

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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C.C.C.A.No. 186 OF 1997

JUDGMENT:

The defendant, being aggrieved by the decree and judgment in O.S.No. 659 of 1988 dated 27-10-1997 on the file of the Court of IV Additional Judge, City Civil Court, Hyderabad (for short, 'the trial Court'), preferred this appeal, whereby and whereunder the defendant was directed to pay Rs.60,000/- to the plaintiff with interest @ 6% *p.a.* from the date of suit till the date of realization while dismissing the counterclaim filed by the defendant in the said suit.

2. The appellant was the defendant and the respondent was the plaintiff before the trial Court. For convenience of reference, the ranks given to the parties in O.S.No. 659 of 1988 before the trial Court will be adopted throughout this judgment.

3. The plaintiff filed the suit, for recovery of Rs.60,000/- together with interest @ 6% *p.a.* from the date of the suit till the date of realization, alleging that the plaintiff agreed to purchase 700 square yards consisting of structures and open land covered by premises No. 3-6-276 and 3-2-277 situated at Himayathnagar, Hyderabad; entered into an agreement with the defendant on 20-12-1984; paid an amount of Rs.40,000/- towards advance of sale consideration on the same day and receipt of the same was also acknowledged by the defendant. As per the terms of the agreement, the plaintiff has to pay balance of sale consideration after the defendant obtaining physical possession of the suit property and obtaining conveyance from his vendor or through Court. While expressing his readiness and willingness, the plaintiff tendered balance of sale consideration within the time fixed under the agreement so as to obtain regular registered conveyance in his favour but the defendant did not receive balance of sale consideration and avoided to execute registered sale deed on the ground that he got the decree executed shortly in O.S.No. 1587 of 1983 on the file of the Court of II Additional Judge, City Civil Court, Hyderabad. Believing the representation of the defendant, the plaintiff did not take any legal action for enforcement of the

terms of the contract. However, the plaintiff got issued legal notice dated 07-12-1987 expressing his readiness and willingness to perform his part of contract while demanding the defendant to execute registered sale deed but the said notice was returned. However, the defendant committed breach of contract. Therefore, on account of breach committed by the defendant, the plaintiff suffered loss of Rs.20,000/- and he is entitled to recover the damages sustained by him besides the amount already paid as advance of sale consideration together with interest.

4. The defendant filed counterclaim for recovery of Rs.70,000/- along with written statement. In the written statement, the defendant admitted about execution of agreement of sale and receipt of earnest money of Rs.40,000/- for due performance of the contract but the plaintiff himself committed breach of the contract. Thereby, the amount of Rs.40,000/- paid towards earnest money was forfeited. He further contended that the plaintiff's plea is inconsistent and that the total consideration as per the agreement was Rs.6,30,000/- i.e. @ Rs.900/- per square yard for 700 square yards and the balance of sale consideration would be Rs.5,90,000/- but the plaintiff deliberately did not mention the balance of sale consideration payable under the agreement of sale and that, as per the terms of agreement, the amount whatever he paid is liable to be forfeited and, accordingly, forfeited on account of the breach committed by the plaintiff.

The defendant further contended that the plaintiff had not paid any amount much less the balance of sale consideration within the time fixed under the agreement of sale nor even made any demand for performance of part of obligation on the part of the defendant by issuing legal notice.

It is mutually agreed between the plaintiff and the defendant that a further sum of Rs.2,00,000/- shall be paid within 30 days from the date of the agreement to enable him to complete the formalities and obtain sale deed in his favour; a further sum of Rs.3,00,000/- was also agreed to be paid by the plaintiff in the month of March, 1985; the 3rd installment of Rs.3,00,000/- was agreed to be paid at the time of delivery of possession and the balance of Rs.90,000/- shall be paid

at the time of executing sale deed but the plaintiff did not pay the balance of sale consideration as agreed under the agreement. Thus, he committed breach of contract. Thereby, earnest money of Rs.40,000/- paid under the agreement was forfeited in terms of the agreement and, finally, the defendant is not liable to pay any amount either as advance received by him or damages allegedly sustained by the plaintiff and prayed for dismissal of the suit.

