



A.S.No.480 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.09.2022	Delivered on : 04.11.2022
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THE HON'BLE MR JUSTICE D. KRISHNAKUMAR
AND
THE HON'BLE MRS. JUSTICE N. MALA

A.S.No. 480 of 2013

A.Dhanam ... Appellant

Vs.

D.Krishnan ... Respondent

This Appeal has been filed under Sec.96 of C.P.C. against the judgment and decree passed in O.S.No.30 of 2012 dated 11.02.2013 by the Principal District Judge, Krishnagiri

For Appellants : Mr.J.Hariharan
For Mr.V.Nicholas

For respondent : Mr.Vasudevan
For Mr.E.Kannadasan

JUDGMENT

[Judgement of the Court was made by *D.KRISHNAKUMAR,J.*]

This Appeal has been filed against the judgment and decree passed in O.S.No.30 of 2012 dated 11.02.2013 by the Principal District Judge, Krishnagiri.



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2. For the sake of convenience, the parties are referred to as per their rankings in the suit. The unsuccessful plaintiff in O.S.No.30 of 2012 is the appellant before this Court.

3. The brief facts leading to filing of the present appeal are as follows:

The case of the plaintiffs before the trial court is that on 20.03.2009, the defendant agreed to sell a land to an extent of 18,715 sq. feet to the plaintiff at the rate of Rs.1,15,000/- per Cent which comes to Rs.49,36,268/- and received advance amount of Rs.15,00,000/-. The time limit for performance of sale agreement was fixed as 11 months. Pursuant to the sale agreement, the defendant also received another sum of Rs.9,50,000/- from the plaintiff on 30.03.2009 and made an endorsement on the sale agreement for the receipt of the said amount. On 01.09.2009, the plaintiff called upon the defendant to receive the balance sale consideration amount of Rs.24,86,295/- and to execute sale deed in her favour, but the defendant expressed his inconvenience and postponed the execution of the sale deed. Hence the plaintiff issued legal notice dated 04.08.2010 calling upon the defendant to execute sale deed by receiving the balance sale consideration. The defendant on receipt of the legal notice on 07.08.2010, issued reply notice dated 09.08.2010, falsely alleging that the



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defendant was ready and willing to perform his part of agreement, but the plaintiff was not ready to pay the balance sale consideration within 11 months. It is further alleged by the defendant that the plaintiff approached the defendant after the expiry of the agreement deed and that too after knowing the acquisition of land situated adjacent to the suit property, anticipating the immediate hike of the suit property value. The plaintiff did not want to comfort with the defendant to get the suit land. Hence, she asked the defendant to return the said sum of Rs.24,50,000/- together with interest at 24% from 20.03.2009, but the defendant was postponing to make repayment by one pretext or other. Hence, the plaintiffs filed the suit to recover the advance amount paid by the plaintiff along with interest and cost.

4. The defendant filed a written statement opposing the suit. According to the defendant, there was a contract of sale between the plaintiff and defendants in respect of the suit property. The time limit was fixed as 11 months as an important clause. It was decided that the defendant would sell the suit property to the plaintiff on the ground that the defendant was in urgent need of money and the defendant was willing to register the sale deed on receipt of the balance sale consideration amount, but the plaintiff had not come forward to pay the balance sale consideration



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within the time limit as fixed in the agreement, but after knowing about laying of 4-way roads adjacent to the suit property and by anticipating rapid hike of market value of the suit property, the plaintiff approached the defendant and expressed her willingness to get the property registered. Therefore, the suit filed by the plaintiff seeking return of the advance amount paid to the defendant for the purchase of suit scheduled property is liable to be dismissed.

5. The trial court on the basis of the pleadings and the documents filed, framed the following issues namely:

1. Whether the defendant is right in saying that the plaintiff was not ready to pay the balance amount and to register the sale deed?
2. Whether the plaintiff is eligible to recover a sum of Rs.42,06,400/- along with interest from the defendant as claimed in the suit?
3. Whether the statement of the defendant that even though he was ready to register the suit property on receipt of balance sale consideration amount, since the plaintiff did not come forward and approached after lapse of time limit, he lost the advance amount is right?
4. To what other reliefs ?



