THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.2740 of 2004

ORDER:

This appeal is filed by the defendant in O.S.No.597 of 1998, on the file of the I Additional Senior Civil Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, against the judgment dated 24.02.2004, by and under which, the learned Senior Civil Judge decreed the suit filed by the plaintiff for specific performance.

2. For convenience, the parties are referred to as 'plaintiff' and 'defendant'.

3. The plaintiff filed the suit for specific performance of agreement of sale dated 17.08.1996, said to have been executed by the defendant in favour of the plaintiff in respect of the schedule premises, bearing House No.26-137 in Plot No.14, in Sy.No.45, admeasuring 242.50 square yards with RCC building with plinth area of 1200 square feet, situated at Sarada Nagar, Safilguda, Malkajigiri Municipality and Mandal, Ranga Reddy District. The case of the plaintiff is that the defendant is the absolute owner of the schedule premises having purchased the same under registered sale deed dated 31.12.1975. The defendant, for performing his daughter's marriage, offered to sell the schedule premises to the plaintiff for a consideration of Rs.4,90,000/- and the plaintiff agreed to purchase the same. The plaintiff paid the entire sale consideration of Rs.4,90,000/- by way of two demand drafts one for Rs.1,00,000/- , another for Rs.50,000/- and paid the remaining Rs.3,40,000/- in cash and the defendant acknowledged the same and executed a registered agreement of sale on 17.08.1996, undertaking to execute the sale deed as and when

the plaintiff expressed his readiness with registration expenses within 18 months from the date of the agreement of sale. The defendant agreed that he will hand over the original link documents and deliver possession on the date of registration of sale deed. In spite of repeated demands, the defendant did not come forward to execute sale deed in favour of plaintiff within stipulated time, and hence the plaintiff got issued legal notice dated 16.03.1996 demanding him to execute registered sale deed and deliver the vacant possession of the schedule premises, but the defendant did not respond and hence, the plaintiff filed the suit.

4. The defendant filed written statement denying the averments of the plaint. It is the case of the defendant that himself and the plaintiff are related to each other and both of them hail from Jakkamcherla village of Krishna District, but on account of their employment they are residing in different towns. Originally the defendant purchased vacant site and constructed a house therein by investing joint family funds and by raising loans from his employer. Except the schedule property, the defendant does not own any other property. The plaintiff and his son Srinivasarao used to do money lending business. The defendant earlier availed loan from the son of the plaintiff to perform his 1st daughter's marriage in 1994-95 and at that time, the plaintiff and his son took blank promissory notes and also a declaration with regard to the schedule property as security for repayment of the loan. The defendant cleared off the said loan. But for performing his second daughter's marriage, the defendant again availed loan of Rs.1,50,000/- only from the plaintiff, but not Rs.4,90,000/- as stated by the plaintiff. The plaintiff granted loan on condition of executing a document as required and deposit of title deed

with him and to pay interest @18% p.a.. The plaintiff paid the loan amount of Rs.1,50,000/- by way of two demand drafts. Therefore, the defendant executed the agreement of sale under compulsion without there being any transaction. Taking advantage of the possession of the agreement of sale, the plaintiff developed an evil idea to get the schedule property, which is worth Rs.15 lakh, and filed the suit for specific performance by suppressing the real facts. The defendant is ready to repay the loan amount of Rs.1,50,000/- with interest, but the plaintiff refused to accept the same. The contention of the defendant is that the agreement of sale was executed only as security for the loan availed by him, but not with an intention to sell the same.

5. On the basis of pleadings of both sides, the Court below framed the following issues:-

1) Whether the suit agreement is executed as security for repayment of loan said to have been advanced by the plaintiff to the defendant as contended by the defendant?
2) Whether the plaintiff advanced any loan to the defendant as contended by the defendant?
3) Whether the suit agreement of sale is not valid and the plaintiff is not entitled to seek specific performance of the suit agreement as contended by the defendant?
4) To what relief?

