

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

RSA No.77 of 2018 (O&M)

Date of decision:04.05.2018

Kailash Kaur

... Appellant

Vs.

Branch Manager, Sify Ltd. and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Narender Singh Kamboj, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

Appellant-plaintiff is in Regular Second Appeal against the judgment and decree dated 26.05.2015 passed by Civil Judge (Junior Division), Chandigarh, whereby, suit for mandatory injunction and declaration to the effect that plaintiff had paid a sum of ₹1,76,000/- as rent under rent agreement dated 10.12.2007 till filing of suit, has been dismissed and judgment and decree dated 16.08.2016, whereby, appeal has been partly allowed with proportionate costs.

The appellant-plaintiff instituted the suit on the premise that agreement dated 15.11.2007 was entered into between the parties. As per the terms and conditions of the agreement, plaintiff had paid the amount as per Schedule II of the agreement and also set up the Sify-i-way internet cafe and invested huge sum of ₹4,36,500/- but before execution of the agreement, representative of defendants no.1 and 2, Mr. Aseem, the then

Marketing Manager Chandigarh had visited the site and found the site fit to run the Sify-i-way (cyber cafe) and he also promised the plaintiff that monthly sale of cyber cafe from the site will be about ₹35,000/- to ₹40,000/-. On this allurement and promise of Marketing Manager, plaintiff set up Sify i-way and invested a total amount of ₹4,36,500/- on the Sify-i-way on computer with hardware, legal and licensed software etc. In the first year, total sale was only ₹9000/- per month. The plaintiff approached to the representative of defendants no.1 and 2 regarding incurring loss in running the Sify i-way but he assured that they will conduct promotional activities at various places in the locality as per clause 3.7 of the agreement but nothing was done. In the second year also monthly sale was only ₹9500/- per month. The various reminders were sent to defendants no.1 and 2 but no action had been taken. Plaintiff was also required to enter into rent agreement with the owner of the property for installation of mass antenna but the defendants clearly stated that roof right for installation of subscriber unit were to be procured by the plaintiff. The plaintiff had to enter into rent agreement with owner of the property on 10.12.2007, vide agreement, rate of rent was fixed at the rate of ₹3000/- per month with an increase of ₹500/- per year. The plaintiff incurred loss and closed the Sify-i-way by giving two months advance notice to defendants no.1 and 2 on 10.02.2010 through e-mail and also intimation in writing as well. The plaintiff deposited an amount of ₹1,05,000/- with defendant no.1 for i-way as per Schedule II of the agreement, out of which ₹25,000/- was as a security

deposit and refundable after closing of the Sify-i-way but defendants did not refund this amount till date, therefore, necessity arose to file the suit.

Defendants No.1 and 2 were proceeded against ex parte. Defendant no.3 filed written statement stating therein that he was owner of the premises and had entered into rent agreement with the plaintiff w.e.f. 10.12.2007 for installing the mass antenna for the purpose of giving connectivity to the Sify i-way @ ₹3000/- per month. In the month of February 2010, the plaintiff told defendant no.3 as well as to his representative that the Sify i-way was rolled back.

Since the parties were at variance, the trial Court framed as many as 6 issues including the issue of Relief. Both the parties in support of their case examined the witnesses and brought on record the documentary evidence.

On the basis of preponderance of evidence, the trial Court dismissed the suit. However, the Lower Appellate Court found the agreement to be correct and ordered for refund of earnest money without interest.

Mr. Narender Singh Kamboj, learned counsel for the appellant-plaintiff submits that the Courts below ought to have ordered for interest payment on the security deposit of ₹25,000/-. Moreover, the Courts below have committed illegality and perversity in not granting the damages as claimed, for, there is mis-representation and mis-appreciation of the terms and conditions of the agreement, for, Clause 3.2 clearly provides that

agreement between appellant-plaintiff and the respondent-defendants. The appellant was to procure the roof right for giving connectivity to the i-way and agreement was entered with the owner of the premises in respect of SCF 78 Govind Vihar, Baltana, Zirakpur. The defendants had installed the mass antenna of about 30' height over the roof but since the plaintiff did not incur the profit as promised by the defendants, there was breach of obligation necessitating the plaintiff to file the suit for mandatory injunction and for that purpose, the plaintiff had incurred loss of income. Non-appearance of defendants no.1 and 2 was also clincher that they were at fault.

I have heard the learned counsel for the appellant-plaintiff, appraised the judgments and decrees of both the Courts below as well as terms and conditions of the agreement and of the view that there is no force and merit in the submissions of Mr. Kamboj, for, as per the terms and conditions of the agreement, there was no condition that when the Sify was to close down, security amount of ₹25,000/- deposited with defendants would entail interest. No documentary evidence has been placed on record to establish that agreement or some writing by defendant no.1 to assure the income of plaintiff @ ₹35,000/- per month in the business. In the absence of evidence or material on record, rightly so, the Courts below had declined damages. The factum of receipt of ₹25,000/- had been proved on record through the contents of agreement, the Lower Appellate Court had modified the judgment and decree of the trial Court by ordering the refund of ₹25000/-. The plea vis-a-vis payment of interest cannot be accepted, for,

terms and conditions of the agreement did not envisage that security deposit would carry certain interest.

The appeal is accompanied by an application seeking condonation of delay of 221 days in filing the appeal. The application is supported by the affidavit. The explanation given in the application is bereft of reasoning as each and every day of delay is conspicuously wanting.

In view of the aforementioned, the appeal is dismissed on merits as well as on ground of limitation.

(AMIT RAWAL)
JUDGE

May 04, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No