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O.S.a.No.182 of 2



THE HIGH COURT OF JUD ICATURE AT MADRAS

Reserved on 04.01.2024	Delivered on 31.01.2024
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

O.S.A.No.182 of 2020
and
Cross Objection No.43 of 2020

O.S.A.No.182 of 2020

1.V.Ramalingam

2.J.Krishna Kumar

...Appellants

Vs.

1.K.S.Sundaram

2.Tambaraparni Printers Private Limited,
19, Mudalippopuram Street,
Kallidaikurichi - 627 416.

3.Tambaraparni Containers Private Limited,
53, Kasturi Rangan Road,
Chennai - 600 018.

...Respondents

Prayer: Original Side Appeal filed under Order XXXVI, Rule (1) of the Original Side Rules, r/w. Clause 15 of Letters Patent, against the judgment and decree dated 28.02.2020 passed in C.S.No.374 of 2016.



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O.S.a.No.182 of 2



For Appellants : Mr.R.Thiagarajan
For Respondents : Mr.G.Rajagopalan, Senior Counsel
for M/s.G.R.Associates

Cross Objection No.43 of 2020

1.K.S.Sundaram

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...Cross Objectors

Vs.

1.V.Ramalingam

2.J.Krishna Kumar

...Respondents

Prayer:- Cross Objection filed under Order XXXVI, Rule 2 of the Original Side Rules, r/w. Clause 15 of Letters Patent, against the decree in counter claim dated 28.02.2020 passed in C.S.No.374 of 2016.

For Cross Objectors : Mr.G.Rajagopalan, Senior Counsel
for Mr.Niranjana Associates
For Respondents : Mr.R.Thiagarajan



J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

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The plaintiffs in C.S.No.374 of 2016, a suit for refund of advance paid and for damages are on appeal, since the Commercial Division dismissed the suit on the conclusion that the agreement provided for forfeiture of the advance amount in the event of failure on the part of the plaintiffs in complying with the terms of the contract.

2.The plaint averments are as follows:-

The plaintiffs are real estate promoters operating from Villupuram and Cuddalore. They were introduced to the 3rd defendant by the brother of the 2nd plaintiff, one J.Ravi. The defendants were looking for development of their property situate in Kariamankkam village of Puducherry Union Territory measuring about 6 acres and 78 cents. After negotiations, the parties entered into an agreement on 24.05.2014, in and by which, the plaintiffs agreed to lay out the entire land, which was partly agricultural and partly industrial, into a residential cum commercial lay out. It is agreed that the plaintiffs should pay a total sale consideration of Rs.6,15,00,000/- to the defendants as per the schedule of payments set out



in the agreement. The agreement also set out the respective rights and obligations of the parties. Pursuant to the said agreement, the plaintiffs had paid a sum of Rs.1,00,00,000/- on various dates.

3.As per the agreement, the plaintiffs were required to pay these total sum of Rs.6,15,00,000/- as follows:-

- a)amount paid on the date of the agreement i.e., 24.05.2014 - Rs.60,00,000/-.
- b)amount to be paid on or before 07.06.2014 - Rs.40,00,000/-.
- c)amount to be paid on or before 01.08.2014 - Rs.1,28,75,000/-.
- d)remaining sum of Rs.5,15,00,000/- shall be paid in four instalments on or before 01.08.2014, 01.11.2014, 31.01.2015 and 15.03.2015.

4.The plaintiffs were also obliged to carry out all official transactions required for obtaining approval of the lay out and for selling the plots. Agreement also provided that the owners namely, the defendants would execute powers of attorney in favour of the developers only on payment of the entire sum of Rs.6,15,00,000/- to enable the plaintiffs to sell the plots. There was also a term in the contract, which provided for execution of sale deeds by the owners namely, defendants for transfer of shares of the 3rd defendant Company. The agreement provided that it will stand cancelled

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automatically on 31.03.2015. Claiming that they were unable to perform their part of the contract due to the failure on the part of the defendants to co-operate with the plaintiffs in obtaining the statutory approvals that are required to be done by the owners of the land only, the plaintiffs claim that the agreement became incapable of being performed. It was the further contention of the plaintiffs that there were also protests by the workers who were employees of the 2nd and 3rd defendants.

5.Citing the above incidents as reasons for the failure of the contract, the plaintiffs sought for refund of advance paid with interest at 18% per annum. The plaintiffs also claimed that they had spent huge sums of money on improving the land in question and also safeguarding the land by appointing security guards. The total claim on that head was Rs.43,49,000/-. With interest at 18% per annum it worked out to Rs.56,53,700/- on the date of the suit. On the whole, the plaintiffs claim a sum of Rs.1,91,03,700/- with interest at 18% per annum on Rs.1,00,00,000/- and on Rs.43,49,000/-.

