IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Judgment	Date of Pronouncing the Judgment
28.11.2019	16.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.Nos.399 of 2008, 998 of 2009 & 274 of 2013

A.S.No.399 of 2008:

1.K.V.Bakthavatsalam

2.Bhuvaneswari

3.Geetha

4.Sreenivasan

5.Poornima ... Appellants

-vs-

1.Pannalal Bafna

2.Sameermal Bafna

3.Uthamchand Bafna (Died)

4.Devichand Bafna

5.Bafna Mahaveer

6.M/s.R.Selvaraj & Brothers
Rep.by its Partner Mr.R.Selvaraj
Carrying on business at
No.44, Acharappan Street
Chennai-600 001

7.Sulochana Devi

8.Sunil Bafna

9.Mamtha Jain ... Respondents
[R7 to R9 brought on record as L.Rs.
of the deceased R3 vide order of Court
dated 07.11.2019 made in
C.M.P.No.23179 of 2019]

PRAYER: Appeal is filed under Section 96 of the Code of Civil Procedure to set aside the Judgment and Decree, dated 19.04.2006 made in O.S.No.7289 of 1996, on the file of the learned II Additional Judge, City Civil Court, Chennai.

For Appellants : Mr.R.Krishnaswamy
for Mr.P.K.Gopalraj

For Respondents : Mr.D.Nalluchamy for R1, R2, R4, R7 to R9
Ex parte R5 & R6

A.S.No.998 of 2009:

1.K.V.Bakthavatsalam

2.S.Indra (deceased)

3.B.Sreenivasan

4.Poornima ... Appellants
[Amended vide order of Court dated 30.09.2009 made in M.P.No.1 of 2009]

-vs-

1.K.Manoharmal Bafna (deceased)

2.Pannalal Bafna

3.Sameermal Bafna

4.Uthamchand Bafna (died)

5.Devichand Bafna

6.Amri Bai

7.Bafna Mahaveer

8.Sulochana Devi

9.Sunil Bafna

10.Mamtha Jain ... Respondents
[R2 to R7 brought on record as legal heirs of deceased K.Manoharmal Bafna and R8 to R10 brought on record as L.Rs. of the deceased R4 vide order of Court dated 07.11.2019 made in C.M.P.No.23164 of 2019]

PRAYER: Appeal is filed under Order XLI Rule (1) read with Section 96 of the Code of Civil Procedure to set aside the Judgment and Decree, dated 19.04.2006 made in O.S.No.4149 of 1990, on the file of the learned II Additional Judge, City Civil Court, Chennai.

For Appellants : Mr.R.Krishnaswamy
for Mr.P.K.Gopalraj

For Respondents : Mr.D.Nalluchamy for R2 to R10

A.S.No.274 of 2013:

1.K.V.Bakthavatsalam

2.B.Srinivasan

3.B.Purnima ... Appellants

-vs-

1.K.Manoharmal Bafna (Deceased)

2.Pannalal Bafna

3.Sameermal Bafna

4.Uthamchand Bafna (Died)

5.Devichand Bafna

6.Bafna Mahaveer

7.Sulochana Devi

8.Sunil Bafna

9.Mamtha Jain ... Respondents
[R7 to R9 brought on record as L.Rs. of the deceased R3 vide order of Court dated 07.11.2019 made in C.M.P.No.23151 of 2019]

PRAYER: Appeal is filed under Order XLI Rule (1) read with Section 96 of the Code of Civil Procedure to set aside the Judgment and Decree, dated 19.04.2006 made in O.S.No.12160 of 1989, on the file of the learned II Additional City Civil Court, Chennai.

For Appellants : Mr.R.Krishnaswamy
for Mr.P.K.Gopal Raj

For Respondents : Mr.D.Nalluchamy for R2, R3, R5 to R9

COMMON JUDGMENT

The first appeals are directed against the common Judgment and Decree, dated 19.04.2006, passed in O.S.Nos.7289 of 1996, 4149 of 1990 and 12160 of 1989, on the file of the II Additional Judge, City Civil Court, Chennai.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

O.S.No.7289 of 1996 (A.S.No.399 of 2008):

3. O.S.No.7289 of 1996 has been laid for specific performance or in the alternative for the return of the advance amount with interest.

4. The case of the plaintiff in brief is that the first defendant and his deceased wife Tmt.Indira entered into an agreement of sale with the plaintiff on 16.03.1987 for the sale of the suit property, for a sum of Rs.6,35,000/- and the plaintiff paid a sum of Rs.25,000/- as advance on the date of the agreement and the abovesaid sum has been agreed to be charged on the property and a further sum of Rs.1,00,000/- was to be paid on or before 15.04.1987 and another sum of Rs.1,00,000/- was to be paid on getting full vacant possession of the suit property and the suit property was subject to a mortgage in favour of Mathan Kavur for a sum or Rs.2,25,000/- and the first defendant and his wife had agreed to deliver the vacant possession of the suit property to the plaintiff on or before 30.06.1987 and the delivery of vacant possession was made as a condition precedent for the execution of the sale deed.

5. Pursuant to the agreement of sale, a further sum of Rs.25,000/- was paid by the plaintiff to the first defendant and his wife on 18.04.1987 and a third sum of Rs.25,000/- was paid on 27.04.1987 and finally, a fourth sum of Rs.10,000/- was paid on 05.05.1987, amounting in all to Rs.85,000/- and on 20.03.1988, the first defendant and his wife issued a notice, through their Advocate, to the plaintiff alleging that the plaintiff has committed breach of the agreement and contended that after the receipt of Rs.85,000/-, a pro note was executed by the first defendant, his wife and their son and daughter on 19.04.1987, without receiving any payment and it has been stated that in November, 1987, a draft sale deed was sent by the plaintiff requiring the son and three daughters of the first defendant and his wife to join in the sale deed as vendors and by way of the said notice, time was given upto 10.03.1988 to discharge the plaintiff's obligation under the abovesaid agreement.

