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Lokesh v. Rameshwar Tyagi , 2017 PLRonline 9000

Punjab and Haryana High Court

Rajbir Sehrawat J.

Lokesh v. Rameshwar Tyagi

RSA No. 1973 of 2013 (O&M)

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11 .12.2017

Specific Relief Act S. 13 - This right of the plaintiff is secured by Section 13 of the Act which entitles the plaintiff to ask the vendor to clear his title; if he does not have the requisite title; to pass on to the vendee. A bare perusal of all the three agreements shows that neither the defendant had saleable title qua the specific khasra numbers; regarding which he agreed to sell to the plaintiff; nor his further alleged original owners had the title qua the specific khasra numbers. Still further, regarding one part of the land agreed to be sold by the defendant; there was not even an agreement in his favour by anybody to sell the same to him. Even the dates of execution of sale deed in those agreements already stood expired. In that situation, the plaintiff had every right to ask the defendant to get a clear saleable title in his favour or, at least, get a GPA executed from all the actual owners, so that the plaintiff could get assured that he would be actually getting the land on payment of the money and that he would not be purchasing any land with the original owner or anybody else. After all, the plaintiff intended to purchase the property and not the problems or litigation for him.

Mr. Sachin Mittal, for the appellants. Mr. Sanjay Vij, for respondent.

Rajbir Sehrawat, J.(Oral)

1. The present appeal has been filed, by the legal representatives of Satish Kumar, the plaintiff; against the concurrent judgment and decree passed by the Courts below; whereby the suit filed by the above said Satish Kumar for recovery of Rs. 10,00,000/- from the defendants, which was paid by him as earnest money in an agreement to sell, has been dismissed. For convenience the parties would be referred to herein as the plaintiff and the defendant as they were described in original suit.

2. The brief facts, as pleaded by plaintiff and mentioned in the judgment of the lower Appellate Court; are that on 03.04.2006, the defendant agreed to sell the land measuring 28 Kanals 11 Marlas, comprised in Khasra Nos. mentioned in the agreement, situated in

Village Kheri Tagga, Tehsil Gannaur, District Sonapat, to the plaintiff for a sale consideration at the rate of Rs. 17,70,000/- per acre. He had received Rs. 10,00,000/- from the plaintiff. The target date for execution of the sale deed was fixed as 1 of 18 29.05.2006. It was not recorded in the agreement that the defendant was the absolute owner of the land. However, the agreement stipulated that the defendant had agreements in his favour from several persons, who were the co-sharers in the land, to purchase this land and those agreements contained stipulations that the defendant could get the sale deed executed in his favour or in favour of the somebody else. On the target date i.e. 29.05.2006, the sale deed could not be executed because the defendant could not arrange for NOC qua the suit land and could not bring all the abovesaid co-sharers to execute the sale deed in favour of the plaintiff. Since, the defendant kept postponing the matter; expressing his inability to execute the sale deed because of the lack of title, therefore, the plaintiff asked him either to refund the earnest money or to get a General Power of Attorney (GPA) from all his vendors, so as to execute the sale deed in favour of the plaintiff. However, instead of either returning Rs. 10,00,000/- to him or getting GPA from his vendors, the defendant hatched a conspiracy to usurp the amount of earnest money by hook or by crook. Hence, the defendant got the notice dated 09.06.2006 served upon the plaintiff through his Advocate. However, the plaintiff also replied to the notice through Advocate on 15.06.2006 and asked the defendant that he should acquire the title qua the land in question and inform the plaintiff about the date of executing the sale deed, otherwise the plaintiff would be entitled to the refund of Rs. 10,00,000/-, besides damages and interest at the rate of 18% per annum. However, instead of acquiring the title of the land to be sold by him to the plaintiff, the defendant again got served a notice dated 19.06.2006, by way of rejoinder to the reply of the plaintiff. Faced with the situation, the plaintiff again 2 of 18 sent a final reply dated 04.07.2006 to the defendant. In this letter, it was stated that the plaintiff and his brother will obtain the equal share, each having half share in the land being purchased, and that they have got sufficient amount in their bank accounts. It was further stated in this letter that till date, the defendant was not having the title of the suit land to confer the same upon the plaintiff; by way of executing the sale deed in favour of the plaintiff. Therefore, it was called upon the defendant that he should either obtain the sale deed in his favour from all the original owners or he should, at least, obtain the GPA from all the original owners- with whom he claims to have agreement to purchase the suit land, so that he can execute the sale deed in favour of the plaintiff. It was further written in this communication that the defendant should inform the plaintiff about acquiring of the GPA in his favour upto 31.07.2006. Otherwise, the agreement shall stand cancelled and the plaintiff will be entitled for refund of the earnest money. By this communication, the defendant was also asked to obtain and send to the plaintiff a copy of No Objection Certificate (NOC) in respect of the entire land. It was further pleaded in the suit that the defendant has, thereafter, neither sent any reply to this communication nor obtained any GPA or NOC in his favour so as to execute the sale deed of the land mentioned in the agreement. Hence, it was claimed that the plaintiff has asked the defendant several times to refund the money, he having failed to execute the sale deed. However, the claim has not been admitted by the defendant. Hence, the suit was filed.

