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

RSA-1-2016 (O&M)
and XOBJC-34-C-2016
Reserved on: 08.08.2023
Date of decision: 17.08.2023

Bhupinder Kaur and others

..Appellants

Versus

Pawan Batra and others

.Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Amit Jhanji, Sr. Advocate with
Ms. Zaheen Kaur, Advocate for the appellants

Mr. Anand Chhibbar, Sr. Advocate with
Mr. Vaibhav Sehgal, Advocate for the cross-objectors/
respondents

ANIL KSHETARPAL, J

1. This judgment shall dispose of RSA-1-2016 and cross objection No.34-C-2016.

2. The issue at hand involves a disagreement between the parties concerning the defendants' liability to return the earnest money paid, as outlined in the agreement to sell that was executed between them on 09.02.2006. On the one hand, the defendants claim that they are entitled to forfeit the entire amount of earnest money whereas it is the case of the plaintiff that defendants have committed default and therefore, they are entitled to decree for refund of the entire amount of earnest money paid.

3. After having heard learned senior counsels representing the parties and perusal of the photocopy of the record produced by the learned counsel representing the plaintiffs as well as the synoptic note submitted by the learned counsel representing the parties, this Court is of the considered view that the following issue arises for adjudication:-

"If the agreement to sell executed on receipt of consolidated earnest money stipulates the execution of the sale deeds at different stages and the intended purchaser commits default at both the stages, whether the forfeiture of the amount of earnest money is required to be apportioned so as restrict it only at the first stage?"

4. Basically, the interpretation of the written agreement to sell executed between the parties lies at the core of the entire controversy. Hence, it would be appropriate to extract the translated version of the agreement to sell which has been reproduced in the grounds of appeal filed by the learned counsel representing the defendants.

"*(On non judicial stamp paper)*

<u>Agreement to sell</u>

Stamp duty : Rs.300/-

Kittey: 6 (50 x 6-300) Land situated at village Guran, Tehsil Jagraon, District Ludhiana & Village Mor Karima, Sub Tehsil Mullanpur Dakha, Tehsil & District Ludhiana.

We, Bhupinder Kaur wife of S. Harbans Singh son of S. Atma Singh & Shital Singh-Jaspreet Singh sons of S.Harbans Singh son of S. Atma Singh, are residents of

Sakrameto (California) U.S.A., through our General Power of Attorney holder S. Harbans Singh son of Atma Singh, resident of Shitrine Way, Sakrameto (California) U.S.A. 95834, presently residing at village Kohala, Tehsil & District Jalandhar vide General power of attorney dated 30.1.2006 executed at Sakrameto (California), duly attested by Commissioner, Patiala Division, Patiala vide Registration No.145 dated 7.2.2006, are agreement executants. Whereas land total measuring 197 kanal 4 marla, as per detail given herein below; Land measuring 167 Kanal 11 Maria i.e. land beariong Khata No.1202/1283, comprised in Khasra No.86//7/1-8/2-13/3-14, 85//10/2-11/1, 86//7/2-8/1/ Kittey 8, measuring 23 kanal 4 marlas, land bearing Khata No.484/525 comprised in Khasra No.84//20, 86//15/1, Kittey 2, measuring 5 Kanal 17 Marla & Khasra No.84//12-21, Kitte: 2 measuring 2 kanal 13 Marla, land bearing Khata No.8480-0- 631/680-682/731, comprised in Khasra No.83/6/2- 17/1-17/3-17/5, kittey 4, measuring 5 kanal 4 marla, land bearing Khata No.683/732, comprised in Khasra No.86//A measuring 8 kanal 0 marla, land bearing khata No.854/915, comprised in khasra No.85//18/1-23/2, Kittey 2, measuring 4 kanal 12 marla, land bearing khata No.1219/1302,comprised in Khasra No.86//25 measuring 1 kanal 7 marla to the extent of 0 kanal 10 marla, land bearing khata No.391/428, comprised in khasra NO.85//1/2, land bearing Khata No.510/551, comprised in Khasra No. //10/1 measuring 4 kanal to the extent of 0 kanal 5 Marla, land bearing Khata No.468/508-1040/1114, comprised in khasra No.83//2-17/4 kittey 2, measuring 3 kanal 16 marla, land bearing Khata No.660/709-662/711- 1206/1284-1211/125 comprised in Khasra No.83//25, 86-15/2-6, 83//15/1-15/2-16-84//11, 85//1/1, measuring 49 kanal 18 marla, land bearing khata

