
(1990) 09 MAD CK 0036
In the Madras High Court

O.M. Muthuswamy

APPELLANT

Vs

V.R. Arunachalam Chettiar

RESPONDENT

Date of Decision : 07-09-1990

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (1991) 267 MLJ 1

Hon'ble Judges : Abdul Hadi, J

Bench : Division Bench

Judgement

Abdul Hadi, J.—In these two appeals the parties are same. The defendant is the appellant in both the appeals - A.S. No. 168 of 1982 is

against the judgment and decree in O.S. No. 1547 of 1978 on the file of the Sub Court, Erode, and A.S. No. 225 of 1981 is against the judgment

and decree in O.S. No. 13 of 1978 on the file of the Sub Court, Erode. Both the suits were tried together and a common judgment was rendered

in both the suits on 10.3.1980.

2. O.S. No. 547 of 1978 is for possession of the suit properties of 10.32 acres of nanja lands - Q.S.No. 13 of 1978 is for recovery of Rs.

10,416.66 towards past mesne profits in relation to the same suit property for the period from 10.12.1976 till the date of suit, viz., 18.1.1978 with

interest and for future mesne profits till date of realisation.

3. The respondent-plaintiffs case is as follows:

The defendant entered into a sale agreement Ex. B-1, dated 9.9.1976 for purchase of the above said suit property with the plaintiff, the owner of

the said property for a sale consideration of Rs. 1,00,000. The defendant paid a sum of Rs. 25,000 as advance under the said sale agreement and

he was also put in possession on that day itself and under the agreement; the sale has to be completed within 3 months. The intention of the parties

was to treat the above said time fixed as the essence of the contract. But the defendant defaulted in paying the balance sale price of Rs. 75,000.

Therefore the plaintiff gave Ex. A-1 notice dated 22.2.1977 to the defendant cancelling the agreement and calling upon him to deliver possession

of the said property to the plaintiff. The defendant received the notice, but did not reply. However, the plaintiff was advised to give the defendant a

reasonable time for compliance of the contract, to avoid technical objections. Accordingly, the plaintiff gave Ex. A-3 notice through his advocate,

on 11.6.1977 calling upon the defendant to pay the balance price with interest within a week and get the sale deed executed by the plaintiff. The

defendant received the said notice. But even to the said notice, there was no reply, nor did he comply with the demand mentioned therein. Thus the

defendant has committed breach of contract and so he is in unlawful possession and is liable to pay the above said mesne profits at the rate of Rs.

10,000 per annum. Hence, the above two suits were filed, one for possession and another for mesne profits.

The plea of the defendant is as follows: The defendant was always ready and willing to perform his part of the contract and he has not committed

breach of contract. Several other persons were setting up title in themselves over the suit property and so the plaintiff should satisfy that he is the

sole owner of the suit property. The parties did not treat the time as the essence of the contract. After the receipt of notice from the plaintiff, the

defendant met the plaintiff and informed him of the claim made by certain other persons and the plaintiff promised to look into the matter and set it

right and so the defendant did not commit default. The plaintiff is not entitled to unilaterally cancel the contract and seek possession.

The trial court decreed O.S. No. 547 of 1978 for possession as prayed for and decreed O.S. No. 13 of 1978, fixing the quantum of mesne profits

at Rs. 7,500 only with subsequent interest and costs. It also held that the quantum of future mesne profits would be decided in separate

proceedings.

6. The learned Counsel for the defendant appellant on tended before me that even as per plaintiffs own document Ex. A-12 dated 15.12.1975 the

plaintiff had earlier entered into an agreement to sell the same property to three persons Thanda Gounder, Kuppanna Gounder and Muniappa

Gounder, that, therefore, there was cloud on title to the suit property and that hence the defendant was justified in not having paid the balance sale

consideration and completed the sale within 3 months period allowed. But this contention is absolutely untenable. For the first time, only now, in

this appeal this contention has been raised. There was no such specific plea in the written statement. Further there was not even a specific plea to

the effect in the Memorandum of Grounds in this appeal. Further, if these contentions were true, the defendant would have certainly replied so

when he got the abovesaid Ex. A-1 or A-3 notice from the plaintiff. But admittedly there was no reply at all to both Exs. A-1 and Ex. A-3. Further

D.W. 1, the defendant did not say anything about such cloud on title based on Ex. A-12, in his evidence. Therefore, absolutely there is no

substance in this contention.