3. Upon notice, the defendant filed written statement. It was claimed in the written statement that the defendant has not claimed to be the owner of 3 of 18 the land in

question. However, the defendant had agreements with the original owners of the land to sell the land in favour of the defendant or any person as per the wish of the defendant. It was claimed by the defendants that the plaintiff was not ready and willing to get the sale deed executed in his favour. It was further claimed that the plaintiff could not insist upon the defendant for obtaining the GPA from all his own vendors; for getting the sale deed executed in favour of the plaintiff. It was claimed that the sale deed in favour of the plaintiff could have been executed directly from the original owners, as per the terms in the agreement between the defendant and the original owner of the suit land. It was further pleaded that on 29.05.2006, the sale deed could not be executed because NOC qua the land had not been issued by the authorities. Hence, the date was extended upto 05.06.2006. After obtaining NOC, the plaintiff was informed and agreed to get the sale deed executed. However, he has failed to get the sale deed executed. In view of the above, the dismissal of the suit was prayed for.

4. The parties led their respective evidence. To prove his case, the plaintiff examined PW1, Jagdish Yadav, Clerk GGB Bank, Branch Badshahpur. Besides this, PW-2, Satish Dewan; PW-3, Parmar Singh; PW-4, Suresh Chand and PW-5, Rajbir. Documents were also tendered in the evidence. On the other hand, the defendants examined DW-1, Surender Kumar; DW-2, Sanjeev; DW-3, Satish Sharma; DW-4, Anita, HRC and DW-5, Ramesh Tayagi. Documents Ex. DX1 to Ex.DX4 were also tendered.

5. After hearing the learned counsel for the parties and appreciating the evidence led by them, the Trial Court dismissed the suit filed by the plaintiff/present appellant. While dismissing the suit of the plaintiff, the 4 of 18 learned Trial Court recorded the finding that the defendant had not claimed to be the owner of the suit land. Rather; as mentioned in agreement, he had claimed right to transfer this land on the basis of further agreements in his favour dated 03.10.2005, 29.11.2005 and 10.03.2006, which he entered into with the original owners of the land. It was further held by the trial Court, there was a clause in the agreement between the defendant and his vendors, as mentioned above, that the defendant would have a right to get executed the sale deed in his favour or in favour of his nominee. Therefore, the defendant had got a right to get the land transferred in favour of the plaintiff by assigning his interest, as per the provisions of the Specific Relief Act. It was further held that even the proposed sale deeds to be executed in favour of the plaintiff/present appellants were drafted, purporting to sell the land in the favour of the plaintiff by the vendors of the defendants. In view of the above, it was held by the Trial Court that the plaintiff had a remedy of filing the suit for specific performance; if the sale deed was not being executed with full title in his favour. However, since he has not filed a suit for specific performance, therefore, he is not entitled to the refund of the earnest money; as claimed by him.

6. Aggrieved of the judgment and decree passed by the Trial Court, the present appellants/plaintiff filed an appeal before the lower Appellate Court. However, the appeal of the present appellants was dismissed by the lower Appellate Court as well. While dismissing the appeal filed by the present appellants, the lower Appellate Court recorded a finding that although the agreements in his favour, dated 03.10.2005, 29.11.2005 and 10.03.2006 have not been proved by the defendant, by examining their 5 of 18 executants, scribes or the

attesting witnesses but the same shall be deemed to be proved because the plaintiff have not denied the existence of these sale deeds in favour of the defendant. The lower Appellate Court further held that as per the stipulation of these agreements, the defendant had a right to get the sale deed executed, further, in favour of his any nominee. Therefore, he had a right to transfer the title in favour of the plaintiff. It was further held by the lower Appellate Court that the plaintiff had a remedy to file a suit for specific performance against the defendant. But the plaintiff was not having a right to recover the amount of earnest money by way of filing a suit for recovery, since, in the agreement in question, there is no stipulation for recovery of the amount, and the stipulation is only of getting the sale deed executed through process of Court, if the defendant failed to execute the sale deed. It was further held that when there is no stipulation in agreement for recovery of the earnest money; his suit for recovery of earnest money; without seeking relief of specific performance of the [contract](#); has no merit. It was further held by the lower Appellate Court that the suit for recovery; simpliciter; without seeking specific performance of the agreement is not maintainable; being barred by the provision of Section 41(h) of the Specific Relief Act, 1963.

