

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.668 of 2009

and

M.P.No.1 of 2009

1.S.K.Ramasamy
2.S.K.Subramaniam

..Appellants/Respondents/
defendants

Versus

S.S.Chellakutti

..Respondent/Appellant/
Plaintiff

Prayer: Appeal filed under Section 100 C.P.C., against the Judgment and Decree dated 24.3.2008 made in A.S.No.69 of 2007 on the file of the Additional District Court / Fast Track Court No.IV, Bhavani, reversing the Judgment and Decree dated 20.07.2007 made in O.S.No.102 of 1999 on the file of the Subordinate Court, Bhavani.

For Appellants :Mr.N.Manokaran

For Respondent :Mr.V.Bharathidasan

JUDGMENT

This Memorandum of Second Appeal has been directed against the Judgment and Decree dated 24.3.2008 and made in the Appeal in A.S.No.69 of 2007 on the file of the learned Additional District Court (Fast Track Court No.IV), Bhavani, reversing the Judgment and Decree dated 20.7.2007 and made in the suit in O.S.No.102 of 1999 on the file of the learned Subordinate Judge, Bhavani.

2. The appellants herein are the defendants in the suit whereas the respondent is the plaintiff.

3. For easy reference and for the sake of convenience, the respondent may hereinafter be referred to as the plaintiff and the appellants be referred to as the defendants wherever the context so requires.

4. Heard Mr.N.Manokaran, learned counsel appearing for the appellants and Mr.V.Barathidasan, learned counsel appearing for the respondent.

5. The plaintiff had filed the above suit against the defendants seeking the relief of specific performance directing the defendants to execute and register a sale deed in respect of the suit property in his favour and to receive the balance of sale price. In case, if the defendants fail to do so, the sale deed may be executed and registered by the Court on behalf of the defendants in his favour and also for granting permanent injunction restraining the defendants from making any kind of alienation or any kind of encumbrance in favour of third parties in respect of the suit property.

6. Alternatively, he had also sought the relief of repayment of advance amount of Rs.88,000/- with subsequent interest @ 9% p.a., from the date of the suit till the date of realisation of the entire amount and also for creating a charge over the suit property for the proper repayment of the advance amount with interest accrued thereon.

7. As it is seen from the averments of the plaint, the defendants had entered into a registered sale agreement with the plaintiff on 21.8.1997 agreeing to sell the suit property for a valuable consideration of Rs.1,00,000/-. The defendants had also received a sum of Rs.88,000/- from the plaintiff as an advance towards the part and parcel of the sale consideration. In the agreement, it was stipulated that the defendants shall execute the sale deed within a period of two years after receiving the remaining balance of sale consideration of Rs.12,000/-. Despite repeated requests were made, the defendants had been evading to execute and register the sale deed. Therefore, the plaintiff was constrained to issue a legal notice on 26.6.1999. Even after the receipt of the said notice, the defendants had not come forward to execute the sale deed despite the plaintiff was ready and willing to perform his part of the contract. Hence, the above suit was filed.

8. On the other hand, the defendants have contended that the document dated 21.8.1997 was executed only as a security for repayment of the loan borrowed by them from the plaintiff. In fact, the defendants had borrowed a sum of Rs.88,000/- from the plaintiff and it was agreed to repay the principal amount with interest at Rs.3 per Rs.100 per month. Since the plaintiff had insisted to execute a document styled as agreement of sale as security for repayment of Rs.88,000/-, the defendants were made to execute the said document. Virtually, the plaintiff had executed a Varthamana Deed on 21.8.1997 acknowledging the loan transaction which took place between them.

9. It is the specific contention of the defendants that they had repaid a major portion of the principal amount along with interest and only a small portion was due to be repaid. The defendants have also contended that, at no point of time, they had entered into any contract with the plaintiff to sell the suit property and there was also no privity of contract between them in respect of the suit property. According to them, the transaction was only a loan transaction. They have further contended that they had totally repaid to an extent of Rs.70,000/- towards interest and having received the said amount subsequent to the loan, the plaintiff had, with a mala fide intention to cheat and defraud them, chosen to file the suit taking advantage of their innocence and ignorance.

10. Based on the pleadings of the parties to the suit, the Trial Court had formulated the following four issues:-

(i) Whether the suit sale agreement was executed towards security for the money advanced to the defendants?