6. On behalf of plaintiff, the plaintiff examined himself as PW 1 and marked Exs.A1 and A2. On behalf of defendant, the defendant is examined as DW 1 and examined one BRK Devenderrao on his behalf as DW 2 and marked Exs.B1 to B7.

7. After considering the oral and documentary evidence let in on either side, the Court below decreed the suit with costs, directing the defendant to execute registered sale deed in favour of the plaintiff in respect of the schedule property and deliver possession thereof. Feeling aggrieved, the defendant filed the present appeal.

8. Learned Counsel appearing for the appellant/defendant submitted that the Court below erred in decreeing the suit of the plaintiff for specific performance when there was voluminous evidence to show that the agreement of sale – Ex.A.1 was never intended to be acted upon as such and was only executed by way of security for repayment of loan. The admissions by the plaintiff, who was examined as P.W.1, clearly goes to show that there were certain financial transaction in between the plaintiff and the defendant, who were not only childhood friends but also distantly related and natives of Jakkacherla village of Krishna District and in view of the pressing necessities of the defendant, he borrowed certain amounts from the plaintiff and his son Srinivasa Rao and on being insisted and having no other option, he had to execute Ex.A.1 as an agreement of sale but the intention of the parties was otherwise. Learned Counsel submits that even though Ex.A.1 is purported to be an agreement of sale and is a registered instrument, evidence to the contra can be admitted and there are catena of authorities on this aspect, but the Court below has erred in not taking into consideration the facts and circumstances and the evidence on record and erroneously decreed the suit. Hence, the appeal to set aside the same.

9. On the other hand, learned Counsel appearing for the respondent/plaintiff submits that the recitals of Ex.A.1 – agreement of sale

clearly go to show that it was an out and out agreement of sale but not as claimed by the defendant. Learned Counsel submits that the defendant, who is examined as DW.1, admits the correctness of the contents of Ex.A.1 and therefore he cannot resile there from and give evidence contrary thereto. Learned Counsel submits that the Court below has properly appreciated the evidence on record and granted the relief of specific performance.

10. In view of the above submissions, the points that arise for consideration are:-

1) Whether Ex.A.1 was not intended to be acted upon as an agreement of sale and was executed only as security for repayment of loan as claimed by the appellant/defendant?
2) Whether the trial Court was justified in granting the relief of specific performance of Ex.A.1 by excluding the evidence on record?

11. A careful perusal of the entire material on record leaves no room for doubt that the admitted facts outweigh the contentious issue. Briefly stated the admitted facts are that the plaintiff and the defendant are distantly related and are natives of the same village and there had been certain financial dealings in between the family of the plaintiff and the defendant. The defendant had one son and two daughters. The plaintiff had one son. The defendant settled down at Hyderabad whereas the plaintiff was residing at Machilipatnam. The defendant purchased an extent of 242 Sq.Yds. of land under registered instrument in 1975 for a consideration of Rs.1,500/-. He was an employee in South Central Railway. Out of his own earnings, he constructed a house on the said site

in the year 1977 and started living therein. On 30.03.1994 and 24.08.1996, the defendant performed the marriages of his two daughters. For meeting the expenses, the defendant borrowed certain amounts firstly from the son of the plaintiff and subsequently from the plaintiff. Different amounts were borrowed on different dates, the details of which shall be stated hereinafter. The amounts so borrowed by the defendant from the plaintiff and his family are not discharged till date.

12. The total consideration for the suit schedule house was determined at Rs.4,90,000/- and entire amount was paid by the date of Ex.A.1. It is also admitted fact that the defendant on 17.08.1996 executed a registered agreement of sale-Ex.A.1 acknowledging the receipt of two Demand Drafts amounting to Rs.1,50,000/- drawn on Andhra Bank dated 10.08.1996 and cash of Rs.3,40,000/-. The said document was executed on a stamp paper worth Rs.25,000/- and was duly registered. The period for completion of the transaction was eighteen months and accordingly the plaintiff issued the legal notice – Ex.A.2 on 16.03.1998 calling upon the defendant to execute the sale deed. That was not replied and hence the suit came to be filed.

