
(1992) 09 MAD CK 0062
In the Madras High Court

S. Arumuga Lakshmi Ammal		APPELLANT
	Vs	
S. Mohamed Shaffi		RESPONDENT

Date of Decision : 09-09-1992

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (1993) 2 MLJ 149

Hon'ble Judges : Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The plaintiff is the appellant herein. The case of the plaintiff is as under:

The defendant agreed to sell his properties to the plaintiff on 15.12.1978 bearing door Nos. 174/C4 ground floor and 174/C9 at Tirunelveli Junction High Road, Tirunelveli for a sum of Rs. 70,000. Accordingly, an agreement of sale was executed on 15.12.1978. The plaintiff paid an advance of Rs. 5,001 to the defendant. The sale was to be completed within 40 days. According to the plaintiff, the conditions stipulated in the sale agreement was not fulfilled by the defendant within the period stipulated therein. The plaintiff was willing to perform her part of the contract. The plaintiff sent a telegraphic notice dated 21.2.1979 to the defendant since he was negotiating to sell the property to a third party. Thereafter, a regular notice dated 23.2.1979 was sent by the plaintiff to the defendant. The defendant sent a reply dated 24.2.1979 containing false allegations. Therefore, according to the plaintiff, the defendant committed breach of contract and hence the defendant is liable to return the advance amount of Rs. 5,001.

2. According to the defendant, since the defendant required money urgently, he entered into a contract with the plain tiff to sell his property. The sale agreement was executed on 15.12.1978 and the sale is to be completed positively before 25.1.1979. Therefore, the time is the essence of the contract. The property agreed to be sold to the plaintiff was under mortgage to a third party and the

plaintiff's husband agreed to pay the mortgage amount before the sale deed is executed. The mortgage amount payable to the third party was settled at Rs. 29,000 and the plaintiff's husband agreed to pay this amount at Madras before 10th January, 1979 to the mortgagee. But the plaintiff's husband failed to pay this amount to the mortgagee before the stipulated date, hence, the mortgage could not be discharged. The mortgagee was pressing the mortgagor for repayment of the mortgage money. Under such circumstances time to complete the said transaction was extended to 28.2.1979 from 25.1.1979 as fixed earlier in the said agreement. Even then, the plaintiff failed to discharge the prior mortgage. Since the plaintiff committed breach of trust, according to the terms of the sale agreement, the advance amount of Rs. 5,001 paid by him was forfeited. Since the plaintiff committed breach of trust the defendant claimed damages from the plaintiff at Rs. 5,001, Therefore, the plaintiff is not entitled to ask for return of the advance amount of Rs. 5,001.

3. The plaintiff filed 8 documents. The defendant filed 10 documents. Mr. Suryanarayanan examined himself as P. W.1 and Sheikh Mohammed examined himself as D.W.1. Considering the facts arising in this case, the trial court decreed the suit with costs as prayed for against the defendant. On appeal, the first appellate court appraising the facts arising in this case held that the plaintiff committed breach of contract and therefore she is not entitled to recover Rs. 5,001 from the defendant. The damages claimed by the defendant was also rejected. Thus, the judgment and decree of the trial court was set aside and the appeal was allowed in part.

4. The learned Counsel appearing for the appellant submitted as under.

5. The plaintiff was ready and willing to perform his part of the contract within the time stipulated in the sale agreement. The defendant failed to furnish the original title deeds, the name of the prior mortgagee and the amount due to that person. Further, the defendant failed to furnish the municipal valuation certificate and the income tax clearance certificate for the purpose of completing the sale transaction. Therefore, the sale could not be completed due to the breach of contract committed by the defendant. Under such circumstances, the plaintiff is entitled to get back the advance amount paid to the defendant. The learned Counsel further submitted that as per the provisions of Section 74 of the Indian Contract Act, the defendant failed to establish the damages suffered by him. Therefore, the defendant cannot say that he is not liable to return the advance amount. In fact, the defendant sold the property for higher price to a third party. In support of this contention, the learned Counsel appearing for the appellant relied upon the following decisions: *Ram Rati v. Fakira* AIR 1988 All. 73, *Smt. Kamal Rani v. Smt. Chandrani* AIR 1988 Del. 188, *De-Smet (India) Private Ltd. Vs. B.P. Industrial Corporation (P.) Ltd.*, and *Kantilal C. Shah Vs. A.G. Devarajulu Reddiar*. It was, therefore, pleaded that the first appellate court was not correct in reversing the well considered decision of the trial court.

