In the High Court of Punjab and Haryana, at Chandigarh

1. Regular Second Appeal No. 4698 of 2017 (O&M)

Date of Decision: 22.01.2020

Om Parkash and Others

... Appellant(s)

Versus

M/s Ganga Developers Private Limited

... Respondent(s)

AND

2. Regular Second Appeal No. 5497 of 2017 (O&M)

M/s Ganga Developers Private Limited

... Appellant(s)

Versus

Om Parkash and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. Lokesh Sinhal, Advocate
for the appellants (In RSA-4698-2017) and
for the respondents (In RSA-5497-2017).

Mr. Akshay Jindal, Ms. Stuti Goel and
Ms. Janya Sirohi, Advocates for the respondent
(In RSA-4698-2017) and for the appellant
(In RSA-5497-2017).

Anil Kshetarpal, J.

This judgment shall dispose of Regular Second Appeal No. 4698 of 2017 and Regular Second Appeal No. 5497 of 2017 filed by the plaintiff as well as the defendants against a common judgment passed by the learned first Appellate Court. Learned counsel for the parties are also agreed that both the appeals can be conveniently disposed of by a common judgment.

Undisputed facts are that the defendants entered into an agreement to sell with the plaintiff company on 17.03.2008 with respect to land measuring 13 Kanals 14 Marlas 6 Sarsai at the rate of ₹ 4,80,00,000/- per acre on receipt of an amount of ₹ 80,00,000/- as earnest money. As per agreement, the parties had agreed to execute and register the sale deed on 30.06.2008.

At the outset, it must be noticed that both the Courts below have committed a factual mistake by assuming that the total sale consideration is ₹ 4,80,00,000/- whereas in fact, this is the rate, at which per acre land was agreed to be sold. The total sale consideration, as per learned counsel for the defendants, comes to ₹ 8,20,00,000/-, not disputed by learned counsel for the plaintiff.

The defendants have taken a stand that they were ready and willing to perform their part of the contract. They went to the office of the Registrar for execution and registration of the sale deed on the target date i.e. 30.06.2008. In token of their presence, got attested their affidavit from the Sub Registrar, but the officials of the plaintiff company did not attend the office of the Registrar. Thereafter, the defendants served a notice on the plaintiff company dated 01.07.2008 i.e. very next day from the target date fixed for execution and registration of the sale deed, calling upon the plaintiff company to come and perform its part of the contract while granting ten days additional time even after the agreed date fixed, failing which the amount of ₹ 80,00,000/- shall stand forfeited. A reply dated 30.07.2008 was sent by the plaintiff company while stating that on account of various reasons/ alleged defaults attributable to the defendants, the sale deed cannot be executed and therefore, the amount of ₹ 80,00,000/- already paid, be refunded. The defendants, thereafter, got served a rejoinder notice Ex.D3 dated 20.11.2008 informing that the defaults/deficiencies on their part as alleged in the reply dated 30.07.2008 are only false excuses put forth by the plaintiff company and hence, the amount of earnest money stands forfeited.

At this stage, it would be appropriate to reproduce translation of the important terms of the agreement to sell, which require interpretation –

(i) Hence, today, we, on account of our free will or volition without any pressure, have agreed to sell land measuring 13 Kanals 14 Marlas 6 Sarsai at the rate of ₹ 4,80,00,00/- (Rupees four crores and eighty lakhs) per acre in favour of Ganga developers Private limited, 455, Sector 12A, Gurgaon. We, today, have received ₹ 80,00,000/- (Rupees Eighty Lakhs) in cash as earnest money as advance money, to be adjusted towards part payment of the sale consideration. The balance amount shall be received at the time of execution and registration of the sale deed. The price of the constructed shops and godowns has been agreed at ₹.4,00,000/- apart from the price of the land. It is agreed that the sale deed would be executed upto 30.06.2008 in favour of the purchaser or any of its nominees.

(ii) If any defect is found in our ownership then I/we, the intended vendors, shall be liable and the date fixed for sale deed shall be deemed to have been extended. If I/we commit any default or postpone the registration of sale deed, the purchaser shall have right to get the sale deed registered through Court of law and in that eventuality, we, the vendors, shall be liable for damages and expenses. If any defect/deficiency is found in our ownership or if there is any dispute thereto, we, the vendors, shall be liable. If the purchaser does not come forward to get the sale deed registered on the agreed date, then the purchaser shall not be entitled to initiate any litigation. If, for execution of sale deed, any "No Objection Certificate" is required, we, the sellers, shall remain liable to sign on the "No Objection Certificate". The expenses for obtaining "No Objection Certificate" shall be borne by the purchasers."