6. The plaintiff gave a reply on 09.06.1988 calling upon the first defendant and his wife to sit over and discuss the matter as to how best the transaction could be completed. However, without giving any concrete proposal, suddenly, the first defendant and his wife issued a notice on 01.11.1988 giving time till 11.11.1988 to complete the sale transaction. A reply was given on 09.11.1988 by the plaintiff expressing his willingness for

registering the sale deed and also called for income tax clearance certificate. While the plaintiff was expecting the income tax clearance certificate from the first defendant and his wife for registering the sale deed, the plaintiff came to know that deliberately the first defendant and his wife have sold the suit property to the sixth defendant and the sixth defendant was fully aware of the agreement of sale in favour of the plaintiff as the whole agreement was arranged by their Advocate P.K.Gopal Raj and on seeing the construction activities going on in the suit property, the plaintiff contacted the Advocate P.K.Gopal Raj and he represented that the suit property had been sold and when the plaintiff referred to the sale agreement in his favour, P.K.Gopal Raj said that he will settle the matter amicably and that is why, the plaintiff did not take steps to issue a notice believing the abovesaid representation to be true. The attempt made by P.K.Gopal Raj to delay the process was only for the purpose of saving his own acts of commission and omission. P.K.Gopal Raj had written a letter to the sixth defendant saying that there is no subsisting agreement to sell the property in favour of anybody to enable the sixth defendant to get finance and the sixth defendant was made aware of the suit agreement by P.K.Gopal Raj and therefore, the sixth defendant is not the *bona fide* purchaser for the value without notice of the suit agreement in favour of the plaintiff.

7. A notice was issued on 16.10.1989, wherein the first defendant and his wife had falsely concocted a story as if the plaintiff was not interested in purchasing the suit property. The plaintiff is a man of sufficient means and always willingness to purchase the suit property. In fact, he had already sent a draft sale deed to the first defendant and his wife for getting the income tax clearance certificate. The plaintiff even expressed his willingness to purchase the suit property without insisting upon the vacant possession of the suit property and a sum of Rs.25,000/- was retained for delivery of vacant possession within three months from the date of the intended sale deed.

8. A reply was given by the plaintiff on 14.11.1989 to the abovesaid notice, with a copy marked to the sixth defendant. A rejoinder was given by the first defendant and his wife on 07.12.1989 *inter alia* stating that the plaintiff received a blank promissory note for Rs.50,000/- without payee's name from the first defendant and his wife and their son and daughter and the abovesaid averments are false. The said pronote is true, valid and supported by consideration and the promisors borrowed Rs.50,000/- from the plaintiff on 19.04.1987 and executed the same in favour of the plaintiff. The plaintiff filed a separate suit, on the basis of the said promissory note. The

reply notice dated 14.11.1989 has also been received by the sixth defendant. The wife of the first defendant died leaving behind the first defendant and the defendants 2 to 5 as her legal heirs and therefore, they had been impleaded. Hence, according to the plaintiff, he has laid the suit for the appropriate relief.

9. The first defendant resisted the plaintiff's suit contending that the sale agreement dated 16.03.1987 had been entered into between him, his wife and the plaintiff with reference to the suit property and they had agreed to sell the suit property to the plaintiff as they were in urgent need of funds to celebrate the marriage of their daughter Geetha, which was scheduled on 02.05.1987 and in addition to the sum of Rs.25,000/- paid as advance on the date of the sale agreement, the plaintiff agreed to pay a further sum of Rs.1,00,000/- or or before 15.04.1987 and however, the plaintiff had not honoured his abovesaid commitment and thereby, committed the breach of agreement. The amounts said to have been paid by the plaintiff have been made after the persistent demands on the part of the defendants. The plaintiff had also obtained a pronote from the first defendant, his wife and defendants 4 and 5, without advancing any amount, on 19.04.1987 and they had signed the same, without receiving any amount, under the fond hope that he would pay the further sum of Rs.1,00,000/- before the marriage of Geetha. For

whatever the amounts the plaintiff had made, he had obtained the signature of the first defendant and his wife on the agreement itself.

10. The first defendant and his wife issued a notice dated 20.02.1988 to the plaintiff stating that the plaintiff had wilfully failed and neglected to discharge his duty as per terms of the sale agreement and also informed the plaintiff that they are not agreeable to execute the sale deed in terms of the said draft sale deed as it required the signature of their son and daughters and the same is not incorporated in terms of the sale agreement. Despite the same, the plaintiff had not changed his stand and made it clear that he is not interested in discharging his duty as per the sale agreement and finally, time was given upto 10.03.1988 to the plaintiff to discharge his duty and the plaintiff was directed to surrender the pronote dated 19.04.1987 duly cancelled and pay the advance amount with interest at the rate of 24% per annum from 15.04.1987 till date and sent the draft sale deed describing the first defendant and his wife alone as vendors, failing which, the plaintiff was apprised that the sale agreement would be treated as discharged and the first defendant and his wife would be treated as discharged from their obligations due to the breach of the sale agreement on the part of the plaintiff and the first defendant and his wife would be refunding Rs.60,000/- to the plaintiff

after adjusting Rs.25,000/- towards damages from the total sum of Rs.85,000/- paid by the plaintiff till then.