No.1204/1283, comprised in Khasra No.86//3/2 measuring 2 kanal 8 marla, land bearing Khata No.1215/1297- 1298, comprised in khasra No.83//7d- 14/2, 83//24, Kittey 3 measuring 21 kanal 7 Marla & land bearing khata no.1197/1278, comprised In khasra NO.83//12/2-13-18/3-23/1, 86//3/1- 8/3- 13/1-13/2, kittey 9, measuring 38 kanal 5 marla, situated at villag Gura, Hadbast No.111, Tehsil Jagraon, District Ludhiana, as per jamabandi for the year 2003-2004 and land bearing khata No.227/260, comprised in Khasra No. 39//16/2-17/1-18/2-19/2- 20/2-21-22- 23-24-25-40//20/2-21, 50//1, 51//9-1-2- 3-4-5, 52//5, situated at village Kor Karim, Hadbast No.109, Sub Tehsil Mullanpur Dakha, Tehsil & Distt. Ludhiana, as per Jamabandi for the year 2002-2003, is owned and possessed by the vendors, as entered in revenue record. Now, I, General power of attorney, in my sound disposing mind, have agreed to sell out said land measuring 197 kanal 4 marla, alongwith connected right & apportenances on Ferozepur Road, debris, two electric motors and electric connection 7.5 H.P. with security deposit, rights of passage, water course, at the rate of Rs.83,00,000/- (Ra.Eighty three lac only) per acre (one acre-4840 square yards), in favour of Arun Singal son of Sh. Lajpat Rai, resident of College Road, Ludhiana & Subhash Malhotra, son of Bishambar Malhotra resident of Samrala Road, Ludhiana & Pardeep Kumar son of Sh.Ratan Chand, resident of Shaheed Bhagat Singh Nagar, Ludhiana & Pawan Batra son of Sh.G.R. Batra, resident of 1379, (text missing) Nagar, Ludhiana and Kidar Nath son of Sh.Baldev Raj, resident of Naulakha Colony, Ludhiana, in equal share and have received a sum of Rs.2,00,00,000/- (Rs. two Crore only), half of which comes to Rs. 1,00,00,000/-, on account of earnest money. It is agreed that the said vendees will pay further *amount of Rs.2,00,00,000/- (Rs. Two Crore only) by 30.9.2006 and I will be liable to get registered, registered sale deed regarding land measuring 20 kanal 0 marla, situated at village Mor Karima, in favour of vendees or the person, as per their choice. The vendees will be liable to pay balance sale consideration by 30.4.2007 and at that time, I would be liable to get registered the sale deed regarding the entire remaining land in favour of vendees or the person as per their choice or the person, as per their choice. In case I fail to get registered sale deed as agreed upon, the vendees may get registered sale deed through court, for which I would be liable to bear all the costs and damages, imposed by the Court. In case the vendees fall to get registered the sale deed, as agreed upon, the earnest money paid by them will stand forfeited. All the sale and registration expenses will be borne by vendees. The possession of so sold land will be delivered to the vendees at the time of registration of sale deeds. I would be liable to get conducted demarcation of land before registration of sale deeds. I would be liable to lift the popular trees, lying grown in the said property. Vendees will have no connection whatsoever with said trees. In case any dispute is detected I, the title, or any loss is caused to veneeds on account of objection raised by legal heirs or anyone else, the vendors and their other property will be liable to make good the same. Hence this agreement to sell has been executed, so as to be used in case of need.*

Dated: 9.2.2006

Vendors

Bhupinder Kaur Sd/-
Shital Singh Jaspreet Singh
Through their General power of attorney holder Harbans Singh

<u>Vendees</u> Witness Witness
Arun Singla, Subhash
Malhotra, Pardeep Kumar,
Pawan Batra, Kidar Nath
Received a sum of Rs. Two crore in cash.

