

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY A.S.No. 584 OF 1997 JUDGMENT: Both the defendants in O.S.No. 34 of 1996 on the file of the Court of District Judge, Vizianagaram (for short, 'the trial Court'), preferred the present appeal challenging the decree and judgment dated 18-10-1996, whereby and whereunder the defendants were directed to refund advance amount of Rs.1,65,000/- together with interest at 12% p.a. 2. The ranks given to the parties before the trial Court will be adopted throughout the judgment for convenience of reference. 3. The plaintiff filed the suit for specific performance of agreement of sale to direct the defendants to execute registered sale deed conveying schedule property on receipt of balance of sale consideration or alternatively for refund of advance of Rs.1,65,000/- with interest thereon. Undisputedly, the defendants are owners and they executed an agreement of sale incorporating usual terms including completion of transaction within two months from the date of execution of agreement of sale dated 22-07-1985. The plaintiff, on the date of execution of Ex.A1 agreement of sale, paid advance of Rs.10,000/-; thereafter, paid different amount on different dates and, thus, paid total amount of Rs.1,65,000/- which is inclusive of Rs.10,000/- paid under Ex.A1. As per the terms of agreement of sale, the defendants have to furnish income tax clearance certificate from concerned authorities within the stipulated time. The plaintiff is always ready and willing to perform his part of contract. Despite readiness of the plaintiff, the defendants did not execute registered sale deed. Hence, the plaintiff got issued registered notice dated 10-08-1988 expressing readiness and willingness to perform his part of obligation under agreement of sale by paying balance of sale consideration but the defendants did not execute registered sale deed. Hence, the suit. 4. The defendants filed written statement admitting their ownership, execution of agreement of sale and the terms contained therein while contending that the plaintiff committed breach of contract as the plaintiff failed to pay balance of sale consideration within the stipulated time. Thereby, the plaintiff is not entitled to primary relief of specific performance or alternative relief and prayed to dismiss the suit. 5. On the strength of the above pleadings, the trial Court framed the following issues and additional issue: Issues: 1) Whether the plaintiff is ready and willing to perform his part of the contract? 2) Whether the time is the essence of the contract in this matter? 3) Whether the plaintiff entitled for refund of money paid in the alternative? 4) Whether the plaintiff is entitled for any damage? 5) Whether the plaintiff is entitled for interest? 6) To what relief? Additional Issue: Whether the document dated 19-12-1985 is true, valid and binding on the defendants and whether the defendants in spite of taking an inconsistent plea by amending the written statement? 6. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 and A21. On behalf of the defendants, D.W.1 was examined and got marked Exs.B1. 7. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court held that the plaintiff failed to prove the requirement under Section 16 (c) of the Specific Relief Act, 1963 (for brevity, 'the Act of 1963'), i.e. readiness and willingness to perform obligation of the plaintiff under Ex.A1 agreement of sale and granted decree for refund of Rs.1,65,000/- together with interest at 12% p.a. from the date of each payment under Exs.A2 to A16 while declining to grant primary relief of specific performance. 8. The defendants, being aggrieved by the decree and judgment of the trial Court, preferred the present appeal on the ground that since the plaintiff failed to prove his readiness and willingness, he is disentitled to claim refund of amount and, his failure to pay balance of sale consideration within the stipulated time, it amounts to breach of contract. It is further contended that, in the absence of any stipulation for payment of interest, the plaintiff is not entitled to claim interest on the advance of sale consideration and prayed to set aside the decree and judgment of the trial Court for refund of advance of sale consideration paid by the plaintiff to the defendants. 9. The plaintiff did not file any cross-objections or separate appeal challenging the adverse finding recorded by the trial Court. Therefore, I need not disturb the finding recorded by the trial Court on other issues. 10. During pendency of the appeal, both the appellants died and their legal-representatives were brought on record as appellant Nos. 3 and 4 as per the orders in C.M.P.No. 2290 of 2009 dated 31-12-2009. 11. Learned counsel for the defendants would submit that the plaintiff agreed to pay balance of sale consideration within two months from the date of execution of Ex.A1 and that the defendants have to furnish clearance certificate from income tax department by the date of execution of registered sale deed but, due to default of the plaintiff, they could not execute registered sale deed. Thereby, the breach is attributable to the plaintiff. Added to that, the purpose of sale was only to meet family necessities and, on account of delay caused by the plaintiff, the defendants were forced to contract debts from third parties and incurred heavy loss. Finally, it is contended that, when the trial Court found that the plaintiff is not ready and willing to perform his part of obligation as required under Section 16 (c) of the Act of 1963, the plaintiff is not entitled to claim refund of amount together with interest and prayed to allow the appeal setting aside the decree and judgment of the trial Court to the extent of granting decree for refund of Rs.1,65,000/- together with interest. 