(ii) Whether the plaintiff is entitled to the relief of specific performance of the contract.

(iii) Whether the plaintiff is entitled to get the relief of permanent injunction?

(iv) To what relief is the plaintiff entitled to?

11. Three witnesses including the plaintiff were examined on the side of the plaintiff and during the course of their examination, Exs.A.1 to A.4 were marked. The second defendant had examined himself as DW.1 and yet another witness was examined as DW.2. During the course of their examination, 3 documents were marked. Besides this, a report dated 9.9.2004 received from the Forensic Sciences Laboratory was also marked as Ex.C.1.

12. On appreciation of the evidence both oral and documentary, the learned trial Judge had proceeded to dismiss the suit on 20.7.2007.

13. Having been aggrieved by the Judgment of the Trial Court, the plaintiff had preferred an Appeal in A.S.No.69 of 2007. After hearing both sides, the first Appellate Court had proceeded to allow the Appeal in part modifying the Judgment and Decree of the Trial Court dated 20.07.2007 as detailed hereunder:-

"The Judgment of dismissal of the suit in respect of specific performance of contract was confirmed. Instead, alternative relief was granted, directing the defendants to pay the amount of Rs.88,000/- along with interest at 6% p.a. from the date of filing

of the Appeal till the date of payment with costs. A charge over the suit property was created. Insofar as the relief of permanent injunction is concerned, the suit was dismissed."

14. Questioning the correctness of the Judgment, the defendants stand before this Court with this Second Appeal.

15. Insofar as this Second Appeal is concerned, the following three substantial questions of law are involved.

(i) Whether the First Appellate Court, having held that the suit document under Ex.A.1 is not an agreement of sale of property, has committed an error in decreeing the suit for refund of money, especially, when the relief is time barred?

(ii) Whether the First Appellate Court is right in law in ordering the refund of amount covered under Ex.A.1 particularly when the suit document is not a sale agreement and the period of limitation of 12 years cannot be extended to the relief of recovery of money?

(iii) Whether the plaintiff is entitled to get the refund of the amount covered under Ex.A.1 in view of the forfeiture clause stipulated in the suit document?

16. Originally, the suit was filed for specific performance of agreement of sale dated 21.8.1997. After the commencement of trial, as it is seen from the records, the plaintiff had filed a petition in I.A.No.212 of 2006 under Order VI, Rule 17 of C.P.C. to amend the plaint as well as the prayer portion for the purpose of including the alternative relief of repayment of advance amount.

17. It is manifested from the records that the suit was filed as early as on 28.07.1999 but the Application in I.A.No.212 of 2006 was filed in the year 2006 after a lapse of 7 years which was allowed on 30.08.2006. It is also explicit that despite strenuous objection was made by the defendants on the ground of limitation, that application was allowed by the Trial Court. That application was also resisted on the ground that no amendment shall be allowed to be made in the plaint after the commencement of trial as per the proviso to Rule 17 of Order VI of the Code of Civil Procedure (Amendment Act 22 of 2002). However, that Application was allowed and the prayer of alternative relief was included in the plaint. In this connection, Mr.N.Manokaran, learned counsel for the appellants has drawn the attention of this Court to the Provisions of Section 3 as well as Article 62 of the Limitation Act, 1963 and equally, to the provisions of Section 105 of C.P.C., as well.

18. Part II of the Limitation Act, 1963 encompasses "limitation of suits, appeals, applications". Section 3 contemplates bar of limitation. Sub-Sections 1 and 2 of Section 3 are extracted as under :

3. Bar of limitation -

(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act, -

(a) A suit is instituted -

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off, or a counter claim, shall be treated as separate suit and shall be deemed to have been instituted-

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in Court;

(c) an application by notice of motion in a High Court is made and when the application is presented to the proper officer of that Court.

19. As it is seen from Sub-Clause (i) of Clause (a) to Sub-section (2) of Section 3, the suit is instituted in an ordinary case when the plaint is presented to the proper officer.

20. As observed by the Apex Court in Lachhman Singh V. Hazara Singh (2008) 5 S.C.C. 444, limitation is a question of jurisdiction. Section 3 puts an embargo on the Court to entertain a suit if it is found to be barred by limitation.

21. With reference to the scope of Section 3 of the Limitation Act, this Court would like to point out that Section 3 limits the time after which suit or other proceedings is to be

barred. It makes the question of limitation a material one for determination in every case irrespective of whether the question is raised by the parties or not.

