

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2017

CORAM

THE HONOURABLE Mr.JUSTICE R.SUBRAMANIAM

A.S.No.749 of 1994

C.Andiappan

..Appellant/Defendant

Vs.

1.M.Ardhanari (Deceased)
2.A.Rathnasabhpathy
3.A.Seetha Lakshmi
4.Sivagami
5.Salai Mailkudi

RR3 to 5 brought on record as Lrs
of deceased R1 vide order of Court
dt.30.07.2010, made in
CMP No.935/2007..

..Respondents/Plaintiffs

Appeal suit has been filed under Section 96 of Civil Procedure Code, against the Judgment and decree dated 22.03.1994, made in O.S.No.336 of 1993, on the file of the Subordinate Judge, Erode, Periyar District.

For Appellant : Mr.P.Valliappan

For Respondents : Mr.M.V.Venkateshan

J U D G M E N T

The defendant in O.S.No.336 of 1993, is on appeal, challenging the preliminary decree for payment of a sum of Rs.2,25,000/- with interest at 12% per annum from the date of the suit till the date of payment.

2. The suit was filed by the plaintiffs, contending that the plaintiffs had certain financial transactions with the defendant and in order to settle the dispute, it was agreed that the plaintiffs should pay a sum of Rs.1,83,000/- in full quit of the amount payable by them to the defendant. It was also agreed that in discharge of a sum of Rs.1,83,000/-, the plaintiffs should execute a sale deed in respect of their property situated at Netaji Road, Erode.

3. It is the further contention of the plaintiffs that the said property was worth about Rs.4,08,000/- and in order to avoid the huge expenditure on stamp duty, the sale deed was registered for a sum of Rs.1,83,000/-. For the balance Rs.2,25,000/-, the defendant had executed a promissory note on 26.03.1990, i.e., the date on which the sale deed was executed and presented for registration. It is also the contention of the plaintiffs that the sale deed dated 26.03.1990, was handed

over to them by the defendant with an intention of creating mortgage in respect of the suit property as security of payment of Rs.2,25,000/- which was covered by the promissory note.

4. According to the plaintiffs, the defendant who was in a dominating position, extracted a varthamanam letter reciting that the plaintiffs were appointed as agents of the defendant for taking delivery of possession of the property from the tenant and hand over the same to the defendant. In the said varthamanam letter, the agency commission was fixed at Rs.2,25,000/- and a period of one year was fixed for plaintiffs to evict the tenant and hand over the possession to the defendant. The varthamanam letter also contains several other clauses which may not be very germane for disposal of the appeal.

5. The said varthamanam letter was also dated 26.03.1990. Within a month, i.e, 23.04.1990, the defendant addressed a letter to the plaintiffs, cancelling the varthamanam letter and seeking return of the original documents deposited as well as the promissory note. The plaintiffs sent a reply to the same on 07.05.1990. The present suit was filed on 22.03.1993, seeking a preliminary decree on the alleged equitable mortgage created by the defendant as security for re-payment of sum of Rs.2,25,000/- which according to the plaintiffs is the balance of the sale consideration under the sale deed Exhibit A2 dated 26.03.1990.

6. The defendant resisted the suit contending that the claim that the sale price was fixed at Rs.4,08,000/- is false. He would contend that the plaintiffs borrowed money from him and he had filed five suits for recovery of money as well as insolvency proceedings against the plaintiffs. According to him a sum of Rs.3,00,000/- was due and payable to him in the year 1990 and when the plaintiffs approached for settlement, he agreed to take a sum of Rs.1,83,000/- in full quit and also accepted the sale of the property in his favour in discharge of the said outstanding dues. He denied the fact that the sale price was fixed at Rs.4,08,000/- and a sale deed was executed for Rs.1,83,000/-. The claim of the plaintiffs that a promissory note was executed as security for re-payment of a sum of Rs.2,25,000/- which, according to the plaintiffs, represents the balance of sale consideration under the sale deed dated 26.03.1990 was specifically denied.

