IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

FRIDAY, THE 5TH DAY OF JUNE 2015/15TH JYAISHTA, 1937

RFA.No. 54 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN OS 1009/2012 of II ADDL.SUB COURT,THRISSUR DATED 29.9.2014

APPELLANT/DEFENDANT:

JOHNSON AGED 52 YEARS
S/O.CHACKO, KUNNAPPILLIL HOUSE, PAZHAYANNUR VILLAGE
KUMBALAKKODE DESOM, THALAPPILLY TALUK.

BY ADVS.SRI.RENJITH THAMPAN (SR.)
SMT.P.R.REENA

RESPONDENT/PLAINTIFF:

ANJUKUMARI, AGED 37 YEARS
W/O.REGHUKUMAR, VASU NIVAS, VADAKKETHARA VILLAGE
-DO- DESOM, PAZHAYANNUR, THALAPPILLY TALUK.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 05-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRAN, JJ.

R.F.A.No.54 of 2015

Dated this the 5th day of June, 2015

JUDGMENT

Anil K.Narendran,J.

The appellant is the defendant in O.S.No.1009 of 2012 on the file of the file of the Court of the Second Additional Subordinate Judge of Thrissur. The said suit was filed by the respondent herein for realisation of an amount of ₹5,00,000/-, which was paid to the appellant/defendant as advance money in terms of Ext.A1 sale agreement dated 6.1.2012 together with interest and costs.

2. The court below by judgment and decree dated 29.9.2014 decreed the suit holding that the respondent/plaintiff is entitled to realise a sum of ₹5,00,000/- together with interest at the rate of 12% per annum from 6.1.2012 till the date of decree and thereafter interest at the rate of 6% per annum till realisation from the appellant/defendant and his assets. The court below further held that the appellant/defendant shall pay ₹92,167/- to the respondent/plaintiff being the proportionate costs. Aggrieved by the judgment and decree of the court below, the appellant/defendant is

before us in this appeal.

3. The plaint averments, in brief, are as follows:

The plaint schedule property belongs to one Thankamma Joseph as per assignment deed No.1932 of 2010 and the defendant had entered into an agreement for sale with her in respect of the aforesaid property vide an agreement dated 17.11.2011. Thereafter, the defendant approached the plaintiff stating that the aforesaid property is available for sale and that Thankamma Joseph has agreed to execute the sale deed in favour of the defendant himself or in the name of the person suggested by him. According to the plaintiff, believing the representation made by the defendant that the property in question is unencumbered, he entered into Ext.A1 sale agreement on 6.1.2012, whereby, the plaintiff agreed to purchase and the defendant agreed to get the sale deed of the property executed in the name of the plaintiff for a total consideration of ₹44,00,000/-. An amount of ₹5,00,000/-was paid as advance and the time limit for performance of the contract was fixed as 6.3.2012. Though the plaintiff was always ready and willing to perform her part of the contract, the defendant failed to perform his part. On enquiry, the plaintiff could understand that there was a subsisting attachment order from court over the plaint schedule property, which was suppressed at the time of execution of Ext.A1 agreement for sale. When this fact was brought to his notice, the defendant promised to get the attachment released by settling the case and accordingly, on 5.3.2012, the time for performance of the contract was extended upto 10.4.2012 and an endorsement to that effect was made on Ext.A1 sale agreement. Thereafter, on 7.4.2012, the defendant agreed to refund the advance amount within 15.5.2012, if the petition filed by him in court for lifting the attachment over the plaint schedule property is not disposed of in his favour. An endorsement to that effect was also made on Ext.A1 sale agreement. As the defendant failed to get the attachment over the plaint schedule property lifted, the plaintiff caused Ext.A2 lawyer notice dated 8.5.2012 to be issued, demanding repayment of the advance together with interest, which the defendant refused to accept. Therefore, the plaintiff filed the suit for realisation of the sum of ₹5,00,000/- together with interest and costs from the defendant and his assets.

4. The appellant/defendant filed a written statement admitting the execution of Ext.A1 sale agreement in respect of the plaint schedule property. But the defendant contended that he was always ready and willing to execute the sale deed and transfer possession of the plaint schedule property in terms of the agreement. According to him, the plaintiff was well aware about the attachment over the plaint schedule property at the time of execution of Ext.A1 sale agreement and he was also informed that steps are being taken to get the said order of attachment vacated. The endorsement dated 7.4.2012 on Ext.A1 sale agreement happened to be made on legal advice, that the order of attachment would be lifted immediately. But the court passed an order vacating the attachment only on 4.6.2012. Before that the plaintiff filed the suit on 31.5.2012, since she had no money with her for executing the sale deed. Therefore, according to the defendant, as the sale could not materialise due to the default of the plaintiff, he is entitled to forfeit the amount of ₹5,00,000/- paid by the plaintiff. On the above grounds, the defendant prayed for dismissal of the suit.

