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C.S.No.231 of 2017



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2023

PRONOUNCED ON : 28.04.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

C.S.No.231 of 2017

A.Ajul Akbar

...

Plaintiff

versus

1.R.Ganesan

2.Saraswathi

...

Defendants

PRAYER: Civil Suit filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of Code of Civil Procedure, praying for a judgment and decree against the defendants :-

- (a) to execute the sale deed in favour of the plaintiff in pursuance of the agreement of sale dated 13.06.2013 after receiving the balance sale consideration of Rs.29,52,000/- from the plaintiff in respect of the balance area of the suit schedule and in default permit the plaintiff to deposit the balance sale consideration of Rs.29,52,000/- into this Court consequently direct the office to execute the sale deed in favour of the plaintiff on behalf of the



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defendants; alternatively direct the defendants to return the part of sale consideration a sum of Rs.84,16,500/- with 25% interest from the date of receipt of the advance amount till the date of repayment of the said sum;

- (b) to grant permanent injunction restraining the defendants from further alienating or encumbering the suit schedule property detrimental to the interest of the plaintiff;
- (c) to grant permanent injunction restraining the defendants or their men or agent or anyone claiming under or through them from interfering with peaceful possession and enjoyment of suit schedule property;
- (d) to direct the defendants to pay the cost of the suit.

For Plaintiff : Mr.K.N.Nataraj

For Defendants : M/s.S.Pushpakaran

JUDGMENT

This Civil Suit has been filed for specific performance along with the reliefs of permanent injunction and damages.

2. Heard the learned counsels for the plaintiff and the defendants and perused the materials available on record.

The case of the plaintiff in brief:-

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3. The defendants are the owners of the suit property, as it was allotted to the first defendant by the Tamil Nadu Slum Clearance Board on hire purchase installment scheme; since the entire monthly installments have been paid, a registered Sale Deed dated 20.03.2006 was executed by the Tamil Nadu Slum Clearance Board in favour of the defendants and the same was registered as Document No.1556/2006; in the sale deed, the area of the plot was mentioned as 96 sq.mtr. (1032.96 sq.ft.), the defendants told that the area shown in the sale deed is on the western side facing the street and the eastern side is the waterlogged area and it is stated by the defendants that they are in possession and enjoyment of 324.16 sq.mtr. including their enjoyment on the bed of waterlogged area.

3.1. The properties are well described in the suit schedule; the defendants offered to sell the suit “A” schedule property, on the basis of the assurance given by the defendants that they would have the rest of the portion in their enjoyment of “A” schedule property, the plaintiff entered into a sale agreement with them on 13.06.2013 for a sale consideration of Rs.1,39,52,000/-; the advance amount on the date of execution of the agreement was fixed at Rs.10,00,000/- and the balance sale consideration



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has been agreed to be paid at the time of execution of the sale deed; the time for completion of the sale agreement has been fixed at two months; the vendors have to obtain layout for the plot from the Tamil Nadu Slum Clearance Board and should furnish it to the purchaser before the execution of the sale deed; it is further agreed that if the defendants executed the registered sale deed within the specified time, they shall return the advance amount along with the penalty of Rs.2,00,000/-; in a similar way, if the plaintiff fails to finish the transaction, Rs.2,00,000/- will be deducted from the advance and the balance amount will be payable by him; subsequent to entering of the sale agreement, the defendants received Rs.25,00,000/- on 02.07.2013 and on various dates cash payments were also received as tabulated under:-

<i>Date</i>	<i>Amount</i>	<i>Mode of Payment / Acknowledgment endorsement on the sale agreement</i>
14/09/2013	15,00,000	Cash
19/10/2013	20,00,000	Cash
13/11/2013	10,00,000	Cash
30/12/2013	10,00,000	Cash
20/02/2014	20,00,000	Cash

3.2. Thus, in all, the defendants have received a total sum of Rs.1,10,00,000/- and had made due endorsement on the back side of the sale



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agreement itself; the defendants did not bother to get the approved layout and insisted only for further payment for executing the sale deed; since the defendants continued to receive payments, by their own conduct had altered the terms of contract; the time is not the essence of the contract, since they had voluntarily waived the time limit; the defendants did not make it possible to execute the sale deed by getting the proper layout as agreed.