6.The plaintiffs would further contend that though the agreement provided for forfeiture of the advance, since there was failure on the part of



the defendants to perform their obligations, they cannot take advantage of their own wrong and claim that they would forfeit the advance. It was also pleaded that the clause was penal in nature and therefore, it cannot be enforced in the absence of actual proof of damages.

7.The defence as set out in the written statement is as follows:

The defendants resisted the suit primarily contending that the agreement failed because of the failure on the part of the plaintiffs to honour their commitments. Citing lack of even a single communication on the part of the plaintiffs seeking performance of the alleged obligations on their part, the defendants would contend that the plaintiffs were singularly responsible for the agreement being breached. It was also contended that the 1st and 2nd plaintiffs did not bother to respond, despite several letters and notices. The claim of the plaintiffs that there was labour unrest or protest by the former workmen of the defendants 2 and 3 was dismissed as imaginary. The defendants would also cite total lack of evidence on the steps that were taken by the plaintiffs for enforcement of the agreement as a reason for its breach.



8.Relying heavily on Clause-3 of the agreement, the defendants would contend that it was the responsibility of the plaintiffs to obtain various statutory approvals and the agreement itself states that they are entitled to apply for various statutory approvals. The defendants would claim that in the event of failure on the part of the plaintiffs to pay a sum of Rs.6,15,00,000/- as per the schedule by 15.03.2015, the defendants were entitled to forfeit the entire advance paid and therefore, the plaintiffs are not entitled to refund of advance.

9.On the claim for damages / value of the improvements carried out by plaintiffs, the defendants would submit that no improvement work was carried out and the land remained as it is. Except in putting up a gate which was also done in breach of the terms of the agreement, the plaintiffs had not done any work so as to alter the physical features of the land as on ground. It is the contention of the defendants that the plaintiffs are not entitled to damages.

10.On the above pleadings, the following issues were framed by the Trial Court:-



"(i) Whether the plaintiffs have committed breach of any of the covenants of the Development Agreement dated 24.05.2014 ?

ii) Whether the defendants have committed breach of any of the covenants of the Development Agreement dated 24.05.2014?

iii) Whether time is the essence of the Development Agreement dated 24.05.2014, as the transaction pertains to immovable property?

iv) Whether plaintiffs were ready and willing to perform / discharge all their obligations under Development Agreement dated 24.05.2014?

v) Whether defendants were ready and willing to perform all their obligations under Development Agreement dated 24.05.2014?

vi) Whether plaintiffs are entitled to refund and damages as claimed?

vii) Whether defendants are entitled to damages as claimed [in the counter claim]?

viii) Whether defendants are entitled to appropriate the advance paid by the plaintiffs by pleading forfeiture under Development Agreement dated 24.05.2014?

ix) To what other relief are the plaintiffs and the defendants entitled?"



11.At trial, the 1st plaintiff was examined as P.W.1, one Mr.J.Ravi was examined as P.W.2 and one Mr.B.Jalaluthin was examined as P.W.3.

Exs.P1 to 72 were marked on the side of the plaintiffs. The 1st defendant was examined as D.W.1 and Exs.D1 to D18 were marked on the side of the defendants.

12.Upon consideration of the evidence placed on record, the learned Trial Judge found that the plaintiffs are guilty of breach of contract. The learned Trial Judge concluded that the plaintiffs have not done anything in furtherance of the agreement and therefore, they are not entitled to refund of the advance. The claims made by the defendants relating to subsistence of a mortgage over the property, non-payment of electricity consumption charges, litigation between the defendants and their tenants were all found to be non-existent. The learned Trial Judge found that these were raised by the plaintiffs only to camouflage their failure to perform their part of the contract. The learned Trial Judge also found that the plaintiffs had not taken any step in furtherance to the agreement. The absence of any evidence to show that the plaintiffs had, in fact, taken some steps to have the lay out approved or to submit the plans to the competent authorities etc.,



led the learned Trial Judge to conclude that the plaintiffs are guilty of non-performance.

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13. On the claim for damages, the learned Judge found that the evidence that was let in was wholly insufficient to prove the nature of the work that was carried on by the plaintiffs. The learned Judge also found that the plaintiffs have not proved that they have spent sum of Rs.43,49,000/- as claimed by them towards development. The fact that there was an attempt by the plaintiffs to wriggle out of the contract and transfer the contract itself to P.W.2 was also noticed by the Court as a factor that would disentitle the plaintiffs from making a claim for damages. On the above conclusions, the learned Trial Judge dismissed the suit.

14. Apart from seeking dismissal of the suit, the defendants also made a counter claim seeking a decree for Rs.1,33,90,000/- being the interest at 13% per annum on the balance amount namely, Rs.5,15,00,000/- with effect from 01.04.2015 till 31.03.2017. According to the defendants, if only the plaintiffs had paid that money within the due dates, the defendants would have profitably invested it and earned interest, which would amount to



Rs.1,33,90,000/-. A reply statement was filed on the counter claim, contending that there is no cause of auction for the counter claim and since the land still remains with the defendants, they have not incurred any loss whatsoever. The learned Trial Judge also found that the counter claim is unsustainable, since the defendants have not proved the loss. Therefore, the suit as well as the counter claim were dismissed. Aggrieved, the plaintiffs have come up with the above appeal and the defendants have come up with Cross-Objection.

