



A.S.No.217 of 2016

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.10.2022

DELIVERED ON : 09.11.2022

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

A.S.No.217 of 2016

and

CROS. OBJ. No.57 of 2016

& CMP No.3289 of 2016

A.S. No.217 of 2016

S. Muruganathan

...Appellant

Vs.

V.C. Kandaswamy

... Respondent

Cross Objection No.57 of 2016

V.C. Kandaswamy

...Cross Objector

Vs.

S. Muruganathan

...Respondent

Prayer in A.S. No.217 of 2016: First Appeal filed under Section 96 r/w Order XLI Rule 1 CPC against the decree and judgment dated 08.12.2014 made in O.S. No.29/2011 on the file of the Principal District Court, Dharmapuri.

Prayer in Cross Objection No.57 of 2016 : Cross Objection filed under Order 41 Rule 22 CPC against the decree and judgment dated



A.S.No.217 of 2016

08.12.2014 made in O.S. No.29/2011 on the file of the Principal District Court, Dharmapuri.

For Appellant : Mr. C.D. Sukumar
For Respondent /Cross Objector : Mr.S. Saravana Kumar

JUDGMENT

The appeal and the cross objection is against the decree and judgment dated 08.12.2014 in O.S. No.29/11 on the file of the Principal District Court, Dharmapuri.

2. The First Appeal in A.S. No.217/2016 was filed by the defendant and the Cross Objection in Cros. Obj. No.57 of 2016 is filed by the plaintiff.

3. For the sake of convenience the parties are referred to as per their ranking in the trial court and in appropriate places, their ranking in the present petition would also be indicated.



A.S.No.217 of 2016

WEB COPY

4. The case of the plaintiff is as follows:

- i. The suit properties belonged to the defendant and they are situated in Pilparuthi village, Papirreddy Taluk, Dharmapuri District.
- ii. The defendant/appellant desired to sell the suit properties to the plaintiff/respondent vide a sale agreement dated 07.02.2011 for a sum of Rs.33,00,000/-, out of which a sum of Rs.10,00,000/- was paid as an advance on the same day.
- iii. It was also agreed to allow time till 07.06.2011 for the plaintiff to pay the balance sale consideration.
- iv. The suit properties were handed over to the plaintiff on the same date with the condition that the plaintiff can level and develop the land to facilitate the formation of lay outs and sell as plots before expiry of the time allowed i.e. 07.06.2011.
- v. The plaintiff contended that he had spent about Rs.2,00,000/- towards the development of the land by levelling the land and getting it ready. Moreover, he had also spent about Rs.1,00,000/- for digging a bore well and thus spent about Rs.3,00,000/- on the land/suit properties.



A.S.No.217 of 2016

WEB COPY

- vi. The plaintiff was ready and willing to pay the balance sale consideration of Rs.23,00,000/-. The defendant did not show any interest in closing the deal causing avoidable stress to the plaintiff. Instead the defendant was trying to alienate the suit properties.
- vii. The plaintiff, therefore, filed a suit for recovery of the advance amount of Rs.10,00,000/- and also a sum of Rs.2,00,000/- (restricted from actual Rs.3,00,000/- spent by him), which he had spent on developing the land along with interest for both the amounts @ 18% per annum. The prayer also indicated grant of permanent injunction restraining the defendant from alienating the suit properties and other consequential reliefs.

5. The defendant resisted the suit by contending that as per the agreement on 07.02.2011 it is clear that if the plaintiff failed in making the balance payment within the prescribed time limit agreed upon by them, he would forfeit the advance amount paid. Moreover, he has also contended that the claim by the plaintiff that he spent Rs.2,00,000/- on the development of the land and Rs.1,00,000/- for digging of a bore well



A.S.No.217 of 2016

WEB COPY

are all false and that it was already done by the defendant even before handing over the properties. Therefore, the defendant prayed for dismissal of the suit.

6. On the basis of the above pleadings, the trial court framed the following issues.

- i. Whether the plaintiff is entitled to return of advance of Rs.10,00,000/- and Rs.2,00,000/- to levelling the land and charge over the suit property till realization?
- ii. Whether the plaintiff is entitled to permanent injunction?
- iii. Whether the defendant already levelled the land before entering into agreement of sale?
- iv. Whether the bore well was already in existence as contended by the defendant is true?
- v. Is it true that agreement of sale comes to an end by 07.06.2011 and therefore the plaintiff lost his advance amount as contended by the defendant?
- vi. Is it true that since plaintiff did not claim any right over the suit



A.S.No.217 of 2016

WEB COPY property he is not entitled to the relief of permanent injunction as contended by the defendant?

vii.What relief the plaintiff is entitled to?

