



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.1204 of 2009 &

M.P. No.1 of 2009

Basavaraj

...Appellant

Vs.

1. Narayanappa

2. Nethappa

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 11.06.2009 passed in A.S. No.6 of 2008, on the file of the Principal District Judge, Krishnagiri, reversing the decree and judgment dated 06.12.2007 passed in O.S. No.74 of 2005, on the file of the Subordinate Judge, Hosur.

For Appellant : Ms.V. Srimathi

For Respondents : Mr. P. Mani.

JUDGMENT

The appellant is the plaintiff in O.S. No.74/05 on the file of the Subordinate Judge, Hosur. He filed the suit for specific performance of contract against the respondents 1 and 2.



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

4. The suit was resisted by the defendants on the following grounds:

- i. The suit property is the ancestral property of the first defendant.
- ii. The defendants approached the plaintiff for obtaining a loan of Rs.50,000/-. The plaintiff, instead of executing a mortgage deed, created an agreement of sale for Rs.1,10,000/-. There was no intention on the part of the defendants to create an agreement of sale.
- iii. The plaintiff paid only a sum of Rs.50,000/- to the defendants and calculated interest @ 3% per annum and added Rs.54,000/- (interest amount) to the principal amount of Rs.50,000/- and shown Rs.1,04,000/- as sale advance. The plaintiff has claimed interest at an exorbitant rate and therefore, punishable under Usurious Loans Act and the Tamil Nadu Prohibition of charging of Exorbitant Interest Act, 2003. There was no intention on the part of the defendants to sell the suit property in favour of the plaintiff and hence, the suit is liable to be dismissed.



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

5. On the basis of the above pleadings, the trial Court framed the following issues :

- i. Whether the plaintiff is entitled for specific performance of contract ?
- ii. Whether the contention of the defendants that the sale agreement filed by the plaintiff cannot be entertained is correct ?
- iii. Whether the contention of the defendants that the sale agreement had been a created one is right ?
- iv. To what relief the plaintiff is entitled?

6. In the trial Court, the plaintiff examined himself and two other witnesses and marked Ex.A1 to A3. The second defendant examined himself, however, no documentary evidence was adduced on his side.

7. After analyzing the oral and documentary evidence adduced on both sides the trial Court decreed the suit in favour of the plaintiff vide its decree and judgment dated 06.12.2007 on the following grounds:



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

- i. The sale agreement was executed and registered for a total sale consideration of Rs.1,10,000/- out of which Rs.1,04,000/- was paid by the plaintiff on the date of sale agreement and hence, the defendants cannot contend that there was no intention on their part to create a sale agreement.
- ii. The guideline value of the suit property was Rs.50,000/- per acre and the sale consideration fixed for 2 acres of land as Rs.1,04,000/- cannot be said to be too low.
- iii. The defendants have not sent a legal notice to the plaintiff to repay the loan amount allegedly paid by them.

8. Aggrieved over the decree and judgment passed by the trial Court, the second defendant filed an appeal in A.S.No.6 of 2008 before the Principal District Court, Krishnagiri. The learned Principal District Judge, Krishnagiri allowed the appeal and set aside the decree and judgment passed by the trial Court vide his decree and judgment dated 11.06.2009 on the following grounds :



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

- i. The arithmetic calculation would establish that the plaintiff paid a sum of Rs.50,000/- as loan to the defendants and the interest for the said sum works out to Rs.54,000/- (@ 3% per month for three years). If the principal amount of Rs.50,000/- and the interest amount of Rs.54,000/- are added, the sum comes to Rs.1,04,000/- which is reflected in the sale agreement Ex.A1.
- ii. It is difficult to accept that the plaintiff who paid 94.5% of the sale consideration, sought three years time for repayment of balance consideration of Rs.6,000/- (5.45%).
- iii. The suit for specific performance is a discretionary relief and the scrutiny of oral and documentary evidence adduced on both sides clearly would go to show that the plaintiff has not approached the Court with clean hands and the plaintiff being a money lender had created the sale agreement only for the purpose of loan amount obtained by the defendants.
- iv. Both the courts below held that the defendants have saleable interest in the suit property and the contention of the defendants that the suit property is an ancestral property was not accepted.



