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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2022

CORAM :

THE HON'BLE MR.JUSTICE T.RAJA
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.567 of 2018

Anandhababu

... Appellant/Plaintiff

Versus

1.C.Chinnadurai

2.S.Veerassamy

... Respondents/Defendants

Prayer : First Appeal filed under Order XL1 Rule 1 and Section 96 of C.P.C to set aside the judgment and decree, dated 28.03.2018 in O.S.No.140 of 2014 on the file of the learned I Additional District Judge, Salem and to allow the appeal.

For Appellant : Mr.R.Nalliyappan

For Respondents: Mr.Murugamanickam, Senior Counsel
for Mrs.Zeenath Begum

JUDGMENT

(Judgment of the Court was delivered by Mr.Justice D.Bharatha Chakaravarthi)

A.The Appeal Suit:

This Appeal suit is filed by the unsuccessful plaintiff, aggrieved by the Judgment and Decree passed by the Learned Additional District in the suit in O.S.No.140 of 2014 dated 28.03.2018, whereby the suit filed by the plaintiff for a direction to the defendants to pay a sum of Rs. 28,65,335/- , towards refund of the advance sale price of Rs.20,00,000/- paid by him pursuant to an agreement of sale dated 24.10.2010, to purchase agricultural lands totally admeasuring Ac.5.23cents belonging to the defendants, along with the interest thereon at the rate of 12% per annum, was dismissed by the Trial Court.



2. For the sake of convenience the parties are referred to as per their array in the original suit itself as plaintiffs and defendants.

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B. The case of the plaintiff:

3. According to the plaintiff the properties described in the description of plaint belong to the defendants. The defendants agreed to sell the suit properties to the plaintiff at the rate of Rs.23,000/- per cent and on 21.04.2010, the plaintiff and the defendants have entered into an unregistered sale agreement and the plaintiff paid a sum of Rs. 20 Lakhs as advance towards the costs of the sale consideration. The time agreed for completion of the transaction is seven months. However subsequently the plaintiff came to know that one of the properties that is the property in Survey No.50/2, Kottagaoundampatti Village, Omalur Taluk, is involved in an encumbrance of a loan by deposit of title deeds with the Indian overseas Bank, which was revealed through the encumbrance certificate taken by the plaintiff on 26.10.2010. Secondly, there is one Madurai Veeran Temple in the properties involved in the suit sale agreement and therefore the relatives of the defendants (Pangalis) are objecting to the plaintiff/third-party for purchasing the property. This apart, there is a house situated in the property and the said house is involved in a mortgage loan.

4. The plaintiff therefore approached the defendants and requested them to clear the said encumbrance and get ready for the sale. However the defendants suddenly issued a legal notice on 10.05.2011 to complete the transaction and the plaintiff issued a reply notice dated 22/05/2011 stating that he will not come to the Registrar's Office to complete the transaction unless the said three encumbrances are cleared. While so on 15.02.2012, the plaintiffs observed that some third parties are entering into the suit properties and since the intention of the defendants is to cheat the plaintiff became clear, the plaintiff filed a suit in O.S.No.162 of 2012 on the file of the District Munsif, Omalur, for a permanent injunction restraining the defendants from alienating or encumbering the suit properties to any third parties. However since the defendants have not thereafter also cleared the encumbrances the plaintiff has no intention of purchasing the suit properties and therefore he has filed the present suit for return of the advance amount of Rs.20 Lakhs along with further interest at the rate of 12% per annum.

The case of the defendants:



