

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED : 21.11.2016

ORDERS DELIVERED: 29.11.2016

DATED: 29.11.2016

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

Second Appeal No.426 of 2015

P.Muthusamy

... Appellant

Vs.

1.K.Arumugam
2.Minor Periyarasu
3.Minor Chinnarasu

Minors rep. By their mother
/guardian Baby

... Respondents

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the Judgment and Decree of the learned Principal Subordinate Judge, Perundurai made in A.S.No.7 of 2011 dated 12.01.2012 reversing the judgment and decree of the learned District Munsif cum Judicial Magistrate, Perundurai made in O.S.No.207 of 2007 dated 10.12.2010.

For Appellant
For Respondents

: Mr.N.Manokaran
: Mr.S.Kaithamalai Kumaran for R1
No Appearance for R2 and R3

J U D G M E N T

The appellant is the plaintiff in a suit for specific performance of an agreement of sale or in the alternative for refund of the advance amount of Rs.57,000/- with accrued interest thereon and for creating a statutory charge over the suit properties under Section 55 (6)(b) of the Transfer of Property Act, 1882, for proper payment of the said amount.

2.The case of the plaintiff, in short, is as follows:

On 23.07.2003, the first defendant entered into an agreement of sale with the plaintiff agreeing to sell the suit properties for a total sum of Rs.60,000/-. On the same day, a sum of Rs.57,000/- was paid towards advance. It was agreed between the parties that the sale should be completed on or before 17.09.2003. Though such time limit was fixed, both parties agreed that the time was not essence of the contract. When the plaintiff was always ready and willing to pay the balance amount, the first defendant was postponing the execution of the sale deed. On 06.01.2004, the plaintiff issued a registered notice expressing his readiness and willingness. It was received by the first defendant on 12.01.2004. On receipt of such notice, the first

defendant sought extension of time. Accordingly, the time was extended till the end of May 2004. However, the first defendant went back on his promise and has not executed the sale deed. The second and third defendants are the sons of the first defendant. Again on 20.04.2007, the plaintiff sent another notice to the first defendant intimating about his readiness and willingness. It was served on the first defendant on 28.04.2007. However, he has not come forward to execute the sale deed. Hence, all the defendants are bound to execute the sale deed as per the suit agreement. If for any reason, the court comes to the conclusion that the relief of specific performance cannot be granted, the plaintiff is entitled to get back the advance amount with interest. The suit is filed within time under Article 54 of the Limitation Act. The plaintiff is also entitled to a charge over the suit properties under Section 55(6) (b) of the Transfer of Property Act.

3.The first defendant filed written statement wherein it is contended as follows:

The plaintiff is doing money lending business from whom the first defendant borrowed a sum of Rs.25,000/- in the year 2003 as loan. At the time of lending the amount, the plaintiff obtained signatures of the first defendant in blank stamp papers and papers as security. The

plaintiff demanded exorbitant rate of interest which though was paid initially, could not be paid later. Hence, the plaintiff fabricated and misused the signed papers of the first defendant and created the suit agreement, which is not a true and genuine document, in any event not intended for selling the property.

4.The second and third defendants filed separate written statement wherein it is contended as follows:

The suit properties are the joint family properties in which these defendants are entitled to 1/3 share each. The suit agreement has not been executed on behalf of the defendants 2 and 3 who were minors at that time. They were not parties to the agreement and therefore, that would not bind them. The first defendant has not executed any sale agreement as contended by the plaintiff.

5.The trial court upon considering the rival pleadings of the parties and the evidence let in by them, though found that the suit agreement is genuine, has however, found that the relief of specific performance is barred by limitation under section 54 of the Limitation Act. Therefore, the trial court rejected the relief of specific performance. However, while considering the alternative relief of

refund of the advance amount, the trial court found that such alternative prayer is not barred by limitation, as the suit has been filed within 12 years and that such relief is protected under Section 62 of the Limitation Act. Accordingly, the trial court, while dismissing the suit for specific performance, has decreed the same for refund of advance sum of Rs.57,000/- with interest 9%p.a.

