

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

1. RSA-5437-2015 (O&M)
Reserved on: 16.11.2022
Date of decision: 24.11.2022

COL. IQBAL SINGH

..Appellant

Versus

MADAN PAL (DECEASED) THROUGH LRS AND ANR.

..Respondents

2. RSA-6241-2015 (O&M)

MADAN PAL (DECEASED) THROUGH LRS AND ORS.

..Appellants

Versus

COL. IQBAL SINGH AND ANR.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sumeet Mahajan, Sr. Advocate
with Mr. Sharan Sethi, Advocate
Mr. Saksham Mahajan, Advocate
Mr. Mandeep Singh, Advocate
Ms. Rabani Attri, Advocate
for appellant (in RSA-5437-2015)
for respondent (in RSA-6241-2015).

Mr. Vivek Aggarwal, Advocate
for Mr. T.S. Khehar, Advocate
for appellant (in RSA-6241-2015)
for respondent (in RSA-5437-2015).

ANIL KSHETARPAL, J.

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh, is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in **Pankajakshi (Dead) through LRs Vs. Chandrika and others, (2016) 6 SCC 157.**

2. The following substantial question of law arises for adjudication in the present case. If the Court comes to a conclusion that the

proposed purchaser/vendee, in the agreement to sell for immovable property, has committed a default in performing his part of the terms of the contract, then, whether a decree for refund of the earnest money is required to be passed?.

3. These two cross-appeals have been filed by the plaintiffs as well as the defendants. The parties shall be referred to by their status in the suit. Both the Courts, while refusing to grant the relief of specific performance of the agreement to sell, have ordered the refund of the earnest money along with interest. The plaintiffs claim relief of specific performance of the agreement to sell, whereas, the defendants (owners) claim that the judgments passed by the Courts directing them to refund the amount of earnest money along with interest are not in accordance with the settled law.

4. The relevant facts, in brief, are being noticed. The execution of the agreement to sell is admitted between the parties. The relevant terms of the agreement are as under:-

“1- That the total sale price of the said property has been fixed at Rs.Seven crores only (Rs.7,00,00,000/-)

That the said purchaser have paid to the seller a sum of Rs.1,05,00,000/- only (Rupees One Core and Five lakhs) as earnest money for the sale of the said property

3- That the last date for the executionand registration of the final documents sale deed has been fixed on or before 20th Jan 2006.

4- That all expenses on the Sale Deed i.e. stamp papers and registration charges including any other expenses shall be borne by the purchaser.

5- That the seller shall register the deed in the name of the said purchasers only.

6- That the seller shall hand over the vacant possession of the said property only after the registration and full payment.

7-That if the purchaser backs out from this deed, then his earnest money shall stand forfeited in favour of the said

seller and the deal shall stand cancelled.

8- That the sale of the said property includes nothing else except land. The standing plantation of the poplar trees is that of the seller and shall be disposed off before handing over possession of the said property.

9- That the payment schedule will be as under and NO deviation from the same shall be acceptable to the seller. Time is the essence of contract:-

(a) Other than earnest money of Rs.One Crore five lakhs only (Rs.1,05,00,000/- only) Rs.Three crores only (Rs.3,00,00,000/- only) shall be payable on or before 12th April 2005.

(b) Final payment of balance amount of Rs.Two crores and ninety five lakhs only (Rs.2,95,00,000/- only) shall be made by 20 Jan 2006.

10- That it is made clear that time is the essence of the contract. The last date for final payment & registration has been agreed between the parties to the agreement as 20/01/06. In case the final payment & registration is not performed by 20/01/06, the said date shall not be extended and the agreement shall deemed to be cancelled and the earnest money shall stand forfeited. In case seller causes delay, he shall return earnest money in double amount.”

Note:- *There was no clause No.2 in the agreement.*

5. Approximately 99 bighas of land located in the outskirts of Chandigarh was agreed to be purchased for a total sale consideration of Rs.7,00,00,000/-. The defendants have admitted the receipt of Rs.1,05,00,000/- as earnest money. The plaintiffs claim that they went to the residence of the defendants on 12.04.2005 with the next installment of Rs.3,00,00,000/- but the defendants refused to receive the same. Thereafter, they visited the office of the Sub-Registrar and got their affidavit attested.

