

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

**RSA No.90 of 2019 (O&M)
Date of Decision:23.01.2019**

M/s Exact Developers and Promotes and Private Limited

.....Appellant

Versus

Suman Khurana and another

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Bipin K. Dwivedi, Advocate
for the appellant.

LISA GILL, J.

Appellant-defendant no.1, is aggrieved of judgment and decree dated 19.11.2015, passed by the learned Civil Judge (Jr. Division), Gurgaon, as well as judgment and decree dated 08.08.2018, passed by the learned Additional District Judge, Gurugram, whereby suit for recovery filed by plaintiff-respondent no.1 has been decreed.

Brief facts necessary for the adjudication of the case are that a suit for recovery of ₹16,87,500/- along with interest was filed by plaintiff-respondent no.1 while pleading that she was a simple housewife. The present appellant and respondent no.2 were stated to be companies incorporated under the Companies Act, 1956. Official of the defendants approached the plaintiff and her husband in February 2007 claiming to be real estate developers of repute. It was projected to the plaintiff and her husband that the defendants were initiating a modern and prestigious commercial project having all facilities at Manesar. The proposed project, it was stated would

yield handsome returns and investment of ₹35 lakhs would yield huge profit and rental income. Plaintiff was told that a very attractive scheme had been introduced for a few days under which the plaintiff could obtain a well located, centrally air conditioned commercial unit on the ground floor at the rate of ₹2500/- per sq. feet, but she would have to make payment of 50% in advance. Scheme was stated to be different from the normal time linked or construction linked payment plans, normally offered by the defendants and it was projected to be a rare opportunity. Defendants painted a rosy picture of their project and induced the plaintiff to invest money. Being swayed by the representations of the defendants, plaintiff agreed to invest ₹16,87,500/- for a centrally air conditioned commercial unit, measuring 1350 sq. ft., near the main entrance at the rate of ₹2500/- sq. ft. Plaintiff deposited the amount of ₹16,87,500/- vide cheque dated 10.02.2010. When the plaintiff demanded the allotment letter/receipt regarding the proposed unit, the defendants promised to send the same within a month as it was to be issued from the head office of the present appellant at Delhi. The cheque in question was got encashed by the appellant. It was conveyed by the defendants to the plaintiff that as there was a delay in launching of the project, therefore the allotment letter would be issued to her as and when the project is finally launched. Believing the representations of the defendants, plaintiff waited, but to no avail and ultimately she insisted that allotment papers to be delivered to her and she also sought information about the progress of construction. At this stage, the defendants disclosed that construction was yet to start, but the price of the unit stood enhanced to ₹5500/- per sq. ft., and in case she still wanted allotment of the unit, she would have to pay at the rate of ₹5500/-

per sq. ft. The plaintiff refused to accept the allotment at the new rate afforded by the defendants and sought refund of her money alongwith interest stating that she was not interested in having any dealings with such unscrupulous persons. Defendants refused to return the amount. Hence the suit was filed.

Present appellant-defendant no.1 while resisting the suit filed a written statement taking various preliminary objections. Averments on merits were controverted. It was stated that the plaintiff had booked a commercial site at the rate of ₹6250/-per sq. ft., through and on behalf of some company. She did not pay the requisite amount, neither furnished the required documents despite numerous requests to the husband of the plaintiff, who often used to visit the office of appellant-defendant no.1 on behalf of the plaintiff. Though, the site was booked on behalf of some company, the plaintiff sought refund of the cheque in her personal name. It was further pleaded that the appellant-defendant no.1 requested the plaintiff to submit the authority letter/power of attorney being the authorized signatory of the company and her statement of account showing encashment of the alleged cheque, but she failed to do so. Dismissal of the suit was prayed for.

Defendant no.2 filed separate written statement submitting that it had been requested by defendant no.1 to handle the marketing of the project namely “Commercial Integrated Project Manesar”. Marketing Management Agreement dated 01.02.2007 had been executed between both the defendants merely for the purpose of marketing of the project and defendant no.2 had no share or interest in the project and had nothing to do

with the amount received for booking of commercial space etc. Dismissal of the suit was prayed for.

Replication was filed. From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether plaintiff is entitled for recovery of Rs.22,95,000/- alongwith interest @ 12% per annum as prayed for?OPP
2. Whether suit of the plaintiff is not maintainable?OPD
3. Whether plaintiff has no cause of action to file the present suit?OPD
4. Whether suit of the plaintiff is totally false, frivolous and *malafide* in the eyes of law and plaintiff has not come to the court with clean hands?OPD
5. whether plaintiff has locus standi to file the present suit? OPD
6. Whether plaintiff is estopped from filing the present suit by his own acts and conducts?OPD
7. Whether suit of the plaintiff has not been properly valued for the purpose of court fees and jurisdiction?OPD
8. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the evidence on record, facts and circumstances of the case, concluded that defendant no.1(appellant) was liable to refund the amount in question which was proved to have been received by the appellant by way of cheque given by the plaintiff. Suit was accordingly decreed, directing defendant no.1 to refund the amount of ₹16,87,500/- along with interest at the rate of 12% per annum from 10.02.2007 till realization. Defendant no.2, it was concluded was not liable in the facts and circumstances of the case as it had nothing to do with the transaction between the plaintiff and defendant no.1.