6. On the other hand, the learned Counsel appearing for the defendant/

respondent submitted as under:

Since the plaintiff was unable to fulfil the contract before 25.1.1979, the defendant agreed to extend the time to complete the sale transaction till 28.2.1979. In spite of extension of time for completing the sale transaction, the plaintiff failed to perform her part of the contract since she has no funds to purchase the property. The sale transaction could not be completed since the plaintiff committed breach of contract. According to the sale agreement, the defendant should discharge the prior mortgage with the money paid by the plaintiff. But the plaintiff failed and neglected to pay the amount for discharging the prior mortgage. It was already mentioned in the sale agreement that the original sale deed was filed in a prior litigation and therefore only a certified copy of the original sale deed alone will be furnished. Accordingly, the defendant produced the certified copy of the sale deed. Therefore, it is not correct to state that the defendant failed to produce the original sale deed. The plaintiff assured the defendant that he will get the income tax clearance certificate before the date of registration, but he did not do, so. The defendant could not get the municipal valuation certificate, since the plaintiff failed to pay any amount apart from the amount paid by way of advance. In fact, the defendant specified the place and asked the plaintiff to come to that place for completing the sale transaction on 28.2.1979, but the plaintiff did not turn up. Therefore, because of the breach of contract committed by the plaintiff, the sale transaction could not be completed. Under such circumstances, the plaintiff is not entitled to ask for refund of the advance amount paid by her. According to the sale agreement, if the plaintiff committed breach of contract, then she is not entitled to ask for the return of the advance amount paid by her. According to the learned Counsel for the respondent in order to obtain relief u/s 74 of the Indian Contract Act, it is not necessary for the defendant to establish the damages incurred by him. In order to support his contention, the learned Counsel appearing for the respondent relied upon the following decisions, viz.. Dharam Chand Soni and Another Vs. Sunil Ranjan Chakrabarty and Another, , Maula Bux Vs. Union of India (UOI), . and Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, . It was, therefore, pleaded that the first appellate court was correct in reversing the judgment and decree rendered by the trial court.

7. I have heard the rival submissions.

8. The fact remains that the plaintiff filed the suit to recover the advance amount paid under the sale agreement dated 15.12.1978. According to the defendant, the plaintiff committed breach of trust and therefore, the plaintiff is not entitled to ask for the advance amount. According to the plaintiff, the defendant committed breach of trust and therefore, the plaintiff is entitled to the refund of Rs. 5,001 from the defendant. Ex.A-5 is the sale agreement dated 15.12.1978. According to the sale agreement, the defendant agreed to sell the suit property to the plaintiff for the sum of Rs. 70,000 and in pursuance of the said agreement, the plaintiff paid a sum of Rs. 5,001 by way of advance to the

defendant. According to Clause 2 of the said agreement, the plaintiff should pay the balance of the sale consideration on or before 25.1.1979. She should be ready with the sale deed so as to enable the parties to complete the transaction within the stipulated date. Clause 3 of the said agreement states that plaintiff should pay the mortgage amount of Rs. 25,000 and the interest thereon upto the date of payment to the mortgagee and the defendant should discharge the mortgage debt and get assignment of the mortgage in favour of the plaintiff. According to Clause 4 of the said agreement, the sale transaction should be completed within 40 days from the date of the agreement and if the plaintiff fails to perform his part of the contract, he should forego the advance amount of Rs. 5,001 paid on the date of agreement and thereafter there is no connection between the plaintiff and the defendant in so far as the sale of the property is concerned. According to Clause 5, if the defendant fails to perform his part of the contract, within the stipulated date, the defendant should return back the advance amount of Rs. 5,001 paid by the plaintiff and under such circumstances, if the defendant refuses to pay the advance amount, then the plaintiff can approach the court for collecting this amount from the defendant. According to Clause 6, the defendant should sell the property free of encumbrance. According to Clause 2, the defendant should handover the original title deeds of certified copies to the plaintiff before the registration of the sale deed. Clauses 7,8,9,10 and 12 are not relevant for the purpose of this litigation.