15.We have heard Mr.R.Thiagarajan, learned counsel appearing for the appellants in the appeal and the respondents in the Cross Objection and Mr.G.Rajagopalan, learned Senior Counsel appearing for the respondents in the appeal and for the objectors in the cross objection.

16.Mr.R.Thiagarajan, learned counsel appearing for the appellants would vehemently contend that the agreement, Ex.P29 is a contract containing mutual obligations on the part of both the plaintiffs and the defendants. According to him, it has reciprocal promises and it was the failure on the part of the defendants to perform their part of the contract that



led to the plaintiffs being unable to perform their part of the contract.

Therefore, according to Mr.R.Thiagarajan, the contract failed not because of the plaintiffs' failure but because of the fact that the plaintiffs were rendered disabled due to the inaction on the part of the defendants.

17.Arguing further, Mr.R.Thiagarajan, learned counsel for the appellants would submit that if a contract containing reciprocal promises fails, the Court must look at the order in which those promises to be performed and the failure of the contract has to be attributed to the party who was bound to take the initial steps. Contending that as an agreement holder, the plaintiffs cannot perform the statutory functions like seeking approval for conversion of the lands used, seeking approval of laying out land into plots and for other developmental works, the learned counsel for the appellants would submit that minimum that was expected was the defendants to cooperate in getting the statutory approvals. Having failed to perform their part in obtaining the statutory approvals, according to Mr.R.Thiagarajan, the defendants cannot seek to forfeit the advance. He would also draw our attention to various documents, which would show that the defendants have not paid the taxes and the electricity charges due



on time which stood in the way of the plaintiffs seeking permission for development.

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18. Drawing our attention to encumbrance certificates that were produced, the learned counsel for the appellants would submit that the encumbrance in favour of the Pondicherry Industrial Promotion Development and Investment Corporation was still shown to be subsisting and the same was discharged only after the agreement. The learned counsel would submit that it were these factors which led to the agreement being left unperformed. The learned counsel would also submit that the mortgage created in favour of the Pondicherry Industrial Investment Corporation was discharged only on 10.04.2015, as seen from Ex.P40. The learned counsel would also draw our attention to the various encumbrances in the form of lease deeds that were executed in the years 2004, 2005, 2006 etc., which would show that there was a serious dispute regarding possession of the property. He would also draw our attention to the litigation that was pending between the tenant and the defendants.



19. Our attention was drawn to Ex.P23, an order in E.P.No.189 of 2013 filed seeking an order for delivery of possession from third parties.

Pointing out the fact that an order for delivery was made only in the month of August, 2014, the learned counsel for the appellants would contend that the defendants were not in possession of the entire extent of the property when they entered into an agreement. Therefore, according to the learned counsel for the plaintiffs, the agreement dated 24.05.2014 being an agreement containing reciprocal promises, and the failure or the breach of the agreement was caused by non-performance of such reciprocal promises by the defendants. Therefore, according to the learned counsel, the Trial Court was not justified in dismissing the suit for refund of advance as well as damages.

20. The learned counsel would also draw our attention to the Sections 70, 73 and 74 of the Contract Act to contend that in the absence of proof of actual damage the defendants are not entitled to forfeit the entire advance, even assuming there is a breach of contract. He would also point out that the forfeiture clause itself is penal in nature and therefore, the same cannot be enforced.



21.Contending contra, Mr.G.Rajagopalan, learned Senior Counsel for the defendants would submit that the plaintiffs who claim to be seasoned real estate developers had entered into a contract with their eyes open.

They had undertaken to do certain acts, which included the obligation to obtain necessary statutory clearances / permissions. Having failed to even apply for such statutory clearances and permissions, the defendants cannot be allowed to take shelter under the requirement of the Development Control rules to contend that it was for the owner to have applied for permission. Relying heavily on Clause - 3 of the contract dated 24.05.2014, the learned Senior Counsel would submit that it was the responsibility of the plaintiffs to have applied for and obtained all statutory clearances. Having failed to even apply, the plaintiffs cannot contend that there was no cooperation on the part of the defendants.

22.On the subsistence of alleged encumbrances, the learned Senior Counsel would point out that the encumbrances were discharged much earlier and the same is evident from Exs.D1 to D6. The learned counsel would also point out that the correspondence between the defendants and the Mediator, Mr.Ravi Reddiar, P.W.2 would show that the plaintiffs have



admitted the default and therefore, they are not entitled to refund of advance or the compensation claimed.

