

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 25.04.2017

Orders delivered on 02.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE M.S.RAMESH

A.S.No.356 of 2011

1. Sunshine Enterprises
a Firm rep. by its Partner V.Senthilnathan,
S/o.M.D.Venkatesan.
2. M.D.Venkatesan,
Managing Partner of Sunshine Enterprises,
rep. by his Power Holder Mr.V.Senthilnathan
... Appellants/Defendants

Vs.

Aasish Guptha ... Respondent/Plaintiff

Prayer:- Appeal Suit has been filed under Section 96 of C.P.C.,
against the judgment and decree dated 07.02.2011 in O.S.No.14 of
2008 on the file of the learned Principal District Court,
Krishnagiri.

For Appellants : Mr.S.V.Jayaraman,
Senior Counsel for Mr.R.Ashokan

For Respondent : Mrs.Chithrasampath,
Senior Counsel for Mr.R.Nalliappan

JUDGMENT

(Judgment of the Court was delivered by R.Subbiah, J.)

This appeal has been preferred against the judgment and
decree dated 07.02.2011 in O.S.No.14 of 2008 passed by the
learned Principal District Judge, Krishnagiri, decreeing the
suit filed by the respondent herein/plaintiff, directing the
appellants herein/defendants to pay the advance money of
Rs.12,67,500/- (being made up of Rs.10 lakhs towards refund of
the advance amount with interest) with subsequent interest @ 9 %

pa from the date of the suit till the date of judgment and thereafter, at the rate of 6% pa till realisation and also declaring that the respondent/plaintiff is entitled to charge over the suit property as per Section 55(6)(b) of the Transfer of Property Act.

2.The appellants herein are the defendants and the respondent herein is the plaintiff before the Trial Court. For easy reference, hereinafter the parties will be referred to as per rankings in the suit.

3.The brief facts of the case of the plaintiff are as follows_

3-1.The defendants own and possess the suit property viz., vacant land measuring 0.14 cents comprised in S.No.644 and an extent of 0.59 1/2 cents comprised in S.No.641/1, in Krishnagiri Sub-Registration District, Hosur Taluk, Hosur Village, Krishnagiri District. The said land was notified for land acquisition for the benefit of the Tamil Nadu Housing Board (in short hereinafter referred to as 'TNHB').

3-2.On 10.02.2005, the defendants agreed to sell the suit property to the plaintiff and executed an agreement of sale. Under the said Sale Agreement, the sale price was fixed as Rs.80 lakhs and the time for performance is fixed as on or before 30.12.2005. On the date of Sale Agreement itself ie., on 10.02.2005, a sum of Rs.10 lakhs was paid by the plaintiff to the defendants towards advance amount. Since the land is under the land acquisition proceedings initiated by the TNHB, there was a clause in the Sale Agreement to the effect that out of the balance sale price, a sum of Rs.25 lakhs shall be paid within 30 days from the date of order being passed by the appropriate Court (in respect of the acquisition proceedings) in favour of the defendants; further, the balance amount shall be paid within 11 months from the date of agreement; that the Sale Deed shall be executed at the costs of the plaintiff on or before 30.12.2005 and it shall be registered within 30 days of release of the land from TNHB by getting No Objection Certificate and transfer of patta in the name of the defendants.

3-3.It is further case of the plaintiff that the defendants have to take steps to get the suit property released from the land acquisition proceedings. As per the Sale Agreement, the defendants shall give Power of Attorney to the plaintiff authorizing him to represent before the TNHB for getting No Objection Certificate and release the property from TNHB Scheme. But, the defendants did not execute any Power of Attorney to the plaintiff. Further, as per the Sale Agreement, if the plaintiff fails to perform his part of the contract, namely paying the balance sale price and taking sale at his

costs, the defendants will forfeit the advance amount of Rs.10 lakhs paid by the plaintiff.

3-4.As the time for performance of the contract was nearing, the plaintiff had taken three Pay Orders in the name of the defendants for the balance sale consideration of Rs.70 lakhs viz., for Rs.23,75,000/-, for Rs.23,25,000/- and for Rs.23,00,000/-. The xerox copies of the said Pay Orders, along with a letter dated 26.12.2005 were sent by the plaintiff to the defendants to show his bone fide that he is ready and willing to perform his part of the contract. In the said letter dated 26.12.2005, the plaintiff has also demanded the defendants to get clearance from TNHB and also to restore the subject land in the name of the defendants in the Revenue records. In fact, the defendants have appointed one Sunil Kumar Patwa, Hosur, to clear the acquisition proceedings of TNHB in respect of the suit property and he was paid a sum of Rs.5 lakhs by demand draft on 18.02.2005. The defendants have sent a reply dated 28.12.2005 stating that the agreement itself refers to the encumbrances and the plaintiff agreed to purchase the suit property at his risk; it is also falsely alleged in the said reply dated 28.12.2005 by the defendants that the above said Sunil Kumar Patwa is the plaintiff's nominee and he was paid a sum of Rs.5 lakhs, only at the instance of the plaintiff. Thus, without clearing the encumbrance, the defendants claimed that they are ready and willing to perform their part of the contract. Hence, the plaintiff issued a notice dated 06.11.2007 through his advocate, to the defendants, demanding them to perform their part of the contract within 15 days of the receipt of the notice. The defendants sent a reply dated 17.11.2007 stating that the defendants have forfeited the advance amount of Rs.10 lakhs on the ground that the time for performance had expired on 30.12.2005.