5. On the side of the plaintiff, she was examined as PW1 and

Exts.A1 to A3 were marked on her side. On the side of the defendant DWs 1 and 2 were examined and Exts.B1 and B2 were marked.

6. On an appreciation of the pleadings and the evidence on record, the court below came to the conclusion that the amount of ₹5,00,000/- paid on the date of execution of Ext.A1 sale agreement is advance money towards part payment of the sale consideration and it is not earnest money as contended by the defendant. The court below held further that there is no breach of contract on the part of the plaintiff and that the defendant is not entitled to forfeit ₹5,00,000/- paid by the plaintiff and that he is liable to return the aforesaid amount received as advance to the plaintiff with interest.

7. We heard the arguments of the learned Senior Counsel for the appellant.

8. The learned Senior Counsel for the appellant contended that the various findings entered by the court below in the impugned judgment are not legally sustainable and that the court below ought to have found that the amount paid by the respondent/plaintiff was earnest money for due performance of Ext.A1 sale agreement, that

there was breach of contract on the part of the respondent/plaintiff and that the appellant/defendant is entitled to forfeit the aforesaid amount since the breach of contract was committed by the respondent/ plaintiff. The learned Senior Counsel contended further that the attachment over the plaint schedule property was known to the respondent/plaintiff at the time of execution of Ext.A1 sale agreement and that even before the expiry of the time limit stipulated, namely 15.5.2012 to have the order of attachment vacated, the plaintiff sent Ext.A2 lawyer notice demanding return of money, which itself would show that she was not ready and willing to perform her part of the contract. According to the learned Senior Counsel, since the appellant/defendant sustained loss as the original owner Thankamma Joseph had forfeited an amount of ₹5,00,000/-, which was paid to her in terms of an agreement for sale dated 7.12.2011, the appellant/defendant is entitled to forfeit an amount of ₹5,00,000/- paid by the respondent/plaintiff.

9. We have considered the contentions raised by the learned Senior Counsel for the appellant/defendant. The fact that on 6.1.2012, the parties had entered into Ext.A1 sale agreement in

respect of the plaint schedule property is not in dispute. It is also not in dispute that on the date of execution of Ext.A1 sale agreement, the appellant/defendant had received a sum of ₹5,00,000/- from the respondent/plaintiff. The appellant/defendant would contend that the aforesaid amount of ₹5,00,000/- was paid as an earnest money for due performance of the contract and it is not an advance sale consideration as contended by the respondent/plaintiff. Going by Ext.A1 sale agreement, the total sale consideration was fixed as ₹44,00,000/- and an advance amount of ₹5,00,000/- was paid on condition that in case of any default by the respondent/plaintiff, the advance amount paid as aforesaid can be forfeited by the appellant/defendant towards his loss. The terms of Ext.A1 sale agreement provide further that in the case of default by the appellant/defendant, the respondent/plaintiff is entitled to get the aforesaid advance amount of ₹5,00,000/- and also a further sum of ₹5,00,000/-.

10. As per section 73 of the Indian Contract Act when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract,

compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. As per section 74 of the Contract Act, when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or, as the case may be, penalty stipulated for.

11. As rightly noticed by the court below, the respondent/plaintiff has specifically averred in the plaint that at the time of execution of Ext.A1 sale agreement, the amount of ₹5,00,000/- was paid as advance. The aforesaid plea is not specifically denied or disputed in the written statement filed by the appellant/defendant. He has also not raised any specific claim in the written statement that the aforesaid amount was paid as earnest

money. Though there is no specific pleading, the appellant/ defendant as DW1 has deposed that he is claiming forfeiture of ₹5,00,000/- towards the loss sustained by him. The appellant/defendant need to prove loss only if the amount is not earnest money. Therefore the stand taken by DW1 would make it abundantly clear that he has no claim that the amount of ₹5,00,000/- was paid as earnest money. Further, in Ext.A1 sale agreement, the amount of ₹5,00,000/- paid on the date of agreement is referred to as 'advance' and not as 'earnest money'. Therefore, the court below was right in holding that the amount of ₹5,00,000/- paid on the date of execution of Ext.A1 sale agreement was paid as 'advance money' towards part payment of the sale consideration and it is not 'earnest money' as contended by the appellant/defendant.

12. The appellant/defendant would contend that he is entitled for forfeiture of an amount of ₹5,00,000/- paid on the date of the agreement as he sustained a loss of ₹5,00,000/- in the sale agreement with Thankamma Joseph, who is admittedly the owner of the plaint schedule property. According to the appellant/defendant,

the aforesaid Thankamma Joseph had agreed to execute the sale deed in favour of the respondent/plaintiff, as directed by him, on receiving the sale consideration. DW1 has deposed that as the respondent/plaintiff failed to perform her part of Ext.A1 contract, the aforesaid Thankamma Joseph could not execute the sale deed and she has forfeited an amount of ₹5,00,000/- out of ₹20,00,000/- paid by the appellant/defendant as advance sale consideration at the time of execution of the sale agreement dated 17.11.2011.