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23.The learned Senior Counsel would also point out that the defendants have taken all the steps to enable performance of the contract and the failure is attributable only to the plaintiffs. The learned counsel would also draw our attention to Clause-13 of the agreement dated 24.05.2014 to contend that the defendants are entitled to forfeit the entire advance. The correspondence that was marked as Ex.P30 was pointed out by the learned counsel for the defendants / cross-objectors to contend that the defendants had made it very clear that the time would be the essence of the contract and non-payment of the consideration as per the schedule set out in Ex.P29, agreement dated 24.05.2014 would entail automatic cancellation of the agreement, apart from forfeiture of the advance amount.

24.The learned Senior Counsel would also point out to several letters were written by the defendants to the plaintiffs pointing out their failure. There was not a single word of reply from the plaintiffs. When the 1st plaintiff saw to it that the letters were returned, the 2nd plaintiff received



the letters and chose not to respond. Therefore, according to the learned Senior Counsel, the conduct of the defendants is not free from blame and hence, the Trial Court was right in rejecting the prayer for refund of advance and damages.

25. Arguing on the cross-objections, the learned Senior counsel would submit that if only the plaintiff had honoured the agreement and paid the balance amount of Rs.5,15,00,000/-, the defendants would have been able to invest the same and earn interest. Reliance is placed on Exs.D14 and D15 to show that money if invested would have earned so much of interest. We have considered the rival submissions.

26. On the contentions of the learned counsel, the following points emerged for consideration:-

- i) Whether the plaintiffs are responsible for breach of the contract.*
- ii) Whether the defendants are entitled to forfeit the entire advance as per Clause-13 of the agreement.*
- iii) Whether the plaintiffs are entitled to a sum of Rs.43,49,000/- with interest claimed as damages.*



iv) *Whether the defendants are entitled to sum of Rs.1,33,90,000/- claimed as damages by way of counter claim.*

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27. Point No.1

Ex.P29 is the contract dated 24.05.2014, which forms basis for the suit.

i) Clause - 3 of the said contract reads as follows:-

"3.In view of the personal inconvenience and dealing with the Schedule Property by negotiating for sale and also to take appropriate steps to make the lands fit for sale, after making necessary conversion of the lands and also obtaining layout sanction from competent authorities and hence the Owners have agreed to entrust the Schedule Property to the DEVELOPER for such development."

ii) Clause 1 of the contract reads as follows:-

1.It is the responsibility of the Developer to deal with the:

- a) Panchayat, Municipality or Local Body*
- b) Pondicherry EB, Pondicherry Water Board*
- c) Asst. Commissioner, Special Commissioner, Urban Land Ceiling Department*
- d) Asst. Commissioner / Commissioner, Land Reforms*
- e) Tahsildar*
- f) Any Government Department/s or Undertaking/s e*



- either Union Territory / Central*
- g) Consumer Disputes Redressal Forum and Commissions*
- h) Court, Tribunal, Quasi Judicial Authorities*
- i) Any Board or Trust constituted under any Act (Union Territory or Central) in force*
- j) Police Department*
- k) Other concerned Government departments*

iii) The schedule of payments as set out in Ex.P29 is as follows:-

8. The Developer shall pay Rs.6,15,00,000/- (Rupees Six Crores 15 Lakhs only) being the value of the Schedule Property in the following manner:-

<i>(a) Amount remitted so far into Owners Bank account up to this day by the Developer</i>	<i>Rs.10,00,000</i>
<i>(b) Amount to be paid on or before 07.06.2014</i>	<i>Rs.40,00,000</i>
<i>(c) Amount to be paid on or before 01.08.2014</i>	<i>Rs.1,28,75,000</i>
<i>(d) Amount to be paid on or before 01.11.2014</i>	<i>Rs.1,28,75,000</i>
<i>(e) Amount to be paid on or before 31.01.2015</i>	<i>Rs.1,28,75,000</i>
<i>(f) Amount to be paid on or before 15.03.2015</i>	<i>Rs.1,28,75,000</i>
	<i>-----</i>
	<i>Rs.6,15,00,000/-</i>
	<i>-----</i>



28.The forfeiture clause namely, Clause-13 of the agreement reads as

follows:-

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i) Clause-13:-

"13.If the Developer is unable to sell the Plot/s on or before 31.03.2015, the Owners shall allocate the Plot/s proportionately to the amount received to the Developer, at the discretion of the Owners.

However if the Developer is unable to get the layout approved on or before 31.03.2015 or in case they are unable to settle the account of the Owners, the Developer shall forfeit the sum of Rs.60,00,000 and any such other advance paid barring the sum exclusively paid for the full purchase value of plots by third parties. In such circumstance, the Developers shall leave the schedule property forthwith for the owners to pursue on their own the sale of plots under no constraint of any compensation to the Developer."

ii) Clause-19 which provides for automatic cancellation of the contract, which reads as follows:-

"19.This agreement shall be in force upto 31.03.2015 only and afterwards it stands cancelled automatically."