5. The defendants resisted the suit by filing a written statement admitting the sale agreement that they entered into for selling the property at the rate of Rs.23 lakhs per acre and a sum of Rs. 20 lakhs was received from the plaintiff and the time to conclude the sale has been fixed as seven months. As a matter of fact, the plaintiff agreed to pay a sum of Rs.50 Lakhs within two months from the date of agreement. But, however, the plaintiff did not do so, and the plaintiff also tactfully avoided the same being put into writing in the agreement. However subsequently the defendants found that the plaintiff has no means to pay and he was never ready or willing to perform his part of the contract. His idea was to keep the suit properties under his clutches by entering into a sale agreement and scheming out by finding some other purchaser(s) for higher prices and make a profit out of it. There is absolutely no encumbrance whatsoever in the suit properties. As a matter of fact Survey No.52/2 is 3.75 acres out of which only 2.19 acres belongs to the defendants and the remaining 1.65 acres belong to third parties. The said third party namely M/s. High-Tech Mineral Industries Private Limited, had created an encumbrance over their property, which has only reflected in the encumbrance certificate. Therefore the first allegation of encumbrance is false. Similarly Madurai Veeran Temple is not situated in any of the properties agreed to be sold. The said Temple is situated in some other land which belongs to one Chinnusamy. Further, Madurai Veeran deity is also not the deity of the defendants or their Pangalis. As far as the third allegation, the defendants raised a mortgage loan over the house property is concerned, the defendants have already discharged the said loan and therefore the plaintiff's case that there was encumbrances in the property is false. The conduct of the plaintiff that he is not ready and willing to go-ahead with the transaction will be clear from the fact that even though seven months time was nearing completion, the plaintiff did not issue any notice and take any steps to complete the transaction and the plaintiff simply slept over the matter. In the meanwhile the value of the properties are rising day by day. The defendants, therefore approached the plaintiff, but since there was no response, they issued a legal notice on 19.05.2011 requiring the plaintiff to conclude the sale within the stipulated time. Without complying with the request, the plaintiff issued a reply claiming the bogus encumbrances which were not there in the suit property. Thereafter, instead of filing a suit for specific performance, the plaintiff filed suit for permanent injunction in O.S.No.162 of 2012 and the defendants were contesting the case. The plaintiff had no intention to purchase the suit property. It is clear that he is purposefully evading to perform his part of the



contract, The sum paid by the plaintiff is only an earnest money and it stood forfeited as transaction failed on account of the default of the plaintiff. The said fact is very clearly stated in the agreement itself. The defendant is put to loss and hardship on account of the action of the plaintiff.

The trial:

6.On the said pleadings the trial Court framed the following two issues:

(i) Whether the plaintiff is entitled for the sum prayed in the plaint along with interest?

(ii) To what other relief?

The plaintiff examined himself as P.W.1 and one Kathirvelu who was witness to the agreement as P.W.2. On behalf of the plaintiff, the sale agreement was marked as Ex.A1; the legal notice issued by the defendants on 19.05.2011 was marked as Ex.A2; the reply notice caused by the plaintiff on 22.05.2011 was marked as Ex.A3; the plaint filed by the defendant in O.S.No.162 of 2012 is marked as Ex.A4; the encumbrance certificate dated 02.11.2017 is marked as Ex.A5.

7.On behalf of the defendants, the first defendant was examined as D.W.1, one Manivasagam was examined as D.W.2 and one Suman Prabhu was examined as D.W.3. On behalf of the defendants, Patta No.181 in favour of the defendants issued on 12.12.2017 was marked as Ex.B1; Chitta corresponding to the Patta No.181 dated 12.12.2017 was marked as Ex.B2; the Adangal accounts for fasali No.1427 issued on 12.12.2017 was marked as Ex.B3; Patta No.29 issued in favour of the defendants dated 12.12.2017 is marked as Ex.B4; the Chitta corresponding to Patta No.29 was marked as Ex.B5 and the Adangal as Ex.B6. The defendants also marked the legal notice sent by them to the plaintiff on 19.05.2011 as Ex.B7 and the reply notice issued by the plaintiff as Ex.B8. The judgement of the learned District Munif, Omalur in O.S.No.162 of 2012 was marked as Ex.B9 and the decree in O.S.162 of 2012 is marked as Ex.B10.

8.Upon summoning through court, the Chitta, F.M.B, rough sketch were marked as Ex.X1 and patta numbers relating to the said survey numbers were marked as Ex.X2.

The findings of the trial court:

