

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 19TH DAY OF APRIL, 2012

PRESENT

THE HON'BLE MR. JUSTICE N. K. PATIL

AND

THE HON'BLE MR. JUSTICE B.V.PINTO

R.F.A. No.1130/2007 (MON)

Between

Mr Felix Lobo
Aged about 54 years
S/o Lewis Lobo
R/o Kurinje Village and Post
Karkala Taluk
Udupi District-574 197 ... Appellant

(By Sri Giridhar, Advocate)

And

Mr P E Hameed
Aged about 46 years
S/o Haji P.S.Ibrahim
R/o Rakshidi Coffee Estate
Rakshidi Village
Sakaleshpura Taluk
Hassan District-573 134 ... Respondent

(By Sri. K Chandranath Ariga, Advocate)

This RFA filed U/s 96 of CPC against the Judgment and Decree dated 23.12.2006 passed in O.S.No.40/2005

(Old.No.80/1996) on the file of Civil Judge (Sr.Dn.) and ACJM., Karkala, dismissing the suit for recovery of money and permanent injunction.

This appeal coming on for Final Hearing, this day, **B.V.PINTO J.**, delivered the following:-

JUDGMENT

This appeal has been filed by the plaintiff in O.S.No.40/2005 on the file of Civil Judge (Sr.Dn) & Additional Chief Judicial Magistrate, Karkala, challenging the Judgment dated 23.12.2006 dismissing the suit of the plaintiff, allowing the counter claim of the defendant and directing the plaintiff to pay a sum of ₹4,00,000/- with interest at 8% per annum on an amount of ₹1,50,000/- from 18.11.1995 and at the rate of 8% per annum on a sum of ₹2,50,000/- from 5.12.1995 with future interest at 8% per annum on ₹4,00,000/- with no costs on either side. The parties are referred in their ranking before the trial Court.

2. The facts leading to the present appeal are as follows:-

The plaintiff approached the Court of Additional Civil Judge (Sr.Dn), Udupi, alleging that the defendant has

entered into an agreement dated 19.8.1995 for purchase of Timber standing in the land bearing Sy.No.125 of Andar Village of Karkala Taluk for a total sum of ₹12,75,000/- and that in pursuance of the said agreement, the plaintiff has received a sum of ₹1,50,000/- as on the date of the agreement and subsequently the plaintiff has further received a sum of ₹2,50,000/- from the defendant. Consequent upon the said agreement, the plaintiff has cut and supplied Timber worth ₹4,02,000/- and the defendant has not paid the amount. Hence, the plaintiff has claimed a sum of ₹4,00,000/- from the defendant. It is the case of the plaintiff that he has entered into an agreement dated 3.9.1991 with one M.Sundara Ajila, who is the patta owner of the land besides being an administrator of the Temple by name Ardhanareeshwara. However, the property is warg property of the said M.Sundara Ajila.

3. The defendant on appearance has contended that though he admits the agreement between himself and the plaintiff, it is his case that the plaintiff has not supplied the Timber as promised since the plaintiff had no right to sell



the property in the trees as the trees were standing as on the date of agreement and therefore there is no question of defendant paying the cost of the Timber to the plaintiff. The defendant has further laid a counter claim for a sum of ₹4,00,000/-, which has been admittedly paid by the defendant to the plaintiff by virtue of an agreement dated 19.8.1995. Though the suit was originally instituted in the Court of Additional Civil Judge (Sr.Dn), Udupi, after the constitution of the Udupi District and establishment of Court of Civil Judge (Sr.Dn) at Karkala, the suit was transferred to the Court of Civil Judge (Sr.Dn) & ACJM, Karkala on 23.3.2005 and was re-numbered as O.S.No.40/2005. Thereafter, the learned trial judge has framed the following issues:-

1. Whether the plaintiff proves that the agreement dated 03.09.1991 empowers him to sell timber?
2. Whether the plaintiff proves that the defendant carried away the cut trees in collusion with one M. Sundara Ajila



without paying the due amount ₹4,00,000/- (Rupees Four Lakhs)?

3. Whether the plaintiff proves that the defendant by carrying away the timber thus violated the cutting permission dated 18-11-1995?
4. Whether the plaintiff proves that the defendant removed timber of a quantity of 8,820 cubic feet, where he is entitled to remove a quantity of timber measuring 6,230 cubic feet as alleged in the plaint? and its value is worth ₹6,27,250.00?
5. Whether the defendant proves that the plaintiff has colluded with one Vishwanath Adyanthaya only to defraud the defendant?
6. Whether the defendant proves the agreement dated 05.12.1995 said to have entered into between Vishwanatha Adyanthaya and K.A.Rehaman?
7. Whether the defendant proves that he has paid ₹1,60,000/- and ₹70,000/- to Vishwanatha Adyanthaya and K.A.Rehaman respectively?



