2025:KER:55443

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

MONDAY, THE 28TH DAY OF JULY 2025 / 6TH SRAVANA, 1947

RFA NO. 477 OF 2016

OS NO.334 OF 2011 OF PRINCIPAL SUB COURT, THRISSUR

APPELLANTS/DEFENDANTS

1 DR.MATHEW JO, S/O. PULIKKAN JOSE,PULIKKAN HOUSE, PLOT NO. 118, OLLUR VILLAGE,THRISSUR TALUK.

2 ANNIE JO, AGED 43 YEARS, PULIKKAN HOUSE, PLOT NO. 118, OLLUR VILLAGE, THRISSUR TALUK.

3 MERY JO, AGED 54 YEARS, D/O. PULIKKAN JOSE,PULIKKAN HOUSE, PLOT NO. 118,OLLUR VILLAGE, THRISSUR TALUK
APPELLANTS ARE REPRESENTED BY THEIR POWER OF ATTORNEY HOLDER JOS PULIKKAN, AGED 81,S/O. PULIKKAN ANTONY, PULIKKAN HOUSE,PLOT NO. 118, OLLUR VILLAGE, THRISSUR TALUK.

BY ADVS.
SHRI.G.SREEKUMAR (CHELUR)
SRI.K.R.ARUN KRISHNAN

RESPONDENT/S:

LIJO JOSE, AGED 40 YEARS, S/O. PALLAN JOSE,MULAMKUNNATHUKAVU DESOM,KILLANOOR VILLAGE, THRISSUR TALUK - 680001

BY ADVS.
SHRI.BENNY P. THOMAS (SR.)
SHRI.M.GOPIKRISHNAN NAMBIAR
SHRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS
SRI.CHETHAN KRISHNAN R.

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18.7.2025, THE COURT 28.07.2025 DELIVERED THE FOLLOWING:

C.R.

JUDGMENT

Dated : 28th July, 2025

The defendants in O.S.334/2011 on the file of the Principal Sub Court, Thrissur are the appellants. (For the purpose of convenience the parties are hereafter referred to as per their rank before the trial court.)

2. The plaintiff filed the suit for specific performance of an agreement for sale. As per the plaint averments, Tony Joe and Tessy George along with defendants 1 to 3, are the owners of the plaint schedule item Nos.1 to 3 properties, having a total extent of 106.259 cents. Out of which, 22.769 cents comprised in Sy.No.46 of Potto village and 20.198 cents comprised in Sy.877/3 of Killannur village belonged to Tony Joe and Tessy George and the remaining properties belonged to defendants 1 to 3. The defendants agreed to sell the plaint scheduled property to the plaintiff and the plaintiff agreed to purchase the same for a price of Rs.60,000/- per cent. Ext.A1 is the sale agreement entered into in that respect on 16.11.2008. On the date of execution of Ext.A1, a sum of Rs.3,00,000/- was paid as advance and another Rs.7,00,000/- was paid on 16.12.2008. As per the terms of the agreement, the agreement was to be performed by 15.9.2009. According to the plaintiff, in pursuance to the agreement, he was permitted to develop the property and accordingly he had put up barbed wire fence around the plaint scheduled property by spending Rs.60,000/-. An extent of 42.967 cents belonging to Tony Joe and Tessy George was purchased by the plaintiff

as per registered assignment deeds. The plaintiff was always ready and willing to perform the agreement with respect to the balance property covered by the agreement, upon paying the balance consideration. Though he approached the father of the defendants Mr.George, for getting the sale deed executed after paying the balance sale consideration, he evaded the same. Therefore, the period of agreement was extended till 31.12.2009, at the instance of the defendants. On 31.12.2009, when the plaintiff approached the father of the defendants for getting the sale deed executed, he informed them that the defendants are coming to the native place and that they are ready to execute the assignment deed. Further, the father of the defendants who was also their Power of Attorney holder, told him that out of the scheduled property, six cents lying in front of the 1st item is puramboku land, without any proper document and that the plaintiff has to purchase the same also for the same price, which was not acceptable to the plaintiff. Therefore, on 5.12.2011, at the instance of the plaintiff a lawyers notice was issued, intimating his readiness and willingness to get the sale deed executed after paying the balance sale consideration. However, the defendants sent a reply raising false contentions. It was in the above context that the plaintiff preferred the suit.

