IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 4021 of 2019 (O&M)
Date of decision: 1.11.2019

Harjit Singh and others
...Appellants

Versus

Gian Singh
...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. S.S.Rangi, Advocate,
for the appellants.

Mr. Manuj Nagrath, Advocate,
for the respondents/caveator.

JAISHREE THAKUR, J.

1. The appellants seek to challenge the judgment and decree of the first Appellate Authority by which the suit of the plaintiff for specific performance has been partly decreed by directing refund of the earnest money as received.

2. The facts as stated are that the plaintiff—respondent (**'the respondent'** for Short) agreed to purchase land measuring 72 K along with passage, electric motor, Khal, Pahi etc @ ₹16,40,000/- per acre, as per sale agreement dated 5.10.2006. The vendors i.e defendants—appellants (**'the appellants'** for short) were Harjit Singh and Pargat Singh, who also acted on behalf of Inderjt Singh and Amanjot Kaur. An amount of ₹6,00,000/- was received by Harjit Singh and Pargat Singh as earnest money for themselves and on behalf of the other two. The sale was to be executed on or before the

15.5.2007. In terms of the agreement, the respondent paid another amount of ₹16,00,000/- to the attorney of Inderjit Singh but as the attorney was not valid, a fresh attorney was got and duly registered with the Commissioner Patiala, on 23.4.2007. An endorsement was made on the back of the page whereby ***Pargat Singh*** for himself and being power of attorney of Inderjit Singh admitted to having received an amount of ₹16 lakh as earnest money. In the agreement for sale, it was also agreed that in case the appellants failed to perform their part of the agreement, the respondent was at liberty to execute the sale deed through the court *or shall be entitled to double of the earnest money*. The respondent appeared before the office of the Sub-Registrar, Samrala, on the appointed date, but the appellants showed their inability to execute the sale deed and an endorsement in this regard was made on the reverse of the agreement (but was not signed by Inderjit Singh and Amarjit Kaur). The respondent got his presence marked before the office of the Sub-Registrar, Samrala. The respondent on inquiry came to know that there was a Civil Suit pending in the Court of Sh. R.K. Mittal, Civil Judge, Khanna, against Inderjit Singh from alienating the suit land in Civil suit No. 437 of 22.11.2006 titled as *Harminder Singh versus Harjit Singh and another* and there was a stay order in another case titled as *Harpal Singh versus Harjit Singh* pending before the Civil Judge (Senior Division), Khanna. It was stated that after entering into the agreement to purchase, the respondent had further entered into an agreement of sale of the same land with other persons but due to non-execution of the sale deed the respondent had to return the earnest money. It was also stated that the appellants did not clear the loan on the suit property and had also not demarcated the land in question as per the terms and conditions of the agreement and as such, since the land was not free from encumbrances a suit for recovery was filed seeking a refund of the part payment made.

3. The suit was contested by the appellants, who filed their separate written statements raising the question of maintainability of the suit. It was averred that the respondent has not sought the relief for specific performance and the appellants were always ready and willing to perform their part of the agreement to sell. It was stated that the land of appellants No. 4 Amarjit Kaur was free from all encumbrances and she was ready to execute the sale deed on 15.05.2007, whereas Inderjit Singh also agreed to execute the sale deed after vacation of the injunction order from the civil courts. It was also stated that the respondent did not have the requisite money to purchase the suit land as would be evident from the fact that he had entered into an agreement with another to sell the land. It was also stated that the respondent did not make payment of ₹7 lakh in ₹13 lakh to Indejit Singh as per the agreement and as such the earnest money of ₹22,00,000/- stands forfeited. Replication was filed and issues were framed. The trial court on the evidence adduced held that the respondent himself was not ready and willing to get the sale deed executed and that the earnest money stands forfeited . It was also held that a simplicitor suit for recovery would not be maintainable without applying for the relief of specific performance. The said judgment was reversed in appeal and the respondent was held entitled to recovery of the amount paid as earnest money. Aggrieved the appeal has been preferred by the appellants.

4. Learned counsel for the appellants submits that the

respondent has not been able to prove that he was present before the Sub Registrar on the 15.5.2007, the appointed day. Moreover the respondent has not been able to prove that he paid a sum of ₹7 lakh to Inderjit on 21.5.2007 nor could he prove his readiness and willingness to execute the sale agreement as he did not have the funds on the necessary day. It is also submitted that a simplicitor suit for recovery would not be maintainable sans the plea of specific performance, as specified in Section 22 of the Specific Relief Act 1963. It is also argued that the prayer for recovery is only maintainable as an alternate relief as per Section 29 of the Specific Relief Act. Moreover, it has been argued that the respondent has not come with clean hands as he has not disclosed the legal notice sent by him dated 18.5.2007 wherein he called for the refund of the earnest money, even after agreeing to extend the date for execution of the agreement. Reliance has been placed upon judgments rendered in **Satish Batra v. Sudhir Rawal 2012 (6) Recent Apex Judgments 1, Veena Talwar and others Vs Harkesh & another 2019 (1) CivCC 691, M/s Kailash Nath Associates Vs Delhi Development Authority and another (2015) 4 SCC 136, Ran Singh and others vs M/s Capex Projects Pvt Ltd.. 2019 (2) PLR 618** in support of his arguments.

5. Per contra, it is pointed out by the learned counsel for the respondent that the first Appellate Authority based on the evidence has come to the firm conclusion that there was no need to plead specific performance, since performance of the sale agreement was impossible and based upon the agreement the sellers were to refund double the amount of earnest money received.

