

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 1492-2006 (O&M)

Date of Decision: 12.03.2020

Sumac International Limited and Another

... Appellant(s)

Versus

M/s Gases and Equipments (India) Pvt. Ltd. and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. Sangram Singh Saron and Ms. Shubhreet Kaur,
Advocates for the appellants.

Mr. Anil Chawla, Advocates
for respondents No.2 and 3.

Mr. Chetan Mittal, Senior Advocate
with Mr. Prateek Gupta, Advocate
for respondent No.4.

Anil Kshetarpal, J.

The plaintiff/appellants have filed the regular second appeal against the concurrent finding of fact arrived at by both the Courts below while dismissing a suit for possession by way of specific performance of the agreement to sell.

The parties, for convenience, would be referred to by their status in the learned trial Court. Defendant No.1 was allotted plot No. 15, Sector 18, Maruti Industrial Estate, Gurgaon measuring 14520 square yards. Defendant No.1 entered into an agreement to sell with regard to the area measuring 12015 square yards in favour of the plaintiffs on 19.09.1989. The total amount of sale consideration was agreed at ₹ 42,00,000/- out of which ₹ 4,50,000/- was paid as earnest money.

In fact, first document between the parties is a receipt dated 12.09.1989 Ex.D1, which reads as under:-

RECEIPT OF TOKEN ADVANCE

Received cheque No. 292076 dated 13/9/89 drawn on Bank of India, Nehru Place Branch, New Delhi for Rs./00 (Rs. Two lacs only) (subject to encashment) against sale of vacant part land as token advance in Plot No. 15, Sector 18, Maruti industrial Area, Gurgaon, measuring 12015 sq. yds. with frontage of 154 feet. Balance of Advance money as agreed by the Purchaser to paid by or before 18th Sept., 1989. The balance of total deal money shall be paid by or before sixty days & then shall the possession be handed over to the purchaser. Failure of any of the above two conditions, this amount shall stand forfeited & the purchaser shall have no claim on this amount. In case, there is flaw in the file, the amount of Rs.2/- lacs (Rs. Two lacs) will be refunded”.

Thereafter, a formal agreement to sell was executed on 19.09.1989. Clauses 2, 3 and 6 of the said agreement are relevant, which are extracted as under:-

“2. It is agreed by both the parties that M/s SUMAC INTERNATIONAL LIMITED shall pay all dues directly to UCO Bank, Parliament Street, New Delhi branch on behalf of M/s Gases & Equipments (India) Pvt. Ltd. to clear the outstanding dues of M/s Gases & Equipment (India) Pvt. Ltd. so that Clearance may be obtained from the Bank for all charges of the bank on the above said property. After settling all upto date

bank dues , balance amount (i.e. Rs.37,50 Lacs less Bank dues paid) shall be paid to the first party, after obtaining the Registered/Conveyance deed and power of attorney, Will, affidavit, transfer letter and all other document in original.

After clearance of Bank dues, first party shall hand over the possession of the said vacant plot area to the second party in proportion to the total payments made by the second party out of the total settled price.

3. *That the first party assures the second party that all amounts, payable in respect of the plot in question have been paid to the HUDA and nothing remains payable. In case any amount is found due upto date of possession, or any claim is made by HUDA in respect of the part of the plot the first party shall be bound to make the said payments, if any.*

4. XXXX XXXX XXXX

5. XXXX XXXX XXXX

6. *That the first party undertakes and assures the second party that the first party shall keep signing all the documents etc. in future to enable the second party to get the ownership transferred I the name of their firm/company. The costs and expenses for all such signing of the documents shall be borne by the second party. However, first party shall not claim any benefit for the same”.*

Pursuant to the aforesaid agreement to sell, defendant No.1 submitted an application to the competent authority for permission to

repayment of bank loan and notice from the bank had already been received. It is for this reason, it was agreed that entire payment would be made within a period of 60 days and the plaintiffs would deposit the amount due to the bank directly.

Application submitted by defendant No.1 for bifurcation was although forwarded, but was not approved immediately. Defendant no.1 sent a communication to the plaintiffs on 05.02.1990 requesting it to pay the amount to them or deposit in the bank and comply with the undertaking as defendant No.1 was suffering huge financial losses apart from making their future programme go haywire. On 19.02.1990, the plaintiffs sent a communication, which reads as under:-

“This has reference to your registered letter dated 5 February 1990 addressed to our Managing Director, Mr. A.K.Verma.

We are not in a position to connect your letter at all.

We do not think we have had any dealings with you.

Kindly let us have complete details of the case so that we could look into this matter forthwith”.

Thereafter, defendant No.1 sent a telegram on 06.04.1990 intimating that initial money stands forfeited. This telegram was followed by another communication dated 29.05.1990 to the same effect.

On 06.06.1990, the plaintiffs, while acknowledging the receipt of communications, informed that agreement to sell signed by both the parties provide that the balance payment is to be made after the completion of all the formalities. It was further communicated that the plaintiffs requested the defendant No.1 to withdraw the letter and if it does not, then to

sent by the plaintiffs to defendant No.1 is extracted as under:-

“Under the circumstance, I'd request you to withdraw your letter. Instead kindly pitch in your resources to resolve the issue on a best effort basis. I am hopeful it should get resolved. If it doesn't I'd advise you to return the initial money deposited with you”.

Ultimately, defendant No.1 withdrew its request for bifurcation of the plot. Thereafter, on 17.12.1992, defendant No.1 entered into an agreement to sell with defendant No.4 with respect to the entire total plot bearing No. 15 for a sum of ₹ 68,00,000/- and defendant No.1 cleared all the dues of the UCO Bank which had swelled to ₹ 53,00,000/- and the sale deed was executed.