13. While admitting the above aspects, which are specifically pleaded by the plaintiff, the contention of the defendant is that the defendant being in need of money firstly took a loan of Rs.60,000/- from Srinivasa Rao, the son of the plaintiff, in the year 1994-95 to meet the expenses of the marriage of his first daughter. The said loan was discharged. He further contended that subsequently in the year 1996, when he intended to perform the marriage of his second daughter, he approached the plaintiff who agreed to give a loan of Rs.1,50,000/- with interest at 18%

per annum and since the marriage was slated for 24.08.1996, the defendant was compelled to execute the document – Ex.A.1 but it was intended to be only a security for the repayment of the loan. The defendant alleges that since the value of the property is more than Rs.15,00,000/-, the plaintiff developed an evil eye and intended to knock away the schedule house instead of taking steps to recover the loan amount.

14. Since the recitals of Ex.A.1 – registered agreement of sale substantiates the claim of the plaintiff that it was an agreement of sale for the purchase of the schedule house for a consideration of Rs.4,90,000/- which was paid, it is for the defendant to show that the parties never intended to enter into agreement of sale but the said document came to be executed as a security for the amounts which admittedly the defendant borrowed from the plaintiff to meet the expenses of the marriage of his daughter.

15. Since the transaction is evidenced by a registered instrument, the same has to be accepted unless contrary is proved. Learned Counsel appearing for the plaintiff submits that no evidence, either oral or documentary, contrary to the recitals of a registered instrument can be permitted in view of the bar contained in Sections 91 and 92 of the Evidence Act but the said contention is refuted by the learned Counsel appearing for the appellant/defendant by relying upon the following authorities. According to the learned Counsel appearing for the appellant/defendant it is permissible for a party to place on record the evidence which goes to show that the document styled as agreement of sale was not in fact an agreement for selling the property but was only

intended to provide security to the plaintiff for the loan which the plaintiff advanced to the defendant.

16. In view of the above controversy, before going into it, what is required to be seen is as to whether the appellant/defendant can be permitted to plead and prove that the suit document-Ex.A1 was not intended to be acted upon but for only a sham and nominal document, and that it is in respect of altogether other agreement which was not recorded in the document but was entered into between the parties.

17. Learned Counsel appearing for the respondent/plaintiff submits that it cannot be done and in support of his contention, he relies upon a decision of the Supreme Court reported in TAMILNADU ELECTRICITY BOARD v. N.RAJU REDDIAR[1]. The Apex Court held in para 7 as under:-

> "Where the agreement between the parties is a written agreement, the parties are bound by the terms and conditions of the agreement. Once a contract is reduced to writing, by operation of Section 91 of the Evidence Act, 1872 it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. Under Section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the contract. It is only when the written contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove the other conditions which also must not be inconsistent with the written contract."

[1] (1996) 4 SCC 551

Reliance is also placed upon a Division Bench decision of our High Court reported in INDIAN BANK v. SUB REGISTRAR, MAKUNDI (V), BELLARI DISTRICT[2] wherein it is observed that in view of the provisions of Section 92 of the Evidence Act, the fact which is required to be established by document, no oral evidence is admissible.

18. Learned Counsel also relies upon the decision of the Supreme Court reported in ROOP KUMAR v. MOHAN THEDANI[3] wherein it is held as under in para 18:-

> "In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract: but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a peculiar contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing."

19. A perusal of the above authorities show that they lay down broad proposition of law that Section 92 of the Evidence Act bars a party from trying to prove the aspects which are contrary to the terms of a written document. However, learned Counsel appearing for the appellant/defendant has referred to several authorities on the subject which have got direct bearing to the facts of the case in hand. In

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[2] 2015 (1) ALT 512 (DB)
[3] AIR 2003 S.C., 2418

TYAGARAJA MUDALIYAR AND ANOTHER v. VEDATHANNI[4], a Bench of three Judges observed as under:-

> "Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also Section 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter.
>
> Even if there were no provisos to Sections 91, and 92, there is nothing in either Section to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract."

