

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:28.11.2016

DATE OF DECISION:02.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.34 of 2010

P.Vaidyanathan

... Appellant

Vs

K.Sundaram

... Respondent

This appeal is filed under Section 96 of C.P.C. read with Order 41 Rule 1 & 2 C.P.C. against the Judgement and decree dated 29.06.2009 passed in O.S.No.4 of 2005 on the file of the Principal District Court, Cuddalore.

For Appellant :Mr.R.Gururaj

For Respondents :Mr.N.Suresh

J U D G E M E N T

The plaintiff whose suit for specific performance accompanied by an alternative prayer for refund of advance amount was decreed in part granting the prayer for refund of advance amount alone, that is for a sum of 2,00,000/-

only as against the claim of Rs.5,50,000/-, is the appellant.

2. According to the plaintiff, the defendant offered to sell his property for a sum of Rs.3,50,000 and a registered agreement was entered into on 12.11.2001. On the date of agreement a sum of Rs.3,00,000 was paid as advance and 15 months time was fixed for payment of the balance amount of Rs.50,000/-. Just about the time from the period fixed under the agreement was to expire, at the instance of the defendant, a second agreement was entered into on 10.02.2003, wherein the sale price was increased to Rs.5,50,000/- and the plaintiff paid further advance Rs.2,00,000/-. Thus making advance Rs.5,00,000/-, the balance sale consideration remained at Rs.50,000/-. A period of 12 months was fixed for performance for the second agreement dated 10.02.2003. Again on 08.03.2004, according to the plaintiff, at the instance of the defendant, the sale price was increased to 6,00,000/- and further advance Rs.50,000/- was paid. The period for performance was fixed as 11 months from 08.03.2004. Therefore, according to the plaintiff, the total advance paid is Rs.5,50,000/- and the balance payable is Rs.50,000/-. Contending that he has always been ready and willing to perform his part of contract to have the sale deed executed, the plaintiff has claimed specific performance or the alternative prayer for refund of advance amount. The suit was filed on 28.12.2004.

3. The defendant resisted the suit contending that under all the three agreements, so far, the plaintiff had advanced a sum of Rs.2,00,000/- to him.

The plaintiff charges interest at 60% per annum. The plaintiff had worked out the amount that would fall due on the last date fixed for performance under the agreement with interest at 60% per annum on Rs.2,00,000/- and the same has been shown as advance paid under the agreement. It reflects the amount that will be due, if 60% is added to the principal sum of Rs.2,00,000/-. It was further contended by the defendant that there is no question of the plaintiff being ready and willing to perform the part of his contract, as there was no agreement for sale of the property. All the three agreements were brought about only as security for the loan taken by the defendant from the plaintiff.

4. On a consideration of the above pleadings, the learned Principal District Judge, Cuddalore, who tried the suit, framed the following issues:

- 1) Whether the plaintiff is entitled to the relief of specific performance?
- 2) Whether the plaintiff is entitled to the alternative relief of refund of amount as prayed for?
- 3) To what other reliefs, the plaintiff is entitled to?

PW.1 to PW6 were examined on the side of the plaintiff and Exs.A1 to A3 were marked. The defendant examined himself as DW1 and marked Exs.B1 to B5.

5. On a consideration of oral and documentary evidence as well as the law relating to the plea of the defendant that the agreements were not intended to be acted upon as agreements of sale, but were executed only as a

security for loan transaction. The learned Principal District Judge accepted the case of the defendant in toto and rejected the relief of specific performance. The learned Principal District Judge, Cuddalore however granted the decree for refund of a sum of Rs.2,00,000/- with subsequent interest at 12% per annum from 12.11.2001 till date of realization.

6. Aggrieved by the said judgement and decree, the plaintiff has preferred the above appeal.

7. I have heard Mr.R.Gururaj, learned counsel appearing for the appellant and Mr.N.Suresh, the learned counsel appearing for the respondent. The following points emerge for determination in the appeal:

- 1) Whether the plaintiff could be held to be entitled to a decree for specific performance?
- 2) Whether the plaintiff is entitled to a decree for refund of advance? If so what is the quantum?
- 3) To what other relief, the plaintiff is entitled to?