Sd/-
Harbans Singh
GPA Holder"

5. The execution of the agreement to sell with respect to the land measuring 197 kanals 4 marlas (3944 marlas) on receipt of Rs.2 crores as the earnest money is not disputed between the parties. The entire sale consideration comes to Rs.20,45,95,00,000/-. As is evident, the plaintiffs were required to pay another sum of Rs.2 crores to the defendants and on such payment being made, the defendants were required to execute the sale deeds with respect to 20 kanals land situated at Village MorKarima in favour of the plaintiffs or their nominees. At the second stage, the plaintiffs were required to pay the balance sale consideration i.e Rs.16,45,95,000/- by 30.04.2007 and get the sale deed registered with respect to the remaining land. According to the agreement to sell, the defendants were obligated to have the land demarcated, harvest and remove the trees that were grown in the land. The defendants harvested the trees before 30.09.2006. On 30.09.2006, the plaintiffs neither paid the amount of Rs.2 crores nor came forward to get the sale deed registered by visitng the office of the Sub-Registrar, whereas the defendants through their attorney were present in the office of the Sub-Registrar. On 17.10.2006, the defendants herein, filed a suit for decree of declaration that the agreement to sell has come to an end and with a consequential relief of permanent injunction, which was

withdrawn on 21.07.2007. However, the plaintiffs filed the suit for recovery of Rs.2,60,00,000/- on 18.07.2008. In substance, the plaintiffs allege that they are entitled to refund of the earnest money on account of the following reasons:-

(i) The defendants are not the owners of the land comprised in Rectangle no.86 khasra no. 225.

(ii) Rectangle number of the land comprised in khasra no.10/1 has not been disclosed.

(iii) There are two passages and one well located in the area and therefore, the entire land is not located in one compact block.

(iv) Defendants are not the owners of the land comprised in Rectangle no. 83 khasra no.23/2.

(v) As agreed, the defendants have failed to get the land demarcated.

6. The defendants vigorously contested the suit. For adjudication of the case, the trial court framed the following issues:-

"*1. Whether plaintiff is entitled to recover Rs.2,60,00,000/- alongwith interest? OPP.*

2. Whether the plaintiffs have no locus standi to file present suit? OPD.

3. Whether the plaintiffs have committed breach of agreement to sell dt. 9.2.06? If so, its effect? OPD.

> *4. Whether the plaintiffs are estopped by their own act and conduct from filing the present suit? OPD.*
>
> *5. Whether the suit filed by the plaintiffs is abuse of process of law? OPD.*
>
> *6. Whether the agreement to sell dt. 9.2.06 stood cancelled and earnest money paid in the agreement stood forfeited? OPD.*
>
> *7. Relief."*

7. In order to prove their case, the plaintiffs examined Prem Batra as PW1, PW2 Paramjit Singh Bhatia, PW3 Kedar Nath, PW4 Arun Sehgal, PW5 Subhash Malhotra, PW6 Pardeep Kumar, PW7 Anil Singhania and PW8 Suresh Kumar in the oral examination.

8. In the documentary evidence, various documents were tendered in evidence. On the other hand, PW1 Harbans Lal appeared on behalf of the defendants and produced various documents.

9. On appreciation of the evidence, the learned trial court dismissed the suit, however, in the first appeal, the judgment and decree passed by the trial court has been modified by the First Appellate Court while justifying the forfeiture of Rs.7,50,000/- out of the total earnest money of Rs.2 crores. It has been held by the First Appellate Court that the plaintiffs defaulted on fulfilling their contract regarding the first portion of the agreement to sell concerning a 20 kanal land. Therefore, the allocation of the earnest money for this 20 kanal land comes to Rs.7,50,000/-.

10. While partly accepting the appeal, the First Appellate Court, in substance, recorded the following findings:-

(i) The plaintiffs were not ready and willing to perform their part of contract with respect to 20 kanals land only, hence, the defendant had no right to forfeit the entire amount of earnest money.

(ii) As per the contractual obligation, the defendants failed to get the land demarcated, therefore, they have also defaulted to perform their part of the agreement to sell.

(iii) Defendants acted in haste and did not wait upto 30.04.2007 as they filed the suit on 17.10.2006 for cancellation of the agreement to sell. Consequently, only Rs.7,50,000/- could be forfeited.

(iv) Agreement with respect to 20 kanals only can be cancelled on 17.10.2006, therefore, the earnest money to the aforesaid extent could be forfeited.

