

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION**

BEFORE:

The Hon'ble Justice Ravi Krishan Kapur

IA NO. GA/1/2021

In CS/263/2021

USHA DEVI CHOKHANI & ANR.

Vs

KUSUM SUREKHA & ANR.

For the petitioners : Mr. Chayan Gupta, Advocate,
Mr. S. Nayak, Advocate,
Mr. Dwip Raj Basu, Advocate.

For the respondents : Mr. Rudraman Bhattacharyya, Advocate,
Mr. Lalit Baid, Advocate,
Mr. S. Mukherjee, Advocate,
Mr. T. Saha, Adv.

Reserved on : 25.08.2022

Judgment on : 22.11.2022

Ravi Krishan Kapur, J.

1. This suit is for recovery of money. The petitioners seek refund of earnest money deposited alongwith interest.
2. Briefly, the petitioners were desirous of purchasing a commercial premises alongwith car parking spaces belonging to the respondents.

Pursuant to the negotiations by and between the parties, the petitioners agreed to purchase (i) one shop room, measuring more or less 334 sq. ft., (ii) one self-contained residential flat, measuring more or less 981 sq. ft. along with a single car parking space of 100 sq. ft. and (iii) nine car parking spaces, measuring more or less 1085 sq. ft.

all on the ground floor of the premises situated at 209, Block-A, Bangur Avenue, P.S.- Lake Town, Kolkata-700 055 ("the premises"). The respondents also agreed to convert the entirety of the premises into a single commercial unit. The purchase consideration was agreed at Rs. 1,26,40,000/-. The respondents were obliged to furnish the title documents of the premises to the petitioners who would cause a title search in respect of the premises. The petitioners also agreed to make payment of earnest money of Rs. 25,00,000/- to the respondents. The respondents upon receipt of the earnest money were to hand over additional papers relating to the regularization of different portions of the premises as a single commercial unit to the petitioners.

3. Pursuant to the aforesaid, the petitioner paid a sum of Rs. 25,00,000/- as earnest money to the respondents. It is alleged that after receipt of the earnest money, the respondents failed to handover the documents to the petitioners for regularisation of the premises to one single commercial unit. Neither did the respondents handover symbolic possession of the premises. In fact, the respondents demanded a sum of Rs.30 lacs out of the total sale consideration in cash. The respondents had also given counter proposals and alternative sites which were rejected by the petitioners. In view of the aforesaid, the petitioners allege total failure of consideration and seek

recovery of the entire amount paid as earnest deposit alongwith interest.

4. On behalf of the respondents, it is contended that, the petitioners have failed to make payment of the entire sale consideration. It is also alleged that the respondents were ready and willing to execute the Deed of Conveyance in respect of the premises if the entire sale consideration had been paid. The respondents further allege that the sale consideration of the premises, was agreed at Rs. 1.75 crores and not Rs. 1,26,40,000/-. The respondents also seek specific performance of the agreement between the parties. In this connection, the respondents rely on *B. Santoshamma & Anr. Vs. D. Sarala & Anr. (2020) 19 SCC 80* to contend that specific performance is no longer a discretionary remedy. In the alternative, the respondents submit that, in view of failure of the petitioners to honour their obligations, the respondents are entitled to forfeit the entire earnest money deposit. The respondents also contend that they have suffered loss and damages in view of the default committed by the petitioners. The damages suffered by the respondents are on account of ill health of the respondent no.1 and the medical expenses incurred in respect thereof.

5. Ordinarily, forfeiture of the right to earnest money is available only if the contract contains a stipulation in that regard. To justify forfeiture of earnest deposit the contract between the parties should also be sufficiently explicit. Smaller payments are likely to be treated as deposits and are liable to be forfeited. Larger payments are more likely to be treated as part payments towards consideration.
6. Admittedly, the respondents have received and appropriated the entirety of Rs. 25,00000/- paid by the petitioners as security deposit. I also find that there has been total failure of consideration insofar as the petitioners are concerned. The respondents have been unable to honour their obligations and have been unable to convert the premises as a single commercial unit. The transaction between the parties has failed. The petitioners are no longer interested in the premises nor in the alternative sites offered by the respondents.
7. The entire case of loss and damages on account of the purported medical expenses suffered by the respondents is also unreasonable and unforeseeable. The general aim of the law of damages is to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. There must be a causal connection between the breach of contract and the loss sustained by the party who suffers the breach.

The important issue is whether a particular loss was within the reasonable compensation of the parties. In my view, the damages suffered as alleged by the respondents are indirect and remote. Expenses incurred for medical expenditure of the respondent no.1 is not a foreseeable event when the underlying transaction is one for sale of land. Considering the nature of the contract, the absence of a clause for forfeiture, and the quantum of money advanced, I find the claim of the respondents to be unsustainable. There is no corresponding loss or damage suffered which the respondents have been able to substantiate. In fact, permitting the respondents to forfeit the earnest money paid by the petitioners would tantamount to punitive or extortionist measures being imposed on the petitioners. (*Fateh Chand vs. Balkishan Dass AIR 1963 SC 1405, Maula Bux vs. Union of India AIR 1970 SC 1955, Kailash Nath Associates vs. Delhi Development Authority (2015) 4 SCC 136, MBL Infrastructure Limited v. Rites Limited and Ors. AIR 2020 Cal 155 and Kanchan Udyog Ltd. vs. United Spirits Ltd. (2017) 8 SCC 237*).

8. I find that the petitioners are not in breach of their obligations. In fact, it is the respondents have failed to fulfil their obligations. of converting the premises to a single unit as assured by them. This is further evident from the offer of the respondents for alternative sites

and options. I also do not find any merit in the defence of specific performance.

9. Hence, I find the claim of the petitioners to be unimpeachable. The petitioners have a strong prima facie case on merits and deserve to be protected and secured. In *Harleen Jairath vs. Prabha Surana and Another* reported in (2019) 4 CHN 412, the Hon'ble Division Bench had held that, a Court faced with an unimpeachable claim should not wait for an unscrupulous litigant to deliver its defence and the luxury of a trial by which time the chance of recovery would be lost forever. Thus, it is necessary to preserve and protect any future money judgment in favour of the petitioners. (*Rahul S. Shah vs. Jinendra Kumar Gandhi & Ors.* (2021) 6 SCC 418).
10. The final outcome of suits takes years if not decades. Even without an intention to defraud creditors, the vicissitudes of the market, cycle changes of any business, the overall financial condition of any respondent is such that may with the passage of time make any plaintiff disinterested and the claim irrelevant. (*Abheya Realtors Private Limited Vs. SSIPL Retail Limited & Anr.* (2010) 2 CHN 203)
11. Notwithstanding repeated adjournments the parties were unable to arrive at any kind of settlement. The balance of convenience and irreparable injury is also in favour of the orders being passed, as

prayed for herein. The petitioners are out of pocket and are being made to run from pillar to post when the underlying transaction between the parties has failed.

12. Insofar as the prayer for an injunction in respect of the bank accounts of the respondents is concerned, there are no pleadings justifying any such drastic order. The petitioners have not even pleaded that the respondents are about to remove or dispose of the whole or part of the premises with the intention of obstructing or delaying the execution of any decree which may be passed in its favour. There are no materials warranting any such order. (*Raman Tech. and Process Engineering Co. & Anr. vs. Solanki Traders (2008) 2 SCC 302*).

13. Accordingly, there shall be an order of injunction in terms of prayer (b) of the Notice of Motion. With the aforesaid directions, GA 1 of 2021 stands disposed off.

(Ravi Krishan Kapur, J.)