8. Mr.R.Gururaj, learned counsel appearing for the appellant would contend that the Trial Court erred in rejecting the claim for specific performance. According to the learned counsel for the plaintiff, the plaintiff has done whatever he could do as a plaintiff and the Trial Court on extraneous reasons rejected the claim for specific performance. The learned counsel would

point out that the plaintiff has examined PW.1 to PW6, who had spoken about the execution of the agreements. He would also contend that Section 92 of the Indian Evidence Act imposed a bar on the defendant from letting evidence varying the recitals of written documents. In support of his contention, the learned counsel would rely upon the judgment of the Hon'ble Supreme Court in ***Sahu Madho Das and others v. Mukand Ram and another*** reported in ***AIR 1955 S.C. 481***, wherein the Hon'ble Supreme Court had observed that Estoppel is a rule of evidence which prevents a party from alleging and proving the truth. Laying emphasis on the said observation of the Hon'ble Supreme Court, the learned counsel would submit that the defendant cannot be allowed to plead that the agreements were intended to be acted upon for some other purposes.

9. The learned counsel would also invite my attention to the observation in paragraph 20 of the judgement of the Hon'ble Supreme Court in ***M/s.Raval and Co. v. K.G.Ramachandran and others*** reported in ***AIR 1974 SC 818*** wherein it was held that the tenant can not be allowed to plead that the rent that was payable was different from the rent that was fixed under a written contract.

10. The learned counsel would draw my attention to the judgement of the Division Bench of this Court in ***Kalianna Gounder and others vs. A.Kalianna Gounder and others*** reported in ***1986 (2) MLJ 470 DB***, wherein it

was that all the arrangements or agreements contrary to terms of the written registered instrument cannot be pleaded as it would be opposed to Clause-4 of Section 92 of the Indian Evidence Act. He would also rely upon a judgement of a Division Bench of this Court in *Nanjammal (died) and another v. Palaniammal* reported in **1993 (2) LW 205**, wherein it was observed, the normal Rule is that once the truth of the agreement is made out the Court shall enforce it unless there are circumstances which would prove that equity will suffer by enforcing the agreement for sale. The Division Bench also held that it is not open to the defendant to raise the plea that the terms of the agreement should be ignored and that the real purpose was to secure the loan transaction. The defendant is barred from raising such a plea by Section 92 of the Indian Evidence Act.

11. Relying upon the aforesaid judgements, the learned counsel would submit that the Trial Court erred in accepting the plea of the defendant that agreements are not intended to be acted upon but were executed only as security for a loan transaction and not otherwise. Per contra, Mr.N.Suresh, the learned counsel appearing for the respondent would submit that what is prohibited under Section 92 of the Evidence Act, is only the attempt to vary the terms of the contract and the defendant can always establish any invalidating circumstance, that would establish that the contract itself was a sham transaction. In support of his contention, the learned counsel rely upon a judgement of the Hon'ble Supreme Court in *Ishwar Dass Jain v. Sohan Lal*

reported in ***AIR 2000 SC 426***. The learned counsel draws my attention to para 16 of the judgement where the Hon'ble Supreme Court after referring the earlier decision in ***Gangabai v. Chhabubai*** reported in ***AIR 1982 SC 20*** observed that it is permissible for a party to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. He also invites my attention to the observations of the Division Bench in ***Kamireddi Sattiaraju vs. Kandamurai Boolaeswari*** reported in ***2007 1 MLJ 499***. It was also a suit for specific performance with similar plea to the effect that agreement was not intended to be acted upon but was executed only as security for a loan transaction. After reviewing the entire case law, the Division Bench has held as follows:

“15. In the judgment , in paragraph 22, the Supreme Court has stated the legal position as regards the substantive part of [Section 92](#) of the Indian Evidence Act in the following words:

22. This Court in [Gangabai v. Chhabubai](#) and [Ishwar Dass Jain v. Sohan Lal](#) with reference to [Section 92\(1\)](#) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended

to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

16. In the decision , the Supreme Court has held as under in paragraph 9:

An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. [Tyagaraja Mudaliyar v. Vedathanni](#) AIR 1936 PC 70 : 64 IA 126 is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different.

