

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

RSA.No. 1184 of 2012 ()

AGAINST THE JUDGMENT AND DECREE IN AS NO.67/2009 of ADDITIONAL DISTRICT
COURT,ALAPPUZHA DATED 11-06-2012

AGAINST THE JUDGMENT AND DECREE IN OS NO. 129/2008 of SUB COURT,ALAPPUZHA
DATED 09-06-2009

APPELLANT(S)/APPELLANT/ 1ST DEFENDANT:

KAMALASANAN,
S/O KUNJU KUNJU, KOCHUPARAMBIL HOUSE
ARYAD SOUTH VILLAGE, THEKKANARYAD MURI
AVALOOKUNNU P.O, ALAPPUZHA

BY ADVS.DR.K.P.SATHEESAN (SENIOR ADVOCATE)
SRI.M.R.JAYAPRASAD
SRI.P.MOHANDAS (ERNAKULAM)
SRI.ANOOP.VNAIR

RESPONDENT(S)/RESPONDENTS/ PLAINTIFF AND SECOND DEFENDANT:

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1. VINEESH M.VAGHESE,
S/O N.D. VARGHESE, NADUVIL PARAMBIL HOUSE
ALAPPUZHA, PIN. 688 006
 2. ABDUL AZEEZ,
THANATHU PARAMBIL, ARYAD SOUTH VILLAGE
THEKKANARYAD MURI, AVALOOKUNNU P.O, ALAPPUZHA, PIN. 688 006.

R1 BY ADV.SRI.MANUEL KACHIRAMATTAM
R1 BY ADV.SMT.MERRY GEORGE

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
03-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.1184 of 2012

Dated this the 3rd day of August, 2015

JUDGMENT

First defendant in a suit for realisation of money is the appellant. Plaintiff and second defendant are the respondents in this appeal.

2. Heard the learned counsel for the appellant and the contesting respondent/plaintiff.

3. Basic facts are as follows:Plaintiff and the first defendant entered into an agreement for sale of the property belonging to the latter having an extent of 35 cents. The price fixed per cent was ₹28,500/-. Ext.A1 is the agreement to assign dated 15.05.2006. Plaintiff paid an amount of ₹1,50,000/- as advance towards the part payment of sale consideration to the first defendant. As the first defendant was in need of money, even before the expiry of time fixed in Ext.A1, ten cents of property involved in the contract was purchased by the plaintiff from him as per Ext.A5 sale deed. Transaction relating to the remaining 25 cents should have been completed as per Ext.A1. It is an admitted fact that none of the parties filed a suit for specific performance of the contract. Later, the first

defendant sold the remaining 25 cents to the second defendant as per Ext.A6 document. Hence the plaintiff filed the suit for return of advance money.

4. First defendant filed a written statement contending that Ext.A1 agreement between the parties was novated as per Ext.X1 agreement. Therefore, the plaintiff has no right to enforce any right under Ext.A1. Not only that the plaintiff himself had agreed to purchase ten cents of property out of 35 cents and relinquished all his claims over remaining 25 cents. Apart from that, the plaintiff purchased ten cents abutting a public road, thereby he got the prime portion of the property for a comparatively lesser price. Therefore, the first defendant suffered damage on account of the fact that the property on the back side fetched only a lesser value. There is a stipulation in Ext.A1 that in the event the plaintiff failed to perform his part of the agreement on time and to obtain assignment of the entire property, he would lose the advance amount paid. As the first defendant suffered damage on account of the act of the plaintiff, by operation of the said clause, the first defendant is entitled to forfeit the advance amount paid.

5. After an elaborate trial, the court below decreed the suit allowing the plaintiff to realise the amount claimed in the plaint. Court below found that there will be a charge under Section 55(6)(b) of the

Transfer of Property Act, 1882. The first defendant took up the matter in appeal. Lower appellate court confirmed the decree of the trial court in part. But, it set aside the charge created over the remaining property of the first defendant in respect of the decree amount.

6. Learned counsel for the appellant raised the following points: Firstly, the execution of Ext.X1 agreement and sale of property as per the terms of Ext.X1 clearly indicate that Ext.A1 agreement had been novated by the parties and no right flowing from Ext.A1 could thereafter be enforced. Section 62 of the Contract Act deals with the concept of novation. The Section reads as follows:

“Effect of novation, rescission, and alteration of contract.-If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

