

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No. 4816 of 2017 (O&M)
Date of decision: 12.09.2018

Vijay Pal

.... Appellant

Versus

Ravinder Kaur and others

..... Respondents

BEFORE: HON'BLE MR. JUSTICE B.S. WALIA.

Present: Mr. Sandeep Bansal, Advocate for appellant.

B.S. WALIA, J.

[1] Regular Second Appeal has been filed by appellant/plaintiff No.2 against the judgment and decree dated 01.12.2016 passed by the learned Additional District Judge, Bathinda modifying the judgment and decree dated 24.04.2015 passed by the learned Civil Judge (Jr. Div.), Bathinda whereby the civil suit filed by the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had been partly decreed, by holding that forfeiture of no part of the earnest money could be allowed.

[2] Brief facts of the case leading to the filing of the instant appeal are that the appellant /plaintiff No.2 and proforma respondent No.3/plaintiff No.1 filed a suit for possession by way of specific performance of agreement to sell dated 04.02.2008 executed in their favour by respondent No.1/defendant qua plot No.111 measuring 500 sq. yards situated in Co-operative Housing Complex, Bathinda and for permanent injunction for restraining the defendant from alienating the suit property and in the

alternative for relief of recovery of ₹ 20 lakh being the amount of earnest money and pre-estimated damages.

[3] Respondent No.1/defendant i.e. owner of plot measuring 500 sq. yards bearing No.111, situated in Housefed Colony, Bathinda agreed to sell the same to appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 for a consideration of Rs.30 lakh by receiving payment of earnest money of ₹ 10 lakh vide agreement to sell dated 04.02.2008 . The sale deed was to be executed in favour of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 on or before 05.04.2008. It was further agreed amongst the parties that in case respondent No.1/defendant failed to get the sale deed executed by the stipulated date, appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 would be at liberty to get the agreement specifically enforced and sale deed executed and registered in their favour through Court and further that if respondent No.1/defendant due to any reason whatsoever did not execute the sale deed then she would be liable to pay equal amount of earnest money as pre-estimated damages in addition to amount of earnest money of ₹10 lakh to the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1. It was further agreed that in case appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 failed to get the sale deed executed and registered in their favour by the stipulated date then they would still have the right to get the sale deed executed in their favour upto 05.05.2008 by paying additional sum of ₹ 45,000/- over and above the agreed rate and in case of default on the part of the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1, to get the sale deed executed and registered upto 05.05.2008, earnest money paid by the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff

[4] Civil suit was filed by appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 alleging that ever since the date of execution of agreement of sale dated 04.02.2008 and even as on date, appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 were ready and willing to perform their part of the agreement and get the plot transferred in their names, but respondent No.1/defendant had been putting off the matter under one pretext or the other and for that matter even had failed to clear the outstanding dues, that they had approached respondent No.1/defendant for the execution of the sale deed on 05.04.2008 to get the plot transferred in their names but she failed to get necessary documents executed in their favour and even after 05.04.2008, appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had been trying to contact respondent No.1/defendant for the execution of the sale deed but she had evaded giving any response to them, that appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had requested respondent No.1/defendant to come present in the office of the Sub-Registrar, Bathinda on 05.05.2008 for getting the sale deed executed and registered and get balance consideration of ₹ 20 lakh plus additional price of ₹ 45,000/- but to no avail. It was further the stand of appellant/ plaintiff No.2 and proforma respondent No. 3/ plaintiff No. 2 that they had reached the office of the Sub-Registrar, Bathinda on 05.05.2008 along with balance amount of sale consideration and amount required for other expenses and waited there for respondent No.1/defendant from 9.00 am to 5.00 p.m., but she did not turn up to get the sale deed executed in their favour whereupon the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 got marked their presence in the office of the Sub-Registrar, Bathinda on 05.05.2008 to show their presence, readiness and willingness to get the sale

deed executed. In the circumstances, ultimately, on 20.05.2008, appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 got issued a legal notice upon respondent No.1/defendant calling upon her to get the plot transferred in their names within seven days, but she failed to give any reply to the notice, therefore civil suit was filed for decree of possession by way of specific performance of agreement dated 04.02.2008 and in the alternative for recovery of ₹ 20 lakhs as per details given above.