7. Learned counsel for the appellants submitted that the defendant was not having any title to the property. Hence, he could not execute the sale deed on the target date i.e. 29.06.2006. The plaintiff never agreed to extension of date, although the defendant kept claiming same unilaterally. Still further although the defendant claimed that the agreement is in his favour from the original owner but the same are also not proved on record by the 6 of 18 defendant. Defendant repeatedly, was trying to avoid the execution of the sale deed and he was not the owner, rather, was claiming the right to assign the agreement, but the plaintiff found from the copy of the agreements that one of the alleged agreements, claimed by the defendant in his favour, was not even the agreement in his favour. Therefore, the plaintiff asked the defendant either to get the sale deed from the original owners or, at least, to get the GPA in his favour from the original owners so as to execute the sale deed in favour of the plaintiff. Hence, a written communication to this effect was sent by the plaintiff to the defendant to obtain the GPA in his favour. It was further intimated by that letter that if the defendant failed to get the GPA in his favour; and failed to inform the plaintiff in this regard; then the agreement to sell shall stand terminated. It is further submitted by the learned counsel for the appellant/plaintiff that since the defendant failed to get any GPA in his favour; so as to execute the sale deed, therefore, the agreements stood terminated due to the fault of the defendant. Since the money was advanced by the plaintiff only as part of the price of the land to be sold by the defendant and the defendants failed to execute the sale deed, therefore, the plaintiff has rightly filed a suit for recovery of the amount. It was further submitted by the learned counsel for the appellant that since the plaintiff has already terminated the agreement, therefore, there was no question of filing the suit for specific performance by him. Hence, the suit was filed to recover the money, which was earlier advanced by the plaintiff to the defendant. Hence, the findings recorded by the Courts below that the plaintiff could not file a suit for recovery is totally perverse. Further arguing in the case, learned counsel for the appellants submitted that the plaintiff never 7 of 18 admitted the agreements of the defendant with the original owners. Even as per the copies of the agreements supplied by the defendant, the date of execution of the sale deed in those alleged agreements already stood expired

and no extension of the date of those agreements has been proved on record. Still further learned counsel submitted that since the defendant had agreed to sell the particular khasra numbers to the plaintiff, whereas, the defendants had the alleged agreements in his favour from the original owners; only regarding the share of the joint holding, therefore, the plaintiff had every right to insist upon the defendant to get the title in his favour; qua specific khasra numbers so as to validly pass on the same to the plaintiff. Since the defendant failed to acquire the saleable title and also failed to prove even the alleged agreements and their extension in his favour, therefore, the agreement was rightly determined by the plaintiff. Hence, the suit for recovery was rightly filed.

8. On the other hand learned counsel for the respondent/defendant submitted that the defendant had agreements in his favour; from the original owners; with the stipulation that he could get the sale deed executed in his favour or in favour of anyone of his assignees, therefore, the defendant had a saleable title. The date of execution of sale deed was extended by agreement to 05.06.2006. Still further, it is submitted by the learned counsel for the respondent that the plaintiff could not have insisted upon the defendant to get the sale deed or the GPA qua the land in question; in his favour or for getting the NOC regarding the suit land, since there was no such stipulation in the agreement. Learned counsel for the respondent further submits that the defendant was always ready and willing to execute the sale deed. It is his further submission that even 8 of 18 NOC was applied by the defendant and while submitting the application for getting the NOC, even the wife of the plaintiff had put her signatures; to show that she was ready to purchase the land. It is further argument of the learned counsel that even the draft sale deed was got prepared by the defendant. This shows that he was ready and willing to execute the sale deed. It was claimed by him that after obtaining the NOC, the same was duly communicated to the plaintiff; by telephone from an STD booth. Therefore, the submission of the learned counsel for the respondent/ defendant that, at the best, the plaintiff could have filed a suit for specific performance for getting the sale deed executed in his favour. Since he had not been ready and willing and had not filed a suit for specific performance, therefore, the earnest money paid by the plaintiff stood forfeited. To substantiate his claim regarding forfeiture of the earnest money, learned counsel relied upon the judgment of the Hon'ble Supreme Court rendered in the case 2013 (1) SCC 345 titled Satish Batra Versus Sudhir Rawal and another judgment of Hon'ble Supreme Court reported in case AIR 2004 SC348 titled as Shyam Singh Versus Daryao Singh (Dead) by LRs and others and still another judgment of Privy Council reported in AIR 1926 Privy Council titled as Chiranjit Singh Versus Har Swarup. It is his submission that since the plaintiff-vendee failed to stand by the agreement and get the sale deed executed, therefore, the earnest money stood forfeited and the plaintiff had no right to recover the same.