Appeal filed by appellant-defendant no.1 was dismissed by the learned Additional District Judge, Gurugram, vide impugned judgment and

decree dated 08.08.2018 with a modification in the rate of interest which was reduced from 12% p.a., to 6% p.a.

Aggrieved therefrom, present appeal has been filed by appellant-defendant no.1.

Learned counsel for the appellant vehemently argues that both the learned Courts below have grossly erred in decreeing the suit filed by the plaintiff. In-fact, the plaintiff sought allotment of a commercial unit at the rate of ₹6250/- per square yard. A sum of ₹16,87,500/- was received as initial earnest money of the unit. The plaintiff sought allotment of the unit in favour of one S.R. Investments. However, vide letter dated 28.02.2008, plaintiff asked for the cancellation of the unit and sought refund of the amount in question. It was insisted by the plaintiff that the amount be refunded in her name and not in the name of S.R. Investments. The appellants afforded allotment of the plot at the price which was initially agreed upon i.e., ₹6250/- per square yard, but she refused to make the payment for the same. In this situation, once the allottee was not coming-forward to deposit the requisite amount, the appellant is entitled to forfeiture of the earnest money. He relies upon the judgments of the Hon'ble Supreme Court in **Satish Batra Vs. Sudhir Rawal, (2013) 1 Supreme Court Cases 345** and **H.U.D.A and another Vs. Kewal Krishan Goel and others, AIR 1996 (SC) 1981**.

It is further submitted that the appellants in order to show their *bona fide* offered to refund the entire amount deposited by the plaintiff, but without the component of interest. It is thus prayed that this appeal be allowed and the judgments and decrees passed by the learned Courts below

be set aside. Consequently suit filed by the plaintiff be dismissed throughout.

I have heard learned counsel for the appellant and have gone through the photocopy of the record which was requisitioned.

It is a matter of record that cheque dated 07.02.2007, Ex.PW1/2 was received by appellant-defendant no.1. The said cheque is proved to have been debited from the account of the plaintiff. Admittedly, the said cheque was encashed by the defendant-appellant. Learned counsel for the appellant is unable to deny that no written agreement was executed between the parties. In the written statement filed by appellant-defendant no.1, it is stated that the plaintiff had booked the alleged commercial site at the rate of ₹6250/- per sq. ft., though on behalf of one company, but the plaintiff demanded refund of the cheque in her personal name. Despite request by the appellant, she did not submit the requisite documents i.e. authority letter or power of attorney of being authorized signatory of the company besides statement of her account showing encashment of the alleged cheque. It is further stated in the preliminary objections that the plaintiff did not disclose the name of the company on whose behalf she admittedly booked the unit and plaintiff failed to produce the alleged bank statement showing encashment of the alleged cheque. It is further stated that the plaintiff is not entitled to refund of the booking amount as she herself violated the terms and conditions of the agreement and she did not deposit the required booking amount and it is due to this reason that the agreement could not be executed. It is categorically stated in the written statement that before seeking refund of the amount, the plaintiff is required to prove the payment

of the alleged amount.

The conduct of the appellant has been rightly deprecated by both the learned Courts below. It is a matter of record that the cheque dated 07.02.2007, Ex.PW1/2 from the plaintiff's account, was duly encashed by appellant-defendant no.1. DW-1-Sushil Kumar, authorized signatory of the appellant namely M/s Exact Developers and Promotes Private Limited admitted in his cross-examination that cheque Ex.PW1/2 was encashed by the company. It is further stated that the amount in question was taken as booking amount for the allotment of one unit. It is admitted by DW-1 that no unit buyer agreement was executed despite the receipt of the cheque in question. It is mentioned by DW-1 that the appellant is ready and willing to refund the amount of ₹16,87,500/- to the plaintiff, but without components of interest.

Learned counsel for the appellant on a pointed query of the Court, is unable to point out any evidence on record which reflects that commercial units to be constructed by the appellant were floated for sale/allotment at the rate of ₹6250/- per sq. ft., which was duly accepted by the plaintiff.

Argument raised by learned counsel for the appellant that once the allottee was not coming-forward to deposit the requisite amount, the appellant is entitled to forfeiture of the earnest money is misconceived and devoid of merit. As noticed earlier, there is no evidence on record that the plaintiff has backed out of any terms and conditions which were arrived at between the parties. To the contrary, it is evident from the evidence on record that the plaintiff had submitted a cheque of ₹16,87,500/- which was

accepted by the appellant without issuing any receipt etc. The said cheque was duly encashed by the appellant. Plaintiff has duly proved the deposit of the cheque, Ex.PW1/2 and its encashment by the appellant which is otherwise admitted by DW-1. Plaintiff's account is duly proved on record by PW-1-Tara Chand, Scale-I Officer, SBI New Colony Gurugram. It is to be noticed that the appellant had the audacity and temerity to take a stand in the written statement asking for proof of encashment of the said cheque. Judgements relied upon by learned counsel for the appellant are of no avail to the appellant in the facts and circumstances of the case.

No other argument has been raised.

Learned counsel for appellant-defendant no.1 is unable to point out any question of law much less substantial question of law which may be involved for consideration in this regular second appeal. Both the impugned judgements are well reasoned judgements rendered after proper appreciation and consideration of the evidence on record. Present is in-fact a case which calls for imposition of costs upon the appellant, but taking a lenient view on request of learned counsel for the appellant, I refrain from doing so.

No other argument has been raised.

Present appeal is, consequently, dismissed with no order as to cost.

23.01.2019
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.