6. On the other hand, the defendants state that the plaintiffs, despite their reminder to the plaintiffs to pay Rs.3,00,00,000/- vide communication dated 01.04.2005, did not pay the amount. On 14.04.2005, the defendants, once again, sent a notice through their lawyer to the plaintiffs terminating the agreement to sell on the ground that the plaintiffs

have failed to pay the next installment of Rs.3,00,00,000/-, which was a condition precedent.

7. Initially, the plaintiffs filed a suit for grant of decree of permanent injunction on 23.04.2005, however, they withdrew the same on 23.01.2006. Thereafter, they filed a fresh suit for possession by way of specific performance of the agreement to sell on 31.01.2006. While claiming to be always ready and willing to perform their part of the contract, they prayed for decreeing the suit. The defendants, while filing the written statement, submitted that the agreement to sell stood terminated on account of failure of the plaintiffs to pay the next installment of Rs.3,00,00,000/-, hence, the agreement to sell stood rescinded vide notice dated 14.04.2005.

8. The plaintiff No.1-Sh. Madan Pal appeared in evidence as PW-1. He admitted that both the plaintiffs received the communication dated 01.04.2005, sent by the defendants. He, also, admitted that no reply was given. On being questioned with regard to the arrangement of the remaining amount, he stated that Rs.1.5 crore was withdrawn from the bank on 18.04.2005, whereas, he, along with the other plaintiff, had issued cheques of Rs.1.5 crore. It has been stated that they reached the house of defendants at 03:00 p.m. on 12.04.2005. On being further questioned, the plaintiff No.1 claimed loss of memory with regard to the details of his bank account. Subsequently, in the latter part of the statement, he stated that he had borrowed the amount from his friends. He also admitted the receipt of notice Ex.P-4, dated 12.04.2005 but stated that they never replied to same. It was claimed that both the plaintiffs got their presence marked on 12.04.2005 while visiting the office of the Sub-Registrar. Subsequently, plaintiff No.1

stated that he does not remember the mode and manner in which they brought the amount of sale consideration on 20.01.2006 before the Sub-Registrar, Derabassi, but both the plaintiffs did not withdraw any amount from the Bank on 20.01.2006. He claimed that they borrowed the money from their relatives and friends but failed to divulge their names. It was claimed that the plaintiffs had brought Rs.6,00,00,000/- with them at the office of the Sub-Registrar.

9. On the appreciation of evidence, the trial Court came to the conclusion that the plaintiffs were not always ready and willing to perform their part of the contract. It was held that the plaintiffs have failed to honour the terms of the agreement, therefore, they are not entitled to the decree of specific performance. The Court found that the evidence of the plaintiffs is contradictory with regard to the sources for arranging the balance sale consideration payable to the defendants. Thereafter, the trial Court held that since the defendants have already received Rs.1.5 crores, therefore, in order to avoid undue enrichment, the plaintiffs are required to be refunded the amount along with interest at the rate of 9% per month from the date of decree.

10. The first appeal as well as the cross-objections filed by the parties were also dismissed by the Additional District Judge.

11. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook along with the requisitioned record.

12. On the one hand, the learned Senior counsel representing the defendants contends that both the Courts have erred in ordering the refund of the earnest money along with the interest despite recording a finding that

the plaintiffs have failed to fulfil the terms of the contract. While elaborating, he refers to clause 7 and 10 of the contract to contend that in case of failure to pay the sale consideration, the amount of earnest money is liable to be forfeited. While drawing the attention of the Court to the judgment of the Supreme Court in Satish Batra Vs. Sudhir Rawal, (2013) 1 SCC 345, he contends that the earnest money has been, rightfully, forfeited by the defendants.

13. Per contra, the learned counsel representing the plaintiffs contends that the findings of the Court to the effect that the plaintiffs were not ready and willing to perform their part, is erroneous and suffers from wrong appreciation of evidence. It is contended that the plaintiffs went to the office of the Registrar after having failed to convince the defendants to accept the amount of Rs.3,00,00,000/-. It is submitted that the plaintiffs filed the first suit for grant of permanent injunction on 23.04.2005, whereas, they filed the suit for specific performance of the agreement to sell on 31.01.2006 i.e. within a period of 11 days from the agreed date of execution of the sale deed. It is contended that the plaintiffs never failed to perform their part of the contract.