3-5.According to the plaintiff, as per the sale agreement, it is the responsibility of the defendants to get the land released from the acquisition proceedings; unless and until the land is released from the acquisition proceedings, the defendants have no saleable right or interest over the property. Even after 25 months, the defendants were not able to get the land released from the acquisition proceedings and they are unable to get NOC from TNHB. Hence, the plaintiff has filed the suit for refund of the advance amount of Rs.10 lakhs along with interest @ 9% from 10.02.2005 to 30.01.2008, totalling to Rs.12,67,500/-, with subsequent interest.

4-1.Before the Trial Court, the case of the plaintiff was resisted by the defendants, by filing written statement, contending that it is the plaintiff, who has voluntarily approached the defendants through a mediator by name Sunil Kumar

Patwa, by offering to purchase the suit property. Only the mediator Sunil Kumar Patwa has brought the plaintiff and introduced him to the defendants. One V.K.Kaliappan was also present during the discussions and also at the time of execution of the sale agreement at Chennai and he stood as a witness in the sale agreement. The defendants have clearly explained to the plaintiff, before signing the sale agreement, that the property is covered by the land acquisition proceedings and action is being taken to release the land from the acquisition proceedings before the appropriate authorities. The plaintiff, who was fully aware of the fact that the property is under the land acquisition proceedings and private encroachments are in existence, has come forward to finalise the negotiation and undertook to take follow up action either by himself or through his agent to release the property from the land acquisition proceedings before the appropriate forum at his own risk. Thus, the plaintiff decided to purchase the property for a sale consideration of Rs.80 lakhs and paid a sum of Rs.10 lakhs as advance amount and entered into the sale agreement at Chennai on 10.02.2005.

4-2.As per clause 6 of the Sale Agreement, the plaintiff has agreed to appoint a Power of Attorney to represent before the Court or any other Govt Department to release the property from the acquisition proceedings. Accordingly, on the advise of the plaintiff a Memorandum of Understanding was executed between the 1st defendant and Mr.Sunil Kumar Patwa, who was appointed as Power of Attorney of the plaintiff. The said Memorandum of Understanding was signed by both the 1st defendant and Sunil Kumar Patwa on 18.02.2005. Accordingly, the 1st defendant paid a sum of Rs.5 lakhs to the said Sunil Kumar Patwa by way of Demand Draft and the same was also acknowledged by him. The said sum of Rs.5 lakhs was paid from the advance amount of Rs.10 lakhs which was paid by the plaintiff at the time of execution of the Sale Agreement on 10.02.2005. The said amount of Rs.5 lakhs has to be paid by the plaintiff together with the balance sale consideration at the time of executing the sale deed. On 22.12.2005, the 2nd defendant had sent a registered letter to the plaintiff to make arrangements for the execution of the Sale Deed as the period of agreement was going to expire on 30.12.2005 and the same has also been acknowledged by the plaintiff on 30.12.2005. But, instead of performing his part of the contract, the plaintiff sent a letter to the 2nd defendant requesting to send NOC of the TNHB and copies of the revenue records.

4-3.It is the case of the defendants that when the plaintiff had specifically agreed that he himself would solve all the problems in getting the property released from the land acquisition proceedings, he cannot expect the defendants to get

NOC from the TNHB. Further, even before entering into the Sale Agreement, the plaintiff was furnished with all the copies of the Sale Deeds including the parental documents and copies of the revenue records including the encumbrance certificate. Only after being satisfied with the records, the plaintiff has entered into the Sale Agreement. The plaintiff was fully aware of the fact that the subject land is under the land acquisition proceedings and there are some private encroachments in the land. It is the plaintiff, who agreed to pursue the matter with the Government by himself or by his nominee to obtain No Objection Certificate and to get the lands released. Accordingly, a writ petition was filed before this Court in W.P.No.12745 of 2005 through the plaintiff's advocate and in the said writ petition, this Court passed an order on 16.04.2005 directing the Government to dispose of the case on merits. The plaintiff approached the defendants voluntarily with his nominee Sunil Kumar Patwa and entered into sale agreement, knowing fully well about the acquisition proceedings and the encroachments in the land, and agreed to purchase the property as it is with all risks and consequences. As the plaintiff failed to honour the agreement, the forfeiture clause in the agreement was invoked and therefore, the plaintiff is not entitled to claim the advance amount or interest from the defendants. Thus, the defendants sought for dismissal of the suit.

