defendant from the plaintiff in respect to the share/right in the defendant no.2-Society. It is submitted here that the agreement to sell dated 17.12.2004 and the receipt are forged and fabricated document since, it was never executed by

the answering defendant. The answering defendant has never received any consideration i.e. Rs.10,80,000/- from the plaintiff. It is also denied that three affidavits were executed by answering defendants in favour of the plaintiff. The true facts are that Ms. Rubi never met defendant no.1 on 17.12.2004 or before 17.12.2004 and there was no occasion for any talk regarding the sale of share by the defendant no.1 in favour of plaintiff and in fact, plaintiff has not met defendant no.1 on 17.12.2004. In fact, Sh.Ram Kishan, the then Secretary of the Society asked the defendant no.1 to execute General Power of Attorney dated 17.12.2004 and Will dated 17.12.2004, which were later on duly cancelled, in favour of the plaintiff just to look after the interest of the defendant no.1 in defendant no.2 Society. Sh. Ram Kishan, the then Secretary of the defendant no.2- Society asked the defendant no.1 to execute General Power of Attorney and Will. He also asked the plaintiff that being Secretary of the Society, he would try to get approval of the Managing Committee for transfer of share of defendant n.1 in defendant no.2 -Society. It is submitted that after obtaining permission from Managing Committee for transfer of share of defendant no.1 in the Society, all the terms and conditions of the sale are to be settled and thereafter, agreement to sell and other documents are to be executed. In fact, the permission of the land has not been given to defendant no.2 Society till 17.12.2004 and no flat has been constructed and even today no

construction work has started. As such, there was no occasion to sell or transfer the flat on 17.12.2004. In fact, defendant no.1 was not competent to transfer his share in favour of any person except with the prior approval of the Managing Committee and as per the bye-laws of the Society. It is submitted that even plaintiff was not known to defendant no.1 at the time of execution of General Power of Attorney and Will and even the plaintiff was not present at Panipat on 17.12.2004 which is clear from General Power of Attorney where her attendance has not been shown. It is submitted that agreement to sell dated 17.12.2004 and the receipt regarding payment of Rs.10,80,000/- and the three affidavits have been forged and prepared later on.

It is submitted that in November, 2006, defendant no.1 was surprised when he received letter no.33 dated 27.2.2006 issued by Sh. B.S.Birla, the then Secretary of the Society. As per that letter Society has not approved membership of defendant no.1 and amount of Rs.2,53,000/- was refunded vide cheque no.179338. As the plaintiff who was General Power of Attorney holder of defendant no.1 was not having any interest in the affairs of the Society and due to that reason, no action has been taken by the plaintiff to safe guard the interest of defendant no.1 and defendant no.1 was compelled to give a legal notice to the Society. As the plaintiff being General Power of Attorney holder of the defendant no.1 was not taking

any interest to safe guard the interest of defendant no.1 and therefore, General Power of Attorney dated 17.12.2004 and the Will dated 17.12.2004 were got cancelled. It is submitted that defendant no.1 paid the amount of installments in cash to the plaintiff but plaintiff in order to play fraud with defendant no.1 issued cheques etc regarding the payment of the installments. It is also submitted that the entire amount of installments paid by the plaintiff has already been received by the plaintiff and due to that reason she has not raised objection of any type when the General Power of Attorney and Will dated 17.12.2004 were revoked on 22.2.2007. It is also submitted that on the basis of legal notice, the then President, Sh. Dhanpat Singh admitted the claim of defendant no.1 and vide letter dated 16.5.2007, Dhanpat Singh, the then President of the Society demanded Rs.50,000/- and defendant no.1 sent a cheque of Rs.50,000/- in favour of defendant no.2 Society and receipt no.205 dated 30.5.2007 was issued in favour of defendant no.1. Later on sale certificate dated 14.7.2007 was also issued in favour of defendant no.1. It is submitted that vide letter no.206 dated 30.10.2007, defendant no.2 Society refunded the amount of Rs.3,03,000/- by way of cheque and thereby cancelled the membership of defendant no.1 without any reason. The defendant no.1 again gave legal notice to the President of defendant no.2 Society, but to no use. It is submitted that ultimately defendant no.1 filed civil suit as well as arbitration

petition before the Registrar, Co-operative Societies, Haryana as the plaintiff was not having any right, title or interest in the membership or the share in the society and due to that reason, she kept mum. In the month of June, 2008, a General Body meeting of defendant no.2 was called and in that meeting Smt. Neelam Pardeep Kashni openly announced regarding her resignation and new President and Managing Committee was unanimously elected and it was also decided in the said General Body Meeting of defendant no.2 Society for the restoration of the membership of all the members expelled by the earlier President, Smt. Neelam Pardeep Kashni. When the plaintiff came to know about the decision of the general body of defendant no.2 Society regarding restoration of membership of all the members expelled by the earlier President, the present suit was filed with a malafide intention because the prices of the land and the flats to be constructed have increased manifold. It is again submitted that neither any agreement to sell was executed nor any receipt dated 17.12.2004 and the affidavits dated 17.12.2004 have been executed by the defendant no.1 in favour of the plaintiff. It is submitted that defendant no.1 has rightly cancelled the General Power of Attorney and Will dated 17.12.2004.