12. Per contra, Smt. P.Rajeswari, learned counsel for the plaintiff, argued totally in support of the finding recorded by the trial Court and requested to pass appropriate order awarding interest and prayed to dismiss the appeal. 13. Considering rival contentions and perusing material available on record including the decree and judgment under challenge, the sole point that arises for consideration is as follows: "Whether the plaintiff is entitled to recover Rs.1,65,000/- from the defendants together with interest at 12% p.a. from the date of payments under Exs.A2 to A16?" 14. In Re. Point: Undisputedly, the defendants executed Ex.A1 agreement of sale agreeing to sell the property to the plaintiff for Rs.3,90,000/- and received Rs.1,65,000/- in installments (Exs.A2 to A16) on various dates including Rs.10,000/- as advance on the date of execution of Ex.A1. The only contention of learned counsel for the defendants is that the plaintiff did not perform his obligation within two months time fixed from the date of execution of Ex.A1. Thereby, the plaintiff committed breach of terms and conditions of the agreement of sale. No doubt, as per Ex.A1, the plaintiff has to pay balance of sale consideration within two months and obtain registered sale deed either in his name or in the name of his nominee for the entire schedule property or piece of it and, at the same time, the defendants agreed to furnish income tax clearance certificate on the date of obtaining registered sale deed from them. No doubt, the plaintiff agreed to pay the amount within two moths from the date of execution of Ex.A1 but there was no clause to terminate the agreement in the event of failure to pay balance of sale consideration within the time fixed i.e. two months from the date of execution of Ex.A1. Thereby, time cannot be said to be the essence of the contract. In fact, it is not even the contention of the plaintiff that time is essence of the contract. 15. Exs.A1 to A16 further disclosed that, on the date of execution of Ex.A1, the defendants received Rs.10,000/- as advance and received Rs.1,55,000/- in installments under Exs.A2 to A16 towards advance of sale consideration but not as earnest money for due performance of obligation under Ex.A1 agreement of sale and there was no term to forfeit the amount, if any, paid by the plaintiff in the event of failure to perform obligation of the plaintiff within the time fixed. The amount paid under Exs.A1 to A16 is only as advance but not as earnest money. If it is earnest money deposit, the plaintiff is entitled to forfeit the same. In Satish Batra Vs. Sudhir Rawal, the Apex Court, explaining the meaning of earnest money, held that "Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor, it is to be forfeited in case of non-performance by the depositor." When a similar question came up for consideration in Videocon Properties Limited Vs. Dr. Bhalachandra Laboratories and others, the Apex Court held as follows: "It was a case where the plaintiffs-appellants had entered into an agreement with the respondents-defendants on 13-05-1994 to sell the landed property owned by the respondents and a sum of Rs.38,00,000/- was paid by the appellants as deposit or earnest money on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the words used in the agreement alone would not be determinative of the character of the "earnest money" but really the intention of the parties and surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned." In the instant case, undisputedly, the amount was paid as advance but not as earnest money and the defendants did not reserve any right to forfeit the same in the event of commission of breach of contract by the plaintiff. In such case, the defendants are not entitled to retain the amount and appropriate the same among themselves. 16. The main contention of the defendants is that, when the plaintiff failed to prove readiness and willingness to perform his obligation, the Court cannot grant decree for refund of advance amount. No doubt, the plaintiff did not pay the amount as agreed within the stipulated time. However, the defendants received amount in installments even after expiry of two months period fixed under Ex.A1. Thereby, the defendants waived the right to claim entire balance of sale consideration within the stipulated time of two months. In similar situation between A.K.Lakshmi pathy (D) and others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and others, the Supreme Court, while declining to grant relief of specific performance as the plaintiff failed to prove his readiness and willingness, directed the defendants to repay the advance of sale consideration received. The same principle is applicable to the present facts of the



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