7. The learned Counsel then submitted that the defendant was ready and willing to perform his part of the contract by paying the balance sale price

and pointed out that the fact that he had means was shown by Ex. B-5 by which the defendant purchased a property on 29.5.1975. But the sale

agreement under Ex. B-1 was much later on 9.9.1976 and there is no document showing that he had means within the above said 3 months"

period from 9.9.1976 prescribed under the sale agreement. The trial court gives very many reasons for holding that the defendant was not ready

and willing to perform his part of the contract in paragraph-16 of its judgment and nothing contra was shown by the learned Counsel for the

appellant.

8. Nextly, the learned Counsel for the appellant also argued that time was not the essence of the contract and that is why under Ex. A-3, the

second notice, further one week time was given for the defendant to perform his part of the contract. But the learned Counsel for the respondent

pointed out that apart from stating in the sale agreement itself that the sale should be completed within the above said three months possession was

also handed over on the date of the agreement itself. Further, he rightly pointed out that the very fact that Ex. A-1 notice was issued on 22.2.1977

would also make it clear that time was essence of the contract. He laid emphasis

that as much as 10.32 acres of fertile nanja land was handed over to the defendant pursuant to the agreement and it was specifically stipulated in the agreement that if the sale was not completed within the time allowed, the above said sum of Rs. 25,000 would be forfeited by the plaintiff. All these, according to him, would make the time the essence of the contract. He also relied on K. Kalianna Gounder v. A. Kalianna Gounder (1986) 2 M.L.J. 470 which held that intention to make time as the essence of the contract might be evidenced by express stipulation or by circumstances. The said decision relied on Go - Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , where the Supreme Court pointed out that if it was intended by the parties that time was the essence of the contract, such intention, if expressed in writing, must be in language, which is clear and unmistakable, but that it might also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances on or before the contract. Thus the intention to make time as the essence of the contract, might be evidenced by either express stipulation or by circumstances sufficiently strong to displace the ordinary presumption that in a contract of sale of land, stipulation as to the time was not of the essence of the contract. So applying the above principles and taking into consideration the above said features in the present case, I confirm the finding of the trial court in holding that time was the essence of the contract in the present case. Even in Ex. A-3 notice it was specifically stated that the time was of the essence of the contract and there was no reply to the said notice by the defendant, nor did he comply with the demand made in Ex. A-3 within the one week time allowed therein. Even earlier, the defendant should have complied with the agreement within three months from the date of the agreement and subsequently also some months have passed by and so if really the defendant was ready and willing to perform his part of the contract, the time of further one week given was quite reasonable.

9. Therefore, I confirm the decree for possession given by the trial court in O.S. No. 547 of 1978.

10. Now, coming to the suit for mesne profits, all that is urged by the learned Counsel for the appellant is that the above said sum of Rs. 25,000

paid as advance must be adjusted with the mesne profits, decree given by the

court below. The learned Counsel for the appellant contended that the above said sum of Rs. 25,000 which is 1/4th of the entire sale consideration, was only advance given towards the sale consideration and it was not given as earnest money for the due performance of the contract, that despite the clause in the agreement that the plaintiff would forfeit the said sum if the defendant committed a breach, the plaintiff cannot forfeit the sum and that hence it should be adjusted with the mesne profits decreed and the balance should be paid by the plaintiff to the defendant. The learned Counsel for the appellant, in this connection, cited two decisions Marimuthu Gounder Vs. Ramaswamy Gounder and Others, and Natesa Mudaliar v. Sulochana Animal (1981)2 M.L.J. 215. The plaintiff in Marimuthu Gounder Vs. Ramaswamy Gounder and Others, , entered into an agreement for sale with the defendants therein and paid a sum of Rs. 10,000 as advance. The agreement for sale, having fallen through, the plaintiff therein issued a notice to the defendant therein for the refund of the advance paid on the ground that the defendant had committed breach of contract. On the question whether the amount paid was to be treated as advance of sale consideration or as earnest money the Division Bench in the said case observed as follows:

It is reasonable also to characterise this amount as advance, since it bears a very great proportion to the totality of the consideration as well.

Generally, earnest money forms a small proportion or ratio to the consideration which is agreed to be the consideration to be passed by" one to the other under a contract of sale.

Then in Natesa Mudaliar v. Sulochana Animal (1981) 2 M.L.J. 215, the sale consideration under the sale agreement was Rs. 1,60,000 and Rs.