[5] Respondent No.1/defendant in her written statement while admitting agreement to sell dated 04.02.2008 denied the claim of the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 by taking up the stand that the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had concealed material facts and not come to Court with clean hands as they had not disclosed that they were responsible to get the NOC from the office of Housefed although it was agreed that respondent No.1/defendant (seller) would be bound to get all the formalities, if any, in favour of the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 (purchaser) completed in the office of Housefed. It was further denied that the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 ever approached respondent No.1/defendant for getting the sale deed executed and registered on 05.04.2008. Respondent No.1/defendant took up the stand that she went to Bathinda on 04.04.2008 to perform her part of the agreement and asked the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 to get the sale deed of the plot in question executed and registered and to give the balance sale consideration to her, but they conveyed to her husband that they could not arrange the balance consideration and that they would arrange the amount on the next date for execution and registration of sale deed i.e. 05.05.2008. Respondent

No.1/defendant also denied appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 having reached the office of the Sub-Registrar, Bathinda on 05.05.2008 and of having got marked their presence vide affidavit at Sr. No.1122. It was stated that said entry was manipulated by appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 in connivance with the officials of the Sub-Registrar, Bathinda. Respondent No.1/defendant further pleaded in her written statement that she had gone to Bathinda on 05.05.2008 to get the sale deed executed and registered whereupon the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 told her that they would get the sale deed executed for less amount than the actual sale consideration to which she did not agree. Thereupon appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 promised respondent No.1/defendant that they would reach the Tehsil premises after arranging entire amount whereupon she and her husband waited for them till 5.00 p.m. but they did not turn up to get the sale deed of the plot in question executed. Thereafter, respondent No.1/defendant got her presence marked before the Sub-Registrar, Bathinda by getting attested affidavit at serial No. 1121. Further stand of respondent No.1/defendant was that appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had committed breach of terms and conditions of the agreement to sell by not getting the sale deed of the plot in question executed and registered on the stipulated date after payment of balance sale consideration to her, thus the amount of earnest money paid by them had been forfeited.

[6] On the basis of the pleadings of the parties, the following issues were framed :-

(1) *Whether the plaintiffs are entitled to the relief of possession as prayed for? (OPP)*

- (2) *Whether the plaintiffs in alternative are entitled to the relief of recovery as prayed for? OPP*
- (3) *Whether the plaintiffs are entitled for the relief of permanent injunction as prayed for? OPP*
- (4) *Whether the suit property valued for the purpose of Court fee and jurisdiction? OPP*
- (5) *Relief.*

[7] Issue No.1 was decided against the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 and in favour of respondent No.1/defendant while issue No.2 was decided partly in favour of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 while issue No.3 was decided against the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1. However, issue No.4 was decided in favour of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 and the suit of the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 was partly decreed to the extent of recovery of Rs.5 lakh.

[8] The learned trial Court came to the conclusion that the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had admitted that they had failed to obtain NOC as per the terms and conditions agreed upon from the competent authority, therefore, it could not be said that they had proved their readiness and willingness to perform their part of the contract and Secondly, that since appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had failed to take positive steps to obtain the NOC and to comply all the formalities to get NOC which was agreed to by them at the time of agreement, the question of their presence in the office of the Sub-Registrar, Bathinda was of no use. Thirdly, that the presence of

respondent No.1/defendant in the office of Sub-Registrar on 05.05.2008 stood established from Entry No.1121 marked in the register of the office of Sub-Registrar though thereafter entry at serial No. 1122 is regarding the presence of the plaintiff in the office of the Sub Registrar Bathinda and in the facts of the case and in keeping with the principle of equity, the forfeiture of the entire money of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 was not permissible, consequentially, they were entitled to recover half of their earnest money from respondent No.1/defendant without interest.

[9] Aggrieved against the order of the learned Civil Judge (Jr. Div.), Bathinda, appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 filed an appeal before the learned First Appellate Court. However, while upholding the judgment and decree of the trial Court denying specific performance, the learned First Appellate Court modified the same by holding that although non execution of the sale deed was attributable to appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1, yet they were entitled to receive back the entire earnest money paid by them without any interest.

