

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31-08-2017

Pronounced on : 22-09-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Appeal Suit No. 87 of 2013

1. N. Sekaran
2. M. Subramaniam

.. Appellants

Versus

C. Rajendran

.. Respondent

Appeal filed under Order 41 Rule 1 read with Section 96 of Code of Civil Procedure against the Judgment and Decree dated 05.07.2012 made in O.S. No. 30 of 2010 on the file of Principal District Court, Erode

For Appellants

: Mr. N. Manokaran

For Respondent

: Ms. G. Sumithra
for Mr. K.R. Krishnan

JUDGMENT

R. SUBBIAH, J

The appellants herein are the defendants in O.S. No. 30 of 2010 on the file of Principal District Court, Erode. The said suit was filed by the plaintiff/respondent herein for specific performance of the agreement of sale dated 15.02.2009, marked as Ex.A1. By the Judgment and Decree dated 05.07.2012 passed in the said suit, the Court below, while dismissing the suit for specific performance of the agreement dated 15.02.2009, directed the defendants/appellants herein to repay the sum of Rs.28,77,000/- to the plaintiff/respondent herein which was received by the defendants/appellants as advance sale consideration, together with interest at

the rate of 12% per annum from the date of agreement namely 15.02.2009 till the date of realisation and a charge is created over the suit properties standing in the name of the first defendant/first appellant herein for the suit amount. Aggrieved by the aforesaid Judgment and Decree dated 05.07.2012, the defendants have come up with the present appeal.

2. For easy reference, the parties shall be referred to as per their litigative status in the suit as plaintiff and defendants.

3. The plaintiff/respondent herein has filed the suit in O.S. No. 30 of 2010 contending that the defendants/appellants herein have originally entered into an agreement of sale with one Chinnasamy, Son of Sellappa Gounder on 24.12.2008 and another agreement on 07.01.2009 with one Chenniyappa Sridhar, R. Vidhyadhar and Kasi Viswanathan. Based on the above agreements, the defendants were in possession of the suit properties. While so, the defendants have agreed to sell the suit property measuring an extent of 1 acre 75 cents to the plaintiff at the rate of Rs.24,66,000/- per acre, for a total sale consideration of Rs.43,15,500/-. Accordingly, on 15.02.2009, an agreement was entered into between the plaintiff and the defendants. On the date of agreement, the plaintiff has paid to the defendants a sum of Rs.28,77,000/- as sale advance. According to the plaintiff, it was specifically agreed between him and the defendants that the remaining sale consideration of Rs.14,38,500/- will be paid on or before 13.04.2009. It is the case of the plaintiff that he was always ready and willing to perform his part of the contract by paying the balance sale consideration and

requested the defendants to execute the sale deed before the agreed date namely 13.04.2009. However, under some pretext or the other, the defendants prolonged the execution of the sale deed. On enquiry, the plaintiff came to know that there is some boundary dispute in respect of the property sought to be conveyed to the plaintiff and when it was questioned, the defendants have sought for some more time to enable them to execute the sale deed. However, even after the expiry of the date fixed for performance of the contract namely 13.04.2009, the defendants did not perform their part of the contract and delayed the execution of the sale deed. In such circumstances, the plaintiff issued a notice dated 01.12.2009 through his counsel calling upon the defendants to receive the balance sale consideration and to execute the sale deed in his favour. In the meantime, the plaintiff came to know that the first defendant, along with one Muthusamy and Kandasamy, has purchased the suit properties and other properties on 29.04.2009, thereby, the first defendant became the joint owner of the suit property. However, even thereafter, the first defendant evaded and avoided to execute the sale deed in favour of the plaintiff. Therefore, the plaintiff has filed the suit for specific performance with an alternative prayer for refund of the advance amount of Rs.28,77,000/- with interest at the rate of 18% per annum.

4. The defendants have filed a written statement and resisted the suit filed by the plaintiff. In the written statement, the defendants have admitted the execution of the agreement of sale dated 15.02.2009 with the plaintiff and the receipt of the advance amount. However, it was contended that the agreement of sale came to be executed with a specific understanding that the sale should be

completed on or before 13.04.2009. In other words, according to the defendants, time was the essence of the contract within which period, the plaintiff has to pay the balance sale consideration and to get the sale deed executed in his favour. However, inspite of repeated demands made by the defendants, the plaintiff did not pay the balance sale consideration before 13.04.2009. The plaintiff, having failed to pay the balance sale consideration within the time stipulated in the agreement of sale, cannot contend that the defendants have postponed the execution of the sale deed. Further, the plaintiff, taking advantage of the purchase of the suit property by the first defendant along with others and that third parties have become joint owners of the suit property, has filed the suit for specific performance after expiry of the time stipulated under the agreement dated 15.02.2009. Further, the plaintiff is fully aware of the purchase of the suit property by the first defendant along with others, however, he did not implead the co-owners of the suit property as party to the suit and therefore, the suit is bad for non-joinder of necessary party. Thus, according to the defendants, the plaintiff was never ready and willing to perform his part of the contract within the time stipulated in the agreement of sale dated 15.02.2009. However, he has issued the notice dated 01.12.2009 through his advocate falsely claiming as though he was ready and willing to perform his part of the contract. Therefore, the defendants sought for dismissal of the suit.

