



AS Nos.967 of 2012 & 103 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 23.08.2023	Delivered on 05.09.2023
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CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MRS.JUSTICE **R.KALAIMATHI**

A.S.Nos.967 of 2012 and 103 of 2014
and MP No.1 of 2012 in AS No.967 of 2012

Rangasamy ... Appellant in AS No.967/12
& 2nd Respondent in AS 103/14

Vs

1. K.S.Periyasamy ...1st Respondent in AS No.967/12
& AS No.103/14

2. S.T.Lajapathi ...2nd Respondent in AS No.967/12
& 1st Appellant in AS 103/14

3. Anitha ...3rd Respondent in AS No.967/12
& 2nd Appellant in AS 103/14

Prayer: These appeals are filed under Section 96 of the Code of Civil Procedure read with Order 41 Rule 1 of C.P.C., against the judgment and decree dated 24.04.2012 passed in O.S.No.6 of 2009 on the file of the learned District Judge of Nilgiris at Udthagamandalam.



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For Appellants : Mr.Sharath Chandran,
for Appellant in AS No.967/12
& 2nd Respondent in AS 103/14

For Respondents : Mr. Manokaran,
for 1st Respondent in both the Appeals

: Mrs.Radha Gopalan,
Respondents 2 & 3 in AS No.967/12
and for Appellant in AS No.103/14

COMMON JUDGEMENT

(Judgment of the Court was delivered by R.SUBRAMANINA, J.)

Both these Appeals arise out of OS No.6 of 2009 on the file of the District Court, Nilgiris. While the defendants 2 and 3 are the appellants in AS No.103 of 2014, the fourth defendant in the said suit is the appellant in AS No.967 of 2012. The suit in OS No.6 of 2009 was filed by the first respondent in both these Appeals, in his capacity as an assignee of an agreement of sale dated 22.08.1996, seeking refund of the advance paid under the said Sale Agreement.

2. The first defendant and his brother Sampathkumar entered into an agreement of sale with a Limited Company called M/s.Club India Resorts (P) Limited. On 22.08.1996 agreeing to sell an extent of 12.33



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acres of land situate at Manjanakorai Village, Ootacamund, for a consideration of Rs.1,31,00,000/-. According to the plaintiff, the said Company paid an advance of Rs.30,00,000/- by way of two cheques on 22.08.1996, thereafter, the agreement vendee had paid another sum of Rs.15,99,300/- on various dates. As per the agreement, the agreement vendee should pay a further sum of Rs.10,00,000/- on or before 10.09.1996 and upon payment of the said sum of Rs.10,00,000/-, the vendors will have to execute a Sale Deed for 2 acres of land. It was further agreed that the entire sale consideration should be paid within a period of six (6) months from the date of the agreement and on such payment the agreement vendors would execute the Sale Deed for the entire extent of the land.

3. Claiming that the agreement fell through because of the failure on the part of the agreement vendors to comply with the terms of the contract, the original agreement vendee viz. M/s.Club India Resorts (P) Limited, issued a notice on 21.05.2001 demanding repayment of the advance paid by it. The first defendant and his brother sent a reply on 06.06.2001 claiming that the agreement fell through only because of the failure on the part of the agreement vendee to pay the balance of sale



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consideration and its unwillingness to complete the transaction. Various correspondence between the parties regarding the disability on the part of the purchaser viz. M/s.Club India Resorts (P) Limited, were highlighted in the reply notice. The agreement vendors also specifically denied the right of the purchaser to seek refund of advance. Thereafter, the plaintiff obtained an assignment of the rights under the agreement dated 22.08.1996 on 21.11.2008 and sued for refund of advance on 25.02.2009.

4. In the plaint it was specifically pleaded that the suit is within time since a statutory charge is created in terms of Section 55(6)(b) of the Transfer of Property Act in favour of the Agreement vendee, Article 62 of the Limitation Act would apply and hence the suit is in time. It was also pleaded that since the last day for institution of the suit viz. 22.02.2009 was declared holiday, the suit filed on 25.02.2009 is in time. Since one of the agreement vendors viz. Sampathkumar had died in the meantime, his wife and daughter were impleaded as defendants 2 and 3. The other agreement vendor Mr.Lajapathi was made as the first defendant. The purchaser of the property was made the fourth defendant. It was contended that the purchase is subject to the right of the plaintiff under the agreement. The second defendant wife of one of the vendors died



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pending suit.