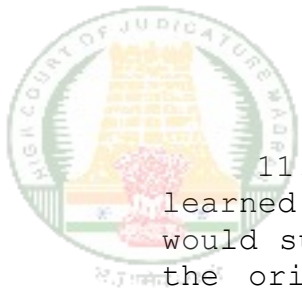


9. Upon considering the oral and documentary evidence on record, the trial court found that there was no encumbrance at all in respect of the extent of the property of the defendants in survey No.52/2 and it is clear from the encumbrance certificate itself and from the other documents marked as Exs.X1 and X2 that the encumbrance was created by third parties in respect of their properties and therefore, the said apprehension raised is not even bonafide. The trial court also found that there was no Madurai Veeran temple in the lands belonging to the defendants. The third encumbrance was also not there and the plaintiff himself in his evidence has not claimed the same. Therefore, the trial court found that the plaintiff did not do anything to perform his part of the contract and he did not even cause any notice or communication, until the defendants issued legal notice, till the expiry of seven months time mentioned in Ex.A1 agreement. Therefore, only to avoid the default on his part, he has raised the plea of encumbrances. Secondly, the plaintiff did not obtain any leave of the court under order 2 Rule 2 of C.P.C, when he filed the earlier suit in O.S.No.162 of 2012 and therefore, the present suit which is filed on the same cause of action is barred under order 2 Rule 2 of C.P.C. In view of the same, the plaintiff having not approached the courts with clean hands and the suit is barred by law, dismissed the suit by holding that the plaintiff is not entitled to any relief. Aggrieved by the findings and conclusions of the trial court, the present Appeal Suit is laid before this Court.

The contentions in the Appeal Suit:

10. Mr. R. Nalliyappan, learned counsel appearing on behalf of the appellant would contend that the agreement clearly states that if there is any encumbrance, the same should be removed by the vendors and only then, it becomes the duty of the plaintiff to complete the transaction. In this case, the defendants never cleared the encumbrances and therefore, it was open for the plaintiff to opt out of the agreement and claim refund of the advance amount. It is his further submission that the cause of action for filing the earlier suit for permanent injunction is different. Aggrieved by the attempt to alienate the property, the previous suit was filed and the present suit is filed for return of the advance amount and therefore, as held by the Hon'ble Supreme Court of India in *Sucha Singh Sodhi (D) Thr. Lrs. Vs. Baldev Raj Walia & another*¹, the bar under Order II Rule 2 of C.P.C, for the present suit does not arise. It is his further submission that on the facts and circumstances of the case, it is not fair to allow the defendants to forfeit the advance amount.

¹ 2018 3 L.W.1



11. Opposing the said submissions, Mr. T. Muruga Manickam, learned Senior Counsel appearing on behalf of the defendants would submit that in this case, being the purchaser, even though the original time was about to expire, the plaintiff did not even issue a pre-suit notice, calling upon the defendants to come for completion of the transaction or removal of the encumbrances. Only after the defendants issued a legal notice, the plaintiff found a frivolous excuse in the name of encumbrances and issued a reply notice. Even then the further conduct of the plaintiff should be taken into account in as much as even assuming he was not interested in the property on account of the encumbrances the plaintiff neither filing a suit for specific performance nor for rescinding of the contract, strangely filed a suit for permanent injunction from alienating the suit property and got the matter pending for five years and allowed the suit to be dismissed for default only in the year 2017. The said conduct clearly and categorically proves the allegations raised by the defendants in the written statement that the intention of the plaintiff was never to purchase the property but to bring this property under his clutches and make a profit out of the defendants' property. He would further submit that the plaintiff has in his cross-examination admitted that he is doing Real Estate business and that he would examine every document in detail before entering into the sale transaction. On facts, by examining D.W.3 and also summoning the documents from the Taluk Office, the first of the two encumbrances have been categorically disproved by the defendants. The defendants also have disproved by the cross-examination of the plaintiff whereby the plaintiff has clearly stated that he did not know where exactly the temple is situated and he did not know the particulars of which of the relative of the defendants who objected for the purchase and on what date etc., and by the positive evidence adduced by the defendants there is no such Madurai Veeran Temple existing in the defendants' property. In view of the said facts, a reading of Ex.A1 sale agreement would make it very clear that the amount of Rs.20 Lakhs, being the sum paid by way of earnest money. The agreement makes it categorically clear that the same will be forfeited in the event of default. This was also categorically mentioned by the defendants in their legal notice which was sent well before the time limit of seven months requiring the plaintiff to come and perform his part of the contract and the failure of the compliance would result in forfeiture of the amount. Thus, there was no error whatsoever in the defendants forfeiting the amount and the suit has been rightly dismissed by the trial court.