The plaintiff-M/s Ganga Developers Private Limited filed a suit for recovery of ₹ 88,00,000/- on 27.01.2009. It was pleaded in the plaint that the defendants have not obtained "No Objection Certificate". The defendants have also concealed the fact that the land agreed to be sold is mortgaged. The plaintiff company has come to know that electricity department is constructing huge towers for laying high tension wire adjoining to the suit land. The plaintiff company has further come to know that major front portion of the suit land was proposed to be acquired by the Government for construction of a road for its proposed Sector 37-C and 37-D, Gurugram.

The defendants contested the suit and pleaded that neither any "No Objection Certificate" was required nor it was ever applied by the plaintiff. It was pleaded that it was the plaintiff company, who was made responsible to make arrangement for obtaining "No Objection Certificate", if any required. They were always ready and willing to sign the documents. The property, agreed to be sold, is not mortgaged. Existence of pending proposal of the Electricity Department for construction of huge towers for laying high tension wire in the adjoining the land in question was also denied. It was also contested that the plaintiff came to know that major front portion of the land in question was proposed to be acquired by the Government. Thus, it was contended that plaintiff is not entitled to any refund of the amount.

The plaintiff in its evidence examined Dalbir Saini, Director of the plaintiff company as PW.1 and Narinder Kumar, Assistant Draftsman in the office of District Town Planer, Gurugram as PW.2. In evidence, following documents were produced and proved:

Ex.P1	*Certificate of Incorporation;*
Ex.P2	*Memorandum of Articles of Association;*
Ex.P3	*Resolutions dated 12.01.2009;*
Ex.P4	*Agreement dated 17.03.2008;*
Ex.P5 to Ex.P10	*Notice dated 01.07.2008, Reply to Notice dated 30.07.2008, copy of postal receipts;*
Ex.PW.2/1	*Certified copy of Notification And*
Ex.PW.2/2	*Site Plan"*

On the other hand, the defendants examined Om Parkash, defendant No.1 as DW.1, Virender Clerk of Sh. J.K.Dang, Advocate as DW.2, Dharambir Singh, Clerk of Primary Co-operative Agricultural and Rural Development Bank Limited, Gurgaon as DW.3 and Sh. S.K.Dahiya, Advocate as DW.4. Documents Ex.D1 to D6, DW3/1, DW.3/2, Ex.DX and Ex.DY were produced and proved.

The learned trial Court, on appreciation of evidence, held that the defendants were responsible to apply and obtain "No Objection Certificate" before the target date and, therefore, the defendants are at fault. Hence, suit for recovery of ₹ 88,00,000/- was decreed along with interest at the rate of 6% percent per annum from the date of filing of suit till its realisation.

The defendants filed first appeal. The learned first Appellate Court on re-appreciation of evidence has found that the reasons pleaded by the plaintiff for non performing its part of the contract on account of alleged defaults of the defendants are not established. It was found that the plaintiff company was at fault. It was also held that the defendants were never made responsible/ under obligation to apply for and obtain "No Objection Certificate", if any required. The plaintiff never called upon the defendants to come forward and sign documents for applying "No Objection Certificate", if any required. However, the first Appellate Court has held that since, in the agreement to sell, the payment of ₹ 80,00,000/- has been described as earnest money and advance payment towards part payment of the sales consideration, therefore, the defendants are entitled to forfeit an amount of ₹ 40,00,000/- out of ₹80,00,000/-.

Learned counsel for the plaintiff/appellant has submitted that since, as per agreement to sell, no liquidated damages had been agreed to be paid and there was no clause authorizing the defendants to forfeit the amount. Hence, the first Appellate Court has erred in partially reversing the judgement of the learned trial court. As per the agreement to sell, it was the responsibility of the intended vendee-the company to apply and obtain "No Objection Certificate" from the competent authority. The development plan of the entire area was already in the public domain prior to the date on which agreement to sell was signed and hence, the plaintiff-company was not justified in refusing to perform their part of the contract and claim refund of the amount paid.