9. Having heard the learned counsel for the parties and perusing the record with their able assistance, this Court finds substance in the submissions made by the learned counsel for the appellants. It is admitted fact that the 9 of 18 defendant did not have the title to the suit property; to pass on the same to the plaintiff. The claim made by the defendant was based upon the further agreement of the defendant with the alleged original owners of the land. For that purpose, the defendant claimed the agreement dated 03.10.2005; where the target date for execution of sale deed was 20.01.2006, the agreement dated 29.11.2005;

where the target date for execution of the sale deed was 30.05.2006 and the third agreement dated 10.03.2006; where the target date for execution of the sale deed was 10.06.2006. The defendant claimed that these agreements contained the stipulation that he could get the sale deed executed in favour of himself or anybody else. Therefore, the defendant claimed that he had the title to pass on to the plaintiff, had the plaintiff been ready and willing to get the sale deed executed in his favour. However, the fact remains that these agreements have not been proved on record by the defendant. None of the executants of these agreements or the attesting witnesses have been examined by the defendant to prove the existence of these agreements. Even the original owner of these agreements have not been produced by the defendant before the Court. The record shows that the defendant; at one point of time; had moved an application before the Court for directing the plaintiff to produce the originals of these agreements before the Court on the pretext that the originals of these agreements were supplied to the plaintiff, at the time when he entered into an agreement with the defendant. However, the written statement filed by the defendant, states that only the copy of the agreement was supplied to the plaintiff and not the original of the same. Hence, neither the execution of these agreements in favour of the defendant have been proved on record nor the contents of 10 of 18 those agreements have been proved on record by the defendant. Both the Courts below have wrongly held that the plaintiff had admitted the execution of these agreements; by the original owners in favour of the defendants. On the contrary, right from the day one, the plaintiff has been asking the defendant to get his title clear or, at least, to get his authority to execute the sale deed cleared; by getting, at least, the GPA in his favour from the original owners. There is no admission on the part of the plaintiff anywhere qua the contents/ terms of the agreements; claimed by the defendant in his favour from the original owners.

10. Otherwise also, even if taken on their face value, the said agreements in favour of the defendant are not sufficient for him to pass on the title; as agreed by him in the agreement with the plaintiff. The bare perusal of the agreement between the plaintiff and defendant shows that the defendant agreed to sell the land comprised in particular khasra numbers whereas, none of the vendors of the defendant in the agreements between the defendant and the original owners; was having ownership over the specific khasra numbers. All those agreements speak of only share of the original owners in joint holdings and not regarding the specific khasra numbers. The matter does not stop there. One of the agreements claimed by the defendant in his favour i.e. the agreement dated 03.10.2005; is not even in favour of the defendant. Rather, this agreement is in favour of the wife of the defendant; from one Sh. Navin and even that Navin is not the original owner. He also claims that he had further agreement in his favour from original owners. The wife of the defendant is not a privy to the contract between the plaintiff and the defendant. Therefore, by no means, it can be said that the defendant had any authority to transfer the land to 11 of 18 the plaintiff; as contained in agreement dated 03.10.2005. Moreover, the target date of this agreement already stood expired. The second agreement claimed by the defendant in his favour is dated 29.11.2005. This agreement had the target date of 30.05.2006 and the land comprised in this agreement is already mortgaged with the State Bank of Patiala; by the original owner. The target date, in the present agreement, between the plaintiff and the defendant was 29.05.2006 whereas the target date in agreement dated 29.11.2005 in

favour of the defendant was 30.05.2006. In the agreement between the plaintiff and defendant, the defendant claims to have got extended the date for execution of sale deed to 05.07.2006. However, he has nowhere stated or proved that he got the date of agreement in his favour; from the original owner extended further from 30.05.2006. Otherwise also, the land involved in this agreement in favour of defendant was not free from encumbrances. Even the third agreement claimed by the defendant in his favour was dated 10.03.2006 and the target date for execution of sale deed that agreement was 10.06.2006. This was also regarding the share only and not regarding any specific khasra numbers when the defendant had agreed to sell to the plaintiff. The defendant served legal notice dated 19.06.2006 for executing the sale deed in favour of the plaintiff. However, he has not proved on record that he ever got the target date of his own agreement; with the alleged original owners; extended beyond 10.06.2006.

