

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

RSA No.3995 of 2015 (O&M)

Date of decision: 13.12.2016

Chanan Singh

... Appellant

versus

Goldy Multani

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr. Munish Gupta, Advocate,  
for the appellant

...

AMOL RATTAN SINGH, J.

This is the second appeal filed by the defendant in a suit filed by the respondent-plaintiff, seeking a decree of joint possession of the suit property, by way of specific performance of an agreement of sale dated 13.04.2006.

The suit property is described in the impugned judgment of the learned Civil Judge (Junior Division), Mukerian, as 08 kanals and 16 marlas of land, being a 1/3<sup>rd</sup> share of the total land comprised in various khasra numbers given in the plaint, situated in village Fatehpur, '*Had Bast*' No. 151, Tehsil Dasuya, District Hoshiarpur.

2. An alternative prayer for recovery of Rs. 7,44,000/- with interest thereupon, was also made by the respondent herein (hereinafter referred to the plaintiff), along with interest thereupon.

3. The facts, as taken from the judgment of the learned courts below, are that the appellant-defendant (hereinafter referred to the appellant)

was stated to be recorded as the joint owner in possession of the suit land which he had agreed to sell to the plaintiff, vide the aforementioned agreement dated 13.04.2006, with the sale consideration settled at Rs. 8,00,000/- per acre. Of the aforesaid sum, the appellant was stated to have received Rs. 3,72,000/- as earnest money from the plaintiff at the time when the agreement was entered into and the date by which the sale deed was executed and registered was stated as 14.04.2007, i.e. one year later.

It was further contended in the plaint that the appellant had also agreed to pay double the amount of the earnest money to the plaintiff if he (the appellant-defendant) did not execute the sale deed and it was agreed that otherwise the agreement dated 13.04.2006 would be enforceable in a court of law.

The plaintiff had further contended that he remained present in the office of the Sub-Registrar on the last date fixed, to perform his part of the contract but the present appellant did not turn up and thereafter also, despite many requests made to him to execute the sale deed, the appellant was allegedly delaying the matter on one pretext or the other.

Consequently, the plaintiff, through his counsel, is stated to have served a legal notice upon the appellant on 30.06.2007, in which he informed the appellant that the sale deed should be executed on 06.07.2007.

It was yet further contended that on that date, the plaintiff again remained present in the office of Sub-Registrar, Dasuya, but the appellant still did not turn up, after which the plaintiff “marked his presence”, vide an affidavit of the same date, i.e. 06.07.2007.

As per the plaintiff, he yet again requested the appellant to

execute the sale deed but upon his not have done so, the suit was instituted on 15.09.2007.

4. Notice of the suit having been issued to the appellant-defendant, he appeared and filed his written statement raising preliminary objections with regard to maintainability, *locus* etc. and on merits contending that the plaintiff is a travel agent who had approached the appellant and assured him that he can send his son Gurnam Singh to Italy within 2 months and that the appellant should pay him Rs. 8,00,000/- for the same. The appellant agreed to do so and on 13.04.2006, he arranged for Rs. 3,72,000/- and gave it to the plaintiff in the presence of Jagir Singh, son of Chet Singh and Nishan Singh son of Puran Singh, both residents of village Aima Mangat, with it being agreed that the remaining amount would be given to the plaintiff when the appellants' son would reach Italy.

As per the appellant, to secure the remaining amount agreed upon to be paid, a writing was made on that date itself (on 13.04.2006) and therefore, what was contended to be earnest money in the suit was actually the money paid by the appellant to the plaintiff, in view of the latter sending his son to Italy.

5. It was further contended by the appellant in his written statement that the son not having been sent, he had requested the plaintiff many a time to return the amount paid, along with the passport of the appellants' son and though the passport was returned in the month of January 2007, the amount paid, i.e. Rs. 3,72,000/-, was not returned but the plaintiff agreed that he would return it in easy installments.

However, instead of doing so, he filed the suit against the

appellant.

6. Thus, it was contended in the written statement, by the present appellant, that there was never any intention of the appellant to sell his land and the writing dated 13.4.2006 was executed only to secure the amount remaining to be paid, out of Rs. 8,00,000/- agreed to be paid.

