



C.S.No.54 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 28.04.2023

Judgment Pronounced on : 28.07.2023

CORAM : JUSTICE N.SESHASAYEE

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Parinee Realty Private Limited
formerly known as
Green Bird Developers Private Ltd.,

.... Plaintiff

(Amended as per order dated 10.03.2016 in
A.No.1243 of 2016 in CS.No.54 of 2009)

Vs

M/s.Peirce Leslie India Limited

.... Defendant

Prayer : Civil Suit filed under Section Order IV Rule 1 of O.S.Rules read with Order VII Rule 1 of CPC., praying for a judgment and decree against the defendants :

- (a) for a sum of Rs.1,00,00,000 (Rupees one crore) claimed and further interest at 18% p.a., from the date of the plaint till realization.
- (b) to award the costs of the suit.



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(c) To pass further order that may deem fit in the circumstances of the case.

For Plaintiff : Mr.Sathish Parasaran, Senior Counsel
Asst. by Ms.Aparajitha Viswanathan

For Defendant : Mr.Krishna Srinivasan
for M/s.Ramasubramanian & Associates

JUDGMENT

The suit is filed for recovery of a sum of Rs.1.0 crore paid as advance amount by the plaintiff to the defendant under a Memorandum of Understanding dated 23.04.2008, with future interest at 18% per annum.

The Pleadings:

2. The case of the plaintiff is follows:

- The plaintiff is a Private Limited Company engaged in the business of promoting multi-storeyed apartments and villas. It is headquartered in Mumbai. It proposed to expand its activities in Kerala, and was scouting for suitable lands there.
- The defendant is also a company registered under the Companies Act,



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with its registered head office at Chennai. It owns lands measuring 6.56 acres at Mamally, Feroke near Calicut. It has nominated M/s Wisma Project Management Services, another Chennai based company, (not a party to the litigation), as its agent/consultant, for negotiating the sale of the said property.

- While so, sometime in April, 2008, the plaintiff came across the defendant's agent Wisma Consultants, to whom the plaintiff has conveyed that the former was looking for lands for developing and promoting residential apartments and villas, and the agent of the defendant informed the plaintiff about the 6.56 acres land which the defendant owns in Kerala.
- The plaintiff negotiated with the agent of the defendant, M/s Wisma Project Management Services. Indeed, Wisma Consultants informed the plaintiff vide a letter dated 15.04.2008, that it is acting on behalf of the defendant. It also enclosed a draft Memorandum of Understanding (MoU) along with the said letter, and informed the plaintiff that the deal could be finalised along the lines of the draft MoU. The plaintiff was also informed that the price of the land and the other conditions stipulated in the draft MoU are non-negotiable. The price of the land was fixed at



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Rs.1,50,000/- per cent (which implied the total consideration for the property is around Rs.9.86 crores).

- On 23.04.2008 the MoU was executed, under which the plaintiff paid an advance of Rs.1.0 crore through a cheque. The remaining sale consideration is required to be paid in two instalments: (a) the first instalment was Rs.3.0 crores to be paid within 30 days of the date of the MoU; and (b) the second and final instalment is required to be paid on or before 60 days from the date of the MoU. In short, the MoU provided for 60 days time for the parties to complete performance of their respective contractual obligations.
- After signing the MoU, the plaintiff came to know that the subject matter of MoU was notified as 'red zone' by the Planning Authority, which implied that was notified as exclusive industrial zone, and not for residential purposes. The plaintiff was oblivious to this ground reality as their essential activities are in Mumbai. However, the defendant who is head-quartered in Kerala, though knew that the property to be transacted was notified as 'red zone', yet it did not disclose this to the plaintiff. Hence viz-a-viz the purpose for which the land could be used, there was no consensus between the parties. Indeed, the very tenor of the MoU,



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and the speed at which the execution of the MoU was hurried through are indicative of absence of any consensus between the parties.

- Due to unsuitability for the intended use of the land, the plaintiff could not proceed ahead to perform its obligations in the MoU. There were exchange of notices, following which, on 10.11.2008, the defendant terminated the contract and informed the plaintiff that it has forfeited the advance amount paid by it. Hence, the suit.

3. Refuting the allegations in the plaint, the defendant contends that:

- At no time, the plaintiff had communicated to the defendant about the purpose for which it proposed to buy the land from it. All it knows is that the plaintiff was in need of a substantial area for its project but not the intended purpose of the project.
- The property was not in an exclusive 'red zone', and as per the certificate issued by the Assistant Engineer, Cherevanur-Nallalam Grama Panchayat, the land is included in an industrial-cum-residential Zone, as per the approved DTP scheme for Calicut.
- In the property to be transacted, there were cashew processing and coffee-curing units, and during the site visit prior to the MoU, the



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defendant did inform the plaintiff that the land would be transacted along with these buildings. The plaintiff therefore knew the purposes which the land had been supporting, and if at all the plaintiff had any doubt about it, it ought to have enquired the same as a prudent purchaser.

