

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

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RSA No. 2059 of 2019 (O & M)

Date of decision : 28.2.2020

Maryoor Khurana and others

.....Appellants

Vs.

Balwinder Kaur

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present : Mr. Gursimran Singh, Advocate, for the appellants

Mr. M.S. Sachdeva, Advocate, for the respondent

Rajbir Sehrawat, J. (Oral)

This is the second appeal by the plaintiffs in the original suit, which was filed for the specific performance of agreement to sell, and in which while reversing the judgment and decree passed by the Trial Court granting refund of earnest money to them, the lower Appellate Court has ordered dismissal of the said suit.

For the convenience, the parties herein are referred to as the plaintiffs and the defendant, as they were described in the original suit.

The facts in brief, necessary for disposal of the present appeal are that, the plaintiffs/appellants filed a suit asserting therein that the defendant/respondent was owner in possession of the suit property. She had entered into an agreement to sell dated 20.10.2009 with the plaintiffs; for sale of the suit property in their favour. As per the recitals in the agreement, two

dates were fixed for execution of the sale deeds; first 20.6.2010; and for the remaining portion the sale deed was to be executed on or before 20.1.2011. It was further asserted in the plaint that the plaintiffs had also paid Rs.40 lakhs as earnest money out of the total sale consideration of Rs.2,19,00,000/-. Besides this, the plaintiffs spent a huge amount on the suit land for getting the same approved for developing residential complex. Although in the first instance, the possession was delivered to the plaintiffs, however, later on, the possession was forcibly taken away by the defendant. Still further, it was asserted in the plaint that earlier also, there was an agreement dated 19.8.2006 between the parties qua the same property. However, the said agreement was cancelled on 10.12.2007 due to some defect in the title of the defendant. Subsequently, the present agreement was entered into, in which the earnest money already paid pursuant to the previous agreement, was adjusted as the earnest money in the present agreement. With these pleadings, the plaintiffs filed suit for specific performance of the agreement; praying for execution of the sale deed or for alternate relief for recovery of Rs.1.50 crores, which included Rs.40 lakhs of earnest money and damages and Rs.70 lakhs as costs of improvements made over the property and the expenses incurred for getting the licence to set up a colony.

Upon notice, the defendant contested the claim made by the plaintiffs. It was asserted in the written statement that the plaintiffs did not have the balance amount of the sale consideration on the stipulated date of the execution of the sale deed. Earlier agreement dated 19.8.2006 qua the same land was also cancelled because of the said reason only. Despite that the defendant had agreed to adjust the earlier earnest money as the earnest money

for the present agreement. On merits, it was claimed by the defendant that she remained present before the Sub-Registrar throughout the day on the stipulated date of execution of the sale deed, however, the plaintiffs did not come present to get the sale deed executed in their favour. It was further asserted that since the plaintiffs have not come forward to get the sale deed executed, therefore, the earnest money stood forfeited as per the terms of the agreement.

To prove their respective assertions, the parties led their respective evidence. After considering the evidence on file, the trial Court recorded a finding that the plaintiffs were not ready and willing to get the sale deed executed in their favour. However, the trial Court ordered the return of the earnest money along with interest @ 6% per annum, from the date of passing of the decree till realisation of the decretal amount. The reasoning given by the trial Court for ordering refund of the money was that, the law does not permit unjust enrichment of any party under a contract. Hence, the defendant was bound to return the amount of earnest money.

Feeling aggrieved against the said judgment and decree passed by the trial Court, the defendant preferred the appeal before the lower Appellate Court. The lower Appellate Court reversed the judgment and decree passed by the trial Court even qua the refund of the earnest money. The lower Appellate Court held that in case the plaintiffs were not ready and willing to perform their part of agreement, then the concept of unjust enrichment is not even attracted. The assertion of the defendant that the earnest money stood forfeited was perfectly in accordance with law. Accordingly, the appeal was allowed by the lower Appellate Court and the suit of the plaintiff was ordered to be dismissed in toto. Hence, the present appeal has been preferred by the plaintiffs.

