

Abraham George vs Moideenkutty

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Court : Kerala

Decided On : Mar-11-2022

Judge : Honourable Mr. Justice P.B.Suresh Kumar, Honourable Mrs. Justice C.S. Sudha

Appeal No. : RFA/563/2014

Appellant : Abraham George

Respondent : Moideenkutty

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR & THE HONOURABLE MRS. JUSTICE C.S. SUDHA FRIDAY, THE 11 TH DAY OF MARCH 2022 / 20TH PHALGUNA, 1943 RFA NO. 563 OF 2014 AGAINST THE JUDGMENT AND DECREE DATED 27.11.2013 IN OS 34/2010 OF SUB COURT, MANJERI APPELLANT/DEFENDANT ABRAHAM GEORGE, S/O.GEORGE, PALLIVATHUKKAL HOUSE, KARUVARAKUNDU AMSOM, CHERUMBA DESOM, NILAMBUR TALUK, NILAMBUR P O, MALAPPURAM, PIN 679 329. BY ADV.SRI.REJI GEORGE RESPONDENT/PLAINTIFF MOIDEENKUTTY, S/O.MUHAMMED, THOTTEKKARA PALLIYALIL HOUSE,

KOLAMANGALAM AMSOM, VALANCHERY DESOM, TIRUR TALUK, VALANCHERY P O, MALAPPURAM DISTRICT, PIN-676 552. BY ADVS.SRI.T.KRISHNAN UNNI (SR.) SRI.K.C.KIRAN SRI.T.SIVADASAN SRI.VINOD RAVINDRANATH SMT.MEENA A. THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 24/2/2022 , THE COURT ON 11-03-2022 DELIVERED THE FOLLOWING: P.B.SURESH KUMAR & C.S.SUDHA, JJ. -----

----- Dated this the 11 th day of March, 2022

JUDGMENT

C.S.Sudha, J.

This is an appeal filed against the judgment and decree dated

Manjeri. The suit is one for return of advance money. The defendant moved for a set off of the plaint claim. The court below rejected the defendants claim for set off and decreed the suit. Aggrieved, the defendant has filed this appeal. The sole plaintiff before the court below is the respondent herein. The parties in this appeal will be referred to as described in the suit.

2. The defendant was the owner of the plaint schedule

property having an extent of 77.26 acres. The defendant by way of Ext.A1 agreement dated 10/09/2008 agreed to sell and the plaintiff agreed to buy the plaint schedule property for a total consideration of 4,45,00,000/-. The advance amount was fixed as 50 lakhs, which the defendant was liable to pay in two installments of 25 lakhs each on 10/09/2008 and 10/10/2008 respectively. The agreement provided that in case the second installment of 25 lakhs was not paid on 10/10/2008, the contract would stand cancelled/ repudiated. Further, out of the balance sale consideration, 1 Crore was to be paid on 29/11/2008 and the remaining sale consideration on 26/12/2008, on which date the sale deed was also to be executed. As agreed, the first installment was paid on the date of execution of Ext.A1 agreement. The second installment was paid on 10/10/2008. Thereafter, the plaintiff came to know that the defendant had availed a loan from the Federal

Bank by creating an equitable mortgage over the plaint schedule property. The agreement had been executed by the defendant by concealing this fact from the plaintiff. His enquiries revealed that the liability outstanding was a huge one. But concealing this fact, Ext.A1 agreement was executed stating that the property had no liability or encumbrance. When the plaintiff questioned the defendant about this, the latter informed him that he was taking all necessary steps to liquidate the debt. Thereafter the defendant for one reason or the other, kept postponing the matter. The plaintiff was under the belief that everything would be sorted out. Thereafter in July 2009, the defendant along with some mediators approached him and informed him that all steps had been taken to clear the liability and that taking into account the difficulties caused to the plaintiff, the defendant agreed to reduce an amount of 35 lakhs from the total sale consideration of 4,45,00,000/-. On this understanding, the plaintiff on 20/07/2009 gave an amount of 5 lakhs as cash and Ext.B1 post dated cheque dated 17/08/2009 for an amount of 3,55,00,000/-. The plaintiff thereafter came to know that the liability outstanding with the bank was not being cleared by the defendant and that he was being cheated. Hence, he did not make arrangements to honour Ext.B1 cheque, which came to be dishonoured for insufficiency of funds in his account. The plaintiff was always ready and willing to perform his part of the contract. The breach of the contract has been committed by the defendant by playing fraud on him. Hence the suit claiming return of the advance amount of 50 lakhs with interest at the rate of 15% p.a. from the date of suit till realisation and costs from the defendant and his assets.

