HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

S.A.No.1040 of 2017

JUDGMENT:

Heard Sri N.Subba Rao, learned counsel for the appellant and Sri S.V.Ramana, learned counsel for the respondent.

2. This Second Appeal is preferred under Section 100 CPC by the appellant challenging the judgment and decree dt.25-10-2016 in A.S.No.116 of 2009 allowing the appeal filed by the respondent partly and setting aside the judgment and decree dt.10-08-2009 in O.S.No.129 of 2006 of the Principal Senior Civil Judge, Tirupathi.

3. The respondent/plaintiff filed the suit for specific performance of agreement of sale Ex.A-1 dt.10-02-2005 executed by the appellant in his favour. He contended that the appellant had sold the plaint schedule property to him under the said agreement of sale for a sum of Rs.4,23,100/-; that he paid an advance of Rs.1.00 lakh to the appellant; that the balance of sale consideration was agreed to be paid on or before dt.21-04-2005; the respondent was always ready and willing to perform this part of contract; when he went to the plaint schedule property, he discovered that plaint B schedule property is in occupation of third party who had fenced it; that the eastern boundary of the property was mentioned as 20’ road, but on the side, there was no road at all; and so he demanded the appellant to recover the plaint B schedule property and deliver it to him and deduct the sale consideration for the extent of 174’. He contended that appellant did

not take any steps and therefore he issued Ex.A-2 notice on 09-10-2005 calling upon the appellant to perform his part of the contract but the appellant evaded to receive the notice, and so he filed the suit.

4. The respondent later amended the plaint and also sought refund of the sale consideration and such amendment was allowed in I.A.No.1050 of 2008 on 27-01-2009.

5. The appellant filed a Written Statement opposing the suit claim. He contended that the respondent was not ready and willing to perform his part of contract by paying the balance sale consideration and so the advance amount of Rs.1.00 lakh was forfeited and Ex.A-1 was also rescinded. He also contended that the agreement had become unenforceable, that it was barred by limitation apart from the suit being hit by Order 2 Rule 2 CPC. He contended that there was no encroachment of suit schedule property, that the said excuse was invented only for the purpose of suit and the respondent was not entitled to either relief of specific performance of contract or for refund of sale consideration.

6. The trial Court framed the following issues:

> *"1. Whether the plaintiff is entitled to relief of specific performance of suit agreement of sale?*
>
> *2. Whether the suit is barred by limitation?*
>
> *3. To what relief?"*

7. An additional issue was also framed on 03-03-2009, *"Whether the plaintiff is entitled to refund of advance amount of Rs.1.00 lakh as prayed?"*

8. The respondent examined P.Ws.1 and 2 and marked Exs.A-1 to A-3. The appellant examined D.Ws.1 and 2 but did not mark any document.

9. The trial Court held that the suit was not barred by limitation and had been filed within time; but it denied relief of specific performance to the respondent on the ground that he was not ready and willing to perform his obligation under Ex.A-1 and that he was not ready and pay the balance consideration by 21-04-2005. It also came to the opinion that time was made essence of the contract as per the terms of the agreement of sale and so the respondent violated the terms of the agreement. The trial Court also did not grant to the respondent relief of refund of sale consideration in view of the finding on issue No.1 and thus, dismissed the suit with costs.

10. Aggrieved by the same, respondent filed A.S.No.116 of 2009 before the VI Additional District Judge (F.T.C.), Tirupathi, not only against denial of relief of specific performance but also denial of alternative relief of refund of advance amount.

11. The lower appellate Court concurred with the trial Court and held that the respondent was not entitled to the relief of specific performance of agreement of sale since he did not pay the balance sale

consideration before the stipulated period and he did not offer to pay it or tried to deposit before any elders or any Nationalized Bank. However it held that the respondent was entitled to alternative relief of refund of advance amount of Rs.1.00 lakh. It opined that the appellant conceded the case of respondent insofar as receiving of amount of Rs.1.00 lakh on the date of execution of Ex.A-1; that the appellant, being vendor, stood to benefit on account of steep increase of market value of plaint schedule properties; and therefore he is bound to refund the advance amount of Rs.1.00 lakh with interest at 18% per annum.

