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

**RSA-3836-2017 (O&M)**
**Reserved on:12.12.2022**
**Pronounced on:19.12.2022**

Satish Kumar ….Appellant.

vs.

Prithvi Singh and others ....Respondents.

**CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA**

Present: Ms. Amrita Nagpal, Advocate,
for the appellant.

Mr. Rakshit Gupta, Advocate for
Mr. Rakesh Gupta, Advocate,
for the respondents.

*****

**HARKESH MANUJA J. (Oral)**

By way of present regular second appeal filed at the instance of appellant-defendant, challenge has been made to the judgment and decree dated 04.05.2017 passed by the court of learned Additional District Judge, Kaithal, whereby a decree for recovery of Rs.4,50,000/- without interest has been passed in favour of respondents-plaintiffs in a suit for specific performance.

2. Brief facts of the case are that based on an agreement to sell dated 23.01.2007 (Ex.P1), respondents-plaintiffs filed a suit for possession by way of specific performance regarding 2500 square yards of land against the appellant-defendant with the averments that total sale consideration was Rs.27,50,000/-, out of which, Rs.5,50,000/- was paid as earnest money and 10.05.2007 was fixed as the target date. The respondents-plaintiffs further pleaded that on the target date, they along with the balance sale consideration and the necessary expenses visited the office of Sub-Registrar, however, the

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

appellant-defendant did not come present, resultantly, compelling them to file the present suit.

3. Upon notice, appellant-defendant appeared and controverted the stand taken by respondents-plaintiffs as regards their readiness and willingness about the performance of the agreement in question, however, the execution of agreement to sell dated 23.01.2007 along with the payment of earnest money of Rs.5,50,000/-, besides, the quantum of total sale consideration being Rs.27,50,000/- with 10.05.2007, the target date was not disputed.

4. The Trial Court vide judgment and decree dated 30.09.2015, dismissed the suit by holding that the respondents-plaintiffs were not ready and willing to perform their part of the contract and, as such, were not entitled for decree of possession by way of specific performance.

5. Aggrieved against the judgment and decree dated 30.09.2015, respondents-plaintiffs filed first appeal. Although, the first Appellate Court also declined to grant relief of possession by way of specific performance in favour of respondents-plaintiffs, however, passed a decree for recovery of Rs.4,50,000/- without interest in their favour being refund of reasonable amount of damages for facing litigation for five years. It is the said judgment and decree dated 04.05.2017, which has been impugned herein by way of present Regular Second Appeal.

6. It has been contended on behalf of the appellant that in the facts and circumstances of the present case, when it was sufficiently proved on record that the respondents-plaintiffs were not ready and willing to perform their part of agreement in question, the amount of earnest money was required to be forfeited based on the terms of the agreement in question

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

Ex.P1. She further submits that even the sending of notice dated 29.01.2008 at the instance of respondents-plaintiffs was duly responded to by the appellant-defendant through reply dated 08.02.2008 calling upon respondents-plaintiffs to come forward for execution of sale deed within a period of 30 days thereof, however, neither the respondents-plaintiffs came forward for the purpose of execution of sale deed nor even the fact of any such reply/response dated 08.02.2008 by the present appellant-defendant was ever disclosed by them in the plaint. Learned counsel for the appellant further submits that even the suit was filed at the fag end of the period of expiry of 03 years from the date of target date, which again reflects the lack of willingness on the part of respondents/plaintiffs.

7. Learned counsel for the appellant also submits that once the respondents-plaintiffs failed to establish their readiness and willingness as regards execution of agreement in question and this fact was duly proved on record and even accepted by both the courts below, the forfeiture of earnest money as per the terms of agreement to sell dated 23.01.2007 (Ex.P-1) could not have been termed to be an act of undue enrichment. For the said purpose, learned counsel for the appellant also places reliance upon the judgment of Hon'ble the Supreme Court, in case of *"Satish Batra vs. Sudhir Rawal"*, reported as *2012 (4) RCR (Civil) 890*.

8. On the other hand, learned counsel for the respondents-plaintiffs submits that there was some dispute regarding the actual position of the boundaries of the land in question as compared to the boundaries reflected in the agreement to sell, which was the main reason for delay in filing the suit. Learned counsel also submits that in fact there was no passage towards the south of the land in question as depicted so in the agreement in question,

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

otherwise, the respondents-plaintiffs were always ready and willing to perform their part of agreement in question, throughout.