[10] Learned counsel for the appellant contended that the appellant/plaintiff No.2 was always ready and willing to perform his part of the agreement but respondent No.1/defendant denied execution of the sale deed and registration of the plot on frivolous grounds. Therefore, it was apparent that respondent No.1/defendant was not ready to sell the plot especially since she had not made any application for transfer of the plot. Therefore, she was liable to pay interest/damages on earnest money as per the agreement. Learned counsel further contended that the Courts below

performance especially in view of the stand of the appellant that he was ready and willing to get the sale deed executed even as on date of filing civil suit.

[11] I have considered the submissions of learned counsel for the appellant and with his able assistance have gone over the record.

[12] Admittedly, there is no dispute with regard to the execution of the agreement to sell dated 04.02.2008 nor with regard to payment of earnest money of Rs.10 lakhs. However, as per the evidence of PW-4 (appellant herein) as well as perusal of agreement to sell Ex.PW-1/C, there is no denial of the fact that NOC and other documents from Housefed Office were to be obtained by none other than the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1. It has been categorically admitted by PW-4 during his cross-examination that as per the terms of the agreement to sell, he was liable to obtain NOC but he never deposited any amount in the office of the Housefed to obtain NOC. He further admitted in his cross-examination that he never applied to Housefed for obtaining NOC. Though PW-4 stated that he had moved an application in Housefed for obtaining NOC but also took up the stand that said application was declined on the ground that the seller was required to be present for moving of the application but he also admitted that he did not inform about the aforementioned aspect to the defendant. Moreover, the application alleged to have been moved by PW-4 before Housefed Office for obtaining NOC was also not brought on record before the learned trial Court. Besides, PW-4 further admitted that he had never intimated respondent No.1/defendant that he had approached the office of Housefed and his application was not entertained by Housefed Authorities in the light of Rule 44 of the Housefed

nor was any such averment taken in the notice issued by appellant/plaintiff No.2 to respondent No.1/defendant. Nor is it the case of the appellant/plaintiff No.2 that he had produced the agreement to sell before the Housefed Authorities in order to assert that he was a prospective buyer and needed to clear the dues, so as to get the property transferred in his name. In the absence of any such evidence coming on record, it is quite clear that appellant/plaintiff No.2 had not made the required efforts in a bona fide manner to obtain NOC from the Housefed Society nor can the appellant/plaintiff No.2 take shelter of Rule 44 of the Housefed Society on failure to prove that his application for NOC was declined by the Housefed Authorities by citing Rule 44 of Housefed Society.

[13] As regards readiness and willingness of appellant/plaintiff No.2 and proforma respondent No. 3 / plaintiff No. 2, it needs noticing here that as per the case of the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1, they remained present in the office of the Sub-Registrar, Bathinda for getting the sale deed executed and registered in their favour and for that matter had produced on record affidavit Ex.PW-1/A showing that on 05.05.2008, Ajaib Singh and Vijay Pal were present in the office of the Sub-Registrar, Bathinda for the purpose of getting the sale deed executed and registered, besides, one endorsement Ex.PW-2/A of affidavit No.33505 dated 23.04.2008 regarding presence of the wives of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 i.e. Sunita Rani and Harkeet Kaur in the office of Sub-Registrar had not been proved and was rejected by the learned Courts below on the ground that there were nothing on the record to show that respondent No.1/defendant had also been called upon to execute the sale deed on 23.04.2008, besides, only the endorsement had been proved and not the affidavit. On the other hand, respondent No.1/defendant

had proved on record affidavit Ex.DW-1/A dated 05.05.2008 registered at serial No.1121 on 05.05.2008 as executed by her to prove her presence in the office of the Sub-Registrar, Bathinda for performing her part of the agreement. It was further the stand of respondent No.1/defendant that on 05.05.2008, she was ready and willing to perform her part of the agreement but appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 were insisting upon her to accept part payment in black money and part payment in white money by showing the sale consideration to be of lesser value than the value as incorporated in the agreement to sell so as to enable them to avoid stamp duty but she had denied, whereupon appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had left the office of the Sub-Registrar with a promise to return with white money. However, when they did not turn up till 5.00 p.m. with white money, respondent No.1 / defendant got her presence marked before the Sub-Registrar and thereafter returned to her home.