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5. The defendants 1 and 3 filed a written statement contending that the suit is barred by limitation. While admitting the agreement of sale, the defendants 1 and 3 would contend that there is no privity of contract between the plaintiff and them. The right to assign and the agreement were questioned. The absence of pre-suit notice was indicated as a defect. It was specifically claimed that the resolution said to have been passed by the Company on 15.11.2008 to assign the contract to the plaintiff and the assignment dated 21.11.2008 are fabricated, manipulated and created for the purpose of the case and they are not valid and enforceable in law.

6. It was also contended that the total amount that was paid by the original agreement holder viz. M/s.Club India Resorts (P) Limited, was only Rs.33,58,000 and not Rs.45,99,300/- as claimed in the plaint. It was also contended that the original purchaser had demolished the building having a plinth area of about 4597 sq. ft. worth about Rs.25,00,000/- without the knowledge of the original owners and hence they are not entitled to seek refund. The plea of limitation was buttressed contending that since the agreement fell through because of the non performance of



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its part of the contract by the buyer, the statutory charge contemplated under Section 55(6)(b) of the Transfer of Property Act, did not arise at all. In other words, it was the specific contention of defendants 1 and 3 that the original agreement holder was never ready and willing to perform its part of the contract and hence the statutory charge which is contemplated in favour of a purchaser will not arise.

7. It was also contended that the notice having been issued on 21.05.2001 itself and the defendants having sent a reply on 06.06.2001 itself, the claim that the statutory charge operated and therefore, the suit is in time should not be accepted. It was also contended that because of the failure on the part of the agreement vendee, they were forced to sell the property at a lower price i.e. for Rs.99,10,000/-, resulting in a loss of around Rs.32,00,000/-. It was also further contended that the cheques that were issued for the advance amount also got dishonoured and even that advance amount was paid in bits and pieces by the original agreement vendor till September 1996. It was further pointed out that the condition for payment of further sum of Rs.10,00,000/- to be paid on or before 10.09.1996 was not honoured.



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8. The fourth defendant, who is a purchaser, from defendants 1 to 3 had filed a separate written statement raising almost similar contentions. He had also claimed that he is a *bona fide* purchaser for value without notice of the subsisting agreement and therefore, the charge cannot be enforced against the property purchased by him. The plaintiff filed a reply statement reiterating the averments in the plaint.

9. On the above pleadings, the learned Trial Judge framed the following issues on 20.03.2010:

1. வாதி தொகை ரூ.97,45,916/- ஐ பின்வட்டியுடன் பெற அருகதையுடையவரா?
2. வாதி தாவா சொத்தைப் பொறுத்து சார்ஜ் பாத்தியதை பெற அருகதையுடையவரா?
3. வாதி தாவா சொத்தைப் பொறுத்து நிரந்தர உறுத்துக்கட்டளைப்பரிகாரம் பெற அருகதை உடையவரா?

and the following additional issue regarding Limitation was framed on 08.04.2010:



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தாவா காலவரையறைச் சட்டத்தின் கீழ்

WEB COPY பாதிக்கப்பட்டுள்ளதா?

10. At trial, the plaintiff was examined as P.W.1 and the Managing Director of the original agreement purchaser viz. one Mr.Raju was examined as P.W.2 and one Mr.S.K.Ravichandran was examined as P.W.3, Exhibits A1 to A14 were marked. On the side of the defendants, the first defendant was examined as D.W.1 and the fourth defendant was examined as D.W.2, Exhibits B1 to B20 were marked.

11. Upon consideration of the oral and documentary evidence, the learned Trial Judge found that a statutory charge in fact stood created in view of Section 55(6)(b) of the Transfer of Property Act. It, therefore, concluded that the suit is within time. The learned Trial Judge also found that defendants 1 and 3 had admitted the receipt of an advance of Rs.41,30,000/- from the original agreement vendee. On the said findings, the learned Trial Judge granted a decree for repayment of a sum of Rs.41,30,000/- with interest at 9% from 13.09.1996 till date of decree and at 6% from the date of suit till date of payment. We should, at this juncture, point out that though the validity of the assignment and the



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execution of the assignment were specifically denied, the Trial Court did not choose to frame an issue on the validity of the assignment.