The plaintiffs initially filed a suit for permanent injunction, which was later on withdrawn but the present suit was filed before withdrawal of the first suit.

Defendant No.1 contested the suit and pleaded that the plaintiffs were never ready and willing to perform their part of the contract and therefore, the amount has rightly been forfeited.

Both the Courts below, on appreciation of evidence, have found that the plaintiffs are not entitled to the decree, as prayed for.

This Court has heard the learned counsel for the parties at length and with their able assistance, gone through the judgments passed by both the Courts below and the record.

Learned counsel appearing for the appellants has submitted that forfeiture of the earnest money vide telegram dated 06.04.1990 followed by

communication dated 26.10.1991 sent by the property broker who was working as an agent of defendant No.1. He further submitted that in view of the aforesaid letter, both the Courts below have erred while returning the finding that the suit filed by the plaintiffs is barred by time. He further tried to impress upon this Court by reading Clause 2 of the agreement to sell to contend that the balance amount was payable only after the transfer letter has been issued by the Haryana Urban Development Authority (hereinafter referred to as “the HUDA”), the allotting agency of the plot in question.

On the other hand, learned senior counsel appearing for respondent No.4 has submitted that the communication dated 26.10.1991 does not help the plaintiffs as there was no offer from defendant No.1. He submitted that this communication was sent by the property broker and it does not help the plaintiffs. He further submitted that the time was essence of the contract which would be apparent from the language of the receipt dated 13.09.1989 as extracted above. He further submitted that the amount was to be deposited in the bank immediately because defendant No.1 had agreed to sell only to discharge the liability of the bank.

On critical analysis of the arguments of learned counsel for the parties, this Court is of the considered view that there is no substance in the present appeal on account of the following reasons.

The agreement to sell dated 19.09.1989 was void due to the mistake of fact on account of both the parties. In fact, the agreement to sell was entered into on the basis of a transfer policy of the industrial plots/bifurcation and fragmentation thereof dated 21.07.1989. The aforesaid policy was circulated by PHD Chamber of Commerce and Industry. It is

whereas the plot in question was allotted by the HUDA. Although defendant No.1 applied for bifurcation, which was favourably recommended, however, the HUDA, vide communication dated 11.06.1990, refused to grant permission. In view of the aforesaid communication, it is apparent that both the parties remained under mistake of fact that bifurcation of the industrial plot has been allowed by the HUDA.

Still further, on reading of the receipt dated 13.09.1989 and agreement to sell dated 19.09.1989, it is apparent that defendant No.1 had defaulted in repayment of bank loan and therefore, required the amount immediately. On careful reading of Clause 2 of the agreement to sell, which has been extracted above, it is apparent that the plaintiffs had agreed to deposit all the dues in UCO bank on behalf of defendant No.1. It is only in the next sentence, it has been written that after settling all upto date bank dues, the balance amount shall be paid to the first party, after obtaining conveyance deed and power of attorney, Will, affidavit, transfer letter and all other documents in original. Thus, it is apparent that the clearance of bank dues was the first step to make the agreement to sell workable. It is undisputed that the plaintiffs did not deposit the amount with the bank.

Still further, the plaintiffs are not proved to be ready and willing to perform their part of the contract on account of non-deposit of dues in UCO Bank on behalf of defendant No.1. Further, inspite of communication dated 05.02.1990, sent by defendant No.1 to the plaintiffs, the plaintiffs responded vide communication dated 19.02.1960 by pleading ignorance about any dealings. The operative part of the communication dated 19.02.1990 has been extracted above. Inspite of the above communication,

the plaintiffs did not deposit the amount with the bank. Even after telegram

sent by defendant No.1 to the plaintiffs dated 06.04.1990 followed by a communication dated 29.05.1990, the plaintiffs did not either offer to deposit the amount or pay to defendant No.1. On the other hand, vide communication dated 05.06.1990, the plaintiffs demanded refund of the amount paid. Thus, the plaintiffs cannot be held to be always ready and willing to perform their part of the contract.

Further, both the Courts below have correctly held that the suit filed by the plaintiffs was barred by time. Although, learned counsel for the appellants has submitted that communication dated 26.10.1991 extends the limitation, however, on careful reading thereof, this Court is of the considered opinion that the aforesaid communication does not extend the limitation for two reasons. First the communication dated 26.10.1991 is not by defendant No.1, it is sent by a property broker and secondly, the communication dated 26.10.1991 does not in any manner revive the agreement to sell entered into between the parties or result in revoking the forfeiture of the earnest money by defendant No.1.

It will be noted here that HUDA, for the first time, has permitted bifurcation only on 27.03.1992. Before the aforesaid communication, all attempts made by defendant No.1 as well as the plaintiffs were not acceded to.

Learned counsel for the appellants further submitted that in the agreement to sell, there is no target date for execution and registration of the sale deed, therefore, the limitation would not begin to run as Part II of Article 54 of the Schedule to the Limitation Act, 1961 would be applicable.

Although, this Court does not find that the argument of learned counsel for

the appellants can be accepted, however, even if it is accepted for arguments

sake, still on 06.04.1990, the telegram sent on behalf of defendant No.1 is a notice on behalf of defendant No.1 to the plaintiffs communicating forfeiture of the earnest money which was followed by a letter dated 29.05.1990 intimating that the agreement to sell has come to an end and chapter is closed. Thus, on receipt of letter dated 29.05.1990, the limitation began to run. Hence, the suit filed by the plaintiffs on 01.08.1994 was beyond the time prescribed i.e. three years.

Keeping in view the aforesaid discussion, there is no ground to interfere. Hence, dismissed.

The miscellaneous application(s), if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

March 12, 2020
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No