IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1770 of 2014 (O&M)
Date of Order: 03.08.2023

**Surinder Mohan Batra and others**
**.Appellants**
**Versus**

**Gurbinder Pal Singh Tiwana and another**
**..Respondents**

**CR No.6981 of 2015**

**Smt. Raj Dulari Batra (since deceased) through LRs**
**...Petitioner**
**Versus**

**Gurbinder Pal Singh Tiwana and another**
**..Respondents**

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

**Present: Mr. Amit Jain, Senior Advocate, with**
**Mr. Aryaman Thakur, Advocate and**
**Mr. Anupam Mathur, Advocate**
**for the appellants (in RSA-1770 of 2014)**
**for the petitioner (in CR-6981 of 2015)**

**Mr. Chetan Mittal, Senior Advocate, with**
**Mr. Kunal Mulwani, Advocate**
**Mr. Ritvik Garg, Advocate**
**for the respondents.**

***ANIL KSHETARPAL, J***

1. Two connected cases, namely, Regular Second Appeal No.1770 of 2014 and Civil Revision No.6981 of 2015 arising between the same parties have come up for final disposal.

2. In the Regular Second Appeal No.1770 of 2014, the defendants challenge the concurrent findings of fact arrived at by the Courts below while decreeing the plaintiffs' (Respondents herein) suit for grant of decree of possession by way of specific performance of the agreement to sell.

3. In order to comprehend the controversy involved in the present case, it is important to take note of the relevant facts.

4. The receipt of the earnest money on the execution of the agreement to sell executed on 24.12.2004 between the parties is not in dispute. The agreement to sell was entered into by defendant no.1 on her behalf as well as on behalf of her children-defendant nos.2 to 6. The agreement has also been signed by defendant no.2 and 6. Defendant nos. 2 to 6 have authorized their mother (defendant no.1) through various Power of Attorneys to sell the property on their behalf. As per the agreement to sell, the defendants received Rs.14,00,000/- as earnest money out of the total sale consideration of Rs.1,40,00,000/-. Out of the earnest money of Rs.14,00,000/-, Rs.8,00,000/- was paid through the account payee cheque, whereas Rs.6,00,000/- was paid in cash. It was agreed that the sale deed would be executed on or before 31.05.2005 and in the meantime, the defendants will get a No Objection Certificate from the Estate Office. On 31.05.2005, the plaintiffs visited the office of the Sub-Registrar along with two pay orders in total of Rs.1,26,00,000/-. Whereas, on the other hand, defendant no.1 was also present, who claims that she had already rescinded the contract. The defendants claim that defendant no.1 orally rescinded the contract on 25.12.2004. Subsequently, she sent a fax message to the plaintiffs on 21.05.2005, offering to pay the amount equivalent to double of the amount of earnest money. Thereafter, another communication was sent on 23.05.2005, cancelling the agreement and replying to the notice sent by the plaintiffs, the defendants once again reiterated the said stand.

5. Keeping in view the aforesaid facts, the question that arises for

adjudication is "Whether intended vendors are entitled to unilaterally cancel the agreement to sell simply because they have changed their mind?"

6. Before this Court proceeds to examine the arguments of the learned counsel representing the parties, it is important to extract Clauses 13 and 14 of the agreement to sell dated 24.12.2004, execution whereof is not disputed between the parties. The said clauses are reproduced below:-

> *"13. That in case the said sellers back out from this bargain then the sellers will be liable to refund to the said purchaser double of the amount received by them as earnest money.*
>
> *14. That in case the said purchasers back out from this bargain then their earnest money shall stand forfeited in favour of the said sellers."*

7. At this stage, it will also be important to extract the relevant part of fax message sent by the defendant no.1 to the plaintiffs on 21.05.2005, which reads as under:-

> "*That immediately after the agreement I had informed you on three successive dates including the last being on 30th December 2004 that my family members were not willing to sell you the house in question and for this reason I intended to cancel the agreement and was willing to pay a sum of Rs.28 lacs( Rupees Twenty-eight lacs only) as per Clause 13 of the agreement which states that "That in case the said sellers back out from this bargain then the sellers will be liable to refund to the*

*said purchaser double of the amount received by them as earnest money."*

8. This Bench has heard the learned senior counsel representing the parties at length and with their able assistance perused the paper book along with the requisitioned record of the lower court.

