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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 05.01.2022

Judgment Pronounced on : 03.02.2022

CORAM :

THE HON'BLE MR.JUSTICE T.RAJA

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.No.212 of 2017

1.Monicca Shantha Nelson
Rep by Power of Attorney
Mr.J.Samuel Nelson

2.S.Santha

3.J.Samuel Nelson

.. Appellants / Plaintiffs

Versus

1. Rajalakshmi Venugopal

2. V.Seshadhari

...Respondents 1 and 2

Rep by their Power of Attorney
against Mr.S.Velladurai

3. S.Velladurai

4. Noah Constructions,
A Proprietary Concern,
Rep. By its Sole Proprietor,
G.Manoharan Joseph

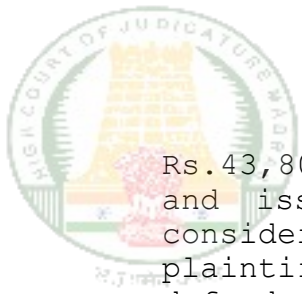
.. Respondents 1 to 4 / Defendants

Prayer : Original Side Appeal has been filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letter Patent to set aside the judgment and decree made in C.S.No.701 of 2011, dated 15.06.2017 and decree the suit.

Prayer in C.S.No.701 of 2011:-

The Plaintiff therefore prays for a Judgment and Decree against the defendants

i)for a mandatory injunction directing the 3rd defendant to receive the balance sale consideration of



Rs.43,80,000/- (Rupees Fourty Three Lakhs Eighty Thousand Only) and issue letter of confirmation for the receipt of total consideration for the sale of the property in favour of the plaintiffs as per agreement dated 01.09.2010 to the 4th defendant and on receipt of such letter direct the 4th defendant to handover possession of the plaint C schedule property to the plaintiffs and in default permit the plaintiffs to deposit the balance sale consideration of Rs.43,80,000/- (Rupees Fourty Three Lakhs Eighty Thousand Only) before this Honble Court and on deposit of the said sum the 4th defendant may be directed to handover the possession of the plaint C schedule property to the plaintiffs.

ii) For a permanent injunction against the defendants or their agents, men from in any way dealing with the plaint B and C schedule properties as a consequential relief.

iii) Award the cost of suit.

For Appellants	: Mr.R.N.Amarnath
For R1 to R3	: Mr.V.Raghavachari for M/s.Ma.Gouthaman
For R4	: Mr.C.D.Johnson

JUDGMENT

(Judgment of this Court made by Mr.Justice D.Bharatha Chakaravarthy)

The Appeal :

This Original Side Appeal in O.S.A.No.212 of 2017 is filed by the unsuccessful plaintiffs, aggrieved by the judgment and decree, dated 15.06.2017 of the learned Single Judge of this Court in C.S.No.701 of 2011, thereby, dismissing the suit filed by plaintiffs for specific performance of the sale/development agreement, dated 01.09.2010 by accepting balance sale consideration of Rs.43,80,000/- and to complete the construction and hand over the C-schedule Flat No.2 to the plaintiffs and for permanent injunction from in any manner dealing with the said flat or the undivided share in respect of the share of the said flat.

2. Monicca Shantha Nelson, the daughter, S.Shantha, the mother and J.Samuel Nelson, the father are the plaintiffs/prospective purchasers of the flat. The first



defendant, Rajalakshmi Venugopal, the mother, the second defendant V.Seshadhari, the son of the first defendant, are the owners of the schedule - A property. The third defendant, S.Velladurai, is their Power of Attorney agent. The fourth defendant, namely Noah Constructions, represented by its proprietor, G.Manoharan Joseph is the builder. In this judgment, the parties are referred to as per their array in their Original Suit.

The admitted facts:

3. The admitted facts before the trial court are that the first and second defendants are the owners of the Schedule - A property, which is a piece and parcel of land ad-measuring about 1800 Sq.ft in old Door No.12, New Door No.2, III Cross Street, United India Colony, Kodambakkam, Chennai - 600024. The first and second defendants entered into a joint development agreement with the fourth defendant/builder through the third defendant, their Power of Attorney agent, on 11.07.2007, for demolishing existing superstructure on the said plot and to put up a new construction, consisting of stilt-cum-ground floor, first floor and second floor in the property by way of residential flats. As per the joint development agreement, dated 11.07.2007, which is marked as Ex.P-6, the first and second defendants are entitled to the ground and first floor and the second floor would go to the share of the builder/fourth defendant.

