



IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 20TH DAY OF NOVEMBER, 2024

PRESENT
THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

REGULAR FIRST APPEAL NO.100097 OF 2020 (SP)

BETWEEN:

1. SHESHMAL S/O TEKCHANDAJI BHANDARI
SINCE DECEASED BY HIS LRS.
- 1.A SOHANIDEVI W/O. SHESHMAL BHANDARI
73 YEARS, HOUSEWIFE,
52, EUREKA COLONY, KUSUGAL ROAD,
KESHWAPUR, HUBBALLI-580 023.
- 1.B ASHOK S/O. SHESHMAL BHANDARI
54 YEARS, BUSINESS,
52, EUREKA COLONY, KUSUGAL ROAD,
KESHWAPUR, HUBBALLI-580 023.
- 1.C NAVARATAN S/O. SHESHMAL BHANDARI
52 YEARS, BUSINESS,
52, EUREKA COLONY, KUSUGAL ROAD,
KESHWAPUR, HUBBALLI-580 023.
- 1.D BHARAT S/O. SHESHMAL BHANDARI
50 YEARS, BUSINESS,
52, EUREKA COLONY, KUSUGAL ROAD,
KESHWAPUR, HUBBALLI-580 023.
- 1.E VIMAL S/O. SHESHMAL BHANDARI
48 YEARS, BUSINESS,
52, EUREKA COLONY, KUSUGAL ROAD,
KESHWAPUR, HUBBALLI-580 023.
2. PRAKASH S/O PREMCHANDRAJI KOTHARI,
AGE: 70 YEARS, KESHWAPUR,
HUBBALLI-580 023, DHARWAD DISTRICT.

- APPELLANTS

(BY SRI HARSH DESAI, ADVOCATE)





AND:

1. VIJAYALAXMI W/O SURESH JITURI
AGE: 75 YEARS, PLOT NO.33/39,
GURUKRUPA HOUSE, MANJUNATH NAGAR,
GOKUL ROAD, HUBBALLI-580 030,
DHARWAD DISTRICT.
2. ARUNA W/O RAJESH BURABURE
AGE: NOT KNOWN, H.NO.18,
PURUSHOTAM NAGAR, VIDYA NAGAR,
HUBBALLI-580 030, DHARWAD DISTRICT.
3. SUVARNA W/O VINAY JARTHARGAR
AGE: NOT KNOWN, EUREKA COLONY,
KESHWAPUR, HUBBALLI-580 023,
DHARWAD DISTRICT.
4. JAYACHAND S/O TUKARAMASA JITURI
AGE: 70 YEARS, PLOT NO.33/39,
GURUKRUPA HOUSE, GOKUL ROAD,
HUBBALLI-580 030, DHARWAD DISTRICT.
5. MANGALA W/O NIJAGUNEPPA GANGAVATI
AGE: 63 YEARS, GAYATRI COLONY,
NEW GAYATRI TEMPLE, BENGERI, KESHWAPUR,
HUBBALLI-580 023, DHARWAD DISTRICT.
6. GIRIJA D/O NIJAGUNEPPA GANGAVATI,
AGE: 55 YEARS, GAYATRI COLONY,
NEW GAYATRI TEMPLE, BENGERI, KESHWAPUR,
HUBBALLI-580 023, DHARWAD DISTRICT.
7. SHOBHA W/O MAHESH
AGE: 56 YEARS, 36, 3RD MAIN ROAD,
BENGALURU-560 001.
8. JAYASHREE W/O VIJAY
AGE: 48 YEARS, C/O GANGAVATI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028,
DHARWAD DISTRICT.
9. ANNAPOORNA W/O GIRISH
AGE: 46 YEARS,
NEAR NELAMANGALA, TELEPHONE OFFICE,
NELAMANGALA-562 123, BENGALURU.



