

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
Reserved on : 10.10.2018  
Pronounced on : 30.11.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM  
S.A.No.1214 of 2001

Venu ... Appellant/plaintiff

Vs.

1. Panjalai (deceased)  
2. Natesan  
3. Chandrasekar  
4. Ramesh Babu  
5. Velmurugan

... Respondents/Defendants

(RR3 to RR5 brought on record as LRs of the deceased R1 vide order of court dated 14/03/2018 made in CMP.No.1063 to 1065/2018 in SA.No.1214/2001)

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 29.10.1999 passed by the Additional District Judge, Villupuram in A.S.No.174 of 1997 confirming the Judgment and Decree of the Court of the Principal District Munsif, Ulundurpet in O.S.No.57 of 1996 dated 21.02.1997.

For Appellant : Mr.V. Raghavachari

For Respondents : Mr.T. Gandhi for R1 and R2.

#### J U D G M E N T

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Additional District Judge, Villupuram in A.S.No.174 of 1997 dated 29.10.1999 confirming the judgment and decree passed by the District Munsif, Ulundurpet in O.S.No.57 of 1996 dated 21.02.1997.

2. The appellant herein has filed a suit in O.S.No.476 of 1994 on the file of the Sub-Judge, Villupuram to direct the defendants 1 and 2 to pay a sum of Rs.23,722/- and interest for the principal amount of Rs.17,440/- at the rate of 12% per annum from the date of the decree till the date of realisation and to create charge over the suit property for prompt payment of the aforesaid amount and for costs. The said suit was subsequently transferred to the

Principal District Munsif, Ulundurpet, and numbered as O.S.No.57 of 1996. The learned Principal District Munsif, by the judgment dated 21.02.1997, dismissed the said suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.137 of 1997 on the file of the Sub-Judge, Villupuram. Subsequently, the said appeal was transferred to the Additional District Judge, Villupuram and numbered as A.S.No.174 of 1997. The learned Additional District Judge, Villupuram, by the Judgment dated 29.10.1990 dismissed the said appeal without costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal. During pendency of the second appeal, the first defendant died and hence her legal representatives have been impleaded as respondents 3 to 5. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

a) The suit property originally belonged to the plaintiff. The second defendant is the maternal uncle of the plaintiff. The first plaintiff is the wife of the second defendant. Since the plaintiff was working as conductor in Thanthai Periyar Transport Corporation at Cuddalore, and the defendants are residing at Ulundurpet, the defendants requested the plaintiff to sell the suit property in favour of the first defendant and in turn, they will make arrangement for purchasing 5 cents of house site at Cuddalore.

b) Though the market value of the suit property was Rs.40,000/-, taking into consideration the relationship and the promise made by the defendants that they will make arrangement for purchasing property at Cuddalore, the plaintiff had executed a sale deed in favour of the first defendant in respect of the suit property on 13.06.1990 by mentioning the guideline value of Rs.17,440/-. But actually the defendants have not paid any amount, because they have promised to purchase house site in the name of the plaintiff at Cuddalore. Subsequently, the defendants did not come forward to fulfill their promise and also refused to pay the sale consideration to the plaintiff. After repeated demands made by the plaintiff, on 05.09.1991, the first defendant had sent a letter to the plaintiff stating that they cannot pay a sum of Rs.40,000/- as demanded by the plaintiff, however she had stated that she will pay Rs.20,000/- only. On the same day, the first defendant had sent letters with the same averments to the plaintiff's brother viz., Tamilmani and plaintiff's mother Periyayee. Further on 16.09.1991, at the instance of the first

defendant, her son Sekar had sent the same kind of letter. The plaintiff had sent a lawyer's notice dated 20.12.1991 to the first defendant demanding to pay a sum of Rs.40,000/- (market value of the suit property). The first defendant had received the said notice on 23.12.1991 but she did not send any reply. Hence, the plaintiff was constrained to file the above suit. The plaintiff restricted his claim for Rs.17,440/- with interest from the date of execution of the sale deed at 12% per annum. Further he asked charge over the suit property under Section 55 (4) (b) of the Transfer of Property Act.