11. Even thereafter, the plaintiff had not bothered to send any reply. Even in the belated reply notice, dated 09.06.1988, the plaintiff has not come forward with any concrete proposal and has given evasive reply. The first defendant had suggested registration of the sale deeds, one by him and the other one by his wife jointly with their son / fourth defendant in favour of the plaintiff or his nominee / nominees and the purchaser, namely, the plaintiff shall deposit Rs.25,000/- each in the fixed deposit in the name of the first defendant and his wife jointly with the purchaser on any Bank and the said fixed deposit amounts would be encashed by the first defendant and his wife after the delivery of possession of the entire building to the plaintiff. Two draft sale deeds were presented by the first defendant and his wife to the plaintiff in August, 1988 for approval and obtaining income tax clearance certificate. However, the plaintiff was not interested in the sale transaction and did not bother to approve the sale deeds and return the same and hence, a legal notice, dated 01.11.1988 was given to the plaintiff. The reply of the plaintiff, dated 09.11.1988, would expose that the plaintiff was not in a position to discharge his duties. Without sending the draft sale deed duly

approved, the plaintiff has merely come forward as if he is ready to register the sale deed and thus, the plaintiff is not *bona fidely* interested in purchasing the suit property.

12. The first defendant and his wife had taken steps to evict the tenants from the suit property and as the mortgagee had instituted a civil suit against the first defendant and his wife claiming the mortgage amount, left with no other alternative, the first defendant and his wife proceeded to alienate the suit property to the willing purchaser and accordingly, they had sold the suit property to the sixth defendant. As the plaintiff had committed breach of the sale agreement, dated 16.03.1987 and the said agreement was not in force, there was no necessity for the first defendant and his wife to disclose the same to the sixth defendant.

13. The sixth defendant had given the draft sale deeds to enable the first defendant and his wife to get the income tax clearance certificate and also discharged the mortgage debts subsisting on the suit property and after completing the necessary formalities, the sale deed had been executed in favour of the sixth defendant and possession was delivered to him. The plaintiff has made unnecessary allegations against the Advocate P.K.Gopal

Raj. The plaintiff has never been ready to discharge his duties and the plaintiff has no means to complete the sale transaction.

14. The first defendant and his wife and the other defendants had filed the suit in O.S.No.12160 of 1989, on the file of the City Civil Court, Madras, for the relief of mandatory injunction directing the plaintiff to return the promissory note dated 19.04.1987. On the other hand, the plaintiff had filed O.S.No.4149 of 1990 claiming the alleged amount due under the pronote dated 19.04.1987. The plaintiff has not come forward with clean hands. Due to the breach committed by the plaintiff, the first defendant had suffered a loss of Rs.70,000/- in the sale of the suit property. The defendants are entitled to forfeit the sum of Rs.25,000/- as per the terms of the sale agreement and accordingly, prayed the necessary counter claim with reference to the same and accordingly, prayed for the dismissal of the plaintiff's suit.

15. The defendants 2 to 5 have filed the written statement contending that they have nothing to do with the sale agreement dated 16.03.1987 entered into between the plaintiff and their parents. The defendants did not borrow Rs.50,000/- from the plaintiff on the strength of the pronote dated 19.04.1987 and the parents of the defendants 2 to 5 wanted

them to sign a pronote for Rs.50,000/- as the plaintiff insisted upon such signature in order to pay the advance amount. Owing to the abovesaid undue influence of their parents, the defendants 4 and 5 had signed the pronote dated 19.04.1987 for Rs.50,000/- without receiving any amount from the plaintiff and the defendants 2 to 5 never approached the plaintiff for a loan of Rs.50,000/- on 19.04.1987 and the abovesaid promissory note is not supported by consideration and it is void and unenforceable. The consent of the defendants 4 and 5 was not obtained freely and with reference to the same, the parents of these defendants and the defendants 4 and 5 had filed O.S.No.12160 of 1989 for the appropriate relief, on the file of the City Civil Court, Madras. The mother of the defendants 2 to 5 did not leave any estate and the fourth defendant had executed the sale deed in favour of the sixth defendant in 1989 itself and therefore, according to them, they are unnecessary parties to the suit and the suit laid by the plaintiff is liable to be dismissed.

16. The sixth defendant resisted the plaintiff's suit contending that they are the *bona fide* purchasers of the suit property without notice and in good faith after proper enquiry and without the knowledge of the alleged previous agreement with the plaintiff and the sixth defendant paid valid

consideration for the purchase of the suit property under two sale deeds dated 22.02.1989, after discharging the two earlier mortgages in respect of the suit property and therefore, the suit laid by the plaintiff against the sixth defendant is not maintainable.

17. The plaintiff is not entitled to seek for the specific performance based on the agreement dated 16.03.1987. The plaintiff is guilty of laches and delay and he has not complied with the terms of the agreement of sale and failed to perform his part of the contract and in any event, to the knowledge of the sixth defendant, there is no agreement between the plaintiff and the defendants 1 and 2 and the sixth defendant is not aware of the correspondences between the plaintiff and the defendants as alleged in the plaint. The sixth defendant obtained financial assistance from the Tamil Nadu Mercantile Bank, G.T.Branch, Madras, for the purchase of the suit property and after obtaining legal opinion, the sixth defendant endeavoured to purchase the suit property for valid consideration and after the eviction of the tenants, the possession had been handed over to the sixth defendant by the vendors and therefore, the sixth defendant had acted *bona fidely* and honestly and after due enquiry, purchased the suit property and put up new construction in the suit property, after obtaining necessary permission from

the Corporation of Madras and the suit property has been mutated in the name of the sixth defendant by the Corporation and therefore, putforth the case that the plaintiff is not entitled to obtain any reliefs as claimed in the plaint and the suit is liable to be dismissed.