3.3. However as a part performance, the defendants have executed a sale deed in respect of a portion of the suit schedule property shown as “B” measuring about 96 sq.mtr. (1032.96 sq.ft.) under a sale deed dated 22.01.2014, registered as Document No.116/2014 on the file of SRO, Royapuram for a sale consideration of Rs.25,83,500/-. The sale consideration was adjusted from the advance amount paid by the plaintiff; the plaintiff was put into possession of the entire suit schedule “A” property on the same day itself; however for the balance sale consideration of Rs.1,13,68,500/-, the defendants are yet to perform their part of contractual obligations; the plaintiff has sent a legal notice on 07.02.2017 calling upon the defendants to execute the sale deed by receiving the balance sale consideration; the notice was received by the defendants on 08.02.2017; even thereafter no sale deed was executed; the plaintiff is always willing to



pay the balance sale consideration of Rs.29,52,000/- and complete the sale transaction.

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3.4. As per the terms of the contract, the defendants are obliged to return Rs.84,16,500/- after deducting the sale consideration for “B” schedule property from the amount already paid and also by adding Rs.2,00,000/- as penalty under Clause 11 of the agreement of sale; hence the plaintiff filed the suit for seeking direction against the defendants to execute the sale deed in his favour in pursuant to the sale agreement dated 13.06.2013 and after receiving the balance sale consideration of Rs.29,52,000/- or to refund the sale consideration of Rs.84,16,500/- already paid along with interest and also to grant a decree for permanent injunction to restrain the defendants from alienating or encumbering the suit property, detrimental to the interest of the plaintiff.

Written submissions filed by the defendants in brief:-

4. The defendants were the owners of the residential building in Plot No.770, 3rd Street, Nethaji Nagar, Tondairpet, Chennai; the said plot was allotted by the Tamil Nadu Slum Clearance Board to the defendants on hire purchase installment basis; on payment of the entire sale consideration,



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a sale deed dated 20.03.2006 was executed by the Tamil Nadu Slum Clearance Board in favour of the defendants *vide* Document No.1556/2006 registered at SRO, Royapuram.

4.1. The land measuring 96 sq.mtr. (1032.96 sq.ft.) of Plot No.770 and the building constructed thereon was under the possession and enjoyment of the defendants; the adjoining area of Plot No.770 namely Plot No.771 is a waterlogged area on the eastern side of Plot No.770 are under the possession and enjoyment of the defendants; the defendants had constructed a building in Plot No.771 and the total area of Plot No.770 which was allotted by the Tamil Nadu Slum Clearance Board and Plot No.771 and the waterlogged area, which are under occupation and enjoyment of the defendants would come to a total extent of 324.16 sq.mtr. (3488 sq.ft.).

4.2. The defendants had entered into a sale agreement dated 13.06.2013 with the plaintiff for sale of 3488 sq.ft. of land comprised of Plot Nos.770, 771 and the waterlogged area in favour of the plaintiff for a sale consideration of Rs.1,39,52,000/- at the rate of Rs.4,000/- per sq.ft.; the said sale agreement was not a registered document; as per the amended



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Section 17(1)(g) of the Registration Act, the instruments of agreement relating to the sale of immovable property of the value of more than 100 rupees should be registered and the amendment came into force on 01.12.2012; hence the sale agreement dated 13.06.2013 is not admissible in evidence and it is not enforceable.

4.3. The sale agreement stipulates two months time to complete the contract and time is not the essence of the contract but the plaintiff has not come forward to finish the sale transaction within two months. As per condition in the sale agreement, the defendants have to give the sketch of the plot allotted in his favour and should hand over the vacant possession and ought to have paid all the tax arrears and hand over the original documents in favour of the plaintiff.

4.4. The defendants applied plan for Plot No.770 with Tamil Nadu Slum Clearance Board and obtained the same on 13.06.2013 and handed over the same to the plaintiff which is a condition precedent for concluding the contract; the plan forms part of the sale deed dated 22.01.2014; though the defendants have performed their part of contract, the plaintiff did not



come forward to pay the balance sale consideration and finish the sale transaction.