4. The averments made in the written statement filed by the second defendant and adopted by the first defendant are, in brief, as follows:

The allegation that the defendants gave a promise that they will make an arrangement for purchasing 5 cents of house site in the name of the plaintiff at Cuddalore and in pursuance of the said promise, the plaintiff had executed a sale deed dated 13.06.1990 in favour of the first defendant in respect of the suit property are all false. It is also false to state that the market value of the suit property was Rs.40,000/-, but in the sale deed only, the guideline value of Rs.17,440/- was mentioned. It is also false to state that the plaintiff had executed a sale deed in favour of the first defendant without receiving any sale consideration. In the sale deed itself, it is clearly mentioned that the plaintiff had received the sale consideration and only thereafter, he had signed in the said document. It is false to state that on 05.09.1991, the first defendant had sent a letter to the plaintiff stating that she will pay a sum of Rs.20,000/- and it is also false to state that on the same day itself, she had sent letters to the plaintiff's brother and mother. It is also false to state that on 16.09.1991, the first defendant had sent a letter through her son Sekar confirming the statement of earlier letters. The alleged letters are not true and genuine, but are concocted and manipulated to base unlawful claim. After receipt of the lawyer's notice on 20.12.1991, the defendants met the plaintiff and questioned about the same. At that time, the plaintiff had stated that only as a measure to silent them in the family affairs relating to his illicit intimacy with one Indirani who is his sister-in-law and promised that he would not precipitate the matter. On the advice of the panchayatars, the defendants did not send reply. The plaintiff is not entitled to have a charge over the suit property as there was no unpaid purchase money. Already the entire sale consideration was paid. The second defendant is not a necessary party to the suit. He was not a party to the sale

transaction. Hence, the suit is bad for misjoinder of unnecessary party. The defendants are not liable to pay any interest. The suit is barred by limitation. Therefore, the defendants prayed to dismiss the above suit.

5. Based on the aforesaid averments, the learned Principal District Munsif Ulundurpet, has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1. He also examined three more witnesses as P.W.2 to P.W.4. He has marked Exs.A1 to A8 as exhibits on his side. On the side of the defendants, the second defendant was examined as DW1. He also examined one more witness as DW2. They have not marked any exhibits on their side.

6. The learned District Munsif, after considering the materials placed before him, found that the plaintiff has not pleaded in his plaint with regard to the execution of Ex.A8 and hence the said document was created only for the purpose of the case. He further found that in the sale deed dated 13.06.1990, the plaintiff has categorically admitted that he has received the sale consideration of Rs.17,440/- and hence, the plaintiff is not entitled to ask the suit amount from the defendants. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.137 of 1997 on the file of the Sub-Court, Villupuram and the same has been subsequently transferred to the Additional District Judge, Villupuram and numbered as A.S.No.174 of 1997. The learned Additional District Judge, Villupuram by the judgment dated 29.09.1999 has dismissed the said appeal confirming the judgment and decree passed by the trial court. However, the learned Additional District Judge, Villupuram has not ordered for costs. Feeling aggrieved, the plaintiff has filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

1. Whether the courts below are right in holding that Section 91 and 92 of the Evidence Act is a bar for recovery of the unpaid purchase money?

2. Whether the courts below are right in not drawing adverse inference as against the 1<sup>st</sup> defendant inasmuch as he had failed to subject herself to cross examination?

3. Whether the courts below ought not to have applied the dictum of the Madras High Court in 2000 (i) L.W. 96?

4. Whether the courts below have not ignored the evidence of PW2 to PW4 who are independent witnesses and spoken categorically as regards the lack of consideration and Panchayat held thereafter?

5. Whether the courts below have not failed to appreciate the proviso to Sec.92 of the Evidence Act which permits proof including the want of failure of consideration?''

8. Heard Mr.V. Raghavachari, learned counsel for the appellant and Mr.T. Gandhi, learned counsel for the respondents 1 and 2.