5. On the above pleadings, the Trial Court has framed the following issues_

- (1) Whether the plaintiff has specifically agreed to solve all problems of withdrawing the property from the land acquisition proceedings?
- (2) Whether the defendants have agreed to execute power of attorney to the plaintiff?
- (3) Whether the plaintiff agreed to purchase the property at his risks?
- (4) Whether the plaintiff has violated all the conditions of the sale agreement dated 10.02.2005?
- (5) Whether the plaintiff is entitled to charge over the suit property?
- (6) Whether the plaintiff is entitled to the relief as prayed for?
- (7) What relief the plaintiff is entitled?

6. In order to prove the case before the Trial court, the plaintiff examined himself as P.W.1 on his side and marked five documents as Ex.A.1 to Ex.A.5. On the side of the defendants, the 2nd defendant examined himself as D.W.1, besides examining

one V.K.Kaliyappan, who is the attestor to the Sale Agreement dated 10.02.2005, and marked seven documents as Ex.B.1 to Ex.B.7.

7.After considering both oral and documentary evidence adduced on either side, the Trial Court decreed the suit, directing the appellants herein/defendants to pay a sum of Rs.12,67,500/- (being made up of Rs.10 lakhs towards refund of the advance amount with interest), with subsequent interest on Rs.10 lakhs at the rate of 9 % pa from the date of the suit till the date of judgment and thereafter, at the rate of 6% pa till realisation and also declaring that the respondent/plaintiff is entitled to charge over the suit property as per Section 55(6) (b) of the Transfer of Property Act. Aggrieved over the same, the defendants have filed the above appeal.

8.The learned senior counsel appearing for the appellants/defendants submitted that the plaintiff has entered into the Sale Agreement dated 10.02.2005 (Ex.A.1), knowing fully well about the land acquisition proceedings in respect of the suit property and took the responsibility of obtaining the No Objection Certificate from the TNHB and to get the land released from the acquisition proceedings. Clause 6 of the Sale Agreement (Ex.A.1) stipulates that the defendants should appoint the plaintiff or his nominee as Power Agent to represent before the TNHB to get the NOC and release the land from acquisition proceedings. This clause would establish the fact that it was the sole responsibility of the plaintiff to get the land released from the TNHB. In the very same Clause 6, the plaintiff has agreed to purchase the property as it is with all risk and consequences.

9.The learned senior counsel for the appellants/defendants submitted that under Clause 9 of the Sale Agreement (Ex.A.1), the plaintiff has agreed that failure to adhere to the payment schedule and failure to complete the sale on or before 30.12.2005 will disentitle him to enforce the sale agreement and the advance amount of Rs.10 lakhs will be forfeited by the defendants. Similarly, Clause 10 of the Sale Agreement (Ex.A.1), the plaintiff has agreed that if the land could not be retrieved from the TNHB before 30.12.2005, the vendors will not be responsible and in that event also, the advance amount will be forfeited and the Sale Agreement cannot be enforced. In Clause 11 of the Sale Agreement, it was agreed that if the transaction was not completed on or before 30.12.2005, the Sale Agreement would expire automatically and the advance will be forfeited and purchaser cannot claim refund of the advance amount under any circumstances.

10.Thus, the learned senior counsel for the appellants/defendants submitted that a reading of the above said

Clauses in the Sale Agreement (Ex.A.1) would show that the plaintiff has entered into the Sale Agreement for purchase of the suit property with open eyes, knowing fully well that the property is under land acquisition proceedings initiated by TNHB. In fact, the plaintiff in his evidence as P.W.1 has stated that the defendants have not suppressed anything relating to the acquisition proceedings. As per Clause 6 of the Sale Agreement (EX.A.1), the defendants were to appoint the plaintiff or his nominee as their Power Agent to represent before the TNHB to get the land released from the acquisition proceedings. This clearly establishes the fact that the plaintiff undertook the responsibility to take steps to get the land released from acquisition. But, the plaintiff after entering into the Sale Agreement has not taken any steps to get the Power of Attorney executed by the defendants, though he has taken the responsibility to get the land released from the acquisition proceedings. Further, the plaintiff has not even sought for execution of the Power of Attorney from the defendants to enable him to get the land retrieved from the TNHB, which goes to establish that the plaintiff was not interested in the transaction despite entering into the Sale Agreement.

11. It is further submitted by the learned senior counsel for the appellants/defendants that though Power of Attorney was not executed by the defendants in favour of the plaintiff, after a week from the date of Sale Agreement, on 18.02.2005, on the advice of the plaintiff, a Memorandum of Understanding (Ex.B.2) was entered into between the 1st defendant and the plaintiff's nominee Sunil Kumar Patwa and a sum of Rs.5 lakhs was paid by the defendants to the said middleman Sunil Kumar Patwa by way of Demand Draft, to get the property released from the acquisition proceedings. But, inspite of the Memorandum of Understanding executed between the 1st defendant and the said Sunil Kumar Patwa, no steps were taken by the plaintiff to get the land released from the land acquisition proceedings. Hence, the 2nd defendant sent a letter dated 22.12.2005 (Ex.B.1) calling upon the plaintiff to make arrangements for execution of the Sale Deed, pointing out that the agreement was to expire on 30.12.2005. In fact, in the said letter dated 22.12.2005, there was no reference to the Memorandum of Understanding entered into between 1st defendant and the middleman Sunil Kumar Patwa. However, while sending reply dated 26.12.2005 (Ex.A.2), the plaintiff has made a reference with regard to the Memorandum of Understanding (Ex.B.2) entered into between the 1st defendant and Sunil Kumar Patwa, but, during the course of cross-examination, the plaintiff had stated that he came to know about Ex.B.2, Memorandum of Understanding entered into between the 1st defendant and the middleman Sunil Kumar Patwa, only on 30.12.2005, which would clearly establish the fact that only at the instance of the plaintiff, the 1st defendant had entered