7. In the trial court, the plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A6. The defendant examined himself and marked Ex.B1 to Ex.B3.

8. After full contest, the learned Principal District Judge, Dharmapuri, decreed the suit vide his decree and judgment dated 08.12.2014 partially by ordering refund of Rs.8,00,000/- with interest @ 12% per annum to the plaintiff from the date of the plaint till the date of realisation with cost. This decree and judgment has been challenged by both the parties by filing the First Appeal (by the defendant) and Cross Objection (by the plaintiff).

9. Heard Mr. C.D. Sukumar, learned counsel appearing for the appellant and Mr.T.S. Saravana Kumar, learned counsel appearing for



A.S.No.217 of 2016

WEB COPY the respondent.

10. Mr. C.D. Sukuma, learned counsel for the appellant would contend that the trial court had erred in ignoring the terms agreed upon by both the parties in the sale agreement. It was also argued that the trial court had not given any weightage to the fact that the respondent/plaintiff had at no point of time showed his readiness and willingness to pay the balance sale consideration. He relied on the decision in **Satish Batra vs. Sudhir Rawal** reported in **2012(6) CTC 121** in which it was held that the purchaser would have to forego the advance amount paid by him if he fails to show his readiness and to complete the deal. According to the counsel this aspect has not been taken into account by the learned District Judge, but on the other hand, he had arrived at a strange formula that Rs.8,00,000/- has to be refunded to the respondent/plaintiff which has no basis.

11. Per contra, the learned counsel for the respondent contended that the suit was not filed for a specific performance of



A.S.No.217 of 2016

WEB COPY

contract and the advance amount of Rs.10,00,000/- mentioned in the sale agreement is not the Earnest Money Deposit (EMD) and therefore, the decision of the trial court in granting the decree in favour of the respondent/plaintiff cannot be faulted. According to him when the plaintiff had claimed an advance amount of Rs.10,00,000/- and also a sum of Rs.2,00,000/- spent by him towards levelling of land and for digging a borewell, the trial court had passed a decree in favour of the plaintiff directing the defendant to pay a sum of Rs.8,00,000/-. It is also his contention that the trial court failed to adduce proper reasons for deducting Rs.4,00,000/- from the amount claimed by the plaintiff.

12. The points for consideration to be decided in the present appeal are as follows:

- i. Whether the advance amount of Rs.10,00,000/- mentioned in the sale agreement has to be forfeited as per the condition mentioned in the sale agreement?
- ii. Whether the plaintiff is entitled for the refund of advance amount of Rs.10,00,000/- plus a sum of Rs.2,00,000/- which the plaintiff



A.S.No.217 of 2016

WEB COPY spent for levelling the land and digging a bore well?

- iii. Whether the appeal is liable to be allowed?
- iv. Whether the Cross Objection is liable to be allowed?
- v. To what relief?

13. In the instant case, the following facts are accepted by both the parties.

- a) Sale agreement dated 07.02.2011.
- b) The advance amount of Rs.10,00,000/- was received by the defendant from the plaintiff.
- c) The suit properties were delivered to the plaintiff by the defendant for development of the land.

The disputed areas are indicated as follows:

- a) The expenses of Rs.2,00,000/- by the respondent/plaintiff for developing the suit properties.
- b) Expenses of Rs.1,00,000/- on installation of a borewell in the suit properties.
- c) Whether the advance amount of Rs.10,00,000/- should be forfeited



A.S.No.217 of 2016

WEB COPY by invoking the clause mentioned in the sale agreement.

14. Out of the disputed versions of the respondent, the trial court had held that as per the contents of the sale agreement the properties were handed over to the respondent only to develop the same. Therefore, the expenses of Rs.2,00,000/- was accepted. As regards the bore well expenses, the trial court concluded that it is presumed that a well already existed in the suit properties as there was an electrical connection for a motor. The trial court further held that the advance amount of Rs.10,00,000/- is around 30% of the sale consideration and therefore the same cannot be construed as Earnest Money Deposit. Hence it has to be refunded to the plaintiff. The sale agreement dated 07.02.2011 (Ex.A1) shows that the plaintiff and the defendant agreed that the plaintiff would forfeit the advance amount in case he fails to make the balance payment on or before 07.06.2011. The decision in **Satish Batra vs. Sudhir Rawal** (cited supra) would apply only to refund of Earnest Money Deposit. It is well settled that in order to forfeit the Earnest Money Deposit, it is necessary to have a forfeiture clause in the



A.S.No.217 of 2016

WEB COPY

contract. The forfeiture clause is penal in nature and it will apply only to reasonable compensation but not an undue compensation as a penalty to perform a contract. Thus it is clear that a party guilty of breach of contract however is eligible only for a reasonable amount of penalty even if the contract includes a penalty clause. In the instant case, the advance amount was about 30% of the total agreed sale consideration which is apparently quite high.