This decision of the Privy Council in Tyagaraja Mudaliyar's case (referred 4 supra) was followed by the Supreme Court in the decision reported in PRAVINDER SINGH v. RENU GAUTAM AND OTHERS[5] and held that the decision of the Privy Council 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. The Supreme Court in the decision reported in GANGABAI v. CHHABUBAI[6] and ISWAR DASS JAIN v. SOHAN LAL[7] 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 Supreme Court further laid down that the bar arises only when the document is

[4] AIR 1936 PRIVY COUNCIL, 70
[5] 2004 (4) SCC 794
[6] AIR 1982 S.C., 20
[7] 2000 (1) SCC 434

relied upon and its terms are sought to be varied and contradicted and that 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. In the decision of Gangabai's case (referred 6 supra), the Supreme Court observed as under:-

> "The bar imposed by sub-sec. (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For the purpose of oral evidence is admissible to show that the 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."

20. A Division Bench of Kerala High Court in a decision reported in K.BHASKARAN NAIR v. HABEEN MOHAMMED AND OTHERS[8] after referring to the observations of the Privy Council in the decision referred to supra held that it can be shown that actually the transaction was intended as a loan transaction and not an agreement of sale as Ex.A.1

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[8] AIR 2002 Kerala 308

appears to be. What is noticed is that the facts before the Division Bench of Kerala High Court are strikingly similar to the facts of the case in hand for in the case before the Division Bench of Kerala High Court there was an agreement of sale – Ex.A.1 and the defendant denied that he intended to sell the property. The contention that was put forward was that the defendant was in dire need of money, that the defendant approached the plaintiff to give a loan which the plaintiff agreed to give if certain documents were executed, that the defendant were asked to sign on stamp paper and that he signed on the stamp paper.

21. The evidence on these aspects pleaded by the defendant were taken into consideration and the Division Bench of Kerala High Court refused to grant the relief of specific performance and while doing so reliance was also placed on the decision of the Supreme Court reported in A.C.ARULAPPAN v. SMT. AHALYA NAIK[9] wherein it was observed as under:-

> "The jurisdiction to decree specific relief is discretionary and the Court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant sp relief, the Court need not grant the order for specific relief, but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20 (2) of the Specific Relief Act, 1963 as to under what circumstances the Court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of

[9] AIR 2001 S.C., 2783

agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting as decree to the plaintiff."

22. Following the above observation of the Supreme Court and also the Privy Council, what is now required to be seen is as to whether the defendant could prove that the agreement – Ex.A1 which is on the face of it an agreement to sell the schedule property never intended to be an agreement of sale but was only executed under compelling circumstances since he was in dire need of money to perform the marriages of his two daughters for which purpose he borrowed the amount and as directed by the plaintiff, he executed Ex.A.1 only as a security for the due discharge of debt which he contracted in the year 1996, just of fortnight prior to performing the marriage of his second daughter on 24.08.1996.

23. In his plaint, the plaintiff has averred the aspects, which are referred to herein above, and the defendant in his written statement reiterated his contention that Ex.A.1 – the agreement of sale is only a sham and nominal document, which cannot be enforced. In the written statement, it is admitted that on 10.08.1996, the plaintiff advanced Rs.1,50,000/- and it was agreed that the said amount should be discharged within a period of eighteen months and the letters dated 28.08.1997, 22.02.1998 and 01.05.1998, which are marked as Exs.B.4 to B.7 clearly demonstrate that the plaintiff wanted to get back the amount lent by him but never sought for execution of the sale deed. The defendant in his written statement denied having received net cash of Rs.3,40,000/- on the date of agreement as recited therein. Clause (5) of the agreement of sale-Ex.A.1 postulates that the sale deed will be executed within a period of eighteen months there from and the

defendant shall handover vacant possession of the schedule mentioned property along with the original documents to the plaintiff on the date of registration.

24. More than the oral evidence, the documentary evidence that is produced by the defendant tilts the scales in his favour and substantiates his contentions as set out in the written statement. The vital piece of evidence is in the shape of letter admittedly written by the plaintiff to the defendant prior to issuing the legal notice – Ex.A.2 on 16.03.1998.