4. One flat ad-measuring 1500 Sq.ft in the first floor falls to the share of the owners/first and second defendants. They offered it for sale and the plaintiffs agreed to purchase the same for a total sale consideration of Rs.1,08,25,000/- (Rupees one crore eight lakhs twenty five thousand only) by tripartite agreement entered into on 29.07.2010 (Ex.P-9). As per the said agreement, a sum of Rs.34,00,000/- shall be paid with a period of four weeks and on receipt of the same, the first and second defendants will register a Sale deed, conveying 675 Sq.ft of undivided share of the land. The plaintiffs thereafter, shall pay a sum of Rs.20,00,000/- within three months from the date of sale deed. Upon receipt of the above sums the defendants shall complete the construction and at the time of handing over of the flat, the balance sale consideration of Rs.48,25,000/- is payable.

5. Accordingly, on 29.07.2010, i.e., on the date of entering into the agreement, by way of cheque, a sum of Rs.6,00,000/- was paid by the plaintiffs. On 30.08.2010, a sum of Rs.16,20,000/- was paid by way of cheque and on the same day another sum of Rs.17,80,000/- was paid as cash. Thus, on receipt of the total sum of Rs.40,00,000/- as on 30.08.2010, the first and second defendants executed a sale deed (Ex.P-10) conveying 675 Sq.ft of undivided share of the land in favour of the plaintiffs. Upto



to this stage of the transaction all the facts are admitted between the parties.

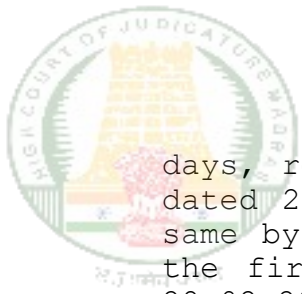
The facts in issue - the plaintiff's version:

6. It is hereafter the differences arise. As per the case of the plaintiffs that after the execution of the sale deed on 30.08.2010, it was agreed between the parties that the sale value originally fixed vide Ex.P-9 agreement was excessive and therefore, by mutual consent, the parties agreed to substitute terms and conditions of Ex.P-9 tripartite agreement by entering into a fresh agreement on 01.09.2010 (Ex.P-11). Vide Ex.P-11, fresh agreement, the sale consideration was agreed as Rs.60,00,000/- (Rupees sixty lakhs only) and the said sum of Rs.60,00,000/- is payable as follows:-

"The ALLOTTEES hereby agree to pay the above said sum of Rs.60,00,000/- (Rupees Sixty Lakhs only) being the total cost of undivided share of land and the cost of construction of the premises in the following manner:

- a) Rs.16,20,000/- (Rupees Sixteen Lakhs an Twenty Thousand only) paid on registration of the undivided share of land.
- b) Rs.15,00,000/- (Rupees Fifteen Lakhs only) within three months from the date of Registration of undivided share of land.
- c) Rs.28,80,000/- (Rupees Twenty Eight Lakhs and Eighty Thousand only) on completion and handing over possession of the flat within 6 (six) months from the date of registration of the undivided share of the land."

7. According to the plaintiffs, it was also agreed by the said new agreement that time will be the essence of the contract, but, however for any delayed payment, the plaintiffs will be liable to pay interest at the rate of 12% per annum. According to the plaintiffs, even though as per the new agreement, he was liable to pay only a sum of Rs.15,00,000/- within three months from the date of new agreement i.e., on or before 30.11.2010, the first and second defendants demanded an additional sum of Rs.5,00,000/- and therefore, after making the said sum of Rs.5,00,000/- ready, the plaintiffs made a payment of Rs.20,00,000/- by way of two cheques, which was sent by them to the first and second defendants on 29.12.2010. The first and second defendants received the same on 30.12.2010. However, after keeping the cheques, without encashing for about twenty



days, returned the cheques to the plaintiffs vide their letter, dated 20.01.2011 (Ex.P-22). However, the plaintiffs resent the same by way of their reply, dated 29.01.2011 (Ex.P-23) to which the first and second defendants issued a rejoinder notice on 28.02.2011 (Ex.P-26) maintaining that the fresh agreement is sham and nominal document, which is not intended to be acted upon.

