

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

RSA No.4602 of 2015 (O&M)
Date of Decision: January 08, 2019

Chiranjiv Singh and another		---Appellants
	Versus	
Lt. Col. (Retd.) Hargobind Singh		---Respondent

Coram: Hon'ble Mr. Justice Harinder Singh Sidhu

Present: Mr. Rahul Sharma, Advocate for the appellants.

Mr. Gurbaksh Singh, Advocate for the respondent.

HARINDER SINGH SIDHU, J.

The plaintiffs have filed this regular second appeal against the judgments of the Courts below, whereby, their suit for specific performance of agreement to sell has been dismissed.

The case of the plaintiffs was that plaintiff No.1 is an industrialist and resident of Chandigarh. He desired to acquire a house at Chandigarh. The defendant was keen to sell his house No.1394, Sector 33-C, Chandigarh. The plaintiffs contacted Lt. Col. (Retd.), J.S. Ahluwalia, a real estate agent for purchase of a house in Chandigarh, who informed them about the aforesaid house being available for sale. An agreement to sell dated 24.04.2004 was entered into between the plaintiffs and the defendant through his attorney Mrs. Parminder Kaur for sale of the house for an amount of `1.46 crore. The defendant was in USA at that time. The agreement was witnessed by J.S. Ahluwalia. It was represented to the plaintiffs that the defendant is the original allottee and absolute and undisputed

owner of the house in question and that a deed of conveyance had been executed

in his favour by the Government. It was also represented that the property was free from all encumbrances. A sum of ₹ 15 lacs was paid to the defendant through his attorney at the time of execution of the agreement and a receipt acknowledging the same was executed by the defendant. A further sum of ₹ 15 lacs was to be paid on or before 30.04.2004. This amount was paid on 01.05.2004 and a separate receipt acknowledging this payment was issued. The sale deed was agreed to be executed on 15.06.2004. It was agreed that the balance sale consideration shall be paid at the time of execution of sale deed. The defendant was required to obtain a 'No Objection Certificate' from the Estate Officer, which was an essential pre-requisite for execution of the sale deed. A notice dated 26.05.2004 was received by the plaintiffs from Sh. Aman Kashyap, Advocate conveying that a suit had been filed against the defendant by his brother Hargursharan Singh claiming 50% share in the said house. On receipt of the notice, the plaintiff No.1 contacted the real estate agent Lt. Col. (Retd.) J.S. Ahluwalia and Mrs. Parminder Kaur, who expressed regrets and offered to return ₹ 25 lacs. The amount was returned and the plaintiffs duly acknowledged its receipt. The plaintiffs also learnt about some other litigation between one Pritam Kaur Shekon and Parminder Kaur in respect of the said house. The plaintiffs were waiting for the litigation to end to execute the agreement. They received a notice dated 18.10.2004 from the defendant intimating that as the plaintiffs had failed to honour the agreement to sell dated 24.04.2004 and did not have the means to pay the balance consideration on 15.06.2004 as per the stipulation in the agreement, the said agreement stood cancelled on receipt of ₹ 25 lacs by plaintiff No.1.

Alleging that the defendant had misrepresented regarding the property being free

from all encumbrances and denying that the plaintiffs were not ready and willing to perform their part of the agreement and that they did not have requisite funds for payment of the balance sale consideration, the suit was filed.

The case of the defendant was that the suit was not maintainable as no valid and legal agreement to sell existed between the parties. The suit was also not competent as the plaintiffs had not challenged the cancellation of the agreement to sell. It was contended that the agreement to sell was cancelled on 26.05.2004 when a sum of ₹ 25 lacs was returned to the plaintiffs as per their demand and the remaining ₹ 5 lacs were forfeited. It was also pleaded that the plaintiffs had failed to comply with condition No.2 of the agreement to sell as per which a sum of ₹ 15 lacs was to be paid on or before 30.04.2004. The payment was made on 01.05.2004. The last date for registration of sale deed was 15.06.2004. The defendant had applied for 'No Objection Certificate' to the Estate Officer on 27.04.2004, which was issued on 28.05.2004. It was denied that the defendants had any previous knowledge of the pendency of any suit regarding the house. Moreover, the defendant was not debarred from selling the property. The defendant was already ready and willing to perform his part of agreement and it was the plaintiffs who asked for and were returned ₹ 25 lacs out of the ₹ 30 lacs received by the defendant. The remaining amount of ₹ 5 lacs was forfeited and the agreement terminated.