3. The defendant filed written statement denying the plaint

allegations. Execution of Ext.A1 agreement and the receipt of the advance amount of 50 lakhs is admitted. The defendant denied the allegation of the plaintiff that he had concealed the existence of the liability on the plaint schedule property. According to the defendant, he had decided to sell the plaint schedule property only for the purpose of clearing the liability with the bank and so he had informed the plaintiff of the said fact right from the beginning of the transaction. The plaintiff was quite aware of the liability outstanding on the property when he entered into Ext.A1 agreement. The plaintiff failed to make the payments as per Ext.A1 agreement and hence the reason why the contract did not materialise. The

Federal Bank from where the defendant had taken the loan, was pressurising him to settle the loan transaction at the earliest, or else he was informed that possession of the property would be taken over by the bank. Though he informed the plaintiff of this fact and the necessity for the plaintiff to pay the balance sale consideration at the earliest, the plaintiff was never ready and willing to perform his part of the contract or pay the balance sale consideration as per the stipulations contained in the agreement. Hence to pay off the liability and to save the property from being taken over by the bank, the defendant was constrained to enter into Ext.B8 sale agreement dated 12/09/2009, as per which he agreed to sell the property for a total sale consideration of 3,67,50,000/- to a third party, pursuant to which, Exts.B9 and B10 sale deeds dated 31/08/2010 and 19/08/2010 respectively were executed. The defendant was constrained to sell the property at the aforesaid price at a loss, only because the plaintiff failed to perform his part of Ext.A1 agreement. Hence, the defendant sustained a loss of 77,50,000/-, which the plaintiff is liable to pay with interest at the rate of 15% p.a. Therefore, the defendant in his written statement sought for a set-off of the amount of 77,50,000/- .

4. PW1 was examined and Exts.A1 and A2 series were

marked on the side of the plaintiff. DW1 was examined and Exts.B1 to B10 were marked on the side of the defendant. After considering the oral and documentary evidence and hearing both sides, the court below dismissed the set-off claimed by the defendant and decreed the suit. The court below accepted the case of the plaintiff that he had been misled into executing Ext.A1 agreement and that the defendant had concealed the huge liability outstanding on the property. It was found that the plaintiff was justified in not making the payments as stipulated in Ext.A1, as the defendant had defrauded him. The court below rejected the case of the defendant that he had suffered loss to the tune of 77,50,000/- due to the execution of Exts.B9 and B10 sale deeds. According to the court below, Exts.B9 and B10 are sham documents created for the purpose of suiting the case put forward by the defendant. Further, the set-off was found to be barred by limitation.

5. Heard Mr. Reji George, the learned counsel for the appellant and Smt. Meena A., the learned counsel for the respondent.

6. The points that arise for consideration in this appeal are -

1. Was the court below right in holding that the defendant had defrauded the plaintiff?

2. Has the defendant pleaded a valid set-off as contemplated under

Order VIII Rule 6 CPC?

3. Is the claim of the defendant for set-off filed within the period of limitation?

4. Has the defendant sustained any legal injury entitling him to claim damages from the plaintiff? If so, what is the extent of damages that is to be awarded to the defendant?

5. Is there any infirmity in the findings of the court below calling for an interference by this Court?

7. Point No.(1): All the terms contained in Ext.A1,

namely, the stipulation relating to the total sale consideration; the amount of advance to be paid; the dates at which the amounts were to be paid, are all admitted. The first installment and second installment of the advance amount were paid on time. The plaintiff as per Ext.A1 was bound to pay 1 Crore on 29/11/2008. The plaintiff's case is that before the said payment date, he came to know about the huge loan liability outstanding on the property and hence he did not make the payment. This case of the plaintiff that he was unaware of the liability outstanding on the property, sounds highly improbable and unbelievable. The plaintiff admits that he had never seen the original title deeds of the property before he entered into Ext.A1 agreement. The explanation he furnishes for this is that he was told by the defendant that the title deeds are in the bank locker, that they would be taken back and shown to him during the course of the transaction. This story cannot be believed for a moment because the total sale consideration for the property is

4,45,00,000/-, which certainly is not a paltry sum by any standards. Therefore, it is unbelievable that an ordinary prudent man would enter into such a transaction without ever seeing or being convinced of the original title deeds. Furthermore, the plaintiff when examined as PW1, in his cross examination deposed that on 25/08/2008 he had come to know of the bank liability on the property, which is apparently before the execution of Ext.A1 agreement on 10/09/2008. The learned counsel for the plaintiff submitted that while appreciating the oral testimony of PW1, a stray sentence in his testimony is not to be extracted out of the context and read in isolation. The deposition of PW1 must be read as a whole and when so read, it would be apparent that he was never told about the liability prior to the execution of the agreement.