10. DEEP D/O NIJAGUNNEPPA GANGAVATHI
AGE: 44 YEARS, C/O GANGAVATHI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028,
DHARWAD DISTRICT.
11. SULOCHANA W/O BASAVARAJ KAMTAGI
AGE: 66 YEARS, C/O GANGAVATHI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028,
DHARWAD DISTRICT.
12. VISHWANATH S/O BASAVARAJ KAMTAGI
AGE: 47 YEARS, C/O GANGAVATHI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028,
DHARWAD DISTRICT.
13. ANAND S/O BASAVARAJ KAMTAGI,
AGE: 44 YEARS, C/O GANGAVATHI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028,
DHARWAD DISTRICT.
14. BASAVARAJ S/O CHANNAASAPPA DHARWADKAR
AGE: 69 YEARS, C/O GANGAVATHI SILK PALACE,
DAJIBAN PETH, HUBBALLI-580 028, DHARWAD DISTRICT.
15. SNEHALATA W/O AMBASA KABADI
AGE: 62 YEARS, C/O RAMESH R. BURBURE,
HOUSE NO.27, CENTRAL EXCISE COLONY,
HUBBALLI-580 030, DHARWAD DISTRICT.
16. JAYASHREE W/O RAMESH BURBURE
AGE: 60 YEARS, C/O RAMESH R. BURBURE,
HOUSE NO.27, CENTRAL EXCISE COLONY,
HUBBALLI-580 030, DHARWAD DISTRICT.

- RESPONDENTS

(BY SRI AKASH R. NAIK, ADV. FOR R11 TO R13;
SRI V.M. SHEELAVANT, ADV. FOR R14;
NOTICE TO R1 TO R6, R8, R9, R15, R16 IS SERVED;
NOTICE TO R7 IS HELD SUFFICIENT;
NOTICE TO R10 IS HELD SUFFICIENT)

THIS REGULAR FIRST APPEAL IS FILED UNDER SECTION 96 OF CPC., PRAYING TO, SET ASIDE THE JUDGMENT AND DECREE DATED 29.11.2019 PASSED BY THE COURT OF II ADDITIONAL SENIOR CIVIL JUDGE AT HUBBALLI IN OS NO.244/2010 AND DECREE THE SUIT BY ALLOWING THIS REGULAR FIRST APPEAL WITH COSTS, IN THE INTEREST OF JUSTICE.



THIS REGULAR FIRST APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 29.10.2024 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **SREENIVAS HARISH KUMAR J.,** DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

CAV JUDGMENT

(PER: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR)

Legal representatives of the first plaintiff, and plaintiff no.2 have preferred this appeal questioning the correctness of dismissal of the suit, O.S. No. 244/2010, by II Addl. Sr. Civil Judge, Hubballi.

2. The plaintiffs are brothers. Their suit is for specific performance of agreement dated 13.12.2009. They stated that defendants 1 and 2 being the owners of CTS No.1300/C2 measuring 201 Square Yards and CTS No.1298 measuring 220 Square Yards situate at Moorsavirmath Road, Harapanhalli Oni, Hubballi ('suit property' for short) agreed to sell the suit property to them for a sale consideration of Rs.2,35,00,000/-. On the date of agreement, the plaintiffs made advance payment of Rs.5,00,000/- to defendants 1 and 2. On 10.03.2010, the plaintiffs took out a public notice



in the newspaper calling for objections to their intention to purchase the suit property. Defendants 1 and 2 issued a counter notice to the plaintiffs on 18.03.2010 denying the agreement of sale and they also got the reply notice published in the newspaper on 18.03.2010 and 19.03.2010. Defendants 1 and 2 admitted to have received Rs.5,00,000/- from the plaintiffs but they stated that it was a loan obtained by them from the plaintiffs on interest at the rate of 5% per month. Immediately the plaintiffs issued another notice on 15.04.2010 calling upon defendants 1 and 2 to execute the sale deed by receiving the balance sale consideration. This notice was also replied by defendants 1 and 2. When the plaintiffs were making arrangements for instituting the suit, defendants 1 and 2 approached and assured them that they would execute the sale deed in terms of the agreement dated 13.12.2009 and insisted them to enhance the sale consideration amount. The plaintiffs assured them of considering their request after consulting their elders. Since defendants 1 and 2 demanded unreasonable enhancement, the elders postponed the settlement talks. Then the plaintiffs



noticed that defendants 1 and 2 had played fraud on them by creating false sale deed dated 30.09.2010 which was subsequently registered on 04.10.2010. The plaintiffs stated that this sale deed was null and void and did not affect their interest in the suit property. They also stated that the sale deed dated 30.09.2010 was a sham and bogus sale deed. Therefore they brought the suit for specific performance stating that they were always ready and willing to perform their part of contract. Alternatively, they also sought refund of earnest money of Rs.5,00,000/- with interest at the rate of 18% p.a. The plaintiffs also impleaded the sisters of defendants 1 and 2 as defendants 8 and 9 by way of abundant caution.

