

) Sri. K.Papanna vs) Sri.R.K.Raju on 19 March, 2021

IN THE COURT OF THE VI ADDL. CITY CIVIL & SESSIONS JUDGE
AT BENGALURU CITY
(CCCH.11)

Dated this the 19th day of March 2021

PRESENT: Sri. Rama Naik, B.Com., LL.B.,
VI Addl.City Civil & Sessions Judge,
Bengaluru City

A.S.NO.21/2012

PLAINTIFFS

- 1) SRI. K.PAPANNA
S/o.Sri.Pillappa
Aged about 74 years
R/at 126, 'Padmamba Nilaya'
'A' Cross, Nanjareddy Colony
HAL Post, Bengaluru -560 017.
- 2) SRI. SRINIVASA REDDY
S/o.Sri.K.Papanna
aged about 36 years
R/at 126, 'Padmamba Nilaya'
'A' Cross, Nanjareddy Colony
HAL Post, Bengaluru -560 017.

[By Pleader Sri.N.N.Harish]

/Vs/

DEFENDANTS

- 1) SRI.R.K.RAJU
S/o.Sri.R.S.Konnur
R/at No.95, 3rd Main, Vyalikaval
Bengaluru -560 003.

[By Pleader Sri.A.Keshava Bhat]
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- 2) SMT.BHAGYA
W/o.late Sri.Krishnappa
Aged about 51 years
R/at 2nd Cross, Basavanagar Main Road
Bengaluru.

- 3) SMT.HEMALATHA
W/o.Sri.Chalapathi
Aged about 41 years
R/at No.126, 'Padmamba Nilaya'
'A' Cross, Nanjareddy Colony,
HAL Post, Bengaluru -560 017.
- 4) SRI.K.NAGARAJA
S/o.Sri.Pillappa
Aged about 33 years
R/at No.25, 3rd Cross, Muniyappa Layout
Murugeshpalya, Bengaluru -560 017.
- 5) SRI.VENKATESH
S/o.Sri.K.Nagaraj
Aged about 37 years
R/at No.25, 3rd Cross, Muniyappa Layout
Murugeshpalya, Bengaluru -560 017.
- 6) SMT.RATHNAMMA
W/o.Mr.Srinivasa
Aged about 31 years
R/at No.25, Kumaraswami Layout
Bengaluru .
- 7) SMT.SUNANDA
W/o.Sri.Muniraju
Aged about 31 years
R/at No.25, 3rd Cross, Muniyappa Layout
Murugeshpalya, Bengaluru -560 017.

[Exparte]

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- 8) SRI.L.M.CHIDANANDAYYA
Advocate & Sole Arbitrator
GF-3, 'Law Citadel Apartment'
No.2, Cunningham Crescent Road
Bengaluru -560 052.

[Arbitrator]

JUDGMENT

This suit is filed under Section 34 of the Arbitration and Conciliation Act, 1996 by Plaintiffs for setting aside the arbitral award dated 24.11.2011 passed by sole Arbitrator/Defendant No.8 in

Arbitration Case No.1/2008.

2) In nutshell, Plaintiffs' case is that Plaintiffs, being the owners of the schedule property, had sold the same to Sri.H.G.Nagananda and Sri.Syed Yakub through their Power of Attorney Holder on 28.03.1998. Remaining portion of the property in the same Sy.No.5/2 measuring 12 guntas was AS.21/2012 purchased by Defendant No.1 by way of a registered Sale Deed dated 18.12.2000.

3) It is stated that, in the year 2003, Defendant No.1 persuaded Plaintiffs to execute Agreement to Sell and Power of Attorney in his favour in respect of the schedule property which would enable him to negotiate with purchasers of schedule property and accordingly, believing the words of Defendant No.1 Plaintiffs executed Agreement to Sell and two Powers of Attorney in favour of Defendant No.1 on 27.09.2003

4) It is stated that Defendant No.1 issued a legal notice dated 07.12.004 calling upon the Plaintiffs and Defendants No.2 to 7 to pay a sum of Rs.8,00,000/- received as advance amount and to pay a compensation of Rs.8,00,000/-. To resolve the dispute raised by Defendant No.1, sole Arbitrator AS.21/2012 was appointed and impugned award came to be passed by him.

5) Plaintiffs have challenged the award on the ground that agreement at its inception is void and on the basis of which, award passed is entirely illegal, perverse and opposed to public policy of India. Hence, pray for setting aside the award.

6) Defendant No.1, in his written statement, states that the learned Arbitrator had given several opportunities to parties to the proceeding and has meticulously proceeded with adjudication.

7) It is stated that the learned Arbitrator framed the issues for consideration and given opportunity to both side to lead evidence. After evidence was closed, the matter was heard by the learned Arbitrator and only thereafter, the award was passed.