8. The learned counsel is certainly right in her submission

regarding the manner in which the oral testimony of a witness is to be appreciated/analysed. However, the improbability of the case put forward by the plaintiff together with the admission made, which was never even attempted to be clarified in the re-examination, assumes importance. The plaintiff has never a case in the box that the date of knowledge of the liability deposed by him is a mistake. That being the position, it is clear that he was well aware of the liability even before the execution of Ext.A1 and therefore the said reason cited for not paying the remaining sale consideration appears to be incorrect and false.

9. The fact that the plaintiff was well aware of the liability is

all the more apparent from his subsequent conduct also. Admittedly the third installment of 1 Crore was to be paid on 29/11/2008. We will assume for a moment that the plaintiff was unaware of the loan liability. The plaintiffs case is that 1 Crore was not paid on 29/11/2008 because by that time he came to know of the fraud played on him by the defendant. In spite of this he took no action to repudiate the contract. His further case is that he continued to be under the belief that the defendant would sort out everything. By this time the period of Ext.A1 agreement expired on 26/12/2008. But he waits till July 2009 when the defendant is alleged to have approached him and offered to reduce an amount of 35 lakhs from the total sale consideration of 4,45,00,000/-. So, believing the words of the defendant, on

20/07/2009 he paid an amount to 5 lakhs towards the sale consideration and also gave Ext.B1 post-dated cheque dated 17/08/2009 for an amount of 3,55,00,000/-. If the plaintiff is to be believed, he was cheated by the defendant. But at the same time, he says that believing the words of the defendant, he waited quite long for everything to be sorted out by the defendant, the very same person who is supposed to have defrauded him. Even after coming to know of the fraud, the plaintiff pays an amount of 5 lakhs and also issued Ext.B1 cheque for a substantial sum. Ext.B1 cheque was dishonoured on

than a year of the expiry of Ext.A1 agreement, he sent Ext.A2 lawyer notice on 19/12/2009 and then filed the suit on 30/01/2010. This conduct of the plaintiff coupled with the admission made in his cross examination that he came to know about the loan liability on 25/08/2008, makes it apparent that he was well aware of the liability on the property even before the execution of the agreement. Therefore, the finding of the court below to the contrary is incorrect and wrong. Point answered accordingly.

10. Point no.(2) and (3): In the written statement,

pleadings are there relating to set-off as well as counter claim. The court below proceeded on the ground that the case put forward by the defendant is a set-off. The learned counsel for the defendant submitted that the claim put forward in the written statement is in fact set-off and not a counter claim. Therefore, we will only be considering the question whether the defendant is entitled to set-off as claimed by him. Order VIII Rule 6 CPC dealing with set-off reads-

6. Particulars of set-off to be given in written statement . -

(1) Where in a suit for the recovery of money the defendant claims to set-

off against the plaintiffs demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiffs suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written

statement containing the particulars of the debt sought to be set- off.

(2) Effect of set-off- The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final

judgment in respect both of the original claim and of the set-off; but this

shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

It is fairly settled that when the defendant in a suit claims an amount from the plaintiff below and up to the plaintiff claim, it is a set off. But when the claim is for an amount larger than the plaintiff claim, the claim for the excess would be a counterclaim, which is really in the nature of another suit by the defendant against the plaintiff. A set-off is a plea in defence, a defence and counterclaim combined, a defence to the extent of wiping off the plaintiff claim and a counterclaim by the defendant for the balance. Order VIII Rule 6 CPC may not only be what is strictly a set-off, but what is also a counterclaim. If the claim is merely defensive, that is, if it is relating to an amount which is less than or equal to the plaintiff's claim in the suit, it is set-off pure and simple; but if it exceeds the plaintiff's claim, it is to the extent of excess a counterclaim. If the claim is a defensive one or purely a set-off, the time of limitation has to be reckoned from the date of suit. But where the claim is in excess of the plaintiff claim, to the extent of excess, it is a cross suit and for the cross suit, time is to be reckoned from the date when the defendant files his written statement (See *Govindji Jevat & Co. v. Canannore Spinning & Weaving Mills Ltd.* - AIR 1968 Kerala 310).

