

(106)

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

RSA No.2386 of 2017 (O&M)

Reserved on : 13.08.2018.

Date of decision :17.10.2018.

BALDEV SINGH.

... APPELLANT

Versus

CHAMAN SINGH AND OTHERS.

... RESPONDENTS

BEFORE: HON'BLE MR. JUSTICE B.S. WALIA.

Present: Mr. D.S. Sandhu, Advocate for the appellant.

B.S. Walia, J.,

[1] Defendant No.1 has come up in appeal against the judgment and decree dated 27.10.2016 passed by the learned Additional District Judge, SBS Nagar, dismissing the appeal filed against judgment and decree dated 18.01.2014, whereby the suit filed by plaintiff-respondent No.1 was decreed granting alternative relief of recovery of Rs.27,00,000/- paid as earnest money to defendant No.1-appellant, along with interest @ 9% per annum from the date of execution of agreement to sell in question, till the filing of the suit as well as future interest @ 6% per annum from the date of filing of the suit, till realization of the entire decretal amount.

[2] Brief facts of the case, leading to the filing of the Regular Second Appeal are that plaintiff-respondent No.1 had filed a civil suit against defendant No.1-appellant for possession by way of specific performance of agreement to sell dated 04.05.2007 along with a prayer for directions to defendant No. 1-appellant to execute a valid sale deed regarding land

measuring 16 K – 0 Ml. bearing Khata No.694/862, Khasra No.67//18/2 (7-7), 19/1(7-7), 22/1(0-13), 23/1(0-13) as entered in the *jamabandi* for the year 2002-03 situated in the area of Village Barnala Kalan, Tehsil and District Nawanshahr along with all rights appurtenant thereto including right of passage after receiving the balance sale consideration and adjusting the earnest money of Rs.27,00,000/- with further directions to defendant / respondent Nos.2 and 3, to join defendant No.1-appellant to execute a legal and valid sale deed etc. In the alternative prayer was for relief of recovery of Rs.54,00,000/- i.e. refund of earnest money of Rs.27,00,000/- already paid besides Rs.27,00,000/- as damages.

[3] As per the terms & conditions in the agreement to sell, sale deed was to be executed on or before 04.06.2008. However, the date was extended to 15.06.2008 vide endorsement dated 04.06.2008 made on the reverse of the agreement to sell. Plaintiff-respondent No.1 further alleged that 15.06.2008 being Sunday and 16.06.2008 being holiday in the office of the Sub Registrar, Nawanshahr, a legal notice was served by him upon defendant No.1-appellant calling upon him to come to the office of the Sub Registrar, Nawanshahr on 17.06.2008 but defendant No.1-appellant failed to turn up for execution of the sale deed, that alleged sale of part of the suit land by defendant No.1-appellant in favour of defendant/respondent Nos.2 & 3 was not admitted and even if proved, the same was a sham and bogus transaction having been created to harm and jeopardize the rights of plaintiff-respondent No.1.

[4] Written statement was filed by defendant No.1-appellant stating that plaintiff-respondent No.1 had himself run away from the agreement to sell and that on 04.06.2008, plaintiff-respondent No.1 was not ready to perform his part of the agreement and had projected that defendant/respondents Nos.2 & 3 were ready to perform contract of the

agreement regarding land measuring 8 Kanals – 04 Marlas as he could not arrange the balance sale consideration whereupon, defendant No.1-appellant extended the time and executed sale deed of the property in favour of defendant-respondent Nos.2 & 3 on the request of plaintiff-respondent No.1, that on 17.06.2008, he had remained present for the entire day but plaintiff-respondent No.1 did not turn up for the execution of the sale deed.

[5] The learned Additional Civil Judge (Senior Division), SBS Nagar, on the basis of evidence led before him held execution of agreement to sell as well as extension of agreement to sell and receipts (Ex. P-3 & P-5) to be admitted by both the parties but that plaintiff-respondent No.1 had failed to show that he had Rs.80,00,000/- as also allied expenses for purchasing the stamp papers etc on the day when he got his presence marked before the Sub Registrar, therefore plaintiff-respondent No.1 was not entitled to the grant of relief of specific performance, that although there was extension of time for execution of the sale deed, the same was without specifying the reason, besides the agreement to sell had been executed way back in the year 2007 that is approximately 7 years earlier and there had been escalation in the prices but since execution of agreement to sell, extension of agreement to sell and receipts (Ex. P-3 & P-5) had been admitted, therefore, the plaintiff-respondent No.1 was entitled to refund of Rs.27,00,000/- paid as earnest money but since he had failed to prove that he had suffered any kind of damages, as such, he was not entitled to the relief of damages and further that although he had not claimed interest but justice would be done if the plaintiff-respondent No. 1 was given reasonable interest. Accordingly, judgment and decree was passed granting alternative relief as detailed in the opening part of the judgment.