18. On the basis of the above pleadings, the following issues were framed for consideration by the Trial Court:

i. Whether the suit as framed is maintainable?

ii. Whether the plaintiff entitled to any charge on the suit property?

iii. Whether the plaintiff has performed his part of the agreement?

iv. Whether the defendants 2 to 5 have not borrowed Rs.50,000/- from the plaintiff on the strength of the pronote dated 19.04.1987?

v. Whether the plaintiff is entitled to a decree as prayed for?

vi. Whether the plaintiffs are committed breach of contract for agreement of sale dated 16.03.1987?

vii. Whether the defendants are entitled to claim damages of Rs.25,000/- as claimed in the counter claim?

viii. Whether the plaintiffs are not entitled to equitable relief of specific performance on the account of laches and lapses on the part of the plaintiffs, as contended by the sixth defendant?

ix. Whether the sixth defendant is bona fide purchaser of the suit property without notice of Ex.A1 sale agreement?

x. Whether the plaintiffs are entitled to claim 18% interest for the advance amount?

O.S.No.4149 of 1990 (A.S.No.998 of 2009):

19. Suit for recovery of money.

20. The case of the plaintiff in brief is that on 19.04.1987, the defendant borrowed a sum of Rs.50,000/- from him and executed a promissory note promising to repay the borrowed amount with interest as recited in the promissory note and despite the repeated demands and

reminders, the defendants have not paid any amount towards the said promissory note. To the notice dated 14.11.1989, issued by the plaintiffs' Advocate, the defendants replied through their Advocate denying the borrowal of the amount, but, admitted execution of the promissory note and at the time, when the notice dated 20.02.1988 was issued, there was negotiation in respect of the purchase of the suit property between the parties and both the parties had agreed that the amount received by way of the promissory note would be repaid and therefore, there was no necessity to issue a notice and therefore, according to the plaintiffs, he had been necessitated to levy the suit for recovery of the amount due on the promissory note.

21. The defendants resisted the plaintiffs' suit contending that they had not borrowed any amount from the plaintiff on 19.04.1987 as alleged in the plaint. The suit promissory note has been obtained fraudulently by the plaintiff without paying any consideration and the defendants 1 and 2 offered to sell their property to the plaintiff and they had entered into an agreement of sale with the plaintiff with reference to the same and the plaintiff had assured to pay a sum of Rs.1,00,000/- on or before 15.04.1987, pursuant to the sale agreement and the amount had been required by the defendants 1 and 2 to perform the marriage of their daughter Geetha and the plaintiff paid

Rs.25,000/- as advance on the date of the sale agreement and did not pay further advance before the expiry of 15.04.1987 and on 18.04.1987, he paid a sum of Rs.25,000/- and obtained endorsement in the sale agreement and on 19.04.1987, when the defendants called upon the plaintiff and insisted for the payment of advance amount as per the terms of the sale agreement, the plaintiff informed that unless the defendants sign a promissory note for Rs.50,000/- and hand over the same as additional security, he would not pay the balance amount. In order to get the balance amount for the celebration of their daughter's marriage, the defendants signed the suit promissory note without receiving any amount from the plaintiff and the suit promissory note is vitiated by undue influence and void *ab initio*. If really the defendants had borrowed any amount under the suit promissory note, the plaintiff would not have waited for more than 20 months for demanding the repayment of the sum and the defendants had been sending notices to the plaintiff calling upon him to return the suit promissory note duly cancelled, however, only on 14.11.1989, the plaintiff issued the legal notice based upon the suit promissory note and the defendants have filed the suit in O.S.No.12160 of 1989 for mandatory injunction directing the plaintiff to return the suit promissory note and therefore, the plaintiff is not entitled to recover any amount from the defendants and the suit is liable to be dismissed.

22. On the basis of the above pleadings, the following issues were framed for consideration by the Trial Court:

i. Whether the plaintiff is entitled to the suit claim amounts?

ii. Whether the plaintiff has not discharged his duty under the agreement dated 16.03.1987?

iii. To What relief?

O.S.No.12160 of 1989 (A.S.No.274 of 2013):

23. Suit for mandatory injunction.

24. The case of the plaintiffs in brief is that on 16.03.1987, the plaintiffs 1 and 2 entered into an agreement with the defendant agreeing to sell their property and received Rs.25,000/- as advance on the date of the sale agreement and the defendant agreed to pay further sum of Rs.1,00,000/- to the plaintiffs 1 and 2 on or before 15.04.1987. However, the defendant failed to pay the abovesaid amount. The plaintiffs 1 and 2 had been repeatedly demanding the defendant to pay the abovesaid amount as the same had been required for celebrating the marriage of their daughter and the defendant paid

a sum of Rs.25,000/- on 18.04.1987 and obtained the endorsement in the sale agreement and when the plaintiffs 1 and 2 insisted the further payment as per the terms of the sale agreement, the defendant directed the plaintiffs 1 and 2 to sign a pronote for a sum of Rs.50,000/- without the name of the payee and handover the same as additional security and thereby, the defendant would pay the balance amount and accordingly, with a view to get the balance amount, the defendant had signed a promissory note on 19.04.1987, without receiving any consideration, believing that the defendant would honour his promise and pay the further advance amount based on the sale agreement, however the defendant paid only a sum of Rs.25,000/- and obtained their signature in the sale agreement and on 05.05.1987, the defendant paid a further sum of Rs.10,000/- to the plaintiffs 1 and 2 and obtained their signatures in the sale agreement and in all, the defendant had paid Rs.60,000/- between 18.04.1987 and 05.05.1987 and the defendant had failed to discharge his duty as per the terms of the sale agreement. Hence, the plaintiffs 1 and 2 issued a legal notice dated 20.02.1988 to the defendant calling upon him to surrender the promissory note for Rs.50,000/- dated 19.04.1987 duly cancelled. The defendant did not dispute the same and also not returned the suit promissory note as demanded by the plaintiffs.