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6. To prove the case of the plaintiff, the plaintiff was examined as P.W.1 and marked documents as Exhibits A-1 to A-5. The defendant was examined as D.W.1 and one A.V.Raja, was examined as D.W 2 and Exhibits B-1 to B-3 were marked on behalf of the defendant.

7. The Court below placing reliance on Ex.P1 Sale agreement, has held that the plaintiff has not come forward to execute the sale deed by paying balance sale consideration within a period of 11 months as fixed in the sale agreement and after the expiry of sale agreement, the plaintiff sent legal notice Ex.P3 on 4.8.2010. The Court below based on the evidence placed by the defendant has held that time is essence of the contract and the defendant was ready to execute the sale deed. However, the plaintiff failed to perform his part of the contract by paying balance sale consideration within the time stipulated in the sale agreement and dismissed the suit. Aggrieved by the judgment and decree dated 11.02.2013, the plaintiff in the suit filed the instant appeal.

8. The learned counsel appearing for the appellant/plaintiff has contended that the amount paid by the plaintiff is not an earnest money forms a small proportion to the consideration which can be forfeited in the



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absence of proof for damages, whereas in the case on hand, the appellant has initially paid a sum of Rs.15,00,000/- and subsequently, a sum of Rs.9,50,000/- and thus totally a sum of Rs.24,50,000/- nearly 50% of the total sale consideration of Rs.49,36,295/-. The clause in the agreement providing forfeiture of the amount paid is in the nature of penalty and therefore, merely on the basis of the said clause in the agreement, the defendant cannot be permitted to unjustly enrich himself by forfeiting the entire amount paid towards sale consideration. Further it is contended by the counsel appearing for the appellant that there was no proof of damages on the part of the defendant for the alleged breach of contract. In support of his submission, the learned counsel appearing for the appellant relied on the following decisions:

1. **Bhagavathi Mudaliar Vs. N.Subramaniam [AIR 1969 MADRAS 317 (V.56 C 71)]**
2. **Marimuthu Goundar vs. Ramaswamy Gounder and others [AIR 1979 MADRAS 189 DB]**
3. **Chinnasamy Pillai & five others vs. K.Marappan and another [1996(I) CTC 318]**
4. **Surendranath Talukdar and others vs. Lohit Chandra Talukdar [AIR 1975 GAUHATHI 58]**
5. **N.Sekaran and another vs. C.Rajendran [2017(3) MWN (Civil) 716]**



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9. The learned counsel appearing for the respondent has submitted that the Court below on perusal of the oral and documentary evidence placed before it, has rightly dismissed the suit and therefore, interference of this Court is not warranted.

10. Heard the learned counsel appearing for the appellant and the learned counsel for the defendant. We have also perused the entire records including the judgment and decree passed by the trial court.

11. This appeal raises a question as to whether the defendant can forfeit a sum of Rs.24,50,000/- when the said amount was paid by the plaintiff as part of sale consideration.

12. Before going into the aforesaid question, It would be relevant to extract Section 64 of the Indian Contract Act, 1872.

"64. Consequences of rescission of a voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promiser. The party rescinding a voidable contract shall, if he had received any benefit thereunder from another party to such contract, restore such benefit, so



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far as may be, to the person from whom it was received."

13. This Court in an identical issue in **Chinnasamy Pillai & five others vs. K.Marappan and another [1996 (I) CTC 318]** has held as under:

"3. I have considered the rival submissions. As held in H.C. Mills v. Tata Air Craft, AIR. 1970 S.C. 1986, earnest money is money given as guarantee for the fulfilment of the contract. But I must point out that there is no such plea at all in the written statement of the defendants in either of the suits. Neither the term Earnest Money is used there, nor there is a plea, that the money in question was given as guarantee for the fulfilment of the contract. On the other hand, in paragraph 14 of the written statement what is mentioned is as follows:- So in the written statement itself, the money in question is described as an advance. It is settled law if the money given is only an advance, it has to be given back to the vendor and cannot be forfeited. (Vide Sardarilal v. Shakuntla Devi, AIR. 1961 Punjab 378 (D.B.).