[14] The stand of the appellant/plaintiff No.2 that there was no question of getting the sale deed registered as it had been admitted by respondent No.1/defendant that only transfer of the property was to be done in the office of Housefed and there was no requirement for execution and registration of the sale deed was controverted by respondent No.1/defendant before the Courts below by contending that if there was no requirement for execution and registration of the sale deed then what was the need for the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 to appear in the office of the Sub-Registrar, Bathinda. The stand of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 that they had got their presence marked in the office of Sub-Registrar, Bathinda

their presence marked in the office of the Sub-Registrar as the NOC was to be obtained from the Housefed Office.

[15] Appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 also moved an application for additional evidence in order to bring on record that they had remained present in the office of Housefed Society for obtaining NOC but the same was declined by the Courts below and revision against said order was also dismissed by this Court. The Courts below observed that it was beyond comprehension as to how a person could remain present at two different places at a given point of time. Consequentially, in view of the mutually contradictory pleas taken by appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1, the courts below concluded that on the one hand the appellant/plaintiff No.2 admitted that he had failed to obtain NOC from the Housefed Society and on the other hand, he stated that he remained present in two offices i.e. Office of Sub-Registrar, Bathinda as well as the office of the Housefed Society on 05.05.2008 for getting the property transferred in his name whereas the notice did not spell out any such facts and in the circumstances, the learned First Appellate Court held that appellant/plaintiff No.1 was trying to set up a smoke screen in front of the eyes of the Court for obtaining the discretionary relief of permanent injunction and specific performance of the contract by misstating facts whereas factually, the conduct of appellant/plaintiff No.2 had not remained above Board in establishing their readiness and willingness to perform their part of the agreement to sell. The learned First Appellate Court also held that when there was a specific allegation on the part of respondent No.1/defendant that the appellant/plaintiff No.2 was insisting upon her to accept some part of the sale consideration in white money and the remaining part in black money then it was imperative upon appellant/plaintiff No.2 to

prove that he had in his possession sufficient white money to get the sale deed executed and registered or at least to pay the balance sale consideration to respondent No.1/defendant to get the property transferred in his name and that in the circumstances, the plea of respondent No.1/defendant that the sale could not materialise as the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 were not ready with enough white money to pay the balance sale consideration, was found to be well-founded and genuine and liable to be accepted on preponderance of the probabilities.

In the circumstances, the First Appellate Court held that appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 had failed to prove their readiness and willingness to perform their part of the agreement to sell by leading any cogent and convincing evidence on record. However, in the absence of proof of any loss incurred by respondent No.1/defendant due to non-execution of the sale deed in question, the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 were held entitled to the alternative relief of money decree without forfeiture of earnest money to any extent.

[16] A perusal of the position as noted above reveals beyond an iota of doubt that as per the terms and conditions agreed upon between the parties, NOC was to be obtained by the appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1. PW-4 (i.e. appellant herein) admitted not only the aforementioned terms and conditions of agreement to sell but also that he never deposited any amount in the office of Housefed for getting the NOC. Thus, there is a clear cut admission on the part of appellant/plaintiff No.2 and proforma respondent No.3/plaintiff No.1 that no steps were taken by them as per the terms and conditions of the agreement to sell. Once it stands established that the appellant/plaintiff No.2 and proforma

respondent No.3/plaintiff No.1 failed to comply with the terms and conditions of the agreement to get the NOC then the question of their being readiness and willingness to perform their part of the agreement did not arise.

[17] In the circumstances, the judgment and decree passed by the learned trial Court upheld after modifying the same by the First Appellate Court vide judgment and decree dated 01.12.2016 declining prayer for specific performance of the agreement to sell while allowing refund of entire earnest money without any interest is in accordance with law. No substantial question of law arises. Accordingly, I find no circumstance whatsoever warranting interference with the same.

[18] In the circumstances, the Regular Second Appeal being bereft of merit, is dismissed in limine. Accordingly, the application seeking condonation of 26 days' delay in filing the appeal is also dismissed.

(B.S. Walia)
Judge

12.09.2018
amit

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