In the High Court of Punjab and Haryana at Chandigar

R.S.A.No. 563 of 2012 (O&M)
Date of decision: 30.11.2015

Sat Pal Jindal

......Appellant

Versus

Aruna

.......Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Kanwaljit Singh, Sr.Advocate with
Ms.Gurdeep Kaur, Advocate,
for the appellant.

Mr.Vivek Suri, Advocate
for the respondent.

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1. Whether Reporters of local papers may be allowed to see the
judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Raj Mohan Singh, J.

1. Plaintiff has filed this regular second appeal against the judgment and decree dated 2.12.2011 passed by Additional District Judge, Panchkula, whereby appeal filed against the judgment and decree dated 19.7.2011 passed by Additional Civil Judge (Sr.Divn.) Panchkula was allowed, thereby, dismissing the suit filed by the plaintiff.

2. Plaintiff filed suit for recovery of ₹ 40 lacs along with interest pendente lite and future interest @ 18% per annum. Plaintiff alleged that the defendant being allottee-cum-owner of

the residential plot number 1406, Sector 21, Panchkula measuring 300 square meters, agreed to sell the same to the plaintiff for a total sale consideration of ₹ 1,03,51,000/- vide agreement to sell dated 22.3.2007. An earnest amount to the tune of ₹ 20 lacs was paid to the defendant and the target date for execution of agreement to sell was fixed as 15.5.2007 or within 10 days of granting permission in favour of the plaintiff by the HUDA to transfer the plot whichever was later . Factum of receipt of payment of ₹ 20 lacs from the plaintiff was duly acknowledged by the defendant vide separate receipt executed at the back of the agreement to sell. There was a recital in the agreement to sell that in case plaintiff backed out from the agreement, the earnest amount paid by the plaintiff shall stand forfeited and in case, defendant backed out from the agreement then double of the earnest amount would be paid by the defendant or to get the sale plot transferred by way of specific performance through Court.

3. Plaintiff further alleged that he was always ready and willing to perform his part of agreement but the defendant kept on postponing the issue on one pretext or the other and did not obtain permission from HUDA for the transfer of the plot in question on or before 15.5.2007. The defendant was granted permission to transfer the plot in favour of the plaintiff vide memo No. 9493 dated 18.6.2007. Defendant informed the

plaintiff regarding the said permission through speed post on 25.6.2007, which was received by the plaintiff on 28.6.2007 and thereafter, in view of telephonic conversation, 2.7.2007 was fixed as the date for execution of sale deed. Plaintiff remained present in the office of Sub Registrar, Panchkula on 2.7.2007 for getting the sale deed executed in his favour on payment of balance sale consideration, but defendant did not turn up. Plaintiff kept on waiting till evening and ultimately, got his affidavit attested from Sub Registrar on 2.7.2007. Plaintiff further alleged that the defendant was not interested to sell the plot in question because the prices turned high in July, 2007, but subsequently the prices became low and defendant issued false notice for enforcement of agreement. Plaintiff alleged that as per clause 2 of the agreement to sell, defendant is liable to pay double of the earnest amount and with this background, the suit came to be filed.

4. Defendant contested the suit by alleging the same to be not maintainable. In addition to other grounds, defendant alleged that the plaintiff was not having sufficient funds to make the balance sale consideration, stamp duty and registration charges, therefore, he failed to perform his part of contract, thereby, forfeiting the earnest amount.

5. Factum of execution of agreement to sell was admitted by the defendant. Permission accorded by HUDA on

18.6.2007 for transfer of plot was also an admitted fact. Defendant alleged that after obtaining permission, the sale deed was to be executed within 10 days of such permission as per recital in the agreement to sell. The defendant wrote a letter to the plaintiff for necessary payments and for intimating time, date and place for execution of sale deed within 10 days. Plaintiff did not respond to the letter of the defendant. Copies of said letters were also sent to the property dealer through speed post by whom the deal was materalised. The defendant and her husband attended the office of Sub Registrar on 10th day after informing the plaintiff from the date of grant of permission by HUDA i.e. 27.6.2007 for execution of registration of sale deed on payment of balance sale consideration. Defendant along with her husband waited up to evening but the plaintiff did not turn up. On 28.6.2007 also defendant re-visited the office of Sub Registrar and stayed there till 5.00 P.M. but the plaintiff did not turn up nor made any effort to contact the defendant. On 27.6.2007 and 28.6.2007, defendant got her presence marked by getting necessary affidavits attested from the Sub Registrar, Panchkula. Thereafter, defendant served a registered legal notice dated 30.7.2007, calling upon the plaintiff to come present in the office of Sub Registrar on 10.8.2007 along with balance sale consideration and other necessary expenses but the plaintiff did not come forward on 10.8.2007 as well.

