

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

**RSA No.3998 of 2018(O&M)
Date of Decision: 13.09.2018**

Bakshish Singh	Appellant
Versus	
Dharampal Gupta	Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Rakesh Nehra, Advocate and
Ms. Binayjeet Sheoran, Advocate
for the appellant.

Mr. Rajinder Goyal, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this regular second appeal against the judgment and decree dated 15.05.2018 passed by Additional District Judge, Patiala, whereby the appeal filed by the appellant against the judgment and decree dated 19.04.2017 passed by Civil Judge (Junior Division), Rajpura was dismissed.

[2]. Respondent/plaintiff filed a suit for specific performance of agreement to sell dated 06.09.2008 in respect of suit land. Permanent injunction was also sought, restraining the defendant from creating any third party interest over the suit property.

[3]. The pleaded case of the plaintiff was that defendant vide agreement to sell dated 06.09.2008 had agreed to sell the suit land measuring 10 bighas of land fully detailed in the headnote of the plaint along with passage, electric connection, kotha, cattle shed, residential house @ Rs.8 lacs per bigha to the plaintiff. Defendant received an amount of Rs.10 lacs as earnest money from the plaintiff. The target date for execution of sale deed was fixed as 20.10.2008 after making payment of remaining sale consideration. Plaintiff pleaded that he was always ready and willing to perform his part of obligation, but the defendant has failed to perform his part of obligation. 20.10.2008 was the holiday and the plaintiff remained present in the office of Sub Registrar on 21.10.2008 along with remaining sale consideration and expenses towards execution and registration charges of sale deed from 9 AM till evening, but the defendant did not turn up. Plaintiff got the affidavit attested from the Executive Magistrate-cum-Tehsildar in token of his presence. After 21.10.2008, the plaintiff approached the defendant with a request to execute the sale deed after getting the land demarcated. Out of total 222 bighas and 9 ½ biswas of land, two other brothers of the defendant namely Sadh Singh and Ram Singh were also having shares in the suit land. The shares of brothers of the defendant had also been purchased by

the plaintiff by getting the sale deed executed and registered in favour of his son and other partner Rajesh Kumar vide sale deed 22.01.2007. Uncle of the defendant was also having share in the land measuring 12 bighas and 13 biswas and 06//2/3 biswas in the total land measuring 222 bighas, 9 ½ biswas. The said land was also purchased by the plaintiff in the name of his wife vide sale deed dated 01.09.2008. The aforesaid facts were in the knowledge of the defendant. Plaintiff made it clear to the defendant that he will purchase the entire chunk of land for establishing a project in the land of the defendant, his brothers and uncle. In view of above situation, defendant started blackmailing the plaintiff by demanding more money for execution of sale deed arising out of agreement to sell.

[4]. Defendant contested the suit and stated that on receipt of earnest money to the tune of Rs.10 lacs, he further executed an agreement to sell dated 14.10.2008 with Rachhpal Singh and paid earnest money to the tune of Rs.11 lacs to him. Due to non-execution of sale deed in question, the amount of Rs.11 lacs paid by the defendant to said Rachhpal Singh has been forfeited. The earnest money paid by the plaintiff stands forfeited as the plaintiff was never ready and willing to perform his part of obligation.

[5]. Both the parties went to trial on the following issues:-

- “1. Whether plaintiff is entitled for possession by way of specific performance of the agreement as prayed for? OPP*
- 2. Whether plaintiff is entitled for permanent injunction as prayed for? OPP*
- 3. Whether plaintiff has concealed material facts from the Court? OPD*
- 4. Whether plaintiff is estopped from filing the present suit on account of his act and conduct? OPD*
- 5. Whether suit of plaintiff is not legally maintainable? OPD*
- 6. Whether suit of plaintiff is liable to be rejected under Order 7 Rule 11 CPC? OPD*
- 7. Whether plaintiff has filed a false and frivolous suit? OPD*
- 8. Relief.”*

[6]. Trial Court vide judgment and decree dated 19.04.2017 partly decreed the suit of the plaintiff for the relief of recovery. The suit for specific performance of agreement to sell and for permanent injunction was dismissed. Plaintiff was held entitled only for recovery of Rs.10 lacs from the defendant along with future interest @ 6 per annum from the date of decree till final realization of the amount. Trial Court held that the plaintiff could not prove any evidence of his financial capacity to show his readiness and willingness to perform his part of obligation on the target date. He could not prove the essential ingredients required for grant of specific performance of agreement in

question in his favour. The plaintiff could not prove his readiness and willingness to perform the obligation arising out of agreement to sell. Payment of amount of Rs.10 lacs towards earnest money was an admitted fact. Trial Court further held that mere non-appearance of the party before the Sub Registrar is not a valid ground to cancel the agreement to sell or to forfeit the earnest money. It was incumbent upon the defendant to send a legal notice to the plaintiff regarding recession of the agreement to sell before forfeiting the earnest money of Rs.10 lacs. Trial Court referred to the concept of unjust enrichment and pass the decree for recovery of Rs.10 lacs along with interest in favour of the plaintiff.