However, one fact which needs to be noted is; that the plaintiffs had not preferred any appeal or any cross objection qua the findings recorded by the trial Court that the plaintiffs were not ready and willing to get the sale deed executed in their favour. Still further, one more fact; apart from the evidence led by the parties, which deserves to be noted is; that even before the lower Appellate Court, as recorded in the judgment of the lower Appellate Court, the defendant had offered to execute the sale deed in favour of the plaintiffs, if the plaintiffs so desired. However, the plaintiffs had not come forward to get the sale deed executed in their favour.

Challenging the judgment and decree passed by the lower Appellate Court, learned counsel for the plaintiffs has submitted that the trial Court had rightly applied the concept of unjust enrichment of the defendant through forfeiture of the earnest money. The earnest money is not liable to be forfeited. Rather, it is the intention of the parties, which is to be seen as to whether the money paid to the defendant was to ensure performance of the agreement or it was paid as advance payment as part of the sale consideration. In the present case the money was not paid as earnest money. Therefore, the same was not liable to be forfeited. Still further, it is submitted by learned counsel for the plaintiffs that the plaintiffs could not get the sale deed executed in their favour because they were purchasing the said property for development of a housing colony, however, the same could not be developed for the reason that there was a scheduled road notified in the area. Hence, the land had been rendered useless, so far as the plaintiffs are concerned. It is further submitted that the defendant was throughout aware of the fact that the plaintiffs were purchasing this property for development of the housing project which could

not materialize. Hence, the earnest money is not liable to be forfeited. Counsel has relied upon a judgment of the Supreme Court rendered in '**Fateh Chand v. Balkishan Dass**, 1963 AIR (SC) 1405' to support his contention that if the money is paid as part payment of the sale consideration and not as security for performance of the contract, then the same cannot be forfeited.

On the other hand, learned counsel for the defendant has submitted that it is the plaintiffs themselves, who claimed that they had paid Rs. 40 lakhs as earnest money. There is not even whisper on the part of the plaintiffs; in the terms of the contract; that the amount of Rs.40 lakhs was paid only as advancement of part payment of the consideration and not as earnest money. The pleadings of the plaintiffs, as well as the evidence led by the plaintiffs themselves shows that the amount was paid only as earnest money, to secure the performance of the contract. It is also submitted that the suit filed by the plaintiffs themselves was for seeking execution of the sale deed, which the defendant never denied. Therefore, the earnest money has rightly been forfeited by the defendant as per the terms of the agreement. So far as the development of the project by the plaintiffs is concerned, it is submitted by the counsel that the agreement executed by the defendant was plain and simple agreement for sale of the property. This agreement never contemplated the said sale to be subject to the development of housing project by the plaintiffs. It was for the plaintiffs to use the same for whatsoever purpose; after having purchased the same. Still further, it is submitted that the plaintiffs had even got the licence for developing the housing project, therefore, the plaintiffs cannot even raise the plea that the contract had been frustrated because of non feasibility of development of the housing project. In the end, it is submitted by the counsel that, as is also reflected in the zimni order passed in this appeal, the

defendant had offered to execute the sale deed even during pendency of the present appeal. However, the plaintiffs still had not come forward to get the sale deed executed. Therefore, no fault could be found with the conduct of the defendant as such. The money has rightly been forfeited in favour of the defendant. The lower Appellate Court has rightly reversed the decree passed by the trial Court qua refund of the money to the plaintiffs. The counsel has relied upon the judgment rendered by the Supreme Court in '**Satish Batra v. Sudhir Rawal**, 2012 (4) RCR (Civil) 890' to support his contention that the defendant is not claiming any compensation on account of any loss, rather, she has forfeited only the earnest money, as per the terms of the agreement. Such a forfeiture was upheld even by the Supreme Court in **Satish Batra's** case (supra).