3. The defendants filed a written statement denying the execution of the agreement, on the ground that they have not signed it. They have also contended that the plaintiff has not made any improvements in the properties with the consent and knowledge of the defendants. According to them, the plaintiff has not obtained any

sanction for developing the property. According to the defendants, they purchased plot Nos.108, 116, 249, 233 and 218 in Akkara Gardens, Thiroor, Thrissur for constructing a residential house for the siblings. Since the idea did not work, they decided to dispose of their respective properties. Accordingly, the plaintiff approached the father of the defendants and entered into an agreement on 26.11.2008. At the time of the agreement, an earnest money of Rs.3,00,000/- was received by the father of the defendants and the last date for performance of the agreement was fixed as 15.9.2009. Another Rs.7,00,000/- was also received by the Power of Attorney holder from the plaintiff towards earnest money. The defendants were always ready and willing to assign the property in favour of the plaintiff after receiving the balance consideration. In the meantime, the plaintiff approached the Power of Attorney holder demanding execution of the assignment deed pertaining to plot Nos.108 and 283 which are attractive and fetch higher value. Thereafter, he sold plot No.283 to another person stating that it is his close relative. However, it is learnt that the said person is a total stranger to the plaintiff. The sale deed in respect of the remaining property could not be executed as the plaintiff did not have the required money. The intention of the plaintiff was to sell the plots for higher rates. The sale deed in respect of the remaining property could not be executed due to the default of the plaintiff. Therefore, the defendants cancelled the agreement and forfeited the earnest money as stipulated in the agreement. The defendants have not approached the plaintiff for extension of the period of the agreement. There was no understanding to obtain title

documents pertaining to six cents of puramboku land as alleged. Since the plaintiff committed breach of contract and the defendants cancelled the agreement, the plaintiff forfeited the earnest money paid by him. Therefore, the defendants prayed for dismissing the suit.

4. The trial court framed four issues. The evidence in the case consists of the oral testimonies of PWs1 to 4, DW1, Exts.A1 to A8, B1 to B6, C1 and C1(a). After evaluating the evidence on record, the trial court found that it was the plaintiff who committed breach of contract and as such held that he is not entitled to get a decree for specific performance. Accordingly, the trial court has directed the defendants to return a sum of Rs.10,00,000/- received by them from the plaintiff along with interest at the rate of 12% per annum. Aggrieved by the above judgment and decree of the trial court, the defendants preferred this appeal.

5. Now the points that arise for consideration are the following :-

1) Whether the defendants are entitled to forfeit the amount received from the plaintiff as earnest money, in spite of no loss or damage sustained?

2) Whether the impugned judgment and decree of trial court calls for any interference, in the light of the grounds raised in the appeal ?

6. Heard Sri.K.R.Arun Krishnan, the learned counsel for the appellants/defendants, as instructed by Sri.Sreekumar G. Chelur and Sri.Chethan Krishnan R. the learned counsel for the respondent/plaintiff.

7. In this case, the trial court itself found that the default was on the part of

the plaintiff and that is why the sale deed in respect of the remaining property covered by the sale agreement could not be executed. It was in the above context the trial court declined the relief of specific performance and decreed only return of the advance amount of Rs.10,00,000/-. Now the contention taken by the appellants/defendants is that Rs.10,00,000/- paid by the plaintiff is earnest money and not part of sale consideration and as such, the trial court was not justified in ordering return of the said amount. On the other hand, the learned counsel for the respondent/plaintiff would argue that though the term used in Ext.A1 agreement is earnest money, it was in fact part of the sale consideration. Further, according to him in this case the defendants have not proved that on account of breach of Ext.A1 sale agreement, they sustained any damage and as such, the trial court was justified in decreeing return of the advance amount. Therefore, the learned counsel prayed for dismissal of the appeal.