[6] Both defendant No.1-appellant as well as plaintiff-respondent No.1 filed an appeal against the judgment and decree passed by the learned Additional Civil Judge (Senior Division), SBS Nagar dated 18.01.2014. During the pendency of the appeal, plaintiff-respondent No.1 moved an application under Order 41 Rule 27 CPC for leading additional evidence in the form of copy of judgment dated 30.10.2014, to prove the conduct of defendant No.1-appellant with regard to the matter in dispute and other property owned by him. However, the said application was contested on the ground that judgment dated 30.10.2014 had been challenged in appeal besides it was not relevant to the matter in dispute. The same was dismissed on the ground that judgment dated 30.10.2014 sought to be placed on record by plaintiff-respondent No.1 had decided the suit for specific performance filed by Jarnail Singh and Narinder Pal against defendant No.1-appellant and it did not have any bearing on the facts and circumstances of the case in hand.

Defendant No.1-appellant also filed separate appeal against the judgment and decree dated 18.01.2014 on the ground that plaintiff-respondent No.1 did not have the financial capacity and he was never ready and willing to perform his part of the contract, therefore, his earnest money was rightly forfeited and further that defendant-respondent Nos.2 & 3 were business partners of plaintiff-respondent No.1 and defendant No.1-appellant had sold part of property to defendant-respondent Nos.2 & 3 only on the asking of plaintiff-respondent No.1 and that date of registration of sale deed was extended because plaintiff-respondent No.1 did not have requisite balance sale consideration.

Defendant No.1-appellant also filed an application under Order 41 Rule 27 CPC for leading additional evidence to the effect that sale of part of the suit land was executed in the name of defendant/respondent Nos. 2&3 at the

instance of plaintiff-respondent No.1 because he was unable to make payment of sale consideration and he had got refund of non judicial stamp papers which had been purchased in the name of his wife Tirath Kaur. The aforesaid application was also dismissed by the learned Additional District Judge on the ground that plaintiff-respondent No.1 had to pay Rs.80,50,000/- to defendant No.1-appellant for registration of sale deed and even if it was assumed that an amount of Rs.1,91,100/- was refunded to Tirath Kaur wife of plaintiff-respondent No.1, it did not have any bearing on the dispute in hand for it was the financial capacity of plaintiff-respondent No.1 and not his wife Tirath Kaur, which was to be seen to decide the readiness and willingness of plaintiff-respondent No.1. Accordingly, the application filed by defendant No.1-appellant under Order 41 Rule 27 CPC was also dismissed.

The learned First Appellate Court while hearing the appeals considered the question as to whether in the light of the terms and conditions of the agreement to sell, defendant No.1-appellant was legally entitled to register the sale deed without the consent of his mother Beant Kaur and whether the plaintiff-respondent No.1 was always ready and willing to perform his part of the contract ? The learned Lower Appellate Court also took note of the fact that defendant No.1-appellant had not stepped into the witness box in support of his case, instead had disputed his power of attorney holder Gurtej Singh to depose on his behalf and in view of the decision in '**Janki Vashdeo Bhojwani versus Indusind Bank Limited**', 2005 (1) RCR (Civil) 240, a person could not be allowed to appear and depose as witness on behalf of the principal in respect of matters qua his personal knowledge and could appear only as a witness in his own capacity to depose with regard to the acts done by him on behalf of the principal and that if the party did not depose personally and appear for cross-examination, such party would be deemed to have failed to

prove his case, accordingly, adverse inference had to be drawn against defendant No.1-appellant, who had not appeared in the witness box and offered himself for cross-examination by plaintiff-respondent No.1.

