

First vs C.Samiappan And Another [2013 (6) Ctc ... on 22 June, 2012

A.NOS.5387 AND 5388
IN C.S.NO.215 OF 2016

APPLICATION NOS.5387 AND 5388 OF 2016
IN C.S.NO.215 OF 2016

M.GOVINDARAJ, J.

First defendant is the applicant.

2. Plaintiff filed a suit for recovery of money a sum of Rs.55,00,000/- together with further compensation on Rs.25,00,000/- at 3% per month from the date of plaint till realisation. The plaintiff and the first defendant entered into a Memorandum of Understanding on 22.06.2012 by which it was mutually agreed that the first defendant shall give his properties mentioned in "A" Schedule and shall acquire 50 acres of land from third parties mentioned in "B" Schedule in favour of plaintiff with a frontage of 60 feet abutting State Highway and the second respondent shall pay the sale consideration of Rs.55,00,000/- per acre. An advance of Rs.25,00,000/- was paid by plaintiff by cheque dated 22.06.2012. On conclusion of the purchase, the property shall be developed by the plaintiff and after adjusting the expenses both parties should share the profits appropriate to their shares. The important terms <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 and conditions of the Memorandum of Understanding, according to the plaintiff is as follows:

(a)The sale consideration payable by the plaintiff to the first defendant was fixed at Rs.55,00,000/- (Rupees Fifty Five Lakhs Only) which shall not exceed or decrease at any stage of the MOU.

(b)The first defendant will furnish all documents to the plaintiff for legal scrutiny and to comply with the legal queries.

(c)The first defendant shall ensure that the lands to be procured for the plaintiff will be contiguous inclusive of the lands in respect of which the first defendant is the owner / power agent, with access of 60 feet (frontage) from the State Highway.

(d)The first defendant and the plaintiff agreed to develop the lands described in Schedule A and Schedule B to the said Memorandum of Understanding dt.22.06.2012 by sharing the expenses proportionately and also share the profits according to the share of the lands.

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(e)It was specifically agreed and undertaken in terms of clause 13 of the Memorandum of Understanding dt.22.06.2012 by the first defendant that till the procurement of the lands for the plaintiff described in the Schedule B thereto, he will not create any kind of encumbrance on the lands described in the Schedule A thereto.

(f)The time stipulated to complete the transaction was 90 to 120 days from the date of the Memorandum of Understanding dt.22.06.2012, i.e, till 22.10.2012.”

3. Though the plaintiff was ready and willing for completing the registration, the first defendant was unable to fructify the deal. He started negotiating with the land owners with the advance money paid by the plaintiff. Due to the utter failure and inability on the part of the first defendant, the deal couldn't be finalised. The first defendant requested to give him some more time. The first defendant requested the plaintiff to register the lands in piecemeal without any proper approach and contiguity. Thereafter, the first defendant started the dispute by sending a communication dated 30.03.2013. Exchange of communications had taken <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 place on 16.04.2013, 27.04.2016, 07.05.2013 and 21.05.2013 between both the parties. Since the first defendant failed to comply with the requirements as per Memorandum of Understanding dated 22.06.2012, the plaintiff suffered loss of reputation. As per Clause 13 of Memorandum of Understanding, the first defendant agreed not to encumber "A" Schedule properties, but transferred the same clandestinely in favour of his mother, the second defendant herein. When questioned about the same, the first defendant did not give proper reply, hence the plaintiff was constrained to file the suit for money claim, impleading the transferee as second defendant. As per Clause 15 of Memorandum of Understanding, the plaintiff is entitled to claim compensation at 3% per month on Rs.25,00,000/- advanced to the first defendant. The compensation works out to Rs.30,00,000/- in all put together Rs.55,00,000/-. Hence, the suit was valued under Section 22 of Tamil Nadu Court Fees and Suits Valuation Act, 2006 on the basis of the cause of action arose on 22.06.2012 when the Memorandum of Understanding was entered between the parties and on 22.06.2012 when the cheque was paid.