3. Defendants 1 and 2 admitted that they were owners of the suit property but denied their contract with the plaintiffs under an agreement of sale dated 13.12.2009. Their specific contention was that being the neighbors of the plaintiffs they had a money transaction with them. On some occasion before 13.12.2009 they had borrowed a sum of Rs.5,00,000/- from the plaintiffs and as a security for this



loan transaction, the plaintiffs obtained their signatures on some blank bond papers which were later on converted into agreement of sale with the sole intention of defrauding them. Therefore, there was no contract between them for sale of the suit property. This being the factual background, they had to reply to the public notice taken out by the plaintiffs in the newspaper denying the agreement. They also stated that on 27.11.2006 itself they had entered into an agreement of sale with defendants 3 to 7 in respect of suit property and thereafter they executed a sale deed on 30.09.2010 in favour of defendants 3 to 7 and sold the suit property to them for a consideration of Rs.60,00,000/-. This sale deed was registered on 04.10.2010 on which day they delivered the actual physical possession of the suit property to defendants 3 to 7. The plaintiffs were aware of this transaction. They stated that when the property was already sold by them it was highly impossible that they would execute an agreement of sale in favour of the plaintiffs. Therefore they prayed for dismissing the suit.



4. Defendants 3 to 7 also denied the agreement in favour of the plaintiffs and stated to have purchased the suit property from defendants 1 and 2 for a consideration of Rs.60,00,000/- under sale deed dated 30.09.2010 which was registered on 04.10.2010. They also stated that they received possession of the suit property.

5. Defendants 8 and 9 filed written statement stating that the suit property did not exclusively belong to defendants 1 and 2 as it was a joint family property. They denied the right of defendants 1 and 2 to enter into contract with the plaintiffs. They denied the agreement dated 13.12.2009. They stated that the sale deed dated 30.09.2010 executed by defendants 1 and 2 in favour of defendants 3 to 10 was bogus, sham, illegal and null and void and did not bind their interest. They set up counter claim seeking declaration that the agreement dated 13.09.2009, the sale deed dated 30.09.2010 as illegal and for a direction to defendants 1 to 7 to partition the suit property and put them in possession of their legitimate share equal to 1/4th each.



6. The defendants 1 and 2 filed their rejoinder to the counter claim of defendants 8 and 9 stating that the respective husbands of defendants 8 and 9 were behind them in setting up counter claim which was baseless and vexatious. They denied the right of defendants 8 and 9 to claim share in the suit property.

7. The judgment of the trial court shows that consequent to order dated 03.10.2012 on I.A. No. 8, the counter claim of defendants 8 and 9 was registered as a separate and independent suit, and it was registered as O.S. No. 309/2012 and decided separately.

8. Out of six issues raised by the trial court, the deciding issues were 1 and 3 which related to plaintiffs proving the agreement dated 13.12.2009, and that the sale deed executed by defendants 1 and 2 in favour of defendants 3 to 7 as not binding them. The trial court answered these two issues against the plaintiffs and that was the reason for suit being dismissed. So the points that emanate for discussion in this appeal are the correctness of the findings of the trial court on these two issues. Besides these two



points, another point to be examined is as to entitlement of the plaintiffs to refund of earnest money of Rs.5,00,000/-.

9. The first plaintiff initially entered the witness box and filed his affidavit in lieu of examination in chief. He was treated as PW1, but he did not appear for cross examination on the ground of his sickness; he appointed his son Ashok S. Bhandari by executing a power of attorney in his favour to adduce evidence. Therefore Ashok S. Bhandari, the son of the first plaintiff was also treated as PW1 through whom the documents Ex.P.1 to P.19 were marked. PW2 was an attester to the agreement marked Ex.P.19 and PW3 was its scribe. From the defendants' side, the first two defendants did not enter the witness box. DW1 and DW2 are the sixth and seventh defendants respectively. DW3 is an attestor to an agreement marked Ex.D.7.