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12. He would further submit that in the facts of the present case, by comparing both the plaints filed in O.S.No.140 of 2014 and in the earlier suit of O.S.No.162 of 2012, the plaints being verbatim the same and both having filed on the same cause of action, the trial court has rightly dismissed the suit as being barred by Order II Rule 2 of CPC., for want of leave of the court. In support of his contention the learned Senior Counsel relied upon the Judgement of Virgo Industries (ENG.,) Private Limited Vs. Venturtech Solutions Private Limited², by relying upon paragraph Nos.9 to 11 and 17 of the said Judgement to point out that the present suit is barred by Order 2 Rule 2 of CPC and it will apply to the present situation. The learned counsel also relied upon the judgement of the Honourable Supreme Court of India in. B.Reddy and Dasardha Reddy Vs. Manjunath and another,³ for the proposition that a mere omission to frame an issue regarding forfeiture will not in any manner vitiate the trial as the parties in this case have gone into the trial with the full knowledge of the case pleaded by each other.

The Questions :

13. We have considered the rival submissions made on behalf of both sides and pleadings and the material evidence on record. In our view the following questions arise in the Appeal Suit to be decided :

i) Whether or not the plaintiff was ready and willing to perform his part of the contract?

ii) Whether the suit is barred under Order II Rule 2 of CPC.,?

iii) Whether the defendants are entitled to forfeit a sum of Rs.20 Lakhs paid by the plaintiff ?

Question No.1:

14. On consideration of the submissions made on behalf of the parties and appraising the evidence on record, we are of the view that the plaintiff was never ready and willing to perform his part of the contract and our reasons are as follows:

i) the plaintiff being the purchaser of the property and when the time of seven months is fixed under Ex.A1/sale agreement, the plaintiff miserably failed and omitted to issue any notice or communication whatsoever, even though the seven months period was about to expire on 23.05.2011. The said conduct by itself abundantly proves that the

² (2013) 1 SCC 625

³ 2021 SCC online 1236



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plaintiff was never interested much less ready and willing to perform his part of contract;

ii) for the first time in the reply notice dated 22.05.2011, the plaintiff raised the excuse of three encumbrances, even then in the reply notice, he requires the defendants to clear the encumbrance but never made it clear that he is terminating the contract nor prayed for return of advance amount. If the plaintiff has found that Madurai Veeran Temple exists in the suit properties and third party of the defendants' relatives had picked up quarells with him, we do not understand what the plaintiff means by requiring the defendants "to clear the encumbrance". Therefore, on the face of it, the alleged encumbrances are firvolous in nature.

iii) Be that as it may, of the three encumbrances mentioned in the notice, the plaintiff in his examination has restricted his claim to two encumbrances. In his cross-examination his answer is this, "தாவா சொத்தை பொறுத்து பிரதிவாதிகள் ஐஓபி வங்கியில் கடன் வாங்கியிருக்கிறார்கள், தாவா சொத்தில் மதுரைவீரன் கோவில் உள்ளது என்ற 2 வில்லங்கங்கள் தான் உள்ளது". In respect of the first encumbrance with Indian Overseas Bank, even though the plaintiff did not do anything, the defendants, filed the encumbrance certificate, examined the Village Administrative Officer one Manivasagam as D.W.2 to prove that in Survey No.52/2, apart from their lands there are lands of other people, one such third party has only mortgaged his property to Indian Overseas Bank and only the mortgage created by High-Tech Company is recorded as document No.417 of 2012. The Assistant from the Sub-Registrar office viz., Suman Prabhu was examined as D.W.3. All the Pattas and Chittas and other related documents are marked in Ex.X1 & X2. On the appraisal of the evidence it is clear that the claim of the plaintiff was bogus one and it was categorically established before the Trial Court. Similarly a reading of the cross-examination of the plaintiff would indicate that he did not know, in which part of the land Madurai Veeran Temple is situated and that he did not know as to the particulars of the relative, who picked up quarrel with him. There is categorical evidence of the defendants there is no such Temple within their land and Temple is located in the land belonging to one Chinnusamy. The Village



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Administrative Officer, D.W.2 has deposed that the Temple is not situated in the land of the defendants and it is situated in S.No.49/2A belonging to one Chinnusamy Vagayara. Therefore, from the evidence on record, it is very clear that both the plea of encumbrances raised by the plaintiff are factually incorrect and bogus. Further the plaintiff has categorically admitted in his cross-examination that he is in the real estate business and that he would go through the title deeds before entering into the agreement itself and therefore, being a real estate person, who claims that only on the last month of the time fixed in the agreement he came to know about encumbrance is per se frivolous. The trial court had found and it can be seen that even from the encumbrance certificate produced by the plaintiff himself and from Ex.B5, it is clear that the name of the executant is mentioned as M/s. High Tech Mineral Industries, Private Ltd., Thus, the claim of the plaintiff is false.