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8) It is stated that, in the award, learned Arbitrator has taken note of the entire factual circumstances and has rightly directed Plaintiffs to pay the amount as per the award. There is no illegality committed by the learned Arbitrator in passing the award. No grounds are made out to set aside the award. Award passed is just and correct. Hence, prays for dismissal of the suit.

9) Heard learned Counsel for Plaintiffs. Counsel for Defendant No.1 filed a Memo on 06.01.2021 reporting the death of Defendant No.1. Plaintiffs' submission that Defendant No.1 died leaving behind no legal representative was recorded on 23.02.2021. Perused the written argument filed on behalf of Plaintiffs and the records.

10) Point that arises for consideration is :

" Whether Plaintiffs have made
out any of the grounds

the Arbitration and Conciliation Act, 1996 to set aside the impugned award?"

11) My answer to above point is in the affirmative for the following :

REASONS

12) This suit came to be filed by Plaintiffs for setting aside the arbitral award dated 24.11.2011 passed by sole Arbitrator/Defendant No.8, whereby, learned Arbitrator has awarded a sum of 7,75,000/-

with interest at the rate of 12% per annum; Rs.28,00,000/- with interest at the rate of 12% per annum towards damages in lieu of specific performance; and costs of Rs.2,00,000/- including legal expenses in favour of Defendant No.1 and against Plaintiffs.

13) Plaintiffs have assailed the award on the ground that award is perverse, unfair and AS.21/2012 unreasonable and same would shock the conscience of the Court.

14) Plaintiffs' contention is that, at the time of execution of Agreement to Sell dated 27.09.2003, schedule property had already been sold by Plaintiffs in the year 1998 and same was no longer in their possession.

15) It is contended that sole Arbitrator ignored Plaintiffs' plea that Agreement to Sell was void from inception as the parties were aware that the Agreement was incapable of performance due to lack of ownership of schedule property. There was, thus, no contract in existence and therefore, the question of awarding damages or compensation for the breach of contract under Section 73 of the Indian Contract Act, 1872 would not arise.

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16) It is further contended that, in the instant case, there being only a void agreement and not a contract, Section 73 would be wholly inapplicable. Hence, award of damages is entirely contrary to the provisions of the Indian Contract Act, 1872 and same is liable to be set aside.

17) It is also contended that payment of money under the Agreement was neither made lawfully, nor was it done under a mistake or under coercion. In the circumstances, the provisions of Section 65 of the Indian Contract Act, 1872 would also not be applicable and Defendant No.1 would not be entitled to even recover the amount advanced to Plaintiffs.

18) On the contrary, Defendant No.1 contends in his written statement that Plaintiffs and Defendants No.2 to 7 were the owners of the schedule property. They have entered into an Agreement of Sale with AS.21/2012 Defendant No.1 agreeing to sell the schedule property. They have received total advance amount of Rs.7,75,000/- under the Agreement. Agreement provides the remedy to resolve the disputes through arbitration in case of any breach of the terms of Agreement. It was incumbent on the part of Plaintiffs and Defendants No. 2 to 7 to execute the registered sale deed conveying the schedule property to Defendant No.1 after receiving the balance sale consideration.

19) It is further contended that after re- delivering the schedule property to Plaintiffs and Defendants No.2 to 7 by the authorities, Defendant No.1 requested Plaintiffs and Defendants No.2 to 7 to execute the registered sale deed after receiving the balance sale consideration. Registered notices were also issued. But, they refused to execute the AS.21/2012 sale deed. In view of terms of Agreement, disputes were rightly referred to sole Arbitrator.

20) It is contended that learned Arbitrator has taken note of the entire factual circumstances and has rightly directed Plaintiffs and Defendants No. 2 to 7 to pay the amount as per the award. There is no illegality in passing the award. No grounds are made out to set aside the award.

21) To assail the contentions of the parties, it is relevant to have regard to the issues framed by learned Arbitrator. Award goes to show that the learned Arbitrator has framed in as much as 10 issues, which are extracted as under :

" 1) Whether the Claimant proves he was ready and willing to perform his part of the contract under the Agreement dated 27.9.2003?

2) Whether the Claimant proves the Claimant has paid a sum of Rs.775,000/- in part performance of the Agreement of Sale dated 27.9.2003?

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3) Whether the Claimant proves that the Respondents executed the General Power of Attorney dated 27.9.2003?

4) Whether the Claimant proves that the Claimant is entitled to the Award directing the Respondents to execute and register the Sale Deed in his favour?

5) Whether in the event of not granting the main prayer of Specific Performance, whether the Claimant is entitled to sum of Rs.1.00 Crore as damages and compensation as claimed in the Claim Statement?