The following issues were framed by the learned Trial Court:-

- “1. Whether defendant executed the agreement to sell dated 24.04.2004? OPP*
- 2. Whether the plaintiff has been ready and willing to perform his part of agreement?OPP*

3. *Whether the defendant through his attorney received Rs. 15 lacs as earnest money on 24.04.2004? OPP*
4. *Whether the plaintiff is entitled to possession by way of Specific Performance?OPP*
5. *Whether plaintiff is in alternative is entitled to decree of Rs.1 crore as damages?OPP*
6. *Whether the agreement to sell is not legal and valid documents?OPD*
7. *Whether the plaintiff has concealed material facts from the Court, if so, its effect?OPD*
8. *Whether the suit is bad for non-challenging the agreement to sell dated 24.4.2004 by the plaintiffs? OPP*
9. *Whether the suit is without cause of action?OPD*
10. *Whether the suit is not maintainable?OPD*
11. *Relief.”*

The learned Trial Court rejected the contention of the plaintiffs that the defendants had made misrepresentation regarding the suit property being free from all kinds of encumbrance. It concluded that there was nothing on record to indicate that on the date of the agreement to sell i.e. 24.04.2004, the defendant had knowledge about the pendency of the suit 'Hargursharan Singh versus Lt. Col. Hargobind Singh', which had been instituted on 27.03.2004. The contention of the plaintiffs that they did not go ahead with the execution of the sale deed because of the pendency of the civil suit was also not accepted by the learned Trial Court considering that the suit for specific performance was instituted by them on 24.12.2004, whereas the litigation between the defendant and his brother came to an end in the trial Court much later on 23.04.2013. The Trial Court further held that the plaintiffs had not shown any bank statement or other material to indicate

issues no.1 and 2 were decided against the plaintiffs. On issue No.8, learned Trial Court relying on the decision of Hon'ble Supreme Court in **I.S. Sikandar Vs. V.K. Subramani and others 2014 (1) RCR Civil 236**, held the suit to be not maintainable as the plaintiff had not sought a declaration that the termination of the agreement to sell by the defendant vide notice dated 18.10.2004 was invalid. Accordingly, the suit was dismissed.

In their appeal before the learned Lower Appellate Court, it was contended on behalf of the plaintiffs that the Trial Court had erred in dismissing the suit. It was contended that the agreement had not been cancelled at the time when part of earnest money i.e. ₹ 25 lacs were returned. It was argued that the very fact that ₹ 5 lacs remained with the defendant was indicative of the intention of the parties to keep the contract subsisting. It was also argued that the learned Trial Court had erroneously held that the plaintiffs were not ready and willing to perform their part of agreement and they did not have the requisite amount to get the sale deed executed. It was also argued that there was no requirement to challenge the termination of the contract as the contract was alive and subsisting.

Learned Lower Appellate Court concluded that the evidence on record indicated that the parties had mutually agreed to terminate the contract when ₹ 25 lacs were returned to the plaintiffs by the defendant on the asking of the former. The relevant discussion by the learned Lower Appellate Court is as under:-

“10. The first foremost contention raised by the counsel for the appellant was that the contract remained subsisting and open and that the learned trial Court had erred in holding to the contrary and further that no detailed findings had been recorded on this aspect and the aspect of Rs. five lacs remaining with the respondent had not been discussed, which proves the contract to be subsisting. Having gone through the entire evidence on record, I fail to find any force in the above submission. The agreement to sell was dated 24.4.2004

and the date fixed for execution of the sale deed was fixed for 15.6.2004. The execution of agreement to sell is not in dispute and neither is the fact that a sum of Rs.30 lacs was paid by the appellant to the respondent on different occasions as part sale consideration/earnest money. In order to come to a conclusion as to whether the agreement had been terminated/ cancelled or as to whether the same was subsisting, it is relevant to refer to the agreement to sell which has been proved on file as Ex.P1. Perusal of the agreement to sell reveals that on the reverse side of the first page there is a receipt regarding receiving of Rs.15 lacs as earnest money on 24.4.2004 and thereafter another receipt regarding receiving of Rs. 15 lacs by the respondent from the appellant on 1.5.2004. Further on the reverse side of the last page of agreement to sell there is a writing Ex. 14, which read as follows:-

“received back pay order for Rs.10 lacs and case Rs.15 lacs today i.e. 26.5.2004 due to pending case of the said property.”