15. The nature and character of the advance amount/Earnest Monery Deposit has been examined by the Apex Court in ***Vidoecon Properties Ltd vs. Dr. Bhalchandra Laboratories and others*** reported in ***(2004) 3 SCC 711***. The Apex Court took the view that the words used in the agreement alone would not determine the character of "Earnest Money Deposit". But the intention of the parties and the surrounding circumstances must also be taken into account so as to know whether the prior payment is essentially an advance deposit or EMD. In the sale agreement dated 07.02.2011 (Ex.A1) the word "advance payment" finds a place. It is also pertinent to mention here that a prospective buyer, as



A.S.No.217 of 2016

WEB COPY

per Section 55 (6) (b) of the Transfer of Property Act, is entitled to a charge on the property against the seller and all persons claiming under him for the amount of purchase money (advance amount) paid by him as part of the sale consideration. Therefore, the trial court had given a equitable relief to the respondent/plaintiff clearly explaining that the advance amount cannot be construed as EMD and need to be refunded to the buyer irrespective of the fact that there was a forfeiture clause in the sale agreement.

16. Another clause in the sale agreement clearly spelt out that in case the seller refuses to accept the balance sale consideration, the buyer has the liberty to deposit the same in the court. The respondent/plaintiff did not do this. He has rather preferred to approach the Court when he felt that the appellant/defendant is trying to alienate the suit properties. He has also not filed the suit for specific performance but only for recovery of advance amount paid by him. When there is a breach of contract, the party who suffers from such breach, is entitled to receive the compensation for no loss of damage. However, it is also



A.S.No.217 of 2016

WEB COPY

settled that no compensation can be granted if a claim is not raised. Thus it is clear that payment made towards part payment of purchase price but not intended as EMD cannot be forfeited. It can be forfeited only if it is guaranteed the due performance of the contract i.e., Earnest Money Deposit.

17. In the instant case, it is evident that a sum of Rs.10,00,000/- was paid as an advance amount against the total sale consideration of Rs.33,00,000/-. An extra amount of Rs.2,00,000/- was reportedly spent by the respondent/plaintiff towards development of the land. However, the trial court had scaled down the refund amount to Rs.8,00,000/- which appears to be arbitrary and with no specific basis. The trial court had also held that the amount of Rs.10,00,000/- was only an advance amount payment and not EMD. With this conclusion the trial court ought to have decided for refund of the entire amount of Rs.10,00,000/- together with interest.



A.S.No.217 of 2016

WEB COPY

18. The learned counsel for the respondent/plaintiff drew the attention of this Court to the cross examination of the defendant (D.W1) wherein he categorically admitted that there was no mention about the existence of a borewell in Ex.A1. Therefore, according to the counsel for the respondent/plaintiff, the plaintiff alone spent a sum of Rs.1,00,000/- for digging a bore well and also Rs.2,00,000/- for developing the lands. But he had restricted his prayer to refund of Rs.2,00,000/- only. The defendant during the course of cross examination admitted that the plaintiff made the suit properties into several housing plots. However, it is his contention that he only laid the road and installed a bore well. The actual expenses incurred by him for this has not been substantiated by adducing bills etc. However, when handing over the suit properties to the plaintiff it was mentioned in the sale agreement that it was for the plaintiff to carry out the development in order to make the suit properties into a layout. Therefore, the trial court rightly held that the development was done by the plaintiff. However, the plaintiff also had not adduced satisfactory documentary evidence for the expenditure.



A.S.No.217 of 2016

WEB COPY

19. In the facts and circumstances I hold that granting a sum of Rs.1,00,000/- towards developing the land and installing bore well would meet the ends of justice. Point No.1 is answered against the appellant and point No.2 is answered accordingly.

20. In the result,

- i. the first appeal is dismissed. No costs. Consequently connected miscellaneous petition is dismissed.
- ii. The Cross Objection is partly allowed.
- iii. The suit in O.S. No.29/2011 on the file of the Principal District Court, Dharmapuri, is decreed partly directing the defendant to pay a sum of Rs.11,00,000/- to the plaintiff together with interest @ 12% per annum from the date of plaint till the date of realisation.

09.11.2022

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
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A.S.No.217 of 2016

R. HEMALATHA, J.
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To

1. The Principal District Judge, Dharmapuri.
2. The Section Officer, VR Section, High Court, Madras.

Pre-delivery Judgment in
A.S.No.217 of 2016
and
CROS. OBJ. No.57 of 2016
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09.11.2022