17. From the above ratio laid down by the Supreme Court, when we analyse the stand of the parties, according to the appellants, irrespective of the fact that Ex. A-1 came into being, it was contended that the deed was never intended to be acted upon and that it was a sham document. When the said stand is probed into further, as held by the Supreme Court, the bar under [Section 92](#) of the Indian Evidence Act vis-a-vis Ex. A-1 would operate if only the appellants attempt to rely upon Ex. A-1 agreement and simultaneously sought to vary and contradict its terms. Such is not the case of the appellants. The appellants are not attempting to contend that the terms contained therein are to be varied or that the evidence let in on their side was to contradict the terms contained therein. According to the appellants, the entire evidence let in both oral and documentary, was only to demonstrate that inspite of existence of Ex. A-1, it will have to be held that the parties had a different contract altogether and Ex. A-1 was never intended to be acted upon. At the risk of repetition, we state that applying the ratio laid down by the

Supreme Court, such a stand of the appellants was certainly not prohibited under [Section 92](#) of the Indian Evidence Act.

12. The learned counsel would also draw my attention to the judgement of this Court in *Pappammal @ T.Pappa vs. P.Ramasamy* reported in **2012 4 CTC 100** wherein also, the Hon'ble single judge had followed the Division Bench judgement referred to above and held that it is open to the defendant in the suit for specific performance to plead that the contract was not intended to be an agreement of sale. Recently in the judgement in *Rajammal and anotherl vs. M.Senbagam* reported in **2016 (6) CTC 225**, this Court held that the plea to the effect that the agreement was not intended to be acted upon can be entertained by the Courts. I have examined the facts of the case on hand, in the light of the law laid down by the precedents referred to at the Bar. I have no hesitation in coming to the conclusion that the defendant cannot be precluded from taking the plea that the agreement was not intended to be acted upon as an agreement of sale, but it was executed for some other purposes namely, as security for loan transaction. Such plea would fall within the exceptions under Section 92 of the Evidence Act because, it is actually a invalidating circumstance which is pleaded before the Court of law and by pleading so, the defendant is not attempting to vary the terms of the contract. The actual attempt is to show that the contract is not one, which was intended

to be acted upon. Therefore, in my considered opinion the argument that Section 92 of the Indian Evidence Act prevents the defendant from contending that the agreement was not intended to be acted upon cannot be countenanced, in view of the categorical judicial pronouncements referred to above.

13. It remains to be seen as to how far the defendant has excluded in establishing his plea. The narration of the facts, in my opinion would lead to an inference that all is not well with the plaintiff's case. As already pointed out there are three agreements, under all the three agreements balance of sale consideration payable is only Rs.50,000/-, which is comparatively a small portion of the total consideration. However, under all the three agreements unusually long period of 15 months, 12 months and 11 months have been fixed for performance. This by itself would show that the actual purpose of the agreement is not that of sale. Though the plaintiff would plead in the plaint and depose in his evidence that he paid an advance of Rs.3,00,000/- on the date of 1st agreement i.e. on 12.11.2001, he paid further advance of Rs.2,00,000/- on the date of second agreement i.e. on 10.02.2003 and further sum of Rs.50,000/- was paid on the date of the 3rd agreement dated 08.03.2004. Therefore, according to the plaint and evidence, the categorical case of the plaintiff is that he paid Rs.3,00,000/-, Rs.2,00,000/- and Rs.50,000/- totalling to Rs.5,50,000/-.

Whereas a perusal of the agreements marked as Exs.A1 to A3 would show that there is no reference to the earlier agreements in Ex.A2 and Ex.A3. Exs.A2 and A3 are so worded that the parties enter in an agreement for the first time. It is also categorically stated that a sum of Rs.5,00,000/- was paid on the date of Ex.A2 and Rs.5,50,000/- was paid on the date of Ex.A3. Whereas, the pleadings as well as the evidence is different.

14. As regards the claim of the plaintiff that he has proceeded the agreements by examining the witnesses, I find that PW2 is a tenant under the plaintiff and he is doing Real Estate business also. A complete reading of his evidence shows that he is a partisan witness, whose evidence can not be relied upon on the face of it. The plaintiff is unable to give any appropriate explanation for fixation of such long periods for performance. Under all the three agreements, only a sum of Rs.50,000/- was payable as balance of sale consideration. PW3-D.Sanmugam is an attesting witness to the 1st agreement. He admits that he had not signed as an attesting witness to Ex.A2 and Ex.A3. However, in cross-examination he would submit that he is actually working under the plaintiff and he would also submit that he is very close relative, brother-in-law one Karunanithi. The said Karunanithi has been examined as PW4. He had deposed that a portion of the property, subject matter of the agreement originally belonged to his family and his father had sold the property. He would also say that he was aware of the earlier agreements between the

plaintiff and one Kannan and he did not inform the plaintiff about the same. He would also depose that he had not informed the plaintiff about the preexisting agreement because the plaintiff would not have agreed to purchase the property, if he knows about the earlier agreement. He would also depose that PW1 and PW2 are close friends. Therefore, the oral evidence on record is not helpful to the plaintiff. Preponderance of probability points out that the agreements are not bonafide transaction. Therefore, I am constrained to agree with the findings of the Trial Court with reference to the actual object of the agreements. Therefore, first point is answered against the appellant.

