

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

RSA No.4920 of 2014 (O&M)
Date of decision : 28.03.2019

Ran Singh and others

...Appellants

Versus

M/s Capex Projects Pvt. Ltd.

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Vivek Khatri, Advocate for the appellants.

Mr. Sanjeev Sharma, Sr. Advocate with
Mr. Shekhar Verma, Advocate and
Mr. Rajanjeet Singh, Advocate for the respondent.

ANIL KSHETARPAL, J.

Defendants-appellants are in the Regular Second Appeal against the judgments passed by the Courts below decreeing suit for refund of earnest money/part payment paid pursuant to the agreement to sell of immovable property.

In the considered view of this Court, following substantial questions of law arise in the present case:-

- 1) What is the meaning of earnest money?
- 2) Whether the judgments passed by the Courts below are result of mis-application of judgments passed by Hon'ble the Supreme Court

in the case of **Satish Batra Vs. Sudhir Rawal, (2013) 1 SCC 345**
and **Videocon Properties Limited Vs. Dr. Bhalchandra**
Laboratories, (2004) 3 SCC 711?

Some facts are required to be noticed.

Undisputed facts are that the defendants-appellants entered into an agreement to sell for sale of land measuring 36 kanals 15 marlas at the rate of ₹1,50,50,000/- per acre (8 kanals) and received ₹60,00,000/- as earnest money/part payment on 24.07.2006 itself. Sale deed was to be got executed and registered on 09.09.2006.

Now the disputed facts are plaintiff-respondent company claims that it was always ready and willing to perform its part of the contract and since 09.09.2006 and 10.09.2006 were holidays, therefore, their representatives went to the office of Sub-Registrar on 11.09.2006 and defendants did not come forward. Hence, plaintiff in order to prove its attendance got attested an affidavit. It was further pleaded by the plaintiff that the defendants did not seek clearance.

On the other hand, defendants pleaded that they were present in the office of Sub-Registrar on 11.09.2006 and representative of the plaintiff company was not present. It was pleaded that plaintiff was never ready and willing to perform its part of the contract. Defendants further pleaded that on 11.09.2006, they got their affidavits attested. They further pleaded that a notice calling upon the plaintiff to come on 14.12.2006 in office of registering authority and get the sale deed executed in terms of the agreement to sell was issued on 06.12.2006. On 14.12.2006,

defendants again visited the office of the Sub-Registrar but the representative of the plaintiff company did not come forward. Thereafter, the defendants once again got served a notice dated 19.12.2006 informing the plaintiff that the amount has been forfeited.

Total sale consideration in the present case is ₹6,16,10,937.5. Earnest money/part payment is ₹60,00,000/- which is little bit less than 10%. The suit was filed by the plaintiff on 07.09.2009 i.e. just before the time when period of 3 years from the target date for execution and registration of the sale deed was about to expire.

As per the agreement to sell which is in Hindi, it has been written that the amount of ₹60,00,000/- has been paid as earnest money and part payment. It is further provided in Clause 4 of the agreement to sell, execution whereof is not disputed between the parties, that if the purchaser does not get the sale deed registered within the time prescribed then total earnest money shall stands forfeited and the agreement shall stands cancelled.

In the present case apart from ₹60,00,000/- which was the amount paid on the date the agreement to sell was executed, no further payment has been made.

The word 'earnest money' has been considered by Hon'ble the Supreme Court in the judgment **Shree Hanuman Cotton Mills and others Vs. Tata Air Craft Limited, (1969) 3 SCC 522**. In para 21, the earnest has been defined as under:-

“21. From a review of the decisions cited above, the

following principles emerge regarding "earnest":

- (1) It must be given at the moment at which the contract is concluded.*
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.*
- (3) It is part of the purchase price when the transaction is carried out.*
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.*
- (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."*

It is again well settled that the word used in the contract is to be interpreted in the context it has been used. The intention of the parties is to be gathered not merely from the usage of a particular word but from the reading of the entire contract.

In the present case, it is apparent that ₹60,00,000/- was the amount of earnest money. The word 'part payment' used alongwith the word 'earnest money' is to be properly construed. In para 1 of the agreement to sell which is on a printed proforma, the words 'earnest money' and 'part payment' have been used. Thereafter, a table has been drawn in which amount of payment and date etc. have been filled in, in different columns. In such circumstances, once on the date of agreement to sell, the payment was made unless a different intention appears from the contract, it is earnest money. Therefore, the Courts have erred in recording a finding that it is a part payment, therefore, cannot be

forfeited.