11.Hence, a bare perusal of all the three agreements shows that neither the defendant had saleable title qua the specific khasra numbers; regarding which he agreed to sell to the plaintiff; nor his further alleged original owners had the title qua the specific khasra numbers. Still further, 12 of 18 regarding one part of the land agreed to be sold by the defendant; there was not even an agreement in his favour by anybody to sell the same to him. Even the dates of execution of sale deed in those agreements already stood expired. In that situation, the plaintiff had every right to ask the defendant to get a clear saleable title in his favour or, at least, get a GPA executed from all the actual owners, so that the plaintiff could get assured that he would be actually getting the land on payment of the money and that he would not be purchasing any land with the original owner or anybody else. After all, the plaintiff intended to purchase the property and not the problems or litigation for him. This right of the plaintiff is secured by Section 13 of the Specific Relief Act which entitles the plaintiff to ask the vendor to clear his title; if he does not have the requisite title; to pass on to the vendee. Hence, both the Courts below have gone wrong in law in assuming that the agreements claimed by the defendant in his favour entitled him to pass on the requisite title to the plaintiff.

12.Still further, it has been admitted by the defendant that the requisite NOC for sale of the land was not available with him or with his own vendors; on the target date of execution of the sale deed in the present agreement. It was obtained by him later on 31.5.2006. The defendant claimed that after getting the NOC; the same was communicated to the plaintiff on telephone from STD/PCO and for that he claimed that he had got the receipt/bill of the call made to the plaintiff. However, this seems to be only an attempt made by the defendant to create evidence. He was vigilant enough to inform the plaintiff on PCO and also to get a receipt of the payment of the call bill and preserve that receipt for the use of the same in the litigation. Then it is beyond comprehension, why did he not 13 of 18 communicate the same fact through a written letter or by meeting the plaintiff. Otherwise also, the defendant claims that the plaintiff agreed for extension of the target date from 29.05.2006 to 05.06.2006. However, no evidence has been led by the defendant to prove this fact. Hence, even the extension of the date for execution of sale deed has not been proved on record by the defendant.

13.The defendant also tried to rely upon some affidavits, allegedly, given by the original

owners; regarding their presence before Sub Registrar on the extended date for execution of the sale deed; to show the readiness and willingness. However, neither these affidavits have been proved on record by examining the persons who submitted these affidavits; nor these affidavits are sufficient to show the readiness and willingness. As stated above, these alleged original owners were also not exclusive owners of specific khasra numbers; which the defendant had agreed to sell. They were also recorded to be owner of only the share in some joint holding; with their other co-sharers. Therefore, without getting partition of the property; any claim of being ready and willing to sell the specific khasra numbers is totally meaningless and irrelevant.

14.The argument of the learned counsel for the respondent that the defendant; through the original owners was ready and willing to execute the sale deed; and even the draft sale deeds were got prepared; is also not substantiated from the record. The alleged draft sale deed is not prepared on the date of execution of the sale deed, as is sought to be contended by the learned counsel for the defendant. Rather, a bare perusal of these alleged draft sale deeds, although not proved on record, shows that these were only samples of sale deeds; created in advance, probably at the time 14 of 18 when the present agreement to sell was written by the parties. This is clarified by the fact that neither these proposed sale deeds are on any stamps papers nor these draft sale deeds have any dates. In fact, these draft sale deeds are not the proposed draft sale deeds to be executed by the original owners on the date of execution of the sale deed. These are only specimen, created by the defendant, at the time of agreement; since he happens to be a property dealer. This much over-doing is quite expected from the defendant; who happens to be a retired/terminated police official and who is in the business of the property dealing as has come in his deposition through cross-examination. The entire effort of the defendant seems to be, to some how entangle the plaintiff; by getting created all kinds of documents just to create evidence, in case of any possible litigation between the parties. Hence, these alleged proposed sale deeds are of no help to the case of the defendant.