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4.5. The plaintiff did not comply the terms of the agreement sincerely. In fact at some point of time, the plaintiff agreed to pay Rs.5,00,000/- as interest for the delay caused on his part to conclude the contract; in order to maintain good relationship the defendants agreed to receive the same along with late payments and the payments have been made in a piecemeal till December 2013, in all together for a sum Rs.90,00,000/-; in the month of January 2014, the plaintiff informed defendants about his inability to purchase the entire area as specified in the sale agreement and wanted the defendants to execute the sale deed in respect of Plot No.770 alone; the sale price for the said Plot No.770 was Rs.1,10,00,000/- which is inclusive of Rs.5,00,000/- interest for the delay in concluding the contract; the plaintiff agreed for the payment of Rs.10,00,000/- on the date of registration of the sale deed i.e. on 22.01.2014 and paid another Rs.10,00,000/- on 20.02.2017 and totaling to Rs.1,10,00,000/-.



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4.6. At the time of execution of the sale deed dated 22.01.2014, the possession of Plot No.770 along with waterlogged area were handed over to the plaintiff and the defendants retained the area in Plot No.771 with constructions standing thereon; after taking possession of Plot No.770 and waterlogged area, the plaintiff had demolished the building existed in Plot No.770 and leveled the waterlogged area by removing all the trees and plants standing thereon.

4.7. The defendants had executed a sale deed in respect of the schedule “A” property as part performance of the sale agreement dated 13.06.2013; the plaintiff is solely responsible for the delay in executing the sale deed; the plaintiff having kept quiet for more than three years, from the expiry of two months time limit, suddenly turned around and issued a legal notice dated 07.02.2017 demanding for execution of the sale deed in respect of the remaining land and it is an afterthought; the agreement also provides for execution of the sale deed in respect of Plot No.770 and for the area comprised in Plot No.771 and in respect of the waterlogged area it is agreed that possession alone should be handed over.

4.8. Though the plaintiff had not acted in accordance with the terms of sale agreement dated 13.06.2013, the defendants have fairly executed the



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sale deed dated 22.01.2014 and delivered possession of Plot No.770 and the waterlogged area for the money received by them; after having issued the notice on 07.02.2017, the plaintiff had hurriedly filed the present suit on 16.02.2017 itself; the plaintiff has committed breach of contract and he is not entitled to the relief of specific performance or any other relief like damages; the defendants are not bound to pay any amount to the plaintiff; the amount of Rs.1,10,00,000/- less Rs.5,00,000/- was the value of the area conveyed by the defendants in favour of the plaintiff at Rs.4,000/- per sq.ft.

5. On the basis of the above pleadings, this Court had framed the following issues:-

- i. *Whether the unregistered sale agreement dated 13.06.2013 is enforceable under law?*
- ii. *Whether the plaintiff is having the readiness and willingness to perform his part of contract?*
- iii. *Whether the plaintiff is entitled to the relief of specific performance?*
- iv. *Whether the plaintiff is entitled to grant of alternative remedy viz., refund of earnest money?*
- v. *To what other relief, the plaintiff is entitled to?*



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agreed towards interest. The rest of Rs.1,05,00,000/- is meant to be the sale consideration for “B” Schedule property. Even as per the sale agreement, the defendants did not agree to create any sale deed in respect of Plot No.771 and the waterlogged area, because they did not have any title but only enjoyment over the said area. So the plaintiff is not entitled to any relief and the suit should be dismissed.

9. Issue No.1:- The fact that the defendants executed a sale agreement in favour of the plaintiff on 13.06.2013 is not denied. The sale agreement consists of Plot Nos.770, 771 and waterlogged area. Plot No.770 was allotted to the first defendant / R.Ganesan by the Tamil Nadu Slum Clearance Board by enabling the first defendant to purchase the same on hire purchase installment. The said allotment order was marked as Ex.P.1. After the entire sale consideration was paid, Plot No.770 was conveyed in favour of the defendants by virtue of a registered sale deed dated 20.03.2006 [Ex.P.2]. As per the sale agreement dated 13.06.2013, the defendants had agreed to convey not only Plot No.770 but the entire area measuring 3488 sq.ft. which is inclusive of Plot No.771 and the waterlogged area on the southern side.