Having heard learned counsel for the parties, this Court does not find any substance in the argument of learned counsel for the appellants. So far as the first part of the controversy, i.e., execution of the agreement and readiness and willingness of the plaintiffs to get the sale deed executed is concerned, needless to say that even the trial Court had held that agreement was duly executed and that the plaintiffs were not ready and willing to get the sale deed executed. That finding was never questioned by the plaintiffs even before the lower Appellate Court. Hence, it stands concluded that the plaintiffs were never ready and willing to get the sale deed executed. This fact is clarified even by the fact that, before the lower Appellate Court, as well as before this Court, the defendant has offered to execute the sale deed in favour of the plaintiffs. However, the plaintiffs have not shown their inclination to get the sale deed executed in their favour. Hence, this Court does not find any

mistake, illegality or perversity, with the finding recorded by the Courts below that the plaintiffs were not ready and willing to get the sale deed executed in their favour.

So far as the aspect of return of money is concerned, on that point also, unfortunately, the plaintiffs have to fail. It is the positive case of the plaintiffs only that an amount of Rs.40 lakhs was paid by them to the defendant as the earnest money. There is not even whisper in the pleadings or in evidence led by them that this amount was paid by them only as advance payment towards sale consideration and not as earnest money. Hence, even as per the pleadings and evidence led by the plaintiffs the money was paid as earnest money. The said earnest money has to be dealt with as per the terms of the agreement. Since the agreement is a bilateral and consensual act of the parties, therefore, this is to operate in both the directions, in favour of, as well as against, the plaintiffs. It could have operated in favour of the plaintiffs, had the plaintiffs been ready to get the sale deed executed in their favour; or for return of the money, if the defendant was not ready to execute the sale deed. Similarly, the agreement has also to operate in favour of the defendant, in case the plaintiffs are not ready and willing to get the sale deed executed, as has been held by both the Courts below. It is not even disputed that there exists a term in the agreement that the amount of earnest money shall be forfeited; in case the plaintiffs do not get the sale deed executed as per the terms of the agreement. Hence, if the earnest money has been forfeited in favour of the defendant, as per the agreement, then no fault can be found with the conduct of the defendant in this regard. Although, counsels have relied upon the judgments, respectively cited by them, however, this Court finds that all the

said judgments are laying down almost the same proposition. As per these judgments, although the damages may not be, necessarily, available to the defendant mere in case of non-performance of contract by the plaintiffs, however, both the judgments are on the same line that the earnest money can very well, be forfeited in favour of the defendant, in case the plaintiffs are not ready to comply with their part of the terms of the agreement. In the present case, the lower Appellate Court has only held that much; that the earnest money has rightly been forfeited in favour of the defendant on account of the plaintiffs not being ready and willing to get the sale deed executed in their favour. This Court does not find any illegality or perversity with the finding recorded by the lower Appellate Court.

Although learned counsel has argued that the plaintiffs were purchasing the suit land for developing a housing project, but that project could not be developed due to presence of a scheduled road and the military area near this land, therefore, the contract stood frustrated and, therefore, the earnest money could not have been forfeited, however, this argument stands defeated by the very fact that the plaintiffs had actually been granted licence by the government to develop housing project on this land. However, if the plaintiffs did not see the intended profit in developing the said project, then the defendant is not to blame for that. Otherwise also; the agreement in question does not talk of any housing project as such. Therefore, by any means, there is no question of the agreement being frustrated for any reason whatsoever. It was for the plaintiffs to use the suit land for any other purpose, if they had decided not to develop a housing project on the suit land.

No other point was argued.

In view of the above, finding no merit in the present appeal, the same is dismissed.

(RAJBIR SEHRAWAT)
JUDGE

28.2.2020
Ashwani

Speaking/Reasoned	:	Yes/No
Reportable	:	Yes/No