11. Set-off essentially serves as a ground of defence being a

mere shield and not a sword which if established would account either for a dismissal of the plaintiff claim in toto or would diminish it. (*M/s. Anand Enterprises, Bangalore v. Syndicate Bank, Bangalore* - AIR 1990 Karnataka 175)

12. In the case on hand, the plaint claim is 65,43,750/-.

However, the amount sought to be set-off by the defendant is 77,50,000/-. Therefore, the plaintiff submitted that a valid set-off cannot go beyond the plaint claim. In answer to this, it was submitted by the learned counsel for the defendant that the defendant is restricting his claim of set-off to the plaint claim.

13. The written statement is seen filed before the court

below on 17/05/2010. Exts.B9 and B10 sale deeds as per which the defendant claims to have sold property to a third party, are dated 31/08/2010 and 19/08/2010 respectively, apparently after the filing of the suit on

submitted by the learned counsel for the plaintiff that in a case of valid set-off, the cause of action must have arisen before the filing of the suit and it must also have arisen out of the same transaction. Here the cause of action arose only on execution of Exts.B9 and B10 sale deeds, which is apparently much after the filing of the suit and written statement. Further, no court fee was paid by the defendant on the date of filing the written statement. It was paid on 29/08/2013. It was only when the court fee was paid, the set-off can be said to have been properly instituted/presented. By the time the court fee was paid, it had long become time barred. Therefore, the argument advanced on behalf of the plaintiff is that if at all the pleadings in the written statement can be taken to be a case of set-off, no relief can be granted as the claim is barred by limitation.

14. It is true that when the written statement was filed on

on file without the defect being noted or the defendant being directed to pay the necessary court fee. This is certainly an omission or a mistake committed by the office of the court below. The trial court also failed to notice this defect when issues were framed in the case. From the proceedings sheet or B Diary of the court below, it is seen that the plaint was initially rejected for non-payment of balance court fee on 07/02/2011. Later on, the suit was restored to file by order of this Court in RFA No.590/2017 dated

granted by this court. The case was then listed for trial to 03/09/2013. However, on 16/08/2013 the case is seen removed from the list at the instance of the defendant, who sought permission of the court for raising an additional issue. The said request was allowed and the case was removed from the list. An additional issue which reads - Whether defendant is entitled to get a sum of Rs.77,50,000/- by way of set-off from the plaintiff as compensation? is seen framed on 23/08/2013. Two additional issues framed on 30/08/2013 read - 1. Whether claim of set-off is sustainable? 2. Whether the claim is barred by limitation? The defendant on 23/08/2013 was given an opportunity to pay court fee for the set-off claimed, pursuant to which the court fee was paid. The exact date on which it was paid is not clear. But from the B Diary it is clear that it has been paid on or before 29/08/2013. Here we refer to Section 149 CPC which reads-

Power to make up deficiency of court fees- Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance. (Emphasis supplied)

Therefore, when the court fee was paid by the defendant, the written statement containing the set off would date back to the day on which it was presented before the court and it shall have the same force and effect as if such fee had been paid in the first instance. As held in Govindji Jevat's case (supra), in case of a set-off, the time of limitation has to be reckoned from the date of suit. That being the position, the argument that the claim is barred by limitation will have to fail.

15. Now coming to the question as to when the cause of

action for the set-off arose. The term cause of action has been explained by the Honble Supreme Court in Dehiben v. Arvindbhai Kalyanji Bhanusali (Gajra) (2020 KHC 6446) thus- 13. "Cause of action" means every fact which would be

necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.