into Memorandum of Understanding with the said Sunil Kumar Patwa, thereafter, the plaintiff is trying to suppress the same as if he came to know about the Memorandum of Understanding only on 30.12.2005. Thus, the learned senior counsel appearing for the appellants/defendants submitted that the plaintiff, having failed to get the land retrieved from the TNHB, is trying to take advantage by claiming that the defendants did not execute Power of Attorney and he was not aware of the Memorandum of Understanding entered into by the 1st defendant with the said Sunil Kumar Patwa.

12.The learned senior counsel for the appellants/defendants would further submit that as per the Sale Agreement (Ex.A.1), it was the responsibility of the plaintiff to get the land released from the land acquisition proceedings initiated by the TNHB. Therefore, though there is no need for the defendants to enter into any Memorandum of Understanding with the said Sunil Kumar Patwa and to pay him Rs.5 lakhs to get the land released from the acquisition proceedings, the only conclusion that could be arrived at is that the defendants entered into the Memorandum of Understanding with the said Sunil Kumar Patwa and paid Rs.5 lakhs only on the instructions of the plaintiff. Even in the Legal Notice dated 06.11.2007 sent by the plaintiff through his counsel, the plaintiff did not deny or question the appointment of the said Sunil Kumar Patwa as Power Agent, especially when the defendants had specifically stated in the letter dated 28.12.2005 (Ex.B.3) that the plaintiff asked him to give authority to his representative Mr.Sunil Kumar Patwa and pay Rs.5 lakhs initially to him for his expense and debit it to the plaintiff's account. Thus, the learned senior counsel appearing for the appellants/defendants submitted that having entered into a Sale Agreement with open eyes for purchase of the property acquired by the Government, having undertaken the responsibility of getting the land retrieved from the acquisition proceedings, having agreed to forfeit the advance amount paid in the event of failing to get the land retrieved from the acquisition and get the sale deed and having not taken any step in pursuance of the sale agreement to get the land retrieved from acquisition, the plaintiff is not entitled to claim refund of the advance amount. But, the Trial Court without considering all these aspects, has decreed the suit as prayed for. Thus, the learned senior counsel for the appellants/defendants sought for setting aside the judgment and decree of the Trial Court.

13.Countering the submissions made by the learned Senior Counsel for the appellants/defendants, it is contended by the learned Senior Counsel appearing for the respondent/plaintiff that it is an admitted case that the defendants are not the owners of the subject property on the date of entering into the Sale Agreement ie., on 10.02.2005, since the TNHB had already

acquired the said property. That apart, there were encroachments in the subject land, which is evident from the preamble portion of the Sale Agreement. Therefore, even if the defendants are willing to execute the Sale Agreement, the suit property can be sold only after the TNHB releases the suit property from the acquisition proceedings. If TNHB does not release the suit property, no registration of the sale deed can take place. As per Clause 3 of the Sale Agreement (Ex.A.1), the plaintiff had paid the advance amount of Rs.10 lakhs. As per Clause 4, the plaintiff is liable to pay a sum of Rs.25 lakhs within 30 days of receipt of the orders passed by the appropriate Court in favour of the defendants/Vendors. In other words, if the plaintiff fails to pay the said amount of Rs.25 lakhs within 30 days of receipt of the order being passed by the appropriate Court, then he loses the right to the sale advance.

14.It is further contended by the learned Senior Counsel appearing for the respondent/plaintiff that as per Clause 5 of the Sale Agreement, the balance sale price of Rs.45 lakhs is payable on or before the expiry of the 11th month from the date of the agreement and the registration shall be completed on or before 30.12.2005 or within 30 days after release of the land from TNHB, by getting NOC and transfer of patta in the name of the Vendor, whichever is earlier. This Clause cannot be bisected into two by reading the first half upto 30.12.2005 and the remaining independent of the first half, because the last line ends as "whichever is earlier". So the contingency mentioned in Clauses 4 & 5 that the transaction will go through only upon the release of the property from TNHB cannot be ignored and the Clauses read as though irrespective of the release of the suit property the plaintiff is liable to pay the balance. In fact, even if the parties are willing to register the sale deed, it cannot happen because the suit property having been acquired it would reflect in the SRO and no Sub-Registrar would register a property acquired by the Government. In the instant case, no order in favour of the defendants was obtained from the appropriate Court relating to the release of the property from acquisition proceedings. Therefore, the plaintiff is not liable to pay the amount as per Clauses 4 & 5 of the Sale Agreement. Under such circumstances, the defendants cannot invoke any Clause in the Sale Agreement, for forfeiture of the advance amount paid by the plaintiff.