9. Question Nos.1 to 5:

The learned counsel for the appellant/plaintiff has submitted that Sections 91 and 92 of the Indian Evidence Act are interdependent. He further submitted that the bar under Section 92 of the Indian Evidence Act would operate only if the appellant/plaintiff attempt to rely upon Ex.A1 sale deed and simultaneously sought to vary and contradict its terms. According to the plaintiff, that was the parties had a different contract altogether i.e., the defendants gave a promise that they will make an arrangement for purchasing 5 cents of vacant site at Cuddalore and taking into consideration of the said promise, the plaintiff had executed Ex.A1 sale deed in favour of the first defendant without receiving any sale consideration and therefore, the appellant/plaintiff was certainly not prohibited under Section 92 of the Indian Evidence Act. He further submitted that in the plaint itself, the plaintiff has clearly averred that on 05.09.1991, the first defendant has sent a letter to the plaintiff stating that she will pay only Rs.20,000/- and on the same day, she also sent letters to the plaintiff's brother Tamilmani and mother Periyayee. He further submitted that on 16.09.1991, the first defendant has sent a letter through her son Sekar and in the said letter, also she has stated that she will pay only Rs.20,000/-, but the first defendant has not filed a written statement denying the aforesaid allegations, on the contrary, the second defendant has filed a written statement and adopted by the first defendant. He further submitted that the first defendant has not come forward to examine herself as witness before the trial court and hence adverse inference has to be drawn against her. He further submitted that after receipt of lawyer's notice, the first defendant did not send any reply and on that ground also, an adverse inference has to be drawn against her. He further submitted that Ex.A8 document came into existence only after filing of the suit and hence, the said fact was

not pleaded in the plaint, but the trial court has rejected the said document on the ground that there was no pleading in the plaint and the said finding is against the fact. He further submitted that the courts below failed to consider that the plaintiff has proved the fact that though in Ex.A1 sale deed, it is mentioned that the sale consideration of Rs.17,440/- was paid, actually no such payment was made. He further submitted that even after filing of the suit, based on the complaint given by the plaintiff before the Deputy Superintendent of Police, the second defendant has executed Ex.A8 acknowledging the fact that no amount was paid for Ex.A1 sale deed, but the courts below erred in rejecting the said document. He further submitted that since the purchase money was due, as per Section 55 (4) (b) of the Transfer of Property Act, the plaintiff is entitled for charge over the suit property for prompt payment of the aforesaid amount and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and decree the suit as prayed for.

10. Per contra, the learned counsel for the respondents submitted that the plaintiff being a party to the document i.e., Ex.A1 sale deed, he is not entitled to adduce oral evidence against the terms of the said document. He further submitted that in Ex.A1, it is clearly stated that the value of the suit property is only Rs.17,440/- and the said amount was paid to the plaintiff and only after receipt of the said amount, the plaintiff has signed in the said document and taking into consideration of the aforesaid facts, the courts below have rightly rejected the claim of the plaintiff. He further submitted that in Ex.A2 to A7, neither the first defendant nor her son signed and therefore, no reliance can be placed upon the said letters. He further submitted that since the first defendant has not signed in the aforesaid letters, no adverse inference can be drawn on the ground that the first defendant did not enter into the witness box. He further submitted that for not sending reply to the lawyer's notice, defendants have clearly explained in their written statement and also in the oral evidence adduced by the DW1. He further submitted that the plaintiff was having illegal contact with one Indirani and when the same was questioned by the defendants, the plaintiff has sent a lawyer's notice with false averments and after receipt of the said notice, the defendants have questioned the same and at that time, the plaintiff has stated that only for diverting the issue, he has issued such a notice and hence, the same may be ignored and considering the said assurance, the defendants did not send any reply and hence, no adverse

inference can be drawn against the defendants for not sending reply. He further submitted that only to extract money, the plaintiff has filed the above suit and therefore, he prayed to dismiss the above second appeal.