14. This Court, while analysing the evidence, has evaluated the arguments of the learned counsel representing the parties. The following facts are required to be highlighted.

i). As per the agreement to sell, the time was clearly the essence of the contract. In para 9, it was agreed that the payment schedule, specified in the agreement, shall be binding and no deviation shall be permissible. There is no dispute that the second installment under clause 9 (a)

was payable on or before 12.04.2005.

ii). The defendants on 01.04.2005 through registered post sent letters to both the plaintiffs reminding them that they have to strictly abide by the time schedule for further payment of Rs.3,00,00,000/-. The plaintiffs, despite the receipt of the aforesaid communication, chose not to reply.

iii). The plaintiffs have not produced any bank account or any witness which may help the Court to come to the conclusion that the plaintiffs were having wherewithal to pay the balance amount of Rs.5,95,00,000/-. Though, the plaintiffs No.1 claims that he had arranged the amount from his friends, however, on a careful study of his deposition, it is evident that he has failed to lead cogent evidence to support that fact. In fact, the defendants summoned the bank officials of HDFC Bank in which the plaintiff No.1 had/has an account. On 12.04.2005, plaintiff No.1 had a credit balance of Rs.2,728.28/-. There was credit entry of Rs.80,00,000/- on 30.06.2005. On 20.01.2006, the plaintiff No.1 had a balance of Rs.55,152.23/-.

15. Moreover, from the reading of the statement of plaintiff No.2- Sh. Ram Kumar who appeared as PW-3, it is evident that his deposition is contrary to the deposition of plaintiff No.1. He has also miserably failed to produce any cogent evidence to prove that they were ready and willing to perform their part of the contract. Thus, the findings of fact arrived at by the

Courts below do not require any interference.

16. Now, let us discuss the substantial question of law which has been culled out.

17. At the outset, it is important to note that the Supreme Court in **Maula Bux Vs. Union of India (1969) 2 SCC 54**, in the context of forfeiture of the earnest money has held that Section 74 of the Contract Act, 1872 has no application to the amount of earnest money which has been forfeited as per the terms of the contract. In **Satish Batra (supra)**, the Supreme Court, after discussing the law in detail, has reiterated the aforesaid position.

18. This Court in **Regular Second Appeal No.4698 of 2017, titled as “Om Prakash and others Vs. M/s Ganga Developers Pvt. Ltd.”, decided on 22.01.2020**, after discussing the various judgments passed by the Supreme Court including **M/s Kailash Nath Associates Vs. Delhi Development Authority (2015) 2 SCC (Civil) 502**, **Shree Hanuman Cotton Mills Vs. Tata Air Craft Ltd., (1969) 3 SCC 522** and **Satish Batra (supra)** has held as under:-

“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."

19. It has, explicitly, been provided in the terms of the agreement that if the plaintiffs fail to pay the sale consideration within the stipulated time, then, the amount of earnest money shall be liable to be forfeited. Therefore, it was not appropriate for the trial Court as well as First Appellate Court below to apply the concept of undue enrichment in the facts of the present case. There may be some case in which the Court may come to a conclusion that the amount of earnest money was excessive and it is not in the interest of justice to order the forfeiture of the entire amount. However, in the present case, the amount of earnest money is only 15% of the total sale consideration. As already noticed, the property is located on the outskirts of Chandigarh. With the passage of time, prices have seen a steep rise. There is a huge demand for land in order to carry out development. The Union Territory of Chandigarh is surrounded by satellite places such as Mansa Devi Complex, Panchkula, Zirakpur, Mohali, New Chandigarh etc.

20. The parties, while entering into the agreement, were conscious of the fact that time is the essence of the contract. The defendants had, time

and again, clarified that no deviation in the schedule of payment shall be acceptable. In such circumstances, while ordering the defendants to return the amount of earnest money, both the Courts have erred in invoking the doctrine of unjust enrichment in the peculiar facts of the case. The amount of sale consideration, as already noticed, is 15% of the total sale consideration and the same is not considered to be excessive. Moreover, the attention of this Court has not been drawn to any special reason for depriving the defendants from forfeiting the amount of earnest money in accordance with the terms of the contract.

21. Consequently, the Regular Second Appeal No.5437 of 2015 is allowed, whereas, Regular Second Appeal No.6241- of 2015 is dismissed.

22. Resultantly, the plaintiffs' suit for grant of decree of possession by way of specific performance of the agreement to sell shall stand dismissed and judgment and decrees passed by the Courts below directing the defendants to return the amount of earnest money along with the interest shall stand set aside. No order as to costs.

23. All the pending miscellaneous applications, if any, are also disposed of.

24th November, 2022

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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned : *Yes/No*

Whether reportable : *Yes/No*