4. The first defendant filed an application under Order XIV <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 Rule 8 CPC read with Order VII Rule 11(d) CPC. According to him, the Memorandum of Understanding was entered between the parties on 22.06.2012, wherein the first defendant claimed to be the owner / power of attorney in respect of "A" Schedule properties and agreed to procure " B"

Schedule properties for which a sum of Rs.25,00,000/- was paid by cheque dated 22.06.2012 as advance amount. The cause of action arose on 22.06.2012 and for filing a suit for recovery of money paid by cheque dated 22.06.2012 period of limitation is three years. The limitation period lapsed on 21.06.2015, whereas suit was filed only on 26.10.2015., i.e., after four months beyond the period of limitation to file the suit. Hence, as per Section 3 of Limitation Act, every suit instituted after the prescribed period shall be dismissed, although the plea of limitation has not been set up as a defence. The instant case filed by the plaintiff to harass the first defendant without any cause of action and beyond the period of limitation amounts to abuse of

process of law, not sustainable and deserves to be rejected.

5. The respondent / plaintiff filed a detailed counter affidavit <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 denying the contents. As per Clause 14 of Memorandum of Understanding, there is clear mention of period of 90 to 120 days (3 to 4 months) from the date of Memorandum of Understanding, as such, the period of limitation will run only after the expiry of 120 days from the date of Memorandum of Understanding. This has been clearly explained in para 10 of plaint and hence, suit is well within limitation. It is not suit for recovery of money, but it is for refund of advance amount paid under Memorandum of Understanding. As held by Hon'ble High Court for refund of advance amount under contract, limitation period is 12 years as per Article 62 of the Limitation Act. Further, limitation is a mixed question of law and it has to be decided only in a full fledged trial. Failure to comply with the terms of Memorandum of Understanding gives rise to cause of action and hence, the petition is liable to be rejected.

6. Heard both sides.

7. The facts narrated above are not disputed. What is to be <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 decided is whether the suit is barred by limitation or not? For that purpose, nature of the suit is to be ascertained. The suit is for recovery of money.

The cause of action for filing the suit is the Memorandum of Understanding dated 22.06.2012 and advance amount of a sum of Rs.25,00,000/- paid by cheque dated 22.06.2012.

8. A perusal of Memorandum of Understanding dated 22.06.2012, reveal that the first defendant as the owner of "A" Schedule property agreed to facilitate the purchase of " B" Schedule property from the owner of the land. After procuring 50 acres of contiguous lands, with a frontage of 60 feet having access from State Highway, the plaintiff shall develop " A" & " B" Schedule properties for sale. After deducting the expenses, the parties, namely the plaintiff and the first defendant shall share the profits according to the share of the lands. The agreement further specify that the first defendant shall negotiate with land owners and present valid encumbrance, free title and convey the same to the plaintiff on payment of sale consideration. A sum of Rs.25,00,000/- was paid to the first defendant for purchase of lands. Therefore, it can be inferred that the <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 agreement is in the nature of partnership or joint venture. The first defendant shall facilitate purchase of lands. The advance amount paid for purchase of lands and it shall be adjusted only at the time of registering the document for the last piece of the land mentioned in the " B" Schedule.

From this, it can be understood there is no contract between the land owner and purchaser, but it is with the principle and facilitator cum partner for purchase of "B" Schedule properties. In that event, no charge was created in any of the properties of "B" Schedule. Further, Clause-7 of the Memorandum of Understanding in particular mentions only "B"

Schedule properties and "A" Schedule properties are the share of the first defendant in the business proposed by the parties. Therefore, there cannot be any charge on "A" Schedule properties too. Of course, Clause 15 of the Memorandum of Understanding enables the party of first part namely the defendant to terminate the agreement and to refund the advance paid in the event of inability of plaintiff to pay sale consideration. On the other hand, if the first defendant fails to deliver goods, he is liable to refund the advance amount and investments made by the party of second part namely, the plaintiff, together with compensation / damages suffered by him. <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 Therefore, the right to terminate the agreement rests with the first defendant and the plaintiff is entitled to claim refund of advance together with compensation. He does not even have the right to have a charge over "A" Schedule properties belonging to the first defendant.