8. In the meanwhile, the fourth respondent, builder, also received a sum of Rs.1,90,000/- from the plaintiffs, for the extra work done in the premises. Similarly, the plaintiffs also paid another sum of Rs.20,274/- for purchase of accessories for modular kitchen. The plaintiffs also paid a sum of Rs.90,926/-, being the difference in cost, towards the tiles chosen by the plaintiffs. However, after all these, the first and second defendants failed and omitted to accept the balance sale consideration and complete transaction and hence, the plaintiffs were constrained to file the present suit.

The version of the first and second defendants:

9. In respect of the disputed facts, the case of the first and second defendants, as per their written statement filed on 10.09.2013 is that the plaintiffs sought to purchase the flat for a total sale consideration of Rs.1,08,25,000/- alone which is the just market value of 1500 Sq.ft flat in United India colony, Kodambakkam, Chennai. The second agreement, dated 01.09.2010 is not an agreement at all to replace the original agreement, but, is a sham and nominal document signed by the parties at the request of the plaintiffs for their purposes of obtaining loan from the bank as the bank would not advance loan if the original amount of Rs.1,08,25,000- is disclosed to them, as their income criteria was low.

10. It is their contention that the factum as to the sham and nominal nature of the second agreement can be gauged from the fact that even though the second agreement was entered into on 01.09.2010, the payment clauses (which is extracted above) would mention that a sum of Rs.16,20,000/- will be paid on registration of the undivided share of the land, while, already the undivided share was registered on 30.08.2010 itself; the second circumstance is that the cash amount of Rs.17,80,000/- and the cheque amount of Rs.6,00,000/- are not at all mentioned in the agreement, even though they were paid and received by the parties; the third circumstance is that on perusal of the alleged fresh agreement, it would be clear that a sum of Rs.15,00,000/- is only payable within three months of the registration of the undivided share, while, on perusal of the original agreement between the parties, it would be clear that the sum of Rs.20,00,000/- is payable and the plaintiffs herein attempted to pay only the said sum of Rs.20,00,000/- as per the



11. It is the further case of the first and second defendants that even as per the sham and nominal second agreement, time is expressly made as the essence of the agreement and since the plaintiffs have failed and omitted to pay the balance sum of Rs.15,00,000/- within the agreed period of three months, the plaintiffs were not ready and willing to perform their part of the contract and therefore, they are not entitled for the relief of specific performance.

12. On such pleadings of the parties, the following issues were framed:-

6. Whether the plaintiffs performed their part of contract and performed their obligation as stipulated under the sale agreement?



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7. Whether the plaintiffs are ready and willing to perform their part of obligations in the contract and to complete the sale as per the terms of the agreement of sale?

8. Whether the plaintiffs are entitled to seek specific performance of the agreement of sale in respect of the suit property?

9. What relief of reliefs the plaintiffs are entitled to?"

13. The third plaintiff was examined as P.W.1 and Exs.P-1 to P-27 were marked. On behalf of the first and second defendants, no oral evidence was let in or documentary evidence was produced. Thereafter, the learned Judge proceeded to hear the learned Counsel on either side and by judgment, dated 15.06.2017, the learned Judge found that firstly, when the second agreement was entered into, it did not expressly supersede the original agreement. Secondly, the plaintiffs paid a sum of Rs.20,00,000/-, which is in consonance that the original agreement and therefore, held that if at all the second agreement is entered into, it is entered into only in continuation of the original agreement and not in derogation or supersession of the original agreement in Ex.P-9. The Learned Judge also held that the agreement dated 01.09.2010 as sham and nominal and not intended to be acted upon.