8. Whether the defendant proves that the plaintiff still owes a sum of ₹12,25,000/- to Sundara Ajila as per the agreement dated 03.09.1991?
9. Whether this suit is bad for non-joinder of necessary parties?
10. Whether the plaintiffs proves that he is entitled to the interest for ₹4,00,000/- due from the date of filing this suit?
11. What order or decree?

and subsequently by order dated 10.8.2006, an additional issue was also framed by the trial Judge.

“Whether the defendant proves that he is entitled to the counterclaim of ₹4,00,000/- with interest thereon as claimed?”

4. In order to prove the case of the plaintiff, he has examined himself as PW.1 and has got marked the documents as Exs.P1 to P32. The defendant got himself examined as DW.1 and also examined one M.Shivarama



Shetty as DW.2 and produced documents as per Exs.D1 to D10 being Triplicate Delivery notes.

5. After hearing the plaintiff and the defendant, the learned trial judge dismissed the suit filed by the plaintiff while allowing the counter claim of the defendant as aforesaid. The plaintiff has filed this appeal challenging the said Judgment and Decree passed by the trial Court.

6. We have heard Sri Giridhar, learned Counsel for the appellant and Sri K.Chandranath Ariga, learned Counsel for the respondent and also perused the records.

7. Sri Giridhar, learned Counsel for the appellant submitted that the trial Court has grossly erred in holding that the agreement-Ex.P3 entered into between the plaintiff and the defendant does not give any right to the plaintiff to sell the standing trees since the standing trees would not have been movable property until they are severed from the earth and therefore agreement entered into by and between the plaintiff and M.Sundara Ajila did not give the plaintiff any authority to sell the property in the trees in the form of



timber. The said finding is an erroneous conclusion arrived at by the learned trial Judge. He has pointed out to clause No.10 of the agreement dated 19.8.1995 in which it is only the owner M.Sundara Ajila, who is restrained from selling the timber for a period of five years from the date of agreement whereas there is no clause restraining the plaintiff from selling the standing tree in the land during the relevant period and that the plaintiff has adduced the evidence to show that he has not only approached the forest authorities for getting the felling permission of the trees but also the permission to saw the Timber. He has also produced the documents to show that the Timber was infact transported to the place of the defendant and therefore it is his submission that the trial Court has grossly erred in dismissing the suit. He has further submitted that the trial Judge has wrongly appreciated the evidence and has allowed the claim of the defendant for a sum of ₹4 lakhs and that the said Judgment deserves to be set aside.

8. Further, learned Counsel for the appellant cited the following decisions:-



**1. AIR 1958 Supreme Court 532 in the case of
Smt. Shanthabai v. State of Bombay and others;**

“(28) Now it will be observed that “trees” are regarded as immovable property because they are attached to or rooted in the earth. Section 2 (6) of the Registration Act, expressly says so and, though the Transfer of Property Act does not define immovable property beyond saying that it does not include “standing timber, growing crops or grass”, trees attached to earth (except standing timber) are immovable property, even under the Transfer of Property Act, because of S.3 (26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immovable property.

(29) Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of “immovable property” and “attached to the earth”; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is



only of "standing timber" and not of "timber trees".

(30) Timber is well enough known to be "wood suitable for building houses, bridges, ships etc., whether on the tree or cut and seasoned". Webster's Collegiate Dictionary). Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practical purposes even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil."

2. AIR 1963 Allahabad 214 (V 50 C 63) FULL BENCH in the case of Baijnath v. Ramadhar and another;

"Registration Act (1908), Ss.2(6), 17 and 49-Sale of Sisham and Nim trees - Sale deed not registered - Trees sold whether "standing timber" - Test to determine whether tree is standing timber - Nature of trees or intention of parties - Held trees sold were standing timber and sale deed, though unregistered, was admissible in evidence. AIR 1915 Oudh 195. Overruled."



3. AIR(38) 1951 Supreme Court 120 in the case of Sarju Prashad Ramdeo Sahu v. Jwaleshwari Prathap Narain Singh and others;

“Civil P.C.(1908). S.107 - Appreciation of evidence by appellate Court - Finding of fact based on conflicting evidence, when can be reversed.

Where the question for consideration for the appellate Court is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has



escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact."

4. AIR 1975 Supreme Court 1534 in the case of Dr.N.G.Dastane v. Mrs.S.Dastane.

"A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for the Supreme Court in appeals under Article 136 to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties."