22. On coming to Article 62 of the Limitation Act, to enforce payment of money secured by a mortgage or otherwise charged upon immovable property, the period of limitation is 12 years from the date when the money becomes due.

23. Article 62 governs suits to enforce on payment of money secured by mortgage or otherwise charged upon the immovable property. It is also relevant to note here that this Article is applicable to all suits for sale or foreclosure regarding the mortgage as well as suits to enforce the charge within the meaning of Section 100 of the Transfer of Property Act. This proposition has been laid down by the Gujarat High Court in the decision in Vala Punja vs. Puna Mavji (AIR 1963 Guj 112).

24. Mr.N.Manokaran, learned counsel appearing for the appellants, has mainly confined his argument on the ground of limitation with reference to granting of alternative relief of refund of advance amount. He has also made reference to Ex.B.1 dated 21.8.1997 i.e. Varthamanam Deed said to have been executed by the plaintiff.

25. Actually, the suit sale agreement under Ex.B.1 is said to have been executed on 21.8.1997. On the same date, Ex.B.1 - Varthamana Deed seems to have been executed by the plaintiff. The suit was filed on 28.7.1999.

26. The defendants had filed their written statement on 12.7.2000. The trial proceedings were commenced and witnesses were also examined. Only at that stage, the plaintiff had filed an Interlocutory Application in I.A.No.212 of 2006 under Order VI Rule 17 of CPC to amend the plaint for the purpose of inclusion of the two alternative reliefs:-

(i) directing the defendants to pay the plaintiff a sum of Rs.88,000/- with subsequent interest @ 9% per annum from the date of suit agreement till realisation of the entire amount?

(ii) creating a charge over the suit property for the proper repayment of advance amount paid with interest accrued thereon.

27. It is significant to note here the above specified amount of Rs.88,000/- is sought to be refunded with interest @ 9% per annum from the date of suit agreement. Insofar as the second alternative prayer is concerned, the plaintiff is sought

to create a charge over the suit property for the repayment of advance amount.

28. This Interlocutory Application was allowed by the trial Court with an observation that the objection raised by the defendants can be considered at the end of the trial proceedings. Challenging this order dated 30.08.2006, the defendants had preferred a revision in CRP No.1532 of 2006 before this Court and this revision was allowed by this Court on 9.11.2006 with an observation in Paragraph 4 of the order which is extracted as under:-

"4. Admittedly, there is specific admissions made by the plaintiff that the agreement itself was entered into only as a security for the money already borrowed by the defendant, the sale agreement has become unenforceable and amount of money received as advance which has nothing to do with the loan has to be returned. For claiming that amount, the period of limitation is 12 years and the amendment petition has been filed within the period of limitation.

29. In Paragraph 5, the learned Judge of this Court has made reference to the decision rendered in the case of Delhi Development Authority vs. Skipper Construction Co (P) Ltd., reported in AIR 2000 SC 573. In this case, in Paragraphs 32 and 33, a Division Bench of Delhi High Court has observed as under:-

32. Article 62 of the Limitation Act, 1963 provides a period of 12 years, "to enforce payment of money secured by a mortgagee or otherwise charged upon immovable property". Time runs from the date "when money becomes due".

33. From the above Article, it is clear that the period of limitation for enforcement of the statutory charge created under section 55(6)(b) of the Transfer of Property Act is 12 years from the date when becomes due and not three years. The period remains the same even for enforcement of the charge on the substituted security..."

30. Therefore, in paragraph 6 of the order, the learned Judge has observed that since the advance amount involved in the present case is paid only as a security for the amount already paid, the period of limitation is 12 years. Therefore, he says that he does not find any defect or error in the order of the learned Subordinate Judge, Bhavani in allowing the Application for amendment.

31. The term "charge" has very well been defined under section 100 of the Transfer of Property Act, 1882. Section 100 is extracted as under:-

"100. Charges - Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simply mortgage shall, so far as may be, apply to such charge.

32. The term "charge" has also been explained in Mrs.I.K.Sohan Sing Vs. State Bank of India [AIR 1964 Punj 123]. It has been held in this case that "in regard to the charges though some times it has been suggested that they should fall within Section 100, Transfer of Property Act, it has been held that there is nothing in the language of the substantive part of the article to restrict the interpretation of the word "charge" to "charges" as defined in Section 100.