Even otherwise, from the facts which have come on record, it is proved that it was plaintiff who was not ready and willing to perform its part of the contract for following reasons:-

- a) Plaintiff company has pleaded in its plaint that defendants did not seek clearance. On reading of the agreement to sell, it is apparent that the defendants were not required to seek any clearance from any authority. Still further, plaintiff has not led any evidence to prove that any clearance was required to be obtained by the defendants before the target date.
- b) Plaintiff has pleaded that after getting its presence noted from the office of Sub-Registrar on 11.09.2006, a notice was got issued to the defendants to come and execute the sale deed. However, such notice has not been produced.
- c) Defendants have pleaded that they have served two notices to the plaintiff i.e. dated 06.12.2006 and 19.12.2006. Defendants also pleaded that they visited the office of Sub-Registrar on 11.09.2006 as well as on 14.12.2006. Notice dated 19.12.2006 is Ex.D1 on the file. The aforesaid notice has been proved through examination of the counsel who had issued that notice on behalf of the defendants. Still, there is no action on the part of the plaintiff. Plaintiff do not even assert that such notice was replied. In this very notice dated 19.12.2006, reference is to the earlier notice dated 06.12.2006.
- d) Plaintiff had taken no steps after 11.09.2006 to get the sale deed

executed. There is complete silence for a period of nearly three years. Suit for recovery was filed on 07.09.2009. This clearly proves that the plaintiff company was not ready and willing to perform their part of the contract.

- e) Plaintiff has failed to prove its affidavit got attested on 11.09.2006. Even official who got its affidavit attested, has not been examined.

In view of the aforesaid, plaintiff company was not ready and willing to perform its part of the contract.

Now let us discuss the judgments which have been relied upon by the First Appellate Court to return a finding that refund is liable to be decreed.

Learned First Appellate Court has first relied upon the judgment passed in the case of Satish Batra (Supra). This Court has carefully read the aforesaid judgment. The aforesaid judgment is rather helps the defendants-appellants and not the plaintiff-respondent company. In the aforesaid judgment, Hon'ble the Supreme Court was examining the correctness of the Division Bench judgment of the Delhi High Court, in which out of total earnest money of ₹7,00,000/-, ₹50,000/- was permitted to be forfeited whereas ₹6,50,000/- was ordered to be refunded. The Supreme Court after examining the contract found that earnest money was paid on two different dates i.e. ₹4,00,000/- on 29.11.2005 and ₹3,00,000/- on 30.11.2005. The Supreme Court held after discussing various judgments of the Court that intended seller was justified in forfeiting the amount of 10% i.e. ₹7,00,000/-, therefore, the trial Court as

well as First Appellate Court have not applied the aforesaid judgments in correct perspective.

The First Appellate Court has further relied upon a judgment passed by Hon'ble the Supreme Court in the case of Videocon Properties Ltd. (Supra). In the aforesaid judgment, the Supreme Court was examining the order passed by a Division Bench of Bombay High Court arising from interim order passed by the learned Single Judge. In the aforesaid case, earnest money had been refunded. Suit for recovery was filed by the intended purchaser who was a builder for grant of interest. In the aforesaid circumstances, learned Single Judge ordered creation of charge under Section 55(6)(b) of the Transfer of Property Act, 1882 which order was modified by the Division Bench. The Supreme Court reversed the judgment of the Division Bench and restored the order of the learned Single Judge. The aforesaid judgment nowhere lays down that the earnest money as per the contract cannot be forfeited.

Clause 4 of the agreement to sell in the present case is clear and specific. The earnest money can be forfeited in case the intended purchaser fails to perform his part of the contract. There is no distinction in the agreement to sell and there is no stipulation that out of ₹60,00,000/- how much is the earnest money and how much is the part payment. Earnest money is a payment made towards part of the price of the property and it represents a guarantee that the contract will be fulfilled.

In view of the aforesaid, the questions of law framed above are answered in favour of the appellants. It is held that the entire amount

of ₹60,00,000/- is/was the earnest money and, therefore, liable to be forfeited and hence rightly forfeited by the defendants-appellants. Accordingly, the judgments passed by the Courts below are set aside and the suit filed by the plaintiff shall stand dismissed with costs throughout.

In view of the above, the present Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the aforesaid judgment.

CM No.18704-C of 2018

Prayer in the application is for permission to lead additional evidence.

In view of the judgment, no order is required in the application for permission to lead additional evidence.

28.03.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No