15.That the defendant was not ready and willing; is also clarified by the fact that the target date for execution of sale deed in the present case was 29.05. 2006 and admittedly, the sale deed was not executed by the defendant on this date. Rather, he claims that the date was extended to 05.06.2006. However, the agreement of the plaintiff to this extension of date is not proved on record by the defendant. No witness of this extension has been examined by the defendant. It has also come on record that the defendant was not in a position to execute the sale deed on this date because of various reasons; including non-availability of the NOC and property being under encumbrance. The plaintiff has claimed that he never agreed to the extension of date for 05.06.2006. In any case, even if it is assumed that parties had agreed to extend the date for 15 of 18 execution of the sale deed, then also the entire sequence of the facts shows that, lastly, the plaintiff had asked the defendant to come clean with his position to execute the sale deed in favour of the plaintiff by getting, at least, the GPA in his favour, failing which, it was communicated by the plaintiff that the agreement would stand terminated. Since the defendant has failed to show that he ever informed the plaintiff regarding his final capacity to transfer the title of specific khasra numbers to the plaintiff; as agreed between the parties, therefore, it is clear that upto the last moment, he was not ready and willing to execute the sale deed in favour

of the plaintiff and that the agreement between the parties stood determined due to fault of the defendant.

16. The argument of the learned counsel for the respondent that the plaintiff could have filed a suit only for specific performance; is not sustainable in law. The plaintiff had already terminated the agreement; by his notice dated 04.07.2007, in case of failure of the defendant to communicate to him regarding acquisition of capacity to execute sale deed by the defendant in favour of the plaintiff; regarding specific khasra numbers; as agreed to between the parties. Once the plaintiff has terminated the agreement as mentioned above, then there is no requirement on his part; to file a suit for specific performance. Even Section 7 of the Specific Relief Act permits the plaintiff to file a suit for recovery. Once no agreement survives between the parties, having been determined by the plaintiff on account of failure of the defendant to perform his part of agreement then there is no requirement for the plaintiff to file a suit for specific performance. The findings of the Courts below in this regard are totally perverse. The Courts below have wrongly understood as if in case 16 of 18 of an agreement to sell between two persons; only a suit for specific performance can be filed. This is not an absolute requirement of the law. The plaintiff can file any suit including the suit for recovery of earnest money in case the agreement is determined. It is a different matter that such suit could be defended and defeated on certain grounds; but such a suit for recovery would not be non-sustainable or non-maintainable, per se, on the ground that he should have filed a suit for specific performance. Hence, the findings of the Courts below in this regard are perverse and liable to be set aside.

17. The submission of the learned counsel for the respondent that the earnest money stood forfeited is also not sustainable. The judgments relied upon by the learned counsel for the respondent, as mentioned above, are of no help to the case of the respondent/defendant. These judgments are distinguishable in view of the facts of the present case. Any forfeiture of earnest money could have been a consequence only in case vendee has failed to perform his part of agreement. However, in the present case, the entire record shows that it was defendant/vendor who was not ready and willing to execute the sale deed and who was not in a position to execute the sale deed in favour of the plaintiff; in terms of the agreement between the parties. Having given a chance to the defendant to perform his part of agreement and the defendant having failed to perform the same; the plaintiff had rightly determined the agreement between the parties. In case of such determination, the other party to an agreement cannot insist upon the specific performance of the same unless the determination of agreement is challenged and got set aside; by the party insisting for specific performance of the agreement or claiming benefit under the terms 17 of 18 of the agreement. This has been held by the Hon'ble Supreme Court in the judgment rendered in 2013 (15) SCC 27 titled as I.S. Sikandar (D) by LRs. vs. K. Subramani and Ors. Therefore, if at all, the defendant wanted to claim any advantage under the terms of the agreement, even qua the forfeiture of the earnest money; then he was required to, first, seek declaration of the determination of the agreement by the plaintiff, as illegal. Once the agreement does not survive, its terms also do not survive. Forfeiture of the earnest money could have been the consequences of non-performance from the side of the vendee and not the consequence of determination of the agreement by the vendee due to the default

of the vendor.

18.No other argument was raised.

19.In view of the above, the judgments and decrees passed by the Courts below are held to be perverse. Therefore, the same are set aside.

20.Accordingly, the present appeal is allowed and the suit filed by the plaintiff is ordered to be decreed with costs.

11th December, 2017

[RAJBIR SEHRAWAT]

shabha

JUDGE