29.The agreement also evidences the fact that the plaintiffs have been put in possession of the property. Though the said possession is stated to be

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symbolic, a perusal of the terms of the contract itself would demonstrate that the contract is heavily loaded in favour of the defendants. No doubt, the learned counsel for the defendants would contend that the plaintiffs, who are experienced real estate developers had entered into contract with their eyes wide open and therefore, they cannot be allowed to take the plea that the contract is one sided. From a reading of the contract, we can straight away to reject the contention of the learned counsel for the appellants that the contract contains reciprocal promises.

30. On the other hand, the contract casts all obligations on the plaintiffs and the only obligation on the part of the defendants is to receive the monies under the contract and the obligation of the defendants to execute sale deeds or power of attorney as the case may be arises only after payment of the entire sale consideration of Rs.6,15,00,000/- by the plaintiffs. The payment schedule is upto 15.03.2015 and the last date of the contract is 31.03.2015. This leaves only a 16 day window for the plaintiffs to take powers of attorney or sell the plots and collect the sale proceeds and request the defendants to execute sale deeds. This, in our opinion, is too short a period.



31.We must also point out that there is total lack of evidence on the steps taken by the plaintiffs to get the necessary statutory approvals. The evidence that is projected in the form of a few unsigned letters marked as Exs.59 & 60 is wholly insufficient to conclude that the plaintiffs had taken some steps in the right direction to get the statutory approvals. There is no evidence of the plaintiffs having even attempted to submit a lay out plan for sanction with the authorities concerned. We find that evidence is lacking to demonstrate that the plaintiffs had taken some steps in furtherance of the agreement, except paying the sum of Rs.1,00,00,000/- as advance.

32.No doubt, the plaintiffs are able to show that there was some litigation pending in respect of possession of a portion of the land between the defendants and their tenants on the date of the agreement. But, as could be seen from the documents, the plaintiffs have expressly stated that they have taken possession of the entire land as per the agreement even during May, 2014.

33.Let us now examine the evidence and the conduct of the parties. The agreement is dated 24.05.2014. On the date of the agreement, the



plaintiffs have paid a sum of Rs.60,00,000/- as advance and a further of Rs.40,00,000/- was paid on 05.06.2014 as evidenced by the endorsement in the agreement itself. Under the agreement, the plaintiffs are bound to obtain all the statutory approvals from the Panchayat, Municipality or Local Body or the Planning Authority as the case may be.

34.Clause-4 of the agreement contains an authorization to the developer to obtain the necessary planning permissions. The plaintiffs would vehemently contend that such authorization is not sufficient under the Development Control Rules. The application forms for necessary approvals have to be signed by the owners of the land namely, the defendants. Therefore, according to the plaintiffs they could not get approval, since the owners did not co-operate in signing the necessary applications for approval. We find it very difficult to accept the said submission. There is not even a scrap of paper produced by the plaintiffs to show that they have attempted to apply statutory sanctions except the two unsigned letters, who were marked as Exs.P59 & P60. There is nothing on record to show that there was an attempt by the plaintiffs to make out necessary applications. Even those two letters, which are unsigned, dated



10.07.2014 have been marked through P.W.3, who has nothing to do with those two letters. We find complete infraction of rules of evidence in the manner in which the two letters have been marked through P.W.3. We find several other infractions in the manner in which the evidence has been recorded in the suit on hand. We shall deal with them in the later part of the judgment.

35.These two letters have not even been to put to D.W.1, to whom they were claimed to have been handed over by the plaintiffs. In the absence of such evidence, we have to necessarily conclude that the plaintiffs did not take any steps to get the statutory approvals. We will have to necessarily uphold the finding of the learned Trial Judge to the effect that the plaintiffs had, in fact, committed breach of the contract.

36.Yet another factor which compels us to agree with the learned Trial Judge on the question of breach is, non-payment of balance of sale consideration. The total sale consideration agreed to was Rs.6,15,00,000/-, which had to be paid as per the schedule found in the agreement. Except paying a sum of Rs.1,00,00,000/- (Rs.60,00,000/- as advance on the date of



the agreement and Rs.40,00,000/- on 04.06.2014), the plaintiffs have not paid the balance amount. The plaintiffs would seek to justify the non-payment by referring to the subsistence of the mortgage, protest by the former Employees of D2 & D3, the claim that third parties were in possession of the property, pendency of execution proceedings against the tenants in E.P.No.189 of 2013 and the non-payment of arrears of electricity charges as reasons for their non-performance.

37.No doubt, certain portions of the property was let out by the defendants to third parties and suits were filed by the defendants as well as the tenants. One such suit is O.S.No.23 of 2006, which was filed by the tenant for refund of security deposit. There the complaint of the tenant was despite she offering to vacate, the defendant did not come forward to take possession. The said suit was decreed and an appeal filed by the defendants in A.S.No.54 of 2007 came to be allowed, entailing the defendants to deduct six months rent from the security deposit. The appeal was decided on 06.04.2009 itself and therefore, the said litigation cannot be treated to be an encumbrance over the suit property. Though there was another lease in favour of Satyasai Industries and the said lease was also terminated by a



surrender instrument marked as Ex.P20 dated 19.04.2011. The only litigation that had survived beyond the date of the agreement is the execution petition in E.P.No.189 of 2013 in O.S.No.14 of 2013. The order passed dated 11.03.2014 in the said Execution Petition has been marked as Ex.D4 which shows that there was an order for delivery by 08.04.2014.