6. No replication was filed to the written statement. On the pleadings of the parties, following issues were framed by the trial Court:-

> "1. Whether the plaintiff is entitled for recovery of ₹ 40 lacs along with pendente lite and future interest @ 18% per annum, as alleged ? OPP
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> 2. Whether the plaintiff has no locus standi and no cause of action to file the present suit ? OPD
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> 3. Whether the plaintiff is estopped from filing the present suit by his own act and conduct ? OPD
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> 4. Whether the plaintiff has concealed the true and material facts from the court, if so, to what effect ? OPD
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> 5. Whether the plaintiff was and still is not ready and willing to perform his part of the agreement for purchasing the suit property on payment of balance sale consideration, as alleged ?
>
> 6. Relief."

7. Trial Court, after discussing issues No.1 and 5 jointly, decreed the suit in favour of the plaintiff-appellant vide judgment and decree dated 19.7.2011. Feeling aggrieved against the judgment and decree passed by the trial Court, defendant went in appeal before Additional District Judge, Panchkula, who reversed the findings recorded by the trial Court and accepted

the appeal, thereby dismissing the suit in toto vide judgment and decree dated 2.12.2011. Hence, the present appeal by the plaintiff.

8. In the grounds of appeal, the following substantial questions of law are claimed to be involved in the present case:-

> "i) Whether the appellant was entitled to alternative relief by way of recovery of ₹ 40 lacs, once the agreement to sell and earnest money is admitted by the vendor ?
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> ii) Whether the vendor had cleared total of the property by complying with the conditions as imposed in Ex.D-1?
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> iii) Whether the property could be sold by the vedor without complying with the conditions of the permission letter of HUDA Ex.D-1?
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> iv) Whether the judgment of reversal was passed with and non appreciation of evidence and therefore, is bad in law and facts ?
>
> v) Whether the respondents-defendants vendors had ever made the genuine offer to get the sale deed executed and even offer before him was only to hoodwink the lawful process as the condition has not been complied with ?
>
> vi) Whether it was incumbent upon the appellate

Court to appreciate the facts and evidence on record before passing the judgment of reversal and to give issue-wise finding and in the absence thereof, the judgment of reversal is absolutely bad and therefore liable to be set aside ?"

I have considered the arguments of both the parties and have also perused the material on record.

9. A bare perusal of agreement to sell dated 22.3.2007, Ex.P-4, shows that amount of ₹ 20 lacs was paid as earnest money, which was acknowledged by the defendant at the back of the first page of agreement to sell as a guarantee of enforcement of the contract and was given to bind the contract. It was paid as a part of the purchase price in view of recital made in para 4 of the agreement to sell. As per condition of agreement, the last date for execution of sale deed was fixed on or before 15.5.2007 or within ten days of the grant of permission to transfer by the Estate Officer, HUDA, Panchkula, whichever was later. Both the parties were required to be present in the office of Sub Registrar as per terms fixed between them. As per condition No.8, it was recited that if the permission to transfer would not be granted by the Estate Officer, HUDA due to any reason then the last date for full and final payment would be extended with mutual consent of both the parties.

10. Condition No. 11 was in respect of default by either of

the party. In the event of default by the plaintiff, the earnest money would be forfeited in favour of the defendant and in the event of default at the instance of the defendant, the earnest money would be paid in double to the plaintiff.

11. Admittedly, defendant was granted permission to transfer the plot in question in favour of the plaintiff vide letter dated 18.6.2007 Ex.P2/ Ex.D-1. As per clause 4 of the agreement to sell Ex.P-4, the sale deed was to be executed on 15.5.2007 or within ten days of grant of permission to transfer the property in question by the Estate Officer, HUDA, Panchkula, whichever was later. Admittedly, defendant informed the plaintiff in this regard vide speed post dated 25.6.2007, which was received by the plaintiff, as per his affidavit Ex.PW2/A, on 28.6.2007 in the evening. Ex.P-6, Ex.P-7 and Ex.D-1 are relevant documents. The defendant in her written statement has pleaded that she passed a telephonic message to the plaintiff on his mobile number 09872289911 in respect of permission granted by HUDA and informed the plaintiff about the said permission vide letter dated 19.6.2007 Ex.P-7 (Annexure D-1). A perusal of Ex.P-7 shows the contention of the defendant in consonance with written statement. The speed post receipt dated 20.6.2007, Annexure D-2, can be looked into which has been admitted. Plaintiff did not respond to letter Annexure D-2 and thereafter, defendant again wrote a letter