12. Assailing the same, this Second Appeal is filed.

13. Sri N.Subba Rao, learned counsel for the appellant, contended that the lower appellate Court erred in granting relief of refund of earnest money to the respondent. He pointed out that as per the terms agreed between the parties under Ex.A-1, the appellant was entitled to forfeit the advance amount of Rs.1.00 lakh; and having accepted the said term, the respondent cannot now seek refund of the advance amount of Rs.1.00 lakh. He also contended that award of interest at 18% per annum by the lower appellate Court is excessive.

14. Learned counsel for the respondent, on the other hand, supported the judgment of the lower appellate Court. He contended that the clause in the agreement entitling the appellant to forfeit the sum of Rs.1.00 lakh in the event of breach of contract by him is penal

in nature and is not a genuine pre-estimate of the loss, if any suffered by the appellant, and the said clause therefore cannot be enforced. He further contended that as rightly held by the lower appellate Court, the appellant would have in fact benefited by the steep increase in the market value of the plaint schedule properties between the date of filing of the suit and the date of the judgment of the lower appellate Court, that he did not suffer any loss at all and therefore the judgment of the lower appellate Court cannot be interfered with.

15. I have noted the contentions of both sides.

16. From the facts and contentions of the parties, it is clear that under Ex.A-1 dt.10-02-2005, the appellant agreed to sell the plaint schedule property to respondent for a sum of Rs.4,23,000/-, that the appellant received Rs.1.00 lakh on the date of agreement Ex.A-1 and respondent promised to pay the balance amount by 21-04-2005. It was agreed under Ex.A-1 that the appellant would be entitled to forfeit the advance of Rs.1.00 lakh in the event of breach of contract by the respondent.

17. The question is *"whether this term in the agreement is penal in the nature or not?"*.

18. Section 74 of the Contract Act, 1872 reads, insofar as it is relevant is, as under:

"Section 74 - Compensation for breach of contract where penalty stipulated for:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

... ..."

19. It thus declares the law as to the liability upon breach of contract where compensation is by agreement of the parties predetermined, or whether there is a stipulation by way of penalty. This provision has been interpreted by the Supreme Court in **Kailash Nath Associates Vs. Delhi Development Authority and Another**[1] as under:

> *"**43.1.** Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

[1] (2015) 4 S.C.C. 136

> ***43.2.*** *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*
>
> ***43.3.*** *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*
>
> ***43.4.*** *The section applies whether a person is a plaintiff or a defendant in a suit.*
>
> ***43.5.*** *The sum spoken of may already be paid or be payable in future.*
>
> ***43.6.*** *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*
>
> *43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."*

20. Thus, since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the Section. The expression "*whether or not actual damage or loss is proved to have been caused there by*" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

21. The subject matter of Ex.A-1 agreement is immovable property. In the normal course, unless proved otherwise, there would be a steep increase in its value, and the Court can take judicial notice of the said fact. No evidence has been let in by the appellant to show that there has been depreciation in the value of the subject property between the date of execution of Ex.A-1 and the date when the lower appellate Court had decided the appeal.

22. In the absence of proof adduced by the appellant of actual damage or loss, the said clause providing for forfeiture of amount of Rs.1.00 lakh out of total sale consideration of Rs.4,23,100/- (which amounts to forfeiture of about 25% of the total sale consideration), clearly appears to be penal. By no stretch of imagination, the sum of Rs.1.00 lakh can be said to be a genuine pre-estimate of damage or loss caused to the appellant. So the said clause in Ex.A1 cannot be enforced.

23. Therefore, in my considered opinion, lower appellate Court rightly came to the conclusion that there would be a steep increase in the market value of the subject property, that the appellant cannot be said to have suffered any loss or damage, and therefore, the respondent was entitled to refund of the advance sale consideration of Rs.1.00 lakh.

24. Coming to the question of interest, though the respondent claimed interest at 24% per annum, the lower appellate Court granted

interest at 18% per annum. It again took into account the fact of steep increase in market value of plaint schedule properties for the said award of interest. Also there is bound to depreciation in the value of the value of the Rupee between the date of payment of Rs.1.00 lakh under Ex.A-1 and the date of its refund, and this Court can take judicial notice of the said fact. Therefore, I do not consider it a fit case to interfere with the judgment of the lower appellate Court even as regards the quantum of interest.

25. I therefore find no merit in the Second Appeal and it is accordingly dismissed. No costs.

26. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date:15-02-2018
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