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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-1358-2013 (O&M)

Date of decision: April 18, 2023

Karnail Singh

....Appellant

versus

Amit Garg

....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** Mr. G.S. Punia, Senior Advocate with
Ms. Harveen Kaur, Advocate for appellant.

Mr. Akash Yadav, Advocate for respondent.

ARUN MONGA, J. (ORAL)

For convenience, parties herein are addressed as per the recitals before learned trial Court.

2. Appellant herein is plaintiff assailing impugned judgment/ decree dated 03.11.2012 passed by learned District Judge, Kaithal whereby appeal filed by respondent-defendant against judgment/ decree dated 13.04.2010 passed by learned Additional Civil Judge (Senior Division), Guhla declining relief of possession by way of specific performance of agreement to sell dated 30.06.2006, but passing money decree of double amount of earnest money, was accepted and judgment/ decree dated 13.04.2010 was set aside and suit of plaintiff was dismissed.

3. Briefly stated, facts, as noticed by learned Courts, are as below:

“2. Case of the plaintiff is that the defendant had entered into an agreement for sale of the land fully detailed and described in para no.1 of the plaint for a consideration of Rs. 5,08,000/- per acre vide duly executed an agreement for sale dated 30.6.2006 along with all rights appurtenant thereto such as bore and electric motor connection etc. It has been alleged that the defendant had received Rs. 4,50,000/- as earnest money from the plaintiff at the time of execution of the said agreement for sale and the balance sale consideration was agreed to be paid to the defendant at the time of execution, attestation and

registration of the sale deed, which was to be executed on 15.12.2006. It was also agreed that the possession of the suit land would be delivered to the plaintiff at the time of execution and registration of sale deed. It was also agreed that in the case the defendant fails to get the deed executed, attested and registered the plaintiff shall be entitled either to recover the double of the said earnest money paid to the defendant or he can get the sale deed executed and registered through court. It was also agreed that in case, the plaintiff fails to get the sale deed executed and registered the earnest money paid by him shall stand forfeited and the said agreement for sale shall stand canceled. The expense for stamp and registration charges etc. were to be borne by the plaintiff. It has been further alleged that the plaintiff along-with one Gural Singh son of Pritam Singh, resident of Village Patwi, District Ambala and along with the balance sale consideration and expense from stamp and registration charges etc. contacted the defendant at her house at Cheek on 12.12.2006 and offered the defendant to get the sale deed executed and registered but, the defendant told the plaintiff that they would out of station for 4/5 days and would not be available on 15.12.2006 and asked the plaintiff to get the sale deed executed and registered at any time after about one week and on the assurance of the defendant the plaintiff had not visited the office of Sub Registrar, Guhla on 15.12.2006. It has been alleged that the defendant served a legal notice dated 28.1.2007 upon the plaintiff on totally false and frivolous allegations vide which the plaintiff came to know that on 12.12.2006 the defendant along with her husband intentionally avoided the presence of the plaintiff for 15.12.2006, which shows the malafide and dishonest intention of the defendant to complete the said agreement for sale. The plaintiff served a notice dated 05.7.2007 upon the defendant calling upon the defendant on 18.7.2007 in the office of Sub Registrar, Guhla to complete her part of said agreement, on receipt of the balance sale consideration. The plaintiff visited the office of Sub Registrar, Guhla on 18.7.2007 along-with balance sale consideration and expenses for the stamp and registration charges etc. and waited the defendant for whole of the working day, but the defendant did not turn up, upon which the plaintiff got his presence marked by way of an affidavit dated 18.7.2007 before the executive Magistrate, Guhla. The plaintiff has always been and still ready and willing to perform his part of contract, but the defendant has failed to perform and complete her part of contract. These are the precise reasons on the basis of which the present suit been filed.”

4. Upon notice, respondent-defendant filed written statement averring that plaintiff was not in a position to arrange the balance sale consideration on 15.12.2006 and defendant waited for plaintiff in the office of Sub Registrar, Guhla for whole of the day for getting the sale deed executed and registered in favour of the plaintiff on receipt of balance sale price, but plaintiff did not turn up, upon which she got her presence marked before Sub Registrar, Guhla by getting an

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affidavit dated 15.12.2006 attested from Sub Registrar, Guhla exercising the power of Executive Magistrate Guhla. It was averred that earnest money paid by plaintiff stood forfeited and agreement to sell was also cancelled. It was denied that plaintiff along with one Gural Singh contacted defendant on 12.12.2006, as alleged. Remaining averments of the plaint were also denied.