13. In order to prove the same, DW2, who is stated to be a witness in the sale agreement between the appellant/defendant with Thankamma Joseph was examined on the side of the defendant,. DW2 has deposed that Thankamma Joseph had forfeited ₹5,00,000/- from the appellant/defendant out of the total amount of ₹20,00,000/- paid by the appellant/defendant to her. As rightly noticed by the court below, the appellant/defendant who was examined as DW1 did not depose anything regarding the total advance consideration paid by him to Thankamma Joseph. Further, the agreement alleged to have been executed between the appellant/defendant and Thankamma Joseph on 17.11.2011 was not

produced. The defendant has also not taken steps to ensure the presence of the aforesaid Thankamma Joseph as a witness in court. In such circumstances, the finding of the court below that the claim made by the appellant/defendant that he had sustained loss to the tune of ₹5,00,000/- cannot be accepted and calls for no interference at the hands of this Court.

14. The appellant/defendant would contend that the respondent/plaintiff was well aware about the attachment over the plaint schedule property at the time of execution of Ext.A1 sale agreement. As rightly noticed by the court below, going by the recitals in Ext.A1 sale agreement, there is nothing to indicate that the attachment over the plaint schedule property was within the knowledge of the respondent/plaintiff. The evidence of the respondent/plaintiff as PW1 is specific to the effect that she was not aware about the order of attachment over the plaint schedule property at the time of execution of Ext.A1 sale agreement. Further, it is stated in Ext.A1 sale agreement that the respondent/plaintiff should be convinced about the encumbrance certificate at the time of executing the sale deed. If the encumbrance certificate was

shown to the respondent/plaintiff, at the time of execution of Ext.A1 sale agreement, there was no necessity for such recital. This would also probabilise the case of the respondent/plaintiff that she was not aware about the attachment over the plaint schedule property at the time of execution of Ext.A1 sale agreement.

15. It is not in dispute that, though the time limit originally fixed for performance of Ext.A1 sale agreement was 6.3.2012, the same was extended on 5.3.2012 for a period upto 10.4.2012 and an endorsement to that effect was made on Ext.A1 sale agreement. According to the respondent/plaintiff, such an endorsement was made as the appellant/defendant had promised to get the attachment over the plaint schedule property released by settling the case. Thereafter, as per the endorsement made on 7.4.2012 on Ext.A1 sale agreement, the appellant/defendant had agreed to refund the advance amount within 15.5.2012 if the petition filed by him before the court for lifting the attachment over the plaint schedule property is not disposed of in his favour.

16. Ext.A2 is the lawyer notice issued to the appellant/defendant, rescinding Ext.A1 sale agreement. In Ext.A2

lawyer notice the respondent/plaintiff has stated that as the attachment was not vacated till date and the appellant/defendant was not ready to perform his part of the contract, she is demanding repayment of the advance money with interest by 21.5.2012. The plaintiff as PW1 has deposed that Ext.A2 lawyer notice was issued before 15.5.2012, i.e., the extended time limit for performance of Ext.A1 sale agreement, since there was no response from the side of the appellant/ defendant and on realising that he would not be ready to return the advance sale consideration of ₹5,00,000/- by 15.5.2012. Therefore, as rightly noticed by the court below, issuance of Ext.A1 lawyer notice on 8.5.2012 before the expiry of the extended time limit for the performance of Ext.A1 sale agreement cannot be termed as a breach of contract on the part of the respondent/plaintiff in performing his part of the contract.

17. Going by the endorsement made on Ext.A1 sale agreement on 7.4.2012, the appellant/defendant had to refund the advance amount of ₹5,00,000/- to the respondent/plaintiff within 15.5.2012, if the petition filed by him before the court for lifting the attachment over the plaint schedule property is not disposed of in

his favour. The aforesaid endorsement made on Ext.A1 sale agreement is not in dispute and the appellant/defendant is bound by the same. The fact that the attachment over the plaint schedule property could be lifted only on 4.6.2012, after the extended time limit of 15.5.2012 fixed for performance of Ext.A1 sale agreement is also not in dispute. In such circumstances, merely for the reason that the respondent plaintiff declined to take possession of the plaint schedule property prior to 7.4.2012, it cannot be concluded that she was not intending to purchase the aforesaid property. The findings of the court below in the impugned judgment are neither perverse nor illegal warranting interference by this Court in this appeal.

We accordingly hold that there is no merit in the appeal. The appeal fails and the same is dismissed. No order as to costs.

Sd/-
P.N.RAVINDRAN, JUDGE

Sd/-
ANIL K.NARENDRAN, JUDGE

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