14. Further, the learned Judge held that the plaintiffs, being the parties seeking specific performance should demonstrate that they were ready and willing to perform their part of the contract. The learned Judge found that the time was made as the essence of the contract expressly and the clause relating to payment of default interest was to the benefit of the first and second defendants and if only they wish to accept the belated payment of consideration, they can accept it with the interest at 12% per annum and it will not enure the benefit of the plaintiffs and therefore, held that the plaintiffs are not ready and willing to perform their part of the contract. The learned Judge held that the plaintiffs are not entitled for specific performance. Holding so, the suit was simply dismissed, as against which, the present appeal is laid before this Court.



The Submissions in the Appeal :

15. Heard Mr.R.N.Amarnath, learned Counsel appearing on behalf of the plaintiffs, Mr.V.Raghavachari, learned Counsel appearing on behalf of the first and second defendants and Mr.C.D.Johnson, learned Counsel appearing on behalf of the fourth defendant.

16. Mr.R.N.Amarnath, learned Counsel appearing on behalf of the plaintiffs would submit that the first and second defendants have not denied the execution of the second agreement. If by their conduct and mutual agreement, the parties have decided to enter into a fresh agreement, the same would automatically supersede the earlier agreement and therefore, the finding of the learned Judge, in this regard, is incorrect in law. He would further submit that the contract is one relating to sale and purchase of immovable property and therefore, normally the time is not the essence of the contract, especially, when there is a stipulation in the contract for payment of 12% interest for belated payment, the same clearly demonstrates the intention that time is not the essence of contract and therefore, the findings of the learned Single judge that the time is the essence of this contract and therefore non-suiting the plaintiffs on this score was erroneous in law.

17. The learned Counsel further submitted that though the original consideration was for sum of Rs.1,08,25,000/-, and even though the fresh agreement mentions only as Rs.60,00,000/- as sale consideration, the Court should take notice of the fact that it is over and above the sum of Rs.23,80,000/, which is left untouched by the second agreement. Therefore, the total consideration comes to Rs.83,80,000/- and thus there is nothing abnormal in the conduct of the parties in renegotiating the terms and reducing a sum of Rs.24,20,000/-. Therefore, according to the learned Counsel, the Trial Court ought to have decreed the suit as prayed for.

18. In support of his contention, the learned Counsel relied upon the judgment of the Hon'ble Supreme Court of India in M/s.Hind Construction Contractors by its Sole Proprietor Bhikam Chand Mulchand Jain (Dead) by LRs Vs. State of Maharashtra¹, for the proposition that when a penalty is imposed for a belated payment, then the same would militate against the time being essence of the contract.

¹ (1979) 2 SCC 70



19. He relied upon the judgment of the Hon'ble Supreme Court of India in Balasaheb Dayandeo Naik (Dead) Through LRs and Others Vs. Appasaheb Dattatraya Pawar², for the proposition that the clauses of the contract prescribing time and prescribing extension of time on penalty should be read together to determine whether time is an essence of contract.

20. The learned Counsel also relied upon the judgment of the Hon'ble Supreme Court of India in Swarnam Ramachandran (Smt) and Another Vs. Aravacode Chakuncal Jayapalan³, that the intention of the parties should be taken into account to determine whether time was essence of the contract or not and in this case, when the parties, having continued to enter into fresh agreement and also making a stipulation of payment of 12% interest and the builder accepting the payment for additional expenses would prove that the intention of the parties was not to make time as essence of contract.

21. The learned Counsel would also rely upon the judgment of Hon'ble Supreme of India in Vidhyadhar Vs. Manikrao⁴, for the proposition that when a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. For the same proposition, the learned Counsel would also rely upon the judgment of the Hon'ble Supreme Court of India in Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. And Others⁵.

22. He would press into service the judgment in Bhavyanath Represented by Power of Attorney Holder Vs. K.V.Balan (Dead) through Legal Representatives⁶ and submit that the readiness and willingness need not be proved by establishing that he was carrying the cash with him on all dates, but, it should be proved only by the fact that the plaintiffs had the capacity to pay the balance sale consideration and complete the transaction and therefore, in this case, it is not the case of even the first and second defendants that the plaintiffs did not have the capacity to pay the balance sale consideration and as such, the suit should have been decreed.