5. Based on the rival pleadings, following issues were framed:

- “(I) *Whether the plaintiff always remained ready and willing and is still ready and willing to perform his part of contract on the basis of alleged agreement dated 30.6.2006? OPP*
- (II) *Whether the plaintiff is entitled for decree for possession byway of specific performance of agreement to sell in question dated 30.6.2006? OPP*
- (III) *Whether the plaintiff has no locus-standi and cause of action to file the present suit? OPD.*
- (IV) *Relief.”*

6. The parties to the suit adduced their oral as well as documentary evidence in support of their pleadings and to discharge their respective onus as per the issues, *ibid*.

7. On appraisal of evidence vis-à-vis pleadings, learned trial Court decided issues No.1& 2 against plaintiff. Issue No.3 was decided in favour of plaintiff. Consequently, learned trial Court while declining relief of decree for possession by way of specific performance of agreement to sell in question dated 30.06.2006, passed money decree of double amount of the earnest amount of the earnest money against defendant.

8. Feeling aggrieved against the said judgment and decree dated 13.04.2010, respondent-defendant preferred first appeal.

9. Learned First Appellate Court below accepted the appeal, resulting in Regular Second Appeal before this Court by appellant-plaintiff.

10. In its judgment, learned First Appellate Court, *inter alia*, observed, as under:

“11. In view of the above discussed evidence one thing is crystal clear that on the target date i.e., on 15.12.2006 the defendant was present before Sub Regsitrar, Guhla but the plaintiff was not present . Again after expiry of the target date the defendant got issued the notice (Ex. D1) intimating that when the plaintiff did not turn up before the Sub Registrar on the target date the earnest money stood forfeited and again it is established on record that for the next approximately six months from 28.1.2007 the plaintiff kept mum till 5.7.2007 when he got issued the notice (Ex.P2). This conduct of plaintiff categorically reflects that neither on the target date nor up to 5.7.2007 when the plaintiff got issued the notice (Ex.P2), the plaintiff was ready and willing to perform his part of contract. If the plaintiff would have been ready and willing to perform his part of agreement, certainly the plaintiff was to react immediately on receipt of notice (Ex.D1) dated 28.1.2007 and non reaction of plaintiff to notice(Ex.D1) is again reflective of conduct of the plaintiff that he was not ready and willing to perform his part of contract.

12. The trial court declined the relief of specific performance but passed a decree for recovery of double of the amount of earnest money whereas according to a judicial pronouncement of the apex court reported as Man Kaur (D) by L.Rs Vs. Hartar Singh Sangha, Law Herald P&HI 2108 when the plaintiff failed to prove his readiness and willingness to perform the part of contract the apex court concluded that the earnest money stands forfeited.

13. In the present case notice (Ex.D1) regarding forfeiture of earnest money was issued by the defendant to the plaintiff and on receipt of that notice the plaintiff kept silent of another six months fill the issuance of notice dated 5.7.2007 and in such a scenario when the plaintiff did not immediately react to notice (Ex.D1), certainly the earnest money stood forfeited and when earnest money stood forfeited, in view of the apex court judgment referred to above, the relief of recovery of the double of the amount of earnest money could not be granted but the trial court while taking erroneous approach of legal proposition has wrongly granted the relief of recovery of double of the amount of earnest money and decreed the suit for recovery of Rs. 9,00,000/- and grant of this relief is not justified as in a judicial pronouncement reported as M/s J.P.Builders and another Vs. A.Ramdas Rao and another , 2011 (1) Civil Court Cases (SC) 846 ther eis reference of another judicial pronouncement reported as R.C.Chandok and another VS. Chuni Lal Sabharwal and others 1970 (3) SCC 140 wherein it has been held that "readiness and willingness" cannot be treated as a strait jacket formula. This has to be determine from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(C) of the Specific Relief Act and when there is non compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit "

14. No other point was argued before me.

15. Resultantly in view of my discussion made above and for the foregoing reasons the findings as contained in the impugned

judgment and decree are not sustainable in the eyes of law. Hence, the present appeal succeeds and is hereby accepted and on acceptance of the present appeal, the findings of the lower court as contained in the impugned judgment and decree are hereby reversed and set -aside and consequent upon the reversal of the findings of the lower court the suit of the respondent-plaintiff fails and stands dismissed in toto. However, keeping in view the peculiar circumstances of the case the parties are left to bear their own costs. Decree-sheet be drawn accordingly . File be consigned to the record room.”