25. Further, the plaintiffs 1 and 2 by way of a legal notice dated 16.10.1989 called upon the defendant to surrender the pronote duly cancelled and even thereafter, the defendant did not respond immediately and only on 14.11.1989, he came forward with a legal notice with a story as if the plaintiffs had borrowed a sum of Rs.50,000/- from him on 19.04.1987 and executed the promissory note and therefore, they are liable to pay the same with interest. The same had been repudiated by the defendant by way of a reply dated 29.11.1989 and therefore, the plaintiffs have been necessitated to lay the suit against the defendant for appropriate relief.

26. The defendant resisted the plaintiffs' suit contending that the suit laid by the plaintiffs is not maintainable either in law or on facts. The defendant had filed a suit in O.S.No.4149 of 1990 against the plaintiffs in respect of the suit promissory note and only to avoid the payment under the suit promissory note, the plaintiffs have come forward with the false case and further putforth the case that the suit for specific performance has also been laid for enforcing the sale agreement entered into between the plaintiffs and the defendant and therefore, contended that the matter is already seized by the concerned Courts and therefore, there is no question of surrendering the

promissory note duly cancelled as claimed by the plaintiffs and the plaintiffs' suit has become infructuous and the same is liable to be dismissed.

27. On the basis of the above pleadings, the following issues were framed for consideration by the Trial Court:

i. Whether the suit is maintainable?

ii. Whether the claim of the plaintiffs for delivery of pronote mentioned in the plaint by way of mandatory injunction is sustainable?

iii. What are the reliefs due to the parties?

28. Inasmuch as common issues were involved in the abovesaid three suits, the abovesaid three suits were jointly tried and common evidence was recorded in O.S.No.7289 of 1996 and the evidence recorded in O.S.No.7289 of 1996 has been treated as evidence in the other two cases.

29. In support of the plaintiffs' case, P.W.1 was examined and Exs.A1 to A15 were marked. On the side of the defendants, D.Ws.1 and 2 were examined and Exs.B1 to B25 were marked.

30. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court was pleased to decline the relief of specific performance prayed for by the plaintiff in O.S.No.7289 of 1996 and granted the alternative relief of the refund of Rs.85,000/- with interest at the rate of 12% per annum from the date of the plaint till the date of realization with proportionate costs and dismissed the suit in O.S.No.12160 of 1989 with costs and decreed the suit in O.S.No.4149 of 1990 for the principal amount of Rs.50,000/- with interest at the rate of 12% per annum from the date of the pronote till the date of the realization with proportionate costs. Impugning the same, the present first appeals have been preferred.

31. The following points arise for determination in these first appeals:

i. Whether the plaintiff is entitled to obtain the relief of specific performance in respect of the sale agreement dated 16.03.1987 as putforth in the plaint?

ii. Whether the plaintiff is entitled to obtain the alternative relief of refund of the advance amount paid to the defendants with interest as claimed in the plaint?

iii. Whether the plaintiff is entitled to recover the suit amount from the defendants based on the promissory note dated 19.04.1987 as claimed in the plaint?

iv. Whether the defendants are entitled to obtain the relief of mandatory injunction in respect of the promissory note dated 19.04.1987 as claimed by them?

v. Whether the sixth defendant is the *bona fide* purchaser of the suit property without notice of the sale agreement dated 16.03.1987?

vi. To what relief, the appellants are entitled to?

vii. To what relief the respondents are entitled to?

Point Nos.1 to 5:

32. From the materials placed on record, it is found that the sale agreement dated 16.03.1987 has come to be entered into between the plaintiff and the defendants. It is further noted that on the date of the sale agreement, the plaintiff has paid a sum of Rs.25,000/- as advance. The sale price has been fixed at Rs.6,35,000/-. It is found that as per the terms of the sale agreement, the plaintiff should pay a further sum of Rs.1,00,000/- to the defendants on or before 15.04.1987 and a further sum of Rs.1,00,000/- on getting vacant possession of the suit property. It is also noted that the subject matter of the sale agreement, namely, the suit property had been subjected to mortgage and the sale agreement recites that the defendants shall ascertain the exact amount due to be paid with reference to the said mortgage and the mortgage debt shall be discharged by the plaintiff i.e. purchaser from and out of the sale consideration and the said amount shall be adjusted towards the sale consideration. Further, the sale agreement also recites that the defendants should obtain the encumbrance certificate as well as pay all the necessary taxes in respect of the suit property and the sale agreement further recites that the defendants should deliver the vacant possession of the property to the plaintiff on or before 30.06.1987 and the parties had agreed to complete the sale transaction within six months.

33. Admittedly, it is found that the plaintiff has not paid the further sum of Rs.1,00,000/- or or before 15.04.1987 as stipulated in the sale agreement. From the pleas putforth by the respective parties and the materials placed on record, it is seen that the plaintiff, in pursuance of the sale agreement, had paid a further sum of Rs.25,000/- on 18.04.1987 and a further sum of Rs.25,000/- on 27.04.1987 and finally, a sum of Rs.10,000/- on 05.05.1987. Thus, inclusive of the advance amount of Rs.25,000/- paid on the date of the sale agreement, it is seen that in all, the plaintiff has paid only a sum of Rs.85,000/- pursuant to the sale agreement. Thus, it is evident that as rightly determined by the Trial Court, the plaintiff had not paid the sum of Rs.1,00,000/- on or before 15.04.1987. Further, it is also seen that the defendants are unable to deliver the vacant possession of the suit property on or before 30.06.1987 and the defendants were able to get the vacant possession only on 21.02.1989. Therefore, it is equally found that the defendants were also unable to comply with terms of the sale agreement as agreed to by them.

34. The plaintiff would putforth the case that the defendants have also failed to obtain the income tax clearance certificate for proceeding further with the sale transaction and with reference to the approval of the sale deeds,

as rightly found by the Trial Court, both parties blame each other contending that they had approved the draft sale deeds, however, the facts remain that with reference to the approval of the draft sale deeds by the respective parties, there is no clear material other than the contra averments putforth by the each party against the other. Thus, it is seen that the Trial Court has rightly determined that both the plaintiff and the defendants had committed the breach of the terms of the sale agreement and resultantly, the sale agreement could not be proceeded further.