It is also submitted here that at the time of execution of the General Power of Attorney and the Will no particulars of the plot number and scheme was mentioned in the GPA and in

the Will. However, the plaintiff has committed perjury and herself illegally mentioned the particulars of the plot number and scheme in the GPA and the Will. Therefore, for producing the fabricated GPA and the Will before this Hon'ble Court the answering defendant reserve his right to initiate appropriate criminal proceedings in the Court of law.”

The pith and substance of the stand taken in the written statement leads to irresistible conclusion that appellant/defendant no.1 though in one breath denied the execution of the agreement, GPA and Will but in other, admitted the same and tried to explain the reasons for the same. It leads to an irresistible conclusion that in fact, appellant had executed the documents as he had nothing to loose for he had apprehension that he would not be allotted a plot, for, application for membership and issuance of sale certificate was pending adjudication. The Society had taken conscious decision, whereby, the applications received for becoming a member of the Society during the period when the Society was in liquidation, as noticed above, while extracting the pleadings were expelled by the then President but owing to subsequent elections, the decision aforementioned was revoked, resulting into restoration of the membership but in the meantime, period of 4 years had elapsed and prices of the property increased (four) manifold.

In fact, it is a case, where appellant/defendant no.1 had backed out from the commitment, equally so, plaintiff could not have claimed the declaration but should have filed a suit for discretionary relief under Section 20 of Specific Relief Act but was not properly and legally advised to

institute a suit, perhaps owing to the fact that bye-laws prohibited the sale of plot allotted by the Society as there was prohibition qua sale of plot for a specified period. It has been seen over a period of time, any deal conducted in respect of plot by a member of the Society, all the documents as in the present case, like agreement to sell, registered GPA, Will and affidavits are executed by the vendor so that vendee is not harassed or troubled in running after vendor after a considerable period while seeking transfer of the plot. Such type of transaction had been acknowledged, as per the provisions of Section 202 of Indian Contract Act.

The back side of the first page of the agreement to sell bore the receipt of ₹10,80,000/- stated to have been received by defendant no.1 in the presence of attesting witness -M.L.Jindal. No doubt, payment on the asking of appellant was made to the Society but it was an internal arrangement between the plaintiff and defendant no.1. There was no receipt issued by the Society either in favour of the plaintiff or defendant no.1 to have received the money from the plaintiff, for, the Society in para 2 of the written statement stated that on cancellation of membership, the entire amount deposited with it, had been refunded to defendant no.1. For the sake of brevity, para 2 of the written statement of defendant no.2 is extracted herein below:-

“2. That the contents of para no.2 of the plaint as stated are wrong and hence denied. It is submitted that the membership of the defendant no.1 is expelled and all money deposited by him with the defendant no.2 is refund to him vide. Rest of the contents of this para are matter on record.”

Order 7 Rule 7 CPC envisages that every plaint while claiming relief specifically state the same but it shall not be necessary to ask for general or other general relief which can always be given by the Court. For the sake of brevity, provisions of Order 7 Rule 7 CPC read thus:-

“ **1. Particulars to be contained in plaint-** The plaint shall contain the following particulars :-

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the Court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.”

“**7. Relief to be specifically stated.-**Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extend as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.”

Even PW2-Vinay Goel also appeared and deposed that defendant no.1 had executed an agreement to sell in favour of the plaintiff as he signed as a witness and plaintiff had paid a sale consideration of

₹10,80,000/- to defendant no.2. DW3 – Narender Singh, Registry Clerk from the office of Sub-Registrar, Panipat appeared and proved the registered power of attorney which was registered at Sr.No.750 in the office of Sub-Registrar, Panipat.

In my view, the plaintiff had been able to prove the execution of the agreement to sell, registered GPA and Will, Ex.P1, Ex.P3 and Ex.P4, respectively which bore the signatures of appellant, tallied with the signatures on the cancellation deed, Ex.P9, another cancellation deed, Ex.D1 and cancellation of Will, Ex.D2.