15.That apart, the learned senior counsel for the respondent/plaintiff has also submitted that the amount of Rs.10 lakhs was paid by the plaintiff to the defendants, only as an advance amount for a part of the sale consideration. The defendants had not claimed the said sum by way of EMD or damages agreed to be paid by the party in the event of breach. It is

also not the case of the defendants that they had suffered damages. Under such circumstances, as per the Law, the alleged Clauses in the Sale Agreement for forfeiture, are not enforceable. In support of this contention, the learned senior counsel for the respondent/ plaintiff has also relied upon the following decisions_

- (i) 1998(1) CTC 443 (Tarsem Singh vs. Sukhminder Singh)
- (ii) 2007(2) CTC 345 (Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao)
- (iii) 2012(2) CTCOL 581 (Mad.) (M.Gouriammal Vs. Soundaraj, Minor Anith Raj and another)

16.It is further submission of the learned senior counsel appearing for the respondent/plaintiff that it is totally incorrect to state that the above said Sunil Kumar Patwa is a nominee of the plaintiff. In this regard, the learned senior counsel appearing for the respondent/plaintiff relied upon the recitals in Ex.B.2, Memorandum of Understanding entered into between the 1st defendant and the said Sunil Kumar Patwa, and demonstrated that the said Sunil Kumar Patwa is not the nominee of the plaintiff. The plaintiff had never agreed or undertook the responsibility of releasing the property from the Housing Board. In this regard, the learned senior counsel for the respondent/plaintiff has also invited the attention of this Court to the evidence of D.W.1 and made a detailed submission.

17.The learned senior counsel appearing for the respondent/plaintiff submitted that only after considering the materials available on record in a proper perspective, the Trial Court has decreed the suit. Thus, the learned senior counsel for the respondent/plaintiff submitted that there is no infirmity in the judgment and decree passed by the trial Court and sought for dismissal of the appeal.

18.We have given our anxious consideration to the submissions made on either side and perused the materials available on record.

19.In view of the above submissions made on either side, the followings points fall for consideration in this appeal_

- (1)Whether the defendants are entitled to forfeit the sale advance amount paid by the plaintiff under Ex.A.1 (Sale Agreement)?
- (2)Whether the defendants have established their defence that the said Sunil Kumar Patwa is the agent of the plaintiff?
- (3)Whether the sum of Rs.5 lakhs paid by the defendants to the said Sunil Kumar Patwa

under the Memorandum of Understanding (Ex.B.2), for initiating action to release the property from the land acquisition proceedings, will have a binding on the plaintiff?

20.POINT No.1:- It is an admitted fact that the suit property was the subject matter of land acquisition proceedings initiated by TNHB and the defendants were not the owners of the property on the date of Sale Agreement i.e, on 10.02.2005. It is also an admitted fact that the parties to the suit Sale Agreement were fully aware of the fact that the subject property can be sold only after the property was released from the land acquisition proceedings.

21.As per Clause 3 of the Sale Agreement (Ex.A.1), at the time of entering into the sale agreement, a sum of Rs.10 lakhs was paid by the plaintiff to the defendants as advance, towards the total sale consideration of Rs.80 lakhs. As per Clause 4 of the Sale Agreement, the plaintiff agreed to pay another sum of Rs.25 lakhs towards a part of sale consideration, within 30 days of receipt of the order being passed by the appropriate Court in favour of the defendants/vendors. As per Clause 5, the balance sale price of Rs.45 lakhs is payable by the plaintiff on or before the expiry of the 11th month from the date of the sale agreement and the registration shall be completed on or before 30.12.2005 or within 30 days after the release of the property from the land acquisition proceedings by the TNHB, by getting NOC and transfer of patta in the name of the vendors.

22.As per Clause 10 of the Sale Agreement, if part sale consideration of Rs.25 lakhs is not paid by the plaintiff as mentioned in Clause 4, the sale agreement will become void and unenforceable and if the land cannot be retrieved from the TNHB before 30.12.2005, the defendants/vendors will not be responsible and in that event also, the advance amount will be forfeited and the sale agreement cannot be enforced.

23.As per Clause 11 of the Sale Agreement, in case of negative orders from the Court or Department, the time upto 30.12.2005 is given considering appeals and the sale agreement automatically expires on 30.12.2005 and the initial advance amount of Rs.10 lakhs will be forfeited and the plaintiff/purchaser cannot claim return of the advance amount under any circumstances.