38.As regards the electricity dues, the order dated 08.10.2014 of the Consumer Grievances Redressal Forum, Puducherry has been produced as Ex.D6, which would show that only a sum of Rs.24,000/- was payable as arrears of electricity dues by the defendants. Therefore, the claim that there were arrears of electricity charges and that third party was in possession of a portion of the property appear to be the claims raised by the defendants, to camouflage their failure to honour the terms of the contract. Be that as it may, the plaintiffs have admitted that they were put in possession of the property and they have also safeguarded the property. We are therefore, unable to fault the learned Trial Judge for having come to the conclusion that the plaintiffs have committed breach of the contract. Therefore, we answer Point No.1 in favour of the respondents.

39. Point No.2:-

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Once we conclude that the plaintiffs have committed breach of the contract, we have to examine as to what is the consequence of the breach.

Clause-13 of the agreement extracted supra is heavily relied upon by the learned counsel for the defendants to contend that the plaintiffs are not entitled to refund of advance. A reading of Clause-13 would show that the consequence of non-payment of the entire sale consideration by the due dates is forfeiture of the advance paid. It is not relatable to any damage that is to be suffered by the defendants due to such non-payment.

40.As we had already pointed out, the defendants have made it very clear that time is the essence of the contract and they would not tolerate any delay. Under Ex.P30 dated 31.07.2014, the defendants have made it clear that the time is the essence of the contract and the time schedule for payment should be adhered to very strictly. The 1st defendant, who is the Author of the letter dated 31.07.2014 marked as Ex.P30 had made it very clear that the time for payment of the instalment that is due on 01.08.2014 is extended to 15.03.2014 only as a gesture and any delay in further payment will result in the contract being cancelled.



41. In the light of the above, it is clear that the non-payment of the monies within the time stipulated under the agreement would lead to cancellation of the agreement but, would that automatically lead to forfeiture of the advance amount, that too, a huge sum of Rs.1,00,00,000/- is what is to be considered by us. The learned trial judge had gone by letter of the contract and concluded that since the plaintiffs are responsible for the breach of the contract and Clause-13 provides for forfeiture, the advance amount will stand forfeited and therefore, the plaintiffs cannot seek refund of advance.

42. Mr. R. Thiagarajan, learned counsel for the appellants would contend that the learned Trial Judge had not adverted to the penal nature of Clause-13 of the agreement. He would also draw our attention to Sections 73 & 74 of the Contract Act, which reads as follows:-

“73. Compensation for loss or damage caused by breach of contract.— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from



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the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for.— 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 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.

to contend that even in a case where there is a forfeiture clause, it will be open to the Court to reduce the penalty, in view of the Section 74 of the Contract Act.

43.The learned counsel would also invite our attention to the judgment of the Hon'ble Supreme Court in ***Maula Bux Vs. Union of India*** reported in ***AIR 1970 SC 1955*** in support of his submissions. While considering the effect of Section 74 of the Contract Act, the Hon'ble Supreme Court had, after considering the various decisions, concluded as follows:-

“6.Forfeiture of earnest money under a contract for sale



of property-movable or immovable--if the amount is reasonable, does not fall within S. 74. That has been decided in several cases: Kunwar Chiranjit Singh v. Hat Swarup (1); Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi(2); Muhammad Habibullah v. Muhammad Shafi(3); Bishan Chand v. Radha Kishan Das(4); These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, s. 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.

44. Our attention is also drawn to the judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority*** reported in **(2015) 4 SCC 136** wherein, the Hon'ble Supreme Court after examining the law relating to damages had observed as follows:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such



liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is



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difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

45. Reliance is also placed on the judgment rendered by one of us in ***Shango Technologies Private Limited Vs. Chemplast Sanmar Ltd.***, reported in ***MANU/TN/1715/2018*** wherein, after referring to the judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates*** supra, it was concluded that the Clause for forfeiture being in nature for penal clause, is not enforceable.

46. In support of his submissions that a forfeiture clause can be enforced, Mr.G.Rajagopalan, learned Senior Counsel appearing for the defendants would invite our attention to the judgments of the Hon'ble Supreme Court in ***Chand Rani Vs. Kamal Rani*** reported in (1993) 1 SCC 519 and judgment in ***Desh Raj and Others Vs. Rohtash Singh*** reported in 33/45



(2023) 3 SCC 714. Reliance is also placed on the judgment of the Hon'ble Supreme Court in *V.Prabhakara Vs. Basavaraj and Another* reported in (2022) 1 SCC 115 to contend that the Appellate Court while exercising the power under Section 96 should keep in mind the views of the Trial Court and mere substitution of views is not permissible.