9. Sri K.Chandranath Ariga, learned Counsel appearing for the respondent/defendant on the other hand submits that the trial Court is right in holding that the agreement between the plaintiff and the owner of the land is not a sale but an agreement to sell which does not give any right to the plaintiff to transfer the property since the standing trees would not have been the subject matter of



sale until they are severed from the earth. The Principal of Law applied by the learned trial Judge is fully in accordance with the settled principles of law and does not require any interference in this appeal. It is further submitted by him that admittedly the plaintiff has stated in his plaint itself that he has received a sum of ₹4 lakhs by virtue of the agreement dated 19.8.1995. The defendant has also examined one M.Shivarama Shetty to show that he has independently purchased the Timber from the owner of the plot and that the plaintiff has never supplied any Timber to the defendant. It is the submission of the learned Counsel that the appeal is devoid of merits and therefore he submits that the appeal may be dismissed.

10. On hearing the parties and the submissions made, the questions that arise for consideration are as follows:-

1. Whether the Judgment dated 23.12.2006 passed by the Court below dismissing the suit of the plaintiff is just and proper or requires to be set aside in this appeal?




2. Whether the Judgment of the trial Court allowing counter claim of the defendant is justified or requires modification?
2. What Order?

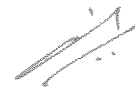
11. The plaintiff has examined himself as PW.1 before the trial Court. He has reiterated the facts mentioned by him in the plaint. He has stated that he has entered into an agreement with the defendant and that one Vishwanath Adyanthaya and K.A.Rehaman were the signatories to Ex.P1, which is an agreement dated 3.9.1991 under which he has purchased the Timber in the form of standing trees from its owner by name M.Sundara Ajila. He has further stated before the Court that the entire 17 acres 9 cents of land in Sy.No.120 of Andar Village of Karkala Taluk belongs to Sri M.Sundara Ajila and he has produced Ex.P2 Extract of RTC of the said land. It is his further case that he has further entered into an agreement with defendant on 19.8.1995 for sale of the Timber for a sum of ₹20 lakhs and in respect of the said sale of Timber he has entered into correspondence with the Forest Department on behalf of Sri



M.Sundara Ajila. It is his case that he was paid a sum of ₹1,50,000/- by the defendant on the date of agreement with a condition that at the time when permission was sought from the Department, another sum of ₹2,50,000/- has to be paid by the defendant to him. Accordingly, he has stated in his evidence that on 5.12.1995, the defendant has paid a sum of ₹2,50,000/- in respect of which he has issued a receipt to the defendant. He has stated that the original of Ex.P3-the agreement of Sale as well as the receipt is in the possession of the defendant and he has produced the carbon typed copy of the said documents before the Court. It is his case that prior to felling the trees, the defendant should have paid in a sum of ₹4 lakhs, but the defendant started felling the trees without paying the said amount. The Forest Department had given permission to felling trees for 12 acres of land. However, the defendant has not paid the said amount of ₹4 lakhs to him. The Department has ultimately permitted the defendant to fell 6,230 cubic feet of tress, which included an extra timber of 1590 cubic feet for which there was no permission. However, the value of the said



trees amounted to ₹8,74,000/-. Since the defendant has not paid the amount he has filed the suit before the Court. It is his case that though there was an agreement between himself and the defendant; due to the conspiracy between one Vishwanath Adyanthaya and K.A.Rehaman, the amount has not been paid. In the cross-examination, the documents are confronted and it is suggested that the plaintiff has never supplied the timber as agreed upon by him. It is also elicited that at the time of recording the evidence before the Court, the owner-M.Sundara Ajila was no more and that one Vishwanath Adyanthaya has filed another suit in respect of trees. The plaintiff has also produced documents at ExP1 to P32. The defendant has entered into the witness box and has also reiterated the contents of written statement and has further claimed that a sum of ₹4 lakhs given by him to the plaintiff is returnable to him since the plaintiff has not supplied the timber though he has admitted the payment in the agreement dated 19.8.1995 and the amount agreed upon namely ₹20 lakhs as per Ex.P3. However, he has denied the knowledge about the agreement



dated 3.9.1998 and about the owner-M.Sundara Ajila in the cross-examination. It is further stated by him that he has entered into another agreement between himself and K.A.Rehaman on the one side and Vishwanath Adyanthaya on the other side in respect of the Timber in connection with which a suit in O.S.No.40/2005 was pending between them. It is further elicited in the cross-examination that the defendant has paid his own money to the plaintiff. He has clearly admitted the agreement and transaction between himself and the plaintiff and further stated that he has never visited the land after 1995 since there was dispute between himself and the plaintiff. He has categorically denied the suggestion of the plaintiff that he himself has cut the tress with the help of M.Sundara Ajila and one M.Shivarama Shetty and they had transported the same to Kerala. He has further admitted the dispute between himself and the plaintiff. It is also elicited from DW.1 that he is not aware as to what work the plaintiff had done in connection with securing of felling permit for the trees standing on the disputed land.