11. Now the Bench proceeds to examine the reasons given by the First Appellate Court. The reason no.(i) has no substance because the plaintiffs were not ready and willing to perform their part of the contract neither at the first stage nor at the second stage. They never filed a suit for specific performance of the agreement to sell. Both the courts have concurrently found that they were not ready and willing to perform their part of the contract and the objections taken by them lack

substance. As regards reason no.(ii) it may be noted that the plaintiffs never sent any communication to the defendants to get the land demarcated before getting the sale deed executed. The defendants are settled outside the country. If the plaintiffs were serious about performing their part of the contract after the demarcation of the land they shall have written a letter or sent a notice to the defendants to get the land demarcated to have enabled them to get the sale deed executed. The plaintiffs have in no manner shown their readiness and willingness to perform their part of the contract. Hence, there is no substance in the second reasons recorded by the First Appellate Court. The next reason assigned by the First Appellate Court is also erroneous as the filing of the suit by the defendants on 17.10.2006 which was admittedly withdrawn on 21.07.2007 would have no bearing on the result of the case. On the other hand, it helps the case of the defendants. They filed a suit but withdrew the same. Even after that the plaintiffs did not take steps for a period of one year.

12. The plaintiff failed to make further payment of Rs.2,00,00,000/- on 30.09.2006 to the defendants, hence, the contract between the parties came to an end. There was no necessity to divide the agreement into two separate independent agreements i.e one with respect to 20 kanal land and second with respect to the remaining land measuring 177 kanals 4 marlas. The agreement to sell is same and not separate. In the agreement to sell, it is not provided that the plaintiffs can only purchase the property to the extent of 20 kanals while surrendering their rights with respect to the remaining land. Moreover,

upto 30.09.2006, the plaintiffs were required to pay Rs. 4 crores whereas the total sale consideration of 20 kanals land comes to Rs.2,07,50,000/-, hence, the First Appellate Court has erred in bifurcating the agreement to sell into two separate agreements. The aforesaid discussion even covers the last reason assigned by the First Appellate Court.

13. Heard learned counsel representing the parties at length and with their able assistance perused the paperbook.

14. The relevant extract of the written note filed by the learned counsel representing the defendants reiterating his oral submissions, reads as under:-

> "*Concurrent finding of courts below observing that the plaintiffs were not ready and willing to perform their part of the contract on 30.09.2006 and they were not ready and willing to make the payment of Rs.2 crores to get the sale deed of the portion of the total land executed and they didn't get their presence marked in the office of the Sub Registrar to show their readiness and willingness. Concurrent finding that earnest money deserves to be forfeited. (page 131, 140-147 of paperbook) (Ld. Trial Court judgment) (page 184-186 of paperbook) (Ld. Appellate Court judgment) (page 200 of LCR-xxxx of PW1).*
>
> *Ld. Trial Court held that entire earnest money I.e Rs. 2 crore was rightfully forfeited. However, Ld. Appellate Court held that only 7.5 lakh out of 2 crores deserves to be forfeited, because according to cross examination of DW1 Harbans Singh (page 481, 485 of LCR) only 7.5 lakh out of 2 crore was to be adjusted against sale of 20 kanal land which was to be executed on*

30.9.2006. Balance amount out of 2 crore of the earnest money was to be adjusted at the time of execution of sale deed for the rest of the land. The Ld. Appellate Court held that since default was in execution of first sale deed for 20 kanal land, only 7.5 lakh could be forfeited. Limited to this extent, the present appeal has been filed. (page 185-188 of paperbook) (Ld. Appellate Court judgment) DW1 stated in xxx that the adjustment was not part of the agreement to sell (page 482, 486 of LCR) Hence, it is submitted that the entire amount paid at the time of the ATS dated 09.02.2006 (which comes out to be 10% of total sale consideration) was earnest money.

It is pertinent to mention here that both the Ld. Courts below observed that plaintiffs have failed to prove that they were present before the sub registrar or t hey had requisite sale consideration on 30.09.2006 for getting the sale deed executed whereas, sufficient evidence has been led by the appellants regarding their presence and willingness. (page 184-185 of paperbook) (Ld. Appellate Court judgment) Further stated in xxx by PW1 that they did not file any affidavit before Sub-Registrar for marking their presence. And do not remember if they got their presence marked. (page 201 of LCR)

Ld. Trial court has observed on page 144-147 of paperbook that as per statements of the PWs, there are no documents to prove that plaintiffs/respondents were in the position to pay requisite sale consideration.