15. For all these reasons, we hold that the plaintiff has miserably failed and omitted to perform his part of the contract and he was never ready and willing to perform his part of the contract and he is the defaulting party on account of which the transaction could not be completed within the time agreed between the parties.

Question No.2:

16.The entire law relating to bar of suit by virtue of Order II Rule 2 is summarised and categorically explained by the Hon'ble Supreme Court of India in the recent judgment of Promod Kumar Vs. Zalath Singh⁴, whereby Supreme Court of India has in paragraph 28, held as follows:-

"28.Order 2 Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, it is open to him to relinquish any portion of the claim. Order 2 Rule 2 provides for the consequences of relinquishment of a part of a claim and also the consequences of omitting a part of the claim. It declares that if a plaintiff omits to sue or relinquishes intentionally any portion of his claim, he shall be barred from suing on that portion so

4 (2019) 6 SCC 621



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omitted or relinquished. Order 2 Rule 2(3), however, deals with the effect of omission to sue for all or any of the reliefs in respect of the same cause of action. The consequences of such omission will be to preclude plaintiff from suing for any relief which is so omitted. The only exception is when he obtains leave of the court."

Therefore the present case falls under the ratio laid down above. The contention of the defendant is that having filed the first suit on the same cause of action, the plaintiff has omitted to sue for the relief of refund of advance amount and admittedly no leave was obtained from the court, when he filed the first suit in O.S.No.162 of 2012. The learned counsel for the appellant, by relying upon Sucha Singh Sodhi (D) Thr.Lrs., case mentioned supra, would answer that since the cause of action for both the suits are different the bar Order II Rule 2 will not arise. The contention of the learned counsel for the appellant is without any merits because in the said case, purchaser was put into the possession by the vendor. However, the vendor attempted to dis-possess the purchaser. In that context of the matter, the Hon'ble Supreme Court of India at paragraph Nos. 31 to 35 held that the cause of action for the purpose of granting or praying for injunction against dispossession was different and will not be same to sue for specific performance of the agreement which would arise on account of the date fixed for the performance and when the vendor refuses to perform the contract. However in the instant case, even as per the first plaint and the second plaint, without clearing the encumbrances, the defendants had issued a legal notice on 19.05.2011 itself mentioning that unless the plaintiff comes forward to perform his part of the contract before the expiry of seven months ie., on 23.05.2011 they will forfeit the advance amount and are attempting to sell the property to third parties by cheating the plaintiff. Therefore, the cause of action for the first suit and the second suit is one and the same.

17.Our conclusion is further fortified by the law laid down by the Hon'ble Supreme Court of India in the above said Promod Kumar case, in which the Hon'ble Supreme Court has also clarified as to how to determine whether both the cause of action are one and the same or not, in paragraph No.31, which reads as follows:

"31. The defence which is set up by the defendants is irrelevant to determine what cause of



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action means. The reliefs, which are sought by the plaintiffs, will not be determinative of what constitutes cause of action. Cause of action, as explained by the Privy Council in Mohd. Khalil Khan case, means that the media through which the plaintiff seeks to persuade the court to grant him relief. It could, therefore, be said to be the factual and legal basis or premise upon which the court is invited by the plaintiff to decide the case in his favour. It is also clear that the cause of action, in both the suits, must be identical. In order that it be identical, what matters is the substance of the matter."

(Emphasis Supplied)

Therefore, if both the complaints are read together, they are verbatim the same and even the paragraphs start with the same words and also end with the same words and sentences. The factual and legal basis on which the suits are laid are one and the same. Just because, the plaintiff seeks a different relief, it will not be determinative to say that it is a different cause of action. Therefore we hold that the suit in O.S.No.162 of 2012 and the present suit are on the same cause of action and the plaintiff having omitted to pray for the present relief in the earlier suit and having failed to obtain the leave of the Court in the earlier suit, the present suit is barred under Order II Rule 2 of CPC., and we answer the question accordingly.