24.From the reading of the above Clauses in the Sale Agreement (Ex.A.1), it is clear that to make further payment of Rs.25 lakhs, the plaintiff was having 30 days from the date of the order being passed by the appropriate Court in favour of the defendants with regard to release of the property from the

acquisition proceedings of the TNHB. Thereafter, the plaintiff has to pay the balance amount of Rs.45 lakhs, as per Clause 5, before the expiry of the 11th month from the date of the sale agreement and the registration shall be completed on or before 30.12.2005 or within 30 days after the release of the land from the acquisition proceedings.

25. But, in the instant case, no order in favour of the defendants was obtained from the appropriate Court with regard to release of the land from the land acquisition proceedings. Therefore, in the absence of any order from the appropriate Court in favour of the defendants with regard to the release of the land from the land acquisition proceedings, it is clear that the plaintiff is not liable to pay the amounts required to be paid under Clauses 4 & 5 of the Sale Agreement. In the absence of liability to make the payments under Clauses 4 & 5, clause 10 will not apply to the plaintiff. Therefore, the question of forfeiting advance amount does not arise in this case. Similarly, in the absence of any orders with regard to release of the land from the acquisition proceedings, there is no obligation on the part of the plaintiff to make further payment. Furthermore, the negative clause viz., Clause 11 also will not apply to the plaintiff. Since none of the contingencies stated in the Sale Agreement has happened, the defendants are not entitled to forfeit the advance amount of Rs.10 lakhs paid by the plaintiff.

26. In fact, in his cross-examination, D.W.1 has admitted that the land acquisition proceedings have not been cancelled till the date of his cross-examination. Unless the subject property is released from the land acquisition proceedings, the registration of the sale deed can not take place. Therefore, We are of the opinion that the defendants cannot invoke any clause for forfeiting the advance amount in this case.

27. Moreover, the payment of Rs.10 lakhs made by the plaintiff is only a sale advance. The defendants have not claimed that the sum of Rs.10 lakhs paid by the plaintiff is by way of EMD or damages agreed to be paid by the party in the event of breach. Unless the payment of Rs.10 lakhs is by way of Security for the due performance of the contract, the defendants are not entitled to forfeit the advance amount for no fault of the plaintiff. In fact, the plaintiff by annexing the Xerox copies of Pay Orders, for the balance amount of Rs.70 lakhs along with letter dated 26.12.2005 (Ex.A.2), expressed his readiness and willingness to pay the balance amount, if the property is released. Under such circumstances, the defendants are not entitled to forfeit the sum of Rs.10 lakhs, which was paid only as an advance amount. In this regard, it would be appropriate to refer some of the judgment

relied upon by the learned senior counsel appearing for the respondent/plaintiff.

28. In 2007(2) CTC 345 (Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao), it has been held by the Hon'ble Supreme Court as follows_

"12. The only question which arises for our consideration is as to whether in a situation of this nature, the respondent could exercise his right of forfeiture of the entire amount. It is not his case that he had suffered any damage. He did not deny or dispute that after the Agreement of Sale was executed, a notification under Section 4(1) of the Act had been issued. He himself raised a contention that the Agreement stood frustrated. It may be true that he not only questioned the validity of the said notification, but had also filed a suit, but indisputably the parties were aware that unless and until, the notification was set aside, the Agreement for Sale, in the aforementioned situation, cannot be enforced by either of them.

13. In the aforementioned facts and circumstances of this case, We are of the opinion that the respondent could not have forfeited the amount of advance. The High Court, in our opinion, committed a manifest error in that behalf in arriving at the finding that the respondent was justified in forfeiting the said amount. We, however, agree that the High Court that enforcement of agreement for sale would be inequitable."

29. Following the above said decision of the Hon'ble Supreme Court, it has been held by the Division Bench of this Court in the case reported in 2012(2) CTCOL 581 (Mad.) (M. Gouriammal Vs. Soundaraj, Minor Anith Raj and another), as follows_

"34. In an agreement of sale, where money is paid only as part of sale price, the forfeiture clause will be treated as having the effect of penalty. The effect of Section 74 is to disentitle the plaintiff to recover simpliciter the sum fixed in the contract, whether penalty or liquidated damages. The plaintiff must prove the damages they have suffered, but the same agreed upon as damages is not recoverable as a matter of course. It is a duty of the Court to determine what compensation could be allowed as reasonable compensation.

35.As pointed out earlier, as per the recitals in Ex.A.1 sale agreement, the amount of Rs.4,00,000/- was paid only as advance/part of sale consideration. Even though the defendants claim that the said amount of Rs.4,00,000/- was paid as earnest money, their contention is not reflected in the recitals in Ex.A.1. Considering the recitals in Ex.A.1 sale agreement, the question falling for consideration is, whether the defendants are entitled to forfeit the entire advance amount of Rs.4,00,000/-. In this regard, the learned Senior Counsel for the appellants contended that when the land was under acquisition notification, agreement thus becoming unenforceable and forfeiture of advance money paid in circumstances of the case is improbable and in support of his contention, the learned Senior Counsel plead reliance upon judgment of the Supreme Court in the case of THIRUVEEDHI CHANNAIAH VS. GUDIPUDI VENKATA SUBBARAO (D) BY LRS & OTHERS, 2007 AIR (SC) 2439, wherein considering the similar question, in paragraph No.12, the Supreme Court held as follows -