According to Cross examination of PW1-Pawan Batra, it is stated that he was provided with copy of jamabandi for the year 2003-2004 by Harbans Singh when the agreement was executed and that they had seen the land before execution of agreement so the stand of the plaintiffs *that they came to know that the land was not 1 tak about 15 days after 30.09.2006 and therefore, there is misrepresentation on part of the appellants/defendants is baseless and an afterthought. (page 214 of LCR) Moreover, no notice qua any such objection was given to the Appellants and no clarification was sought by the plaintiffs. They did not file any complaint regarding fraud. (page 203-203 of LCR)*

Plaintiffs had prior knowledge that the land was not one tak.DW1 stated in chief (page 462 of LCR) and xxx (page 489 of LCR) that he never represented to the plaintiffs that land was one tak. Further page 472, 473, 474 and 482 of LCR regarding the xxx examination of DW1 are relevant.

It is the own stand of the plaintiffs that the land didn't serve their purpose since it was bifurcated so they were not willing to execute the sale deed and they arrived upon this decision by 15.10.2006 (page 203 of LCR) which evidences that irrespective of the suit for declaration filed by the appellants (on 17.10.2006), the plaintiffs were never willing to execute the sale deed for the rest of the land either. Therefore, no amount of earnest money deserves to be refunded to the plaintiffs. (page 203 of LCR)

Defendants suffered loss due to non-execution of the sale deed (page 495 of LCR).

Rs. 2 crores were given as earnest money and not as advanced money (according to agreement to sell and cross examination of DW1 at page 473 of LCR). The money was given at the time of the agreement to sell dated 09.02.2006 and amounts to about 10% of the total sale consideration which is about 20 crore."

15. On the other hand, the written note of the submissions filed by the learned counsel representing the plaintiffs reads as under:-

> i. *The perusal of the agreement to sell 09.02.2006 shows that the performance of the above-mentioned agreement was contemplated by the parties to be performed in two parts i.e the first part was to be performed on 30.09.2006 qua 20 kanals of the suit land against the payment of Rs.2 crores. The other part of the agreement to sell with regard to the remaining portion of the suit land was to be performed on 30.04.2007.*

> *ii. The admitted case of the parties is that an advance amount of Rs.2 crores was paid to the defendants on the date of agreement to sell dated 09.02.2006. The cross-examination of the attorney of the defendants namely Sh. Harbans Singh would show that as on 30.09.2006, the date on which sale deed qua 20 Kanals of the suit land had to be executed, an amount of Rs. 7,30,000/- out of the advance amount of Rs.2 Crores was to be adjusted because the total sale consideration of 20 Kanals of suit land comes out to Rs. 2,07,50,000/-. The agreement as stated above was in two parts. The defendants are residents USA and were acting through their agent/attorney namely Harbans Singh. It is gleanable from record that Harbans Singh was also living in USA and returned to India on 29.09.2006 and after returning to India did not give any intimation to the plaintiffs. He was in extreme haste of forfeiting the advance amount and he filed civil suit for declaration that the agreement to sell stand cancelled and the earnest money stands forfeited, on 17.10.2006 and withdrew the same on 21.07.2007. The intention of the defendants was thus malafide from the very beginning as the defendants were only concerned in invoking the forfeiture clause without*

even waiting for the Second target date mentioned in the agreement to sell i.e. 30.04.2007. In such a situation, the Ld. Lower Appellate court rightly granted the relief of recovery to the plaintiffs.

iii. That the conduct of the defendants in the present case is of seminal importance. The attorney of the defendants admittedly returns from USA, just one day prior to the date fixed for execution and registration of sale deed qua 20 Kanals of suit land. There is no intimation from him that he has returned or when he will be appearing before the sub-registrar. Still further, the Khasra Nos, mentioned in the agreement to sell were admittedly not correct and the agreement to sell was never got rectified. It is also discernible from records and from the bare perusal of the agreement to sell that the subject agreement contained blanks rendering the agreement vague. On the basis of such agreement, there is no question of invoking forfeiture clause.

iv.That the filing of the suit by the defendants on 17.10.2006 gives death-knell to the case of the defendants. The defendants without waiting for Second target date contemplated in the agreement to sell date 09.02.2006 went ahead and unilaterally cancelled the agreement to sell dated 09.02.2006. In such a situation Section-64 of the Indian Contract Act, 1872 kicks in and becomes operative and by virtue of the same the defendants as per law are liable to return the advance amount to the plaintiffs.