7. The defendant would contend that the said amount of Rs.2,25,000/- was fixed only as agency commission to enable the plaintiffs to evict the tenant and hand over vacant possession. It is the further contention of the defendant that since he found that the plaintiffs were acting against his interest and they were not taking any steps in the right direction for the eviction of the tenant, he was forced to terminate the said agency by his notice dated 23.04.1990.

Therefore, according to the defendant, the consideration for the sale deed was only Rs.1,83,000/- and his liability to pay a sum of Rs.2,25,000/- would arise only in the event of the plaintiffs evicting the tenant and handing over the vacant possession. According to the defendant, the plaintiffs did not take any steps in the said direction, but he initiated the proceedings for eviction and obtained vacant possession of the property nearly 12 years after the sale in the year 2003.

8. Therefore, the defendant would contend that he is not liable to pay any amount under the promissory note or under the alleged equitable mortgage. It was also further pointed out that the sale deed dated 26.03.1990, could not have been deposited with the plaintiffs on 26.03.1990, as the same was registered by the registrar only on 29.03.1990. On the above pleadings, the learned Trial Judge framed the following issues,

1. Whether the plaintiff is entitled to the suit claim?
2. Whether the plaintiff is entitled to the interest as prayed for?
3. To what other relief the plaintiff is entitled to?

9. The second plaintiff was examined as P.W.1 and Mohanasundaram was examined P.W.2 and the Exhibits A1-A5 were marked on the side of the Plaintiffs and the defendant was examined as D.W.1 and Exhibits B1-B7 were marked. On consideration of the oral and documentary evidence, the learned Subordinate Judge, Erode, who tried the suit, concluded that the cumulative effect of the oral and documentary evidence would show that the actual sale price agreed was Rs.4,08,000/- and the sale deed was registered for Rs.1,83,000/-. The learned Sub-ordinate Judge also concluded that the varthamanam letter namely Exhibit A3 was only a front for the balance of the sale consideration, namely, Rs.2,25,000/-.

10. The learned Sub-ordinate Judge, particularly took note of the fact that the agency commission agreed under Exhibit A3 varthamanam letter was more than the value of the property as reflected by Exhibit A2 sale deed and concluded that it cannot be taken as representing the agency commission alone as contained in the varthamanam letter. The learned Subordinate Judge had also accepted the claim of the plaintiffs that the varthamanam letter was obtained under duress and coercion by the defendant. On the aforesaid findings, the learned trial Judge decreed the suit as prayed for. Aggrieved, the defendant is on appeal.

11. Heard, Mr.P.Valliappan, learned counsel for the appellant and Mr.M.V.Venkataseshan, learned counsel for the respondents. The learned counsel for the appellant/defendant would contend that the suit as framed is not maintainable. According to him, the plaintiffs cannot be allowed to plead or prove that the consideration for the sale was something

different from what was set out in the sale deed itself. Relying upon Section 92 of the Evidence Act, he would contend that the plaintiffs are precluded from pleading or proving that the consideration under the sale deed under Exhibit A2 was infact Rs.4,08,000/- as alleged by them, in as much as it amounts to varying terms of the contract which has been reduced in writing.

12. He would further contend that a reading of the varthamanam letter, Exhibit A3 would show that the plaintiffs were appointed as agents of the defendant for obtaining a vacant possession of the property from the tenant, within a period of 1 year and the consideration agreed for such contract is Rs.2,25,000/- and the promissory note as well as the deposit of title deed are only security for the contract of agency and not for the alleged outstanding sale consideration.

13. He would further point out that the agency was terminated within a month. According to the learned counsel it was open for the plaintiff to have sought for compensation for wrongful termination of the agency under Section 205 of the Contract Act. The present suit based on the equitable mortgage and promissory note dated 26.03.1990, according to the learned counsel, cannot be maintained as the consideration for both namely the promissory note as well as the mortgage, is the agency commission that is payable. If the plaintiffs had evicted the tenant and handed over the possession of the property within a period of one year. Admittedly, the said act has not been done and therefore, both the promissory note as well as the mortgage are devoid of consideration.