6. I have heard the counsel for the parties and with their assistance have perused the pleadings and case law.

7. The sale agreement Ex. P1 on the record has been admitted as the factum that the appellants had received a sum of ₹22,00,000/- from the respondents by the 19.10.2006. It is also borne out from the record that one of the appellants had been restrained from alienating the suit land in Civil Suit No. 437 of 22.11.2006 titled as *Harminder Singh versus Harjit Singh and another* and there was a stay order in another case titled as *Harpal Singh versus Harjit Singh* pending before the Civil Judge (Senior Division) Khanna. These documents are available on the record as Exs. P6 to Ex P11. The stay was vacated only in the year 2010 and that too after filing of the suit for recovery. It is also an admitted fact that the suit land had not been demarcated in terms of the sale agreement, nor was the land free of the mortgage created upon it from the bank by the date the sale deed was to executed. It was specifically mentioned in the sale agreement that the loan would be cleared before the execution of the sale deed by Harjit Singh and Amanjot Kaur. Therefore, it can rightly be said that the terms and the conditions as specified in the sale agreement were not complied with by the appellants.

8. The money that had been received was towards part payment of the agreed sale price as has been acknowledged by the appellant Harjit Singh in his statement as DW4 . A perusal of the translated copy of the sale agreement also reflects that the seller has received an amount of ₹16,00,000/- on the 19.10.2006 . As per the sale agreement, the purchaser would be entitled to a refund of double the advance amount or get the sale

executed through a court of law. But in the case in hand, the Civil Court had stayed the sale of the property belonging to Inderjit Singh nor was the land free of the mortgage so the question of the contract being performed did not arise. The only recourse left for the respondent was to ask for the refund of the amount so paid by him by filing a suit for recovery. It would not be necessary for him to prove the ingredients of being ready and willing to execute the sale deed.

9. Section 22 of the Specific Relief Act allows a person suing for specific performance of a contract to seek the relief of possession or partition and separate possession of the property or refund of the earnest money or deposit paid in case his claim for specific performance is refused. In a judgment rendered by a Division Bench in **Harbans Lal v. Daulat Ram 2007 (1) ILR (Delhi) 706** it has been held "*That is however far from saying that a party must necessarily seek specific performance of the agreement to sell in order to seek refund of the earnest money paid by him in terms of the agreement to sell. The provisions of Section 22 do not, in our opinion, go that far nor do they forbid a claim for refund of the earnest money paid by a party who is not at fault for the failure of the transaction. The trial court was not, therefore, correct in holding that refund of earnest money was impermissible so long as the suit for specific performance was not filed and a claim for refund made only by way of an alternative prayer. The true position appears to be that if the seller under an agreement to sell defaults in the discharge of his obligations, as was the position in the present case, the purchaser has the option of filing a suit for specific performance and for additional reliefs as indicated earlier or for*

cancelling the agreement and demanding the refund of his earnest money. As a matter of fact, the demand of the earnest money back from the seller may in itself constitute a repudiation of the agreement by the purchaser for such a demand would be inconsistent with his readiness and willingness to go ahead with the transaction. In other words, no sooner the purchaser demands the refund of the earnest money on the ground that the seller is unable to perform his part of the agreement, the demand must constitute a cancellation of the agreement at the instance of the purchaser. Institution of a suit for specific performance for taking a refund of the earnest money would in such an event be wholly unnecessary."

10. The judgments, as relied upon by the Counsel for the appellants, are distinguishable and not applicable to the facts of the instant case.

11. In **Satish Batra v. Sudhir Rawal 2012 (6) Recent Apex Judgments 1,** the agreement to sell property failed due to fault of purchaser. A suit for recovery of the earnest money was filed by the purchaser and it was held that a seller is entitled to forfeit entire earnest money. It was further held that if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

12. In **Veena Talwar case's (Supra),** it was held that once the purchaser failed to prove that he was ready and willing to perform his part of the contract, the earnest money would be forfeited**.** The reliance upon the judgment rendered in **M/s Kailash Nath's (Supra**) is wholly misplaced as the issue involved therein was pertaining to an auction of a plot and the non-

deposit of the balance amount within the stipulated period on account of a recession in the market. The time for making the payment was extended twice by the High Powered Committee. The plot was subsequently sold at a much higher price and the earnest money was forfeited without due notice. It was in these circumstances that the matter came before the court. Therefore the facts are distinguishable and would not be applicable herein.

13. In **I.S. Sikandar (D) by LRs. v. K. Subramani and others 2013 (6) Recent Apex Judgments 487** an agreement to sell had been executed and an amount of ₹5,000/- paid towards earnest money. The seller terminated the agreement and on the purchaser filing a suit for specific performance the Supreme Court held that there was no agreement in existence and, therefore, a suit for specific performance without challenging the termination of the contract would not be maintainable. In the case in hand, the respondent has not filed a suit for specific performance but a suit for recovery based on the agreement that in case the sale deed is not executed he would be entitled to recovery double the amount of money advanced towards the sale price. Hence, the ratio as laid down in the case cited above is not applicable to the facts herein.

14. Consequently, finding no ground to interfere in the well reasoned judgment of the first Appellate Authority , this appeal is dismissed.

1.11.2019 **(JAISHREE THAKUR)**
prem **JUDGE**

Whether speaking/reasoned Yes
Whether reportable No