



A.S.No.293 of 2011 &
Cross Objection No.108 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2022

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE A.A.NAKKIRAN

**A.S.No.293 of 2011 &
Cross Objection No.108 of 2022
and**

M.P.No.1 of 2011 & C.M.P.No.7935 of 2019

A.S.No.293 of 2011 :

V.Radhakrishnan

... Appellant

Vs.

1.Seetha
2.Sharmila
3.N.Premkumar
4.N.Ashok Kumar

... Respondents

Prayer : Appeal Suit filed under Section 96 and Order 41 of Code of Civil Procedure against the judgment and decree dated 10.01.2011 in O.S.No.1 of 2010 on the file of the District Court of Nilgiris at Uthagamandalam.



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For Appellant : Mr.G.Govarthanan
for Mr.B.Ramamoorthy

For R2 : Mr.V.Krishnamoorthy

For R1, R3 & R4 : Mr.C.A.Diwakar

Cross Objection No.108 of 2022 :

Sharmila

... Cross-Objector

Vs.

1.V.Radhakrishnan
2.Seetha
3.N.Premkumar
4.N.Ashok Kumar

... Respondents

Prayer : Cross Objection filed under Order 41 Rule 22 of Code of Civil Procedure in A.S.No.293 of 2011 against that portion of the judgment and decree dated 10.01.2011 passed by the District Judge of Nilgiris, Udthagamandalam, in the specific performance suit in O.S.No.1 of 2010 directing the defendants to pay a sum of Rs.1,97,715.00 towards cost of the suit while ordering the defendants to refund Rs.50,000/- with interest to the plaintiff.

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For Cross-Objector : Mr.V.Krishnamoorthy
For R1 : Mr.G.Govarthanan
for Mr.B.Ramamoorthy
For R2 to R4 : Mr.C.A.Diwakar

COMMON JUDGMENT

(Judgment was delivered by **S.S. SUNDAR, J.**)

The plaintiff in the suit in O.S.No.1 of 2010 on the file of the District Court of Nilgiris at Udthagamandalam is the appellant in A.S.No.293 of 2011. The 1st defendant in the suit is the cross-objector in Cross Objection No.108 of 2022.

2.Brief facts that are necessary for the disposal of the appeal and the Cross Objection are as follows :

The appellant filed the suit in O.S.No.1 of 2010 for specific performance of an agreement of sale marked as Ex.A1 dated 05.03.2007. It is admitted by parties that the suit property originally belonged to Sri S.T.Nanjundan, the husband of the 1st defendant, who died on 18.09.2009.



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It is also admitted that the plaintiff/appellant was a tenant who was in possession and enjoyment of the suit property which is an independent 3-Bedroom Bungalow constructed in an extent of 30 cents of land located in a prime locality in Ooty. However, the plaintiff/appellant was paying monthly rent of Rs.5,000/- per month. It is the case of plaintiff/appellant that the said Sri S.T.Nanjundan agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.25,00,000/- and received a sum of Rs.50,000/- as advance and executed a sale agreement under Ex.A1 dated 05.03.2007. As per the agreement, it is stated that time for performance was three years from the date of agreement.

3.It is admitted that the plaintiff issued a letter to the 1st defendant immediately after the death of Sri S.T.Nanjundan, the husband of the 1st defendant. As per the said letter, the plaintiff/appellant called upon the 1st defendant to receive the balance consideration and execute the sale deed as per the agreement, her husband had executed earlier under Ex.A1. The plaintiff thereafter issued a notice on 06.11.2009 calling upon the defendants to execute the sale deed after receiving the balance of



consideration. Stating that the plaintiff was always ready and willing to perform his part of the contract, the suit came to be filed on 05.01.2010 for specific performance.

4.The suit was contested by the respondents/defendants mainly on the ground that the deceased Sri S.T.Nanjundan, the husband of the 1st defendant, never agreed nor had an intention to sell the suit property at any point of time and that the alleged sale agreement is only a loan transaction. It is further contended that the plaintiff was a tenant in the suit property under the said Sri S.T.Nanjundan. It is the specific case of the defendants that the said Sri S.T.Nanjundan, who was a cancer patient, approached the plaintiff for a loan of Rs.50,000/- to meet his urgent medical expenses and in the usual course of such loan transaction, the agreement was executed at the instance of the plaintiff/appellant. Therefore, the specific case of the defendants in the written statement is that the agreement was not executed with an intention to act upon as a sale transaction, but it was executed at the instigation of the plaintiff as a security for the loan transaction. In the written statement, it was also specifically contended by the defendants that



the value of the suit property was 10 times more than the amount mentioned in the agreement and that S.T.Nanjundan would never agree to sell such valuable property. It is also stated that the defendants initiated action for eviction of the plaintiff by filing a petition in R.C.O.P.No.10 of 2010 before the Rent Controller, Udthagamandalam, on the ground of willful default and owner's occupation. Though the defendants have succeeded in getting an order of eviction before the Rent Controller as well the Rent Control Appellate Authority, it is admitted before this Court that a revision petition is pending before this Court as against the concurrent findings of Rent Controller as well as the Appellate Authority while granting and confirming the order of eviction.