[7]. After passing of the decree, an application was filed by the plaintiff for reviewing the judgment and decree dated 19.04.2017. Vide order dated 04.08.2017, the application was partly allowed and the plaintiff was held entitled to the relief of *pendente lite* interest @ 9% per annum from the date of payment till the date of passing of judgment and decree of the trial Court.

[8]. Plaintiff felt contended with the judgment and decree of the trial Court did not file any appeal before the Lower Appellate Court. Defendant/appellant filed appeal before the Additional District Judge, Patiala against the judgment and decree dated

19.04.2017 passed by the trial Court. Lower Appellate Court also held that the plaintiff was at fault in not honouring the obligation arising out of agreement to sell, but merely because the plaintiff was at fault, the defendant could not have forfeited the earnest money of Rs.10 lacs. Lower Appellate Court by referring to clause of agreement to sell Ex.P1 held that the amount of Rs.10 lacs was not an earnest money, rather the same was a part payment of consideration amount. By referring to Clause 3 of agreement to sell Ex.P1, Lower Appellate court held that the amount in question could not be forfeited by the defendant. Lower Appellate Court also held that the defendant has not led any evidence to show that he has suffered loss due to breach of agreement done by the plaintiff. Lower Appellate Court after noticing the factum of agreement to sell dated 14.10.2008 between the defendant and Rachhpal Singh also observed that Rachhpal Singh has not been examined, therefore, the aforesaid transaction was not proved. With the aforesaid observations, Lower Appellate Court dismissed the appeal on 15.05.2018, thereby endorsing the decree of the recovery in favour of the plaintiff with modified interest i.e. 9% *pendente lite* interest and 6% future interest from the date of decree till final realization of the amount.

[9]. The appellant has preferred this appeal with the following substantial questions of law:-

“i. Whether the impugned order to refund the earnest money 10 lacs with interest (inspite of fact that there is no clause for refund of earnest money and there is clause of forfeiture of earnest money) is violative of law?

ii. Whether the impugned order to refund the earnest money (with interest) even in absence of prayer for refund of money is violative of law?

iii. Whether the suit for specific performance can be treated as suit for recovery?

iv. Whether an issue regarding recovery/refund of earnest money is required to be framed in circumstances when court orders for refund of money with interest even in absence of prayer?

v. Whether the Id. Court has rightly reviewed the judgment and decree without issuing notice and granting opportunity of hearing to effected party?

vi. Whether the Id. Lower Court has rightly ordered to refund the sale consideration/earnest money even in absence of any such clause in agreement?

vii. Whether the Id. Lower Court has rightly observed that appellant has suffered no loss, inspite of proved fact that his earnest money of Rs.11 lacs, in next transaction has been forfeited?

viii. Whether the impugned judgment and decree dated 15.05.2018 passed by learned Add. Distt. Judge, Patiala and judgment and decree dated 19.04.2017 passed by learned Civil Judge, Jr. Division, Rajpura is

liable to be set aside?”

[10]. I have considered the arguments of learned counsel for the parties and have also perused the material on record.

[11]. Learned counsel for the appellant relied upon terms and conditions of agreement to sell and contended that there was a clause of forfeiture in the event of non-compliance on the part of the plaintiff. Clauses 2 and 3 of the agreement to sell were to the following effect:-

“2) That if the above seller will not get the sale deed registered upto above prescribed date the purchaser will have the right that he can file a case in the Court for specific performance and can get the sale deed registered. In that case all the expenses will be borne by the seller.

3) That if the said purchaser will not get the sale deed registered on or before the above mentioned date, the earnest money paid by the purchaser will be forfeited in favour of seller and the deal will be treated as cancelled. The purchaser will not be entitled for any recovery.”

Since there was no default on the part of the defendant, therefore, the earnest money paid to the defendant was liable to be forfeited in his favour and the transaction was to be treated as cancelled in view of Clause 3 of the agreement to sell which was bilateral in nature.