12. We have heard Mr.Sarath Chandran, learned counsel for the appellant in AS No.967 of 2012 and for the second respondent in AS No.103 of 2014, Mrs.Radha Gopalan, learned counsel the respondents 2 and 3 in AS No.967 of 2012 and for the appellant in AS No.103 of 2014 and Mr.N.Manokaran, learned counsel appearing for the first respondent/plaintiff in both the Appeals.

13. Mrs. Radha Gopalan, learned counsel appearing for the appellant in AS No.103 of 2014 would vehemently contend that the assignment itself is not supported by consideration. She would also contend that the Trial Court committed a grave error in not framing an issue regarding the validity of the assignment, more so, when it was specifically questioned by the defendants 1 and 3 in their written statement. Drawing our attention to para 6 of the written statement, which reads as follows:

“6. The defendants Nos.1 and 3 state that the alleged resolution of the M/s. Club India Resorts and



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Metro Hotel Limited dated 15.11.2008 and thereafter the alleged made over of the Sale agreement by M/s.Club India Resorts and Metro Hotel Ltd., to the plaintiff on 21.11.2008, have been fabricated, manipulated and created, for the purpose of the case and the same is not valid nor enforceable in Law and no right, title, interest, can ever be claimed through the alleged resolution and the alleged made over in favour of the plaintiff and as such also the suit is liable to be dismissed.”

the learned counsel would submit that in view of such specific denial made in paragraph 6, the Trial Court erred in not framing an issue regarding the validity of the agreement. She would further contend that creation of a charge under Section 55(6)(b) of the Transfer of Property Act, is not automatic. In order to have the benefit of a charge under the said provision, the purchaser must show that he had not improperly declined to accept delivery of the property, meaning thereby he should have been ready and willing to perform his part of the contract.

14. According to the learned counsel if it is shown that the purchaser was not willing to perform his part of the contract, no charge would be created under Section 55(6)(b) of the Transfer of Property Act



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in favour of such purchaser. Pointing out the correspondence between the parties which, according to the learned counsel, clearly demonstrates the inability of the purchaser viz. M/s.Club India Resorts (P) Limited, to purchase the property and to pay the balance of sale consideration, the learned counsel would contend that no charge stood created under Section 55(6)(b) which would automatically render the suit filed, admittedly at the fag end of the 12year period, barred by limitation.

15. The learned counsel would also invite our attention to the contents of the assignment under Ex.A13 and contend that the alleged assignment does not disclose even the consideration paid by the plaintiff to the original agreement holder. She would also draw our attention to the oral evidence of P.W.1 regarding payment of such huge sum of Rs.97,00,000/- on the date of the assignment and submit that the said evidence which is so unnatural that it cannot be relied upon. The learned counsel would further point out that the evidence of P.W.2, wherein P.W.2 has specifically admitted that the Company/original agreement vendee has not produced the accounts to prove receipt of Rs.97,00,000/- on the date of the assignment viz. 21.11.2008 despite several opportunities having been extended to it by the Court.



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WEB COPY 16. Mr.Sarath Chandran, learned counsel appearing for the appellant in AS No.967 of 2012/defendants 1 and 3 in the suit would contend that the creation of charge under Section 55(6)(b) of the Transfer of Property Act is not automatic and it is dependant on the conduct of the parties. If it is shown that the agreement did not fructify because of the failure on the part of the purchaser to comply with the terms of the contract, Section 55(6)(b) does not operate at all and therefore, the limitation for the suit for refund of advance cannot be 12 years and it will only be 3 years under Article 54 and Article 62 of the Limitation Act will not apply.

17. In support of his contention, the learned counsel would rely upon a judgment of this Court in *Ponnammal v. Pichai Thevan and others, reported in Vol. 24 LW 826*, he would also draw support from the judgment of the Division Bench of this Court in *Adari Sanyasi v. Vaddadi Nookalamma and another*, reported in *Vol. 34 LW 556*, and the judgment of the Hon'ble single judge of this Court in *K.Savithiri and another v. L.Ramasamy and others*, reported in *(2017) 3 CTC 812*. On the validity of the assignment, the learned counsel would, by and large,



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adopt the arguments of Mrs.Radha Gopalan, the counsel for defendants 1 and 3.