14. Per contra, Mr.M.V.Venkataseshan, the learned counsel for the plaintiffs/respondents would contend that the entire evidence on record and the preponderance of probabilities would point out that the defendant owed some money to the plaintiffs on the date of the sale i.e. 26.03.1990. Having admitted the execution of the promissory note and deposit of title deed, the defendant cannot plead that he was not liable to pay any amount to the plaintiffs. He would also draw my attention to Section 118 of the Negotiable Instruments Act and contend that once execution of the promissory note is admitted, it is for the defendant to prove the lack of consideration.

15. On the above arguments the following points arise for determination in this appeal.

1. Whether the suit as framed based on Exhibit A1 promissory note and the alleged deposit of title deeds is maintainable?
2. Whether the plaintiffs are entitled to plead and prove that the consideration for Exhibit A2, sale deed was different from what has been recited therein?

3. Whether the plaintiffs are entitled to the decree as prayed for?

Since, all the three points are inter-connected. They are dealt with together.

16. The fact that Exhibit A2 sale deed, evidences a bargain, which is required to be reduced in the form of writing and registered under law, is not in dispute. If the plaintiffs want to establish that the sale consideration was different from what has been recited in the document, the plaintiffs can succeed only if they are able to establish the sale consideration recited in Exhibit A2 was only a lesser amount than the actual sale consideration agreed between the parties. In attempting to do so, the plaintiffs, will be letting in evidence to vary or contradict the terms of the written document which evidences a transaction, which is required to be in writing. Such evidence is specifically barred under Section 92 of the Evidence Act. Section 92 of the Evidence Act reads as follows:

"92. Exclusion of evidence of oral agreement—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).---Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] of consideration, or mistake in fact or law.

Proviso (2).---The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).---The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).---The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to

be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).--- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).--- Any fact may be proved which shows in what manner the language of a document is related to existing facts."

17. Unless the plaintiffs are able to show that their claim falls within any one of the provisos of Section 92, the evidence of a different bargain than what is set out in the document itself cannot be looked into by the Court. The claim of the plaintiffs that the actual sale consideration was different from what has been recited in the document, by any stretch of imagination, does not fall within any of the provisos of Section 92 of the Evidence Act. Therefore the plaintiffs are debarred from letting in such evidence. No doubt, Section 118 of the Negotiable Instrument Act creates presumption of passing of consideration when once there is an execution of the promissory note but the said presumption is only a rebuttable presumption, it can be rebutted by proving that the consideration in the promissory note is illegal or that promissory note was executed as a security for a future transaction.

18. Exhibit A3 which has been admitted by the parties clearly recites that the promissory note was executed as a security for a payment of sum of Rs.2,25,000/- as an agency commission for the plaintiffs, if they evict the tenants and hand over the vacant possession within a period of one year. Admittedly, the plaintiffs have not taken any steps to evict the tenant within a period of one year. At this juncture, the learned counsel for the plaintiffs/respondents would contend that they were disabled from doing so, because of the conduct of the defendant in terminating the agency within a period of 1 month by issuing notice under Exhibit B3 dated 23.04.1990, may be the said notice amounted to illegal termination of the agency for which the remedy of the plaintiffs is to sue for damages on the basis of the illegal termination of the agency. The present suit is not one for such relief. It is a suit based on the promissory note supported by alleged deposit of title deeds creating a equitable mortgage. Therefore, I find much force in the contention of the learned counsel for the appellant. May be the conduct of the defendant is not satisfactory but unfortunately, for the plaintiffs, the burden is on them to prove that the promissory note Exhibit A1 and the alleged deposit of title deed creating a equitable

mortgage are supported by legal consideration. In order to prove that the deposit of title deeds created a equitable mortgage there should be a pre-existing debt. In the absence of any debt, the very deposit of title deed cannot create a mortgage.

19. Placing strong reliance on the evidence of P.W.2 Mohanasundaram, who was, according to the plaintiffs, the mediator, Mr.Venkataseshan, learned counsel for the plaintiffs/respondents strenuously contended that the fact that the consideration agreed under the Exhibit A2 sale deed was Rs.4,08,000/- was established by the plaintiffs. Unfortunately, for him, Section 92 stands in the way and prevents the Court from look into such evidence. Therefore, the evidence of P.W.2 cannot rescue the plaintiffs from the situation that they had got themselves in.