47.We have to examine the clause in question as found in the agreement dated 24.05.2014. It provides for forfeiture simplicitor in the event of failure to pay the balance of sale consideration. It is not one for payment of liquidated damages. It is a forfeiture plan and simplicitor. As we have already adverted to the Hon'ble Supreme Court in *Maula Baux* and had held that forfeiture of earnest money or forfeiture of advance if found to be penal in nature, need not be enforced.

48.The Hon'ble Supreme Court had time and again reiterated that if the clause stipulating liquidated damages in breach of contract is unreasonable or is by way of penalty, the Court need not enforce it. Though the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved, if it is found that the compensation stipulated is by way of penalty or is unreasonable, the Court can always

34/45



refuse such forfeiture. If we are to test Clause-13 on the basis of the above and the law laid down by the Hon'ble Supreme Court, we find that Clause-13 is definitely penal in nature apart from being unreasonable.

49.Both the decisions referred to by Mr.G.Rajagopalan, learned Senior Counsel for the respondents, did not consider the scope of Section 73 or 74 of the Contract Act. While the Hon'ble Supreme Court in ***Chand Rani Vs. Kamal Rani*** was concerned with the issue as to whether the time is the essence of contract for sale of immovable property, in ***Deshraj -Vs- Rohtash Singh***, the Hon'ble supreme Court was concerned with the grant of refund of advance in the absence of a prayer in terms of Section 22 of the Specific Relief Act. The question of refund of earnest money or the penal nature of the clause providing for the forfeiture of money was not gone into by the Hon'ble Supreme Court in both those cases.

50.The learned Single Judge has gone by the clause and concluded that in view of the Clause-13, the plaintiffs are not entitled to sue for refund of advance. No doubt, there is a breach on the part of the plaintiffs but, unfortunately, we find that the judgment in ***Maula Baux Vs. Union of India*** and ***Kailash Nath Associates Vs. Delhi Development Authority*** were not



brought to the notice of the learned Single Judge. In fact, we do not find even a reference to Section 74 of the Contract Act in the judgment of the Trial Court.

51.In the light of the law laid down by the Hon'ble Supreme Court, we are unable to sustain the findings of the learned Trial Judge to the effect that the plaintiffs are not entitled to refund of advance. Once it is found that the clause providing for forfeiture is penal in nature and a discretion is vested in the Courts, as Courts of equity, to ensure that there is no unjust enrichment to any of the parties to the litigation. Apart from there being no proof of loss, we find that the defendants would be immensely benefitted by the failure of the contract.

52.Yet another important fact that has been overlooked by the Trial Court is the conduct of the defendants. In fact, even in December, 2014, there had been negotiations between the parties and parties had agreed for cancellation of the contract. The fact that there was a cancellation of the contract and an attempt was made to enter into a contract with P.W.2 had been admitted by D.W.2 in his evidence, in Ex. D9, letter addressed by him



to P.W.2 and under Ex.P34, the cancellation agreement, which was admittedly prepared by the counsel for the defendants. The defendants had agreed to give land equivalent value of the advance amount namely, Rs.1,00,00,000/- to the plaintiffs. No doubt, this agreement was not signed by the defendants. But, Ex.D8 contains an acknowledgment of the fact that there was a proposal to cancel the agreement dated 24.05.2014 and to compensate the plaintiffs for the advance amount with land of equivalent value.

53. Again under Ex.D9 dated 30.12.2014, the 1st defendant has written to P.W.2, agreeing for cancellation of the agreement. He has also stated that the defendants would take steps to sell the plots and upon sale of the plots, settlement will be made to return the deposits standing to the credit of the developers without any interest. Therefore, it is clear that the defendants were alive to the fact that the forfeiture clause is penal in nature and therefore, they are bound to refund the advance. Only after the cancellation of the agreement on 28.02.2015 under Ex.D11, did the defendant insisted on forfeiture of the advance amount.



54.It is therefore, clear to us that the clause relating to forfeiture namely, Clause-13 as found in the agreement is penal in nature and the same cannot be enforced. There is enough evidence to conclude that the defendants had in fact agreed to compensate the plaintiffs for the monies paid by them by way of land or to refund the same without interest, after selling the land in question. We are therefore, unable to subscribe to the conclusions of the learned Trial Judge that,in view of the forfeiture clause, the plaintiffs would not be entitled to refund of advance. Therefore, Point No.2 is answered in favour of the plaintiffs / appellants.