25. Ex.B.4 is the hand written inland letter addressed by the plaintiff to the defendant on 28.08.1997. The agreement is dated 17.08.1996 and this letter is addressed nearly an year thereafter. In the said letter, after exchanging the pleasantries and discussing about other issues, there is a reference to the transaction in hand which clearly shows that the suit document – Ex.A.1 was intended to be only a security as contended by the defendant but not an agreement of sale as alleged by the plaintiff. The plaintiff in the said letter written as under in Telugu language:-

> "ముఖ్యముగా వ్రాయునది, నా బాకీ తాలూకా తీర్మానము గడువు అయిపోయినది. నీవు ఎప్పటిలోగా తీర్మానము చేయగలవు. లేకపోతే మనము అనుకున్న ప్రకారము స్వాధీనము వెంటనే చేయవలసి యున్నది లేదా అద్దె పంపించే ఏర్పాటు చేయవలసి యున్నది. వీలైనంత వరకు నా పైకము నాకు తిరిగి ఇప్పించే ఏర్పాటు చేస్తావని ఆశిస్తాను. అశ్రద్ధ చేయక అన్ని వివరములతో వెంటనే నాకు ఉత్తరము వ్రాయగోర్తాను."

If what is extracted above is translated in English, it will read as under:-

"The important thing to be written is about the discharging the debt for which time stipulated expired. By what date you are going to clear the debt. Otherwise, as agreed by us, you (the defendant) must immediately handover the possession to me (the plaintiff). Otherwise, you must arrange to send the rents. As far as possible, I hope that you will arrange for refund of the amount lent by me. Do not neglect. I request you to reply immediately giving all the details."

26. From the above contents of the letter, dated 28.08.1997, addressed by the plaintiff to the defendant what is manifest is that the agreement between the parties was to refund the amount by the stipulated date or else, the possession of the house should be handed over to the plaintiff as per the terms of the agreement-Ex.A.1. The plaintiff also requested in the said letter to the defendant either to handover the possession of the house or send the rents. If really, Ex.A.1 was intended to be an agreement of sale, the plaintiff would not have written such a letter a year after Ex.A.1 wherein the time for completion of the contract was stipulated as 18 months. The other crucial letter is Ex.B.6 which is addressed by the plaintiff to the defendant on 01.05.1998. After exchanging the usual courtesies and the personal issues, the plaintiff has written as under in Telugu:-

"ముఖ్యముగా వ్రాయునది, నీవు వెంటనే అన్న మాట ప్రకారము పైకము పంపించగలవు. నీవు అన్న మాటలకు చేతలకు చాలా తేడా వచ్చింది. మన మధ్య వున్నా సత్సంబంధాలను కాపాడ గలవు. పెద్ద, పెద్ద మాటలతో ఉత్తరము వ్రాశావు. స్వయంగా వచ్చి మాట్లాడుతానన్నావు. కానీ జరుగలేదు. చాలా

అశ్రద్ధ చేస్తున్నట్లుగా భావించవలసి వస్తుంది. కనుక ఈ ఉత్తరము అందిన వెంటనే అన్ని వివరములతో జవాబు వ్రాస్తూ, నీవు స్వయంగా వచ్చి అన్న మాట ప్రకారము పైకము ఇవ్వగలవు. చాలా ఇబ్బంది పడవలసి వస్తున్నది. ఇప్పటికే చాలా ఆలస్యమైంది. ఓపిక నశిస్తోంది. నన్ను ఇబ్బంది పెట్టుట నీకు మంచిది కాదు."

If the above contents are translated in English, it reads as under:-

"That as per our agreement, you must immediately send my money. There is lot of difference between your (defendant) words and actions. You must try to protect the good relationship in between us. You have written a letter with big promises. You promised to come and discuss the issue in person but you did not come. I have to presume that you are exhibiting maximum negligence. Therefore, immediately on receipt of this letter, you must reply with full details. As assured, you must come and refund the amount otherwise there is going to be lot of difficulties. Already it is considerably delayed and I am loosing patience. It is not good on your part to trouble me."