9. Though the sale agreement fixed 25.1.1979 as the date for completion of the contract, the defendant gave time till 28.2.1979 to the plaintiff to complete the sale transaction. According to the defendant, in spite of the fact that time was extended to complete the sale transaction, the plaintiff failed to perform her part of the contract. In the matter of sale of immovable properties, generally, time will not be the essence of the contract.

10. According to the defendant, the mortgagee sent a letter dated 16.4.1979 demanding payment of mortgage amount. Thereafter, the mortgagee has sent a notice dated 4.11.1979 to the defendant demanding the payment of Rs. 32,875 in respect of the amount due on the mortgagee. The defendant sent a reply which is marked as Ex.D-7. In the reply, the defendant has stated that he is making serious attempts to dispose of some of his properties to repay the loan due to the mortgagee. According to the defendant he entered into a contract to sell the suit property mainly for the purpose of discharging the prior mortgage. According to the defendant, the plaintiff failed to discharge the prior mortgage within the stipulated time as agreed between the parties in the sale agreement. But, according to the plaintiff, the defendant did not disclose the name of the mortgagee and the exact amount due to the mortgagee. According to the defendant in Ex.A-5 itself, it is specifically stated that the properties were under the mortgage and it is for the plaintiff to discharge the same within the stipulated time/On 23.2.1979, the plaintiff sent a notice through her advocate to the defendant, calling upon the defendant to furnish the original sale deed, the particulars with regard to the prior mortgage and the income tax clearance

certificate, since the sale consideration is over and above Rs. 50,000. Prior to this notice, the plaintiff has also sent a telegram on 21.2.1979 calling upon the defendant to furnish the above said particulars. The defendant sent a reply, Ex.A-2 on 24.2.1979. In the reply, it is stated that the defendant has settled the mortgage amount at Rs. 29,000 and this amount was requested by the defendant to be paid to him, so that he could discharge the mortgage. Therefore, it was stated that there was no necessity for the plaintiff to know about the name of the mortgagee. It was further stated that there was no clause in the agreement with regard to the production of the income tax clearance certificate by the defendant. In the reply notice, it was further stated that the plaintiff should pay Rs. 29,000 to the defendant before 4.00 p.m. on 28.2.1979 and the defendant would discharge the mortgage. For this purpose the defendant would be waiting at door N6.174/E, High Road, Tirunelveli Junction to complete the sale deed as per the agreement. It is also stated that if the plaintiff fails to perform her part of the contract before 4.00 p.m. on 28.2.1979, defendant will consider that the plaintiff committed breach of contract Ex.A-3 is the reply sent by the defendant to the plaintiff dated 26.2.1979 In the said reply, it is stated that the plaintiff is ready and willing to purchase the property as stipulated by the defendant and requested to keep the original deed ready and also the mortgage deed from the mortgagee so that the transaction could be completed on that day. It is also stated that the husband of the plaintiff is willing to meet the defendant on 28.2.1979 at the stipulated place. Ex.A-4 dated 26.2.1979 is the reply sent by the defendant. In the said reply it is stated that the original sale deed was filed in the High Court in a pending suit and the defendant is having a certified copy and he will produce the same. In the matter of getting the Income Tax clearance certificate, it is stated that the plaintiff should bring the original sale deed with the copy and the defendant is ready and willing to comply with other formalities. In the matter of obtaining Municipal office rental value certificate, it was stated that the same will be obtained before the document is presented for registration. It is stated in the said reply that the plaintiff is not in a sound financial position to complete the sale transaction and that is why there is delay in performing his part of the contract and again it was stated that the offer of the defendant will be kept open till 4.00 p.m. on 28.2.1979.