11. In support of his contentions, he relied upon the following decisions:

1. Parvinder Singh Vs. Renu Gautam and Others (2004) (4) SCC 794
2. Kamireddi Sattiaraju and another vs. Kandamuri Boolaeswari 2007 (1) LW 309

12. It is an admitted fact that the second defendant is the maternal uncle of the plaintiff and the first defendant is the wife of the second defendant. It is also an admitted fact that the suit property originally belonged to the plaintiff and he sold the same to the first defendant under Ex.A1 sale deed dated 13.06.1990. It is also an admitted fact that the suit property is the vacant site admeasuring 8 cents situated at Ulundurpet.

13. According to the plaintiff, since he was working as conductor in the Thanthai Periyar Transport Corporation at Cuddalore and the defendants are residents of Ulundurpet, and they are close relatives, the defendants requested the plaintiffs to execute the sale deed in respect of the suit property in favour of the first defendant and in turn, the defendants would purchase 5 cents of vacant site in the name of the plaintiff at Cuddalore and accordingly, he executed Ex.A1 sale deed dated 13.06.1990 in favour of the first defendant in respect of the suit property without receiving any amount. His further case is that on the date of execution of Ex.A1, the market value of the suit property was Rs.40,000/- but only the guideline value i.e., Rs.17,440/- has been mentioned as sale consideration in Ex.A1. His further case is that after execution of Ex.A1, he made several requests to fulfill their promise i.e., to purchase 5 cents of vacant site at Cuddalore in the name of the plaintiff, but they failed to do so and hence, he made demands to pay market value of the suit property i.e., Rs.40,000/- but the defendants refused to pay the said amount also and on the contrary, the first defendant has sent letters stating that she will pay only Rs.20,000/- .

14. In order to substantiate his case, the plaintiff examined himself as PW1 and also examined three more witnesses as PW2 to PW4. He also produced the inland letters said to have been sent by the first defendant to him, his brother Tamilmani and his mother Periyayee and marked as Ex.A2 to Ex.A5. Ex.A2 is the inland letter dated

05.09.1991 said to have been sent by the first defendant to the plaintiff's brother Tamilmani. The said Tamilmani was examined as PW2. PW2 has stated in his evidence that he has received Ex.A2 letter dated 05.09.1991 and the same has been written by the first defendant in her own handwriting. He further stated that in the said letter, the first defendant has stated that she will pay Rs.20,000/- and made a request to come and receive the said amount. He also stated that he signed as one of the witnesses in Ex.A1 sale deed and in the said document, only the guideline value of Rs.17,440/- was mentioned and actually, no amount was paid to the plaintiff towards execution of the said document.

15. Ex.A3 is another inland letter said to have been sent by the first defendant dated 05.09.1991 to the plaintiff's mother Periyayee. Ex.A4 is also an inland letter said to have been sent by the first defendant on 05.09.1991 to the plaintiff. In all the aforesaid letters, it is clearly stated that the first defendant is willing to pay Rs.20,000/- and also requested the plaintiff to come and collect the said amount. In Ex.A4, the first defendant has signed in English. Ex.A5 dated 16.09.1995 is another inland letter said to have been sent by the defendant's son viz., N.C.Sekar on behalf of the first defendant. In the said letter, it is stated that the plaintiff has not sent any reply for the earlier letter. Further, it is stated that the plaintiff did not come for collecting the amount. Further, it is stated that the said amount has been made ready by pledging the jewels in the bank. Hence, he made a request that the plaintiff should come and receive the amount immediately. To deny the averments made in the aforesaid inland letters, the first defendant did not enter into the witness box. Only the second defendant examined himself as DW1. He has not chosen to examine his wife (first defendant) and also his son viz., Sekar to deny the execution of inland letters viz., Ex.A2 to Ex.A5.

16. At this juncture, it would be relevant to refer to the decision in Eswar Bai C. Patel Vs. Harihar Bihara and another, 2000 -1-LW-178 SCC wherein the Hon'ble Supreme Court in paragraph Nos.15 has observed as follows:

"15. Admittedly defendant No.1 had an account in the Central Bank of India Limited, Sambalpur Branch which his father, namely, respondent No. 2, was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by respondent No. 2. It has been given out in the statement of respondent No. 2 that when the appellant had approached him for a loan of Rs.