9. Hence, it is clear that the plaintiff can either sue the first defendant for specific performance or for recovery of money. The plaintiff has chosen to sue the defendant for recovery of money. As discussed above, as per Clause - 15, the first defendant terminated the agreement. The averments made in the plaint goes to show that the first defendant had requested the plaintiff to purchase the land in piecemeal which the plaintiff refused to buy and first defendant started the dispute by terminating the agreement. The Courts must be conscious to take the plain in its entirety to arrive at a decision with respect to cause of action and limitation. In the instant case, the failure of the first defendant to present contiguous lands with 60' feet frontage and failure to pay sale consideration by plaintiff give rise to cause of action. It is also relevant to point out that the time limit to complete the transaction is 90 to 120 days <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 as per Clause 14 of the Memorandum of Understanding. At the risk of repetition, as discussed above, the cause of action arises, for claiming damages, for the plaintiff on the failure of the first defendant on 120th day. But the same shall be specifically pleaded in the plaint as to when the title documents were given to the plaintiff and when they were found defective; at when the plaintiff refused to accept the same and demanded contiguous land with 60 feet access from State Highways and when the first defendant failed to perform his promise. But the entire pleadings reveal vague statements without specific dates on which the cause of action arose. In a suit filed for recovery of money, it is to be seen as to when the plaintiff gets the right to sue.

10. In the instant case, as per Clause - 15, the plaintiff get the cause of action only when the first defendant fails to procure the lands. The plaint averments show that the plaintiff did not terminate the agreement, but chosen to wait for 3 or 4 months as requested by the first defendant, but the first defendant started the dispute by terminating the agreement. It is also well settled that cause of action may not be the <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 starting point of limitation. In the instant case, the plaintiff filed the above suit valuing it under Section 22 of the Tamil Nadu Court Fees and Suits Valuation Act, 2006, for recovery of money. The

cause of action said to have arisen on 22.06.2012 when the Memorandum of Understanding was entered and the cheque was paid. For filing a suit for recovery of money as Article 20 of the Limitation Act, the period of limitation is three years from the date when cheque paid, in the present case three years from 22.06.2012 i.e., 21.06.2015.

11. The learned counsel for the plaintiff would rely on the judgment of this Court in K.SHANMUGAM AND ANOTHER VS. C.SAMIAPPAN AND ANOTHER [2013 (6) CTC 28] to buttress his argument that suit for refund of advance amount, limitation period is governed by Article 62 of the Limitation Act and the plaintiff can file the suit within two years.

12. The said judgment was on the basis of an agreement of <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 sale of an immovable property as the buyer gets statutory charge over the property to the extent of interest of the seller. But, in the instant case, the first defendant is neither the owner of the lands nor possessed any interest in "B" Schedule properties. As such, the plaintiff does not have any charge over the property. Hence, the above judgment will not apply to the case on hand.

13. Article 62 of the Limitation Act, 1963, reads as under:

Description of suit Period of Time from which period limitation begins to run

62. To enforce payment of money Twelve years When the money sued for secured by a mortgage or otherwise becomes due charged upon immovable property.

14. As per Article 54 of the Limitation Act, 1963, for filing a suit for specific performance, limitation is three years from the date fixed for the performance or from when plaintiff has noticed that performance is refused. If a suit for specific performance is filed, the limitation starts from the date fixed or date of refusal / failure to perform. But the plaintiff had elaborately pleaded about failure of the first defendant, he has not <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 chosen to file a suit for specific performance.

15. Article 20 of the Limitation Act, 1963, reads as under:

Description of suit Period of Time from which period limitation begins to run

20. Like suit when the lender has Three years When the cheque is paid given a cheque for the money

16. In the case on hand, the plaintiff paid a sum of Rs.25,00,000/- towards advance facilitating the purchase of identified lands belonging to third parties. If the deal does not fructify, he is entitled to refund or return of the money together with compensation. The plaintiff has quantified the compensation at 3% per month on the advance amount. In so far as recovery of this money, the cause of action arises from the date when the money is paid. In the instant case, the cheque was paid on 22.06.2015. It is not the case of the plaintiff, the cheque was honored on a later date and

therefore, cause of action arises on a subsequent date. Even in such circumstances, it is held that cause of action need not be starting point of limitation.