27. From the perusal of the above letter also it is manifest that the plaintiff had been repeatedly insisting the defendant to come forward and refund the amount and not to delay it further. This letter is dated 22.02.1998 and the period of eighteen months stipulated in agreement-Ex.A.1 expired by 17.02.1998. Therefore, within five days thereafter, this letter is addressed by the plaintiff to the defendant and significantly, the defendant was not called upon in the said letter to come forward and execute the sale deed as agreed but only to refund the amount. The

plaintiff as P.W.1 did not deny that Exs.B.4 and B.6 are the letters written by him to the defendant. A feeble attempt is made by the plaintiff to explain the contents of the two letters by saying that they are with reference to other loan transactions. However, if the letters are carefully read, this do not appear to be correct. As already stated, there is a specific reference to the fact that if the amount is not paid as agreed, the defendant shall either handover possession of the house to the plaintiff or pay the rents there for.

28. The defendant on his part fairly concedes that he borrowed substantial amounts firstly from the son of the plaintiff and subsequently from the plaintiff at the time of performing the marriages of his two daughters. The explanation of the defendant is that he was compelled to execute Ex.A.1 as an agreement of sale and he had no other option except to accept the demand of the plaintiff since the marriage of his second daughter was scheduled just a fortnight away from the date of agreement-Ex.A.1. However, while the defendant admits having received the two Demand Drafts worth Rs.1,50,000/- on the date of agreement viz., 17.08.1996, he denies having received the cash of Rs.3,40,000/- as mentioned in Ex.A.1. However, when it came to the evidence, the defendant went on to exhibit his fairness by conceding that over and above a sum of Rs.1,50,000/-, which he received by way of Demand Drafts, he is also liable to pay the plaintiff another sum of Rs.1,84,400/-. The defendant also admits that he took Rs.10,000/-; Rs.1,00,000/-; and Rs.77,400/- on 28.03.1994, 13.02.1995 and 26.03.1995. If this amount is added to the sum of Rs.1,84,000/- which the defendant admits to have received, it comes to about Rs.3,60,000/-. Therefore, the claim of the

plaintiff that in addition to the two Demand Drafts amounting to Rs.1,50,000/-, the defendant was further liable to pay about Rs.3,40,000/- stands established. If the oral evidence of the defendant as DW.1 and the cross-examination made on his behalf to the plaintiff, examined as P.W.1, is carefully perused, the fact that emerges is that the defendant received Rs.4,90,000/- from the plaintiff and the said fact is recorded in the agreement-Ex.A.1.

29. P.W.1 in his evidence gave the details of the amounts paid by him to the defendant on different dates. He admits the letters which are referred to above having been written by him. P.W.1 further admits that Ex.B.1 is the declaration executed by the defendant in favour of his son Srinivasa Rao. Ex.B.1 is a hand written undertaking written by the defendant on a stamp paper worth Rs.100/- and the defendant acknowledges having taken loan from the son of the plaintiff and he also mentions that he is handing over the original sale deed, site plan and approved house plan to the son of the plaintiff and agreed that he will pay the hand loan and take back the documents. The defendant further undertook in the said undertaking that he will not mortgage, sell or transfer the said house, until the loan taken from the son of the plaintiff is cleared. This undertaking is dated 13.02.1995. It is not in controversy that the defendant has any house other than the house which is subject matter of the agreement of sale. From this undertaking of February, 1995, what could be gathered is that the defendant has borrowed some amount, which however is not mentioned in Ex.B.1 from the son of the plaintiff and by way of security, deposited the original title deeds, site plan and building permission to the son of the plaintiff. If this conduct is

juxtaposed with the subsequent agreement of sale, one can easily infer that the defendant borrowed amounts from the plaintiff and his son and firstly he deposited the title deeds with the son of the plaintiff in 1995 and subsequently when further loan was taken from the plaintiff, the agreement – Ex.A.1 was executed on 17.08.1996. Therefore, it can safely be concluded that Ex.A.1 is not the agreement to sell the house but was only executed by way of security for the discharge of the debt which the plaintiff had been demanding from the defendant as borne out from the letters-Exs.B.4 and B.6 referred to above.