5. Basing on the above pleadings, the trial Court framed the following issues and additional issues:

Issues:

1. Whether the plaintiff is entitled to claim Rs.60,000/- as alleged in the plaint?
2. Whether the plaintiff is entitled to claim interest on the suit amount?
3. Whether the defendant is entitled to claim Rs.70,000/- from the plaintiff?
4. To what relief?

Additional Issues:

1. Whether the defendant is entitled for the relief of counterclaim as prayed for?
 2. To what relief? (extracted)
6. During the course of trial, on behalf of the plaintiff, the plaintiffs himself was examined as P.W.1 and got marked Exs.A1 to A4. On behalf of the defendant, D.W.1 was examined and got marked Exs.B1 to B7.
7. Upon hearing argument of both counsel, the trial Court, answering issue No. 4 and additional issue No. 2, held that the defendant is liable to pay Rs.60,000/- together with interest @ 6% *p.a.* while dismissed the counterclaim.
8. Aggrieved by the decree and judgment under challenge, the defendant preferred this appeal on various grounds. The main contention of the defendant in the grounds of appeal is that the trial Court did not appreciate the terms and

conditions of the agreement of sale dated 20-12-1984 for payment of balance of sale consideration and the clause for forfeiture of the amount paid by the plaintiff in the event of breach committed by the plaintiff. Therefore, the decree and judgment of the trial Court are not sustainable. It is further contended that granting interest on the earnest money deposit and damages @ Rs.20,000/- simultaneously is unsustainable and prayed to set aside the decree and judgment. The defendant also questioned the dismissal of counterclaim on the same grounds.

9. During the course of hearing, learned counsel for the defendant would submit that in view of clause Nos. 6 and 8 of Ex.A1, whatever amount the plaintiff paid was forfeited as the plaintiff committed breach of contract and, thereby, question of sustaining any damages would not arise. Therefore, the plaintiff is not entitled to claim refund of Rs.40,000/- and damages of Rs.20,000/- together with interest @ 6% *p.a.* but the trial Court did not consider the terms and conditions of Ex.A1, more particularly clause Nos. 6 and 8 of Ex.A1 and committed an error. Added to that, the trial Court did not consider the specific plea in the counterclaim for claiming damages of Rs.70,000/- as he obtained loan from bank for completion of transaction and, on account of failure to comply the terms and conditions of Ex.A1 agreement by the plaintiff, he sustained huge loss of Rs.70,000/- and prayed to pass decree for Rs.70,000/- while dismissing the suit filed by the plaintiff.

10. None appeared for the plaintiff-respondent despite listing the matter under the caption 'For Dismissal'.

11. Considering the contentions of learned counsel for the defendant and perusing oral and documentary evidence including the decree and judgment under challenge, the points that arise for consideration are as follows:

1. Whether the amount paid by the defendant is towards earnest money or advance of sale consideration?
2. Whether the defendant is entitled to forfeit the amount whatever he paid under Ex.A1 invoking clause Nos. 6 and 8 of Ex.A1 in the

event of committing breach of terms of the contract by the plaintiff?