dated 25.6.2007, which was admittedly received by the plaintiff on 28.6.2007. The first letter dated 19.6.2007 having speed post receipt dated 20.6.2007, Ex.P-7 was specific in the context of asking the plaintiff to arrange payment for execution of sale deed as per condition of the agreement. There had been a telephonic message on the mobile phone of the plaintiff to come present in the office of Sub Registrar for execution of sale deed on 27.6.2007 and 28.6.2007. A perusal of Ex.D-2 and Ex.D-3 makes it clear that on both these dates, defendant was present in the office of Sub Registrar, Panchkula for execution of sale deed, but plaintiff did not turn up. As against this there is only sole serving statement of the plaintiff that after 28.6.2007, as per telephonic conversation, 2.7.2007 was fixed as a date for execution of the sale deed and on that day, plaintiff attended the office of Sub Registrar, but defendant did not turn up. Plaintiff did not specify in the plaint at whose instance the date i.e. 2.7.2007 was fixed. In his cross-examination, plaintiff deposed that he was asked by the defendant to appear before the Sub Registrar on 2.7.2007, but further he expressed ignorance about the date on which he received the telephonic message. He had further stated that he received the said message on his mobile number 09872289911.

12. The testimony of the plaintiff in respect of the fact that as to how much money was required by him for purchasing the

stamps for the sale deed also went in interpretation. According to the plaintiff, he had brought cash of ₹ 35 lacs and his admission in cross-examination that he did not give any notice to the defendant regarding his presence before the Sub Registrar, Panchkula on 2.7.2007 further clinched the matter.

13. Even after institution of the present suit, defendant on the very first day of her appearance made an application, offering to get the sale deed executed in favour of the plaintiff. The said offer was not accepted by the plaintiff and her application under Order 38 Rule 5 CPC was dismissed by the trial Court vide order dated 27.8.2008.

14. Learned counsel for the appellant has argued that the permission granted by HUDA was contingent upon fulfillment of certain conditions by the defendant, which she had not fulfilled, rendering the agreement to be inexecutable in nature, therefore plaintiff was not at fault as the defendant did not fulfil the conditions of permission, which were sine qua non for valid permission in favour of the defendant, therefore, learned counsel for the plaintiff imputed fault at the behest of the defendant. Appellant claimed himself to be always ready and willing in view of his presence before the Sub Registrar on 2.7.2007 and failure on the part of the defendant to come present in the office of Sub Registrar for execution of the sale deed.

15. On this aspect, learned counsel for the respondent-defendant has relied upon decision of the Honb'le Apex Court in **<u>Vishwa Nath Sharma vs. Shyam Shankar Goela and another</u> 2007 (2) RCR (Civil) 415** to contend that a vendor can sell his property and execute sale deed even though sale was prohibited without prior sanction of the authority. Sanction can be obtained subsequently. According to learned counsel for the respondent, the permission from HUDA was not at all necessary for execution of sale deed if the vendor had agreed to sell the property which can be transferred only with the sanction of the Government authority. The Court has jurisdiction to order the vendor to apply to the authority within a specified time and if the sanction is forthcoming to convey the purchaser within certain time. Permission from the HUDA was not a condition precedent for grant of decree for specific performance. In the event of refusal by the competent authority in respect of permission, the plaintiff may not be able to enforce the decree for specific performance, but that was not a bar to the Court for passing a decree for that relief. If after grant of decree for specific performance the competent authority refuses to grant permission, the decree holder may not be in a position to enforce a decree, but it cannot be held that such a condition is a condition precedent for passing of decree for specific performance of the agreement. In **Vishwa Nath Sharma's**

case (supra), reliance was placed by the Hon'ble Supreme Court on a earlier decided case titled **Maharo Saheb Shri Bhim Singhji vs. Union of India, AIR 1961 Supreme Court 234.** On the aforesaid aspect, this Court concurs with the contention raised by learned counsel for the respondent that grant or dismissal of permission was not a sine qua non for execution of sale deed in the light of aforesaid dictum laid down by the Hon'ble Apex Court. The condition of agreement was that the sale deed was to be executed within 10 days of receipt of such permission. There was no condition that after the target date of 15.5.2007 during the period of 10 days, extension was to be made at the instance of either of the party, rather the sale deed was to be executed within 10 days after the permission is granted by the Estate Officer, HUDA, Panchkula. Apparently, due information was conveyed to the plaintiff on 19.6.2007 Ex.P-7 as well as reminder in the form of letter dated 25.6.2007. First letter dated 19.6.2007 was admittedly received on 20.6.2007 Annexure D-2. Receipt of communication dated 25.6.2007 Ex.P-6/ Annexure D-4 was the necessary corroboration of receipt of earlier notice dated 19.6.2007, thereby informing the plaintiff to get the sale deed executed in his favour after being ready with the balance sale consideration as well as towards other expenses within the said period. On the aforesaid front, plaintiff has not lead any evidence, except the plea that 2.7.2007 was the date fixed and on the said date plaintiff attended the office of Sub Registrar and defendant failed to do so. Since no such extension was the subject matter of any interpretation arising out of clause 11 of the agreement, nor any such date was extended except the communication in the context of Annexure D-2/ Ex.P-7 and Annexure D-4/Ex.P6.