18. Contending contra, Mr.N.Manokaran, learned counsel appearing for the plaintiff/first respondent in both the Appeals would submit that the charge under Section 55(6)(b) of the Transfer of Property Act stood created since the defendants 1 and 3 had admitted the receipt of the advance and therefore, in equity they are bound to repay it. He would rely upon the judgment of the Hon'ble Supreme Court in ***Kapilaben and Others v. Ashok Kumar Jayantilal Sheth and others***, reported in ***(2020) 20 SCC 648***, wherein it was held that the assignee of a contractual interest can seek specific performance. He would also draw our attention to the judgment of the Punjab & Haryana High Court in ***Mrs.I.K.Sohan Singh v. State Bank of India***, reported in ***ILR 1963 (Vol XVII (1)) 143***, in support of his contention that once a charge under Section 55(6)(b) of the Transfer of Property Act is created, the period of limitation would be 12 years under Article 62 (Article 132 of the Limitation Act 1908) and therefore, this suit is in time.

19. We have considered the submissions of the learned counsel on



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either side.

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20. The following points emerge for determination in the Appeal:

- (i) Whether the assignment dated 21.11.2008 is true and valid and whether it has been proved in accordance with law;
- (ii) Whether a charge stood created under Section 55(6)(b) of the Transfer of Property Act; and
- (iii) Whether the suit is barred by limitation.

Point No.1:

21. Even though this issue has not been discussed by the Trial Court, we find that there is sufficient evidence let in by the parties on this issue and hence we do not see any reason to remit the matter to the Trial Court for consideration of this issue. We proceed to determine the said issue, since the entire suit is based on the assignment dated 21.11.2008.

21.1. The assignment dated 21.11.2008 which is made out the reverse of the first page of the Sale Agreement Ex.A1 dated 22.08.1996, reads as follows:



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“கிரைய உடன்படிக்கை மேலோவர்

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21.11.2008 இரண்டாயிரத்து எட்டாம் ஆண்டு நவம்பர் மாதம் இருபத்து ஒன்றாம் நாள் ஆகிய இன்று.

சென்னை -8 மான்டியத் ரோடு, கதவிலக்கம் 45ல் இயங்கி வரும் மெஸர்ஸ் கிளப் இண்டியா ரிசார்ட்ஸ்(பி) லிமிடெட், நிறுவனத்திற்காக அதன் தலைவர் முருகேசன் மகன் எம். ராஜு ஆகிய நான் ஈரோடு மாவட்டம், பெருந்துறை வட்டம், காஞ்சி கோயில் வழி, பெத்தாம் பாளையம் அஞ்சல் கருக்கம் பாளையம், கே.எல். சண்முகம் வீதி கதவிலக்கம் 9/42ல் வசித்து வரும் பி. சொக்கலிங்கம் மகன் கே.எஸ். பெரியசாமி ஆகிய தங்களுக்கு எழுதிக் கொடுக்கும் கிரைய உடன்படிக்கை மேலோவர் என்னவென்றால்.

மேற்படி மெஸர்ஸ்.கிளப் இண்டியா ரிசார்ட்ஸ் (பி) லிமிடெட் நிறுவனம் தற்போது பப்ளிக் லிமிடெட் நிறுவனமாக மாற்றம் செய்யப்பட்டு கொடைக்கானல் பூம்பாறை என்ற இடத்தில் “கிளப் இண்டியா ரிசார்ட்ஸ் மற்றும் மெட்ரோ ஷோர்ட்டல்ஸ் லிமிடெட்” என்ற பெயரால் இயங்கி வருகிறது.

மேற்படி நிறுவனம் கடந்த 22.08.1996ம் தேதியன்று உதகமண்டலம் கிரீன் பீல்ட்ஸ் “குமரன்



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இல்லத்தில்” வசிக்கும் திருவேங்கடம் என்பவரது மக்கள் எஸ்.டி.லஜபதி மற்றும் எஸ்.டி.சம்பத்குமார் ஆகியோர்கள் வசம் கிரைய உடன்படிக்கையில் கண்ட சொத்துக்களான உதகமண்டலம் கிராம ரீ.ச.எண்.161ல் உள்ள 12.33 ஏக்கரை ரூ.1,31,00,000/- க்கு விலை பேசி இரண்டு காசோலைகளின் வாயிலாக ரூ.30,00,000/- கிரய முன் பணமாக செலுத்தப்பட்டுள்ளது. பின்னிட்டு பல்வேறு தவணைகளில் ரூ.15,99,300/- முன் பணமாக செலுத்தப்பட்டுள்ளது. அந்த வகையில் மேற்படி எங்களது நிறுவனம் ரூ. 45,99,300/- ஐ முன் பணமாகவும், கிரய தொகையில் ஒரு பகுதியாகவும் மேற்படி உரிமையாளர்களுக்கு செலுத்தியுள்ளது.