4. Even assuming it is earnest money, the law is that unless there is proof that the defendants have suffered by the breach of contract committed by the plaintiff, it cannot be forfeited, but has to be given back to the vendor. It has also been so held in Marimuthu Gounder v. Ramaswamy Gounder 1971 (I) M.L.J. 343



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and Natesa v. Sulochana 1981 (2) M.L.J. 215
Division Bench. In the later decision, the relevant observation is as follows:-

"Whether the amount paid at the time of the contract for sale is treated as advance or deposit or earnest money, Section 74 of the Contract Act, will be attracted notwithstanding the clause for forfeiture of the said amount, the party in breach will be entitled only to a reasonable compensation subject to the maximum amount mentioned in the agreement for sale." (emphasis supplied).

In the former decision, the relevant observation is "Proof of actual damage was a sine quo non to seek damages" In the present case, there is a clear finding by the lower appellate Court regarding this aspect as follows :-

"இந்த வழக்கில் பிரதிவாதிகள் தங்களுக்கு நஷ்டம் ஏதும் ஏற்பட்டதாக மெய்ப்பிக்கவில்லை"

As against this factual finding learned counsel for the appellants could not point out a single ground in the second appeal memorandum of grounds. Therefore, when it is established that the defendants have not suffered any damage because of any breach of contract committed by the plaintiff, they have necessarily to refund the abovesaid amount, and that is what the lower



appellate court has done. I am unable to see any error at all in the judgment and decree of the lower appellate Court. Accordingly, the second appeal is dismissed with costs."

14. The Division Bench of this Court in **N.Sekaran and antoher vs. C.Rajendran [2017 (3) MWN (Civil) 716]** while dealing with suit for Specific Performance Act along with Sec.74 of the Contract Act, has held as under:

"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,



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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."

15. On facts of the case, the defendant had marked Exhibit -B3 paper publication, dated 10.07.2010 published by the High Ways Department in the 'Dinamani Daily' for acquisition of lands for laying of 4-way roads



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adjacent to the suit property, wherein the Highways departments has called
for the objections, if any from the land owners of the lands mentioned in
the said notice.



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16. On careful analysis of the decisions cited supra and the judgment of the Court below, we are of the opinion that since said notification relied upon by the defendant was issued subsequent to the sale agreement entered into between the parties and the advance payment was not made by the plaintiff as guarantee for the fulfillment of contract but was made only as part payment of the purchase price agreed upon between the parties, the advance amount should be refunded. Further, the respondent/defendant has not placed any substantial evidence to prove that due to the breach of contract by the plaintiff he has suffered damages.

17. Therefore, when the money is paid as part of sale consideration, the forfeiture clause will be treated as having the effect of penalty. This Court cannot permit the defendant/vendor to unjustly enrich himself merely on the ground that the plaintiff breached the contract by not performing her contractual obligations in the sale agreement. Admittedly, the defendant received a sum of Rs.24,50,000/- as advance towards the total sale consideration of sum of Rs.49,36,295/- and the said amount is major portion of the sale consideration and the same shall be refunded to the appellant/plaintiff. We accept the contentions made by the learned counsel for the appellant/plaintiff.



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18. In the light of foregoing discussion and the decisions cited supra, the judgment and decree passed in O.S.No.30 of 2012 dated 11.02.2013 by the Principal District Judge, Krishnagiri is set aside. The appeal is allowed. The defendant is directed to refund the sum of Rs.24,50,000/- along with interest at the rate of 6 % per annum to the plaintiff within a period of three (3) months from the date of receipt of a copy of this judgment. No costs.

[D.K.K.J.]

[N.M.J.]

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Speaking/Non Speaking Judgment

Index: Yes/No

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(Order of the Court was made by D.KRISHNAKUMAR, J.)

After the judgment was pronounced in the open court, learned counsel for the respondent submitted that the dispute in respect of the subject land is now pending before the Sub Court, Uthangarai in LAOP No.4/2014 and in the aforesaid LAOP, the appellant has filed counter-claim, seeking for compensation amount in respect of the appellant's share from the respondent.

2. Learned counsel for the respondent agreed that in the event the amount is paid by the respondent, to comply with the decree, the appellant shall not press the said counter-claim now pending before Sub-Court, Uthangarai. Learned counsel for the appellant also agreed, that in the event of the amount settled as per the decree in suit, the appellant would not press for the counter-claim pending before the Sub-Court, Uthangarai.

3. Statement of both counsel is recorded.

(D.K.K., J.) (N.M., J.)
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