8. The words used in Ext.A1 is that Rs.300000/- received by the defendants on the date of execution of the agreement is earnest money. The further amount of Rs.700000/- received on 16.12.2008 was also stated to be part of earnest money. The learned counsel for the defendants relied upon Section 74 of the Indian Contract Act, in support his argument. Section 74 of the Indian Contract Act, 1872 reads as follows :-

> ***"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."*

9. In the decision in **Soji Peter v. K.B.Vijayan and Others, 2017 (4) KHC 456,** a Division Bench of this court while dealing with the concept of earnest money held in paragraph 27 as follows :-

> *"The concept of earnest money has been thus distilled by the Hon'ble Supreme Court in various judgments above, can only be accepted to be that sum of money, which is a pre-estimate of the actual damage that may be caused to a party in event of breach of the agreement and which is fixed by both the parties even at the time when the agreement was entered into. Even this pre-quantification, has to be found to be reasonable and to be a genuine pre-estimate of the damages by the court. It is only in the event that the court feels that what is fixed in the contract represents the actual damages that is pre-estimated by the parties that the court will allow it to be completely forfeited.*

10. In the above decision, in an agreement for sale there was a clause to the effect that if the respondent commits default in honouring the terms of the agreement, the amount accepted by the appellant as advance will be forfeited towards his loss. In the above context the appellant claimed that he is entitled to forfeit the advance amount paid by the respondents. While rejecting the above claim advanced by the

appellant, the Court held in paragraph 29 as follows :-

> *"We are afraid, on the foundation of law as declared by the Hon'ble Supreme Court and by this Court as afore recorded, the contention of the appellant cannot find forensic approval. This is because, the appellant has not pleaded or proved the actual damage caused to him nor has he even made an attempt to show the nature of the damage that he claims. It is merely a statement in the pleadings that since he did not obtain the sale consideration in time, he was not able to invest it in his business and that he was forced to take further loans. These submissions have not been proved or established by cogent evidence and the court below was, therefore, justified in refusing to accept these contentions and in ordering return of the money paid by the respondent. We are aware that the court below has concluded that rescission of the contract at the hands of the respondent was not on account of any factors that were attributable to the appellant. However, this by itself will not entitle the appellant to forfeit the advance amount received by him. His contention that the amount is earnest money deposit also cannot be sustained, since as is obvious from the agreement itself, the said amounts were not accepted by the appellant as a bona fide pre-estimate of the damages or loss that he would have suffered on the agreement being breached by the respondent. "*

11. After evaluating various judgment on the topic, in paragraph 36, the Division bench concluded that :

> *"The compendium of all that we have seen above, especially with respect to the various judgments that we have noticed in the earlier portion of this judgment, makes our opinion firm that where a sum is named in a contract as the liquidated amount payable by way of damages, the party complaining breach, will be entitled to receive as compensation such amounts only if it is found to be genuine and fixed as a pre-estimate of the damages by the parties and found to be reasonable by the court. In all other cases, the sum shown as liquidated amount payable as damages would not be liable to be forfeited by*

the party complaining of breach, unless he/she shows to have faced a detriment by way of actual loss or damages and the courts will be justified in awarding only reasonable compensation, but not exceeding the amount so stated. This is the same position when an amount is shown as penalty. This is the law that has now been crystalised by the various judgments of the Hon'ble Supreme Court and we are, therefore, obviously, bound by the binding precedents. "

12. In the decision in **Afro Asian Agro Products (Singapore) Ltd. v. Lekshmi Enterprises and Others, 2023 KHC 109**, in a similar case a Division Bench of this Court while dealing with the scope of Section 74 of the Indian Contract Act, also held that the Court has to ascertain the reasonable compensation payable to the plaintiff, having regard to the conditions existing on the date of the breach.

13. Relying upon the decision of the Hon'ble Supreme Court in **K.R.Suresh v. R.Poornima & Ors.** (Civil Appeal No.5822/2025 dated 2.5.2025, the learned counsel for the plaintiff would argue that with regard to the forfeiture clause, Ext.A1 is a one sided one and on that ground itself, the forfeiture clause is liable to be ignored. His argument was to the effect that as per Ext.A1, in case the plaintiff defaults, he is liable to forfeit a sum of Rs.10,00,000/- and if the defendants default, as per the agreement, they need to pay only Rs.3,00,000/-. However, in the original agreement, the amount to be forfeited by both sides was shown as Rs.3,00,000/-. During the pendency of the agreement, a further sum of Rs.7,00,000/- was paid and it was stated that it is also part of the earnest money. It was in the above context, the learned counsel for argued that the forfeiture clause is a one sided one.