17. Pleadings with regard to cause of action is very clear that <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 it arose on 22.06.2012. The relevant portion of the plaint is extracted as under:

“11.The cause of action for the suit arose at Chennai at the office of the Plaintiff situated at Egmore, within the jurisdiction of this Hon'ble Court, the place where the plaintiff is having its office and the defendants are residing; the place where the Memorandum of Understanding dt.22.06.2012 between the plaintiff and the first defendant was executed and the sum of Rs.25,00,000/- was paid by the plaintiff to the first defendant on 22.06.2012 by cheque on Axis Bank, Kilpauk Branch, Chennai.”

18. The Hon'ble Supreme Court in LIVERPOOL & LONDON S.P. & I ASSOCIATION LTD., VS. M.V. SEA SUCCESS I AND ANOTHER [2004 (9) SCC 512] has held as follows:

“132.In our opinion the order refusing to reject the plaint falls in the category of a preliminary judgment and is covered by the second category carved out by this Court. It is trite that a party should not be unnecessarily harassed <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 in a suit. An order refusing to reject a plaint will finally determine his right in terms of Order 7 Rule 11 of the Code of Civil Procedure.

133.The idea underlying Order 7 Rule 11A is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of Civil Procedure, the Courts would interpret the provisions in such a manner so as to save expenses, achieve expedition, avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of the court is doomed to fail would not further be allowed to be used as a device to harass a litigant.” Hence the above case fully governed under Article 20 of the Limitation Act, 1963.

19. The contention of the learned counsel for the respondent / plaintiff that the Memorandum of Understanding is one in the nature of <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 facilitation agreement and Limitation Act does not specify any specific period of limitation. In those cases, Article 137 of the Limitation Act would apply. Therefore, the suit is within the period of limitation. But, above suit is covered under Article 20 of the Limitation Act. Hence, the above contention is not sustainable.

20. The other point raised by the learned counsel for the petitioner is that the issue of limitation is a mixed questions of fact and law and it requires evidence and hence, a suit cannot be rejected under

Order VII Rule 11(d) of CPC as barred by limitation. The words "barred by law" will not apply to Limitation Act.

21.This Court in DR.L.RAMACHANDRAN VS. K.RAMESH AND OTHERS [2015 (5) CTC 629] has held as under:

“26.In terms of Order 7 Rule 11 (d) CPC, the Plaint shall be rejected where the suit appears from the statement in the Plaint to be barred by any law. The scope of Rule 11 of Order 7 CPC has been explained in various decisions and <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 the legal principle deducible are that, if the Plaint does not disclose the cause of action or is bared by law; can be rejected where the litigation was utterly vexatious and abuse of process of Court ; if any one of the conditions mentioned under the Rule were found to exist, thus saving the defendants onerous and hazardous task of contesting a non maintainable suit during the course of protracted litigation and where the suit was instituted without proper authority. Thus, the provision of Order 7 Rule 11 PC being procedural is designed and aimed to prevent vexatious and frivolous litigation. The plaint is liable to be rejected on the ground of limitation only where the suit appears from the statements in the plaint to be barred by any law and the law within the meaning of clause (d) of Order 7 Rule 11 CPC, shall include law of limitation as well.

27.Thus, considering the averments in the instant case and by considering as to whether the Plaint is liable to be rejected under clause (d) of Order 7 Rule 11, the only conclusion that could be arrived at is that the plaint was barred by limitation.....”

22. The suit is valued under Section 22 of the Tamil Nadu <http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 Court Fees and Suits Valuation Act for recovery of money. The relief sought for also is only recovery of money. The cause of action said to be for recovery of money. As per the averments of the plaint, the suit is filed far beyond the period of limitation. It is a purest question of law and does not involve any question of fact to put it to trial. The case on hand is squarely covered by the judgment of this Court in DR.L.RAMACHANDRAN's case (cited supra). Therefore, it is unnecessary to force the defendants to undergo the ordeal of trial and put them to mental torture for the above futile claims.

23. Therefore, viewing from any angle, the suit is hopelessly barred by limitation and accordingly, the plaint in C.S.No.215 of 2016 stands rejected and the both the applications are allowed.

/ o8 / 2020 TK M.GOVINDARAJ, J.

<http://www.judis.nic.in> A.NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 TK PRE-DELIVERY COMMON ORDER MADE IN APPLICATION NOS.5387 AND 5388 OF 2016 IN C.S.NO.215 OF 2016 26 / o8 / 2020 <http://www.judis.nic.in>