30. One more crucial circumstance which shows that it was not an agreement of sale is the fact that according to the plaintiff, the total sale consideration of the house was determined at Rs.4,90,000/-. The entire consideration according to the plaintiff was paid on the date of agreement – Ex.A.1 i.e., 17.08.1996. The amount of Rs.25,000/- was also spent for purchase of the stamp papers on which Ex.A.1 is engrossed and it was also duly registered. Therefore, virtually nothing remains on the date of Ex.A.1 so as to prevent the plaintiff from obtaining an outright sale deed on the said date instead of an agreement of sale, that too by giving time of eighteen months there from for completing the transaction. When entire amount is paid and considerable amount has been spent which is required for registration of a document on 17.08.1996 itself, there was no need for the parties to enter into an agreement of sale and agree to wait for eighteen months for completing the sale transaction if really the parties intended to sell and purchase the house. The plaintiff would not have given a long rope to the defendant to execute the sale deed by giving him eighteen months time when the defendant has received the

entire consideration for the property and the amount required for registration viz., Rs.25,000/- was already spent on the date of Ex.A.1 itself inasmuch as the agreement-Ex.A.1 is executed on stamp papers worth Rs.25,000/- and that too it was a registered document. Virtually, what is all that is required to be done for concluding a sale transaction has been concluded on 17.08.1996 that is the date on which Ex.A.1 was executed. No prudent man will wait for eighteen months having done what is all that is required to complete the transaction if really it was intended to be a sale transaction. It is not as though that the plaintiff was still liable to pay any amount to the defendant towards sale consideration or that he was not having funds for meeting the expenses for registration since even amount required for registration has been spent on the date of agreement Ex.A.1 itself when it came to be registered. The contention of the plaintiff that the defendant wanted one year time to handover possession of the house cannot be taken as a valid ground for the parties to defer execution of the sale deed for eighteen months if that was the real intention of the parties.

31. According to P.W.1, the reference to refund of money in Exs.B.4 and B.6 is to the amount of Rs.60,000/- which was lent by P.W.1 to the defendant prior to the present transaction. However, he admits that in the said letters, there is no mention of that amount nor is there any mention about it in the plaint which he filed in the present suit. So also he admits that there is no reference about this amount of Rs.60,000/- in the legal notice, which he issued. Similarly P.W.1 admits that prior to entering into the transaction for purchasing an immovable asset worth nearly Rs.5 lakhs, he has not obtained any permission from the employer

as is required since he is a Public Servant working in Panchayat Raj Department.

32. As against the testimony of P.W.1, there is evidence of the defendant, who is examined as DW.1 and reiterated his stand which he has consistently taken in the suit. DW.1 admits his taking loan of Rs.1,87,400/- from the son of the plaintiff and executing Ex.B.1 and depositing the title deeds of the suit schedule property. He asserts that he never intended to sell the suit schedule property and that Ex.A.1 was executed by him by way of security for repayment of the loan amount contracted by him from the plaintiff and his son. DW.1 further admits that he agreed to repay the loan amount together with interest thereon at 36% per annum and that the loan was to be paid within eighteen months from the date of Ex.A.1. He also admits that subsequent to the agreement, the plaintiff wrote letters to him (Exs.B.4 to B.7) requiring him to discharge the debt. It is also admitted by DW.1 that while he received Rs.1,50,000/- through two Demand Drafts, he also received a net cash of Rs.1,84,400/- approximately from the plaintiff. Even though DW.1 denies that he received net cash of Rs.3,40,000/- on the date of Ex.A.1, the denial appears to be incorrect for the reason that he himself admits having received Rs.1,84,400/- from the plaintiff in addition to the Demand Drafts of Rs.1,50,000/- and also admits that he borrowed approximately Rs.1,77,400/- from the son of the plaintiff.

