

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

RSA No.5552 of 2017 (O&M)

Date of Decision: July 04, 2018

Mohinder Singh

---Appellant

Versus

Naib Singh

---Respondent

Coram: Hon'ble Mr. Justice Harinder Singh Sidhu

Present: Mr. Mahavir Sandhu, Advocate for the appellant.

HARINDER SINGH SIDHU, J.

For the reasons stated therein, CM No.14680-C of 2017 for making good the deficiency in court fee, is allowed, subject to all just exceptions.

The plaintiff has filed this regular second appeal against the judgments of the Courts below, whereby his suit was dismissed.

The plaintiff filed a suit for possession by way of specific performance of agreement to sell dated 15.8.2010 directing the defendants to execute and register the sale deed in respect of land measuring one bigha four biswas comprised in khewat No.46/33, Khatoni No.51, Khasra No.1302 situated in village Dhamala, Tehsil Kalka, District Panchkula. He also sought a decree of declaration to the effect that legal notice dated 18.11.2010 of the defendant terminating the agreement and forfeiting the earnest money was illegal, null and void and not binding on the plaintiff.

The case of the plaintiff was that the defendant had vide agreement to sell dated 15.8.2010 agreed to sell the suit land to the plaintiff

for a sale consideration @ Rs.8,00,000/- per bigha. A sum of Rs.1.5 lacs was given to the defendant as earnest money on the same day. The sale deed was to be executed on 15.11.2010. On 15.11.2010 the plaintiff went to the office of Sub-Registrar Kalka alongwith the balance sale consideration and expenses for purchase of stamp papers etc. to get the sale deed registered. He remained present in the office of Sub-Registrar, Kalka from 9.00 AM to 5.00 PM. However, the defendant did not reach there. The plaintiff got attested an affidavit from the Executive Magistrate, Kalka indicating his presence. On 18.11.2010, the defendant through his counsel, sent a legal notice to the plaintiff terminating the agreement and forfeiting the earnest money. The plaintiff sent a reply to the notice on 8.1.2011 through which he asked the defendant to come to the office of Sub Registrar, Kalka on 31.01.2011 for execution of the sale deed. Even on 31.1.2011 the plaintiff remained present in the office of Sub-Registrar Kalka upto 5.00 PM alongwith a cheque of Rs.8,10,000/- but the defendant did not turn up for execution of the sale deed whereupon the plaintiff again got his presence marked in the office of Sub-Registrar Kalka by getting attested an affidavit from the Executive Magistrate Kalka. It was pleaded that the plaintiff was always ready and willing to perform his part of the agreement and he was still ready and willing to do so.

In the written statement filed by the defendant, the agreement to sell dated 15.8.2010 was admitted. It was also admitted that the defendant had received earnest money of Rs.1.5 lacs from the plaintiff. It was stated that on 15.11.2010 the defendant had remained present in the office of Sub-Registrar, Kalka from 9.00 AM to 5.00 PM to perform his part of the agreement. However, as the plaintiff was not able to arrange the balance sale

consideration, he did not reach there despite the defendant having contacted him. The defendant got marked his presence before the Executive Magistrate by getting attested an affidavit. The defendant served a legal notice dated 18.11.2010 on the plaintiff informing him that he had terminated the agreement and forfeited the earnest money as time was of essence. It was pleaded that the defendant was in dire need of money and hence, he sold the suit land to one Ms. Amrik Kaur wife of Baljeet. Regarding his alleged absence on 31.1.2011, it was pleaded that he was not required to reach the office of Sub-Registrar Kalka on that day as the agreement to sell had already been cancelled and earnest money forfeited by him.

In order to prove his case the plaintiff appeared as PW-1. Ms. Bharti Pahal Naib Tehsildar Kalka appearing as PW-2 admitted her signatures on the affidavits dated 15.11.2010 and 31.1.2011 of Mohinder Singh plaintiff regarding his presence in the office of Sub-Registrar, Kalka. PW-3 Vicky Stamp Vendor deposed that the plaintiff had purchased the stamp papers for affidavit dated 15.11.2010. PW-4 Abhinav Raj, Manager Andhra Bank deposed that the plaintiff had an account with the bank and as per the statement of account for the period 1.7.2010 to 24.2.2011 an amount of Rs.27,30,148/- was lying in the said account. PW5 R.K. Sharma, official of Parwanoo Urban Cooperative Bank, District Solan deposed that Cheque No.211208 dated 31.1.2011 for an amount of Rs.8,10,000/- had been drawn in favour of defendant-Naib Singh. The cheque was later cancelled on 5.2.2011. PW6 Jarnail Singh, attesting witness to the agreement to sell identified his signatures thereon and deposed regarding the payment of earnest money of Rs.1.5 lacs to the defendant by the plaintiff.