On the other hand, learned counsel appearing for the defendant/appellants has submitted that the first Appellate Court has erred in assuming that 50% of the amount paid at the time of execution of agreement to sell is not part of the earnest money. The first Appellate Court has correctly held that the reasons given by the plaintiff, while refusing to perform its part of the responsibility, are false. He, hence, submitted that the entire amount is liable to be forfeited.

Before this Court proceeds to analyse the various submissions of learned counsel, it would be appropriate to notice that the entitlement of the intended sellers to forfeit the earnest money has been drawing attention of the Courts for quite some time. Various judgements have been cited by learned counsel for the parties. Learned counsel for the plaintiff company has relies upon the judgement passed by the Hon'ble Supreme Court in the case of ***Kailash Nath Associates v. Delhi Development Authority 2015(2)***

SCC (Civil) 502. He submitted that it has been held that in absence of any power to forfeit the earnest amount paid/deposited, the owner is not justified in forfeiting the amount of earnest money. On the other hand, learned counsel for the defendants has relied upon the judgement passed by the Hon'ble Supreme Court in ***Shree Hanuman Cotton Mills v. Tata Air Craft Ltd. 1969 (3) SCC 522*** and ***Satish Batra v. Sudhir Rawal 2013(1) SCC 345***.

On careful reading of the judgement passed in the case of ***Kailash Nath Associates*** *(supra),* it will be noted that in the aforesaid judgement, the Hon'ble Supreme Court was considering a situation wherein Kailash Nath Associates had given its bid to purchase immovable property in a bidding which was open to public and deposited 25% of the total sale price towards earnest money and part payment. Subsequently, there were various communications, and time for deposit of the remaining amount was extended. The matter remained pending with the authorities for pretty long time. Other similarly situated purchasers had also not deposited the amount. The public authority, with respect to other similarly situated allottees, had not ordered any forfeiture of the amount paid. In those circumstances, the Hon'ble Supreme Court held that the time was never treated as an essence of the contract and hence the forfeiture of the amount by a government agency, in the facts of the aforesaid case, was not justified in forfeiting the amount paid.

As regards judgements relied upon by learned counsel for the defendants, on careful reading thereof, it has been laid down that the earnest money can be forfeited by the intended sellers once the quantum of amount is agreed as liquidated damages even in the absence of evidence of loss/damages suffered by the vendors. At this stage, it would be appropriate that the principles culled by the Hon'ble Supreme Court, in the case of ***Shree Hanuman Cotton Mills****(supra)* in para 21, are taken note of:-

> *"(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****".*

Now let us examine the arguments of learned counsel for the parties.

The first argument of learned counsel for the plaintiff company is that no liquidated damages have been fixed and there is no clause providing for forfeiture of the earnest money. In this respect, it must be noticed that on careful reading of the agreement to sell, translation whereof has been extracted above, it is clear that plaintiff was debarred from filing a suit or initiating any litigation if the intended purchaser/vendee does not get the sale deed registered on the date agreed to in the agreement to sell. In other words, it was agreed that the intended purchaser shall not be entitled to initiate any litigation once it fails to perform its part, as was expected/agreed to be performed, as per agreement to sell. Plain meaning of the aforesaid agreement is that the intended purchaser shall not be entitled to file a suit for recovery of the amount paid as earnest money because the plaintiff was given right to file suit for specific performance of the agreement to sell in the previous clause. Once the intended purchaser does not pay the amount and that also for no valid reason, he was debarred from initiating any litigation. The intention of the parties was explicitly clear. Therefore, the learned counsel for the plaintiff is not correct that there is no clause allowing forfeiture of the earnest money paid or no liquidated damages have been agreed upon.

As regards next argument of learned counsel for the plaintiff, it will be noted that in the agreement to sell, it is not provided that the defendants shall be responsible to apply and get "No Objection Certificate". Rather it has been provided that if any "No Objection Certificate" is required, the sellers/vendors shall be responsible to sign the document required for the same. The vendee company was made liable to bear all the expenses to be spent on obtaining a "No Objection Certificate". It is not the case of the plaintiff company that they ever requested the defendants to come forward and to sign the papers for getting "No Objection Certificate" or offered to bear the expenses thereof. The conduct of the plaintiff company leads the Court to conclusion that the plaintiff company was not serious in performing its part of contract. Particularly when after the date of agreement to sell i.e. on 17.03.2008 till the target date i.e. 30.06.2008 i.e. more than three months, the plaintiff company never issued any notice or addressed any communication to the defendants to apply for or called upon them to put their signatures on documents required for getting "No Objection Certificate".