3. Whether the defendant is entitled to recover Rs.70,000/- from the plaintiff as counterclaim?

12. **In Re. Point No. 1:**

The major contention of the plaintiff is that he paid Rs.40,000/- as advance of sale consideration under Ex.A.1-agreement of sale, dated 20.12.1984 for purchase of 700 square yards of site out of 1400 square yards allegedly purchased by the defendant and obtained a decree for specific performance and due for execution of the decree. Ex.A.1 is the agreement of sale. As per the terms and conditions of Ex.A.1, more particularly Clauses (vi) and (viii), the execution of the registered sale deed in favour of the purchaser or his nominee and handing over of physical possession of schedule property should be completed within four months and the time limit may be extended in justifiable circumstances by mutual consent of vendor and purchaser and that if the purchaser due to his own fault and inability fails to perform his part in executing the sale deed or take physical possession of the property within the agreed time, soon after receiving intimation from the vendor, he shall lose all the amounts paid by him to the vendor as earnest money, part payment of consideration or otherwise. The plaintiff paid Rs.40,000/- as per Clause (ii) as earnest money towards sale consideration and in part performance of the agreement of sale. Receipt of Rs.40,000/- by the defendant as earnest money which forms part of sale consideration is not seriously disputed by him in the written statement. From a bare look at the contents of Ex.A.1, it is clear that the plaintiff paid Rs.40,000/- only as earnest money which forms part of sale consideration in the event of execution of registered sale deed. The defendant reserved his right to forfeit the amount in the event of commission of breach in view of Clauses (vi) and (viii) of Ex.A.1. The agreement was obtained on 20.12.1984 and the transaction should be completed within four months from 20.12.1984 i.e., by the end of 20th March 1985.

13. Clause (ii) of Ex.A.1 is relevant to decide whether the plaintiff paid

Rs.40,000/- as earnest money deposit or advance of sale consideration. However, it is evident from Clause (ii) of Ex.A.1 that the plaintiff paid only Rs.40,000/- toward earnest money which forms part of sale consideration in the event of execution of registered sale deed accordingly, the point is decided.

14. **In Re. Point No. 2:**

One of the major contentions of the plaintiff is that though he was ready and willing to perform his part of obligation, the defendant did not execute the registered sale deed and protracted the matter on the ground that he has to obtain a registered sale deed in pursuance of the decree obtained by him in O.S.No.1587 of 1983 on the file of II Additional Judge, City Civil Court, Hyderabad, and that the delay was only due to the conduct of the defendant, but this fact is not substantiated. However, it is evident from the record that the plaintiff did not seek extension of time as required under Clause (vi) of Ex.A.1. Even according to Clause (vi) of Ex.A.1, the time can be extended for performance of contract with the consent of both the parties and it is not the specific plea of the plaintiff that the time was extended for performing the part of obligation of the defendant by mutual consent in terms of Clause (vi) of Ex.A.1. As per Clause (ii) of Ex.A.1, only when there is a justifiable ground, the time can be extended by mutual consent. What is justifiable ground is not pleaded in the plaint except contending that the defendant failed to execute registered sale deed on the ground that he did not obtain registered deed in pursuance of decree in the earlier suit, but this fact is not substantiated by any evidence and the conduct of the plaintiff in maintaining silence for two years after execution of Ex.A.1 led me to conclude that the plaintiff failed to establish his readiness and willingness within the time fixed for performance under Clause (vi) of Ex.A.1.

15. When the plaintiff failed to perform his part of obligation in terms of Clause (vi) of Ex.A.1 within four months time fixed thereunder from the date of execution of Ex.A.1, the amount paid by him is liable for forfeiture as per Clause (viii) of Ex.A.1. Admittedly, the plaintiff did not pay balance of sale consideration of Rs.5,90,000/- as per terms of Ex.A.1. The defendant pleaded that the parties

agreed to pay the balance of sale consideration in installments and no such agreement was entered into and filed before this Court.

16. Clause (vii) of Ex.A.1 enables the plaintiff to recover Rs.40,000/- if the vendor due to his own fault or inability or any other legal impediment fails to get the sale deed registered and fails to hand over physical possession of the property within the agreed time. Therefore, if any breach occurred on account of the conduct of defendant, he is liable to refund the earnest money of Rs.40,000/- paid as per Clause (ii) of Ex.A.1.