10. In regard to the evidence adduced by PW1 Ashok Bhandari, the trial court has commented that his evidence in the capacity of General Power of Attorney holder of the first plaintiff cannot be acted upon as he did not have personal knowledge of the transaction leading to execution of



agreement dated 13.12.2009 as per Ex.P.19. It has been held that though there is no bar for a general power of attorney holder to adduce evidence, the reliability of the evidence of power of attorney holder depends on his personal knowledge about the transaction involved in the suit. He is a competent witness in regard to actions and transactions done by him as an agent but any matter that lies within the personal knowledge of his principal cannot be proved by him. Here though PW1 stated that he was present at the time of execution of the agreement as per Ex.P.19, his presence is not forthcoming from the records; he was not a signatory to the agreement as a witness. His personal knowledge about the sale agreement is therefore doubtful. In spite of the fact that PW2 and PW3 adduced evidence that the agreement came into existence in their presence, their evidence cannot be based to hold the agreement proved because the evidence of PW1 cannot be relied upon. If the first plaintiff could not appear for cross examination, the second plaintiff who was one of the parties to the agreement



could have adduced evidence. The best evidence having been withheld, the testimony of PW1 is of no use.

11. In regard to the above findings it was the argument of Sri Harsh Desai that there was a reason for first plaintiff being not able to appear for cross examination. The trial court has not properly appreciated the evidence of PW1, the power of attorney holder of the first plaintiff. PW1 is none other than the son of the first plaintiff. He has clearly stated that he was very much present at the time when transaction took place between the plaintiffs and defendants 1 and 2, and in fact it was he who brought the documentation paper. Merely for the reason that Plaintiff no.2 did not adduce evidence, the trial court should not have recorded a finding that PW1 was incompetent witness as he was a power of attorney holder. There is no absolute bar for a power of attorney holder to depose in court, it all depends on facts and circumstances and if it is found that power of attorney holder has adduced evidence from his personal knowledge about the transaction, such evidence becomes admissible. He argued that the evidence of PW2 and PW3



should not have been discarded giving reason that unless the evidence of PW1 is admissible, the testimonies of PW2 and PW3 are of no use.

12. The findings of the trial court about the admissibility of the evidence given by PW1 cannot be said to be incorrect. As a son of the first plaintiff, even if it is assumed that he was present at the time when Ex.P.19 was executed by defendants 1 and 2 and thus he had the knowledge of it, it is not forthcoming as to why the second plaintiff who was one of the parties to Ex.P.19 did not enter witness box. In the circumstances, he was the best witness especially if the specific defence of defendants 1 and 2 is considered. The evidence given by PW2 and PW3 is only corroborative in nature. PW2 is stated to be an attester to Ex.P.19 and PW3 was the scribe, as he has stated. They assert that they were very much present when defendants 1 and 2 executed the agreement and received earnest money of Rs.5,00,000/- from the plaintiffs. Since this is a suit for specific performance, basically the execution of the agreement must be proved by the plaintiffs. If plaintiff no.1



was unable to adduce evidence due to his sickness, plaintiff no.2 could have adduced evidence. Therefore even though PW1 claimed to be having personal knowledge about the transaction, his evidence cannot be received in proof of execution of agreement as per Ex.P.19.

13. The trial court has given another reason for holding that the plaintiffs failed to prove the agreement of sale. The reason is that the sale consideration shown in the agreement was Rs.2,35,00,000/-, the plaintiffs were businessmen and the amount being huge they should have opted for registration of agreement of sale. Since agreement was not registered, it leads to doubt very execution of the agreement. Though these reasons are not acceptable, the improbability in the transaction between plaintiffs and defendants 1 and 2 can be doubted for yet another reason which the trial court has discussed.

14. The plaintiffs have stated that defendants 3 to 7 are subsequent purchasers of the suit property and therefore they are bound to perform the terms and conditions of the agreement between them and defendants 1 and 2. On the



contrary defendants 1 and 2 have pleaded that they had entered into an agreement with defendants 3 to 7 on 27.11.2006 for selling the suit property to them for sale consideration of Rs.60,00,000/- and pursuant to this agreement they executed a sale deed on 30.09.2010 which was registered on 04.10.2010. Ex.D.7 is the agreement dated 27.11.2006 and Ex.D.14 is sale deed dated 30.09.2010. It may be recalled here that the counter claim set up by defendants 8 and 9 (Smt.Snehalata Ambasa Kabadi and Smt.Jayashree Ramesh Burbure respectively) was ordered to be registered as a separate suit in O.S.No.309/2012, where the plaintiffs were arrayed as defendants 8 and 9. They did not file written statement in O.S.No.309/2012. In the said suit the validity of the agreements dated 27.11.2006 and 13.12.2009, and the sale deed dated 30.09.2010 had been questioned and the court which decided that suit held that the execution of agreement of sale dated 27.11.2006 and sale deed dated 30.09.2010 were proved. It was also held that defendants 3 to 7 herein were bonafide purchasers of the suit property. Referring to



the findings in O.S.No.309/2012, the trial court has held that though the present plaintiffs were co-defendants in that suit, in view of conflict of interest between them and other defendants, the said findings would operate as res-judicate in view of the decision of the Supreme Court in Makija Construction & Engineering Pvt. Ltd. Vs. Indore Development Authority and others [2005 (6) SCC 304]. Therefore the present plaintiffs cannot claim that sale deed executed by defendants 1 and 2 in favour of defendants 3 to 7 does not bind them.