Next argument of learned counsel for the plaintiff is also without any substance particularly in absence of any material available on the file. Still further, the proposed plan, if any, is expected to be in the knowledge of the plaintiff company. It is the plaintiff company which is in the business of buying, selling and acquiring land in India and abroad and develop colonies as would be clear from Memorandum and Article of Association of the plaintiff company Ex.D1. The plaintiff company is expected to be in knowledge of the development plan, if any, already notified by the government.

Now let us examine the conduct of the defendants. In the present case, the defendants on the target date fixed in the agreement to sell did visit the office of the Sub Registrar for execution and registration of the sale deed. They, in token of their presence in the office of Sub Registrar, got attested an affidavit from the Executive Magistrate (Sub Registrar). Thereafter, they issued notice calling upon the plaintiff company to come forward and perform its part of contract as per the agreement on 01.07.2008. It was also brought to the notice of the plaintiff that if the sale deed is not executed within the next ten days, the earnest money shall stand forfeited. The plaintiff still did not come forward to perform its part of the contract. Rather the plaintiff company chose to give "false excuses" for not executing the sale deed and tried to put entire blame on the defendants. The defendants on receipt of the reply, sent a rejoinder dated 03.07.2008, denying all the allegations. From the perusal of the record, it is established, as also correctly found by the first appellate Court, that the defendants are not at fault. Now the stage is set for considering the crucial issue.

In the considered view of this Court, the plaintiff company is not entitled to refund of the earnest money and the defendants are entitled to forfeit the entire amount for the following reasons:-

i) The plaintiff company is involved in the business of real estate including sale and purchase thereof and thereafter, development of the colonies. The plaintiff company, after having entered into an agreement to sell, has tried to put forth "false excuses" as a covering for not performing its part of the agreement.

ii) As noticed above, all the reasons given by the plaintiff company for not performing its part of the contract have been found false.

iii) Still further, the first Appellate Court has erred in making a distinction between earnest money and advance money paid at the time of entering into an agreement to sell adjustable towards part payment of sale consideration at the time of registration of the sale deed or completion of the deal. The earnest money is, in fact, a payment which is paid as a guarantee by the intended purchaser to the intended seller so as to ensure the completion of the deal/transactions. Such part payment is liable to be adjusted if the deal matures and both the parties perform their part of the contract. Therefore, the first Appellate Court erred in making a distinction that an amount of ₹ 80,00,000/- was not entirely the earnest money. In fact, the amount of ₹ 80,00,000/- is the earnest money and not additional payment. The Hon'ble Supreme Court in the case of ***Satish Batra*** *(supra)* has drawn this distinction.

iv) As noticed, the amount of earnest money is less than 10% of the total sale consideration. Therefore, it cannot be said that the amount of earnest money is disproportionate and there is no reason not to allow its forfeiture. The total sale consideration under the agreement to sell is stated to be ₹ 8,20,00,000/-, 10% whereof comes to ₹82,00,000/-, whereas the earnest money is only ₹80,00,000/-.

v) Still further, there is a big difference between bargaining capacity of the farmers (defendants) and the plaintiff company, which is in the business of real estate. The directors of a real estate company is expected to be in knowledge of the proposed projects and the development plans. The real estate company is also expected to be in better position to know about the proposed plans as compared to the defendants who had agreed to sell their agricultural land at the agreed price. In these circumstances, the plaintiff company has no equity in its

> favour, particularly when the plaintiff company has taken a false stand while the suit in the Court, claiming refund. The plaintiff company tried to put entire blame on the defendants for non-completion of the agreement which has been found to be false.

In view of the above, Regular Second Appeal No. 4698 of 2017 shall stand allowed, whereas Regular Second Appeal No. 5497 of 2017, filed by M/s Ganga Developers Private Limited, shall stand dismissed. Resultantly, the suit filed by the plaintiff is ordered to be dismissed. The miscellaneous application(s), if any, filed in both the appeals shall also stand disposed of.

(Anil Kshetarpal)
Judge

January 22, 2020
"DK"

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