16. In *Swamy Atmananda v. Sri Ramakrishna Tapovanam* [2005 KHC 1649: AIR 2005 SC 2392] it has been held:

"24. A cause of action, thus, means every fact, which if traversed, it would be necessary for the plaintiff to prove an order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded." (Emphasis supplied)

17. Here, according to the defendant, it was because the

plaintiff failed to perform his part of the contract, the defendant was constrained to sell the property at a far lesser price by way of Exts.B9 and B10. The fact that plaintiff did not have sufficient funds at the time of execution of Ext.A1 is admitted by him in his cross examination. The plaintiff has no case that he had the capacity to raise the necessary funds at that point of time. Dishonour of Ext.B1 cheque evidenced by Exts.B2 and B3 will also establish the fact that the plaintiff did not have the necessary funds to take the sale of the property. The fact that the creditor bank was fast moving on the property, is evident from Exts.B4 to B7. The defendant contends that he was constrained to enter into Ext.B8 agreement when he realised that the plaintiff would not pay the balance sale consideration. He was in urgent need of money to save his property from being taken over by the creditor bank, which was the sole reason for entering into Ext.A1 agreement in the first place. Ext.B8 sale agreement dated 12/09/2009 is apparently seen executed before the filing of the suit on 30/01/2010 and even before Ext.A2 lawyer notice dated 19/12/2009 was issued by the plaintiff to the defendant. It is true that Ext.B8

transaction was completed only on the execution of Exts.B9 and B10 sale deeds, apparently after the filing of the written statement. As held by the Apex court, the cause of action, a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit, is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. Here part of the bundle of material facts had arisen on

the defendant may have actually occurred in money terms only when Exts.B9 and B10 sale deeds were executed. But at least a part of the cause of action if not the whole, had arisen when Ext.B8 sale agreement was executed.

18. Now even assuming that the cause of action arose only on

execution of Exts.B9 and B10 sale deeds, the claim for set-off made can only be stated to be pre-mature on the date of filing the suit. Can a claim be dismissed solely on the ground of it being pre-mature? The Honble Supreme Court in *Vithalbhai Pvt. Ltd. vs. Union of India*- AIR 2005 SC 1891: 2005 KHC 601, held that a suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the Court; the Court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the Court to grant decree or not. The Court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the Court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and

pressed for decision. It will equally be the responsibility of the Court to examine and promptly dispose of such a plea. The plea should not be permitted to be raised at a belated stage of the suit. However, the Court shall not exercise its discretion in favour of decreeing a premature suit in the following cases :

(i) When there is a mandatory bar created by a statute which disables the

plaintiff from filing the suit on or before a particular date or occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the Court's jurisdiction, and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency and (v) where leave of the Court or some authority is mandatorily required to be obtained before the institution and was not so obtained (See also *Samar Singh v. Kedar Nath* - 1987 KHC 801:AIR 1987 SC 1926).

19. A written statement pleading a set-off or counter claim is

to be treated as a plaint in a cross suit. The defendant occupies the position of a plaintiff so far as set off or counter claim is concerned though a separate suit number is not required to be given to it (*Cosex Exports Ltd. V Canara Bank* - AIR 1997 Delhi 355).

20. Here the claim of the defendant does not fall under any of the exceptions referred to in *Vithalbhai* (supra) and hence it cannot be dismissed or rejected on the ground that it is premature.

21. Further, the transaction by which the defendant claims to

have sustained loss/damage is not an entirely different transaction which has no connection whatsoever with the plaint transaction, as argued by the learned counsel for the plaintiff. As contended by the defendant it was because the transaction as per Ext.A1 agreement failed, Exts.B9 and B10 sale deeds came to

be executed. By execution of Exts.B9 and B10 sale deeds for a much lower sale consideration than what is stated in Ext.A1 agreement, has the defendant sustained or suffered a legal injury entitling him to damages is the moot question, to which we shall come to shortly.

22. Now coming to the question whether there are proper

pleadings in the written statement to bring it within the ambit of a legal set-off as contemplated under Order VIII Rule 6 CPC ? It was submitted on behalf of the plaintiff that when a set-off is claimed it has to be for an ascertained sum of money, which is not the case here. In *Sankara Pillai v. Parameswaran Pillai*, AIR 1959 Kerala 352, relied on by the defendant it has been held that an ascertained sum of money means a sum of money of which the amount is fixed and known; it does not necessarily mean a sum admitted by the other side or decreed by Court; the words are used in contradiction to unliquidated damages. The mere fact that an arithmetical calculation is necessary to arrive at the total sum cannot render such total, an unascertained sum of money. But where the set-off is in respect of a claim for damages which are not ascertained, or where the amount can be ascertained only on taking accounts or by determining the quantum of the share due to the defendant, or where the claim is for interest on a sum due to the defendant fixed by him at an arbitrary rate, this rule will not apply.