9. Based on the aforesaid submissions, learned counsel for respondents-plaintiffs submits that since, there was material defect in the property in dispute, as such, the forfeiture of earnest money was wholly uncalled for and for this he places reliance upon a decision rendered by Hon'ble the Supreme Court in case titled as *"Haryana Financial Corporation and another Vs. Rajesh Gupta, 2010(1) SSC, 655.*

10. I have heard learned counsel for the parties and gone through the paper book as well as the relevant record in the shape of agrement in question (Ex.P-1) provided to me at the time of hearing, I find substance in the submissions made on behalf of the appellant.

11. In the present case, the following question of law arises for consideration:-

> *"Whether the forfeiture of earnest money under an agreement is permissible, in case, the transaction fails on account of default of the purchasers/vendee."*

The afore-stated question of law is no more res-integra as the same already stands expounded upon by Hon'ble the Supreme Court in *Satish Batra's* case (supra). The relevant paragraphs No.17 and 18 of the aforesaid judgment are reproduced hereunder:-

> *"17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the*

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

> *contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.*
>
> *18. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011."*

12. Now, applying the principles of law laid down by Hon'ble the Supreme Court in <u>*Satish Batra's*</u> case (supra), to the facts and circumstances of the present case, wherein a concurrent finding of fact based on proper appreciation of evidence available on record has been arrived at by both the courts below to the effect that respondents-plaintiffs were not able to prove their readiness and willingness to perform their part of agreement in question, one can trace out that the transaction fell through on account of fault of the vendee i.e. respondents/plaintiffs. Once that was so, as per terms of the agreement dated 23.01.2007 (Ex.P-1), the appellant-defendant was entitled for forfeiture of the earnest money received under the same, based on a specific covenant to that effect. The translation of relevant portion of the agreement in question is reproduced hereunder for reference:-

> *"......In case, the purchasers does not come forward to get the sale deed registered, his earnest money will be forfeited....."*

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

On a perusal of contents of agreement in question, it can be found that a sum of Rs.5.50 lakhs was paid as earnest money, the remaining sale consideration was to be paid at the time of registration of sale deed for which period was fixed up to 10.05.2007. From the portion of agreement reproduced herein above, one can see through that the payment of earnest money was to be treated as gurantee with reagard to its performance. Once, it was established that the respondents/plaintiffs were not able to proved their readiness and willingness to perform their part of agreement in question and the transaction fell through on this account, the appellant/defendant was well within his right to forfeit the amount of earnest money.

13. In view of the discussion made hereinabove, I find that the first Appellate Court fell into an error of law while allowing the appeal filed at the instance of respondents-plaintiffs to the extent of refund of Rs.4.50 lakhs out of the earnest money having relied upon the doctrine of undue enrichment of appellant-defendant, which was not even made out in the facts and circumstances of the present case, as the rights of the parties were strictly to be governed and adjudicted upon under the terms of agreement/contract entered into between them. The respondents-plaintiffs even tried to defend the judgment and decree passed by the first Appellate Court by stating that the sale deed could not be executed/registered in their favour as there was some dispute about existence of a passage towards the south of property in question as recorded under the agreement in question. It was also submitted that in fact, no such passage towards the south of the property, in question, as alleged under the agreement dated 23.01.2007 (Ex.P-1) was in existence at the spot, which was the prime reason for non-enforcement of the agreement by them. I am unable to accept the

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document

aforesaid conention made on behalf of the respondents as the aforesaid contention, which is purely based on facts did not find favour with either of the courts below. I am even unable to accept the same in view of lack of sufficient evidence in this regard.

14. Accordingly, in view of the reasons recorded hereinabove, the appeal stands allowed, the judgment and decree dated 04.05.2017 passed by the first Appellate Court is set aside resulting into dismissal of the suit filed at the instance of respondents-plaintiffs.

15. Pending applications, if any, stand disposed of.

19.12.2022 **(HARKESH MANUJA)**
sonika **JUDGE**

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

SONIKA
2022.12.21 13:14
I attest to the accuracy and
authenticity of this document