"10.The only question which arises for our consideration is as to whether in a situation of this nature, the respondent could exercise his right of forfeiture of the entire amount. It is not his case that he had suffered any damage. He did not deny or dispute that after the Agreement of Sale was executed, a notification under Section 4(1) of the Act had been issued. He himself raised a contention that the Agreement stood frustrated. It may be true that he not only questioned the validity of the said notification, but had also filed a suit, but indisputably the parties were aware that unless and until, the notification was set aside, the Agreement for Sale, in the aforementioned situation, cannot be enforced by either of them. "

36.As discussed earlier, even in Ex.B.12-letter dated 19.04.2002, the 1st defendant has sent the letter to the plaintiff asking him to cancel Ex.A.1-Sale agreement. It is not the case

of the defendants that because of the non-performance/delay in performance of plaintiff's obligations, the defendants suffered any loss. The defendants have not adduced any evidence that they suffered damages. In the absence of any evidence as to the damages suffered by the defendants, the trial Court was not right in holding that the entire advance amount is liable to be forfeited. In the facts and circumstances of the case and applying the ratio of the Thiriveedhi Channaiah case (AIR 2007 SC 2439), in our considered view, the defendants are not entitled to forfeit the amount of advance. Even though the plaintiff has not asked for the alternative relief of return of advance amount, with a view to render complete justice between the parties, the Court is empowered to mould the relief. It would be appropriate to direct the respondents/defendants to repay the amount of advance paid by the plaintiff/appellant with interest at the rate of 9% p.a. from the date of plaint till this date and thereafter with interest at the rate of 6% p.a. till the date of realisation."

30. In 1998(1) CTC 443 (Tarsem Singh vs. Sukhminder Singh), the Hon'ble Supreme Court has held as follows—

"37. We may point out that there are many facets of this question, as for example (and there are many more examples), the agreement being void for any of the reasons set out in Section 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, We are dealing only with a matter in which one party had received an advantage under an agreement which was "discovered to be void" on account of Section 20 of the Act. It is to this limited extent that we say that, on the principle contained in Section 64 of the Act, the petitioner having received Rs.77,000/- as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent. A decree for refund of this amount was, therefore, rightly passed by the Lower Appellate Court."

The dictum laid down in the above cited decisions is squarely applicable to the present facts of the case also. In the

backdrop of the above said judgments, We are of the opinion that in the instant case, when the defendants have not claimed the payment of Rs.10 lakhs by way of EMD or damages agreed to be paid by the party in the event of breach, the defendants cannot forfeit the advance amount. Further, the defendants have also not adduced evidence to show that they had suffered damages, as such that they are having a right to forfeit the advance amount.

31.In the instant case, except saying that there is a clause for invoking forfeiture of the amount, absolutely there is no pleading or evidence on the side of the defendants that they suffered damages and as such, they are entitled to invoke the clause of forfeiting the amount. Hence, We are of the opinion that the defendants are not entitled to invoke any clause for forfeiting the amount, in the absence of any evidence to show that they suffered damages.

32.POINT Nos.2 & 3:- It is the specific defence of the defendants that the said Sunil Kumar Patwa is the agent/nominee of the plaintiff and only at the instance of the plaintiff, the 1st defendant had entered into a Memorandum of Understanding with the said Sunil Kumar Patwa to take steps to release the land from the acquisition proceedings. It is further case of the defendants that only at the instance of the plaintiff, they had paid a sum of Rs.5 lakhs to the said Sunil Kumar Patwa, from the amount of Rs.10 lakhs paid by the plaintiff towards advance amount; therefore, the defendants cannot be held responsible, if the land is not released from the land acquisition proceedings.

33.Per contra, it is the case of the plaintiff that the said Sunil Kumar Patwa was not his agent/nominee and it is incorrect to state that the defendants have paid a sum of Rs.5 lakhs from advance amount of Rs.10 lakhs paid by the plaintiff, to take steps to release the land from the acquisition proceedings at the instance of the plaintiff.

34.On a perusal of the Memorandum of Understanding (Ex.B.2) entered into between the 1st defendant and the said Sunil Kumar Patwa, We find that in the recitals, at the preamble portion, it has been stated "For this party of Second Party undertakes to get Authorization from the purchasers nominating him as their representative". A reading of the above said portion in Ex.B.2, it is clear that the said Sunil Kumar Patwa should get authorization from the purchaser/plaintiff nominating him as their representative. Therefore, on the date of entering into the Memorandum of Understanding (Ex.B.2), it is clear that the said Sunil Kumar Patwa was not the agent/nominee of the plaintiff. From a perusal of the evidence of D.W.1, it is seen that the said Sunil Kumar Patwa had initiated legal

proceedings, after execution of Memorandum of Understanding (Ex.B.2), and some orders were also passed and the defendants were still pursuing the legal proceedings. Thus, it is clear that the said Sunil Kumar Patwa had acted on Ex.B.2, without reference to the plaintiff.