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10. On perusal of the sale agreement, it is seen that an extent of 3488 sq.ft. has been agreed to be sold for a sum of Rs.1,39,52,000/- at the rate of Rs.4,000 per sq.ft. In the sale agreement itself it is seen that the defendants had purchased one plot and the rest of the area were in their enjoyment.

11. The defendants have raised objection to the validity of the unregistered agreement to be produced as evidence on the side of the plaintiff, even though he did not deny the fact about its execution. The plaintiff referred the amended Section 17(1)(g) of the Registration Act, wherein the instruments of agreement relating to the sale of immovable property of the value of more than 100 rupees was made compulsory and the said amendment came into effect from 01.12.2012.

12. So it is claimed by the defendants that the sale agreement dated 13.06.2013 which is executed subsequent to the above amendment ought to have got registered. However, proviso for Section 49(c) of the Registration Act would exempt unregistered document to be received in a suit for specific performance. The position of law on this point has been upheld by



the Hon'ble Supreme Court in *R.Hemalatha vs. Kashthuri (Civil Appeal No.2535 of 2023 dated 10.04.2023)*. In the said case, it is held as under:-

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“12. At this stage, it is required to be noted that the proviso to Section 49 came to be inserted vide Act No.21 of 1929 and thereafter, Section 17(1A) came to be inserted by Act No. 48 of 2001 with effect from 24.09.2001 by which the documents containing contracts to transfer or consideration any immovable property for the purpose of Section 53 of the Transfer of Properties Act is made compulsorily to be registered if they have been executed on or after 2001 and if such documents are not registered on or after such commencement, then there shall have no effect for the purposes of said Section 53A. So, the exception to the proviso to Section 49 is provided under Section 17(1A) of the Registration Act. Otherwise, the proviso to Section 49 with respect to the documents other than referred to in Section 17(1A) shall be applicable.

13. Under the circumstances, as per proviso to Section 49 of the Registration Act, an unregistered document affecting immovable property and



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required by Registration Act or the Transfer of Property Act to be registered, may be received as evidence of a contract in a suit for specific performance under Chapter-II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument, however, subject to Section 17(1A) of the Registration Act. It is not the case on behalf of either of the parties that the document/ Agreement to Sell in question would fall under the category of document as per Section 17(1A) of the Registration Act. Therefore, in the facts and circumstances of the case, the High Court has rightly observed and held relying upon proviso to Section 49 of the Registration Act that the unregistered document in question namely unregistered Agreement to Sell in question shall be admissible in evidence in a suit for specific performance and the proviso is exception to the first part of Section 49.”

13. Hence the sale agreement is admissible in evidence in a suit for specific performance and thus issue No.1 is answered.



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14. Issue Nos.2 & 3:- The plaintiff has claimed that he has paid Rs.1,10,00,000/- to the defendants on various dates as part sale consideration. Even though the same was not denied by the defendants, the defendants claimed that Rs.1,10,00,000/- would comprise a sum of Rs.5,00,000/- meant for the interest agreed to be paid by the plaintiff due to the delay caused by him in making the payments. The defendants have not produced any document or agreement to show that the plaintiff had agreed to pay Rs.5,00,000/- as interest.

15. It is stated in the sale agreement that the time for contract is two months. However, it is not specifically mentioned that the time is the essence of the contract. Even though the plaintiff made part payments towards sale consideration on various dates which were beyond two months from the date of execution of the sale agreement, the defendants had received the same without objection. The defendants had not demanded any interest or penalty by invoking penalty clause agreed in the agreement. The payments were made by the plaintiff to the defendants until 20.02.2014 and it is proved that he had made a total payment of Rs.1,10,00,000/- till 20.02.2014. As stated already, the defendants did not prove that



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Rs.5,00,000/- out of Rs.1,10,00,000/- was paid towards interest and hence the entire payment of Rs.1,10,00,000/- should be considered as the partial sale consideration paid by the plaintiff. However, the parties did not finish the entire deal as agreed between themselves. The defendants did not insist for performance of contract or to pay penalty after the expiry of two months but they continued to receive payments and hence from the conduct of the defendants, it can only be presumed that the time is not the essence of the contract.

