IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Regular Second Appeal No. 2924 of 2014 (O&M)
Date of decision : 20.08.2015

Ram Phal .....Appellant

Versus

Rajbir ....Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. V.K. Jindal, Senior Advocate with
Mr. Amardeep Sheoran, Advocate
for the appellant.

Mr. Jarnail Singh Saneta, Advocate
for the respondent.

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LISA GILL, J.

Present appeal has been filed by the defendant-appellant Ram Phal impugning the judgment and decree dated 03.05.2014 passed by the learned Additional District Judge, Panipat to the extent that alternate relief of refund of earnest money has been granted to the plaintiff-respondent whose suit for specific performance had been dismissed by the trial Court.

Upon hearing learned counsel for the parties, following substantial question of law is found involved for consideration of this Court:-

> “Whether the learned First Appellate Court has misread the evidence on record to return a perverse finding

thereby decreeing refund of earnest money of ₹14 lakhs to the plaintiff?

Brief facts of the case are that respondent-plaintiff Rajbir son of Sh. Jagat Ram filed a suit for specific performance of agreement dated 05.01.2009 entered into between him and defendant for sale of agricultural land measuring 30 kanal 16 marlas in village Mahawat Tehsil Samalkha District Panipat for a consideration of ₹23,50,000/- per acre, total consideration amount being ₹90,47,500/-. It was urged that part payment of ₹14 lakhs was made on 05.01.2009 in the presence of witnesses Kaptan Singh and Dilbag Singh. Agreement was reduced into writing, thumb marked by defendant - Ram Phal and signed by the plaintiff - Rajbir. It was typed and drafted in Tehsil complex, Samalkha and attested by Mr. Janeshar, Advocate and Notary Public, Panipat. Balance sale consideration was agreed to be paid at the time of execution and registration of the sale deed i.e. 20.04.2009, the date settled by mutual consent of the parties.

Though not mentioned in the abovesaid agreement to sell, it was further agreed between the parties on the same day i.e. 05.01.2009 that defendant – Ram Phal shall sell the area of 3 kanal 18 marlas adjacent to area as mentioned in mutation No. 4250, 4586 and situated in village Mahawat Tehsil Samalkha District Panipat. Said area was projected to be a part of shamlat deh and free from encumbrances. Sale consideration was agreed upon as ₹1,00,000/- which was paid by the plaintiff to the defendant in the presence of witnesses Kaptan and Dilbag. Possession of 3 kanal 18 marlas was handed over by the defendant being in its exclusive possession. Registration of this area was agreed to be executed in favour of the plaintiff or any other person as may be desired by him.

It was further pleaded that plaintiff - Rajbir had gone to his fields in the morning of 20.04.2009 with an intention to thereafter proceed to the office of Sub Registrar, Samalkha but he remained busy in urgent agricultural work. Thereafter he fell sick and was taken to Anand Nursing Home, Sonepat on the same morning. Otherwise he was ready and willing to execute the agreement and register the sale deed on the same day. Necessary arrangements had been made by him. Mediator between the parties allegedly reached the hospital and assured the plaintiff to inform the defendant-appellant about his illness as well as readiness and willingness to execute the agreement and further prayer for extension of time for execution of the sale deed. Information being conveyed to the defendant was confirmed in the first week of May 2009 when he inquired about the health of the plaintiff and it was conveyed that defendant-appellant had agreed for extension of time till the plaintiff's recovery.

However, notice dated 22.04.2009 was issued by the defendant-appellant through his counsel wherein it was alleged that defendant-appellant remained present in Tehsil office, Samalkha as agreed on 20.04.2009 from 9.00 a.m. to 5.00 p.m. His presence was marked but the plaintiff failed to turn up for execution of sale deed. Reply dated 01.05.2009 to the notice refuting all the allegations was sent by the plaintiff-respondent. Notice was only in respect to the agreement dated 05.01.2009 regarding sale of 30 kanal 16 marlas of land but no mention was made about the sale of 3 kanal 18 marlas.

In reply dated 01.05.2009, plaintiff-respondent requested the defendant-appellant to verify the agreement in respect to 3 kanal 18 marlas as well within a period of 15 days and expressed his readiness and willingness to perform his part of the agreement. However, defendant was not willing to execute the agreement any longer. Another legal notice dated 08.05.2009 was received by the plaintiff-respondent from the defendant-appellant. Plaintiff vide this notice was asked to come to the Tehsil Office, Samalkha on 15.05.2009 for execution of sale deed failing which the earnest money submitted by him would be forfeited. Reply dated 15.05.2009 was sent to the defendant informing that the plaintiff was ready and willing to get the sale deed executed and registered as per the terms and conditions of both the agreements. However, defendant refused to sell the shamlat land measuring 3 kanal 18 marlas and demanded additional amount of ₹10 lakhs for transferring the shamlat deh in his favour. In a meeting held on 26.08.2009 at Samalkha defendant reduced his demand of ₹10 lakhs to ₹5 lakhs. Defendant refused to execute the sale deed qua the shamlat land till the said amount was paid to him. Despite numerous requests by the plaintiff, it was alleged that the defendant refused to execute and register the sale deed in his favour as per terms and conditions of the both agreements in question. Rather he threatened to alienate the said property. Therefore, the present suit for specific performance of the agreement to sell dated 05.01.2009 was filed. Prayer for permanent injunction was also made for restraining the defendant from alienating the suit property.