- After entering into the MoU and paying the advance amount as required under the MoU, it is unjust, unfair and illegal for the plaintiff to find reasons to wriggle out of the contract. Indeed, the MoU itself provided a window for exit if the plaintiff is not satisfied with the title of the vendor, but has fixed a 21 days time-line from the date of MoU, and also provided for return of the entire advance amount forthwith if the plaintiff was not satisfied with the title of the defendant. During discussion, the plaintiff was provided with the photostat copies of all the title deeds that are necessary for title scrutiny of the land in question. And at no time before the expiry of 21 days time referred to above, did the plaintiff choose to exercise its right to exit.
- The plaintiff, being a promoter of the multi-storeyed apartments, ought to have clarified with the defendant about the suitability of the land for its intended purpose as per the municipal laws.
- The allegation of the plaintiff that there was no consensus between the



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parties vis-a-vis the MoU is denied. In its letter dated 21.05.2008, which was in response to the plaintiff's letter dated 20.05.2008, the defendant had recorded its regret to the suggestions of the plaintiff that the latter was not informed of the relevant material facts. Indeed, extensive discussions had taken place prior to MoU, measurements were taken jointly, title - documents were examined, and it is only when the time for payment of the first instalment of the balance sale consideration of Rs.3.0 crores arrived, the plaintiff invented a reason to wriggle out of the contract.

- Clause-10 of the MoU entitles the defendant to charge interest at 18% per annum on the delayed payment, and Clause-11 thereof provides for termination of MoU by the defendant if the plaintiff delayed its payment beyond 30 days from the due date for payment, and also for the forfeiture of the amounts earlier made. The defendant has therefore, justly and legally forfeited the advance amount as stipulated in Clause 11 of the MoU.
- Indeed the defendant had suffered considerable monetary loss due to breach of contract of the plaintiff. Indeed the defendant had lost its opportunity of selling the land to others as purchasers are not keen about



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transacting the land owing to the dispute between the plaintiff and the defendant.

Hence the suit is liable to be dismissed.

Issues:

4.1 On the above pleadings, following issues are framed :

1. *Whether the defendant is guilty of suppression of fact that the suit property was prohibited by the local municipal law for the proposed use by the plaintiff for the construction?*
2. *Whether the defendant can invoke the forfeiture clause in MoU and forfeit amount of Rs.1.0 crore?*
3. *Whether the Clause 11 of MoU dated 23.04.2008 is applicable to the case?*
4. *Whether the plaintiff is entitled to recover the suit claim?*
5. *To what other relief the plaintiff is entitled to?*

4.2 It may have to be said that the pleadings in this case raised an issue whether there was a concluded and enforceable contract between the parties. This was also echoed during the final arguments in this case. However, no pointed issue was framed on it. Hence, an Additional Issue is now raised:



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Were the parties in consensus ad idem when they executed the Memorandum of Understanding dated 23.04.2008, and whether the MoU constitute an enforceable contract?

It is made clear that a decision on the additional issue does not require any additional evidence since parties knew what they were contesting, and have also produced evidence. As would be seen later, the conclusion to be drawn on this issue is essentially based on an analysis and understanding of the documentary evidence now available on record on a legal plane.

5. During trial, for the plaintiff, its Manager Mr.Gangadharan was examined as P.W1 and Ext.P1 to Ext.P11 were marked on its side. For the defendant, one Mr.V.Sudhakar, the Manager of the defendant-company was examined as D.W1 and has marked Ext.D1 to Ext.D6. Of them, Ext.P4, is the MoU dated 23.4.2008, entered into between the plaintiff and the defendant.

Preliminary Statement:

6. Facts are substantially admitted. Broadly, the plaintiff opted to enter into Ext.P-4 MoU, dated 23.04.2008, for purchase of a block of land measuring 6.56 acres belonging to the defendant. The land is located somewhere in Calicut



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district in Kerala. There is no dispute between the parties that the plaintiff-purchaser is required to pay a total sale consideration of around 9.86 crores. There is also no dispute about the time schedule for payment as has been provided in the MoU. However, when the time was due for payment of the first instalment of the balance sale consideration, the same was not paid. Even as the defendant was sending reminders vide Ext.P-9 and P-10, and also two other letters which are part of Ext. D5 series between 21.05.2008 and 02.09.2008, the plaintiff did not make the payment, but issued Ext.P-11 legal notice, dated 09.10.2008, where under, it alleged that (a) the plaintiff's business is promotion and development of residential apartments and villas, and that property proposed to be purchased was not suitable for the purpose which the plaintiff intended as it was categorised as an industrial zone by the planning authorities; (b) that the intended purpose of the plaintiff was made known to the consultant of the vendor (M/s Wisma Project Management) through whom the negotiations had taken place, but the said agent suppressed the material aspect affecting the use of the land; and (c) that inasmuch as it was duped into believing the suitability of the land for its intended purpose, it required the vendor/defendant to refund the advance amount of Rs.1.0 crores with interest at 18% p.a. It may be noted there was no formal termination of contract from the