7,000/-, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of respondent No.1 and it was on his suggestion that the respondent No. 2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness box to make a statement on oath denying the statement of defendant (respondent) No. 2 that it was at his instance that respondent No. 2 had advanced the amount of Rs. 7,000 to the appellant by issuing a cheque on the account of defendant (respondent) No. 1. Having not entered into the witness box and having not presented himself for cross examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act.

17. In this case also, as already pointed out that the first defendant did not enter into the witness box and had not made any statement on oath in support of the pleadings made in the written statement. Likewise, the defendant's son viz., N.C.Sekar was also not examined, to deny the allegation that he has sent Ex.A5 inland letter. The first defendant and her son not subjected themselves for cross-examination and therefore, applying the principles as stated in the aforesaid decision, an adverse inference has to be drawn against the first defendant.

18. It is also to be pointed out that before filing of the suit, the plaintiff has sent a lawyer's notice under Ex.A6, dated 20.12.1991 to the first defendant. The first defendant has received the said notice on 23.12.1991 and the postal acknowledgment has been marked as Ex.A7, but she has not chosen to send any reply for the said notice. In the written statement filed by the second defendant and adopted by the first defendant, it is stated that after receipt of the said notice, the defendants met the plaintiff and questioned about the same and at that time, he has stated that only as a measure to silent them in the family affair relating to his illegal intimacy with Indirani who was the sister-in-law he had issued lawyer's notice. It is also stated that he had promised that he would not precipitate the same. Further, it is stated that on the advice of panchayatdars, the defendants did not send a reply. The second defendant while examining himself as

DW1 has stated that in their house, the plaintiff was staying and going to job and at that time, the plaintiff developed illegal intimacy with his brother's wife's sister viz., Indirani and hence, the plaintiff was warned by the defendants and also sent him out from the house and hence, the plaintiff has sent such a lawyer's notice and after receipt of the said notice, they have called the plaintiff and his brother and questioned the same and at that time, the plaintiff has stated that since the defendants sent him out from their house, he has sent such a notice and if he is again admitted in the house, he will not file any suit and also he will not repeat the illegal contact with the said Indirani and considering his words, he was again admitted in their house and hence they did not send any reply, but subsequently, the plaintiff has continued the said illegal contact and hence, he was again sent out and thereafter, immediately the plaintiff has filed the above suit. It is to be pointed out that in the written statement, the defendants have not stated that the plaintiff was staying in their house and since he was having illegal intimacy with one Indirani, they have sent him out. Further they have not stated in the written statement that after receipt of the lawyer's notice, they called the plaintiff and his brother and questioned about the same. On the contrary, they have stated in the written statement that after the receipt of lawyer's notice, they met the plaintiff and questioned about the same and at that time, he has stated that only as a measure to silent them in the family affair relating to illegal intimacy with Indirani who was the sister-in-law, he had promised that he would not precipitate the same. Further, they have stated that only on the advice of the panchayatdars, they did not send the reply, but the said fact was not stated in the evidence. Therefore, the contention of DW1 (second defendant) that after the receipt of the lawyer's notice, they have called the plaintiff and his brother and questioned about the same and at that time, the plaintiff has stated that if he was again admitted in their house, he will not file any suit and also he will not repeat the same illegal activities, cannot be accepted.

19. PW1 has stated in his evidence that after filing of the suit, a panchayat was conducted and in the said panchayat, the second defendant has admitted that in lieu of the suit property, he would purchase the property at Cuddalore in the name of the plaintiff. He further deposed that since they did not purchase the property at Cuddalore, he agreed to pay Rs.15,000/- and to that effect, a Muchalika was executed. The said Muchalika was marked as Ex.A8. To substantiate the said plea, the plaintiff

examined PW3 and PW4. PW3 and PW4 have deposed that a panchayat was convened on 31.07.1994 and as per the decision of the panchayat, the second defendant has agreed to pay a sum of Rs.15,000/- and to that effect, Ex.A8 was executed and in the said document, the second defendant has signed and they have signed as witnesses.

