

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 24.11.2016

Judgment Pronounced on : 05.12.2016

Coram

The Honourable Mr.**Justice R.SUBRAMANIAN**

A.S.No.28 of 2010

P.Sivakumar ... Appellant

Vs.

1.Soundaram
2.Mythili ... Respondents

This Appeal has been filed against the Judgment and decree dated 30.06.2009 passed in O.S.No.294 of 2008 on the file of the learned Additional District Judge, (Fast Track Court No.III), Dharapuram.

For Appellant : Mr.C.Ananda Ramani

For 2nd respondent : Mr.S.Saravanan

J U D G M E N T

The defendant, in O.S.No.294 of 2008 on the file of the learned Additional District Judge, (Fast Track Court No.III), Dharapuram, is the appellant.

2. The suit was filed for refund of the advance amount of Rs.5,00,000/- paid by the plaintiffs under the sale agreement dated

08.01.2008. It is not in dispute that the plaintiffs have entered into agreement of sale for purchase of certain immovable properties from the defendant on 08.01.2008. The total sale consideration agreed was Rs.18,97,200/-. Out of the said amount, the plaintiffs paid the advance amount of Rs.5,00,000/- and the period of 120 days was fixed for performance and the said period expired on 05.05.2008. The plaintiffs claims that they came to know that the defendant had attempted to sell the property to third parties and therefore, they issued a legal notice on 31.07.2008 demanding performance of the contract or in the alternative for refund of the advance amount. Though the said notice was received by the defendant on 22.08.2008, he neither came forward to execute the sale deed nor to return the advance amount. Later, during the month of October,2008, the plaintiffs came to know that the defendant had executed a power of attorney on 05.05.2008 in favour of one Mani, who had, in turn sold a portion of the property, which is the subject matter of the agreement dated 08.01.2008, to one Swamyappa on 02.06.2008 under two sale deeds. Hence, the plaintiffs have issued another legal notice dated 22.10.2008 demanding repayment of the advance. Since the defendant did not come forward to refund the advance, the plaintiffs laid the suit for recovery of advance amount of Rs.5,00,000/- along with interest at 12% p.a.

3. In defence, the defendant would contend that the plaintiffs were not ready and willing to perform their part of the contract and therefore as per the clause in the agreement, the advance amount was forfeited. It is also claimed that the first plaintiff and the power agent, namely, Mani had colluded in order to cheat the defendant. It is the further claim of the defendant that time being the essence of contract and since the plaintiffs were not ready and willing to performance their part of the contract, they have lost the right to recover the advance amount paid by them.

4. On a consideration of the pleadings, the learned Additional District Judge, (Fast Track Court No.III), Dharapuram framed the following issues.

1. Whether the plaintiffs are entitled to get the relief of refund of sale advance amount with 12% interest?
2. Whether the advance amount was forfeited as alleged by the defendant?
3. To what relief?

5. Before the trial Court, the first plaintiff was examined as P.W.1 and one Rajendran was examined as P.W.2 and Exs.A1 to A11 were marked on the side of the plaintiffs. On the side of the defendant, the defendant examined himself as D.W.1 and Exs.B1 to B4 were marked. Exs.X1 and X2 were marked as Court documents.

Upon consideration of the oral and documentary evidence, the learned trial Judge came to the conclusion that the time is not essence of the contract and the plaintiffs had not forfeited the advance amount because of the fact that they were not ready to take sale deed within the time stipulated under the agreement. The learned trial Judge also came to the conclusion that the fact that the defendant had authorised one Mani to deal with the property on 05.05.2008 itself would show that he never intend to perform his part of the contract. The trial Court has taken into account the fact that the defendant did not chose to send any reply to the lawyer's notice dated 20.08.2008. On the above findings, the learned trial Judge decreed the suit as prayed for. Aggrieved over the same, the defendant has preferred the above appeal.

