In the High Court of Punjab and Haryana at Chandigarh

Date of Decision:30.8.2019

RSA No. 6237of 2015 (O&M)

Subhash Chander and others

---Appellants

vs.

Pritpal Singh and others

---Respondents

RSA No. 1285 of 2016 (O&M)

Pritpal Singh and others

---Appellants

vs.

Subhash Chander and others

---Respondents

Coram: **Hon'ble Mrs. Justice Rekha Mittal**

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Present: Mr. Amit Jhanji, Advocate
for the appellants in RSA-6237 of 2015
for the respondents in RSA-1285 of 2016

Mr. G.S.Punia, Senior Advocate with
Ms. Kanu Priya, Advocate
for the respondents in RSA-6237 of 2015
for the appellants in RSA- 1285 of 2016

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Rekha Mittal, J.

This order will dispose of RSA Nos. 6237 of 2015 and 1285 of 2016 as these have emerged out of the same judgments and decrees passed by the courts and involve identical questions of law and fact. For facility of reference, facts are taken from RSA No. 6237 of 2015.

Indisputably, the plaintiffs and defendant No. 1 for himself and his co-sharers defendants No. 2 to 4 entered into agreement of sale dated

31.1.2005 in respect of property W.G. 545 bearing BIX/2-452 measuring 2 kanal 1 marla 126 Sq. feet, detailed in head note of the plaint, for a sale consideration of Rs. 2,40,00,000/-. A sum of Rs. 20,00,000/- was paid towards earnest money and sale deed was agreed to be executed on 30.9.2005. As per the agreement, defendant No. 1 agreed to get the sale deed executed by bringing other co-sharers or get their general power of attorney. The vendor was obligated to pay the house tax, electricity bill, water bill etc. till the date of registration and to obtain 'No Objection Certificate' after getting the property transferred from Municipal Corporation. There is no denial that on the stipulated date i.e. 30.9.2005, neither the plaintiffs nor the defendants came present in the office of Registering Authority for getting the sale deed executed and registered, as agreed.

The plaintiffs filed suit for specific performance on the basis of agreement of sale and in the alternative sought recovery of Rs. 60,00,000/- and also prayed for permanent injunction restraining the defendants from selling the suit property. The suit was dismissed by the trial court vide judgment and decree dated 17.1.2013. The appeal preferred by the appellants-plaintiffs was partly allowed by the District Judge, Jalandhar and they were allowed alternative relief of refund of earnest money of Rs. 20 lakhs with interest @ 9% per annum w.e.f. 31.1.2005 till the date of decree and future interest @ 6% per annum from the date of decree till realization.

RSA No. 6237 of 2015 has been filed by the plaintiffs-appellants to assert their right for specific performance of agreement of sale whereas other appeal has been filed by the defendants-respondents to assail the decree passed by the First Appellate Court allowing refund of Rs. 20,00,000/- with interest, noticed hereinabove.

Counsel for the appellants would argue that as per terms and conditions of agreement of sale, defendant No. 1 agreed to ensure presence of defendants No. 2 to 4, other co-owners of the suit property or secure a power of attorney from them to facilitate execution of sale deed on 30.9.2005. It is argued that since defendant No. 1 along with his co-owners neither appeared in the office of Sub Registrar on the stipulated date nor any power of attorney had been executed by defendants No. 2 to 4 in favour of defendant No. 1 on or before 30.9.2005, the defendants have breached the terms and conditions of agreement of sale, therefore, they cannot be allowed to take advantage of their own wrong by forfeiting the earnest money or denying to execute the sale deed in favour of the appellants-plaintiffs.

Another submission made by counsel is that there is nothing on record suggestive of the fact that defendants had already discharged their obligation to pay outstanding dues towards consumption of water, electricity, house tax etc. nor they obtained 'No Objection Certificate' from Municipal Corporation, Jalandhar. It is argued with vehemence that since the defendants are guilty of breaching the terms and conditions of agreement of sale, the courts have wrongly rejected plea of the appellants seeking specific performance of agreement of sale.