6.Challenging the judgment and decree passed by the trial court, the first defendant preferred the appeal, while the plaintiff has not chosen to challenge the judgment and decree of the trial court in so far as the rejection of the relief of specific performance is concerned. Thus, the dismissal of such prayer by the trial court has become final and conclusive.

7.The First Appellate Court found that the plaintiff has miserably failed to prove the suit sale agreement and the passing of consideration. It is also found that when the suit is clearly barred by limitation under Article 54 of the Limitation Act, the other relief of refund of the advance amount is also barred by limitation. Accordingly, the First Appellate Court allowed the appeal by setting aside the judgment and decree of the trial court, thereby dismissing

the suit in its entirety.

8.Challenging the judgment and decree of the lower appellate court, the plaintiff filed the present second appeal. This Court while admitting the second appeal has raised the following substantial questions of law:

"a) Whether the first Appellate Court is right in law in refusing to grant the decree for refund of advance amount on the ground of bar of limitation particularly when the suit for refund can be filed within 12 years as per Article 62 of the Limitation Act as held in 2000(1) CTC 507?

b) Whether the first Appellate Court has committed an error in disbelieving the execution of the sale agreement (Ex.A1) on the basis of the evidence of P.W.3, even though the execution of Ex.A1 has been clearly admitted in the evidence of D.W.1?

c) Whether the first Appellate Court is correct in law in dismissing the suit especially when the execution of Ex.A1 was not in dispute and the first defendant was legally debarred from giving oral evidence contrary to the written document as per sections 91 and 92 of Evidence Act?"

9.Mr.N.Manoharan, learned counsel appearing for the appellant submitted as follows:

The lower appellate court failed to consider that the suit for

refund of advance amount can be filed within 12 years as contemplated under Article 62 of the Limitation Act and not required to be filed within three years, since Article 54 of the Limitation Act, would apply only for the relief of specific performance. When a statutory charge is created for the unpaid purchase money under Section 55(6)(b) of the Transfer of Property Act, automatically, Article 62 of the Limitation Act alone would come into play and therefore, the suit was well within time in so far as the relief of refund money is concerned. Once the execution of the suit agreement is not disputed and the first defendant had admitted such execution in his deposition, the plaintiff is entitled for refund.

10.The learned counsel for the appellant in support of his contention relied on the following decisions:

- i)2000(1) CTC 507, Delhi Development Authority vs Skipper Construction Co.(P) Ltd.;
- ii)2013(6) CTC 28, K.Shanmugam vs C.Samiappan;
- iii)2004(SCC) 711, Videocon Properties Ltd. Vs Dr.Bhalchandra Laboratories;

11.Per contra, Mr.S.Kaithamalai Kumaran learned counsel for the respondents submitted as follows:

For taking shelter under Section 55(6)(b) of the Transfer of Property Act, the plaintiff should first prove the suit agreement. The first defendant has specifically denied its execution. Therefore, when Ex.A1 itself is not proved, no question of repayment would arise, even otherwise, such relief is barred by limitation. In support of his contention, the learned counsel relied on the following decisions reported in

- a) 2016 (4) MLJ 17, S.K.Ramasamy vs S.S.Chellakutti
- and
- b) 1998(1) LW 301, Koothapadayachi vs Arjuna Pillai.

12.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and perused the materials placed before this court.