35.Further, in Ex.B.2 (Memorandum of Understanding) it has been agreed between the parties therein that the defendants/vendors would pay only a sum of R.10 lakhs as his share of expenses for moving the TNHB and any amount in excess of the same should be borne by the second party and the purchasers. Surprisingly, in Ex.A.1 (Sale Agreement), there is no term making the plaintiff/purchaser liable for the expenses for obtaining the release of the land from TNHB. In Ex.B.2, it was further agreed between the 1st defendant and Sunil Kumar Patwa that the sum of Rs.5 lakhs paid to him will not be recovered from him in the event of his failure to obtain the land released from the land acquisition proceedings of TNHB. Further, in Ex.B.2, it was stated that out of the total amount of Rs.10 lakhs, the said Sunil Kumar Patwa will not be entitled to the balance amount of Rs.5 lakhs, if the property is not released from the acquisition proceedings of the TNHB. The plaintiff had nowhere agreed to be liable or responsible for the release of the property from TNHB. In fact, D.W.1 in his cross-examination has admitted that the plaintiff had never agreed or undertook to release the land from the acquisition proceedings. The relevant portion in the evidence of D.W.1 reads as follows_

"நில ஆர்ஜித பொறுப்பை வாதியே நடவடிக்கை எடுத்துக்கொள்ள எப்போதும் ஒத்துக் கொள்ளவில்லை, எப்போதும் தயாராக இல்லை".

The cumulative effect of all the above facts would show that under Sale Agreement (Ex.A.1) the plaintiff was never saddled with the responsibility of obtaining the release of the property from acquisition proceedings. The defendants have miserably failed to establish that the said Sunil Kumar Patwa was the agent/nominee of the plaintiff and the plaintiff was saddled with the responsibility of releasing the property from the acquisition proceedings of the TNHB. Under such circumstances, the defendants are not entitled to forfeit the advance amount of Rs.10 lakhs paid by the plaintiff.

36.For the foregoing reasons, We do not find any compelling circumstances warranting this Court to reverse the judgment and decree of the trial Court. We do not find any infirmity in the judgment and decree of the Trial Court. The appeal is liable to be dismissed as devoid of any merit.

In fine, the appeal fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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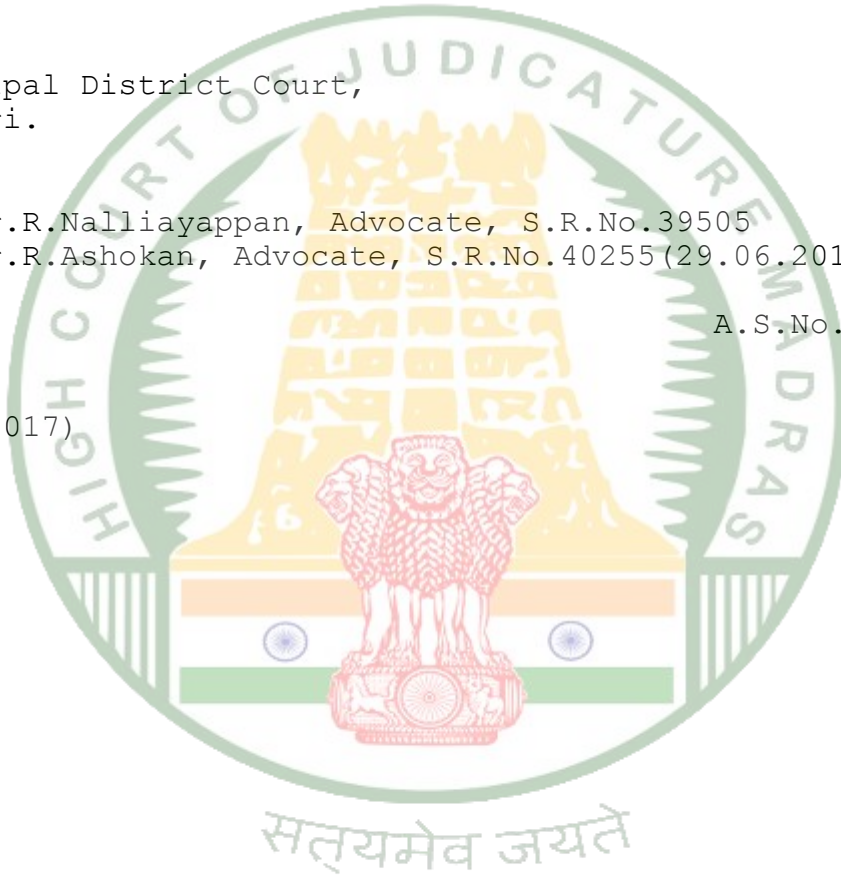
To

The Principal District Court,
Krishnagiri.

+1cc to Mr.R.Nalliyappan, Advocate, S.R.No.39505
+1cc to Mr.R.Ashokan, Advocate, S.R.No.40255(29.06.2017)

A.S.No.356 of 2011

KJ(CO)
CA(07/06/2017)



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