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plaintiff's side, but an implied rescission of contract could be gathered. Now, it was left to the defendant to terminate the contract under Ext.D-6, dated 10.11.2008. Having terminated the contract, the defendant promptly forfeited the advance amount of Rs.1.0 crore in terms of clause 11 of the MoU. The claim over this Rs.1.0 crore is the bone of contention between both the sides.

7. If the documentary evidence are scanned, there are only two correspondences, namely Ext.P-2 and P-3, both of which are from the consultant of the defendant to the plaintiff, that are prior to the execution of the MoU. Ext.P-2 is dated 15.04.2008, barely a week before the execution of MoU on 23.04.2008. Along with this letter the draft MoU was sent. It appears that the plaintiff intended to negotiate on some terms, and this could be gathered from the next correspondence in Ext.P-3, dated 22.04.2008, a day prior to the date of MoU, in which the vendor's consultant had informed the plaintiff that the terms of the MoU are non-negotiable. Then followed the MoU. On the very date on which the MoU was executed, the plaintiff was given copies of the title documents of the vendor as could be seen from Ext.D.3 and D4.



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8. The material terms of the MoU which are relevant for the current purpose are:

"9. In the unlikely event that the buyer is not satisfied with the vendor's title to the property and gives notice to the vendor within 21 days from the date of this MOU the amount Rs.1,00,00,000/- (Rupees One hundred Lakhs only) paid as advance will be returned forthwith to the buyer by the vendor without any interest.

10. The vendor, in his sole discretion, shall give notice to the buyer by registered acknowledgement due letter to the buyer's address given in this memorandum of understanding and charge interest on the amounts due to them at the rate of 18.00% (Eighteen Percent) P.A if the buyer for any reason other than the reason stated in paragraph 9 above is unable to or does not make payments to the vendor as stated in paragraph 3 above.

11. The vendor will have the right to terminate this MOU by giving notice in writing to the buyer as registered acknowledgement due letter to the buyer's address given in this memorandum of understanding and the MOU will then stand cancelled and the buyer shall forfeit all the payments made upto the date of the notice if any of the installments as stated in paragraph 3 above is delayed beyond 30 days from the due date."



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Argument for the Plaintiff:

9. This is the setting. Thiru. Sathish Parasaran, the learned senior counsel of the plaintiff argued, to start with there is utter absence of consensus between the parties regarding the use to which the property could be put to, and hence Ext.P-4 MoU fails, and hence the defendant has no right to forfeit the advance amount paid by the plaintiff under the MoU. Expatiating his argument, the learned counsel submitted,

- The consultant of the defendant through whom the contract was negotiated has been informed that the plaintiff is only engaged in the development and promotion of residential apartments, and that it is looking for a property only for the said purpose. Indeed, in paragraph 2 of Ext.P7 correspondence from the Director of the plaintiff to the Managing Director of the defendant, this was re-asserted. This was not denied pointedly until the written statement was filed. Nor did the defendant attempt to disprove by examining anyone from its consultant M/s.Wisma during trial.



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- When the plaintiff's purpose for the purchase of the property is disclosed, the duty is on the defendant to disclose every fact that affects the use of the land as mandated under Sec.55(1)(c) of the Transfer of Property Act. In this regard it is necessary to note that when MoU was executed, not even the title documents of the properties were shared with the plaintiff. It was only on the date of the MoU, the copies thereof were handed over to the plaintiff vide Exts. D3 and D4, and the plaintiff was granted a bare 21 days time for verification under clause 9 of the MoU. Given the time-frame provided thus, the duty is enormously on the defendant to disclose every fact that affects title and the use of the property. On this aspect the defendant ducks the issue when it says that during pre-MoU survey of the property, the plaintiff's representative had noted a factory building in the property, and hence the plaintiff should have made enquiries as to whether the property is suitable for the purposes which the plaintiff intended. When a fact affecting the use of the property is latent and is known only to the vendor, the defendant is duty bound to disclose it.
- To prove that the property situated is not in exclusive industrial zone, but in a residential cum industrial zone, the defendant has produced Ext. D2,



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a certificate of the Assistant Engineer of the Panchayat (in which the property is situate) dated 27.02.2009, but this document is after the suit.

It is after obtaining this document, the defendant has raised it in his written statement, but not at any time prior to that. And, the author of Ext.D2 was not examined either during trial.