[7] The learned lower Appellate Court further held that Gurtej Singh, Power of Attorney holder of defendant No.1-appellant, in his cross-examination as DW-1 had admitted the signatures of defendant No.1-appellant on the agreement to sell (Ex. P-2), receipts of Rs.10,00,000/- (Ex. P-3) and Rs.17,00,000/- (Ex. P-5) endorsement for extension of the date of agreement of sale deed dated 04.06.2008 to 15.06.2008 (Ex. P-4) and further that perusal of the agreement to sell (Ex. P-2) showed that defendant No.1-appellant was duty bound to obtain the consent of his mother Beant Kaur, before registering the sale deed in favour of plaintiff-respondent No.1 because Beant Kaur had life time rights on the produce of the land in dispute. Besides *jamabandi* of the land of the year 2002-03 (Ex. P-9) also depicted Beant Kaur, widow of Bhag Mal to have life time rights in 1/4th share of the suit property and it had been admitted by DW-1 that Beant Kaur, mother of defendant No. 1-appellant was entitled to maintenance out of yield from the property in dispute and no sale deed could be executed without her consent and further that consent of Beant Kaur was not obtained to execute the sale deed, which made it abundantly clear that defendant No.1-appellant did not fulfil the precondition requisite for registering the sale deed in favour of plaintiff-respondent No.1.

[8] The learned first Appellate Court further held that apart from the above, instead of obtaining the consent of his mother Beant Kaur and thereafter registering sale deed in favour of plaintiff-respondent No.1, defendant No.1-appellant sold 8 Kanals 4 Marlas out of the suit land to respondent/defendant Nos.2 & 3 for sale consideration of Rs.28,70,000/- and

although DW-1/A had deposed in his affidavit (Ex. DW-1/A) that part of the

suit land was sold on 04.06.2008 to respondent-defendant Nos.2 & 3 on the asking of plaintiff-respondent No.1 but aforesaid fact had neither been mentioned either in the sale deed (Ex. DX) nor in the endorsement dated 04.06.2008 for extension of the date of registration of sale deed (Ex. P-2), which proved that the land was sold to defendant Nos.2 & 3 at the back of plaintiff-respondent No.1, therefore, defendant No.1-appellant could not be allowed to illegally enrich himself at the cost of plaintiff-respondent No.1, therefore, could not forfeit the earnest money amounting to Rs.27,00,000/- paid by plaintiff-respondent No.1.

[9] The learned first Appellate Court also held that plaintiff-respondent No.1 was not ready and willing to perform his part of the contract because he did not have the requisite financial capacity to pay the balance sale consideration and further that although it was not necessary to show the entire amount of sale consideration yet plaintiff-respondent No.1 did not even purchase the stamp papers worth Rs.4,25,000/- required for the registration of the sale deed.

[10] In the light of the position as noted above, the learned first Appellate Court dismissed the appeal, filed by defendant No.1-appellant as well as plaintiff-respondent No.1.

[11] Learned counsel for the appellant contended that once it had been found by both the Courts that the plaintiff-respondent No.1 was not ready and willing to perform his part of the agreement then in that situation, he could not be granted the alternative relief of refund of earnest money and the same ought to have been allowed to be forfeited.

[12] I have considered the submission of learned counsel for the appellant and have gone over the paper book.

[13] Admittedly, both the Courts below have held that the plaintiff-respondent No.1 was not ready and willing to perform his part of the agreement since he did not have the requisite financial capacity to make the payment of Rs.80,50,000/- nor for that matter had purchased stamp papers of the value of Rs. 4,25,000/- requisite for registration of the sale deed. However, the fact remains that agreement to sell dated 04.05.2007 was in respect of 16 k – 0 marla land for a consideration of Rs.1,07,50,000/-. Earnest money of Rs.27,00,000/- had been paid and sale deed was to be registered on 04.06.2008 but the target date was extended to 15.06.2008, on which date the plaintiff-respondent No.1 was required to pay the balance sale consideration of Rs.80,50,000/- to defendant No.1-appellant.