Written statement was filed by the defendant-appellant alleging concealment of true and material facts as well as challenging the maintainability and locus standi of the plaintiff to file the suit. It was denied that an agreement dated 05.01.2009 had been agreed to sell shamlat land measuring 3 kanal 18 marlas, however, execution of agreement dated 05.01.2009 qua agricultural land measuring 30 kanal 16 marlas for total sale consideration of ₹90,47,500/- i.e. at the rate of ₹23,50,000/- per acre was admitted. Receipt of ₹14 lakhs as earnest money was admitted.

Defendant-appellant took a plea that he was always ready and willing to perform his part of the contract and in fact was present in the office of Sub Registrar, Samalkha on 20.04.2009 i.e. the date mutually agreed upon for execution and registration of the sale deed. He waited for the plaintiff till 5.00 p.m. but when he did not turn up defendant got his presence marked by getting an affidavit attested before the Executive Magistrate. Legal notice dated 22.04.2009 was served upon the plaintiff through counsel asking him to come present in the office of Sub Registrar, Samalkha on 29.04.2009 for execution and registration of sale deed in his favour. Instead of coming forward, the plaintiff sent a reply dated 01.05.2009 making false and baseless averment regarding execution of the agreement with regard to shamlat land measuring 3 kanal 18 marlas. Another notice dated 08.05.2009 was served upon the plaintiff asking him to come present on 15.05.2009 for execution and registration of sale deed but still the plaintiff did not come present on the appointed day. Yet another notice dated 21.05.2009 was issued to the plaintiff requesting him to come present in the office of Sub Registrar, Samalkha on 28.05.2009 alongwith balance sale consideration amount. Plaintiff failed to appear alongwith the said consideration amount, therefore, had clearly failed to perform his part of the contract. In such a situation, earnest money paid by him would stand forfeited. It was denied that the plaintiff had ever fallen ill on 20.04.2009 or that he was admitted in any hospital. Dismissal of the suit was prayed for.

Following issues were framed by the learned trial Court:-

1. Whether plaintiff is entitled for the relief of specific performance in view of the agreement to sell dated 05.01.2009? OPP
2. In case, issue no. 1 is proved in affirmative then whether plaintiff is entitled for relief of permanent injunction, as prayed for? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD
5. Relief.

Issues No. 1 and 2 were decided against the plaintiff-respondent by the learned trial Court vide judgment and decree dated 10.07.2013 while observing that the execution of the agreement to sell dated 05.01.2009 in respect to 30 kanal 16 marlas of land is admitted by the plaintiff but readiness and willingness on the part of the plaintiff to execute the same could not be proved. Learned trial Court dismissed the suit filed by the plaintiff vide judgment dated 10.07.2013.

Appeal was preferred by the plaintiff-respondent Rajbir impugning the judgment dated 10.07.2013. Learned Additional District Judge, Panipat vide judgment dated 03.05.2014 upheld the finding of the learned trial Court on issues No. 1 and 2. It is specifically observed that there is no evidence on record to show that the appellant ever had the balance sale consideration amount with him. Averments of the plaintiff regarding his illness and consequent inability to have the sale deed executed was found to be unsubstantiated by the evidence on record.

It is relevant to note that this finding has not been challenged and has attained finality. Learned Additional District Judge, Panipat, however, held the plaintiff-respondent entitled to refund of the earnest money deposited by him. Consequently, decree for recovery of ₹14 lakhs alongwith interest at the rate of 9% per annum was issued in faovur of the plaintiff-respondent. It is this finding that the appellant-defendant is aggrieved from.

Learned counsel for the appellant relies on judgment of the Hon'ble Supreme Court in ***Satish Batra versus Sudhir Rawal*** 2012 (4) RCR (Civil) 890 to submit that ₹14 lakhs was indeed paid as earnest money, therefore, until and unless it is proved that this amount was not intended as earnest money, the seller is entitled to forfeit the same.

On the other hand, learned counsel for the respondent vehemently argues that specific alternate prayer for refund of the earnest money had been made by the plaintiff in his suit. There is no evidence to show that it is infact earnest money which has been paid by the plaintiff and not part payment of the purchase price. Furthermore, there is no clause of the purchaser getting double the amount of earnest money in case the seller resiles from the agreement. This fact in itself shows that amount of ₹14 lakhs is not earnest money.