11. In the matter of furnishing original sale deed, it was already said to the plaintiff by the defendant, that it was filed in another litigation and certified copy of the original sale deed alone will be produced. The Income Tax clearance certificate cannot be obtained without furnishing the copy of the sale deed. In the agreement, it is clearly stated that the plaintiff should pay the amount due to the mortgagee to the defendant and the defendant will discharge the mortgage and get an assignment in favour of the plaintiff. The defendant ascertained the amount due on the mortgage and intimated the same to the plaintiff. But the plaintiff did not come forward to pay this amount to the defendant. Instead of that the plaintiff wanted to know the name of the mortgagee, etc. Municipal valuation certificate can be obtained at any time. Therefore, the facts on record

show that the plaintiff was hesitating to fulfil his part of the contract. Therefore, the plaintiff committed the breach of contract. This is also the finding arrived at by the first appellate court on facts.

12. While considering a question of similar nature as arising in this case, the Supreme Court in *Fateh Chand Vs. Balkishan Das*, , held as under:

...further, that the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty-whether it is for payment on breach of contract of money, or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74 of the Indian Contract Act. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the term of a contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

13. In this context, another decision brought to my notice was that reported in the case of *Sabina D'Costa Vs. Joseph Antony Noronha*, . According to the facts arising in that case "an agreement for sale contained a stipulation that purchaser shall on date of agreement deposit certain sum as advance towards consideration. It was further stipulated that seller would be entitled to forfeit the sum paid as advance in case of breach of agreement by purchaser. A suit came to be instituted at the instance of purchaser for return of advance deposited on ground that seller has committed a breach. It was however found as a fact that purchaser and not seller had committed the breach. The disputed question was whether purchaser was entitled to the refund of advance. It was contended by seller that what was forfeited by him was in reality earnest money though described as advance towards consideration in the agreement and as such Section 74 had no application". On these facts, the Karnataka High Court held as under:

If what is contemplated by the agreement to be paid or forfeited in case of its breach, may it MLJ 20 be described as earnest money, is by way of penalty, Section 74 comes into play. The court in such cases is not only empowered but has a duty to apply provisions of Section 74. But, if the contract is such as damages cannot be ascertained, then, if the parties pre-estimated the damages and the same appears reasonable, that amount shall be considered proper and shall be forfeited.

14. In the above cited decision of Karnataka High Court, the decision rendered by the Supreme Court in the case of *Maula Bux Vs. Union of India (UOI)*, is extracted in the following manner:

Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has

been decided in several cases: Chiranjit Singh v. Har Swarup AIR 1926 P.C. 1, Roshan Lal v. Delhi Cloth and General Mills Co. Ltd., Delhi ILR (1911) All. 166, Mohammad Habib-Ul-Lah Vs. Mohammad Shafi, , Bishan Chand v. Radha Kishan Das, ILR (1897) All. 489. 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, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

15. So also, while considering the provisions of Section 74 of the Indian Contract Act the Supreme Court in the case of Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, , held as under:

Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in the contract, pre-determining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named, or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. Use of these expressions "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract.

16. In the instant case, the facts on record would go to show that the plaintiff committed the breach of contract. In the sale agreement dated 15.12.1978 there is a forfeiture clause and the amount of forfeiture was also pre-determined. This amount also appears to be reasonable. Thus considering the facts arising in this case in the light of the judicial pronouncements cited supra, I hold that there is no infirmity in the judgment and decree rendered by the first appellate court. Accordingly, the judgment and decree of the first appellate court are confirmed and the second appeal is dismissed. However, there will be no order as to costs.