5. On the above pleadings, the trial court framed as many as six issues. During the course of trial, the plaintiff examined himself as PW1 and Exs. A1 to A11 were marked. On the side of the defendants, the first defendant examined himself as DW1, but no document was marked. The trial Court, after analysing the

oral and documentary evidence, by the Judgment dated 05.07.2012, rejected the claim of the plaintiff for specific performance of the agreement of sale dated 15.02.2009, however, accepted the plea of the plaintiff for refund of the advance sale consideration of Rs.28,77,000/-. Thus, the trial court dismissed the suit, however, directed the defendants herein to jointly pay the advance amount of Rs.28,77,000/- together with interest at the rate of 12% per annum from the date of agreement till the date of realisation. Till such payment, it was ordered that a charge will be created over the suit properties standing in the name of the first defendant for the suit amount. As against the dismissal of the suit for specific performance, the plaintiff has not filed any appeal. However, as against the direction issued by the trial court for refund of the advance amount of Rs.28,77,000/-, the defendants have come up with this appeal.

6. The only argument advanced by the learned counsel appearing for the defendants/appellants before us is that the trial Court, while dismissing the suit for specific performance, ought not to have directed the defendants to refund the advance sale amount of Rs.28,77,000/- with interest at the rate of 12% per annum. According to the learned counsel for the defendants/appellants, as per the recitals contained in the agreement of sale dated 15.02.2009, Ex.A1, in the event of the failure on the part of the plaintiff in performing his part of the obligations within the time stipulated in the agreement of sale, the defendants have every right to forfeit the advance amount paid by the plaintiff. When the agreement of sale contains a default clause, the trial court is not right in directing the defendants to repay the advance amount paid by the plaintiff with interest. In support of his contentions,

the learned counsel for the defendants/appellants relied on the decision of the Honourable Supreme Court in the case of **(P.S. Ranakrishna Reddy vs. M.K. Bhagyalakshmi and another)** reported in **(2007) 10 Supreme Court Cases 231** wherein in para No.14, it was held as follows:-

“14. The purported default clause, to which our attention has been drawn by Mr. Chandrasekhar, does not lend support to the conclusion that the same was a contract of loan. By reason thereof, the respective liabilities of the parties were fixed. In the event, the provisions of the said contract were breached, the damage which might have been suffered by one party by reason of act of omission or commission on the part of the other in the matter of performance of the terms and conditions thereof had been quantified. The quantum of damages fixed therein was the same for both the parties. The submission of Mr. Chandrasekhar that in view of the fact that parties had agreed that in the event of breach on the part of the appellant, the respondent would be entitled to claim damages for a sum of Rs.10,000 only and, thus, the said agreement of sale was not meant to be acted upon cannot be accepted. If the said contention is accepted, the damages quantified in the event of any breach on the part of Respondent 1 cannot be explained. It is clear that in the event of commission of any breach on the part of the respondent, the appellants are entitled to forfeit the entire amount offered as advance. The very fact that the parties intentionally incorporated such default clause clearly goes to show that they intended to lay down their rights and obligations under the contract explicitly. They, therefore, knew the terms thereof. They understand the same. There is no uncertainty or vagueness therein.”

7. Relying on the above decision, the learned counsel for the defendants/appellants would contend that when the plaintiff has agreed for the clauses incorporated in the agreement of sale, it is no longer open to him to seek for refund of the amount advanced towards part of sale consideration.

8. On the above contention, this Court heard the learned counsel for the plaintiff/respondent herein. The learned counsel for the plaintiff/respondent would contend that at the time when the agreement of sale was entered into between the plaintiff and the defendants, the defendants were not the owners of the suit

property and they were only agreement holders. Subsequently, the first defendant alone became the owner of the suit property along with other co-owners. In such circumstances, the plaintiff cannot be expected to fulfil his obligations to pay the balance sale consideration to the defendants within the time stipulated in the agreement of sale and it cannot be a reason for the defendants to forfeit the advance amount paid. In other words, according to the learned counsel for the plaintiff, the conditions incorporated in the agreement of sale could not be enforced due to the failure on the part of the defendants to acquire a right, interest and title over the suit property and consequently, they have no right to forfeit the advance amount paid by the plaintiff.

9. We have heard the learned counsel for both sides and perused the material records placed. The only point arises for consideration in this appeal is as to whether the court below is right in directing the defendants to refund the advance amount paid by the plaintiff notwithstanding the default clause contained in the agreement of sale dated 15.02.2009, Ex.A1.