- When the defendant is at fault for non-disclosure of a material fact affecting the use of the property, it cannot be said that the plaintiff is in breach of contract. Ext.D6 is therefore invalid.
- Turning to damages, firstly, Clause 11 of the MoU is penal in character. Secondly, Rs.1.0 crore represents the advance amount and not any earnest money; thirdly, according to D.W.1 the defendant has not suffered any damage; and fourthly, even if the plaintiff is presumed to be at fault, the defendant cannot claim anything more than the actual damages suffered even if liquidated damages are stipulated in the contract.

The learned counsel for plaintiff has placed reliance on ***Balaramireddigari***



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Soma Reddi and Another Vs Gowkanapalli Thippa Reddi [(1948) SCC OnLine Mad 131]; ***Kopparthi Venkataratnam and Another Vs Palleti Sivaramudu and Another*** [AIR 1940 Mad 560]; ***Riverlate Properties Ltd. Vs Paul*** [1971 R.2849]; ***Investors Compensation Scheme Ltd. Vs West Bromwich Building Society*** [(1998) 1 W.L.R.896]; ***Conlon and Another V Simms*** [(2008) 1 WLR 484]; ***Government of NCT of Delhi Through Commissioner of Industries Vs Bhushan Kumar and Another*** [2008 SCC OnLine Del 379 : (2008) 151 DLT 158 (DB)]; ***Kailash Nath Associates Vs Delhi Development Authority and Another*** [(2015) 4 SCC 136]; ***Placido Francisco Pinto (D) by LRs and Another Vs Jose Francisco Pinto and Another*** [2021 SCC OnLine SC 842]; ***J.G.Engineers Private Limited Vs Union of India and Another*** [(2011) 5 SCC 758]; ***Shanmugavelu, Managing Director, Ms/. Sunbringh Designers Private Limited Vs The Authorised Officer, Central Bank of India*** [Order dated 27.10.2021 in CRP.Nos.1892 & 2282 of 2021]

Argument for the Defendant:

10. In response, the learned counsel for the defendant argued that the plaintiff,



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with open eyes, has entered the MoU, and hence, it cannot resile from it on grounds which are not explicit in the contract. Given the nature of the business which the plaintiff is engaged in, it cannot pretend innocence like a first-time non-commercial purchaser of an immovable property. The plaintiff knew and at all times ought to know that it has to factor in the zonal classification under the planning laws, and it ought to investigate the suitability of the land under the scheme of classification of the property by the town planning authorities. The burden is therefore, on the plaintiff to investigate about the suitability of the land for its intended purposes, and not on the defendant to declare. This may have to be considered on the basis of the following evidence:

- a) Prior to the execution of Ext.P4 MoU, the plaintiff's representative visited the property and inspected it and found the cashew and coffee curing factories in it. P.W.1 in his cross examination admits it. This implies that the plaintiff knew about the existence of factories in the property that should have alerted it to investigate on the purpose for which the property could be utilised before the execution of the MoU.
- b) On 15.04.2008, Vide Ext.P.2 draft MoU was sent. In this draft, only 15 days time was provided for the plaintiff to exit from the contract, but this



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was altered to 21 days in the final version in Ext.P4. This additional time was given only to enable the plaintiff to satisfy itself not only on the title to the property, but also on other ancillary aspects affecting the property. This would indicate that the MoU was prepared after due application of mind on either side. And there was no compulsion on the plaintiff to sign the MoU either. Nor, did the MoU pushes the plaintiff to hurry through the process of completing the sale. It has provided 60 days. The defendant, on its part, has been co-operating with the plaintiff as could be seen from Ext.P.5 communication from the defendant dated 28.04.2008, when it even required the officials of the plaintiff to contact their counsel for any clarification on the former's title.

- c) For the next one month since the execution of the MoU, there was a lull, and it is in this back drop the defendant reminded the plaintiff Vide Ext.P-6. It was only after Ext.P-6, did the plaintiff come up with its theory of 'red zone', something that it invented for the first time under Ext.P7 notice. More particularly, it did not disclose when exactly the plaintiff came to know about the zoning restriction that it projected in Ext.P7 notice. In its response to Ext.P7 notice vide Ext.P.8, the defendant



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promptly brought to the notice of the plaintiff about the existence of the factory buildings in the property, and this was not pointedly denied.

d) If the plaintiff truly believed the alleged zoning restriction that it refers to in Ext.P-7 as an aspect providing it with a cause for the current action, then it should have disclosed pointedly Ext.P.7 notice in the plaint, but it was not done.

e) If the plaintiff commits breach of contract leading to termination of the contract, then forfeiture of advance as provided in Clause 11 of the MoU gets enabled, and that precisely what the defendant has done.

