

Mohammed Sultan Rowther Vs. Naina Mohammed and ors.

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Court : Chennai

Decided On : Mar-28-1972

Reported in : (1972)2MLJ576

Appellant : Mohammed Sultan Rowther

Respondent : Naina Mohammed and ors.

Judgement :

V.V. Raghavan, J.

1. The plaintiff is the appellant. The suit is to recover Rs. 1,120. The plaintiff's case is that the defendants, who are the owners of Survey No. 14/2 measuring 6.70 acres in Valandaravai village, offered to sell to the plaintiff for a sum of Rs. 5,000 and received an advance of Rs. 1,000. Out of the balance it was agreed that Rs. 2,000 could be adjusted towards the other subsisting on the property and the balance of Rs. 2,000 Was payable before the Sub-Registrar at the time of the registration of the sale deed. The case of the plaintiff is that in pursuance of the agreement the plaintiff got the stamp papers and wrote out the document and took it to the defendants for their signature¹ and registration. But the defendants refused to complete the transaction and register the document-Thereupon on 28th of April, 1964 in pursuance of mediation it was agreed that a release deed from the brothers-in-law of the plaintiff in respect of the suit property should be obtained in the name of the defendants' father and on the same day the defendants should

execute a sale deed in the name of the plaintiff, that the plaintiff requested his brothers-in-law to execute a release deed, but they claimed that they were entitled to a half share in the suit property and that they would not execute the release deed. Thus, the sale deed could not be completed and the agreement had become impossible of performance. On 29th June, 1964 the plaintiff caused a registered notice to be issued to the defendants calling upon them to refund the advance of Rs. 1,000 received by them. The defendants refused to return the advance and the present suit is filed for recovery of the sum paid.

2. The defence to the suit is that the plaintiff agreed to purchase the property for Rs. 8,950, that in order to evade the payment of excess stamp duty the consideration was proposed to be mentioned in the sale deed as Rs. 5,000, that they did not agree for the consideration being mentioned as Rs. 5,000 in the sale deed, that the plaintiff did not offer to pay the entire consideration for the sale deed and consequently the sale transaction could not be completed. The further defence is that they were not aware of the fact that the plaintiff got the sale deed written on 27th April, 1964 and they came to know about it only after receiving a notice from the Taluk Office in connection with the refund of the stamp papers. The further contention was that the defendants represented to the plaintiff that the property proposed to be sold belonged to them absolutely, that the plaintiff insisted that he should obtain a release deed before taking the sale deed, that it was agreed that the plaintiff should obtain a release deed from his brothers-in-law and then take the sale deed, that the Plaintiff's brothers-in-law refused to execute the release deed, that, as the plaintiff did not act in terms of the agreement dated 28th April, 1964, he should forfeit the advance paid by him. ' The defendant therefore, contended the plaintiff having committed default, the advance paid had been forfeited and that the plaintiff is not entitled to claim the amount and the defendants are not liable to pay interest on the said sum in any event and the defendants prayed for the dismissal of the suit.

3. The trial Court held that the plaintiff committed default inasmuch as he failed to act in terms of the contract, that the plaintiff is not entitled to the refund of Rs. 1,000 and that though it was not agreed between both parties that if the plaintiff defaulted, he should lose the advance. In the result, the suit was dismissed.

4. The plaintiff filed A.S. No. 120 of 1968 to the District Judge, Ramanatha-puram at Madurai. The learned Judge while holding that time is not of the essence of the contract to sell the immovable property, held that the plaintiff committed default and that he is not entitled to the refund of the advance paid by him. The plaintiff has filed the above Second Appeal.

5. The question that arises for consideration is whether the sum of Rs. 1,000 which was paid as advance out of a total promised consideration of Rs. 5,000 for the sale deed which the defendant agreed to execute in favour of the plaintiff and which was not executed is liable to be forfeited by the defendant. The agreement between the parties in this case is Exhibit A-1 dated 28th April, 1964, whereunder the plaintiff agreed to purchase 6-70 acres of land in Survey No. 14/2 of Valandaravai village belonging to the defendants for a sum of Rs. 5,000. The above written contract appears to have been preceded by an earlier oral agreement in pursuance of which Rs. 1,000 was paid. It is not clear that the sum of Rs. 1,000 was paid by way of advance or as a security deposit for due performance of the contract. The contract, however, does not contain any provision relating to the forfeiture of the said sum of Rs. 1,000 paid in case of any default by the plaintiff. The question is whether in the absence of any specific provision in the agreement relating to the forfeiture, the defendants are entitled to forfeit the sum of Rs. 1,000 paid by the plaintiff even assuming that the plaintiff has committed default. In this connection, three recent judgments of the Supreme Court have been referred to viz., *Mania Bux v. The Union of India* : [1970]1SCR928 , *Shree Hanuman Cotton Mills and Anr. v. Tata Air Graft Limited* : [1970]3SCR127 , and an earlier decision of the Supreme Court in *Fateh Ghand v. Balkishan Das* : [1964]1SCR515 . In everyone of the above decisions, in the contract entered into between the parties there were specific provisions for forfeiture of the advance or earnest money in case of default. In the present case the agreement entered into between the parties does not contain any provision entitling the defendant to forfeit the advance paid in case of default. The plaintiff's case is that it was the defendant who insisted upon the release deed being executed by the heirs of the plaintiff's father-in-law and that he was willing to take the sale deed without getting any such release deed. The defendants, on the other hand, contended that they never insisted upon the release deed being executed by the heirs of the plaintiff's father-

in-law and that they were always willing and ready to execute the sale deed. Both the Courts below have held that the plaintiff is at fault. In the absence of a specific clause in the contract, the defendants are not entitled to forfeit the advance of Rs. 1,000. But the defendant is, however, entitled to be compensated for the plaintiff's default which has been found by the Courts below. The defendant will be entitled to only reasonable compensation which I assess at Rs. 500.

6. In the result, the appeal is allowed in part and the plaintiff is entitled to a refund of Rs. 500 out of the advance of Rs. 1.000 paid. The parties will bear their own costs throughout. No leave.

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