7. From the aforesaid pleadings, the following issues were framed by the learned Civil Judge:-

*“1. Whether the plaintiff is entitled for joint possession of the property in dispute for specific performance of agreement to sell dated 13.04.2006 as prayed for? OPP.*

*2. Whether the plaintiff is entitled for recovery of Rs. 7,44,000/- with interest as alternative relief? OPP.*

*3. Whether the suit is maintainable? OPP*

*4. Whether the plaintiff got locus standi to file the present suit? OPP*

*5. Whether the suit is properly verified? OPP*

*6. Whether the cause of action has arisen to the plaintiff for filing present suit? OPP.*

*7. Whether the defendant executed an agreement to sell dated 13.04.2006 in favour of plaintiff? OPP.*

*8. Whether the plaintiff has not come to the court with clean hands? OPD.*

*9. Relief.”*

8. The plaintiff examined himself and one Harjinder Pal Singh and another, Balkar Singh, as witnesses, whereas the appellant-defendant examined himself and the aforementioned Jagir Singh and Nishan Singh as his witnesses.

9. Upon appraising the pleadings, arguments and the evidence led, the learned Civil Judge found that other than the fact that the testimony of the

witnesses examined by the plaintiff, including himself, could not be 'dented' even in cross-examination, the appellant-defendants' own witnesses, i.e. Jagir Singh and Nishan Singh, had also admitted to the appellants' as also their own signatures on the agreement, Ex. P-1 and in fact, DW-2 Jagir Singh, even admitted that the agreement had been actually executed for selling land measuring 08 kanals and 16 marlas.

10           It was further found by the learned Civil Judge that the appellant could not prove in any manner, the stand taken by him, that the agreement was actually executed to secure the remaining amount of Rs. 8,00,000/-, for sending his son to Italy.

Hence, the agreement Ex. P-1 having been executed was held to have been proved, but despite that, it was further held that the plaintiff actually did not prove that he had come present before the Sub-Registrar on the date actually fixed for execution of the sale deed. (At the last stage of the judgment, the date has wrongly been shown as 30.04.2007 by the Civil Judge, whereas earlier it has been shown to be 14.04.2007, as has also specifically been stated by the learned first appellate Court).

Hence, even though the legal notice dated 30.04.2007 was also shown to have been sent by registered post and thereafter, the plaintiff proved his presence before the Sub-Registrar on 06.07.2007, i.e. the date given by him in the aforesaid legal notice, however, it was held that it did not prove his willingness and readiness to execute the sale deed on the date fixed in the agreement Ex. P-1.

11.           Therefore, holding that the relief of specific performance is a discretionary relief to be exercised dependent upon the facts of each case, the

suit of the plaintiff was only decreed to the extent of recovery of Rs. 7,44,000/- as prayed for by the plaintiff, by way of an alternative relief.

12. The present appellant filed an appeal before the learned first appellate Court, in which that Court duly noticed the pleadings, the issues framed and the evidence led before the lower Court and thereafter, like the learned Civil Judge, came to the conclusion that the agreement of sale, Ex. P-1, executed by the parties to the *lis*, had been duly proved to have been so executed, with no evidence led by the present appellant, that it was actually only by way of security for the remaining amount of Rs. 8,00,000/- to be paid upon his son being sent to Italy by the plaintiff.

Thus, the amount of Rs. 3,72,000/- stated to have been paid as earnest money to the appellant by the plaintiff was accepted as such by the first appellate Court also.

13. On the next aspect, of the readiness and willingness of the plaintiff to actually execute sale deed in his favour, again that Court also found that the plaintiff had not proved his presence before the Sub-Registrar on the stipulated date, i.e. 14.07.2007.

Consequently, it was held that the plaintiff was also not entitled to payment of Rs.7,44,000/-, which obviously included a penalty amount equal to the amount of earnest money.

Holding as above, the judgment of the learned Civil Judge was modified to the extent that instead of Rs. 7,44,000/-, the respondent-plaintiff was held entitled to recover only the amount of money paid by him, alongwith interest @ 6% per annum, running from the date of the decree of the lower court till the realization of the amount.

14. The appellant-defendant is thus, in second appeal before this Court, against even that judgment and decree, by which he has been directed to refund the earnest money proved to have been paid to him, along with interest as aforesaid.

At this stage itself, it needs to be noticed that the respondent-plaintiff is not seen to have challenged even the decree of the learned Civil Judge by which he was granted only the alternative relief prayed for and not the relief of specific performance of the contract.

Similarly, the plaintiff is also not in appeal against the modification of the judgment and decree of the lower court, by the first appellate Court, entitling him to a refund of only Rs. 3,72,000/- instead of Rs. 7,44,000/-.

15. Learned counsel for the appellant has cited a judgment of the Supreme Court in Satish Batra vs. Sudhir Rawal, 2013(1) SCC 345, to submit that once the plaintiff could not prove his readiness and willingness to execute the sale deed pursuant to an agreement entered into between the parties, the appellant-defendant, i.e. the vendor, was entitled to forfeit the earnest money paid.