23. He would submit that from the very fact that the first and second defendants did not get into the box, the readiness

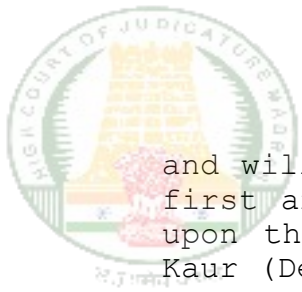
² (2008) 4 SCC 464

³ (2004) 8 SCC 689

⁴ (1999) 3 SCC 573

⁵ (2005) 2 SCC 217

⁶ (2020) 11 SCC 790



and willingness of the plaintiffs should be presumed against the first and second defendants and for the said purpose, he relies upon the judgment of the Hon'ble Supreme Court of India in Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha⁷.

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24. The learned Counsel would submit that even if this Court comes to a conclusion that the subsequent reduction of price causes hardship to the first and second defendants, this Court, while exercising the discretionary nature of jurisdiction, while granting decree of specific performance, can order a payment of additional consideration and for the said proposition, relied upon the judgment of the Hon'ble Supreme Court of India in K.Prakash Vs. B.R.Sampath Kumar⁸. Therefore, he would contend that this Original Side Appeal should be allowed and the suit should be decreed as prayed for.

25. Mr.V.Raghavachari, learned Counsel appearing on behalf of the first and second defendants would submit that it is totally illogical and unbelievable that after executing the sale deed for the undivided share on 30.08.2010, by receiving a total sum of Rs.40,00,000/-, on the very next day, the parties would renegotiate the terms and agreed for a sale price that to reducing it by a sum of Rs.48,00,000/-. Rs. 1,08,20,000/- is only the correct sale price for a 1500 Sq.ft flat in a locality such as United India Colony, Kodambakkam, Chennai and on the very fact of it, the plaintiffs case would fall flat. He would further submit that in this case, even though the parties have signed the second agreement, the circumstances, namely the cash amount of Rs. 17,80,000/- and the other payment of Rs.6,00,000/- was not even mentioned to be refunded would itself show that the agreement was sham and nominal. The second circumstance that even by the conduct of the appellant that he paid only a sum of Rs.20,00,000/- as per Clause-6 of the Original contract would itself show that the second agreement was not intended to be acted upon. He would submit that only to help the plaintiffs in obtaining their bank loan, the first and second defendants signed the second agreement, which was never intended to be acted upon.

26. The Learned counsel drew the attention of this Court to the recital portion of the second agreement, which reads as follows:-

"...for that purpose have purchased 675
Sq.ft. undivided share of land (more

⁷(2010) 10 SCC 512

⁸ (2015) 1 SCC 597



the suit for specific performance by granting the reliefs to the parties in the aforesaid manner by moulding the relief.

28. Mr.C.D. Johnson, the Learned Counsel appearing on behalf of the builder would submit that it the concern of the fourth defendant that whoever is entitled to the flat should be directed to pay the additional charges as he has incurred additional expenses over and above the original agreed amount on account of the improvements and modifications suggested.

The Questions:

29. Upon hearing the learned Counsel on either side, considering the pleadings of the parties and evidence on record, the following questions arise for consideration in this appeal:-

(i) Whether the second agreement, Ex.P-11, dated 01.09.2010 is sham and nominal?

(ii) Whether the appellant was ready and willing to perform his part of the contract?

(iii) To what reliefs, the parties are entitled to?

Question No.1:

30. Even though the signing of Ex.P-11 is admitted by the parties, it is the contention of the plaintiffs that it was signed pursuant to an understanding between the parties to reduce the sale price as it was felt that the original price of Rs.1,08,25,000/- was felt to be excessive. The first and second defendants' case is that the second agreement was entered into only for the purpose of producing the same before the bankers for obtaining loan. The following are the material circumstances:

(i) It is seen from the transaction between the parties that the second agreement, dated 01.09.2010 is on the very next day of payment of Rs.40,00,000/- and execution of Ex.P-10, Sale deed, therefore, we do not believe that there could have been a renegotiation on the next day of the parties making substantial part performance under the original agreement.