35. Now, according to the defendants, they had been repeatedly demanding the plaintiff to pay further sum of Rs.1,00,000/- on or before 15.04.1987 as they were to celebrate the marriage of their daughter. However, it is putforth by them that the plaintiff directed them to sign a promissory note for a sum of Rs.50,000/- on 19.04.1987 and handover the same by way of additional security without the name of the payee and on that, he would pay the further sum as per the terms of the sale agreement. On that promise, it is the case of the defendants that particularly with a view to secure the balance amount, they had duly signed a promissory note for Rs.50,000/- without the name of the payee and handed over the same to the plaintiff on 19.04.1987 believing that the plaintiff would honour his promise in paying the sum as per

the terms of the sale agreement dated 16.03.1987. Therefore, according to the defendants, the promissory note dated 19.04.1987, marked as Ex.A13, is devoid of consideration and that no amount had been passed under the same and therefore, putforth the case that the plaintiff is not entitled to recover any amount on the basis of the same.

36. Per contra, according to the plaintiff, the defendants had borrowed a sum of Rs.50,000/- from him on 19.04.1987 and executed the promissory note promising to repay the said amount with interest as recited therein on demand and thereafter, they had failed to pay the same, despite the legal notice and repeated demands and hence, according to him, the suit in O.S.No.4149 of 1990 has been laid.

37. Seeking the return of the abovesaid promissory note from the plaintiff, the defendants have levied the suit against the plaintiff in O.S.No.12160 of 1989.

38. It is, thus, found that the promissory note / Ex.A13 has come into existence after the sale agreement dated 16.03.1987 marked as Ex.A1 had been executed between the parties. As rightly held by the Trial Court, if

really the defendants had not borrowed any sum under the promissory note / Ex.A13, as to why they had executed the promissory note in favour of the plaintiff, no proper explanation is forthcoming on the part of the defendants. When on the date of the execution of the promissory note, the sale agreement / Ex.A1 is in force and when as per the terms of the sale agreement, the plaintiff is bound to pay a sum of Rs.1,00,000/- to the defendants on or before 15.04.1987, in such view of the matter, the defendants should have endeavoured to secure the said amount from the plaintiff and on his failure to honour the same, the defendants should have proceeded further to cancel the agreement of sale as per law. On the other hand, to say that for securing the amount of Rs.1,00,000/- agreed to be paid by the plaintiff on or before 15.04.1987, under Ex.A1 sale agreement, they had executed a promissory note for Rs.50,000/- as additional security, as such, cannot be believed and accepted.

39. According to the defendants, when on the date of the execution of the promissory note, the plaintiff is liable to pay them a sum of Rs.1,00,000/-, in such view of the matter, there is no need on the part of the defendants to receive a sum of Rs.50,000/- under the promissory note and therefore, the Court should hold that the promissory note had been executed

and handed over by them to the plaintiff as additional security. Thus, it is found that even as per the version of the defendants, the promissory note / Ex.A13 had not been executed in relation to the sale agreement as such and on the other hand, it is found that the same had been executed by the defendants, as per their case, as additional security in favour of the plaintiff. But, the abovesaid case of the defendants, as held by the Trial Court, is found to be totally unreliable. If really the defendants had not received Rs.50,000/- under the promissory note on 19.04.1987, the defendants would not have come forward to endorse the receipt of Rs.25,000/- said to have been received by them on 27.04.1987 and a sum of Rs.10,000/- said to have been received by them on 05.05.1987 based on the terms of the sale agreement. On the other hand, the conduct of the defendants in meekly admitting the receipt of Rs.25,000/- on 27.04.1987 immediately after the execution of the promissory note and endorsing the receipt of the same in the sale agreement would only go to show that as they had received the consideration of the promissory note under Ex.A13, they had not putforth any resistance in making the endorsement with regard to the receipt of Rs.25,000/- on 27.04.1987 and Rs.10,000/- on 05.05.1987 and therefore, it is seen that the plea of the defendants that the promissory note under Ex.A13 is devoid of consideration, as such, cannot be accepted.

40. The defendants, having admitted the execution of the promissory note dated 19.04.1987, in such view of the matter, it is for the defendants to establish that the said promissory note is devoid of consideration. If really the defendants had executed the promissory note, without receiving any consideration and when the defendants had come to know of the unwillingness on the part of the plaintiff in not acting as per the terms of the sale agreement and the plaintiff had only, in toto, paid a sum of Rs.85,000/- and not honoured his commitments, if the defendants had executed the promissory note, without receiving any consideration on 19.04.1987, immediately, on noting the conduct of the plaintiff, as rightly held by the Trial Court, the defendants should have endeavoured and called upon the plaintiff to return the same by issuing a legal notice at the earliest point of time or should have instituted a suit against the plaintiff for the retrievement of the promissory note in the manner known to law. On the other hand, the defendants are found to have issued a legal notice only 20.02.1988, nearly ten months after the execution of the promissory note. Thereafter, there had been some exchange of notices between the parties and no doubt, at the earliest point of time, the plaintiff had not repudiated the case of the defendants putforth by them in the legal notice dated 20.02.1988. However, subsequently, the plaintiff had come forward with the legal notice calling upon

the defendants to pay the amount received by them under the promissory note. Considering the recitals found in the notices exchanged between the parties, it is found that though the parties had been making allegations against each other one way or the other, however, still, it is found that they have endeavouring to some extent to go ahead with the completion of the sale transaction, however, finally they were unable to proceed further in concluding the sale transaction. As held by the Trial Court, the plaintiff, being a financier, normally would not have endeavoured to advance the amount borrowed from him by the defendants by way of adjusting the same towards the sale price. On the other hand, if the amount had been lent on the promissory note, the plaintiff being the financier and anxious to receive interest on the same, accordingly, it is found that though the promissory note / Ex.A13 had come into existence, during the pendency of the sale agreement / Ex.A1, the plaintiff has not chosen to adjust the consideration of the promissory note towards the sale price and accordingly, it is seen that considering the abovesaid facts, in toto, the Trial Court is justified in holding that the promissory note / Ex.A13 is supported by consideration and the case of the defendants that they had handed over the same as additional security to the plaintiff for securing the further sum under the sale agreement is unacceptable.

