

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

SA.No. 658 of 2002 ()

**AGAINST THE JUDGMENT IN A.S.No. 279/1998 of DISTRICT COURT, THRISSUR
DATED 20-03-2002**

**AGAINST THE JUDGMENT IN O.S.No.1020/1996 of MUNSIF COURT, CHAVAKKAD
DATED 11-12-1997**

APPELLANT/RESPONDENT/DEFENDANT:

**SRI.BALAKRISHNAN, AGED 36 YEARS,
S/O.KOCHAMAN VALIYAKATH HOUSE, KADAPPURAM AMSOM,
CHAVAKKAD TALUK, THRISSUR DISTRICT**

BY ADV. SRI.RAJIT

RESPONDENT/APPELLANT/PLAINTIFF:

**SMT.BEEVATHU, AGED 50 YEARS,
D/O. ASSANARU KURUPPAMVEETIL ALUNGAL HOUSE,
KADAPPURAM AMSOM, KARUKAMADU DESOM, CHAVAKKAD TALUK,
THRISSUR DISTRICT.**

BY ADV. SRI.K.A.SREEJITH

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 30-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

MJL

ALEXANDER THOMAS, J.

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S.A.No.658 of 2002

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Dated this the 30th day of October, 2015

JUDGMENT

This Appeal is directed against the impugned judgment and decree dated 20/03/2002 in Appeal Suit A.S. 279/1998 on the file of the District Court, Thrissur which in turn arose out of the judgment and decree rendered on 11/12/1997 by the Munsiff's Court, Chavakkad in O.S.No. 1020/1996 filed by the respondent herein. The case set up by the plaintiff/respondent herein in the suit is that the plaint schedule property belongs to the defendant/appellant herein as per document No.1266/1993 of S.R.O Chavakkad and that on 06/01/1996, the plaintiff and the defendant had entered into an agreement for sale in respect of the plaint schedule property for a total consideration of Rs.50,000/- and that the plaintiff had paid Rs.15,000/- as advance as per Ext.A1 agreement dated 06/01/1996. That thereafter as agreed by the defendant, the plaintiff had constructed a hut in the said property

and started residence along with her daughter. That as the plaintiff's daughter was not amenable to the amorous advances made by the defendant, they were evicted and it was made clear to them that the defendant would not convey the property to plaintiff or return the advance amount. That the notice issued by the plaintiff was returned unaccepted by the defendant and thereafter the instant suit was filed for realisation of the advance amount of Rs.15,000/- with interest thereon.

2. The defendant/appellant herein filed written statement contending that the plaintiff did not construct the hut or start residence in the plaint schedule property and that he has not made any amorous advances against the plaintiff's daughter. Ext.A1 agreement dated 06/01/1996 was admitted by the defendant. But the forcible eviction of the plaintiff as alleged in the plaint was denied. That the defendant was not aware of the notice alleged to have been sent by the plaintiff and that the defendant has not violated any terms of the agreement. That he was already ready and willing to perform his part of the contract and the contract could not be completed only on account of the default by the plaintiff. That the plaintiff never demanded for specific performance.

Accordingly it is urged that the defendant is not liable to return the amount. It is further averred in the written statement that since the contract was not fulfilled the defendant has sustained heavy losses.

3. The plaintiff was examined as PW1 and Exts.A1 and A2 series of documents were marked on the side of the plaintiff. The defendant gave evidence as DW1.

4. The trial court dismissed the suit. Aggrieved by such dismissal, the plaintiff had approached the District Court by filing Appeal Suit A.S.No.279/1998 to impugn the dismissal of the suit. The lower appellate court as per the impugned judgment dated 20-03-2002 in A.S. No.279/1998 had reversed the verdict of the trial court. Aggrieved by the verdict of the lower appellate court, the defendant in the suit has preferred the instant Second Appeal. The Second Appeal was admitted by this Court on 13-11-2002 on the questions of law formulated in the Appeal Memorandum. The said questions are as follows:

- “(a) When the remedy available to the buyer is specific performance as specifically agreed by the parties to the agreement to sell is the buyer entitled to demand the advance paid after committing the breach of the contract.
- (b) Whether the buyer demanding the advance even after refusing to purchase the property as per the agreement is entitled to get interest on the advance, even without proving that he had served the notice as per the law,

demanding the advance.

- (c) Is the court justified in ordering the return of advance with interest, when the property had to be sold for lesser price, due to the breach of contract committed by the buyer.”

5. Heard.

6. Ext.A1 agreement dated 06-11-1996 is admitted by the defendant. It was also common ground that the advance amount was not treated as security for the due performance of the contract and it is also conceded by the defendant that it was not earnest deposit but only as an advance. Therefore as rightly held by the lower appellate court, even if it is assumed that breach had occurred due to the fault of the plaintiff, the defendant has to plead and successfully prove that damages have in fact been sustained by him due to such breach. True that in the written statement it is alleged that on account of the non performance of the contract, the defendant had suffered business loss and later he sold the property to another person for very low price etc. However, the material particulars as to what exactly was the business loss or what was its connection with the contract or at what price the property was sold are not cogently pleaded in the written statement. Therefore in the absence of concrete and precise pleading, the defendant cannot raise any issue out of such vague and imprecise pleadings. Even if

the evidence is examined it could be seen that he has set up a new case at the time of evidence that he had given Rs.10,000/- to purchase a canoe and that it was lost. Since this is not a case that is clearly pleaded, the lower appellate court was right in holding that the evidence in that regard need not be considered. Even otherwise it can be seen that the defendant has also deposed that later he sold the property for Rs.35,000/-. At the same time he has not produced either the copy of the sale deed or examined anybody else connected with the alleged sale to prove that the property was sold only for a low price and that he has thus suffered losses in that regard. The plaintiff has challenged the evidence given by the defendant in that regard by suggesting in cross examination that the property was in fact sold for Rs.65,000/-. In view of this, the defendant was bound to have adduced concrete and clear evidence as to the details of such sale. In these circumstances, it is only to hold that there is neither proper pleading nor proof that the defendant/appellant herein has sustained any loss on account of the alleged breach. Accordingly this Court is of the considered opinion that the lower appellate court was fully right in holding that the plaintiff is entitled to get return of the advance amount. It is in

this view of the matter the lower appellate court has decreed the suit allowing the plaintiff to realise a sum of Rs.16,750/- together with interest on the principal sum of Rs.15,000/- @ 6% per annum from the date of suit till the date of realisation and costs throughout from the defendant and his assets.

7. In the light of the above aspects, even if it is held that the breach had occurred due to the fault of the plaintiff, so long as the defendant has not pleaded and proved the damages actually sustained by him, due to breach, the plaintiff is entitled for return of the money. The question of law (a) referred to above is answered accordingly. So long as the defendant has not pleaded and proved that losses and damages have in fact sustained by him due to breach even if committed by the plaintiff, the plaintiff is entitled for not only for return of the advance money but also for interest thereon. The question of law (b) referred to above is answered accordingly. As the defendant has not pleaded and proved that he has in fact sustained damages, the question (c) referred to above does not actually arise for consideration in the facts and circumstances of this appeal. In view of the aforesaid discussion, it is only to be held that the lower appellate court was fully right to

reverse the verdict of the trial court. In view of the aspects, the instant Second Appeal stands dismissed.

There will be no order of costs.

Sd/- ALEXANDER THOMAS, JUDGE

MJL

S.A.No.658 of 2002

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