6. The following points arise for consideration in this appeal.

1. Whether the forfeiture clause in Ex.A1 sale agreement could be enforced by the defendant to deny repayment of the advance amount to the plaintiffs?
2. Whether the action of the defendant in executing a power of attorney in favour of one Mani on 05.05.2008 dis-entitles him from claiming that the plaintiffs were not ready and willing to perform their part of the contract?

7.I have heard Mrs.C.Ananda Ramani, learned counsel appearing for the appellant and Mr.S.Saravanan, learned counsel appearing for the respondents.

8. Mrs.C.Ananda Ramani, learned counsel appearing for the appellant taking me through the contents of Ex.A1 sale agreement and the evidence of P.W.1 would contend that the plaintiffs have lost their right to seek refund of advance. She would also invite my attention to the evidence of P.W.1, wherein, P.W.1 had admitted that one Sathasivam, who is the attestor in both the sale agreement and power of attorney executed in favour of Mani. The learned counsel for the appellant would rely upon certain portion of the evidence of P.W.1 to contend that the said Sathasivam was already known to the plaintiff. However, the defendant took a stand that he had directed, Mani, namely, his agent, to sell the property and repay the advance amount to the plaintiffs. Therefore, the learned counsel appearing for the appellant would contend that the suit is collusive one at the instance of the plaintiffs, who had colluded with the said Mani to defeat the rights of the appellant.

9. Per contra, Mr.S.Saravanan, learned counsel appearing for the respondents would contend that the suggestions to the effect that the plaintiffs knew Mani and Mani had in fact paid back the advance amount to the plaintiffs have been denied. The sum and substance of the contentions of the learned counsel appearing for the appellant

is that the sale agreement Ex.A1 provides for forfeiture of the advance, if the plaintiffs are not shown to be ready and willing to perform their part of contract. According to the learned counsel for the appellant, the plaintiffs have issued a notice dated 31.07.2008, seeking performance of the contract, i.e. beyond the period fixed under the agreement. Therefore, the plaintiffs were not ready and willing to perform their part of the contract.

10. I am unable to accept the said submissions of the learned counsel appearing for the appellant in view of the fact that the defendant himself had executed a power of attorney on 05.05.2008, i.e., on the last day fixed for performance and the agent appointed under the said power of attorney had in fact sold the portions of the suit property to one Swamyappa on 02.06.2008. This fact itself demonstrates that it was the defendant who had breached the agreement. Even otherwise, the clause in the agreement which provides for forfeiture of the advance, in my considered opinion, is penal in nature and the same cannot be enforced. After all, the defendant admits the receipt of Rs.5 lakhs, he had sold a portion of the property on 02.06.2008 through his power agent within a month from the date fixed for performance of contract. The fact that the defendant had not chosen to send a reply to the legal notice issued by the plaintiffs would also militate against the claim of the defendant. Though the learned counsel would vehemently contended

that the forfeiture clause should be held to be valid and it should be enforced, I am unable to accept the said contention in view of the peculiar facts of this case, where the defendant himself had sold the property and chosen to appoint a power of attorney on the last date fixed for performance under the agreement. The inaction on the part of the defendant in not replying the legal notice issued by the plaintiffs also militates against the claim of the defendant. The trial Judge has considered the entire evidence on record and has come to the conclusion that the plaintiffs are entitled to refund of advance. Hence, I do not see any ground to interfere with the said factual findings which are based on evidence. Therefore, the findings of the learned Trial Judge are bound to be confirmed.

11. In the result, the appeal is dismissed confirming the judgment and decree dated 30.06.2009 made in O.S.No.294 of 2008 on the file of the learned Additional District and Sessions Judge, (Fast Track Court No.III), Dharapuram. However, there will be no order as to costs in this appeal.

05.12.201

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Index : Yes/No
Internet: Yes/No

To

The Additional Judge, Fast Track Court No. III,
Dharapuram.

R.SUBRAMANIAN,J.

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Pre-Delivery Judgment
in
A.S.No.28 of 2010

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