Reliance was placed on the ratio in *Ambalal Sarabhai Enterprises Ltd., Vs K.S.Infraspac LLP and Another* [2019 SCC OnLine SC 1311], *Sebastiao Luis Fernandes (Dead) through LRs and Others Vs, K.V.P.Shastri (Dead) through LRs and Others* [(2013) 15 SCC 161], *Satish Batra Vs. Sudhir Rawal* [(2013) 1 SCC 345], *Commissioner of Customs (Preventive) Vs. Aaflo Textiles India Private Limited ad Others* [(2009)11 SCC 18], *Continental Foundation Joint Venture Holding Vs. Commissioner of Central Excise*



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[(2007) 10 SCC 337], *Anil Rishi Vs Gurbaksh Singh* [(2006) 5 SCC 558],
*Rajasthan State Industrial Development and Investment Corporation and
Another Vs. Diamond & Gem Development Corporation Limited and
Another* [(2003) 5 SCC 470], , *Videocon Properties Ltd. Vs. Dr Bhalchandra
Laboratories and others* [(2004) 3 SCC 711], *V. Lakshmanan Vs. B.R.
Mangalagiri and Others* [1995 Supp (2) SCC 33], *Padmini Products Vs.
Collector of Central Excise* [(1989) 4 SCC 275], *Shree Hanuman Cotton
Mills and others Vs. Tata Air Craft Limited* [1969 (3) SCC 522], *Thukkaram
Vs. Shanthi Varadharajan and Another* [(2015) 1 LW 468)

Discussion & Decision

11. On the execution of Ext.P-4 MoU, there exists no dispute. And it now stands terminated vide Ext.D6 letter of the defendant. There is no dispute on this as well. But, does the MoU constitute a concluded contract and is capable of enforcement? If it so, something which the defendant contends, it leaves a certain consequence, in that this Court will be required to probe, (a) if the plaintiff was in breach of the MoU, and if it is found against it, then (b) is the defendant justified in forfeiting the entire advance amount in terms of Clause



11 of the MoU.

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12. The plaintiff contends that the MoU is not enforceable, since there was no consensus ad idem between the parties when it was entered into as the defendant did not disclose a material term affecting the very contract. And, it relates to the purpose to which the land proposed to be purchased under the MoU could be put to. Let it be termed as the usability of the land. The plaintiff contends that it only negotiated with the defendant's agent/consultant, M/s.Wisma, and conveyed to its representative the purpose for which the plaintiff proposed to purchase the property – to develop the same into a residential complex, a business which the plaintiff was engaged in, whereas subsequent to the MoU, the plaintiff came to know that the land in question was in red zone, or exclusive industrial purpose zone under the scheme of town planning, and is not suited for its intended purpose. The defendant did not deny the nature of the plaintiff's business but came up with two alternate statements on the zonal classification of the land, one before the suit, and the other after the suit through its written statement. Its pre-suit statement is candid: It is the plaintiff's job to enquire about the zonal classification of the land and its usability, for only it knows its business and purposes. In the property there



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were cashew processing and coffee curing factories. And before signing the MoU there was a field inspection of the property by the plaintiff's representative. He noticed these factory buildings. The existence of these industrial units is notice enough for the plaintiff's representative on the zonal classification of the property. The post-litigation stands which the defendant takes in the written statement is a slightly toned down variant of its earlier stands, where it would say that the property comes under residential cum industrial zone and tries to support it with Ext.D2 certificate of the Engineer of the concerned Panchayat.

13. Was there not any consensus ad idem as to the usability of the land between the parties when the MoU was entered? This is the core aspect. And, if so, whether the usability of the land a material term of the contract, and if it is so, has the defendant, or more particularly its agent/consultant, suppressed it.

Additional Issue & Issue No:1

14. The MoU on its face does not speak anything about the intended purpose of the plaintiff for its proposal to purchase the land. Nor, have any of the parties



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produced any pre-contractual correspondences between them on the point. On this aspect, the plaintiff makes three specific allegations:

- a) that it informed the consultant of the defendant (M/s Wisma) about the intended use of the land, and hence Wisma knew about it even during negotiations;
- b) that the land is found to be notified in the red zone, which implies that it could be used only for industrial purpose; and
- c) that Wisma either did not know about the zonal classification under the Town Planning Act, or it suppressed a material term of the contract. A case of silence operating as a representation.

It is an admitted fact that the defendant did not directly negotiate with the plaintiff, and opted to outsource it to its consultant-agent. Therefore, the defendant either did not have, or denied itself an opportunity of knowing what exactly was discussed during pre-MoU negotiations. And, when faced with a pointed allegation of the plaintiff that the usability of the land was negotiated with Wisma, the defendant chose not to examine that representative of Wisma who engaged in the negotiations, to deny it. In Ext.P12, reply to the legal notice



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dated 09.10.2008, the defendant did not pointedly deny that the plaintiff is an exclusive developer of residential property either. The consequence is to state the obvious: That the defendant knew about the plaintiff's business and purpose, and then to draw an adverse inference against the defendant, and then to trust the word of the plaintiff that it conveyed its intended purpose behind the purchase of the property to the defendant's agent Wisma, something which will bind the defendant.