[14] Appellant-defendant No.1 has also filed an application under Order 41 Rule 27 read with Section 151 CPC for permission to lead additional evidence that stamp papers purchased by Tirath Kaur wife of plaintiff-respondent No.1 for Rs.1,91,100/- on 03.06.2008, were cancelled and payment refunded besides, stamp papers purchased for registration of sale deed in favour of defendant-respondent No. 2 was in continuation of the aforesaid stamp papers and defendant No.2-respondent No.2 was the business partner of plaintiff-respondent No.1 and it was on the asking of plaintiff-respondent No.1 that the sale deed was executed in favour of defendant – respondent No.2. Although, no mention was made at the time of making submissions in the appeal with regard to the application for additional evidence yet in view of the said application having been moved, the same is being taken up for consideration and decision. It also needs mention here that similar application for additional evidence was moved by defendant No.1-appellant before the first appellate Court on the ground that sale deed of part of suit land was executed in the name of Gurdip Singh at the instance of

plaintiff-respondent No.1 because he was unable to make payment of sale consideration and he had got refund of non judicial stamp papers which had been purchased in the name of his wife Tirath Kaur. The aforementioned application was dismissed by the learned Additional District Judge on the ground that plaintiff-respondent No.1 had to pay Rs.80,50,000/- to defendant No.1-appellant for registration of sale deed and even if it was assumed that an amount of Rs.1,91,100/- was refunded to Tirath Kaur wife of plaintiff-respondent No.1, the same did not have any bearing on the dispute in hand for it was the financial capacity of plaintiff respondent No.1 and not the capacity of his wife Tirath Kaur, which was to be seen in order to decide the readiness and willingness of plaintiff-respondent No.1 to register the sale deed. In the light of the position as noted above, I find no reason to take a view different than the one taken by the learned first Appellate Court, in dismissing the said application. Apart from the above, although DW-1, attorney of defendant No.1-appellant in his affidavit (Ex. DW-1/A) stated that part of the suit land was sold on 04.06.2008 to defendant-respondent No.2 on the asking of plaintiff-respondent No.1 but aforementioned fact is neither mentioned in the sale deed (Ex. DX) nor in the endorsement dated 04.06.2008 for extension of date of registration of sale deed (Ex. P-2). The same establishes that land was sold by defendant No.1-appellant to defendant-respondent No.2 otherwise then at the behest of the plaintiff-respondent No.1. Moreover, DW-1, i.e. attorney of defendant No.1-appellant categorically admitted that as per the agreement to sell, consent of Beant Kaur, mother of defendant-appellant No.1 was necessary before executing the sale deed since she had life time rights in 1/4th share of the suit property/life time rights on the produce of the land in dispute and that consent of Beant Kaur was not obtained to execute the sale deed. Accordingly, finding no merit in the application under Order 41 Rule

27 CPC, the same is dismissed. Likewise, all connected applications filed along with the appeal are also dismissed.

[15] In the circumstances, the finding of the Courts below that defendant No.1-appellant could not be allowed to illegally enrich himself at the cost of the plaintiff-respondent No.1, therefore, could not forfeit the earnest money of Rs.27,00,000/- paid by the plaintiff-respondent No.1 does not call for any interference whatsoever. In '**M/s Kailash Nath Associates versus Delhi Development Authority and Another**', 2015 (4) SCC 136, Hon'ble the Supreme Court considered a similar matter in which the appellant therein had filed a suit for specific performance and in the alternative for recovery of damages and recovery of the earnest money. Although, the appellants suit therein for specific performance and damages was dismissed but a refund of earnest money forfeited was ordered along with interest @ 9% per annum. Hon'ble the Supreme Court held that as earnest money was an amount paid in case of breach of contract and named in the contract as such, it would be covered by Section 74 of the Contract Act and that since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused was a *sine qua non* for the applicability of the Section and that Section 74 applied whether a person was a plaintiff or a defendant in a suit, as also that Section 74 would apply to cases of forfeiture of earnest money under a contract. Relevant extract of aforesaid decision is reproduced as under:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such

liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused in a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. ”

[16] In the circumstances, Hon’ble the Supreme Court reversed the judgment of Hon’ble Division Bench of the Delhi High Court, which had set aside the judgment of the learned Single Judge, who although had dismissed the appellant suit for specific performance and damages had ordered refund of the earnest money forfeited along with interest @9% per annum and restored judgment of the learned Single Judge. The matter is thus even otherwise, squarely covered by the aforementioned decision of Hon’ble the Supreme Court.

[17] No substantial question of law arises for consideration. The appeal is bereft of merits. Accordingly, finding no merit in the appeal, the same is dismissed in limini but with no order as to costs.

(B.S. WALIA)
JUDGE

17.10.2018
rajneesh

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No