13.The appellant is the plaintiff in a suit for specific performance or in alternative for refund of advance amount. The trial court rejected

the relief of specific performance and granted the relief of refund of advance amount. The plaintiff has not challenged the refusal of the relief of specific performance by filing any appeal before the first appellate court. On the other hand, it is only the first defendant, challenged the decree for refund of the advance amount. Therefore, in so far as the plaintiff is concerned, he cannot canvass the correctness or otherwise of the judgment rendered by the trial court refusing the relief of specific performance before this court, while challenging the judgment and decree of the lower appellate court dismissing the suit in its entirety. Fairly, the learned counsel for the appellant has also conceded that the relief of specific performance is barred by limitation, since the suit itself came to be filed after the period of three years. However, it is his contention that for refund of the advance amount, Article 62 of the Limitation Act alone is to be applied, since a charge is created over the suit property under Section 55(6)(b) of the Transfer of Property Act.

14. On the other hand, it is contended by the other side that when the suit agreement itself is not proved, the defendants are not liable to refund the advance amount. They also raised the question of limitation for refund.

15. Therefore, this court has to see as to whether the present suit filed with alternative relief for refund of the advance amount, is well within time.

16. Before going into the merits of the matter, the relevant provisions of law involved in this case are necessary to be quoted as hereunder:

17. Article 54 of the Limitation Act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
54. For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

18. Article 62 of the Limitation Act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.

19. Section 55(6)(b) of the Transfer of Property Act reads as

follows:

55.Rights and liabilities of buyer and seller:-*In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:-*

(6) The buyer is entitled-

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(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.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a) and paragraph (5), clause (a), is fraudulent."

20.While dealing with the provisions in Section 55(6)(b) of the Transfer of Property Act and Article 62 of the Limitation Act, the Apex

Court in its decision reported in **2000(1) CTC 507, Delhi Development Authority vs Skipper Construction Co.(P) Ltd.**, has observed at paragraph Nos.29 to 33 as follows:

"29.These points depend upon the effect of the provisions in Sub-clause (6) of Section 55 of the Transfer of Property Act. That Section starts with the words "In the absence of a contract to the contrary", and reads thus (insofar as it is material for our purpose):

"Section 55 (6)(b): The buyer is entitled

(a)

(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 property 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".

It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The

charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge under [Section 55\(4\)\(b\)](#). The buyer's charge under this Section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract (Chettiar Firm Vs. Chettiar) (AIR 1941 P.C. 47). No charge is available unless the agreement is genuine. (T.N. Hardas Vs. Babulal) (AIR 1973 SC 1363) As pointed out in Mulla's Commentary on [Transfer of Property Act](#), 8th Ed. (P.411), the charge on the property under [Section 55\(6\)\(b\)](#) is enforceable not only against the seller but against all persons claiming under him. Before the amending Act of 1929, the words 'with notice of payment' occurred after the words "all the persons claiming under him". These words were omitted as they allowed a transferee without notice to escape. After the Amendment of 1929, notice to the purchaser has now become irrelevant.

30. When the property upon which the charge is created gets converted into another form, the buyer will be entitled to proceed against the substituted security. This is a general principle of law and [Section 73](#) of the Transfer of Property Act is only an example of the said principle. The above principle has been applied to enforce mortgage on substituted securities (see Barham Deo Prasad Vs. Tara Chand (1913) 41 I.A. 45 (PC) and Muniappa Vs. Subbaiah (AIR 1917 Mad.880)). The same principle which is applicable to mortgages applies to cases

of statutory charge under [Section 55\(6\)\(b\)](#). If immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject matter of the agreement is converted.

31. The above sub-section of [Section 55](#) also makes it clear that the buyer is entitled to interest on the amount of purchase money paid. Interest is payable from the date of payment of the purchase money to the seller till date of delivery of property to the purchaser or till the execution of the sale deed, whichever is earlier. Points 1 and 2 are decided accordingly in favour of the buyers.

POINT 3:

32. Article 62 of the Limitation Act, 1963 (which corresponds to Article 132 of the Limitation Act 1908) 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\(6\)\(b\)](#) is 12 years from the date when becomes due and not 3 years. The period remains the same even for enforcement of the charge on the substituted security. Point 3 is decided accordingly."