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

9. Now the present second appeal is filed by the plaintiff on the following substantial question of law :

- i. Whether the lower appellate court is justified in concluding that the nature of transaction is only security for the loan transaction, contrary to Sections 91 & 92 of Evidence Act?
- ii. When the value of the property is as indicated in the sale agreement whether it is permissible on the part of the defendants to contend that the document under Ex.A1 is a loan transaction ?
- iii. Whether the defendants are not estopped by record and conduct from denying the contents of Ex.A1?

10. Heard Ms.V.Srimathi, learned counsel for the appellant and Mr.P.Mani, learned counsel for the respondents.

11. Ms.V.Srimathi, learned counsel for the appellant would contend that a bare perusal of Ex.A1 sale agreement would go to show that the nature of transaction was only that of a sale agreement and not a loan transaction and the onus of proof heavily lies on the respondents



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

who had contended that there was only a loan transaction between them and the plaintiff and that in the instant case the defendants have not discharged their burden. She relied on the decision in *A.M.Adhil Badusha vs.Sucharitha Anand and Another* reported in (2012) 8 Mad LJ 177 and *T.G.Pongiannan vs. K.M.Natarajan and Another* reported in 2009 (6) CTC 301 in support of her contentions. She also relied on the decision in *Mangala Waman Karandikar (Dead) through legal representatives vs. Prakash Damodar Ranade* reported in (2021) 6 SCC 139 and contended that conjoint reading of Sections 92 & 95 of the Indian Evidence Act would go to show that it is only in cases where the terms of the document leave the question in doubt, then resort could be had to the proviso to Section 92. She further contended that in the instant case since the document is a straight forward one and presents no difficulty in construing it, the proviso to Section 92 would not apply and if the contrary view is adopted to render Section 92 of the Indian Evidence Act, it would enlarge the ambit of proviso (6) beyond the main section itself. She would further contend that the plaintiff has paid the



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB CODE

substantial amount of sale consideration even on the date of sale agreement and he was possessing sufficient means to pay the balance amount of Rs.6,000/-. It is her contention that the first appellate court without taking into account Section 92 of the Indian Evidence Act had held that the suit transaction was only a loan transaction and there was no intention on the part of the defendants to create a sale agreement in favour of the plaintiff merely on the ground that the plaintiff admitted that he is a money lender. She therefore, prayed for allowing the present appeal.

12.Per contra Mr.P.Mani, learned counsel for the respondents relied on the following decisions in

1. *Tejram vs. Patirambhau reported in 1997 (9) SCC 634*
2. *Pappammal @ T.Pappa vs. P. Ramasamy reported in 2012 (4) CTC 100*
3. *Rajammal and another vs. M.Senbagam reported in 2016 (6) CTC 225.*



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

4. *Judgment dated 17.03.2021 passed by the Division Bench of this Court in A.S. No.573 of 2018 (S.A. Giridaran and others vs. A. Mallika).*
5. *Judgment dated 07.07.2021 passed by the Single Judge of this Court in S.A. No.500 of 2021 (C.Senthamarai vs. Vincent Mary)*
6. *Judgment dated 18.10.2022 passed by the Single Judge of this Court in S.A. No.329 of 2017 (Luisa @ Lusiva (died) rep. by her legal heir vs. Prakasam Ammal)*

and contended as follows:

- i. Having regard to the sale consideration fixed, the advance paid and time fixed for payment of balance sale consideration, one can easily infer that Ex.A1 could not have been intended to be acted upon as agreement of sale.
- ii. It is sufficient for the respondents to prove preponderance of probabilities which would lead to the conclusion that Ex.A1 was not intended to be acted upon as agreement sale.
- iii. No convincing reason is stated as to why the plaintiff sought 3



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

years time for paying the balance sale consideration of Rs.6,000/- to get the sale deed executed in his favour, more particularly, when the fact remains that he is a money lender.