16. Passing of earnest amount represented a guarantee that contract will be fulfilled and word “earnest” was to bind the contract. Since the payment of ₹ 20 lacs was in the nature of earnest money, therefore, it cannot be treated to be simply a part payment of purchase price which could not have been forfeited unless the same is shown to be a guarantee for due performance of the contract. Since the amount was advanced towards earnest money, therefore, forfeiture clause shall apply. The earnest money was primarily a security for due performance of agreement and, therefore, the defendant is entitled to forfeit the deposit on the basis of fault committed by the plaintiff.

17. Learned counsel for the appellant tries to extract interpretation from the decision of the Apex Court in **<u>Satish Batra vs. Sudhir Rawal</u> 2012 (4) RCR (Civil) 890** in the aforesaid context. Para Nos. 17 to 19 of the said judgment read as under:-

> *“17. Law is, therefore, clear that to justify the forfeiture of advance money being part of ‘earnest*

money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

18. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other *clause militates against the clauses extracted in the agreement dated 29.11.2011.*

19. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs.7,00,000/- as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The High Court has, therefore, committed an error in reversing the judgment of the trial court."

18. Consequently, the precedent cited by learned counsel for the appellant even corroborates the plea of the defendant that the amount so advanced towards earnest money can be forfeited by the defendant in the event of proved default on behalf of the plaintiff.

19.. The substantial questions of law as framed, if decided on the threshhold of available evidence on record, then the same are not found to be involved in favour of the appellant. Question No.1 in the event of plaintiff not found to be ready and willing to perform his part of obligation has to be answered against the plaintiff. Payment of earnest money and execution of agreement to sell are admitted facts, but in view of forfeiture clause in the agreement itself, the amount in question stands forfeited and plaintiff is not entitled to recover double of the earnest amount as after communication of receipt of permission, plaintiff himself failed to show any evidence of his being ready and willing to perform his part of obligation within 10 days of receipt of permission as per conditions No.4 and 11 of the agreement to sell. Questions No.2 and 3 in the light of authoritative pronouncements by the Hon'ble Apex Court in **Vishwa Nath Sharma's case (supra)** do not involve at all. Question No.4 is a question of fact and is not a question of law much less substantial question of law. Questions No.5 and 6 do not involve at all in the light of findings given on the aspect of readiness and willingness. Since the defendant has been able to show that even if permission dated 18.6.2007 was not sine qua non for execution of agreement to sell, but still after obtaining necessary permission on 18.6.2007, due intimation was given to the plaintiff firstly on 19.6.2007, which was duly received and secondly on 25.6.2007, which was also received by the plaintiff. The documents Ex. P-6, P-7 and Ex.D-1 have been correctly appreciated by the lower Appellate Court. There was no extension prescribed in terms of condition No.4 of the agreement to sell .The sale deed was to be executed within 10 days of the receipt of permission dated 18.6.2007 for which compliance was already done by the defendant, informing the plaintiff about the factum of permission. It was only thereafter, the plaintiff has tried to create imaginatory date i.e. 2.7.2007 on the basis of alleged telephonic conversation, which was never intended to be so because there was no extension clause prescribed in terms of clause 4 of the agreement to sell. 2.7.2007 was never fixed as the date for execution of sale deed by the parties. The lower Appellate Court, on the basis of correct appreciation of evidence on record, has rightly concluded that the plaintiff has failed to discharge the initial onus to prove that he was always ready and willing to perform his part of obligation and 2.7.2007 was the actual date fixed for registration of the sale deed. The defendant has proved her readiness and willingness by way of unimpeachable testimonies and evidence and in view of condition in the agreement to sell, the earnest amount which represented a guarantee for performance of the contract and to bind the contract is liable to be forfeited. Since clause of forfeiture is duly existed in the agreement to sell, therefore, parties are bound to follow the same.

20. Having considered the evidence in detail, this Court does not find any illegality in the judgment and decree dated 2.12.2011 passed by the lower Appellate Court. Consequently, this appeal is dismissed being bereft of merits.

(RAJ MOHAN SINGH)
JUDGE

November 30, 2015

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