41. The defendants had also contended that the contents of the promissory note / Ex.A13 are found to be not similarly written and therefore, on that plea, endeavoured to putforth the case that the promissory note is not supported by consideration. However, the Trial Court has considered the similarities of the writings found in the promissory note and also further noted that the defendants having admitted the execution of the promissory note and when the plaintiff is entitled to fill-up the name of the payee as the holder of the promissory note under Section 20 of the Negotiable Instruments Act, 1881 and when it is not the case of the defendants that they had not executed the promissory note, as such, but only pleaded that the same is devoid of consideration, the defendants having failed to sustain such a plea, in such view of the matter, the Trial Court is wholly justified in upholding the plaintiff's case in respect of the promissory note / Ex.A13.

42. As above noted, as far as the relief of specific performance based on the sale agreement / Ex.A1 prayed for by the plaintiff, when it is found that the plaintiff has not established the readiness and willingness to perform his part of the contract and not endeavoured to pay the sale price within the agreed time and also considering the exchange of notices between the parties and the attitude of the plaintiff in not expressing his readiness and

willingness to go ahead with the completion of the sale transaction and been taking his own time in performing his obligations under the agreement and in such view of the matter, it is seen that there is a complete absence of readiness and willingness on the part of the first respondent in going ahead with the completion of the sale transaction pursuant to the sale agreement.

43. As abovenoted, the defendants are also found to be not acting as per the terms of the sale agreement in obtaining the vacant possession of the suit property within the stipulated period and hand over the same to the plaintiff based on the same. Thus, it is found that both the parties are at default in the performance of their obligations of the sale agreement and when it is seen that the plaintiff has belatedly issued the notice calling upon the defendants to enforce the sale agreement and also subsequent thereto, the sale agreement not having been acted upon, the suit property had been sold to the sixth defendant by the defendants.

44. Considering the materials placed on record, as rightly determined by the Trial Court, the sixth defendant had purchased the suit property *bona fidely* without the knowledge of the sale agreement, as such, and pursuant to the same, it is also found that he has put up the construction

in the suit property and obtained the mutation of the same in his favour and in all, it is seen that the sixth defendant had *bona fidely* purchased the suit property without notice of the sale agreement. Merely because, the defendants' counsel had given the legal opinion as regards the suit property being subjected to no encumbrance, it cannot be presumed that the sixth defendant had knowledge about the sale agreement entered into between the plaintiff and the other defendants. Considering the materials placed on record, it is found that it is only the sixth defendant, who had discharged the mortgage in respect of the suit property and thereupon, obtained the sale deed from the other defendants and put up the construction and enjoying the suit property by effecting necessary mutations in respect of the property.

45. In the light of the abovesaid discussions, the Trial Court is wholly justified in not extending the relief of specific performance in favour of the plaintiff based on the sale agreement / Ex.A1. Admittedly, when it is found that the plaintiff had, in toto, paid a sum of Rs.85,000/- to the defendants pursuant to the sale agreement and when the defendants had failed to establish that they had suffered any damages, as such, for the failure of the enforcement of the sale agreement on the part of the plaintiff and as abovenoted when the defendants are also found to have defaulted in the

enforcement of the sale agreement as they also not performed their part of the contract of sale, in such view of the matter, the Trial Court is justified in negativing the counter claim putforth by the defendants. Resultantly, it is found that the Trial Court is correct in holding that the plaintiff would be entitled only to secure the alternative relief of refund of Rs.85,000/- from the defendants with interest as determined by it.

46. In view of the determination that the plaintiff is entitled to recover the amount, based on the promissory note / Ex.A13 from the defendants, resultantly, it is seen that the claim of the defendants in seeking return of the promissory note from the plaintiff as putforth by them in O.S.No.12160 of 1989 is unsustainable and accordingly, the Trial Court is justified in dismissing the said suit.

47. The defendants have made a counter claim in O.S.No.7289 of 1996. The Trial Court has declined the same. In such view of the matter, as rightly contended by the plaintiff's counsel, the counter claim being in the nature of the suit, though taken in the written statement, as the same is based upon an independent cause of action, which could also be agitated in a separate suit and appeal is provided against the decree of counter claim, in

such view of the matter, according to the plaintiff's counsel, when the counter claim is also treated as a suit and when the counter claim has been determined by the Trial Court and disposed of by way of the common Judgment, according to him, inasmuch as the defendants have not preferred any independent appeal against the rejection of their counter claim, on that basis, according to him, the appeals preferred by the defendants are barred by *res judicata* and in this connection, he placed reliance upon the decision in ***Vediammal and others vs. M.Kandasamy and others***, reported in ***1997 TLNJ 96***.