Question No.3:

18. To answer this question, before advert to the facts of this case, it is necessary to summarise the law relating to forfeiture of the amount paid under an agreement for sale of immovable property. The Hon'ble Supreme Court of India in Shree Hanuman Cotton Mills & others Vs. TATA Aircraft, Ltd.,⁵ had held that it is not the advance amount, but the earnest money which can be forfeited. In the Judgement of the Hon'ble Supreme Court of India it was held as to what constitutes earnest money and when the advance amount to be termed as earnest money, the following principles were laid down:

i) it must be given at the moment of which the contract is concluded.

ii) it represents a guarantee that the contract will be fulfilled or in other words, the earnest is given to bind the contract.

⁵ (1969) 3 SCC 522



iii) it is part of the purchase price when the transaction is carried out.

iv) it is forfeited when the transaction falls through by reason of default or failure of the purchasers.

v) Unless there is anything contrary to the terms of the contract on default committed by the buyers, the seller is entitled to forfeit the earnest.

This position was reiterated in the judgement of Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd.,⁶

19. In the case of V. Lakshmanan v. B.R. Mangalgiri and Others⁷, the Hon'ble Supreme Court of India held as follows:

"the question then is only the respondents are entitled to forfeit the entire amount. It is seen that governed by the contract the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract they are entitled to forfeit the entire amount."

The Hon'ble Supreme Court of India in Satish Batra -Vs- Sudhir Rawal⁸ has after considering all the previous rulings in this regard, held as follows :

"15. The law is, therefore clear that to justify the forfeiture of advance money being part of 'earnest money', the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and as a pledge for its due performance by the depositor to be forfeited in a case of non-performance by the depositor."

categorically and finally concluded the legal position that if there is a clause in the contract, upon failure of the purchasers they are entitled to forfeit the earnest money paid. It is also relevant to advert to Section 74 of the Contract Act, which reads as follows:

"74. Compensation for breach of contract where penalty stipulated for.-1 [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

⁶ 1995 Supp (1) SCC 751 : Manu/SC/0247/1995

⁷ 1995 (2) SCC (Suppl.) 33

⁸ 2013 (1) SCC 345



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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.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

By considering Section 74 of the Contract Act, originally the Hon'ble Constitutional Bench of the Supreme Court of India in *Fateh Chand Vs. Balkishan Dass*⁸, had held that there are two circumstances mentioned in Section 74, (i) the sum agreed in the contract to be paid in case of a breach (liquidated damages); and (ii) where the contract contains any other stipulation by way of penalty. In both circumstances the reasonable amount subject to the maximum being the amount mentioned in the contract can be permitted to be forfeited or can be ordered as compensation. Subsequently in *Maula Bux v. Union of India (UOI)*⁹, the Hon'ble Supreme Court of India had considered several Judgements rendered earlier and held that if the earnest money paid is a reasonable amount it would not amount to imposing a penalty and therefore will not come within the purview of Section 74. The Hon'ble Supreme Court held thus :

"5. Forfeiture of earnest money under a contract for sale of property — Movable or immovable — If the amount is reasonable, does not fall within Section 74. That has been decided in several cases: *Kunwar Chiranjit Singh v. Har Swarup*; *Roshan Lal v. Delhi Cloth and General Mills Company Ltd. Delhi* [ILR 33 All 166] ; *Muhammad Habibullah v. Muhammad*

⁸ AIR 1963 SC 1405

⁹ 1970 (1) SCR 928,



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Shafi [ILR 41 All 324] ; Bishan Chand v. Radhakishan Das. [ILR 19 All 490] These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty. Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

The Hon'ble Supreme Court of India in the recent judgement of Kailash nath Associates Vs. Delhi Development Authority¹⁰ considered all the earlier judgements and had by detailed discussions in paragraphs 30 - 40 stated the law that for the forfeiture of the earnest money deposit so long as it is reasonable, it will not come within the purview of Section 74, if the sum is higher in nature it would be penal and then would be within the purview of Section 74. If it is within the purview of Section 74 the Court would only award or permit to forfeit a reasonable sum, the reasonableness or otherwise has to be by way of specific pleadings and wherever possible to prove the actual loss, the actual loss to be proved and in other cases, it would be based on the exercise of discretion by the Court. Thus the law relating to forfeiture of advance amount can be summarised as follows:

(a) the advance amount can be forfeited by the vendor, if it is the earnest money;

(b) if the advance amount is also paid as the guarantee for the performance of the contract, it takes the character of the earnest money and it can be forfeited, if the transaction falls through and it becomes the part of the sale consideration, if the transaction goes through;

(c) It should have been paid only at the time of entering into the contract;

(d) to justify the forfeiture of advance money being part of 'earnest money', the terms of the contract should be clear and explicit.