15.1 The defence to this point however, is that it is the job of the plaintiff to enquire, for which under Clause 9 of the MoU, 21 days clear time was granted to the plaintiff to satisfy itself on the title of the property, and it is for the plaintiff to enquire. And this was backed by an allegation that during a field visit of the property by the plaintiff's representative prior to MoU, he saw cashew processing and coffee curing units in the property, and their very existence is a notice of the fact that the property is in the industrial zone. The defendant would also cite clause 2 of the MoU, which states that the plaintiff had "*inspected the property and has satisfied himself regarding its location, position and all other features*", and contends that the plaintiff indeed knew what it was purchasing.



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15.2 The aforesaid contention has two parts: (a) The effect of Clause 9; and (b) whether the mere existence of factory units ipso facto will convey that the property is in industrial zone. If they are stretched further, it revolves around the point as to whether at all any duty is cast on the defendant to make a positive statement on the usability of the land to the plaintiff, rather than letting it draw its own inference. This will be relevant in the context of identifying whether both parties were on the same page as regards all the material terms of the contract at the moment when the MoU was signed. This is directly hinged on the outcome of this suit.

16. Clause 9 of the MoU provides the plaintiff a window to exit from the MoU, if it is not satisfied with the defendant's title to the property within 21 days from the date of the MoU. Let each of the limbs of defence of the defendant be now considered.

17. First to the field visit by the representative of the plaintiff prior to MoU. A field visit at best is good for noting any patent and noticeable defects in the property to be purchased, but it cannot be extended to cover that which are



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latent features of the property. For instance during a field visit of an immovable property, the physical features of the property can be noted and its extent can be measured, but it does not provide any statement on the title to the property or encumbrance over it. By merely looking at the property, all that the representative of the plaintiff could notice is the physical features of the property and not the nature of user to which the property could be legitimately put to. This would very obviously mean that the zonal classification under the scheme of town planning cannot be known by a field visit.

18. But, was the defendant or its agent is duty-bound to disclose the usability of the land under the town planning scheme? Before dealing with this aspect, let it be reminded one more time that this Court has already held that the plaintiff had disclosed its intended purpose behind its proposed purchase to the defendant's agent Wisma, and that the latter had not disproved. Turning to the duty of the vendor of a sale of immovable property, this is governed by Sec.55 of the Transfer of Property Act. The relevant provisions read as below:

Sec.55 : Right and liabilities of buyer and Seller :

In the absence of a contract, to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have



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the rights, mentioned in the rules next following or such of them as are applicable to the property sold:-

(1) The Seller is bound-

(a) to disclose to the buyer any material defect in the property [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b)

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d)

(e)

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

A buyer of an immovable property is entitled to the possession thereof, and is entitled to be informed of every fact which the seller knows, but not the buyer. Turning to duty part, there is definitely a duty on the defendant viz-a-viz its statutory obligation under Sec.55(1)(c) to inform the plaintiff of every piece of information that goes to affect the title and usability of the property which cannot be conveniently known by a mere inspection of the property, as a fair vendor.



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19. This takes the discussion to ascertain if the MoU, represents a concluded contract? For if the parties are not in consensus ad idem on all the material terms of the contract there never be an enforceable agreement in law. This is the core contention of the plaintiff.

20.1 To start with, on the day on which the MoU was executed, it does not create any binding obligation on both the parties, more particularly on the plaintiff to perform it, since the plaintiff was not even in a position to ascertain the title of the defendant over the property proposed to be purchased. Here arrives clause 9 of the MoU. It is reproduced:

“In the unlikely event that the buyer is not satisfied with the vendor's title to the property and gives notice to the vendor within 21 days from the date of this MOU the amount Rs.1,00,00,000/- (Rupees One hundred Lakhs only) paid as advance will be returned forthwith to the buyer by the vendor without any interest..”

Now Sec.54 of the Transfer Property Act, defines a sale of an immovable property as “transfer of ownership in exchange for a price paid or promises to be paid.” And, here is a MoU which was entered into between the parties



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without the vendor satisfying itself on the title of the defendant over the property proposed to be purchased. Even though a sale carries a warranty of vendor's title, that is an *ex post facto* aspect, which follows an actual sale, and has little relevance before it. What may go to constitute the content of warranty of title after a sale, will only be a representation before sale or when the agreement for sale is entered into.