48. On a perusal of the abovecited decision, it is seen that the counter claim putforth by the defendants being in the nature of a separate suit and determined by way of the of the common Judgment by the Trial Court, the defendants having not preferred any independent appeal against the rejection of the same, the principle of *res judicata* has to be applied to the same and the position of law with reference to the same has been outlined in the abovecited decision as follows:

> *"From the above decisions the following principles emerge:-*
>
> *A counter-claim is really a suit, though the same is taken in the written statement. Just as a suit*

is filed by the plaintiff, defendant seeks a relief against the plaintiff on a cause of action which he has against the plaintiff. It is an independent cause of action which could also be agitated in a separate suit. It is to avoid multiplicity of proceedings, defendant is given liberty to file a counter-claim and get adjudication. Issues are suggested in both the original claim as well as in the counter claim, and both are disposed of by a common judgment. (Or.8, R.6-A(2), C.P.C.says that there can be a final judgment in the same suit, both on the original claim and counter-claim). In common parlance, 'common judgment' means, 'decisions arrived simultaneously in more than one suit tried together'. In view of the legal position under Order 8, Rule 6-A, C.P.C., a counter-claim or set-off can be made in many forms in a suit. But they need not be given separate numbers. The counter-claim is also said to be a weapon of evidence and enables the defendant to enforce the claim against the plaintiff as effectively as an independent action. As stated earlier, it is an enabling provision which gives a right to the defendant that instead of fling an independent action, he can seek that relief in a suit filed by plaintiff against him. Originally, there was a doubt whether the counter claim filed in a suit for recovery of money and whehter there should be nexus to file cause of action on which the suit is

instituted. The legal position is now settled in view of the judgment reported in ***JT 1996 (5) 428*** *(****Shri Jag Mohan Chawla v. Dena Badha Swami Satsang****).*

The said decision has been subsequently followed by the Bombay High Court in the decision reported in 1996 (2) Maharashtra Law Journal page 844 Hemraj v. Yamunabai. From the judgment of the Supreme Court, it is clear that the scope of a counter-claim is in the nature of a cross-suit for all purposes.

This view of mine is supported by the decision reported in ***(1991) Madhya Pradesh Law Journal page 102 Shivkali Bai v. Meera Devi****.*

The only difference is, instead of filing two suits having two registered numbers, relief is sought for in the same suit by both plaintiff and defendant. The inference is irresistible therefore, that a counter claim will be a suit. It must have a cause of action and that cause of action can be independently enforced. Necessary counter-fee must be paid on the relief sought for.

If the counter-claim is treated as a suit, and the same is disposed of by a common judgment, and if one of the judgments is not appealed against, the principle of res judicata has to be applied. For the definition of 'former suit' we need look into only Explanation 1 to S.11 of the Code of Civil Procedure. If the decision in one suit has become final in which

the issue which has to be decided in Appeal was heard and finally decided, the connected suit cannot be appealed against, for, the same is barred by res judicata. I need only refer to a very recent decision of the Supreme Court reported in (1993) Supp.(2) SCC 146 = AIR 1993 S.C.1202 (Premier Tyres Limited. v. Kerala State Boad Transport Corpn.) In that case, their Lordships considered a similar question. (Omitted)

In Ramagya Prasad Gupta v. Murli Prasad an effort was made to get the decision in Sheodan Singh reconsidered. But the Court did not consider it necessary to examine the matter as the subject matter of two suits being different one of the necessary ingredients for applicability of Sec.11 of the CPC were found missing.

Although none of these decisions were concerned with the situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow

when a judgment or decree in a connected suit is not appealed from.

Mention may be made of a Constitution Bench in Badi Narayan Singh v. Kamdeo Prasad Singh. In an election petition filed by the respondent a declaration was sought to declare the respondent as the elected candidate. The Tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. (Omitted)

Our High Court also had occasion to consider a similar question in the decision reported in AIR in 1981 Madras 282 (Angappa Gounder v. Rajavelu Gounder) where also the scope of a former suit was discussed. Yet another decision is reported in AIR 1983 Madras 131 (S.Kandaswami v. B.A.Murugesa) wherein the same legal position was reiterated.

...

...

In view of the above legal position, it cannot be doubted that the Second Appeal is not maintainable, and the same is barred by res judicata."

49. Thus, as rightly contended by the plaintiff's counsel, the present appeals preferred by the appellants are found to be barred by the principle of *res judicata* on the failure to prefer the appeal against the rejection of their counter claim. In addition to that, the plaintiff's counsel, with reference to the abovesaid position of law, also relied upon the decision in ***K.A.Perumalsamy vs. A.Kandasamy and another***, reported in ***2001 (4) CTC 297***.

50. On the other hand, the counsel for the defendants placed reliance upon the decision ***Anthony Chellappa vs. Victoria Ammal***, reported in ***1999-3-L.W.608***. The principles of law outlined in the abovecited decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

51. In the light of the abovesaid discussions, I hold that the plaintiff is not entitled to the relief of specific performance as prayed by him in respect of the sale agreement dated 16.03.1987. On the other hand, I hold that the plaintiff is entitled only to secure the refund of the sum of Rs.85,000/- from the defendants with interest as determined by the Trial Court. I further hold that the plaintiff is entitled to recover the amount under

the promissory note dated 19.04.1987 with interest as determined by the Trial Court. I therefore hold that the defendants are not entitled to the relief of mandatory injunction prayed for by them in respect of the promissory note dated 19.04.1987. I hold that the sixth defendant is the bona fide purchaser without the notice of the sale agreement dated 16.03.1987. Accordingly, the point Nos.1 to 5 are answered.

Point Nos.6 & 7:

52. For the reasons aforestated, the common Judgment and Decree, dated 19.04.2006, passed in O.S.Nos.7289 of 1996, 4149 of 1990 and 12160 of 1989, on the file of the II Additional Judge, City Civil Court, Chennai, are confirmed. Resultantly, all the first appeals are dismissed with costs. Consequently, connected miscellaneous petitions, if any, are closed.

16.12.2019

Internet : Yes / No
Index : Yes / No

krk

To:
The II Additional Judge,
City Civil Court,
Chennai.

T.RAVINDRAN, J.

krk

COMMON JUDGMENT
IN
A.S.Nos.399 of 2008, 998 of 2009 & 274 of 2013

16.12.2019