5.The trial Court, though did not frame specific issues with regard to several factual issues raised by the defendants, came to the conclusion that the plaintiff is not entitled to the relief of specific performance, accepting the case of the defendants that the suit agreement is a loan transaction. The trial Court further held that the relief of specific performance, which is an equitable relief, cannot be granted in favour of the plaintiff who has not



proved the genuineness of the transaction. Since the receipt of advance was not seriously disputed, the trial Court, while dismissing the suit for specific performance, granted relief for recovery of money in favour of the plaintiff/appellant for a sum of Rs.50,000/-.

6. Aggrieved by the judgment and decree of the trial Court, the plaintiff has preferred this appeal. Even though the defendants are not aggrieved by the decree directing them to pay a sum of Rs.50,000/- which was paid under Ex.A1, they have filed the Cross Objection mainly aggrieved by Clause (3) of the decree, whereby the defendants were asked to pay a sum of Rs.1,90,715.50 towards cost of the suit even though the value of money claim is just Rs.50,000/-.

7. Learned counsel appearing for the appellant/plaintiff submitted that the agreement of sale dated 05.03.2007 is admitted by the defendants and therefore, the trial Court has erred in holding that the agreement is not enforceable and it is just a loan transaction. The learned counsel then submitted that the defendants, who are the legal heirs of the deceased Sri



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S.T.Nanjundan, are not aware of the agreement that was entered into by the said S.T.Nanjundan, the husband of the 1st defendant, and that therefore, the sale agreement as such cannot be questioned by the legal heirs of the deceased. The learned counsel then submitted that the appellant was a tenant on a monthly rent of Rs.5,000/- in respect of the suit property and that no irregularity or suspicion can be attributed to the agreement, where the original owner had agreed to execute the sale deed upon receipt of total sale consideration of Rs.25,00,000/-. The learned counsel then submitted that the plaintiff issued a letter under Ex.A2 dated 28.10.2009 and subsequently, issued a legal notice under Ex.A3 dated 06.11.2009. Pointing out that the defendants have not issued a reply immediately after the first letter and the reply under Ex.A4 was long after the issuance of legal notice, the learned counsel submitted that the conduct of the defendants denying the agreement and setting up a case that the agreement was just a loan transaction is an afterthought. He submitted that the defendants are bound by the terms of agreement.

8.The learned counsel appearing for the appellant/plaintiff also



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submitted that the plaintiff has proved his readiness and willingness. It is further stated that the suit for specific performance was filed on 05.01.2010 before expiry of the period specified under Ex.A1 and that therefore, the trial Court ought to have held that the plaintiff/appellant is ready and willing to perform his part of the contract. The learned counsel then submitted that the trial Court has not considered the documents and evidence in a proper perspective.

9.Per contra, learned counsel appearing for the respondents/defendants relied upon a few judgments to show that the plea that was raised by the defendants is not barred by Sections 91 and 92 of Indian Evidence Act. The learned counsel then, referring to the document Ex.B1, the reply notice issued by the plaintiff's counsel in response to the legal notice in relation to certain promissory notes, submitted that the plaintiff had entered into an agreement earlier in 2003 in respect of the same property by specifying the time as three years and that the suit agreement is a continuation of a previous agreement which was also a loan transaction. The learned counsel then pointed out that the plaintiff, who is a tenant, has



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taken advantage of his possession as a tenant by paying a paltry sum of Rs.5,000/- per month as rent and he is trying to grab the valuable property of the plaintiff, taking advantage of the precarious situation to which the 1st defendant's husband Sri S.T.Nanjundan was put to. The learned counsel, by referring to several documents and the pleadings, submitted that the agreement was at the time when 1st defendant's husband Sri S.T.Nanjundan was critically sick, when there was an urgent need for money to take treatment for his illness. The learned counsel reiterated that the property was worth 10 times more than the consideration that was specified in the agreement under Ex.A1. Therefore, the learned counsel submitted that the plaintiff is not entitled to the equitable relief of specific performance on the basis of agreement which was never intended to be acted upon as an agreement of sale.

10.Since the suit has now been decreed only for refund of money received as advance, the learned counsel appearing for the cross-objector/2nd defendant submitted that the decree is not in terms of the judgment insofar as Clause (3) of the decree directing the defendants to pay



the entire Court fee, is concerned.