(emphasis supplied)

21. Similarly in another decision reported in **2004(SCC) 711, Videocon Properties Ltd. Vs Dr Bhalchandra Laboratories**, while

considering the scope of Section 55(6)(b) of the Transfer of Property Act, the Apex Court has observed at paragraph No.13 as follows:

"The buyer's charge engrafted in clause (b) of paragraph 6 of [Section 55](#) of the Transfer of Property Act would extend and enure to the purchase-money or earnest money paid before the title passes and property has been delivered by the purchaser to the seller, on the seller's interest in the property unless the purchaser has improperly declined to accept delivery of property or when he properly declines to accept delivery including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter. The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under [Section 55\(4\)\(b\)](#). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form by proceeding against the substituted

security, since none claiming under the seller including a third party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of purchaser's own default or his improper refusal to accept delivery. So far as payment of interest is concerned, the section specifically envisages payment of interest upon the purchase-money/price prepaid, though not so specifically on the earnest money deposit, apparently for the reason that an amount paid as earnest money simplicitor, as mere security for due performance does not become repayable till the contract or agreement gets terminated and it is shown that the purchaser has not failed to carry out his part of the contract, and the termination was brought about not due to his fault, the claim of the purchaser for refund of earnest money deposit will not arise for being asserted."

22.By following the above two decisions of the Apex Court, the learned Single Judge of this court in a decision reported in **2013(6) CTC 28, K.Shanmugam vs C.Samiappan** has observed at paragraph No.23 as follows:

"23. The ratio laid down by the Supreme Court is that the the buyer shall have a statutory charge over the immovable property under [Section 55](#) (6)(b) of the

Transfer of Property Act, 1882. The said view has been followed by various High Courts including the Division benches of this Court. Citing all those decisions shall not be necessary. Suffice to state that now it is a settled position of law that limitation for refund of advance money with interest under an agreement for sale of immovable property is governed by Article 62 of the Limitation Act as the buyer has got a statutory charge over the property to the extent of interest of the seller and that hence the period of limitation shall be 12 years from the date on which the right to sue for the refund of advance amount accrues. Therefore, the lower appellate Court is definitely wrong in holding that the limitation for filing a suit for refund of advance amount shall be governed by Article 54 of the Limitation Act and hence, the period shall be three years from the date of accrual of the right to sue. Consequently, the lower appellate Court has committed an error in holding that the suit filed by the appellants/plaintiffs for refund of the advance amount is barred by limitation. The said finding of the lower appellate Court is erroneous and the same deserves interference and reversal. "

23. On the other hand in the decision reported in **2016 (4) MLJ 17, S.K.Ramasamy vs S.S.Chellakutti**, relied on by the learned counsel for the respondents, the learned Single Judge of this court has

observed that when the main relief of specific performance was rejected, the alternative relief of refund of advance amount cannot have legs to stand. The same view was taken by the learned Single Judge of this court reported in another decision reported in **1998(1) LW 301, Koothapadayachi vs Arjuna Pillai**, holding that once a suit for specific performance is held as barred by limitation, the plaintiff will not be entitled to the alternative relief also.

24.I have given my careful consideration to the above referred provisions of law and the decisions rendered by the Apex Court and this court cited by both sides.

25.Perusal of Article 54 and 62 of the Limitation Act would certainly indicate that both are not acting on the same field and on the other hand, they are to be applied only in respect of the suit for which respective Article is meant for. Needless to say that as per Article 54 of the Limitation Act, a suit for specific performance of a contract has to be filed within a period of three years from the date fixed for the performance or if no such date is fixed, from the date of the refusal of such performance. At the same time, it is to be noted that the plaintiff is not precluded from seeking an alternative prayer for refund of the

advance amount. Such alternative prayer, certainly, is not a consequential prayer to the other relief of specific performance and on the other hand, such alternative prayer itself will have the character of the main relief, however, alternatively sought for. If such alternative prayer for refund of advance amount is also sought for in a suit for specific performance, certainly, the period of limitation to be considered in respect of that relief is concerned, Article 62 of the Limitation Act alone has to be applied and not the limitation period fixed for specific performance. Article 62 of the Limitation Act grants 12 years time for enforcing payment of money secured by a mortgage or otherwise charged upon immovable property.