The defendant in support of his case examined himself as DW-1. DW-2 Ram Asra, Lambardar of village Rajjipur deposed that the defendant had remained present in the office of Sub-Registrar Kalka on 15.11.2010. He also admitted his signatures over the said affidavit Mark DA.

Considering that the defendant had admitted the execution of the agreement to sell dated 15.08.2010 and the receipt of earnest money, learned Trial Court held that the only issue between the parties was regarding the readiness and willingness of the parties to perform their part of the agreement. The plaintiff had proved his presence before the Sub-Registrar Kalka on 15.11.2010 and 31.1.2011. The defendant, on the other hand, had placed on record his affidavit Mark DA regarding his presence in the Office of Sub-Registrar on 15.11.2010. The Court held that though the original of the affidavit dated 15.11.2010 executed by the defendant had not been produced, however, considering that Ms. Bharti Pahal, the then Naib Tehsildar, Kalka appearing as PW-2 had admitted her signatures on the said affidavit and also admitted that the defendant had remained present in the Office of Sub- Registrar, Kalka on 15.11.2010 it had to be taken that the defendant remained present in the office of Sub- Registrar Kalka on 15.11.2010.

In view of the fact that both the plaintiff as well as the defendant were proved to be present in the office of Sub-Registrar, Kalka on 15.11.2010 the Court then proceeded to consider the question as to who was liable for the frustration of the agreement.

Learned Trial Court noted that though the plaintiff had

sufficient amount on 15.11.2010 to defray the balance sale consideration as

has been deposed by PW-4 Manager Andhra Bank, the only question that remained to be considered was the willingness on his part to perform the agreement. The Court noted the following acts/omissions on the part of the plaintiff which negated his plea of willingness to perform his part of the contract:

- Though the plaintiff alleged that the defendant did not come to the office of Sub-Registrar Kalka on 15.10.2010 for registration of the sale deed but there was no pleading that the plaintiff either telephonically or otherwise asked the defendant on 15.11.2010 to get the sale deed registered in his favour nor is there any pleading to the effect that he had offered the balance sale consideration to the defendant on 15.11.2010. The absence of such a plea was taken as an adverse inference in regard to the willingness of the plaintiff to perform his part of the agreement considering that the defendant had also been able to prove his presence in the office on that day.
- The plaintiff had also not purchased the stamp papers for execution of the sale deed. He had also admitted that he had not taken the balance sale consideration to the office of Sub-Registrar, Kalka in the form of cash, rather he only had taken his cheque-book to the office for making payment of the balance sale consideration. This was taken as a lack of willingness on the part of the plaintiff to get the sale deed registered.
- The original agreement to sell was not produced before the Court. It was only vaguely stated that the original agreement to sell was probably lying in the possession of the Jarnail Singh, Property Dealer.

The Trial Court, thus, held that the plaintiff had failed to prove

the plaintiff had failed to get the sale deed registered on 15.11.2010, the legal notice dated 18.11.2010 issued by the defendant to the plaintiff terminating the agreement and forfeiting the earnest money could not be termed to be illegal.

Accordingly, the suit was dismissed.

The Learned Lower Appellate Court affirmed the findings of the Trial Court.

The Lower Appellate Court additionally noticed that the plaintiff had admitted the receipt of notice dated 18.11.2010, whereby, the defendant cancelled the agreement and forfeited the earnest money. The said notice was issued just three days after the date fixed for execution of sale deed. But the plaintiff remained silent thereafter. He made no immediate effort to contact the defendant. It was only on 8.1.2011 i.e. about one and half month after receipt of the notice that he replied to the notice and called upon the defendant to be present before the Sub Registrar Kalka to execute the agreement on 31.01.2011. The agreement having already been terminated by the defendant, his calling upon the defendant to execute the agreement on 31.1.2011 was held to be meaningless. He filed the suit on 3.3.2011. This delay at each step by the plaintiff was taken as further evidence of lack of his readiness and willingness to perform the contract.

While accepting that that plaintiff had been able to establish that he had sufficient means to pay for the balance sale consideration, findings of fact with regard to his failure to prove his readiness and willingness to execute the agreement to sell have been recorded by the Courts below. Learned counsel for the appellant has not been able to

establish as to how these findings are perverse or against the record.

No question of law arises for decision in this appeal.

Dismissed.

Since the appeal has been dismissed on merits, therefore, there is no necessity of deciding the application for condonation of delay in re-filing the appeal.

July 04, 2018

(HARINDER SINGH SIDHU)
JUDGE

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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No