[12]. Secondly, learned counsel submitted that in view of

stand taken in the written statement, the defendant has already placed reliance on agreement to sell dated 14.10.2008, which was executed between the defendant and Rachhpal Singh son of Sada Singh. The said agreement to sell was duly exhibited as EX.D1 on record. Rachhpal Singh has already died and his son namely Kuldip Singh has been examined as DW 2 by the defendant. The finding to the contrary recorded by the Lower Appellate Court was on account of misreading of evidence. Agreement to sell dated 14.10.2008 was duly exhibited as Ex.D1 on record and the factum of loss suffered by the defendant has been demonstrated with the help of testimony of DW 2.

[13]. Thirdly, learned counsel submitted that agreement to sell is an admitted document between the parties. The agreement has arising out of bilateral obligation between the parties, wherein factum of payment of Rs.10 lacs towards earnest money was recorded. The payment of Rs.10 lacs was recited as earnest money. Clauses 2 and 3 of the agreement to sell were very specific in nature and the amount of earnest money cannot be termed to be part payment towards sale consideration. Lower Appellate Court has virtually made out a new case to the plaintiff. Learned counsel further submitted that on the one hand, defendant has suffered loss of Rs.11 lacs on

account of his inability to execute the sale deed in favour of Rachhpal Singh and at the same time, the amount of earnest money has been ordered to be refunded by him with interest.

[14]. On the other hand, learned counsel for the respondent submitted that though the plaintiff/respondent has not preferred any first appeal before the Lower Appellate Court, but still he can argue the case with the help of Order 41 Rule 33 CPC. For forfeiture of the earnest money, defendant never issued any notice to the plaintiff. Forfeiture of the amount cannot be done, particularly when the defendant himself has not performed the obligation which is required to be fulfilled before execution of sale deed as the defendant was required to get a demarcation conducted in order to show his readiness and willingness and to facilitate the execution of sale deed. Defendant while appearing as DW 1 has admitted the aforesaid latch on his part. Learned counsel further submitted that even though the plaintiff has not resorted to Order 41 Rule 33 CPC at the stage of First Appellate Court, still the plea being legal can be raised at the stage of regular second appeal.

[15]. I have considered the submission made by learned counsel for the parties.

[16]. The cumulative reading of questions of law framed by learned counsel for the appellant would impel this Court to reframe following substantial questions of law:-

1. Whether the plaintiff is bound by the recital of agreement to sell dated 06.09.2008 executed between the parties as a bilateral obligation?
2. Whether earnest money paid under agreement to sell is liable to be forfeited in the event of breach of bilateral obligation at the instance of the plaintiff?
3. Whether principle of unjust enrichment can be applied in a case of bilateral obligation, where readiness and willingness on the part of the plaintiff was not endorsed by the Courts below and the defendant has led evidence of suffering of losses on account of non-performance of agreement to sell by the plaintiff?
4. Whether judgment and decree passed by the Lower Appellate Court is the result of misreading of evidence?
5. Whether Order 41 Rule 33 CPC can be pressed into service at the stage of regular second appeal, particularly when question of readiness and willingness was not adverted to by the plaintiff before the Lower Appellate Court?

[17]. Substantial questions of law No.1 and 2 are

interconnected, therefore, they are decided together. Bare perusal of agreement to sell shows that Clauses 2 and 3 were specific in nature. There was a clear recital that in the event of breach on the part of the plaintiff, the earnest money paid by the plaintiff to the defendant will be forfeited and the agreement will be treated to be cancelled. The purchaser will not be entitled for any recovery. The Courts below have found that the plaintiff was not ready and willing to perform his part of obligation arising out of agreement to sell. The findings to the said effect recorded by the trial Court were not assailed by the plaintiff before the Lower Appellate Court in the form of cross appeal or cross objections. Even the readiness and willingness on the strength of provisions in terms of Order 41 Rule 33 CPC were not argued before the Lower Appellate Court. The judgment recorded by the Lower Appellate Court contained only a passing reference in para Nos.15 to 18. No such contention based on Order 41 Rule 33 CPC was noticed by the Lower Appellate Court. In view of material on record, I find that the earnest money is liable to be forfeited in the event of non-adherence of the bilateral obligation by the plaintiff. In view of aforesaid, I hold that the plaintiff was bound by the recital of agreement in question. Therefore, substantial questions No.1 and 2 are answered in favour of the defendant.

[18]. As regard question No.3, the observations made by the Lower Appellate Court are totally not in existence. Lower Appellate Court has ignored the material evidence on record. Agreement to sell dated 14.10.2008 executed between the defendant and Rachhpal Singh has been duly exhibited on record. The earnest money of Rs.11 lacs was paid by the defendant in pursuance of aforesaid agreement. Rachhpal Singh has died and the factum of agreement to sell has been endorsed by his son Kuldip Singh while appearing as DW 2. Statement of DW 2 has been ruled out of consideration before the Lower Appellate Court by misreading the evidence on record. The loss suffered by the defendant was specifically pleaded and the material to that effect was brought on record in the form of Ex.D1 which was duly supported by the statement of Kuldip Singh (DW 2) son of Rachhpal Singh in whose favour sale deed in pursuance of agreement to sell dated 14.10.2008 was executed by the defendant. In view of aforesaid material on record, the observations to the contrary made by the Lower Appellate Court in the context of undue enrichment are the result of exceeding jurisdiction and the same are simply not tenable in law.