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11.Considering the pleadings and arguments of the learned counsel appearing on either side, this Court is of the view that the following points arise for consideration :

- i. Whether the suit agreement under Ex.A1 is a bona fide sale agreement or a document which was executed at the instance of the plaintiff as part of a loan transaction ?*
- ii. Whether the plaintiff was ready and willing to perform his part of the contract ?*
- iii. Whether the plaintiff is entitled to equitable relief of specific performance ?*
- iv. Whether Clause (3) of the decree directing the defendants to pay cost proportionate to the entire suit claim is sustainable, when the suit is decreed only in respect of the relief of recovery of a sum of Rs.50,000/- paid as advance under the suit agreement ?*

Point No. (i) :

12.On the first issue, this Court has to consider not only the exchange



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of notice pursuant to the suit agreement but also a few more documents which are also admitted by the parties. Ex.A7 is a sale agreement, dated 06.01.2004, admittedly executed by Sri S.T.Nanjundan, husband of the 1st defendant, earlier in favour of the plaintiff/appellant. Almost Ex.A7 agreement is also a replica of Ex.A1 except the fact that earlier consideration was Rs.21,50,000/- for the same property. Absolutely, there are no serious changes as regards other terms. In the previous agreement, Clause (7) reads as follows :

"7.The Vendor/First Party herein has handed over 3 promissory notes to the Purchaser herein. The Vendor/First Party has received a legal notice dated 02.05.2003 from M/S.Perumayeammal, wife of late A.Muniappan and 8 others of Indra Street, Karumapuram. Thiruchengode, Namakkal District being the legal heirs of A.Muniappan through their lawyer Thiru. K. Chandramohan demanding a sum of Rs.8,00,000-00 (Rupees Eight Lakhs only) alleging to be the amount covered under the above said 3 promissory notes and stating that the said promissory notes are the subject matter of an equitable mortgage created by the Purchaser/Second Party



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herein in favour of late A.Muniappan. The parties herein hereby affirm that the Vendor/First Party herein is not liable to pay any amount to the Purchaser herein under the above said three promissory notes. Hence he is also not liable to pay any amount to any third parties making any claim under the above said three promissory notes. If there is any claim by any third parties basing on the above said three promissory notes, it will be the responsibility of the Purchaser/Second Party herein to make good the said demand and the Vendor/First party shall not be liable to pay any amount under the above said three promissory notes. If any suit of suits are filed against the vendor/first party herein basing on the above said promissory notes the Purchaser/Second Party herein shall become responsible for the same and shall settle any such claim failing which the Purchaser/Second Party shall loose all his rights under this agreement. It is further agreed that the Purchaser/Second Party shall hand over back the above mentioned three promissory notes before getting the schedule property registered in his name failing which also he shall not entitled to have his right under this agreement."

13.The agreement under Ex.A1 also contain similar recitals. On a perusal of the recitals in the first agreement under Ex.A7, dated 06.01.2004,



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the second agreement under Ex.A1, dated 05.03.2007, need not be taken as a continuation or extension of time. These two distinct sale agreements in the gap of three years would only indicate that the parties had entered into a formal agreement to vouch the payment made. The plaintiff has not paid more than Rs.50,000/-. The time given for performance was three years under Ex.A1 and the previous agreement under Ex.A7. The fact that the value of the property was very much higher compared to the sale consideration, is not seriously disputed. Therefore, the contention of the defendants as regards the character of the agreement appears to be more probable. This Court has no compelling reason to interfere with the findings of the trial Court as regards the nature and character of Ex.A1.

14.An argument was advanced by the learned counsel appearing for the appellant that the defendants who had admitted the execution of agreement cannot describe the same as one in relation to a loan transaction. The Hon'ble Supreme Court and this Court has time and again recognized the legal position that a party to the contract is entitled to raise a plea which would invalidate the contract as a whole. In other words, the plea of



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misrepresentation, fraud or sham and nominal transaction are permissible and Section 92 of Evidence Act has no application. The Hon'ble Supreme Court, in the case of ***Gangabai v. Chhabubai*** reported in ***AIR 1982 SC Page 20***, after referring to Section 92(1) of Evidence Act, has 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. It is further observed that the bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Several judgments of the Hon'ble Supreme Court were considered by the Hon'ble Supreme Court in the said judgment and therefore, the plea that has now been raised by the defendant is not barred under Section 92 of Indian Evidence Act.