23. In the written statement, the defendant has specified the

amount of loss/damage sustained by him as 77,50,000/-. This according to the defendant is the difference between the sale consideration in Ext.A1 and Exts.B9 and B10 sale deeds. Therefore, the requirement that set-off claimed has to be for an ascertained sum of money is also satisfied. This sum has now been limited to the plaint claim. Points answered accordingly.

24. Point no. 4 & 5: - Now coming to the question whether

the defendant has sustained any legal injury entitling him to damages as claimed by him and the measure of damages, if any, to which he is entitled to. Here we refer to Section 73 of the Contract Act which reads -

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 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. ...

So the loss must have naturally arisen 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 the breach. Here the specific case of the defendant is that he had decided to sell the property for the purpose of clearing the liability on the property. We have already found that the case of the plaintiff that he was unaware of the liability and that the same had been concealed by the defendant while entering into Ext.A1 agreement is improbable and unbelievable. In the written statement, it is contended that the defendant had sustained damages to the tune of 77,50,000/-. In the rejoinder filed by the plaintiff in reply to the set-off, the plaintiff only states that the contention of the defendant that the former is responsible for the breach is incorrect; that the relief of set-off is barred by limitation; that if at all the defendant has sustained any loss, he ought to have filed the claim within a period of three years from the cause of action arising and that having failed to file it within the time limit, the claim of set-off is liable to be rejected. It is true that the defendant has not given any written notice of resale to the plaintiff. However, in the written statement as well as in the proof affidavit filed in lieu of chief examination, it is clearly averred that the defendant had approached the plaintiff several times and had requested the latter to take sale of the property as the bank was initiating steps for taking possession of the property. These facts have been given in detail in the proof affidavit also. But this fact has not been denied by the plaintiff in his rejoinder filed in reply to the written statement. The defendant when examined as DW1 was never cross examined on these points. There is not even a suggestion seen made to DW1 that the contention put forward that he had approached the plaintiff and informed him of the impending action by the bank, is false. There is absolutely no

challenge to the case put forward by the defendant that he had informed the plaintiff that he needs the balance sale consideration at the earliest to pay off the liability, otherwise, the bank would take coercive steps against him. This would show that the plaintiff was put to notice or that he knew when he entered into Ext.A1 agreement that in case he failed to take sale of the property pursuant to the agreement, there was every possibility of the bank taking over the property from the defendant resulting in loss to the latter. The fact that the breach of the contract was committed by the plaintiff is clear from the evidence on record. Therefore the latter part of Section 73 of the Contract Act is attracted here.

25. As held in *Varkey Thomas v. Vijendrakurup*, 2017 (1)

KHC 452, the defendant is not liable to be compensated in the absence of proof of legal injury. In *State of Kerala v. United Shippers and Dredgers*, 1982 KHC 179: AIR 1982 Ker. 281, the position in law stated is that a party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from S.73 and S.74 of the Contract Act. S.74 is only supplementary to S.73 and it does not make any departure from the principle behind S.73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of S.73. Whether it be a contract which stipulates a sum of money as being payable on breach of contract or whether it contains any other penal clause, or whether it is a contract which does not contain any such clause, the party complaining of breach of contract cannot successfully claim compensation unless he makes out loss or damage referable to such breach.

26. Compensation or damages represent the pecuniary

recompense recoverable by process of law, by a person who has sustained an injury through the wrongful act or omission of another. The object of damages is to put the party in as good a position, as far as money can do it, as if the promise had been performed. Damages are of two kinds, namely, general and special. General damages are non-pecuniary losses, which cannot be calculated in terms of money. On the other hand, special damages are such damages which can be

computed in terms of money. In regard to special damages, they have to be specifically pleaded and proved; whereas general damages do not need to be so specifically alleged and proved.

27. In *Madhavdas Parmanand v. Jan Mahomed Ghulam*

Hyder, AIR 1942 Sind 37 it has been held that when a contract of sale does not provide a penalty, the right of the seller to damages, on the failure of the buyer to complete payment, will arise under Section 73 or under Section 75 of the Contract Act, and is something quite independent of the amount of any part payment made. (See also *(Kunwar) Chiranjit Singh vs.*

Har Swarup-AIR 1926 Privy Council 1). The remedy of a seller/vendor when there is a failure to complete a purchase, in cases where the contract has been completed and goes beyond the executory stage and there is a passing of title, is to sue for the recovery of the purchase-money together with interest thereon (S. 55(4)(b) of the Transfer of Property Act). But if the contract is still executory and the purchaser commits a default in taking the purchase, the remedy of the vendor is not to sue for the purchase-money, for he cannot have both the land and its value, but to sue for damages for breach.