In view of such situation, question arises whether the plaintiff was entitled to declaration or not and agreement to sell could be enforceable or not. The finding of the Lower Appellate Court is based upon the appreciation of provisions, in my view, is correct appreciation of law because on the date of agreement to sell, appellant was not allotted any plot owing to non-issuance of sale certificate but the Court cannot remain unmindful or oblivious of the fact that the principles of equity and justice are required to be pressed into service, particularly, when the plaintiff had parted with the substantial amount. The Lower Appellate Court while exercising the powers under Order 7 Rule 7 CPC gave the findings in the following manner:-

“22. Lastly, question arises, as to whether it is equitable, and fair to allow the respondent no.1 got scot free, after receiving huge amount from the appellant? Admittedly, respondent no.1 was a retired Government servant, he knowing well, he was not competent to sell his membership in the Society, which at

relevant time, even has not been allotted to him, despite that he received an amount of Rs.10,80,000/- from the appellant and the appellant continued to deposit installments with the Society and she has placed on record receipts Ex.P5 to Ex.P8? The receipt Ex.P5 is dated 17.05.2004, Ex.P6 is dated 22.08.2003 and these are prior to execution of agreement to sell Ex.P1. It means these were handed over to her by the respondent no.1. Had it not been so, then, there was no question of coming the same into the hands of the appellant and amount against these receipt is treated to be adjusted in sale consideration qua agreement for sale Ex.P1. Receipt Ex.P7 is dated 23.05.2006 in the sum of Rs.35,000/- and receipt Ex.P8 is dated 29.06.2007 of Rs.38,050/-, which are after the execution of agreement to sell Ex.P1. Since these are in the hands of the appellant and this fact proves on record the payment against both these receipts was made by the appellant to the Society. In this way, it is established on record the total amount incurred by the appellant qua the purchase of membership of the respondent no.1 on 17.12.2004 Rs.10,80,000/-, the amount of sale consideration + Rs.35,000/- Ex.P7+Rs.38,050/- Ex.P8 paid to the Society by the appellant i.e. total Rs.11,53,050/-. The appellant is a housewife. No doubt, she is also party to the agreement to sell Ex.P1 and she cannot say that she was not aware regarding the status of the respondent no.1 in the Society. From the own pleadings of both the parties, it is clear

both of them were at fault, but the respondent no.1 is much more than to the appellant as he was not competent to sell his membership in the Society, being still not acquired and despite that he received huge amount from the appellant and he cannot be permitted to go scot free. Section 56 of the Indian Contract Act, 1872 is reproduced as under:-

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. —An agreement to do an act impossible in itself is void."Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.1 —A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.2"

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such

promisee for any loss which such promisee sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

23. *Since the appellant was also at fault, she is not entitled to declaration as prayed, as agreement to sell Ex.P1 is not enforceable in the eye of law and consequently, she cannot be held entitled for any flat constructed by the Society, respondent no.2 at site of GH-2, Sector 2, Mansa Devi Complex, Sector 6, Panchkula and findings of the learned trial Court to this extent are affirmed. At the same time, the respondent no.1 cannot escape from the liability to refund the aforesaid amount to the appellant, which he received from her and he is liable to return the same. Since the appellant was also at fault, she is not entitled to any interest on the aforesaid amount."*

The appellant though specifically denied the execution of the agreement to sell but in cross-examination admitted that he had executed registered GPA dated 17.12.2004 in favour of respondent No.1/plaintiff and as well as execution of the Will dated 17.12.2004. In cross-examination, he also admitted that he had not lodged any criminal complaint against the

plaintiff for alleged forgery of the aforementioned documents, much less affidavits.

The appellant/defendant no.1 had not been able to rebut the categoric pleading in the written statement filed on behalf of the Society that after cancellation, the entire money was refunded to him. Thus, argument of Mr. Gopal Sharma that judgment and decree of the Lower Appellate Court directing appellant-defendant no.1 to refund the earnest money *vis-a-vis* pleading of the plaintiff having failed to refund the money is not able to cut the ice, much less wholly un-tenable, for, even if assuming for an argument sake, the money had been paid in the manner as pleaded in the plaint but fact of the matter is that Society returned the money back to defendant no.1, thus, is it not a case that appellant-defendant no.1 is forcibly compelled to return the money which he allegedly did not receive from the Society or from the plaintiff.

In order to rebut the evidence led by the plaintiff qua execution of the agreement to sell, much less payment of ₹10,80,000/- to produce the bank statement for encashment of draft, perhaps defendant no.1 was afraid that truth may not be out or would level faced with some criminal prosecution, therefore, the adverse inference has rightly been drawn.

There is no dispute to the ratio decidendi culled out in the judgments cited above but all the judgments are based upon the facts and circumstances of each case, for, property in dispute in such cases was not subject matter of allotment by the Society where there are different parameters and yardsticks governing the allotment. There was no certain contingency in the present case as on the date when the agreement to sell

was executed, defendant no.1 was not having title in the property yet he had received a sum of ₹10,80,000/-. He could not have gone scot free with the aforementioned amount as the allotment subsequently was in his favour. It would tantamount to be drawing double benefit and apparent cheating. In my view, there is no error apparent on record in the findings recorded by the Lower Appellate Court enabling this Court to form a different opinion. Thus, questions posed above are answered in favour of respondent/plaintiff.

As an upshot of my findings, I do not find any illegality and perversity in the findings of the Lower Appellate Court which are based upon the appreciation of oral and documentary evidence, much less no substantial question of law arises for adjudication of the present appeal.

No other argument has been raised.

Resultantly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

March 01, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No