15.The learned counsel appearing for the defendants/respondents submitted that the value of the property was not less than Rs.2.5 Crores as on the date when the agreement under Ex.A1 was entered into. The evidence regarding valuation of the property is also available and the learned counsel appearing for the appellant/plaintiff has admitted that the value of the property was more than that was agreed under Ex.A1. The suit



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property is a 3-Bedroom Bungalow in a prime locality in Ooty. The property was taken on lease by the plaintiff nearly about 30 years ago for a monthly rent of Rs.5,000/- per month. All these facts would show that the value must be significantly higher than the consideration that was stated in the agreement that was earlier executed under Ex.A7 and subsequently, under Ex.A1. The plaintiff admitted during cross-examination that there was financial dealings between plaintiff and S.T.Nanjundan. The fact that the husband of 1st defendant was indebted to the plaintiff even in 2003 is admitted. The plaintiff has not denied the suggestion put to him that the guideline value is Rs.4 Lakhs per cent and that the value of suit property is more than Rs.2.5 Crores. The longer time of 3 years specified in the agreement for payment of balance of sale consideration is also a factor which support the case of defendants. Therefore, the contention of the defendants appears to be more probable particularly having regard to the successive contracts containing the same terms.

16.This Court, therefore, holds that the agreement Ex.A1 was not intended to be acted upon and it is only a sham and nominal document



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executed at the instance of the plaintiff to secure the loan transaction which was necessitated at the time when the 1st defendant's husband Sri S.T.Nanjundan was seriously ill.

Point No. (ii) :

17.The question of readiness and willingness does not assume more importance having regard to the real issues that arise for consideration. In this case, if the agreement is taken as a genuine transaction, the plaintiff has filed the suit even before the expiry of three years from the date of agreement. The plaintiff has paid a sum of Rs.50,000/- under Ex.A1 as advance and agreed to pay the balance within a period of three years. Within the period that was available to the plaintiff under Ex.A1, he has issued letter originally to the 1st defendant and thereafter, a notice. Since the defendants have sent a reply, the plaintiff has filed the suit immediately on 05.01.2010. In the said circumstances, this Court has no material to suspect the readiness if the contract is held to be valid and binding on the defendants. In view of the finding on the first issue, this Court is of the view that the issue regarding readiness and willingness is not required to be



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answered.

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Point No. (iii) :

18.This Court has held that the agreement under Ex.A1 is not a *bona fide* sale transaction and it was never intended to be acted upon as an agreement of sale in relation to the sale of suit property. When it was held that the agreement of sale was nominal and never intended to be acted upon and it was only at the instance of the plaintiff to secure the loan transaction, this Court is not supposed to grant a decree for specific performance to enforce the contract which was never intended to be acted upon in terms of the contract. Secondly, the suit property is a valuable property in a prime locality in Ooty. The plaintiff took the property on lease in 1994 agreeing to pay a sum of Rs.5,000/- per month and was in a position to take advantage of the financial crisis of the owner. The rent which was fixed in 1994 was not enhanced for all these years. The defendants have already suffered because of being deprived of a legitimate income from the suit property. The admitted facts make it inequitable to enforce specific performance.



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Therefore, this Court is of the view that the plaintiff is not entitled to the relief of specific performance.

Point No. (iv) :

19.As pointed out earlier, though the trial Court has granted a decree only for recovery of money as against the defendants, the defendants cannot be saddled to bear the cost of entire Court fee paid for specific performance. When the plaintiff was held to be not entitled to the relief of specific performance, the defendants are not liable to bear the cost of plaintiff to pay the Court fee. The learned counsel appearing for the appellant/plaintiff submitted that the Cross Objection was filed with a long delay. Under Section 35(2) of the Code of Civil Procedure, where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The principle that cost should follow the event is well settled and it has been reiterated in several judgments that the Court, while decreeing the suit or dismissing the suit, cannot issue direction regarding payment of cost quite contrary to the judgment. This Court finds no reason for directing the defendants to pay costs, namely the entire Court fee paid by the plaintiff, in the suit for specific performance. In the absence of any specific reason, this



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Court finds that the decree is not in terms of the judgment of the trial Court.

Since the plaintiff has succeeded only for recovery of sum of Rs.50,000/- with interest, there can be a direction to the defendants only to bear proportionate costs. To that extent, the judgment of the trial Court is liable to be modified.

20.In the result, the appeal in A.S.No.293 of 2011 is dismissed. The judgment and decree of trial Court is confirmed except Clause (3) of the decree. The Cross Objection No.108 of 2022 is allowed with a modification of the judgment and decree in O.S.No.1 of 2010 on the file of District Court of Nilgiris, Udthagamandalam, to the extent that the defendants are liable only to bear proportionate costs and Clause (3) of the decree is set aside and Clause (3) shall read as follows :

"3. that the defendants shall pay costs proportionate to the amount that is decreed in favour of the plaintiff."

No costs. Consequently, connected miscellaneous petitions are closed.

(S.S.S.R., J.) (A.A.N., J.)



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Internet : Yes

Index : Yes / No

To

- 1.The District Judge of Nilgiris at Uthagamandalam.
- 2.The Section Officer,
VR Section, High Court,
Chennai.



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