Whereas on principal that proposition cannot be doubted, however, if there has to be a forfeiture of the earnest money paid, in the opinion of this Court also, then it becomes incumbent upon the defendant to also prove his readiness and willingness to execute the contract, even with the plaintiff, i.e. the prospective vendee, not found willing and ready.

In Satish Batras' case (supra), undoubtedly the right of a seller/vendor to forfeit the earnest money paid to him, upon non-performance

of the contract by the prospective vendee, was upheld. However, it is seen that in that case, firstly it seems obvious from a perusal of paragraph 3 thereof, that the suit filed by the prospective vendee, was only one seeking recovery of the earnest money which had already been forfeited by the vendor. The lower court having dismissed the suit of the plaintiff, in appeal, the Delhi High Court held the seller entitled to forfeit only a nominal amount of Rs. 50,000/- and not the entire earnest money of Rs. 7,00,000/-. That judgment of the High Court was reversed by the hon'ble Supreme Court in the appeal filed by the vendor, upholding his right to forfeit the entire earnest money, with the plaintiff not having been able to fulfill his part of the contract, of payment of the remaining amount of Rs. 63,00,000/- in order to get the sale deed executed.

However, their Lordships also held as follows before allowing the appeal of the vendor:-

*“The 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 a converse situation also that if the seller fails to perform the contract the purchaser can also get 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. In the present case, though there is a recital in the sale deed that if “party no. 2”, i.e. the prospective vendee (plaintiff) refuses to fulfill his part of the contract, then his earnest money shall be considered to be forfeited, and what has been held by the learned courts below, is that the plaintiff was not found to be present in the office of the Sub-Registrar to execute the sale deed on the last date fixed for doing so, as contended in the agreement, i.e. 14.04.2007. Therefore, an inference was drawn that the plaintiff could not prove his readiness to perform his part of the contract on that date. As already noticed, the plaintiff has not challenged the judgments of the courts below.

However, it was also proved that two and half months thereafter, i.e. on 30.06.2007, the plaintiff had sent a legal notice to the appellant-defendant (vendor) to come and execute the sale deed six days later on 06.04.2007, on which date the plaintiff proved his presence before the Sub-Registrar.

19. The appellant on the other hand, could not prove the stand that he took in his written statement, to the effect that the amount of Rs. 3,72,000/- was not paid by the plaintiff to him but in fact by him to the plaintiff, for the purpose of sending his (appellant-defendants') son to Italy and that the agreement executed was only to secure the payment of the amount remaining to be paid allegedly by the appellant to the plaintiff, out of the total consideration of Rs. 8,00,000/- allegedly settled between the parties for the purpose of sending the appellants' son abroad.

20. Hence, the appellant in fact tried to put the shoe on the other foot by saying that the money was paid by him and not to him. Yet, neither could

he prove that, nor in fact did he even raise a counter claim for recovery of any such money from the plaintiff. Hence, for him to rely upon the agreement of sale itself, which he actually denied was such an agreement, to state that the money shown to have been paid to him by the plaintiff as earnest money, should stand forfeited in his favour, is a plea not available with him.

21. Other than the above reasoning, even going wholly by the terms of the agreement, the plaintiff at least about two and half months after the last date fixed for execution of the sale deed, sent a legal notice to the appellant for execution of the sale deed, but the appellant at no stage whatsoever, whether before or after the legal notice issued by the plaintiff, ever issued any notice to him, or even replied to the notice dated 30.06.2007, to even state that since the plaintiff did not come present at any stage to execute the sale deed, the earnest money stood forfeited. Instead, his stand was that the money was not payable by him because the agreement was actually not an agreement of sale.

Hence, in short, though the plaintiff at least two and half months later expressed a desire to execute the sale by payment of the remaining consideration settled, the appellant at no stage expressed his desire to either execute the sale deed, or even to forfeit the earnest money paid, due to the plaintiff not turning up on the original date fixed, i.e. 14.04.2007.

22. Therefore, in the aforesaid circumstances, I find no error whatsoever in the impugned judgment of the learned lower appellate court, by which , though the suit for specific performance filed by the respondent-plaintiff was not so decreed, in view of the fact that the plaintiff himself could not prove his presence on 14.04.2007 and thereby his readiness to execute the sale

deed, yet, with the appellant firstly having even denied the agreement itself and thereafter, not having shown in any manner that he was willing to execute his part of the contract, he cannot be allowed to forfeit the earnest money paid.

Consequently, finding no merit in the appeal, it is dismissed in *limine* but with no order as to costs.

13.12.2016  
pk/nitin

( AMOL RATTAN SINGH )  
JUDGE

|                           |     |
|---------------------------|-----|
| Whether speaking/reasoned | Yes |
| Whether Reportable        | Yes |