Counsel representing the respondents-defendants, on the contrary, would argue that power of attorney by defendants No. 2 to 4 in favour of defendant No. 1 was prepared prior to 30.9.2005 but the same was registered from Sub Registrar, Mumbai on 4.10.2005. It is further argued that defendants issued registered notice dated 7.1.2006 through Sh. Yogesh Malhotra, Advocate calling upon the plaintiffs to appear in the office of Sub Registrar for getting the sale deed executed and registered on 23.1.2006 but the appellants-plaintiffs failed to respond to that notice nor appeared before the Sub Registrar on 23.1.2006 and the same negates plea of the appellants that they were ready and willing to perform their part of the agreement. It is further argued that neither the appellants ever contacted defendant No. 1 prior to 30.9.2005 to know about their convenience to appear in the office of Sub Registrar on the stipulated date or with regard to power of attorney nor they appeared in the office of Sub Registrar on the stipulated date, therefore, the courts have rightly rejected contention of the appellants that they always remained ready and willing to perform their part of the agreement. It is argued with vehemence that Subhash Chander plaintiff No. 1 appeared in the witness box and facts elicited in his cross examination speak volumes that the appellants did not have the resources to meet their obligation to pay balance sale consideration of Rs. 2,20,00,000/- either on the stipulated date or on 23.1.2006 and for that reason the appellants neither appeared before the Sub Registrar on 30.9.2005 nor on 23.1.2006. It is vehemently argued that had the appellants been ready and willing to perform their part of the agreement, there was no reason for them to maintain silence despite receipt of notice dated 7.1.2006 issued by the respondents calling upon them to get the sale deed executed and registered on 23.1.2006 on payment of balance sale consideration. The last submission made by counsel is that since the appellants themselves were not ready and willing to perform their part of the agreement, they neither can seek refund of earnest money of Rs. 20,00,000/- nor can support the judgment and decree passed by the First Appellate Court allowing refund with interest.

Counsel for the respondents has made a vain attempt to argue that in the notice dated 7.1.2006, it has been specifically incorporated that in case the appellants failed to get the sale deed executed and registered on 23.1.2006, earnest money would stand forfeited and agreement would stand cancelled, therefore, the appellants cannot maintain the suit without seeking declaration to set aside cancellation of agreement of sale. For this purpose, reliance has been placed upon judgment of Hon'ble the Supreme Court **I.S.Sikandar (D) by Lrs vs. K. Subramani and others 2014(1) RCR (Civil) 236.**

Counsel for the appellants, in reply, would argue that as the respondents-defendants have failed to raise a plea or produce any evidence that because of failure of the transaction to fructify, they have suffered any damages/loss, they are not entitle to enrich themselves by retaining the amount of earnest money. For this purpose, he has cited judgments of Hon'ble the Supreme Court **P.D'Souza vs. Shondrilo Naidu (2004) 6 SCC 649, Tarsem Singh vs. Sukhminder Singh 1998 (3) SCC 471** and **Kailash Nath Associates vs. Delhi Development Authority and another 2015 (4) SCC 136.**

I have heard counsel for the parties, perused the paper book and copies of documents made available during the course of hearing.

Indisputably, both the courts have negated plea of the appellants that they always remained ready and willing to perform their part of the agreement as they did not have resources to meet their financial obligation to pay balance sale consideration of Rs. 2,20,00,000/- in addition to meet expenses of registration etc. Counsel for the appellants has failed to advance any arguments much less meaningful to assail these factual findings recorded by the courts. Admittedly, plaintiffs did not appear in the office of Sub Registrar on the stipulated date i.e. 30.9.2005 with an intent to get the sale deed executed and registered after payment of balance sale consideration of more than Rs. 2 Crores. They did not respond to notice dated 7.1.2006 sent by the respondents nor appeared in the office of Sub Registrar on 23.1.2006 for getting the sale deed executed and registered. The trial court, in para 10 of the judgment, has noticed that the plaintiffs immediately after entering into agreement to purchase entered into agreement to sell suit property with Sanjiv and recovered Rs. 20 Lakhs. Counsel for the appellants has not challenged correctness thereof. This fact is a strong telling circumstance to negate plea of the appellants qua their readiness and willingness to perform their part of the agreement. In this contest, reference can be made to judgment of Hon'ble the Supreme Court **Abdullakoya Haji and others vs. Rubis Tharayil and another 2019 (11) Scale 107.** In this view of the matter, findings of the courts that appellants did not have the means to discharge their obligation under the agreement are liable to be affirmed and ordered accordingly. That being so, judgments passed by the courts rejecting claim of the appellants for specific performance of agreement of sale are based upon correct appreciation of materials on record and accordingly affirmed.