It is well settled that in order to novate a contract, the parties should have decided to substitute the original contract with a new contract and the rights under the original contract should be relinquished or replaced by the new contract. This position is settled in **Khaddah Company Ltd. v. Raymon and Co. (India) Private Ltd. (AIR 1962 SC 1810)**. The Apex Court in **H.R.Basavaraj (dead) by His Lrs. and another v. Canara Bank and**

others ((2010) 12 SCC 458) laid down that the basic principle described the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. If the rights under the old agreement were kept alive even after the second agreement, then there is no substitution of the contract and hence, no novation. Learned counsel for the first defendant contended that the plaintiff did not compel the first defendant to execute a sale deed in respect of remaining 25 cents of land included in Ext.A1 is an indication that he had abandoned the contract. Further it is contended that out of ₹1,50,000/- paid as advance, ₹10,000/- was adjusted towards the sale price of land in Ext.A5 and balance consideration was paid by the plaintiff to the first defendant. These are indications to show that the plaintiff had relinquished all his claims under Ext.A1, contended the learned counsel for the appellant/first defendant. Per contra, learned counsel for the contesting respondent/plaintiff contended that there was no novation of contract as claimed by the first defendant. It is the case of the plaintiff that the first defendant was in dire need of money, so the plaintiff accommodated him by buying a portion of the property included in Ext.A1 and got the assignment of ten cents. Ext.X1 agreement is only in respect

of that deal which culminated in Ext.A5 sale deed. It is contended by the plaintiff that neither Ext.X1 nor Ext.A5 would show that there was any novation. On a reading of Ext.X1 and Ext.A5, it cannot be seen that the parties unequivocally agreed to alter or rescind the terms in Ext.A1. On a reading, in fact, it can be seen that Ext.X1 was executed as another contract only in respect of a portion of the property included in Ext.A1 and that part of the contract was completed by executing Ext.A5. Therefore, I am of the definite view that the theory of novation put forward by the first defendant has not been established.

7. Even if the contention of the first defendant that Ext.A1 contract was novated by executing Exts.X1 and A5 is accepted, the question looms large for decision is whether the first defendant is entitled to forfeit the advance amount paid to him as per Ext.A1. Section 74 of the Contract Act deals with compensation for breach of contract where penalty is stipulated for. It reads as follows:

Compensation for breach of contract where penalty stipulated for.- *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, the penalty stipulated for.

Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.-When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

So far as the law in India is concerned, there is no qualitative differences in the nature of liquidated and unliquidated damages as Section 74 of the Contract Act eliminates the somewhat elaborate refinement made under the common law between stipulations providing for payment of liquidated

damages and stipulations in the nature of penalty, which under the common law is stipulation *in terrorem*; and a genuine pre-estimate of damages is regarded as liquidated damages which is binding on the parties.

8. Learned counsel for the appellant contended that if Ext.A1 contract is rescinded by the parties by execution of Ext.X1, in law, novation would take place, then the plaintiff is legally precluded from raising a claim as the entire terms in the old contract should be treated as abandoned. As I have already found that there is no question of novation, this argument cannot be sustained.

9. The principle in Section 74 of the Contract Act is that if any party to a contract establishes sufferance of damage on account of the action or inaction by the other party, certainly he is entitled to recover compensation for the breach of contract upto the maximum amount stipulated for in the contract. In this case, it is contended by the learned counsel for the appellant/first defendant that as the plaintiff got assignment of the front portion of the 35 cents abutting a public road, rest of the property behind the property included in Ext.A5 fetched only a lesser value. Ext.A6 is the assignment deed executed by the first defendant in favour of the second defendant in respect of 25 cents which was left after the assignment of ten cents to the plaintiff. Learned counsel for the plaintiff

pointed out that Ext.A6 property is having the advantage of abutting two roads - viz., on the eastern side and northern side. It is, therefore, contended that the plea of the first defendant that he suffered any damage on account of the sale of ten cents of property to the plaintiff cannot be sustained. Another aspect in this case to improbabilise the plea of the first defendant that he had suffered damages on account of the reduction in value of the property lying behind Ext.A5 property is that had he suffered any reduction in land value, he would have filed a suit against the plaintiff for specific performance of the contract. All these facts probabilise the case of the plaintiff that the sale of property involved in Ext.A5 did not cause any damage to the first defendant. In the absence of proof of damage, the first defendant cannot be heard to say that he is entitled to forfeit the advance amount as stipulated in Ext.A1 as the clause certainly will fall within the category of a clause *in terrorem*. Therefore, it is unenforceable. Considering the entire facts and circumstances, I do not find any substantial question of law arising in this appeal. Lower appellate court rightly modified the decree passed by the trial court and found that the plaintiff is not entitled to get a charge under Section 55(6)(b) of the Transfer of Property Act for the reason that he could claim that right only if it is established that he did not improperly decline to accept delivery of the

property. He also admittedly move for specific performance of the contract. The judgment passed by the lower appellate court is legally correct and warrants no interference.

In the result, the appeal is dismissed.

All pending interlocutory applications will stand dismissed.

A. HARIPRASAD, JUDGE.

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