Point No.2.

15. The Trial Court had taken into account the admission of the defendant that he borrowed only a sum of Rs.2,00,000/- from the plaintiff and has executed the agreement as security for loan transaction. On the strength of said admission, the learned Trial Judge had decreed the suit for refund of advance amount of Rs.2,00,000/-. Realising the difficulty in bringing home the claim for specific performance, Mr.R.Gururaj, learned counsel appearing for the appellant would submit that the plaintiff is atleast entitled to a decree for refund advance amount as reflected in Exs.A3 dated 08.03.2004 i.e. for a sum of Rs.5,50,000/-. Mr.N.Suresh, the learned counsel appearing for the respondent would vehemently contend that there cannot be a decree for refund of a sum of

Rs.5,50,000/- as the same would amount to allowing the plaintiff to obtain a decree for a sum of Rs.2,00,000/- with interest at 60% per annum.

16. I have already concluded that the agreements in question were not intended to be acted upon as agreements for sale. They were executed only for the purpose of securing loan transaction. The learned Principal District Judge, Cuddalore had on examination of evidence on record has come to the conclusion that the plaintiff has claimed contradictorily and has obtained the above documents as security to secure the principal amount with exorbitant interest. On a perusal of the entire evidence on record, I do not see any reason to disagree with the findings entered by the learned Principal District Judge, Cuddalore.

17. Though Mr.R.Gururaj, learned counsel appearing for the appellant would vehemently contend that the suit is for specific performance and the plaintiff is atleast entitled to a decree for refund of a sum of Rs.5,50,000/- shown as advance in Ex.A3, I am afraid that the acceptance of his contention is only amount to unjust enrichment of the plaintiff. As already pointed out, the pleadings and oral evidence relating to payments of advance, are totally different from the contents of the documents. The plaintiff for his purposes wants the Court to believe his oral evidence, which is contrary to the recitals in

the documents and in fact, it is the plaintiff who wants to vary the terms of the documents. Though documents Ex.A2 and A3 would show that advance of Rs.5,00,000/- and Rs.5,50,000/- was paid on the date of those documents i.e. on 10.02.2003 and 08.03.2004, the plaintiff in his plaint as well as in oral evidence would submit that he had paid only Rs.2,00,000/- and Rs.2,50,000/- respectively on the said dates. The other witnesses examined by the plaintiff have also spoken on the same line. In my considered opinion, neither the plaintiff nor the witnesses have come forward to speak the truth. Therefore, I find that no decree could be passed on the basis of the documents namely, Ex.A1 to A3. Mr.N.Suresh, learned counsel appearing for the respondent would contend that once, it is concluded that the agreements are not intended to be agreements of sale, there cannot be a decree for refund of advance. He would also rely upon a judgement in *V.P.Murugesan vs. P.Shiek Mideen* reported in **2015 (6) CTC 810**, wherein it was held that if Court finds that transaction is not for agreement of sale, no relief of refund of advance can be granted. Therefore, I find that the plaintiff cannot seek the relief of refund of advance Rs.5,50,000/-. But, however in the case on hand, on admission of borrowings Rs..2,00,000/-, the Trial Court granted a decree for Rs.2,00,000/- with interest at 12% per annum. The defendant has not filed any appeal against the said decree. Therefore, I do not propose to disturb the decree that has already been granted in favour of the plaintiff for a sum of Rs.2,00,000/- with interest at 12% per

annum from the date of agreement namely, 12.11.2001 till date of realisation.

Therefore, the second point is answered against the appellant.

18. In fine, the appeal is dismissed confirming the judgement and decree of the Trial Court dated 29.06.2009 passed in O.S.No.4 of 2005 on the file of the Principal District Court, Cuddalore. However, in view of the peculiar circumstances of the case, I am not making any order as to costs.

02.01.2017

Internet: Yes/No

Index : Yes/No

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To The Principal District Court, Cuddalore

R.SUBRAMANIAN,J

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