- iv. Right to pay the balance amount and claim for execution of sale deed does not arise for the plaintiff at the eleventh hour of the third year and in the instant case the plaintiff has filed the suit at the fag end of the third year.
- v. The plaintiff should have shown that the right to get the sale deed executed in his favour commences even from the date of execution of the agreement and the plaintiff should plead and prove his readiness and willingness right from the date of agreement till the decree is passed. No reason has been shown in the sale agreement or in the plaint as to why 3 years time limit was fixed for execution of the sale deed and such a long delay indicates that there is no readiness or willingness on the part of the plaintiff.
- vi. The trial court had erred in relying on the vague evidence of the plaintiff to grant discretionary relief of specific performance in contravention to the mandate of Section 20 of the Specific Relief



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

Act. Therefore, the first appellate court was right in setting aside the decree passed by the trial court.

12.1. The learned counsel for the defendants also relied on the decision of this court in A.S. 293 of 2011 dated 22.12.2022, wherein this Court held as follows:

*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 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*



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY *therefore, the plea that has now been raised by the defendant is not barred under Section 92 of Indian Evidence Act.*

It is his further submission that the plaintiff has failed to provide any documents or evidence which would indicate that he called upon the respondents to perform their obligations within the time stipulated in the contract. Specific Performance being a equitable remedy, the court while granting decree of specific performance exercises its discretionary jurisdiction. As per Section 20 of the Specific Relief Act, discretion of the court must be exercised in accordance with sound and reasonable judicial principles. He also relied on the decision in ***Katta Sujatha Reddy and another vs. Siddamsetty Infra Projects Pvt. Ltd.*** reported in **2023 (1) MWN (civil) 65** in which the Apex Court held that the amended Section 20 of the Specific Relief Act is prospective and not retrospective. He, therefore prayed for dismissal of the appeal.

13. It is admitted by both the parties that the registered sale agreement (Ex.A1) was entered into on 19.09.2002 and the sale



S.A.No.1204 of 2009 & M.P. No.1 of 2009

consideration of the suit property was fixed as Rs.1,10,000/-, out of which Rs.1,04,000/- was paid by the plaintiff on the date of the sale agreement itself. The contention of the defendants is that though a registered sale agreement was made, it was not intended to be acted upon. According to them, they obtained a loan of Rs.50,000/- from the plaintiff for which an exorbitant rate of interest @ 36% per annum was charged by the plaintiff and the advance amount was indicated in the sale agreement as Rs.1,04,000/-

14. It is pertinent to point out that though the plaintiff paid a sum of Rs.1,04,000/- on the date of sale agreement itself, it is not known as to why he fixed three long years for payment of the balance of Rs.6,000/- for getting the sale deed executed in his name. This was taken into account by the first appellate court and held that the sale agreement was created only for the purpose of loan transaction between the plaintiff and the defendants. The first appellate court had also calculated the interest for Rs.50,000/- for three years which comes to Rs.54,000/- (@ 3% per month for three years) and held that if the principal amount and



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

the interest amount are added it would come to Rs.1,04,000/- and this was indicated in Ex.A1 as an advance amount.

15. The specific contention of the learned counsel for the appellant is that when the execution of the sale agreement and the terms of the contract had not been denied by the defendants, they cannot now contend that Ex.A1 was created for some other purpose as it is hit by Section 92 of the Code of Civil Procedure.

16. Per contra Mr.P.Mani, learned counsel for the respondents contended that as per proviso to Section 92 of the Indian Evidence Act the party to the deed can be permitted to contend that the deed was not intended to be acted upon but was only a sham and nominal document and that the bar arises only when the document is relied upon and the terms are sought to be varied and contradicted. It is his contention that the plaintiff himself admitted that he is a money lender and therefore, it is sufficient for the defendants to prove their case by preponderance of



S.A.No.1204 of 2009 & M.P. No.1 of 2009

probabilities as held by the Hon'ble Supreme Court in the decision in *Pappammal @ T.Pappa vs. P. Ramasamy* (cited supra).