33. The total comes to Rs.5,21,800/- and it may be recalled that the total consideration for the property is mentioned as Rs.4,90,000/- and the stamp papers worth Rs.25,000/- upon which the agreement – Ex.A.1 is engrossed has been purchased by the defendant. The amount required

for registration of a document was actually required to be met by the plaintiff. DW.1 admits that he purchased stamp papers and incurred the expenditure of Rs.40,000/- from out of the amount received by him from the plaintiff for registering the agreement of sale. He also admits that the stamp papers on which Ex.A.1 is written was obtained in the name of the plaintiff.

34. The defendant in his cross-examination admits that he took a loan of Rs.1,77,400/- from the son of the plaintiff at the time of marriage of his first daughter and he gave a declaration – Ex.B.1 together with blank promissory notes to the son of the plaintiff. He also admits that the son of the plaintiff issued a legal notice demanding to return a sum of Rs.2,50,000/- due on promissory notes dated 13.02.1995 and he admits that he did not discharge the said debt till date. Similarly, he also admits that he did not discharge the debt which he took from the plaintiff at the time of marriage of his second daughter. DW.1 further admits that the plaintiff filed O.S.No.64 of 2000 on the file of the Additional Junior Civil Judge, Machilipatnam, based on a promissory note dated 30.03.1997.

35. The cumulative effect of the foregoing discussion and the perusal of the oral and documentary evidence on record leaves no room for doubt that the defendant executed Ex.A.1 on 17.08.1996 and got it registered and ostensibly the said document is agreement of sale. However, the intention of the parties was not to enter into agreement of sale but the transaction was otherwise. The plaintiff and his son lent amounts to an extent of about Rs.5 lakhs to the defendant at the time of his performing the marriages of his two daughters in the year 1994 and 1996. The evidence and the circumstances clearly show that in view of the

precarious condition in which the defendant was placed just before performing the marriage of his second daughter, he had to execute Ex.A.1 as demanded by the plaintiff but the real intention was that the said document was intended to be a security for the loan which the defendant admittedly took from the plaintiff and this fact is borne out from the letters which the plaintiff addressed to the defendant before instituting the present suit. It is also borne out from the record that the amount so borrowed by the defendant from the plaintiff has not been discharged as yet. The defendant has no house other than the suit schedule property and he had been in possession thereof. During the pendency of the appeal, however, the defendant died and his legal representatives have come on record as appellants in the appeal. The defendant borrowed the amounts agreeing to pay interest @ 36% per annum. The oral and documentary evidence proves beyond doubt that the recitals in Ex.A.1 were never intended to be acted upon and only by way of security for the loan amount, the document came to be executed. For the reasons discussed herein above, such oral and documentary evidence which is contrary to the recitals of the registered instrument can be looked into. They clearly show that the document was not intended to create any sale of the property but was a security for the loan amount.

36. The learned trial Judge has not taken into consideration the above aspects and has erroneously decreed the suit for specific performance.

37, Taking into consideration the totality of the facts and circumstances, I am of the opinion that the plaintiff can be granted the relief of return of the amount which he admittedly lent to the defendant together with a reasonable interest thereon i.e., at 12% per annum. The defendant having borrowed the amount in 1996 acknowledges the same and also admits that the said amount has not been paid. Therefore, in the interest of justice, I feel that the defendant can be directed to pay a sum of Rs.15 lakhs and this amount is arrived at keeping in view the fact that nearly Rs.5 lakhs was due by the defendant to the plaintiff having taken as long back as in the year 1996 and 20 years have elapsed in between and even if reasonable interest is calculated, the defendant can be directed to pay Rs.15 lakhs to the plaintiff.

38. In the result, the appeal is allowed. The judgment and decree is set aside in so far as granting of decree for specific performance. However, the suit is decreed directing defendant to pay the plaintiff a sum of Rs.15 lakhs (Rupees fifteen lakh only) together with interest @ 12% per annum thereon from today onwards. The said amount with interest shall be paid within three months from today.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: 07.03.2017
Dsr/Smr