25,000 was paid at the time of the agreement towards the sale consideration. In that coniect, the Division Bench which decided the said case observed as follows:

No doubt there is the clause that in the event of default on the part of the plaintiff the amount paid as advance would be forfeited. Marely because there is such a stipulation for forfeiture, it cannot be said that the amount paid bears the character of earnest money for the due performance of the contract. There is nothing in the terms of Ex. A-1 to show that the amount was paid as a guarantee on the part of the plaintiff that she would fulfil

the contract. On a reading of the terms of Ex. A-1 agreement for sale we are convinced that the intention of the parties was not that the sum of Rs.

25,000 which according to us is the amount paid at the time of Ex. A-1 was entered into should be treated as deposit or earnest money and not as

advance or part of the sale consideration. This conclusion of ours is further strengthened by the fact that the sum of Rs. 25,000 paid at the time of

Ex.A-1 agreement for sale represents an appreciable percentage of the sale consideration. Normally the earnest money will form a small

percentage of the total sale consideration to be passed on by one to the other under a contract for sale. In view of the fact that in this particular

case the amount that was originally paid forms an appreciable percentage of the sale consideration, it is but proper to conclude that parties must

have intended to treat the amount as advance and not as earnest money.

However, the learned Counsel for the respondent pointed out that in the above referred to two cases, possession was not handed over on the date

of the sale agreement and that in the present case, as much as 10.32 acres of nanja land was handed over to the defendant on the date of the

agreement and that hence in the light of this particular fact and the other above referred to circumstances, it should be held that the above said

amount was given only as earnest money for the due performance of the contract. But, as pointed out above, it was held that merely because there

was a stipulation for forfeiture, it could not be said that the amount paid bore the character of earnest money for the due performance of the

contract. No doubt in the present case, possession was handed over on the date of the agreement. But, on that ground alone, it could not be

construed that the above said amount was earnest money for the due performance of the contract. No doubt if the defendant-appellant is found to

have committed breach of the said sale agreement and to be liable to give back possession to the plaintiff, but he continued in possession

unlawfully, he would be liable to pay mesne profits. But simply because he was put in possession on the date of agreement, it cannot be said that

the above said sum of Rs. 25,000 paid was earnest money for the due performance of the contract. No evidence was brought to my notice to

show that the said amount was paid as guarantee on the part of the defendant that he would fulfil the contract. So, the amount of Rs. 25,000

cannot be treated as earnest money and in this regard I find that the Court below has erred in observing in paragraph 22 of its judgment that the

above said. deposit of Rs. 25,000 was in the nature of security to see that the defendant fulfils his obligations under the contract.

11. At any rate, the above referred to Natesa Mudaliar v. Sulochana Ammal (1981) 2 M.L.J. 215 has also observed that whether the amount paid

at the time of the contract for sale was treated as advance or earnest money, Section 74 of the Contract Act would be attracted notwithstanding

the clause for forfeiture of the said amount and that the party in breach would be entitled only to a reasonable compensation subject to the

maximum amount mentioned in the agreement for sale. The Division Bench in the said case has pointed out that, that the view that Section 74 of the

Contract Act has no application to cases of earnest money for due performance of the contract, which is stipulated to be forfeited for breach, was

no longer a good law in view of the judgment in Fateh Chand Vs. Balkishan Das, . But no evidence was brought to my notice regarding this

reasonable compensation, subject to the maximum of the above said Rs. 25,000 as prescribed in Section 74 of the Contract Act. That apart, the

learned Counsel for the respondent-plaintiff points out that even assuming that the plaintiff is entitled to retain only a reasonable compensation out

of the abovesaid Rs. 25,000 and not the entirety of it and the balance has to be paid over to the defendant, it could not in the present suit be

adjusted with the mesne profits due to the plaintiff from the defendant, since there is no such plea or claim in the written statement in O.S. No. 13

of 1978. I think this contention is correct. Paragraph 19 of the written statement of the defendant in O.S. No. 13 of 1978 only says as follows:

The amount of Rs. 25,000 given as advance cannot be forfeited and the allegation that the said amount will be forfeited is untenable.

But there is no plea that this sum of Rs. 25,000 has to be adjusted with the above said mesne profits. Only if there is such a plea, the other

question (about which also both the counsels argued) whether such an adjustment is a set off or counter claim and whether Court fee has to be

paid on it separately by the defendant can be gone into. So, I hold, with reference to this relief of adjustment urged by the defendant's counsel that

it can be had only in a separate suit if and when filed by the defendant. There was no issue also in this suit, on this question and the trial court also

has not gone into the said aspect of the case.

12. Therefore, I dismiss both the appeals with costs.