10. Before dealing with the rival contentions, we feel it just and proper to refer to the legal position enumerated by this Court as well as the Honourable Supreme Court in identical cases. In **2007(2) CTC 345 (Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao)**, in an identical case, the Hon'ble Supreme Court held 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 of 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."

11. 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."

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."

13. The legal position enumerated above would only indicate that 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. Further, even in the absence of a prayer for refund of the advance sale amount by the plaintiff, with a view to render complete justice, the Court is empowered to mould the relief and to issue appropriate direction to the defendant for refund of the advance sale price. Notwithstanding the above legal position, in the present case, as rightly pointed out by the learned counsel for the plaintiff, on 15.02.2009 when the plaintiff and the defendants have entered into an agreement of sale under Ex.A1, the defendants have not acquired any right, title or interest over the suit property and on that date they are only agreement holders in respect of the suit property. Further, admittedly, even after the expiry of the time stipulated in the agreement of sale under Ex.A1, it is only the first defendant who has acquired a right over the suit property along with the other co-owners and therefore, the plaintiff cannot be blamed for not performing his part of the obligations contained under the

agreement of sale dated 15.02.2009. Furthermore, in such a circumstances, the conditions incorporated in the agreement of sale dated 15.02.2009 will not bind the plaintiff in any manner or such conditions will confer any right to the defendants to forfeit the advance sale amount paid by the plaintiff. In such circumstances, we feel that the trial court is wholly justified in issuing a direction to the defendants to refund the advance amount of Rs.28,77,000/- to the plaintiff. At the same time, we find that the rate of interest of 12% per annum, at which the defendants were directed to pay the advance amount of Rs.28,77,000/-, is not warranted and instead the defendants shall be directed to pay the amount of Rs.28,77,000/- with interest at the rate of 7.5% per annum.

14. In the result, we confirm the decree and judgment passed by the trial court only in so far as it relates to the direction, directing the defendants to refund the sum of Rs.28,77,000/- to the plaintiff. As far as the rate of interest at which the defendants were directed to pay the sum of Rs.28,77,000/- is concerned, we modify it from 12% per annum to 7.5% per annum. Accordingly, the Appeal Suit is dismissed. No costs.

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(R.P.S.J.) (P.V.J.)

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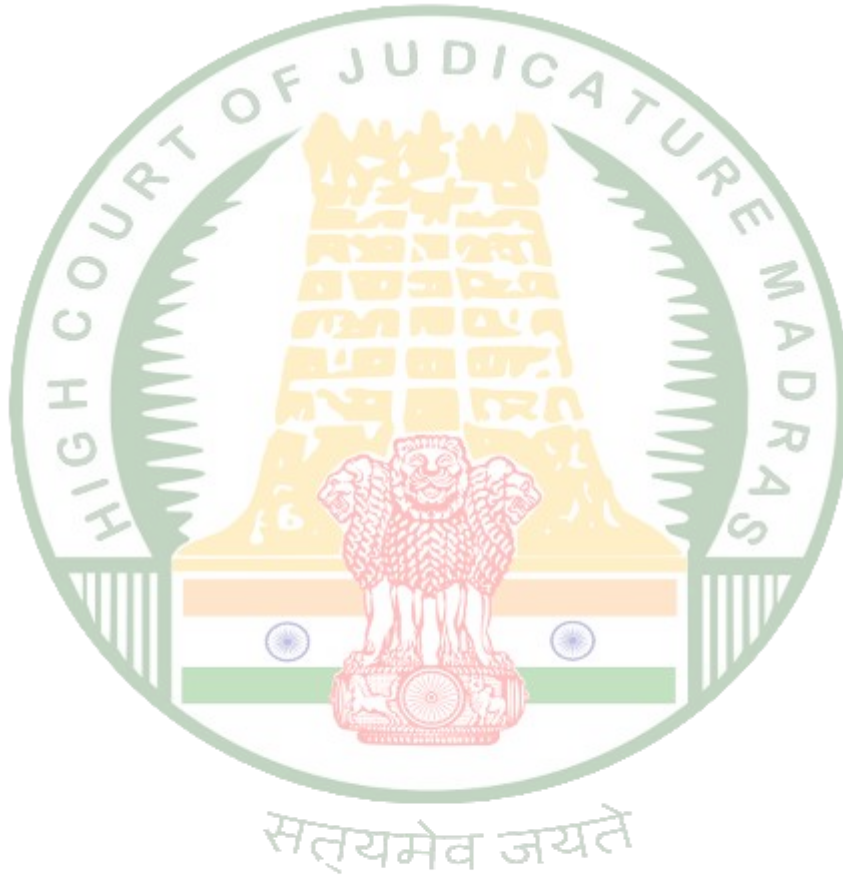
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To

The Principal District Judge
Erode

R. SUBBIAH, J
and
P. VELMURUGAN, J

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Pre-delivery Judgment in
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