

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH

WEDNESDAY, THE 29TH DAY OF FEBRUARY 2012/10TH PHALGUNA 1933

RSA.NO. 241 OF 2012 ()

**AS.108/2006 OF ADDITIONAL SUB COURT, IRINJALAKUDA
OS.554/2003 OF MUNSIF'S COURT, KODUNGALLUR**

APPELLANT/RESPONDENT/DEFENDANT:

**GOPI
S/O.VARIKAPPILLY AYYAPPAN, ELTHURUTH DESOM
MANATHALA VILLAGE, KODUNGALLUR TALUK.**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SMT.PREETHY KARUNAKARAN
SRI.K.RAVI (PARIYARATH)**

RESPONDENT/APPELLANT/PLAINTIFF:

**JOSEPH
S/O.ELENJIKAL LENIS, PULLOOT VILLAGE-DESOM
KODUNGALLUR TALUK.**

R1 BY SRI.K.G.BALASUBRAMANIAN

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 29-02-2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

THOMAS P.JOSEPH, J.

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R.S.A. No.241 of 2012

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Dated this the 29th day of February, 2012

J U D G M E N T

Exhibit A1, agreement for sale dated 25.11.2002 was executed between appellant and respondent for sale of property belonging to the appellant to the respondent for consideration at the rate of Rs.710/- per cent. It is not disputed that at the time Ext.A1 was executed, respondent paid Rs.15,000/- to the appellant by way of advance sale consideration. Time for performance of the contract was fixed as on or before 15.05.2003. Respondent stated that he was ready and willing to perform his part of the contract but appellant declined, without any valid reason to execute the sale deed. Respondent issued notice to the appellant on 16.05.2003 demanding return of the said sum of Rs.15,000/-. He filed O.S. No.554 of 2003 in the Munsiff's court, Kodungallur for recovery of the amount with interest.

2. Appellant contended that he was not at fault and was always ready and willing to perform his part of the contract. He claimed that he handed over copy of the sale deed and sketch of the property to the respondent to prepare the sale deed and had

even gone to the Sub Registrar's office on 15.05.2003 after intimating the respondent to execute the sale deed. Appellant produced Exts.B1 and B2 to show that he was present at the office of the Sub Registrar on 15.05.2003. It is also his contention that on the strength of Ext.A1, agreement he entered into Ext.B3, agreement dated 19.02.2003 with one Mary for purchase of property belonging to her and paid Rs.10,000/- by way of advance. According to the appellant, since respondent did not fulfill his obligation under Ext.A1 he was not able to raise the money for purchase of property as per Ext.B3 and hence Mary forfeited the sum of Rs.10,000/- he had paid by way of advance. Thus he suffered loss of Rs.10,000/- on account of breach of Ext.A1, contract which he is entitled to adjust in the advance sale consideration paid by the respondent.

3. Learned Munsiff accepted the plea of appellant and after adjusting the sum of Rs.10,000/- which he lost on account of his inability to perform Ext.B3, agreement, gave a decree for of Rs.5,000/- in favour of the respondent.

4. Respondent challenged that judgment and decree in the Sub Court, Irinjalakuda in A.S. No.108 of 2006. Learned Sub Judge took the view that there was breach on the part of the

respondent but the mere fact that appellant and Mary executed B3, agreement does not mean that appellant has suffered loss and at any rate, that loss is to be adjusted in the advance amount to be refunded to the respondent. First appellate court gave a decree for the balance sum of Rs.10,000/- also. That judgment and decree are under challenge in this Second Appeal.

5. Learned counsel for appellant contended that finding entered by the first appellate court is not correct. It is pointed out by the learned counsel that since the first appellate court has confirmed the finding of trial court that respondent was at breach, it was not correct in interfering with the judgment and decree of trial court and allowing respondent to realise entire sum of Rs.15,000/-.

6. I have also heard learned counsel who took notice for the respondent. According to the learned counsel the mere fact that Ext.B3, agreement is executed between appellant and Mary does not mean that appellant has suffered any loss and at any rate, that loss is to be recouped by the respondent.

7. Since admittedly the amount paid to the appellant is advance sale consideration, the question as to who was at breach in the matter of performance of Ext.A1, agreement is not

of relevance except for the purpose of deciding whether appellant is entitled to adjust the loss if any suffered by him on account of the alleged breach.

8. Exhibit B3 is the copy of agreement executed between appellant and Mary on 19.02.2003 where it is stated that appellant paid Rs.10,000/- by way of advance to the said Mary. That agreement could not be performed. Appellant filed O.S. No.1036 of 2003 against the said Mary for recovery of Rs.10,000/- he paid to her. Exhibits B4 and B5 are the copy of plaint and written statement in that case.

9. First appellate court took the view that the mere fact that appellant has filed O.S. No.1036 of 2003 for recovery of advance paid to Mary is not sufficient to say that he has suffered loss in so far as no evidence was adduced to show that a decree was passed in O.S. No.1036 of 2003 against the appellant.

10. I wanted learned counsel for appellant to get information whether O.S. No.1036 of 2003 has been decreed in favour of appellant. Learned counsel submitted that the information given to him is that O.S. No.1036 of 2003 is decreed, there was some settlement between appellant and Mary, the dispute between them was settled and the sum of Rs.10,000/-

paid by the appellant to Mary was returned to the appellant.

11. Whatever that be, the appellant has filed a suit against Mary is not by itself sufficient to show that appellant has suffered any loss. Question of loss arises only when the suit is dismissed holding that there was breach on the part of the appellant in performing Ext.B3, agreement, Mary suffered loss on account of that breach and she is entitled to adjust the advance amount in Ext.B3, agreement towards such loss.

12. Since such materials are not before court, the first appellate court cannot be found fault with for holding that mere filing of O.S. No.1036 of 2003 cannot mean that appellant has suffered loss and is entitled to adjust that loss in the advance amount paid as per Ext.A1, agreement. In that view of the matter I do not find any substantial question of law involved in the Second appeal requiring its admission. It follows that decree of the first appellate court has to stand.

Regular Second Appeal is dismissed.

All pending Interlocutory Applications will stand dismissed.

THOMAS P. JOSEPH, JUDGE.