(ii) The second circumstance is that even as per the case of the plaintiffs, the sale consideration of Rs.1,08,25,000/- is very high, therefore, they have fixed it on the sum of Rs.60,00,000/-, which is the correct sum. But, even as per the claim of the plaintiffs that in the second agreement, out of Rs.40,00,000/- paid by them, only a sum of Rs.16,20,000/- is given credit to. Nothing is said about the balance sum, which is already paid by the plaintiffs to the first and second defendants as to whether it is to be refunded or will be



adjusted to the sale price. This is a clinching circumstance about the second agreement being sham and nominal. The answer of the learned Counsel for the plaintiffs is that the said sum was left to the first and second defendants to be construed as additional sum over and above the sum of Rs.60,00,000/-, which is not mentioned so in the second agreement and therefore, the case of the plaintiffs is inherently illogical and absolutely unbelievable.

(iii) The third circumstance is that as extracted supra, the original Clause No. - 6 in the first agreement i.e., Ex.P-9, dated 29.07.2010 mentions payment of Rs.20,00,000/- and the plaintiffs were paying Rs.20,00,000/- on 29.12.2010 and not the sum of Rs.15,00,000/- as mentioned in the second agreement. Even though, the plaintiffs tried to put up a case that it is the first and second defendants, who demanded an additional sum of Rs.5,00,000/-, absolutely no correspondence or evidence whatsoever is produced in this case and therefore, that circumstance is also to be taken against the plaintiffs that the plaintiffs were still making payment as per the original agreement.

(iv) Next, it is important to note the cleverness that which the plaintiffs had drafted the said letter Ex.P-16 enclosing the said cheques, he has enclosed the amount as two cheques for Rs.15,00,000/- and another Rs.5,00,000/-. In the subject they mention both the tripartite agreement and the construction agreement. The plaintiffs do not make it clear whether they are making the payment either under the first agreement or under the second agreement and they are, as a matter of fact, tried to take undue advantage of the situation. The letter is extracted as below:-

"Dear Sir,

Sub:Payment of second installment of the Sale consideration For the flat purchased by me (first floor constructed at Door No.2, Third Street, United India Colony) as per our tri-partite Sale cum construction agreement.

I enclose the following checks for the total sum of Rs.20 lakhs for the above stated purpose.

Check No.	Dated	Sum	Drawing
459 961	29.12.2010	Rs.15 Lakhs	Oriental
			Bank
			of
			Commerce,
			Kodambakkam



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624 622

29.12.2010

Rs.5 Lakhs

State
Bank
of
India

Rs.20 Lakhs

I want to mention here that I have been trying to contact you over phone to inform you to collect this amount since 30.11.2010 onwards. Since you did not contact me back, I am making this payment by post. Please acknowledge the same.

Sincerely,"

(emphasis supplied)

From the above circumstances, we hold that the second agreement, dated 01.09.2010 was sham and nominal document and not intended to be acted upon between the parties.

31. At the same time, we are also not buying the reason given by the first and second defendants that the second agreement is given for the purpose of the plaintiffs approaching their bankers as it is also unbelievable. If only the sale consideration is higher and the plaintiffs have paid more sum, the bankers would be interested in lending him the loan and it defies logic to show reduced sale consideration before the lenders, while lenders would normally require higher consideration. We could see the real purpose of the second agreement being evasion of (a) Service tax due to the Government on the whole sum received towards taken of the flat (b) Cash component being hidden to evade income tax. In such cases, the Courts have evolved the doctrine of pari delicto principle, which means that the Courts will not will not grant relief based on such agreement with an illegal purpose at the instance of a person who himself is a party to the illegality or fraud. The Hon'ble Supreme Court of India has in Mohd. Salimuddin Vs Misri Lal and another⁹ held that :

"The doctrine of pari-delicto is not designed to reward the 'wrong-doer', or to penalize the 'wronged', by denying to the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined

⁹ 1986 (2) SCC 378



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hands to flout the law for their mutual gain. Such being the position the said doctrine embodying the rule that a party to a transaction prohibited by law cannot enforce his claim in a Court of law"

The illegal contract benefits the plaintiffs who are participi criminis in the transaction. Further, the more comprehensive rule of law, *ex turpi causa non oritur actio* on account of which no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract, or transaction which is illegal¹⁰. Thus, the Ex-P11 agreement is not only sham and nominal, not intended to be acted upon by the parties, is for an illegal purpose and is unenforceable and we answer the question accordingly.