v. That in the present case it is clearly proved on record that time was never the essence of contract. Firstly, the haste with which the defendants cancelled the agreement before waiting for Second target date shows the malafide intention of the defendants. Still further, the contract was divided in two parts and thus the amount of Rs. 2 Crores *could not have been forfeited after the expiry of the First target date. The cross-examination of Harbans Singh, attorney of defendants would further show that even after 30.09.2006, he was in touch with the plaintiffs for the execution and registration of sale deed which fully proves that time was never the essence of the contract. It is settled law that in case of contracts relating to immovable property, time can never be the essence of the contract.*

vi. That the defendants in the present case have neither pleaded any loss damage and they have not been able to establish any loss/damage. Once the pleading and proof qua damages is conspicuously missing, the Ld. Trial Court gravely erred in dismissing the suit of the plaintiffs while ordering forfeiture of the entire amount of Rs. 2 Crores. Even the Ld. First Appellate committed material irregularity while ordering forfeiture of an amount of Rs. 7.5 lacs and thus the plaintiffs have preferred cross-objections qua the same. It is a case where it is proved on record that the description of the suit land was not proper, agreement to sell was never rectified, defendants themselves cancelled the agreement and were in extreme haste in forfeiting the huge amount of Rs. 2 Crores and thus, the suit of the plaintiff ought to have been decreed in toto as prayed for in the plaint. Still further, the material aspect of the matter is that the suit land still vests in the defendants and in such a situation to allow the defendants to retain the amount of Rs. 2 Crores would amount to unjust enrichment.

vii. That in the present case the defendants have committed material defaults and were never ready and willing to perform their part of the contract. The essential term of the contract with regard to demarcation of the suit land was never complied with and without the said compliance, question of specific performance of the agreement to sell *never arose. In the wake of clear evidence, permitting forfeiture of huge amounts of Rs. 2 Crores to a party who was in default is not only illegal but wholly illogical."*

16. At the outset, it is important to note that the earnest money of Rs.2 crores constitutes less than 10% of the total sale consideration ie. Rs.20,45,95,00,000/-. Hence, the amount of earnest money is not excessive.

17. The aspect of the entitlement of the defendants to forfeit the earnest money has been drawing attention of the Court from time to time .This Court has dealt with the aforesaid aspect in **Ran Singh and others vs. M/s Apex Projects Pvt. Ltd. RSA 4920-2014 decided on 28.03.2019.** After explaining the expression 'earnest money' in the context of the judgment passed by the Supreme Court in '**Shri Hanuman Cotton Mills and others vs. Tata Aircraft Limited' 1969 (3) SCC 522**, it was held that earnest money is not only the advance payment but it is much more than that. Thereafter, after taking note of the judgments passed in **Satish Batra vs. Sudhir Rawal 2013(1) SCC 345**, **Videocon Properties vs. Dr. Balachandra Laboratories (2004) 3 SCC 711**, the Court held that the earnest money is liable to be forfeited once the intended purchaser fails to perform his part of the contract. Thereafter, again this aspect was examined in '**Om Parkash and others vs. M/s Ganga Developers Pvt. Ltd.' RSA-4698-2019 decided on 22.01.2020.** After taking note of the judgment passed in "**Kailash Nath Associates vs. Delhi Development Authority and another' 2015 (2) SCC (Civil) 502,** it was held that forfeiture of the

earnest money is permissible without proving the actual loss suffered by the intended seller. Thereafter, once again this matter was examined in **Col. Iqbal Singh vs. Madan Pal (deceased) through LRs and another 2023(2) RCR (Civil) 660**. After taking note of the judgment passed by the Supreme Court in **Maula Bux vs. UOI 1969 (2) SCC 552** it was held that Section 74 of the Indian Contract Act, 1872, has no application to the amount of the earnest money in the context of forfeiture thereof.

18. Now, the Bench proceeds to analyze the arguments put forth by the learned counsel representing the plaintiffs (cross-objector). The argument no.(i) of the learned counsel is factual. However, it may be noted that only one agreement to sell was entered with respect to 197 kanals 4 marlas land. Of course, the agreement provided for registration of the sale deed at two different stages. However, the First Appellate Court has erred in bifurcating the amount received as earnest money in two different and independent contracts.