11. Learned Senior counsel for appellant/ plaintiff submits that judgment/ decree passed by learned trial Court is a well reasoned one, whereby though decree for possession by way of specific performance was declined, but money decree of double amount of earnest money was passed in favour of plaintiff.

12. On the other hand, learned counsel for respondent opposes the prayer and supports the judgment/ decree passed by learned First Appellate Court.

13. In **Satish Batra versus Sudhir Rawal**, reported in **2012 (3) Apex Court Judgments (SC) 726**, the Supreme Court has held as under:

“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 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.

19. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs. 7,00,000/-as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled

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to forfeit the entire deposit. The High Court has, therefore, committed an error in reversing the judgment of the trial court.”

13.1 Further, in a subsequent judgment rendered in **Rakesh Kumar Vats versus Vinod Kumar Chahel**, reported in **2019 (1) CivCC 101**, it has been held as under:-

“4. In the present case, it is seen that respondent/defendant/seller has failed to prove any loss caused to him on account of the stated breach by the appellant/plaintiff/buyer of the said Agreement to Sell. The respondent/defendant is only relying upon the clause of the Agreement to Sell entitling forfeiture of the amount paid. This aspect and entitlement to forfeiture of the seller of the property has been considered and negated in the judgment in the case of M.C.Luthra (supra), and accordingly the respondent/defendant cannot forfeit the amount paid by the appellant/plaintiff to the respondent/defendant under the subject Agreement to Sell except a nominal amount. The respondent defendant is therefore held entitled to forfeit 10% of the amount paid i.e. a sum of Rs. 30,000/- out of the total sum of Rs. 3 lacs on account of breach of contract by the appellant/plaintiff under the subject Agreement to Sell. The appellant/plaintiff however will be entitled to interest and as held in para 18 of the judgment in the case of M.C. Luthra (supra) rate of interest will be at 12% per annum simple.

5. In view of the aforesaid discussion, this appeal is allowed. Suit of the appellant/plaintiff is decreed for a sum of Rs.2,70,000/- alongwith interest @ 12% per annum simple from 28.9.2011 till payment. Parties are left to bear their own costs. Decree sheet be prepared.”

14. What emerges before this Court in the instant case after having perused judgments of both the Courts below is that neither of the parties adduced any evidence with regard to having suffered any losses due to non-execution of the sale deed. No doubt, in an agreement to sell, if there is a specific forfeiture clause on non-performance of agreement by the vendee entitling vendor to forfeit the money advanced to him, the vendee cannot have a premium on his non-performance and claim that forfeited amount should be refunded to him. In the premise, learned trial Court committed manifest error of law in passing decree in favour of vendee/plaintiff to pay double amount of the earnest money i.e., which amount to 50% of the sale consideration.

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15. Applying principles enunciated by the Supreme Court in case of **Satish Batra** *ibid*, I am of the view that ends of justice would be met in the present case, in case defendant-respondent is allowed to retain 10% of the total sale consideration as per agreement to sell i.e., Rs.1.9 lakh since total sale consideration was Rs.19 lakh and to refund the remaining amount of earnest money i.e., Rs.2.6 lakh to appellant/plaintiff. Rest of the findings *qua* non-performance on the part of plaintiff do not require any interference. Aforesaid amount of Rs.2.6 lakh be paid to appellant/plaintiff along with interest @ 6% per annum w.e.f. the date of filing of the suit, within a period of 4 months.
16. As an upshot of my preceding discussion, judgments and decrees of learned Courts below are modified and the instant appeal is disposed of, in the above terms.
17. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

April 18, 2023
mahavir

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