பின்னிட்டு மேற்படி நிறுவனத்திற்காக நான் 21.05.2001ம் தேதி மேற்படி எஸ்.டி. லஜபதி மற்றும் எஸ்.டி.சம்பத்குமார் ஆகியோர்களுக்கு அறிவிப்பு கொடுத்து அந்த அறிவிப்பை பெற்றுக் கொண்ட நில உரிமையாளர்கள் இருவரும் 6.6.2001ம் தேதியன்று கிரய உடன்படிக்கையை ஒப்புக்கொண்டு பதில் கொடுத்துள்ளார்கள்.

இன்று நான் தங்களிடம் இருந்து கிரய ஒப்பந்தத்தின் அடிப்படையிலான பிரதிபலன் முழுவதையும் வட்டியுடன் சேர்த்து அடியிற்கண்ட சாட்சிகள் முன்னிலையில் பெற்றுக் கொண்டு கிரய ஒப்பந்தத்தின் அடிப்படையிலான முழு உரிமையையும் தங்களுக்கு இன்று



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மேடோவர் செய்து கொடுக்கிறேன். (இதன் அசலின் 1ம் பக்கம் முடிவு)

இனி மேற்கொண்டு தாங்களே 22.8.1996 தேதிய கிரய ஒப்பந்தத்தின் அடிப்படையிலான முழு உரிமையையும் அடைந்து அதன் அடிப்படையில் உரிய பலனை தாங்களே அடைந்து கொள்ளவேண்டியது. இனிமேற்கொண்டு எங்கள் மேற்படி நிறுவனத்திற்கோ, அதன் உறுப்பினர்களுக்கோ கிரய ஒப்பந்தத்தின் அடிப்படையில் யாதொரு உரிமையும், பாத்தியமும், பின் தொடர்ச்சியும் கிடையாது. ஆகவே, தாங்களே கிரய ஒப்பந்தத்தின் சாராம்சங்களின்படி தேவையான நடவடிக்கைகளை சட்டப்படி எடுத்து அதன் பலனை அடைந்து கொள்ள வேண்டியது.

இந்தப் படிக்கு நான் மேற்படி எங்களது நிறுவனத்திற்காக மேற்படி நிறுவனம் 15.11.2008ம் தேதி நிறைவேற்றிய தீர்மானத்தின் அடிப்படையில் தங்களுக்கு எழுதிக்கொடுத்த மேடோவர் சரியே. இத்துடன் நான் தீர்மான நகலையும் தங்களுடன் ஒப்படைத்து விட்டேன்.

Sd/xxx

Left thumb Impression of M. Raju

The original of this bears the seal of the Club India Resorts & Metro Hotels. Chennai-8

சாட்சிகள்



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1)Sd/- xxxx
S/o. K.K. Kandasamy,
S.K.C. Road, Erode-1

2) Sd/- P.G. Thiyagarajan
S/o.Gurusamy
K.N.K. Road, Erode-3

தயாரித்தவர்

Sd/- P.M. Senthil Kumar B.A., B.L.,
Advocate,
Erode.”

21.2. As rightly pointed out by the learned counsel for the appellants, the above assignment does not reflect the consideration for which it has been made. P.W.1 in his evidence would claim that he paid Rs.97,00,000/- in cash on the date of the assignment. The evidence of P.W.1 regarding payment, in our opinion, is wholly unbelievable. Nowhere in the plaint or in his evidence in Chief examination P.W.1 has disclosed the actual amount paid by him as consideration for the assignment. Regarding payment of consideration, the contents of his proof affidavit is as follows:

“மேலோவரின் அடிப்படையில் முன் பணத்தை

நான் ராஜூவிடம் செலுத்திவிட்டேன். அதனை அவர்



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பெற்றுக் கொண்டார். பணத்தை பெற்றதை

சாட்சிகளும், வழக்குரைஞரும் பார்த்தார்கள். ராஜு

(இதன் அசலில் 5ம் பக்க முடிவு) ஆவணங்களை

என்னிடம் ஒப்படைத்தார்.”