[19]. Evidently, the plaintiff was not found to be ready and willing to honour the obligation arising out of bilateral obligation

to agreement to sell. Defaulter cannot have the premium over his in-action. Clause of forfeiture in the agreement to sell was an admitted fact between the parties. The judgment and decree passed by the Lower Appellate Court has virtually made out a new case in favour of the plaintiff/respondent. In view of above, aforesaid question is also answered in favour of the defendant/appellant.

[20]. Question No.4 is dependent upon the evidence. Evidence in the form of agreement to sell Ex.P1, agreement to sell Ex.D1 and statement of DW 2 Kuldip Singh have been misread by the Lower Appellate Court. Payment of earnest money has been coined out towards part payment of sale consideration despite any cogent material on record. Recital of agreement to sell has been misread which specifically provided for interpretation that the amount of Rs.10 lacs was an earnest money. The observation of the Lower Appellate Court that there is no material of any loss caused to the defendant was wholly meritless in view of existence of agreement to sell dated 14.10.2008 Ex.D1 and statement of Kuldip Singh son of Rachhpal Singh, proving the factum of loss and inability of the defendant to execute the sale deed in pursuance of agreement to sell dated 14.10.2008 which had caused loss of Rs.11 lacs to the defendant. In view of above, the impugned judgment and

decree passed by the Lower Appellate Court is found to be the result of misreading of evidence.

[21]. As regards question No.5, it can be appreciated that against the judgment and decree passed by the trial Court, the plaintiff/respondent did not venture to file any first appeal before the Lower Appellate Court. He remained contented with the decree of the trial Court. Even during the first appeal, provision in terms of Order 41 Rule 33 CPC was not pressed into service by the plaintiff/respondent inasmuch as that the Lower Appellate Court has not adverted to readiness and willingness on the part of the plaintiff/respondent and in para Nos.15 to 18 of the judgment, only a passing reference was made. Only such contention was recorded at the instance of the plaintiff/respondent that he was always ready and willing to perform his part of obligation and the fail was on the part of the defendant in not getting the demarcation conducted in time so as to facilitate execution of sale deed on that count. Neither cross appeal nor cross objections were filed before the Lower Appellate Court. Lower Appellate Court passed the judgment and decree on the basis of judgment and decree passed by the trial Court. Even at the stage of regular second appeal, no cross objection was filed by the plaintiff/respondent. An effort was made to argue on the basis of Order 41 Rule 33 CPC orally.

[22]. Perusal of the record would show that the plea of readiness and willingness on the part of the plaintiff was found to be negated by both the Courts below. Plaintiff/respondent never thought it appropriate to challenge the said plea even by filing cross appeal or cross objections before the lower Appellate Court. Even in the absence of aforesaid exercise, the plaintiff could have argued the concept of Order 41 Rule 33 CPC before the Lower Appellate Court. Evidently, no such arguments were raised before the Lower Appellate Court. The judgment and decree passed by the Lower Appellate court did not contain any such argument raised by learned counsel for the appellant at any point of time. Allowing the plaintiff to take recourse of Order 41 Rule 33 CPC at the stage of regular second appeal would be highly improper as no substance existed for granting such an indulgence in favour of the plaintiff who was found to be wanting in terms of obligation arising out of bilateral agreement to sell. The concept of undue enrichment cannot be inferred in favour of the plaintiff, rather as per material on record, defendant has suffered losses on account of non-fulfillment of obligation by the plaintiff as the defendant has suffered loss of Rs.11 lacs in not executing the sale deed as per agreement to sell dated 14.10.2008 executed between the defendant and Rachhpal Singh.

[23]. The cumulative effect of the aforesaid discussion would show that the present appeal has force of law. The amount of earnest money paid to the defendant/appellant is liable to be forfeited as per terms and conditions of the agreement to sell. The substantial questions of law as formulated hereinabove arise in the present case and on the basis of discussion made hereinabove, the appeal in question deserves to be accepted.

[24]. In view of above, the present regular second appeal is allowed. Impugned judgments and decrees passed by the Courts below are hereby set aside. The suit is dismissed in toto.

September 13, 2018
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking
Whether reportable

Yes/No
Yes/No