(e) the Court may also take into consideration the intention of parties and surrounding circumstances also in determining which the money is given in earnest;

(f) As long as the amount is reasonable and does not amount to penalty, the court will allow to forfeit as per the stipulation in the agreement;



(g) If the amount is on the higher side, then it would be penal in nature and fall within the purview of Section 74 of the Contract Act and in which case, the Court will go into whether the sum is reasonable or not and determined on the basis of actual loss if the loss can be proved or on the basis of its discretion if it cannot be specifically proved;

(h) In order to take up the exercise of reasonableness, there must be specific pleadings by the parties and in the absence of the same, the Court will not go into the question of reasonableness.

Now, advertent to the facts of the case, it is clear that it is admitted the case of the parties that sum of Rs.20 Lakhs was paid at the time of entering into the agreement, is relevant clause in Ex.A1/agreement of sale, which reads as follows:

"அவ்விதம் மேற்படி வாய்தாவிற்குள் மீதி கிரய தொகையை நம்மில் 3லக்கமிட்டவர் ரொக்கமாக செலுத்தி கிரயம் செய்துகொள்ள தவறினால் மேற்படி வாய்தாவிற்கு பிறகு இந்த கிரய ஒப்பந்த பத்திரம் செல்லத்தக்கதல்ல, ரத்தாகத்தக்கது. நம்மில் 3லக்கமிட்டவர் செலுத்தியிருக்கும் கிரய அட்வான்ஸ் தொகையும் இழந்துவிட வேண்டியது."

20.Thus, it is clear that the caluse is a similar one as dealt with by the Supreme Court of India in Satish Batra, advance amount was paid and received as a guarantee ensuring the performance of the contract within the time. Therefore, it partakes the character of the earnest money. In this case, it is not a plea of the plaintiff that the advance money is on the higher side or that it is in the nature of the penalty. Therefore, this Court cannot go into the reasonableness of the amount. As a matter of fact, in the written statement filed by the respondents, they have pleaded the loss caused by them, by attempting to clinging on to the property, by getting brokerage commission, by making them to discharge their loan etc., and in the proof of affidavit Paragraph No.5 and 6 they have stated about the loss caused to them. But, however, the plaintiff has not raised any plea about the reasonableness as his entire case is that he was not the defaulting party. Therefore the defendants in this case are entitled to forfeit the earnest money.

21.There is yet another circumstance which also goes against the plaintiff. As any normal and prudent man, if he has subsequently found that after the agreement there is temple at the property that is being objected and that there are other encumbrance, he would have normally and reasonably expected to recind the contract and pray for refund of the earnest money. But, however, in this case, the plaintiff goes on to file a suit for permanent injunction restraining the defendants from selling the property to any third party by reserving his right in the



said plaintiff that he would file a suit for specific performance at a later point of time, but does not obtain leave of the Court for such reservation. Without withdrawing the said suit, during the pendency of the said suit, the present suit was filed in the year 2014 and he allowed the earlier suit to be dismissed for default in the year 2017. This conduct certainly proves the pleading of the defendants in the written statement that by paying a nominal sum of Rs.20 Lakhs, the plaintiff has attempted to bring the properties involved under his clutches by entering into a sale agreement and keeping the defendants at bay. Therefore, from any view of the matter, we hold that the defendants are justified in forfeiting the sum of Rs.20 Lakhs paid by the plaintiff, pursuant to Ex.A1/sale agreement and we answer the question accordingly.

Findings on the issues :

22.In view of our above answers to the questions framed in the appeal, we find that the findings of the trial court in respect of issue No.1 that the plaintiff is not entitled to the sum prayed in the plaint along with interest is correct and we affirm the same and we also find that the trial court has correctly held that the plaintiff is not entitled to any other relief prayed for and we answer the issue No.2 accordingly.

The result :

23.In the result, the present appeal suit is without any merits and it is accordingly dismissed. However, the parties shall bear their costs.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

klt
To

The I Additional District Judge,
Salem.

+lcc to Mrs.Zeenath Begum, Advocate Sr.469
+lcc to Mr.R.Nalliyappan, Advocate Sr.358

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