In cross-examination he has claimed that a resolution was passed to assign the right under the agreement to him for a consideration of Rs.97,00,000/-, he has stated that he has paid that the said sum of Rs.97,00,000/- in cash, his evidence in this regard reads as follows:

“வாசாஆ1 கிரைய ஒப்பந்தத்தை மேட்-ஓவர் செய்வதற்கு 97 லட்சம் ரூபாய் தீர்மானம் செய்யப்பட்டது. அந்த தொகையை நான் பணமாகத்தான் கொடுத்தேன். விவசாய பூமியிலிருந்து அந்த வருமானத்தை வைத்து நான் அந்த தொகையை கொடுத்தேன். 97 லட்சம் ரூபாய் கிளப் இண்டியா ரிசார்ட்ஸ் நிறுவனத்தில் கொடுத்ததற்கு எந்த ஆவணமும் என்னிடம் கிடையாது. 15.11.2008ற்கு முன்பே 1ம் பிரதிவாதியின் தம்பி எஸ்.டி.சம்பத்துமார் இறந்த விவரம் எனக்கு தெரியும். 28.3.2007ல் 1ம்



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பிரதிவாதியின் தம்பி எஸ்.டி.சம்பத்துமாரின் வாரிசுகளும் தாவா சொத்தை 4ம் பிரதிவாதிக்கு பதிவு கிரைய ஒப்பந்தம் எழுதிக்கொடுத்த விவரம் எனக்கு தெரியும். அந்த விவரம் 11.12.2008ற்கு முன்பே எனக்கு தெரியும்.”

again in cross-examination by the fourth defendant P.W.1 had deposed as follows:

“4ம் பிரதிவாதி தரப்பில் :- வாசாஆ1 கிரைய ஒப்பந்தம் மேட்-ஓவர் செய்த தேதியான 21.11.2008ல் ரூ.97 லட்சம் கொடுத்தோம். வாசாஆ1ல் 97 லட்சம் கொடுத்ததாக குறிப்பிட்டு எழுதவில்லை. வழக்குரையிலும் 97 லட்சம் ரூபாய் 21.11.2008ல் கொடுத்ததாக நான் சொல்லவில்லை. 21.11.2008ல் 97 லட்சம் என்னிடம் இருந்ததற்கு எந்த ஆவணமும் என்னிடம் கிடையாது.”

21.3. P.W.2, the Managing Director of the original agreement vendee M/s.Club India Resorts (P) Limited, has in cross-examination admitted that Ex.A13 assignment does not disclose the amount paid as consideration under the said assignment.



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“வாசா ஆ 13 ஆவணத்தில் எவ்வளவு தொகைக்கு
மேட்லவர் செய்யப்படுகிறது என்று குறிப்பிடப்படவில்லை
என்பது உண்மைதான்.”

Again he would admit that the receipt of Rs.97,00,000/- has been reflected in the accounts of the Company though it was not deposited in any Bank. The relevant portion of the cross-examination of P.W.2 is as follows:

“வாதியிடம் பெற்ற ரூ. 97,00,000/- தொகையை
நான் என் கம்பெனியின் வங்கி கணக்கில்
போடவில்லை. அந்த தொகையை நான் பல
நபர்களுக்கு பிரித்து கொடுத்துவிட்டேன். அதை
நீரூபிக்க என்னிடம் ஆவணங்கள் உள்ளன.”

He would, however, admit that he has not produced those documents despite time having been granted to him by the Court. As we had already adverted to, the learned Trial Judge has not framed an issue relating to the validity of the assignment despite a specific plea having been taken by the defendants 1 and 3, disputing the assignment.



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21.4. A perusal of the assignment and the supporting evidence of

P.Ws.1 and 2 on the assignment would show that the entire transaction is shaky. To say the least, it does not inspire the confidence of the Court.

P.W.1, who claims to be an agriculturist, claims that he has paid a sum of Rs.97,00,000/- in cash which is wholly unbelievable, not even a shred of paper has been produced to show that P.W.1 had wherewithal to pay a sum of Rs.97,00,000/- in cash on the date of the assignment. P.W.2 is the Managing Director of a Company and his evidence extracted above compels us to draw an adverse inference against the plaintiff for non-production of material evidence in the form of Accounts Books of a Limited Company which is claimed to be in existence.