It is also submitted that RSA No. 2923 of 2014 arising out of the lis between the parties in respect to the 3 kanal of shamlat land has been withdrawn by the appellant. In the said case, ₹1,00,000/- had been directed to be refunded. It is, thus, prayed that this appeal being bereft of any merit be dismissed.

Having heard learned counsel for the parties and going through the file, I find that there is merit in the arguments raised by the learned counsel for the appellant.

Undisputedly, finding that respondent/plaintiff was not ready and willing to execute agreement dated 05.01.2009 has attained finality. Respondent/plaintiff has admittedly not challenged this concurrent finding.

A perusal of agreement dated 05.01.2009 reflects that ₹14 lakhs has been specifically mentioned to be earnest money. Relevant extract of the agreement to sell dated 05.01.2009 reads as under:-

> “ Therefore, the first party agreed to sell the above said land alongwith electricity connection to the second party for amount of Rs. 23,50,000/- (Rs. Twenty three lacs fifty thousand only) per acre and the earnest money to the

tune of Rs. 14,00,000/- (Fourteen lacs) has been received in cash and the balance amount shall be received at the time of registration of sale deed and the target date for registration of sale deed has been fixed on 20.04.2009 before the registration, there shall be nothing on the land and if there is any loan, the first party shall be bound to pay the same and also get the sale deed registered in favour of the second party by producing himself before the office**. The first party shall forfeit the amount of earnest money if the second party shall not get the sale deed registered.** (emphasis added) The registration shall be registered on the name of second party or the name suggested by the second party and the first party shall be bound to get the sale deed registered, if he will not do the second party shall be free to get the same through court and the expenses for the same shall be borne by the first party. Both the parties shall be bound for the agreement and also their legal heirs."

It is to be noted that total consideration amount is ₹90,47,500 i.e. at the rate of ₹23,50,000/- per acre. Amount of ₹14 lakhs is a little over 15% of the total consideration amount. Recital in the agreement is unequivocal and clear to the effect that the said amount of ₹14 lakhs is earnest money, which was paid to the seller. Argument of learned counsel for the respondent is unacceptable that recital of the balance amount to be paid at the time of registration of the sale deed transforms the said amount of ₹14 lakhs to part payment of purchase price.

Earnest money is admittedly a pledge for due performance by the depositor which is to be forfeited in case of non-performance, by the depositor. Earnest money will obviously and always remain a sum of money to be adjusted in the total consideration of money to be paid. Therefore, in that sense it would always remain a part of the purchase price but it cannot be termed to be part payment of purchase price. Such an interpretation would be rendering sheer violence to the phrase and language. There is specific recital in the agreement that the said amount of earnest money shall be forfeited if the second party does not get the sale deed registered.

Learned First Appellate Court has erred in relying upon **Satish Batra's** case (supra) to direct refund of earnest money. It has been held by the Hon'ble Supreme Court in **Satish Batra's** case (supra) that:

> "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."

In the above said case, the seller was held justified in forfeiting the earnest money of ₹7 lakhs out of a total consideration of ₹70 lakhs. In the instant case also recital in the agreement dated 05.01.2009 is clear and explicit. There is no ambiguity whatsoever which would entitle the respondent for refund. Argument that said amount should not be termed as earnest money as there is no clause of the purchaser getting double the amount in case of default on the part of the seller is indeed fallacious and misconceived.

Learned counsel for the respondent has vehemently argued that withdrawl of RSA No. 2923 of 2014 by the appellant in which refund of ₹1,00,000/- has been directed to be paid in respect to agreement of shamlat land disentitles the appellant to any relief in the present case. Said argument is misconceived and untenable. Said order dated 29.05.2014 in RSA No. 2923 of 2014 reads as under:-

> " Counsel for the appellant states that without prejudice his rights in RSA No. 2924 of 2014, he does not wish to press this appeal.
>
> Ordered accordingly."

Abovesaid appeal has evidently been withdrawn without prejudice to the appellant's right in the present appeal. Furthermore, admitted case of the plaintiff is that ₹1,00,000/- was the total consideration for the transfer of land (3 kanal 18 marlas) which was part of shamlat deh and possession of said land was handed over to him. ₹1,00,000/- was paid by him on 05.01.2009. Though not to be construed as an opinion on the merits and the controversy of the said case it is obvious that this amount of ₹1,00,000/- cannot be termed as earnest money by any stretch of imagination as it is the total consideration amount as per plaintiff's own case.

It is, thus, clear that the learned Additional District Judge, Panipat has erred in granting the decree for recovery of ₹14 lakhs in favour of the respondents alongwith interest at the rate of 9% per annum from the date of agreement in question. Said finding is, therefore, set aside and the judgment passed by the trial Court is upheld.

Consequently, appeal is allowed.

(Lisa Gill)
Judge

August 20, 2015
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