Question No.2:

32. Now adverting to the submissions made on behalf of the plaintiffs that even cumulatively considering the first and second agreement, the plaintiffs in this case have been ready and willing to perform their part of the contract and therefore, on the strength of the dictum laid by the Hon'ble Supreme Court of India in the judgments relied on by them, this being a case sale of immovable property time is not normally the essence of the contract and when the parties have stipulated that belated payments are to carry 12% interest, the time is not an essence of contract. Only with 29 days delay, the payment was made by the plaintiffs. The plaintiffs have shown the readiness and willingness since they have already paid a sum of Rs.40,00,000/- and were willing to pay a balance sale consideration of Rs.43,80,000/- as agreed in the second agreement and the plaintiffs have even filed an application for depositing balance sale consideration, but, however, it is the Trial Court, which has posted the said application along with the main suit. The plaintiffs have proven their capacity to pay the said amount and they are ready to pay the said amount. The Learned Counsel would submit that they are even willing to pay the additional consideration within any time as this Court may order and therefore, readiness and willingness should be presumed on the part of the plaintiffs. However, we cannot accept the contentions of the plaintiff for once we hold that the second agreement is sham and nominal, then the plaintiffs having sued only upon the sham and nominal agreement, is not at all entitled to the relief and the question of readiness and willingness itself need not be gone into.

¹⁰*J.K. Panthaki and Co. v. Income-Tax Officer (Investigation)*, 2010 SCC OnLine Kar 5143



33. However, since both the parties are at fault in entering into such a sham and nominal agreement, even going by the first agreement, dated 29.07.2010, the plaintiffs are liable to pay the balance sum of Rs.20,00,000/- within three months from the registration of the sale deed i.e., on or before 30.11.2021. Even assuming that time is not the essence of the agreement, the communication of the plaintiffs, which is extracted above in an by which, he has made two cheques of Rs.15,00,000/- and Rs.5,00,000/- separately and mentioning the construction agreement also even while mentioning that he has been trying to contact over phone to inform to collect amount since 30.11.2021 onwards, read with Ex.P-23 reply notice, wherein he has categorically contended that Ex.P-9 tripartite agreement has been superseded and that he will only pay the total sale consideration of Rs.60,00,000/-, they have clearly demonstrated that they are not ready and willing to perform their part of contract, as per Ex.P-9 tripartite agreement. Therefore, we are afraid that the various rulings relied upon by the learned Counsel for the plaintiffs in any manner support the case of the plaintiffs. We, therefore, hold that the appellant was never ready and willing to perform his part of the contract and as an excuse, he had clandestinely and cleverly tried to rely upon the sham and nominal document and therefore, the question is answered in favour of the first and second defendants and against the plaintiffs.

Question No.3:

34. The learned Judge, after answering issues against the plaintiffs, has simply dismissed the suit as in this case there was neither a plea for alternative relief by the plaintiffs, nor there was any counter claim made by the first and second defendants in their written statement for reconveyance of the undivided share, which is conveyed to the plaintiffs. This results in the situation where the contract is held not specifically enforceable, the plaintiffs' money is stuck with the defendants and defendants undivided share is stuck with the plaintiffs. Thus, after full fledged trial and appreciation of evidence and after judgment, the parties are in the same position as in the start of the litigation. It is a settled position that in appropriate cases, even in the absence of the plea of alternative relief, even in the absence of any counter claim on behalf of the first and second defendants, the Court can appropriately mould the relief, if otherwise it would result hardship and injustice to parties. The Hon'ble Supreme Court of India in B.R. Mulani Vs Dr. A.B. Aswathnarayana and others¹¹ has while declining the relief of specific performance, held :

¹¹ 1993 Supp 4 SCC 743



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"We, accordingly, direct that while the prayer for specific performance is refused, there will be a decree for payment of the mortgage money which really was intended to be a mode of application and appropriation of the sale price and was, in that sense, a part of the same transaction. It is appropriate that the petitioner should not be driven to a separate suit to enforce the obligations which must, in the circumstances of this case, be held to be a part of the same transaction. (Emphasis Supplied)