21.5. We are therefore of the considered opinion that the plaintiff has not proved the assignment. As pointed out by the Hon'ble Supreme Court in *Kapilaben and Others v. Ashok Kumar Jayantilal Sheth and others*, cited supra, though an assignee can sue for performance, he must establish a valid assignment. The evidence extracted above, in our opinion, is totally insufficient to uphold the assignment. We therefore find that the plaintiff has not established that he had obtained a valid assignment of the rights under the agreement dated 22.08.1996. Hence he



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is not entitled to sue for refund of advance.

WEB COPY 21.6. Point No.(i) is thus answered against the plaintiff/first respondent in both the Appeals.

Point Nos. (ii) & (iii):

22. These two points are to be taken up together, as they are interlinked. Section 55(6)(b) of the Transfer of Property Act, reads as follows:

“55. Rights and liabilities of buyer and seller.—

(6) The buyer is entitled— (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.”

22.1. Under the above provision, a buyer is entitled to a charge



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over the property unless he has improperly declined to accept delivery of the property. The charge contemplated under Section 55(6)(b) of the Transfer of Property Act is not automatic unlike the charge that a seller is entitled to under Section 55(4)(b) of the Transfer of Property Act. A lien or a charge for payment of the unpaid purchase money which is commonly called as “unpaid vendor's lien” is automatic.

22.2. A charge contemplated under Section 55(6)(b) of the Transfer of Property Act is not automatic. In order to get the benefit of such charge, the purchaser will have to show that he had not done anything which would amount to improperly declining delivery of the property. In other words, a buyer in order to have the benefit of the charge under Section 55(6)(b) of the Transfer of Property Act, will have to show that the contract did not fail due to his own fault. If we are to look at the evidence available in the case on hand, in order to find out as to whether the purchaser viz. M/s. Club India Resorts (P) Limited, had always been ready and willing to perform its part of the contract and it was not responsible for the failure of the contract, we have to necessarily conclude that the Company was not always ready and willing to perform its part of the contract.



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22.3. As we had already pointed out though the agreement reads that the Company has paid Rs.30,00,000/- by way of two cheques on the date of the agreement, it is admitted that both the cheques bounced and amounts were paid on various other dates. Ex.B4 letter dated 02.01.1998 address to the first defendant by M/s. Club India Resorts (P) Limited, would show that a cheque for Rs.35,000/- issued by them was dishonoured and they had sent a Demand Draft for Rs.20,000/- on 30.12.1997 while undertaking to pay a further sum of Rs.15,000/- shortly. In Ex.B5 dated 26.02.1998 the Company has acknowledged its inability to finalise payments under the agreement. It has undertaken to pay a part of the amount and get at least 5 acres of land registered by 10.03.1998. It is also seen that the Company has attempted to pledge certain shares and borrow monies from one Mr.B.K.Gupta on 31.03.1998 (Ex.B6 series).

22.4. The above coupled with the fact that the Company had handed over a Mahindra Armada Jeep, Registration No.TN 01 L 5913 to the vendors viz. the first defendant and his brother during the year 1999 and the said Jeep was seized and taken away by the financier for non-payment of the instalments. Ex.B9 is a telegram issued by P.W.2 during



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the course of these transactions, wherein P.W.2 would acknowledge that the financial arrangements are getting delayed. The above correspondence would go to show that the original agreement vendee viz. M/s. Club India Resorts (P) Limited, was not always ready and willing to perform its part of the contract. A notice was issued under Ex.A4 on 21.05.2001 seeking return of advance which would go a long way to show that the original agreement vendee was not able to perform its part of the contract.

22.5. In *Ponnammal v. Pichai Thevan and others*, cited supra, Hon'ble Justice Ramesam, had framed two points for determination in a Second Appeal, they are (1) whether the plaintiffs are entitled to a charge for the said amount; and (2) when did the cause of action for the suit arise. The said suit was also one for refund of earnest money claiming a charge over the property. It was claimed that the appellant is entitled to a charge under Section 64 of the Contract Act, the Hon'ble Judge after discussing the law on the point concluded as follows:

“In the present case, the plaintiffs had no interest at the time of payment. They only entered into a contract to purchase the property and the money they paid to discharge the mortgage was only part of the