16. It is submitted by the plaintiff that the defendants could not get the approved layout for the property in his possession and that is the reason why the sale could not be completed. Even at the time of entering into the sale agreement, the defendants had only furnished the allotment order pertaining to Pot No.770 and he has stated that Plot No.771 along with waterlogged area are under his enjoyment. The clauses in the agreement does not stipulate that the defendants are obligated to get proper layout from the Tamil Nadu Slum Clearance Board for the area situated in Plot No.771 and waterlogged portion.



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17. It is not possible for the Tamil Nadu Slum Clearance Board to allot another plot to the defendants in addition to Plot No.770 which has been already allotted to them. The plaintiff, who entered into the sale agreement ought to have been aware of this difficulty, at the time when the sale agreement was entered into. Even for the sake of arguments it is admitted that the defendants had agreed to get the layout in respect of Plot No.771 and waterlogged area, it is an impossibility. In respect of Plot No.770 sale deed has been executed by the defendants on 22.01.2014 (Ex.P.7) and the portion for which the sale deed has been executed is shown under the “B” schedule of the plaint.

18. It is submitted by the plaintiff that the sale deed dated 22.01.2014 [Ex.P.7] was executed for a sale consideration of Rs.25,83,500/- and so he is entitled to the balance sale consideration of Rs.84,16,500/- in addition to Rs.2,00,000/- towards penalty for not performing the defendants part of contract. The main prayer of the plaintiff is to execute the sale agreement in respect of Plot No.771 and the remaining waterlogged area. The sale agreement [Ex.P.3] dated 13.06.2013 coupled with the evidence on record would show that the defendants did not have any title in respect of



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Plot No.771 and the waterlogged area. In that context, it is impossible to direct the defendants to execute the sale deed in respect of “C” schedule property. Due to the said reason, the readiness and willingness on the part of the plaintiff cannot be adverted into. Thus issue nos.2 and 3 are answered accordingly.

19. Issue No.4:- Since the defendants themselves have got no right to execute the sale deed in respect of “C” schedule property and the remedy that can be available to the plaintiff can be only the alternate relief of refund of the balance sale consideration. Now the quantum of the amount for which the plaintiff is entitled for refund has to be found out. It is claimed by the plaintiff that the balance sale consideration after meeting out the sale consideration for Plot No.770 would be Rs.84,16,500/- after deducting Rs.25,83,500/-. The plaintiff has admitted that he had agreed to purchase the property from the defendants at Rs.4,000/- per sq.ft. The property comprised in Ex.P.7 sale deed is seen to be 96 sq.mtr. which is equal to 1033 sq.ft.



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20. The defendants have claimed that the entire sale consideration so far paid by the plaintiff is Rs.1,10,00,000/- was meant for the sale price of Plot No.770. Such a submission cannot be accepted due to the very fact that the sale agreement is agreed for a total extent of 3488 sq.ft. So it is unfair on the part of the defendants to claim that sale price of the portion of the property (B schedule property) for which the sale deed has been executed is Rs.1,10,00,000/-.

21. As per the evidence of the plaintiff, he has stated that he is in enjoyment of 1332 sq.ft., which is inclusive of a portion of the waterlogged area. Even though no one has got right to sell waterlogged area, taking into consideration of the defendants enjoyment over the same, the plaintiff had agreed to pay a sale price of Rs.4,000/- per sq.ft. inclusive of the water logged area. Even though Ex.P.7 sale deed was registered for a sum of Rs.25,83,500/-, the actual sale price that can be appropriated for the plot in enjoyment of the plaintiff has to be either worked out at Rs.4,000/- for 1332 sq.ft. (working out to Rs.53,28,000/-) or at an enhanced equitable rate of Rs.5,158/- for 1033 sq.ft. in Plot No.770 (working out to Rs. 53,28,214/-), over which the defendants has a saleable interest. It is because,



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the plaintiff has purchased the property with an additional advantage of having the possession and enjoyment of the waterlogged area attached to Plot No.770. The defendants can not assume title in respect of the waterlogged area. But it was with the enjoyment of the defendants and who had parted away such enjoyment in favour of the plaintiff. By applying the principle of equity, the defendants should be given with a liberty of deducting Rs.53,28,000/- from the total amount of Rs.1,10,00,000/- received by him. It has been already observed that the defendants did not prove that a sum Rs.5,00,000/- is agreed to be the interest part for the delayed payment.