20. The consideration for the promissory note is the agency commission that may fall due, if the plaintiffs had performed their duties under Exhibit A3 varthamanam letter. Unfortunately, for them, Exhibit A3 varthamanam letter was cancelled. Therefore, it is clear that Exhibit A1 promissory note is not supported by consideration, once it is concluded that Exhibit A1 promissory note is not supported by consideration, the deposit of the title deed would not create a mortgage. Therefore, the very suit based on the mortgage and the promissory note will have to suffer dismissal at the hands of the Court.

21. The learned Trial Judge has not adverted to the prohibition contained under Section 92 of the Act. He has gone on the premise that the plaintiffs can be allowed to prove that the consideration for the sale deed Exhibit A2 is different from what has been recited in the said document. Therefore, I am unable to subscribe to the views of the learned Subordinate Judge. All the points raised in the appeal are answered in favour of the appellant and against the respondents. Hence, the appeal is allowed and setting aside the Judgment and decree of the Trial Court in O.S.No.336 of 1993. O.S.No.336 of 1993, will stand dismissed. With regard to the conduct of the appellant in cancelling the agency within a period of one month, thereby making it impossible for the plaintiffs to perform their obligations under the contract Exhibit A3, I can only observe that the same is not satisfactory. In view of the same, I make no order as to costs.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

gsk/sm

<https://hcservices.ecourts.gov.in/hcservices/>

To

1.The Subordinate Judge,
Erode, Periyar District.

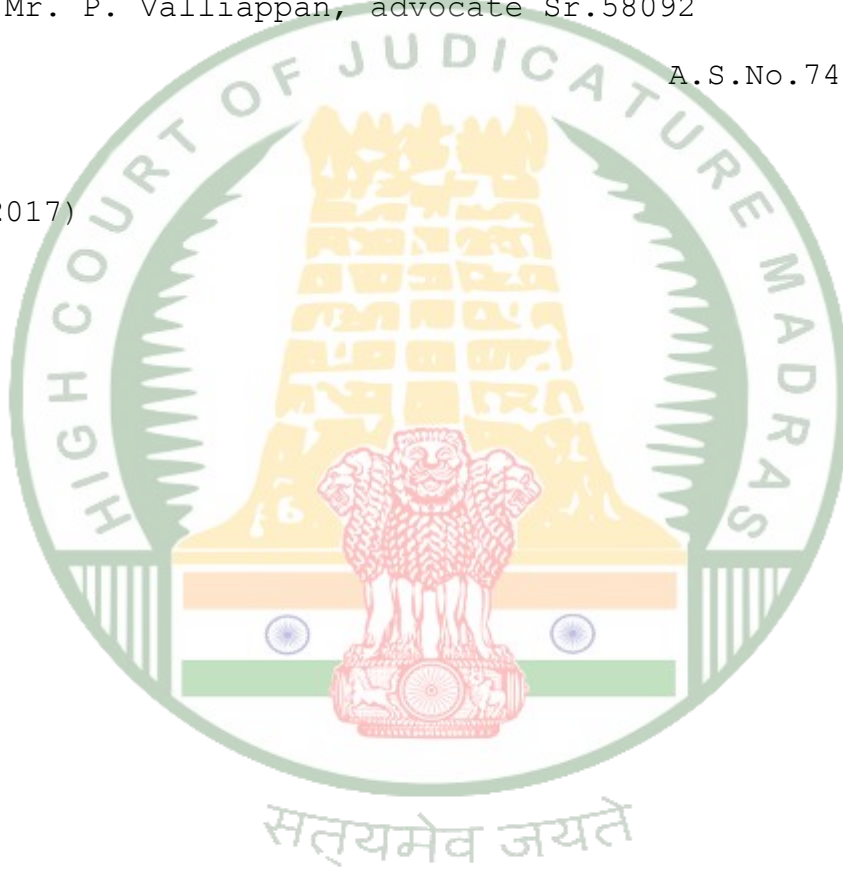
2. The Section Officer,
Vr Section,High Court, Madras.

+ 1 cc to Mr. M.V. Venkataseeshan, Advocate Sr.57703

+ 1 cc to Mr. P. Valliappan, advocate Sr.58092

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NM(CO)
EU(26/10/2017)



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