19. As regards argument no.(ii), it may be noted that the oral deposition of a witness cannot supersede a written contract between the parties particularly, when the terms of the contract are crystal clear and unambiguous. Oral evidence to modify the terms of the contract shall not be admissible in the Court under Section 92 of the Indian Evidence Act, 1872. It is done to uphold the integrity of the written agreements and prevent dispute arising from the verbal claims that could alter the original intent of the parties involved. Both the courts have found that the defendants harvested their trees (as agreed in the

agreement to sell) much before 30.09.2006. Harbans Singh, who was a power of attorney holder on behalf of his children as well as his wife, returned to India on 29.09.2006 and remained present in the office of the Registrar on 30.09.2009 whereas the plaintiffs did not come forward for registration. As far as the steps taken by the defendants in filing the suit for grant of declaration that the agreement to sell stands cancelled on 17.10.2006, is concerned, it may be noted that the aforesaid step does not result in crystalizing the rights of the parties as on 17.10.2006. Additionally, the defendants withdrew the suit on 21.07.2007. Moreover, there was a consolidated earnest money with respect to the entire land measuring 179 kanals and 4 marlas. Hence, the bifurcation of the earnest money for the purpose of forfeiture on the part of the First Appellate Court was not correct.

20. The argument no.(iii) put forth by the learned counsel also does not have substance because Harbans Singh on behalf of the defendants reached India a day prior to the date fixed for execution and registration of the sale deed with respect to the land measuring 20 kanals. The plaintiffs never intimated the defendants there is a small inadvertent error which is required to be rectified. Moreover, the aforesaid error was only with respect to 0.25% of the total area, as out of the land comprised in Rectangle no. 86 Khasra no. 85 only 10 marlas was agreed to be sold which constitute 0.25% of total land which was agreed to be sold. In fact, the purpose of getting the land demarcated was to know the exact area which was to be sold because the agreement to sell provided that the land should be sold at the rate of Rs.83,00,000/-

per acre. In order to avoid any deficiency or excess, the provision was made in the agreement to sell for demarcation. In such circumstances, the undue importance given to the fact that the defendant did not have the land demarcated lacks substance, particularly when it was nowhere provided in the agreement to sell that the defendants will get the land demarcated before execution of the sale deed on 30.09.2006. Hence, there is no substance in the third argument also.

21. As regards argument no.(iv), it may be mentioned here that Section 64 of the Indian Contract Act, 1872 is not applicable to the facts of the present case as it deals with the consequences of the avoidance of voidable contract. In this case, the contract between the parties was not voidable.

22. With reference to argument no.(v), it may be noticed that the time was essence of the contract as the agreement itself envisaged further payment of Rs.2 crores by 30.09.2006 at time the sale deed with respect to the land measuring 20 kanal was to be executed, and on the payment of the remaining sale consideration sale deed for the remaining part of the land agreed to be sold was to be registered. In these circumstances, in the agreement to sell entered into by the parties the time was the essence of the contract. With regard to the argument of the learned counsel that the agreement to sell is required to be divided into two parts, it may be noticed that a perusal for the agreement to sell does not prove that two distinct and separate agreements were executed. At the rate of Rs.83,00,000/- per acre, with respect to the 20 kanal land,

the total sale consideration will come to Rs.2, 07,50,000/- whereas as per the agreement to sell by that time the plaintiff would have paid Rs.4 crores. Hence, the agreement to sell cannot be divided into two independent parts. As regards argument no.(vi), the matter has already been discussed. The Supreme Court in **Maula Bux's case (supra)** held that Section 74 of the Indian Contract Act, 1872 is not applicable to the forfeiture of the earnest money. The last argument of the learned counsel is insubstantial because both the courts have concurrently found on appreciation of the evidence that the plaintiffs have defaulted in performance of their part of the contract. Both the courts have also discussed that the failure to get the land demarcated in the absence of any communication by the plaintiffs would not be sufficient to hold that the defendants had also committed default.

23. From the careful reading of the agreement to sell, which has been extracted above, it is evident that the parties entered into agreement to sell with respect to 197 kanals and 4 marlas. These were not two independent agreements. A consolidated agreement to sell was executed. The First Appellate Court has erred in observing that the agreement only with respect to 20 kanal land can be cancelled on 17.10.2006. Because the plaintiffs failed to prove their readiness and willingness to perform their part of the agreement to sell, which resulted in ending the whole agreement.

24. In view of the aforesaid facts, the judgment passed by the First Appellate Court to extent of recovery of Rs.1,92,50,000/- is set

aside while restoring the judgment of the trial court. Resultantly, the suit filed by the plaintiffs shall stand dismissed. Consequently, the cross objections filed by the plaintiff shall stand dismissed.

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

17.08.2023 **(ANIL KSHETARPAL)**
rekha **JUDGE**
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No