22. The plaintiff has claimed that he had suffered due to the breach on the part of the defendants in violating the condition that the sale deed should be executed after obtaining the necessary documents in respect of the suit property and hence he should be compensated with interest at the rate of 25%. As stated already the plaintiff was aware of the fact that the defendants did not have title in respect of Plot No.771 and waterlogged area. The plaintiff has taken the risk of entering into the sale agreement for the property including the portion over which the defendants did not have



any title. Since the plaintiff has also contributed to the failure, he cannot claim interest at a fantastic rate of 25%.

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23. The defendants have acted in an unfair manner by retaining the balance price paid by the plaintiff, though they knew that the whole of that sum is not meant for the extent comprised in the sale deed Ex.P.7. Neither the plaintiff nor the defendants are entitled to invoke the penalty clause, because the defendants had entered into the sale agreement in respect of the portion of the property knowing pretty well that they did not have any title. And the plaintiff has taken the risk of entering into the sale agreement inclusive of the portion for which the defendants did not have any title. Hence, neither the plaintiff nor the defendants is entitled to invoke the penalty clause.

24. The plaintiff had paid the total of Rs.1,10,00,000/-. Even though the sale deed in Ex.P.7 is registered for a sum of Rs.25,83,500/-, for the reasons already stated in paragraph no.21, the defendants are entitled to deduct a sum of Rs.53,28,000/-. The balance sum after deducting Rs.53,28,000/- from Rs.1,10,00,000/- is Rs.56,72,000/- and on which the



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plaintiff is entitled to get interest at the rate of 9% from 20.02.2014, on which date the plaintiff has made his last payment, subsequent to the sale agreement.

25. So I conclude that the plaintiff is entitled only for an alternate relief of refund for a sum of Rs.56,72,000/- along with interest at the rate of 9% p.a. on 20.02.2014 till the date of the decree and at the rate of 6% p.a from the date of decree till the date of realisation. Thus, issue no.4 is answered accordingly.

26. In the result, the suit in C.S.No.231 of 2017 is partly decreed in respect of the alternate relief of refund for a sum of Rs.56,72,000/- (Rupees Fifty Six Lakhs Seventy Two Thousand only) only with cost along with interest at the rate of 9% p.a from 20.02.2014 till the date of the decree and at the rate of 6% p.a from the date of decree till the date of realization. Time for payment 1 month.

28.04.2023

Speaking order
Index : Yes

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Neutral Citation : Yes
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Witnesses examined on the side of plaintiff:-

P.W.1	A.Ajul Akhar
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List of documents marked on the side of plaintiff:-

Ex.P1	Original Allotment proceedings by TNSCB dated 18.11.1987
Ex.P2	Original Sale Deed executed by TNSCB in favour of defendants dated 20.03.2006
Ex.P3	Original Agreement of Sale dated 13.06.2013 between the parties (Marked with objection objecting that it is unregistered).
Ex.P4	Office copy of Legal Notice dated 07.02.2017 by the plaintiff
Ex.P5	Original Postal acknowledgment card dated 08.02.2017 series-2 Nos.
Ex.P6	Original Rough sketch of the suit schedule property
Ex.P7	Original Sale Deed dated 22.01.2014 Doc.No.116/2014



Witnesses examined on the side of plaintiff:-

D.W.1	R.Ganesan
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List of documents marked on the side of defendants:-

Ex.D1	The photograph (marked during PW1 cross)
Ex.D2	Certified copy of plaint filed in O.S.No.2909 of 2018 (marked during DW1 chief)
Ex.D3	Certified copy of complaint made to H 6 R.K.Nagar Police Station (marked during DW1 chief)
Ex.D4	Certified copy of Online complaint made to Commissioner of Police, Chennai on 12.05.2018 (marked during DW1 chief)
Ex.D5	Certified copy of complaint dated 13.05.2018 made to Commissioner of Police, Chennai (marked during DW1 chief).
Ex.D6	Certified copy of photos (marked during DW1 chief)

28.04.2023

Copy to :

1.The Sub Assistant Registrar,
Original Side, High Court of Madras.

2.The Record Keeper,
Original Side Records Section,
High Court of Madras.

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R.N.MANJULA, J.

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Pre-Delivery Judgment made in
C.S.No.231 of 2017

28.04.2023