28. In the case on hand, it is true that the bank did not take

over the property. However as stated earlier, the definite case of the defendant is that because of the breach committed by the plaintiff, he had to sell the property as per Exts.B9 and B10 for a much lower price in order to save his property. It is true that the defendant did have a duty to mitigate the loss. It was submitted on behalf of the defendant that the price at which he sold the scheduled property to a third party as per Exts.B9 and B10 sale deeds, is not the actual/real market price but much lower than it. However, he was constrained to sell the property at a much lower price, as he was not in a position to bargain for getting the market price of the property. He never had the bargaining power at that point of time as all the prospective buyers were well aware of the liability outstanding on the property. It was in such a difficult situation, he had to sell the property at a much lower rate than the price agreed to in Ext.A1. The plaintiff has no case that the market price

was lesser than the amount that has been shown in Exts.B9 and B10 sale deeds. On the other hand, his definite case is that the property would have fetched much higher price than what is shown in Exts.B9 and B10.

29. Before we go further into the question of injury, damages

and the measure of damages, it has to be noted that the court below has not gone into these aspects, as it had rejected the case of the defendant in toto. The findings are incorrect and hence need to be reversed. Further, the defendant has limited his claim of set-off to that of the plaint amount only at the appellate stage. That being the position, we feel that in the interest of justice, the plaintiff must be given an opportunity to defend the modified claim put forward by the defendant. Before the court below, the plaintiff proceeded on the premise that the set-off is not maintainable as the amount claimed is more than the plaint claim. Now when the claim has been brought down to the plaint claim, the position is different. The breach of the contract has been committed by the plaintiff. Therefore the question that needs to be considered is whether the defendant is entitled to damages/compensation as per the latter part of Section 73 of the Contract Act. The power of the appellate court to remand a case is contained in Order XLI Rule 23, Rule 23A and Rule 25 of CPC. The appellate court is required to give reasons as to why it has taken recourse to any one of the Rules of Order XLI for remanding the case to the trial court. It is true that the Appellate Court shall not pass an order of remand as a matter of course. Here it is Rule 23A that can be invoked. The words "the decree is reversed in appeal" appearing in Rule 23A are wide enough to include the setting aside of a decree on any ground (Radhakrishnan P.S. V. A.Indu - 2018(3) KHC 877).

30. The fact that advance amount of ` 50 lakhs was paid by the

plaintiff to the defendant is admitted. The plaintiff is entitled to get a refund of the same unless the defendant establishes loss or damages. We have already found that the pleadings in the written statement make out a case of legal set-off. The breach of contract has apparently been committed by the plaintiff. Hence, the question that needs to be further considered is whether the defendant has sustained any legal injury to which he is entitled to damages, and if so the

measure of damages. The Code of Civil Procedure, is 'procedure', which is designed to facilitate 'justice' and further its ends. It is not a penal enactment for punishment and penalties and not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation have to be guarded against (provided justice is done to both sides), lest the very means designed for the furtherance of justice be used to frustrate it (Sangram Singh V. Election Tribunal, Kotah - 1955 KHC 374). If the aforesaid aspects are decided here, it would certainly cause prejudice to the plaintiff, as he would be taken by surprise and it would be as good as tripping him up. Therefore in the interest of justice, both parties are to be given an opportunity to establish the disputed issues as to whether the defendant has sustained any legal injury entitling him to damages, if so the measure of damages and also whether the defendant is entitled to set-off the said amount against the plaint claim.

In the result, the appeal is allowed. The judgment and decree of

the court below are set aside and the matter is remanded to the court below to consider and adjudicate the aforesaid issues on which there has been no adjudication. Both the parties are at liberty to make necessary additional pleadings, if so advised, on the aforesaid points and also to adduce evidence in support of their respective case. We make it clear that the remand is not an open remand. The questions available for consideration after remand are only whether the defendant has suffered any loss entitling him to damages, if so, the measure of damages and whether he is entitled to set-off the amount adjudged as damages against the plaint claim. The parties shall appear before the court below on 23/05/2022. The suit being of the year 2010, the trial court shall make all earnest efforts to dispose of the matter at the earliest.

All interlocutory applications, if any pending, shall stand disposed of. Sd/-
P.B.SURESH KUMAR JUDGE Sd/- C.S.SUDHA JUDGE ami/

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