33. To fall within the amplitude of Article 62 of the Limitation Act, the suit should be one for recovery of money charged upon immovable property and not for its recovery personally from the defendant.

34. This principle has been laid down in State Vs. Jathavedan Nambudripad [AIR 1959 Ker 1 (FB)].

35. Though the plaint was amended in respect of the alternative prayer for refund of the advancement as well as to create a charge over the suit property for proper repayment of advance amount, the Trial Court had accepted the plea taken by the appellants and dismissed the entire suit with costs. Even the alternative prayer was also not accepted by the Trial Court. But, the First Appellate Court had proceeded to confirm the Judgment of the Trial Court in respect of rejection of the prayer of specific performance finding that the respondent is not entitled to get the relief of specific performance of contract but the prayer of alternative relief with reference to the refund of alleged advance amount of Rs.88,000/- was granted directing the appellant to pay the above said amount with interest @ 6% per annum from the date of appeal.

36. Since the Trail Court as well as the First Appellate Court have rejected the prayer of specific performance, no necessity is arisen for this Court to reconsider the rejected relief of specific performance of contract.

37. Insofar as the alternative relief of refund of Rs.88,000/- is concerned, it is significant to note here that the respondent/plaintiff had executed a Varthamana Deed on 21.8.1997, but he had cleverly refrained himself from marking this document (Ex.B.1) on his side. The conduct of the respondent itself would go to establish the fact that he had not come forward to file this suit with clean hands. The suppression of execution of Varthamana Deed dated 21.8.1997 by the respondent/plaintiff and hiding himself from marking this document on his side entails to reject his claim.

38. It is obvious to note here that the plaintiff himself had admitted the execution of Ex.B.1 Varthamana Deed dated 21.8.1997. The contents of Ex.B.1 Varthamana Deed is extracted as under:-

வார்த்தமான உடன்படிக்கை
1997ம் வருடம் ஆகஸ்ட் மாதம் 21ம் தேதி
பவானி வட்டம், ஆத்தானி கிராமம், ஆ. செம்ப
ளிச்சாம் பாளையத்தில் இருக்கும் கருப்பண ஆசாரி
மக்கள் எஸ்.கே.ராமசாமி 1, எஸ்.கே.சுப்பரமணியம் 2
ஆகிய உங்கள் இருவருக்கும் உடி வட்டம், உடி
கிராமம், உடி ஊரிலிருக்கும் (லேட்) சுப்பணகவண்டர்
குமாரர் எஸ்.எஸ்.செல்லக்குட்டி ஆகிய நான்
எழுதிகொடுத்த வார்த்தமான உடன்படிக்கை
என்னவென்றால் இப்பவம் உங்களுக்கு
பாத்தியப்பட்ட ஆத்தானி கிராமம் ரிச, 203/1 -ல்
0.94¹/₂ செண்ட் பூமியை உங்களுக்கு ஒரு கிரைய
உடன்படிக்கை 1,00,000/- (ஒரு லட்சத்துக்கு) -க்கு
எழுதி அதில் ரூ.88,000.00 (எண்பத்தி எட்டாயிரம்)
அட்வான்ஸ் பெற்றுள்ளதாக எழுதி அந்தியூர் சார்
பதிவாளர் அலுவலகத்தில் பதிவாகி உள்ளது. எடி
ரூ.88,000.00 நான் உங்களுக்கு கடனாகத்தான்
கொடுத்திருக்கிறேன். உடி கண்ட இரண்டு வருட
வாய்தாவில் உடி கண்ட ரூ.88,000/- த்தை நீங்கள்
என்னிடம் கொண்டு வந்து கொடுத்தால் நான் உடி
கண்ட உடன்படிக்கையை ரத்து செய்து கொடுக்க
உள்ளவன். இந்தப்படிக்கு என் சம்மதியில்
எழுதிகொடுத்த வார்த்தமான உடன்படிக்கை.