17. Though the agreement of sale was registered and the plaintiff paid a sum of Rs.1,04,000/- on the date of the sale agreement, he fixed three years period for the payment of balance sale consideration of just Rs.6,000/-. The plaintiff nowhere in the plaint has explained the reasons for the same. Though the learned counsel for the appellant relied on several decisions to show that the appellant was having sufficient money to pay the balance sale consideration and get the sale deed executed in his name, the real issue involved in the instant case is whether the parties executed the sale agreement only for the purpose of executing the sale deed in favour of the plaintiff or it is executed as a security for the loan obtained by the defendants as alleged by them. In the plaint, though the plaintiff had stated that he approached the defendants to pay the balance sale consideration on several occasions and that the defendants evaded, the plaintiff has not specified any date of the alleged



S.A.No.1204 of 2009 & M.P. No.1 of 2009

approach made by him for getting the sale deed executed in his favour.

The fact that the agreement is registered gives an indication that special care is taken by the plaintiff to make the agreement as a genuine sale transaction. In evaluating whether the plaintiff was ready and willing to perform his part of the contract, it is not only necessary to view whether he had financial capacity to pay the balance sale consideration but also assess his conduct throughout the transaction. It is settled law that the plaintiff must prove that he was always ready and willing to perform his part of the contract and in this regard, the burden of proof heavily lies on the plaintiff. In the instant case, admittedly the plaintiff did not issue even a single notice to the defendants though it is contended by him that the defendants evaded him. The suit was filed just few days before the expiry of the period of limitation of three years and that too without issuing any notice to the defendants. It is settled principles of law that the Court while granting decree of specific performance exercises its discretionary jurisdiction. In the decision in ***Katta Sujatha Reddy and another vs. Siddamsetty Infra Projects Pvt. Ltd.*** (cited supra) the full bench of the Hon'ble Supreme Court held that the amendment carried out in 2018 in



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

the Specific Relief Act was not a mere procedural enactment, rather it had substantive principles built into its working and such amendments would apply only prospectively and not retrospectively. The sale agreement was prior to the amendment in 2018 and therefore, the submission of the learned counsel for the appellant that after the amendment of Section 10 of the Specific Relief Act, the Courts are obliged to enforce the specific performance of a contract subject to the provisions of sub section (2) of Section 11, Section 14 & Section 16 of the Specific Relief Act cannot be accepted.

18. The trial Court merely based on the guideline value had come to the conclusion that the sale consideration had been properly fixed in the agreement of sale. It is settled that the guideline value and market value are distant neighbours. No documentary evidence was produced by the plaintiff to show that the actual market value of the suit property at the relevant point of time was Rs.1,06,000/-. Merely because the sale agreement is registered and the defendants did not deny their signatures on the sale agreement, it cannot be simply held that the parties intended



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

only to create a sale agreement. The evidence on record and the surrounding circumstances in the instant case such as fixing up of a long gap of three years for payment of just Rs.6,000/- from the date of the sale agreement adding exact interest amount of Rs.54,000/- to Rs.50,000/- as advance amount in the sale agreement and non issuance of notice by the plaintiff to the defendants to show his readiness and willingness to perform his part of the contract are all the factors which go against the case of the plaintiff.

19. In the decision in *A.M.Adhil Badusha vs.Sucharitha Anand and Another* (cited supra), relied upon by the counsel for the appellant, the time for performance of contract was fixed as six months and before the expiry of six months the plaintiff issued a notice calling upon the defendants to execute the sale deed in his favour after receiving balance sale consideration of Rs.50,000/-. In such circumstances, it was held that the plaintiff is entitled for specific performance of contract. Hence the said decision would not apply to the present case. Similarly, the decision in **T.G.Pongiannan vs. K.M.Natarajan and Another** (cited supra)