15. It was the argument of Sri Harsh Desai that defendants 3 to 7 being the purchasers of the suit property cannot question the execution of agreement by defendants 1 and 2 in favour of the plaintiffs and this kind of defence is not available to them. He also argued that the plaintiffs agreed to purchase the suit property for a sum of Rs.2,35,00,000/-, whereas defendants 3 to 7 purchased the same for Rs.60,00,000/-. This difference in price itself is sufficient to show that the sale in favour of defendants 3 to 7 was not a genuine transaction and it was made with a view



to defeating the interest of the plaintiffs. He further argued that if really defendants 1 and 2 had borrowed Rs.5,00,000/- from the plaintiffs, they should have come up with a plea that they cleared the loan amount and should have given the particulars of repayments made by them. It is not their defence that they repaid Rs.5,00,000/-. In this regard he further argued that the plaintiffs and defendants 1 and 2 were both affluent businessmen and it is not possible to believe that the latter were in need of just Rs.5,00,000/-.

16. Sri V.M.Sheelavant tried to point out during his argument that Ex.P.19 cannot be said to have come into existence on 13.12.2009 because of an endorsement made by the Sub-Registrar on 14.12.2009. His line of argument was that if agreement was executed on 13.12.2009, the stamp duty payable on the agreement should have been made on 13.12.2009 itself and not on the next day. It has to be stated that this line of argument is not sustainable in as much as there is no bar for making payment of stamp duty on a subsequent date.



17. Truly a doubt arises in the specific contentions of defendants 1 and 2 that they had borrowed Rs.5,00,000/- from the plaintiffs. If it was really a loan transaction, defendants 1 and 2 could have taken up a plea that they had repaid the loan. Argument of Sri Harsh Desai is of course acceptable and in fact the trial court has also expressed a doubt about the loan transaction. Merely for the reason that loan transaction cannot be believed, it cannot be said that the plaintiffs' case is to be upheld. To repeat, the plaintiffs state that the agreement as per Ex.P.19 came into existence between them on 13.12.2009. But much before this date, there was an agreement between defendants 1 and 2, and defendants 3 to 7 on 27.11.2006 and pursuant to the same the sale deed was executed on 30.09.2010 and registered on 04.10.2010. That means by the time Ex.P.19 came into existence, there was already a contract between defendants 1 and 2, and defendants 3 to 7. The plaintiffs themselves have stated about objections taken by defendants 1 and 2 when they took out publication in the news about their agreement dated 13.12.2009. This shows that defendants 1



and 2 denied the agreement dated 13.12.2009 before lis commenced. If defendants 1 and 2 had entered into contract with the plaintiffs, they would not have objected; their getting a reply in the news paper to the plaintiff's public notice might be because of their previous contract with defendants 3 to 7. Thus seen there appears no probability in the plaintiffs' case. Moreover as has been rightly held by the trial court, the plaintiffs being parties in O.S.No.309/2012 are bound by the findings therein. For these reasons, it has to be stated that a doubt arises with regard to coming to being of agreement of sale dated 13.12.2009 as per Ex.P.19. The plaintiffs cannot state that sale deed executed by defendants 1 and 2 in favour of defendants 3 to 7 does not bind them. Issues 1 and 3 are correctly answered by the trial court.

18. In spite of the fact that agreement is not proved by the plaintiffs, it remains a fact that defendants 1 and 2 do not dispute receiving of Rs.5,00,000/- from plaintiffs. It is not their defence that they repaid this money. The plaintiffs claimed alternative relief of refund of Rs.5,00,000/- with