9. The learned senior counsel representing the appellants contends that in view of Clause 13 of the agreement to sell, the defendants were entitled to cancel the agreement by offering the amount equivalent to double of the amount of earnest money. He submits that on 25.12.2004 on the next day of the date on which the agreement to sell was executed, the plaintiffs were conveyed the intention of the defendants and, therefore, at the most the plaintiffs are entitled to claim the amount equivalent to double of the amount of the earnest money. He further submits that the agreement to sell was rescinded before the agreed date for execution of the sale deed and this fact was conveyed to the plaintiffs. While contending that there is no specific prayer for the cancellation of the agreement to sell has been made in the suit therefore, the suit is liable to be dismissed. He placed reliance on ***I.S.Sikandar (dead) by LRs vs. K. Subramani and others, (2013) 15 SCC 27.*** He further contends that the plaintiffs concealed the receipt Ex.D1 (communication dated 24.05.2005) though it was admitted in the cross-examination by the plaintiffs. Hence, the plaintiffs are not entitled to the decree for specific performance of the agreement to sell.

10. On the other hand, the learned senior counsel representing the respondents (plaintiffs) contended that the cheque of Rs.8,00,000/- was presented by defendant no.1 for encashment on 27.12.2004, which was

credited in the account of defendant no.1 on 29.12.2004. Hence, the arguments of the learned counsel representing the appellant that on 25.12.2004, defendant no.1 communicated her unwillingness to go ahead with the agreement to sell is factually incorrect.

11. This Court has considered the submissions of the learned counsels representing the parties while analyzing the arguments of the learned counsel representing the parties.

12. At this stage, it becomes important to analyze the terms of the agreement to sell. Clause 13 of the agreement to sell if read in isolation can lead to a result as projected by the defendants, however, the agreement to sell is required to be read comprehensively in order to determine the real intention of the parties. It may be noted here that out of six defendants, only one defendant resides in India, whereas the remaining defendants are either settled in UK or USA.

13. The agreement to sell has been executed on a non-judicial stamp paper of Rs.20/-. It is specifically agreed that the defendants have agreed to sell the property for a total consideration of Rs.1,40,00,000/- and Rs.14,00,000/- as earnest money has been paid. Clause 4 of the agreement to sell provides that the sale deed would be executed on or before 31.05.2005 and the said date, if desired, can be extended by the mutual consent. Clause 6 of the agreement to sell provides that the vendors shall clear all the outstanding dues of the house to the Government upto date and shall also clear the water and electricity bills of the said house. Clause 7 of the agreement to sell provides that it shall be the responsibility of Sh. Darshan Kumar Batra (property broker) to get the ownership of the said

house transferred in the names of the said vendors in the record of the Estate Office, Chandigarh before the last date. Clause 8 of the agreement to sell provides that the vendors shall obtain the No Objection Certificate and Completion Certificate in respect of the said house from the Estate Office, Chandigarh before the last date. Clause 10 of the agreement to sell provides that the vendors have assured the said vendees that there is no defect in the title of the said house and Clause 11 provides that the vendors shall hand over all the original documents of the said house at the time of execution of the sale deed while delivering the actual and physical possession. Clauses 13 and 14 of the agreement to sell are required to be read and understood. Both these clauses are normally incorporated in every agreement to sell. However, such terms of the agreement to sell does not exclude the intended purchaser from filing the suit for specific performance of the agreement to sell. In fact, maintainability of suit for specific performance in presence of such clause has been considered by the Supreme Court in ***Man Kaur (dead) By LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512***.