The only issue that survives for consideration is whether the

First Appellate Court has rightly allowed refund of earnest money along with interest. Since the appellants were not ready to perform their part of the agreement for want of availability of funds with them, can they be allowed to take advantage of failure of the defendants to appear in the office of Sub Registrar on 30.9.2005 or power of attorney being registered on 4.10.2005 to assert their claim for refund of earnest money, as has been ordered by the First Appellate Court. The answer, at the outset, appears to be in negative. As per the agreement, the vendors were given right to forfeit the earnest money in case the vendees fail to perform their part of the agreement. There is no such clause in the agreement that in case the vendors would be at fault for non-execution of the sale deed, the vendees would be entitle to seek refund of earnest money irrespective of whether they were ready and willing to perform their part of the agreement or not. This apart, the power of attorney was executed by defendants No. 2 to 4 in favour of defendant No. 1 but the same was registered on 4.10.2005. The First Appellate Court has not rejected plea of the respondents that the said power of attorney was prepared even before 30.9.2005. In January 2006, the defendants served notice through an advocate wherein there is reference that power of attorney has been executed and the appellants were called upon to appear in the office of Sub Registrar on 23.1.2006 for getting the sale deed executed and registered. The appellants did not respond to the notice nor appeared in the office of Sub Registrar on 23.1.2006. Had the appellants been really serious as well as ready and willing to perform their part of the agreement, notice issued by the respondents was a God sent opportunity to be availed by them to get the sale deed executed and registered despite their having failed to appear before the Sub Registrar on the stipulated date i.e. 30.9.2005. The facts on record that the appellants did not have the resources to meet their financial obligation on 30.9.2005 coupled with their failure to respond to notice dated 7.1.2006 and appear in the office of Sub Registrar on 23.1.2006 goes a long way to show that they filed the suit for specific performance in October 2006 with a clear intent to seek refund of earnest money and nothing else. Once the appellants themselves were responsible for the transaction having fallen through as they did not have funds to discharge their obligation, they cannot be allowed to take advantage of their own wrong and seek refund of earnest money merely because power of attorney by defendants No. 2 to 4 was registered in favour of defendant No. 1 on 4.10.2005 instead of some time prior to 30.9.2005. In this view of the matter, findings recorded by the First Appellate Court allowing refund of earnest money along with interest suffer from perversity and cannot be allowed to sustain.

To be fair to the appellants, counsel for the appellants has relied upon judgments of Hon'ble the Supreme Court to support their cause for refund of earnest money. The judgments have got no bearing on the facts of the case at hand and were rendered in view of peculiar facts and circumstances of those cases. In **P.D'Souza' case (supra),** Hon'ble the Supreme Court has held that only because a clause of liquidated damages exists in the agreement, it would not be true that a suit for specific performance would not be maintainable. It has also been held that it is indisputable that the plaintiff must establish his readiness and willingness to perform his part of the contract but that would also depend upon whether the defendant did everything which was required of him to be done in terms of the agreement. Keeping in view the discussion made hereinbefore, the appellants cannot take advantage of there being no power of attorney before 30.9.2005 or the power of attorney being registered on 4.10.2005.

The Judgment in **Tarsem Singh's case (supra)** deals with an agreement where the parties were under a mistake as to a matter of fact (area of land) essential to the agreement for sale of land rendering the agreement to be void and, therefore, forfeiture clause also to be void. In the case at hand, there is no such plea by any of the parties that agreement was void. On the contrary, the appellants sought specific performance of the agreement by getting the sale deed executed and registered.

Similarly, the judgment in **Kailash Nath Associates' case (supra)** deals with a different controversy with regard to payment of damages etc. but not in respect of forfeiture of earnest money. In this view of the matter, the appellants cannot derive any advantage to their contention from the referred authorities.

Counsel for the respondents raised a plea with regard to non-maintainability of suit, in view of recitals contained in the notice dated 7.1.2006. Counsel, in response to a query, would fairly inform that no such plea was raised by the respondents before the trial court. As per settled position in law, no factual plea can be raised for the first time in second appeal. In this view of the matter, contention raised by counsel for the respondents with regard to non-maintainability of suit is not tenable.

In view of what has been discussed hereinbefore, the appeal filed by the appellants is dismissed. On the contrary, appeal filed by the respondents is allowed. Judgment and decree passed by the First Appellate court allowing refund of earnest money with interest is set aside. As a natural corollary, judgment and decree passed by the trial court dismissing suit of the appellants-plaintiffs in toto is restored.

(Rekha Mittal)
Judge

30.8.2019
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Whether speaking/reasoned: Yes
Whether reportable : Yes/No