17. To prove breach of contract by the defendant, the plaintiff himself was examined as P.W.1 and according to his evidence, the period for completion of the transaction is four months from the date of agreement of sale and the defendant also undertook that he delivers possession of the schedule property after obtaining registered sale deed in his name, but the defendant did not keep up his promise and he protracted the matter on one pretext or other, though the plaintiff is ready and willing to perform his part of obligation under Ex.A.1. The defendant was examined as D.W.1 and according to his evidence, he obtained a decree in O.S.No.1587 of 1983 for specific performance and in pursuance of the decree, he filed E.P.No.46 of 1984 for obtaining registered sale deed in his favour and obtained a registered sale deed on 15.10.1985. Ex.B.1 is the said sale deed, whereas Ex.A.1 was executed on 20.12.1984, but there is delay in obtaining the sale deed by the defendant himself in E.P.No.46 of 1984 from his vendor in O.S.No.1587 of 1983. However, the delay is only 7 months due to legal process. After obtaining Ex.B.1, nothing prevented the plaintiff to pay balance of sale consideration and obtain registered sale deed, even if obtaining registered sale deed by the defendant from his vendor in O.S.No.1587 of 1983 is a condition in terms of Ex.A.1, but the plaintiff did not pay balance of sale consideration as required under Clause (iv) of Ex.A.1. From a bare look at the conditions of Ex.A.1, the plaintiff has to pay balance of sale consideration “soon after he obtains physical possession of the schedule property and obtains registered sale deed in his favour” and that the defendant has to pay all taxes

and other charges over the property including production of encumbrance certificate, link documents, income tax clearance certificate and urban land ceiling exemption. Therefore, the order of performance is fixed under the terms of Ex.A1 and when the order of performance of obligation is fixed, the parties to the agreement are bound to adhere to the terms in view of Section 50 of the Indian Contract Act, 1872 (for short 'the Act') which says that performance of any promise may be made in any manner, or at any time which the promise prescribes or sanctions. The contract of sale-Ex.A.1 is a reciprocal promise and unless the defendant obtains registered sale deed and delivers vacant possession of the schedule property sold under Ex.A.1, the obligation to pay balance of sale consideration by the plaintiff would not arise. In a recent judgment of the Apex Court in ***Sardamani Kandappan vs. S.Rajalakshmi and others***^[1] the Apex Court held that when the order of performance is fixed, the parties shall adhere to the terms and conditions of the agreement and perform their obligation in the order.

18. In the present case, the defendant did not obtain delivery of possession and also sale deed marked as Ex.B1 within four months and thereby the question of his delivery of possession of suit schedule property to the plaintiff as per Clause (iii) of Ex.A.1 does not arise. Thus, the defendant failed to establish performance of part of his obligation in the order of performance fixed under Ex.A.1. According to Section 54 of the Act, when a contract consists of reciprocal promises, such that if one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor or the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. In view of Section 54 of the Act, till the defendant performs his part of obligation i.e., delivery of possession of the schedule property in terms of Clause (iii) of Ex.A.1, he cannot insist the plaintiff to perform his part of obligation i.e., payment of balance of sale consideration. Therefore, it

is difficult to hold that the plaintiff committed breach of terms of contract, as the defendant failed to perform his initial part of obligation of delivery of vacant possession as per Clause (iii) of Ex.A.1. When the defendant is at fault, he is not entitled to invoke Clause (viii) of Ex.A.1 to forfeit the earnest money deposit paid for due performance of agreement of sale in view of Clause (vii) of Ex.A.1. As the parties agreed to refund the earnest money of Rs.40,000/- paid, which forms part of balance of sale consideration in the event of execution of registered sale deed, enabling the plaintiff to recover the same in the event of default on the part of the defendant in performance of obligations in the order of performance fixed in Ex.A.1.