14. In any case, once the contract is signed by the parties on receipt of the earnest money or promise to pay the earnest money, the contract is complete. In such circumstances, it would not be appropriate to hold that such agreement signed by the parties can be cancelled by one party i.e. unilaterally, unless specifically authorized. Clause 13 of the agreement to sell cannot be construed to mean that the intended vendors will be at liberty to back out from the bargain without any reasonable justification. It is evident from the reading of fax message dated 21.05.2005, that the vendors expressed their desire to back out of the agreement only because of the

change of mind, which in the opinion of the court, should not be permitted. Moreover, the right to get the agreement to sell specifically performed is a statutory right which cannot be permitted to be defeated by the unilateral action of any of the parties involved in the agreement and that also without a sufficient cause.

15. Consequently, in view of the aforesaid discussion, the question is answered in favour of the respondents.

16. The second argument of the learned counsel is with respect to failure of the plaintiffs to challenge the alleged communications dated 21.05.2005, 23.05.2005 and 24.05.2005. In fact, this issue has been examined in detail by this Court in ***Suksham Lata @ Kusum Lata and another vs. Jagdish Ram, (****RSA No.1783 of 2014, decided on 10.12.2018)* and ***Ashok Kumar and others vs. Purshotam Bansal****(Regular Second Appeal No.4201 of 2012, decided on 02.02.2018)***,** in the following manner:-

> *"Secondly, the facts in the case of* ***I.S.Sikandar (supra)*** *are entirely different. In that case, within the stipulated period, the plaintiff did not come forward to execute the sale deed, despite this fact, the defendants got issued a notice, calling upon the plaintiff to come and execute the sale deed but the plaintiff did not come forward. Plaintiff in reply admitted his fault in performing his part of the contract and sought extension. The defendants once again sent a notice to the plaintiff, extending time and asking him to pay the sale consideration amount and get the sale-deed executed and*

> *on failure to comply with the same, the agreement to sell would stand terminated/cancelled. The plaintiff did not even come forward to perform his part within the extended time. Under these circumstances, the Hon'ble Supreme Court has held that the plaintiff was required to seek a declaration that the cancellation/termination of the agreement to sell was illegal while filing a suit for specific performance of the agreement to sell.*

17. Additionally the attention of the Supreme Court was not drawn to the distinction between the suit filed for the cancellation of an instrument and the suit filed for declaration. The first category of the suits are governed by Section 31 of the Specific Relief Act, 1963 (hereinafter referred to as 'the 1963 Act'), whereas the second category of the suits are governed by Section 34 of the 1963 Act. Section 31 of the 1963 Act envisages a written instrument. The question of a notice sent, cancelling the agreement to sell would not fall within the purview of a written instrument. The expression "written instrument" has been used in the context of an agreement, gift deed, mortgage deed, sale deed etc. which are signed by the parties and if such instrument is void or voidable, the court is required to cancel the instrument. Whereas, in the second category of cases, a person entitled to any legal declaration or as to right to any property may file a suit for grant of decree of declaration. This distinction has been drawn by the Hon'ble Supreme Court in ***Suhrid Singh alias Sardool Singh vs. Randhir Singh and others, (2010) 12 SCC 112***, in context of liability to pay advalorem court fee.

18. This matter can be examined from yet another angle. Section 22 of the 1963 Act enables the court to grant relief for possession, partition and refund of earnest money etc. Clause (b) of sub-Section (1) of Section 22 enables the court to grant any other relief to which any person suing for specific performance is found entitled to. No doubt, sub-Section (2) provides that such relief shall not be granted by the Court unless it has been specifically prayed for. However, the mandatory nature of sub-section (2) is taken away by the proviso which has been explained in a recent judgment passed by the Supreme court in ***Manickam @ Thandapani and another vs. Vasantha, 2022 (2) RCR (C) 862***. Moreover, in ***Mrs. A.Kanthamani vs. Mrs. Nasreen Ahmed, 2017(4) SCC 654***, the Supreme Court distinguished the judgment passed in ***I.S. Sikander(dead) by LRs vs. K. Subramani and others, (2013) 15 SCC 27***.