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*consideration they had to pay for the sale. It was really what would have become of the vendee's money if the contract had been carried out **Har Shyam Chowdhuri v. Shyam Lal Sah.** In this respect the case resembles the decision in *Govinda Padayachi v. Lokanatha Aiyar* and the case in *Har Shyam Chowdhuri v. Shyam Lal Sahu*. The observations of the Privy Council in *Mohesh Lal v. Mohant Bawan Das* throw similar light (see also the observations of Mukerjee, J., in *Surjiram Marwari v. Barhamdeo Persad*. **If in this case the contract was not carried out on account of the default of the defendants it may be that the plaintiffs would be entitled to a charge. It is on account of their own default that the contract was not completed. It is simply a case where plaintiffs paid a part of the consideration but not the rest and though they are entitled to a refund of the part payment made they are not entitled to a charge.**”(Emphasis Supplied)*

22.6. In *Adari Sanyasi v. Vaddadi Nookalamma and others*, cited supra, a Division Bench of this Court had considered a similar question and had observed as follows:

“....The question whether a purchaser by part payment can obtain a charge on the property depends in our opinion on whether the default in completing the



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contract rests with him or with the vendor. (Emphasis Supplied) This is a matter of fact to be found in each case. In Ponnammal v. Pichai Thevan, the purchaser redeemed a mortgage which was a part consideration for the sale, but he failed to go on with the contract and pay the remainder of the purchase money. Ramesam, J., held that he had no charge on the property even though he had discharged the mortgage. We find nothing in the judgment of the Privy Council which conflicts with this decision. Their Lordships mention Sect. 55 (6) of the Transfer of Property Act and say:

“Their Lordships are of opinion that the section applied to the agreement in this case, where the buyer had paid earnest money, and so far from refusing to accept delivery, was pressing for specific performance, and that the agreement did in itself create an interest.”

No authority has been shown to us for the proposition that a purchaser paying earnest money and then refusing to complete the purchase has a charge on the property for the earnest money, and any such proposition is on its face quite untenable.

We are in respectful agreement with the conclusions of the Division Bench and that of Hon’ble Justice Ramesam.



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22.7. Similar view has also been expressed by Hon'ble Mr.Justice

Sathish Kumar in ***K.Savithiri and another v. L.Ramasamy and others***,

cited supra, wherein the Hon'ble Judge has held as follows:

“29. A conjoint reading of above judgments and Section 55(6)(b) of the Transfer of Property Act, make it clear that for the money paid by the buyer before the title passes, a statutory charge will be created and attached to the property and such a charge will be lost in case of purchaser's own default and in case he refused to accept delivery. The charge attaches to the property from the moment he pays the purchase money and is only lost in case of his own subsequent default. Therefore, under Section 55(6)(b) unless buyer improperly declines to accept delivery or properly decline to delivery the charge for the amount paid will remain from the time of payment. The above judgments also makes it clear that statutory charge arises only when the buyer show that he has not improperly declined to accept delivery of the property or he properly declined to accept delivery.”

Therefore, the law regarding the charge under Section 55(6)(b) of the Transfer of Property Act, is too well settled to the effect that it will apply only if the purchaser demonstrates that the contract did not fail due to



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his/her own fault.

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22.8. As we had pointed out earlier the evidence in the case on hand clearly indicates that the purchaser was at fault and it had in fact demanded repayment of the advance money even in the year 2001. Therefore, by no stretch of imagination can be concluded that the charge stood created and therefore, Article 62 of the Limitation Act would apply. We, therefore, conclude that the plaintiff is not entitled to invoke the benefit of Section 55(6)(b) of the Transfer of Property Act and consequently Article 62 of the Limitation.

22.9. In view of the above finding, the suit laid on 25.02.2009 is clearly barred by limitation. Thus point Nos. (ii) & (iii) are answered in favour of the appellants and against the first respondent.

23. In the light of the above, the Appeals will stand allowed with costs and the judgment and decree of the Trial Court will stand set aside, the suit in OS No.6 of 2009 will stand dismissed. Consequently, the connected miscellaneous petition is closed.



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(R.SUBRAMANIAN, J .) (R.KALAIMATHI, J.)

05.09.2023

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Index : Yes
Internet : Yes
Speaking order
Neutral Citation: Yes

To

1. The District Judge
Nilgiris at Udhagamandalam.
2. The Section Officer,
V.R.Section,
High Court, Madras 600 104.



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R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

jv

Pre-delivery judgment in
A.S.Nos.967 of 2012 and 103 of 2014
and MP No.1 of 2012 in AS No.967 of 2012

05.09.2023