6) Whether the Respondents prove that the Claimant was bent upon acquiring the Schedule property and under the pressure from the claimants the Respondents entered into the Agreement of Sale on 27.9.2003?

- 7) Whether the Respondents prove that the Respondents executed the said Agreement of Sale in good faith as claimed in paragraph-2 of the Statement of defence?
- 8) Whether the respondents prove that the Writ Petition No.24705/2004 was filed without the knowledge and consent of the Respondents?
- 9) Whether the Respondents prove that the Claimant had the knowledge of the sale of the Schedule Property as on the date of Agreement of Sale namely 27.9.2003?
- 10) Whether the Respondents are entitled to set up the plea of the lack of ownership as claimed in the Statement of objection/Written Statement? "

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22) Plaintiffs' entire contention revolves upon Issue No.9. It is the submission of learned Counsel for Plaintiffs that since the learned Arbitrator has categorically come to the conclusion that Defendant No.1 had the knowledge of the sale of Schedule Property on the date of Agreement to Sell, there would be no necessity for him to consider the rest of the issues and to pass the award in favour of Defendant No.1.

23) A meaningful reading of the award, it would be clear that there is substance in the submission that answer to rest of the Issues is entirely depending upon Issue No.9.

24) Learned Arbitrator, while answering Issue No.9, has come to the categorical findings that Defendant No.1 had the knowledge of the earlier sale deed which is one of the ground for denying the specific performance of the Agreement of Sale.

AS.21/2012 It is worthwhile to read the findings of the learned Arbitrator on Issue No.9. It reads thus :

"I have carefully considered the rival contentions of the parties and in view of the specific recitals of the Agreement of Sale Ex.C1, I have no other option except to hold that the claimant had the knowledge of the sale deed and with the full knowledge, the claimant has entered into the Agreement of Sale with the respondents. The Sale Deed executed has been specifically referred to in Ex.C1. Having full knowledge of the Sale Deed, the claimant has entered into the Agreement of Sale with the respondent and therefore I hold that the claimant had full knowledge of the earlier sale deed. The contention of Sri.Subramani that the reading of the entire document does not disclose the knowledge on the part of the claimant of the earlier sale deed cannot be accepted in view of the admitted fact in Ex.C1. Therefore I hold that the claimant had the knowledge of the earlier sale deed which is one of the ground for denying the specific performance of the Agreement of Sale".

25) Agreement of Sale dated 27.09.2003 makes it clear that Plaintiffs and Defendants No. 2 to 7 were not the owners of schedule property and schedule property was sold under Sale Deed dated AS.21/2012 28.03.1998. Relevant para of the Agreement to Sell dated 27.09.2003 reads thus :

" (a) that the Vendors were the absolute owners of the Schedule Property till the Acquisition Notification is issued by the Government of Karnataka and acquired for Amarjyothi Co-op. Society.

(b) that the Schedule Property has not been sold to any others or there is no other agreement or understanding with any other third parties.

(c) There is no other legal proceedings pending either filed by the vendor against the acquisition or filed by the purchaser under Sale Deed dated 28-03-1998 against the Vendors."

26) Learned Counsel for Plaintiffs submits that though learned Arbitrator categorically holds that Defendant No.1 had the knowledge of the earlier sale deed at the time of entering into Agreement of Sale and that Plaintiffs and Defendants No.2 to 7 were not the owners of the schedule property, learned Arbitrator passed the award in favour of Defendant No.1 in contravention of the provisions of the Indian Contract Act, 1872.

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27) From the Agreement of Sale dated 27.09.2003 and from the award, it is clear that, at the time of entering into Agreement of Sale dated 27.09.2003, Plaintiffs and Defendants No.2 to 7 were not the owners of the schedule property and Defendant No.1 had the knowledge of the earlier sale deed.

28) Question that looms the matter is that once the learned Arbitrator has come to the conclusion that Defendant No.1 had the knowledge of the earlier sale deed and Plaintiffs and Defendants No.2 to 7 were not the owners of the schedule property at the time of entering into Agreement of Sale dated 27.09.2003, it was justifiable for the learned Arbitrator to award the damages by way of compensation under Section 73 of the Indian Contract Act, 1972 by relying upon the provisions of Section 21 of the Specific Relief Act, 1963. To AS.21/2012 assail the same, it is necessary to have regard to the relevant provisions of Indian Contract Act, 1872. They read thus :

" 2. Interpretation - clause. -

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract.

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract".

"65. Obligation of person who has received advantage under void agreement, or contract that becomes void.- When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

73. Compensation for loss or damage caused by breach of contract. - When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

AS.21/2012 Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

29) Thus, from the above provisions of law, it is clear that an agreement is not enforceable by law is said to be void. If it is enforceable at the option of one party, but not at the option of the other is voidable contract. If it is enforceable by law is a contract. Section 65 deals with two situations. Agreement is discovered to be void or contract that becomes void. In that circumstance, Section 65 states that it is the duty of the person, who has received advantage under void agreement or contract that becomes void to restore it, or to make compensation for it to the person from whom he received it. Section 73 deals with compensation for loss or damage caused by breach of contract.