interest. In these circumstances, the trial court could have ordered for refund for Rs.5,00,000/- to the plaintiffs with reasonable interest. It is the finding of the trial court that because the plaintiffs were not able to prove the execution of agreement, they were not entitled to alternative relief of refund of earnest money. But once defendants 1 and 2 have admitted to have received Rs.5,00,000/- under Ex.P.19, though it cannot be called an agreement of sale, they have to repay the same to the plaintiffs with interest. Very pertinently a judgment of the Supreme Court in the case of Firm Srinivas Ram Kumar Vs. Mahabir Prasad and others (AIR (38) 1951 SC 177) may be referred here. The facts in this case were that plaintiff firm claimed specific performance from the second defendant referring to an agreement of sale said to have been executed by the latter in the end of October, 1945. Plaintiff stated that the sale consideration agreed was Rs.34,000/- and it made payment of Rs.30,000/- to the creditor of the second defendant. Thus according to plaintiff balance was only Rs.4,000/-. The second defendant went back on the contract and sold the property to the first



defendant and therefore the suit came to be filed. The contention of the second defendant was that he never agreed to sell the property and he obtained loan of Rs.30,000/- from the plaintiff with interest at the rate of 6% per annum. When the plaintiff filed the suit it did not claim refund of earnest money as an alternative to the main relief. The trial court declined the relief of specific performance but directed the second defendant to return Rs.30,000/- to the plaintiff. The plaintiff appealed to the High Court questioning the refusal of specific performance, and the second defendant also preferred an appeal aggrieved by the direction given by the trial court to repay Rs.30,000/- to the plaintiff. The High Court dismissed the plaintiff's appeal and allowed the second defendant's appeal, the consequence of which was the suit in entirety was dismissed. When the plaintiff appealed to the Supreme Court the following was the observation:

"9. As regards the other point, however, we are of the opinion that the decision of the trial Ct. was right & that the H. C. took an undoubtedly rigid & technical view in reversing this part of the decree of the Subordinate Judge. It is true that it was no part of the result pltf's case



as made in the plaint that the sum of Rs.30,000 was advanced by way of loan to the defts. second party. But it was certainly open to the pltf. to make an alternative case to that effect & make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A pltf. may rely upon different rights alternatively & there is nothing in the Civil P. C. to prevent a party from making two or more inconsistent sets of allegations & claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Ct. to give him relief on that basis. The rule undoubtedly is that the Ct cannot grant relief to the pltf. on fact, a case for which there was no foundation in the pleadings & which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the pltf. could have made, was not only admitted by the deft. in his written statement but was expressly put forward as an answer to the claim which the pltf. made in the suit, there would be nothing improper in giving the pltf. a decree upon the case which the deft. himself makes. A demand of the pltf. based on the deft's own plea cannot possibly be regarded with surprise by the latter & no question of adducing evidence on these facts would arise when they were expressly admitted by the deft. in his pleadings. In such circumstances, when no injustice can possibly result to the deft., it may not be proper to drive the pltf., to a separate suit. As an



illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in Mohan Manucha v. Manzoor Ahmad, 70 I. A. 1: (A. I. R. (30) 1943 P. C. 29). This appeal arose out of a suit commenced by the pltf. applt. to enforce a mtge. security. The plea of the deft. was that the mtge. was void. This plea was given effect to by both the lower Ct. as well as by the P. C. But the P. C. held that it was open in such circumstances to the pltf. to repudiate the transaction altogether & claim a relief outside it in the form of restitution under S. 65, Contract Act. Although no such alternative claim was made in the plaint, the P. C. allowed it to be advanced & gave a decree on the ground that the resp. could not be prejudiced by such a claim at all & the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the applt. even though the appeal was heard ex parte in the absence of the resp.”

19. Therefore defendants 1 and 2 have to repay sum of Rs.5,00,000/- to plaintiffs. Although they have claimed interest at the rate of 18% per annum, in the facts and circumstances, interest at the rate of 8% appears to be reasonable. The plaintiffs have claimed damages of Rs.2,30,00,000/-. There is no evidence as to how they are entitled to this much of damages and hence it cannot be awarded.



Hence, the following:

ORDER

1. The appeal is partly allowed.
2. The judgment dated 29.11.2019 in O.S.No.244/2010 on the file of II Additional Senior Civil Judge, Hubballi is modified.
3. The legal representatives of the first defendant i.e., respondents 1 to 3 in this appeal and defendant no.2/respondent no.4 are directed to repay a sum of Rs.5,00,000/- to the legal representatives of the appellants with interest at the rate of 8% p.a. from the date of suit till date of realization.

The appellants are entitled to costs of the appeal.

**Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE**

**Sd/-
(T. G. SHIVASHANKARE GOWDA)
JUDGE**

BVV,EM
LIST NO.: 1 SL NO.: 2