26. Further, it is to be noted that in respect of an advance payment made under an agreement for sale, if not disputed by the vendor regarding the quantum or the nature of transaction between the parties, there is no liability fastened on the vendor for repayment of the said sum on the date of the agreement itself. Only under certain eventualities, the liability to repay such advance amount by the vendor would arise. On the other hand, such advance amount paid creates an interest over the property agreed to be sold as discussed hereunder.

27.The question, that in an agreement for sale in respect of an immovable property, whether a statutory charge is created on such property in favour of the buyer/the agreement holder is answered by the relevant statute itself under Section 55(6)(b) of the Transfer of Property Act, which I have extracted supra. Under the said provision of law, the statutory charge is created on the subject matter property in an agreement for sale, unless a contract to the contrary is specifically referred to in the said agreement itself or in a circumstance where the buyer has improperly declined to accept the delivery of the property. The creation of such statutory charge under Section 55(6)(b) of the Transfer of Property Act and consequently, the application of Article 62 of the Limitation Act have been, in clear and categorical terms, dealt with by the Apex Court in ***Delhi Development Authority's case***, thereby holding that 12 years is the time limit for enforcement of the charge and not three years.

28.No doubt, the learned counsel for the respondents contended that the suit agreement was not proved by the plaintiff and therefore, he is not entitled for refund of the advance amount. The trial court, on

appreciation of the evidence let in by the parties, has found that the first defendant failed to prove that the suit agreement was forged by the plaintiff. In this case, the suit agreement was marked as Ex.A1 and the attestor and scribe of the same were examined as PW2 and PW3. The first defendant did not dispute his signature in the suit agreement but he contended that such signature was obtained by the plaintiff in blank stamp papers and that there was no passing of consideration. When that being the admitted position, it is for the defendants to disprove such contention by letting in evidence in support of such contra pleading. Except by examining the first defendant as DW1, they have not examined any other independent witnesses. Therefore, the lower appellate court erred in shifting the burden on the plaintiff to disprove the contention of the defendants. In my considered view, when the initial burden is discharged by the plaintiff by marking Ex.A1 and examining the attesting witness and the scribe apart from examined himself as PW1, the onus is then shifted on the defendants to prove their case, which they miserably failed to do in this case. Therefore, the decisions relied on by the learned counsel for the respondents are not factually applicable to the present case more particularly, when the Apex Court in the decisions referred to supra has in clear and categorical terms distinguished the time limit

between the suit for specific performance and recovery of advance amount. When the plaintiff has filed the present suit with such alternative relief and the same having been filed within a period of 12 years, I am of the view that the relief of refund of advance amount is not barred by limitation, as the same is protected by Article 56 of the Limitation Act read with Section 55(6)(b) of the Transfer of Property Act.

29. Accordingly, I find that the appellant is entitled to succeed in this appeal. Thus, the questions of law are answered in favour of the appellant. The appeal is allowed and the judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial court are restored. No costs.

29.11.2016

Index: Yes/No

K.RAVICHANDRABAABU,J.

Vri

To

- 1.The Subordinate Judge,
Perundurai.
- 2.The District Munsif cum Judicial Magistrate,
Perundurai.

PRE DELIVERY JUDGMENT IN
S.A.NO.426 OF 2015

29.11.2016

PRE DELIVERY JUDGMENT

IN S.A.426 OF 2015

TO

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

Most respectfully submitted
by

(V.RAJESWARI)
P.A. TO HON'BLE JUDGES

<http://www.judis.nic.in>