ஓம்- எஸ்.எஸ்.செல்லக்குட்டி
(ஆங்கிலத்தில்)

39. In this Deed, the plaintiff himself had admitted that the amount of Rs.88,000/- was advanced as a loan to the

defendants and two years time was given for the repayment of this amount. The plaintiff had also stated that he was under the obligation to cancel the sale agreement provided the loan amount was paid with the above said two years time. Therefore, it is clear that it is an independent and personal loan and it is also palpable that this amount of Rs.88,000/- is not charged upon the immovable property belonging to the defendants. When such being the case, the question of application of Section 62 of the Limitation Act does not arise in this case. If the amount was charged upon the property, the respondent/plaintiff would not have asked for the alternative relief of creation of charge over the property.

40. Mr.N.Manokaran, learned counsel appearing for the appellants, has placed reliance on the decision of the Apex Court made in Voltas Ltd Vs. Rolta India Ltd., [(2014) 4 Supreme Court Cases 516]. In Paragraph 28 of the above said decision, while speaking on behalf of the Division Bench of the Apex Court, Hon'ble Mr.Justice Dipak Misra has observed as under:-

28. ... In fact, It would be contrary to the law laid down not only in the said case (State of Goa Vs. Praveen Enterprises [(2012) 12 Supreme Court Cases 581], but also to the basic principle that a time barred claim cannot be asserted after the prescribed period of limitation.

41. In Paragraphs 29 and 30, His Lordship has also observed as under:-

29. Mr.Nariman, learned Senior Counsel, has also contended that the counter-claims filed before the learned arbitrator is an elaboration of the amount stated in the notice and, in fact, it is an amendment of the claim of the respondent which deserved to be dealt with by the learned arbitrator. In this context, we may refer with profit to the ruling in K.Raheja Constructions Ltd., v. Alliance Ministries [1995 Supp (3) SCC 17] wherein the plaintiff had filed a suit for permanent injunction and sought an amendment for grant of relief of specific performance. The said prayer was rejected by the learned Trial Court. A contention was canvassed that the appellant had not come forward with new plea and, in fact, there were material allegations in the plaint to sustain the amendment of the plaint.

The Court observed that having allowed the period of seven years to elapse from the date of filing the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent. The said principle has been reiterated in *South Konkan Distilleries v. Prabhakar Gajnan Naik* [(2008) 14 SCC 632] and *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit v. Ramesh Chander* [(2010) 14 SCC 596].

30. In *Revajeetu Builders and Developers v. Narayanaswamy and Sons* [(2009) 10 SCC 84] while laying down some basic principles for considering the amendment, the Court has stated that as a general rule the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

42. Article 23 of the Limitation Act 1963 contemplates that for money payable to the plaintiff, for money paid for the defendants, the period of limitation is 3 years and the time from which the period begins to run is when money is paid.

43. Therefore, as discussed in Paragraph 33, since the amount advanced to the defendants is to be recovered personally from them and since the money is not charged upon the immovable property and the plaintiff himself has admitted the execution of *Varthamanam Deed* saying that he had advanced the amount of Rs.88,000/- as a nloan to the defendants, the period of limitation of 3 years is applicable. Therefore, the claim of the plaintiff is definitely barred by limitation. The Substantial questions of law (i) and (ii) are answered against the respondent/plaintiff.

44. Secondly, when the main relief of specific performance of contract was rejected, the alternative relief of refund of advance amount cannot have legs to stand because the Trial Court itself has found in Paragraph 13 of its Judgment that the plaintiff had failed to substantiate his claim as contemplated under Section 101 of the Indian Evidence Act. On the other hand, the defendants have substantiated their case as envisaged under Sections 102 and 103 of the Indian Evidence Act. Therefore, the alternative relief cannot be maintained and in this regard, this Court is of the considered view that the

Judgment and Decree of the First Appellate Court with reference to the granting of alternative relief is not sustainable in law and therefore, liable to be set aside. Accordingly, the Substantial Question of law No.(iii) is also answered against the respondent/plaintiff.

45. In the result, the Second Appeal is allowed. The Judgment and Decree of the First Appellate Court with reference to the alternative relief is concerned, is set aside, and the Judgment and Decree of the Trial Court is restored. There shall be no order as to costs. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

asvm

To

- 1.The Additional District Judge /
Fast Track Court No.IV, Bhavani.
2. The Subordinate Judge, Bhavani.
3. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to Mr. N. Manokaran, Advocate SR.12020
+ 1 cc to Mr.V. Bharathidasan, Advocate Sr.12071

सत्यमेव जयते

S.A.No.668 of 2009
and
M.P.No.1 of 2009

VGI(CO)
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