35. In the instant case, as we have found that the plaintiffs have come up with an incorrect case, they are not entitled for specific performance. But, however, the already undivided share of 675 Sq.ft is conveyed in their favour. They have paid a sum of Rs.40,00,000/- towards sale consideration and incurred expenses of Rs.2,12,000/- being the additional sum admittedly paid to the fourth respondent/builder, by way of additional expenses, purchase of accessories, difference in cost of tiles etc., and a sum of Rs.1,79,995/- towards the purchase of stamp paper and registration charges.

36. The learned Counsel for the first and second defendants had, in the course of his submission, agreed to return the same with 9% interest from the date of which, the amounts were paid/ the expenses were incurred, till date of payment in the event of plaintiff being directed to re-convey the undivided extent. The claim of the builder is not part of the transaction and is independent and therefore, we are not making any observation in respect of the same.

37. Therefore, we are inclined to modify the judgment and decree of the Trial Court by directing the first and second defendants to refund the entire amount paid as an advance and the expenses incurred by the plaintiffs to them with 9% interest per annum from the dates of which the respective amounts were paid till date of payment, while directing the plaintiffs to refund the 675 Sq.ft of undivided share conveyed to them.

Findings on issues:

38. In view of our above findings, we affirm the findings of the Trial Court in respect of issue No.1 that the agreement among the parties has been validly terminated by the defendants 1 to 3 on account of the default committed by the plaintiffs. In respect of issue No.2, we hold that the agreement, dated 01.09.2010 was not executed to supersede and substitute the



agreement, dated 29.07.2009. In respect of issue No.3, which is sham and nominal and not intended to be acted upon. We hold, in respect of issue No.4, that the execution of the sale deed would amount to part performance of the agreement of sale. In respect of issue No.5, we hold that the defendants 1 to 3 are not estopped from canceling the sale agreement since the plaintiffs are not ready and willing. Issue No.6 is answered in favour of the defendants that the plaintiffs did not perform their part of obligation under the sale agreement and in respect of issue No.7, the plaintiffs were not ready and willing to perform their part of the obligations. In respect of issue No.8, we affirm the findings of the Trial Court that the plaintiffs are not entitled to seek for specific performance. In respect of issue No.9, as stated supra, we are inclined to modify the findings of the Trial Court and mould the relief and grant alternate reliefs to the parties.

The Result:

39. In view of the above, we are inclined to modify the judgment and decree of the Trial Court, by decreeing the suit, on the following terms:-

(i) that the first and second defendants 1 and 2, shall refund to the plaintiffs, the total sum of Rs.43,91,995/- (Rs.40,00,000/- + Rs.2,12,000/- + Rs.1,79,995/-) with interest at the rate of 9% per annum from the dates on which the respective amounts were paid till the date of payment;

(ii) the first and second defendants shall deposit the aforesaid sum within a period of six weeks from the date of receipt of the judgment and the decree of this Court;

(iii) upon said deposit by the first and second defendants into the Court, within two weeks therefrom, the plaintiffs shall execute re-conveyance deed, before the appropriate Sub-Registrar, re-conveying 675 Sq.ft., undivided share, conveyed to them, vide Ex.P-10, Sale deed dated 30.08.2010 morefully described as Schedule - B property to and in favour of the first and second defendants;

(iv) the first and second defendants shall bear the stamp duty and registration charges of said re-conveyance document;

(v) upon execution of such re-conveyance deed, the plaintiffs shall be forthwith entitled to withdraw the amount deposited by the first and second defendants into the Court with accrued interest, if any.

(vi) There shall be no order as to costs.



The Original Side Appeal is disposed off on the above terms.

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Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

grs

To

The Sub-Assistant Registrar,
Original Side,
High Court of Madras.

+1cc to Mr.R.N.Amarnath, Advocate, S.R.No.7590
+1cc to M/s.Ma.Gouthaman, Advocate, S.R.No.6783
+1cc to Mr.C.D.Johnson, Advocate, S.R.No.7086

O.S.A.No.212 of 2017

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NSK 09/03/2022