20.2 The title to the property, and ability to obtain possession and enjoying a property, are the soul of any contract for the sale of an immovable property, but in the instant case this term was left inchoate, and it was to be decided within 21 days. When the evidence is probed, only Vide Ext. D3 letter, which bears the same date as the MoU, the copies of the title documents were handed over to the plaintiff. Therefore, when all the material terms of contract are not settled, it is hard to conceive that the parties were consensus ad idem on every material term of the contract when they executed the MoU. While the defendant may project Clause 9 as a contingency, this Court considers it as a pointer to understand whether the MoU represents a concluded agreement capable of being enforced in law. Now, Clause 9 leaves 21 days time line for the plaintiff to satisfy itself about a vital term of the contract – the defendant's



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title. What if the plaintiff finds that the defendant's title is defective or has discovered certain facts which are not noticeable on a field visit, as has happened in the present case, after 21 days but before the performance of his part of the contract? Can the defendant still insist that the contract should be performed by the plaintiff because he discovered something after 21 days? The 21 days time line therefore, cannot be considered as a material term of the contract, whereas the title to the property is.

21. The issue here is not much on the title to the property but on its usability. In the case of a sale of immovable property it is not just title, but every piece of information that affects the title, possession and usability of the property in law is material. They form different layers of the same aspect. Therefore, if the vendor knew something that may affect the title or possession or usability then it is liable to be shared with the purchaser. The antiquity of this principle dates back to the decision in ***Carlish v Salt*** [1906 1 Ch 335] where Joyce, J had ventured to observe as under:

*“In the case of the sale of a chattel, the law as stated by Bramwell B. in ***Horsfall v. Thomas*** is that if there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is*



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bound to point it out. Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation with respect to a material defect in the title, or in the subject of the sale, which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions. “

Notwithstanding the above, if the purchaser risks buying a property with a defective title, or anything that is likely to affect the possession of the property and usability after being informed by the vendor, then it should bother the vendor the least. But this would happen only when the vendor informs the purchaser. Here, the defendant brings in the doctrine of *caveat emptor* to hold that it is the responsibility of the purchaser to investigate the title. The *caveat emptor* rule is predominantly applied in cases of sale of moveables, but still is confined to patent defects which will be easily visible on a physical examination, but not for latent defects. This doctrine rarely has any application in the sale of immovable property and if it has to be applied, it can be applied only for patent defects, namely those defects or shortcomings in the property which are visible on a field visit of the property. To reiterate, law expects the purchaser only to act like a prudent man and it does not require him to done the



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role of a mind reader to investigate the inner recesses of the mind of the seller.

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22. Does Clause 2 of the MoU satisfy the requirement mandated by Sec.55(1)(c)? All that clause 2 states is that buyer had visited the property and satisfied itself about the locality, position and '*all other features*' of the property. Whether the expression '*all other features*' include the zonal classification of the property under the town planning scheme? As stated earlier, a mere visit to the property can hardly provide any information greater than what the physical features of the property can show. Therefore, spotting a factory, in a property may not by itself convey anything, unless it is shown that the plaintiff knew that there was a zonal classification of the property and that the factory was built after the zonal classification. And, here is a scenario, a Mumbai based company was granted a bare 21 days to investigate even the title to the property.

23. Even if the applicability of the rule of caveat emptor is considered as a possibility, had then the plaintiff the time to investigate the title and satisfy itself on all the aspects touching upon it, including the usability of the land for its purposes? Ext.P3, is a communication from the defendant's consultant



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Wisma, and it is dated 22.04.2008. This was a day prior to the date of the MoU. It sets the time-line for the plaintiff to sign MoU, by 5 pm on the next day, 23.04.2008. And to repeat, copies of the title documents have been handed over to the plaintiff only on the date of MoU under Ext.D3. Therefore, except a field visit, there was nothing with the plaintiff to examine and ascertain anything about the title and usability and suitability of the property for its purposes when it signed the MoU. To state it differently, MoU was executed without the plaintiff satisfying itself about the title to the land and other aspects touching it such as its usability of the land and its suitability for its purposes. And from the stand point of the plaintiff, all it had was only 21 days to satisfy itself on the title to the property and all other aspects that affects its enjoyment. And it is to this MoU, the defendant is keen on pinning down the plaintiff to. It appears plainly unconscionable to the conscience of this court. Now, is there a place for applying *caveat emptor* rule? A desperate plea in defence, which this court refuses to countenance.

24.1 The cumulative effect of what have been herein above discussed are: (a) that the defendant did owe the plaintiff a duty to disclose the usability of the land proposed to be purchased under the MoU; (b) that this duty was not



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discharged; (c) that the parties are no consensus ad idem on material term of the contract on the date when MoU was executed as not even there was an agreement on the title of the property; and (d) that the MoU does not represent a concluded contract, and at the best it represents only a provisional agreement still not enforceable in law, since the agreement on the issue of title to the property, which as indicated earlier includes the factor affecting the usability of the land was yet to be reached.