19. Learned counsel for the defendant has drawn attention of this Court to Ex.B.2, letter dated 17.01.1987, while contending that the defendant himself addressed a letter demanding the plaintiff to pay balance of sale consideration within 15 days after receipt of Ex.B.2 expressing his intention to sell the property even after a year while informing his difficulty in obtaining the sale deed from his vendor in O.S.No.1587 of 1983. On a close analysis of the terms and conditions of Ex.A.1, more particularly clause (iii), it is clear that the defendant has to deliver vacant possession of the property sold under Ex.A.1 and convey title to the property by executing registered sale deed, then only the plaintiff has to pay balance of sale consideration, but in original of Ex.B.2, he did not express his readiness to deliver vacant possession of the property, strictly adhering to clause (iii) of Ex.A.1. Therefore, the plaintiff cannot be blamed for his failure to pay balance of sale consideration, since question of payment of balance of sale consideration does not arise till the defendant delivers vacant possession of the property purchased by him. In Ex.B.2, the agreement was referred while pleading a totally different mutual agreement or arrangement for payment of balance of sale consideration, which is admittedly not reduced into writing and not established by any amount of evidence. Therefore, there is absolutely no evidence to establish that the plaintiff committed breach of terms of contract and on the other hand, the evidence available on record established that on account of default of the defendant in obtaining sale deed from his vendor in terms of the

decree in O.S.No.1587 of 1983 and delivery of possession as per Clause (iii) of Ex.A.1, thereby, by invoking Clause (vii) of Ex.A.1, the plaintiff is entitled to recover the earnest money of Rs.40,000/- deposited with the defendant which forms part of sale consideration in the event of execution of a regular registered sale deed. Hence, I find no error in the finding recorded by the trial Court, even after reappraisal of entire evidence. Therefore, the finding of the trial Court is upheld, holding this point in favour of the plaintiff and against the defendant.

20. One of the head of claim is damages of Rs.20,000/-. The actual damage was not established by the plaintiff that caused to him on account of alleged breach of terms and conditions of Ex.A.1 by the defendant. However, the trial Court granted damages of Rs.20,000/- without substantive evidence to establish the actual damage sustained by the plaintiff. In view of my finding on point No.1, the defendant himself is at fault on account of delay that caused by him and till issue of Ex.B.2, the plaintiff was totally in darkness and therefore, on account of defendant's default, the plaintiff would sustain loss by investing Rs.40,000/- and taking into consideration of the interest that is to be accrued on Rs.40,000/- per one year, I find that it is a fit case to award damages of RS.5,000/- which is equivalent to interest that is payable on Rs.40,000/-. The trial Court, without any basis for the damage sustained by the plaintiff, awarded damages at the rate of Rs.20,000/-. Hence, damages awarded by the trial Court is reduced from Rs.20,000/- to Rs.5,000/-. In view of the breach of terms of reciprocal promise under Section 54 of the Act, the defendant must pay compensation to the plaintiff for the loss which he sustained due to non-performance of his obligation by the defendant i.e. delivery of vacant possession and execution of sale deed. Hence, damages of Rs.20,000/- is reduced to Rs.5,000/- and accordingly the point is answered.

21. **In Re.Point No.3**

According to my finding on point No.2 the defendant committed breach as he failed to perform his obligation in the order of performance fixed under Ex.A.1, therefore question of sustaining damaged on account of breach of contract by

plaintiff does not arise. Hence, the defendant is not entitled to claim damages at any rate, much less Rs.70,000/- as claimed by him. The trial Court on consideration of terms and conditions of Ex.A.1 and correspondence, Ex.B.1 rightly concluded that the defendant failed to perform his obligation under Ex.A.1 in the order of performance and rightly declined to award any damages. Hence, the finding of the trial Court is confirmed holding this point in favour of the plaintiff and against defendant.

22. In view of my findings on points 1 to 3, I find that the appeal is devoid of merits except to the extent of reducing quantum of damages.

23. In the result, the appeal is allowed in part, while confirming the decree for refund of earnest money and reducing damages from Rs.20,000/- to Rs.5,000/- with interest at the rate of 6% per annum from the date of suit till the date of realization, but, in the circumstances, without costs. Miscellaneous petitions pending, if any, shall also stand disposed of.

M.SATYANARAYANA MURTHY, J

Date: 06.02.2015

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[\[1\]](#) AIR 2011 SC 3234