The said receipt is signed by the plaintiffs and is an admitted writing. The version brought forth by the appellant is that the said writing was executed as Rs.25 lacs had been returned due to there being a pending litigation and it was agreed between the parties that Rs.5 lacs shall be retained by the respondent in order to keep the agreement to sell subsisting and the sale deed shall be executed after the litigation qua the property in question coming to an end. The version of the respondent is that in fact that the amount had been returned as the agreement had been cancelled due to the appellant himself not wanting to go ahead with it and Rs.5 lacs were forfeited on account of breach of contract by the appellant Ex.P14 i.e. the writing does not say a word as regards either Rs. 5 lacs remaining with the respondent in order to keep the contract subsisting or the parties agreeing to keep the contract subsisting till the end of litigation. There is another document proved on record which is Ex.D1 and Ex.D1/A, which is copy of agreement to sell in question and is an admitted document of the parties. The appellant in his cross-examination has admitted that Ex.D1 is the copy of the original of agreement Ex.P1 except that endorsement Ex.P14 is not there and he has admitted the endorsement on the back of page 2 of Ex. D1 to be correct, which had been further exhibited as Ex.D1/A. He has further admitted that mark D1/B is the copy of his handwriting and its contents are correct and that Ex. D1 has each and every page signed by him. He has further admitted it to be correct as it is mentioned in Ex. D1/A that balance amount is to be received. Perusal of Ex. D1/A reveals that there is a writing/endorsement wherein it is recorded that “received back pay order for Rs.10 lacs and case of Rs.15 lacs today i.e. 26.5.2004 and balance remaining to receive Rs. 5 lacs due to pending case of the said property”. The evidence on the file shows that in fact post execution of agreement to sell, civil suit had been filed regarding the suit property by one Hargursharan Singh, brother of respondent, claiming ownership to the extent of 50% share in the suit property. The reading of Ex. P14 and Ex. D1/A reveals that though both are not exactly the same but both of them end up disclosing that the amount of Rs.25 lacs had been returned back to the appellant by the respondent out of total amount of Rs. 30 lacs paid by the appellant to the respondent. However, the writing dated 26.5.2004 on Ex. D1/A, which is admitted word to word by the appellant, who also admits the same to be in his own handwriting reveals that Rs.25 lacs were paid back to the appellant and it was agreed that the appellant was to receive Rs. 5 lacs as remaining balance, due to pending case of the said property. What transpires and can be logically concluded from the said writing is that in fact upon coming to know regarding pending case qua the suit property, the parties had sat together and amount of Rs.25 lacs was returned to the appellant, while the respondent further agreeing to pay balance of Rs. 5 lacs to the appellant. This clearly leads to an inference and is the most probable and logical conclusion that the parties had mutually agreed to terminate the contract and thus, for this

reason, the amount of Rs. 25 lacs had been returned back while the appellant himself stating that Rs. 5 lacs remained to be paid. No other possible conclusion comes out from the above writing. If the intention of the parties was to keep the contract subsisting and to wait to honour the same, upon the ongoing litigation qua the same coming to an end, then in that eventuality it would have been but natural that this fact would have been recorded in writing so as to make their intentions clear. Moreover, it does not appear to logic nor appears to be reasonable to a prudent mind that the seller would keep the contract subsisting while retaining only Rs. five lacs, despite the total sale consideration being Rs.1 crore and that too without there being any specific time frame, as nothing could be said with certainty as to when the litigation would be coming to end. It cannot be believed that both the parties for that matter would keep on waiting for years to come, in order to bring the agreement to its logical end. As observed above, this was a crucial aspect and if so intended, should have been specifically reduced in writing but it is not so and rather the intent of the parties which can be gathered from writing on Ex.D1/A is that the entire amount was to be repaid back to the appellant by the respondent due to there being a case pending qua the suit property and on this count, the contract between them stood cancelled for all intents and purposes. In civil matters, it is the preponderance of probabilities which is also to be considered and kept in mind by the court and in the present case, though it has not been specifically mentioned that the agreement stood cancelled, the entire facts and circumstances point to one aspect and that is the agreement having been cancelled by the parties, which also explains the return of Rs. 25 lacs out of the total Rs.30 lacs paid till then by the appellant, while it being agreed that Rs.5 lacs remained to be paid. If the said Rs.5 lacs were to be retained by the respondent till the litigation coming to an end, then there was no reason or occasion for the appellant to record regarding Rs.Five lacs being balance remaining to be received by him.”