24.2 Both the Additional Issue & Issue No:1 are decided in favour of the plaintiff.

25. And, to the last aspect. It relates to Ext.D2 certificate of the Engineer of the Panchayat, which says the property is in a residential cum industrial area. But this document has come one stage too late, as it is a post-suit document. Now, if the zonal classification under Ext.D2 were to be considered true, what prevented the defendant from disclosing it at least in its Ext.P12 reply notice? At that point of time even the defendant had not terminated the contract, which took another month when it issued Ext.D6.



Issues 2,3 & 4

26. The foregoing discussion makes it obvious that the defendant cannot invoke Clause 11 of the MoU and has no right in law to retain the advance amount paid under it. All these issues are decided against the defendant.

27. After all the analysis and the conclusions arrived, this Court wonders why the defendant had not shown humility to inform the plaintiff prior to suit that the property falls in a residential cum industrial zone? Indeed, after the expiry of 21 days and before the time for the payment of the first instalment of the balance consideration, on 20.05.2008, vide Ext.P7, the plaintiff had written to the Managing Director of the defendant directly, and invited him for a discussion on the matter concerning the zonal classification. Sadly, the defendant flexed the muscles vide Ext.P8 reply notice, dated 21.05.2008, when it should have displayed commercial prudence. Right through, the defendant was keen to make smart moves to outsmart the plaintiff, but it did not appear to have made the right and intelligent moves to save the MoU. And when it made a climb down in the written statement on zonal classification of the property, it was too late.



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Conclusion:

28. To conclude, the suit is decreed with costs. The defendant is directed to pay a sum of Rs.1,00,00,000 (Rupees one crore) with interest at 7.5% from 09.10.2008, the date of Ext.P11, till the date of suit and thereafter @ 6% p.a. till date of payment. Connected miscellaneous petition if any, shall stand closed.

28.07.2023

Index : Yes / No

Speaking order / Non-speaking order
ds



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APPENDIX

I. Witnesses :

<i>Plaintiffs :</i>	
P.W.1	Gangadharan
<i>Defendants :</i>	
D.W.1	Sudhakar

II. Exhibits :

Ext.P1	10.02.2015	Certified true copy of the Extracts of Minutes of the Meeting of the Board of Directors of Parinee Realty Pvt Ltd., (Formerly known as “Green Bird Developers Pvt Ltd.”), the plaintiff.
Ext.P2	15.04.2008	Letter to the plaintiff by Wisma Project Management Services
Ext.P3	22.04.2008	Letter to the plaintiff by Wisma Project Management Services
Ext.P4	23.04.2008	MoU entered between the plaintiff and the defendant
Ext.P5	28.04.2008	Photocopy of fax message sent to the plaintiff by the defendant with a copy marked to Wisma Project Management Services
Ext.P6	14.05.2008	Photocopy of fax message sent to the plaintiff by the defendant with a copy marked to Wisma Project Management Services
Ext.P7	20.05.2008	Photocopy of letter addressed to the defendant by the plaintiff
Ext.P8	21.05.2008	Photocopy of fax message sent to the plaintiff by the defendant
Ext.P9	24.06.2008	Photocopy of fax message sent to the plaintiff by the defendant
Ext.P10	26.07.2008	Photocopy of fax message sent to the plaintiff by the defendant
Ext.P11	09.10.2008	Photocopy of unsigned legal notice sent to the defendant
Ext.P12	22.10.2008	Legal notice sent to the plaintiff by the defenant's counsel



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Ext.P13	10.11.2008	Photocopy of the letter addressed to the plaintiff by the defendant
<i>Defendants :</i>		
Ext.D1	31.08.2016	Certified copy of the extract from the Minutes of the Meeting of the Board of Directors of the defendant-company held on 23.6.2016
Ext.D2	27.02.2009	Certificate issued by the Assistant Engineer, Cheruvannur-Nallalam Grama Panchayat certifying that R.S.No.143/1, 2 is an industrial-cum-residential zone
Ext.D3	23.04.2008	Letter addressed to the plaintiff by the defendant enclosing certain documents in accordance with Clause 13 of the MoU
Ext.D4 series	29.04.2008	Letter addressed to the plaintiff by the defendant enclosing photocopy of the patta of the property at Mamally, Feroke
Ext.D5 series	21.05.2008	Photocopy of the letter sent to the plaintiff by the defendant through fax and post, also enclosed postal acknowledgement receipt.
Ext.D6	10.11.2008	Original letter addressed to the plaintiff by the defendant regarding termination of MoU

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N.SESHASAYEE.J.,

ds

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