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

would not apply to the facts of the present case. A conjoint reading of Section 92 and 95 of the Indian Evidence Act makes the point clear that even though there is a registered instrument evidencing a particular transaction, yet the parties are at liberty to plead and prove that such a registered document was not intended to be acted upon. As already observed, the reason for fixing up a long gap of three years for the payment of balance sale consideration Rs.6,000/- and the non issuance of notice by the plaintiff to show his readiness and willingness and also the absence of plea in the plaint in this regard are the factors which have to be taken into account in the instant case and, the defendants by preponderance of probabilities have proved that the sale agreement Ex.A1 was created only for the purpose of repayment of loan amount obtained by them from the plaintiff. Moreover, the sale agreement is of the year 2002. More than two decades have passed and the value of the property would have increased manifold and in the circumstances it may not be proper for the Courts to exercise its discretionary power to grant the decree of specific performance of contract. The first appellate court in fact had analysed the entire evidence on record and had observed as follows :



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

"22. The suit for specific performance is a discretionary relief. The Court has to look into the genuineness of the case by weighing the evidence on either side. According to the plaintiff, the defendants agreed to sell the property for Rs.1,10,000/- and the plaintiff has paid Rs.1,04,000/- as advance i.e. 94.55% of the sale amount. It is agreed to pay the balance sale consideration of Rs.6,000/- i.e. 5.45% within 3 years time and get the sale deed executed. In a usual practice it is difficult to accept that the purchaser having paid 94.55% of the sale amount as advance would wait for 2 long years to pay the remaining balance sale consideration of 5.45% and it is not practical and common, which would give the strength of the case of the defendants. Further during the course of the cross examination P.W.1 admittedly

"மாதத்திற்கு 3 ரூபாய் வட்டி என்றால் ஒரு வருடத்திற்கு ரூ.18 ஆயிரம் என்றும் 3 வருடத்திற்கு ரூ.54 ஆயிரம் வட்டி ஆகும் என்று சொன்னார்கள்.



S.A.No.1204 of 2009 & M.P. No.1 of 2009

பாக்கித் தொகைக்கு 3 வருட வாய்தா கொடுத்தோம்.
திருப்பி ரூ.1,04,000/-ஐ கொடுத்து விட்டால் கிரைய
ஒப்பந்த பத்திரத்தை அமல்படுத்த மாட்டேன் என்ற
காரணத்திற்காக அவ்வாறு எழுதினேன். ரூ.1,04,000/-ஐ
திருப்பி தந்தால் நான் கிரயம் செய்து தரமாட்டேன்
அதற்காக தான் 3 வருடம் வாய்தா தந்தேன். தற்போது
தரமாட்டேன்."

It is clearly an admission that Ex.A1 was created only as a security for due repayment of loan of account obtained by the defendants. The citation referred by the plaintiff's counsel is not applicable to this case. To substantiate the case of the defendant by working out interest at the rate of 3% per month per 100 for 3 years would come to Rs.54,000/-. Rs.50,000/- principal added with 3 years of interest would come to Rs.1,04,000/-. This would also help the defendants to come to conclusion and the defendants' case has been accepted on this score also. Therefore, the appellant/2nd defendant established that Ex.A1 was created as a security to the due repayment of loan amount. Ex.A1 is not intended to act upon.



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

I do not find any infirmity in the above observations of the first appellate Court and therefore, the Second Appeal is dismissed as devoid of merits.

20. In the result,

- i. The Second Appeal is dismissed. No costs. Consequently connected miscellaneous petition is dismissed.
- ii. the decree and judgment dated 11.06.2009 passed in A.S. No.6 of 2008, on the file of the Principal District Judge, Krishnagiri, is upheld.
- iii. the decree and judgment dated 06.12.2007 passed in O.S. No.74 of 2005, on the file of the Subordinate Judge, Hosur, is set aside.
- iv. The Suit in O.S. No.74 of 2005 on the file of the Subordinate Judge, Hosur, is dismissed with costs.

08.03.2023

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga



S.A.No.1204 of 2009 & M.P. No.1 of 2009

WEB COPY

To

1. The Principal District Judge, Krishnagiri.
2. The Subordinate Judge, Hosur.
3. The Section Officer, VR Section, High Court, Madras.



WEB COPY



S.A.No.1204 of 2009 & M.P. No.1 of 2009

R. HEMALATHA, J.
bga

S.A.No.1204 of 2009 &
M.P. No.1 of 2009

08.03.2023