The reasoning the learned Lower Appellate Court on this issue is unexceptionable.

Learned Lower Appellate Court further held that apart from the document Ex.D1/A itself manifesting the intention of the parties to terminate the contract, even thereafter, the defendant vide notice dated 18.10.2004 (Ex.P-15) communicated the termination of the agreement. Hence, it was incumbent upon the plaintiffs to challenge the termination of the contract. Reliance was placed on the case of I.S. Sikandar (supra). The learned Lower Appellate Court, however, did not agree with the contention of the defendants that ₹ 5 lacs had been forfeited by them. It was noticed that Ex.D1/A, which have been relied upon by the defendant itself showed that it was agreed that ₹ 5 lacs was the balance to be received by the plaintiffs. The Court held that if the said amount had been

forfeited, it would not have been mentioned that this amount was to be received by the plaintiffs. As the defendant had been unable to prove that ₹ 5 lacs had been forfeited, it was held that the defendant had wrongly withheld the amount. The findings of the Trial Court dismissing the suit of the plaintiffs qua the relief of specific performance was upheld. However, the judgment of the Trial Court was partly set aside and suit of the plaintiffs for recovery of ₹ 5 lacs was decreed. The amount was to be returned with interest @7.5% per annum from 26.05.2004 i.e. the date when the agreement was terminated till the passing of the judgment along with future interest @ 6% per annum till realization.

Mr. Rahul Sharma, learned counsel for the plaintiffs has argued that the Courts below have wrongly dismissed the suit as being not maintainable relying on the case of I.S. Sikandar (supra). He has referred to some decisions of this Court, RSA No.1936 of 2014 titled as '**Mandhir Singh and others Vs. Gurjant Singh**' and RSA No.2943 of 2017 titled as '**Brahm Dutt Vs. Sarabjit Singh**' where **I.S. Sikandar case (supra)** was distinguished on facts and a suit for specific performance was held to be maintainable even without a challenge to the termination of agreement to sell. He further argued that the findings of the learned Lower Appellate Court that the contract/agreement stood forfeited on return of ₹ 25 lacs is not sustainable. Mr. Gurbaksh Singh, Ld. Counsel for the defendant on the other hand defended the judgment of the Courts below.

It is not possible to agree with the contentions of Mr. Sharma, learned counsel for the appellants.

The argument of Mr. Sharma that the contract/ agreement was subsisting and did not stand forfeited is wholly without merit. He has not been

able to counter the unexceptionable reasoning of the Ld. Lower Appellate Court in the paragraph from its judgment extracted below. The same is affirmed.

Mr. Sharma, learned counsel for the appellants has not referred to any decision of Hon'ble Supreme Court to indicate that the decision in **I.S. Sikander (supra)** has been reversed or even that its ratio has been doubted. In the absence thereof it remains the binding law. In the various decisions of this High Court referred to by Mr. Sharma, the proposition of law in I.S. Sikandar has not been doubted, as it could not be. Only it has been held to be not applicable on the facts of those cases.

In the instant case, even without reliance on **I.S. Sikandar's case**, the result would be same. The Ld. Lower Appellate Court in its findings extracted above, has rightly concluded that the writing/ endorsement dated 26.5.2004 on Ex D1/A to the effect: *“received back pay order for Rs.10 lacs and cash of Rs.15 lacs today i.e., 26.5.2004 and balance remaining to receive Rs.5 lacs due to pending case of the said property”* indicated the intention of the parties to terminate the agreement. Once there was no subsisting agreement, no specific performance could be granted.

Thus, there is no merit in the present appeal and the same is dismissed.

January 08, 2019

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(HARINDER SINGH SIDHU)
JUDGE

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No