55. Point No.3

This relates to damages claimed by the plaintiffs. We have concluded that the plaintiffs are responsible for the breach of the contract. Except the evidence of P.W.3, there is nothing on record to show that the expenses as claimed were actually incurred by the plaintiffs. More over, the plaintiffs had taken possession of the land, pursuant to the agreement and they are bound to safeguard the same. They cannot claim damages on the ground that they had engaged Watchman to safeguard the land in question. Moreover, once we have found that the plaintiffs are responsible for breach



of the contract and failure of transaction, they cannot be favoured with a decree for damages. We therefore, answer Point No.3 in favour of the respondent / defendants.

56. Point No.4

This leaves us with a question of damages claimed by the defendants. The very claim for damages is on the assumption that if the plaintiffs had paid the balance money, that would have been invested in a profitable manner thereby, earning interest at 12% per annum. This loss has to be proved. At the end of the day, upon failure of the agreement, the land still remains with the defendants, they continue to be the owners of the same. We cannot lose sight of the fact that the land value is ever increasing and today, the defendants would definitely be in a possession to sell the land at a better price that was offered by the plaintiffs way back in 2014.

57.It is claimed that the plaintiffs had sought for an attachment before judgment and the defendants had given an undertaking not to alienate the land during the pendency of the suit and this appeal. That by itself would not entail them to claim damages. After all, there was no order of



attachment. A voluntary undertaking has been given by the defendants in order to avoid an order of attachment. Such a voluntary undertaking will not enable the defendants to seek damages. We therefore, find that the appeal against a rejection of the cross-objection should be dismissed.

58.Having answered the issues that arose in the the appeal and the cross-objection, we shall now advert to the irregularities found by us in recording of evidence. Two unsigned letters which were marked as Exs.P59 and P60 are said to be authored by the 1st defendant and addressed to the Secretary, Puducherry Planning Authority. They have been marked through P.W.3. P.W.3 is a contractor, who has been examined by the plaintiffs to show that he had been engaged in earth filling work in the property. He has nothing to do with those two documents. His proof affidavit also does not contain any reference to those two documents. However, the learned Additional Master, who was in-charge of recording of evidence has been hoodwinked in marking those documents through P.W.3. Strangely, those two documents have not been put to D.W.1, who is stated to be the Author of those documents. It is now claimed that originals of those two letters were handed over to D.W.1 for being sent to the authorities seeking sanction of lay out plans. It is clear that this story is an invented story, there is no



pleading to that effect in the plaint. There is nothing in the evidence of P.W.1 to the effect that these letters are handed over to D.W.1.

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59. Yet another aspect, which we find a little intriguing is the cross-examination of D.W.1 on the absence of a signature in some of the exhibits marked as Ex.D8, D9, D10 and D11. A perusal of the proof affidavit of D.W.1 shows that these documents are copies of the letters addressed by him to P.W.2, the counsel for the defendants and the 1st plaintiff. The proof affidavit itself makes it clear that these are copies of the letters. Absence of signature in a copy is very normal. However, a very serious attempt has been made to discredit the evidence of D.W.1 by pointing out that these documents are unsigned and the Additional Master has been coaxed to put questions to D.W.1 on the absence of signature in these documents. This is very very unfortunate. D.W.1 who seems to be a well educated witness also has not realised that he is being taken for a ride. He has also deposed very irresponsibly stating that the documents are xerox copies and being xerox copies, his signatures are not visible in those documents. This shows that the Additional Master who has recorded evidence in the case on hand has



not devoted any attention to the happenings while evidence was recorded.

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60. The following are irregularities:-

1) Documents have been marked Ex.P59 & 60 without any reference to them in the proof affidavit of the witness.

2) Lengthy cross-examination has been allowed on the absence of signature in the Office copies of the documents, which have been addressed to the 1st plaintiff, P.W.2 and the lawyer for the defendants.

3) The Additional Master has been made to put a Court question on the absence of signature in the Office copies. Normally, Office copies are maintained without signatures only. It shows that the Additional Master who has recorded the evidence has not even followed the proof affidavit before allowing cross-examination.

61. We are recording these incidents only to prevent recurrence of such abuse of process of recording evidence in future. We direct the Registry to forward a copy of the judgment to the Additional Masters, who are in-charge of the recording evidence to ensure that they follow a proper procedure in recording evidence and do not allow such breaches in



procedure to recur.

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62.In fine the appeal is **partly allowed**, there will be decree for repayment of a sum of Rs.1,00,00,000/- with 9% interest from the date of the suit till date of payment. We are not granting pre-suit interest, since we have held that the plaintiffs are guilty of breach of contract. We are granting 9% interest only though this is a commercial transaction and the defendants have had the benefit of the said sum of Rs.1,00,00,000/- for nearly 10 years now, again, because of the fact that we have held that the plaintiffs are responsible for the breach of the contract. In all other aspects, the suit will stand dismissed, the cross-objection against the dismissal of the counter claim will also stand dismissed. We direct the parties to bear their own costs in this appeal and cross-objection.

(R.S.M., J.) (R.S.V., J.)
31.01.2024

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Internet:Yes

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Nuetral Citation :Yes



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R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

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