14. In the instant case, even according to the defendant, due to the efflux of time the value of the subject matter only increased. Therefore, the learned counsel would argue that in case a seller is benefited by the breach of agreement by the purchaser, he is not entitled to forfeit earnest money. In **K.R.Suresh** (supra) relying upon '*Pollock & Mulla'* the Apex Court held in paragraph 55 as follows :-

> *"Where a clause entitling forfeiture of earnest money is contained in the agreement, it would not be refundable to the plaintiff who has failed to perform his part of the contract. Forfeiture of earnest money should not be allowed where the vendor has not suffered any loss, but has actually gained, viz., on account of frustration of contract. Where the value of land had considerably increased after the sale agreement, the Court, while refusing a decree for specific performance, ordered a refund of the earnest amount on the ground that the plaintiff did not suffer any loss, but had gained due to the default of the plaintiff. "*

15. In the decision in **Kailash Nath Associates v. Delhi Development Authority and Anr., (2015) 4 SCC 136**, after considering various precedents on the topic the Apex Court summarized the law on compensation for breach of contract under Section 74 of the Contract Act in paragraph 43 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:-*
>
> *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.

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 73of the Contract Act.

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.

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

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

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 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.

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."

16. As per the above decision also, only if a party sustains actual loss or damage, reasonable compensation can be awarded under Section 74 of the Contract Act, not exceeding the amount specified. Further, where the value of the land had considerably increased after the sale agreement, forfeiture of earnest money by the

seller cannot be allowed. In the instant case, even as per the pleadings in the written statement, due to efflux of time the value of the property increased considerably. Therefore, due to the non-performance of the sale agreement, there was not only no loss or damage to the defendants, but in fact defendants have actually gained because of the increase in the value of the property. Moreover, a total sum of Rs.10,00,000/- advanced by the plaintiff was in the possession of the defendants from the year 2008, till they deposited the same before the trial court, as directed by this Court in the order dated 9.8.2016, at the time of admitting the appeal.

17. In this context it is also to be noted that though in the sale agreement, it is stated that Rs.3,00,000/- received on 16.11.2008, was earnest money and further sum of Rs.7,00,000/- received on 16.12.2008 is also part of earnest money, there are two other endorsements in Ext.A1 admitting receipt of a further sum of Rs.25.5 lakhs and the said amount is stated to be received as part of sale consideration and not as part of earnest money. From the above endorsements also it appears that Rs.10,00,000/- received prior to the receipt of Rs.25.5 lakhs was towards part of sale consideration and not towards earnest money. Further, from Exts.A6 andA7 documents, it can be seen that the plaintiff already purchased 10.527 cents on 29.7.2009 and 13.194 cents on 8.9.2009 from out of the property covered by Ext.A1 agreement and as such, only part of the agreement remains not performed.

18. Since from the evidence on record it is revealed that the defendants have not sustained any loss but only benefited because of the non-performance of the

agreement, they are not entitled to forfeit the amount received from the plaintiff and as such, they are liable to repay the said amount of Rs.10,00,000/- with reasonable rate of interest to the plaintiff.

19. The trial court has awarded interest at the rate of 12% per annum from the date of payment till the date of decree and thereafter, at the rate of 6% per annum till realisation. Considering the fact that the breach of contract was committed by the plaintiff, I hold that the rate of interest awarded by the trial court is on the higher side and uniform rate of interest @ 8% per annum through out will be reasonable in this case. In the above circumstances, I do not find any irregularity or illegality in the impugned judgment and decree of the trial court, except on rate of interest, so as to call for any interference. Points answered accordingly.

20. In the result, this appeal is disposed of fixing the rate of interest at 8% per annum from the date of the suit till deposit/payment, with proportionate costs.

All pending interlocutory applications in the appeal will stand dismissed.

Sd/-

C.Pratheep Kumar, Judge

Mrcs/21.7.