20. Though the second defendant, while examining himself as DW1, has denied the said document, he has not attributed any motive against PW3 and PW4 for giving evidence against him. According to the plaintiff, since the said document was executed after filing of the suit, the said fact was not stated in the plaint. A perusal of Ex.A8 shows that it was executed on 31.07.1994, whereas the plaint was presented before the Sub-Court, Villupuram on 13.06.1993 itself and therefore the reasons stated by the plaintiff that why the said fact was not mentioned in the plaint has to be accepted.

21. The next question which arises for consideration is whether the plaintiff is entitled to adduce oral evidence as no consideration passed for Ex.A1 sale deed. At this juncture, it would be relevant to refer to Section 92 of the Indian Evidence Act and the Proviso (1) attached to the said Section, which reads thus:-

"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"

22. A plain reading of the aforesaid provision of law would show that oral evidence can be adduced to prove the fact that consideration was not passed. Therefore, the plaintiff is entitled to adduce evidence to prove that for the Ex.A1 sale deed, no consideration passed.

23. In Parvinder Singh Vs. Renu Gautam and Others (supra), the Hon'ble Supreme Court in paragraph No.9 has observed as follows:

".....The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Vs. Vedathanni, AIR 1936 PC 70 is an authority for the proposition that 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....."

24. In Kamireddi Sattiaraju and another vs. Kandamuri Boolaeswari (supra), a Hon'ble Division Bench of this court in paragraph Nos.15 to 17 has observed 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."

25. From the aforesaid decisions, it is clear that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but only a sham document. The bar arises only when the document is relied upon simultaneously sought to vary and contradict its terms. The oral evidence is admissible to show that the documents executed was never intended to operate as an agreement, but with some other agreement altogether, not recorded in the document was entered into between the parties. Further, it is clear that an enquiry into the reality of transaction is not excluded merely by availability of writing reciting the transaction. 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. Therefore, the plaintiff is entitled to adduce oral evidence that what was mentioned in the Ex.A1 sale deed with regard to passing of consideration is not true.

26. In this case, as already pointed out that the PW1 and PW2 have categorically deposed that though it is mentioned in Ex.A1 that the sale consideration of Rs.17,440/- was passed, but actually the said amount was not paid by the defendants. The contents of Ex.A2 to Ex.A5 (inland letters) would clearly probabalise the case of the plaintiff that the consideration was not passed for Ex.A1. In the aforesaid letters, the first defendant categorically admitted that she will pay Rs.20,000/- and made a request to the plaintiff to come and collect the same. In Ex.A5, the defendant's son Sekar has admitted the contents made in the earlier letters. In order to deny the aforesaid allegations, the first defendant did not enter into the witness box. Further the defendants did not chose to examine their son Sekar to deny the fact that he has sent Ex.A5 letter. So adverse inference has to be drawn against the defendants. Further the first defendant has not sent reply to the lawyer's notice. All the aforesaid facts would probabalise the case of the plaintiff and therefore, this court is of the view that the defendants are bound to pay the said amount to the plaintiff. The courts below failed to consider the aforesaid facts in a proper perspective. The findings of the courts below are against the evidence adduced by the plaintiff.

27. As per Section 55 (4) (b) of the Transfer of Property Act, the plaintiff is entitled for charge over the suit property for the purchase money due to be paid by the defendants. For filing of the suit, in respect of the charge, the limitation prescribed under Article 62 of the Limitation Act is twelve years and therefore, the suit is not barred by limitation. Accordingly, the substantial questions of law are answered in favour of the appellant/plaintiff.

28. In the result, the second appeal is allowed. The judgments and decrees passed by the courts below are set aside. The suit filed by the plaintiff is decreed as prayed for with costs throughout.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

gv  
To

1. The Additional District Judge,  
Villupuram.
2. The Principal District Munsif,  
Ulundurpet.
3. The Section Officer,  
V.R.Section,  
High Court, Madras.

+1cc to Mr.T. Gandhi , Advocate SR.No. 82853

S.A.No.1214 of 2001

A.SK(26/03/2019)



WEB COPY