12. DW.2-M.Shivarama Shetty, has stated that he is the Power of Attorney of M.Sundara Ajila and that he has got released the trees in consequence of the Court order by furnishing a bond to the Court. He has also stated that he has given bank guarantee to the Court for releasing the trees attached by the Court. He has further stated that the Timber thus released has been sold by him in the State of Kerala by obtaining necessary orders from the Court. He has also further stated that he has secured necessary permission from the Forest Department and also from the Sales Tax Department for sale of the said Timber in the State of Kerala. It is stated by him that the defendant did not cut and remove the trees and further for one year prior to his deposition before the Court the said M.Sundara Ajila has died. In the cross-examination, it is suggested that he has deposed falsely to help the defendant. However, in the cross-examination, Exs.D1 to D10-Triplicate Delivery Notes, evidencing the transport of Timber from Karnataka to Kerala are got marked through this witness.



13. It is on the basis of the aforesaid evidence that the trial Court has come to the conclusion that at the time when plaintiff and defendant executed Ex.P3, the plaintiff had no right to sell the standing trees by holding that the standing trees could not have the subject matter of sale, it can only be a subject matter of agreement to sell. Therefore, it is held by the trial Court that the standing trees could not have been agreed to be sold since the plaintiff did not have ownership on the trees as on the date when Ex.P3 was entered into between the plaintiff and the defendant. The trial Court has further found that the plaintiff has not proved as to whom the trees were felled and the same was ready for sale to the defendant and therefore the trial Court has found that the defendant is entitled to refund of the amount admittedly paid by him to the plaintiff by virtue of agreement dated 19.8.1995. In that view of the matter, the trial Court has dismissed the suit of the plaintiff while allowing the counter claim of the defendant.

14. We have carefully gone through the entire evidence of the plaintiff, defendant and the documents more



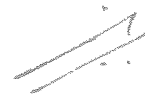
particularly the contents of Exs.P1 and P3, which are the two agreements. The finding arrived at by the trial Court in our view is a proper view of the matter and that no fault could be found on the observation that at the time when the agreement was entered into between the plaintiff and M.Sundara Ajila, the land in Sy.No.125 was having standing trees which could not have been a subject matter of sale and at best Ex.P1 could be framed as an agreement to sell in which the goods never passed from M.Sundara Ajila to the plaintiff and therefore on 19.8.1995 when the plaintiff entered into an agreement with the defendant, the plaintiff had no ownership right to sell the property in goods and therefore, the trial Court has rightly held that the plaintiff could not have sold the timber to the defendant. The trial Court has also found that there is no corroborating evidence on behalf of the plaintiff to show that he has supplied timber to the defendant and hence, the finding of the trial Court that the defendant does not owe any money to the plaintiff also does not call for interference in this appeal.



15. So far as the counter claim of the defendant is concerned, it is the case of the plaintiff himself that he has received ₹4 lakhs from the defendant on the respective dates on the promise of supplying timber to him and therefore, the trial Court has rightly allowed the counter claim of the defendant.

16. In view of what has been stated above, we are of the considered opinion that the trial Court is right in holding that the plaintiff could not succeed in the suit whereas the defendant's claim has been established by preponderance of evidence. Hence, the finding of the trial Court deserves to be confirmed.

17. However, on a careful consideration of the order of the trial Court we find that the rate of interest imposed by the trial Court is on the higher side. Therefore, we are inclined to reduce the rate of interest. The trial Court has imposed an interest at 8% p.a. on the amount payable to the defendant. On a careful perusal of the circumstances under the agreement, we are inclined to modify the rate of interest



to 6% p.a. as per Section 34 of the Code of the Civil Procedure.

18. In the result, the appeal is **disposed of** by confirming the finding of the trial Court and reducing the rate of interest from 8% p.a. to 6% p.a. while keeping the other terms intact.

19. The appellant has furnished a bank guarantee on 6.6.2008 before this Court by virtue of the order dated 11.9.2007.

20. The Office is directed to transmit the bank guarantee to the trial Court for encashment by the respondent/defendant.

Sd/-
JUDGE

Sd/-
JUDGE

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