19. In these circumstances, it would not be appropriate to non-suit the plaintiff on a hyper-technical objection which does not affect the merits of the case. Moreover, it is a well settled principle that the Court in the facts and circumstances of the case is entitled to mould the relief keeping in consideration the peculiar facts of the case.

20. Additionally, the attention of the Supreme Court in ***I.S.Sikander's case (supra)*** was not drawn to Order VII Rule 7 CPC which provides that it shall not be necessary to ask for general or other relief which may always be given as the court may think just and proper. In common parlance, this is called the moulding of relief. In ***Neelawwa vs. Shivawwa, ILR 1988 KAR 2761,*** a Division Bench of the Karnataka High

Court explained the scope of Order VII Rule 7 CPC to hold that the Court even in absence of a specific prayer for partition and separate possession should have passed a preliminary decree for partition. In this judgment, the Division Bench relied upon a previous judgment passed in ***Rangappa vs. Jayamma , ILR 1987 Karnataka 2889***, to the same effect. In fact, this issue was also examined in a different context by the Supreme Court in ***Kidar Lal Seal and another vs. Hari Lal Seal , AIR 1952 SC 47,*** it was held as under:-

> *"The Court would be slow to throw out a claim on a mere technicality of pleading when the substance of a thing is there and no prejudice is caused to the other side and it is always open to a Court to give the plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."*

21. Similarly, other High Courts have also taken the same view. Furthermore, the judgment passed in ***I.S.Sikander's case (supra),*** it was held that the aforesaid judgment has been passed on the facts involved therein and is thus distinguishable. Reliance in this regard can be placed on a judgment passed in ***Mrs.A.Kanthamani vs. Mrs. Nasreen Ahmed, 2017(40) SCC 654***. In such circumstances, it will not be appropriate to dismiss the suit filed by the plaintiffs only on a hyper technical objection which does not affect the merits of the case.

22. The next argument of the learned senior counsel representing the appellants is with regard to the denial of the plaintiffs about receiving the communication, Ex.D1.

23. In the considered view of the Court, that alone shall not be sufficient to deny the specific performance of the agreement to sell particularly when the plaintiffs were always ready and willing to perform their part of the contract. On the date fixed for the execution of the agreement to sell i.e. 31.05.2005, the plaintiffs visited the office of the Sub-Registrar with the balance sale consideration of Rs.1,26,00,000/- in the form of two pay orders payable to the defendants. Thereafter, they issued notice to the defendants on 06.06.2005 and filed the suit on 29.08.2005.

24. In such circumstances, it would not be appropriate to deny the relief of specific performance of the agreement to sell on account of insignificant and inadvertent mistake on the part of the plaintiffs.

25. Consequently, the Regular Second Appeal No.1770 of 2014 is dismissed.

26. In the connected civil revision petition, the execution petition filed by the plaintiffs and the application filed by the defendants under Section 28 of the Specific Relief Act, 1963 (hereinafter referred to as 'the 1963 Act') for the rescission of the contract are still pending before the court below. In the proceedings under Section 28 of the 1963 Act, the Court has culled out the issues and permitted the decree holders to lead evidence.

27. The learned senior counsel representing the judgment debtors contends that the court was not required to frame an issue and it would have been more appropriate for the court to decide the application without permitting the parties to lead evidence.

28. This court has considered the submissions of the learned senior counsels representing the parties.

29. The application under Section 28 of the Specific Relief Act, 1963 mandates the Court to decide about the alleged rescission of the contract on account of a default committed by the decree holder. In the peculiar facts of the case, the Court is entitled to frame an issue for adjudication while calling upon the parties to lead evidence.

30. In these circumstances, it would not be appropriate to interfere in the impugned order passed by the Court, at this stage. However, the observations made by this Court or by the trial Court while passing the impugned order shall not be construed as the final expression on the merits of the case. It shall be open for the Court to decide the application independently without being influenced by the observations made by this Court.

31. With these observations, the civil revision petition is disposed of.

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

**August 03, 2023** **(ANIL KSHETARPAL)**
*nt* **JUDGE**

**Whether speaking/reasoned :YES/NO**
**Whether reportable :YES/NO**