30) To buttress the submission of learned Counsel for Plaintiffs, he has placed reliance on the AS.21/2012 judgment in Kujju Collieries Ltd. Vs. Jharkhand Mines Ltd. And Others [(1974) 2 SCC 533]. It is worthwhile to read para-6 and 8, which read thus:

"6. We are of the view that Section 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65 reads as follows :

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally

enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these AS.21/2012 cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was not contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply.

8. A Full Bench of five Judges of the Hyderabad High Court in Budhulal v.

Deccan Banking Company speaking through our brother, Jaganmohan Reddy, J. as he then was, referred with approval to these observations of the Privy Council, they then went on to refer to the observation of Pollock and Mulla in their treatise on Indian Contract and Specific Relief Acts, 7th Edn. To the effect that Section 65, Indian Contract Act does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English Law will be the best guide. They then referred to the reasoning of the learned authors that if the view of the Privy Council is right namely that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal AS.21/2012 purpose is carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe :

In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than: when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the pre-existence of something which a subsequently found out and it may be observed that Section 66, Hyderabad Contract Act makes the knowledge (Ilm) of the agreement being void as one the pre- requisities for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of

fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, AS.21/2012 in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possess an advantage over the plaintiff - in pari delicto potior est conditio defendentio.

Section 84, Indian Trust Act, however, has made an exception in a case - where the owner of property transfers it to another for illegal purpose any such purpose is not carried into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor.

This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact.

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them."

31) The Hon'ble Supreme Court was pleased to make distinction between Agreement and Contract, the two terms used in Section 65 of the Indian Contract Act, 1972. It is distinguished that in void agreement, the parties or one of the parties to the AS.21/2012 agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable.

In a contract becoming void, in which, an agreement which was originally enforceable and which becomes void due to subsequent happenings.

32) In the judgment (supra), it is specifically held that in both cases, any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it, to the person from whom he received it.

33) Further, on facts, the Hon'ble Supreme Court was pleased to hold that "But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, AS.21/2012 void, there was no contract, but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent

happenings. Therefore, Section 65 of the Contract Act, did not apply. If both the transferor and transferee are in pari delicto the courts do not assist them". Thus, it is abundantly clear that agreement and contract are two different phraseologies and both are not operating in the same sphere.

34) In the instant case, in the Agreement of Sale itself it is made clear that Plaintiffs and Defendants No.2 to 7 were not the owners of the schedule property and that schedule property had already been sold under Sale Deed dated 28.03.1998. Learned Arbitrator has also categorically held that Defendant No.1 had full knowledge of the earlier Sale Deed. It is neither a case where it is AS.21/2012 discovered to be void subsequently, nor is it a case of the contract becoming void due to subsequent happenings. It is abundantly clear that Agreement of Sale dated 28.03.1998 was entered into between the parties only for the purpose of defeating the right of purchasers under Sale Deed dated 08.03.1998. In that circumstance, the question of restoring the advantage received under the agreement under Section 65 of the Indian Contract Act, 1872 and granting compensation by invoking Section 73 of the Indian Contract Act, 1872 which deals with compensation for breach of contract only does not arise at all.

35) In Associate Builders Vs. Delhi Development Authority, [(2015) 3 Supreme Court Cases 49], the Hon'ble Supreme Court was pleased to hold that :

" A contravention of the substantive law of India would result in the death knell of an AS.21/2012 arbitral award. Violation of Indian statutes i.e. the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice and would be regarded as being contrary to the fundamental policy of Indian law. Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the 1996 Act."

36) Thus, it is clear that award passed is in contravention of the provisions of the Indian Contract Act, 1872. Award is not free from vice of illegality. Illegality goes to the root of the matter and same requires the interference of this Court. In that view, I answer the above point in the affirmative and pass the following :

ORDER (1) Suit filed under Section 34 of the Arbitration and Conciliation Act,1996 by Plaintiffs for setting AS.21/2012 aside the arbitral award dated 24.11.2011 passed by sole Arbitrator/Defendant No.8 in A.C.No.1/2008, is hereby allowed.

(2) The award dated 24.11.2011 passed by sole Arbitrator/ Defendant No.8 in A.C.No.1/2008 is hereby set aside.

(3) No order as to costs.

(Dictated to the Judgment Writer directly on computer, typed matter corrected and then pronounced by me in open court, on this the 19th day of March, 2021) (RAMA NAIK) VI Addl.City Civil & Sessions Judge Bengaluru City AS.21/2012 28